

**Thomas Irwin Emerson's Fight for Civil Liberties in the United States:
Freedom of Expression as the Antidote to Anticommunism, Espionage, and Soviet Active
Measures, from 1946 to 1964**

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I. Introduction

Throughout the 2016 US Presidential Election, millions of Americans used the social media platform Twitter to express their unwavering support or extreme disdain for Hillary Clinton, Donald Trump, and the Republican and Democratic parties. With a Twitter press release indicating that Americans sent one billion tweets during the election cycle, the platform was an important outlet of conversation – the de facto “public square” of a digital-age election. It was democratizing: any user’s tweets could be amplified by a public figure and get retweeted by millions. At the same time, anyone could build sizable followings with not only the content of their tweets, but the added discoverability of catchy hashtags that pooled content by topic. For example, Twitter user @LeroyLovesUSA, a Trump supporter, sent emblazoned tweets like “#ThanksObama We’re FINALLY evicting Obama. Now Donald Trump will bring back jobs for the lazy ass Obamacare recipients.”¹ Another user with over 24,000 followers tweeted “It’s not about electing our next president. It’s about giving up everything we stand for or fighting back! #WakeUpAmerica #PodestaEmails6.”² In a separate example, a liberal-leaning user seemed frustrated by Clinton’s nomination over Bernie Sanders: @BLACKMATTERSUS, with over 14,000 followers, tweeted “#Clinton Campaign said they pitched a story to #TheDailyBeast to attack #BernieSanders. Why are we not surprised?”³ But although these tweets seemed to come from ordinary, impassioned Americans exercising their First Amendment rights, they did not.

¹ A suspended, covert Russian account sent this tweet on January 20, 2017, cited in Darren L. Linvill and Patrick L. Warren, “Troll Factories: Manufacturing Specialized Disinformation on Twitter,” *Political Communication* 37, no. 4 (2020): 451, doi:10.1080/10584609.2020.1718257.

² A suspended, covert Russia account sent this tweet on October 13, 2016, cited in Oliver Roeder, “Why We’re Sharing 3 Million Russian Troll Tweets,” *FiveThirtyEight*, July 31, 2018, <https://fivethirtyeight.com/features/why-were-sharing-3-million-russian-troll-tweets/>

³ Ibid.

These tweets – and the corresponding accounts with thousands of followers – were sent and run by Russian operatives.⁴

Russia was engaging in a full-fledged attack on the United States. Operating through an organization called the Internet Research Agency (IRA), Russian President Vladimir Putin hoped to generate chaos among the American public with divisive content in a time of political turmoil. The IRA, funded by a Russian oligarch with intimate ties to Putin and the Russian security state, had massive reach: according to the Computational Propaganda Research Project, between 2015 and 2017, over 30 million Americans shared the IRA's social media posts on Instagram and Facebook – and countless millions more were exposed to the content. As the researchers state, the IRA sought to systematically divide Americans by convincing minority voters to lower their turnout, invigorating and activating conservatives to action, and spreading “sensationalist” content and conspiracies to all Americans. Ultimately, all of the IRA's activities oriented towards waging an information war on the United States, exacerbating social divisions and creating an environment for America to implode under polarization.⁵

The idea of using America's openness and civil liberties against itself dates back to the early Cold War, when the Soviets targeted the foundation of America's civil liberties: the Constitutional right to freedom of speech. The very existence of a free and open information sphere invited both domestic and foreign manipulation through the exploitation of the public's fears and existing divisions. Following World War II, the Soviet security state expanded to prioritize influence operations, known as active measures, against the United States. The only

⁴ For more on Tweet counts sent during the election, see Twitter, “How #Election2016 was Tweeted so far,” *Twitter Press Release*, November 7, 2016, https://blog.twitter.com/official/en_us/a/2016/how-election2016-was-tweeted-so-far.html; For a database of millions of tweets sent by Russian operatives, see *supra* note 2.

⁵ Philip N. Howard et al., “The IRA, Social Media and Political Polarization in the United States, 2012-2018,” *Computational Propaganda Research Project*, University of Oxford, Released by US Senate Select Committee on Intelligence, October 2019: 3, <https://digitalcommons.unl.edu/senatedocs/1/>.

objectives were to weaken American resolve and subvert the United States from within by influencing public opinion. In the words of former KGB agent Yuri Bezmenov, the purpose of active measures was “to change the perception of reality of every American to such an extent that despite the abundance of information, no one is able to come to sensible conclusions in the interests of defending themselves, their families, their community, and their country.” Cold War active measures fomented sensationalism and absurdism amongst the American public, much like in the 2016 election. But during the Cold War, there were two key differences: first, the domestic hysteria focused on the potential growth of communism within the United States, and second, the government took serious action in an attempt to contain communism’s influence.⁶

Cold War anticommunism in the United States greatly impacted the day-to-day lives of citizens. With such high tensions, it became difficult to distinguish facts from falsities, which often contained a kernel of truth blown out of proportion. Hysteria surrounding the prospect of nuclear war, the Soviet Union’s espionage, and the fear of domestic subversion created an environment for the federal government to justify infringing on civil liberties. The Cold War anticommunist position hardened in the 1940s in what became known as the Second Red Scare, named after the Red Scare from two decades prior. The government curtailed civil liberties in more ways than one: President Harry Truman instituted a government loyalty program to weed out potential communists, the House Committee on Un-American Activities (HUAC) routinely questioned those with liberal-leaning beliefs, and laws like the Smith Act allowed the government to indict those with communist associations. In the 1950s, figures like Senator Joseph McCarthy engaged in witch-hunt-style accusations of suspected communists in government. Individuals and organizations suspected of communist affiliation were at constant

⁶ Yuri Bezmenov quoted in the New York Times, “Meet the KGB Spies Who Invented Fake News | NYT Opinion,” YouTube Video, November 19, 2018, 3:40-4:00, <https://youtu.be/h5WjRjz5mTU>. Hereafter “Meet the KGB Spies Who Invented Fake News.”

risk of losing jobs, public humiliation, or even imprisonment. Few Americans would defend them.

Thomas Irwin Emerson was one of the few. As both a legal scholar and practicing attorney, Emerson was part of a small group of lawyers who worked to counter the infringement of civil liberties during the Second Red Scare. He was an expert on the First Amendment, and he believed that increasing freedom of speech protections in times of national crisis strengthened – rather than sabotaged – national security. With experience in academia, government, and grassroots politics during the Cold War, Emerson had a first-person perspective on anticommunism in the United States. And he brought with him plenty of attention: because of his liberal position and his commitment to representing communists in court, the FBI and HUAC repeatedly investigated him. His personal and professional experiences with anticommunism only reinforced his perspective on the importance of First Amendment protections to national security.

Emerson showed how protecting civil liberties in times of hysteria could lower tensions and thus increase protections against anticommunism, espionage, and active measures. Allowing the public to focus on the tangible issues of the Cold War, rather than rumor and speculation, could bring the United States together to choose, democratically, the best way forward. Through his deep understanding of the danger of the anticommunist threat, legal representation of suspected Communists, and political action in the Progressive Party and National Committee to Abolish HUAC, Emerson's work for protecting First Amendment rights increased tolerance, minimized hysteria, and combatted Soviet subversion.

II. Background

A. Thomas Irwin Emerson

Born in 1907 in Passaic, New Jersey and living until the age of 83, Emerson spent much of his professional life – and the twentieth century – defending civil liberties through law, politics, and academia. After graduating from Yale College in 1928 and Yale Law School in 1931, he quickly became well-known, though not necessarily well-liked, at the highest levels of government and society. He held important positions like president of the National Lawyers Guild, ran for Governor of Connecticut in 1948, won seminal Supreme Court cases like *Sweezy v. New Hampshire* and *Griswold v. Connecticut*, and led a petition to abolish HUAC that generated conversation nationwide. Before spending over thirty years of his career as a professor at Yale Law School, he spent thirteen years in the federal government – in 1933, Emerson became assistant counsel at the National Recovery Administration (NRA), joining Franklin D. Roosevelt’s New Deal Administration through the recommendation of “brain trust” advisor Thomas Corcoran. He shifted around through different agencies and administrations, holding legal positions at seven different organizations in FDR’s government. During World War II, for example, Emerson enforced all of the Office of Price Administration’s (OPA) regulations for wartime rent controls and consumer good prices as the Deputy Administrator for Enforcement. In his last role in the federal government and at the end of the war, he was promoted to General Counsel of the Office of War Mobilization, where he worked closely with John Snyder, a future Treasury Secretary. Through Emerson’s legal roles, even in his early career, he quickly rose the ranks of Roosevelt’s Administration and was exposed to government leaders that would come to shape policy in the decades ahead. But with the federal government weary of communism as a national security threat, those with leftist beliefs could be seen as suspicious, and Emerson was

no exception. As a liberal-leaning lawyer and an active member of the National Lawyers Guild (NLG) – a legal organization committed to protecting the civil liberties of all, including Communists – he was frequently antagonized personally, professionally, and sometimes, publicly.⁷

During his time in the Roosevelt Administration, Emerson was accused of harboring communist beliefs for the first time in his career. In 1941, the Treasury Department’s Intelligence Unit re-opened an FBI investigation into him for his initial role at the OPA, that of Associate General Counsel. The Department accused him of being a “fellow traveler” of the Communist Party. Emerson’s anger and nervousness were evidenced in his reaction to this first investigation, when, in a letter to Leon Henderson, the acting administrator of the OPA, he wrote:

I deny emphatically that I am now or have ever been a member of the Communist Party, or any organization affiliated with or dominated by it. I deny also that I am now or have ever been a ‘fellow traveler.’ On the contrary, I have openly and sharply differed with the position of the Communist Party on many substantial issues...I have never made any effort to conceal my views or philosophy.⁸

Compared to his other investigations and interviews with FBI special agents, Emerson sought to distance himself from communism as much as possible when he was first personally attacked in 1941. His first *public* accusations were not far away, either: in 1944, Congressman Fred Ernst Busbey, a member of HUAC, accused Emerson of being a ‘fellow traveler’ and both the OPA and NLG of concealing communists. Emerson’s defense mirrored the arguments he sent to Henderson, but his confidence had clearly grown with statements such as “[t]he idea that they [at

⁷ For general information about Emerson, see Mike Strom, “Guide to the Thomas Irwin Emerson Papers,” Manuscripts and Archives, Sterling Memorial Library, Yale University: 4-5, <https://ead-pdfs.library.yale.edu/4511.pdf>. Hereafter “Emerson Papers Finding Aid”; Governmental relationships found within unsigned autobiographical note in Untitled Biographical Statement, October 10, 1947, in Box 84, Folder 30 of the Thomas Irwin Emerson Papers, (MS 1622), Manuscripts and Archives, Sterling Memorial Library, Yale University. Hereafter, “Emerson Papers”. Hereafter, Thomas I. Emerson is referred to as “Emerson.”

⁸ Emerson, “Memorandum, Thomas Emerson to Leon Henderson, Subject: Investigation by Intelligence Unit, Treasury Department,” December 15, 1941, Letter, in Box 79, Folder 75 in Emerson Papers.

the NLG] are Communists or influenced by the Communist Party is preposterous.”⁹ Public and private communist accusations would come to shape Emerson’s career, providing him with additional experience and perspective in understanding the importance of protecting civil liberties. It was during those early investigations that Emerson definitively fought for civil liberties and personally felt the tight grip of injustice.

Following his time in government, Emerson joined the Yale Law School faculty in 1946. He was a professor for almost thirty years, becoming Lines Professor of Law in 1955 and teaching courses on the First Amendment and civil liberties – one of the most popular of which was “Political and Civil Rights.” During his time as a professor, Emerson wrote over a hundred articles, including the fiery “Loyalty Among Government Employees” in 1948 and “Toward a General Theory of the First Amendment” in 1963. The former had tremendous influence on the national conversation surrounding President Truman’s Loyalty Program, garnering a response from FBI Director J. Edgar Hoover that defended the program as effective in weeding out communists. The latter, written later in Emerson’s career, was his attempt to create an effective unifying theory of the First Amendment; it was representative of Emerson’s deep commitment to providing the First Amendment with teeth to withstand environments like anticommunist America. Although he was a professor for most of his career, he hardly locked himself in an ivory tower.¹⁰

Emerson often leveraged his standing as a professor to advise, lend credibility to, and lead organizations advancing civil liberties like the National Lawyers Guild, of which he was

⁹ Emerson, “Statement of Thomas I. Emerson, Deputy Administrator for Enforcement, OPA: In Answer to Charges of Congressman Busbey,” Statement, June 16, 1944, in Box 79, Folder 76 in Emerson Papers.

¹⁰ One of the first syllabi for his course, “Political and Civil Rights,” was for the Summer 1947 Term. In it, he focused on the “Rights of government employees,” among other topics. See Emerson, “Political and Civil Rights: Summer Term 1947,” 1947, Course Syllabus, in Box 101, Folder 65 in Emerson Papers; Emerson, “Toward a General Theory of the First Amendment,” *Yale Law Journal* 72, no. 5 (April 1963), in Box 85, Folder 44 in Emerson Papers.

president in 1950 and 1951; engage in politics, including executive board membership of the Progressive Party during the 1948 presidential election; and use the courts to defend communists and suspected communists who were stripped of their civil liberties during the Second Red Scare. Emerson's unusualness came from his unique academic and practical experiences – he pushed the meaning of the First Amendment forward through academia, but he also tested its boundaries in politics and in courts. He was also unique in the timelessness of his arguments: the Second Red Scare was just one example where the US government infringed on civil liberties. And unbeknownst to him, the same argument for the protection of the freedom of expression could combat covert Soviet active measures, which relied on hysteria, the internal fracturing of the United States, and intolerance to be effective.¹¹

B. The Cold War and Anticommunism

Much of Emerson's career defending civil liberties took place in the context of the Cold War and the existential threat the Soviet Union posed to the United States. The origins of the Cold War involve more than just the ideological differences between the capitalist West and the communist Soviet Union – the escalation from disagreement to anxiety lies in the Allies' post-World War II agreements and settlements. Though the United States partnered with the Soviet Union in the Second World War, the countries' strategic objectives diverged following the defeat of Hitler. According to Cold War historian John Lewis Gaddis in *The Cold War: A New History*, there was a fundamental misalignment in the ambitions of the United States and Soviet Union. Both Roosevelt and Stalin wanted the same thing – peace and security – but Stalin envisioned a post-World War II Soviet Union that dominated the capitalist powers of Europe:

¹¹ See Emerson's obituary for more biographical information: Glenn Fowler, "Thomas I. Emerson, 83, Scholar who Molded Civil Liberties Law," *New York Times*, June 22, 1991, <https://nyti.ms/3GKbGTB>.

“[h]e could simply wait for the capitalists to begin quarreling with one another, and for the disgusted Europeans to embrace communism as an alternative.”¹² In essence, Stalin wanted a “capitalist fratricide” while the United States sought to balance global powers and prevent further conflict through “collective security,” supporting “economic integration,” and encouraging “political self-determinism.”¹³ With this fundamental difference in outlook, the Soviet Union became the enemy of the United States.

Within five years of the end of World War II, the fear of a new war between the capitalist and communist worlds dominated the American public. By the late 1940s, public opinion in the United States could not be more anticommunist and fearful of potential conflict – in a June 1948 Gallup Poll, for example, Americans listed “internal communism” as the single most pressing domestic issue and “War” and the “Soviet Union” as the most important international issues.¹⁴ Though there existed a possibility of direct conflict with the Soviet Union, different parts of the federal government exploited the national security risk to justify a constriction of civil liberties. During the Second Red Scare, all three branches of the federal government took action in an attempt to curb communism and gain a damaging level of control over the public. The executive branch built a loyalty program with President Truman’s 1948 Loyalty Order, requiring all government employees to take a “loyalty” oath and empowering the FBI to investigate suspected communists. The Order gave a specific anticommunist meaning to laws like the Hatch Act of 1939, which stated that government employees could not “have membership in any political party or organization which advocates the overthrow of our constitutional form of government.” The legislative branch, through Congress, proposed new anticommunist laws like the

¹² John Lewis Gaddis, *The Cold War: A New History* (New York: Penguin Press, 2005), 14.

¹³ *Ibid.*, 26-27.

¹⁴ The June 1948 poll is accessible in the third from the bottom infographic of the following article: Gregor Aisch and Alicia Parlapiano, “What Do You Think Is the Most Important Problem Facing This Country Today?,” *New York Times*, Feb. 27, 2017, <https://nyti.ms/2mxZc5Q>.

Mundt-Nixon Bill, which would have required communist organizations to register with the federal government. The judicial branch took action to affirm anticommunist laws, including upholding convictions of communists under the Smith Act of 1940, which allowed for the prosecution of anyone that advocated for “overthrowing or destroying any government of the United States.” With the Soviet Union’s rise in power, Americans perceived as supporting communism were deemed a national security risk. Ironically, the anxiety created from anticommunism likely greatly overshadowed the danger posed by communism and the Soviet Union.¹⁵

Perhaps the most damaging government-endorsed anticommunism initiatives came from HUAC. Established in 1945, the Committee primarily engaged in partisan investigations into suspected communists with a focus on spectacle – effectively turning fear into hysteria. Lasting until 1975, well into the Cold War, its success relied on its unique position in history, when the extent of the Soviet Union’s threat to the United States was both difficult to measure and often unknown: the perfect condition for baseless accusations. Thus, as historian Landon Storrs states, when subpoenaed individuals refused to comply with HUAC and denounce their suspected association with communism, the committee assumed guilt rather than innocence – the product of a hysterical environment. In one particularly famous trial, HUAC subpoenaed dozens of creatives in the film industry, from screenwriters to directors, for suspected communism. In the trials of “Hollywood Ten,” when individuals refused to discuss their politics in front of the committee, they were held in contempt of Congress and blacklisted from the industry. The Committee had no bounds with its accusations, and the climate it created was nothing short of draconian. According to historian Ellen Schrecker, even members of Congress that opposed the

¹⁵ “Classification 101: Hatch Act (Obsolete),” *National Archives*, August 15 2016, <https://www.archives.gov/research/investigations/fbi/classifications/101-hatch-act.html>; *Smith Act of 1940*, U.S. Code 18 U.S.C. (1946 ed.), § 10, which at present is 18 U.S.C. § 2385.

Committee for its violation of civil liberties had difficulty in an unwavering anticommunist climate. In one example, during a vote to reauthorize the committee's predecessor, the Special House Committee to Investigate Un-American Activities, Democratic Congressman Herman Eberharter stated that "On the one hand, to adopt this resolution is to seemingly approve the un-American procedures of the [committee]. On the other hand, to defeat the resolution is to seemingly approve of a continuation of subversive activities."¹⁶

The Second Red Scare matured into McCarthyism in the 1950s. Named after Senator Joseph McCarthy, the figurehead of the movement thanks to his headline-grabbing and sensationalized claims, McCarthyism embodied the government's politicization and suppression of dissent through baseless assertions of one's communist association. With broad proclamations like his alleged list of communists in the State Department, the media provided McCarthy a platform that allowed lies and hysteria to pervade American households: a sample of attention-grabbing *New York Times* headlines from 1950 and 1952 included "STATE DEPARTMENT DENIES HARBORING 'TOP RUSSIAN SPY'," "M'CARTHY STICKS TO FIGHT ON REDS," and "M'CARTHY TO NAME 'IMPORTANT' FIGURE."¹⁷ The vagueness and fear was present in even the most respected newspapers. As historian Beverly Gage emphasizes, McCarthy had a fifty percent approval rating when he was his most influential in the early 1950s; the country was clearly divided. The government's anticommunist policies provided legitimacy to attacks on liberals and fueled fear mongering, directly affected thousands of Americans and altered the lives of millions, creating a culture of anxiety for anyone with

¹⁶ Landon R. Y. Storrs, "McCarthyism and the Second Red Scare," *Oxford Research Encyclopedia of American History*, July 2, 2015, doi:10.1093/acrefore/9780199329175.013.6; Representative Herman Eberharter quoted in Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little Brown and Co., 1998), 91. Hereafter "Schrecker, *Many Are the Crimes*".

¹⁷ William S. White, "STATE DEPARTMENT DENIES HARBORING 'TOP RUSSIAN SPY,'" *New York Times*, March 24, 1950, <https://nyti.ms/3EUjl0c>; Joseph A. Loftus, "M'CARTHY STICKS TO FIGHT ON REDS," *New York Times*, July 10, 1952, <https://nyti.ms/3GEvbwE>; Harold B. Hinton, "M'CARTHY TO NAME 'IMPORTANT' FIGURE," *New York Times*, March 12, 1950, <https://nyti.ms/3EwqrXx>.

left-leaning beliefs. Driven by the hysteria surrounding communism and the possibility of internal subversion, the Second Red Scare and McCarthyism became a breeding ground for the violation of civil liberties. The loudspeaker behind both HUAC's and McCarthy's baseless accusations had an additional side effect as well: they provided the Soviet Union with an enormous opportunity to further divide the United States.¹⁸

C. Soviet Active Measures and Espionage

The Soviet Union's active measures strategy began in the 1920s. With the post-World War II Soviet Union focused on spreading communism, gaining power, and fracturing the West's liberal order, active measures played an increasingly important role in Soviet foreign policy throughout the twentieth century. By 1959, the KGB founded a dedicated unit, Department D, to focus solely on active measures. By 1962, the KGB promoted the active measures unit to Service A – the highest level in the KGB, as part of the First Chief Directorate and one of two services that, combined, staffed around twenty thousand intelligence officers. In essence, active measures became the KGB's modus operandi. As stated by former KGB agent Yuri Bezmenov, “only about fifteen percent of time, money, and manpower is spent on espionage as such. The other eighty-five percent is a slow process that we call ideological subversion or active measures, or ‘aktivnye meropriyatiya’ in the language of the KGB.”¹⁹ According to a 1982 House Select Committee on Intelligence hearing about active measures, operations included forgeries of both public and private documents, recruitment of communist-friendly individuals and organizations to influence opinion, and disinformation campaigns for creating sensationalized and fabricated

¹⁸ Beverly Gage, “McCarthyism was never defeated. Trumpism won’t be either.” *Washington Post*, December 4, 2020, https://www.washingtonpost.com/outlook/joseph-mccarthy-movement-trumpism/2020/12/04/d6e807ee-3460-11eb-b59c-adb7153d10c2_story.html.

¹⁹ Yuri Bezmenov quoted in the *New York Times*, “Meet the KGB Spies Who Invented Fake News,” 3:10-3:28, <https://youtu.be/h5WjRjz5mTU>.

news stories. CIA Deputy Director John McMahon emphasized the asymmetry of the threat: “There is a tendency sometimes in the West to underestimate the significance of foreign propaganda and to cast doubt on the effectiveness of active measures as instruments of foreign policy. Soviet leaders, however, do not share such beliefs.”²⁰ When combined with traditional espionage and an America paranoid about communism, the effectiveness of Soviet active measures in exacerbating hysteria could not be understated.²¹

In order to think about how active measures impacted the United States, in 1985 foreign policy expert Dennis Kux framed Soviet influence operations in terms of “white,” “gray,” and “black” propaganda. Day-to-day diplomacy and traditional foreign policy made up “white” operations. “Gray” operations were “semi-overt,” including communist fronts and known propaganda media outlets. “Black” operations were completely covert, including “the use of agents of influence, spreading false rumors, duping politicians and journalists, and disseminating forgeries and fake documents.” Kux framed active measures as a median between “black” and “gray” operations. This in-between allowed active measures like disinformation to take a life of their own, but also allowed for the Soviet Union to ideologically separate itself from its operations. The KGB was willing to take existential risks to fracture the United States and the West, and sometimes this involved trading outside of the communist line and engaging with fascist ideologues.

In one particularly sinister example in January 1960, the KGB hoped to create distrust and panic through making it seem like there was a resurgence of Nazism around the Western

²⁰ John McMahon quoted in U.S. Congress, Senate, *Report of the Select Committee on Intelligence United States Senate on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election: Volume 2: Russia's Use of Social Media, with Additional Views*, October, 2019, 116th Cong., 1st sess., 2019, S. Doc., Report 116-XX, https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf: 4-5; For active measures tactics, see 36-38. Hereafter, “1982 Soviet Active Measures Hearings.”

²¹ For information about the organizational structure of active measures in the KGB, see Thomas Rid, *Active Measures: The Secret History of Disinformation and Political Warfare* (New York: Farrar, Straus, and Giroux, 2020), 145.

World. According to political scientist Thomas Rid in *Active Measures*, the KGB's thinking involved exacerbating existing fissures in the capitalist West to "drive a wedge into NATO."²² In cities across Europe and the United States, Soviet operatives paid agents to commit hate crimes, including spray painting swastikas on Jewish graves and synagogues. In New York alone, the American agents sprayed swastikas on hundreds of Jewish graves and multiple synagogues. A January 4, 1960 *New York Times* article headline exemplified the hysteria and the perceived vastness of the danger: "THIRD SYNAGOGUE IN CITY IS DEFACED: Swastikas Painted on Walls – More Incidents Abroad."²³ Vandalism occurred across the country, with thirteen American cities reporting hate crimes. Former KGB officer Oleg Kalugin confirmed the active measure, stating that "[m]y fellow officers paid American agents to paint swastikas on synagogues in New York and Washington. Our New York station even hired people to desecrate Jewish cemeteries."²⁴ In Germany, agents distributed material with anti-Semitic slogans and vandalized memorials, synagogues, mailboxes, and benches. In London, stores removed products produced in Germany and thousands protested at the German Embassy. In West Berlin, the chancellor was forced to hold an emergency cabinet meeting, and the government passed anti-hate crime laws. If the goal of the operation was to create fear and hysteria, turning the West against itself, then this was a potent example of the Soviet Union's success.²⁵

However, during World War II and through 1960, traditional espionage played a more outsized role than active measures in Soviet policy. The recently declassified Venona Cables provide evidence of Soviet espionage in the United States beginning in 1943, demonstrating how

²² Thomas Rid, *Active Measures*, 131.

²³ "THIRD SYNAGOGUE IN CITY IS DEFACED: Swastikas Painted on Walls – More Incidents Abroad.," *New York Times*, January 4, 1960, <https://nyti.ms/3OGp656>.

²⁴ Oleg Kalugin quoted in Rid, *Active Measures*, 132.

²⁵ Dennis Kux, "Soviet Active Measures and Disinformation: Overview and Assessment," *Parameters* 15, no.1 (1985), doi:10.55540/0031-1723.1388: 19-20; For more on the KGB's Nazi operation, see Thomas Rid, *Active Measures*, 125-127.

anticommunism and espionage accusations were not based on complete falsities. But the active measures tactics that gained prominence in the 1960s and 1970s could still apply in this early Cold War period – even before the founding of the KGB in 1954 – and could be more damaging than espionage alone. Borrowing from foreign policy researcher Clint Watts’ analysis of Russia's behavior in the 2016 election, active measures targets could be divided into three categories: “useful idiots,” “fellow travelers,” and “agent provocateurs.”²⁶ “Useful idiots” could include those that pushed the Soviet agenda forward without their own knowledge, like Joseph McCarthy and his spread of fear with extreme anticommunist rhetoric. “Fellow travelers” included those in the Communist Party of the United States (CPUSA) that passed information to Moscow because they believed in the proletarian revolution and spread of Communism. “Agent provocateurs” included spies like Julius Rosenberg, who passed information about the atom bomb to the Soviet Union, and Elizabeth Bentley, who acted as an informant for American government activities.

Using this framework, the real hysteria likely came not from damage done by the spies themselves, but by the idea of the existence of spies and the possibility of subversion. For Americans in a fearful and highly politicized climate, it was easy to make plausible accusations of espionage. In *Many Are the Crimes*, historian Ellen Shrecker stated that “[b]ecause Communism had been so thoroughly demonized, it did not take much evidence to convince most Americans that Communists spied for Russia.” She emphasized the wide-reach of the hysteria, arguing that the espionage “amplified the perceived threat of American Communism, thus allowing many moderates and liberals to acquiesce in and justify forms of political repression that under other circumstances they would never condone.”²⁷ This was the environment in which Emerson built his understanding of the importance of civil liberties. He could not have known

²⁶ Clint Watts quoted in *1982 Soviet Active Measures Hearings*, 20.

²⁷ Ellen Schrecker, *Many Are the Crimes*, 167

about the extent of the active measures in the early Cold War, but his belief in defending freedom of speech and political expression aided in countering active measures' effects.

III. Emerson and the First Amendment: Identifying How Anticommunism Infringed on Civil Liberties

The most succinct distillation of Emerson's thoughts on freedom of speech is found on a single, crinkly typewritten paper titled "Extract from Lecture on Freedom of Speech." In the 1957 speech, Emerson contextualized the importance of freedom of speech within America's confusion about how to handle fear and security risks during its Cold War with Russia. "To some degree the social values embraced in our concept of freedom of speech must compete with other social values, such as public order and national security," he proclaimed. "But it is a serious mistake to assume that these values are always in conflict. On the contrary, neither orderly government nor national security can ultimately be achieved without the fullest measure of freedom of speech."²⁸ Seemingly innocuous, his argument was innovative, unique, and controversial for an anticommunist America – especially for a non-communist lawyer committed to protecting communists' civil liberties. He believed that freedom of speech was *critical* to national security, and that lowering tensions in the United States would inevitably lower tensions abroad. Thus, domestic civil liberties like freedom of speech were an important mechanism by which to end the Cold War, and Emerson believed that the United States was holding itself back by suppressing them. He injected urgency into his advocacy both by reminding his audiences of the dangers of authoritarianism in recent history and by demonstrating how the government actively suppressed freedom of speech. To him, this was a time of immense change, a break from

²⁸ Emerson, "Extract from Lecture on Freedom of Speech," November 14, 1957, Lecture, in Box 84, Folder 39 in Emerson Papers.

the past with a new economic system, a changing societal power structure, and the possibility of nuclear war. To begin to understand his reasoning, it is important to explore his philosophical arguments, personal experience, and the context of the world immediately following the Second World War.²⁹

A. Emerson's Philosophical Argument of Change

Emerson outlined his philosophical argument of the relevance of civil liberties to modern democracy by addressing the economic, political, and social changes of the 1940s and 1950s. Though he believed in the lofty ideals of freedom and liberty as ends in themselves, to him the more potent ends were strengthening American democracy and security. He asked questions like, “Is the classical theory of freedom of political expression valid under modern conditions? Does it require modifications of some sort?”³⁰ He argued that the changing economy – from laissez faire to monopolistic and government-involved capitalism – endangered civil liberties because it demanded conformity to entrench power. Using the communications industry as a particularly relevant example, in a 1950 *New York Compass* article he stated that “[t]he day of the small newspaper and the pamphleteer is gone. In their place we have the great newspapers and press associations, the magazines with gigantic circulation, the closely held movie, radio and television systems, all controlled by a relatively small group identical or closely allied with the major business interests.” The effects were significant: “...the channels of communication through which new or diverse ideas may reach the mass of people are severely circumscribed.”³¹ Thus, the expansion of freedom of expression protections were necessary to counteract the interests of

²⁹ The “dangers of authoritarianism” specifically refers to Nazi Germany in the Second World War; though the Cold War was not a break from the past, it is plausible that Emerson viewed it this way after experiencing rapid and intense change with World War II.

³⁰ Emerson, “Political Expression in a Modern Democratic Nation,” December 4, 1950, Article Draft for the *New York Compass*, in Box 83, Folder 25 in Emerson Papers: 1. Hereafter “Political Expression.”

³¹ *Ibid.*, 2.

the wealthy and powerful. Emerson essentially argued that the new, limiting economic structure did not *negate* protections for freedom of expression, but required the protections to expand and adapt to modernity in order to maintain democracy.³²

Emerson also argued that new developments in politics indicated a further need for safeguards for freedom of expression – namely, the strengthening of the CPUSA and the conformity of the dominating political parties. With regards to the CPUSA, Emerson argued that it was an anomaly in two ways: first, it was a “highly disciplined political party such as has not been known before in American politics,” and second, that “[t]he relationship of the Communist Party with foreign parties and governments raises problems which have not been faced up to now in the present form.”³³ The CPUSA was a case study for Emerson in developing his argument for the necessity to protect political expression. It was not an easy problem. The Communist Party presented a new challenge to the doctrine, and Emerson spent much of his career fighting for the civil liberties of Communists to strengthen political freedoms, which in turn he hoped would strengthen democracy. With the conformity of the dominating political parties, Emerson believed that both the Democratic and Republican parties focused on anticommunist measures, creating a bi-partisan effort to limit freedom of speech and expression. In a 1949 essay, Emerson stated that both parties “appeal to the voters for support of the same general policies, operate in the same atmosphere of unimaginative complacency, [and] neglect to formulate a program geared to the pressing needs of the day.”³⁴ Support of new and diverse parties, to Emerson, was critical in maintaining a democracy that could react to an increasingly complex world.³⁵

³² The article quoted in this paragraph was part of a ten-article series for the *New York Compass* on whether freedom of expression was still relevant or possible in 1950.

³³ *Ibid.*, 3.

³⁴ Emerson, “Issue of the Day, The Question: Do we really have a two-party system?” June 14, 1949, Article, in Box 84, Folder 32 in Emerson Papers.

³⁵ The “Issue of the Day” essay is from an untitled newspaper. Emerson likely wrote this in the context of supporting the Progressive Party. His involvement in the Progressive Party during the 1948 presidential election will be explored in Part III.

Social changes were equally important to the economic and political changes that demanded freedom of expression protections. Emerson argued that new developments in psychology and science both challenged and necessitated a commitment to freedom of expression. With psychology, he believed that new understandings about “prejudices, fears and emotions”³⁶ voided the legal idea that people were rational and would always make logical decisions. He cited psychoanalysts like Erich Fromm to support his arguments, stating that “there may be situations in which the wish of man for freedom is replaced by a desire for submission to authority.”³⁷ Thus, with the potential for politicians to exploit the fears of the public, it was extremely important to Emerson that freedom of expression be protected – it would guarantee the continued flow of new ideas, the ability to contradict authority, and would ultimately allow democracy to work towards the best solutions.

In discussing his beliefs about the necessity of freedom of expression, Emerson often used the framework of a changing modern world. He pointed specifically to the changing power structures of politics and the economy along with new developments in psychology and science, arguing that each development indicated a need for strengthening freedoms. With the alternative being the very real possibility of authoritarianism, he thought about civil liberties as a way to preserve some of the core tenets of democracy: the freedom of choice, open debate, and inclusive decision-making. The problem was holistic, and Emerson took society’s economic, political, and social shifts into consideration in building his philosophy for strengthening the freedom of expression.

³⁶ Emerson, “Political Expression,” at 4.

³⁷ Ibid.

B. The Influence of Emerson's Personal Experience and Recent History

Emerson's commitment to strengthening freedom of expression was not purely philosophical – it had a foundation in his personal experience and the specific period in history in which he lived. He was not immune to the fears of the moment. Rather, he was likely horrified by what he had just witnessed – fascism in the Second World War, the bombing of Hiroshima and Nagasaki, the rapid armament of the United States and the Soviet Union. He also knew that a hot war between the United States and the Soviet Union was a real possibility. In one of his early speeches, given in 1950 and titled “The Crisis in Civil Liberties,” Emerson argued that the struggle of civil liberties in the early Cold War was different than those in the past:

As in previous periods of our history – such as in the time of the Alien and Sedition Acts and at the period of the First World War – our conduct is hysterical and irrational. But this current now seems to run deeper than before. The advances made in mass communication, the increasing concentration of control over the organs that influence public opinion, the accelerating temp of the times, all combine to produce a more widespread and inflammatory situation than at any time in our past history.³⁸

Essentially, the difference was rooted in modernity: new technology allowed for the efficient spread of propaganda and hysteria while new weaponry brought about existential fears. His frustration came from a repetition of history – to him, America never seemed to learn about the dangers of suppressing speech, whether it was the Sedition Act of 1918 or the Alien and Sedition Acts of 1798. Authoritarianism abroad from Nazi Germany and Fascist Italy was also fresh on his mind. Having just witnessed the rise of fascism in the Second World War, in a 1949 speech titled “Civil Liberties in the Modern World,” he stated that “[e]ither we must work out the methods by which the mass of citizens can participate intelligently and effectively in the making of basic decisions, or we must yield that task to authoritarian control operating from the top

³⁸ Emerson, “The Crisis in Civil Liberties: Address of Thomas I. Emerson, Professor of Law, Yale Law School, and President of the National Lawyers Guild, at the Conference on Civil Liberties, sponsored by the Los Angeles and Hollywood-Beverly Hills Chapters of the National Lawyers Guild, at Hollywood, California,” June 23, 1950, Speech, in Box 84, Folder 33 in Emerson Papers: 8. Hereafter “The Crisis in Civil Liberties.”

down.”³⁹ Emerson’s understanding of the constriction of civil liberties was closely intertwined with the context of the world wars and the early Cold War. His arguments about authoritarianism carried weight in 1949 – he clearly believed the survival of democracy was at stake.⁴⁰

But Emerson was optimistic, and both the optimism throughout his career and his proposed solutions to the crises in civil liberties came from his personal experiences. Though he thought the Cold War and anticommunism meant imminent danger for civil liberties, he always believed there was a path forward. He believed that the United States only had one choice to escape a hot war with the Soviet Union: one where democracy could flourish by a government-supported expansion of civil liberties. And intentional or not, his positive experiences with the New Deal in Roosevelt’s Administration shaped his solutions. He had first-hand experience of the government’s potential for guiding the United States forward during the Great Depression’s economic and social crisis. Frequently citing the New Deal and its programs and alluding to Keynesian economics, he believed the solution to increasing civil liberties involved the entire government and its cultivation of free expression. In his 1950 article for the National Lawyers Guild Review – titled “The Role of the Guild in the Coming Year” – Emerson, then-president of the Guild, wrote that one of the major forces that built the organization was “...the changing conception of the social, economic and moral values upon which a democratic society in the modern industrial world must be built. These ideas found their political expression in the New Deal.”⁴¹ He saw elements of the New Deal as a requirement for the realization of civil liberties. Finally, his optimism shone through in almost all of his speeches.

³⁹ Emerson, “Civil Liberties in the Modern World: Speech Before the Special Refugee Appeal of the Joint Anti-Fascist Refugee Committee Dinner,” March 13, 1949, Speech, in Box 84, Folder 32 in Emerson Papers: 4-5. Hereafter “Civil Liberties in the Modern World.”

⁴⁰ Emerson frequently contextualized elements of the Second Red Scare within the Sedition Act of 1918 and the Alien and Sedition Acts in 1798, arguing that the United States had yet to learn its lesson in the Cold War.

⁴¹ Emerson, “The Role of the Guild in the Coming Year: For Lawyers Guild Review,” June 15, 1950, Article Draft, in Box 84, Folder 33 in Emerson Papers: 1.

In an example from “The Crisis in Civil Liberties,” he wrote that “[t]he dangers are great, perhaps greater than we have ever dealt with before. But there is certainly no need for despair. Rational answers can be found.”⁴² Emerson thought that if the government could work to support, rather than repress, the economic growth and social changes demanded by modernity, then it could nurture civil liberties like the freedom of expression.⁴³

C. The Government Organs Responsible for Constricting Civil Liberties

Though Emerson argued that the government repressed freedom of speech in many ways in the 1940s and the early 1950s, he argued that the worst problems stemmed from HUAC, Senator Joseph McCarthy, and Truman’s 1948 Loyalty Order. To Emerson, they represented the state moving towards authoritarianism and a government built on lies, misdirecting resources towards weeding out communists rather than focusing on strengthening democracy. Before McCarthy rose to fame, Emerson thought HUAC was the single largest issue. When discussing HUAC, he did not hold back: he believed that “[n]o group has repudiated more completely the American tradition of civil liberties or done more to encourage the spirit of fascism in America,” going on to say that “[t]he tactics of the Committee – elaborately developed by the shrewd little minds of Dies, Rankin and Thomas – are designed to evoke fear, distrust and hysteria, not to appeal to rational or tolerant thought.”⁴⁴ Emerson argued that the Committee was a tool of authoritarianism, stating that “it calls for the creation of new crimes, – ‘near treason,’ ‘virtual espionage,’ and ‘cold war treason and espionage.’ The establishment of such vague and all-embracing offense is an out-and-out tactic of fascism.”⁴⁵ During the Second Red Scare,

⁴² Emerson, “The Crisis in Civil Liberties,” at 16.

⁴³ In different articles and speeches, Emerson discusses New Deal programs like the Tennessee Valley Authority as examples of effective government support of the economy (Emerson, “Civil Liberties in the Modern World,” at 11). To Emerson, this is critical to civil liberties – they cultivate a supportive and democratic relationship with the public.

⁴⁴ Emerson, “Civil Liberties in the Modern World,” at 7-8.

⁴⁵ *Ibid.*, 8.

HUAC was probably the most publicly visible form of anticommunism before McCarthyism, and thus was responsible for a significant proportion of damage done by hysteria and fear mongering.⁴⁶

In a personal brush with HUAC, Emerson experienced its baseless accusations regarding the National Lawyers Guild. He was president of the Guild in 1950, and as an organization of lawyers committed to protecting all citizens from discrimination and suppression, the Guild often defended Communists whose liberties had been infringed upon. Thus, the Guild was a clear target for HUAC, and on September 17, 1950, the Committee released a fifty-page statement titled “Report on the National Lawyers Guild: Legal Bulwark of the Communist Party.” The official Congressional report blatantly ignored the principles of civil liberties, stating that because the NLG defended Communists and its positions criticized many entities of the United States government, it was “the foremost legal bulwark of the Communist Party, its front organizations, and controlled unions.”⁴⁷ HUAC, in this case, blatantly and willfully ignored the fact that the NLG was a civil libertarian organization and would defend marginalized groups like Communists. The report argued that the NLG attacked the United States and

...has consistently fought against national, State, and local legislation aimed at curbing the Communist conspiracy. It has been most articulate in its attacks upon all agencies of the Government seeking to expose or prosecute the subversive activities of the Communist network, including national, State, and local investigative committees, the Department of Justice, the FBI, and law enforcement agencies generally.⁴⁸

HUAC used this line of reasoning to paint the NLG as anti-American, laying out specific examples of the Guild siding with Communists, criticizing federal agencies, and taking the

⁴⁶ Emerson’s relationship with HUAC is extensive and oftentimes personal. It will be explored in Part III of the essay, when Emerson helped lead a movement to abolish the committee entirely.

⁴⁷ U.S. Congress, House, Committee on Un-American Activities, *Report on the National Lawyers Guild: Legal Bulwark of the Communist Party*, 81st Cong., 2d Sess., 1950, H. Rep., 3123, 1: https://www.prisonlegalnews.org/media/publications/us_house_report_on_nlg_and_communist_party_1950.pdf. Hereafter “Report on the National Lawyers Guild.”

⁴⁸ Ibid.

Communist Party line in its statements. It included an appendix with side-by-side columns of the NLG's statements and those of the CPUSA as evidence, selecting only for statements where the NLG sided with Communists and ignoring instances of the contrary. In the report's conclusion, it ultimately requested that the Department of Justice place the NLG on its list of subversive organizations, and that NLG members be refused federal employment and admission to the Bar.⁴⁹

Emerson and the NLG took the opportunity to argue how authoritarian and unaccountable HUAC had become, penning an article titled "The National Lawyers Guild: Legal Bulwark of Democracy" in October of 1950. In it, Emerson and the national executive board of the NLG shot back at HUAC, addressing each point in the Committee's report. The NLG's essay states that HUAC's report was "wholly one-sided," "relied upon misstatements, half-truths and distortions," and that the "report of the Committee is an indictment, not of the Guild, but of the Committee itself."⁵⁰ The HUAC report solely focused on the Guild's alleged Communist affiliations: for example, the NLG's opposition to anticommunist laws like the Mundt-Nixon Bill and its similarities to communist arguments published by the Communist *Daily Worker*, such as denouncing the Second World War as imperialist. By contrast, the NLG essay argued that the report "contains no reference to an equal number of cases where the Guild has intervened on issues not involving Communism."⁵¹ In essence, HUAC placed a microscope on the NLG and its activities, only paying attention to those involving the Communist Party when, in reality, the Guild had many more areas of focus. In a *Yale Daily News* article on the matter, Emerson stated that the Guild's objective was "to protect and foster the civil rights and liberties of all people. It

⁴⁹ For appendix, see "Report on the National Lawyers Guild," 23; For conclusion, see 21.

⁵⁰ For note about the HUAC report being 'wholly one-sided' see Emerson and the National Lawyers Guild National Executive Board, "The National Lawyers Guild: Legal Bulwark of Democracy: A Reply to the Report of the Committee on Un-American Activities," *Lawyers Guild Review* 10, no. 4 (Fall 1950): 96 in Box 84, Folder 33 in Emerson Papers; the rest of the descriptions in this sentence found in *ibid*, 93.

⁵¹ *Ibid.*, 96.

happens that the Communists are the scapegoat now.”⁵² HUAC assumed the Guild’s overlap and interactions with Communists meant that it was a tool of the Communist Party – not that it was carrying out its true mission. Thus, its flawed proceedings could quickly escalate to fantastical claims that were difficult to counter. Emerson and the NLG demonstrated how swift responses could expose HUAC for what it really was: a tool of suppression, instrument of baseless accusation, and agent of division.⁵³

With Truman’s Loyalty Order, Emerson saw a Democratic president appease HUAC and its repressive measures. Emerson argued in multiple essays that Truman’s Loyalty Order was really a test of conformity – it limited acceptable viewpoints and stunted the potential for government to be responsive to the people, enact change, and cultivate a free and open society. In “Civil Liberties in the Modern World,” Emerson stated that “[u]nder the President’s program, loyalty in practice has come largely to mean servile conformity to conventional opinion. We are transforming the government service into a drab collection of empty-headed bureaucrats.”⁵⁴ But the Loyalty Order was more than just an inconvenience. This top-down program of conformity would ultimately foster hysterical and intense reactions against communist and liberal ideas, adding yet another vector of anticommunism within government. Emerson believed that by its mere existence it violated the freedom of expression and thus posed a significant risk to democracy. In one of his most famous articles, co-written with legal scholar David Helfeld in 1948 and titled “Loyalty Among Government Employees,” Emerson explored the history, faults and potential negative effects of Truman’s federal loyalty program. Emerson and Helfeld argued

⁵² Emerson quoted in John Koch, “Emerson Accused in House Probe of Communist Front Organizations,” *Yale Daily News*, September 25, 1950, <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19500925-01.2.4&srpos=77&e=-----en-20--61--txt-txIN-%22Thomas+I+Emerson%22----->.

⁵³ Examples of the NLG and Communist Party both denouncing the Second World War as imperialist found in “Report on the National Lawyers Guild,” at 44-45; Opposition to Mundt-Nixon Bill found under “Opposes Legislative Action on Communism” of *ibid.*, at 8.

⁵⁴ Emerson, “Civil Liberties in the Modern World,” at 7.

that from a legal perspective, the Order's failure to define "disloyalty" and its vagueness of terms like "subversive" allowed it to engage in exploitation of non-conforming employees.⁵⁵ They go on to criticize the underlying basis of the Order, emphasizing that data about the extensiveness of subversion within government did not exist. Given the rate of investigations, they inferred that between 200 and 250 employees out of 2,000,000 checked for loyalty would be deemed disloyal, indicating a need for reconsidering the cost-benefit analysis of the program.⁵⁶ Ultimately, the most widespread damage was not done by the small number of employees discharged from government service. According to Emerson and Helfeld, "[u]nwarranted charges of disloyalty against government employees affect every citizen. As the story spreads there develops a fear of refusing to conform, a fear of speaking, a fear of signing a petition or a letter to a Congressman – all for fear of being declared subversive, of losing a job, or position in society."⁵⁷ To Emerson, it was clear that the damage done to the freedom of expression by the Loyalty Order was significant. It supported HUAC by further legitimizing the Committee's divisive rhetoric, and it was an important tool of generating fear and anticommunist sentiment.⁵⁸

Finally, with the rise of Senator Joseph McCarthy in the early 1950s, Emerson included McCarthy within his assessment of the largest governmental sources of hysteria. McCarthy amplified the same rhetoric as HUAC through his own speeches, taking fear mongering to an entirely different level. Emerson stated that McCarthy's techniques involved making accusations without any evidence: "[a]ll that is necessary is to repeat the charges constantly in contradictory and shifting forms so that the public can never thoroughly understand them. When a possibility

⁵⁵ Thomas I. Emerson and David M. Helfeld, "Loyalty Among Government Employees," *The Yale Law Journal* 58, no. 1 (1948): 37 and 39, doi: 10.2307/793350. Hereafter "Loyalty."

⁵⁶ *Ibid.*, 60.

⁵⁷ *Ibid.*, 83.

⁵⁸ Emerson and Helfeld's article was so influential that J. Edgar Hoover defended the FBI's loyalty checks, investigations, and wire tapings. See J. Edgar Hoover, "A Comment on the Article 'Loyalty among Government Employees,'" *The Yale Law Journal* 58, no. 3 (1949): 401–411, doi: 10.2307/793169.

develops that one lie will be nailed, one has only to jump to a new one.”⁵⁹ It was with McCarthy – where hysteria could be embodied within a single person – that the damage done to the American public was escalated. Emerson went on to state that “[t]he effect of this technique in creating confusion, in arousing prejudice, in laying the foundation for further suppression, need hardly be elaborated.”⁶⁰ The combination of HUAC, Truman’s Loyalty Order, and Senator McCarthy’s accusations and culture of conformity restricted the freedom of expression to move the United States towards totalitarianism. Emerson fought each entity on the basis of civil libertarian ideals, but he also explored how legal doctrine allowed the country to support such a repressive government.

D. How the Law Constricted Civil Liberties

Turning to case law and legislation, Emerson used his background as a lawyer to analyze the legal basis of how the government effectively created hysteria. He argued that while the courts developed large amounts of legal doctrine regarding freedom of expression during the interwar period, they did not sufficiently protect freedom of expression from governmental encroachment during the early Cold War. Thus, HUAC, the Loyalty Order, and the prosecutions of Communists could serve preventive justice – attempts to stop the overthrow of the government *before* there was real evidence of such a threat. The legal support for many of these attacks was the Smith Act, which made it illegal to “teach or advocate the overthrow of the government by force or violence,”⁶¹ and it was also the law most touched upon by the courts in cases involving Communists.⁶² Emerson identified the Supreme Court doctrine surrounding the

⁵⁹ Emerson, “The Crisis in Civil Liberties,” at 4.

⁶⁰ *Ibid.*

⁶¹ Emerson, “The Solution of Practical and Moral Problems Through the Use of Reason: In Law – Civil Liberties, Lecture Before the Institute of Religious and Social Studies, New York,” November 13, 1956, Lecture, in Box 84, Folder 38 in Emerson Papers: 16. Hereafter, “The Solution of Practical and Moral Problems.”

⁶² *Ibid.*, 16.

Smith Act as one of the core enablers of hysteria, with the Court abandoning its recently developed “clear and present danger” test in favor of a “clear and probable danger” test. The Court, under Justice Oliver Wendell Holmes, invented the former in 1919 to increase the threshold for inflammatory speech to be considered illegal. Under Justice Holmes’ interpretation, the speech must have presented an *immediate* danger of illegal action. After the seminal Supreme Court case *Dennis v. United States*, where the government prosecuted eleven Communist leaders for violation of the Smith Act, the Court argued that Marxism’s anti-capitalist rhetoric *implied* a likelihood of overthrowing the government. Emerson, however, argued that this line of reasoning in *Dennis* as well as in many judicial opinions “have seriously weakened the clear and present danger rule.”⁶³ He stated that “[o]nly if there is a real and imminent danger of an attempt at overthrow of government through the teachings of the Communist Party can one rationally justify a series of prosecutions under the Smith Act.”⁶⁴ Thus, Emerson firmly believed that anticommunist hysteria was also driven by misconstrued legal doctrine surrounding the freedom of expression.⁶⁵

IV. Emerson’s Solutions: Minimizing Hysteria and Focusing on Productive Issues

Rather than simply addressing problems, Emerson proposed intricate solutions in essays, court arguments, and political activity. Like his historical contextualization of anticommunist hysteria, he took a holistic approach and understood that, at the fundamental level, anticommunism was a reaction to change. The core issues came from resistance to immense societal changes – from the economy to technology – and the government’s exploitation of the

⁶³ *Ibid.*, 17.

⁶⁴ *Ibid.*

⁶⁵ On page 15 of *ibid.*, Emerson discussed how the Loyalty Order was an example of preventive measures – trying to stop a potential overthrow of government in the indeterminate future. He uses this as a cornerstone of his argument in

American public's fears. Thus, he took action, using different methods to disseminate information: legal journals, academic articles, newspapers, panels, lectures, conferences, classroom teaching, and legal advocacy. Emerson appealed to rational thought, begging the public to see past HUAC's accusations and the Loyalty Order's perceived legitimacy. In the context of the Cold War, Emerson believed that the nation needed to undergo a shift in mindset to one that welcomed change. In his 1951 article "Must We Choose—National Security or Freedom," Emerson reiterated his belief that national security required freedom of expression: "[t]he issue is not national security or freedom, but national security through freedom."⁶⁶ But he also emphasized that a mindset of openness to change was critical to security. He stated that "[i]n a changing world security can be found only in progress. And the foundation of any real and lasting progress is freedom."⁶⁷ Throughout his works that hinted at his solutions to the government's suppression of civil liberties, anticommunism, and resistance to change, the common thread was a push for the public's collective reframing of mind.⁶⁸

Emerson's solutions focused on increasing freedom of expression through increasing tolerance. He broke down different mechanisms of tolerance at the governmental level to effectively minimize hysteria. In his 1951 essay, "The Conditions of Democratic Survival," Emerson outlined how the government could cultivate tolerance, labeling it as necessary for the survival of the nation. Four of the most important ways of increasing tolerance and protecting civil liberties included enforcing equitable procedures of punishment, balancing competing political interests, maintaining freedom of education and research, and holding a high standard of government service. By providing these solutions, Emerson took a comprehensive civil

⁶⁶ Emerson, "Must We Choose—National Security or Freedom: Summary of Address by Thomas I. Emerson at Conference on Civil Liberties, Springfield College, Springfield, Mass.," March 17, 1951, Speech, in Box 51, Folder 735 in Emerson Papers: 1.

⁶⁷ *Ibid.*, 3.

⁶⁸ Emerson's 'begging' was evident in the titles of his essays (i.e., "Must We Choose—National Security or Freedom") and his unrelenting dismissals of HUAC, McCarthy, and Truman's Loyalty Order.

libertarian stance to combating anticommunism. It is clear that he did not identify with the Communist Party, but that he saw anticommunism as an opportunity to strengthen civil liberties.⁶⁹

A. Enforcing Equitable Procedures of Punishment: Legal Solutions

The judicial system offered legal guardrails to ensure equitable procedures for punishment. Emerson believed there already existed First Amendment doctrines that could protect the freedom of expression, and that the courts must adhere to them to be effective. In his 1956 essay “The Solution of Practical and Moral Problems Through the Use of Reason” he provided five legal doctrines relevant to the protection of civil liberties in a repressive and hysterical environment: First Amendment precedence, the clear and present danger test, the rule against vagueness, the rule that restriction must be narrowly drawn, and guilt by association.⁷⁰

Emerson believed that freedom of expression was a *fundamental* right that was necessary to the function of democracy, and he argued that the courts should practice the same belief. In the event of suppressing speech, “the burden should be on the government to justify the restriction” rather than the other way around.⁷¹ Following the precedence of the First Amendment, the second guardrail was “the clear and present danger test,” of which Emerson frequently argued was central to minimizing Communist prosecutions. It was especially relevant during the Second Red Scare, as its proper enactment could have reduced the vast majority of Communist accusations. Emerson stated that “[i]t buttresses the more tolerant and mature elements of society

⁶⁹ Emerson, “The Conditions of Democratic Survival: Address of Thomas I. Emerson at the 15th Annual Education Conference of the Teachers Union, New York City,” April 7, 1951, in Box 51, Folder 735 in Emerson Papers: 5-7. Though in this essay he outlines five points of action, four of them are most elaborated upon throughout all of the Emerson Papers. The last one in this essay, from page 8 – “create a public attitude of tolerance” – is redundant as it is implied throughout each of the other points. Hereafter “The Conditions of Democratic Survival.”

⁷⁰ Emerson, “The Solution of Practical and Moral Problems.”

⁷¹ *Ibid.*, 6.

which seek to solve problems through a process of deliberation and compromise that will take into account the legitimate grievances of those expressing the unorthodox views.” Together, the “presumption in favor of First Amendment rights” and the clear and present danger test created a rigorous standard by which to assess threats to government. When specifically applied to communism, they render many of HUAC’s and the Loyalty Order’s purposes legally void.⁷²

The rule against vagueness, like the clear and present danger test, minimized the scope of valid Communist prosecutions – its enactment would have required that illegal expression be clearly delineated. Emerson stated that it would combat a fear-ridden society, as “it is characteristic of those who react to fear or other emotion, or who seek to exploit such emotions, to state their standards of undesirable conduct obscurely.”⁷³ The rule against vagueness provided the Supreme Court with a powerful guideline that could have forced HUAC and the Loyalty Order to clarify terms such as “disloyal” and “Un-American.”⁷⁴ Similarly, “the rule that restriction must be narrowly drawn” secured freedom of expression by preserving the rights of the whole when just the part is at risk – for example, restricting certain speech for a political organization would not deem the entire organization illegal.⁷⁵

Emerson identified the last powerful tool available to the courts as limiting guilt by association. He argued that society’s changing power structures required individuals to organize in groups to be heard – whether it was political parties, labor unions, or non-governmental organizations. Emerson stated that “the fundamental principle remains that the final conclusion must rest...upon an independent judgment of the individual as an individual.”⁷⁶ Though it had never been adopted by a majority opinion on the Supreme Court, Emerson believed it critical to

⁷² Ibid., 9.

⁷³ Ibid., 10.

⁷⁴ Ibid., Emerson includes these terms as examples of vague terminology employed to sustain anticommunism.

⁷⁵ “The rule that restriction must be narrowly drawn” elaborated on page 11 of *ibid.*

⁷⁶ Ibid., 12-13.

separate organization from individual in order to maintain freedom of expression in a complex modern society. This was particularly relevant to organizational units like the Communist Party, where laws like the Loyalty Order assumed that someone's belief in Communist principles implied guilt by association to the Party.⁷⁷

B. Balancing Competing Political Interests: Tolerating Communism

In addition to leveraging legal doctrine in the courts, Emerson believed that the United States could work towards tolerance by creating an inclusive political environment that “actively promote[s] new ideas, weigh[s] varying proposals with tolerance, and seek[s] a solution that balances competing interests.”⁷⁸ Given the context of the Cold War and the Second Red Scare, Emerson was pointedly referring to destigmatizing Communists. Though he was no Communist, he believed it necessary to stop spending governmental resources prosecuting Communists and fomenting fear about the possibility of an America ruled by totalitarian dictatorship. This required that the problem be approached rationally and without repulsion. For one, Emerson was exasperated with the central focus on the Communist Party. In his 1956 lecture “The Solution of Practical and Moral Problems Through the Use of Reason,” he stated that

If one considers the unprecedented economic prosperity of the country; the strength of our political institutions, and their demonstrated capacity to meet the crisis of a devastating depression and two world wars; the dwindling strength of the Communist Party, now down to 20,000 members; the complete rejection by the American people of Marxist theory and doctrines of force and violence; the abundance of other legislation to deal with any actual resort to force and violence, – a conclusion that the teachings of the Communist Party on force and violence present even a probable danger of overthrow seems little short of fantastic.⁷⁹

⁷⁷ For information about how a Supreme Court majority never created a clearcut precedent for ‘guilt by association,’ see *Ibid.*, 13.

⁷⁸ Emerson, “The Conditions of Democratic Survival,” at 5.

⁷⁹ Emerson, “The Solution of Practical and Moral Problems,” at 17-18.

Far more alarming was the country's diversion of resources to focus on the Communist Party. Emerson thought there was no need to do so, pointing out the existing laws that could effectively combat potential subversion. Specifically, he referred to laws like the Hatch Act of 1939, which made it "unlawful for members of the Communist Party to hold positions in the executive branch of the government" and made laws like Truman's Loyalty Order unnecessary.⁸⁰ Allowing the Communist Party to exist while enforcing existing laws like the Hatch Act would have likely lowered hysteria – by addressing the problem with a mindset of rationality and tolerance, it would have become easier to place the Communist Party in perspective and see it as less of a threat.

C. Balancing Competing Political Interests: Emerson and the Progressive Party of 1948

Though Emerson denied ever supporting or engaging with the Communist Party, he genuinely believed in increasing tolerance by allowing the Party to express itself politically. He took this personally, borrowing parts of the Communist Party platform to form his liberal beliefs. In a letter from September 1947, Emerson wrote, "I feel that the world can achieve peace, prosperity, and freedom only through a fusion of some of the contributions of Russian Communism – such as their position on racial issues and on control over their economic destiny – with American traditions of political and civil freedoms."⁸¹ One of the ways he believed this was possible was through a newly-formed party for the Presidential Election of 1948: the Progressive Party.

The Presidential Election of 1948 saw the two leading candidates, Democrat Harry Truman and Republican Thomas Dewey, battle for votes amongst the backdrop of the Cold War

⁸⁰ Emerson and Helfeld, "Loyalty," at 65.

⁸¹ Miles Pennybacker, *Miles Pennybacker to Thomas I. Emerson*, Sept. 9, 1947, Letter, in Box 53, Folder 757 in Emerson Papers.

and the Second Red Scare. But a third party, the Progressive Party, led by Roosevelt's former Vice President Henry Wallace, aimed to carve a different route. Left of the Democrats, the Progressives ran on a platform of "peace, security, and abundance" that sought to protect civil liberties, better race relations, improve economic outcomes, and pursue a policy of peace towards the Soviet Union. The goal was to avoid a catastrophic war following World War II while still providing America with a way out of the Cold War and towards a more prosperous future. The official party platform's preamble stated that both the Republican and Democratic parties "represent a single program – a program of monopoly profits through war preparations, lower living standards, and suppression of dissent." It put its argument regarding civil liberties bluntly: "Civil liberties are being destroyed."⁸²

Emerson took action towards building a new political party that could push new ideas to the national conversation. He became the first chairman of the People's Party of Connecticut, which quickly aligned with the national Progressive Party. He then chaired the state's Provisional Committee for Wallace. Emerson's role spanned grassroots canvassing and direct political participation: he both led the drive for petitions to put Wallace on the ballot in the state, and he ran for governor on the People's Party ticket. Emerson sought to expand freedom of expression by providing another option to the anticommunist mainstream. In the case of getting signatures for Wallace, he stated that those signing did so "to assure themselves a chance to vote [for] the Wallace program of peace, support of labor's right to organize, and civil liberties." In running for governor, he dropped out to avoid splitting the liberal vote.⁸³

⁸² "Peace, Freedom, and Abundance: The Platform of the Progressive Party as adopted at the Founding Convention, Philadelphia, July 23-25, 1948," in Box 53, Folder 759 in Emerson Papers: 1-2. Hereafter "Progressive Party Platform."

⁸³ "Notes on speakers – Glenn Taylor Rally," People's Party, Sept. 26, 1948, in Box 53, Folder 758 in Emerson Papers; "For Immediate Release," From the Provisional Committee for Wallace, March 10, 1948, in Box 53, Folder 757 in Ibid.; Emerson quoted in "For Release Monday," From the People's Party of Connecticut, May 10, 1948, in Box 53, Folder 758 in Ibid.

Emerson was eventually elected as a national committeeman for the Progressive Party, taking an active role at both the state and national level. When asked why he supported Wallace, he told the magazine *Uncensored* that

The United States today is facing one of the most critical periods in its history. As the price of survival it must grapple with and solve such problems as world peace, control over its own economic destiny, and the securing of social justice for all citizens. The Republican and Democratic Parties, as exemplified in the 80th Congress, are totally incapable of even visualizing the nature of these problems. The Progressive Party under the leadership of Henry Wallace proposes a courageous, resourceful, and tolerant program, within the framework of our democratic institutions.⁸⁴

But in the end, Emerson broke with the Progressive Party in 1950, two years following Wallace's defeat. He was one of few national committee members to break from the party in 1950, when he disagreed with the party's stance on the Korean War. In his resignation to the national secretary C.B. Baldwin, Emerson discussed the party's failure to condemn the violence in Korea, stating that "[n]o party that stands for peace can tolerate acts of military aggression."⁸⁵ When he no longer believed the party was in line with his values, Emerson decided to leave and focus the fight for civil liberties and a more peaceful, just, and prosperous America elsewhere.⁸⁶

*D. Maintaining Freedom of Education and Research: Expanding Academic Freedom in *Sweezy v. New Hampshire**

A third way to build tolerance was to look into the realm of education. Emerson argued that preserving freedoms in intellectual circles within schools and universities was critical to the mission of progress: "[i]t is here that we must look for the fashioning of the tools with which to

⁸⁴ Emerson, "Statement of Thomas I. Emerson," Sept. 15, 1948, in Box 54, Folder 762 in Emerson Papers. Attached to a letter sent to the editor of *Uncensored*, where the editor asked the board of the National Council of the Arts, Science and Professions – of which Emerson was a member – to send statements of why they support Wallace and the Progressive Party.

⁸⁵ Emerson, *Thomas I. Emerson to C.B. Baldwin*, Aug. 3, 1950, Letter, in Box 54, Folder 763 in Emerson Papers.

⁸⁶ Notably, Henry Wallace left the Progressive Party as well on the same issue.

find the answer to the pressing questions of the day. Our teachers, our scholars, our scientists must be completely free to pursue the search for truth wherever it may lead them.”⁸⁷ Academia was the engine of change, and as an academic himself, Emerson was in a unique position to protect it from anticommunism’s infringements on freedom of expression – and that is exactly what he did. Emerson had a direct impact in the 1957 Supreme Court case *Sweezy v. New Hampshire*, where he represented Paul Sweezy, an economics professor and Marxist investigated by the Attorney General of New Hampshire for subversion.⁸⁸

Since Sweezy was a Marxist economist, he quickly drew attention to himself from governmental authorities in an anticommunist climate. During his testimony for the Attorney General, he refused to answer questions related to the content of his lectures in an attempt to maintain freedom of expression. In nearly two hours of oral arguments, Emerson concluded his statement by telling the justices the critical question at hand: “The appellant in this case attempted to draw a line between those areas in which the State had an interest in legislating with respect to political expression, and those areas where the State must stay out.”⁸⁹ Sweezy denied Communist Party affiliation. But he did not want to provide material that, although for all intents and purposes was academic in nature, could still criminalize him in an anticommunist climate. Emerson reiterated the importance of clarity in drawing that line, raising his voice in the conclusion of his oral argument. He stated that

That is the line which seems to me extremely important for this Court to recognize...and confirm so far as it can be made clear because...the whole development of political expression in times like this depends upon that kind of

⁸⁷ Emerson, “The Conditions of Democratic Survival,” at 6.

⁸⁸ The facts of the case are drawn from Emerson’s Papers, which include multiple folders on the case. See Thomas I. Emerson and William L. Phinney, “In the Supreme Court of the United States: Paul M. Sweezy vs. State of New Hampshire, On Appeal from the Supreme Court of New Hampshire, Jurisdictional Statement,” October 1955, Jurisdictional Statement, in Box 84, Folder 37 in Emerson Papers. Hereafter “Sweezy vs. New Hampshire, Jurisdictional Statement.”

⁸⁹ Emerson, “Sweezy v. New Hampshire: Oral Arguments,” Oyez, 1:55:20 - 1:55:40, <https://www.oyez.org/cases/1956/175>.

distinction... The distinction specifically in this case being the distinction between force and violence or advocacy of force or violence and academic discussion or lawful political organization.⁹⁰

Here, Emerson put his beliefs into practice in a dramatic fashion – he was referring to multiple legal doctrines, including the idea that the First Amendment took precedence, the clear and present danger test, and the rule against vagueness. He conveyed his argument to the Court directly, clearly indicating the importance of the freedom of expression, setting firm boundaries in what actually presented a danger to the government, and clarifying vague rules of what could be considered “subversion.”⁹¹

In the end, the Court decided the case in favor of Sweezy, resulting in a victory for academic freedom and teaching socialism in classroom environments. In the majority opinion, Chief Justice Earl Warren stated that “No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”⁹² Emerson’s influence on academic freedom could not be understated. Following the opinion of the court, the *New York Times* contextualized the weight of the decision: “The third branch of the government is now, it seems, trying to redress the balance of the other two.”⁹³ By the late 1950s, the courts finally heard Emerson’s arguments. It was this combination of early legal scholarship and advocacy that led Emerson to decrease hysteria and strengthen civil liberties, all while not adopting Communist ideology.⁹⁴

⁹⁰ Ibid., 1:55:40 - 1:56:31.

⁹¹ Interestingly, his passion for civil liberties is audible in the oral arguments, even in such a solemn setting. He had a heavy New Englander’s accent and seemed to stutter quite frequently, though that might have been due to nerves. Further, this was one of the only accessible accounts of Emerson’s voice. For a 1982 oral interview series, see the Columbia Center for Oral History at https://oralhistoryportal.library.columbia.edu/document.php?id=ldpd_13629720

⁹² Chief Justice Earl Warren quoted in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

⁹³ James Reston, “High Court Decision Put a Strong Stress On Academic Liberty,” June 19, 1957, *New York Times*, <https://nyti.ms/3XP5wYx>. Chief Justice Warren’s quote was originally found in this article.

⁹⁴ For more on Sweezy’s background, see Emerson, “Sweezy vs. New Hampshire, Jurisdictional Statement,” at 5.

E. Holding a High Standard of Government Service: Abolishing HUAC

Finally, Emerson believed that the government needed to return to a standard of decency, both with minimizing Communist accusations and bettering its treatment and selection of government employees. Emerson argued that “[w]e need men and women who can handle the tools necessary to resolve the increasing complex problems of government today,” specifically “the boldest, the most able, the most resourceful public servants that the nation can produce.”⁹⁵ The Loyalty Order and HUAC, with their cultures of repression and fear, diminished the government’s capacity to produce “bold” public servants. After his experience in the Progressive Party and arguing the Sweezy case, Emerson turned towards HUAC: in 1964, Emerson helped lead a petition to abolish HUAC altogether, working as co-author of the petition and eventually becoming the Constitutional Law Advisor for the National Committee to Abolish the House Un-American Activities Committee (NCA).⁹⁶

On April 3, 1964, executive director of the NCA Frank Wilkinson asked Emerson to lead an initiative to write HUAC-abolishing legislative proposals for House members. Emerson, overcommitted by his law professorship, declined, but he agreed to be a member of the NCA. A few months later, in December of 1964, Emerson submitted the NCA’s official petition to Congress. His contributions were visible in the petition, especially his emphasis of HUAC ignoring the rule against vagueness, his attack of HUAC’s suppression of speech, and his indications of HUAC’s unconstitutionality. Emerson wrote sharply and with clear intent directly to HUAC, stating that “[w]hen such power is directed exclusively against the rights of Americans to free and open expression, or association for such purposes, it cannot be justified

⁹⁵ Emerson, “The Conditions of Democratic Survival,” at 7.

⁹⁶ NCA is used for brevity, even though it only encapsulates the words “National Committee to Abolish.”

under any concept of democracy.”⁹⁷ Moreover, the petition demonstrated Emerson’s level-headedness in that he did not suggest a complete removal of national security measures – he simply believed that security could be achieved by means other than a witch-hunting organization that generated hysteria and hindered the democratic process.⁹⁸

While the petition did not result in the immediate abolition of HUAC, it certainly had an immediate effect. A hundred public law professors and legal experts, including Emerson, from elite institutions signed the petition, resulting in the House’s serious consideration of the proposal. One article from the *Guardian* confirmed that the petition was given to the Speaker of the House and would be distributed to each member of the succeeding Congress, which had the ability to abolish HUAC when it first convened on January 4, 1965. Numerous Representatives responded directly to Emerson, thanking him for his petition and indicating a generally agreeable attitude to the proposal for abolition. Congressman Richard Ottinger of New York, for example, wrote that “I certainly agree with the position taken by your organization and I will do all I can to help achieve this necessary goal.”⁹⁹ Though some members indicated favorable viewpoints of HUAC and others were pessimistic about the potential for actual abolition, by July of 1965 the petition drove 76 Representatives to oppose HUAC. A decade later, on the opening of the 94th Congress, the House dissolved the Committee.¹⁰⁰

⁹⁷ Emerson et al., “Petition to the House of Representative, 1964 End Product,” November 5, 1964, Petition, in Box 29, Folder 428 in Emerson Papers.

⁹⁸ Frank Wilkinson, *Frank Wilkinson to Thomas I. Emerson*, April 3, 1964, Letter, in Box 29, Folder 438 in Emerson Papers: 2; Emerson, *Thomas I. Emerson to Frank Wilkinson*, April 10, 1964, Letter, in *ibid*.

⁹⁹ Richard L. Ottinger, *Richard L. Ottinger to Thomas I. Emerson*, December 14, 1964, Letter, in *ibid*.

¹⁰⁰ Special to the *Guardian*, “100 legal experts ask HUAC abolition: House Witch-Hunt Committee Denounced,” n.d., *The Guardian*, Newspaper Clipping, in Box 29, Folder 434 in Emerson Papers; There was not much publicity surrounding the initial release of the petition – in a letter from December 11, 1964 (found in *ibid.*), Emerson indicated that the *New York Times* refused to run the piece even though the *Washington Post* mentioned it; For more on the number of Representatives against HUAC, see Frank Wilkinson, *Frank Wilkinson to Thomas I. Emerson*, July 8, 1965, Letter, in Box 29, Folder 435 in Emerson Papers.

On January 14, 1975, Emerson’s nearly thirty year battle with HUAC came to an end with the House’s vote to dissolve the Committee. Behind the scenes, Emerson moved his legal theory into reality, believing that the government must return to a level of decency to promote freedom of expression. On the day of HUAC’s dissolution, Democratic Congressman Robert F. Drinan acknowledged the NCA’s contribution, stating that “No account of the demise of the House Un-American Activities Committee would be complete without a notation of the extraordinary work done by the [NCA].”¹⁰¹ Although Congress, and not the NCA, dissolved HUAC, Emerson was instrumental to its demise – as the constitutional law authority behind the NCA’s work, he shaped the organization’s message to Congress and enveloped it in the legal doctrine of his many essays, lectures, and speeches.

V. How Emerson Countered Espionage and Active Measures

A. Traditional Espionage

Active measures became the KGB’s primary strategy in the late 1950s. But in the years following World War II, President Truman, HUAC, and McCarthy largely justified their anticommunism with the threat of espionage. The extent of espionage was not publicly known until the declassification of the Venona Cables in 1995, but FBI Director J. Edgar Hoover – who enforced Truman’s Loyalty Program – knew about the Soviet agents in government positions. As John Earl Haynes and Harvey Klehr state in *Venona: Decoding Soviet Espionage in America*, the program was highly classified and compartmentalized in government – only the FBI, CIA, and certain military officers knew of it. The FBI did not have the authority to bring the appropriate

¹⁰¹ Robert F. Drinan quoted in Rick Lyman, “Frank Wilkinson, Defiant Figure of Red Scare, Dies at 91,” *New York Times*, January 4, 2006, <https://www.nytimes.com/2006/01/04/us/frank-wilkinson-defiant-figureof-red-scare-dies-at-91.html>. Though the original quote states that the Committee was the “National Committee Against Repressive Legislation” (NCARL), this was the same as the NCA. The NCA was renamed to the NCARL.

evidence to court, and thus relied on shady investigative programs and outlets like HUAC. Even so, Emerson's civil libertarian position still held. His work still combatted traditional espionage. Although he was not aware of the extent of espionage, he acknowledged that spies likely existed in government. In their 1948 article "Loyalty Among Government Employees," Emerson and Helfeld accounted for that possibility by building their argument assuming that both HUAC's accusations and the FBI's investigations were legitimate. Even so, they believed that a comprehensive loyalty program was not needed to counter the likely small number of agents in key governmental positions: instead, a small counter-espionage force would have been the most effective. Further, counter-espionage laws were already in place. Emerson did not discount the possibility of espionage, but he approached the issue in the spirit of tolerance, believing espionage should be examined rationally and dispassionately.¹⁰²

Emerson's involvement in the Progressive Party also bore issues of espionage and Communist subversion. In its official party platform, the Progressive Party explicitly laid out its policy towards communists, stating that the "Progressive Party will fight for the constitutional rights of Communists and all other political groups to express their views as the first line in the defense of liberties of a democratic people."¹⁰³ The Progressive Party also garnered official support of the CPUSA, and thus naturally led to questions about the possibility of it operating as a communist front. In reality, communists had compromised the party's integrity and operated covertly within Progressive Party leadership. In *Henry Wallace's 1948 Presidential Campaign and the Future of Postwar Liberalism*, historian Thomas Devine pointed out that leaders within the Progressive Party, such as Wallace's speechwriter Charles Kramer and the Party's general

¹⁰² John Earl Haynes and Harvey Klehr, *Venona: Decoding Soviet Espionage in America* (New Haven: Yale University Press, 2000), 15. Hereafter *Venona*; See Emerson and Helfeld, "Loyalty," at 60, 67, 135, and 141 for more information about effective counter-espionage for a small number of compromised government employees.

¹⁰³ "Progressive Party Platform," at 10.

counsel John Abt, would later be revealed to have been Soviet intelligence informants. But Emerson himself was aware of the issue: in March of 1948 he wrote that “I take it that there may well be Communists in the Third Party organization...[i]t is possible of course that individual contributions come from members of the Communist party.”¹⁰⁴ The presence of some Communists within the Progressive Party certainly did not discredit its mission of tolerance, and Emerson firmly believed that. He again approached the problem rationally – Communist membership was a distraction from the overarching goals of the Progressive Party. But in a highly anticommunist climate, it likely contributed to the Progressive Party’s downfall.¹⁰⁵

B. Active Measures

The KGB’s active measures program expanded in the late 1950s to supplement its espionage, allowing for a much more scalable intelligence apparatus that focused on subversion through “gray” and “black” propaganda. But Emerson’s work helped stop subversion in its tracks: active measures almost entirely depended on fear, hysteria, and division to be effective. In a lecture from 1983, KGB defector Yuri Bezmenov explained how psychological subversion operated in stages, with the first being demoralization.¹⁰⁶ Taking between fifteen and twenty years, the time to educate a generation, it included sowing discord, creating distrust, and distracting the public from productive issues in favor of conformity to irrational beliefs. Bezmenov, lecturing from a chalkboard, highlighted how the KGB would let the United States use its own momentum in this process, “[w]e don’t stop an enemy. We let him go, we help him

¹⁰⁴ Emerson, *Thomas I. Emerson to Talbot Smith*, March 22, 1948, Letter, in Box 54, Folder 763 in Emerson Papers.

¹⁰⁵ Thomas Devine, *Henry Wallace’s 1948 Presidential Campaign and the Future of Postwar Liberalism* (Chapel Hill: University of North Carolina Press, 2013), xii and 227.

¹⁰⁶ Yuri Bezmenov lecture from 1983 quoted in GBPPR2, “Yuri Bezmenov: Psychological Warfare Subversion & Control of Western Society (Complete),” YouTube Video, February 23, 2011, <https://youtu.be/5gnpCqsXE8g?t=533,8:53-32:00>.

go in the direction we want them to go.”¹⁰⁷ In the case of the early Cold War, anticommunist hysteria served as the irrational, demoralizing force of American society. Bezmenov also went on to say that the KGB did not believe in the idea of equality: “If we put the principle of equality in the basis of our social political structure it’s the same thing as building a house on sand. Sooner or later it will collapse.”¹⁰⁸ But it was here where the KGB was wrong. The KGB, using the idea of equality as a stand-in for democratic ideals writ-large, operated under the assumption that democracies were flimsy and could be easily subverted. HUAC, Truman’s Administration, and McCarthy fell for this idea as well. Emerson, however, demonstrated how a mindset of tolerance, a national security system rooted in freedom of expression, and a societal commitment to meet change with progress could combat anti-democratic forces.

VI. Conclusion

Throughout the Cold War, Emerson embodied the antidote to anticommunism, Soviet active measures, and espionage. He fought to strengthen democracy in an anticommunist America, dealing with a government committed to creating fear among the public. Government entities like HUAC and the FBI, initiatives like Truman’s Loyalty Program, and dangerous politicians like Senator McCarthy damaged American democracy far more than the Communist Party. They enabled the Soviet Union to effectively conduct espionage operations and active measures, and they risked the United States losing the Cold War. While living in anticommunist America, Emerson identified macrohistorical events to understand the context of hysteria and the government’s suppression of civil liberties. Though he was not without faults – he could certainly dismiss the Communist Party threat too much at times – his unique ability to

¹⁰⁷ Ibid., at 12:52-12:55.

¹⁰⁸ Ibid., 27:50-28:05.

understand the problem, maintain tolerance, and propose solutions led him to effectively minimize hysteria and strengthen freedom of expression. By providing a consistent stream of lectures, academic articles, newspaper commentary, legal representation, and political action, Emerson reinforced both freedom of expression and national security.

In 1979, Emerson penned an essay titled “Freedom of Speech in the Year 2000,” where he hypothesized what America could look like in the twenty-first century. Some of his predictions missed the mark, such as his belief that America would become much more socialist and that private companies would have much less power. But others, especially surrounding technology, could not be more accurate. Twenty eight years before Jack Dorsey founded Twitter, Emerson predicted that freedom of expression would undergo a revolution with technological improvements in communication and the decentralization of media. He wrote that “new facilities will be available for citizen to citizen communication, now a monopoly of the few who own and operate the radio and television stations.”¹⁰⁹ He thought a step further as well, discussing the possibilities of the democratization of information. But he also issued a warning:

[t]he existence of this information can readily shift the balance of forces in a society, depending upon who has access to the information and who is qualified, by education or otherwise, to make use of it. The accumulation of information can enhance the effectiveness of citizen participation in the system of freedom of expression, and it can permit greater decentralization of power, but it can also lead to other results.¹¹⁰

Those “other results” would come to include Russia’s exploitation of the information sphere.

In the twenty-first century, Russia continues to employ tactics inspired by Soviet-era active measures. President Vladimir Putin, a former KGB agent, knows the value of disinformation and psychological warfare. Russia’s modern cyber attacks have shown his

¹⁰⁹ Emerson, “The First Amendment in the Year 2000: A Paper Prepared for the Conference on the Future of the Bill of Rights, October 16-20, 1978, Buffalo, New York,” 1978, in Box 83, Folder 17 in Emerson Papers: 4.

¹¹⁰ Ibid., 4-5.

commitment to continuing the tradition of active measures: the Internet Research Agency's influence operations ultimately had a substantial impact not only on the 2016 election, but on general public opinion and discourse in America. The 2016 election, then, was just an example of a broader philosophy of warfare, one embraced by the highest levels of the military. In 2016, Russian General of the Army Valery Gerasimov stated that "the very 'rules of war' have changed. The role of nonmilitary means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness."¹¹¹

In 2022, the global context has shifted, and Russia's invasion of Ukraine demonstrates freedom and democracy are once again under attack. Russia's invasion continues to leverage the same active measures tactics in addition to physical force – this time directed at Ukraine's digital infrastructure.¹¹² Following Emerson's lead now is more critical than ever: freedom of expression and tolerance are the only ways forward. The future of democracy depends on the strength of civil liberties, and there is much work still left to do.

Word Count: 12,414

¹¹¹ Valery Gerasimov, "The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations." *Military Review*, 96 (2016): 24, <https://api.semanticscholar.org/CorpusID:147488164>.

¹¹² Microsoft Digital Security Unit, "Special Report: Ukraine, An Overview of Russia's Cyberattack Activity in Ukraine," April 27, 2022, <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE4Vwwd>

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Bibliographic Essay

This project is the culmination of over a year's work, where I had the pleasure of getting to know Thomas I. Emerson through the many boxes of papers he left behind. Though Emerson's archive could not have been a better fit for my research goals, my journey on this project started far before I encountered him. My interest in this project can be traced to Professor Asha Rangappa's Fall 2021 graduate seminar, "GLBL 580: Russian Intelligence, Information Warfare, and Social Media." It was here that I learned about Russia's interference in the 2016 US Presidential Election and the long history of Soviet active measures. With my Ukrainian-American heritage, I desperately wanted to explore the relationship between the Soviet Union and the United States, and I was surprised to learn about the USSR's extensive covert operations throughout the Cold War. The following spring, in Professor Beverly Gage's seminar "HIST 161J: Communism and Anticommunism in the Twentieth-Century United States," I connected active measures with anticommunism, exploring how hysteria could quickly spread in an open society like the United States. What struck me most was how government entities like HUAC gained power from fear rooted in only the *possibility* of subversion. Combining themes from both of these courses along with my interests in biography, the First Amendment, and the Cold War, I landed on the Emerson Papers.

Among the sources that impacted me most was Ellen Schrecker's *Many Are the Crimes: McCarthyism in America*. I originally read select chapters for Professor Gage's seminar, and it guided me throughout this project. *Many Are the Crimes* forced me to think about the true dangers of anticommunism. While in *Venona: Decoding Soviet Espionage in America*, John Earl Haynes and Harvey Klehr argue that Soviet espionage existed in the Second Red Scare and thus lent more credibility to anticommunism, Schrecker argues that the number of spies did not

matter – it was the belief in their existence that led to the government’s infringement of the public’s civil liberties.¹¹³ Thomas Rid’s *Active Measures: The Secret History of Disinformation and Political Warfare* adds complexity by providing a glimpse into the Soviet Union’s intents and covert operations, demonstrating how the Second Red Scare was about more than just communists and spies. These intellectual debates and intersections formed the foundation of my research, pointing me to Emerson to dive into a first-hand account of the fight for civil liberties during the Cold War.

The Emerson Papers contained a handful of gems that were critical to my research. Among the most influential was his essay “Must We Choose—National Security or Freedom,” where he outlined his belief that freedom of expression and national security were positively related: the more freedom of expression, the more national security. This counterintuitive approach hinted at Emerson’s wisdom and uniqueness as a subject, and it ultimately served as a critical thread throughout my essay. Moreover, his ability to break down complex legal topics into digestible pieces helped me better place the First Amendment in the context of anticommunist America. Pieces like “The Solution of Practical and Moral Problems Through the Use of Reason” guided my legal arguments and showcased Emerson’s capacities as a lawyer. But perhaps Emerson’s correspondence from his time in the Progressive Party left the strongest impression. This is where I started my research on Emerson, giving me a comprehensive look at his political beliefs, exasperation from communist accusations, and willingness to step out of the classroom to fight for what he believed in.

In all honesty, I am surprised that there has yet to be a biography written on Emerson’s work and life. The majority of his papers span from the 1940s to the 1980s, and his experience in the highest levels of government, politics, academia, and law allowed him to make an impact on

¹¹³ See Haynes and Klehr, *Venona*, at 7; See Schrecker, *Many Are the Crimes*, at 166-167 and 179-180.

the direction of the twentieth century. He worked closely with the leading minds of twentieth century America, vehemently defending freedom of expression protections when most of the public had completely abandoned them. He brushed shoulders with powerful politicians, Supreme Court justices, intelligence leaders, and civil rights activists that wrote the history of his generation. With so much breadth to his work, I found my most formidable challenge: sifting through his 42 linear feet of papers.¹¹⁴

The most frustrating aspect of the Emerson Papers was the lack of personal material. Though correspondence from his time in the Progressive Party proved invaluable to my understanding of him, he had limited material in the form of personal letters to friends and loved ones. I also could not find anything from his time in Yale College or Yale Law School, since most of the archive was from the 1940s onwards. I believe that I only had the opportunity to see one part of Emerson – his best self. But at the same time, the most unexpected sources gave me a more holistic, and sometimes comical, picture. For example, an FBI Report on Emerson from March 3, 1949 mentioned that he stood at five feet five inches and had a high voice; light brown, slightly graying hair that parted in the middle; a light, “pasty” complexion; and “peculiarities” that only noted “[s]mokes pipe and limps slightly.”¹¹⁵ Although reaching a thorough understanding of Emerson’s career could be difficult at times, the sheer volume of papers combined with secondary sources painted a clear picture of his contributions to fighting anticommunism.

As such, there are almost limitless further avenues of research to be done in the Emerson Papers. I hope to someday have the opportunity to continue where I left off, specifically looking

¹¹⁴ Following my dozens of trips to the archives, I have well over 1,000 images of Emerson’s papers in my camera roll.

¹¹⁵ Federal Bureau of Investigation, *Thomas I. Emerson: Security Matter – C*, by Arthur R. Stevens, File 100-11684, New Haven, Connecticut, March 16, 1949: 23, in Box 75, Folder 23 in Emerson Papers.

into Emerson's contributions to privacy law. Emerson argued *Griswold v. Connecticut* in front of the Supreme Court, and he thus had a direct impact on the Constitutional foundations of privacy. His forward-thinking outlook, as exemplified by papers like his 1978 essay "The First Amendment in the Year 2000," foreshadow his relevance to the privacy and First Amendment questions of the digital age. Relatedly, I would be interested in tracing the evolution of Emerson's thoughts on the First Amendment throughout his career, engaging with his pre-Cold War government service and legal thinking and ending with his final essays in the 1980s. There is much to be explored.

Finally, I would like to thank the many people who have influenced my research, exposed me to the intersection of the First Amendment, history, and technology, and supported me in exploring my intellectual interests. Thank you to Professor Gage and Professor Rangappa for introducing me to anticommunism and active measures. I will forever be thankful for Professor John Gaddis for advising me throughout this essay and for introducing me to the History Major through "HIST 022: What History Teaches" – I never thought I would study history in college, and now I cannot imagine studying anything else. And thank you to mom, papa, and Vlad for always encouraging me, pushing me, and supporting me through my time as a first-generation college student at Yale.