

## McCARTHYISM and STATE BAR ADMISSIONS

By Evan Gutman CPA, JD (2002)

*“These cases, which concern inquisitions . . . are relics of a turbulent period known as the “McCarthy era,” which drew its name from Senator Joseph McCarthy from Wisconsin.”*

**In Re Stolar**, 401 U.S. 23 (1971) Majority opinion by U.S. Supreme Court Justice Hugo Black

The purpose of this section is to demonstrate that McCarthyism is the foundation of the State Bar admission process today, just as U.S. Supreme Court Justice Hugo Black correctly recognized in 1971. The fear of Communism, known as the “Red Scare,” which permeated virtually all facets of American life during the 1950s became a cornerstone power bloc for the State Bars. The U.S. Supreme Court cases of *Konigsberg*, *Schware*, *Anastaplo*, *Stolar*, *Baird* and *Law Students Civil Rights Council*, (discussed subsequently herein) all dealt in one way or another with Bar application questions that inquired into the associations of an Applicant.

Senator Joseph McCarthy was the most notorious instigator of the Red Scare. His tactics were predicated on making unfounded accusations against individuals, with the result that the mere allegation served to destroy the person’s credibility. Ultimately, he overplayed his hand and was exposed on national television as a buffoon. He was censured by the U.S. Senate and McCarthyism was for the most part, then discredited. There was one place however, one institution, where it quietly survived and still flourishes today. That place is the State Bar where the exact same tactics used by McCarthy still prevail. As previously discussed, the Bar admissions character review process gained the bulk of it’s power during the 1930s. World War II however, led to a diminishment of that power. McCarthyism provided the State Bars with the opportunity to recoup what they lost during World War II.

Unsurprisingly, McCarthy prior to becoming a U.S. Senator was a Wisconsin attorney and Judge. It is clear that McCarthyism has its’ roots in Joe McCarthy’s judicial background, his experience in the legal profession and dealings with the State Bar. He honed his ruthless tactics by learning from the State Bar. To this day, McCarthy’s home state of Wisconsin is one of the most egregious violators of the Constitution with respect to the admission process, as will be demonstrated in the Section of this book discussing admission cases in the various states.

During his short-lived height of power, when virtually every member of the U.S. Congress feared him, McCarthy was essentially a demagogue. He was extremely charismatic possessing great leadership qualities, but lacking markedly in intellectual knowledge. Academically, he was a poor writer, and he did not read much. He typically relied on shortcuts and bluffing techniques. In 1939, at age 30 he became the youngest man ever elected to be a circuit judge in Wisconsin. As a Judge, he had a reputation for possessing a shrewd ability to get to the heart of a matter. On the negative side, he was not a student of the law, lacked comprehension of the rules of evidence and often intentionally made sly remarks in the presence of the jury for the purpose of influencing the outcome of a case. He was also known to admire Adolf Hitler’s book, *Mein Kampf* and would point to the book in his chambers when local attorneys were present, noting that was the way to get things done. Throughout his career, his adversaries accused him of being a Nazi. Certainly, the political tactics he learned from the State Bar and utilized, supported the assertion. One of his biographers, Thomas C. Reeves tells the following story about McCarthy as a Wisconsin Judge:

“When Lappley requested an immediate or at least early trial to appeal the order, he later explained, Joe launched into a lengthy discourse about the entire case. He said that a trial would be a “waste of the court’s time,” . . .

Four days later Lappley petitioned the Wisconsin supreme court for a writ of mandamus. The supreme court responded immediately and requested all of the records in the case. **When the documents arrived, a page was discovered missing from the trial record, and the court demanded an explanation. Joe claimed that after the June 7 hearing he had read some flattering remarks about Lappley into the record at the attorney’s request. He had recently ordered that portion of the record destroyed. . . . (Joe told friends privately that his action was pure revenge, prompted by Lappley’s sudden decision to appeal.)** Joe no doubt also sought to conceal from the supreme court his informal comments on the case, in particular his assertion that a trial would be a waste of time. . . .

The supreme court issued an opinion shortly . . . sharply rebuking McCarthy. . . .”<sup>162</sup>

In 1946, while still a circuit Judge, McCarthy ran for election to the U.S. Senate as a Republican. In doing so, he flouted judicial ethics. The *Milwaukee Journal* called for his withdrawal from the race on the ground that he was barred from holding any political office other than judicial, during the term he was elected to be a circuit judge. McCarthy was undeterred and during the campaign even had the audacity to publish a newspaper advertisement citing four of his judicial decisions with the headline “Labor Record of Judge Joe McCarthy, Candidate for U.S. Senator.” It was a complete slap in the face to judicial ethics. Nevertheless, he was elected and when the issue of whether he could run for the U.S. Senate while still a State Circuit Judge was heard before the State Supreme Court, they ruled in his favor. As a Senator, he formed strong political alliances with Senator Richard Nixon and FBI Director J. Edgar Hoover, both of whom also contributed to instigating the Red Scare, and supported Congressional Hearings pertaining to the loyalties of U.S. State Department employees. He also became an alcoholic while a Senator. As his obsession with Communism grew, and his alcoholism intensified he lost most of his charisma.

On March 21, 1947, President Harry Truman in response to public fears of Communism issued an Executive Order drastically altering conditions for federal employment. Under the Order, all persons entering employment in the Executive branch would be subject to extensive investigations of past activities and associations, including examination of school records and inquiries of former employers and personal references. The doctrine of guilt by mere allegation became the cornerstone of implementing the Order and gave birth to McCarthyism. Testimony about federal job applicants was accepted from people who wanted their identities to remain confidential. Job applicants did not know the identity of their accuser. Shortly thereafter, in November, 1947, the Attorney General issued a list of 82 organizations that the FBI considered disloyal and more names were subsequently added. The standard for denying employment under the Executive Order was stated ambiguously as:

“on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the government. . . .”<sup>163</sup>

In 1949, McCarthy believed reports that the U.S. Army had tortured confessions out of Nazi SS men after the war, and gave them a sham trial. In support of the Nazi prisoners of war, he launched a political attack on the U.S. Army. Ultimately, the highly inflammatory reports were determined to be

substantially meritless after a Congressional investigation. McCarthy however, claimed that the Congressional Committee had whitewashed the alleged atrocities. He issued a press release that stated:

“ I accuse the subcommittee of being afraid of the facts. I accuse it of attempting to whitewash a shameful episode in the history of our glorious armed forces. . . .”

He subsequently delivered a speech on the Senate floor condemning the Congressional hearings. His speech contained numerous factual errors. He recklessly treated allegations in prisoner affidavits as self-evident truths, even if unsupported by countervailing facts. This tactic became his modus operandi. It was also the chief cause of his downfall. He would shoot from the hip, without being certain of the legitimacy or logic of his position. His attack on the U.S. Army coupled with his support of Nazi prisoners gave him a reputation as a Nazi sympathizer. In 1954, during Hearings attempting to drive him from the Senate, Senator Flanders characterized McCarthy's involvement as fitting in:

“neatly with other parallels between the amateurish senator from Wisconsin and the accomplished and successful dictator of Germany.”<sup>164</sup>

In 1951 and 1952, his financial dealings came under attack. It was alleged that he had welched on a \$ 5,500 gambling debt in a wild dice game. Senator Thomas Hennings a member of the committee investigating McCarthy commented:

“. . . if a man wants to engage in gambling games and pays a debt or does not pay it, that is not a matter the United States Senate is really concerned with.”<sup>165</sup>

As McCarthyism gained steam in the 1950s, almost everyone was viewed as a possible Communist. McCarthy's attacks and allegations concentrated predominantly on the U.S. State Department, U.S. Army, and journalists. Most were ultimately proven to be untrue. By the same token however, he threw out so many allegations at so many individuals that a few were proven to be factually correct in later years. The overwhelming majority of people who had their careers and credibility destroyed as a result of McCarthyism were innocent of the allegations made.

On June 1, 1950, the Senate's only woman member, freshman Republican Margaret Chase Smith of Maine read on the Senate floor a “Declaration of Conscience,” which she and six other Republican Senators signed that was a stern attack on McCarthyism. On June 6, 1950 Governor Earl Warren of California, later to become Chief Justice of the U.S. Supreme Court, also declared against McCarthyism. President Truman and the U.S. State Department joined in the attack. The State Department accused McCarthy of a “rape of the facts” and declared that “the facts do not deter him from his reckless course.”<sup>166</sup> McCarthy labeled Mrs. Smith and her co-signers as “Snow White and the Seven Dwarfs.” He continued undeterred. In fact, due to substantial support from the general public, he had not yet nearly reached the apex of his power which would peak in 1953.

On July 17, 1950 the Tydings Committee of the Senate issued a report on an investigation spearheaded by McCarthy pertaining to the arrest of six people on charges of conspiracy to violate the Espionage Act. Those arrested included two co-editors of the publication *Ameriasia*, and a writer for *Collier's* magazine.<sup>167</sup> The Senate Report was a scathing indictment of McCarthy. It characterized McCarthy's charges and methods as:

“A fraud and hoax perpetrated on the Senate of the United States and the American people. They represent perhaps the most nefarious campaign of half-truths and untruth in the history of this Republic.”<sup>168</sup>

It further stated:

“For the first time in our history, we have seen the totalitarian technique of the “big lie” employed on a sustained basis. The result has been to confuse and divide the American people. . . .”<sup>169</sup>

The impact on the general public of the Tydings Report was entirely negated by J. Edgar Hoover’s “coincidental” announcement of the arrest of Julius Rosenberg to commit atomic espionage on the exact same day the Tydings Report was released.<sup>170</sup> If anything, McCarthy’s standing was enhanced rather than diminished. In February 1952, McCarthy told an audience in Wisconsin that the nation’s leadership was “almost completely morally degenerate” and that the President was a “puppet on the strings.”<sup>171</sup> McCarthy assessed “moral character” in a manner similar to State Bar admission committees. Good moral character constituted that which he wanted and believed. Anything else was “degenerate.” Senator William Benton on the Senate floor compared McCarthy’s tactics to Hitler.<sup>172</sup> Dishonest exploitation of “moral character” assessment was the foundation of McCarthyism and is similarly the foundation of the State Bar admission process today.

When Eisenhower was elected, McCarthy’s political position was initially boosted. McCarthy supporter Scott McLeod who served as assistant Secretary of State for Security Affairs, in his first three weeks on the job, fired twenty-one State Department employees for alleged homosexuality. He and a team of nearly two dozen ex-FBI agents examined desks, drawers, file cabinets, employee reading matter during and after working hours, in pursuit of alleged subversives. They forced the State Department to operate in a virtual police-state atmosphere. Later in the year, McLeod proudly announced that 306 citizen employees and 178 aliens had been removed from employment on numerous grounds without a single hearing.<sup>173</sup> When Charles E. Bohlen, a counsellor of the State Department and former interpreter and adviser at Yalta was announced to become the new U.S. ambassador to the Soviet Union, an FBI report revealed a small quantity of derogatory information. It was predicated on anonymous letters and hearsay reports, including one report from a person who claimed to have a “sixth sense” that detected immorality in Bohlen.<sup>174</sup> On February 19, 1953 the State Department issued Information Guide 272 which banned the books, music and paintings of Communists from the Voice of America and ordered overseas librarians to remove all publications written by “controversial” authors. One official stated:

“No one seems interested in the truth. If you quit it looks like some tacit admission of guilt. If you protest, it is insubordination, and you might find yourself suspended.”<sup>175</sup>

Fear of persecution by the Congressional subcommittee caused Raymond Kaplan, a 42-year old Voice of America engineer, to commit suicide by jumping in front of a truck. In a farewell letter to his wife and son, Kaplan wrote:

“You see, once the dogs are set on you everything you have done since the beginning of time is suspect. . . . I have never done anything that I consider wrong but I can’t take the pressure upon my shoulders any more.”<sup>176</sup>

In 1953, President Eisenhower issued Executive Order 10450, which took Truman’s Order pertaining to investigation of Federal employees even further. Eisenhower’s Order subjected all present and future employees of the Executive Branch to a broad character scrutiny. It allowed for the firing of employees based on personal traits such as alcoholism, homosexuality or “infamous” conduct unrelated to loyalty to the government.<sup>177</sup> But On July 24, 1953, Arthur Eisenhower, the President’s brother called McCarthy “the most dangerous menace to America.” “When I think of McCarthy,” he told a

reporter, "I automatically think of Hitler." "He is a throwback to the Spanish inquisition."<sup>178</sup> In 1953, Senator Everett Dirksen declared:

**"Government employment is not a right, it is a privilege."**

McCarthy stated in June, 1953 that anyone who invoked constitutional rights in refusing to tell a congressional committee about communist party membership is obviously a communist. He would repeatedly assert that the right to remain silent was a shield for the guilty, although the U.S. Supreme Court had held it was designed to protect the innocent from an overly intrusive government. Similar to the State Bar admission process, congressional witnesses were asked about the occupations of brothers, sisters and relatives. It was anything and everything goes. Congressional committees wanted to know everything without exception. Just like the State Bar admission committees. In November, 1953, Ex-President Harry Truman in a nationally televised broadcast vehemently attacked McCarthyism, defining it as follows:

"It is the corruption of truth, the abandonment of our historical devotion to fair play. It is the abandonment of the "due process" of law. It is the use of the big lie and the unfounded accusation against any citizen in the name of Americanism or security. It is the rise to power of the demagogue who lives on untruth. . . ." <sup>179</sup>

McCarthy then made a huge blunder. He not only attacked Truman which was not unexpected, but he also condemned Eisenhower. Eisenhower's reputation was impeccable throughout the nation. McCarthy followed up with another political attack on the Army which infuriated Eisenhower. When McCarthy turned on his own Republican President, his downfall began. While there was always friction between the Democrats and McCarthy, he now found vast numbers of Republican Senators and Congressman withdrawing their support from him. When his long-time ultra-conservative ally Vice-President Richard Nixon withdrew support in 1954, McCarthy's political career was in ruins. In May, 1954 his fate was sealed and his public image conclusively tarnished when he was required to testify before a Congressional Committee. The Hearings were nationally televised and he ended up doing specifically and exactly that which he had criticized so many other witnesses for doing. He refused to answer questions before Congress. It was unbelievable. A small excerpt was as follows:

Mr. Welch: The oath included a promise, a solemn promise by you to tell the truth. . . . Is that correct, sir?

Senator McCarthy: Mr. Welch, you are not the first individual that tried to get me to betray the confidence and give out the names of my informants. You will be no more successful than those who tried in the past, period.

Mr. Welch: I am only asking you, sir, did you realize when you took that oath that you were making a solemn promise to tell the whole truth to this committee?

**Senator McCarthy: I understand the oath, Mr. Welch.**

**Mr. Welch: And when you took it, did you have some mental reservation, some Fifth-or Sixth-Amendment notion that you could measure what you would tell?**

**Senator McCarthy: I don't take the Fifth or Sixth Amendment.**

**Mr. Welch:** Have you some private reservations when you take the oath that you will tell the whole truth that lets you be the judge of what you will testify to?

**Senator McCarthy:** The answer is there is no reservation about telling the whole truth.

**Mr. Welch:** Thank you, sir. Then tell us who delivered the document to you.

**Senator McCarthy:** The answer is no. You will not get that information.<sup>180</sup>

McCarthy was politically demolished after the televised hearings. He was subsequently censured by the Senate and wholly discredited. For the short remainder of his career on Capitol Hill, he was an obstructionist that no one took seriously. He was the only Senator to vote against confirmation of the Great William Brennan, Jr., to the United States Supreme Court.<sup>181</sup> In May, 1957 he died of cirrhosis of the liver due to his alcoholism.

That is the heart and soul of the modern day State Bar admissions process. The Bars make an unreasonably cumbersome inquiry into every single facet of an Applicant's life. Everyone has something that is mildly incriminating. Once the State Bar's ruthless investigative tactics find that minor and often immaterial fact, they then have discretion to deny admission. They will admit the Applicant if they like them, and deny admission if they don't. If admission is denied, it won't ostensibly be based on attitude, appearance or beliefs, but rather instead on the incriminating information unconstitutionally obtained. Substantively however, the true reason for the denial is that the admissions committee just doesn't like the person for some irrational reason.

The manner in which questions are phrased during a Bar admission interview can unavoidably result in tripping the Applicant up on the way they answer. Mildly incriminating responses are irrationally elevated by the Bar to support an inference that an Applicant lied or tried to conceal information. Socrates proved long ago, that just by questioning an individual, you can lead them to support any conclusion you desire, regardless of what the true facts are. That is the way the State Bar admissions process works, and that is the essence of McCarthyism. McCarthyism is discredited. The contemporary Bar admission process is a relic of the turbulent period known as the McCarthy era, as Justice Hugo Black correctly stated.

His testimony before Congress on national TV should serve as a good lesson to State Bars which predicate their admission process on tactics of McCarthyism. They use overbroad inquiries into personal matters to find small bits of derogatory information. Through manipulative questioning they overinflate the significance of such matters. And then of course, they exempt licensed attorneys and Judges from being required to provide the same type of information on a periodic basis.

The lesson for the State Bars from McCarthy's testimony is as follows. The same technique that State Bars use against Bar Applicants can ultimately be turned against the Bar inquisitors. No one is morally perfect. We all have our faults, flaws and weaknesses. Assessing another person's moral character, as the U.S. Supreme Court has stated is a "dangerous instrument." Dangerous instruments should not be used against Bar Applicants. Rather instead, the dangerous instrument of character assessment should only be used with respect to acts of conduct that shock the moral conscience.

Otherwise, there is no doubt that like Joseph McCarthy, the State Bars, and Judges who support the legal profession's anticompetitive goals, will find out, that what goes around, comes around.

**NOTE:** The presentation of most facts about Joe McCarthy's life herein is based on his biography: **Thomas C. Reeves, *The Life and Times of Joe McCarthy*** (Madison Books, Maryland, 1997).