Florida Law Review

Volume 15 | Issue 3 Article 3

December 1962

Is Dennis Really a Menace?

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IS DENNIS REALLY A MENACE?

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Are the *Dennis* and subsequent cases[1] really a menace to the first amendment[2] to the Constitution of the United States?

Until a little over a decade ago, it was generally held that the first amendment clearly prohibited Congress from "abridging freedom of speech." But in 1951, in *Dennis v. United States*,[3] the Court, for the first time, in a matter dealing with a conviction under the Smith Act,[4] announced the "balancing of rights" doctrine, under which it is held that Congress can decide, on a reasonable basis, when the proscriptions of the first amendment shall be subordinated to the requirements of national security.

Two primary factors caused this retreat from first amendment absolutism:

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1. Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. 341 U.S. 494 (1951).

4. Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. §§10, 11 (1946) (see 18 U.S.C. §2385 (1958)), provide as follows:

"Sec. 2. (a) It shall be unlawful for any person—(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or by violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. (b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political sub-division of any of them.

"Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title."

(1) For the first time in our history we have a number of American citizens and residents, variously estimated from 20,000 to 100,000, who profess a higher allegiance to a foreign power and its political and economic theories than to the United States; and

(2) For the first time in our history we can be attacked disastrously in less than an hour by missiles launched by that same militarily potent foreign power, waging nuclear war.

Finley Peter Dunn's "Misther Dooley" used to say "The Supreme Court follies the illiction returns." Were he alive today Mr. Dooley might well amend his famous dictum to some appropriately Hibernian expression in respect to the fact that the Supreme Court also follows the hard realities of history and the brutal facts of power politics.

THE DANGER TEST — SCHENCK TO DENNIS[5]

The freedom of speech in the first amendment is not absolute; libel, slander, obscenity, contempt of court, incitement to riot, and seditious utterances are punishable. In two early cases[6] the power of Congress and of a state legislature to declare specified words punishable went unquestioned and was routinely upheld. The question whether speech is punishable has arisen most often in cases in which the language allegedly has a tendency to incite to other offenses, most often seditious conduct. In this area two constitutional principles clash, that of freedom of expression and that of the right to protect the public safety or the national security.

The most famous judicial scalpel for separating these often conflicting rights was forged by Mr. Justice Holmes in *Schenck v. United States*.[7] In 1919, he initiated the "clear and present danger" test[8] to determine whether utterances of a Socialist were punishable as attempting to impede recruiting in World War I. Although not spelled out by the court in those terms, the test would appear to be no more than an aspect of the definition of attempt in criminal law.[9]

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5. See Mendelson, *Clear and Present Danger — From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952), for a more complete analysis of the danger test during this period.

6. Fox v. Washington, 236 U.S. 273 (1915); Davis v. Beason, 133 U.S. 333 (1890).

7. 249 U.S. 47 (1919).

8. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Id.* at 52. It was in this case that Mr. Justice Holmes also pointed out that there is no legal right to yell "fire!" in a crowded theater.

9. The writer has never seen this theory advanced elsewhere. It is included

In that field, if an act comes reasonably near effecting the commission of the crime intended the defendant is charged with "attempt." The "clear and present danger" test is, in effect, an application of these principles to freedom of expression. If the words are used, says Mr. Justice Holmes, "in such circumstances, and are of such a nature as to create a clear and present danger" [that is, to come reasonably near] of bringing about "the substantive evils that Congress has a right to prevent," they are punishable. "It is a question of proximity and degree." From its announcement in *Schenck* to its near annihilation by misapplications culminating in *Dennis*, the "clear and present danger" test has meant various things to members of the Court, not always what Mr. Justice Holmes intended.

In 1919 and 1920, the Court affirmed five convictions involving interference with our war aims in which *Schenck* was cited without mention of the danger test.[10] Again in 1925, in *Gitlow v. New York*,[11] the Court rejected the danger test and sustained a statute making it criminal to advocate the overthrow of government by force and violence. In 1927, in *Whitney v. California*[12] a criminal syndicalism statute was upheld as a reasonable infringement on free speech without resort to the danger test. During this period the danger test was nurtured by Justices Holmes and Brandeis in concurring and dissenting opinions.[13] They maintained that "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence."[14]

The cases in the 1930's followed no doctrinal pattern; and despite a flood of civil rights cases the danger test was mentioned only twice.[15] Through this chain of precedents the right of free speech was propelled to a position approaching absolutism.

From 1940 to 1951, the danger test was applied in a variety of situations and discarded in others seemingly similar. It never became a firm rule of law, but its potential impact in any case involving

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for what little value it may have.

10. Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs. v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

11. 268 U.S. 652 (1925).

12. 274 U.S. 357 (1927).

13. The dissent of Mr. Justice Holmes in *Abrams, supra* note 10, at 630, is particularly notable. He would uphold the constitutional "experiment" of allowing expression of "opinions that we loathe" unless they "imminently threaten immediate interference" with order. In *Gitlow, supra* note 10, he argued eloquently for a free market place for ideas in which truth would ultimately prevail.

14. Whitney v. California, 274 U.S. 357, 377 (1927).

15. In Herndon v. Lowry, 301 U.S. 242 (1937), the danger test was used to backstop the Court's reversal of a conviction for alleged insurrection. In Herndon

"freedom of speech" had to be considered. When used in this period, the danger test limited public rights and filled the areas thus created with permissible speech.

Starting in 1940, five anti-picketing statutes were held unconstitutional because they outlawed a mode of expression that presented no "clear and present danger."[16] Also in 1940, "prior restraint" was used to invalidate legislation, which was also susceptible to the danger test.[17] Further in 1940, requiring school children in the public schools to salute the flag was found to be a reasonable exercise of legislative judgment.[18] However, dissatisfaction with the reasonable basis approach in the early 1940's led to reversal of the flag salute case[19] and a corresponding expansion of the use of the danger test. The danger test was used primarily to invalidate legislation and reverse convictions.[20] Other doctrines were occasionally used when a contrary result was desired, although the minority continued to couch their dissents in danger language.[21] The Court required the danger to be "imminent" before limiting speech. The "clear and present danger" doctrine became a "catch-all" to test the validity of legislation as well as its scope, a use probably not contemplated by Mr. Justice Holmes. These cases, for the most part, comprise the rise and fall of the doctrine. Applied indiscriminately, the danger test became detached from its foundations. However, the net effect, at this time, was to place the first amendment above competing Constitutional rights.

Beginning about 1950, a change was noticeable. In *American*

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v. Georgia, 295 U.S. 441 (1935), Mr. Justice Cardozo used danger language in his concurring opinion. Several cases reversed convictions as prior restraints on freedom of speech. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

16. Baker & Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Hotel & Restaurant Employees v. Wisconsin Employment Relations Bd., 315 U.S. 437 (1942); AFL v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

17. Cantwell v. Connecticut, 310 U.S. 296 (1940).

18. Minerville School Dist. v. Gobitis, 310 U.S. 586 (1940).

19. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 105 (1943).

20. *E.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (reversed conviction for speech that induced a breach of the peace); Craig v. Harney, 331 U.S. 367 (1947) (newspaper contempt citations reversed); Pennekamp v. Florida, 328 U.S. 331 (1946), in which Mr. Justice Frankfurter, concurring, foreshadowed his opinion in *Dennis*; Thomas v. Collins, 323 U.S. 576 (1945) (statute requiring registration of labor organizers unconstitutional as applied). The cases involving Jehovah's Witnesses, *e.g.*, Jones v. Opelika, 319 U.S. 103 (1943), reversed convictions primarily on prior restraint grounds, as did Saia v. New York, 334 U.S. 558 (1948), involving a sound truck.

21. *E.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Prince v. Massachusetts, 321 U.S. 158 (1944). The Court seems to have taken the reasonable basis approach in these cases.

Communications Ass'n v. Douds,[22] a case requiring officials of labor organizations to sign non-communist affidavits, the respective rights were "balanced" in favor of public order. In another case the danger test was used to sustain a conviction for the first time in thirty years.[23]

The cases decided prior to *Dennis* dealt with interference with the armed forces, Jehovah's Witnesses, labor leaders, contempt citations, inept state attempts to prevent sedition, polygamy, and race hatred. Whenever the position of the defendant was upheld, the emphasis was on the importance of freedom of expression rather than on whether harm was done to society. The cases striking down statutes gave a preferred position to the first amendment.

No case applying the Holmes doctrine involved the avowed aim of Marxists to communize the whole world by force and violence if necessary. A realistic analysis of these cases would not require clairvoyance to predict a reversion to the *Gitlow*[24] doctrine, that a state can protect itself by prohibiting specific language if deemed necessary for internal security, when the Court was faced with the brutal facts of the contemporary uneasy balance of international power as it was in the *Dennis* case.

THE DENNIS CASE

In 1949, a number of national officials of the Communist Party were convicted of conspiring to organize the Communist Party of the United States as a group to teach and advocate the violent overthrow of the Government of the United States with intent to do so. On appeal the Second Circuit affirmed.[25] Chief Judge Learned Hand, interpreting the danger test to fit the situation, found that "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[26] On certiorari, Mr. Chief Justice Vinson writing for the Court states: "We adopt this statement of the rule."[27] The opinion concludes that in view of the inflammable nature of world conditions, "it is the exis-

22. 339 U.S. 382 (1950). The Association sued Douds as director of the National Labor Relations Board to restrain the holding of an election. The Court held, by Mr. Chief Justice Vinson, that the requirement that officers of labor organizations must file affidavits that they do not belong to the Communist Party and do not believe in the overthrow of the Government by force and violence does not violate the Bill of Rights. The doctrine of balancing the rights of "public order" and "partial abridgment of speech" is relied on. *Id.* at 399. Unlike *Dennis*, however the "balancing" is held to be a duty of the courts.

23. Feiner v. New York, 340 U.S. 315 (1951).

24. Gitlow v. New York, 268 U.S. 652 (1925).

25. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

26. *Id.* at 212.

27. Dennis v. United States, 341 U.S. 494, 510 (1951).

tence of the conspiracy which creates the danger."[28] Both Chief Judge Learned Hand and Mr. Chief Justice Vinson, in adopting this version of the "clear and present danger" rule held, by implication, that the advocacy of the defendants created a clear danger that the Government of the United States would probably be overthrown by force and violence. Sensing, but not fully admitting the dilemma, Mr. Chief Justice Vinson earlier rests his decision on the more proper and understandable ground that "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[29] He tries to escape from the dilemma by saying that "if the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."[30] In short, the opinion, while squinting in the direction of *Schenck* and its progeny, and the "clear and present danger" test, actually holds that Congress has a right and duty to protect the security of the United States and this right is superior to the right of the petitioners to advocate violent revolution under the first amendment. The Court held that sections 2 (a)1, 2 (a)3, and 3 of the Smith Act do not violate the first amendment. Further, Mr. Chief Justice Vinson holds, contrary to a prior case,[31] the question of whether "clear and present danger" exists is a matter of law for the courts.

After this labored attempt to avoid the effect of the danger test and still not repudiate it, the concurring opinion of Mr. Justice Frankfurter sweeps through the case like a clean fresh breeze.[32] He makes a powerful, well-reasoned and direct argument for the "balanced rights" doctrine and rejects the danger theory as inapplicable in the instant case. He forthrightly recognizes the conflict between the right "to advocate a political theory" and the right "to safeguard the security of the Nation" and that this conflict cannot be resolved by a "sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict."[33] He maintains that the responsibility for adjusting such conflicts is primarily that of Congress. Mr. Justice Frankfurter concludes that, in the conflict between national security and free speech, "Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech."[34] He asks: "Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?"[35]

28. *Id.* at 511.
29. *Id.* at 509.
30. *Id.* at 511.
31. Pierce v. United States, 252 U.S. 239 (1920).
32. 341 U.S. 494, 517 (1951).
33. *Id.* at 519.
34. *Id.* at 550.
35. *Id.* at 551.

Mr. Justice Jackson further clears the air by saying, in a concurring opinion, that the danger rule is not applicable. The case is a conspiracy case and Congress can prohibit people from conspiring to do with others that which they can lawfully do alone.[36]

Mr. Justice Black would reverse. He does not believe free speech can be legally suppressed on the notion of Congress or the Court as to what is "reasonable." He feels there was bias in the jury and impropriety in its selection. He also concurs with Mr. Justice Douglas who finds no evidence of seditious conduct. The latter believes the defendants merely taught from four books on the Marxist doctrine, which would be lawful in a classroom. Conspiracy, says Mr. Justice Douglas, cannot turn speech into sedition. He, like Brandeis, advocates "more speech, not enforced silence" if time permits.

Dennis holds, in brief, that the "danger" in the clear and present danger test need no longer be imminent. It is enough if Congress has a reasonable basis for finding that it is probable. And so the lines are drawn.

The majority holds that if Congress has reasonable cause to place the security of the United States above certain types of freedom it may do so without violating the Bill of Rights. The dissenters adhere to the "clear and present danger" rule under which speech and association can be punishable only if, as a result of the words spoken, the overthrow by force is imminent.

Liberty First or Safety First?

The two legal philosophies involved are free speech absolutism, on the one hand, and legal justification of the balancing of rights of national security against the liberty guaranteed by the first amendment, on the other.

The first school is presently headed by Justices Black and Douglas, usually joined by Mr. Chief Justice Warren and Mr. Justice Brennan. Their views once had the support of Mr. Chief Justice Stone and Justices Murphy, Rutledge, Jackson, and Roberts. The second was headed by Mr. Justice Frankfurter until his recent retirement, aided by Justices Harlan and Clark. Sometimes they were joined by Mr. Justice Stewart. Previously the school included Mr. Chief Justice Vinson and Justices Reed, Byrnes, Burton, Whitaker, and Minton.

The philosophy of absolutism is based on the precept that no speech should be censored in advance. If actionable at all it should be punished only after utterance as an offense such as libel, slander, obscenity, or "action" words of incitement leading immediately to the commission of crime. Mere advocacy should never be punishable. The right of freedom of expression is an ancient one and deserves, in

36. *Id.* at 561.

modern times, a preferred position constitutionally. The basis of the philosophy is that truth will always prevail if given a free market place for the exchange of ideas. Granting full, free and fearless discussion, the harmful, the wrong and the untrue will be rejected by an informed people. Hence Voltaire's famous willingness to lay down his life for another's right to express an idea detestable to him. Hence the positions of Montesquieu, Jefferson, Lincoln, Holmes, Brandeis, Cardozo, Stone and more lately Black, Douglas, and Warren. The reasoning forces them to the length of protecting advocacy of the overthrow of the government by the use of force and violence.

The second school supports the Bill of Rights and all the basic tenets of liberty and due process short of protecting speech that is likely to endanger the national security. Whether specific speech may have that effect is something left by the Constitution to the determination of Congress. At this fork in the road, they part company from the first school. The need for preserving American sovereignty must be "balanced out" against the guarantees of the first amendment. The latter must yield to requirements of national security.

In actual practice, however, the real difference is one of approach to the Communist threat. The "absolutists" believe Communism is a danger only as an external threat of military force by the Soviet Union and its satellites, but not as an internal danger. They have been conditioned by our one-hundred-seventy-year tradition of regarding the long-haired radical, the anarchist, the I.W.W. and the Socialist and their soapboxes with good-natured tolerance. This accords with the inherited Anglo-Saxon custom of suffering the advocacy of hanging kings and queens in speech-making in London's Hyde Park. The "balancers" believe that the international Communist conspiracy exists and has as its purpose the domination of the entire world by force, and that the American Communist Party should have been dealt with substantially as Congress has dealt with it.

This is the chart to be used by the legal mariner in sailing the seas of Supreme Court decisions in dealing with Communist cases of every kind. There is here no real question of law. It is a question of fact. Does Communism present an internal menace? With the foregoing discussion in mind, the above digest of *Dennis* and the following cases with their holdings and dissents become readily understandable.

POST DENNIS CASES

The next case of importance was *Yates v. United States*.[37] The defendants were indicted for conspiracy to advocate overthrow of

37. 354 U.S. 298 (1957).

the Government by force and violence and to organize the Communist Party as a society so to advocate, with intent so to do. The case was submitted to the jury on both the advocating and the organizing charges. The Supreme Court held, by Mr. Justice Harlan, that to "organize" refers only to the time of first organization, prosecution for which was barred by the three year statute of limitations. Since it was impossible to determine on which count the jury convicted, the case was reversed as to all, five acquitted and nine ordered retried.[38]

The Court held that the advocacy outlawed was more than mere speech, and again approved the charge given to the jury in *Dennis* that advocacy of action must be by "language reasonably and ordinarily calculated to incite persons to such action."[39] The nine ordered retried had done more than merely talk; there was evidence of attendance at classes that taught street-fighting, sabotage, and "moving masses of people in time of crisis."[40]

Mr. Justice Black, joined by Mr. Justice Douglas, concurs as to "organize," but would reverse as to all defendants on the ground that the Smith Act is unconstitutional as contravening the first amendment. He would draw the line between talk and action.

The *Yates* case represents a slight retreat from the position of the *Dennis* case. The principle of *Yates* means Congress can only "balance out" against advocacy if it is coupled with evil intent and *some* effort to instigate action.

On June 5, 1961, ten years after *Dennis*, three more cases bearing directly on the points under discussion were decided.

In the first of these, *Communist Party of United States v. Subversive Activities Control Bd.*,[41] the Supreme Court, by Mr. Justice Frankfurter, decided that the Communist Party is a Communist-action organization required to register with the Attorney General and that the registration requirements of the Subversive Activities Control

38. The *Yates* case was also a Smith Act prosecution, but in 1948 the Smith Act was re-enacted in the general re-codification of the U.S. Criminal Code as 18 U.S.C. §2385, 62 Stat. 808. Section 3 of the Smith Act was not carried into §2385 in 1948, but was, in substance, restored to §2385 in July 1956. 70 Stat. 623. For convenience the Smith Act and §2385 are referred to throughout this article as "the Smith Act." See footnote 1 of the *Yates* case, 354 U.S. 298, 300, for full text of the original Smith Act, 18 U.S.C. §2385 and the general conspiracy statute, 18 U.S.C. §371. Incidentally, the cases against the nine ordered retried were ultimately dropped without retrial.

39. 354 U.S. 298, 326 (1957). On advocacy, the Court also said: "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court . . . ." *Id.* at 318.

40. 354 U.S. 298, 332 (1957).

41. 367 U.S. 1 (1961).

Act[42] were not a bill of attainder or a violation of the first amendment.

In deciding the first amendment question, Mr. Justice Frankfurter[43] relies squarely on the "balancing out" theory as in *Dennis*.

Mr. Justice Black dissents in the vigorous language of a devoted first amendment absolutist and would reverse. He believes the decision bars association merely because it advocates hated ideas. This is "a fateful moment in the history of a free country"; the constitutional questions ought to be decided now; the act is a bill of attainder and violates the fifth and first amendments. It is worse than the Alien

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42. The proceeding was pursuant to §14 (a) of the Subversive Activities Control Act, which Act is Title 1 of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §781 (1952). It was amended in 1954 by 68 Stat. 775, and carried in part into 8 U.S.C. §§1182, 1251, 1424, and 1451 (1952). There is a full discussion of the Act in 367 U.S. 1, 4. A summary of the Congressional findings of fact is most relevant to the contentions set forth in this article and is given herewith briefly as follows: Congress finds there is a world-wide Communist revolutionary movement which seeks through any means to establish a totalitarian dictatorship throughout the world; the dictatorship would suppress all opposition and all liberty; the movement is controlled and directed by the "Communist dictatorship of a foreign country" which uses subservient "action" organizations in each country which try to carry out the objectives by overthrowing existing governments *by force if necessary*. These action organizations are not political parties. They are elements of the Communist movement and promote their objectives by conspiracy instead of by democratic processes. They operate on a conspiratorial basis substantially through Communist front organizations. The "most powerful" Communist dictatorship has succeeded in establishing Communist dictatorships in numerous foreign countries; agents use espionage and sabotage and largely control the Communist network in the United States; international travel is a necessity to the activities; there has been infiltration in the United States by disloyal aliens; many deportable aliens now in the United States are "free to roam the country"; individuals who participate in the Communist movement in the United States transfer their allegiance to a foreign country which controls the movement. The Communist movement in the United States numbers thousands of disciplined adherents, awaiting the moment when the United States, over-extended by foreign engagements, divided within, and in industrial and financial straits might possibly be overthrown by force and violence; the movement seeks converts here by an "extensive system of schooling and indoctrination." Such methods and organizations have succeeded elsewhere. The movement, pursuing its objectives with "recent" (1950) successes elsewhere, and the nature and control of the world Communist movement itself "present a clear and present danger to the United States" and to the existence of free American institutions and make it necessary for Congress to "provide for the common defense" and to preserve the independence of the United States to enact appropriate legislation. For more details see 367 U.S. 1, 4-8 (1960).

43. 367 U.S. 1, 91 (1961). "To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value

and Sedition Acts,[44] and laws like the Smith Act and the Subversive Activities Control Act "constitute a baseless insult to the patriotism of our people."[45]

Mr. Chief Justice Warren and Mr. Justice Douglas also dissent. Mr. Justice Brennan, "with whom the Chief Justice joins," dissents in part.

This case draws the line more clearly between the majority of five who rest on the "balancing out" theory and the minority of four who would let the truth prevail through free exchange in the market place of ideas as long as the proselytes of evil confine themselves to speech and refrain from action.

The second case decided on June 5, 1961, was *Scales v. United States*.[46] Scales and others were indicted for violation of the member-

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to the public of the ends which the regulation may achieve." Mr. Justice Frankfurter refuses to meet the fifth amendment question of self-incrimination until it arises. Even if parts of the registration act are found to be unconstitutional the matter would be governed by Electric Bond & Share v. Securities & Exchange Comm'n, 303 U.S. 419 (1938).

44. 367 U.S. 1, 155 (1961). The so-called Alien and Sedition Acts were enacted in 1798: 1 Stat. 570; 1 Stat. 577; 1 Stat. 596. The Sedition Act of July 14, 1798, was directed at two types of conduct. Section 1 made it a criminal offense to conspire "to impede the operation of any laws of the United States," and to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination." Section 2 provided:

"That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combination therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." 1 Stat. 596-97.

45. 367 U.S. 1, 167 (1961). "I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic Government truly dedicated to freedom and justice — the kind of Government which some of us still think of as being 'the last best hope of earth.'" *Id.* at 169.

46. 367 U.S. 203 (1961).

ship clause of the Smith Act.[47] A somewhat overlapping provision of the Internal Security Act of 1950[48] provides that membership per se is not a crime. *Scales* holds, by Mr. Justice Harlan, that there must be knowledge of existing illegal party purposes and, in addition, active and purposive participation in the organization's criminal ends. The Internal Security Act is not intended to repeal the membership clause of the Smith Act. Guilt is personal but guilt by complicity is possible. The proscribed activity is unprotected by the first amendment but is governed by the "clear and present danger" rule. Speech may be used to effect substantive evils that Congress can legally prevent. In this case the *Yates* requirement of strict proof of advocacy of action is met. The defendant trained people for action and prepared personally for overt efforts to exploit the Negro "nation" and the working classes. Such trial errors as existed were not substantial enough to require reversal.

Mr. Justice Black dissents, holding that the Internal Security Act bars prosecutions under the membership clause of the Smith Act. Also, the first amendment bars outlawing of political parties because of philosophical tenets of overthrow at some distant time. Recent cases have "balanced away" protections of the first amendment. The question now is not whether there was an abridgement but whether Congress believes the interest of the Government requires the abridgment. This theory might cover literally anything the Government seeks to do.

Mr. Justice Brennan, "with whom the Chief Justice and Mr. Justice Douglas join," dissents. In his view the 1950 Act suspends the membership clause of the Smith Act and protects registrants from prosecution thereunder.

The *Scales* case follows the previous line-up of the Court. The "balancers" would convict; the "absolutists" would acquit.

The third case decided on June 5, 1961, was Noto v. United States.[49] It affords an ironic touch to the legal trilogy of *Yates, Scales* and *Noto*. The Supreme Court, by Mr. Justice Harlan, reversed a conviction under the membership clause of the Smith Act on the ground that the evidence was not sufficient to support a finding that the Communist Party illegally taught and advocated the violent overthrow of the Government! The opinion draws a parallel to the "infirmity that we found in the *Yates* record," but not in *Scales*. Mere abstract teaching of theory is not enough to constitute a violation. There must be strong evidence of a "call to violence now or in the future."[50]

47. 18 U.S.C. §2385 (1958).
48. 64 Stat. 987, 50 U.S.C. §781 (1958).
49. 367 U.S. 291 (1961).
50. *Id.* at 298.

The Chief Justice and Justices Black, Douglas and Brennan would remand with directions to dismiss.

As the evidence seemed to show only reading and teaching of theory without advocacy of action, the case illustrates that the "balancers" and the "absolutists" are not as far apart as the language of majority and minority opinions in *Dennis, Yates, Scales* and the other cases on the subject decided in the last decade would seem to indicate.

CONCLUSION

During the decade since *Dennis,* the Court usually divided five to four in cases in which first amendment freedoms and national security interests have been in opposition. But the position of the self-restraining five, who would yield to Congress in determining what our national security requires, despite the extent of circumscription of liberty, and the position of the four first amendment absolutists, happily can be reconciled both in logic and in law.

When there are Congressional findings, based on elaborate investigation, reason and common sense, that the Communists are an international organization who are determined to seize power over the entire world by force and violence[51] (and such findings cannot be lightly disregarded by the Court), it can properly be held that, in an era of push-button war in which it takes thirty minutes from any launching site for an ICBM to reach its target in any portion of the globe, there is a "clear and present danger" that advocacy of the use of force and violence with evil intent, directed at prompting unlawful action, may result at any time, and hence immediately, in bringing about "the substantive evils that Congress has a right to prevent." If it is a question of "proximity and degree" who can state with certainty how soon or how great the danger? Interpreting "immediate" to mean "probable" is not unreasonable in such a context.

Viewed in this perspective, *Dennis* may not be quite as revolutionary as it appears to be. If libelous, blasphemous or obscene language, or other forms of speech, which Congress finds is inimical per se to the welfare of the people, can be prohibited, why not the advocacy of overthrowing the Government by force and violence? Assuming the restriction is reasonably necessary to the protection of national security and the means used are proper to effectuate a legitimate end, due process of law has been observed in the exercise of the police power of the state. To avoid begging the question we must consider only whether the end *is* legitimate.

This is a policy matter which the Constitution may well have left to Congress to decide. The first amendment is not absolute. It

51. Subversive Activities Control Act, Title 1 of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §781 (1958).

prohibits abridging "the freedom of speech," not *any* speech. It leaves to Congress the area of definition encompassed by that great field of Anglo-Saxon liberty known as "the freedom of speech." The words in quotes are words of art, first developed in the English common law and since 1787 in American constitutional law.

There is no contrary precedent in either which would forbid finding that, in the present context of continuing international crises, specific words, spoken by an advocate of communism with knowledge of the purpose of the Communist Party, advocating the commission of the crime of violent overthrow of government should be classed as prohibited action. The words, in such relation, are more than speech; they are also acts that Congress could find to be *malum in se.*

The "clear and present danger" doctrine has no realistic application to the situation. That test is based on whether the acts, which are in the form of speech, come sufficiently near to the crime intended to constitute an attempted crime. In the Smith Act, Congress, in effect, decreed that advocacy of violent overthrow, within the area proscribed by the Smith Act, is a form of anti-patriotic obscenity. This is not a matter of "proximity or degree." The prohibition falls within the established non-absolute area of the first amendment.

The power of Congress to determine what acts, in the form of speech, may be prohibited is circumscribed only by the necessities of the general welfare and the propriety of means used to protect that welfare. The limitation in this field is the same as in any other "due process" problem.

In the long line of cases from *Schenck* to *Dennis* the issues dealt with the free expression *by legitimate means* of competing ideas. This distinction is the best justification of the *Dennis* case. The attempted interchange of ideas in that case was not by legitimate means but was *in furtherance of an illegal conspiracy.* If this major premise is accepted, *Dennis* is merely the logical conclusion which must follow. In short, as Mr. Justice Jackson said, the case was a conspiracy case.

Overshadowed by the possibility of nuclear warfare, the "clear and present danger" doctrine seems more of a "literary phrase," as Mr. Justice Frankfurter said in *Pennekamp v. Florida,*[52] than a judicial approach to the requirements of the safeguarding of national security.

In a "hot" war many constitutional rights are circumscribed by the paramount necessity of preserving sovereignty. *Dennis* merely high-lights the need to do the same in a "cold" war in a missile world.

Nor is *Dennis* a complete rejection of the "clear and present danger" rule, which still has validity when the words are not themselves prohibited and when the question is solely whether these words,

52. 328 U.S. 331, 353 (1946).

in their substance and context, would come reasonably near effecting the commission of a crime.

Our Bill of Rights has always impaled us on the horns of the dilemma presented by the Gordian knotty problem of what to do about "freedom for those who would destroy our freedom." One horn is security with repression; the other horn is liberty with danger.

Perhaps it is just as well that *Dennis* cut the Gordian knot. By protecting ourselves practically in a power world from our own citizens and residents who would aid foreign powers to conquer us we can best perpetuate a last forum and haven for those who would peacably discuss the philosophy of revolution.[53]

Dennis may not be a menace after all!

53. The classic statement of the creed of political freedom is from Jefferson's inaugural address in 1800: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."