The Smith Act and the Supreme Court

An

American Civil Liberties Union

Analysis, Opinion and

Statement of Policy

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THE SMITH ACT of 1940 makes it unlawful to conspire to advocate a bringing about of forceful or violent overthrow of the government, and to organize a group so to teach. The Act is the chief federal sedition law.

The American Civil Liberties Union has opposed this law, from the time of its enactment to the present, because we believe that it infringes upon the rights of freedom of speech and because we believe the law is dangerously unwise. We have fought the Smith Act on civil liberties grounds without respect to the identity of the persons or organizations prosecuted under this law. The ACLU attacked the law in 1941 when it was first applied to the "Trotskyites" although the Communists approved of that prosecution; in 1943, when it was used in the mass "sedition" trial of alleged Nazi sympathizers; and in 1948 when it was applied against the leaders of the Communist Party. In each instance the sole concern of the ACLU was to defend fundamental rights given the people by the Constitution.

Eleven leaders of the Communist Party were indicted on July 20, 1948; their trial opened on January 17, 1949, and they were convicted on October 14, 1949. Their conviction was affirmed by the Supreme Court on June 4, 1951, upholding the constitutionality of the Smith Act. Chief Justice Vinson wrote the prevailing opinion, speaking for himself and Justices Burton, Minton and Reed, while Justices Frankfurter and Jackson wrote concurring majority opinions. Justices Black and Douglas entered dissenting opinions. Justice Clark did not participate in the consideration or discussion of this case.

Since that date, about 50 "second string" Communist officers, editors and teachers have been indicted.

In some of these cases the bail issue and the defendants' difficulty in obtaining qualified counsel have become collateral issues. Inasmuch as some Communists fled prior to indictment or after conviction, bail has been set at figures ranging up to $100,000—later reduced by higher courts—and restrictions have been placed upon the source of bail. Public ill-will has been directed against judges and attorneys who have sought for these defendants no more than justice under the law.

The decision of the Supreme Court upholding the Smith Act of 1940

has not changed the position of the American Civil Liberties Union, and we find no barrier to further legal testing or to further criticism of its wisdom. We are convinced that this sedition law, and others like it, must be overruled by the force of later decisions or repealed by legislative action in order that we may live again under the full protection of the Bill of Rights.

WHAT DOES THE DECISION MEAN?

The decision of the Supreme Court upholding the Smith Act of 1940 appears to mean that Congress may constitutionally:

1. Prohibit a number of persons (but not an individual),
2. from advocating (but not discussing),
3. under certain circumstances (but not under all circumstances),
4. violent overthrow of the government (but not necessarily any other end).

In terms of the prosecution of Communists, which is the particular issue in 1952, it seems that one person can express Communist beliefs about the overthrow of government by violence, and several persons may meet to *discuss* these beliefs. However, several persons may not meet to conspire to *advocate* a belief in the desirability of violent overthrow of the government, under circumstances deemed dangerous by the courts, even if this advocacy does not point toward immediate overt acts.

WHY DOES THE ACLU DISPUTE THE COURT'S DECISION?

The Union is convinced that the decision which upholds the Smith Act and affirms the conviction of the Communist leaders threatens the fundamental liberties of all of us in several unconstitutional ways:

1. A distinction is established between "discussion" and "advocacy" which is so vague and uncertain, as to permit zealous prosecutors to suppress the freedom of democratic debate.

2. A criterion for "what may be said" is established in terms of what a future, possible court decision may reasonably hold to have potential elements of serious danger. Under this criterion men must guard their speech, not in terms of dangerous acts clearly likely to be immediately

dependent on their speech, but in terms of future events which the courts may think related to their advocacy.

3. The "clear and present danger" test for judging the likely harm to society from revolutionary talk has been emasculated. The court fails to give sufficient weight to the fact that under the new rule of "clear and probable danger" fearful citizens, prosecutors, and courts will be more likely to stifle the criticism of government upon which a free society is based.

4. The area of criminal prosecution for conspiracy is enlarged by the court's holding that conspiracy itself is the dangerous element in advocacy. It seems obvious to us that this holding is inimical to our traditional freedom because there is not a sufficient further proof of connection between the advocacy and any real and imminent threat from domestic Communists to the safety of the country.

5. The decision approves the ruling of the trial judge that the question of the existence of a clear and present danger is one for the court to decide as a matter of law and not one for the jury to decide as a matter of fact. Chief Justice Vinson says:

> "The formation . . . of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom (these leaders) were in the very least ideologically attuned, convinces us that their convictions were justified on this score . . . it is the existence of the conspiracy which creates the danger."

But it is the belief of the Union that both common sense and legal tradition dictate that a conclusion about the general state of the social order should be a conclusion as to fact, and should be made by the representatives of society who sit upon a jury.

These five points, presented in summary form, indicate why the ACLU believes the Smith Act of 1940 and the decision of June 4, 1951 are in fundamental conflict with the Constitution. Before arguing these points at length and discussing the unwisdom of the Act in the later pages of this pamphlet, we present the program of action which the ACLU will follow in working toward a restoration of the protections guaranteed by the Bill of Rights.

THE ACLU PROGRAM OF ACTION

1. The ACLU will seek an overruling of the June 4 decision by participating independently (through briefs and legal arguments) in further Smith Act cases when they reach the Supreme Court. We shall not forget that two distinguished Justices believe the law to be unconstitutional, and that minority views—as in the cases relating to the minimum wage laws and the flag salute—have in time become the law of the land.

2. The ACLU stands ready, in further cases at all court levels, to see that the limits of the court's constitutional approval are not overstepped. When persons are arrested we will protest improper standards in the setting of bail or the placing of illegal restrictions upon the source from which bail may be obtained; we will insist, in the words of District Judge Kirkpatrick, that "Bail is not fixed to keep a person in jail."

3. We shall continue to press the view that a defendant under this law has the right to present, and to present to a jury, evidence as to whether there is a clear and present danger of advocacy leading to the commission of illegal acts. Since this evidence will involve the weighing of general social tensions, it should be considered by a jury of the defendant's peers, the men and women who have the knowledge and the right to interpret the society in which we live.

4. The ACLU will urge the repeal of the Smith Act of 1940, and any similar state or local legislation, and will oppose any new laws of this kind. Apart from the question of constitutionality, we are convinced that the Smith Act is bad legislation. It is based upon fear rather than upon confidence in the power of the people to debate and rationally determine their future, and it is a powerful threat to democratic freedom of speech and association. We shall remind the public that not only Justices Black and Douglas, but also Justices Frankfurter and Jackson expressed doubts as to the wisdom of this legislation as a means of preventing revolution, and warned of its threat to our freedom.

5. The ACLU will undertake a vigorous program of public education, in cooperation with other non-Communist organizations, in order that the American public may come to see the incompatability of this law and the principles of the Bill of Rights. Subsequent to ACLU's announcement of its stand, the national CIO and Americans for Democratic Action also have announced opposition to the Smith Act.

THE UNCONSTITUTIONALITY AND UNWISDOM OF THE SMITH ACT OF 1940

Since our organic law protects the large and fundamental rights of the people, questions naturally arise as to the wisdom of legislation with which it is in conflict. It is appropriate, therefore, in the discussion which follows, to consider together questions of wisdom and constitutionality.

1. *The distinction between "discussion" and "advocacy."*

The court holds that while *discussion* of violent overthrow of the government may not be prohibited, it is constitutionally proper to prohibit conspiracy to *advocate* such overthrow.

> The basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. (Vinson, C.J.)

> It is true that there is no divining rod by which we may locate advocacy. . . . But there is underlying validity in the distinction between advocacy and the interchange of ideas, and we do not discard a useful tool because it may be misused. . . . The object of the conspiracy before us is clear enough that the chance of error in saying that the defendants conspired to advocate rather than to express ideas is slight. (Frankfurter, J.)

The court finds that the distinction between discussion and advocacy resides in the intent with which a statement is made: ". . . there is a line beyond which (those who would advocate constitutionally prohibited conduct) may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand." (Vinson, C.J.)

It is true that laws often demand inquiry into the intent with which a given *act* was committed, and occasionally into the intent with which a given *statement* was made. But reliable evidence on the intent with which a given statement was made is too difficult to obtain to justify a generalized constitutional or statutory distinction between "discussion" and "advocacy" in speaking or writing. One may ask, is it advocacy for two men to try to persuade a third man of the rightness of their views? And what about newspapers? Some of the Communist editors have been convicted and others indicted apparently not because of their journalistic function but because of their work as Party leaders. Will other men who

have had a strictly editorial function also be prosecuted? How will the conflict be resolved between the criminality of conspiratorial advocacy and the claims of a free press? Is it conspiratorial advocacy merely to teach at a Communist school? If not, why have later indictments under the Smith Act included such teaching as a charge? In all these questions we are confronted by the necessity of making exceedingly difficult distinctions between the quality of discussion and the quality of advocacy in a man's statement. The confusion which will arise is likely to lead to silence on the part of those who *could* legally speak but will fear to do so, and to a dangerously loose enlargement of the area of prosecution.

2. *What kind of statement may a person make?*

Freedom of speech has never been absolute and can never be so; but, the basis for any limitation should be what it was before this decision, simply and strictly this: either civil libel or slander, or a clear and present danger arising from the speech because of its nature and the attendant circumstances (that is, immediate incitement to riot, or to treason, espionage, sabotage or violence).

There can be no quarrel with Chief Justice Vinson's observation that "overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech . . ." if it be understood that he is concerned about overt acts immediately arising from speech: or with that of Justice Frankfurter when he says "On any scale of values which we have hitherto recognized, speech of this sort (advocacy of violent overthrow of government) ranks low." And we agree with the remark of the court in a previous case when it was said that advocacy of the violation of any law is "reprehensible *morally*" (*Whitney* v. *California,* [emphasis supplied]).

But what is morally to be condemned is not therefore automatically to be legally forbidden; one of the chief purposes of the First Amendment is to allow for the free play of ideas and the possibility of a changing society. In our era, until this decision, this was the view of the Supreme Court itself. As recently as May, 1950, Chief Justice Vinson had declared that "one (should) be permitted to advocate what he will unless there is a *clear* and *present* danger that a substantial public evil will result therefrom." (*American Communications* v. *Douds,* quoting *Whitney* v. *California,* [emphasis supplied].) And if this is the rule for one man, we are

prepared to argue—as we do below—that men speaking together shall not have a narrower freedom.

3. *What does* "clear *and* present *danger" mean?*

In considering the meaning of "clear and present danger" the close relationship between law and national crisis makes it appropriate to consider at the same time the constitutionality and the wisdom of this law. This the justices have done; their opinions and their points of view are judicial, but it is clear that they have a serious interest in stating their philosophies of social change, their attitudes toward revolutionary principle, and their concept of free speech in a democratic society.

Chief Justice Vinson asserts:

> If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. . . . Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, it is sufficient evil for Congress to prevent.

He accepts the standard for judgment which Judge Learned Hand set forth in the Circuit Court opinion:

> In each case (courts) must ask whether the gravity of the "evil" discounted by its improbability, justified such invasion of free speech as is necessary to avoid danger. (Judge Learned Hand, quoted by Vinson, C.J.)

Justice Frankfurter takes his customary position—the minimum possible interference by the courts with the legislative prerogative:

> Free-speech cases are not an exception to the principle that we are not legislators. . . . It is not for us to decide how we could adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. . . . But it is relevant to remind that in sustaining the power of Congress in a case like this nothing irrevocable is done. . . . Power and responsibility remain with the people and immediately with their representation.

Justice Jackson follows the Chief Justice's realism and also places emphasis on the need for awareness of the historical situation:

> It requires us to reappraise, in the light of our own times and conditions, constitutional doctrines devised under other circumstances to strike a

balance between authority and liberty. . . . If the clear and present danger test is applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.

In short, the justices who hold the Smith Act to be constitutional appear to believe that the Bill of Rights, and the guarantees which it embodies, are at this time under present stresses to be interpreted more narrowly than in the past.

Justices Black and Douglas, while cognizant of the dangers of unfettered speech, believe that the writers of the Constitution intended us to take that considered risk.

> Undoubtedly, governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . . (Black, J.)
>
> . . . This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. (Douglas, J.)

The belief of the ACLU in the supreme importance of the guarantees of the Bill of Rights aligns us with the position of the dissenting justices.

Furthermore, we believe that *it is dangerous and unwise to substitute the majority view of the concept of probability for the established concept of imminence.* Treasonable or revolutionary *acts*—large or small, open or secret, of whatever sort, and with whatever prospect of success or failure—can and should be legally prevented or punished *at any time under any circumstances.* Speech advocating treasonable or revolutionary acts should be opposed by speech, until the time and the circumstances join with the nature of the speech to create a clear and *present* danger that such acts will actually be attempted.

And even on the ground of a clear and probable test for danger—a ground we reject on the principle that in a free society speech can answer speech—we agree with Justice Douglas: "(On the record) . . . it is impossible for me to say that Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech."

4. *Conspiracy as the danger in advocacy.*

We have already quoted Chief Justice Vinson to the effect that "it is the existence of the conspiracy which creates the danger." Qualified in one way, looking toward an overt act, this is sound law; but it is open to qualification in the direction of conspiracy based upon speech—the view which we reject. Justice Jackson says:

> When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty were the Government on the one hand and the individual citizen on the other. . . . In more recent times these problems have been complicated by the intervention between the state and the citizen of permanently organized, well-financed, semisecret and highly disciplined political organizations. . . . These organizations assert as against our Government all of the constitutional rights and immunities of individuals and at the same time exercise over their followers much of the authority which they deny to the Government. . . . The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government.

Neither Justice Douglas nor Justice Black can accept this immense broadening of the area in which conspiracy may be prosecuted.

> The doctrine of conspiracy has served diverse and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. . . . To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. (Douglas, J.)

> These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything designed to overthrow the Government. The charge was they agreed to assemble and talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. (Black, J.)

The ACLU bases its approach to the problem of "conspiracy to

advocate" upon our understanding of what the "clear and present danger" test should mean. A criminal conspiracy is a combination for an unlawful purpose; the mere fact of combination, even if secret, is not *criminal unless its purpose is unlawful.* A criminal conspiracy is properly to be prevented and punished under the law, independently of and in addition to the unlawful act which is its purpose; *but everything hinges on the purpose being unlawful.* Prevent or punish the unlawful *act,* prevent or punish the conspiracy to *commit* the unlawful act (that includes preventing or punishing the communication which is an integral part of the conspiracy to commit the unlawful act); but leave the combination to *advocate* the commission of the unlawful act legally free *until* the time and the circumstances join with the nature of the advocacy to create a clear and present danger that the unlawful act will actually be attempted—the criminal conspiracy thus coming into existence only when the advocacy which is its purpose becomes unlawful. There may be a need for further legislation to make unlawful certain treasonable or revolutionary *acts*—large or small, open or secret, of whatever sort (meeting, among others, Justice Jackson's point that the old anti-anarchist, violent-overthrow-of-government, legislation is not enough in today's circumstances), and with whatever prospect of success or failure—which the Communist Party, or anyone else, may be committing or may be deemed likely to commit. There may be a need for further legislation to clarify the law on criminal conspiracy. But, taking the law as it has been and still is at present, the recent decision should be opposed because five of the six judges (not Frankfurter, but Jackson emphatically) seem to have applied the doctrine of criminal conspiracy far more broadly than it should be—though Vinson's interpretation apparently carries the consolation of exempting from prohibition such individual advocacy as was not prohibited before this decision.

5. *The "clear and present danger" question as a matter for a jury.*

On the question as to whether the jury or the judge should find that a "clear and present" danger exists, there is a sharp difference of opinion between the majority and the dissenting views. Chief Justice Vinson says:

> The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. . . . Indeed, in the very case in which the phrase was born . . . this Court itself examined the record to find whether the requisite danger appeared, and the issue was not

submitted to a jury. And in every later case in which the Court has measured the validity of a statute by the "clear and present danger" test, that determination has been by the Court, the question of the danger not being submitted to the jury.

The dissenting justices contradict this view:

I must also express my objection to the holding because . . . it sanctions the determination of a crucial issue of fact by the judge rather than by the jury. (Black, J.) . . . I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in Pierce v. United States to be a jury question. . . . That is the only time the Court has passed on the issue. None of our other decisions is contrary. Nothing said in any of the nonjury cases has detracted from that ruling. (Douglas, J.)

A heavy responsibility rests upon those who would remove from jury consideration an essential and overwhelmingly important question of fact.

6. *The unwisdom of the Smith Act of 1940.*

The American Civil Liberties Union is convinced that the Smith Act is bad and dangerous legislation. It is based upon fear, rather than upon confidence in the power of the people to debate and rationally determine their future; it is a powerful threat to the freedom of speech and association which is the basis of democratic life. Our conviction is sustained by the words of the dissenting justices and, with equal force by those of Justice Frankfurter and Jackson.

I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry. Corruption, ineptitude, inflation, oppressive taxation, militarization, injustice, and loss of leadership capable of intellectual initiative in domestic or foreign affairs are allies on which the Communists count to bring opportunity knocking to their door. Sometimes I think they may be mistaken. But the Communists are not building just for today—the rest of us might profit by their example. (Jackson, J.)

The First Amendment makes confidence in the common sense of our people and in the maturity of judgment the great postulate of our democracy. The philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. . . . Vishinsky wrote in 1948 in the law of the Soviet State, "In our state, naturally there

can be no place for freedom of speech, press, and so on for the foes of socialism." Our concern should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded. (Douglas, J.)

The wisdom of the assumption underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. . . . Civil liberties draw at best only limited strength from legal guarantees. Pre-occupation by our people with the constitutionality, instead of with the wisdom of legislation or of executive action, is preoccupation with a false value. . . . When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. . . . The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcized. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its uncertitudes. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved. (Frankfurter, J.)

For their eloquent expression of doubts concerning the wisdom of this legislation, the four justices have earned the lasting gratitude of free men. Federal and state and local legislatures, and the people whom they represent, should take immediate and full account of those doubts in considering *the repeal of existing legislation and any proposals for further similar legislation.*

Something more is needed. While it is a highly desirable rule that congressional judgment should in general be sustained, *judicial judgment regarding the constitutional admissibility of legislation is needed to protect the rights of the individual citizen in his basic relation to his government and his community.* The citizen must know that there is in that relation a layer of judicially-guaranteed bedrock on which he can stand—day in and day out—generation in and generation out, without fearing that it will be undermined by popular majorities or legislators or executive officials—who, however high-minded, have to make their decisions from moment to moment in the thick of the fight. Not even judges can be

completely above the battle, but they are as far above it as possible, and should not abdicate the responsibility which must be theirs alone to render the final judgment on the meaning of the prime essentials of the Constitution.

7. The pervasive danger of the decision.

The most frightening aspect of this decision is that judges, legislators, executive officers of the government, and the public generally may take it as *precedent, authority and encouragement* for prohibiting the free speech of many other people besides the Communist Party leaders—perhaps including even people who merely want to discuss, as individuals, under non-dangerous circumstances, ideas far less explosive than the idea of revolution. The American people should stop that tendency, and reverse it. It is not just the individual citizens seeking to exercise free speech who benefit from it.

The nation needs the free speech of all its individual citizens—to remain a strong nation in a time of international struggle, to remain a free society, and to remain a country in which faults are corrected and new virtues developed. There are always risks in free speech, but all life, being an experiment, involves risks, as Justice Holmes told us long ago. The ACLU recognizes that in times of international tension a reasonable balance must be struck between the demands of national security and the wide freedoms which are customary in peaceful years; but where risks must be taken we believe that it is wiser, short of clear and present danger, to take those risks on the side of free speech.

Even at the level of practical politics, putting aside principle for the moment, the Smith Act is inept and unwise. Communist propaganda agencies throughout the world are emphasizing for all it is worth the contrast between our principles of democratic freedom and our practice of actual restriction. The peoples whose good will and respect we are trying to insure are being told that the United States is now driven by its fear of words to retreat from the principles of democratic debate by which our Constitution came into being.

Although the *New York Times* approved the court's decision, it went on to say: "It is for us, the American people, to keep alive the habit of free and full discussion, to tolerate differences of opinion, no matter how distasteful they may be to the great majority, and to leave to the police and the courts the task of suppressing conspiracies intended to use liberty as a weapon for destroying liberty."

We should continuously remember, and act on Justice Black's statement of the problem and the hope: "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

The American Civil Liberties Union feels itself under a clear obligation to arouse in every proper way vigorous opposition to the reasoning of the Supreme Court majority in the Smith Act case, and to convince the American public that the views of the dissenting justices should prevail. While working toward this end, the ACLU must also mitigate the practical dangers likely to result from the administration of this sedition law.

Strong and persistent affirmation of the principles of civil liberty can restore our traditional tolerance of even the most hateful political dissent which takes the form of speech, publication and non-violent association. This tolerance is basic in American life and we believe it valid and precious at all times for all people. We cannot abandon it without deserting the democratic concept.

APPENDIX

The prevailing opinion of the Supreme Court in Dennis v. United States, 341 U.S., 494 decided June 4, 1951. Chief Justice Vinson for himself and Justices Burton, Minton and Reed.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) § 11, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, *inter alia,* that the statute was unconstitutional was denied. *United States* v. *Foster,* 80 F. Supp. 479, and the case was set for trial on January 17, 1949. A verdict of guilty as to all the petitioners was returned by the jury on October 14, 1949. The Court of Appeals affirmed the convictions. 183 F. 2d 202. We granted certiorari, 340 U. S. 863, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) §§ 10, 11 (see present 18 U. S. C. § 2385), 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 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 violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.

"(b) For the purpose 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 subdivision 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."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. That court held that the record in this case amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared. Petitioners dispute the meaning to be drawn from the evidence, contending that the Marxist-Leninist doctrine they advocated taught that force and violence to achieve a Communist form of government in an existing democratic state would be necessary only because the ruling classes of that state would never permit the transformation to be accomplished peacefully, but would use force and violence to defeat any peaceful political and economic gain the Communists could achieve. But the Court of Appeals held that the record supports the following broad conclusions: By virtue of their control over the political apparatus of the Communist Political Association,[1] petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist

[1] Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period.

Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

I.

It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. More specifically, he charged that the jury could not find the petitioners guilty under the indictment unless they found that petitioners had the intent "to overthrow the government by force and violence as speedily as circumstances permit."

Section 2 (a) (1) makes it unlawful "to knowingly or wilfully advocate, . . . or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence. . . ." Section 2 (a) (3) "to organize or help to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow. . . ." Because of the fact that § 2 (a) (2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly *or* wilfully" in § 2 (a) (1), or the omission of exact language in § 2 (a) (3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. See *Williams* v. *United States,* 341 U. S. 97, 101-102 (1951); *Screws* v. *United States,* 325 U. S. 91, 101-105 (1945); *Cramer* v. *United States,* 325 U. S. 1, 31 (1945).

Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. A survey of Title 18 of the U. S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as "knowingly," "maliciously," "wilfully," "with the purpose of," "with intent to," or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal

jurisprudence. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 411 (1950).

It has been suggested that the presence of intent makes a difference in the law when an "act otherwise excusable or carrying minor penalties' is accompanied by such an evil intent. Yet the existence of such an intent made the killing condemned in *Screws, supra,* and the beating in *Williams, supra,* both clearly and severely punishable under state law, offenses constitutionally punishable by the Federal Government. In those cases, the Court required the Government to prove that the defendants *intended* to deprive the victim of a constitutional right. If that precise mental state may be an essential element of a crime, surely an intent to overthrow the Government of the United States by advocacy thereof is equally susceptible of proof.[2]

II.

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such *power,* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 407 (1950). We are not here confronted with cases similar to

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[2] We have treated this point because of the discussion accorded it by the Court of Appeals and its importance to the administration of this statute, compare *Johnson* v. *United States.* 318 U. S. 189 (1943), although petitioners themselves requested a charge similar to the one given, and under Rule 30 of the Federal Rules of Criminal Procedure would appear to be barred from raising this point on appeal. Cf. *Boyd* v. *United States,* 271 U. S. 104 (1926).

Thornhill v. *Alabama,* 310 U. S. 88 (1940); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); and *DeJonge* v. *Oregon,* 299 U. S. 353 (1937), where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college and university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

III.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech.

We pointed out in *Douds, supra,* that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck* v. *United States,* 249 U. S. 47 (1919). Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier

dates placed no unique emphasis upon that right.[3] It was not until the classic dictum of Justice Holmes in the *Schenck* case that speech *per se* received that emphasis in a majority opinion. That case involved a conviction under the Criminal Espionage Act, 40 Stat. 217. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a unanimous Court, Justice Holmes stated that 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." 249 U. S. at 52. But the force of even this expression is considerably weakened by the reference at the end of the opinion to *Goldman* v. *United States,* 245 U. S. 474 (1918), a prosecution under the same statute. Said Justice Holmes, "Indeed [*Goldman*] might be said to dispose of the present contention if the precedent covers all *media concludendi,* but as the right to free speech was not referred to specially, we have thought fit to add a few words." 249 U. S. at 52. The fact is inescapable, too, that the phrase bore no connotation that the danger was to be any threat to the safety of the Republic. The charge was causing and attempting to cause insubordination in the military forces and obstruct recruiting. The objectionable document denounced conscription and its most inciting sentence was, "You must do your share to maintain, support and uphold the rights of the people of this country." 249 U. S. at 51. Fifteen thousand copies were printed and some circulated. This insubstantial gesture toward insubordination in 1917 during war was held to be a clear and present danger of bringing about the evil of military insubordination.

In several later cases involving convictions under the Criminal Espionage Act, the nub of the evidence the Court held sufficient to meet the "clear and present danger" test enunciated in *Schenck* was as follows: *Frohwerk* v. *United States,* 249 U. S. 204 (1919)—publication of twelve newspaper articles attacking the war; *Debs* v. *United States,* 249 U. S. 211 (1919)—one speech attacking United States' participation in the war; *Abrams* v. *United States,* 250 U. S. 616 (1920)—circulation of copies of two different socialist circulars attacking the war; *Schaefer* v. *United States,* 251 U. S. 466 (1920)—publication of a German-language newspaper with allegedly false articles, critical of capitalism and the war; *Pierce* v. *United States,* 252 U. S. 239 (1920)—circulation of copies of a four-page pamphlet written by a clergyman, attacking the purposes of the war and United States' participation therein. Justice Holmes wrote the opinions for a unanimous Court in *Schenck, Frohwerk* and *Debs.* He and Justice Brandeis dissented in *Abrams, Schaefer* and *Pierce.* The basis of these dissents was that, because of the protection which the First Amendment gives to speech, the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck.* But these dissents did not mark a change of principle. The dissenters doubted only the probable effective-

[3] *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402 (1918); *Fox* v. *Washington,* 236 U. S. 273 (1915); *Davis* v. *Massachusetts,* 167 U. S. 43 (1897); see *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 439 (1911); *Robertson* v. *Baldwin,* 165 U. S. 281 (1897).

ness of the puny efforts toward subversion. In *Abrams,* they wrote, "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." 250 U. S. at 627. And in *Schaefer* the test was said to be "one of degree," 251 U. S. at 482, although it is not clear whether "degree" refers to clear and present danger or evil. Perhaps both were meant.

The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, *e. g.,* interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence.

The next important case[4] before the Court in which free speech was the crux of the conflict was *Gitlow* v. *New York,* 268 U. S. 652 (1925). There New York had made it a crime to "advocate . . . the necessity or propriety of overthrowing . . . the government by force. . . ." The evidence of violation of the statute was that the defendant had published a Manifesto attacking the Government and capitalism. The convictions were sustained, Justices Holmes and Brandeis dissenting. The majority refused to apply the "clear and present danger" test to the specific utterance. Its reasoning was as follows: The "clear and present danger" test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow,* however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was "reasonable." Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present danger" of the substantive evil which the legislature had the right to prevent. Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. This approach was emphasized in *Whitney* v. *California,* 274 U. S. 357 (1927), where the Court was confronted with a conviction under the California Criminal Syndicalist

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[4] Cf. *Gilbert* v. *Minnesota,* 254 U. S. 325 (1920).

statute. The Court sustained the conviction, Justice Brandeis and Holmes concurring in the result. In their concurrence they repeated that even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.[5] And in *American Communications Assn.* v. *Douds, supra,* we were called upon to decide validity of § 9 (h) of the Labor-Management Relations Act of 1947. That section required officials of unions which desired to avail themselves of the facilities of the National Labor Relations Board to take oaths that they did not belong to the Communist Party and that they did not believe in the overthrow of the Government by force and violence. We pointed out that Congress did not intend to punish belief, but rather intended to regulate the conduct of union affairs. We therefore held that any indirect sanction on speech which might arise from the oath requirement did not present a proper case for the "clear and present danger" test, for the regulation was aimed at conduct rather than speech. In discussing the proper measure of evaluation of this kind of legislation, we suggested that the Holmes-Brandeis philosophy insisted that where there was a direct restriction upon speech, a "clear and present danger" that the substantive evil would be caused was necessary before the statute in question could be constitutionally applied. And we stated, "[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." 339 U. S. at 412. But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *Douds,* 339 U. S. at 397. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

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[5] *Contempt of court: Craig* v. *Harney,* 331 U. S. 368, 373 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331, 333-336 (1946); *Bridges* v. *California,* 314 U. S. 252, 260-263 (1941).

Validity of state statute: Thomas v. *Collins,* 323 U. S. 516, 530 (1945); *Taylor* v. *Mississippi,* 319 U. S. 583, 589-590 (1943); *Thornhill* v. *Alabama,* 310 U. S. 88, 104-106 (1940).

Validity of local ordinance or regulation: West Virginia Board of Education v. *Barnette,* 319 U. S. 624, 639 (1943); *Carlson* v. *California,* 310 U. S. 106, 113 (1940).

Common law offense: Cantwell v. *Connecticut,* 310 U. S. 296, 308, 311 (1940).

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as *Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); but cf. *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. Such also is true of cases like *Fiske* v. *Kansas,* 274 U. S. 380 (1927), and *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); but cf. *Lazar* v. *Pennsylvania,* 286 U. S. 532

(1932). They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the atempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. Cf. *Pinkerton* v. *United States,* 328 U. S. 640 (1946); *Goldman* v. *United States,* 245 U. S. 474 (1918); *United States* v. *Rabinowich,* 238 U. S. 78 (1915). If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

IV.

Although we have concluded that the finding that there was a sufficient danger to warrant the application of the statute was justified on the merits, there remains the problem of whether the trial judge's treatment of the issue was correct. He charged the jury, in relevant part, as follows:

> "In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government

of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

. . . . . .

"If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants, or any of them, are guilty of a violation of the statute, as I have interpreted it to you, I find as a matter of law that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.

"This is matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass upon the guilt or innocence of the defendants. . . ."

It is thus clear that he reserved the question of the existence of the danger for his own determination, and the question becomes whether the issue is of such a nature that it should have been submitted to the jury.

The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of §§ 2 (a) (1) and 2 (a) (3) of the Smith Act, involved in the conspiracy charge. There can be no doubt that if the jury found those facts against the petitioners violation of the Act would be established. The argument that the action of the trial court is erroneous, in declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment, rests on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.

When facts are found that establish the violation of a statute the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.

Petitioners' reliance upon Justice Brandeis' language in his concurrence in *Whitney, supra,* is misplaced. In that case Justice Brandeis pointed out that the defendant could have made the existence of the requisite danger the important issue at her trial, but that she had not done so. In discussing this failure, he stated that the defendant could have had the issue determined by

the court *or* the jury.[6] No realistic construction of this disjunctive language could arrive at the conclusion that he intended to state that the question was *only* determinable by a jury. Nor is the incidental statement of the majority in *Pierce, supra,* of any more persuasive effect.[7] There the issue of the probable effect of the publication had been submitted to the jury, and the majority was apparently addressing its remarks to the contention of the dissenters that the jury could not reasonably have returned a verdict of guilty on the evidence.[8] Indeed, in the very case in which the phrase was born, *Schenck,* this Court itself examined the record to find whether the requisite danger appeared, and the issue was not submitted to a jury. And in every later case in which the Court has measured the validity of a statute by the "clear and present danger" test, that determination has been by the court, the question of the danger not being submitted to the jury.

The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent. Bearing as it does, the marks of a "question of law," the issue is properly one for the judge to decide.

V.

There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such

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6 "Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the *court or the jury.* She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by *the court or a jury.* On the other hand there was evidence on which *the court or jury* might have found that such danger existed." (Emphasis added.) 274 U. S. at 379.

7 "Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution." 252 U. S. 239, 250 (1920).

8 A similarly worded expression is found in that part of the majority opinion sustaining the overruling of the defendants' general demurrer to the indictment. 252 U. S. at 244. Since the defendants had not raised the issue of "clear and present danger" at the trial, it is clear that the Court was not faced with the question whether the trial judge erred in not determining, as a conclusive matter, the existence or nonexistence of a "clear and present danger." The only issue to which the remarks were addressed was whether the indictment sufficiently alleged the violation.

vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. See *Abrams* v. *United States,* 250 U. S. 616, 627-629 (1919) (dissenting opinion); *Whitney* v. *California,* 274 U. S. 352, 373 (1927) (concurring opinion); *Taylor* v. *Mississippi,* 319 U. S. 583, 589 (1943). A claim of guilelessness ill becomes those with evil intent. *Williams* v. *United States,* 341 U. S. 97, 101-102 (1951); *Jordan* v. *De George,* 341 U. S. —, — (1951); *Douds,* 339 U. S. at 413; *Screws* v. *United States,* 325 U. S. 91, 101 (1945).

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbalization, "clear and present danger" is the proper standard. We see no difference from the standpoint of vagueness, whether the standard of "clear and present danger" is one contained in *haec verba* within the statute, or whether it is the judicial measure of constitutional applicability. We have shown the indeterminate standard the phrase necessarily connotes. We do not think we have rendered that standard any more indefinite by our attempt to sum up the factors which are included within its scope. We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line, which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. *Williams, supra,* at 101-102; *Jordan, supra,* at —; *United States* v. *Petrillo,* 332 U. S. 1, 7 (1948); *United States* v. *Wurzbach,* 280 U. S. 396, 399 (1930); *Nash* v. *United States,* 229 U. S. 373, 376-377 (1913). Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute.

We have not discussed many of the questions which could be extracted from the record, although they were treated in detail by the court below. Our limited grant of the writ of certiorari has withdrawn from our consideration at this date those questions, which include, *inter alia,* sufficiency of the evidence, composition of jury, and conduct of the trial.

We hold that §§ 2 (a) (1), 2 (a) (3) and 3 of the Smith Act, do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and

violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are

Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

Summary of *concurring majority opinion of Justice Frankfurter*

The clear and present danger test in this situation is useless. When there is a conflict of interest in legislation between security and free speech, it is for the legislature to decide the adjustment, and the courts should only find the legislation unconstitutional if unreasonable.

Judge Hand's rule, now adopted by the Court, is only "a sonorous formula" which is in fact a euphemistic disguise for an unresolved conflict. Abuses of free expression can be prohibited. The weighing of interest between the demands of free speech and national security must be adjusted primarily by Congress, which is a representative body, and as applied to the facts of the case, the judgment of Congress is not in conflict with the First Amendment.

The difficulty of weighing such interest is not fairly met by the majority's use of the terms "clear" and "present" to mean a probability of danger. Far better to abandon the clear and present danger test than hide that the interest of free speech is not ncessarily more conclusive in judicial review than the other attributes of democracy or the necessity of assuring the safety of the government. Speech of the kind prohibited here ranks low and deserves little protection.

While the distinction between discussion and advocacy may be misused because exposition of ideas readily merges into advocacy, the tools should nonetheless be retained because of its utility. In determining the reasonableness of the decision of the Congress, the Court is not limited to the facts found by the jury but must consider everything relevant to the legislative judgment—and here the common knowledge would amply justify the legislature's conclusion that a substantial danger to national security was created by recruitment of additional party members.

But ". . . In sustaining the conviction before us, we can hardly escape restriction on the interchange of ideas," ". . . It is self-delusion to think that we can punish (these defendants) for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance." The legislation and the prosecution here are unwise. Debates cannot be won by silencing opponents, by sinking to the levels of the enemies of democracy and becoming like them, by abandoning our faith in the power of discussion. The people should be preoccupied with wisdom of

legislation or executive action rather than its constitutionality. "Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. . . . The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. . . . Without open minds, there can be no open society. And if society be not open, the spirit of man is mutilated and becomes enslaved."

Summary of *concurring majority opinion of Justice Jackson*

The activity here charged to be criminal is conspiracy. If the statute were to be qualified by the doctrine of clear and present danger, the stratagem of the Communists—to wait for a concerted uprising until the government is about ready to fall of its own weight—would "outwit the pattern" of the statute and permit the forceful overthrow of the government. Therefore, the clear and present danger test should be disregarded in cases involving speech advocating a crime, and should be saved only for cases where conviction is sought to be based on speech not so advocating but which might have such a tendency. The consequences then could not be grave. Here it would lack reason to use the clear and present danger test to deal with an organized and nation-wide conspiracy. The doctrine could not be soundly applied since it would require the court to make a prophecy appraising imponderables in the guise of a legal decision. Even an individual could not claim that the Constitution protects him in advocating forceful overthrow. No one has the constitutional right "to work up a public desire and will to do what it is a crime to attempt," though it is not always easy to decide what is teaching or advocacy in the sense of incitement rather than in the sense of exposition or explanation.

Since this was a prosecution for conspiracy, the other Justices should not have discussed everything except the law of conspiracy. Under that law, conspiracy is not a civil right. Many conspiracies have been criminally condemned though carried out as here chiefly by speech or writing. While the doctrine of criminal conspiracy has its dangers, there is no reason why it should not be applied to action undermining our whole government. Though the record is replete with acts to carry out the conspiracy, no overt act need be shown. Congress can punish a conspiracy whose ends are themselves punishable. In the usual conspiracy case, there need be no showing even of the power to create a danger.

But I have little faith in the long range effectiveness in this conviction to stop the Communist movement. "Communism will not go to jail with these Communists. . . . Many failures by fallen governments attest that no government can long prevent revolution by outlawry."

The dissenting opinion of Justice Black

Here again, as in *Breard* v. *Alexandria,* decided this day, my basic disagreement with the Court is not as to how we should explain or reconcile what was

said in prior decisions but springs from a fundamental difference in constitutional approach. Consequently, it would serve no useful purpose to state my position at length.

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that Congress "shall make no law abridging . . . the freedom of speech, or of the press . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "nor more than recognize a minimum compulsion of the Bill of Rights." *Bridges* v. *California,* 314 U. S. 252, 263.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection. I must also express my objection to the holding because, as MR. JUSTICE DOUGLAS' dissent shows, it sanctions the determination of a crucial issue of fact by the judge rather than by the jury.

Nor can I let this opportunity pass without expressing my objection to the severely limited grant of certiorari in this case which precluded consideration here of at least two other reasons for reversing these convictions: (1) the record shows a discriminatory selection of the jury panel which prevented trial before a representative cross-section of the community; (2) the record shows that one member of the trial jury was violently hostile to petitioners before and during the trial.

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

The dissenting opinion of Justice Douglas

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful.[1] Petitioners, however, were not charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence.[2] It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine

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[1] 18 U. S. C. § 2384 provides: "If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both."

[2] 18 U. S. C. §§ 10, 11; 54 Stat. 671.

contained chiefly in four books:[3] Foundations of Leninism by Stalin (1924), The Communist Manifesto by Marx and Engels (1848), State and Revolution by Lenin (1917), History of the Communist Party of the Soviet Union (B) (1939).

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the government is. The Act, as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said,* but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here. Treason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought;* they get convicted not for what they said but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech, to which the Constitution has given a special sanction.

The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion, which by invoking the law of conspiracy makes speech do service for deeds which are

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[3] Other books taught were Problems of Leninism by Stalin, Strategy and Tactics of World Communism (H. Doc. No. 619, 80th Cong., 2d Sess.), and Program of the Communist International.

dangerous to society. The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme.

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 376-377,

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however, reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of a clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*" (Italics added.)

I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce* v. *United States,* 252 U. S. 239, 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said, "Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial." That is the only time the Court has passed on the issue. None of our other decisions is contrary. Nothing said in any of the nonjury cases has detracted from that ruling.[4] The statement in *Pierce* v. *United States, supra,* states the law as it has been and as it should be. The Court, I think, errs when it treats the question as one of law.

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[4] The cases which reached the Court are analyzed in the Appendix attached to this opinion.

Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. It says, "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace.

The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state which the Communists could carry. Communism in the world scene is no bogey-man; but Communists as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and

government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places—these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F. B. I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[5] The political censor has no place in our

[5] 12 Hennings Stat. (Virginia 1823), c. 34, p. 84. Whipple, Our Ancient Liberties (1927), p. 95, states: "This idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his The Spirit of the Laws ('Words do not constitute an overt act'), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson."

public debates. Unless and until extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action.

Vishinsky wrote in 1948 in The Law of the Soviet State, "In our state, naturally there can be no place for freedom of speech, press, and so on for the foes of socialism."

Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

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347

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