No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1959

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

365

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 8

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

In its order of June 29, 1959, 360 U.S. 924, setting this case down for reargument, the Court specified five questions to which counsel were requested to address themselves, as follows:

"(1) Is the Membership Clause of the Smith Act, 18 U.S.C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speed-

ily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

We have here briefed, or rebriefed, these issues in the order followed by the Court, not attempting to reargue the other issues covered in our brief on the merits submitted last term. For the convenience of the Court, and to avoid referring back and forth between documents, our brief submitted in the 1958 Term

is reprinted in the back of this brief, following the inserted blue page.[1] Therefore, there is included within these covers all of the material on the basis of which we submit the case at this time.

The Smith Act (18 U.S.C. 2385), in its form applicable to this case, provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays 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, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

[1] As to the "Jencks Act" discussion (Br. 99–112), this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, substantially disposes of that issue.

> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

In answering the Court's questions, we shall assume in Point I that the statute requires proof of membership with knowledge of the association's aims, without proof of either specific intent or of activity, but subject to the proper application of the constitutional limitation of the "clear and present danger" test as discussed in Point IV. In Point II we assume the elements on which the discussion in Point I is based and add the element of specific intent, but not activity, again subject to the "clear and present danger" limitation. In Point III we assume the elements of Point II plus activity, again subject to the "clear and present danger" limitation. However, for the purpose of analysis, we note that these combinations by no means exhaust the possibilities. The "clear and present danger" doctrine could be considered a separate element and added or left out of each of the other groups. It would also be possible to consider intent and activity as alternative additional elements, rather than considering activity (as we do) only as it is added to intent.

I

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL EVEN THOUGH IT BE INTERPRETED TO PERMIT A CONVICTION BASED SOLELY ON PROOF THAT THE ACCUSED WAS A MEMBER OF A GROUP DESCRIBED IN THE ACT, KNOWING THE PURPOSES THEREOF

1. In our previous briefs in this case at the 1956 and 1958 Terms, we have not argued this point, assuming that this Court had construed the membership clause of the Smith Act to require proof of specific intent and that the term "membership" should be limited to active membership (1956 Br. 23, 39–41; 1958 Br. 47–55). Thus, we did not discuss the constitutionality of the clause in the absence of those requirements.

In *Dennis* v. *United States,* 341 U.S. 494, 499, it is stated: "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."[2] Although the opinion had specific reference to the first paragraph of the Smith Act, dealing with teaching and advocating overthrow, and to that portion of paragraph three which deals with organizing a group to teach or advocate such overthrow, the language

[2] The quotation is from the opinion of the Chief Justice, joined by Justices Reed, Burton and Minton. The concurring opinion of Mr. Justice Frankfurter assumes the same construction. 341 U.S. at 518. Mr. Justice Jackson, concurring, and Justices Black and Douglas, in dissent, were silent on the point.

and reasoning of the Court was generally applicable to the entire Act. The membership clause, here involved, is structurally a part of the same paragraph as the organizing clause. We, therefore, understand the Court's decision in *Dennis* to mean that intent to carry out the overthrow of the United States is a part of the offense prescribed. While in *Yates* v. *United States,* 354 U.S. 298, the grounds upon which the case was disposed of made it unnecessary for the Court to reexamine the specific intent required for conviction, assumptions by the Court in its consideration of the sufficiency of the evidence indicate no withdrawal from the position adopted in *Dennis.* See 354 U.S. 298 at 331 and 332. Earlier, the Court had given a similar construction to Section 9(h) of the National Labor Relations Act. *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 406–408.

This case was tried on the premise that a showing of both intent to accomplish the overthrow of the government and active membership were necessary, and we have not asked the Court to consider the case in the absence of those factors. Nor do we do so now, since we continue to believe that specific intent is, under the statute, an essential part of the Government's case and that the proof of activity in this case aids in upholding the conviction either as a matter of construction or of constitutional application (see *infra,* pp. 11–27). Nevertheless, since the Court has asked for discussion of the issue, we submit that there is authority supporting the constitutionality of the provision even if it is applied as requiring neither the specified intent nor actvity beyond mere membership.

2. In the beginning, it is important to keep clear the specific intent which we are discussing. There is no question but that the statute in specific terms requires proof of knowledge of the purposes of the organization. A man is not punished for joining a subversive association in ignorance of its nature; the government must prove that he knew what he was doing. The intent referred to in the Court's question is the defendant's personal intent to carry out the purposes of the organization, a mental attitude going beyond *mens rea,* as that term is used to characterize criminal intent in common law crimes. See *Morissette* v. *United States,* 342 U.S. 246, 250–263. The intent here involved is an intent to overthrow the government of the United States by force and violence.

To test the question, let it be assumed that an individual with full knowledge of the objectives of the Communist Party becomes a member with no intention of aiding in bringing about a revolution, but because he believes action through the Party is the most effective way to secure social legislation, or public ownership, or a labor-conscious administration.[3] Let it be assumed further that no specific

[3] A harder case is involved if the individual not only does not intend that the objective shall be attained, but has the specific intent to divert the organization from its existing unlawful program. In such a case, it might well be unreasonable to construe the statute as applying to a person whose intent was entirely consistent with the Congressional purpose, at least until the failure of the individual's efforts had become clear. Cf. *Whitney* v. *California,* 274 U.S. 357, discussed *infra,* pp. 9–10.

activity, other than maintaining membership, was proved. There is authority for the proposition that the constitutional protections of free speech and the right to assembly and due process do not prevent Congress from making such membership a crime, even where the member's heart is not in it. This is supportable on the principle that knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself, and that it is the objective of the organization, not of the individual, which governs.[4]

This Court has infrequently considered the constitutionality of laws proscribing membership, but, where it has, it has upheld their validity without regard to such specific intent or to activity. In *Bryant* v. *Zimmerman,* 278 U.S. 63, a New York statute, aimed at the Ku Klux Klan, punished membership in certain oath-bound associations which had failed to register. The Court held that to forbid individual members to attend meetings or retain membership did not violate due process of law.[5] More recently in *N.A.A.C.P.*

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[4] In the present case the trial judge gave explicit instructions to the jury that it must find that the intent of the Communist Party, in addition to the petitioner's own intent, must be to bring about the overthrow of the government by force and violence (R. A 39–A 40).

[5] The petitioner seeks to distinguish the case on the ground that the statute dealt with registration (Pet. Br. 25–26). However, the statutory language was: "Any person who becomes a member [of a secret, oath-bound association] * * *, or remains a member thereof, * * * with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor." Art. V–A, N.Y. Civil Rights Law, c. 664, Laws 1923, p. 1110, Sec. 56.

v. *Alabama,* 357 U.S. 449 at 465, the Court, in commenting on the earlier case, stated:

> * * * [In *Bryant* v. *Zimmerman*] this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition of membership to file with state officials copies of its * * * [constitution, membership lists, etc.]. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice.

Apparently, then, the Court did not feel that the intent or activity of the individual member was essential to the validity of the statute—as applied to that member—which it upheld on the basis that the legislature had authority to regulate such organizations having oath-bound memberships and therefore to punish membership in an organization which had not complied with the statutory requirements.

The information in *Whitney* v. *California,* 274 U.S. 357, encompassed violations of the California Syndicalism Act by reason not only of the defendant's participating in the organization of the California Communist Labor Party, but also her membership in it. One of the issues before this Court was her claim that in fact she personally opposed the illegal aims at

the time of its organization and that they were adopted over her protest. In treating with this claim, the Court, without exploring her own intentions, placed reliance on the fact that she had knowingly retained membership after the aims of the party had become clear. The majority of the Court, therefore, found nothing inconsistent with the Fourteenth Amendment in punishing knowing membership even without the element of specific intent to carry out the objectives of the association. The concurring opinion of Mr. Justice Brandeis, while differing strongly from the majority of the application of the clear and present danger doctrine, raises no question with respect to punishing membership, even in the absence of intent, if the element of immediate serious danger is satisfied.[6]

As to the Smith Act itself, the Court of Appeals for the Fourth Circuit discussed the membership clause

[6] The petitioner and the government differ so widely on the meaning and significance of the concurring opinion of Justices Brandeis and Holmes in the *Whitney* case that it is probable that the only way to resolve the difference is to read the statements against the contents of the opinion itself. However, we call to the attention of the Court the fact that Miss Whitney was convicted on count one of the information which charged her with organizing and becoming a member of the Communist Party of California. 274 U.S. 357, 360. Therefore, when the concurring opinion talks about the intent to "commit present serious crimes" (274 U.S. at 379), it must be talking about acts of the Party to which the petitioner was connected through her membership. In this respect, therefore, the case, including the concurrence, supports the position of the government that membership in a subversive organization with knowledge of its aims may constitutionally be made the basis for criminal liability.

in *Frankfeld* v. *United States,* 198 F. 2d 679 at 683–684, certiorari denied, 344 U.S. 922, saying:

> * * * So far as "membership" in an organization advocating * * * destruction or overthrow [of government] is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged.

Moreover, the same construction of various state syndicalism laws has been upheld in the state courts. *People* v. *Ruthenberg,* 229 Mich. 315, writ of error dismissed, 273 U.S. 782; *State* v. *Laundy,* 103 Ore. 443, 500; *State* v. *Hennessy,* 114 Wash. 351, 368. And even those state decisions which have construed state syndicalism laws as requiring intent have reached this result, not on the basis of constitutional necessity, but merely as a matter of legislative purpose. *People* v. *Gitlow,* 195 App. Div. 773, 794; *State* v. *Kahn,* 56 Mont. 108; *Commonwealth* v. *Widovich,* 295 Pa. 311.

Therefore, we conclude that there is authority to support the proposition that the elements of intent to bring about the overthrow of the government by force and violence, and of affirmative activity in addition to membership, are not essential to the constitutionality of the membership clause of the Smith Act.

However, as pointed out above, we do not urge the Court to adopt this position since we do not believe it is a correct construction or application of the statute or an issue necessary to be passed upon in view of the record now before the Court.

II

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS PROPERLY INTERPRETED AS REQUIRING PROOF OF SPECIFIC INTENT AND AS SO INTERPRETED IS CONSTITUTIONAL

1. The first paragraph of the Smith Act (the advocacy clause), *supra*, pp. 2–3, punishes *knowing* or *willful* advocacy of the duty of overthrowing the government by force or violence; the second paragraph (the literature clause) punishes the publication of written or printed matter advocating such overthrow when done with the *specific intent* to cause such a result; the third paragraph comprises both the so-called organizing clause and the membership clause, forbidding respectively the organizing of societies which advocate violent overthrow, and membership in such societies *with knowledge* of the organization's purpose.[7]

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[7] As originally enacted in Title I of the Alien Registration Act of June 28, 1940, 54 Stat. 670, the advocacy clause constituted Section 2(a)(1) of that Act; the literature clause was Section 2(a)(2); and the organizing and membership clauses were contained in Section 2(a)(3) of the Act. In addition, Section 3 of the Alien Registration Act contained a special conspiracy provision. Section 2(a)(1) and the organizing clause of Section 2(a)(3), as originally enacted, were involved in *Dennis* v. *United States*, 341 U.S. 494, since the conspiracy there charged was alleged to have run from April 1, 1945, to July 20, 1948. When the Criminal Code was revised in 1948, the phraseology of Section 2 of the Alien Registration Act was changed to effect consolidation but without any change of sub-

Since the literature clause expressly requires a specific intent to overthrow the government, and be cause of the absence of precise language calling for a specific intent in the advocacy and conspiracy clauses, it was claimed in *Dennis* v. *United States,* 341 U.S. 494, 499, in an attempt to create a more difficult constitutional issue, that Congress deliberately omitted any such requirement. The Chief Justice indicated that since the *Dennis* defendants had themselves requested a charge with respect to specific intent, under Rule 30 of the Federal Rules of Criminal Procedure they appeared to be barred from raising this point on appeal (341 U.S. at 500, fn. 2); but, nevertheless, he discussed the point because of its importance to the administration of the statute. *Ibid.* In rejecting the contention, he said:

> * * * 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* willfully" in * * * [the paragraph containing the advo-

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stance, the numbering of the individual paragraphs was dropped, and Section 2 was recodified as 18 U.S.C. (1952 ed.) 2385. Section 3 (the special conspiracy provision) was also omitted as covered by the general conspiracy provision of 18 U.S.C. 371. Act of June 25, 1948, c. 645, § 1, 62 Stat. 808. This is the form of the statute as applicable to the instant case.

The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000, and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of 18 U.S.C. 2385 the special conspiracy provision.

> cacy clause], or the omission of exact language in * * * [the paragraph containing the organizing and membership clauses]. 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.* [Citing cases.]
>
> 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. * * * The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. [341 U.S. at 499–500; emphasis added.]

It is in the face of this explicit holding that the petitioner argues that the membership clause should not be construed as requiring specific intent. It is true that the membership clause itself was not in issue in *Dennis,* but its reasoning is nonetheless compelling here.

The attempt of the petitioner to distinguish between the construction of the organizing clause and the membership clause, insofar as reading into them a requirement of specific intent is concerned (Pet. Supp. Br. 15–17), is not convincing. There would seem to be

quite as much intent implicit in joining an organization with full knowledge of its purposes, which have already been established, as there is in organizing an association the aims of which may not have been fixed.[8] In fact, in *Whitney* v. *California,* 274 U.S. 357, where this Court upheld the validity of a conviction under the California law without reference to the specific intent of the defendant (*supra,* pp. 9–10), it appears that the Court read more legal significance into Miss Whitney's continued membership in the Communist Labor Party of California after the organization was completed and the aims of the party defined than it did in her participation in its organization.

It seems clear that in reading intent into the advocacy and organizing clauses in *Dennis* the Court contemplated the same interpretation for the Act as a whole. Such an interpretation is supported by all the cases in which the Court has followed the long-established practice of favoring an interpretation which, not only supports constitutionality, but avoids serious constitutional issues. However, two are particularly pertinent here.

In *Screws* v. *United States,* 325 U.S. 91, the Court was faced with the problem of construing a provision of the Civil Rights Act which made it a crime to de-

[8] The petitioner paraphrases the organizing clause as forbidding the organizing of groups "to" advocate the overthrow of the government (Pet. Supp. Br. 16). The language of the paragraph makes illegal the organization of any group "who" advocates such overthrow. Therefore, there is nothing specific in the language to require the element of intent which the Court found was implied.

prive a person of any rights guaranteed him by the due process clause of the Fourteenth Amendment. The opinion of Mr. Justice Douglas, upholding the constitutionality of the Act, was based on a construction that the Act required a specific intent to deprive a citizen of his constitutional rights. Thus the Court avoided the very type of constitutional problem which the petitioner seeks to inject in this case. Similarly, in *American Communications Ass'n* v. *Douds,* 339 U.S. 382, where the Court was dealing with the non-Communist affidavit requirement of Section 9(h) of the National Labor Relations Act, belief in the overthrow of the government by force was interpreted to require specific intent to accomplish such a result, rather than a mere abstract feeling that such a process was inevitable. Thus again, the Court, by construction, upheld a statute which would otherwise involve a serious constitutional issue. The same should be done here.

2. Construing the membership clause to require a specific intent to bring about the violent overthrow of the government serves two important functions. Firts, it precludes the statute's application to membership in organizations in order to participate in abstract or academic discussions of the idea of revolt. Second, it precludes its application to membership in an organization where the individual—though aware of the unlawful purposes of the organization—does not believe or desire that complete overthrow can or should be attained, but participates in order to reach intermediate goals short of that goal and perhaps entirely legal in themselves. In the present case, the specific

intent and purpose of the petitioner is so obvious as to obscure the importance of that factor in closer cases (1958 Br. 85–88). In borderline cases, however, construing the clause to require a specific intent would be of crucial importance for it provides both juries and judges with an adequate means to prevent the application of the Act to persons who in no way contribute to the dangers with which Congress was concerned. Cf. *Hartzel* v. *United States,* 322 U.S. 680, a World War II prosecution under the Espionage Act of 1917, where this Court reversed the conviction because of the paucity of evidence respecting the requisite specific intent of the defendant. Dissenting from the majority conclusion, Mr. Justice Reed, with whom Justices Frankfurter, Douglas and Jackson joined, said:

> * * * The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends. [322 U.S. at 694.]

Justices Holmes and Brandeis appear to have considered that a specific intent to produce prohibited evils is a substitute for, or equivalent to, a "clear and present danger" that speech will produce such evils, at least in those cases where the latter "test" applies. Although we do not concern ourselves under this point with the "clear and present danger" doctrine as such (see *infra,* pp. 28–32), we advert to it insofar as a specific intent requirement has relevancy to that subject. Justice Holmes suggested this interpolation in

Schenck v. *United States,* 249 U.S. 47, 52, when he said: "If the act (speaking, or circulating a paper), its tendency and *the intent with which it is done* are the same, we perceive no ground for saying that success alone warrants making the act a crime" (emphasis added). And he developed the idea at some length in his dissenting opinion in *Abrams* v. *United States,* 250 U.S. 616, 627–628, as follows:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk* and *Debs,* 249 U.S. 47, 204, 211, were rightly decided. 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 will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.
>
> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its

> opinions would hinder the success of the government aims or have any appreciable tendency to do so. *Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger* and at any rate would have the quality of an attempt. So I assume that the second leaflet if published *for the purpose* alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. * * * [Emphasis added.]

Almost identical language appears in Mr. Justice Brandeis' concurrence in *Whitney* v. *California,* 274 U.S. 357, 373:

> * * * That the necessity which is essential to a valid restriction does not exist unless speech would produce, or *is intended to produce,* a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. [Emphasis added.] [9]

And this Court has put the matter thus in *Taylor* v. *Mississippi,* 319 U.S. 583, 589–590:

> As applied to the appellants * * * [the Mississippi statute which punished advocacy of refusal to salute the flag] punishes them although what they communicated is not claimed or shown to have been done *with an evil or sinister purpose,* to have advocated or incited subversive action against the nation or state, *or* to

[9] Significantly, in *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 395, the Court quoted with approval this statement of Mr. Justice Brandeis.

> have threatened any clear and present danger to our institutions or our Government. [Emphasis added.]

3. When the Act is read to encompass the element of intent, the views expressed in Point I, *supra,* with respect to the constitutionality of the membership clause are reinforced. Actually, the issue would seem foreclosed by the *Dennis* case itself. It is difficult to see how these two parallel provisions, the organizing clause and the membership clause, can, if the same intent is read into each, have different constitutional results.

At the risk of laboring the obvious, it is helpful to re-examine the structure of the Smith Act as a whole. In all its paragraphs, it is explicitly aimed at "advocacy" of overthrow of the government by force or violence. The first paragraph strikes at direct advocacy by an individual; the second at responsibility for publications which advocate the illegal action; the organizing clause deals with organizing an association which engages in such advocacy; and the membership clause outlaws knowing affiliation with an organization so engaged. All sections, including the conspiracy provisions now re-enacted into the law (see fn. 7, *supra,* p. 12), deal with direct or indirect advocacy of overthrow. It is difficult to argue that knowing membership in an illegal enterprise with intent to carry out its purposes is too tenuous a connection between the individual and the advocacy to form a basis for liability while organizing, conspiring, or publishing for the same ends may be punished. (See also 1958 Br. 48–56.)

These views were well expressed by District Judge Kraft in *United States* v. *Blumberg,* 136 F. Supp. 269, 271 (E.D. Pa.):

> However defendant vigorously maintains that the means by which this power [to prohibit acts intended to effect the violent overthrow of Government] is carried into execution by the membership clause of the Smith Act are not appropriate or plainly adapted to the end of protecting the Government from armed rebellion. Defendant concedes that a conspiracy to organize a group who advocate violent governmental overthrow may constitutionally be made a crime. *It would be strange logic, indeed, to hold that an agreement to organize such a group may be made criminal, but that membership in the group organized pursuant to such a conspiracy, with knowledge of its purposes, may not be made a crime.* [Emphasis added.]

III

THE CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE IS FURTHER FORTIFIED BY THE REQUIREMENT THAT THE MEMBERSHIP BE ESTABLISHED AS ACTIVE MEMBERSHIP, AND THIS REQUIREMENT IS REASONABLY TO BE INCLUDED EITHER AS A MATTER OF STATUTORY CONSTRUCTION OR AS A CONSTITUTIONAL LIMITATION ON THE APPLICATION OF THE ACT

1. The first sentence in the Court's questions about this issue (*supra,* p. 2) asks whether the constitutionality of the membership clause would be aided by adding the requirement of proof that the membership is active. An indication of the answer to this ques-

tion is found in the petitioner's repeated assertions that there was no charge that the petitioner performed any act whatever (Pet. Br. 3) or engaged in any Party activity (Pet. Br. 24); that the indictment charges nothing more than a state of mind (Pet. Br. 25); that there is absent from the charge an allegation of agreement or participation (Pet. Supp. Br. 31); and other picturesque ways of laying a foundation for the argument that under our law guilt must be brought home to an accused by reason of his individual action. To the petitioner it is clearly a strong point that conviction under the membership clause does not require a showing of activity of any kind.

It was to meet this false premise that the element of "active membership" was first explicitly introduced into the case through the government's supplementary memorandum after the first argument. (Gov't Supp. Memo. on Reargument, Nos. 3 and 4, October Term, 1957). But all along, the case had been briefed and argued by the Government on the theory that membership was not a passive state, but an affirmative support of the aims and purposes of the organization. (Gov't Br. in *Scalcs* v. *United States,* No. 3, October Term, 1956, pp. 23, 41.) We had also pointed out that, with respect to the Communist Party, membership was, under its rules, active membership. (*Id.,* p. 42; *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 431–432.)

The necessity of establishing active membership, either to meet a reasonable construction of the word "membership", or, alternatively, as a constitutional

limitation on the application of the Act, does help in upholding its constitutionality. This is so even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes. The solicitation of membership, the contribution of financial assistance, or the handling of public relations all help the organization and therefore indirectly promote its objectives. In an army there must be not only fighters, but also suppliers, and transporters and medical aides. Any activity which contributes to the ultimate success of the undertaking bears its share of responsibility for that outcome.[10]

The trial court in this case gave a severe definition of what was necessary to constitute active membership, stating (R. A–41):

> On the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group or society, then you should next consider whether the defendant, Scales, was an active member of, or affiliated with, the Party with knowledge of its aims and purposes. The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member; it must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he

[10] In the comparable situation with respect to the nature of overt acts necessary to sustain a conviction for conspiracy, this Court recently held that the acts need not themselves be illegal. *Yates* v. *United States*, 354 U.S. 298, 334. See also *Pierce* v. *United States*, 252 U.S. 239, 244; *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Braverman* v. *United States*, 317 U.S. 49.

> was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party. Moreover, to be criminal, the activities of the membership and knowledge of the Party aims and purposes must have existed within the period from November 18, 1951, to November 18, 1954.

This hard standard for activity can be accepted for this case since the jury found that it was met. Except for purposes of analysis, it is not necessary to consider the quantity or quality of petitioner's activity; acting as chairman of the Communist Party of North Carolina for an extended period of time, recruiting and instructing new members, and participating in special Communist schools, must certainly suffice in both particulars. It is the case before it, involving the activities of this petitioner, on which the Court must pass judgment, not some hypothetical set of facts which may never arise. In *McComb* v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137, 141 (C.A. 2), Judge Frank stated, "I think it always unwise for a court to cross hypothetical constitutional bridges; crossing actual ones is dangerous enough." See *Fleming* v. *Rhodes*, 331 U.S. 100, 104; *Blackmer* v. *United States*, 284 U.S. 421, 442.

Requiring a showing of active membership not only meets any due process objection on the ground of personal responsibility, but it also takes the strength out of the argument that the membership clause runs afoul of the First Amendment. If all that was involved were bare membership, or bare membership

plus some attendance at Party meetings, there would be more foundation for the argument that freedom of speech and of the right of assembly was impaired. Cf. *De Jonge* v. *Oregon,* 299 U.S. 353, finding unconstitutional the provision of the Oregon syndicalism law forbidding presiding at or assisting in conducting a meeting of a certain type of organization. This argument disappears when the requirement of activity is added.

Therefore, the answer to the first branch of the Court's question is that adding the element of activity does aid in sustaining the constitutionality of the membership clause whether that element is incorporated as a matter of interpretation or as a test of constitutional application (akin to the "clear and present danger" test).[11]

2. The second question posed by the Court in this part of its reargument order is whether the statute can properly be construed to require proof of active membership. An affirmative answer to this does not mean that activity must be alleged as a separate element of the crime, as the petitioner suggests (Pet. Supp. Br. 19). Rather, an allegation of membership in the indictment must mean membership in the sense

[11] The element of activity is pertinent to a jury's consideration of a case under the membership clause, not only because of the question of construction, but also because the defendant's activity is one of the best ways of proving his intention, a factor which, as we point out above, should be part of the government's burden of proof. Two of the state cases emphasize this significance of evidence of a defendant's activity. *People* v. *Lloyd,* 304 Ill. 23, 87–89; *Shaw* v. *State,* 76 Okla. Cr. 271, 310.

in which Congress used the term and it then becomes a matter of instructions to the jury as to what that term requires in the way of proof. This is analogous to the Court's reading of additional meaning into the word "belief" in the National Labor Relations Act, as it did in *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 407, or the word "wilfully" in *Hartzel* v. *United States,* 322 U.S. 680, 686–687.

The propriety of interpreting the membership clause to include the requirement of activity is supported not only by the policy of construing statutes so as to avoid questions of constitutionality (*supra,* pp. 15–16), but also by specific holdings of this Court giving a similiar interpretation to comparable words in other statutes. In *Galvan* v. *Press,* 347 U.S. 522, it was determined that Congress in providing for deportation on the basis of membership in the Communist party intended something more than "nominal" membership. 347 U.S. at 527. See also *Rowoldt* v. *Perfetto,* 355 U.S. 115. *Galvan* follows the earlier decision in *Bridges* v. *Wixon,* 326 U.S. 135, where the term affiliation was construed to require a working alliance. And both of these decisions follow the district court decision in *Colyer* v. *Skeffington,* 265 Fed. 17, 72 (D. Mass.), reversed on other grounds *sub nom. Skeffington* v. *Katzeff,* 277 Fed 129 (C.A. 1).

3. But, whether or not the concept of activity is comprehended within the word "membership", in any event it is a proper consideration for the courts, either trial or appellate, to apply in determining whether the statute is constitutional in its impact on particular cases. Just as in the application of the

"clear and present danger" principle a court must decide whether in the individual case the application of the restriction on speech is really necessary to avert serious peril to the country, so here a court should, even if it doubts that an application to a passive communist would be constitutional, consider its constitutionality as applied to a dedicated, full-time, proselytizing communist. If the Act would be constitutional as so applied, then the only question remaining would be whether the various applications are separable. (See also 1958 Br. 65–66.)

Many times this Court has stated that it will not upset an act of Congress because in some hypothetical case the law could have an unconstitutional application. See, *e.g. Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39; *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.,* 226 U.S. 217, 219; *Fleming* v. *Rhodes,* 331 U.S. 100. And again the Court has said that it will consider only the case as it affects the petitioner, not some other individual not before the Court. *Blackmer* v. *United States,* 284 U.S. 421; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515; *United States* v. *Wurzbach,* 280 U.S. 396. Sometimes, the issue has been stated in terms of whether Congress intended the statute to continue to be enforced in one application, if it is held unconstitutional in some other application. *Dorchy* v. *Kansas,* 264 U.S. 286; *The Abby Dodge,* 223 U.S. 166; *Naional Labor Relations Board* v. *Jones & Laughlin,* 301 U.S. 1. On this issue of separability, as in other questions of construction, the Court will adopt a construction, if it sees its way clear to do so, which will save the Act rather than

destroy it. *United States* v. *Rumely,* 345 U.S. 41; *Ashwander* v. *T.V.A.,* 297 U.S. 288.

Therefore, the answer to the final portion of this third question, is that, wholly apart from statutory construction, there is here a constitutional application of the statute to a defendant whose activity in the Communist cause would meet the strictest test conceivable. Whatever its application to other cases, the Act is constitutional in its present application.[12]

IV

THE "CLEAR AND PRESENT DANGER" TEST AS APPLIED TO THE MEMBERSHIP CLAUSE AND TO THIS PARTICULAR CASE SUSTAINS THE CONSTITUTIONALITY OF THE CONVICTION

1. Exhaustive consideration was given to the application of the "clear and present danger" doctrine to the Smith Act in *Dennis* v. *United States,* both in the Court of Appeals, 183 F. 2d 201, and in this Court, 341 U.S. 494. Although both courts recognized that applications of the test had not been consistent through the years, it was concluded that the test was applicable to the Smith Act, or at least to the conspiracy provision of the Smith Act, and the main opinion in this Court specifically accepted Judge

[12] Of all of the state and federal cases cited by both parties to this case in this field, none deals with a factual situation where the accused was not shown to be active in some official capacity in carrying out the aims of his organization. Even in the *De Jonge* case, 299 U.S. 353, the conviction was thrown out, not because De Jonge had not been an active member of the party, but because the indictment alleged only his assistance in the conduct of a meeting.

Hand's formulation of it in relation to the Smith Act. 341 U.S. at 510. In *Yates* v. *United States,* 354 U.S. 298, there was no withdrawal from that position. Although fine lines of distinction have been drawn in applying the test, we had not thought that there was sufficient distinction between the offense proscribed by the membership clause, as properly construed, and the conspiracy, advocacy, or organizing clauses to justify asking the Court to reconsider the matter. Therefore, in the trial of the case and in our prior presentations to this Court we have assumed that the rule applied here as it did in *Dennis* (1958 Br. 66).

2. However, since the Court has invited reconsideration of the matter, it is appropriate to re-examine the application of the test in the light of this particular case.

Certainly, there is support in the majority opinions in *Gitlow* v. *New York,* 268 U.S. 652, and in *Whitney* v. *California,* 274 U.S. 357, for the proposition that where Congress has dealt directly with aspects of speech, as it has here in proscribing direct or indirect advocacy of violent overthrow, the issue is properly one of whether the Congressional determination of the necessity of such restriction is reasonable and, if it is, there is no occasion to apply the "clear and present danger" test to the individual case. If this is the proper rule, there is now no real issue as to the reasonableness of Congress's action in forbidding the type of advocacy outlawed in the Smith Act, since this Court has in other contexts upheld Congressional authority with respect to participation in the type of organization here involved. See the concurrence of

Mr. Justice Frankfurter in *Dennis* v. *United States,* 341 U.S. 494, 546–552; Mr. Justice Jackson in *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 424–433; *Barenblatt* v. *United States,* 360 U.S. 109, 127–128. However, in this particular case, if the Court adheres to the position of the main opinion in *Dennis,* the existence of a clear and present danger from participation in the Communist Party at the present stage of our history, as reviewed in our 1958 brief, pp. 75–88, 121–139, supports the application of the Act to this case as fully as the corresponding facts before Congress justified it in making its legislative judgment.

There is, however, one aspect of the case which was not specifically referred to in *Dennis* and which supports the view that, if the statute be given the construction which we urge in earlier sections of this brief, there is no necessity for the application of the "clear and present danger" test at all. If we are right in our contention that the statute requires proof of a specific intent to carry out the aims of the organization to bring about the overthrow of the government by force and violence (*supra,* pp. 11–21), then, even under the strictest views of Justices Holmes and Brandeis, this illegal intent dispenses with the occasion for the additional qualification that the danger be immediate. This goes back to the theory of *Fox* v. *Washington,* 236 U.S. 273, which held that the right of free speech does not include the right to incite actual breaches of the law. Certainly the overthrow of the government by force and violence is illegal and it seems that intentional activity to stir

others to accomplish that end comes within the rule of the *Fox* case. The Court of Appeals for the Fourth Circuit, in dealing with a case under the membership clause that followed the *Dennis* case (*Frankfeld* v. *United States*, 198 F. 2d 679, 684, certiorari denied, 344 U.S. 922), stated:

> The defendants contend that these provisions [literature and membership clauses] of the statute are unconstitutional because they do not require a "clear and present danger" as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in "clear and present danger". This would be to make the near success of an attempted crime the criterion of criminality for making the attempt.

We suggest, therefore, that if the Court does desire to reconsider the applicability of the "clear and present danger" doctrine to the Smith Act, it should consider whether, if the statute is properly construed to require specific intent and activity, there remains any need for the additional limitation based on the probabilities of success. It is too late to doubt that it is entirely appropriate to punish an individual for deliberately attempting an illegal act, even where his realistic chances of accomplishing it are uncertain, or even slight. *United States* v. *Quincy*, 6 Pet. 445, 465; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821.

3. It is our view that if the "clear and present danger" doctrine is applicable at all to this case, it is to be applied with regard to the danger to be anticipated

from the Communist Party rather than from the individual membership of this particular petitioner. It would be the same as writing the Act off the books to require that the government prove that it is in danger of overthrow from the activity of any individual. This petitioner's membership is his contribution to the common end, and it is his membership, plus that of his associates, that gives the Party power. Nominal, *pro forma,* membership by itself might well be held to be no contribution at all; but once the statute is interpreted or applied as we have suggested there remains no question but that the "danger" test is to be applied to the organization. This has been the uniform practice in this type of case. *Gitlow* v. *New York,* 268 U.S. 652; *Whitney* v. *California,* 274 U.S. 357; cf. *American Communications Ass'n* v. *Douds,* 339 U.S. 382.

We have no doubt that the "clear and present danger" test, properly applied in this case, upholds the conviction of the petitioner.[18] That the peril is real has been attested by the experience of this and other nations which have been subject to infiltration by such organizations from within. See 1958 Br. 39–45. That

[18] Since the "clear and present danger" doctrine is a test of constitutionality in the application of restraints on speech, not an element of the offense to be proved in making out a case, it is clear that the determination is a question of law to be decided by the trial court if the question is raised before it and to be reviewed by the appellate courts. Therefore, the proper test can now be applied by this Court on the basis not only of the record in the particular case but also of all of the facts of which the Court may take judicial notice. *Dennis* v. *United States,* 341 U.S. 494, 514.

the peril is sufficiently immediate to justify governmental restrain is attested by the sensitive international situation which has resulted in the country's living in a state of emergency year after year. There is no reason for the Court to blind itself to a world situation of which Congress, the Executive, and the public generally are fully conscious.

V

SECTION 4(F) OF THE INTERNAL SECURITY ACT DOES NOT BAR PROSECUTION UNDER THE MEMBERSHIP CLAUSE OF THE SMITH ACT [14]

In the course of repeated briefing and argument of this case, the petitioner has become so entangled in the ultimate purposes and the Congressional history of Section 4(f) of the Internal Security Act (50 U.S.C. 783(f))[15] that he appears to have forgotten what it actually does. What it does is to modify subsections (a) and (c) of the same section and to amend all other criminal statutes dealing generally or specifically with offenses arising out of association with the Communist Party as though there were read into each of them the language of Section 4(f). The Smith Act can now be

[14] See also pp. 68–74 of our 1958 brief.

[15] The provision reads:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

read as though it included an additional paragraph reading "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of this Section." The question we have is whether active membership with knowledge of the aim of the Party and with specific intent to carry out those aims is "membership per se". The court below held not, and so have all other federal courts which have had the issue before them. *Lightfoot* v. *United States,* 228 F. 2d 861, 870–871 (C.A. 7), reversed on other grounds, 355 U.S. 2; *United States* v. *Blumberg,* 136 F. Supp. 269, 273 (E.D. Pa.); *United States* v. *Noto,* 262 F. 2d 501, 508 (C.A. 2); *United States* v. *Hellman* (D. Mont., Cr. 3722, decided June 16, 1958). They reach this result because neither the language nor the purpose of Section 4(f) indicates any other result.

The language of Section 4(f) does not apply to this case because the specific use of the term "per se" bars it. Obviously, this provision was included in the Internal Security Act in order that the very facts making registration necessary under that Act would not in and of themselves constitute a federal crime. To constitute a violation of any federal criminal statute, Congress said, there must be something more. And there is something more in the provisions of the membership clause, namely, knowledge of the intent of the organization, and, under the decision in the *Dennis* case, specific intent to carry out the aims of the Party. This is not membership per se.

The question then arises, if Congress did not believe that either the Smith Act or any other statute pun-

ished membership per se, why did it write Section 4(f) into law? The answer is that through this device Congress hoped to bolster the validity of the registration provisions. (See 1958 Br. 70–72.) If by registering one confessed all of the elements of a federal offense, he could well argue that the requirement of registration was a plain violation of the privilege against incrimination. So Congress specifically recited that the bare fact leading to registration, *i.e.*, membership, is not per se a crime. When, or if, individual Communists are required to register under Section 8 (which will occur only when the Party fails to register) it is possible that they may still argue that the registration requirement is unconstitutional because it requires them to incriminate themselves on an essential element of a crime (even if not the whole crime). It will be time enough to meet that problem when it arises. But if these Communist members are successful in that plea, the result will be invalidation of that portion of the Internal Security Act, not the repeal of the Smith Act.[16]

The petitioner has repeatedly made the argument that, as we interpret the provision, registration will be required only of Communists who do not know the objectives of the Party. (Pet. Br. 48; Pet. Supp. Br. 37.) But Section 4(f) does not relieve any one

[16] Implied repeal of the membership clause of the Smith Act would not obviate the problems inherent in the registration provisions. Individual Communists would still argue that registration compels incrimination with respect to other clauses of the Smith Act, as well as other federal legislation, *e.g.*, the sedition laws. See *Blau* v. *United States*, 340 U.S. 159.

at all of the necessity of registration. The fact that only Communists with knowledge and intent are the subject of prosecution under the Smith Act and that naive Communists, if there are any, are completely secured from such prosecution, does not at all mean that only the naive Communists are required to register under the Internal Security Act. Perhaps the sophisticated Communists may object on the ground of self-incrimination, and, if so, the courts will have to decide that issue when it arises. The petitioner's fault is to read Section 4(f) as though it dealt with the necessity of registration rather than with susceptibility to criminal prosecution. It is at this point that he loses contact with the present case.

The petitioner would also support his argument by the fact that Section 4(f) provides not only that membership per se shall not be a crime but that holding of office shall likewise not per se be criminal. He argues that office holding, as we admit, is itself "strong evidence" of knowledge of the Party's aims. This, we suppose, leads to the conclusion that it will be rare indeed that one can find a Communist official who is ignorant of the aims of the Party. It seems unlikely that Congress really believed that there would be instances of this. But, in effect, Congress has said that it would take no chances in drafting this legislation; no harm would be done in exempting such a person (*i.e.*, the ignorant official) from the criminal law and it might help to sustain the constitutionality of the Internal Security Act. Therefore, Congress could

write in the exemption even though it believed it would have little or no application.

We do not assume from the fifth question in the Court's order that it desires a general discussion of the constitutionality of the registration provisions of the Internal Security Act at this time. However, we refer the Court to *Shapiro* v. *United States,* 335 U.S. 1, and *United States* v. *Sullivan,* 274 U.S. 259, for holdings relating to the authority of the federal government to require records and reports which may in fact serve as a link in establishing a criminal act. It may well be that Congress had these decisions in mind when it determined to go ahead with registration of Communist organizations.

CONCLUSION

For the reasons stated in our 1958 brief as supplemented above, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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OCTOBER 1959.

No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 455–495)[1] is reported at 260 F. 2d 21.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (R. 495). The petition for a writ

[1] "R." will be used herein to refer to the printed record. "Tr." will refer to the reporter's transcript, and "G. Ex." to the Government's exhibits.

[2] The opinion of the Court of Appeals affirming the judgment of conviction rendered following petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the *per curiam* opinion of this Court reversing that judgment (on the authority of *Jencks* v. *United States*, 353 U.S. 657, and the Solicitor General's confession of error) is reported at 355 U.S. 1.

of certiorari was filed on November 3, 1958, and granted on December 15, 1958 (R. 496). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U.S.C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4(f) of the Internal Security Act of 1950 (50 U.S.C. 783(f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" cause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was denied a fair trial because of

(a) the composition of the grand jury which indicted him;

(b) the legislative findings of fact concerning the Communist Party as set forth in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841);

(c) the application at the trial of the "excision" provisions of the so-called "Jencks" Act, 18 U.S.C. 3500 (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions

which do not relate to the subject matter of the testimony of the witnesses); or

(d) the admission of certain evidence offered by the prosecution.

STATUTES INVOLVED

The Smith Act (18 U.S.C. 2385), in its form applicable to this case,[3] provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays 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, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the

[3] The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000 and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of Section 2385 of Title 18 the special conspiracy provision which had been repealed when the Criminal Code was revised in 1948.

overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The text of the Smith Act, together with relevant provisions of the Constitution of the United States, the Internal Security Act of 1950, the Communist Control Act of 1954, the "Jencks" Act (18 U.S.C. 3500), and pertinent statutes concerning the qualifications and the empanelling of jurors (28 U.S.C. 1861, 1864), are set forth in the Appendix to Petitioner's Brief, pp. 1a–9a.

STATEMENT

On November 18, 1954, petitioner was charged in an indictment (R. A2) returned in the United States District Court for the Middle District of North Carolina with having violated the so-called "membership clause" of the Smith Act, 18 U.S.C. 2385, proscribing being or becoming a member of a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof (*supra*, pp. 3–4). Specifically, the indictment charged him with having been, from in or about January 1946 to and including the date of the filing of the indictment, a member of the Communist Party of the

United States, a society of persons who allegedly "teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit," well knowing that the said Party was and is such a society, and "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit" (*ibid.*).

On April 21, 1955, following a trial by jury, petitioner was found guilty and was thereafter sentenced to six years' imprisonment. On November 7, 1955, the Court of Appeals for the Fourth Circuit affirmed the conviction. *Scales* v. *United States,* 227 F. 2d 581. On March 26, 1956, this Court granted certiorari. 350 U.S. 992. On June 3, 1957, following the submission of briefs on the merits and oral argument, this Court ordered the case to be restored to the docket for reargument. 353 U.S. 979. In September 1957, the Government filed a supplemental memorandum which, *inter alia,* pointed out that petitioner was entitled (at least) to a new trial under the rationale of *Jencks* v. *United States,* 353 U.S. 657 (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 1–2). On October 14, 1957, this Court, citing the *Jencks* decision, *supra,* entered an order reversing the Fourth Circuit's affirmance of petitioner's conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General." *Scales* v. *United States,* 355 U.S. 1.

Petitioner was thereafter re-tried and, on February 21, 1958, again convicted and sentenced to six

years' imprisonment (R. A49; Tr. 2217). On appeal to the Court of Appeals for the Fourth Circuit, the judgment of conviction was, on October 6, 1958, affirmed (R. 495). On December 15, 1958, this Court granted certiorari (R. 496).

The evidence adduced at petitioner's second trial may be summarized as follows:

A. GENERAL EVIDENCE (NOT SPECIFICALLY LINKED TO PETITIONER) ESTABLISHING THE CHARACTER OF THE COMMUNIST PARTY AS AN ORGANIZATION WHICH DURING THE INDICTMENT PERIOD TAUGHT AND ADVOCATED THE FORCIBLE OVERTHROW OF THE GOVERNMENT OF THE UNITED STATES AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT

A mass of evidence was introduced to prove that the Communist Party, during the entire indictment period (1946–1954), taught and advocated the forcible overthrow of the Government of the United States as speedily as circumstances would permit. We set forth in Appendix A, *infra*, pp. 121–139, a summary of so much of this evidence as was not specifically linked at the trial to the petitioner, but directed generally to the character and activities of the Communist Party as an organization knowing membership in which is proscribed by the Smith Act.

B. EVIDENCE, SPECIFICALLY LINKED TO PETITIONER, FURTHER ESTABLISHING THE CHARACTER OF THE PARTY AS AN ADVOCATE OF FORCE AND VIOLENCE, AND SHOWING PETITIONER'S KNOWLEDGE OF THAT CHARACTER AND HIS INTENT WITH RESPECT TO VIOLENT OVERTHROW AT THE EARLIEST FEASIBLE OPPORTUNITY.

Petitioner, commencing in or before 1948, and continuing throughout the indictment period, was the

Chairman of the North and South Carolina Districts of the Communist Party (R. 388–389; Tr. 962, 1585)—the "District" being the largest geographical division in the Party below the national organization itself (R. 66–67; Tr. 279–280). As such, he regularly reported to the National Committee on the activities of the Party in his District and saw to it that the directives of the National Committee were carried out in that area (R. 389; Tr. 1585–86); recruited new members into the Party (R. 257–258; Tr. 1007, 1579); selected and made arrangements for promising Party members to further their education in Marxism-Leninism by attending the Jefferson School of Social Science, which the Party conducted in New York (R. 271–274, 320–323; Tr. 1031–32, 1037, 1039, 1306–1309); received the plaudits of William Z. Foster, the Party's National Chairman, for his work in the Party's behalf in the Carolinas (Tr. 1082); and was the director of a Party training school for "outstanding cadres in the North Carolina area" (R. 396–398; Tr. 1603–1605). On occasion, he privately tutored promising prospective recruits in the fundamentals of Marxism-Leninism (R. 249–252; Tr. 980–995). In December 1951, he disappeared into the Communist underground (R. 307, 334; Tr. 1122–23, 1335–1336). The evidence further showed that petitioner was familiar with substantially all of the basic Marxist-Leninist "classics" which the Government introduced, in supplementation of its proof as adduced through its living witnesses, to show the revolutionary nature and purposes of the Communist Party. Specifically, he was shown to be familiar with the following texts: *Foundations of*

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Leninism (G. Ex. 5, Tr. 112; R. 259, 262; Tr. 1010, 1014); *Problems of Leninism* (G. Ex. 42, Tr. 971; R. 262–263; Tr. 1014–1015); *State and Revolution* (G. Ex. 16, Tr. 184; R. 248; Tr. 970–971); *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213; R. 397–398; Tr. 1604–1605), and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607; R. 397–398; Tr. 1604–1605).

The evidence summarized below, unlike that summarized in Appendix A (*infra,* pp. 121–139), relates exclusively to petitioner's own statements and actions. In addition to constituting further evidence—supplementing that set forth in Appendix A—of the character of the Communist Party as an organization which advocates the violent overthrow of the Government of the United States at the earliest feasible opportunity, it tends to show petitioner's personal knowledge of, intent with respect to, and activities in furtherance of, the Party's violent revolutionary aims and purposes.

In September 1948, witness Clontz, while a law student at Duke University, wrote to petitioner stating that he was interested in Communism (R. 244; Tr. 961). Petitioner sent Clontz a box of Communist literature and a letter in which he stated that he would be glad to discuss any matter relating to the Party and its activities (G. Ex. 41, Tr. 962–963; R. 245; Tr. 961–962). In that same month, Clontz got together with petitioner at a conference at which petitioner explained to Clontz the Party's basic strategy (R. 248–249; Tr. 980). This meeting was followed by other similar sessions, held from time to time over

the next several years (R. 262, 290–291; Tr. 964, 1014, 1077–78).

There were, petitioner told Clontz, "two classes of people in this country" who "could be used by the Communist Party to foment a revolution" (R. 249; Tr. 981). The first was "the working class or Proletariat," of whom the Communist Party was the leader (*ibid.*). The second was what petitioner termed "the Negro nation," consisting of a "Black Belt" of "thirteen Southern States" (*ibid.*; R. 250; Tr. 986–987). The "basic strategy of the Communist Party," said petitioner, was, by bringing "the working class, led by the Communist Party" and the "Negro nation" together, "to bring about a forceful overthrow of the Government" (R. 249; Tr. 981).

In a discussion which petitioner had with Clontz shortly before Christmas 1948, petitioner told Clontz how Communism would come into power in the United States (R. 246–247; Tr. 967–969). Clontz had suggested that, "with as wonderful a system as communism offered," the Party should "educate the people" as to the benefits of Communism so that "the people would vote in a Communist form of government" (R. 246; Tr. 967). Petitioner "answered that that was completely impossible" and "completely fallacious" because "the Government controlled all of the media of communication, the newspapers, the radio, * * * the institutions of government, including the Army, the police powers, [and] the educational system" (R. 246; Tr. 968). The idea that Communists could convert the masses "by an educa-

tional process," according to petitioner, was "idealism" (*ibid.*). "Idealism," petitioner explained to Clontz (R. 246–247; Tr. 968–969)—

> * * * was a doctrine that Stalin and William Z. Foster had shown to be completely false, that as long as the institutions of government stood and were not overthrown, that ideas could absolutely do nothing.
>
> He [petitioner] said that he and the other followers of Stalin believed that you could use the institutions of government, once you had taken them over, to get across the ideas to the people. But, the defendant said that a militant force would have to force a change in government and at that point he said that is where we come in.

"[I]t would be nice," said petitioner (R. 263–264; Tr. 1017),—

> * * * if revolutionary ideas would automatically produce a revolution. But * * * it was impossible, that a militant force would have to bring about the revolution and that force was the only answer.[4]

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[4] On cross-examination, Clontz was asked if petitioner had not once told him that the Communist Party "does not advocate the overthrow of the United States Government by force and violence. On the contrary, they simply know that the monopolists will soon resort to force to thwart the will of the masses of the workers. When this happens, we will have to meet their force with force" (Tr. 1202–1203). Clontz replied that petitioner had explained the Party's attitude toward force in those terms in their "first meetings," but that he "later explained to me that that was the Communist double talk that was put out for the purpose of misleading * * * people of liberal leanings" (Tr. 1203). "The explanation given by the Party for public consumption," Clontz testified, "was that the

Petitioner, at this meeting, furnished Clontz with Communist Party literature, including Lenin's *State and Revolution* (G. Ex. 16, Tr. 184) and Stalin's *Problems of Leninism* (G. Ex. 42, Tr. 971) (R. 248; Tr. 970–971). In the former of these works Lenin stated that "the liberation of the oppressed class is impossible not only without a violent revolution but also without the destruction of the apparatus of State power * * *" (Tr. 975), and that revolution "is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon * * *"; the Paris Commune [5] was used as an example (Tr. 975–976). Clontz testified that petitioner told him that one of the reasons why he should read Communist Party literature was that it would "help prepare [him] for the time when the Communist Party would call on [him] in time of crisis" (R. 313; Tr. 1151–1152).

In July 1949, petitioner showed Clontz the dedication of a book, *Twilight of World Capitalism,* by William Z. Foster, the Party's National Chairman, in which Foster stated that his great grandson "would live in a Communist U.S.A." (R. 250–251; Tr. 993). Petitioner "told me [Clontz] that there was a depres-

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way the revolution would come about was that the people would vote in a Communist regime, at which time the capitalists would bring the armies and the police powers to overthrow the people's government and at that time the people's workers would meet force with force" (*ibid.*). This, however, Clontz was told by Party initiates, including petitioner, was merely "one of the formulations used by the Communist Party to conceal their actual methods, their actual purpose and their actual beliefs" (Tr. 1203–1204).

[5] See Appendix A, *infra*, p. 129.

sion coming, * * * that Communists would suffer probably more than anyone else in the * * * depression, but that they actually reveled in the depression because it gave them an opportunity to reach people that during prosperous times they couldn't even reach, and Scales remarked that if a depression came, William Z. Foster's grandson wouldn't have to wait so long * * * [f]or the revolution" (R. 251; Tr. 993–994).

In November 1949, petitioner told Clontz that he had "the definite feeling" that it would not be long before "things would pop" in this country (R. 251–252; Tr. 994–995). He "explained the basis for his feeling" by saying that he (R. 252; Tr. 995)—

> * * * just had been reading in some book which he didn't identify, the writings of Lenin back in 1917 and 1918; he said that the situation in Russia in that particular time and in the United States, in 1949, was a direct analogy. He said that Lenin had pointed out in his writings around the first part of the year that the Communists were a minority, that they were outnumbered, that they were weak, but that Lenin had still expressed hope.
>
> He said that Lenin had pointed out in July of that same year the Communists were outlawed, the Bolshevik Party, that is, were outlawed, and driven completely underground. Yet, he said, Lenin had pointed out that that very next October was the famous Russian October Revolution. Scales said that he saw exactly the same analogy here. Scales said that he did not foresee a bloody revolution soon, but

that it would come inevitably exactly as it had in the Soviet Union.

On January 17, 1950, petitioner officially received Clontz into the Communist Party as a secret member-at-large (R. 257–258; Tr. 1007). He told Clontz that he would continue his "private tutoring" of Clontz as a member-at-large and instructed him to continue his Marxist-Leninist studies, with "particular emphasis" on Stalin's *Foundations of Leninism* (R. 259; Tr. 1009–1010). In addition, at or about that time, petitioner gave Clontz "an outline" of *Foundations of Leninism* which he told Clontz he had "personally prepared" (R. 262; Tr. 1014). Thereafter Clontz would from time to time study the outline and the book and "would meet to recite to [petitioner], who in turn would give me the correct Party interpretation of those particular things" (*ibid.*).[6]

In February 1950, while petitioner was continuing to give Clontz private instructions to prepare him for future work in the Party and possibly to form an underground cell in Charlotte, North Carolina, Clontz asked him when he thought the "revolution" would come (R. 259–260; Tr. 1011). Petitioner replied that, while he did not think it would come in the immediate future, he "could say definitely that [Clontz'] daughter, who then was fourteen months old, would

[6] In *Foundations of Leninism*, one of the basic Marxist-Leninist "classics," Stalin taught, among other things, that "The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine * * *" (G. Ex. 5, p. 54). Repudiating with Lenin the "possibility of the peaceful evolu-

marry in a Socialist or Communist United States'' (*ibid.*).[7]

Following this discussion, petitioner and Clontz were joined by Bernard Friedland, the District Organizer for the Party in North and South Carolina (R. 260–261; Tr. 1012). In petitioner's presence Friedland questioned Clontz extensively concerning his background and reasons for joining the Communist Party (R. 261; Tr. 1013). He asked Clontz "why as an attorney [he] had not sought out reform, to reform the system, if [he] felt that the system of government we had was wrong" (R. 262; Tr. 1013–1014). Clontz (R. 262; Tr. 1014)—

> replied to Friedland that Scales had taught me that the entire court system, the entire system of justice in this country was so completely evil that only by overthrowing the whole government and doing away with it could we ever have justice * * *.

This answer "apparently satisfied'' Friedland and petitioner (*ibid.*).

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tion of bourgeois democracy into a proletarian democracy" in "England and America" (*id.*, pp. 55–56), he stressed that "the law of violent proletarian revolution, the law of the smashing of the bourgeois state machine" was "an inevitable law" in all "imperialist countries," including the United States, and proclaimed that Lenin was "right in saying" that "The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine" (*id.*, p. 56).

Elsewhere in the same work, Stalin defined "Strategy" as "the determination of the direction of the main blow of the proletariat at a given stage of the revolution * * * (*id.*, p. 90; read to jury at Tr. 1027).

[7] Petitioner used the terms "communism" and "socialism" interchangeably in his conversations with Clontz (R. 266; Tr. 1020–1021).

In March 1950, at another study and discussion session, petitioner "brought to [Clontz'] attention" the following passage from Stalin's *Problems of Leninism* (R. 263; Tr. 1016):

> Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy, which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost normal human understanding, or has grossly and openly repudiated the Proletarian revolution.

Petitioner "pointed out this particular passage as simply proving * * *, as he already had taught, that education and reform would accomplish absolutely nothing, but that revolution, a violent revolution was the only possible way to bring about a change in the form of government" (*ibid.*).

At this same session, petitioner, referring to another passage from *Problems of Leninism,* told Clontz that "this contained the explanation of why a revolution would be easier here" than it had been in Russia (R. 264; Tr. 1018). Whereas "in the Soviet Union there had been no one to help the Soviet Party," petitioner explained (R. 264–265; Tr. 1018–1019),—

> * * * in this country when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution, because part of the purposes of the Communist Party in the Soviet

> Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country.

Clontz asked petitioner (R. 265; Tr. 1019)—

> * * * what kind of help we would expect. I asked him whether troops were going to be landed or just exactly how we would get help.

Petitioner replied that "we could not expect the Soviet Union to land troops to start our revolution," since "experience had taught the Communists that that sort of approach was disastrous" (*ibid.*). He cited the Communists' experience in China, where, when the Russian Communist Party, originally, "sent in Russian generals," "the Chinese Communists had been licked completely" (*ibid.*). The "new approach"—which had resulted in the successful Chinese Communist Revolution under Mao-Tse-Tung, who "had never even been to Russia"—was for the Russian Communist Party to send "military leaders" and "professional revolutionaries" to assist native Party leaders in "bringing about their [own] revolution" (R. 265; Tr. 1019–1020). Consequently, said petitioner, "we Communists in this country would have to start the revolution, and we would have to continue fighting it" (R. 265; Tr. 1019). On the other hand, he pointed out, "we could count on drawing on the experience of the Soviet Union," which "would furnish us when the revolution came with experienced revolutionaries from Russia" (R. 265; Tr. 1020). "[O]ne thing" that was "certain," petitioner said, was that (R. 266; Tr. 1020)—

> * * * if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and * * * that would be a bloody time for all.

Also at this meeting petitioner told Clontz that there was a "basic difference" between the Communist Party and "labor unions" (R. 266; Tr. 1020). Labor unions, he said (*ibid.*)—

> didn't have the advantage the party had, of being able to see beyond the next hill. * * * [A] labor union could only see to the next hill, whereas the Communist Party could see all the way over and could see the ultimate goal, the Communist Party United States.

In June 1950, petitioner made arrangements for Clontz to attend the Jefferson School of Social Science in New York, which he described as "patterned after a National Party School he had attended" (R. 271; Tr. 1031–1032). He told Clontz he would have to use an alias while at the school, since "no communist going up to New York to this school from out of the state registered under their right names" (R. 273–274; Tr. 1037–1038). On August 5, 1950, Clontz left for New York to begin his studies, which lasted approximately three weeks (R. 274; Tr. 1045, 1055). During the second and third weeks, Clontz was privately tutored by Doxey Wilkerson, the Director of Curriculum and liaison officer between the school and Communist Party headquarters (R. 297; Tr. 1055, 1101). (Wilkerson's statements to Clontz as to the Party's position with respect to the use of force and violence in achieving its objectives are summarized in

Appendix A at pp. 134–137, *infra*.) On his return to North Carolina, Clontz discussed in detail the teachings of the Jefferson School with petitioner and Henry Farash, the Party Organizer for North and South Carolina, who worked under petitioner's immediate supervision (R. 293, 300; Tr. 1081, 1106–1107). Clontz read to them his notes on the subject matter of his classes, "showed them the various diagrams, such as the formula for force and violence [see *infra*, pp. 135–136], and commented to them how much more effective the presentation was with the various charts that Doxey Wilkerson had used" (R. 293; Tr. 1081). Clontz "agreed with them that it was the same thing they'd been teaching me, but that I felt it was a little better taught at the Jefferson School because of the better teaching aids that they had there" (*ibid.*).

At the same meeting, petitioner and Farash discussed Clontz' future Party assignments with him; it was decided that Clontz would continue on as a secret Party member and eventually become a member of an Underground Club which was to be organized (R. 292; Tr. 1079–1080). In September 1951, petitioner discussed with Clontz the Party's plans for setting up an underground means of communication (R. 301–302; Tr. 1111–1113). He told Clontz that the Party "was growing more and more like an iceberg with a tenth of it or a hundredth of it above the surface but the vast majority of it hidden and concealed underground" (R. 303; Tr. 1113). In December 1951, petitioner himself was ordered by the national Party headquarters to go underground (R. 307–308; Tr. 1123, 1126). However, he continued to

serve as Chairman of the Party's Carolina District until at least as late as the time of his arrest under the indictment in this case (see Tr. 1519, 1532).

Government witness Reavis testified that in May 1949 he attended the Jefferson School of Social Science, the Party-operated school in New York City concerning which Clontz also testified (*supra,* pp. 17–18) (R. 320–331; Tr. 1306–1331). Reavis, like Clontz, attended the School at the suggestion of petitioner (R. 320–321; Tr. 1306–1307), who gave him detailed security precautions and instructions as to "where to go in New York, and who I was to call for, and what I was to do in case of an emergency" (R. 322–323; Tr. 1308–1309). At the School, Reavis received further precautionary instructions designed to safeguard his "own security" and the "security of the school" (R. 330; Tr. 1330). For example, the students "were told not to all leave the building as a group," "to go in ones and twos to lunch," to put any books they must carry "in newspapers," not to "talk to people" they lived with, etc. (R. 330; Tr. 1330–1331).

Government witness Childs testified that in October 1950 he was invited by Farash, the Party District Organizer for North and South Carolina, on behalf of petitioner, to become a Party member (Tr. 1578–1579). Two weeks later he was received into the Party, and was assigned by petitioner to work in and try to recruit members for the Labor Youth League (R. 387–388; Tr. 1580–1581, 1584), the Party's youth arm (R. 381; Tr. 1560). Childs purchased from petitioner on this occasion a quantity of Party litera-

ture, including Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 116) (Tr. 1584–1585).

In July 1952, Childs, who was at that time an employee of the Western Electric Company in Winston-Salem, showed petitioner a pamphlet, entitled *Our Own Communists Can Cripple Us,* which the Company had placed in one of its reading racks for its employees to read (R. 392–393; Tr. 1596–1597). Petitioner, after examining the pamphlet, told Childs that "we should keep a list of the authors of these books and shoot them some day" (R. 393; Tr. 1597).

Also on this occasion petitioner urged Childs, who had indicated that he was "planning to return to school",[8] to "stay at Western Electric" and become a "leader among the workers" there (R. 393–394; Tr. 1597). Indicating that the Party was "expect[ing] a crisis" in the near future, when it was thought that "things would * * * come to a head," petitioner told Childs that it was more important from the Party's standpoint that he "remain in the industry" and "gain the road of leadership among the broad mass" of the workers than that he complete his education (R. 393–394; Tr. 1597–1598). In this connection he told Childs that "we did not want the Red Army to have to liberate us, meaning by that * * * that if the Communist Party does not have a broad mass able to lead a broad mass of the people in a revolution, then * * * these leaders of the revolution will be placed in

[8] Childs had been enrolled in High Point College from 1948 to 1950, quitting at the end of his second year to go to work (Tr. 1544). In September 1952, he entered the University of North Carolina, where he was still a student at the time of his testifying (Tr. 1545).

the jail and then it will be necessary for the Russian Army or the Red Army to come to the United States to liberate these leaders" (R. 394; Tr. 1598). "The trade unions," petitioner further told Childs in this conversation, "are the schools of revolution" (R. 395; Tr. 1600).

In August 1952, Childs was selected by petitioner to attend a "Party training school for outstanding cadres in the North and South Carolina and Virginia Districts of the Communist Party" (R. 396–399; Tr. 1603–1605). Petitioner was the director of the school (R. 398; Tr. 1605), which was conducted on the farm of a Party member at Walnut Cove, near Winston-Salem (R. 400; Tr. 1609). The students at the school were subject to strict security precautions (R. 398; Tr. 1605). False names were assumed, and no one was permitted to tell other Party members where he was going, make telephone calls, send or receive mail, or leave the school before it was over (Tr. 398, 400–401; Tr. 1605, 1609).

Childs was instructed by petitioner to bring with him to the school copies of the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213) and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607) (R. 397–398; Tr. 1604–1605). The students were assigned readings in these Marxist-Leninist classics, which were later discussed by the group (R. 403–407, 417; Tr. 1613–1618, 1631–1632).

Among the subjects discussed at the school was "how to Bolshevize" the Party (R. 417; Tr. 1632). Bob Handman, the District Organizer for the Virginia District, led the discussion on "Party building" (R. 424; Tr. 1663). He taught that the role of the

Party is to lead the masses in a "broad coalition" resulting in the "overthrow of the capitalist government" (R. 425; Tr. 1664). One of the weaknesses which prevented the Party from attaining this goal, he said, was the insufficiency of its industrial concentration program, *i.e.,* the program of infiltration of key industries and plants by Party members for the purpose of forming Party cells and controlling the unions in such industries (R. 425–427; Tr. 1664–1667). Nothing was said at the school, Childs testified, concerning any need for the Communist Party to become a "majority party" in order to attain its goal (R. 426; Tr. 1666). Handman, in the presence of petitioner, once gave a demonstration of jujitsu, and also demonstrated "how to kill a person with a pencil" (R. 432; Tr. 1680). Stating to those present that they "might be able to use this on a picket line," he demonstrated a method of thrusting a wooden pencil through a person's chest or throat (R. 432; Tr. 1680–1681).

Petitioner once "arranged a private meeting between the staff of the school and" Childs, the purpose of which was again to emphasize to Childs that, rather than return to college, he should retain his job with Western Electric (R. 429–430; Tr. 1671–1672). The staff pointed out to Childs that "the Party program was industrial concentration" and that it was essential that he "remain in industry" in order to "keep a contact with the broad masses of the people" (R. 430; Tr. 1671).

At a party which was held at the conclusion of the Walnut Cove School, petitioner said that there would

be "socialism" in this country by the time that the "grandchildren" of one of the persons present—who then had children ranging in age from ten to four—were born (Tr. 1674–1675). A feature of the party was a cake with a "great big red star" on it, prepared by the wife of the owner of the farm where the School was held, who remarked at the party that "that would be a good time for the F.B.I. to come in" (Tr. 1673).

In the spring of 1953, at a meeting of a Party Club which Childs attended at the home of a Party member named Betsy Van Camp (Tr. 1689), petitioner accused Betsy of being "confused" about "the purpose of a Communist Party Club" (Tr. 1692). "[T]he Party Club," he said, "is not for just the Bourgeois Revolution but for the ultimate Proletariat Revolution" (*ibid.*).

SUMMARY OF ARGUMENT

I

The membership clause of the Smith Act is valid on its face and as applied in this case. Under the principles enunciated in *Dennis* v. *United States,* 341 U.S. 494, and reaffirmed in *Yates* v. *United States,* 354 U.S. 298, there is no basis for the contention that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as shown by the evidence in this case), advocates the violent overthrow of this Government in the sense of a call to forcible action, it was powerless to proscribe knowing, purposive, active—and here, high-level—membership in such a group from which alone the

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organization derives its power to work towards the accomplishment of its violent objective.

A. *Validity of the clause on its face.*—1. The familiar history which was before the Court in *Dennis*—and see Mr. Justice Jackson's concurring opinion in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 422, *et seq.*—gave solid ground for the judgment of Congress in 1940 that Communist, Nazi, and Fascist organizations were dedicated to principles of force and violence. The years since 1940 have confirmed that judgment. The experience of countries like Czechoslovakia and Poland has tragically demonstrated how minority groups like these, by tactics of infiltration and with the aid of their foreign alliances, can destroy free institutions with a coup when the time is ripe. There has been powerful evidence of Communist Party espionage in this and other countries on behalf of a foreign power. And this threat has been seen to be potent and grave in a time when the constant possibility of lightning war calls for daily vigilance against national disaster, including the wreckage which could be effected by even a small group which seeks to occupy strategic places and which pledges its loyalty to a potential enemy. These harsh realities, sustaining the portion of the Smith Act involved in *Dennis,* equally sustain the portion involved here. For although the charge in *Dennis* was "conspiracy" and the charge here is membership, the danger and the power of Congress to meet it are essentially the same.

2. Petitioner's suggested bases of distinction, with respect to constitutionality, between the "conspiracy"

provisions sustained in *Dennis* and the "membership" clause involved here, have no validity.

(*a*) Like the provisions involved in *Dennis,* the membership clause does not expressly state the element of intent required for conviction. As in *Dennis,* however, it is none the less true "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." 341 U.S. at 499. In *Dennis,* this conclusion followed from the familiar principles that (1) the task of judicial construction is to save, not to destroy, and (2) "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. These principles apply here. There is no merit in petitioner's claim that the Court should refuse to hold intent to be an element of the crime and thereby create a constitutional difficulty.

(*b*) In his effort to show a constitutional difference between the "conspiracy" problem in *Dennis* and the "membership" problem here, petitioner would have membership in the Communist Party or similar totalitarian organizations viewed as a merely passive status, devoid of any action or concert with others. But we deal here with membership in a rigidly indoctrinated and severely disciplined group dedicated to the violent overthrow of the Government—membership coupled with knowledge of the group's purposes and intent to achieve them. As the Court recognized in *Dennis* (p. 511), "rigidly disciplined members subject to call

when the leaders" find the time has come, comprise the obviously essential sinews of the threat against which the Smith Act is directed. Dealing with such knowing members who aim for the Party's unlawful goals, the membership clause neither covers nor threatens passive dupes or innocents who lack the requisite knowledge and intent.

The rule of *Dennis* does not rest, of course, on some special constitutional principle confined to crimes technically designated as "conspiracies." And the fact is that, at least so far the Constitution is concerned, the combination denounced by the membership clause "partakes of the nature of a criminal conspiracy." *Whitney* v. *California,* 274 U.S. 357, 371–372; see *American Communications Assn.* v. *Douds, supra,* at 432 (Mr. Justice Jackson, concurring). Even the important concurring opinion of Justices Brandeis and Holmes in *Whitney* in no way suggests that the membership clause of the state syndicalism statute there involved ("clear and present danger" considerations being satisfied) presented constitutional difficulties; on the contrary, the implications of the opinion are indicative that those Justices perceived no constitutional obstacle to the enforcement of the membership clause in a proper case.

(*c*) The same reasoning disposes of the claim that the membership clause imposes "guilt by association" and is therefore void. The crime punished is not mere "association." It consists in the individual's personal participation in a combination aimed at forcible revolution with knowledge of this end and intent to achieve it. The liability is personal, not

vicarious. It is for conduct, not mere status. It stands on the same constitutional footing as the conduct held punishable in *Dennis*.

B. *Validity of the clause as applied.*—1. If, as we believe, petitioner fails to show that the membership provision should be held void on its face, he certainly fails to show its invalidity as applied to him. It was proved overwhelmingly that the Communist Party teaches and advocates overthrow of the Government by force and violence, that petitioner knew this, and that he personally intended the accomplishment of that objective. Petitioner was shown to be a Party leader in a significant area, teaching and advocating its doctrines and working for their implementation. The fact that he alone could not overthrow the Government does not immunize him. The same was true of the *Dennis* defendants at the time they were convicted. The Party exists and acts only through its leaders and members who will take action when the time is ripe. Congress could strike at the danger the Party poses in the only way it could be reached—through these leaders and members.

2. Petitioner's specific challenges of the clause as applied have no validity.

(*a*) The record fails to support the claim that the trial court misconstrued *Yates* v. *United States,* 354 U.S. 298, as holding that the Smith Act is directed against advocacy of concrete action irrespective of whether the action is of a violent or a non-violent nature. The court's refusal to give the defense's requested instruction No. 7 does not support petitioner's contention, and the instructions which the

court gave, which petitioner does not criticize, were fully in conformity with those approved by this Court in *Dennis* and *Yates* as to the kind of advocacy with which the Smith Act is concerned.

(*b*) The admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, did not render the membership clause unconstitutional as applied. The only way to prove what the Party advocated is by the words and teachings of its leading members, and it would be arbitrary to limit the proof on this issue to the words and teachings of the particular leader on trial or of others uttered in his presence. See also the discussion, *infra,* p. 37, relating to the substantially identical issue of the fairness of admitting such testimony.

(*c*) The contention that the indictment failed to charge an essential element of the offense—*active* Party membership—is without merit. The trial court's charge that the jury, to convict, were required to find that petitioner was an active member of the Party was given (at the Government's request) to guard against the possibility that this Court, while accepting the Government's contention that the membership clause is directed only against active Party members, might hold that the determination of this issue is one which should be made by the jury (rather than by the court, in the same manner that the "clear and present danger" determination is made). See Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957. Our position remains

what it was before in this Court in this case, *i.e.*, that the "activity" factor is a controlling constitutional standard, to be applied by the *court,* by which to test whether the membership clause has been validly applied in a particular case. It is no more an "element of the offense," required to be charged in the indictment, than is the "clear and present danger" factor. That the issue was submitted to the jury as a precautionary measure, to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second, did not have the effect of making this factor an "element of the offense" within the meaning of the rule that the indictment must allege each such element.

II

Section 4(f) of the Internal Security Act of 1950 does not amend the membership clause of the Smith Act so as to exempt membership, with knowledge and intent, in the Communist Party. It provides that membership in a Communist organization shall not constitute "per se" a violation of any criminal statute. But this does not afford the immunity petitioner claims from prosecution under the Smith Act. He was not indicted or convicted for membership "per se", but for membership coupled with knowledge of the Party's purposes and intent to achieve them.

Failing to find the asserted exemption in the statutory language, petitioner fails equally when he seeks it in what he describes as "logic and legislative history" (Pet. Br. 47). The history only confirms that Con-

gress exempted "membership * * * per se" and nothing more. Indeed, the history shows that Congress was particularly concerned with the Communist Party and in no mood to grant its members any immunity beyond that deemed absolutely necessary for purposes of the Internal Security Act. It fully satisfies the asserted demands of logic to conclude that Congress did only what the language it wrote says—that it exempted only "membership * * * per se." Sections 4(a) and 4(c) of the Internal Security Act—covered, like the Smith Act, by this exemption—are similarly not aimed at membership *per se*. In each instance, the exemption functions perfectly well as an aid to interpretation, making certain that mere membership without more is not to be declared criminal.

III

The evidence sustains the verdict.

A. The evidence as to the character of the Party's advocacy of violence meets the *Yates* (354 U.S. 298) standard of a call to forcible action at some future time. The proof shows that the Party engaged in systematic, personal indoctrination—not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which is and has been the Party's ultimate aim and objective. An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the numerous schools and classes and per-

sonal briefing sessions to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. The record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the classes and schools and individual briefings, to advocate to such members and pupils not merely that it would be a good thing if somebody, someday, overthrew this Government by force and violence, but that they take personal part in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Collectively considered, such evidence, much of which directly involved petitioner, constituted the sort of proof which this Court, in *Yates*, referred to as meeting the evidentiary requirements of the Act, *i.e.*, evidence of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action," including the "develop[ment] in the members of the group [of] a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (354 U.S. at 331). The Court has held that the Government need not "wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited," but may take preventive action

when it "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" (*Dennis,* 341 U.S. at 509). The evidence at bar established that the Communist Party was during the indictment period precisely such a group.

B. The evidence is equally clear and sufficient to prove petitioner's unlawful knowledge and intent. Petitioner acknowledges that he was the Party leader in the Carolinas. This alone goes a long way to prove his knowledge of what the Party was about. In addition, however, there was extensive evidence specifically detailing petitioner's own acts and declarations. These revealed clearly his knowledge and endorsement of the Party's objectives.

The same evidence compelled the jury's determination that petitioner personally intended the realization of these objectives. He led the Party in the Carolinas; he taught its doctrines and recruited members; he worked openly and then underground in the Party's cause. While it may be possibly imaginable that a person could bend all his efforts in this way toward a specific goal without intending to reach it, the jury was certainly free to conclude beyond a reasonable doubt that no such hypothetical divergence between conduct and intent existed here.

IV

Petitioner received a fair trial.

A. Petitioner's motion attacking the indictment because of the composition of the grand jury was prop-

erly rejected because (1) it came too late and (2) it was insufficient on its merits.

1. Such a motion must be made before the plea is entered or "within a reasonable time thereafter" when allowed by the trial judge. Failure to present the motion within the prescribed time constitutes a waiver. Rule 12, F.R. Crim. P. Petitioner was given extensions totaling 64 days after his plea in which to present his numerous pre-trial motions. The motion here in question was not made until more than two weeks after the expiration of these ample extensions. There was no suggestion of a reason, and there is none now, for the delay. These circumstances fully warranted the decision that the motion must be denied as untimely.

2. In any event, petitioner's attack on the grand jury which indicted him presents no basis for reversal. Petitioner claims that 28 U.S.C. 1864 was violated in that the Jury Commission could not have known that there were 300 names of qualified persons in the box when the panel here involved was drawn. But the Deputy Clerk testified that there were in the neighborhood of four hundred to five hundred names in the box and that he was "satisfied" that the number was "more than three hundred"; that, based on 70 years' residence, he had a "pretty good knowledge" of the people in the county involved, including their "background and their present status"; and that it had been his experience that the jurors drawn for service had represented a fair cross-section of the community. The testimony further showed that the Clerk never intentionally or systematically excluded any class

or group and that he sought a wide selection of jurors from all walks of life. Special efforts were made to secure women and Negro jurors. The fact that names of prospective jurors were solicited from community leaders and organizations does not vitiate the Jury Commission's action or the indictment. This was not a case like *Glasser* v. *United States,* 315 U.S. 60, where the defect was solicitation of names from a single organization and a consequently improper weighting of the list. See *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414, 427 (C.A. 3); *United States* v. *Dennis,* 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494.

It should be noted, finally, that the method of selection in the district here involved has been changed so as to correct the asserted deficiencies of which petitioner complains. This fact, coupled with the tardiness of the objection and the utter absence of prejudice, makes this a singularly inappropriate case for invoking the supervisory powers of this Court.

B. Petitioner argues that he must be presumed to have been denied a fair trial because Congress, in the Internal Security Act of 1950 and the Communist Control Act of 1954, made findings that the Communist Party aims at violent overthrow of the Government. Because of these legislative findings, it is said, the jury must necessarily be deemed to have been incapable of following the instructions which required that it determine the nature of the Communist Party for itself. But there was no evidence of the bias petitioner would have the Court presume as a matter of law. It was not shown either that the

jurors actually knew of the legislative findings in question or were influenced by them if they did. Petitioner's theory would invalidate every conviction under the Smith Act since 1950 on this ground alone. But the theory, which attacks the verdict on premises inconsistent with the jury system itself, is unacceptable. The suggested possibility of bias could certainly have been explored; it is not a matter to be presumed without proof. Compare *Accardi* v. *Shaughnessy,* 347 U.S. 260, with *Shaughnessy* v. *Accardi,* 349 U.S. 280.

C. The "Jencks" Act's excision procedures (subsection (c) of 18 U.S.C. 3500) are valid, and their application to petitioner's trial did not violate the constitutional prohibition against *ex post facto* legislation.

1. The excision provisions of the "Jencks" Act (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions which do not relate to the subject matter of the testimony of the witnesses) are valid.

(*a*) Assuming *arguendo* that the *Jencks* decision, 353 U.S. 657, is based on constitutional grounds, the statutory excision procedure is fully consonant with *Jencks.* Under *Jencks,* only statements which relate to the subject matter of the witness' testimony need be turned over to the defense. There is no more reason for turning over non-relevant portions of a witness' statement which is relevant in part than there is for turning over a statement which is wholly irrelevant to that subject matter. The defendant is

fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement by the provision of the statute directing that the entire statement be preserved for inspection by the appellate court in the event that the defendant is convicted and appeals. The defense should not be entitled to see a statement of a witness contained in the Government's confidential files in order to determine for itself whether the Government is correct in maintaining that the statement, because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

(*b*) In any event, the *Jencks* decision proceeded, not on constitutional grounds, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (emphasis added) (*Gordon* v. *United States*, 344 U.S. 414, 418, which decision *Jencks* followed and explained).

2. The question of the validity of the "Jencks" Act's definition of "statement" (subsection (e)) does not arise on this record because the *Jencks*-type materials which were in fact turned over to the defense were not limited to statements of the type defined in subsection (e), but (subject to the excision of non-relevant material) included everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition.

3. The contention that the application of the "Jencks" Act to petitioner's trial violated the consti-

tutional ban on *ex post facto* legislation because his offense preceded the Act is unavailable because made for the first time in this Court. It is in any event without substance. The excision procedures of the Act—the only provisions of which petitioner can complain—are wholly consonant with *Jencks,* and so did not alter (certainly not in any substantial sense) previously-existing law as interpreted in *Jencks.* Accordingly, no *ex post facto* question arises. But even if it be assumed that the excision provisions of the Act effected a change in previously-existing law, the change was, at most, one relating "to modes of procedure only, in which no one can be said to have a vested right," and which, accordingly, Congress may "regulate at pleasure" (*Hopt* v. *Utah,* 110 U.S. 574, 590).

D. Evidence petitioner attacks as inadmissible was relevant and otherwise competent.

1. It was proper to receive evidence as to the nature and character of the Communist Party which was not directly linked to petitioner. The first element to be proved in a "membership" case is that the group or society was one which taught and advocated the forcible overthrow of the Government. To limit such proof to acts and statements of the particular individual charged (or done or uttered in his presence) is unacceptable because the group's character cannot be established solely by proof of the acts and statements of an individual in isolation.

2. The "three documents * * * relating to the Korean War" (Pet. Br. 65) of which petitioner complains were admissible in the trial judge's discretion

to show that the Party seeks unceasingly to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. Such evidence, which was directly linked to petitioner, tended to show that the Party is a serious *action*-organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup.

3. The evidence that the Party teaches that the Negroes in this country's so-called "Black Belt" should be regarded as an oppressed nation with the right of self-determination was admissible because this teaching was shown to be a basic part of the strategy and tactics of the proletarian revolution which the Party advocates. Petitioner himself was shown to have related the "Black Belt" and "Negro nation" concepts to the Party's program of violent revolution.

ARGUMENT

I. THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE

We recognize, with the petitioner (Pet. Br. 15), that constitutional issues are to be reached last, not first. However, petitioner begins his argument with the Constitution, and we accept his arrangement of points for the convenience of the Court. We submit that this case is substantially controlled on the constitutional issues by the principles enunciated in *Dennis* v. *United States,* 341 U.S. 494, and reaffirmed

in *Yates* v. *United States,* 354 U.S. 298.[9] Petitioner has failed in his effort to show that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as established by the evidence in this case, see *infra,* pp. 75–85), advocates the violent overthrow of the American Government in the sense of a call to present or future forcible action, it was powerless to proscribe knowing, purposive, active—and here, high level—membership in such a group from which alone the organization derives its power to work towards the accomplishment of its violent objective.

A. VALIDITY OF THE CLAUSE ON ITS FACE

1. Reviewed at length in *Dennis,* and long familiar to the Court in any event (see, *e.g.,* Mr. Justice Jackson's opinion in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 422 *et seq.*), the extensive knowledge of totalitarian threats on which Congress has acted scarcely requires lengthy rehearsal here. As the Court knows and everyone knows, it was clear by 1940, when Congress wrote the Smith Act, that the Communist, Nazi, and Fascist movements, armed with

[9] In *Yates*, the convictions were reversed, but on grounds not relevant to the present issue. *Yates* did not weaken the authority of the *Dennis* case but adhered to and reaffirmed the principles underlying that decision (see *Yates*, 354 U.S. at 300, 320–327). *Yates*, in presently pertinent part, held that the kind of advocacy condemned by the Smith Act (as sustained in *Dennis*) is advocacy of violence in the sense of a call to action (now or in the future), as distinguished from advocacy of violence solely as an abstract principle. We argue *infra*, pp. 75–85, that the evidence in this case as to the character of the Communist Party's advocacy of violence fully meets the *Yates* standards.

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modern techniques of subversion and infiltration, posed grave threats to democratic governments the world over. To focus only on the Communist Party, which is involved here, Congress had before it voluminous evidence that the Party's members had at least divided loyalties,[10] and that the Party was under the firm, direct control of the Communist International, and, through it, of the Soviet Union.[11] From the testimony of Earl Browder and Benjamin Gitlow and from a great mass of documentary evidence, Congress could reasonably conclude that both the Communist International and the Communist Party of the United States were devoted jointly to a program of establishing socialism through the medium of violent revolution.[12]

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[10] See, for example, the testimony of William Z. Foster, Chairman of the Communist Party of the United States, before the House of Representatives Special Committee To Investigate Communist Activities in the United States, 1930–1931, in which Foster stated that the "more advanced workers" in this country look upon the Soviet Union as "their country" (Hearings, Part I, Volume 4, pp. 384, 385).

The evidence in this case makes it clear that this situation was not limited to the 1920's and 1930's. In 1950, petitioner told the witness Clontz that American Communists looked to the Soviet Union as their "mother country," whose help they would have the benefit of "when the revolution started" (*supra*, pp. 15–16).

[11] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Congress, 1st sess., pp. 4308–4311, 4432, 4671.

[12] See, *e.g.*, the statement of Representative McCormack of Massachusetts:

"* * * We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the

Events following 1940, both prior to and since the *Dennis* decision, have served to make the Communist threat clearer and more serious and to confirm the judgment on which Congress proceeded in the Smith Act. Immediately following the collapse of Nazi Germany, Soviet troops occupied Poland, Czechoslovakia, Hungary, Bulgaria and Rumania. In each of these countries a new government was established consisting of a coalition of parties, and in each of these countries the Communists were a minority party. In each case the Communists secured control of the Ministry of the Interior—control of the police—and gradually assumed power through the oppressive use of the police and pressure exerted by the Soviet Union.[13]

special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. Therefore, a Communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at, and the Government should have the burden of proving that a person 'knowingly or wilfully' advocates the overthrow of government and is 'knowingly or wilfully' a member of an organization that believes in the ultimate overthrow of our Government." [84 Cong. Rec. 10454]

[13] Poland—15 State Dept. Bull. 422; 16 State Dept. Bull. 299.

Rumania—15 State Dept. Bull. 1057; 17 State Dept. Bull. 38, 329, 995; 18 State Dept. Bull. 216; 20 State Dept. Bull. 450, 692, 755.

Hungary—16 State Dept. Bull. 495, 583, 1215; 17 State Dept. Bull. 392, 411; 20 State Dept. Bull. 450, 556, 692, 697, 755.

Bulgaria—16 State Dept. Bull. 1218; 17 State Dept. Bull.

Recent history demonstrates also that Communist Parties in various countries have provided an extensive network of espionage on behalf of the Soviet Union. Canada discovered the existence of a Soviet espionage ring in 1946,[14] Australia in 1954, when Vladimir Mikhailovich Petrov left the service of the Soviet Union and was granted political asylum in Australia.[15] That a similar network of espionage has existed in the United States and elsewhere seems unquestionable from the testimony of such persons as Whittaker Chambers[16] and Elizabeth Bentley,[17] from the case of Klaus Fuchs in England,[18] and from the *Rosenberg* and *Abel* (No. 263, this Term) espionage trials in this country.

In a word, contemporary history compellingly supports the opinion of Mr. Justice Jackson in *American Communications Assn.* v. *Douds,* 339 U.S. at 425, 429, in which he said:

429, 481, 531, 702; 19 State Dept. Bull. 447, 710; 20 State Dept. Bull. 450, 556, 692, 755.

Czechoslovakia—18 State Dept. Bull. 304, 446, 536.

[14] *Report of the Canadian Royal Commission,* which was issued after a thorough investigation by a commission of two Canadian Supreme Court Justices.

[15] *Report of the Royal Commission on Espionage* of the Commonweath of Australia, published in 1955.

[16] Hearings before the House Committee on Un-American Activities Regarding Communist Espionage in the United States Government (1948), pp. 1429–1449.

[17] Hearings, *supra* fn. 16, pp. 503–562.

[18] The text of Fuchs' confession is partially reproduced in the *New York Times* for February 11, 1950, p. 2.

1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.* * * *

* * * * *

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup dé'tat,* terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and by the same tutors. [Italics in the original.]

The familiar dangers with which Congress, in enacting the Smith Act, concerned itself become greatly magnified in times of grave national crises. The serious threat under which free nations of the world must live today is, through force of necessity, receiving more and more recognition. Since 1955, the Executive Branch of the Government has conducted annual nation-wide Civil Defense exercises to help

insure the country's preparedness in the event of a hostile attack.[19]

The exercises in preparation for possible large-scale nuclear attacks are designed to cope with the problems arising "in a period of 'heightened international tension and deteriorating international relations.' "[20] It requires no lively imagination to com-

[19] In July 1956, following a mock hydrogen bomb attack, the test was carried out on the assumption that planes had dropped bombs and submarines had fired guided missiles on targets consisting of 63 cities, nine air bases, and four Atomic Energy installations. In the New York City area alone it was assumed, for purposes of the test, that five imaginary one-megaton bombs were dropped, inflicting about six million casualties. Ten thousand key operating personnel were required to evacuate Government departments in Washington and travel to 65 relocation centers. *New York Times*, July 20, 1956, p. 1, and July 21, 1956, p. 1. The 1957 exercise assumed a mock attack in which 175 hydrogen bombs were dropped on 162 American cities. The blast of a single twenty-megaton bomb in the New York City area alone, equivalent in destructive power to 20,000,000 tons of TNT, was estimated to have resulted in over six million casualties, without considering the bomb's radioactive fallout propensity. This test similarly entailed a theoretical mass evacuation of thousands of Government employees to relocation sites. *New York Times*, July 13, 1957, pp. 1, 3, July 14, 1957, p. 8, and July 20, 1957, p. 6. The 1958 Operation Alert concentrated on the recovery phase, as opposed to the immediate attack and post-attack phases, of a supposed continental nuclear attack. Again, there was a hypothetical evacuation of thousands of key Government officials and their staffs from Washington to relocation centers for the purpose of resuming governmental functions. *New York Times*, February 20, 1958, p. 4, July 15, 1958, p. 7, and July 17, 1958, p. 13.

[20] *New York Times*, July 7, 1957, p. 9. Current world events of which this Court may well take judicial notice—events associated with such places as Lebanon, Quemoy, and Berlin—reflect, unfortunately, no recent improvement in these international relations or relaxation of such tension.

prehend the danger that would be presented to the national security in a time of disaster by an organization consisting of thousands of highly disciplined, tightly organized, adherents whose doctrines are ideologically attuned to the aggressor nation and who have been located in key positions for revolutionary purposes. And so the danger to which Congress and the Executive have found need to address themselves must be and has been appraised in terms of the lightning speed of modern warfare. Doctrines of infiltration into strategic places and readiness to aid a foreign power's assaults, familiar and central features of the Communist program, cannot be weighed on outmoded assumptions which consider only the threat of the Party by itself in a "normal" world. The threat is not the less real, large, or potentially disastrous for the fact that no one can predict for sure when or if the preparation will eventuate in a direct and violent assault on our security and institutions.

2. Recognizing the solid factual basis on which Congress acted (see, *e.g.*, 341 U.S. at 510–11), this Court, in *Dennis,* concluded (p. 516) "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 * * *." That conclusion and the premises on which it rests govern this case. To be sure, we are concerned here specifically with the "membership" provision whereas the convictions in *Dennis* were for conspiracy (1) to organize the Communist Party as a group of persons who teach and advocate overthrow

of the Government by force and violence and (2) knowingly and willfully to advocate and teach the duty and necessity of such overthrow. 341 U.S. at 497. And so the present petitioner has undertaken to show that, though Congress could strike at the Communist conspiracy in its inception, it lacks power to reach the forged weapon by punishing those who constitute it when they become and remain members of the Party, knowing its purposes, intending their achievement as speedily as possible, and supplying in this way the force by which such achievement is sought. For this view, petitioner argues (a) that it is "at least doubtful" that a requirement of personal intent may be found in the membership clause though such intent was found to be a requisite in the *Dennis* provisions, and this lack invalidates the statute (Pet. Br. 25, fn. 30);[21] (b) that there is a constitutional difference between the evil of the conspiracy in *Dennis* and the evil of the membership involved here, because the individual as a member lacks the strength and may lack the intent to overthrow the Government (Pet. Br. 20–24); and (c) that the membership clause punishes mere association and imposes "guilt by association" (Pet. Br. 27–28). These arguments, largely ignoring the factual realities which concerned Congress and are revealed in the record here, fail

[21] Petitioner's "doubt" on this question represents a retreat from his position on this point as expressed in his prior brief in this Court. There he argued, affirmatively, that intent "should not be read by implication into [the membership] clause" (Pet. Br., No. 29, Oct. Term, 1956 [No. 3, Oct. Term, 1957], p. 17).

utterly to warrant the proposed constitutional distinction between this case and *Dennis*.

(*a*) *Intent*—As in the portions of the Act considered in *Dennis*, the membership clause does not state expressly the requirement of personal intent. In *Dennis*, following the familiar principle that judicial construction of statutes should save rather than destroy, it was held "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." 341 U.S. at 499. It was recalled there that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. That ruling, with its salutary reasons, is squarely apposite here.

Directly contrary to this Court's reminder "that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution" (*Dennis*, 341 U.S. at 501), petitioner here contends that, in contrast to *Dennis*, it is "at least doubtful that intent may be read by implication" (Pet. Br. 25, fn. 30) into the membership clause. The effort, we think, has been sufficiently refuted. The principles of constitutional adjudication and criminal jurisprudence which required intent as an element in *Dennis* require it no less here. It is no answer to suggest, in a curious insistence on creating constitutional infirmities, that conspiring to organize the Party and teach and advocate its unlawful objectives (*Dennis*) necessarily en-

tails intent to achieve these objectives, while membership in the Party does not (Pet. Br. 23–24). At most, the suggestion could mean that in certain imaginable cases, not the one here, membership might be proved without showing the requisite intent. It by no means follows that the courts should strain after constitutional difficulty by rejecting the natural conclusion that intent is an element of the crime the statute denounces.

(*b*) *"Membership"*—Pervading petitioner's constitutional arguments is the premise that membership in the organizations against which the Smith Act is directed—with knowledge of their purposes and intent to achieve them—is a merely passive status, connoting neither actions nor declarations, amounting only to a harmless and constitutionally protected form of peaceful assembly. *Dennis* was different, the argument runs, because the crime there was a "conspiracy" and conspiracy—being active and "at work"—stands on a wholly different constitutional footing from "membership." The argument could stand only if "membership" and "conspiracy" were no more than lifeless abstractions and isolated dictionary terms, divorced from their context in the Smith Act and from the evils to which the Act is directed.

The fact is, however, that the "membership" against which this statute is directed is not passive membership in a literary society but (1) active membership in an organization teaching or advocating the Government's violent overthrow, (2) with knowledge of the organization's purpose and (3) a

personal intent to accomplish that purpose. The familiar teachings of recent history, reflected in this case and so many others, show that the membership in question, unlike membership in a club or political party, entails rigidly disciplined adherence to and labors for the organization's unlawful objectives. Thus, in rejecting the constitutional attacks presented in *Dennis,* this Court noted as an essential and integral element of the "highly organized conspiracy" its "rigidly disciplined members subject to call when the leaders * * * felt that the time had come for action * * *." 341 U.S. at 511. Similarly, Mr. Justice Jackson wrote in *American Communications Assn.* v. *Douds,* 339 U.S. 382, under the topic heading, *"Every member of the Communist Party is an agent to execute the Communist program"* (p. 431), that (p. 432):

> Membership in the Communist Party is totally different [from membership in lawful political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. * * * Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.
>
> Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume

> such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program.

It was against membership of this now familiar kind that Congress directed the Smith Act. Expressing the frequently reiterated understanding of the Congress, Congressman McCormack said during the consideration of the bill which became the Act (84 Cong. Rec. 10454):

> A Communist is one who "knowingly or willfully" is committed to a movement which has as its objective the ultimate overthrow of government by any means legal or illegal, or a combination of both. We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual official records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. * * *

Against the background of the realities with which Congress was concerned in the Smith Act there is no meaningful place for the suggestion that the member-

ship clause must be held invalid on its face because, read only as a bare collocation of words without a context, it *could* reach the "entirely passive" member who attends no Party meetings and has no "Party contacts or activities" of any kind (Pet. Br. 24–25). Certainly, there has been no effort to prosecute such an individual in the case before the Court or in any other. This is clearly not such a case, as the jury necessarily found in arriving at its verdict.[22] And the hypothetical possibility is—to paraphrase *Dennis*—"particularly nonpersuasive when presented by [petitioner], who, the jury found, intended to overthrow the Government as speedily as circumstances would permit" (at 515).[23] In any event, the possibility is in fact only imaginary when it is considered in the light of what Congress justifiably believed and sought to guard against when it wrote the Smith Act. Sensibly read, the language negatives any basis for fearing that the innocent or the duped may be ensnared.[24] It is

[22] See *infra*, pp. 64–68.

[23] The quoted language was used in rejecting a claim that the Smith Act, as construed, was objectionably vague.

[24] The situation is thus very different from that which existed in *DeJonge* v. *Oregon*, 299 U.S. 353, where the indictment was brought under an Oregon statute making it a crime "to preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism." Since it was held that the statute was so broad in its scope that it could reach individuals who were not themselves members of the Communist Party or familiar with its purposes, the Court found the statute unconstitutional on its face with the observation (p. 362) that "peaceful assembly for lawful discussion cannot be made a crime."

Similarly unhelpful to petitioner is *Herndon* v. *Lowry*, 301

directed only at those who, with full knowledge of the organization's unlawful purposes, lend it their "aid and encouragement" and add to its strength by their active membership, thereby making themselves "party to the unlawful enterprise in which it is engaged." *Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C.A. 4), certiorari denied, 344 U.S. 922. Finally, if a prosecution should be brought against a passive member who does not fall into this category, the courts could strike down the conviction as constitutionally invalid—just as they would strike down a conviction if not satisfied of the presence of a "clear and present danger." See *infra*, pp. 64–68.

It seems clear, then, that the applicability of the *Dennis* ruling is not to be escaped by the effort to assign to the "conspiracy" there a constitutional significance which disappears wholly from the tightly interrelated "membership" now before the Court. We submit, on the contrary, that if, as *Dennis* establishes, Congress can proscribe the teaching and advocacy of violent overthrow of the Government and can proscribe the organizing of a group for such purpose, it can equally prohibit active membership in such a group—particularly high-level member-

U.S. 242, where, reversing a state conviction for an attempt to incite to insurrection by violence, decision went "on the ground that the Fourteenth Amendment prohibited conviction where on the evidence a jury could not reasonably infer that the defendant had violated the statute the State sought to apply." *Dennis*, at 538 (Frankfurter, J., concurring). There, though the defendant had solicited members for the Communist Party, the defect was a lack of proof "that he had urged or even approved those of the Party's aims which were unlawful." *Ibid.*

ship—coupled with knowledge of the purpose and a specific intent to accomplish it as speedily as possible. Indeed, insofar as the problem of conspiracy has a role in sustaining the power of Congress to act, it is scarcely less present here than it was in *Dennis,* where the specific term "conspiracy" described the crime. For, as Mr. Justice Jackson said in the opinion quoted earlier, "ordinary conspiracy principles" are plainly relevant to membership in an organization where membership entails such tightly disciplined, quasi-military, deeply conspirational activities as those of the organizations against which the Smith Act is directed. *American Communications Assn.* v. *Douds, supra,* at 432. Such membership obviously partakes of the concert-of-action, combination, and acting-together which characterize conspiracy. As observed by the court below (R. 459):

> [M]embership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. * * * [H]e who joins [such a group] with open eyes becomes a party to all that he sees.

These views, rendered more compelling by the experience of the intervening years, merely echo what this Court said thirty years ago in the comparable, though measurably less acute, circumstances of *Whitney* v. *California,* 274 U.S. 357, 371–372:

> The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired

> ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. * * * That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear.

To be sure, what the Court said in *Whitney*—and has never repudiated—must be read with the weighty concurring opinion of Justice Brandeis, joined by Justice Holmes. But at this juncture the significant fact about that opinion is precisely that it was a concurrence, joining in affirmance of the conviction. The state statute there punished membership, as does the provision here, and the information charged, in the conjunctive, the organizing of, and knowing membership in, the organization there involved. Justice Brandeis' opinion was concerned with "clear and present danger" considerations. After pointing out that Miss Whitney had failed to raise the clear and present danger issue at her trial, Justice Brandeis said that if she had done so, and if the issue had been resolved in her favor by a finding on the part of the court or jury that the requisite danger did not exist (the Justice indicated that a finding that such danger did exist might well have been supportable), he would have voted to reverse; it was only because that issue had not been raised that he voted to affirm, and so concurred in the result. But the significant point about the concurring opinion for present purposes is that it did not distinguish between the organizing and membership clauses of the information, or in any way

indicate that violation of the membership provision of the statute would not have been constitutionally punishable provided the clear and present danger test was met. There is nothing in the opinion to suggest that a statute denouncing "membership" as a crime is, as petitioner urges, void on its face; on the contrary, the implications of the opinion are quite to the contrary.

Thus, both opinions in *Whitney* help to refute the claim that, in the teeth of *Dennis,* upholding the closely related conspiracy provision, the membership clause of the Smith Act may be held void on its face. In itself, the particular word "conspiracy" is obviously not the key to the constitutional problem. Insofar as there is importance in the nature of the public dangers to which "conspiracy" may be a shorthand reference in the Smith Act context, the same factual judgments by Congress which sustain the conspiracy provision of the Act defeat the contention that the companion membership clause is void.

(*c*) *"Guilt by association"*—The considerations just discussed dispose equally of the claim that the membership provision is invalid because it creates a crime involving only "guilt by association." The defendant convicted under this provision is, in the words of petitioner's brief (p. 27), "held criminally liable only for his own conduct, or for the conduct of others in [a] form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants." There is no force in petitioner's subsequent observation (*ibid.*) that " 'Membership' is not

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such a recognized combination." For the fact is that the kind of membership at which the Smith Act strikes—active, knowing, purposive—is precisely such a combination, long recognized by Congress and by all the world. And the only question is whether, having recognized it, Congress was powerless to act against it. The *Dennis* case answers that question, and the square applicability of the answer here is not obscured by the facile claim that the membership in issue amounts only to "guilt by association." "Guilt by association" connotes personal innocence and unawareness. That term cannot be used to describe active membership in a group such as the Communist Party, with full knowledge of its unlawful aims and the personal intent to bring them about. See also *infra*, pp. 64–68, 85–88.

B. VALIDITY OF THE STATUTE AS APPLIED IN THIS CASE

1. If, as we have urged, the membership provision is valid on its face, there can be little doubt that it could be and was constitutionally applied in this case. Viewing the indictment alone, and building upon his factually groundless premise that the membership in question is a merely passive "status," the petitioner says (Pet. Br. 24) that "[f]or all that appears from the indictment * * *, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members." It might as well be said that a man who spent his career in the Navy never met another sailor. The answer is, of course, that the in-

dictment does not charge "membership" as a bare, general abstraction applicable both to a garden club and to Murder, Incorporated, but a particular membership—membership in "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 as speedily as circumstances would permit" (R. A2), and membership coupled with full knowledge of the group's aims and intent to accomplish them "as speedily as circumstances would permit" (*ibid.*). The indictment describes considerably more than a mere "status (membership) and state of mind" (Pet. Br. 24). It charges, as we have shown, that petitioner joined himself with an unlawful combination which Congress could validly proscribe as a whole and in its constituent parts.

Turning from the indictment to the proof, the validity of the statute's application becomes even clearer. The evidence, reviewed elsewhere (*supra,* pp. 6–23; *infra,* pp. 75–88, 121–139), demonstrated clearly that the Communist Party—wedded to doctrines of violent revolution, tightly controlling and indoctrinating its members—teaches and advocates the forceful overthrow of the Government. It was proved beyond doubt that petitioner fully understood, supported, and intended the achievement of the Party's ends; that he was no mere innocent or trivial underling, but a *leader* in the organization with control over a significant area; and that he engaged aggressively in the Party activities his active membership and leadership entailed. The proof fully sustained both the jury's verdict and

the trial judge's finding of the existence of "clear and present danger."

The considerations which answered the clear-and-present-danger argument in *Dennis* apply here as well. Petitioner is, of course, correct when he states (Pet. Br. 22–23) that neither he nor any other individual has power to overthrow the Government by force. But it was no less clear in *Dennis* that the Party as a whole, with those who conspired to organize it—without the events they anticipated—lacked such power currently or for at least the near future. (But cf. pp. 41–45, *supra,* recalling the experience of countries like Poland and Czechoslovakia and the nature of the Party's infiltration program which, at least today and for the foreseeable future, makes the danger presented by the Party a threat capable of calamitous realization). *Dennis* teaches, however, that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." 341 U.S. at 509. The power which entitled Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way the Party can function and be reached—through its members. The fact that each member in isolation, even a leading member, may seem insignificant cannot bar Congress from dealing with the "ingredients of the reaction * * *." *Dennis,* at 511. Just as the Nation's commerce may be protected by dealing with individual instances which taken alone lack consequence (*e.g., Polish National*

Alliance v. *National Labor Relations Board*, 322 U.S. 643, 647–648), the Communist Party's threat to the national security may be reached through the members who comprise it, at least where those members have the active purpose to help the Party achieve its unlawful objective. Such members will either be the leaders who undertake to launch violent action when "the circumstances permit", or the indoctrinated followers who will readily and enthusiastically answer the call (*Dennis*, at 509, 511). Petitioner was the Party leader in the Carolinas, a "rigidly disciplined" member of the conspiratorial group, and the one most likely to plan and carry out the Party's unlawful objective in that area.

2. Petitioner argues, however, that, as applied in this case, the membership clause is unconstitutional because, allegedly, (a) the trial court erroneously construed the *Yates* holding (354 U.S. 298, 312, 320) as to the nature of the advocacy, or "incitement," properly punishable under the Smith Act (Pet. Br. 33–39), (b) the admission, as part of the Government's proof of the nature and character of the Communist Party, of testimony of persons (former Party members) who did not have any knowledge of petitioner or of his Party activities rendered the "metes and bounds of the Smith Act, in terms of guilt or innocence," so "vague and far-reaching" as to be violative of due process as well as the First Amendment (Pet. Br. 39–41), and (c) the indictment failed to charge an essential element of the offense (Pet. Br. 41–44). We submit that none of these contentions has merit.

(*a*) After adverting to the fact that under the standards of proof laid down by this Court in the *Yates* case, 354 U.S. 298, "advocacy of forcible overthrow is punishable under the Smith Act only (354 U.S. at 312, 320) if the advocacy is of such a nature as to 'incite' persons to take 'concrete action for the forcible overthrow of government'" (Pet. Br. 33), petitioner argues (Pet. Br. 33–39) that "the prosecution and the court put an erroneous construction on this requirement" (Pet. Br. 33). "The prosecution saw only the words 'concrete action,'" says petitioner, "and ignored or overlooked the qualifying phrase 'for the forcible overthrow of government.' As a result, the prosecution took the position that proof of Communist Party incitement to action of *any kind* would be relevant to the case and sufficient to meet the standard of proof prescribed in the *Yates* case" (Pet. Br. 33–34; petitioner's emphasis). That the court shared this misconception, the argument concludes, is evidenced by the fact that it refused to give a defense-requested instruction (No. 7, R. A33–A34) that "the 'action for the forcible overthrow of the government' referred to in the *Yates* case does not include constitutionally protected activities such as speaking, publishing, or writing letters to public officials, unless those means of public persuasion are used to advocate forcible overthrow of the government" and that "the defendant could not be found guilty 'if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of

American citizens those opinions may be'" (Pet. Br. 35–36).

We submit that, while one of the prosecuting attorneys at the trial (there were four) did, at one point in the trial proceedings, use language (R. A9, quoted at Pet. Br. 34 and *infra,* p. 62) which suggests that he may have misinterpreted the nature of the incitement-to-action type of advocacy which this Court, in *Yates,* held to be the sort of language prohibited by the Smith Act, the record is clear that the court entertained no such misconception and—what is most important—did not by its instructions and refusals to instruct, as petitioner maintains, permit the jury to base a finding of guilt on the basis of any such erroneous conception.

The Government attorney's remarks were made extemporaneously in the course of oral colloquy with the court as to the admissibility of a certain issue of a newspaper, *The Textile Workers' Voice* (G. Ex. 62 for identification), which the Communist Party published in North Carolina and copies of which were furnished by petitioner to witness Clontz (R. A7; Tr. 1132–1133). One of the articles in this paper, entitled *The Atlantic Pact,* was a vituperative attack on the "treaty called The Atlantic Pact," including a charge that, whereas "the Taft-Hartley Act * * * uses police, soldiers and courts against American workers," the "Atlantic Pact wants to use atom bombs against the workers of the whole world" (R. A8–A9). The article concluded with an appeal to readers to write to their Senators and "tell them to vote this war pact down" (R. A9). On objection and motion

to strike by defense counsel, the court asked government counsel, "How is that relevant * * *?" (*ibid.*). Government counsel made the following reply, which is the basis of petitioner's contention (*ibid.*):

> If Your Honor please, * * * it is directly linked to the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. "Write to your Senators." It expresses the desire of the Communist Party, and we think the language itself is inciting to action.

The court's response to the foregoing, which petitioner neglects to mention, was as follows (Tr. 1137–1138):

> I think that it is connected with the defendant all right, *but I do not see that it has any relevancy to the subject matter of the case.*
>
> *I think the motion should be sustained.* [Emphasis added.][25]

There is thus no basis for petitioner's contention that the trial court erroneously construed the *Yates* decision with respect to the meaning of language which "incites to action." The court's refusal to give the defense's requested instruction No. 7 (*supra*, pp. 60–61), which petitioner cites as proof that the court

[25] Later in the proceedings, after intervening colloquy, the court took under advisement the admissibility of the particular exhibit in question and some six others (R. A13–A14; Tr. 1676–1677, 1705). The court thereafter excluded four of the exhibits, including that which gave rise to the quoted colloquy, and admitted the others (R. A18). The admissibility of the latter is treated *infra*, at pp. 116–119.

misconstrued *Yates* on this point, in no way indicates what petitioner suggests. This instruction was refused because, as the court remarked, "it in effect selects certain portions of the evidence" (Tr. 1937)—contrary to the court's determination not to discuss specific aspects of the evidence in its charge. But the thorough and careful instructions which were given were fully in conformity with those approved by this Court in *Dennis* (341 U.S. at 511–512) and more recently in *Yates* (354 U.S. at 326) as to the kind of advocacy at which the Smith Act is directed, and, in effect, included the substance of the defense's requested instruction No. 7 (R. A37–A40).[26] Accordingly, petitioner's argument on this point cannot be accepted.

(*b*) Petitioner also urges that the admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, rendered the membership clause unconstitutional as applied. This contention is answered in substance at pp. 113–116, *infra,* where we reply to the argument that the admission of such testimony deprived petitioner of a fair trial. In summary, our point is that (a) the only way to prove what the Party advocated is by the words and teachings of its leading members; (b) the Party is a tightly-knit, well-disciplined group, not a loose, amorphous society; (c) petitioner was a Party leader, active and knowledgable; and (d) he was shown to have the necessary un-

[26] Petitioner, significantly, makes no complaint concerning the instructions which were given.

lawful intent. In these circumstances, it was appropriate, fair, and valid to admit the testimony of the former Party members.

(*c*) The contention that the indictment failed to charge an essential element of the offense is likewise without merit. The argument is that the Government, in order to save the membership clause from being declared void on its face by this Court, has injected a new element into the offense defined by that clause—an element specified neither in the language of the statute nor in the indictment—and prevailed upon the trial court to require the jury, in order to convict, to find this element to be present in this case; it follows, says petitioner, that he has been convicted of an offense with which he has never been properly charged (Pet. Br. 41–44).

It is true that the trial court, at the Government's request, charged the jury that they were required to find that petitioner's Party membership (in addition to being coupled with the requisite knowledge and intent) was an "active" membership (defined as one entailing the devotion of "all, or a substantial part, of [one's] time and efforts to the Party," as distinguished from a mere "nominal, passive, inactive, or purely technical membership" (R. A41)). It is also true that this so-called "activity" factor is not mentioned explicitly in the statute or the indictment. But it does not at all follow that petitioner has been convicted of an offense with which he has not properly been charged.

Following this Court's restoration of the prior appeal in this case (and the *Lightfoot* case) to the

docket for reargument (353 U.S. 979), and before the Court's reversal and remand of those cases because of the production-of-documents errors (*Scales* v. *United States,* 355 U.S. 1; *Lightfoot* v. *United States,* 355 U.S. 2), the Government filed a supplemental memorandum in this Court the purpose of which was "(1) to clarify some aspects of our argument at the last term on the constitutional issue, and (2) without in any wise abandoning our position that the membership clause has been properly and validly applied in these cases, to present certain suggestions as to the disposition of the cases should that position not be wholly accepted by the Court" (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 2–3). We pointed out that, in defending the validity of the membership clause on its face, and as applied in those cases, we had urged that the clause does not apply to "a merely passive status," but solely to "active membership" in a society of the type defined in the Act, with the requisite knowledge and intent (*id.,* p. 3). We further pointed out that, since neither jury had been specifically instructed that a finding of such *active* membership was requisite to conviction, there was implicit in our argument the idea that the determination that the membership be of an active quality was not required to be made by the jury, but could be made by the trial court—in the same manner that a finding of the existence of a "clear and present danger" is one which is properly made by the court (*ibid.*). We emphasized that we were *not* suggesting that the "activity" factor was to be considered "an element of

the crime established by the Smith Act, to be proved in addition to" membership, knowledge, and intent, but, rather, that it was a "controlling constitutional standard by which to test whether the membership clause of the Smith Act has been validly applied in a particular case" (*id.*, pp. 3–4).[27] In recognition, however, of the possibility that the Court, while accepting our position that only *active* membership is punishable under the Act, might be of the view that the determination of whether the membership is or is not of an active quality is for the jury to decide, we suggested that it would be desirable for this Court to give guidance to the trial courts as to the contents of a proper instruction (*id.*, p. 5) and set forth what

[27] As we said in our Supplemental Memorandum, statutorily the crime is fully proved by sufficient evidence of membership, knowledge, and intent, but the "activity" test then determines whether the conviction can be allowed to stand under the Constitution. Just as the finding of "clear and present danger" is not an integral element of the various offenses under the Smith Act, but an external constitutional limitation on the validity of convictions under the Act which are otherwise proper, so the factor of "activity" plays the same limiting role with respect to the membership clause.

For this reason—that the "activity" factor is not an element of the offense but an overriding constitutional test—the determination of "activity" is not for the jury but for the court, on the basis of its own evaluation of all the evidence adduced by both sides. With respect to this determination, as well as for the "clear and present danger" finding, "[t]he question * * * 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. * * * Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide" (*Dennis* v. *United States*, 341 U.S. at 514–515).

we thought would be an appropriate charge on the point (*id.*, pp. 6–7).

As previously noted, the Court thereafter, without hearing reargument, remanded the cases to their respective Courts of Appeals solely on account of the production errors. Although the Court, in remanding, was silent with respect to the subject matter of our Supplemental Memorandum, the trial court, at the re-trial of the instant case, incorporated (at the Government's request) the substance of our suggested charge in its instructions to the jury (R. A41). The reason for the Government's request and for the court's acquiescence is thus clear: to guard against the *possibility* that this Court might hold such a charge necessary to a valid conviction under the membership clause. We have never thought the inclusion of such a charge was *necessary,* and do not now.[28] Our request was purely a precautionary measure, designed to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second; our primary position remains what it was before—that the "activity" factor is a controlling constitutional standard, to be applied by the *court,* by which to test whether the membership clause has been validly applied in a particular case.

In the light of these circumstances, we submit that

[28] Unlike petitioner (see Pet. Br. 42, fn. 44), we fail to see any inconsistency between the Government's action at the trial in requesting the charge on "activity" and its argument in the Court of Appeals that the instruction was "unnecessary," and, in the light of the circumstances as outlined in the text, submit that there is none.

there is no substance to petitioner's claim that the Government and the trial court have injected into the membership clause a new "element of the offense," which Congress has failed to define. And by the same token there is no merit to the argument that petitioner has been unconstitutionally convicted of an offense with which he has never been charged.

II. SECTION 4(F) OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT AMEND THE MEMBERSHIP CLAUSE OF THE SMITH ACT SO AS TO EXEMPT MEMBERSHIP, WITH KNOWLEDGE AND INTENT, IN THE COMMUNIST PARTY

A. Section 4(f) of the Internal Security Act of 1950 (Pet. Br. App. 3a–4a) provides that "[n]either the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner argues that this provision limits the scope of the Smith Act so that the membership clause no longer applies to membership in any Communist organization (Pet. Br. 44-50). The argument is plainly refuted by the statutory terms; Section 4(f) refers only to membership "per se" whereas the Smith Act punishes membership, not "per se," but coupled with knowledge and intent. And petitioner's effort to find in legislative history the unlikely repealer the language of 4(f) does not effect is demonstrably unsound.

Perhaps the use of the term "membership clause" to describe the pertinent provision of the Smith Act is the primary source of plausibility in petitioner's argument, since it carries the implication that mere "membership" as such is proscribed. The language

of the Act dispels this misconception, declaring explicitly that it is limited to anyone who "becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, *knowing the purposes thereof*" (emphasis added). In addition, as we have shown (*supra,* pp. 47–48), the membership provision of the Smith Act requires for conviction an intent to achieve the group's unlawful purposes as speedily as circumstances permit. Unless those requirements of knowledge and intent are ignored, or the reference in the Security Act to membership "per se" is misread to mean membership plus knowledge plus intent, the application of the Smith Act to the offense here charged was not affected.

Petitioner suggests no reason for ignoring the words "knowing the purposes thereof" in the Smith Act. In this case, the court below on the former appeal not only noted their presence, but specifically decided that they added the element of knowledge as an esential part of the offense (*Scales* v. *United States,* 227 F. 2d 581, 589), and the differently constituted Court of Appeals on the instant appeal adhered to and reaffirmed these views (R. 460–461). This interpretation has been approved by the Seventh Circuit in *United States* v. *Lightfoot,* 228 F. 2d 861, 871, reversed on other grounds, 355 U.S. 2, and by the Second Circuit in *United States* v. *Noto,* 262 F. 2d 501, 508, pending on petition for a writ of certiorari, No. 564, Misc., this Term. See also *Dunne* v. *United States,* 138 F. 2d 137, 143 (C.A. 8), certiorari denied, 320 U.S. 790. When this critical difference in express terminology is coupled with the *Dennis* principle

(*supra,* pp. 47–48) requiring the further element of intent for conviction under the Smith Act, no room is left for finding in the membership "per se" exemption under the Internal Security Act an absolution for those Communist Party members who have the requisite knowledge and intent.

What petitioner's argument amounts to is the linguistically untenable claim that when Congress used the language "membership * * * per se" it meant "membership plus knowledge and intent * * * per se". This argument is inherently improbable in view of the use of the language "per se", which must have been inserted to refer to naked membership. Unless the very word "membership" includes within itself the concepts of knowledge and intent, petitioner's argument is basically inconsistent with the Act. This Court has recently recognized that Congress can legislate and has legislated with respect to membership without either knowledge of the aims of an organization or intent to carry them out. *Galvan* v. *Press,* 347 U.S. 522, 526–528. In that case the Court held an alien deportable on the basis of membership alone without proof of knowledge of the aims of the organization. Moreover, petitioner himself agrees—in connection with his discussion of the constitutional issues—that "membership" can and does exist without knowledge of the organization's aims and without any intent to foster or achieve them.

B. Since the petitioner can find little comfort in the language of the two Acts, he seeks support in what he terms "logic and legislative history" (Pet. Br. 47). Neither the precursor bill (H.R. 5832, 80th

Cong., 2d sess.) nor the initial versions of the bills (H.R. 9490, S. 2311) in the 81st Congress, which eventually passed as the Internal Security Act, contained anything comparable to Section 4(f). Apprehension then arose that the registration provisions (finally enacted as Sections 7 and 8, 50 U.S.C. 786, 787) might be held unconstitutional under the Fifth Amendment on the ground that other provisions of the Act (Sections 2 and 4(a)) might be construed to make membership in the Communist Party in itself illegal, so that all of the proof necessary for conviction could be obtained from the registration provisions.[29] When the Senate Judiciary Committee sought to meet this objection by inserting in S. 4037 (81st Cong., 2d sess.) a provision like present Section 4(f), but applicable only to Sections 4(a) and 4(c) of the bill, certain Senators raised on the floor the objection that under this provision the registration provisions might still be claimed to incriminate members because of the Smith Act.[30] In response to this objection, the final version of the bill as it came from conference contained the present language of Section 4(f); there can be no doubt that it was drafted with the Smith Act in mind.

This is a long way from an intention to modify the

[29] These doubts were expressed in a letter from the late John W. Davis to Senator McCarran, dated February 10, 1950 (96 Cong. Rec. 15258), a report from Attorney General Clark (96 Cong. Rec. 14597), and a statement by Senator Langer (96 Cong. Rec. 15204).

[30] Senator Kefauver (96 Cong. Rec. 15198), Senator Humphrey (96 Cong. Rec. 14479), and Senator Lehman (96 Cong. Rec. 14190) raised this point.

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Smith Act so that membership in the Communist Party, plus knowledge of its aims, plus an intention to promote such aims, should no longer be covered. The most that can be said is that Congress intended the Smith Act to be read with Section 4(f) as an aid to interpretation so that it would not be held applicable to membership alone, much as this Court read the Sherman Act and the Norris-LaGuardia Act together in *United States* v. *Hutcheson,* 312 U.S. 219, to determine the extent of the exemption from criminal sanctions granted to unions. There is no adequate ground for the improbable conclusion that the Congress which passed the Internal Security Act meant thereafter to exempt Communists, objects of particular concern, from the membership clause of the Smith Act. If that clause did not cover Communists, it would be unlikely to cover anybody.

Elsewhere in the Internal Security Act, Congress gave further evidence that Section 4(f) was to mean only what it said, and not to provide the immunity petitioner seeks from it. Plainly, the extensive findings in Section 2 of the Act (50 U.S.C. 781) as to the menace of the Communist Party hardly comport with petitioner's effort to expand the immunity under Section 4(f) beyond what its terms require. And, to make sure, Congress added in Section 17 (50 U.S.C. 796):

> The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

As to the "logic" of petitioner's position, it does not follow, as he suggests, that merely because no

criminal law at the time of the Internal Security Act forbade membership *per se,* one must assume the repeal of the nearest thing, *i.e.,* membership plus knowledge plus intention. True, since the membership clause does not apply to membership *per se,* but only to membership when coupled with these subjective states (knowledge plus intent), it was not, strictly speaking, necessary for Congress to include in Section 4(f) the phrase "or of any other criminal statute" in order to insure that the membership clause would not be deemed to apply to such naked membership. But petitioner's argument that this proves that by those words Congress must have intended to effect "immunity from prosecution [under the membership clause]" (Pet. Br. 48) for Communist Party members who *otherwise* come within the purview of that clause—*i.e.,* persons who, in addition to being members, have the requisite knowledge and intent—is based on the most mechanical "logic" indeed. It imputes to Congress a legislative intent which there is not the slightest evidence to suggest that Congress had. The obvious method of accomplishing what petitioner argues Congress meant to do would have been to amend the membership clause directly and unambiguously. What (we submit) Congress meant to do in inserting the disputed language into Section 4(f)—doubtless out of an abundance of caution in its concern to safeguard the constitutionality of the registration provisions and thus ensure their enforceability—was to eliminate any conceivable doubt that the membership clause was not to be deemed applicable

to *mere* membership in a Communist organization, without more.

Mere membership is a far different concept, as we have stressed under Point I, *supra,* from membership plus knowledge plus intent. There is no reason to believe that Congress, in enacting Section 4(f), desired to treat them on a par. As suggested above, it is far more logical to assume that Congress wished to treat them differently and intended Section 4(f) as an aid to interpretation not only of Sections 4(a) and 4(c) of the Internal Security Act, which also do not on their face outlaw mere membership, but also of the membership clause of the Smith Act.[31]

In sum, the language of the various statutes, their legislative history, and logic all lead to the conclusion that membership in the Communist Party, *standing by itself,* should not be made criminal. This leaves unaffected the present case, where the statutory prohibition, the indictment, and the evidence all encompass not only membership in the Communist Party but knowledge of its unlawful aims and an intent to promote those aims.

[31] Similarly, the decision of Congress not to adopt Senator Humphrey's suggestion in 1954 to proscribe membership in the Communist Party with knowledge of its purposes, on the ground that it would fortify the claims to self-incrimination under the registration provisions (see Pet. Br. 49–50), adds nothing to petitioner's previous argument. It merely shows that Congress was as concerned in 1954 as it was in 1950 to take no action which, under even the most liberal interpretation, would endanger the enforceability of those provisions.

III. THE EVIDENCE FULLY SUPPORTS THE VERDICT

A. THE EVIDENCE AS TO THE CHARACTER OF THE PARTY'S ADVOCACY OF VIOLENCE MEETS THE *YATES* STANDARD OF A CALL TO FORCIBLE ACTION AT SOME FUTURE TIME

In *Yates* v. *United States*, 354 U.S. 298, this Court construed the Smith Act's teaching and advocacy clause as referring to the teaching and advocacy of violent governmental overthrow in the sense of a call to forcible action to that end (pp. 312–333). The clause makes illegal "advocacy directed at promoting unlawful action", the Court held, as distinguished from "mere doctrinal justification of forcible overthrow" or the advocacy of force "as an abstract principle" (pp. 318, 321).

In thus distinguishing between "advocacy of abstract doctrine" and "advocacy of action" (354 U.S. at 320), however, the Court was careful to point out that the "action" advocated, to come within the Act's proscription, was not required to be present action, or immediately impending action, or even action to be taken at a fixed or foreseeable future time. Referring to the fact that what "was condemned in *Dennis*" was "*indoctrination* preparatory to action", and adverting to "the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough", the Court epitomized its ruling as relating to "advocacy or teaching in the sense of a call to forcible action *at some future time*" (354 U.S. at 320, 322, 329; emphasis added). When this time will occur is, necessarily, not calculable in advance. For, as the Court noted, the summons to present, or imminent, action will not come until "the time [is] ripe" (354

U.S. at 332). And that will occur only when the Party's leaders "fe[el] that the time ha[s] come for action" (*Dennis,* 341 U.S. at 511)—at the historic coincidence of the so-called "objective" and "subjective" conditions of which the witnesses in this case spoke (*infra,* pp. 123–124, 130, 132). Both *Dennis* and *Yates,* in short, make clear that the particular time in the future when the action advocated is to take place is unimportant so far as enforcement of the advocacy clause of the Smith Act is concerned; what is essential is that it be in fact *action* that is advocated, *i.e.,* forcible action to be taken by the persons to whom the advocacy is addressed, whenever the signal for such action is received from the Party leaders.[32]

It remains, then, to consider whether the evidence adduced at the trial below as to the character of the Party's advocacy during the pertinent years (1946–54) meets the evidentiary standard of "advocacy of

[32] Obviously, this signal will not be given until the Party leaders think that the venture's prospects of success are good. As Party leader Doxey Wilkerson told witness Clontz, the Party wants a successful revolution, not "martyrs" (*infra,* p. 135). It is equally evident that if the signal is long delayed—if the "objective" and "subjective" conditions for successful violent revolution in a given country or area of the world are long in coming to pass—not all of those who have been indoctrinated and readied for action over the years will be present to participate in the actual uprising or "*putsch*" (*Dennis,* 341 U.S. at 509). It is clear, however, both from *Dennis* and *Yates* that neither of these imponderables is a bar to the present enforcement of the Smith Act's prohibitions against present advocacy of future violence.

action" thus articulated in the *Yates* case.[33] We submit that it does. That evidence has been summarized in detail in Appendix A, *infra,* pp. 121–139, and at pp. 6–23, *supra.* It appears from that summary that there was adduced at this trial precisely the evidence which *Yates* held was needed to support a finding of Party advocacy of force and violence—evidence of systematic, personal indoctrination, not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which the evidence so clearly established is and has always been the Party's ultimate aim and objective.[34]

[33] In *Yates*, the charge was that the defendants themselves had conspired to advocate violent revolution. (They were also charged with having conspired to organize as the Communist Party a society of persons who so advocated, but this portion of the charge was invalidated by this Court on grounds not now pertinent.) In a "membership" case, such as this, the charge is membership in an organization (namely, the Communist Party) which during the pertinent period so advocated, with the requisite knowledge and intent. The *Yates* holding of what properly constitutes advocacy of forcible overthrow under the Smith Act is thus equally germane and relevant to a membership case. The difference is that, whereas in a "conspiracy to advocate" case (such as *Yates*) it is necessary to prove that *the defendants*, personally, conspired to engage in the forbidden advocacy, in a "membership" case it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent.

[34] As petitioner points out (Pet. Br. 52), this Court had occasion in *Yates* to consider the evidence *in the Yates record* that the Communist Party advocated the forcible overthrow of the Government, and found such evidence wanting in respect of

An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the multitudinous schools and classes which were so unceasingly being conducted to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. In other words, this record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the numerous classes and schools and personal briefing sessions held throughout the country ever since 1945, to advocate to such Party members and pupils—not merely that it would be a good thing if somebody, someday, overthrew the Govern-

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the requisite advocacy of forcible *action*. (The occasion of the Court's consideration of the *Yates* evidence on this issue was its inquiry into whether the Party could justifiably be viewed as "the nexus between these petitioners and the conspiracy charged" (354 U.S. at 330).) This determination, however, was limited to the proof on that issue adduced in that case. It is the Government's position in this case that the kind of proof which the Court found wanting in the *Yates* record concerning the nature of the Party's advocacy is present in this record. We disagree entirely, in short, with petitioner's contention that "the evidence in the two cases [*Yates* and the case at bar] is substantially identical" (Pet. Br. 52). With the exception of witness Lautner, not a single one of the witnesses in this case who testified with respect to the Party's advocacy of forcible overthrow—Hartle, Clontz, Childs, Reavis, Cummings, Duran and Jones—testified in *Yates*. Nor was the testimony of these witnesses a mere duplication, as petitioner claims, of testimony found wanting in *Yates*. See our discussion, *infra*, pp. 78–85, concerning significant aspects of their testimony, viewed in the light of the *Yates* standards.

ment by force and violence—but that they take part, *personally,* in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Thus, when the petitioner told witness Clontz in the course of his extensive personal indoctrination of that Party recruit that "we Communists in this country would have to start the revolution" and "could not expect the Soviet Union to land troops to start" it, but that, on the other hand, "we would have the benefit of" Russian help from the outset and "we naturally would continue to receive" such help until the revolution was victorious, etc. (*supra,* pp. 15–17), he was not indulging in "mere doctrinal justification of forcible overthrow" (*Yates,* 354 U.S. at 321), nor engaging in "advocacy in the realm of ideas" (*id.,* p. 320). He was indoctrinating Clontz in his duty, as a tested and disciplined Party member, to join forces with other Party members, when the time was propitious, in forcibly overthrowing this Government. He was advocating action—personal and violent action—by Clontz himself.

Again, when petitioner told Clontz that "it would be nice if revolutionary ideas would automatically produce a revolution," but that that "was impossible, that a militant force would have to bring about the revolution and that force was the only answer" (*supra,* p. 10), he was engaging in "indoctrination preparatory to action" (*Yates,* 354 U.S. at 322). This is equally true of the statement he made when he called Clontz's attention to the familiar passage in Stalin's *Problems of Leninism* in which Stalin rhetor-

ically asks—and answers emphatically in the negative—whether "such a radical transformation of the old Bougeois order" can "be achieved without a violent revolution"; petitioner "pointed out" to Clontz at that time, Clontz testified, that "this particular passage * * * simply prov[ed]" what he (petitioner) "already had taught"—that "education and reform would accomplish absolutely nothing" and that "violent revolution was the only possible way" to achieve the Party's objectives (*supra,* p. 15). Nor was petitioner engaging in mere advocacy in the realm of ideas when he urged Clontz to read Communist Party literature because it would "help prepare [him] for the time when the Communist Party would *call on* [*him*] *in time of crisis*" (*supra,* p. 11; emphasis added).[35] Indeed, the entire series of briefing sessions and personal conferences which petitioner had with Clontz (*supra,* pp. 8–19) were part and parcel of, and collectively constituted, a "call to forcible action at some future time"—a call which was being made upon Clontz by petitioner in the latter's official capacity

[35] Cf. Scarletto's testimony in the *Yates* case that he was surreptitiously indoctrinated in methods of moving "masses of people in time of crisis" (354 U.S. at 332). The Court indicated in *Yates* that this was the sort of evidence for which an appellate court should look in reviewing a Smith Act conviction. "It might be found, under all the circumstances," the Court said, "that the purpose of this teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe" (*ibid.*). This, we submit, is what the evidence in this case overwhelmingly shows was the purpose of the indoctrination courses, classes, and briefing sessions which the Party as an organization and petitioner personally conducted for the benefit of Party members and recruits.

as a leader of the Party—in the sense of the *Yates* holding (354 U.S. at 329).

Petitioner was not the only Party leader shown by the evidence to have advocated forcible overthrow of the Government in the sense of a call to action. Consider, for example, the statements and teachings attributed by one of the witnesses to Party leader Art Bary, the District Organizer for a seven-state District in the Rocky Mountain area. As testified by witness Duran, Bary told the members of his Communist Party class in Evergreen, Colorado, that when the time for the revolution came "we would have to set up barricades, establish a central point from where we would participate from." "[B]ecause during the revolution it may become necessary to ebb, retreat in certain battles," Bary further told them, "we would have to learn to retreat in an organizational way * * * " "In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution" (*infra,* pp. 138–139). *"We,"* it is to be noted, are to engage in all this action. Bary was plainly doing more than "doctrinally justifying" revolutionary violence to his pupils, or simply defending violent revolution "as an abstract principle, divorced from any effort to instigate action to that end" (*Yates,* 354 U.S. at 318).

Similarly, at the National School for Mexican Cadres, conducted in 1951 in Los Angeles, Party leader Alberto Moreau, a member of the Party's National Education Commission, systematically indoctri-

nated his students in the need to "smash," "by force and violence," "the entire state machinery of the Bourgeoisie" as a preface to the bringing about of the "Socialist system" which all desired. "[F]irst we teach the people the desirability of overthrowing them [the capitalists]," counseled Moreau, "and then when the time is ripe we could stampede them against the capitalist class" (*infra,* pp. 137–138). Moreau also "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s." And it was important, he stressed, that following the successful seizure of power the Party "collect * * * from the people" the "guns" with which they had been armed in order to ensure that they not be used in any "counterrevolution movement" (*infra,* p. 138). This sort of talk was certainly concrete and specific.

To cite one further example, the students of Party leader George Siskind, at the conclusion of the 1947 Party Training School in St. Louis, Missouri, were required to take a personal pledge, dictated by Siskind, to carry out the "will of the Party even though it meant to fight and to kill" (*infra,* p. 132). And during the preceding weeks of the School they had been indoctrinated, among other things, in the need to "take over" the citadels of capitalism and "wipe them out" (*infra,* p. 132).[36]

[36] See also *infra,* pp. 127, 128, 131, 132, 134, for other instances of statements and teachings by Party leaders which, we submit, cannot fairly be reconciled with the theory that nothing more than the "abstract principle" of political violence was taught by the Party during the pertinent period in its schools and classes and personal indoctrination sessions.

Collectively considered, the testimony constituted the sort of testimony which this Court, in *Yates,* referred to as meeting the evidentiary requirements of the Act, *viz.,* testimony of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute" (354 U.S. at 331). From the extensive testimony of this sort to be found in this case, even more than from the comparable testimony alluded to in *Yates,* "[i]t might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (*ibid.*).[37]

To sum up, the evidence amply supports the conclusion that the Party members and pupils in the numerous schools and classes and indoctrination talks which the Party conducted understood that they were being called upon, *personally,* to take part in the

[37] *Yates* also cited, as an example of the type of evidence which would meet proper evidentiary standards in a Smith Act prosecution, testimony in that case from which "it might be found that individuals considered to be particularly trustworthy were taken into an 'underground' apparatus and there instructed in tasks which would be useful when the time for violent action arrived" (354 U.S. at 332). Compare the testimony in this case concerning the establishment of an elaborate "underground apparatus," seven levels deep, consisting of the most trusted and disciplined ten percent of the Party membership (*infra,* pp. 133–134). Petitioner himself, in December 1951, disappeared into this "underground" (*supra,* p. 18).

future violent *putsch* which it was the common intention to bring to pass at the earliest feasible opportunity. The Party leaders who conducted these schools and classes and personal briefing sessions intended that their indoctrinees so understand, and, indeed, openly called upon them to join forces with their fellow Party members in the forcible seizure of power when the call to imminent action came. This is what the jury found, under instructions which were carefully framed in the light of the *Yates* decision. And it is this sort of advocacy, we think it clear, that this Court meant when it referred in *Yates* to "advocacy or teaching in the sense of a call to forcible action at some future time" (354 U.S. at 329). For it "cannot [be]," as observed by Chief Justice Vinson in the *Dennis* case, 341 U.S. at 509, "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 [the] 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" (emphasis added). These words sum up, and fairly epitomize, what it was that the Party, as established by the evidence in this case, was doing during the period covered by this indictment.

In a Smith Act case no less than in other kinds of criminal cases it is for the jury to judge the credibility of the witnesses and to determine what inferences are to be drawn from the evidence (*Pierce* v.

United States, 252 U.S. 239, 251), and inferences that might reasonably be drawn must, in deciding whether the evidence is sufficient, be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. On that basis, it is submitted that the jury's finding that the Communist Party, during the pertinent period, taught and advocated the forcible destruction of this Government in the sense of the *Yates* holding, and under instructions which were approved in *Yates,* is fully supported by the evidence.

B. THE JURY'S FINDING THAT PETITIONER KNEW THE PARTY'S CHARACTER AS AN ORGANIZATION WHICH ADVOCATED FORCIBLE GOVERNMENTAL OVERTHROW IN THE *YATES* SENSE, AND THAT HE PERSONALLY INTENDED TO BRING ABOUT THAT RESULT AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT, IS LIKEWISE SUPPORTED BY THE EVIDENCE

Acknowledging his role as a Party functionary, petitioner contends (Pet. Br. 56–59) that the evidence is insufficient to show his knowledge of the Party's character as a society of persons who advocated the forcible overthrow of this Government in the *Yates* sense, and his intent to bring to pass that result as speedily as circumstances would permit. Of course, petitioner's status as a *leader* of such a rigidly disciplined and indoctrinated organization is in itself strong evidence against the suggestion that he might not have known what the Party was about or might not have purposed the furtherance of its ends. However, the record goes far beyond this and shows not only that petitioner was "in contact with" the Party's aims (Pet. Br. 56), but that he himself actively taught and

advocated the violent overthrow of the Government in the sense condemned in *Yates*.

In the years between 1948 and 1951, petitioner acted as a personal tutor to the witness Clontz, supplying him with volumes of Communist Party literature and explaining to him the Party's vanguard role in the coming proletarian revolution (*supra*, pp. 8–19). As we have seen, some of the clearest evidence in the record that *the Party* advocated this Government's forcible destruction in the *Yates* sense emanated from petitioner's own lips, in his tutoring of Clontz (*supra*, pp. 9-18). Some of this evidence was discussed in the preceding section of this brief (*supra*, pp. 79–81), and it is plain that that evidence has equally cogent force on the issue of petitioner's knowledge and intent.

There is other substantial evidence. Petitioner directed the witness Childs to remain in industry where there were unions because the Communist Party considered that trade unions "are the schools of revolution" (*supra*, pp. 20–21). In 1952, petitioner was instrumental in establishing, and was in fact the director of, the secret Communist Party training school at Walnut Cove, North Carolina, at which Childs and other Party members were indoctrinated in the Party's revolutionary goal and the tactics for achieving it (*supra*, pp. 21–23).

Reflecting and acting upon the revolutionary purposes and teachings of the Party, petitioner explained to Clontz the nature and importance of underground activities (*supra*, pp. 13, 18). He said that "if war came" he would go underground himself (R. 302; Tr.

1113). And in December 1951, during the fighting in Korea, he in fact went underground, pursuant to orders of the national Party headquarters (*supra,* p. 18). In these activities, petitioner gave concrete point to the revolutionary doctrines he taught and followed (see *supra,* pp. 12–13), vividly belying his effort now to deny the evidence of his intimate knowledge and unlawful intent with respect to the Party's objectives.

Given the nature of the offense, it would be absurd to expect, and it is not required, that there be even more extensive evidence in the form of explicit statements by the petitioner himself announcing his knowledge and intent. Those we have summarized are numerous and damaging enough. Together with the unquestioned fact that petitioner was a Party member and its leader in the Carolinas, and bearing in mind the proof of the duties and activities such a role entailed, we submit that on this record it would have been incredible to suppose that petitioner was ignorant of the Party's aims or lacking in intent to help achieve them. At least, the jury clearly had ample ground for finding the requisite knowledge and intent.

The Court of Appeals correctly observed that (R. 478–479):

> The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. * * * [He] was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party

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> and was active in recruiting suitable Party members amongst the university students in North Carolina, and * * * he furnished them with Communist literature and advised and instructed them as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was a director of one of these schools and in harmony with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed their instruction that he should go underground under an assumed name.

The court accordingly was correct in concluding that (R. 477):

> Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained.[38]

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[38] Similarly, the Court of Appeals on the former appeal concluded, on the basis of the evidence adduced at the first trial (*Scales* v. *United States*, 227 F. 2d 581, 593):

"* * * Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete under-

IV. PETITIONER RECEIVED A FAIR TRIAL

A. THE DENIAL OF PETITIONER'S MOTION CHALLENGING THE COMPOSITION OF THE GRAND JURY WAS PROPER

Petitioner urges that the trial court committed prejudicial error in refusing to grant his motion challenging the composition of the grand jury which indicted him (Pet. Br. 59–61). The pertinent facts are as follows:[39]

After his arrest on November 18, 1954, petitioner first appeared in court on December 7, 1954. His request for a one-week extension for the purpose of securing counsel was granted. On December 16, he again appeared before the court for arraignment, but was still not represented by counsel. The court thereupon appointed two members of the bar to represent him for purposes of the arraignment. On that day, he entered a plea of not guilty, reserving the right to file appropriate motions by January 14, 1955, and specifically reserving his right to challenge the composition and array of the grand jury.

On December 22, 1954, petitioner was released on bail. On January 14, 1955, the date fixed by the court for the filing of appropriate motions, he was represented by a New York attorney who requested sixty additional days in which to file motions. Act-

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standing of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged * * *."

[39] The essential facts pertinent to this issue, which are recited in the following four paragraphs, are also set forth in the trial judge's "Finding of Fact, Conclusion of Law, and Order" of April 15, 1955, reproduced in Appendix B, *infra*, pp. 140–145.

ing on this request, the court granted an extension to February 18, 1955, by which time the petitioner was to file his motions, and the court fixed April 11, 1955, as the date for the commencement of the (original) trial. Petitioner's counsel announced complete satisfaction with the dates as set.

On February 18, 1955, petitioner, again represented by new counsel of his own choosing, filed motions to dismiss the indictment on constitutional and other grounds, for a bill of particulars, for the return of seized property and the suppression of evidence, for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure, for pretrial inspection of documents under Rule 17(c), to strike portions of the indictment, and for continuance of trial.

Argument on these motions was heard by the court on March 8, 1955, and at this time petitioner's counsel advised the court of his intention to file a motion challenging the method of selecting the grand jurors despite the Government's announced intention to object to the filing of such a motion on the ground that it would be untimely. Petitioner subsequently filed the motion together with a challenge attacking the method of selecting the trial jury. On April 1, 1955, the court, reserving to the Government its objection to the motion challenging the grand jury, conducted a hearing on the method of selecting jurors, since the evidence as to each of the two motions was necessarily the same in substance. At the conclusion of the hearing, the court denied the motion attacking the grand jury panel because

(1) the motion was not timely filed and
(2) the evidence produced at the hearing failed to show that the method of selecting jurors was improper [Motion Tr. 150–153].[40]

The motion challenging the petit jury also was denied.[41] Thus, each of the two grounds of denial of the motion challenging the composition of the grand jury is independently sufficient to sustain the ruling. We submit that the denial was correct on both grounds.

1. *Petitioner waived the right to challenge the composition of the grand jury*

As appears from the facts as just set forth and in the trial court's undisputed findings (Appendix B, *infra,* pp. 140–145), petitioner, after being arraigned on December 16, 1954, was granted two lengthy extensions totaling 64 days in which to file pre-trial motions. At the end of these extensions, on February 18, 1955, petitioner filed numerous pre-trial motions but not the one now in question attacking the composition of the grand jury. This motion was not filed

[40] "Motion Tr." refers to the typewritten transcript of the hearing held on April 1, 1955, on the pre-trial motion challenging the method of selecting jurors.

[41] The trial court observed that a revised list of prospective jurors was being prepared by the jury officials (Motion Tr. 153–154), and when petitioner's counsel agreed that the method of selection of this revised list was satisfactory to him (Motion Tr. 154–164), the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164), from which the jury which returned the original verdict was selected. There was thus no issue on the former appeal as to the legality of the constitution of the petit jury. Similarly, there is no issue in the present appeal as to the validity of the constitution of the jury which returned the verdict at the second trial.

until March 8, 1955, more than two weeks after the ample extensions granted by the trial court had expired. The court found (Appendix B, *infra,* p. 142), and there is no contrary suggestion, that the information on which this belated additional motion was based had been available to defendant and his counsel from the time of the indictment, and that there had been not even an attempt to explain or justify the inordinate delay.

In these circumstances, as held by the Court of Appeals (R. 493–495), the trial court was clearly justified in rejecting the motion as untimely. Under Rule 12 of the Federal Rules of Criminal Procedure, such a motion must be made before the plea is entered or "within a reasonable time thereafter" when permitted by the court. Failure to present the motion within the prescribed time constitutes a waiver. *Carruthers* v. *Reed,* 102 F. 2d 933, 939 (C.A. 8); *Redmon* v. *Squier,* 162 F. 2d 195, 196 (C.A. 9); *Wright* v. *United States,* 165 F. 2d 405, 407 (C.A. 8); "Notes of Advisory Committee on Rules" following Rule 12, p. 2532 in 18 U.S.C. The Rule provides that "for cause shown" the court "may grant relief from the waiver." But no cause was shown here and there is no basis for questioning the propriety of the decision that the waiver effectively barred the complaint against the grand jury. *Frazier* v. *United States,* 335 U.S. 497, 503; *Shaw* v. *United States,* 1 F. 2d 199, 201 (C.A. 8); *Nations* v. *United States,* 52 F. 2d 97, 99 (C.A. 8); *Moffatt* v.

United States, 232 Fed. 522, 528 (C.A. 8); *Hornbrook* v. *United States*, 216 F. 2d 112 (C.A. 5).

2. *In any event, the complaint is on its merits not ground for reversal of the conviction*

Petitioner premises almost his entire argument on this point upon his allegation that it was impossible for the Jury Commission to know whether the jury box contained the requisite 300 names of qualified persons at the time of drawing (Pet. Br. 60), and that there was, therefore, a failure to meet the requirements of 28 U.S.C. 1864. This contention is rebutted by the evidence adduced at the hearing.

The Deputy Clerk testified that, at the time the indicting grand jury panel was drawn, the jury box contained, as an estimate, "something in the neighborhood of probably five hundred" names (Motion Tr. 83).[42] He further stated that he had been a resident of the county from which the names were drawn for nearly 70 years, had "canvassed the county several times," and had "been in the Legislature several sessions;" that as a result he had a "pretty good knowledge of the people there, their background and their present status;" and that it had been his experience that the jurors drawn for service had represented a "cross-section of all walks of life in [the] community" (Motion Tr. 84–85).

The Clerk of the District Court testified that the

[42] Elsewhere in his testimony he estimated the number of names as "probably four hundred, four hundred and fifty or five hundred, somewhere around there" (Motion Tr. 84). In any event, he was "satisfied," he testified, that the number was "more than three hundred" (*id.* 83).

procedure used by the Commission in selecting names for the jury box[43] had been commended by members of the bar throughout the district and by others for the fairness of the jurors serving in the courts (Motion Tr. 48, 49). This witness also testified that the procedure used had been discussed with inspectors from the Administrative Office of the United States Courts and with other clerks and visiting judges; and that he had found this to be "substantially the procedure followed elsewhere," uncriticized by any of these sources (Motion Tr. 51).

Aside from the foregoing, no testimony was adduced by petitioner as to the number of qualified names in the box at the time of the grand jury selection. It is thus evident that the inference petitioner would have this Court draw falls far short of rebutting the presumption of regularity which attends the work of the Jury Commissioner and Clerk of the court, a presumption which may be overcome only by clear and convincing proof. *Frazier* v. *United States,* 335 U.S.

[43] In selecting names for the grand and petit juries, requests were sent out on form letters, under the joint direction of the Clerk and Jury Commissioner, who constitute the Jury Commission, to men of knowledge, character and standing who knew the people in the respective counties, asking them to send in suitable names for jury service (Motion Tr. 18–30). Upon the return of these forms, the commission determined the eligibility of the names submitted and eliminated those found to be ineligible to serve. The eligibility was determined by the Clerk or Jury Commissioner's personal knowledge of the individuals' names or from comments of the persons requested to send the names. All names not eliminated by this process were then placed in the jury box on separate cards indicating the names and addresses of the persons selected (Motion Tr. 33–35).

497; *Fay* v. *New York,* 332 U.S. 261; *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217. In addition, even if it be assumed *arguendo* that the Jury Commission was not certain that there were 300 *qualified* names in the jury box at the time of the drawing, this fact standing alone is an insufficient basis, without a showing of prejudice, upon which to nullify an indictment.[44]

And, far from suggesting prejudice, the record demonstrates that there was none. The testimony showed that the Clerk never intentionally or systematically excluded any class or group and that he sought a wide selection of jurors from all walks of life (Motion Tr. 47–48). Acting on the express direction of the District Court, the Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25), and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58). As observed by the court below, "It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand

[44] "Does this statute mean that there must be 300 names in the box of qualified persons as a condition of any valid drawing of any jurors therefrom? If this was the meaning of Congress it would involve the duty on the part of the commissioners of determining in some reliable manner the question of eligibility, and would have rendered it necessary for the legislature to have proceeded further and to have granted them authority and process for hearing and determining the matter in a *quasi*-judicial manner; but they are not triers, nor have they the power to appoint triers. I do not think this is the meaning of the statute." *United States* v. *Rondeau,* 16 Fed. 109, 111 (E.D. La.).

jury chosen in this case or that the defendant was in any way prejudiced by the procedure" (R. 493).

On this record, petitioner cannot prevail in his argument (Pet. Br. 61) that, because the Clerk and Jury Commissioner sent letters to various individuals and leaders of organizations seeking suggested names, they unlawfully delegated their duties so that the indictment must now be quashed. Disposing of a similar contention, the Court of Appeals for the Third Circuit has said (*Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414, 427):

> The jury officials could in the exercise of their discretion resort to others for the suggestion of names so long as it could reasonably be expected that a cross-section would thereby be obtained, and using the names taken from such a variety of sources does not result in an unlawful delegation of duty by the officials.

The evidence here gives every reason to believe that a proper cross-section was obtained and that the jury officials duly exercised their duty of selection. As the Third Circuit observed in the *Dow* case (*supra,* at 427), such circumstances leave no basis for invoking the rule of *Glasser* v. *United States,* 315 U.S. 60, where the vice was solicitation of names from only a single organization with a resulting list improperly weighted. See also *United States* v. *Dennis,* 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494; *United States* v. *Flynn,* 216 F. 2d 354, 378–389 (C.A. 2), certiorari denied, 348 U.S. 909; *Walker* v. *United States,* 93 F. 2d 383, 391 (C.A. 8), certiorari denied, 303 U.S. 644.

It may be noted, finally, that, after denying the

motion challenging the grand jury selection as untimely and also on the merits, the trial court observed that a revised list of prospective jurors was then being prepared by the jury officials involved in this case (Motion Tr. 153–154). Petitioner's trial counsel agreed that the method of selection of the revised list of jurors was satisfactory and met all his objections (Motion Tr. 154–164). Accordingly, the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164). See footnote 41, *supra,* p. 91. It would appear, therefore, that any defect of which petitioner could have made timely complaint has disappeared for the future. In view of the complete absence of prejudice, and apart from other reasons already stated, there is no sound basis in petitioner's tardy motion for invoking the supervisory powers of this Court.

B. THE CONGRESSIONAL FINDINGS IN THE INTERNAL SECURITY ACT OF 1950 AND THE COMMUNIST CONTROL ACT OF 1954 DID NOT PRECLUDE A FAIR TRIAL

Petitioner next urges (Pet. Br. 62) that, without a shred of concrete evidence of prejudice, it must be presumed that he could not have had a fair trial because Congress, in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841), made findings that the Communist Party aims at the violent overthrow of the Government.[45]

[45] This contention was first made by petitioner in his petition for a writ of certiorari to review the former judgment of the Court of Appeals (No. 626, Oct. Term, 1955 [No. 29, Oct. Term, 1956; No. 3, Oct. Term, 1957], pp. 2–3, 44–45.

The argument proceeds on the unrealistic and unacceptable assumptions, without proof, that the jurors (1) were in fact familiar with the statutes in question and (2) ignored the court's instructions to determine the nature of the Communist Party from the evidence before them for themselves, and merely followed unthinkingly the findings of Congress in the Internal Security Act and the Communist Control Act. These assumptions attack the basic premises of the jury system itself. If they are correct, it must follow that every Smith Act conviction which has been returned since 1950 has been erroneous on this ground alone and that the Communist Party, by becoming a threat so grave as to require explicit recognition by Congress and much of the public, has immunized its organizers and members against prosecution. As the Court of Appeals for the Seventh Circuit said, rejecting the same argument, in *United States* v. *Lightfoot,* 228 F. 2d 861, 870, reversed on other grounds, 355 U.S. 2:

> In effect, it is defendant's position that all persons subject to prosecution under the Smith Act are immunized from prosecution indefinitely, or at least as long as the Communist Control Act remains a part of the laws of this nation. We do not agree. If any jury had any such prejudgment, the instructions of the Court cured their error. Furthermore, whether any such belief existed in the mind of any juror, might have been discovered on the *voir dire* examination.

Petitioner was certainly entitled to investigate, in this as in any other case, to determine whether the

jurors might be disabled by bias from trying him fairly. But the conclusive presumption of bias he seeks to establish rests only on a speculative hypothesis which cannot avail to impugn the jury's verdict. Compare *Accardi* v. *Shaughnessy,* 347 U.S. 260, with *Shaughnessy* v. *Accardi,* 349 U.S. 280.

C. THE "JENCKS" ACT'S EXCISION PROCEDURES ARE VALID, AND THEIR APPLICATION TO PETITIONER'S TRIAL DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LEGISLATION

Petitioner challenges the validity, in two respects, of the so-called "Jencks" Act (Public Law 85–269, approved September 2, 1957, 71 Stat. 595, adding a new section, § 3500, to Title 18 of the U.S. Code), and further argues that, in any event, its application to his trial violated the constitutional prohibition against *ex post facto* legislation (Pet. Br. 63–64). We show, first, that his challenge of the excision procedures of the Act (subsection (c) of § 3500) is without merit; second, that the question of the validity of the Act's definition of "statement" (subsection (e)) does not arise on this record; and, third, that the *ex post facto* contention is unavailable to petitioner because it is made for the first time in this Court and that it is without substance in any event.

1. *The excision provisions of the "Jencks" Act are fully consonant with due process*

At the re-trial below—which was necessitated because of the error of the first trial court in refusing to order the production for cross-examination use by the defense of prior reports to the FBI by prosecution witnesses touching upon the subject matter of their

testimony[46]—the procedure followed with respect to the production of such reports was (with a qualification to be mentioned; see *infra*, pp. 108–110) that prescribed by 18 U.S.C. 3500, as added by the "Jencks" Act. Subsection (b) of that section,[47] provides that the trial court in any criminal prosecution brought by the United States shall, on motion of the defendant, after a witness called by the United States has testified on direct examination, "order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The same subsection then directs that, "[i]f the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use." It is then provided in subsection (c)—the subsection here in issue—that:

> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such ma-

[46] *Scales* v. *United States*, 355 U.S. 1, reversing 227 F. 2d 581 on the authority of *Jencks* v. *United States*, 353 U.S. 657.

[47] The full text of the section appears at pp. 7a–9a of the Appendix to petitioner's brief.

> terial excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

Petitioner challenges, on due process grounds, the validity of this excision procedure (Pet. Br. 63–64). Basing his argument on *Jencks* v. *United States,* 353 U.S. 657, he contends that "only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination" (Pet. Br. 64). The argument is untenable for two reasons.

(*a*) Assuming *arguendo* that the *Jencks* decision is based on constitutional grounds (but see *infra,* pp. 106–108), the statutory excision procedure is fully consonant with *Jencks.*

Clearly, the mere fact that a government witness has in the past given a statement to a government agent on matters relating to the subject matter of his trial testimony would not require that *all* past statements by this witness to government agents—on any subject whatever—be turned over to the defense. Petitioner makes no such claim and the *Jencks* deci-

sion makes no such suggestion.[48] It is only statements which *relate to the subject matter of the witness' testimony* that must be turned over. But there is no more reason for turning over to the defense non-germane portions of a witness' statement which is in part germane (because it touches on—but only in part—the subject matter of his testimony) than there is for turning over a statement *no* part of which is pertinent to that subject matter. As the Court of Appeals for the Tenth Circuit has observed, "Surely, if an entire statement can be refused when it does not relate to the subject [of the witness' testimony], it is entirely proper to deny access to a part of a statement on the ground that such part does not have the necessary relationship. * * * Unless some provision is made for the restriction of production to matters related to the testimony of the witness, the door is

[48] On the contrary, *Jencks* clearly indicates that statements of the witness which do not relate at all to the subject matter of his testimony are not required to be produced: "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established *when the reports are shown to relate to the testimony of the witness*" (353 U.S. at 669; emphasis added). And in its precise holding the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., *touching the events and activities as to which they testified at the trial*" (353 U.S. at 668; emphasis added). Again: "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses *touching the subject matter of their testimony at the trial*" (353 U.S. at 672; emphasis added).

opened for 'the broad or blind fishing expedition' which the Supreme Court has condemned" (*Sells* v. *United States,* No. 5992, decided December 30, 1958, slip opinion, pp. 26–27, pending on petition for a writ of certiorari, No. 691, Misc., this term).[49]

The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement germane in part. He is entitled under subsection (c) of the Act (*supra,* pp. 100–101)—and that procedure was followed here (see opinion below, R. 489–490)—to have the entire statement preserved for inspection by the appellate court, and a determination by that court of the correctness of the trial judge's rulings with regard to excision, in the event that the defendant is convicted and elects to appeal.[50] The statutory procedure thus protects the accused's proper cross-examination rights while at the same time safeguarding the privacy of government records in which the accused has no proper interest.

Petitioner quotes from the *Jencks* opinion (Pet. Br. 63–64) language which he claims supports his contention that statements to a government agent by a prosecution witness which are relevant in part (be-

[49] To the same effect, see the opinion below at R. 490–491.

[50] The court below stated in its opinion: "We have examined [the original unexcised reports of the Government witnesses] to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the testimony of the witnesses" (R. 489–490). The reports, in their excised and unexcised forms, have been lodged with the Clerk of this Court for this Court's inspection if it should desire to make a similar determination.

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cause they refer in part to matters concerning which he has given testimony) must be made available to the defense in their entirety for cross-examination purposes. But the *Jencks* opinion is careful to limit its ruling as to production of reports to matters "touching the events and activities as to which" the witness testified at the trial, or "touching the subject matter of their testimony at the trial". 353 U.S. at 668, 669, 672; see footnote 48, *supra,* p. 102. The thrust of the opinion, as of the decision, is that only the defense can adequately appraise the value for impeachment purposes of statements of a prosecution witness which *in fact* touch upon or relate to a matter concerning which he has testified. But the question of whether a statement of the witness relates in fact to a subject or topical area with respect to which he has testified is a question which the judge is able to decide without assistance from the defense.

Indeed, the latter question, *i.e.,* whether a witness' statement *does relate to or touch on* his testimony, must be determined by the judge without participation by the defense. For the defense obviously cannot join in that decision without being made privy to the very statement which the Government claims does not relate to or touch upon the witness' testimony and for that reason (since the statement is part of the Government's confidential files) should not be seen by other than authorized persons. Petitioner's contention, in short, begs the question. For his argument is, in essence, that the defense is entitled to see a statement of a witness contained in the Government's confidential files in order to determine for

itself whether the Government is correct in maintaining that the statement, because of its confidential character and because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

If petitioner were correct, it would be difficult to see why the defense would not equally be entitled to examine every statement in the investigative files which had ever been made by the witness on any subject whatever, since the reason asserted why the accused should be made privy to the entire contents of a document relevant only in part would apply with equal force to papers and documents in the files containing statements of the witness wholly irrelevant, in fact, to anything contained in his testimony, *viz.*, to enable the defendant and his counsel to determine for themselves if such is the fact. See the Tenth Circuit's remarks in the recent *Sells* case (*supra,* pp. 102–103). As we have noted, petitioner himself makes no such broad claim, and there is nothing in the opinion in *Jencks* which lends support to any such idea or to the comparable rule for which petitioner does contend. As aptly remarked by the court below (R. 490–491):

> [T]he new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the reports should be excised is not left to the Government

but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. * * *

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. * * *

(*b*) What we have said thus far has assumed *arguendo* that *Jencks* was based on constitutional grounds of due process. We believe, however, that this Court did not in that case purport to lay down a basic rule of constitutional law, but rather (pursuant

to its general supervisory powers over the administration of justice in the federal courts) a procedural principle, analogous to a rule of evidence, to be applicable in federal criminal trials in the absence of a definitive statute. In holding that the trial court had erred in failing to order the production of the statements of Ford and Matusow, the Court said that it was following its prior decision in *Gordon* v. *United States,* 344 U.S. 414. It clarified that decision by holding that (contrary to the views of the lower courts in *Jencks*) "a preliminary showing of inconsistency" between the witness' testimony and his prior statement was not, under *Gordon,* a "prerequisite to" the accused's right to inspect the prior statement (353 U.S. at 666–667). But *Gordon* was decided, not on constitutional principles, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (344 U.S. 418; emphasis added). It would follow, therefore, that the *Jencks* decision likewise was based on common law principles, as interpreted in the light of reason and experience, and did not purport to lay down a fundamental principle of due process, beyond the power of Congress to alter or amend by legislation.

In the words of the opinion below, "In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States,* 318 U.S. 332, [3]40, [3]41, [as] 'its supervisory authority over the administration of criminal justice in the United States

* * * by the establishment of civilized standards of procedure and evidence'; and Congress, by the passage of the interstitial legislation contained in § 3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage" (R. 491).[51]

For further discussion, see the Brief for the United States in *Rosenberg* v. *United States,* No. 451, this Term.

2. *The question of the validity of the "Jencks" Act's definition of "statement" does not arise on this record*

The second respect in which petitioner challenges the constitutionality of Section 3500 relates to the definition of "statement" in subsection (e). The term is there defined as (Pet. Br. App. 8a–9a)—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or

[51] This conclusion has the support also of such decisions as *United States* v. *De Lucia*, 262 F. 2d 610, 614 (C.A. 7), pending on petition for a writ of certiorari, No. 745, this term; *United States* v. *Spangelet*, 258 F. 2d 338, 340–341 (C.A. 2); *United States* v. *Lev*, 258 F. 2d 9, 13 (C.A. 2), pending on writ of certiorari, Nos. 435, 436, 437, this Term; *United States* v. *Palermo*, 258 F. 2d 397, 400 (C.A. 2), pending on writ of certiorari, No. 471, this Term; *United States* v. *Gandia*, 255 F. 2d 454 (C.A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C.A. 2); *United States* v. *Miller*, 248 F. 2d 163, 165 (C.A. 2), certiorari denied, 355 U.S. 905. See also *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 144–146 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Rosenberg*, 257 F. 2d 760, 763 (C.A. 3), pending on writ of certiorari, No. 451, this Term; *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 868, n. 15 (S.D.N.Y.).

> other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

This definition, petitioner argues, "is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently 'approved' them and whether or not they are 'substantially verbatim' or 'recorded simultaneously' " (Pet. Br. 64).

While we think petitioner's challenge untenable because this is an area of trial practice which it is proper for Congress to regulate by statute (see *supra*, pp. 106–108),[52] the question need not be reached here. In this case the *Jencks*-type materials which were in fact turned over to the defense were not limited to "statements" of the type defined in subsection (e), but included agent-prepared summaries (if any) of oral statements made by the witnesses to the F.B.I. The Government, in making available to the defense the records of prior statements to the F.B.I. by prosecution witnesses touching upon the subject matter of their testimony, did not limit itself to statements of the kind defined in subsection (e), but turned over everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition. There is, accordingly, no basis for this

[52] See also the Briefs for the United States in *Lev*, *Wool* and *Rubin*, Nos. 435–437, this Term; *Palermo*, No. 471; and *Rosenberg*, No. 451.

petitioner's challenge to the subsection (e) definition; he is seeking to argue, in the abstract, a theoretical question which has no pertinency to the facts of his case.[53]

3. *The contention that the application of the "Jencks" Act to petitioner's trial violated the constitutional ban on ex post facto legislation is unavailable because made for the first time in this Court, and is in any event without substance*

Petitioner's final contention pertaining to the "Jencks" Act is that the application of that Act "in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation" because his "alleged crime was committed before the enactment of this statute" (Pet. Br. 64).

[53] In neither court below did petitioner contend that he had not been shown documents which he was entitled to see despite the limitations of subsection (e) of the statute. Rather, petitioner confined his objections to the excision of portions of documents otherwise made available to him—a point discussed *supra*, pp. 99–108. Because this contention was not raised below the Government had no occasion prior to the filing of its memorandum in reply to the petition for a writ of certiorari to place upon the record the fact which it therein asserted (at p. 9)—*i.e.*, that all relevant documents were made available to petitioner regardless of the subsection (e) limitations of the "Jencks" statute.

In *United States* v. *Lev*, No. 435, this Term, *supra*, failure to make a document available to the petitioner at the trial was held to be harmless error because, were a retrial to be ordered, the document would nevertheless be unavailable to the defense under the new statute. Here, somewhat the converse situation exists: any supposed defect in subsection (e) has no bearing on this case because petitioner was, in fact, shown all that he was entitled to see irrespective of the subsection (e) restrictions.

(*a*) In the first place, this argument was not urged either in the District Court or in the Court of Appeals; it was made for the first time in this Court (in the petition for a writ of certiorari, at p. 28). It is, accordingly, not available to petitioner at this time. Cf. *Yakus* v. *United States,* 321 U.S. 414, 444–445; *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16; Rule 51, F.R. Crim. P.

(*b*) In any event, this *ex post facto* contention is on its merits clearly without substance.

We have seen (*supra,* pp. 99–110) that the only provisions of the "Jencks" Act of which petitioner can complain are those relating to the excision procedures prescribed by subsection (c). And, as we have argued (*supra,* pp. 101–106), these provisions are wholly consonant with due process of law and with the holding and rationale of the *Jencks* decision, 353 U.S. 657. It follows that the excision features of the Act did not at all—and certainly not in any substantial sense—alter previously-existing law (as interpreted in *Jencks*). On the contrary, the statute gave statutory sanction to that decision, implementing it by prescribing the mechanics for eliminating non-germane material from the papers and documents required to be made available to the defense. In short, in this respect the Act made no change, even of a procedural nature, in previously-existing law. Accordingly, no *ex post facto* question arises.

But even if it be assumed that the excision clauses of the "Jencks" Act effected a change in previously-existing law, it is clear that the change was, at most, one relating "to modes of procedure only, in which no

one can be said to have a vested right," and which, accordingly, Congress may "regulate at pleasure" (*Hopt* v. *Utah,* 110 U.S. 574, 590). Certainly, these provisions of the Act do not remotely resemble the sort of legislation against which the *ex post facto* prohibition is, characteristically, directed, *viz.,* "penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment" (*Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594). And while "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition," it is "now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Beazell* v. *Ohio,* 269 U.S. 167, 170 (statute authorizing joint trials for jointly indicted persons *held* not *ex post facto* as applied to prior crime).[54]

For further discussion, see the Government's Brief in *Rosenberg* v. *United States,* No. 451, this Term.

D. INADMISSIBLE EVIDENCE WAS NOT RECEIVED

Petitioner's final contention (Pet. Br. 64–71) is that he was prejudiced by the admission of certain al-

[54] See also *Mallett* v. *North Carolina,* 181 U.S. 589, 592–597 (statute giving state right of appeal); *Thompson* v. *Missouri,* 171 U.S. 380 (statute making admissible an important new type of evidence); *Hopt* v. *Utah, supra,* 110 U.S. 574, 590 (statute making previously incompetent class of persons competent to testify).

legedly incompetent and irrelevant evidence. Complaint is made of three principal types of evidence.

1. It is argued that it was error to admit evidence as to the nature and character of the Communist Party which was not directly linked to petitioner (Pet. Br. 64, 66–71). There is no substance to this contention.

One of the elements of the offense defined by the "membership" clause of the Smith Act—the first element to be proved—is that the group or society was, during the pertinent period, one which taught and advocated the forcible overthrow of the Government. *Knowing* membership in the group must be proved in addition, but the first step, legally and logically, must necessarily be proof of the character of the organization. The only way to prove the character of an organization is to adduce evidence of the authoritative acts, statements, and publications of its officers, leaders, and official spokesmen. To limit such proof to acts and statements of the particular individual charged with knowing membership in the organization (or done or uttered in his presence) is incorrect. If petitioner's contention that this is required were valid, the nature of the Party, a material issue, could never be proved. For the Party is by definition a group. And the group's character could not be known by examining only the acts and statements of an individual member in isolation. This argument harks back to petitioner's effort on the constitutional issue to divest "membership", as used in the Smith Act, of its essential meaning—of its denotation of concert with and adherence to others. Both contentions must

fail because they refuse to take account of the group and collective character of membership in a tightly-knit organization such as the Communist Party.

Of course, where the individual defendant in a membership case is, as here, a high-ranking officer and leader of the Party, proof of the character of the Party may (and would normally be expected to) include (as it did here, *supra*, pp. 6–23, 79–81) individual acts and statements of the defendant himself. But there is surely no merit to the argument that it must be *limited to* such individual acts and statements. As noted by the court below, "That part of the evidence which pertained to the activities of the Party with which he [petitioner] had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence" (R. 481).[55]

Petitioner necessarily concedes this central point when he admits that it would be competent for the Government to prove what the Party advocates by putting in evidence "its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations"—even though he may have had no personal role in their drafting (Pet. Br. 67). "If in Smith Act cases against Communist Party members," he says, "the prosecution

[55] And see, on the same point, the opinion of the court below on the former appeal. *Scales* v. *United States*, 227 F. 2d 581, 589. See also, to the same effect, *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (C.A. 7), reversed on other grounds, 355 U.S. 2.

should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time" (*ibid.;* petitioner's emphasis). This is, of course, true. But in view of the rigorously disciplined nature of the Party organization and its alertness to discover and swiftly punish any deviation from the Party line, it is clear that what the Party truly advocates and what its teachings are is better shown by what it permits and authorizes its officers and leaders, *in practice,* to teach and advocate. It would be wholly unrealistic to restrict the prosecution's proof on this subject to the Party's constitution, by-laws, and other "official" pronouncements when these very pronouncements are shown, by the testimony of the Party's own former leaders (as in the case of witness Lautner), to contain "meretricious and self-serving disclaimers," to use petitioner's phrase—or "double talk," to use Lautner's (Pet. Br. 68).[56]

Nor can petitioner escape the force of this logic by his argument that "[i]f it is secret advocacy in contravention of open Party doctrine that is the basis of the charge [that the Party advocates violent overthrow],

[56] Cf. the Second Circuit's observation in the *Dennis* case, 183 F. 2d 201, 229, affirmed on other issues, 341 U.S. 494 (holding that it was proper to permit a prosecution witness, a former Party leader, to testify that the Party's constitution contained "passages * * * which were understood by the initiate to be only a cover—'window-dressing'—for the violent methods advocated and taught"): "This was so patently competent testimony that it needs no discussion."

then it cannot be proved as against Party member A by what member B said to member C in A's absence" (Pet. Br. 69). Where, as here, the evidence clearly establishes that the defendant-member was a Party leader who was privy to such "secret advocacy" and himself engaged in it, no sound reason exists for limiting the proof of what the Party teaches to his own personal teachings and pronouncements. On the contrary, as we have pointed out, precisely because it is *group* advocacy that is in issue no such arbitrary limitation of the proof on this issue is justified, so long as the defendant is shown (as here) to be an integral and knowledgeable member of the group.

2. Petitioner also challenges (Pet. Br. 65–66) the admissibility—on the ground that they were irrelevant, inflammatory, and prejudicial—of "three documents (G. Exs. 64, 65, and 66) relating to the Korean War" (Pet. Br. 65). These documents, it is claimed, "had no conceivable bearing on the issues in the case" (*ibid.*).

The basis of petitioner's argument in regard to these documents is that any document, declaration, or utterance which does not *directly* tend to establish the character of the Communist Party as an organization which advocates the violent overthrow of the Government is not germane to any issue under the Smith Act's membership clause.[67] This premise is misconceived. As noted by the Court of Appeals, the

[67] See colloquy at R. A23 concerning petitioner's motion for a mistrial based on the admission of and reading from these exhibits.

three documents in question—which petitioner personally delivered to the witness Clontz (R. A20, 311–312; Tr. 1149–1150)—"were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted. [They] clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party" (R. 481). Similarly, the Court of Appeals on the former appeal sustained the admissibility of documents which had as their purpose "the arousing of dissension" on the ground that they "had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself" (*Scales* v. *United States,* 227 F. 2d 581, 589).

That such were the Party's purposes in publishing and disseminating these documents is particularly true with respect to Government Exhibit 66, *I Saw the Truth in Korea,* whose admissibility petitioner particularly challenges (Pet. Br. 65–66). This exhibit constituted but one item of the prosecution's proof that the Party seeks unceasingly, day by day, to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. To be sure, evidence of the type contained in Government Exhibit 66 would certainly not suffice, of itself, to prove that the Party advocates the forcible destruction of this Gov-

ernment. But it was admissible as tending to establish the true nature of the Party as an organization which knows that its ultimate objective of a forcible seizure of power is unattainable so long as the populace is generally content with its economic and political lot and the system of government under which it lives, and so long as there are no deep fissures in the loyalty and patriotism of the people as a whole.

Such evidence was admissible, in other words, as tending to show that the Party is no mere intellectual or visionary group parroting words of advocacy of force, without either hope of success or realistic plans for achieving its goal, but a serious *action*-organization—an organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup. The disputed evidence tended to reveal the Party as an organization which, by exploiting potentially divisive issues (particularly *vis-à-vis* the Communist world) with a view to stirring up hatred by the people of their own Government and by taking day-to-day steps designed to bring about a state of seething resentment against the Government, works realistically towards bringing about the necessary "objective" conditions (see *infra,* pp. 123–124, 130, 132) which it realizes must be present before any attempt at forcible seizure of power can have hope of success. Since the evidence was in that sense relevant to the nature and character of the Party as an advocate of political violence, it was admissible in the trial judge's discretion. We submit that the documents in question would have been ad-

missible even if they had been received simply as Party documents reflective of the character of the Party as such, and had not been specifically linked to petitioner. In fact, as we have noted, the evidence shows that witness Clontz received each of the documents from petitioner himself (R. A20, 311–312; Tr. 1149–1150).

3. Neither was it error, as petitioner claims (Pet. Br. 66), to receive in evidence "Communist Party teachings concerning a so-called 'Black Belt' of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed 'nation' with the right of self-determination." The Party's teachings on the "Negro Question," particularly with reference to the right of self-determination and the proposed establishment of a separate Negro nation in the South, were shown to be a basic part of the strategy and tactics of the proletarian revolution (R. 22–23, 164–167, 249–250, 256, 280, 315–319, 327–329, 341–343, 383–384, 414–415, 422). Petitioner himself related the "Black Belt" and "Negro nation" concepts to the Party's program of violent revolution (*supra,* p. 9). *Foundations of Leninism* (G. Ex. 5), a basic Communist "classic," and one which petitioner required Clontz to study with special care as part of his indoctrination (R. 262), explains the method by which the Party's program of self-determination is to be used in facilitating the forcible overthrow of "imperialist" governments:

> Leninism has proved, and the imperialist war and the revolution in Russia have confirmed, that the national problem can be solved only in connection with and on the basis of the pro-

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> letarian revolution, and that the road to victory of the revolution in the West lies through the revolutionary alliance with the liberation movement of the colonies and dependent countries against imperialism. The national problem is a part of the general problem of the proletarian revolution, a part of the problem of the dictatorship of the proletariat [pp. 78–79].

The "Black Belt" evidence was thus directly relevant to the character of the Party as an advocate of the revolutionary destruction of this Government by force.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

Summary of the Evidence (Not Specifically Linked to Petitioner) That the Communist Party Was During the Indictment Period an Organization Which Taught and Advocated the Forcible Overthrow of the Government of the United States as Speedily as Circumstances Would Permit

John Lautner, a prosecution witness, was one of the leading members of the Communist Party at the national level prior to 1950 (R. 2; Tr. 80–81), having been, at the time of his expulsion in that year, a member of the National Review Commission, the Party's top security body, as well as the Chairman of the New York State Review Commission (R. 3, 6; Tr. 83, 86–87, 312).

Lautner first joined the Communist Party in 1929 (R. 1–2; Tr. 80–81). In 1930 he was a pupil at the Party's National Training School in New York, together with some twenty other students selected from different parts of the country (R. 7–8; Tr. 87–88, 103). Later, in 1941, he again attended this National Training School, together with six other students, all of whom held high Party positions (Tr. 126–128). The School's director, Jacob Mindel, told the students that "normally," *i.e.,* if the "world situation" were different from what it was at that time, they would have been sent to the Lenin School in Moscow, which trained "professional revolutionaries" for the Communist Party (R. 19–20; Tr. 130–131). From 1947 to 1949, Lautner, in turn, was a teacher at various Party schools and classes in New York (Tr. 249, 251, 269, 307–309).

In the 1930 and 1941 national schools Lautner was taught, and in his own classes he himself taught, "that the ultimate goal, the ultimate aim of the Communist Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the States" (R. 105; Tr. 426–427) and that (R. 106; Tr. 427)—

> * * * this fundamental change cannot be achieved peacefully. The United States * * * being the most powerful imperialist country, being the leader of the countries in the so-called imperialist camp, * * * this change will come and it can come as a result of force and violence on the part of wresting power from the capitalist class in this country.

In the 1941 school Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 115) was assigned and the principles contained in the following passage were discussed (G. Ex. 6, pp. 19–20; R. 36–37; Tr. 174–175):

> Can such a radical transformation of the old Bourgeois system of society be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy which is adapted to the domination of the Bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution.[1]

Lautner testified that these principles were taught to be "applicab[le] * * * to the United States at that time" (R. 37; Tr. 175) and that he, in turn, taught

[1] As noted *supra*, p. 15, petitioner once called this passage to witness Clontz's attention and commented on it.

them in his own Party classes in the late 1940's (*ibid.*).

Strategy and Tactics (G. Ex. 13, Tr. 157, 158), a collection of excerpts from the writings of Lenin, Stalin, and other authoritative Communist spokesmen, was discussed in the 1941 school and by Lautner in his own classes in the late 1940's (R. 26–27; Tr. 156); among the passages discussed was the following (G. Ex. 13, p. 56; R. 30–31; Tr. 167):

> The revolutionary will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities for the revolutionary preparation of the masses for the overthrow of the Bourgeoisie may be intensified. * * * The reformist, on the other hand, will accept reforms as a pretext for renouncing all illegal work, to thwart the preparation of the masses for the revolution and to "rest in the shade" of reforms that have been "bestowed".

Lautner testified that George Siskind, the instructor on Marxism-Leninism at the 1941 school and a member of the Party's National School Commission (Tr. 137), said, in reference to this quotation, that reformism "had nothing in common with Marxism-Leninism" (R. 31; Tr. 168).

In both the 1930 and the 1941 schools, Lautner was taught, and in his later classes he himself taught, that the fundamental change, to be accomplished by force and violence, would be brought about when two "sets of conditions" historically coincided (R. 57–58, 107; Tr. 260–261, 428–429). These conditions, which in Party parlance are referred to as the "objective" and "subjective" conditions (R. 57–58, 107), were explained by Lautner as follows (R. 57–58):

> There are two sets of conditions necessary for a successful Proletarian Revolution. One set [of] conditions is objective and the other set of conditions is a subjective set of conditions. The objective set of conditions are a disruption in the smooth running, the state apparatus of capitalism, a war situation, a war, disruption in the economy of capitalists in the capitalist state, mass unemployment, wide dissatisfaction with the way things are, where the government of a capitalist state has to resort to all types of improvisations to maintain itself * * *. These are one set of conditions.
>
> Now parallel with that, if there is a strong Communist Party in that given country—not necessarily numerically strong. Numerical strength does not decide the strength of the Party. The influence of the Party and leadership, and the ability to exploit a situation determines the strength of [the] Communist Party; not numbers. * * * if there is a strong Communist Party that has and enjoys the influence of the decisive sections of the working class in the basic industries, in addition to that, and enjoys the confidence of other sections of the workers, if also in addition to that, enjoys the confidence of large sections of the so-called allies of the working class, like poor farmers, and in the United States the Negro people, and in addition to that, that the Communist Party is able to neutralize sections of the middle class, when those two sets of conditions exist, then the Proletarian Revolution will be successful.

At that time, in other words, the Party, "carrying out its vanguard r[o]le," will "lead the working class to wrest power from capitalism, and bring about that fundamental change in the social, political and economic structure of our society here" (R. 107).

In all the schools, Lautner testified, the instructors stressed that all Marxist-Leninist principles applied

to the United States, and they condemned so-called "American exceptionalism"—the doctrine that the United States is exempt from the basic principles of Marxism-Leninism and that there is a possibility that the "fundamental change in the economic, political and social structure could be achieved [in this country] through an evolutionary process" (R. 29–30, 33–34, 37, 56; Tr. 165–166, 171–172, 175, 259–260). Party leaders and instructors, including Lautner, also repeatedly emphasized that the day-to-day activities of the Party and each of its members must be directed toward realizing the final aims of the Party and that the efforts of every member were being constantly evaluated in this light (R. 58–59, 107–108; Tr. 262–263, 429–430).

At its national convention in 1944, the Communist Party was reorganized as the Communist Political Association (Tr. 524–525). In July 1945, however, a new national convention reconstituted the Communist Party (R. 47–48, 51; Tr. 218, 225, 232–233, 525) and devoted itself to ending the "revisionist" policies of Earl Browder, the former General Secretary of the Party, which were being attacked throughout the Party (R. 39; Tr. 180, 218–220, 535). The convention passed a resolution[2] condemning the "opportunist errors" of Browder (Tr. 538), which witness Barbara Hartle, a member of the Resolutions Committee (Tr. 532), explained as meaning "pursuing a social democrat or peaceful road to socialism * * * instead of a

[2] The resolution was published in *On the Struggle Against Revisionism* (G. Ex. 23; Tr. 228, 233, 538), which contained the basic documents of the convention and was used to reeducate Party members returning to civilian life following their army service (Tr. 537), as well as in the September 1945 issue of *Political Affairs* (G. Ex. 24; Tr. 227, 233), the Party's official theoretical organ (Tr. 209–210).

revolutionary road to socialism" (Tr. 538). Mrs. Hartle said that the term "opportunist errors" was used because it was more acceptable to the working class while having a "basic meaning of a great deal more to Marxist-Leninists" (Tr. 538).

In order to implement the new policies, the Party leaders began a revitalized training program in Marxism-Leninism, including classes for beginning, intermediate, and advanced students under the direction of the Party's National Education Commission (R. 51–52; Tr. 243). To guide instructors in these classes outlines were prepared by the Commission (R. 52; Tr. 243), including the *Outline on Fundamentals of Marxism*[3] (G. Ex. 25, Tr. 245, 247). This *Outline* consisted of nine "Lessons," each covering a specific phase or aspect of Marxism-Leninism, and each referring the student to one or more of the Marxist-Leninist "classics," or selections therefrom, as "reading assignments" or "additional reading." These reading assignments included those "classics" (and passages therefrom) which most unambiguously called for the use of force in overthrowing the governments and institutions of the "capitalist" nations. For example, Lenin, in chapter I of his *State and Revolution* (G. Ex. 16, Tr. 181, 184) (one of the study assignments for Lesson IV), chastised Kautsky for having "forgotten or glossed over" the fact that "it is clear that the liberation of the oppressed class is impossible not only without a violent revolution, *but also without the*

[3] This outline was distributed by the Party's national headquarters and was used as a guide by Lautner in classes he taught in Party schools in the late 1940's (R. 52–54; Tr. 244–246). It was also used by Mrs. Hartle in classes she taught in the Northwest District from 1948 until 1950 (R. 179; Tr. 653). In her capacity as District Educational Director, she mimeographed two hundred copies of the outline and distributed them to the sections and clubs of her District (R. 179; Tr. 654).

destruction of the apparatus of state power * * *" (G. Ex. 16, p. 9, emphasis in the original; read to the jury at Tr. 975). Similarly, Stalin, in chapter IV of his *Problems of Leninism* (G. Ex. 6, Tr. 112, 116) (assigned as "additional reading" for Lesson VII), ridiculed the idea that the proletariat's seizure of power could be achieved "without a violent revolution" (G. Ex. 6, p. 19; read to the jury at R. 36–37, 263; Tr. 174, 1016). "To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy," he said, "means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution" (G. Ex. 6, p. 20; read to the jury at R. 37, 263; Tr. 174, 1016).

Witness Cummings testified that in December 1945 he was taught, in a class on the role of the Communist Party, conducted at the Party's Midwest Regional School by George Siskind, the school's principal instructor, that "the capitalist system must be overthrown" and that "the only way" that this could be done "was by force and violence" (R. 447; Tr. 933). Siskind further stated that the Communist Party must teach the most militant workers in the shop, just as Lenin instructed the most militant workers in Russia, that "they cannot have peace with the working class without a revolution" and "that it was necessary at times to throw bombs in the machinery" (R. 447–8; Tr. 933). Siskind taught that the United States was in the last, or "imperialist," stage of capitalism and that, because of the unequal development of capitalism in different countries in this stage, World War II had resulted (R. 448–9; Tr. 935). He emphasized that the only solution to unequal development "was the overthrow of the capi-

talist governments, and he said that the only way the capitalist government would be overthrown was by force and violence" (R. 449; Tr. 935). Siskind further instructed his students that they must "hate" and "fight" the "capitalist class," and that, just as "blood ran in the streets in Russia" at the time of the Bolshevik Revolution in that country, so too, "before we would have peace with the capitalist class in America," "blood would run in the streets in America" (R. 450; Tr. 937).[4]

In April 1946, witness Barbara Hartle attended a Party National Training School (called the "Stalin-Foster" School) near New York City (Tr. 548–550). Mrs. Hartle, a full-time Party Worker from 1940 until 1952 (Tr. 809, 753), held numerous Party offices, including membership on both the District Board and the District Committee of the Northwest (Washington, Oregon, and Idaho) District (R. 120–121; Tr. 501–502), and the office of Administrative Secretary of that District (Tr. 523). The "Stalin-Foster" School was part of the Party's re-education program designed to wipe out all remnants of "revisionism"; it was attended by thirty students, all of whom were Party officers, from different parts of the country (Tr. 549–552, 554).

In a class on "The State," the instructor told the students that the United States was a "bourgeois state," which "must be forcibly overthrown by the working class led by the Communist Party" (R. 135;

[4] On recross-examination, Cummings read to the jury from a report he had made to the F.B.I., at the time he attended the classes, concerning what he had been taught, as follows (R. 454; Tr. 979): "The worker must hate the capitalist class and fight them. It will mean the spilling of blood. We will have streets of blood as they had in Russia. The workers must be organized so when this revolution comes, it must not be a failure. * * *"

Tr. 577–578). Two examples of the revolutionary seizure of a state by force and violence were cited (Tr. 581–582). The first was the "Paris Commune" of 1871 (Tr. 581). The instructor described this as (*ibid.*)—

> * * * the first attempt of the Proletariat to storm the citadels of capitalism, and it was an unsuccessful attempt, but that was described to us as the first time in the history of humanity that the working class, the Proletariat class had made an effort to gain power.

Asked if she was taught "why this effort was not successful," Mrs. Hartle replied (*ibid.*):

> Yes. We were taught * * * that the reason that * * * the Parisian Proletariat didn't retain power was because they did not take sufficient means, sufficient necessary steps, did not use sufficient force to keep that power, and we were taught one of the big mistakes that we made was that in seizing the power they overlooked taking over the banks the same time that they took over the Bastille and some other things like that.

The second example cited by the instructor was "[t]he October, 1917, Revolution in Russia" (Tr. 582).

One of the courses in the school, Mrs. Hartle testified, was on the subject of "The U.S.S.R.," taught by Max Weiss (R. 167; Tr. 639–640), a member of the Party's National Committee (Tr. 237). Weiss taught that "it is not enough in the Communist Party to discuss and study Socialist principles in the abstract, as had been done in Socialist parties and movements in the past," because "today there is a Socialist country in the world, a working class that has gained power, established the dictatorship of the Proletariat, and has exercised that dictatorship and, therefore, the Communist Party studies socialism not in the abstract but

in its concrete manifestations in the Soviet Union" (R. 168; Tr. 640-641). Describing the Bolshevik Revolution of 1917 as "a forcible seizure of power through the destruction of the existing Bourgeois state machine" (R. 171; Tr. 644), Weiss (*ibid.*)—

> * * * taught us that the task that confronted the Russian Proletariat led by the Bolsheviks was, one, the smashing of the Bourgeoisie state machine. He said that the armed forces, courts, prisons, administrative apparatus, police, had to be smashed, that one of the first things that was done was to issue a decree forming a Red Army and Navy, but that it was not possible to form this Red Army and Navy just in a day or two and that the first steps that were taken were to attach commissars from the Bolshevik Party to the old officers' staffs, that immediately Red guard units were formed, and that a workers' militia was established.

It was "possible and relatively easy for the Bolsheviks to take power in Russia," Weiss taught, "because of a number of subjective and objective conditions" (R. 139; Tr. 589). "The objective conditions were that there was a serious situation in the country as the result of the war, World War I"; the "subjective conditions" lay in the fact that "the Bolsheviks were a trained, steeled and tested party" (*ibid.*)[5]

Mrs. Hartle further testified that it was taught at the school that the Communist Party of the United States, "in preparing for the Proletarian Revolution" in this country, should "be guided by the experiences of the Bolshevik Party in Russia at the time of the Russian Revolution"; that Party members in this country "should study very seriously the History of the Communist Party of the Soviet Union, that that

[5] Compare Lautner's testimony, *supra*, pp. 123-124, concerning the "objective" and "subjective" conditions needed for a successful proletarian revolution.

was one volume which more than any other volume would give experience and guidance to the American working class" (R. 173; Tr. 646–647).[6] It was the "plan and program" of the Party, she was taught, when a "revolutionary situation" came to pass, "to lead the working class to seize power, to smash the Bourgeois state machine, establish the dictatorship of the working class or the Proletariat, and then to proceed to reorganize all industry on a Socialist basis" (R. 138–139; Tr. 588). Instructor Weiss pointed out to the class, Mrs. Hartle testified, that the Russian Bolshevik Party was only fourteen years old when it seized power in 1917, and that "if the Communist Party of the U.S.A. had used the same timetable" in this country the "dictatorship of the Proletariat would have obtained in this country in 1934" (R. 168–169; Tr. 641).

Mrs. Hartle further testified that the following passage from *A Letter to American Workers,* by Lenin (G. Ex. 17, p. 16; R. 232; Tr. 798), was taught to the students at the school:

> For the class struggle in revolutionary times has always inevitably and in every country taken on the form of civil war, and civil war is unthinkable without the worst kind of destruction, without terror * * *.

Mrs. Hartle testified that she used the notes and instructions which she received in this 1946 National Training School in various Party training schools at

[6] Lautner testified that when the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 201–202, 213) was published in 1939 it was strongly recommended by Party leaders and plans for its wide distribution were made (G. Ex. 20, Tr. 206, 207; Tr. 203–207). It became part of the re-education program after the 1945 convention and was recommended in an article in the December 1949 issue of the official Party publication, *Political Affairs* (G. Ex. 21, Tr. 208, 210; Tr. 208–213).

which she taught in the Party's Northwest District from 1946 to 1950 (R. 177–178; Tr. 651–653).

Mrs. Hartle, in summarizing what she taught and was taught as a Party member from the reconstitution of the Party in 1945 until she left it in 1952 (R. 227–234; Tr. 793–801), said that the goal of the Party was the dictatorship of the proletariat, which could only be attained by forcible means (R. 230–231; Tr. 797–798); that "any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class" (R. 231; Tr. 798); and that force and violence would be used to seize control at "that moment in history * * * when both the subjective and objective conditions are ripe at the same time" (R. 233–234; Tr. 800–801).

In April 1947, witness Obadiah Jones attended a Party Training School in St. Louis, Missouri (R. 335; Tr. 1363). Jones was instructed by George Siskind, the principal instructor (R. 335; Tr. 1364), that the "way to attack capitalism was to fight for socialism, and also to take over the capitalist plant, and wipe them out" (R. 344; Tr. 1377). Siskind told his students that socialism "would be obtained through bloodshed, if necessary" (R. 347; Tr. 1381). Jones asked Siskind whether "the capitalists" would "defend themselves," to which Siskind replied, "Yes, they would definitely defend themselves, but there would be no use because there was other Communist nations that would surround the United States and come to the defense of the Communists" (R. 349; Tr. 1397–1398). At the final session of the school, Jones and the other students were required to take a pledge, dictated by Siskind (R. 352; Tr. 1401), promising to carry out the "will of the Party even though it meant to fight and to kill" (R. 353; Tr. 1402).

After the 1948 national convention, the Party began nationally to organize ten percent of its membership in an underground apparatus (R. 84–85, 91, 101–102, 221–224; Tr. 374–375, 387, 398–399, 401A, 725–728). The apparatus consisted of seven levels, each level consisting of groups of three Party members each; each group of three, on each level except the top and bottom levels, was connected with one higher-level group of three and one lower-level group of three (G. Ex. 33, Tr. 379, 381; R. 87–88, 222–223; Tr. 381–383, 725–726, 736).[7] The new organizational structure was developed for security purposes, since each member was known only to six other members (R. 88–89; Tr. 383–384; see R. 222–223; Tr. 726). To further protect the underground from detection, "calling points" for exchanging telephone messages, "drop places" for leaving written messages, and hiding places for Party leaders were chosen (R. 89–90, 224–225; Tr. 384–385, 728–729). National headquarters instructed the Districts to establish large reserve funds for use by the underground (R. 226; Tr. 730). Lautner was instructed in connection with this program to set up two sensitive short-wave radio stations, to have a printing apparatus ready for use by the underground, and to supply the names of Party members who could be trusted with from ten to twenty thousand dollars (R. 90, 95; Tr. 385–386, 391–392). Before Lautner was expelled in 1950, the Party had made considerable progress in implementing its security system in New York (R. 91–104; Tr. 387–402), including the manufacture of mimeograph machines (R. 92–94, 96–97, 100–102; Tr. 388–390, 392–393, 397–400) and the running of a security test (R. 98–99; Tr. 395–396). In the Northwest District at least part

[7] The organization was called *troika*, the Russian word for "three-system" (R. 91; Tr. 386).

of the underground apparatus was established, including a secret courier system to national headquarters complete with points of contact, passwords, and hiding places, reduction in the size of branches from about twenty-five to about fifteen members, and the organization of the branches into groups of from two to five members, with only the group leader knowing who were in the group (R. 222–224; Tr. 726–728).[8]

In the summer of 1950, witness Clontz attended the Party's Jefferson School of Social Science in New York (R. 271–274; Tr. 1031–1032, 1037–1040).[9] In addition to the regular Marxist-Leninist curriculum, Clontz received special instruction from Doxey Wilkerson in August 1950 (R. 276; Tr. 1048). Wilkerson, an instructor at the School (Tr. 313), had been elected to the Party's National Committee in 1945 (G. Ex. 23, Tr. 236; Tr. 237). In order to see Wilkerson, Clontz had to go through a strict security procedure, including the use of special passes which were destroyed by Wilkerson so that they could not be reused (R. 276–277; Tr. 1060–1061). Wilkerson told Clontz that, while some Party members had at one time hoped that the Communists' coming to power "could come about without a violent revolution" (R. 279; Tr. 1063–1064), Clontz (R. 280; Tr. 1064–1065)—

> * * * could forget all this drivel about peaceful means and that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means that no longer was there any even pretense among intelligent

[8] In July 1950, witness Hartle went underground herself adopting a fictitious name, staying in her room or apartment as much as possible, and moving frequently from town to town (R. 227; Tr. 732–750).

[9] As shown above (*supra*, p. 17), the arrangements for Clontz' attending this School were made by petitioner.

> Communists that any voting system or any people's election could bring this government.

Continuing, Wilkerson told Clontz that (R. 280; Tr. 1065)—

> * * * the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class, with the Communist Party leading the working class as the vanguard, and that a violent revolution would be necessary to overthrow the Government.

Wilkerson further told Clontz that "the capitalists [in the United States] were speeding their death," and that "if the Korean War was converted into World War III," the "revolution would come much quicker than otherwise would be expected" (R. 289; Tr. 1076). He emphasized, however, that "we Communists did not want any martyrs" and that "the revolution should be started when the time was ripe, and not prematurely" (R. 290; Tr. 1076).

Wilkerson also told Clontz that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis and for secret communications from New York to the rest of the country (R. 282; Tr. 1067). Clontz was advised that, when he returned to North Carolina, he "should remain under cover," maintaining "contact with an undercover Communist club"; that in that way he "would be much more helpful to the Party when the revolution came" (R. 285–286; Tr. 1071–1072).

On one occasion Wilkerson "wrote on a piece of paper" a "formula"—"M–L=F & V"—which, he told Clontz, had been "compounded by the Appellate Courts in the land," and which, he explained, "stood for the proposition that * * * Marxist-Leninist

teachings equal force and violence" (R. 283–284; Tr. 1068–1069). Because of this, he said (R. 284; Tr. 1069)—

> * * * action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution.

As part of this concealment process, Wilkerson pointed out (*ibid.*),—

> * * * an official statement had been issued by the Education Commission of the Communist Party U.S.A. disowning or disclaiming certain study outlines, certain texts, certain publications * * *.

The order had "ordered all Communist Party members to turn those in" and "said henceforth, we will not recognize these as official Party publications" (*ibid.*). "[B]y doing that," Wilkerson explained, the Party leaders "established a technicality for Communists on trial and their attorneys" and thus made it "more difficult for Communists to be convicted" (R. 284–285; Tr. 1069–1070). This stratagem would not, on the other hand, "unduly hamper the Communist Party," Wilkerson explained, since (R. 284–285; Tr. 1070)—

> * * * in the future many things would be left unsaid that previously had been said, many things would be left unwritten that previously had been written, * * * for example, in teaching, a mere bare outline would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

"[T]hat, naturally," however, Clontz was told, "would not change the basic Party goal or the basic aims of the Communist Party" (R. 285; Tr. 1070).[10]

In March 1951, witness Duran attended the National School for Mexican Cadres in Los Angeles, sponsored by the Party's National Education Commission for highly trusted Party cadres (R. 354; Tr. 1422). Alberto Moreau, one of the instructors at the School and a member of the National Education Commission (R. 357; Tr. 1428), in discussing "the Proletarian Revolution," told the students (R. 360; Tr. 1433)—

> * * * that the Proletarian Revolution would only come about if a Bolshevik rank and file, the sincere Communists, would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system * * * the peaceful way; it had to be erupted from, and had to be taken away by force and violence * * * and the entire state machinery of the Bourgeoisie smashed, the F.B.I., the courts, and the Army and the Navy, * * * —the entire instrumentality of the Bourgeoisie had to be smashed * * *.

With respect to "the role that would be played by the Communist Party during this period of revolution when the Government would be overthrown by force and violence," Moreau told the students that (R. 361; Tr. 1435)—

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[10] Wilkerson illustrated his point by referring to the fact that a certain study outline, which Wilkerson had been using in his instructions, and which Clontz was holding in his hands, was "technically * * * illegal because we Communists have disclaimed it, so that you are holding an illegal document there, actually" (R. 285; Tr. 1070).

> The role of the Communist Party * * * was to play a vanguard role, a leading role; * * * first we teach the people the desirability of overthrowing them [the capitalists] and teach them * * * it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class.

"Marxism-Leninism," Moreau told the class, was neither a "blueprint" nor a "dogma" but a "guidance for action" (R. 362; Tr. 1436). The students, he said, should take back the teachings they learned in the School and, in turn, teach them to their fellow Party members at all Party levels (R. 362–363; Tr. 1436–1437).

In the course of his teachings on the proletarian revolution, Moreau "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s" (R. 357–358; Tr. 1429). Following the revolution, he told them, it would be important that the Party "collect * * * from the people" the "guns" with which they had been armed during the uprising in order to make sure that they "would not join a counterrevolution movement" (R. 360–361; Tr. 1434).

In September 1952, Duran attended another Party school, in Evergreen, Colorado (R. 375; Tr. 1507). This school was under the direction of Art Bary [11] (R. 375–376; Tr. 1508), the Party's District Organizer for a seven-state District in the Rocky Mountain area and the National Chairman of the Mexican Commission (R. 374; Tr. 1506). At one point in the course, Duran asked Bary whether the transition to socialism was to be "a peaceful transition" or whether "we [were] to fight a Proletarian Revolu-

[11] This individual's name is misspelled in the record as "Berry".

tion" (R. 379; Tr. 1511–1512). In the course of Bary's "explanation of violent overthrow of the Government or peaceful," he (R. 379–380; Tr. 1512–1513)—

> * * * stated that not only would it be that [*i.e.*, violent], but that we would have to set up barricades, establish a central point from where we would participate from; he stated the "we" literally speaking "we," would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.
>
> In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution.[12]

[12] At an earlier school, held in Estes Park, Colorado, in June 1951 (R. 375; Tr. 1507), Bary taught that the transition from "capitalism" to "socialism" would be analogous to the turning of water in a kettle to steam, with the Communist Party providing the fire under the kettle (R. 377; Tr. 1509–1510). "[T]he American people," he said, "will not and cannot make a successful change over from capitalism to socialism by themselves," but, "like the fire underneath the water, the Communist Party teaches and leads them to where when the society reaches that nodule point, the Communist [Party] * * * leads them to make that abrupt change into the society of socialism" (R. 377; Tr. 1510).

APPENDIX B

In the United States District Court for the Middle District of North Carolina

No. 4320-G

UNITED STATES OF AMERICA

v.

JUNIUS IRVING SCALES

FINDING OF FACT, CONCLUSION OF LAW AND ORDER

This cause having come before the Court by virtue of a motion filed by the defendant to dismiss the indictment because of the illegal selection of the grand jury panel which returned the indictment in the above entitled cause, and the Court having considered said motion and the briefs of counsel for the defendant and for the United States of America on said motion, and having heard such evidence and legal arguments in open court on April 1, 1955, as the defendant and the United States of America desired to present, and having fully considered all the facts as well as the law involved, makes the following findings of fact:

1. That the defendant was indicted by the Grand Jury for the Middle District of North Carolina at Wilkesboro, North Carolina on November 18, 1954 and that the defendant was arrested shortly thereafter in Memphis, Tennessee.

2. That on December 7, 1954, the defendant was brought before the United States District Court, Middle District of North Carolina for the purpose

of arraignment at which time the defendant was without counsel and declined an offer of the Court to appoint counsel.

3. That the defendant was again brought before the District Court on December 16, 1954, at which time the Court appointed counsel to represent the defendant for the sole purpose of arraignment and upon his arraignment the defendant pleaded not guilty.

4. That before the defendant was arraigned the Court entered an order that the plea to the charge in the indictment by the defendant would not constitute, on the part of the defendant, a waiver to his right to file pre-trial motions in this case before the 5th of January, 1955.

5. That upon the request of counsel and acquiesced in by the defendant, the time for filing pre-trial motions was extended from the 5th of January to the 14th of January, 1955.

6. That the defendant failed to file any pre-trial motions by the 14th of January, 1955. However, on this date the defendant appeared in Court with counsel, Mr. Ruben Terris, who, after requesting 60 days extension to file pre-trial motions and a discussion regarding such extension was granted until the 18th of February, 1955, to file any and all pre-trial motions.

7. That the Court set the 2nd of March, 1955, as the date by which replies by the Government to all pre-trial motions must be made and the 8th of March, 1955, for the date of hearing on such motions. The Court at that time also set the 11th of April, 1955, for the trial.

8. That pre-trial motions were filed by Mr. David Rein, counsel for the defendant on the 18th of Feb-

ruary, 1955: That the Government filed its anwers on or before the 2nd of March, 1955.

9. That on the 8th of March, 1955, 23 days after the deadline set for filing pre-trial motions, counsel for the defendant indicated for the first time he might desire to file a motion attacking the grand jury.

10. That the defendant was granted at his first request 29 days from the date of arraignment for filing motions; That he was later granted 35 days more; and that he was granted a total of 65 days from the date of his arraignment in which to file pre-trial motions.

11. That the defendant did not file his motion attacking the grand jury until 24 days after the deadline of the 18th of February, 1955, had expired and 88 days after the date of the arraignment, which was the 16th of December, 1954.

12. That the information necessary to support defendant's motion attacking the grand jury was available to the defendant and/or his counsel at the time of his indictment and had been available at all times within the period set by the Court for the filing pretrial motions.

13. That there was no attempt by the defendant or his counsel to show cause or excuse for the delay in filing the motion attacking the grand jury.

14. That the Clerk of the District Court and the Jury Commissioners of this District would jointly send out to reputable citizens (sponsors) of knowledge and character who knew the people in their community, several different types of form letters requesting each of these sponsors to furnish a list of names of individuals suitable for jury service.

15. That the various form letters would request that the sponsors would furnish on their lists, names of

women, negroes, freeholders and persons affiliated with both the Democratic and Republican Parties.

16. That the word "Freeholder" as set forth in one of the exhibits was by no means a restriction, but was simply the designation of another source to be tapped for the names of prospective jurors.

17. That there was no intimation of any discrimination in favor of or against any particular class, by reason of political or religious faith, or race, color, or sex, or any other classification.

18. That the evidence failed to disclose any delegation of duty by the Clerk of the District Court or by the Jury Commissioner in selection of prospective jurors for service.

19. That the Clerk and Jury Commissioner exercised reasonable screening of the prospective jurors in that the Clerk and Jury Commissioner examined the names and reasonably measured each prospective juror against the statutory requirements.

20. That examination of the prospective jurors was also made by the Clerk and Jury Commissioner by availing themselves of the judgment of persons who were familiar with the prospective jurors and the areas from which they were drawn.

21. That the method used in the selection of Grand Juries was substantially the same for all the divisions of this District except that the prospective jurors for each division reside in that division.

22. That the Clerk of the District Court and the Jury Commissioner supervised and directed the selection of all names of prospective jurors, including those names inserted into the jury box for the Wilkesboro Division of this Court.

23. That there is a new jury box for each division made every five years; in years evenly divisable [*sic*] by five.

24. That the Clerk of the District Court or his deputy and the Jury Commissioner for each respective division when filling the jury box for that division, would insert into the jury box the names of prospective jurors alternately and one name at a time until the jury box contained the number of names required by the Court's Order.

25. That when the Clerk of the District Court and the Jury Commissioner inserted names into the jury box, they did so without any regard to the race, creed, color, sex or political affiliation of such person.

26. That in making up the jury box for each division there was no attempt on the part of the Clerk of the Court or the Jury Commissioner to systematically or intentionally exclude any class or group of persons from the jury box.

27. That from the names in the jury box prospective jurors were drawn and summoned for jury service. That on the reverse side of the summons was a questionnaire asking various questions regarding the name, address, occupation, citizenship, prior jury service, prior convictions, which the prospective jurors were to fill out and return to the Clerk.

28. That, although many questionnaires were not completely answered, the Clerk of the Court or his deputy would examine the answers on each questionnaire.

29. That from the group of prospective jurors summoned nineteen were drawn by a child of tender years to serve as the Grand Jury. That the remaining prospective jurors would form the petit jury panel.

That upon the foregoing facts it is concluded as a matter of law that the motion of defendant to dismiss the indictment in this case because the grand jury was illegally selected was not timely filed. It is further concluded that the evidence did not show any prejudi-

cial defects that would result in a denial to the defendant of any of his rights and that there was not any serious or substantial departure or deviation from the statutory requirements.

Of course, passing on the merits is not necessary because the motion has been rejected for its tardiness, however, the Court feels that, if there is any error in refusing the motion on the time element, it is proper to, and the Court should, pass upon the merits.

The Court denies this motion.

(S) ALBERT V. BRYAN,
United States District Judge.

GREENSBORO, N.C., *April 15, 1955.*

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