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*During the anticommunist hysteria of post—World War 11 America, the House Un-American Activities Committee investigated alleged communist influence in the movie industry. Jack L. Warner, vice president of Warner Bros. Pictures, took the witness chair in 1947. Committee members included future president Richard Nixon, second from right.*



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approach—noting, "It is the considerations that gave birth to the phrase clear and present danger, not the phrase itself, that are vital in our decisions of ques­tions involving . . . the First Amendment:' In his view, the ad hoc balancing approach fully encapsulated that genesis: because Congress has determined that com­munism constitutes harmful conduct carried on by people, Congress may regulate such conduct in the public interest.

Vinson's standard is akin to the bad tendency test of the 1920s. Both operate under the assumption that the First Amendment protects the public good, as defined by legislatures, rather than individual expression. But just one year after *Douds,* in *Dennis v. United States,* the Court adopted yet another standard: the clear and probable danger test. At issue in *Dennis* was the Smith Act. Enacted in 1940 this statute prohibited anyone from knowingly or willfully advocating or teaching the overthrow of any government of the United States by force; from organizing any society to teach, advocate, or encourage the overthrow of the United States by force; or from becoming a member of any such society. By covering so many kinds of activities, the law pro­vided authorities with a significant weapon to stop the spread of communism in the United States.

As you read *Dennis,* keep in mind the environment in which the justices operated. Remember that tremen­dous political pressures influenced the Court just as they did many other sectors of American life.

***Dennis v. United States***

341 U.S. 494 (1951)

[*http://laws.findlaw.com/U.5/34*](http://laws.findlaw.com/U.5/341/494.html)*1/494.html*

*Vote: 6 (Burton, Frankfurter, Jackson, Minton, Reed, Vinson)*

*2 (Black. Douglas)*

**OPINION ANNOUNCING THE JUDGMENT OF THE COURT:** *Vinson*

**CONCURRING OPINIONS: *Frankfurter, Jackson***

**DISSENTING OPINIONS:** *Black, Douglas*

**NOT PARTICIPATING:** *Clark*

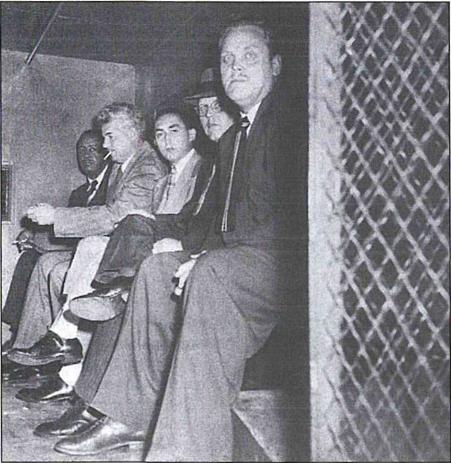
**FACTS:**

On July 20, 1948, eleven leaders of the National Board of the Communist Party were indicted for conspiring to teach and advocate the overthrow of the govern­ment by force and violence and to organize the Communist Party for that purpose in violation of the Smith Act. Their trial was a protracted affair, lasting nine months and generating sixteen thousand pages of evidence. A great deal of the testimony on both sides involved Marxist-Leninist theory and the inner work­ings of the Communist Party. The prosecutor's case read like a spy novel, full of international conspiracies, secret passwords and codebooks, aliases, and plots to overthrow the U.S. government. The defense was a bit more philosophical as it attempted to demonstrate that the leaders of this particular branch of the party wanted "to work for the improvement of conditions under capitalism and not for chaos and depression:'

Not sympathetic to this line of reasoning, the trial court sentenced each defendant to five years in prison

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*Eleven leaders of the American Communist Party, including Eugene Dennis, second from left, were sentenced to prison in 1949 for conspiring to teach and advocate the overthrow of the U.S. government, a violation of the Smith Act. In* Dennis v. United States *(1951), the Court upheld the law on the grounds that the threat of communism was grave enough to justify restricting free speech.*

and a $10,000 fine. After their convictions were sustained by the court of appeals, Dennis and the others appealed to the U.S. Supreme Court, asking it to overturn their convictions and strike down the Smith Act as an uncon­stitutional infringement on free speech. They said, "The statute and the convictions which are here for review can­not be validated without at the same time destroying the constitutional foundations of American democracy"

**ARGUMENTS:**

***For the petitioners, Eugene Dennis, et al.:***

* The Smith Act, as written and applied in this case, unconstitutionally makes it a crime to teach or advocate an outlawed doctrine or to organize a group to teach or advocate that outlawed doctrine without regard to circumstances.
* The conspiracy provisions of the Smith Act make it a crime merely to agree to speak, distribute materials, or organize a political party to advance certain polit­ical ideas. No overt illegal act need be committed.
* The petitioners' intent does not justify a denial of constitutional protections. Rather, the government must show that the advocacy created a clear, present, and imminent danger of a substantive evil.

***For the respondent, United States:***

* The Smith Act in this case was applied not to abstract discussions by isolated agitators but to American leaders of a worldwide totalitarian political movement.
* The Smith Act is a valid exercise of congressional authority to preserve democratic government and military security.
* The First Amendment does not protect the petition­ers in their preparation for an attempt to establish by force in the United States a communist dictatorship whenever it may seem to them that circumstances favor such action.

|  |
| --- |
| **10 MR. CHIEF JUSTICE VINSON**  **ANNOUNCED THE JUDGMENT OF THE COURT.** |

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

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discus­sions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to con­duct in an American college and university a course explaining the philosophical theories set forth in the

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books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the tradi­tional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

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

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. Overthrow of the Government by force and violence is certainly a sub­stantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any soci­ety, for if a society cannot protect its very structure from armed internal attack, it must follow that no sub­ordinate value can be protected. If, then, this interest may be protected, the literal problem which is pre­sented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circum­stances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses

ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a success­ful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or proba­bility of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow [v. New York, 1925]* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. They were not con­fronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

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

We hold that . . . the Smith Act dotes] not inher­ently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights. . . . Petitioners intended to over­throw the Government of the United States as speed­ily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear

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

*Affirmed.*

***MR. JUSTICE FRANKFURTER, concurring in***

***affirmance of the judgment.***

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . .

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on free­dom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.

Can we then say that the judgment Congress exer­cised was denied it by the Constitution? Can we estab­lish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?

To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment.

***MR. JUSTICE BLACK, dissenting.***

At the outset I want to emphasize what the crime involved in this *case* is, and what it is not. These peti­tioners were not charged with an attempt to over­throw the Government. They were not charged with overt acts of arty kind designed to overthrow the Government. They were not even charged with say­ing anything or writing anything designed to over­throw the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they con­spired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of

the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold §3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

. . . To the Founders of this Nation . . . the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abrid­ging the freedom of speech, or of the press. . . " I have always believed that the First Amendment is the key­stone of our Government, that the freedoms it guaran­tees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges v. California* [1941].

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to pro­tect any but those "safe" or orthodox views which rarely need its protection. . . .

***MR. JUSTICE DOUGLAS, dissenting.***

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

Full and free discussion has indeed been the first article of our faith. We have founded our political sys­tem on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted

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the common sense of our people to choose the doc­trine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

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

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its con­tents. There must be some immediate injury to society that is likely if speech is allowed. . . .

. . . Free speech—the glory of our system of govern-ment—should not be sacrificed on anything less than plain and objective proof of danger that the evil advo­cated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

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

purposes of civil government, for its officers to inter­fere when principles break out into overt acts against peace and good order." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provoca­teurs among us move from speech to action.

The *Dennis* decision illustrates the differing approaches advocated by members of the Court at that time. A plurality of the Court accepted Vinson's clear and probable danger test. Quoting appeals court judge Learned Hand, Vinson writes, "In each case courts must ask whether the gravity of the 'evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." But is this a rea­sonable interpretation of the test emanating from *Schenck?* That is, would Holmes have agreed with this language? Or does it more closely resemble the bad tendency standard, with which Holmes disagreed?

Justice Frankfurter, concurring in *Dennis,* contin­ued to articulate a balancing approach, with its clear bias toward supporting government action. For Frank­furter, Congress had decided, after due deliberation, that communism was a significant threat and that the courts should restrain themselves from intervening.

In dissent, Justice Hugo Black expressed support for the preferred freedoms position and the clear and present danger test. "I have always believed," Black wrote, "that the First Amendment is the keystone of our Gov­ernment, that the freedoms it guarantees provide the best insurance against the destruction of all freedom."

Finally, Justice William 0. Douglas, in dissent, advocated an entirely different approach. He argued that the First Amendment prohibits Congress from abridging the freedom of speech and "provides no exception." This argument is often referred to as the absolute freedoms test because it applies the language of the First Amendment literally. The words "Congress shall make no law" impose an absolute prohibition against government regulation of freedom of speech.

As we shall see, Black and Douglas, the Court's strongest civil libertarians, remained in relative isola­tion during the early 1950s, but the Warren Court of the late 1950s and 1960s adopted many of their views.

In spite of the divided Court, *Dennis* is an impor­tant precedent: between 1951 and 1956, the justices