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The End of the Smith Act Era: A Legal and Historical Analysis of *Scales v. United States*

by MARK A. SHEFT*

Introduction

In *Scales v. United States*, the Supreme Court upheld the membership clause of the Smith Act, which proscribed knowing membership in organizations that advocate the violent overthrow of the government. *Scales* was an anomalous case, the prosecution and outcome of which reflected not the unbiased application of a pristine law, but, instead, the collision of politics and jurisprudence before the bar of the federal judiciary. When examined within the legal-historical latticework of the 1950s, *Scales* represents the bizarre concluding chapter in the Smith Act drama that had been played out during the preceding thirteen years.

* * *

In 1939, Junius Irving Scales, scion of a wealthy North Carolina family, joined the Communist Party club at the University of North Carolina, Chapel Hill because he harbored a profound hatred of racism and bigotry. Convinced that it was the correct vehicle through which to channel his idealism, Scales devoted himself completely to the party, eventually becoming District Organizer of the Carolinas. In 1945, however, after the ouster of Earl Browder, the party's long-time leader and a steadfast advocate of an American road to socialism, Scales began to question the party's belief in the infallibility of Josef Stalin. Nikita S. Khrushchev's revelation of Stalinist crimes and the Soviet Union's suppression of the Hungarian uprising turned his doubts into severe disillusionment. Moreover, the party's attempts in the 1950s to root out "revisionism" repelled him because of its obvious parallels to McCarthyism. In 1957, convinced the party had become programmatically bankrupt, Scales severed his ties. Thus, the defendant in *Scales v. United States*, a man charged with criminal membership in the Communist Party, was an ex-communist. Yet, the Department of Justice's paramount concern was that it craft from the membership clause a new statutory weapon with which to destroy the Communist Party. The evidence adduced against Junius Scales remained the most secure foundation upon which to build such a test case.

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The Advent of *Scales v. United States*

When Senator Joseph R. McCarthy told an audience in Wheeling, West Virginia, that he had in his hand "a list of 205 . . . names that were known to the Secretary of State and who nevertheless are still working and shaping the policy of the State Department," he set off a movement which, for many observers, would indelibly mark the 1950s with his name.¹ McCarthyism signified national fear, intolerance and, in the name of anticommunism, the acceptance of unconstitutional interference with fundamental freedoms. Individual reputations were destroyed because of alleged Communist Party affiliation; the State Department's Far Eastern Bureau was gutted by its dismissal of supposedly disloyal analysts; and loyal citizens were harassed during testimony before the House Un-American Activities Committee and McCarthy's Senate Subcommittee on Governmental Operations.

Yet anticommunism in America was not purely a Cold War phenomenon: indeed, it had existed since the Bolshevik Revolution of 1917. After World War I, as communism gained ground in much of Central Europe, American newspapers and politicians delivered polemics about international communism's threat to American government and economic institutions. Domestic radicals were perceived as the agents of the Communist International, an organization which incessantly fomented revolution throughout the world. The incidence of labor strikes confirmed, to many citizens, that the irrepressible battle between capital and labor was erupting in the United States. Ultimately, a wave of bombings impelled the public, accustomed to the Justice Department's wartime repression of radicals, to demand that such activity be curbed. Responding to Congressional and popular pressure, Attorney General A. Mitchell Palmer, in late 1919 and early 1920, coordinated a massive police assault on the headquarters of leftist organizations. The Palmer Raids occurred in twelve cities and resulted in the arrest of more than 1000 alien radicals. Like most people who would later be investigated by Senator McCarthy, a substantial percentage of Palmer's detainees were not security threats; still, a relieved citizenry congratulated Palmer for his successful campaign.² Bolstered by the wave of public support, the Attorney General pressed for passage of a federal peacetime sedition law to provide for the Justice Department a statutory weapon against subversion. In the winter of 1919-1920, over seventy bills were introduced

1. Senator Joseph R. McCarthy, Republican of Wisconsin, speech in Wheeling, West Virginia on February 9, 1950. Quoted in David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy*. (New York: The Free Press, A Division of Macmillan, Inc., 1983), p. 109.

2. Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover*. (New York: The Free Press, A Division of Macmillan, Inc., 1987), chapter 3; Robert K. Murray, *Red Scare: A Study in National Hysteria 1919-1920*. (Minneapolis: University of Minnesota Press, 1955).

in Congress, but none became law because the red scare had ebbed.³ The Communist Party's resurgence during the depression, however, motivated reconsideration of legislative action, and culminated with the passage of the Smith Act on June 22, 1940: the sedition law for which Palmer had so thirsted was now on the statute books.

As written, the initial draft of the Smith Act forbade aliens to advocate the violent overthrow of the government or to accept membership in groups which so advocate. On July 29, 1939, however, Representative Howard W. Smith, Democrat of Virginia, and the man for whom the act was named, dramatically took the House floor and sponsored an amendment broadening the bill's scope. He told Congress:

We have laws against aliens who advocate the overthrow of this Government by force, but do you know that there is nothing in the world to prevent a treasonable American citizen from doing so? He can advocate revolution, the overthrow of the Government by force, anarchy, and everything else, and there is nothing in the law to stop it. This amendment makes it unlawful for any person . . . to advocate the overthrow of the Government of the United States by force.⁴

Notwithstanding Congressman Vito Marcantonio's attempt to have the bill recommitted to the House Judiciary Committee for a comprehensive study of the amendment's constitutional implications, Smith's proposal passed after only twelve minutes of debate. Ultimately, both houses of Congress overwhelmingly accepted the Alien Registration Act, the Smith Act's official title.⁵ Although antialienism and anticommunism nourished this cavalier attitude toward fundamental freedoms, Congressional frustration regarding the practical limitations of the federal conspiracy law was critical. The existing law's requirement of evidence demonstrating both the presence of a conspiracy and overt acts to that end, effectively protected communists from prosecution.

3. Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties*. (Westport, Connecticut: Greenwood Press, 1977), p. 16.

4. *Congressional Record*, p. 10452. July 29, 1939.

5. The relevant portions of the act provide that:

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 . . . by force or violence, or by the assassination of any officer of such government;

Whoever organizes or helps to attempt to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or becomes or is a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

Shall be fined not more than \$20,000 or imprisoned not more than twenty 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 (18 U.S.C. 2385). The italicized portion is the membership clause.

The Smith Act, in contrast, merely proscribed advocacy of violent overthrow and deferred to the judiciary for a determination of the danger and intent associated with the words. As C. Herman Pritchett comments, the Justice Department was the lucky beneficiary of this remedial legislation "because it is easy to prove that communists have made communist speeches and read communist books."⁶

At the time of the Alien Registration Act's passage, Zechariah Chafee, Jr., one of the nation's foremost civil libertarians and a specialist on freedom of speech, thought that the title of the law and the newspapers' coverage of it was misleading because most of the statute had little to do with registration, and much of it applied to citizens. He maintained that if the subversive advocacy clause was constitutional at all, it would necessarily be interpreted much more strictly than many Congressional proponents had anticipated. Chafee emphasized that the First Amendment is more than a mere articulation of the limits of federal power; it is an assertion of a policy which favors "public discussion of all public questions."⁷ The right to express innocuous, diluted opinions does not serve the social function implicit in the framer's conception of freedom of speech. Furthermore, the membership clause, about which almost nothing was said during the debate, was definitely a violation of the First Amendment because it imputed guilt based on associations rather than personal actions.⁸ Addressing the membership clause specifically, Senator Tom Connally, Democrat of Texas, had described it as a "stringent" clause but, unlike Chafee, he had asserted that it was not worthy of concern since it only proscribed membership in groups which illegally advocated overthrow of the government.⁹ This comment is notable both for its failure to grasp the First Amendment questions raised by the law and as one of the few comments about the membership clause specifically that can be found in the record. Since there was so little said about the clause, Telford Taylor, Junius Scales' attorney, contended that it was inadvertently lifted from the criminal syndicalism laws of two decades before.¹⁰

6. C. Herman Pritchett, *Congress Versus the Supreme Court, 1957-1960*. (Minneapolis: University of Minnesota Press, 1954), pp. 66-67.

7. Zechariah Chafee, Jr., *Free Speech in the United States*. (Cambridge, Massachusetts: Harvard University Press, 1941), p. 6.

8. *Ibid.*, chapter titled "A Sedition Law for Citizens."

9. *Congressional Record*, p. 8342. June 15, 1940.

10. As Taylor said: "The membership clause itself does not embody the considered judgment of Congress, but merely a hasty copying from state statutes enacted in a period not notable for calm or reflective judgment." Brief for the Petitioner in *Scales v. United States*, p. 72. This brief hereinafter will be cited as Petitioner. Located in the John Marshall Harlan papers, Supreme Court Case Files, October Term, 1960. Box 103, Seeley G. Mudd Manuscript Library, Princeton University. These papers hereinafter will be cited as HP. Published with the permission of Princeton University Libraries.

Eleven years passed before the Supreme Court grappled with the constitutionality of the Smith Act. A turbulent period for the Communist Party, it dissolved in 1944, reconstituted itself in 1945, and then was implicated in a number of internal security breaches.¹¹ These breaches, in conjunction with American foreign policy setbacks, transformed the smoldering embers of domestic anticommunism into the fiery blaze that characterized the 1950s. The United States Department of Justice, attempting both to assuage the nation's apprehensions concerning the threat of domestic communism, and to mollify partisan political rhetoric, fashioned from the Smith Act its principal tool in an aggressive campaign to cripple the Communist Party. In 1948, the department indicted the eleven top party members for violation of the conspiracy provisions of the Smith Act.¹² Convictions were obtained for all eleven and, upon appeal, the convictions were sustained by the Second Circuit Court in New York. Thus, in *Dennis v. United States*, the Supreme Court received its first opportunity to appraise the constitutionality of the law.

Affirming the Appeals Court decision, Chief Justice Fred M. Vinson adopted the approach employed by Judge Learned Hand in the lower court opinion. As Vinson argued:

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase [clear and present danger] 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. . . . The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions . . . convince us that their convictions were justified on this score. . . . It is the existence of the conspiracy which creates the danger. [If] the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.¹³

Furthermore, the Court declared that the law criminalized the advocacy of violence in the unforeseeable future: "If [the] Government is aware that a group aiming as 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

11. In 1945, the Office of Strategic Services disclosed that Philip J. Jaffe, editor of *Amerasia*, a communist-sponsored magazine which influenced American policy in the Far East, possessed secret government documents. The Federal Bureau of Investigation then discovered a connection between Jaffe and Chinese communist and Soviet officials. In 1946, the exposure of a Soviet spy ring in Canada shocked America and fueled the fire of those in the United States who insisted that the Communist Party was a conspiratorial organization which had already infiltrated the government. The internal security difficulties culminated with the Alger Hiss affair.

12. There were actually twelve members of the party's national board, but William Z. Foster was not tried because of poor health.

13. *Dennis v. United States*, 341 U.S. 494 (1951), pp. 510-511.

is required."¹⁴ The speculated effect of words, or the "bad tendency" of the utterances, was enough to sanction speech restrictions. Most commentators agree that the *Dennis* decision perverted the traditional clear-and-present-danger test which Justice Oliver Wendall Holmes had enunciated in *Schenck v. United States*.¹⁵ The supposed conspiratorial nature of the party constituted the danger, rather than the content of the words and the circumstances in which they were spoken. Essentially, the Court argued that because the advocates were communists, they were a danger. To the horror of civil libertarians and observers well-versed in constitutional law, the *Dennis* decision emphasized the character of the speaker and the remote, imagined consequences of the words.

The Vinson Court had fed freedom of speech to the internal security wolf since, in the wake of the *Dennis* decision, the Justice Department initiated a nationwide effort to prosecute the "second string" party leaders. In trials all over the country, from Hawaii to Pennsylvania, the second echelon party leaders were convicted of violating the Smith Act's advocacy clause.¹⁶ In each trial the government would establish that the defendants read communist books and made communist speeches. Ex-communist informants or F.B.I. undercover agents would testify as to party teaching, and then the jury would deliver a verdict of guilty. However, on November 18, 1954, Junius Scales became one of only seven individuals ever arrested solely for violation of the membership clause.

According to the historian, Michal R. Belknap, the Justice Department was conducting "preliminary experiments" into the viability of the membership clause as an additional implement to use against communists.¹⁷ On April 12, 1954, Attorney General Herbert Brownell had told a House Judiciary subcommittee to "anticipate some rather interesting [future] developments."¹⁸ Scales' arrest was one of those "interesting developments," and within eighteen months he had been

14. *Ibid.*, p. 509.

15. In *Schenck v. United States*, 249 U.S. 47, the Supreme Court first grappled with the question of how to apply the First Amendment's free speech guarantee in a manner which would imperil neither individual liberty nor national security. In his landmark decision, Justice Holmes wrote for the majority: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

16. Since the national leaders were indicted before 1950, the indictment also included a membership clause offense as well. However, after passage of the 1950 Internal Security Act, there was fear that section 4(f) of that statute barred prosecution under the Smith Act's membership clause. Thus, until 1954, all of the "second string" communists who were arrested after *Dennis* were charged only with conspiracy to illegally advocate violent overthrow.

17. Belknap, p. 261.

18. Quoted in Belknap, p. 262.

convicted, had lost on appeal, and had presented arguments before the Supreme Court. Yet, at this stage of the tortuous procedural path which Scales' case would follow, nothing distinguished it from any other membership clause case or Smith Act case in general. Two critical Supreme Court decisions handed down in 1957 changed that.

In *Jencks v. United States*, the Court ruled that a defendant was allowed to examine F.B.I. reports based on the questioning of informant witnesses so that the written reports could be compared to the oral testimony and examined for inconsistencies.¹⁹ Also in 1957, in *Yates v. United States*, Justice John Marshall Harlan, speaking for the Court, introduced a more strict evidentiary standard which had to be met in order constitutionally to convict for illegal advocacy. Basing the decision upon the deficiency of the District Court judge's jury instructions, Justice Harlan underscored the crucial distinction between advocacy of "abstract doctrine" and advocacy of action:

In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since "inciting" speech is usually thought of as something calculated to induce immediate action, and since *Dennis* held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action. This misconceives the situation.
...²⁰

Although purporting to be an affirmation of *Dennis*, Harlan's standard sought to place more emphasis on the character of the words spoken than had Justice Vinson in *Dennis*. Henceforth, the Justice Department would be unable to prosecute communists unless it had proof that the defendant advocated action: this required more than the mere demonstration that he had read communist classics and had made communist speeches. It compelled the government to produce evidence of the defendant's actual advocacy and to show that it was more than a call for overthrow in some abstract sense.

Although the new standard was not exceedingly strict when compared to that necessary to convict for conspiracy, for example, it severely retarded the Justice Department's anticommunist crusade because it deprived the department of its primary weapon: the Smith Act's advocacy clause. According to the *Attorney General's Annual Report* for fiscal year 1959, the *Yates* decision caused either prosecutions to be dismissed or convictions to be reversed in seventy cases.²¹ This was evidence of how flimsy the government's cases had

19. *Jencks v. United States*, 353 U.S. 657 (1957).

20. *Yates v. United States*, 354 U.S. 298 (1957), p. 320.

21. *Attorney General's Annual Report* for fiscal year 1959, p. 341.

always been. In terms of Scales' case, the *Jencks* decision and the *Yates* decision combined to make his prosecution the government's most urgent Smith Act test, as it sought to sustain its campaign by giving primacy to the membership clause.

The High Court had read the briefs and had listened to oral arguments for Scales' case, but it had not delivered an opinion as of the time when the *Jencks* and *Yates* decisions were handed down. Since Scales' trial had been conducted in 1955, before the *Jencks* decision, the F.B.I. files had not been produced for defense use and the trial was subject to reversal. On September 25, 1957, the Solicitor General, J. Lee Rankin, to the defense's surprise, filed a memorandum with the Supreme Court in which he stated that Scales' conviction "must be reversed for further proceedings in the light of the *Jencks* decision."²² The government did not, however, concede that the membership clause was incorrectly applied to Scales. This tactical maneuver, Telford Taylor points out, was primarily a response to the *Yates* decision, not the *Jencks* decision, as the government had maintained. The prosecution had more reason to fear that the conviction would be overturned on the basis of the stricter *Yates* evidentiary standard, with which the government had not concerned itself when presenting its case in District Court. Reversal in light of *Yates* differed in one crucial way from reversal because of *Jencks*: if *Yates* were invoked, it would require a ruling on the First Amendment issues involved in Scales' case and would not leave open the opportunity for a new trial. To urge the Court to reverse on the *Jencks* principle was to urge that these issues be avoided until the government could construct a new case which considered the impact of *Yates*.

Thus, it was for the sake of the membership clause that the Justice Department so resolutely prosecuted this case. Although by this time the defendant had quit the party, the government continued to view *Scales* as its most viable opportunity to obtain a membership-clause conviction based on evidence that satisfied *Yates* and that demonstrated to the Court that the Communist Party was an organization which incited people forcefully to overthrow the established political system.²³ *Scales v. United States*, however, should not have burdened the judicial system for a second time: Junius Scales was a former member of a dead party, and was never charged with the commission of any overt acts—yet, for five more years, he would be treated as a dangerous threat to American freedom.

Back to Greensboro

Junius Scales' second trial began on February 3, 1958, in the Federal

22. Quoted in the *New York Times*, September 25, 1957, p. 31.

23. Telford Taylor, forward to Junius Scales and Richard Nickson, *Cause at Heart: A Former Communist Remembers*. (Athens, Georgia: The University of Georgia Press, 1987), pp. xvii–xviii.

District Court of Greensboro, North Carolina. As in the first trial, Judge Albert W. Bryan presided, and Victor C. Woerheide and Robert L. Gavin presented the case for the government. Telford Taylor, the well-known Nuremberg prosecutor and New York lawyer, represented Scales. In his forward to Scales' memoir, Taylor recalls that anticommunism had so penetrated the state level and national bar associations that most attorneys eschewed the defense of an acknowledged Communist Party official. Yet, he felt that the membership clause had constitutional problems and adamantly believed that the defendant deserved "competent legal representation."²⁴ He did not, however, accept the case unconditionally. He realized that the Communist Party had, in the past, used the courtroom as a forum for political proselytizing and disruptive histrionics.²⁵ Also, its method of legal defense tended sometimes to bully defense attorneys. From the outset, then, Taylor made it clear that he, not the party, would run the defense. He would not represent the Communist Party, but Junius Scales, the individual. Because "foreign" lawyers generally had more difficulty convincing local juries, McNeil Smith, a senior partner in a well-known and respected Greensboro law firm, would help Taylor. Both shared the opening and closing statements, but Smith handled witnesses from the Greensboro vicinity whose testimony specifically covered the defendant. Taylor made all the formal motions and cross-examined the government witnesses who testified about the Communist Party.²⁶

Looking back to the second trial, after thirty years, Junius Scales writes in his memoir that it was much more of an ordeal than the first had been. He no longer felt the courage which came from association with a noble cause: his sense of martyrdom disappeared when he severed ties with the party. Moreover, it pained him to discuss the views he had espoused because he now condemned many of them as naive or uncritical. No longer could he examine his past "through self-justifying rose colored glasses."²⁷ During jury selection, Scales' mind drifted back through the years in an attempt to ascertain for himself whether or not he had ever advocated violence as a means to build socialism in America. He had always felt that violence "created more ugliness than it could ever eradicate."²⁸ Dismissing the violent rhetoric of Marxism-Leninism, he had maintained that the political support of the majority would be sufficient to overcome the impediments to power set up by the present leadership.

24. Taylor, in Scales, p. xiii.

25. The nine month trial of the eleven leaders of the Communist Party is the best example of such courtroom behavior: Judge Harold Medina held the defense attorneys and some of the defendants in contempt for their conduct.

26. Taylor, in Scales, pp. xiii-xix.

27. Scales, p. 325.

28. *Ibid.*, 328.

As the defendant engaged in silent retrospection, the prosecution, presenting its case first, set out to prove four things: that the Communist Party was an organization which "systematically taught and advocated and encouraged the overthrow of the Government of the United States by force and violence"; that the defendant, Junius Scales, was a member of the party during the three-year indictment period from November 18, 1951, to November 18, 1954; that Scales had knowledge of the party's violent goals; and that he had harbored the specific intent to effectuate these goals by violence.²⁹ To prove that the party was an organization which advocated the violent overthrow of the government, the prosecution, for the first half of the trial, presented testimony which never mentioned the defendant's name. The foundation witness, as in many previous Smith Act trials, was John Lautner, an ex-communist who had been unjustly expelled from the party as an informant.³⁰ He testified about the party's reconstitution in 1945 and the reaffirmation of Marxism-Leninism over "Browderist revisionism."³¹ The new organization, he stated, returned to its prewar position that violence was necessary to achieve socialism in America. The party schools taught that a southern "black belt" would be a potential locus for revolutionary support. Most importantly, the witness stated, a reeducation program, centered around the national training schools, taught members about the inexorability of violence and outlined the specifics of the industrial concentration program. To implement this program, members would infiltrate important industrial sites and gain worker support, as well as coordinate worker activity during the revolution.³²

Barbara Hartle, another former communist, corroborated Lautner's testimony about the party reconstitution and the reeducation campaign's focus on violence. To punctuate this point, the government presented testimony by three informants who had infiltrated the party: William Cummings had attended training school in Chicago in December, 1951; Obadiah Jones received his party training in St. Louis in 1947; Bellarmino Duran attended party school in Los Angeles in 1951. Their testimony established a pattern of teaching which emphasized violence, and the

29. Mr. Woerheide, *Scales v. United States*, District Court Trial Transcript, p. 2089. The transcript hereinafter will be cited as Transcript.

30. Lautner was a member of the New York Review Commission, the state party organ charged with the maintenance of ideological conformity and internal party security. An internal security lapse and unsubstantiated rumors led party leaders to believe erroneously that he was an informant.

31. Earl Browder, in changing the party to the Communist Political Association in 1944, argued that the basic principles of Marxism-Leninism did not apply to America. The "fundamental change in the economic, political and social structure," he stressed, "[could] be achieved in an evolutionary process." Browder advocated the use of established political channels rather than violence and was thus condemned, one year later, as a revisionist.

32. Concentration industries were ones which represented the foundation of regional economies. Tobacco in the Carolinas is an example.

need for the noble workers to overthrow the evil capitalist class. Duran was taught that the vanguard party would violently smash the bourgeois machinery: the revolutionaries would be armed with guns, he noted. Lautner, Hartle, Jones, and Cummings all stated that George Siskand, a member of the national training staff, instructed members to hate the capitalist class and forced them to promise to implement the party will, irrespective of the human cost. Based on this testimony, counsel concluded that the party was an activist organization, "steeled in struggle" and dedicated to violence.³³ Since Scales publicly admitted his membership in the party and had also been taught by Siskand, by implication he agreed with the party's attitude toward violence.

The party's violent intent had been accepted by the Supreme Court in *Dennis* and had been demonstrated to juries in every subsequent Smith Act trial. In many of those trials, and indeed in Scales' first trial, however, the defense presented expert testimony to counter the Government. Such testimony normally emphasized the confluence of communist theory and the American doctrine of revolution outlined in the Declaration of Independence.³⁴ Membership in the Communist Party, the argument stressed, involved not a departure from revered American traditions, but a dedication to the cornerstone principles upon which American government and society had been erected. Curiously, in his second trial Scales elected not to counter directly the testimony of the five government witnesses.³⁵

Instead, Taylor objected to their testimony on the ground that it was irrelevant and incompetent. None of the witnesses, he asserted, had ever met Scales, and their knowledge related only to activities which had occurred before the indictment period. However, Judge Bryan denied the defense's motion to strike all of their testimony from the record. Taylor's other tactic was to point out the weaknesses of this testimony in his closing argument. The informants' employment by the Justice Department, he reminded the jury, compromised their objectivity and biased their descriptions. Furthermore, the fact that Lautner and Hartle had "invested the best years of their lives in a venture that has now turned to gall and wormwood in their hands" necessarily skewed their recollection of events and impaired their credibility.³⁶ Also, counsel noted, Hartle told the court that she, like Scales, had regarded her party work not as an effort to foster the violent overthrow of the established power structure, but, rather, as a means to promote equality and justice. Therefore, evidence of a pattern of teaching did not prove beyond a reasonable doubt the intent of individuals within the party.

33. Woerheide, Transcript, p. 2097.

34. See John Somerville, *The Communist Trials and the American Tradition: Expert Testimony on Force and Violence*. (New York: Camerin Associates, Inc., 1956).

35. Professor Robert S. Cohen, a member of the Wesleyan University faculty, had testified as an expert on Marxism-Leninism at Scales' first trial.

36. Transcript, p. 2118.

After Bryan denied the defense's motion, the government embarked on a course designed to prove that Junius Scales was an active member, with knowledge of the party's goals and the specific intent to achieve these objectives by violence. It contended that, as District Organizer for the Carolinas, Scales recruited and educated new members, reported to the party's national committee about his district, and generally promoted the party's "revolutionary aims."³⁷ The first witness called to the stand was Ralph Clontz, a native of Charlotte, North Carolina, and a graduate of the Duke University Law School. From 1942-1946, he served in the army, spending part of that time as a military intelligence officer in Austria. In 1948, after Clontz offered to gather intelligence about communist activity in the Carolinas, the army referred him to the F.B.I., which encouraged him to join the Communist Party and make reports to the Bureau. Later that year, after Clontz had expressed interest in the party, the defendant sent him a box of literature and invited Clontz to his house for further information. The basis of the witness' testimony came from two lengthy conversations he had with Scales.

Clontz testified that at the second meeting he asked Scales about the party's attitude toward the use of force and violence: the defendant allegedly claimed that the ballot was useless, that ideas do not produce results, that the government had blocked all routes for the education of the masses, and that force was required to implement the party's program. According to Clontz's report to the F.B.I., Scales volunteered: "It would be nice ... 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."³⁸ Therefore, Scales called official party literature referring to a peaceful road to socialism mere "double talk."³⁹ Scales, the witness continued, discussed the need to unite blacks and workers behind the party, confirming that the defendant's ideas resembled those being taught in the training schools around the country. In fact, the defendant even arranged for Clontz to attend the Jefferson School of Political Science, a party run school in New York, which reportedly taught to students the desirability of violent overthrow. Lastly, describing the activities which Scales had urged him to perform, Clontz sought to provide evidence which would satisfy the *Yates* requirement of action-inciting advocacy.

Two other witnesses alluded to Scales' violent intent. Charles Childs,

37. Lucius J. Barker and Twiley W. Barker, Jr., *Freedom, Courts, Politics: Studies in Civil Liberties*. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1972), pp. 98-99.

38. Quoted in the Brief for the Government in *Scales v. United States*, p. 10. Located in HP, Box 103. This brief hereinafter will be cited as Government.

39. Clontz, in Transcript, p. 2107.

an F.B.I. informant, described how he had once shown the defendant an article which attacked communism and the American Communist Party. Scales told Childs to make a list of the authors' names so that each one could be shot after the revolution. Childs also testified about an incident which occurred at a party school organized by the defendant, in Walnut Grove, North Carolina. The students were in recess when another instructor, in Scales' presence, demonstrated how to kill a person with a pencil: "What he showed us to do was to take our pencil . . . and place it simply in the palm of your hand so that the back will rest against the base of the thumb, and then we were to take it . . . and give a quick jab so that it would penetrate through [the heart]."⁴⁰ Scales introduced the other witness, Odis Reavis, to the party in October 1950 and initially had him recruit members for the Labor Youth League, a party front organization. Reavis talked about his employment at the Western Electric Company in Winston-Salem: he had wanted to return to school, but Scales urged him to remain there and help organize more support among workers. The defendant reminded him of the urgent need to perfect plans to insure the success of the revolution.

In an effort to counter the second prong of the government's case, the defense questioned the adequacy and accuracy of the witnesses' testimony. Upon cross-examination, Smith asked Clontz to describe the actions he was instructed to perform. Clontz had written letters to the *Greensboro Daily News* and the *Raleigh News and Observer* about a number of subjects: negotiations to end the Cold War, the hydrogen and atomic bombs, the United Nations, and the Mundt Internal Security Bill. At the conclusion of the trial, Smith told the jury that, since these actions were all legal, they were not sufficient grounds from which to infer unlawful intent. He then asked the jury to consider the likelihood that Scales would have revealed his allegedly illegal intent to a virtual stranger, implying that Clontz altered his testimony to conform to the Justice Department's needs. Putting aside the question of whether Clontz perjured himself, the conversation took place in December, 1948, well before the indictment period. The defense also questioned the witness Childs' recollections about the pencil incident because neither his notes nor his F.B.I. report contained any record of it. Indeed, two months had passed before he reported it so he could not state definitively whether the defendant had been present. Furthermore, Reavis' testimony merely showed that Scales had advocated increased union activity and further efforts to combat racial segregation. It was devoid of proof sufficient to impute the intent to use violence.

When the prosecution had concluded its case, Taylor moved for acquittal in light of insufficient evidence: the government, he asserted, had failed to produce evidence which would remedy the deficiencies

40. Charles Childs, quoted in *Scales v. United States*, 367 U.S. 203 (1961), p. 250.

found by the Supreme Court in *Yates v. United States*. Accordingly, the proof adduced did not justify a different conclusion than that reached by the High Court. Once again, Judge Bryan found Taylor's argument unconvincing, so the trial continued with defense testimony which demonstrated Scales' good reputation and peaceful intentions. Five witnesses testified that he had an excellent character.⁴¹ To their knowledge, the defendant never advocated forceful revolution, never spoke about the establishment of a separate Negro nation, and never welcomed an economic depression. Miss Lucy H. Pell, Scales' aunt, mentioned that he had even expelled two people from the party because they had advocated the use of force. But, upon cross-examination, the government elicited that the witnesses had never discussed violent overthrow with the defendant, nor had they ever discussed Communist Party activity or Scales' conversations with other party members. Indeed, they had neither attended party meetings nor discussed revolution with Scales. As Gavin explained to the jury, this "negative defense" was inherently flawed because the witnesses had no knowledge of what Scales had said in the presence of other party members.⁴²

The other defense witnesses provided more impressive testimony because they cited specific instances when Scales repudiated the use of violence. Esther M. Gillis, a spinner in the Highland Cotton Mill, in High Point, North Carolina, first met Scales in September 1939. She once asked him about the efficacy of violence as a means to foment revolution: "Esther, he said, you know better than that, said the only way that we would ever make our Government better would be for people to register and vote and belong to organizations, labor and work with one another."⁴³ Scales, she said, felt that labor organization was the only way to remedy injustice and win for workers the right to a decent home and fair wages. Charles V. Dunnagan, a classmate at Chapel Hill, recalled a radio interview he conducted with Scales in 1948: the defendant told him that if the revolution ever manifested itself, it would come with words, not violence. This directly contradicted the witness Clontz's testimony that in December 1948, Scales told him violence was required. Joseph W. Straley, a member of the geology department at the University of North Carolina, Chapel Hill, visited Scales at his home in 1951. During Straley's conversation with Scales, the defendant lamented America's acute racial problems and expounded on the need for reform. Scales maintained that the structure of society, education, and the news media did not allow workers or blacks to develop an

41. The five witnesses were: Miss Lucy H. Pell, Scales' aunt; Mrs. Emily H. Preyer, a friend of the Scales family; William A. Stern, a junior high school classmate; the Reverend Charles M. Jones, a minister in Chapel Hill, North Carolina; and Julius C. Herrin, a chaplain for Baptist students at the University of North Carolina, Chapel Hill.

42. Transcript, p. 2192.

43. Transcript, p. 1882.

awareness of their common goals. They needed to be taught that united political action, such as voter registration and petitioning, would improve their quality of life.

Such testimony notwithstanding, the evidence provided by Mary Lee Scales, Junius' mother, was the defense's best chance to convince the jury that Scales' membership was not criminal. Because she feared that the party was an improper outlet for his idealism, she engaged him in many discussions about communism and his membership in the party. As she testified, he believed in the superiority of his ideas and felt that education and pamphleteering would gradually persuade people to join the Communist Party. When she questioned him about the party's attitude toward violence, he claimed that, according to his understanding, the party did not advocate force. This testimony cast doubt upon Scales' guilty knowledge of the party's illegal objectives. Moreover, even if Scales misconstrued the doctrine, he personally did not condone the use of violence. To prove this, Mrs. Scales reiterated that the defendant had expelled two members because they advocated such radical measures. She also mentioned that her son "would defend his country from any aggression, from any country, [including the Soviet Union]."⁴⁴ Upon redirect examination, she testified about his disillusionment in the wake of Nikita S. Khrushchev's speech to the Twentieth Party Congress of the Soviet Union: the speech uncovered many personal doubts which Scales had buried. Ultimately, he left the party because of these doubts, but before doing so, he advised all the people he had recruited to leave as well.

Mary Scales and the other witnesses described to the jury a defendant who was strikingly different from the one described by the government: the knowledgeable and purposive Communist Party agent was, to them, an idealistic and gentle man who hoped to effectuate a vision. According to Scales' attorneys, the character evidence adduced by the defense was legally sufficient to create a reasonable doubt as to the defendant's guilt. Aware of this fact, the prosecution used a clever argument to minimize the impact of this testimony. As Gavin stated: "It has been brought out in testimony that the communist position is that it is all right to tell a lie or to steal as long as it benefits the Communist Party."⁴⁵ He suggested that Scales dissembled when speaking to non-party members, but told the truth when speaking to Clontz, Reavis, and Childs. Significantly, a similar argument had been advanced in other Smith Act trials: if a passage from the communist texts supported the government's case, counsel presented it to the jury as truth; if the passage contradicted the prosecution, however, the government dismissed it as an example of the Aesopian language used by communists to veil the hidden meaning of their words. By resorting once again to such an argument, the prosecution revealed that its case regarding Scales' knowledge and intent rested on an insecure foundation.

44. Transcript, p. 1963.

45. Transcript, p. 2083.

In his closing statement for the defense, Telford Taylor underscored that the burden of proof was on the government, and that the foundation of American jurisprudence was the presumption of innocence. By implication, the defense asserted that the prosecution had not met the high standard of proof required by America's juridical tradition. Taylor attacked the government's contention that Scales had knowledge of the party's illegal aims. Despite proof that certain party schools taught and advocated the use of violence, the party constitution, by-laws, and official resolutions all rejected the doctrine of forceful overthrow. The uncertainty surrounding the nature of party advocacy rendered it impossible to assess definitively Scales' state of mind. To say that the official pronouncements were written in Aesopian language or were mere "double talk," as Clontz testified, did not eliminate this problem. Furthermore, counsel argued, the defense had adequately refuted the government's contention that Scales personally intended to engage in violent overthrow of the government. Since the prosecution introduced no evidence as to what Scales advocated or planned while "underground," it could not maintain that Scales' decision to go underground in 1951 was an insidious attempt to subvert American institutions. Rather, the underground network was a response to F.B.I. surveillance and harassment. With an appeal to the jury's humanity and sympathy, Taylor concluded:

The heartache for humanity. I wonder whether most of us have half enough of that particular heartache. Maybe Junius Scales had too much. Unfortunately, a compassionate feeling for humanity is not enough. It has to be governed . . . by the wisdom born of experience and common sense, and maybe Junius Scales did not have enough of those attributes; too much feeling and too little wisdom can lead man into bad trouble . . . and that is just where this lack of balance has landed Scales. But I do not think that it has led him into crime. And that is what you, ladies and gentlemen, are going to have to decide.⁴⁶

The government, in its closing statement, presented the Communist Party and Scales in a negative light, arguing that communism was inimical to freedom and that Scales had accepted the party's doctrine of hate and violence. Woerheide referred to Scales' three years in the communist underground, during which the defendant adopted aliases, moved about constantly, and hid from federal agents. Then, attempting to make Scales' underground activity sound sinister and dangerous, Gavin made a remarkable statement: "He was underground for three years; where he was, we don't know. What he did, we don't know."⁴⁷ This stunning admission revealed that the government could not produce any information about Scales' activity during the indictment period. Essentially, Gavin asked the jury to find Scales guilty of violating the Smith Act's membership clause, despite a lack of proof.

46. Transcript, pp. 2129-2130.

47. Transcript, p. 2182.

The prosecution noted that the testimony of Clontz, Reavis, and Childs was uncontested by a witness who had intimate knowledge of party affairs. Indeed, the testimony of Junius Scales would have bolstered his defense since he could have refuted, as he does in his memoir, each point about which the three witnesses testified. For a year after the trial, he grappled with the question of whether or not he should have testified. He was averse to "naming names" of other party members, and he knew that the prosecution would have him held in contempt of court if he refused to provide names; yet, in order to dispel the myths and hysteria, he desperately wanted to present his impressions of the party. His unenviable choice was to either go to jail for contempt or to go to jail upon jury conviction. Perhaps, Scales later mused, he should have accepted the court's contempt as a small price to pay in order to refresh the "tree of liberty."⁴⁸ Instead, he sat quietly in the courtroom listening to the prosecution witnesses present what he considered to be fabricated evidence. While Clontz testified, Scales "half listened, pondering the skill, or duplicity, needed to paint such a basically false picture of the Party. The simple truth revealed quite enough wrong with the Party."⁴⁹ Thus, Scales could never tell the jury that Clontz's account of their December 1948 conversation was totally inaccurate.⁵⁰ Nor could he provide the proper context for Childs' assertion that Scales instructed him to prepare an execution list.⁵¹ Clearly, Scales' testimony would have exposed weaknesses in the government's case.

Instead, the defense hoped to make these weaknesses apparent to the jury by shaping Judge Bryan's instructions. Taylor suggested that Bryan charge: "It is not a crime under the Smith Act for any person to incite or stir up other persons to take illegal or violent action if such action is not intended or reasonably calculated to lead toward the overthrow of the Government by force and violence."⁵² This instruction would render impotent Clontz's and Reavis' testimony about advocacy of action, because everything Scales required them to do was legal and not reasonably calculated to bring about overthrow. The defense also asked that the jury be told that, "even if you should be persuaded that the Communist Party seeks to accomplish the overthrow

48. Scales is quoting Thomas Jefferson, p. 300.

49. Scales, p. 331.

50. According to Scales, during the critical conversation, he told Clontz that the party advocated a majoritarian movement which emphasized the ballot as the means to effectuate its objectives; that since the members were not putschists, violence would only be tolerated as a means of self-defense; that education would convince people as to the merits of the party's program; and that the party would deservedly die out on its own if it could not gain support through peaceful means. Scales, p. 238.

51. Scales claims that he did make this statement, but that it was harmlessly intended to mock the popular impression that the party was full of radical killers. Scales, p. 275.

52. Quoted in Barker, p. 101.

and destruction of the Government by force and violence, you cannot find the defendant guilty, unless you find that the Communist Party advocates or teaches such violent overthrow, and that the defendant knew that the Communist Party so advocates."⁵³ This would insure that the jury questioned whether Lautner's and Hartle's testimony held for the entire party or just for a segment of it. Also, it underscored the doubt which Mary Scales' testimony created as to the defendant's state of mind. Lastly, Taylor wanted the judge to articulate the rights protected by the First Amendment so that the jury would not lightly disregard them.

The charge, nevertheless, did not include these suggested passages. Bryan did distinguish, as *Yates* prescribed, between advocacy of abstract doctrine and advocacy of action. He also reminded the jury to consider, when scrutinizing testimony, the biases of informant witnesses. Most importantly, as the prosecution suggested, Bryan charged that a conviction under the membership clause required a finding that the defendant was an active member of the Communist Party, with knowledge of the party's objectives, and with the specific intent to achieve these goals by violence. As Taylor observes, neither side expected this charge to influence the jury deliberation: "The prosecution had introduced these limitations, not out of any concern for the Jury, but in an effort to bolster the content of the membership clause itself, against the time when the Supreme Court would again confront the question of its constitutionality."⁵⁴ Yet, such statutory construction did not accord with the legislative history of the Smith Act since the membership clause, in all likelihood, was lifted unceremoniously from the criminal syndicalism laws of the 1920s. It was an irony lost upon the District Court, and indeed the Supreme Court, that the government made inferences as to the intent of a statute which, it seems, was unintentionally copied from earlier laws.

Following Judge Bryan's lengthy charge, the jury deliberated for slightly over one hour before it returned with a guilty verdict. Smith requested that the jury be polled so, one by one, each juror stated for the crowd which had gathered in the courtroom that the defendant was guilty. After Bryan once again sentenced Scales to six years in prison, Gladys Scales, Junius' wife, broke into tears and agonized over the fact that the government was "trying to *destroy* [them]!"⁵⁵ But the government was merely exploiting a problem endemic to the American legal system: during times when freedom of speech is most threatened, essentially, when fear and hatred pervade the nation, the jury system breaks down. James Madison, acknowledging this, wrote to Thomas Jefferson that the Bill of Rights loses its efficacy precisely at those

53. *Ibid.*

54. Taylor, in Scales, p. xx.

55. Scales, p. 337.

times when its "control is most needed."⁵⁶ The reason, asserts Zechariah Chafee, Jr., is that during political trials juries are unable to appraise objectively the evidence presented to them.⁵⁷ Herbert L. Packer, who has written an analysis of the testimony of ex-communist witnesses, maintains that to expect a judicial verdict on the question of whether individuals or groups advocate the duty and propriety of armed overthrow of the government places too great a burden on the judiciary. During the trials, complicated theoretical material is oversimplified, rarely is there confirmation of facts by overt action, and an accurate appraisal of goals, motivations, and theory requires an intimate knowledge of decades of history.⁵⁸ In Scales' trial, the government witnesses barely mentioned that communist literature was subject to a different interpretation: they all defined party doctrine as being one of revolution regardless of the circumstances. Packer emphasizes that the witnesses were often biased informants on the payroll of the Justice Department, so it is not unlikely that they committed subtle perjury.⁵⁹ Indeed, Clontz's notes sometimes seemed as if they were designed to meet the specific needs of the department.⁶⁰ Furthermore, since the evidence failed to prove that Scales advocated acts reasonably calculated to foster the overthrow of the government, the jury was compelled to impute intent based solely on the character of the party of which he was a member and on the speculated bad effects of the words he uttered.

Yet, juries during this era found the bad tendency of words sufficient to convict communist defendants. A public opinion study conducted by Samuel Stouffer in 1955 revealed that people were afraid of communist ideas, not communist espionage or sabotage: people feared that the party would convert other Americans to its creed.⁶¹ Irrespective of the government's claims that ideas were not on trial in the Smith Act cases, to the citizens who comprised juries, communist ideas constituted the offense. Chafee appropriately summarized the problem: "A fitness to apply a common-sense standard to alleged criminal acts bears no resemblance to a capacity to appraise the bad political and social tendency of unfamiliar economic doctrines during panic The only tribunal which can pass properly on the menace of ideas is time."⁶²

56. James Madison, letter to Thomas Jefferson, October 17, 1788. In *The Constitution and the Supreme Court: A Documentary History*, Vol. I. Louis H. Pollak, ed. (Cleveland: The World Publishing Company, 1966), pp. 121-123.

57. Chafee, p. 139.

58. Herbert L. Packer, *Ex-Communist Witnesses: Four Studies in Fact Finding*. (Stanford, California: Stanford University Press, 1962), p. 220.

59. *Ibid.*, pp. 219-221.

60. Scales, p. 239.

61. Samuel A. Stouffer, *Communism, Conformity, and Civil Liberties: A Cross-Section of the Nation Speaks its Mind*. (Garden City, New York: Doubleday & Co., Inc., 1955), p. 157.

62. Chafee, p. 139.

Because of this institutional flaw, for the second time in three years, a jury, "utterly 'dead' in its reactions to [the defense's] statements and witnesses," found Junius Scales guilty of unlawful membership in the Communist Party.⁶³ Although Smith informed the judge that Scales would appeal the decision, neither Scales nor his attorneys expected much from the notoriously conservative Fourth Circuit Court of Appeals, which had upheld his first conviction; much to their chagrin, however, the tripartite structure of the federal judiciary once again directed the road to the Supreme Court through the Appeals Court in Asheville, North Carolina.

"A Very Troubling Case"⁶⁴

Junius Scales' case ended its procedural respite on June 13, 1958, when the Fourth Circuit Court of Appeals heard oral arguments. On October 6, as Scales had expected, Circuit Judges Morris Soper and Clement Haynsworth and District Judge Alfred Barksdale unanimously affirmed the conviction, asserting that:

membership 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. The activities of such a group constitute a clear and present danger to the state and he who joins with open eyes becomes a party to all that he sees.⁶⁵

Equating Communist Party membership with conspiracy, these judges cited *Dennis* as confirmation of the government's right to protect itself from such a cabal. The court accepted the prosecution's suggestion that the requirements of specific intent and activity be read into the language of the Smith Act's membership clause. It rejected, however, the petitioner's arguments that section 4(f) of the Internal Security Act (1950) barred prosecution under the membership clause; that the *Yates* standard of evidence had not been satisfied; and that the membership clause was unconstitutional on its face, and as applied by the District Court.⁶⁶

Dissatisfied with the outcome of his appeal, Scales asked the

63. Taylor, in Scales, p. xix.

64. Stephen N. Shulman, a clerk for Justice John Marshall Harlan, circulated a bench memorandum about the *Scales* case, in which he commented: "This is a very troubling case. Something seems wrong, but the 'handles' to grasping it are difficult to identify." Stephen N. Shulman, Bench Memorandum regarding *Scales v. United States*, April 28, 1959. Located in HP, Box 103.

65. *Scales v. United States*, 260 F. 2d 21 (4th Cir., 1958), p. 26.

66. The Internal Security Act (50 U.S.C. § 781) was an omnibus security law which, among other things, required Communist Party members to register as such with the newly created Subversive Activities Control Board. Section 4(f) of the Internal Security Act provides that: "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."

Supreme Court to reexamine his arguments and to consider the adequacy of the conspiracy ruling applied by the appellate judges. Hence, on December 15, 1958, the Court granted Scales an unrestricted writ of certiorari. Telford Taylor anticipated the approaching legal encounter with mixed feelings. Three conservative justices, Stanley F. Reed, Harold H. Burton, and Sherman Minton, all members of the *Dennis* majority, had retired since Taylor first argued Scales' case in 1957. Their replacements, Charles E. Whittaker, Potter Stewart, and William J. Brennan, although they had not yet carved out a philosophical niche on the Court, were improvements insofar as they were not personally committed to the *Dennis* ruling. Also, since Brennan's lower court opinions revealed that he would be receptive to the petitioner's arguments, Taylor felt reserved optimism that the Court would discern the membership clause's inherent constitutional problems: "In the light of the First Amendment's protection of free speech and association, it appeared to me that the Court might have difficulty in sustaining a statute imposing heavy criminal penalties upon so tenuous a connection with unlawful activity."⁶⁷ Assuming that Hugo Black and William O. Douglas, the lone dissenters in *Dennis*, would find the defense's arguments persuasive, Taylor would need to convince three other justices that the differences between the *Dennis* conspiracy indictment and Scales' membership clause indictment were so compelling that Scales' conviction could be overturned without chipping away at the *Dennis* edifice.

But, there were causes for concern as well. Taylor realized that anticommunism was confined not only to the legal laymen who comprised juries; the objectivity of judges was sometimes suspect, despite their supposed appreciation of the American juridical tradition.⁶⁸ More importantly, the Court did not exist in a hermetically sealed environment, impervious to political trends and popular pressure. The Supreme Court's analysis of Scales' case was inevitably affected by Congressional attempts, in the late 1950s, to curtail the power of the Court. Anticommunism and segregationism combined to spark the anti-Court movement: *Brown v. Board of Education* (1954), which invalidated the "separate but equal" doctrine, insulted the values and traditions of the South and galvanized the force of southern racism behind the movement; *Yates v. United States* and *Watkins v. United States*, in which the Court ruled in favor of communist defendants, inflamed the forces of political anticommunism.⁶⁹ Thus, because the Warren Court had struck an unfriendly chord

67. Taylor, in Scales, pp. xiii–xv, xxi.

68. See Paul L. Murphy, *The Constitution in Crisis Times 1918-1969*. (New York: Harper & Row, 1972), p. 280.

69. *Watkins v. United States*, 354 U.S. 178 (1957), handed down the same day as *Yates*, limited Congressional investigatory powers. The Court said that Congress did not have the right to "expose for the sake of exposure"; the intentions and jurisdiction of committees needed to be clearly defined. This, the Court asserted, would allow witnesses to determine whether the questions asked were pertinent to the stated purpose of the committee. *Watkins*, referred to supra., p. 200.

in two potent Congressional blocs, an insignificant opposition movement evolved into a serious attack on the Court's power.⁷⁰ Respected legal organizations launched a limited assault as well. In 1958, the Conference of Chief Justices criticized the Supreme Court's usurpation of policy-making power. To temper this potential threat to the separation of powers, the group recommended that the Court exercise greater judicial restraint.⁷¹ The American Bar Association noted that *Yates* and *Watkins* had been "severely criticized and deemed unsound by many responsible authorities."⁷² The association suggested that Congress reframe internal security legislation in the interest of clarification.

But the anticommunist and segregationist Congressional leaders, assuming a more aggressive posture, wanted to undermine the prestige of the High Court by restricting the Court's appellate jurisdiction in loyalty and subversion cases.⁷³ All of the Court-curbing bills, however, were defeated and the movement subsided. This was due, in part, to the Court's enduring reputation as the most sturdy bulwark against violations of individual liberty. Also, the character and hyperbolic rhetoric of the attackers alienated supporters.⁷⁴ Walter F. Murphy, a well-known constitutional scholar, contends that the segregationist opposition, although it helped generate support for the anti-Court coalition, undermined the campaign since it impelled northern liberals to defend the Court as the guardian of Negro rights.⁷⁵ Perhaps most importantly, the Court deflected the pressure by moderating some of its controversial decisions. In *Barenblatt v. United States*, it showed renewed deference to the legislature's investigative power by tacitly acknowledging that supervision of committees was a Congressional task.⁷⁶ In *Uphaus v. Wyman*, the "teeth" were extracted from the *Nelson* and *Sweezy* decisions.⁷⁷

70. Pritchett, pp. 19-20,

71. *Conference of Chief Justices Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, August, 1958. Appendix 2, in *Ibid.*

72. *Resolutions of the Special Committee on Communist Tactics, Strategy, and Objectives*, (Adopted by the House of Delegates, American Bar Association, February 24, 1959). Appendix 1, in *Ibid.*, p. 139.

73. The vital provisions of the Jenner-Butler bill, the most prominent of such bills, stipulated that Congressional committees, contrary to the *Watkins* decision, retained control over their investigative power; that forty-three state anti-subversive statutes, invalidated by the Court's decision in *Nelson*, would be reinstated; and, to counteract the *Yates* decision, that the Smith Act would be amended so that teaching and advocating revolution would be criminal irrespective of their short-term effects. In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), referred to *supra*, the Court stated that the federal Smith Act supplanted all state subversion statutes.

74. Strom Thurmond, Republican of South Carolina, called the *Yates*, *Watkins*, *Jencks*, and *Nelson* decisions a "red bill of rights," and charged that the Justices were aiding and abetting communist conspirators. Quoted in Pritchett, p. 120.

75. Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process*. (Chicago: The University of Chicago Press, 1962), p. 267.

76. *Barenblatt v. United States*, 360 U.S. 109 (1959).

77. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Supreme Court limited the power of state legislatures to launch investigations. The Court's decision in *Uphaus*

Yet in the face of Congressional, professional, and popular opposition, this retreat was not unexpected. As Solicitor General Rankin expounded:

Independence is primary in the administration of justice and we can never be too watchful in protecting it. We would be shocked to learn that the Court had been reached by bribes or other approaches by interested parties either within or outside the government, but long continued, public attacks may cause an even more serious damage to the Court, although it be an insidious and indirect effort to affect its judgement.⁷⁸

Certainly, the Court held *Scales v. United States* over for additional terms in order to buffer itself from controversy.⁷⁹ Robert S. Hirschfield even interprets *Scales* as one in the litany of decisions in which the Supreme Court retreated from positions staked out in earlier opinions.⁸⁰ In contrast, Robert Mullan sees *Scales*, not as a retreat, but as an adoption of an alternative, less speech-protective reading of *Yates*.⁸¹ Nevertheless, to appraise the validity of such interpretations requires an understanding of how the *Scales* opinion evolved.

The preparation of a majority opinion in *Scales* was an arduous process since the justices found it difficult to come to grips with the case. The constitutionality of the membership clause on its face, the impact of section 4(f) of the Internal Security Act, and the meaning of the *Yates* decision were all divisive issues. This explains why, in 1959, the Court demanded the reargument of certain fundamental questions, and it provides context for Justice Potter Stewart's admission: "This case has caused me more difficulties than any other we have had since I have been [on the Court]."⁸² Remarkably, in early 1961, almost two years after the Court had listened to oral arguments, to formulate a

v. *Wyman*, 360 U.S. 72 (1959), however, contravened *Sweezy* and *Nelson* by broadening state legislative investigatory power, thereby augmenting the states' jurisdiction in the anti-subversive campaign. Pritchett, p. 121; Robert S. Hirschfield, *The Constitution and the Court: The Development of the Basic Law Through Judicial Interpretation*. (New York: Random House, Inc., 1962), pp. 128-130.

78. Quoted in Pritchett, p. 132.

79. *Scales*' case was argued before the Court on April 29, 1959, but the decision was not handed down until June 5, 1961.

80. Hirschfield, p. 131.

81. It was more common for the lower courts to construe Harlan's opinion as a refutation of the bad tendency test. Since the intent which inspired advocacy was irrelevant, the most vociferous proponent of violence could speak in abstract terms and still be afforded constitutional protection. A less common reading of *Yates*, and indeed the one proffered by the government in *Scales*' case, however, held that repeated advocacy of violence could be proscribed because it instilled dangerous attitudes in the minds of listeners. This latter argument did not offer communists any First Amendment protection and belied the impression that *Yates* represented a libertarian shift by the Court. See Robert Mullan, "Smith Act Prosecutions: The Effect of the *Dennis* and *Yates* Decisions." *26 University of Pittsburgh Law Review* 705 (June 1965).

82. Potter Stewart, letter to John M. Harlan. April 13, 1961. Located in HP, Box 105.

majority opinion still seemed like a Herculean task. A majority only emerged after many hours of debate and rumination, compromise and contention.

In April 1959, Harlan asked one of his clerks, Stephen N. Shulman, to examine the government's construction of the membership clause. According to Shulman, since the membership clause, on its face, imputed guilt by association, the government was compelled to add the intent requirement: "This is a typical conspiracy situation. If the action of the group may be imputed to the member, the group is a conspiracy, the member a conspirator. This would seem to render the membership clause unnecessary and redundant." Also, in the absence of a new rule of evidence which demanded stricter proof, in Scales' trial the evidence used to prove intent was much broader than in a conspiracy trial. Instead of demonstrating the existence of an agreement, the prosecution suggested intent by filling the record, for the first half of the trial, with testimony which was either unrelated to the defendant or prejudicial. Yet to enforce higher evidentiary standards merely underscored the membership clause's "indistinguishability" from conspiracy. Furthermore, he continued, the government was not certain that the addition of intent was sufficient to save the statute, so it conjured up activity as an "overriding constitutional requirement." Shulman dismissed this argument as logically untenable: activity was a discrete element of the offense, a matter of fact, not law, to be considered by the jury. He cautioned that to add "action to the overriding constitutional requirement category brings you one step closer to the point at which statutes in the free speech field don't have to provide anything. The Courts will simply declare activities criminal on the basis of a whole slew of overriding constitutional requirements which are not offended." Ultimately, the best course would be to declare the membership clause unconstitutional on its face.⁸³

In the Court opinion, although Harlan adopted aspects of Shulman's argument, he rejected the most salient point: that the membership clause should be declared unconstitutional. The Court was unpersuaded by the petitioner's insistence that intent and activity could not fairly be read into the statute. Harlan did not want to attribute to Congress the intention of punishing nominal, passive members: such a law would be an unconstitutional infringement upon the freedom of association and speech guaranteed by the First Amendment. Nor could he not take seriously a claim that Congress wanted to punish passive membership so severely.⁸⁴ Furthermore, Harlan argued, the intent and activity elements created an objective standard, "fixed by the law itself," to determine criminality.⁸⁵ This assertion, nevertheless, suggested that the Court had

83. Shulman Bench Memorandum.

84. *Scales v. United States*, 367 U.S. 203, p. 222. The opinion hereinafter will be cited as Opinion.

85. *Ibid.*

rewritten an intolerably broad clause.⁸⁶ Also, the legislative history provided no indication as to what kind of membership the Smith Act was directed at, so it was not unreasonable to assume that Congress intended to punish severely passive membership. Harlan had based his argument on a Congressional intention that was nonexistent, and he had underestimated the degree to which antialienism and anticommunism permeated Congress in 1939-1940.⁸⁷

Harlan's opinion also accepted the government's contention that activity was not a "discrete" element of the crime; however, he agreed with Shulman that it was not an overarching constitutional standard like clear-and-present-danger. Instead, activity was "an inherent quality of the membership element," not to be stated in the indictment.⁸⁸ Then, adopting the approach utilized by the Appeals Court, Harlan reasoned:

Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity.⁸⁹

The addition of intent and activity insured that a conviction would be based on more than a mere "expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."⁹⁰ Thus, active membership with intent was legally commensurate with action. Harlan, as did the Appeals Court and the government, ignored that conspiracy was neither charged nor proven; he was also unconvinced by Shulman's claim that such an interpretation rendered the membership clause surplusage.

The brethren also devoted considerable attention to the meaning of section 4(f) of the Internal Security Act, which 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 statute's convoluted language shrouded its intended meaning and contributed to the polarization which had begun to emerge during discussion of the membership clause's constitutionality. Attempting to navigate through the mist which engulfed the provision, Harlan asserted: "If the Wood Amendment was in response to Celler's Smith Act objections, and the 'other criminal statutes' referred to included the Smith Act, it lends strong support to the conclusion that 'other statutes' referred in the final draft of the first sentence of 4(f) was to (*inter alia*) the Smith Act. Admittedly

86. See Brian M. Sax, "Judicial Rewriting of Overboard Statutes: Protecting the Freedom of Association from *Scales* to *Robel*." 57 *California Law Review* 240 (January 1969) for a discussion of why such rewriting is not prudent as a matter of policy.

87. See Chafee for an account of the legislative history of the Smith Act.

88. Opinion, p. 223.

89. *Ibid.*, p. 225.

90. *Ibid.*, p. 228.

this only gets one half way home—you still must show that 4(f) referred to the membership made criminal in the Smith Act.”⁹¹ He agreed that the immunity provision was drafted with the Smith Act in mind; however, the inclusion of the words “per se” baffled him. The “insertion was not inadvertent,” he thought, but was it meant to differentiate between passive membership and the membership proscribed by the Smith Act?⁹² “Why doesn’t the ‘per se’ mean that membership without proof of other overt acts or courses of conduct [is not made criminal]? ”⁹³

Attempting to answer these questions, Paul Bator, one of Harlan’s clerks, studied the history of the Internal Security Act and concluded that 4(f), as it was originally written, was not a broad grant of immunity; instead it was intended as an unequivocal statement that membership in the Communist Party was not a violation of section 4(a).⁹⁴ By a parity of reasoning, he argued, the addition of “or of any other statute” was also supposed to be read narrowly as clarification. It was meant to inform prosecutors and judges that, as Congress already realized, membership “per se” was not a crime under the Smith Act: “Certainly the evidence so far would indicate that [membership was not considered by Congress to be a crime], and that ‘new 4(f)’ was put in not to give heed to [the contention that membership was, in fact, a crime] but to remove the (already mistaken) assumption of fact on which [the contention] was based—just as the drafters felt that ‘old 4(f)’ served to remove a mistaken assumption of fact about the scope of 4(a).”⁹⁵

91. John M. Harlan, comment written in the margin of a Memorandum from Justice Felix Frankfurter to the other Justices. October 26, 1956. Located in HP, Box 103. The Wood Bill, named for Congressman John S. Wood, Democrat of Georgia, was an internal security bill which had originated in the House of Representatives during the Eighty-first Congress. This bill, like the McCarran Act which was eventually adopted, contained a provision which required that communists register as such. Congressman Emanuel Celler, Democrat of Illinois, noted that the registration provision would create self-incrimination problems under the Smith Act’s membership clause. In response to this opposition, Wood offered to amend the immunity provision of his bill so that it covered other federal criminal statutes as well. The Wood Bill passed the House and was sent to conference. Ultimately, in conference, the immunity provision from the Wood Bill was included in the Senate omnibus measure which Congress adopted. This provision became section 4(f) of the McCarran Internal Security Act.

92. *Ibid.*

93. *Ibid.*

94. Section 4(a) made it illegal to knowingly combine with other persons to commit acts intended to establish a totalitarian dictatorship in the United States. The original version of 4(f), which Bator referred to as “old 4(f),” stated that registration would not be a violation of this section of the Internal Security Act: it did not yet include the language, “or of any other statute.” “New 4(f)” was the version that appeared in the law.

95. Paul Bator, Memorandum on Legislative History of Section 4(f). There is no date. Located in HP, Box 103. To support his assertion that Congress did not consider membership a crime, Bator cited a portion of the *Congressional Record* in which Senator Homer Ferguson, Republican of Michigan, asked: “Is it not true that Judge [Harold] Medina, in his charge to the jury in the trial of the eleven communists, told them that

To render tenable his clarification argument, Bator misread the language of the clause. Indeed, if the clause had said membership "per se" shall not constitute a crime, then his contention would be reasonable: the per se could be interpreted to distinguish passive membership from active membership with knowledge and intent. But Henry P. Sailer, another Harlan clerk, noted that the language, if read correctly—"membership shall not constitute per se"—distinguished between membership accompanied by overt acts of violence and membership. Sailer was "somewhat hesitant to ascribe to Congress an intention to distinguish between 'membership with knowledge' and 'membership,' particularly since there seems to be more natural choices of words possible to state that membership is not a crime unless one knows the purposes of the organization."⁹⁶

Furthermore, Bator's argument ignored critical differences between section 4(a) and the membership clause. Whether or not it was a "mistaken assumption of fact," some Congressmen genuinely feared that zealous prosecutors would construe membership as a violation of section 4(a). Therefore, it was reasonable to interpret 4(f) as a clear statement that membership was not a crime under this section. In contrast, since the Smith Act's membership clause explicitly stated that knowing membership was a crime, to protect the Internal Security Act's registration provision, something more than clarification was required: in effect, complete immunity from prosecution.⁹⁷ Because Bator underemphasized the importance of the registration provision, he ignored the possibility that Congress would "distinguish between requiring registration when that

mere membership in the Communist Party was not sufficient to warrant the jury in convicting them under the Smith Act?" Senator Karl E. Mundt, Republican of South Dakota, responded in the affirmative and said that "it would . . . be an incorrect interpretation of the Act" to construe it as criminalizing membership. The eleven communist leaders, nevertheless, were indicted under other clauses of the Smith Act. Because the indictment did not specify a membership offense, Medina was required to charge that proof of membership was not sufficient to sustain a conviction. Therefore, the charge cannot be construed as an authoritative statement about the proper meaning of the membership clause. Yet Bator's memorandum failed to note this, and erroneously equated the membership clause and the subversive advocacy clause. This error obscured the fact that many Congressmen felt that the membership clause indeed criminalized party membership.

96. Henry P. Sailer, Memorandum on Bator Memorandum on Legislative History of Section 4(f). There is no date. Located in HP, Box 103.

97. According to page 4 of *Senate Report # 2369, Part I* (August 17, 1950), registration of communists was the "central provision" of the Internal Security Act: disclosure was the primary objective because it would force the Communist Party above ground and prevent "unwitting collaboration" by loyal citizens. Because section 4(a) and 4(c) of the instant law, possibly, and the membership clause of the Smith Act, definitely, criminalized membership in the Communist Party, the registration provision would unconstitutionally violate the Fifth Amendment's protection against self-incrimination. Conscious of this, Congress added section 4(f), which repealed "the Smith Law and various other internal-security measures which we now have on the statute books." Senator Harvey M. Kilgore, Democrat of West Virginia. *Congressional Record*, p. 15192. September 20, 1950.

registration might simply be helpful from an investigatory and evidentiary standpoint in a prosecution for crime, and requiring registration when that registration establishes the sole overt element of a crime."⁹⁸ Indeed, as the petitioner insisted, this distinction was a crucial implication of section 4(f).

Because Congress did not long debate the alleged repeal of the membership clause, Bator concluded that such a repeal was neither intended nor effectuated. Sailer proposed an alternative explanation: since the membership clause was used so infrequently, he said, it was probably not until the conference committee that Congress remembered it. The repeal of a never-used section of the Smith Act might not generate the degree of debate which Bator assumed: Congress was not, after all, repealing the entire act. Perhaps, also, 4(f) was so obviously a repealer that no one felt it merited discussion. As Sailer summarized: "the self-incrimination problem was one of which both houses had increasing awareness as time went on, and there seems to me nothing inherently unlikely in a hypothesis that when the conferees put their heads together and exchanged ideas they decided that the membership clause would have to go if the registration provision were to be valid."⁹⁹ Both Harlan and Felix Frankfurter, nevertheless, agreed with Paul Bator's argument that section 4(f) was merely intended as a clarification of the Smith Act.¹⁰⁰ Justices Tom C. Clark, Potter Stewart, and Charles F. Whittaker also concurred.

The majority opinion accepted the government's rephrasing of section 4(f), and it found no Congressional "purpose to repeal the Smith Act insofar as Communist Party membership was concerned."¹⁰¹ The Court regarded "the first sentence of section 4(f) as a clear warrant for construing the clause as requiring not only knowing membership, but active and purposive membership, purposive that is to the organization's criminal ends. By its terms, then, subsection (f) does not effect a *pro tanto* repeal of the membership clause; at most it modifies it."¹⁰² Significantly, section 4(f), if interpreted as a barrier to prosecution, would have allowed the Court to reverse Scales' conviction without necessarily rejecting the government's construction of the membership clause. Moreover, Harlan could have avoided altogether discussion of the evidentiary implications of *Yates*. But the Court declined the opportunity and chose instead to engage in a contentious debate over the sufficiency of the evidence. It was compelled both to focus on the efficacy of the *Dennis* and *Yates*

98. Sailer Memorandum.

99. *Ibid.*

100. In the margin of Sailer's memorandum, next to the material just quoted, Harlan wrote "no." Moreover, Justice Felix Frankfurter, in a letter to Harlan, wrote that "I'm clearer than ever that section 4(f) is not a repealer." October 7, 1959. Located in HP, Box 103.

101. Opinion, p. 217.

102. *Ibid.*, pp. 209-210.

approaches and to consider the propriety of altering established precedents: *Scales* was transformed, fundamentally, into a debate over the doctrine of *stare decisis*.

Harlan's circulation of a tentative draft of the opinion sparked the discussion. In the draft, he maintained that the evidence presented by the prosecution satisfied the *Yates* standard of action-inciting advocacy and therefore warranted Scales' conviction. Justice Potter Stewart, "after a thorough, independent search of both records," disagreed vehemently: "I simply cannot agree that in the present case sufficient additional evidence was adduced of the Party's activity and teaching to infuse it 'with permissible inferential vitality, towards establishing advocacy of action'." John Lautner's testimony, Stewart asserted, was virtually identical to his testimony in *Yates*, and the documentary evidence provided was also similar. The testimony of Barbara Hartle, Ralph Clontz, Charles Childs, and Bellarmino Duran, which Harlan construed as "the controlling evidentiary distinction" between the *Yates* and *Scales* records, Stewart deemed a restatement of what the Court found unacceptable in *Yates*. Stewart assumed that a more rigorous evidentiary standard must be applied when the Court reviewed a conviction, as in the instant case, than when it merely determined whether the evidence warranted reprocsecution, as in *Yates*. Since the evidence in *Yates* did not meet the standards necessary for prosecution, certainly a comparable record, when subjected to a more strict level of scrutiny, should be judged insufficient as well.¹⁰³

Charles Fried, another clerk, observed that Stewart's position had two points in its favor. First, in *Yates* the Court did not pronounce that the evidence was "arguably" deficient, or "on the balance deficient"; it asserted that the evidence as to the party was "strikingly" deficient. Also, theoretically Stewart was correct to assume that a more permissive standard was applied in that case since, as stated above, the Court was only deciding whether to allow reprocsecution. Yet, as Fried conceded, the Court had erroneously applied a strict standard in *Yates*, similar to that required in *Scales*: "We just said too much in *Yates*, or [in other words,] even though we prevented a further prosecution we did not do it by the proper standard—i.e. [by articulating] that the evidence is so flimsy that reprocsecution would amount to harassment—but in fact by a standard rather like the one which is appropriate here: can a conviction stand consistently with First Amendment principles."¹⁰⁴ In *Yates*, Harlan had based his decision on the deficiency of the jury instructions rather than on constitutional standards, which suggested that *Dennis* was still the controlling precedent. This tactic had allowed the Court to limit the detrimental

103. Potter Stewart, Memorandum on the Evidence in *Scales v. United States*. February 1961? Located in HP, Box 105.

104. Charles Fried, Memorandum on Justice Stewart's Memorandum on the Evidence. There is no date. Located in HP, Box 105.

impact of *Dennis* without focusing on the constitutionality of the Smith Act; nevertheless, based on the record present in *Yates*, Harlan, by deciding for the petitioner, trod outside the bounds of the *Dennis* framework. However, this was not apparent to the public. As Fried continued: based on a reading of the *United States Reports*, “the most that can be said is that the initial decision to overturn the conviction on the jury instruction made it much easier. . . . But that is a matter of biography and history, not of legal analysis.”¹⁰⁵ Significantly, Harlan did not intend to, or think that he had, rewritten *Dennis*.

But it appears that Stewart thought that *Yates* had overruled *Dennis*, since his evidentiary argument rested on the premise that the record in the instant case should be compared to that in *Yates*. He emphasized not *Yates*’ distinction between advocacy of action and advocacy of abstract doctrine, but the quality of the record as a whole and the fact that it had been ruled insufficient. To counter this point, Fried insisted that what was controlling in *Yates* was not, as Stewart believed, the record *per se*, but the “articulated standards” set out: the requirement of action-inciting advocacy. A back-to-back comparison was therefore not warranted because “the standards and criteria of judgement enunciated would be useless and superfluous”: the Court would be forced to comb an “unwieldy yardstick” for portions of evidence which would measure up to those in earlier records. Yet to argue that *Yates* was controlling, and then to determine that evidence deemed insufficient in *Yates* was sufficient in *Scales*, obscured the standard. Moreover, the Court was divided on the evidentiary question because the “articulated standards” were so unclear; presented with such a divergence, it was not only permissible, but also imperative that the Court undertake a comparison of the records in order to insure that precedent was not perverted *sub silentio*.¹⁰⁶

Essentially, the issues of precedent and responsibility framed the debate: did Stewart’s argument for a comparison of records necessarily overrule *Dennis*; or, perhaps, had Harlan already modified precedent in *Yates*? Irrespective of the interpretations proffered by historians and legal commentators after the fact, the justices’ answer to this question was critical because the Court’s decision hinged upon it. To acknowledge that *Yates* had overruled *Dennis* would have given Harlan the freedom to reverse Scales’ conviction: indeed, he was “not an enthusiast for these Smith Act prosecutions,” and believed “that [the Court] should keep a tight rein on them.”¹⁰⁷ Nevertheless, in a letter to Stewart, Harlan made it clear that he did not interpret *Yates* as an alteration of *Dennis*: “I must say that reversal here would be almost tantamount to overruling at least the part of *Dennis* and *Yates* which allowed the application of the statute to advocacy

105. Ibid.

106. Indeed, Fried suggested that this was an argument Stewart might have advanced to support his point that a comparison of the records was mandatory.

107. John M. Harlan, letter to Potter Stewart. February 13, 1961. Located in HP, Box 105.

of unspecified future violence."¹⁰⁸ Judicially conservative, he felt bound by *stare decisis* to uphold precedent, even one that subverted fundamental political freedoms.

As for Potter Stewart, he eventually cast the "swing" vote in favor of the majority's decision to uphold Scales' conviction.¹⁰⁹ The paucity of documentation, however, renders it difficult to state definitively why Stewart abandoned the position to which he had clung.¹¹⁰ Two months before the decision was handed down, Stewart's doubts persisted. As he informed Harlan: "I realize the great desirability of a Court opinion, if one can be achieved, but I have continuing doubts as to the sufficiency of the evidence here under the standard established in *Yates*."¹¹¹ Presumably, he still felt that a back-to-back comparison of the evidence was warranted, and that such a comparison would reflect unfavorably on the government's case. Inexplicably, in the next sentence he stated: "After an inordinate amount of time, I have concluded that I can conscientiously join in affirming the judgment."¹¹² What happened to the "continuing doubts" to which he had alluded in the preceding sentence? Harlan had not appreciably altered his opinion in order to remedy the deficiencies which Stewart had perceived. The only plausible inference is that Stewart adopted Harlan's approach in order to insure that a Court opinion could be formulated. If this is correct, Stewart effectively abdicated his judicial responsibility by failing to vote as he thought justice required.

Still, a Court majority existed, so on June 5, 1961, by a five-to-four decision, the Supreme Court affirmed the appellate court's decision. As Harlan stated in the opinion, generally the Court did not review the sufficiency of evidence; because *Scales* was the Court's first membership clause case, however, it accepted the mandate in order to articulate guidelines for future lower court decisions in this constitutionally sensitive area. Furthermore, the decision underscored the fact that "the evidentiary question here is controlled in large part by *Yates*".¹¹³ As he had in the initial drafts of the opinion, Harlan claimed that Lautner's testimony "furnished the necessary background in Party theory and terminology which is crucial to the proper appreciation of the tenor of Party pronouncements, for these pronouncements, taken out of this larger context, might appear harmless and peaceable without in reality being so."¹¹⁴ Despite this comment,

108. Ibid.

109. On February 13, 1961, Harlan wrote a letter to Stewart which, among other things, informed Stewart that his was "the deciding vote."

110. The Harlan papers only provide sketchy details from which to make inferences, and, unfortunately, the Potter Stewart papers, which are located at Yale University, will not be open to scholars until all the justices with whom Stewart served have left the Supreme Court.

111. Stewart to Harlan, April 13, 1961.

112. Ibid.

113. Opinion, p. 232.

114. Ibid., pp. 234-235.

in the Smith Act trials, quotations cited out of context by government witnesses often sounded more, not less, harmful than they were originally intended. Regarding the evidence as to Scales' intent, Harlan's summary was devoid of examples which demonstrated that the defendant told Clontz to perform actions which would foster forcible revolution: any comments attributed directly to Scales were either predictions, or general statements about strategy. Although Harlan's discussion of Odis Reavis' testimony also lacked concrete examples as to where the record met the strict standards introduced in *Yates*, the Court regarded "this testimony, which finds no counterpart in the *Yates* record with respect to any of the defendants whose acquittal was directed, as being of special importance" in determining Scales' intent.¹¹⁵ Yet as Justice Stewart had asserted in April 1961, the testimony of Clontz, Childs, and Reavis failed to demonstrate illegal advocacy in the *Yates* sense. The *Scales* decision, then, confused the entire question as to what constituted criminal advocacy and intent.

Remarkably, none of the four dissenters in *Scales* focused on evidentiary considerations. Justice Hugo L. Black objected to the Court's construction of the membership clause: to add intent and activity, Black insisted, denied Scales due process of law because he was not indicted under a "clearly defined, pre-existing 'law of the land.'"¹¹⁶ He also condemned the Court's reliance on the balancing test, a test which inevitably sanctioned the suppression of political freedom. Justices Earl Warren, William O. Douglas, and William J. Brennan all accepted the petitioner's argument that section 4(f) barred prosecution under the Smith Act's membership clause, and they chastised the majority for misreading it as "membership per se": "the kind of membership given immunity," Brennan asserted, "is not restricted. It may be nominal, short-term, long-term, dues-paying, non-dues-paying, inactive, or active membership."¹¹⁷ Justice Douglas prepared an additional dissent in which he berated the Court for its importation of guilt by association into the American legal tradition. Furthermore, he remarked, notwithstanding the majority's verbiage about a membership offense's similarity to conspiracy, they were quite different as matters of law. Douglas then delivered an eloquent historical discourse in which he reminded the Court that the right to revolution was "a part of the fabric of our institutions."¹¹⁸ Although government must defend itself from overt acts, the First Amendment embodied the framers' hope that government and society would have the courage to preserve the rights of free speech and association during times of crisis. He concluded with cautious optimism: "What we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and nonconformity no longer cast a shadow over us."¹¹⁹

115. *Ibid.*, p. 243.

116. Hugo L. Black's Dissent in *Scales v. United States*, 367 U.S. 203, p. 261.

117. William J. Brennan's Dissent in *Scales v. United States*, 367 U.S. 203, p. 287.

118. William O. Douglas' Dissent in *Scales v. United States*, 367 U.S. 203, p. 269.

119. *Ibid.*, p. 275.

Douglas' dissent suggested that *Scales* was inconsistent with the First Amendment, but, to return to the question which frames this section, was the Supreme Court's decision a further retreat in the face of Congressional and popular opposition? Regarding the doctrine enunciated in *Yates*, the answer must be no. As Justice Harlan wrote to Potter Stewart: "You will note that my revised argument leaves unimpaired both the *Yates* definition of Smith Act advocacy and its requirement of strict proof—the two things that I have always considered were *Yates'* healthy contribution to this difficult field of law."¹²⁰ Indeed, these two elements had decisive consequences, since the Justice Department abandoned the majority of its outstanding subversive advocacy clause prosecutions. To many observers, this indicated the weakness of the government's cases and conveyed the impression that *Yates* was speech-protective. However, *Yates* also affirmed that the "advocacy of unspecified future violence" was criminal, and therefore preserved much that was problematic with *Dennis*.¹²¹ Significantly, since the Court had barred reprosecution of the defendants, this element of continuity was largely ignored by those who lambasted the decision. Because the *Scales* decision reiterated each of these points, it must be interpreted as an affirmation of *Yates*: in effect, the Court had pronounced that the standards articulated in *Yates*, despite their ambiguity, were the controlling precedent.

Regarding the Court's other arguments, an answer to this question is more conjectural. Harlan's opinion, it seemed, bent over backwards to uphold the constitutionality of the membership clause, first by accepting the government's statutory construction, and then by agreeing that the indictment was not deficient as written. Moreover, as Thomas I. Emerson observes, even if the government's interpretation of the membership clause was accepted, the measure still violated the First Amendment. The knowledge, intent, and activity requirements did not insure that the defendant's membership was intimately related to the illegal conduct of the Communist Party:

To make proof of knowledge and intent, shown to the satisfaction of a jury, a sufficient link with the illegal action to sustain the criminal penalty, does not draw the line [between action and expression] with the necessary precision and does not, realistically or effectively, prevent impairment of legitimate political expression. Under the circumstances, only a requirement of actual participation in the illegal action would serve to separate action and expression in a manner consistent with the maintenance of free expression.¹²²

But these considerations did not weigh heavily enough in the Supreme Court's balance. Nor did the majority find compelling the

120. Harlan to Stewart, February 13, 1961.

121. *Ibid.*

122. Thomas I. Emerson, "Freedom of Association and Freedom of Expression." 74 *Yale Law Journal* 1 (November 1964), p. 34.

assertion that section 4(f) explicitly barred the present prosecution. The Internal Security Act's legislative history demonstrated that Congress was willing to sacrifice the membership clause in order constitutionally to protect the registration provision. Still, by inexplicably reading the clause to say "membership per se," the Court maintained that it was solely intended as a clarification of the Smith Act. It is not unreasonable to assume, then, that the Court's decision to uphold Scales' conviction was a product of both legal and political considerations. McCarthy was dead, but anticommunism, because it remained a volatile Congressional and public issue, continued to impact the Court.

Epilogue

The *Scales* decision elicited two discordant reactions, indicating that no consensus had emerged by 1961 regarding the proper relationship between communist activity and civil liberties. The day after the Court's decision, the Communist Party castigated the majority for striking "a crushing blow at democracy and the Constitution of the land." With language which evoked the memory of Oliver Wendell Holmes, Jr., and his efforts to guard the First Amendment, the party's scathing statement concluded: "If the Supreme Court and the reactionary forces for whom they speak think that in this way they can intimidate the Communist Party of the United States and prevent it from carrying on its clear and present duty to defend democracy and peace it is seriously mistaken."¹²³ The American Civil Liberties Union, which had filed a brief as *amicus curiae* in *Scales*, issued a statement which was more moderate in tone, but no less critical of the message the Court had sent.¹²⁴ *Scales*, it said, perpetuated "the legal fiction" articulated in *Dennis* that the Smith Act did not threaten seriously the fundamental freedoms protected by the First Amendment. The organization also noted its concurrence with the petitioner that section 4(f) of the Internal Security Act barred membership clause prosecutions.¹²⁵ Because the Court had

123. *New York Times*, June 6, 1961, p. 16.

124. In its *amicus* brief, the A.C.L.U., like the petitioner, condemned the membership clause as unconstitutional because it imputed guilt based on a status, rather than actions. The organization criticized the lower court's equation of a speech crime with criminal conspiracy, asserting that "to apply the harsh conspiracy rule of imputed guilt to the members of a radical political group is contrary to the basic principles of fairness and political liberty." The intentions of ordinary criminal conspirators, murderers or robbers, for example, were not as ambiguous as for Smith Act defendants. Members joined political parties for disparate reasons, so to ask a jury to determine the state of mind of a defendant was to overly burden the judiciary. Essentially, the decision would reflect the jury's "general antipathy towards those with whom [the defendant] has associated." The A.C.L.U. also took issue with the government's unwarranted statutory modification of the Smith Act. Located in the American Civil Liberties Union Archives, General Correspondence, Vols. 21-23, Seeley G. Mudd Manuscript Library, Princeton University. These papers hereinafter will be cited as Archives.

125. Text of the American Civil Liberties Union statement regarding *Scales v. United States*, June 5, 1961. Located in Archives.

dismissed this point, the A.C.L.U. recommended that Attorney General Robert F. Kennedy discard the ill-advised law enforcement policy of his predecessors by *de facto* closing the book on the membership clause.¹²⁶

The *New York Times*, as did many influential newspapers, expressed its opposition to the Supreme Court's decision as well. The *Times* editorial staff, which subscribed to the Holmes-Brandeis clear-and-present-danger test "with imminence," condemned *Scales* for its callous disregard of political freedoms. As in *Dennis*, the High Court had upheld a statute which punished membership and speech, rather than actions such as sabotage, espionage, or violence. Furthermore, the editorial censured the Court for diverting public attention to the "virtually nonexistent" communist threat: the decision allowed McCarthyism's legacy to persist despite the fact that "no reasonable person can believe that the Communists are sufficiently persuasive in this country to create any immediate likelihood of success for their subversive ideas."¹²⁷ The *Washington Post* disagreed with *Scales* and asserted contemptuously that the federal subversive legislation was a "confused mess."¹²⁸ The *Atlanta Constitution*, the *St. Louis Post Dispatch*, the *Minneapolis Sunday Tribune*, and the *Boston Herald*, all papers which opposed communism, criticized the decision as a threat to the "preferred" freedoms protected by the Constitution.¹²⁹

Of course, many conservative publications praised the Court for demonstrating a sensitivity to the alleged threat posed by the Communist Party. Most prominent among these were the *U.S. News and World Report*, the *Los Angeles Times*, the *Chicago Tribune*, and the *National Review*.¹³⁰ Moreover, some writers and political leaders used the op/ed and "letters" pages as forums for expressing support for the *Scales* decision. Arthur Krock, columnist for the *New York Times*, commended the Court for having strengthened the national defense by protecting the country from communist saboteurs who hid behind the "shield" of the First Amendment. He also excoriated the four dissenters who, he contended, still failed to comprehend the gravity of the communist menace: "Opposed as ever to the terms of legislation by which Congress has attempted to build protections in this country from the operations of the international communist conspiracy were Chief Justice Warren and Justices Black, Douglas, and Brennan."¹³¹ Krock's piece illustrates that, in the minds of some citizens, a residue of antagonism generated by the *Yates* and *Watkins* decisions still persisted.

126. *New York Times*, August 14, 1961, p. 5.

127. *New York Times*, June 7, 1961, p. 40.

128. *Washington Post*, June 7, 1961, p. A18.

129. "National Association for Democratic Rights" advertisement in the *New York Times*, September 7, 1961, p. 26.

130. Belknap, p. 270.

131. *New York Times*, June 6, 1961, p. 36.

Congressman Francis E. Walter, Democrat of Pennsylvania, and chairman of the House Committee on Un-American Activities, wrote a letter to the *New York Times* which attacked the paper's June 7 editorial. He insisted that the *Times* had misconceived the nature of Scales' offense when it wrote that "only speech is involved in Smith Act prosecutions." The one incontrovertible fact, according to Walter, was that a majority of the approximately 150 Smith Act prosecutions involved conspiracy. He stated that the editorial's claim was "tantamount to asserting that 'only speech' is involved when persons are protected for conspiracy to fix prices, [and to] commit murder. . ."¹³² He failed to realize that the examples he had enumerated were conspiracies to commit actions; the Smith Act, as the *New York Times* had argued, proscribed speech. Anticommunism insured that some intelligent people still ignored the merits of seemingly irrefutable arguments.

It is difficult to gauge accurately how the general public reacted to the *Scales* decision because there is so little literature about it, and because no public opinion survey was ever conducted. Justice Harlan, nevertheless, was inundated with hundreds of congratulatory letters which implies that his opinion was well-received by some. Most of the letters praised the Court majority for preserving liberty and for rendering a "decision in favor of the American people."¹³³ Lyrel Berdell, of Pleasant Plains, Illinois, composed a letter typical of those which Harlan received. She wrote: "It is time we stopped defending our known enemies. Any intelligent person should plainly see they are closing in all around us because our neutralism provides no protection and our inaction is giving the forces of evil the right of way in our world."¹³⁴ Yet, in 1961-1962, fear of a domestic communist insurgency was giving way increasingly to apprehension about the health of the economy, and to ideological division regarding the future of racial inequality and segregation.¹³⁵ The letters which Harlan received, then, probably reflected a narrow constituency which was more reluctant than most of the nation to relax its anticommunist posture.

The expression of support for the decision, however, indicated that many people were pleased that Junius Scales would be sent to prison. Hoping to avoid this contingency, on July 24, 1961, Scales filed an

132. *New York Times*, June 14, 1961, p. 18.

133. Charles and Hazel Mann, letter to Justice John Marshall Harlan. June 15, 1961. Located in HP, Box 105.

134. Lyrel Berdell, letter to Justice John Marshall Harlan. July 12, 1961. Located in HP, Box 105.

135. The results of a Gallup Poll illustrate that the public considered the condition of the economy, the high level of unemployment, and the mounting racial problems to be the most salient domestic issues which faced the nation. Domestic communism did not receive enough votes to even warrant being listed as a separate problem: it was probably placed into the category of "others." *The Gallup Poll: Public Opinion 1935-1971*, Vol. 3. (New York: Random House, 1972), p. 1764.

affidavit which appealed for a reduction of his six-year sentence. Although he described himself as a "liberal or radical who supported the Constitution," the government alleged that he was still sympathetic to the party's violent objectives: he had been seen on June 8, 1961, with persons known to be members of the party.¹³⁶ Notwithstanding that this argument was based on guilt by association, the Justice Department was not inclined to treat with leniency its first membership clause convict. Upon the department's recommendation, Judge Albert Bryan denied the request and ordered Scales to surrender to a United States marshal in New York City at noon, on October 2, 1961. When the time arrived, Scales embraced his wife for one last time, and then walked up the courthouse steps, the first part of a journey which he assumed would culminate with six years in the federal penitentiary in Lewisburg, Pennsylvania.¹³⁷

In February 1962, just three months after Scales' prison term began, however, a group of prominent Americans launched a campaign to impress upon President John F. Kennedy the need for executive clemency. Norman Thomas, the well-known Socialist Party leader, Robert F. Goheen, president of Princeton University, Reinhold Niebuhr, philosopher, theologian, and Grenville Clark, former chairman of the American Bar Association's Committee on the Bill of Rights, sent to the White House a pardon petition signed by 550 respected people. A number of other influential historians, religious leaders, authors, and scientists personally mailed letters to Kennedy which expressed similar sentiments. Furthermore, labor unions such as the United Auto Workers Union and the United Packinghouse Workers Union joined the fray on the side of executive clemency. George Meany, the president of the AFL-CIO, and David Dubinsky, president of the International Ladies Garment Workers Union, also endorsed clemency.¹³⁸

Editorial support provided for the campaign additional momentum since both the *New York Times* and the *Washington Post* almost immediately announced their support for either a pardon or commutation of the sentence. The *Times* asserted "that the cause of democracy is ill served by jailing men who have honestly broken with communism. The President would, we believe, enhance respect for justice by commuting Scales' sentence."¹³⁹ The petitioners did not contend that the Court had erred as a matter of law; the pardon advocates, in contrast, emphasized the political imprudence of jailing a repentant Communist Party member. Indeed, to incarcerate a former member who was, at most, guilty of misplaced idealism served no reasonable governmental

136. *New York Times*, July 25, 1961, p. 15.

137. Scales, p. 346.

138. *New York Times*, February 7, 1962, p. 36; *New York Times*, April 6, 1962, p. 10; Scales, pp. 402-403.

139. *New York Times*, February 7, 1962, p. 36.

purpose. Bolstered by the support of these organizations, Scales, in June 1962, personally appealed to the Justice Department for clemency.¹⁴⁰ His plea underscored that two federal judges in North Carolina, nine of the twelve jurors who convicted him, and five senior partners in leading North Carolina law firms all supported commutation of the six-year sentence.¹⁴¹ Ultimately, on Christmas Eve, President Kennedy ended Scales' eight-year ordeal by commuting the sentence of America's last Smith Act prisoner.

In addition to the personal impact of the *Scales* decision, it had critical legal ramifications: ironically, although the constitutionality of the membership clause was upheld, never again could the Justice Department satisfy the requirements which it had imported into the statute. After 1959 the Communist Party sanitized its statements, rendering it impossible to impute to the party, or to its members, the specific intent violently to overthrow the government.¹⁴² Moreover, in *Noto v. United States*, a companion decision handed down the same day as *Scales*, the Court overturned a membership clause conviction.¹⁴³ The majority decision, again written by Justice Harlan, reiterated the *Yates* distinction between advocacy of action and advocacy of abstract doctrine. In *Noto*, the evidence adduced by the prosecution was purely of an abstract nature, and the government had failed to provide any examples of illegal advocacy by the defendant himself. *Noto*, then, limited the detrimental impact of *Scales* because it suggested to prosecutors that the Court would guard jealously the evidentiary standard which it had enunciated in *Yates*.

The Justice Department was not oblivious to this implication. After the *Scales* decision, the department reviewed comprehensively all of its pending membership clause cases to determine whether or not they satisfied the Court's criteria: remarkably, every case was dropped.¹⁴⁴ The department's victory in *Scales* was a transient one because it had dulled inadvertently the edge of its own sword. Unconstitutional on its face, the membership clause compelled the government to construct it so that its infirmities would be less apparent. Yet, the government could never again satisfy the specific intent standard which it had insisted would remedy the clause's deficiency. So, in all the years during which the membership clause was on the statute books, only Junius Scales, an ex-communist, was ever sent to prison for violating it.¹⁴⁵ But the

140. The Justice Department recommends to the President which clemency pleas should be accepted.

141. The judges were J. Braxton Craven Jr., and L. Richardson Poyer. Judge Poyer was the husband of Emily Poyer, one of the witnesses who had testified on Scales' behalf during the District Court trial. *New York Times*, June 12, 1962, p. 13.

142. Belknap, p. 272.

143. *Noto v. United States*, 367 U.S. 290 (1961).

144. *Attorney General's Annual Report* for fiscal year 1960-1961, p. 257; Taylor, in Scales, pp. xxii-xxvii.

145. See Ted Draper's letter to the *New York Times*, February 7, 1962, p. 36.

Justice Department did not need the membership clause since the legal, political, and popular opposition to the Communist Party insured that it would enter the new decade, and remain to this day, an attenuated skeleton of the organization it once had been. And as for the Smith Act—it remains on the statute books, an historical relic from an era during which freedom and liberty were superseded by the demands for internal security vigilance.