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DENNIS V. UNITED STATES
341 U.S. 494 (1951)

The Smith Act of 1940 made it a crime to teach or advocate the overthrow of the government by force or violence, or to conspire to do these things. First used in 1941 against eighteen members of the Socialist Workers Party in Minnesota, the law was seldom invoked during World War II. After the war and with the onset of the Cold War, the Justice Department began to enforce the Smith Act against domestic Communists. In 1949, a jury found Eugene Dennis and ten other board members of the American Communist Party guilty of violating the statute. The eleven Communists appealed on multiple grounds, including the First Amendment, to the U.S. Court of Appeals for the Second Circuit. In an opinion by Judge Learned Hand, the court unanimously sustained the convictions and rejected in particular the defendants' First Amendment claims. The Supreme Court, in a plurality opinion by Chief Justice Vinson, affirmed.

Dennis marked the demise of the clear-and-present-danger test. The two dissenting justices—Black and Douglas—contended that faithful application of the test could lead only to a reversal of the convictions. The plurality evidently agreed with this analysis, for otherwise it would not have felt compelled to weaken the test so as to allow the convictions.

This task had already been performed by Judge Hand for the Second Circuit. "In each case," Hand wrote, "[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." Thus diluting the immediacy requirement of the clear-and-present-danger test, Hand effectively made the test into something more akin to the old bad-tendency test. Following Hand's analysis, the Vinson plurality found that "the requisite danger" for government action existed. That there was no attempt by the defendants to overthrow the government by force or violence was beside the point, said Vinson. "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."

Justices Frankfurter and Jackson voted with the plurality. Significantly, however, neither did so on the basis of a clear-and-present-danger analysis. After *Dennis* the Court mostly ignored the clear-and-present-danger test and developed new doctrines to decide First Amendment claims of an increasing number and variety.

On the authority of *Dennis*, the Justice Department intensified its efforts to prosecute domestic Communists under the Smith Act. By 1957, the department had obtained 145 indict-

ments and 89 convictions under the law. That year, however, the Supreme Court in *Yates* v. *United States* (1957) reviewed Smith Act convictions of fourteen Communists and reversed each one of them. Though the Court did not overrule *Dennis* (and indeed never has), it interpreted *Dennis* to require a distinction between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end. As a result of *Yates*, federal prosecutors, in order to obtain a conviction under the Smith Act, had to show specific illegal acts by party members; membership in the party was not enough. *Dennis* thus was weakened, and prosecutions under the Smith Act ground to a halt.

Opinion of the Court: **Vinson**, Reed, Burton, Minton. Concurring opinions: **Frankfurter**; **Jackson**. Dissenting opinions: **Black**; **Douglas**. Not participating: Clark.

Dennis v. *United States* was decided on June 4, 1951.

OPINIONS

CHIEF JUSTICE VINSON ANNOUNCED THE JUDGMENT OF THE COURT AND AN OPINION IN WHICH JUSTICE REED, JUSTICE BURTON, AND JUSTICE MINTON JOIN . . .

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

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. . . .

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and

evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged. . . .

We pointed out in *American Communications Assn.* v. *Douds* [1950] that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations. . . .

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

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. . . . Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the cir-

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

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

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

We hold that [the challenged provisions] of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment. . . . Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are

AFFIRMED.

JUSTICE FRANKFURTER, CONCURRING IN THE JUDGMENT . . .

Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as

their advocacy does not create an immediate danger of obvious magnitude to the very existence of our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds. . . .

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. . . .

A generation ago this distribution of responsibility would not have been questioned. . . . But in recent decisions we have made explicit what has long been implicitly recognized. In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society. . . . Some members of the Court—and at times a majority—have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. It has been said that such statutes "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins* [1945]. It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid, see *United States* v. *Carolene Products Co.* [1937], and it has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards. *Kovacs* v. *Cooper* [1949].

The precise meaning intended to be conveyed by these phrases need not now be pursued. It is enough to note that they have recurred in the Court's opinions, and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of "imminent" peril against which legislation may guard. It is on this body of the Court's pronouncements that the defendants' argument here is based.

In all fairness, the argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater re-

sponsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities. . . .

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

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

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

The wisdom of the assumptions underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. . . .

Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcised. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its incertitudes. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved. . . .

JUSTICE JACKSON, CONCURRING . . .

The "clear and present danger" test was an innovation by Justice Holmes in the *Schenck* [v. *United States*, 1919] case, reiterated and refined by him and Justice Brandeis in later cases, all arising before the era of World War II revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties. In those cases, they were faced with convictions under so-called criminal syndicalism statutes aimed at anarchists but which, loosely construed, had been applied to punish socialism, pacifism, and left-