

"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...."

SCALES v. UNITED STATES

367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961).

Junius Irving Scales, former chairman of the Communist party in North and South Carolina, was convicted under the clause of the Smith Act making it a crime to be a member of an organization that advocated violent overthrow of a government in the United States. The court of appeals upheld the conviction, and the Supreme Court granted certiorari.

Mr. Justice **HARLAN** delivered the opinion of the Court....

II. CONSTITUTIONAL CHALLENGE

... The jury was instructed that in order to convict it must find that within the three-year limitations period (1) the Communist Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious; and (2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit."

The constitutional attack upon the membership clause, as thus construed, is that the statute offends (1) the Fifth Amendment, in that it impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies ... and (2) the First Amendment, in that it infringes on free political expression and association. Subsidiarily, it is argued that the statute cannot be interpreted as including a requirement of a specific intent to accomplish violent overthrow, or as requiring that membership in a proscribed organization must be "active" membership, in the absence of both or either of which it is said the statute becomes a fortiori unconstitutional. It is further contended that even if the adjective "active" may properly be implied as a qualification upon the term "member," petitioner's conviction would nonetheless be unconstitutional, because so construed that statute would be impermissibly vague under the Fifth and Sixth Amendments, and so applied would in any event infringe the Sixth Amendment, in that the indictment charged only that Scales was a "member," not an "active" member, of the Communist Party.

1. Statutory Construction....

The only two elements of the crime ... about which there is controversy are ... "specific intent" and "active" membership. As to the former, this Court held in *Dennis v. United States* [1951] that even though the "advocacy" and "organizing" provisions of the Smith Act ... did not

expressly contain such a specific intent element, such a requirement was fairly to be implied. We think that the reasoning of *Dennis* applies equally to the membership clause....

We find hardly greater difficulty in interpreting the membership clause to reach only "active" members. We decline to attribute to Congress a purpose to punish nominal membership ... not merely because of the close constitutional questions that such a purpose would raise ... but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act. Nor can we assume that it was Congress' purpose to allow the quality of the punishable membership to be measured solely by the varying standards of that relationship as subjectively viewed by different organizations. It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself.... Petitioner's particular constitutional objections to this construction are misconceived. The indictment was not defective in failing to charge that Scales was an "active" member of the Party, for that factor was not in itself a discrete element of the crime, but an inherent quality of the membership element.... Nor do we think that the objection on the score of vagueness is a tenable one. The distinction between "active" and "nominal" membership is well understood in common parlance....

We find no substance in the further suggestion that petitioner could not ... anticipate a construction of the statute that included within its elements activity and specific intent, and hence that he was not duly warned of what the statute made criminal. It is, of course, clear that the lower courts' construction was narrower, not broader, than the one for which petitioner argues ... and that therefore, according to petitioner's own construction, his actions were forbidden by the statute....

2. Fifth Amendment

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment....

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....

What must be met, then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's alleged criminal activity.... It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing....

In an area of the criminal law which this Court has indicated more than once demands its

watchful scrutiny (see *Dennis*; *Yates* [v. United States (1957)]; and see also *Noto v. United States* [1961]), these factors have weight and must be found to be overcome in a total constitutional assessment of the statute. We think, however, they are duly met when the statute is found to reach only "active" members having also a guilty knowledge and intent....

3. First Amendment

Little remains to be said concerning the claim that the statute infringes First Amendment freedoms. It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment....

Affirmed.

Mr. Justice **BLACK**, dissenting.

... My reasons for dissenting ... are primarily those set out by Mr. Justice Brennan— that § 4(f) of the Subversive Activities Control Act * bars prosecution under the membership clause of the Smith Act— and Mr. Justice Douglas....

Specifying that neither membership nor holding office in any "Communist controlled" organization would, of itself, constitute a federal crime.

There are, however, two additional points that I think should also be mentioned.

... [T]he Court has practically rewritten the statute ... by treating the requirements of "activity" and "specific intent" as implicit in words that plainly do not include them.... It seems clear to me that neither petitioner nor anyone else could ever have guessed that this law would be held to mean what this Court now holds it does mean.... [P]etitioner has been convicted under a law that is, at best, unconstitutionally vague and, at worst, ex post facto....

Secondly, I think it is important to point out the manner in which this case re-emphasizes the freedom-destroying nature of the "balancing test" presently in use by the Court to justify its refusal to apply specific constitutional protections of the Bill of Rights. In some of the recent cases ... the Court has suggested that it was justified in the application of this "test" because no direct abridgment of First Amendment freedoms was involved, the abridgment in each of these cases being, in the Court's opinion, nothing more than "an incident of the informed exercise of a valid governmental function." A possible implication of that suggestion was that if the Court were confronted with what it would call a direct abridgment of speech, it would not apply the "balancing test" but would enforce the protections of the First Amendment according to its own terms. This case causes me to doubt that such an implication is justified....

Mr. Justice **DOUGLAS**, dissenting.

When we allow petitioner to be sentenced to prison for six years for being a "member" of the Communist Party, we make a sharp break with traditional concepts of First Amendment rights and make serious Mark Twain's lighthearted comment that "It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them."

Even the Alien and Sedition Laws— shameful reminders of an early chapter in intolerance— never went so far as we go today....

We legalize today guilt by association, sending a man to prison when he committed no unlawful act. Today's break with tradition is a serious one. It borrows from the totalitarian philosophy....

The case is not saved by showing that petitioner was an active member. None of the activity constitutes a crime.... Scales was the Chairman of the North and South Carolina Districts of the Communist Party. He recruited new members into the Party, and promoted the advanced education of selected young Party members in the theory of communism to be undertaken at secret schools. He was a director of one such school. He explained the principles of the Party to an FBI agent who posed as someone interested in joining the Party, and furnished him literature, including articles which criticized in vivid language the American "aggression" in Korea and described American "atrocities" committed on Korean citizens. He once remarked that the Party was setting up underground means of communication, and in 1951 he himself "went underground." At the school of which Scales was director, students were told (by someone else) that one of the Party's weaknesses was in failing to place people in key industrial positions. One witness told of a meeting arranged by Scales at which the staff of the school urged him to remain in his position in an industrial plant rather than return to college. In Scales' presence students at the school were once shown how to kill a person with a pencil, a device which, it was said, might come in handy on a picket line. Other evidence showed Scales to have made several statements or distributed literature containing implicating passages. Among them were comments to the effect that the Party line was that the Negroes in the South and the working classes should be used to foment a violent revolution; that a Communist government could not be voted into power in this country ...; that force was the only way to achieve the revolution ...; that the revolution would come within a generation; that it would be easier in the United States than in Russia to effectuate the revolution because of assistance and advice from Russian Communists....

Not one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief....

Mr. Justice **BRENNAN**, with whom the Chief Justice [**WARREN**] and Mr. Justice **DOUGLAS** join, dissenting....

Editors' Notes

(1) **Query:** Harlan relied more heavily on *Dennis* than on *Yates*, even though he wrote the opinion for the Court in *Yates* and there was no opinion for the Court in *Dennis*. How does one explain that emphasis? How can one distinguish between *Scales* and *NAACP v. Alabama* (1958; reprinted above, p. 646), in which Harlan also wrote the opinion of the Court?

(2) **Query:** Where did the right to associate stand after *Scales*? The answer to that question is complicated by a series of other decisions. *Noto v. United States* (1961), decided the same day as *Scales* and by the same 5-judge majority again speaking through Harlan, reversed the conviction of another communist under the Smith Act's membership clause on grounds that the evidence at the trial had been insufficient to prove that the Communist party had advocated direct action to overthrow the government by force. Also on the same day, *Communist Party v. Subversive Activities Control Board (SACB)* (1961) upheld, again 5, the constitutionality of a requirement of the Internal Security Act of 1950 that groups held by the SACB to be "communist controlled" register with the attorney general and give, among other items, the names and addresses of all members.

When the Communist party refused to register, the attorney general tried to enforce another section of the 1950 act that required, under such circumstances, all individual members to register. *Albertson v. SACB* (1965) unanimously held that section of the law unconstitutional. The effects of the Smith Act as upheld by *Scales*, the Court reasoned, made compulsory registration equivalent to compulsory self-incrimination. *Aptheker v. Secretary of State* (1964; reprinted below, p. 657) invalidated the section of the Internal Security Act of 1950 that refused passports to American citizens who belonged to a communist organization, and *United States v. Robel* (1967) struck down the section that made it a crime for a member of such an organization to hold a job in a defense industry once the SACB had ordered the organization to register. In 1973 the Nixon administration allowed the SACB to die by declining to ask Congress to appropriate funds to keep it in existence.

(3) By the time the Court decided *Scales* in 1961, he had broken with the party. Thus a reformed communist was the only person in prison in the United States for being a communist. President Kennedy pardoned Scales at Christmas, 1962.