going to tell us what it meant to you under all the circumstances and so on put in the question.

Section 2: "Adherence to and participation in any clique, group, circle, faction, or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy whereby the majority of the American people can maintain their right to determine their destinies in any degrees shall be punished by immediate expulsion."

Now what did that mean to you?

Budenz: In view of the dedication of the Party in the first sentence [of its constitution] to Marxism-Leninism and the definition that has been given to Marxism-Leninism this was purely Aesopian language for protective purposes to protect the Party in its activities before courts of law in America while it could continue the theory and practice of Marxism-Leninism.

[The government seeks to place a copy of The History of the Communist Party of the Soviet Union *in evidence.]*

Isserman:[6] We are putting a book on trial. . . .

The Court: If the contents of this book and these other pamphlets and documents of one kind or another, that were handed around, and people were told to study them and to teach other people what to do, and how they were to go around and do the things that have been testified to here. I can scarcely believe that it is trying a book. It is trying those persons who used the book and other means to allegedly commit a crime, and that is part of the paraphernalia of the crime.

[6]Abraham Isserman, another defense attorney long associated with the Communist party, was disbarred for his efforts in the case and was not able to practice law again until 1961.

11

Outlawing the Communist Party: The Supreme Court Upholds the Smith Act

On June 4, 1951, the Supreme Court, by a 6–2 majority, affirmed the conviction of the leaders of the Communist party under the Smith Act. The decision, though no surprise, was enormously important. The justices were confronted with the main free-speech case of the cold war—and they knew it. As Justice Felix Frankfurter noted, the Court had dealt with "few questions of comparable import"; and he and his colleagues underlined the seriousness of the case by producing four separate concurring and dissenting opinions in addition to that of Chief Justice Fred Vinson for the majority.

The following selections from Vinson's majority opinion and Justice Hugo Black's dissent reveal the political character of the case. In these excerpts, as well as in the opinions that have not been included, the justices' assessment of the nature of the Communist threat determined the outcome of their deliberations. Most of the Court shared the currently standard view of the Communist party as a highly disciplined organization whose robotlike members "slavishly" followed all party directives and thus might threaten the nation by engaging in espionage or sabotage in the event of a major crisis. While noting that the party was not actually trying to overthrow the government, Frankfurter insisted that "it would be equally wrong to treat it as a seminar in political theory."

National security considerations predominated. The Korean War was raging and the majority of justices felt that the precariousness of the international situation justified the limitations on political freedom. Vinson noted "the context of world crisis after crisis"; Justice Robert Jackson explicitly referred to the 1948 coup in Czechoslovakia; and Frankfurter alluded to atomic spying as testified to by Igor Gouzenko and Klaus Fuchs. The dissenting justices were less fearful about the

Dennis et al. v. United States, 341 U.S. 494 (1951).

danger posed by, in William O. Douglas's words, "the best known, the most beset, and the least thriving of any fifth column in history" and more concerned about the First Amendment. As we see in an article by Douglas in Document 22, he feared that the anti-Communist furor might stifle free thought.

CHIEF JUSTICE FRED VINSON

Majority Opinion in Dennis et al. v. United States

June 4, 1951

In the first part of the opinion, Vinson summarizes the results of the trial and agrees with the finding of the lower court that the Communist party did want "to achieve a successful overthrow of the existing order by force and violence." He then tackles the constitutional issues raised by the Smith Act.

II

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

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 [the Smith Act] 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. . . . 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.

III

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

[The chief justice then discusses earlier Supreme Court decisions that deal with free speech.]

. . . 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. . . . 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. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. . . .

. . . Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech.

Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

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

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."... We adopt this statement of the rule....

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....

JUSTICE HUGO BLACK

Dissenting Opinion in Dennis et al. v. United States

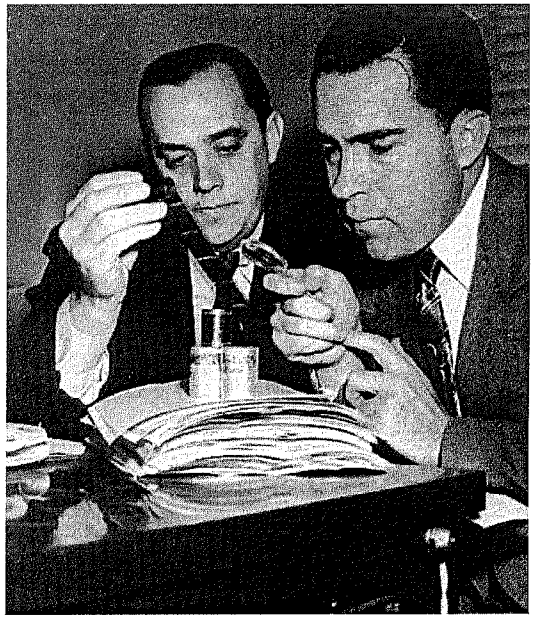
June 4, 1951

... At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids....

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . . I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. . . .

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

Public opinion being what it now is, few will protect the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.



Right: With the help of the committee's counsel Robert Stripling, HUAC member Richard Nixon examines microfilms that ex-Communist witness Whittaker Chambers had hidden in a pumpkin on his Maryland farm. The melodramatically staged production of the "Pumpkin Papers" in early December 1948 bolstered Nixon's career, increased HUAC's power, and forced the Justice Department to indict Alger Hiss.

Above: As the chief sponsor of the Internal Security Act of 1950 and chair of the Senate Judiciary Committee, Nevada Democrat Pat McCarran, shown here shortly before his death in 1954, was the Senate's most powerful anti-Communist. His conduct of the Senate Internal Security Subcommittee's investigation of the Roosevelt and Truman administrations' East Asia policies helped popularize the notion that Communists in the State Department had "lost" China.

In memory of Andrea Eagan
(1943–1993)

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