

THE STATUS OF ANTI-COMMUNIST LEGISLATION

THE presence of an internal Communist movement bent on forcibly overthrowing the Government¹ has necessitated periodic enactment of federal statutes limiting the freedom of activity of Communists in the United States.² On several occasions the Supreme Court has construed these statutes narrowly for purposes of reconciliation with rights and privileges of the first and fifth amendments.³ This comment will examine the effect of such decisions upon the legislative attempt to minimize the Communist threat of forcible overthrow.

COMMUNIST ADVOCACY

Advocacy⁴ is a form of speech generally protected by the first amendment.⁵ Like obscene and libelous utterances,⁶ however, advocacy attaining a significant nexus with action injurious to the public welfare is not immunized from proscription and punish-

¹ The Communist threat has been detailed by Congress in the Subversive Activities Control Act (McCarran Act) § 2, 64 Stat. 987 (1950), 50 U.S.C. § 781 (1958).

² The Communist control system is primarily grounded upon the following acts: Alien Registration Act of 1940 (Smith Act) §§ 2, 3, 5, as amended, 18 U.S.C. § 2385 (Supp. V, 1964) (outlawing advocacy of forcible governmental overthrow and criminally proscribing membership in any society which so advocates); Subversive Activities Control Act (McCarran Act) §§ 1-17, 21, 64 Stat. 987 (1950), as amended, 50 U.S.C. §§ 781-98 (1958, Supp. V, 1964) (requiring, *inter alia*, registration of Communist organizations and individual disclosure of Party membership upon applying for employment with the United States); Labor-Management Reporting and Disclosure Act § 504, 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1964) (prohibiting the holding of union office by any member of the Communist Party during his membership or for five years after termination of such membership).

³ "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ." U.S. CONST. amend. I.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

⁴ "Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.'" *Gitlow v. New York*, 268 U.S. 652, 665 (1925). "Advocacy constitutes action and the instigation of action, not mere belief or opinion." *First Unitarian Church v. County of Los Angeles*, 48 Cal. 2d 419, 434, 311 P.2d 508, 517 (1957). *But see Butash v. State*, 212 Ind. 492, 497, 9 N.E.2d 88, 90 (1937).

⁵ See note 3 *supra*.

⁶ *E.g.*, *Roth v. United States*, 354 U.S. 476, 481-85 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 255-57 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). "[T]he lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Ibid.*

ment.⁷ The test for determining a causal relationship between advocacy and injurious action was crystallized by Mr. Justice Holmes who, speaking for the Supreme Court in 1919, formulated the "clear and present danger" test.⁸ Under this formula, speech may not be proscribed unless (1) the harm it threatens is *substantial*;⁹ (2) it is *probable* that the threatened harm will materialize;¹⁰ and (3) materialization of the harm is *imminent*.¹¹ The relative emphasis accorded these factors in first amendment litigation, however, has varied since 1919.¹²

Subsequently, in the Smith Act of 1940¹³ Congress imposed criminal penalties¹⁴ upon those advocating "the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence,"¹⁵ and upon those organizing

⁷ "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . 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." *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.).

⁸ *Id.* at 47-53.

⁹ See *Giboney v. Empire Storage Co.*, 336 U.S. 490, 501-03 (1949); *Pennekamp v. Florida*, 328 U.S. 331, 348-50 (1946); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Board of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943); *Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Thornhill v. Alabama*, 310 U.S. 88, 102-06 (1940); *Whitney v. California*, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring).

¹⁰ See *Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940); *Whitney v. California*, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 272 (1920) (Brandeis, J., dissenting).

¹¹ See *Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Thornhill v. Alabama*, 310 U.S. 88, 105-06 (1940); *Whitney v. California*, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

¹² Immediately after *Schenck v. United States*, 249 U.S. 47 (1919), the clear and present danger test was relegated by the Court to apply only in cases where the legislature had not determined that a specified class of utterances creates the danger of a substantive evil. See, e.g., *Whitney v. California*, 274 U.S. 357, 371-72 (1927); *Gitlow v. New York*, 268 U.S. 652, 668-70 (1925). In a series of cases immediately prior to World War II, however, the test was applied by the Court to all first amendment cases. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 310-11 (1940) (publicly expressing religious views); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (antipicketing statute). Since that time, the test has been applied by the Court, but its content remains somewhat uncertain. See generally HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* 69-166 (1963).

¹³ Alien Registration Act of 1940, §§ 2, 3, 5, as amended, 18 U.S.C. § 2385 (Supp. V, 1964).

¹⁴ The original maximum penalty of a \$10,000 fine or ten years imprisonment, or both, provided in § 5 (b), was raised to \$20,000 and twenty years respectively by Act of July 24, 1956, § 2, 18 U.S.C. § 2385 (Supp. V, 1964).

¹⁵ Alien Registration Act of 1940, § 2 (a) (1), 18 U.S.C. § 2385 (Supp. V, 1964).

or attempting to organize any society of persons which would so advocate.¹⁶ The act was aimed directly at attempts to form the Communist Party,¹⁷ and in 1949 eleven Party leaders were convicted for conspiring to organize the Party in New York.¹⁸ On appeal, the Supreme Court held in *Dennis v. United States*¹⁹ that in order to sustain the convictions it was necessary first to determine that the defendants specifically intended to accomplish overthrow, and then to apply the clear and present danger test to the facts of the case.²⁰ Having found the requisite specific intent,²¹ the Court altered the independent standards of Holmes' clear and present danger test by holding that advocacy could be proscribed if the harm threatened by such advocacy was significantly substantial.²² Under *Dennis*, the elements of probability and imminence were relegated to a secondary status, apparently affecting the outcome of a case only in situations where the threatened harm was relatively insubstantial.

However, in 1957 on virtually identical facts, the Supreme Court reversed the convictions of Party leaders in California. In *Yates v. United States*,²³ the Court revamped the *Dennis* rule to include the element of probability as a requisite factor in Smith Act prosecutions. It held that the Government had failed to prove that the defendants would have advocated forcible overthrow to a group of "sufficient size and cohesiveness" to justify a reasonable expectation of action inimical to the public interest.²⁴ Significantly, since *Yates* the Government has ceased to prosecute under the advocacy clause.²⁵

Under *Dennis* any attempt to overthrow the Government by force, no matter how futile, constitutes substantial harm for purposes

¹⁶ Alien Registration Act of 1940, § 2(a)(3), 18 U.S.C. § 2385 (Supp. V, 1964).

¹⁷ See, e.g., 86 CONG. REC. 9032-33 (1940) (remarks of Congressmen Hobbs and Ramspeck).

¹⁸ *United States v. Dennis*, 183 F.2d 201, 205-06 (2d Cir. 1950).

¹⁹ 341 U.S. 494 (1951).

²⁰ *Id.* at 508-10.

²¹ The Court noted that mere study and "discussion" of Communist theory would be constitutionally protected speech which was not proscribed by the Smith Act. *Id.* at 502.

²² *Id.* at 509. This analysis, according to the Court, also vitiates any distinction between a mere conspiracy to advocate and advocacy itself, since the existence of the conspiracy alone creates a substantial danger. *Id.* at 511.

²³ 354 U.S. 298 (1957).

²⁴ *Id.* at 321-22.

²⁵ See *Fujimoto v. United States*, 251 F.2d 342 (9th Cir. 1958), *United States v. Yates*, 158 F. Supp. 480 481 (S.D. Cal. 1958).

of the clear and present danger test.²⁶ The evidence necessary to demonstrate a *probable* materialization of that harm is less certain. Five of the fourteen defendants in *Yates* were granted directed acquittals on the ground that mere teaching of Party doctrine does not create a probable materialization of violent overthrow.²⁷ However, directed acquittals were denied for the remaining nine defendants because they were implicated in teaching specific acts of violence.²⁸

Assuming probability of harm is found to exist, Justice Holmes' original formulation of the clear and present danger test would require that the Government also prove that materialization of that harm was imminent.²⁹ The majority opinion in *Yates* clearly intimated that imminence is *not* a factor: "the Government need not hold its hand 'until the *putsch* is about to be executed, the plans have been laid and the signal awaited.'"³⁰ However, at least two members of the present Court have continually asserted that abridgment of speech is unconstitutional when sufficient time remains to avert the advocated evil by means other than prohibition of the advocacy.³¹ This minority view stresses the value of an open forum where advocacy need not be suppressed unless it presents a threat of injury so imminent that there is no time for words of reason to counter the threat.³² Nevertheless, it is arguable that the imminence factor has no realistic place in Smith Act prosecutions, for legislative and judicial investigations have indicated that Communist indoctrination consists of a rigid training program in which the inductee

²⁶ 341 U.S. at 509.

²⁷ 354 U.S. at 329-31.

²⁸ *Id.* at 331-33. Compare *Scales v. United States*, 367 U.S. 203, 233-34 (1961).

²⁹ In *Dennis* the Court sustained the trial court's charge that action need only be planned "as speedily as circumstances would permit." 341 U.S. at 510. *Yates* also accepted this view. 354 U.S. at 321. This is the antithesis of the imminency test, which requires proximity in time linking the words to the advocated action. See *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring).

³⁰ 354 U.S. at 321.

³¹ See, e.g., *id.* at 340 (Black, J., concurring); *Dennis v. United States*, 341 U.S. at 585 (Douglas, J., dissenting).

³² See CHAFEE, *FREE SPEECH IN THE UNITED STATES* 33-35 (1941). "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson, First Inauguration Address, March 4, 1801, in 3 *WRITINGS OF THOMAS JEFFERSON* 319 (Bergh ed. 1907). Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

is deprived of the value of an open forum because he is disciplined to accept orders without question.³³

MEMBERSHIP IN COMMUNIST ORGANIZATIONS

Active Membership

In addition to prohibiting advocacy of and conspiracy to advocate forcible overthrow, the Smith Act also declares illegal membership in a society of persons who so advocate.³⁴ In *Scales v. United States*,³⁵ a defendant indicted under the membership clause contended that imputation of guilt solely on the basis of his Party membership was inconsistent with the due process clause of the fifth amendment and, furthermore, that the Smith Act membership clause contravened his right to freedom of association under the first amendment.³⁶

The Court construed the membership clause as it had the advocacy clause, that is, to require as an element of the crime that the defendant specifically intended to accomplish violent overthrow of the Government.³⁷ Furthermore, the Court refused to attribute to Congress the purpose of visiting upon *non-active* Party members the heavy penalties imposed by the Smith Act;³⁸ hence the statutory term "member" was construed to reach only *active* members³⁹ whose participation in the illegal advocacy of the Party was sufficient to satisfy established due process standards of criminal imputability.⁴⁰

As a result of this construction, those members who participate

³³ See, e.g., *Scales v. United States*, 367 U.S. 203, 244-51 (1961); Communist Control Act § 2, 68 Stat. 775 (1954), 50 U.S.C. § 841 (1958).

³⁴ Alien Registration Act of 1940, § 2 (a) (3), 18 U.S.C. § 2385 (Supp. V, 1964).

³⁵ 367 U.S. 203 (1961).

³⁶ *Id.* at 220.

³⁷ *Id.* at 221-22. See notes 20-21 *supra*.

³⁸ The Court justified this addition to the statutory classification by asserting that Congress only intended to eradicate the threat of violent overthrow. Thus, the act does not punish membership for the purpose of nonviolent revolution. 367 U.S. at 221-22, 252 n.27. See *Dennis v. United States*, 341 U.S. at 499-500; *cf.* Subversive Activities Control Act § 4(a), 64 Stat. 991 (1950), 50 U.S.C. § 783(a) (1958), which punishes a conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States, "Provided, however, That this subsection shall not apply to the proposal of a constitutional amendment."

³⁹ The Court stated that the term "active" was not so vague as to afford defendants inadequate notice of criminal conduct because "the distinction between 'active' and 'nominal' membership is well understood in common parlance." 367 U.S. at 223.

⁴⁰ *Id.* at 222, 224-28. The Court noted that the longstanding concept of punishment for conspiracy and complicity is grounded on the principle that "society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior." *Id.* at 224-25.

solely to advance legitimate aims were exempted from criminal sanction.⁴¹ Since *Dennis* and *Yates* had established that advocacy prohibited by the Smith Act was not constitutionally protected speech, the Court felt that it was logical to preclude *active* membership in a society which so advocated from constitutional protection.⁴² The membership clause, thus limited to exclude legitimate political association, was held consistent with the first amendment's guarantee of freedom of association.⁴³

In order to sustain Scales' conviction in light of the due process clause, it was necessary to find that a significant portion of the Party's activity during Scales' membership constituted illegal advocacy under the *Yates* rule. The evidence had established that one member of Scale's group instructed indoctrinees in the art of provoking riots by killing with a pencil;⁴⁴ consequently, that illegal advocacy was imputable to other active members including Scales.⁴⁵ In the companion case of *Noto v. United States*,⁴⁶ however, the Court held that the defendant can be convicted only on evidence concerning that segment of the Party of which he was allegedly a member, and not upon evidence pertaining to other segments of the Party or upon what may be supposed to be the tenets and activity of the Party as a whole.⁴⁷

A comparison of the standards enunciated in *Yates* and *Scales* reveals an apparent dichotomy in the application of first amendment protection. Under the former, advocacy of forcible overthrow must entail a significant degree of probability of action detrimental to the public welfare to be illegal.⁴⁸ Probability of harm resulting from the proscribed fact of membership in the Party, on the other hand, is not required by the *Scales* rule.⁴⁹ Perhaps such probability can be

⁴¹ *Id.* at 229-30.

⁴² "In this instance it is an organization which engages in criminal activity, and we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act." *Id.* at 226-27.

⁴³ *Id.* at 228-29.

⁴⁴ *Id.* at 249-51; see text accompanying note 28 *supra*.

⁴⁵ *Id.* at 251.

⁴⁶ 367 U.S. 290 (1961).

⁴⁷ *Id.* at 299.

⁴⁸ See text accompanying note 24 *supra*.

⁴⁹ See text accompanying notes 37-42 *supra*.

presumed to exist by imputing illegal advocacy, in the form of encouragement and assistance to others, to any *active* members.⁵⁰ Nevertheless, it is conceivable that an active member may be unaware of the illegal activities of others associated with his Party, and it is submitted that a probability of harm resulting from active membership alone cannot be demonstrated in the absence of actual knowledge of illegal advocacy.

Registration of the Party

The 1950 McCarran Act⁵¹ signified a fresh approach to the problem of Communism in the United States. The act was aimed at exposing instead of punishing the activities and membership of the Communist Party;⁵² hence, it provided in part for mandatory registration with the Attorney General of all "Communist-action organizations" and all "Communist-front organizations."⁵³ The act defined a "Communist-action organization" as one which is substantially controlled by the foreign government controlling the world Communist movement,⁵⁴ and which "operates primarily to advance the objectives of such world Communist movement."⁵⁵ The "Communist-front organization" was defined as one controlled by a Communist-action group and operated for the purpose of giving aid to the latter, but not engaging directly in the advancement of illegal Communist objectives.⁵⁶

⁵⁰ See note 42 *supra*.

⁵¹ Subversive Activities Control Act (McCarran Act) §§ 1-17, 21, 64 Stat. 987 (1950), as amended, 50 U.S.C. §§ 781-98 (1958, Supp. V, 1964).

⁵² See Subversive Activities Control Act § 2 (6), (7), (15), 64 Stat. 988-89 (1950), 50 U.S.C. § 781 (6), (7), (15) (1958). There are indications that the McCarran Act was directed at accomplishing the same result as the Smith Act (protection of the government from internal attack) without employing criminal sanctions which had the adverse effects of driving the Party further underground and of creating martyrs out of radicals. See *Hearings on H.R. 4422 and H.R. 4581 Before the Subcommittee on Legislation of the House Committee on Un-American Activities*, 80th Cong., 2d Sess. 22 (1948) (Clark, J., then Attorney General); *Scales v. United States*, 367 U.S. at 279 (Brennan, J., dissenting).

⁵³ Subversive Activities Control Act § 7, 64 Stat. 993 (1950), 50 U.S.C. § 786 (1958).

⁵⁴ "The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country." Subversive Activities Control Act § 2 (4), 64 Stat. 987 (1950), 50 U.S.C. § 781 (4) (1958). The McCarran Act never explicitly states which foreign country controls the world Communist movement.

⁵⁵ Subversive Activities Control Act § 3 (3) (a), 64 Stat. 989 (1950), 50 U.S.C. § 782 (3) (a) (1958).

⁵⁶ Subversive Activities Control Act § 3 (4), 64 Stat. 989 (1950), 50 U.S.C. § 782 (4) (1958).

A. Communist-action Organizations

The McCarran Act, as implemented by regulations promulgated by the Justice Department,⁵⁷ requires an officer or a duly authorized agent of any action organization to register the organization with the Department of Justice.⁵⁸ This subscribed registration form must be accompanied by a complete list of the organization's present officers and rank-and-file members.⁵⁹ To avoid the contention that this procedure violates the self-incrimination clause of the fifth amendment, Congress provided in section 4 (f) of the McCarran Act that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of [this act] . . . or of any other criminal statute."⁶⁰ However, when Scales interposed section 4 (f) as a defense to criminal liability under the Smith Act, the section was construed to protect only "mere membership," as opposed to active membership with specific intent proscribed by the Smith Act.⁶¹

⁵⁷ Subversive Activities Control Act § 7, 64 Stat. 993 (1950), 50 U.S.C. § 786 (1958); 28 C.F.R. § 11.200 (1964).

⁵⁸ *Ibid.*; see *Communist Party v. United States*, 331 F.2d 807, 810 (D.C. Cir. 1963), cert. denied, 377 U.S. 968 (1964). Since certified authorization by the organization would necessarily require the signature of one or more officers of the organization, the regulation amounts to a requirement that an officer sign on behalf of the organization.

⁵⁹ Subversive Activities Control Act § 7 (d), 64 Stat. 994 (1950), 50 U.S.C. § 786 (d) (1958).

⁶⁰ Subversive Activities Control Act § 4 (f), 64 Stat. 992 (1950), 50 U.S.C. § 783 (f) (1958). Congressman Celler explained the rule of *Counselman v. Hitchcock*, 142 U.S. 547 (1892), to the effect that if the required disclosure of membership could lead to the uncovering of other evidence that could be used to convict the registrant under a federal statute, the registration provisions would be vitiated by the fifth amendment. Hence, Celler stated that a grant of complete immunity is necessary in the McCarran Act. 96 CONG. REC. 13740 (1950). Subsequently, the provision that the fact of registration should not be received in evidence against any registrant was changed in conference committee to the present form of § 4 (f). See *Scales v. United States*, 367 U.S. at 282-86 (Brennan, J., dissenting). This history may indicate that § 4 (f) was meant to extend immunity to Party members from membership clause convictions as long as the forced registration requirements of § 7 remained in effect. See *id.* at 285-86.

Sections 4 (b) and 4 (c) of the Subversive Activities Control Act, 64 Stat. 991 (1950), 50 U.S.C. § 783 (b), (c) (1958), prohibit the communication of classified information to a member of any Communist organization; § 5 (a), 64 Stat. 992, 50 U.S.C. § 784 (a), makes it a crime for a member of a Communist organization to apply for or accept employment with the United States without disclosing the fact of such membership; § 6 (a), 64 Stat. 993, 50 U.S.C. § 785, prohibits a member of any Communist organization from seeking a passport from the State Department. Hence, the meaning of the words "per se" in section 4 (f) appears to be that evidence of membership in a Communist organization will be admissible only when accompanied by evidence showing a violation of some criminal statute which proscribes specific activity that would be legal if done by anyone other than a member of a Communist organization. See *Scales v. United States*, *supra* at 280 n.1 (Brennan, J., dissenting).

⁶¹ 367 U.S. at 209.

Shortly after passage of the McCarran Act the Justice Department requested the Communist Party to register as a Communist-action organization.⁶² The Party refused, and after eleven years of litigation and hearings,⁶³ the Supreme Court ruled in *Communist Party v. Subversive Activities Control Bd.*⁶⁴ that the Party was an action organization required to register with the Attorney General. The organization's contention that section 7 of the McCarran Act contravenes the self-incrimination clause of the fifth amendment was declared prematurely raised, since the Court could not know whether the Party's officers would ever claim that privilege.⁶⁵ Upon subsequent refusal of the Party's officers to register, it was held in *Communist Party v. United States*⁶⁶ that registration could not be compelled unless the Justice Department produced a volunteer who was willing to waive his privilege against self-incrimination.⁶⁷ Thus, the limitation of immunity under section 4 (f) to "mere membership" has resulted in subordinating the McCarran Act policy of registration and disclosure to the Smith Act policy of proscription and punishment.

Voluntary registration by an officer is unlikely as it would invite conviction as an active member under the membership clause of the Smith Act.⁶⁸ Moreover, the Government probably could not avoid the stumbling block of self-incrimination merely by alleging that an officer of the Party lacked the specific intent required to sustain conviction under the Smith Act.⁶⁹ Self-incrimination problems clearly could be avoided, however, if the Government were to grant the witness immunity from future Smith Act prosecutions pursuant to the Immunity Act of 1954.⁷⁰

Once the problem of self-incrimination is eliminated, Party officers will be liable under section 7 (h) of the McCarran Act⁷¹ for

⁶² *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 19 (1961).

⁶³ *Id.* at 19-22.

⁶⁴ 367 U.S. 1 (1961).

⁶⁵ *Id.* at 106-08.

⁶⁶ 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964).

⁶⁷ *Id.* at 814-15.

⁶⁸ See text accompanying notes 60-61 *supra*. It is reasonable to presume that officers are active members.

⁶⁹ Such an allegation would not by itself establish the lack of specific intent. If the matter were pursued, the defendant-officer could invoke his privilege against self-incrimination on the issue of his intent.

⁷⁰ 18 U.S.C. § 3486 (c) (1953). Compare *Ullmann v. United States*, 350 U.S. 422 (1956).

⁷¹ Subversive Activities Control Act § 7 (h), 64 Stat. 995 (1950), 50 U.S.C. § 786 (h)

failure to register. And were the Party registered, attempts to vacate this registration would succeed only if the Party was completely disbanded.⁷²

B: Communist-front Organizations

In *American Comm. for Protection of Foreign Born v. Subversive Activities Control Bd.*,⁷³ the court of appeals was presented with first and fifth amendment questions related to compulsory registration of Communist-front organizations⁷⁴ under section 7 of the McCarran Act.⁷⁵ In *American Committee* the defendant organization had provided legal services for aliens for over thirty years.⁷⁶ The Subversive Activities Control Board found that the Committee's purposes were to win the good will and support of aliens for the Communist Party and to contest the deportation of Party members.⁷⁷ In addition, the Board found the Committee to be controlled by two rank-and-file members of the Communist Party.⁷⁸ These elements of control by and support of an action organization authorized the Board to order the Committee to register as a front organization.⁷⁹

(1958). Section 7 (h) provides that in case of failure of a Communist organization to register, responsibility for registering the organization devolves onto its executive officer and its secretary, who then can be held personally liable for failure to register the organization.

⁷² In cases involving registration of Communist-front organizations, one court of appeals has held that registration cannot be compelled if the organization has been totally dissolved. *Labor Youth League v. Subversive Activities Control Bd.*, 322 F.2d 364 (D.C. Cir. 1963); *Washington Pension Union v. Subversive Activities Control Bd.*, 322 F.2d 398 (D.C. Cir. 1963). In the *Labor Youth League* case, the court noted that if the society was reorganized, the previous order to register would still be valid. But in the *Pension Union* case, the front group had employed the legal form of a corporation, and the court held that dissolution of the corporation permanently vacated the order to register.

⁷³ 331 F.2d 53 (D.C. Cir. 1964), *remanded per curiam*, 85 S. Ct. 1148 (1965).

⁷⁴ *American Committee* brought before the Court the issues whether the McCarran Act requirement for registration of front organizations is constitutional and whether the defendant is a front organization within the purview of that Act. 33 U.S.L. WEEK 3013 (1964). The Court, however, remanded the case because of a stale record. 85 S. Ct. 1148 (1965).

⁷⁵ Subversive Activities Control Act § 7 (d) (2), 64 Stat. 994 (1950), 50 U.S.C. § 786 (d) (2) (1958).

⁷⁶ 331 F.2d at 54.

⁷⁷ *Ibid.*

⁷⁸ *Id.* at 55-57. It was not claimed, nor did the Board find, that these two officers of the American Committee were *active* in the Communist Party. Such a finding would have been unnecessary, since the statutory criterion of control by a Communist-action organization is met if the director of the front group is merely a representative of the action group. *Id.* at 56.

⁷⁹ *Id.* at 54.

The first amendment problem in *American Committee* falls between those which occasioned two previous Supreme Court decisions. In *NAACP v. Alabama*⁸⁰ the Court invalidated a similar registration requirement imposed by Alabama on the NAACP on the ground that the indirect abridgment of free association, due to the attachment of public opprobrium to the members thus exposed, was not justified by Alabama's interest in controlling intrastate business of foreign corporations.⁸¹ In the first *Communist Party* case,⁸² on the other hand, the Court held that the interest of the federal government in exposing members of a foreign-directed conspiracy to overthrow the Government was sufficient to justify compelled disclosure of membership lists, despite a comparable degree of public opprobrium.⁸³ A front organization such as the American Committee does not by definition maintain a purpose of violent overthrow.⁸⁴ However, it does solicit support from an unwary public like the Communist Party,⁸⁵ and section 7 only requires disclosure of its officers, and not of its rank-and-file members.⁸⁶ Therefore, if the control by an action organization is found to result in the front group's supporting that action group to a significant extent, the first *Communist Party* case dictates that forced registration is consistent with the first amendment. If it is shown that the front group does not supply a significant degree of support to some action organization, *NAACP v. Alabama* stands as authority for disallowing forced registration.

Arguably, no fifth amendment problems are presented by forced registration of front organizations,⁸⁷ for membership in front groups is not proscribed by the Smith Act. Nevertheless, a front organization by definition must be controlled by an action organization and thus it is logical to infer that an officer of a front group is likely to

⁸⁰ 357 U.S. 449 (1958).

⁸¹ *Id.* at 462-66.

⁸² *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

⁸³ *Id.* at 102-03.

⁸⁴ Otherwise, it would be classified as an action organization. See Subversive Activities Control Act § 3 (3)-(4), 64 Stat. 989 (1950), 50 U.S.C. § 782 (3)-(4) (1958).

⁸⁵ See Subversive Activities Control Act § 2 (7), 64 Stat. 988 (1950), 50 U.S.C. § 781 (7) (1958); 367 U.S. at 103.

⁸⁶ Subversive Activities Control Act § 7 (d), 64 Stat. 993 (1950), 50 U.S.C. § 786 (d) (1958).

⁸⁷ See discussion of the second *Communist Party* case, at text accompanying notes 66-68 *supra*.

be an active member of some action organization.⁸⁸ This inference might subject the registration requirements⁸⁹ for front organizations to the same self-incrimination impasse met by the Government in the second *Communist Party* case.

TRAVEL

Section 6 of the McCarran Act⁹⁰ was designed to impede communication between Communist organizations in the United States and the world Communist movement⁹¹ by prohibiting the issuance of passports to any member of a group subject to a final order to register as a Communist-action or Communist-front organization. After the first *Communist Party* decision,⁹² the Subversive Activities Control Board entered a final order directing the Party to register as an action organization.⁹³ Members of the Party were thus prohibited from traveling outside the Western Hemisphere or to Cuba.⁹⁴

In *Aptheker v. Secretary of State*⁹⁵ the passports of two leading Party officials⁹⁶ were withdrawn pursuant to section 6. The Supreme Court held section 6 incompatible with the constitutional right to travel⁹⁷ on the ground that the restrictions were based upon "a tenuous relationship between the bare fact of organizational mem-

⁸⁸ However, this is merely a possible inference. See note 78 *supra*.

⁸⁹ Pursuant to Subversive Activities Control Act § 7 (d) (2), 64 Stat. 994 (1950), 50 U.S.C. § 786 (d) (2) (1958).

⁹⁰ 64 Stat. 993 (1950), 50 U.S.C. § 785 (1958).

⁹¹ S. REP. NO. 2369, pt. 1, 81st Cong., 2d Sess. 4 (1950). See Subversive Activities Control Act § 2 (8), 64 Stat. 988 (1950), 50 U.S.C. § 781 (8) (1958).

⁹² See text accompanying notes 63-65 *supra*.

⁹³ See *Aptheker v. Secretary of State*, 378 U.S. 500, 502 (1964).

⁹⁴ *Id.* at 511-12.

⁹⁵ 378 U.S. 500 (1964).

⁹⁶ *Aptheker* was the editor of *Political Affairs*, the Party's "theoretical organ" in the United States. Flynn was the Party chairman. Both were native-born citizens of the United States, and both had held valid passports prior to State Department revocation under § 6 of the McCarran Act. See *id.* at 502, 515.

⁹⁷ The right to travel free of unreasonable restrictions is protected by the fifth amendment. 378 U.S. at 505-07. *Accord*, *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958).

The composition of the majority and dissenting factions in *Aptheker* is of some analytical interest. The majority consisted of the four dissenters in *Scales*—Justices Warren, Black, Douglas and Brennan—with the addition of the newest Court member, Mr. Justice Goldberg, who wrote the majority opinion. Due to the apparent stability of the Warren-Black-Douglas-Brennan bloc in the Communist control cases, the addition of Mr. Justice Goldberg to this group in *Aptheker* may indicate that this bloc will now form a consistent majority. Compare *Yellin v. United States*, 374 U.S. 109 (1963); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963).

bership and the activity Congress sought to proscribe."⁹⁸ The Court refused to consider whether this passport restriction would be constitutional if applied only to top-ranking Party leaders such as the defendants, since the statute was not susceptible of such a construction.⁹⁹

Since the opportunity of Party leaders to confer with Communists abroad may be sufficiently related to the threat of violent overthrow of the Government, it is possible that a statute explicitly limited in application to Party officials could constitutionally limit the right to travel.¹⁰⁰ In such event, the Government also might be required to prove further that the applicant for passport intends to participate in such a conspiracy.

Alternatively, the purpose of section 6 might be effectuated through use of section 1 of the Passport Act of 1926¹⁰¹ and section 215 of the Immigration and Nationality Act of 1952.¹⁰² These provisions empower the Secretary of State to issue passports and, unless the citizen has a valid passport, to prohibit travel from the United States (except to such countries as the President may authorize) during a state of national emergency proclaimed by the President. A state of national emergency proclaimed during the Korean conflict¹⁰³ has never been rescinded or terminated.¹⁰⁴ Hence, the State Department still has power to place geographical limitations on travel by refusing to validate passports to certain foreign countries.

The constitutionality of such a procedure was recently upheld in *Zemel v. Rusk*,¹⁰⁵ where the plaintiff sought to enjoin enforcement of the above two acts in order to validate his passport for tourist

⁹⁸ 378 U.S. at 514.

⁹⁹ *Id.* at 515-16. Section 6 makes it unlawful for *any* member of a Communist organization which has been ordered to register to apply for or receive a passport. The clarity and precision of this provision, as contrasted with the membership clause of the Smith Act, made it impossible for the Court to incorporate the elements of activeness and specific intent. *Ibid.*

¹⁰⁰ A narrowly drawn restriction on travel premised on congressional power to safeguard the United States would probably be constitutional. See U.S. CONST. art. I, § 8, cl. 11. See also 378 U.S. at 509. It would also seem that Congress could delegate the power to impose such restrictions to the State Department. See *Zemel v. Rusk*, 85 S. Ct. 1271, 1276-79 (1965).

¹⁰¹ 44 Stat. 887 (1926), 22 U.S.C. § 211a (1958).

¹⁰² 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958).

¹⁰³ Proc. No. 2914, 64 Stat. A454 (1950).

¹⁰⁴ *Zemel v. Rusk*, 85 S. Ct. 1271, 1277 (1965).

¹⁰⁵ 85 S. Ct. 1271 (1965).

travel to Cuba.¹⁰⁶ The Supreme Court held that since the issuance of passports could directly affect foreign relations, governmental imposition of geographical travel restrictions did not contravene the right to travel guaranteed by the fifth amendment.¹⁰⁷ Under this rationale, Congress could prohibit travel by American citizens to specific Communist countries, or to specified countries within which a Communist Party is active if such activity reasonably presages an attempt at violent overthrow.

LABOR UNIONS

The vital role which labor unions play in the economic structure of the United States renders Communist infiltration of unions a special threat to national security. In 1941 the Party promoted a lengthy political strike at an Allis-Chambers defense plant after having placed one of its members in a commanding position in the union.¹⁰⁸ With such incidents in mind, Congress enacted section 9 (h) of the Taft-Hartley Act of 1947¹⁰⁹ to prohibit labor unions from access to the facilities of the NLRB or a place on the ballot in representation proceedings unless all of their officers annually signed a non-Communist affidavit.¹¹⁰

The constitutionality of this provision was affirmed by the Supreme Court in *American Communications Ass'n v. Douds*.¹¹¹ The Court characterized the affidavit requirements as an *indirect* restraint on freedom of assembly,¹¹² since members who refused to sign were nevertheless allowed to hold union office.¹¹³ In place of the "clear and present danger" test,¹¹⁴ the Court chose a balancing approach,

¹⁰⁶ *Id.* at 1274. The request for validation was made on March 31, 1962, and the Passport Office informed him that tourist travel to Cuba was not in the best interest of the United States, and had been excluded by the State Department. *Zemel v. Rusk*, 228 F. Supp. 65, 66 (D. Conn. 1964).

¹⁰⁷ 85 S. Ct. at 1279-82.

¹⁰⁸ See *Hearings on Bills to Amend and Repeal the National Labor Relations Act Before the House Committee on Education and Labor*, 80th Cong., 1st Sess. 3609-15 (1947); *American Communication Ass'n v. Douds*, 339 U.S. 382, 388 (1950).

¹⁰⁹ Labor Management Relations Act (Taft-Hartley Act) § 9 (h), 61 Stat. 146 (1947).

¹¹⁰ The affidavits required each officer to certify that he was not a member of the Communist Party nor supported any organization which advocated forcible overthrow of the government. See statute cited note 109 *supra*.

¹¹¹ 339 U.S. 382 (1950).

¹¹² *Id.* at 399-400; see 341 U.S. at 507.

¹¹³ 339 U.S. at 389-90. Although § 9 (h) sanctioned substantially more than mere withdrawal of NLRB facilities, the Court found that unions could exist and perform meaningful functions without complying with the section. *Ibid.*

¹¹⁴ *Id.* at 393-400.

weighing the evil of Communist leadership in labor unions¹¹⁵ against the inhibiting effect on freedom of speech and association resulting from coercing unions to deny Communists executive positions.¹¹⁶

The requirement of non-Communist affidavits worked poorly in practice,¹¹⁷ however, and in 1959 Congress repealed section 9 (h). To achieve the same objectives,¹¹⁸ it substituted the approach contained in section 504 of the Labor-Management Reporting and Disclosure Act.¹¹⁹ This section imposes criminal sanctions directly upon any labor union executive who is a Communist Party member, whether or not he believes in the forcible overthrow of the Government or intends to cause a political strike.¹²⁰ However, the prohibition contained in section 504 presents a different case from *Douds*, in that it does expressly prohibit union officers from being Party members.¹²¹

The constitutionality of section 504 has been challenged in *Brown v. United States*,¹²² currently pending before the Supreme Court. Brown was a Communist Party member elected to the executive board of a local longshoreman's union.¹²³ His conviction was reversed by the Ninth Circuit on the ground that section 504 was unconstitutional. The court held that *Douds* was distinguishable,¹²⁴ and that fifth amendment standards of criminal imputability from association would be met only if section 504 were construed to

¹¹⁵ *Id.* at 399-400.

¹¹⁶ *Id.* at 400-12.

¹¹⁷ Besides complicating and delaying the processing of cases before the NLRB, the non-Communist affidavits actually failed to accomplish their express purpose, for the Party simply instructed those who were affected by the statute to file the affidavits anyway and continue their Party membership on a secret basis. See *Hearings on Bills Pertaining to Labor-Management Reform Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 86th Cong., 1st Sess. 430 (1959) (Mr. J. Walter Yeagley). Furthermore, the affidavits made it possible for the leadership of a Communist-dominated union to appear to have received a clean bill of health from the government, thereby hindering the efforts of anti-Communist unions to displace the Communist union. See *id.* at 597 (Goldberg, J., then counsel to UAW).

¹¹⁸ *Brown v. United States*, 334 F.2d 488, 490 (9th Cir. 1964), *cert. granted*, 379 U.S. 899 (1964) (No. 399, 1964 Term).

¹¹⁹ 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1964).

¹²⁰ A violation of § 504 renders the violator liable for a maximum fine of \$10,000, a maximum imprisonment of ten years, or both. § 504 (b), 73 Stat. 537 (1959), 29 U.S.C. § 504 (b) (Supp. V, 1964).

¹²¹ Compare 339 U.S. at 409.

¹²² 334 F.2d 488 (9th Cir. 1964), *cert. granted*, 379 U.S. 899 (1964) (No. 399, 1964 Term).

¹²³ *Id.* at 491.

¹²⁴ *Id.* at 494.

require the element of specific intent to use union office for purposes of interrupting interstate commerce or overthrowing the Government.¹²⁵ In the court's opinion, section 504 was not susceptible to such a construction and, therefore, did not afford a Party member a basis for determining whether his political convictions disqualified him from holding union office.¹²⁶

Perhaps section 504 need not be construed to require proof of specific intent. It can be argued that the disposition of a particular class of persons to commit acts injurious to the public welfare should constitute a constitutionally sufficient basis for proscribing any or all of its members from holding positions of public importance; a great deal of prohibitory legislation enacted under congressional power to regulate interstate commerce is grounded on this premise.¹²⁷ Brown *indicates*, however, that legislation presuming a disposition to commit injurious acts merely from the fact of membership in an organization fails to satisfy constitutional standards of reasonable classification. Presumably this objection might be cured by limiting section 504's proscription to active members of the Party.

CONCLUSION

The legislative effort to devise statutory controls inhibiting the activity of Communists within the United States has been generally unsuccessful. Convictions under the conspiracy and advocacy clauses of the Smith Act will be impossible in the absence of action tending to result in a probability of harm.¹²⁸ Convictions under that act's membership clause in turn require evidence of illegal advocacy.¹²⁹ The spectre of possible Smith Act prosecutions, on the other hand, has thwarted attempts to compel disclosure of Communist member-

¹²⁵ *Id.* at 496.

¹²⁶ *Id.* at 496-97.

¹²⁷ 334 F.2d at 505 (Chambers, J., dissenting); see, e.g., Banking Act of 1933, § 21, 48 Stat. 189, as amended, 12 U.S.C. § 378 (1958) (prohibiting a person from engaging in the business of underwriting or selling securities while also engaged in the business of receiving deposits subject to repayment by check or presentation of a passbook); Securities Exchange Act of 1934, § 4(a), 48 Stat. 885, as amended, 15 U.S.C. § 78d(a) (1958) (prohibiting SEC Commissioners from engaging in any other business, or dealing in any stock-market operations of a character subject to SEC regulation); 18 U.S.C. § 283 (1958) (prohibiting officers or employees of the United States from acting as agents or attorneys for prosecuting claims against the United States).

¹²⁸ See text accompanying notes 23-25 *supra*.

¹²⁹ See text accompanying notes 44-47 *supra*.

ship and activities pursuant to the McCarran Act.¹³⁰ The attempt to eliminate Communists from labor unions has also been frustrated by the problem of imposing criminal sanctions.¹³¹

According to one student of the Communist movement, those Communist agents who represent a truly dangerous threat to national security sever all ties with overt Communist organizations;¹³² this author concludes that outlawing the Party serves only to hinder effective counterespionage.¹³³ Thus, until such time as the internal Communist Party does present a demonstrable threat to national security, it would appear wise to effectuate the McCarran Act's policy of disclosure by suspending prosecutions under the Smith Act. Restrictions on travel and membership in unions could be narrowly drawn without imposing criminal sanctions. This would preclude the possibility of self-incrimination problems and insure a degree of protection commensurate with the desire to eliminate Communist activity in vital areas.

¹³⁰ Repealing or vitiating the Smith Act has apparently become a political hot potato tossed among all three branches of the federal government. Instead of repealing the Smith Act, Congress enacted the less specific immunity clause of the McCarran Act. See note 60 *supra* and accompanying text. The Court limited the protection accorded by this section to "mere members," see text accompanying notes 60-61 *supra*, and hence created a problem involving self-incrimination. See text accompanying notes 66-67 & 89 *supra*. Although the Justice Department has the power to grant immunity from the possibility of Smith Act prosecutions, see note 70 *supra* and accompanying text, it has been hesitant to invoke this power.

¹³¹ See text accompanying notes 122-26 *supra*.

¹³² EBENSTEIN, *TODAY'S ISMS* 26 (1961).

¹³³ *Ibid.* Compare hearings cited note 52 *supra*. Mr. J. Edgar Hoover opposes outlawing the Communist Party of the United States on similar grounds. *Hearings on H.R. 1884 and H.R. 2122 Before the House Committee on Un-American Activities*, 80th Cong., 1st Sess. 43 (1947).