Cold War Supreme Court: Analysing the Change in Constitutional Interpretation between Dennis v. U.S. (1951) and Yates v. U.S. (1957)

By

Hayden Thorne

A thesis submitted to the Victoria University of Wellington in fulfilment of the requirements for the Degree of Masters of Arts in History

Victoria University of Wellington

2018

Acknowledgement

The greatest of thanks is due to my supervisor, A.Prof. Dolores Janiewski, whose support, guidance, and regular provision of chocolate made the whole process a great deal easier. This thesis would not have reached its potential without her gentle pushes to always do a better job.

I am also deeply grateful to the Victoria University of Wellington Faculty of Humanities and Social Science's Joint Research Committee, who supplied the funding for my archival research trip. This thesis would not have been possible without their assistance.

The support from the university, and in particular the staff and students in the History department has been invaluable.

Thanks are also due to my family and friends. My sister Bry for the regular coffee breaks which kept me sane, and Danielle for her editing and advice. To my parents, for always encouraging me to do what I love, and never suggesting that I stop studying and try to find a 'real job'!

Finally, and most importantly, to Chloe. Thank you for supporting and encouraging me; putting up with the late nights and early starts; never complaining about the lack of a stable income; for always pushing me to do more, and to do better. Without you, this thesis would never have been completed in its present form.

Contents

Table of Abbreviations (Text)

Abbreviation	Term
ABA	American Bar Association
ACLU	American Civil Liberties Union
CPUSA	Communist Party of the United States of America
FBI	Federal Bureau of Investigation
HUAC	House Un-American Activities Committee
NAACP	National Association for the Advancement of Colored People
NLG	National Lawyers Guild

Table of Abbreviations (Sources)

CHS	California Historical Society
LARC	Labor Archives and Research Center at San Francisco State University
NC-ACLU	American Civil Liberties Union of Northern California

Abstract

During the early Cold War, America was gripped by an intense domestic Red Scare. This thesis explores how the United States Supreme Court dealt with the Alien Registration Act (Smith Act) and the issue of freedom of speech in the context of that Red Scare. In particular, this thesis focuses on the change in interpretation which occurred between the 1951 decision in *Dennis v. United States*, and the 1957 decision in *Yates v United States*. *Dennis* upheld the constitutionality of the Smith Act, and upheld the convictions of eleven Communist Party of the United States of America (CPUSA) leaders. *Yates* overturned the convictions of a group of California CPUSA officials, and placed strict limitations on the use of the Smith Act in a drastic change in interpretation.

This thesis aims to explore that change in interpretation by drawing on three different lines of reasoning: the impact of changes to the wider Cold War context, the impact of changes to the personnel making up the Supreme Court, and changes in legal strategy on behalf of the defendants in the two cases. To achieve this, the thesis draws on a wide range of sources, beginning with a discussion of existing literature, and moving to explore previously untapped sources from both a historic and a legal perspective. This includes looking at the records of law firms acting in both cases, analysing other Supreme Court opinions from the time, and drawing on more traditional historical sources like media coverage of various events.

This thesis argues that, contrary to most existing scholarship, the change in interpretation is best explained by a multi-causal approach. The changes to the court's makeup and changes to the context amongst which the cases occurred were only part of the reason for the change in interpretation. The impact of a change in legal strategy also played an important role in causing the Supreme Court's change in interpretation.

Introduction

"*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 the United States Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."*

— Oliver Wendell Holmes, Schenck v. US, 1919.[1]

"Free speech – the glory of our system of government – should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent"

— William O. Douglas, Dennis v. United States, 1951.[2]

"*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*"

— Hugo Black, Dennis v. United States, 1951.[3]

"*Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason – men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government.... The First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us."*

— Hugo Black, Yates v. United States, 1957.[4]

---

[1] Schenck v. United States, 39 S.Ct. 247 (US Supreme Court 1919).
[2] Dennis, et al. v. United States, 71 S.Ct. 857 (US Supreme Court 1951).
[3] *Dennis v. United States*, 71 S.Ct. at 903.
[4] Yates, et al. v. United States, 77 S.Ct. 1064 (US Supreme Court 1957).

In 1951, the Supreme Court of the United States upheld the convictions of eleven leaders of the Communist Party of the United States of America (CPUSA) in the case *Dennis v. United States* despite a strong constitutional defence based on the First Amendment right of freedom of speech.[5] Six years later, in June 1957, the Supreme Court effectively reversed that decision in *Yates v. United States* with a decision that greatly reduced the effectiveness of the relevant legislation.[6] This thesis seeks to explain why this major shift in constitutional interpretation took place by combining a study of the legal situation with an analysis of the historical context in which the change occurred. Both cases dealt with the same provisions of the Alien Registration Act (1940), informally known as the Smith Act, and the conflict between those provisions and the First Amendment.[7] The Supreme Court's initial position affirming the constitutionality of the Smith Act provisions played an important role in validating anti-Communist repression. In the interval changes in the international Cold War after Stalin's death reduced the Supreme Court's concerns about national security. The change in position to a pro-free speech stance represents an important development in U.S. constitutional law, widening the protection of civil liberties and contributing to the waning of the domestic Red Scare,.

In an atmosphere of heightened anti-Communist tension in the early stages of the Cold War, the Federal Bureau of Investigation (FBI) and Justice Department deployed the Smith Act against CPUSA leaders, most significantly in New York where the Party had its headquarters. The arrest, prosecution and conviction of eleven CPUSA leaders occurred in a ten-month trial that began in late 1948 and ended in October 1949.[8] On appeal from those convictions, the Supreme Court in *Dennis v. United States* (1951) ruled that the relevant provisions of the Smith Act did not violate the First Amendment right of freedom of speech. The Court in *Dennis* relied on a precedent from the 1919 case of *Schenck v. United States* which used a test known as the 'clear and present danger' test to allow limitations on civil liberties during periods of heightened threats such as wartime.[9] In the case of the New York Smith Act defendants, the majority of the Supreme Court accepted the lower court's decision that the defendants intended

[5] *Dennis v. United States*, 71 S.Ct.
[6] *Yates v. United States*, 77 S.Ct.
[7] "Alien Registration Act," Pub. L. No. 670, 54 Stat. 670 (1940).
[8] At trial, the New York case was labelled *U.S. v. Foster*. The label was changed on appeal after William Foster was removed from the case to *Dennis v. U.S.* For the sake of clarity, this thesis will refer to the first instance trial as the 'New York trial', and will use *Dennis v. U.S.* or *Dennis* to refer to the Supreme Court judgement.
[9] *Schenck v. United States*, 39 S.Ct.

to overthrow the government. The decision upheld their convictions, and the Court also upheld contempt of court convictions against their lawyers for their actions during the trial.[10]

After the Supreme Court had issued that decision, the FBI arrested other CPUSA officials, including fifteen leaders in Los Angeles who were prosecuted in a six month trial in 1952.[11] The Los Angeles trial resulted in the conviction of fourteen defendants (one defendant, Mary Doyle, was removed from the case in the early stages), and the imprisonment of one defendant, Oleta Yates, for contempt of court.[12] *Dennis* remained the dominant interpretation of the Smith Act until 1957 when the Court decided *Yates v. United States*, which focussed on the defendants from the 1952 Los Angeles trial.[13] In the 1957 decision the Court strictly construed the provisions of the Smith Act to protect the civil liberties of the defendants, rendering the Act unusable for the majority of Communist prosecutions, and setting aside the convictions from the California trial.[14] Clearly civil liberties had supplanted 'clear and present danger' for the majority in the *Yates* decision. This analysis will explain that shift in interpretation.

The remarkable shift in interpretation enabled the two dissenters in 1951, Justices Hugo Black and William O. Douglas, to join a majority of six to one in 1957. Black forcefully argued that "the First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way wide open for people to favour, discuss, advocate, or incite causes and doctrines however obnoxious or antagonistic such views may be to the rest of us".[15] A new Chief Justice, Earl Warren, and new members of the Court acted in a changing ideological environment to reconcile the conflict between dangers posed by the CPUSA and freedom of speech.

---

[10] *Dennis v. United States*, 71 S.Ct.; Sacher et al. v. United States, 72 S.Ct. 451 (US Supreme Court 1952).

[11] The Los Angeles trial was labelled *U.S. v. Schneiderman*, with the name changed to *Yates v. U.S.* on appeal. For the sake of clarity, this thesis will refer to the trial as the 'Los Angeles trial' to differentiate from both the New York trial and from the appeal judgement. *Yates v. U.S.* or *Yates* will be used only to refer to the Supreme Court judgement.

[12] U.S. v. Schneiderman, 106 F.Supp 906 (United States District Court, S.D. California, Central Division 1952).

[13] *Yates v. United States*, 77 S.Ct.

[14] *Yates v. United States*, 77 S.Ct.

[15] *Yates v. United States*, 77 S.Ct. at 1090.

Three important areas influenced the outcome of the respective decisions. The first factor concerns the legal strategies used by lawyers for the defence and prosecution in the two cases, starting with the trials in New York and Los Angeles respectively, to determine whether changing legal strategies influenced this profound change in constitutional interpretation. The second factor relates to the changing Cold War context in which the decisions occurred. By analysing the nature of both the internal 'Red Scare' and the external Cold War at the time of the two different decisions, it will be possible to assess the impact of historical context on Supreme Court deliberations. The third factor concerns the composition of the Supreme Court itself, and the different judicial philosophies and outlooks of the justices who upheld the Smith Act convictions in 1951 and the justices who joined the majority in 1957 which effectively emasculated the Smith Act.[16]

Discussions of the Cold War context, and the Supreme Court's composition are features of the existing historiography surrounding the *Dennis* and *Yates* decisions. This thesis will draw on existing scholarship in analysing the impact of context and the Court's composition on the change in interpretation, along with a range of new sources in order to form a clearer picture of the impact of each explanatory factor. Those sources include an extended analysis of the Court's judgements in a number of important cases, newspaper coverage of events, and administration records which have subsequently been made public. The judicial record of different Supreme Court justices provides another way of looking at *Dennis* and *Yates*, providing a point of comparison in assessing their positions with regard to the Smith Act. A picture of each individual justice can be constructed through a combination of historiographical sources, their own personal papers and writings, and their written judgements in other cases.

Historians have written widely on the impact of legal decisions on other events, and on society more generally. However, there is little research done which incorporates the impact of the decision with how the decision was reached. One significant aspect of the production of a particular legal decision is the strategy involved in arguing a particular case. The approach of lawyers to a given case can, and does, have a substantial bearing on the outcome of that case. This means that inquiring into the legal strategy behind a particular case is an important part

[16] *Dennis v. United States*, 71 S.Ct.; *Yates v. United States*, 77 S.Ct.

of understanding the outcome in that case. This is particularly true where, like in this situation, two cases with similar facts and the same legislation produced such contrasting results.

The legal strategy employed by lawyers for the defence in the two cases which are the focus of this thesis is not a part of the existing historiography. In order to analyse and distil the approach of the lawyers, this thesis will draw on the record of both cases, both at trial and on appeal, along with other evidence. This includes, significantly, the records of the Leonard law firm, which began as Gladstein, Grossman and Margolis. It provided a lawyer in *Dennis* (Richard Gladstein) and in *Yates* (Norman Leonard), along with the papers of William Schneiderman, a defendant who acted for himself throughout the Los Angeles trial.[17] These legal records allow the construction of a coherent picture of the defence strategy in each case, which in turn assists in understanding how the legal strategies developed over the course of Smith Act prosecutions. The thesis will assess the extent to which changes to those strategies played a role in creating the shift in interpretation which is the subject of this thesis. This discussion is further aided by use of the papers of the Northern California branch of the American Civil Liberties Union, and the papers of the National Lawyers Guild, to which many of the attorneys belonged.

The Supreme Court is the highest ranking judicial institution in the United States, operating as an appeal court with the power to determine the constitutionality of legislation enacted by Congress or state legislatures. The Court also has the power to review the constitutionality of the actions of the President and other parts of the federal and state executive. The Court's power stems firstly from Article 3, Section 1 of the U.S. Constitution which establishes that "the judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish".[18] Drawing on the latent power given by that instrument, the Court itself in the famous case of *Marbury v. Madison* in 1803 effectively created the power of judicial review – the ability to review legislation to determine whether or not it was constitutional.[19] In that case, Chief Justice Marshall made the enduring statement that "it is emphatically the province and duty of the judicial department to

[17] William Schneiderman, "Opening Statement to Jury" February 6, 1952, Box 1, Folder "Smith Act Speeches," William Schneiderman Papers, larc.ms.0026, Labor Archives and Research Center, San Francisco State University [hereafter Schneiderman, LARC].
[18] U.S. Const. art. III, ss 1.
[19] William Marbury v. James Madison, Secretary of State of the United States, 5 U.S. 137 (US Supreme Court 1803).

say what the law is".[20] That, in the simplest way, encapsulates the role of the Supreme Court – to 'say what the law is' and whether actions, decisions, or legislation conform to the Constitution and its Amendments, including the first ten which make up the Bill of Rights. The Court's power, despite its wide jurisdiction, is not absolute. Under the separation of powers doctrine which governs the American political system, the Court does not have any legislative power, and defers to Congress over legislative issues.[21]

Most judicial systems have a court of last resort, or final appeals court in the nature of the Supreme Court. Where the US Supreme Court stands out, however, is in its "truly remarkable" power to declare a law passed by Congress, or an action of the executive "in violation of the Constitution and therefore null and void".[22] This power is of particular significance when it is noted that the justices are appointed (not elected) for life, with no method to hold them accountable other than the other justices. The Court, through its power of constitutional interpretation, makes law in constitutional areas.[23] Howard Spaeth argues that this law-making power turns the Court into a policy making organ, with a decisive influence in American political, social, economic, cultural, and religious life.[24]

This thesis will follow a thematic, rather than a strictly chronological structure. The first chapter will provide a background to the New York trial and subsequent Supreme Court decision, including the legal precedents stemming from the post-World War I Red Scare, and the development of anti-radical and anti-Communist sentiment during and after World War II. Chapter 2 will discuss legal strategy. It will investigate how each case was conducted, from pre-trial to appeal, and whether the differences in strategy contributed to the more successful outcome for the *Yates* lawyers. Chapter Three will analyse the contextual argument favoured

---

[20] *Marbury v. Madison*, 5 U.S.

[21] The 'Separation of Powers' doctrine is a model for governing a state. The three major functions of the government: legislative, judicial and executive, are divided amongst three different branches of government, each independent of each other. This ensures power is 'separated' and prevents one branch from securing an overwhelming power over the government of the state. For more information see: Barbara B. Knight, ed., *Separation of Powers in the American Political System* (Fairfax, Virginia: George Mason University Press, 1989).

[22] Richard Hodder-Williams, *The Politics of the US Supreme Court* (London: George Allen & Unwin Ltd, 1980), 4–5.

[23] Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge, Massachusetts: Harvard University Press, 2004), 3.

[24] Harold J Spaeth, *Supreme Court Policy Making: Explanation and Prediction* (San Francisco: W. H. Freeman and Company, 1979), 6–7.

by many existing works, to determine how anti-Communist sentiment changed during the 1950's, and what impact this had on the shift in interpretation. The fourth chapter will discuss the changes to the makeup of the Court, and the impact this had on generating a different result in *Yates*. There will also be a brief discussion of the aftermath to the *Yates* case, followed by a conclusion.

Historiography

The historiography relating to the change between *Dennis* and *Yates* divides into two distinct areas of scholarship: historiography on American anti-Communism and scholarship relating specifically to the Supreme Court's decisions about CPUSA defendants and the Smith Act in the 1950s. The historiography on American anti-Communism follows a fairly rigid dichotomy; anti-Communists are cast either as villains, or less frequently, as heroes. The Victim-centred approach argues that the threat from the CPUSA was greatly exaggerated. Larry Ceplair sums up this approach, stating that "it is difficult to escape the conclusion that the domestic Cold War was an elite-driven enterprise and that the elites were not really scared about Communist spying or infiltration".[25] Ceplair argues instead that anti-Communism was a tool used primarily for political gain, serving the "agendas of a significant number of official and unofficial anti-Communists".[26] The opposing approach, taken by Richard Gid Powers and John Earl Haynes, among others, argues that anti-Communist 'heroes' responded to a very real threat.[27] Powers, in particular, believes that the good work done by a majority of anti-Communists has been obscured by a focus on extremists for whom the term 'McCarthyism' became a blanket condemnation.[28] The anti-Communist movement is particularly relevant because it provides the ideological environment in which the Supreme Court decided the two cases: *Dennis* and *Yates*. Although scholars disagree on the reality of the Communist threat, there is considerable agreement over the significance of the anti-Communism which pervaded many aspects of American life, including all three branches of the federal government in Washington, D.C. where the justices lived. The possibility that the decline in anti-Communist fervour between 1951 and 1957 may have influenced the Supreme Court decision and the strategies of the lawyers leading up to the *Yates* decision will be investigated.

Detailed and specific scholarship discusses the Supreme Court and the decisions in *Dennis* and *Yates*. Those two cases have been the subject of significant academic study. Historians have

---

[25] Larry Ceplair, *Anti-Communism in Twentieth-Century America: A Critical History* (California: Praeger, 2011), 218.
[26] Ceplair, 215.
[27] Richard Gid Powers, *Not Without Honor: The History of American Anticommunism.* (New York: Free Press, 1995); John Earl Haynes, "The Cold War Debate Continues: A Traditionalist View of Historical Writing on Domestic Communism and Anti-Communism," *Journal of Cold War Studies* 2, no. 1 (2000): 76–115.
[28] Powers, *Not Without Honor*, 427.

inserted the cases into the context of the Cold War and the domestic anti-Communist movement, while legal scholars have studied their significance in regard to protections for First Amendment rights including freedom of speech and association. The two groups of scholars take very different approaches, and often reach very different conclusions. Historians tend to focus on the lessening of tensions between the US and USSR, the weakening of the domestic anti-Communist movement between 1951 and 1957, the decline in the CPUSA, the impact of Nikita Khrushchev's revelations about Stalin in February 1956, and the Hungarian repression later in 1956 as contributing to the *Yates* decision. Legal scholars stress the importance of the change in Supreme Court composition between the two cases. An analysis of the ideological context, the justice's judicial philosophies, and the legal strategies through lawyers' records and court transcripts will test both claims while adding the consideration of defence and prosecution strategies as a third important contributing factor.

Michael Belknap provides an example of the 'contextual' approach in *Cold War Political Justice*, where he argues that the desire for an anti-Communist propaganda victory motivated the *Dennis* decision.[29] He suggests that the "emotions unleashed by Truman's crusade against international Communism" alongside the ongoing Korean War determined the result of the trial and subsequent appeals.[30] He then argues that "after international tensions began to ease in 1953, many people grew worried about what the methods used to combat domestic communism were doing to civil liberties", suggesting that 'clear and present danger' was becoming of lesser import than civil liberties concerns.[31] William Wiecek takes a similar approach when explaining why "most justices of the Supreme Court and nearly all American jurists accorded Communists a unique and diminished status under the Constitution".[32] The answer, he believes, is that even Supreme Court justices had succumbed to the hysteria that built up as a result of increasing international and domestic Cold War tensions.[33] This school of thought often takes inspiration from Justice Black's dissent in *Dennis*, where he remarked

[29] Michal R. Belknap, *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties*, Contributions in American History ; No. 66 (Westport, Conn.: Greenwood Press, 1977), 116–32.
[30] Belknap, 116–32.
[31] Belknap, 211.
[32] William M Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953*, vol. 12, The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States (Cambridge: Cambridge University Press, 2006), 537.
[33] Wiecek, 12:537–41.

that "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".[34] Richard Fried argues that context was the major determinative factor in the Supreme Court's decisions, pointing in particular to the Korean War as "dramatically narrowing the nation's limited tolerance of political dissent".[35] The Supreme Court has, it is argued, shown a particular hesitancy to engage with national security issues in a time of war.[36] This thesis will test whether a decrease in tension made it easier for the Court shift from an emphasis on 'clear and present danger' to Black's "calmer times" when "pressures, passions and fears" had subsided, by exploring the changes in the Cold War ideological climate between 1951 and 1957.[37]

The alternative approach, taken by legal scholars and legal historians, emphasises changes that occurred to the Supreme Court itself: Warren's replacement of Fred Vinson as Chief Justice, and the appointment of Associate Justice John Marshall Harlan II in particular. Arthur Sabin focussed on the appointment of Warren as Chief Justice, and the appointment of Justice Brennan in 1956, as vital factors in a wider change to the Court's approach, although Brennan was not involved in the *Yates* decision.[38] Constitutional expert William Lasser points to the civil rights decision in *Brown v. Board of Education* as indicative of the Court's development to be an "independent force in American politics", coming as a result of changing personnel.[39] Ted Morgan attributes the reversal in *Yates* to arriving "before a completely different Court than the one that upheld the first Smith Act convictions" while Michael E Parrish argues "the Supreme Court majority displayed little sympathy for the victims of non-confrontation until Earl Warren succeeded Fred Vinson…in 1953".[40] Scott Martelle notes that between *Dennis*

[34] *Dennis v. United States*, 71 S.Ct. at 903.
[35] Richard M Fried, *Nightmare in Red: The McCarthy Era in Perspective* (New York: Oxford University Press, 1990), 113.
[36] Michael Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press, 1990).
[37] *Dennis v. United States*, 71 S.Ct. at 903.
[38] Arthur J Sabin, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999), 106; 139.
[39] William Lasser, *The Limits of Judicial Power: The Supreme Court in American Politics* (Chapel Hill: The University of North Carolina Press, 1988), 161–72.
[40] Ted Morgan, *Reds: McCarthyism in Twentieth Century America* (New York: Random House, 2004), 545; Michael E Parrish, "Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Impeiling It?," *North Carolina Law Review* 82, no. 1799 (June 2004): 5.

and *Yates*, four justices had changed, with some 'deferential' to anti-Communists replaced by "judges who placed more weight on individual liberties than on the privileges of the state".[41] By looking at the judicial attitudes of justices involved in these cases, the impact of the new justices will be tested while also recognising the influential role of *Dennis* dissenters Black and Douglas.

The weight of scholarship and supporting evidence suggests there is a strong argument to be made for each theory, yet it is rare to find scholarship that gives due attention to both explanations. Ceplair uses the composition of the Court and the Cold War tensions of 1951 to explain the decision in *Dennis*, but not for the subsequent change in *Yates*.[42] Fried notes that 1953-54 was an ideological turning point as "the underpinnings of the second Red Scare slowly eroded" but places greater emphasis on the changes to the makeup of the Court.[43] The reluctance to engage with both interpretations means that current scholarship fails to provide an adequate explanation in view of the Supreme Court's habitual avoidance of challenges to the executive branch during times of war or alleged threats to national security, as Michael Linfield has argued.[44] It is important to bring the two fields together to create a better interpretation.

Explaining the change from *Dennis* to *Yates* also draws upon a range of legal topics that touch on this era of the anti-Communist movement. Zechariah Chafee, David Rabban, William Turner and David M O'Brien, provide important analysis of the doctrine of freedom of speech.[45] Useful background and information about the Supreme Court can be found in the work of William Lasser, Ioannis Dimitrakopoulos and Osmond Fraenkel, while specific discussions of judicial philosophy can be found in Philippa Strum and Wallace Mendelson.[46]

---

[41] Scott Martelle, *The Fear Within: Spies, Commies, and American Democracy on Trial* (New Brunswick: Rutgers University Press, 2011), 251.

[42] Ceplair, *Anti-Communism in Twentieth-Century America*, 106.

[43] Fried, *Nightmare in Red: The McCarthy Era in Perspective*, 178–84.

[44] Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War*.

[45] Zechariah Chafee Jr., *Free Speech In The United States* (Massachusetts: Harvard University Press, 1941); David M Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997); William Bennett Turner, *Figures of Speech: First Amendment Heroes and Villains* (California: PoliPoint Press, 2010); David M O'Brien, *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the U.S. Supreme Court* (Maryland: Rowman and Littlefield Publishers, Inc., 2010).

[46] Lasser, *The Limits of Judicial Power*; Ioannis G Dimitrakopoulos, *Individual Rights and Liberties Under the U.S. Constitution: The Case Law of the U.S. Supreme Court* (Boston: Martinus Nijhoff

There is also a wide body of scholarship on the individual cases and pieces of legislation that adds to the wider understanding of this particular issue. Michael Linfield's *Freedom Under Fire* includes a wide ranging discussion of the impact of war on civil liberties in the United States.[47] Stanley Kutler's *The American Inquisition* is a valuable overview of political repression during the Cold War, covering a number of examples outside the Smith Act, such as the trials of Harry Bridges, and the persecution of leftist lawyers, which provides important context within which the particular Smith Act decisions sit.[48]

There are other areas with the potential to contribute to an explanation of the change in the interpretation of the constitutionality of the Smith Act between 1951 and 1957. That includes, significantly, a close examination of the different legal strategies, an issue that is touched on by Sabin who notes the two were conducted very differently.[49] There is repeated reference in both scholarship and primary source material to the antagonistic behaviour of the defendants and their lawyers in the New York trial, and the continual insistence on defending the Marxist dogma, but a similar analysis does not exist for the *Yates* case. There is also a need for a closer look at the legal reasoning and the formulation of the judicial opinions in both cases. Such a legal analysis is often made in the context of a discussion of one case, or the other, but very rarely with reference to both cases. A closer reading of the two judgements and an analysis of the differences they contain will shed additional light on why the change occurred.

Publishers, 2007); Osmond K Fraenkel, *The Supreme Court and Civil Liberties: How the Court Has Protected the Bill of Rights*, 2nd ed. (New York: Oceana Publications, Inc., 1963); Philipa Strum, *Louis D Brandeis: Justice for the People* (Massachusetts: Harvard University Press, 1984); Wallace Mendelson, ed., *Felix Frankfurter: The Judge* (New York: Reynal and Company, 1964).

[47] Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War*.

[48] Stanley I Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982).

[49] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 164–65.

Chapter 1: Background and Red Scare Narrative

To understand the *Dennis* decision of 1951, it is important to understand the historical developments that resulted in the indictment issued by the Grand Jury in July 1948, as well as to understand how the law had developed up to that point in time. The New York trial and subsequent appeals arose in the midst of the post-World War II Red Scare, during a time when anti-Communist passions were running high, stemming in particular from a number of revelations about Soviet spies and espionage activities in America. The case was not the first time, however, that the Supreme Court had cause to consider constitutional protections for freedom of speech in the context of allegedly dangerous or seditious speech. The precedent set by earlier cases, particularly those occurring in the post-World War I Red Scare, provide important background to the *Dennis* decision, as well as providing an important starting point for understanding the legalities of the decision, due to the doctrine of *stare decisis*.[50] That doctrine requires lower courts to follow the precedent set by decisions of a higher court – so where the Supreme Court had made decisions relating to the First Amendment, those decisions could only be overturned by another decision of the Supreme Court. Additionally, Supreme Court Justices are often hesitant to overturn their own decisions, particularly in marginal cases, because of a desire for legal stability and certainty, and a hesitation to impugn the judgement of their predecessors. The Court has repeatedly emphasised that extreme care must be taken in overturning any decision, in order to promote "the evenhanded, predictable, and consistent development of legal principles".[51]

Legal Anti-Communism

The starting point for considering the legal and contextual background to *Dennis* is the post-World War I Red Scare when the issue of free speech arose in regard to the Espionage Act (1917), as amended by the Sedition Act (1918).[52] Title 1, Section 3 of that Act created a range of offenses, including making false statements to interfere with the actions of national forces, and printing, writing, or uttering disloyal or abusive language about the Government or the

[50] Mortimer N. S. Sellers, "The Doctrine of Precedent in the United States of America," *The American Journal of Comparative Law* 54, no. Fall 2006 (2006): 68.

[51] Samuel James Johnson v. United States, 135 S.Ct. 2551 (U.S. Supreme Court 2015); Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey, et al., 112 S.Ct. 2791 (U.S. Supreme Court 1992).

[52] "Espionage Act," Pub. L. No. 24, 40 Stat. 217 (1917); "Sedition Act," Pub. L. No. 150, 40 Stat. 553 (1918).

Constitution.[53] That legislation generated a large number of police raids and prosecutions, with Harvard Professor Zechariah Chafee estimating in 1941 that there were "over nineteen hundred prosecutions and judicial proceedings during the war, involving speeches, newspaper articles, pamphlets and books".[54] The Supreme Court first ruled on the constitutionality of those laws in *Schenck* in March 1919.[55]

Arrested for passing out anti-conscription leaflets, Charles Schenck and co-defendant Elizabeth Baer had been charged and convicted of three offences under the Espionage Act, most pertinently for "causing and attempting to cause insubordination…in the military and naval forces of the United States, and to obstruct the recruitment and enlistment service".[56] The Supreme Court affirmed the convictions in a majority opinion written by Justice Oliver Wendell Holmes, Jr., with the support of the full bench. That opinion introduced the 'clear and present danger' test, with Holmes stating "the question in every case is whether the words 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".[57] The *Schenck* decision provides the starting point for the entrenchment of the 'clear and present danger' test in future Court decisions relating to free speech.

The Supreme Court dealt with the 'clear and present danger' test in two subsequent decisions, both released on 10 March 1919, and both related to the Espionage Act. *Frohwerk v. United States* dealt with a newspaperman who had been convicted of violating the Espionage Act by publishing a number of articles which were alleged to obstruct military recruitment.[58] *Debs v. United States* dealt with a speech given by Eugene V. Debs protesting U.S. involvement in World War I, which resulted in a conviction for "attempting to obstruct the recruiting service of the United States".[59] Justice Holmes delivered unanimous decisions in both cases, utilising

[53] Espionage Act, sec. 3.
[54] Chafee Jr., *Free Speech In The United States*, 3.
[55] *Schenck v. United States*, 39 S.Ct.
[56] *Schenck v. United States*, 39 S.Ct. at 247–48.
[57] *Schenck v. United States*, 39 S.Ct. at 249.
[58] Frohwerk v. United States, 249 U.S. 204 (US Supreme Court 1919).
[59] Debs v. United States, 249 U.S. 211 (US Supreme Court 1919).

the precedent set by *Schenck* and affirming and applying the 'clear and present danger' test, although the guidelines for use of the test remained vague.[60]

In November 1919, the Supreme Court had its first significant disagreement over the meaning of 'clear and present danger' in *Abrams et al. v. United States*, another case related to Title 1, Section 3 of the Espionage Act.[61] Justice John Hessin Clarke for the majority found that "the conspiracy and the doing of the overt acts charged were largely admitted and fully established."[62] He then dismissed the First Amendment argument that had been raised in a brief paragraph, relying on *Schenck* and *Frohwerk*. Justice Holmes, the author of the test created in *Schenck*, responded with a vigorous dissent which legal scholar Erwin Chemerinsky believes "remains at the core of First Amendment jurisprudence to this day".[63] Holmes did not dispute that the 'clear and present danger' test remained the operative test – his issue was with its application. His remarks include a clarification of the test, stating "it is only the *present* danger of *immediate* evil…that warrants Congress in setting a limit to the expression of opinion…" [emphasis added].[64] Holmes' rationale, which continues to be a dominant force in free speech jurisprudence, was that "the best test of truth is the power of the thought to get itself accepted in the competition of the market", rather than any form of political censorship.[65] Although Holmes' opinion represented only a minority consisting of himself and Justice Louis Brandeis, it represents an important development in First Amendment jurisprudence, with continued significance as a basis for the dissents of Black and Douglas during the post-World War II Red Scare. Holmes also points to a significant issue with the clear and present danger test, that of determining when a particular danger reaches the level where imposition on freedom of speech can be justified to prevent that danger from occurring.

The final major development relating to the provisions of the Espionage Act came in *Gitlow v. People of the State of New York*, decided in June 1925.[66] In that case, the majority opinion of Justice Sanford contained the brief but important statement that "for present purposes we may and do assume that freedom of speech and of the press – which are protected by the First

[60] *Frohwerk v. United States*, 249 U.S.; Debs v. United States, 249 U.S.
[61] Jacob Abrams, et al. v. United States, 40 S.Ct. 17 (US Supreme Court 1919).
[62] *Abrams v. United States*, 40 S.Ct. at 18.
[63] Erwin Chemerinsky, *The Case Against the Supreme Court* (New York: Penguin Books, 2014), 67.
[64] *Abrams v. United States*, 40 S.Ct. at 21.
[65] *Abrams v. United States*, 40 S.Ct. at 22.
[66] Gitlow v. People of the State of New York, 45 S.Ct. 625 (US Supreme Court 1925).

Amendment from abridgement by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment by the states."[67] Prior to the *Gitlow* decision, state laws were not subject to the Constitutional protections offered by the First Amendment. The majority opinion established conclusively that state legislation would in future be subject to the same freedom of speech and press rules as federal laws. While the decision in *Gitlow* was not favourable to free speech rights in terms of the specific decision on its facts, it provided a significant development in applying the same legal standard to both state and federal legislation. This extended the 'clear and present danger' test to situations dealing with state legislation, thereby widening the scope of review and creating a unified standard for free speech cases.

These decisions, relating to the post-World War I 'Red Scare', set the precedent for the *Dennis* decision. Ellen Schrecker argues that "the constitutional legacy of the red scare turned out to be quite far reaching" in terms of establishing broad parameters, with few constitutional barriers to the suppression of unpopular, particularly Communist, opinions.[68] The decisions in *Schenck, Abrams* and *Gitlow* are of particular importance because they provide the legal basis for the decisions of the early 1950s, particularly *Dennis*, while the dissenting opinions of Holmes and Brandeis in *Abrams* formed the theoretical basis for the dissenting opinions of Black and Douglas in both *Dennis* and *Yates*. Black and Douglas, continuing the tradition of Holmes and Brandeis, played an important role in shifting the Court majority towards a more favourable free speech position, even if the final result in *Yates* remained a long way short of their commitment to the First Amendment.

After *Gitlow*, there was a period of relative quiet in terms of federal anti-radical action, but state governments, which had passed criminal syndicalism legislation during the Red Scare, found occasion to arrest and prosecute those deemed seditious. Ceplair notes that thirty-two out of forty-eight states passed 'red flag' laws, and thirty-four passed either sedition, or criminal anarchy (syndicalism) statutes.[69] The Supreme Court generally upheld convictions that occurred in state courts, in keeping with the decisions relating to federal statutes. In one such case, *Whitney v. California*, in 1927, based upon criminal syndicalism legislation passed

[67] *Gitlow v. New York*, 45 S.Ct. at 630.
[68] Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown and Company, 1998), 60.
[69] Ceplair, *Anti-Communism in Twentieth-Century America*, 23.

in 1919, the Supreme Court held that a state had the power to punish utterances "inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government".[70] The Supreme Court did make some positive decisions in favour of protection for the First Amendment, but limited these, as was the case in *Stromberg v. People of the State of California* (1931), to a specific set of obscure facts, leaving the *Schenck/Abrams* precedents firmly in place, despite uncertainty over what constituted a 'clear and present danger' in any given situation.[71]

The federal government's more tolerant attitude towards radical groups waned in the late 1930s as the prospect of war became more obvious, leading the Roosevelt administration to seek increased production for military purposes, protect vital infrastructure, and view militant unions with increased concern.[72] Anti-Communist sentiment, already strong in response to trade union militancy, increased after the publicity started by a special House Committee to investigate 'un-American' activities in 1938 and the Nazi-Soviet non-aggression pact in August 1939.[73] When the CPUSA began to agitate against war preparations after the pact, the Roosevelt administration became more receptive to constraints on Communists and Nazi sympathisers as threats to national security.

The Alien Registration Act (1940), better known as the Smith Act after its sponsor, Representative Howard Smith of Virginia, formed "the keystone in the arch of official anti-Communism in the United States" according to Ceplair.[74] The Act, which contained provisions criminalising the advocacy and teaching of the violent overthrow of the United States Government, was introduced in March 1939, when concerns about Nazi sympathisers and CPUSA opposition to war preparations dominated the political agenda in Washington.[75] There was, for such an important piece of legislation, little fanfare when it was introduced, nor indeed any substantial opposition. To understand the line of cases in the 1950s, it is important to also

[70] Whitney v. People of the State of California, 47 S.Ct. 641 (US Supreme Court 1927).
[71] Stromberg v. People of the State of California, 51 S.Ct. 532 (US Supreme Court 1931).
[72] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 24.
[73] William M Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States," *The Supreme Court Review* 2001 (2001): 398–400.
[74] Ceplair, *Anti-Communism in Twentieth-Century America*, 26.
[75] Alien Registration Act.

appreciate the origins of the Act, the arguments presented that secured its passage, as well as the earliest 'test' cases when it was first used by authorities in active prosecutions.

A short but intense Red Scare combined with a 'Brown Scare' (anti-Nazi) from August 1939 until June 1941 provided a favourable context for the passage of countersubversive legislation.[76] The law, Kutler argues, "reflected a fear of growing Fascist and Communist powers in the world and their use of domestic subversive groups" intensified by the onset of World War II.[77] The 1939 Nazi-Soviet Non-Aggression Pact, coupled with opposition to New Deal policies, generated suspicion and made anti-Communism a useful weapon for conservatives.[78] The proposed legislation, introduced first in 1939 as H.R. 5138, drew together the major elements of anti-alien and anti-radical legislation New Deal opponents had introduced over preceding Congressional sessions.[79] The debates on the proposed legislation, from July 1939 until June 1940, showed the growth of a conservative coalition in Congress composed of Republicans and conservative Democrats for whom anti-Communism was a rallying cry, combined with hysteria about a so-called 'Fifth Column' of secret Nazi or Fascist sympathisers in the United States during the occupation of Norway and the fall of France. The phrase, originally associated with covert Fascist supporters during the Spanish Civil War came into wider use in the American press during the German defeat of France in May and June 1940.[80]

The debate on the bill generated little substantial opposition in the House. The bill's focus on blocking or preventing Communist activity in particular was clear from the outset. One congressman speaking in support on 19 July 1939, argued that "these subversive influences are becoming more active and audacious every day", before singling out the CPUSA for special attention, noting, "It certainly prevents advocates of communism from spreading propaganda".[81] Smith, defending the bill during the same debate, denied red baiting while making the implicitly anti-Communist argument that "those who want to keep aliens in this

---

[76] Ceplair, *Anti-Communism in Twentieth-Century America*, 53; M. J. Heale, *American Anticommunism: Combating the Enemy Within, 1830-1970* (Baltimore: Johns Hopkins University Press, 1990), 123–26.
[77] Kutler, *The American Inquisition: Justice and Injustice in the Cold War*, 152–53.
[78] Heale, *American Anticommunism*, 123.
[79] Belknap, *Cold War Political Justice*, 22.
[80] "Fifth Column," *Oxford English Dictionary*, 2018, www.oed.com.
[81] 84 Cong. Rec. 9533-9534 (July 19, 1939).

country who favor the overthrow of this Government by force ought to vote against this bill, and those who want to throw them out on their necks…ought to vote for this bill".[82] Smith gained substantial support from another congressman, who insisted that "it is one of the most important bills that has ever been presented in this body. There is no security in this country for life, liberty, the pursuit of happiness, or property without adequate national defense", while at the same time insisting that the bill did not infringe on free speech.[83] The bill enjoyed wide support among members of the House, meaning it did not require significant explanation or engagement with the points raised in opposition.

Often stated eloquently and forcefully, the limited opposition within the House focussed on perceived infringements to Constitutional rights and civil liberties. One congressman remarked that "now we find in the year of our Lord 1939 that we are attempting to imitate Nazi Germany", while also noting that the bill would have the effect of "denying civil liberties" to those affected.[84] Another also pointed to similarities with Nazi Germany, remarking that, "if I could forget that this nation has been built largely by the work and the help of aliens and that Hitler went into power by the persecution of minority groups, and if I could forget my oath of office, then I could remain seated here and let things carry on."[85] A third representative extended that critique, arguing that the bill's passage would entail shooting "the light out of the hand of the Statue of Liberty".[86] Another warned that the legislation was "enough to make Thomas Jefferson turn over in his grave. It is without precedent in the history of American legislation. It is an invention of intolerance contrary to every principle of democracy".[87] Representative Vito Marcantonio, the Harlem-based representative of the American Labor Party, voiced the strongest opposition, expressing a sentiment later displayed in the *Dennis* dissents. Marcantonio believed that "the test of democracy lies in the ability of that democracy to maintain its liberties, to preserve those liberties, and have more freedom rather than less freedom during the period of crisis".[88] He assailed the legislation as requiring the "amputation of the Bill of Rights" which "will not permit American democracy to live, it will kill it."[89]

[82] 84 Cong. Rec. 9537 (July 19, 1939).
[83] 84 Cong. Rec. 10357 (July 28, 1939).
[84] 84 Cong. Rec. 9534 (July 19, 1939).
[85] 84 Cong. Rec. 9540 (July 19, 1939).
[86] 84 Cong. Rec. 10363-10364 (July 28, 1939).
[87] 84 Cong. Rec. 10446 (July 29, 1939).
[88] 86 Cong. Rec. 9034 (June 22, 1940).
[89] 86 Cong. Rec. 9034 (June 22, 1940).

Despite such stirring rhetoric, the bill received 382 yeas, 4 nays, and 45 not voting in the House.[90] The Act passed the Senate on the same day, and soon received Roosevelt's signature in late June 1940.[91]

Although the New York and Los Angeles trials became the most famous examples of Smith Act prosecutions, these were not the only occasions the legislation was used, nor the only high level court decisions relating to that legislation. After the legislation passed in 1940, it quickly came into use in 1941 in a test case against a Trotsykist union local.[92] There was also a significant case in 1947 where the legislation was implemented against accused Communists, and a series of cases in the 1950s between *Dennis* and *Yates*. Sabin found that there were 126 indictments under the relevant Smith Act provisions, with only 10 acquittals at trial level.[93] Those cases led to a total of 418 years in prison sentences, and US$435,000 in fines.[94] The cases before *Dennis* enabled the development of the central Constitutional arguments, as well as demonstrating the significance of context in judicial decision making about guilt or innocence for defendants accused of violating the Smith Act.

One significant prosecution using the Smith Act took place in Minneapolis in 1941.[95] The prosecution of a group of Trotskyite unionists affiliated with the Socialist Workers' Party, the proponents of a variation or strand of Marxist theory, set an important precedent for the Smith Act cases that followed both in its prosecution and appeal process.[96] The pattern followed by the case, which is apparent from the media coverage of events, is eerily similar to previous Red Scare cases (in particular the 1917/18 espionage cases), and to the subsequent Cold War Smith Act prosecutions. *The New York Times'* coverage emphasises the role played by the FBI in the early stages of the case, including raids in multiple cities to collect the evidence supporting the indictments.[97] *The New York Times* also noted in its early coverage that the trial was the

[90] 86 Cong. Rec. 9036 (June 22, 1940).
[91] 86 Cong. Rec. 9110, 9138, 9127 (June 22, 1940).
[92] Donna T. Haverty-Stacke, "'Punishment of Mere Political Advocacy': The FBI, Teamsters Local 544, and the Origins of the 1941 Smith Act Case," *The Journal of American History* 100, no. 1 (June 2013): 68.
[93] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 14.
[94] Sabin, 14.
[95] Haverty-Stacke, "Punishment of Mere Political Advocacy."
[96] Haverty-Stacke, 68.
[97] "Twin Cities Offices of 'Reds' Raided: Heads of Socialist Workers' Party Will Be Accused of 'Seditious Activities,'" *The New York Times*, June 28, 1941, 9.

"nation's most extensive peace time action against alleged seditious conspirators".[98] It ended it the conviction of eighteen of the twenty-three defendants for conspiracy to generate military insubordination.[99]

Although the defendants appealed their convictions, the U.S. Court of Appeals for the Eighth Circuit upheld the verdicts in *Dunne et al. v. United States* in 1943.[100] A passage in the judgement outlined the circumstances which compelled the passage of the Act and justified its peacetime implementation. Referring to the outbreak of European war and the 'Fifth Column', the judges agreed that "while this Act is applicable to peace as well as war conditions, it was enacted on the brink of war to correct existing dangers".[101] In regards to the constitutional validity of the Smith Act provisions, the Court specifically held, in an opinion authored by Judge Kimbrough Stone, that the provision at issue was "not vague" but only "sweeping" in order "to cover the different means by which Congress deem the forbidden result might be brought about".[102] The Court also held that the language of the statute is incapable of a construction which would include "guilt by association".[103] In response to the appellants' argument that the Smith Act was unnecessary because existing legislation fulfilled the same function, the Court responded, "That is a legislative and not a judicial concern. As stated hereinbefore, there was a situation at the time this Act was before Congress which would well justify the enactment – if any justification be needed."[104] Context, then, in terms of the threat of war and the danger posed by 'Fifth Column' infiltration played an important part in judicial decisions upholding the constitutionality of early Smith Act convictions.

It is also relevant to note the legal test used by the Court of Appeal in the *Dunne* case. Judge Stone, writing for himself and two other judges in a unanimous opinion, declined to use the clear and present danger test formulated in *Schenck* to challenge the Smith Act, instead relying on the 1925 decision in *Gitlow*. Stone argued that *Gitlow* "definitely determines that the

---

[98] "29 Reds Indicted in 'Overthrow Plot,'" *The New York Times*, July 16, 1941, 7.
[99] "18 Guilty of Plot to Disrupt Army, They and 5 Others Freed of Sedition," *The New York Times*, December 2, 1941, 1.
[100] Dunne et al. v. United States, 138 F.2d 137 (United States Court of Appeals for the Eighth Circuit 1943).
[101] *Dunne v. U.S.*, 138 F.2d at 141.
[102] *Dunne v. U.S.*, 138 F.2d at 142.
[103] *Dunne v. U.S.*, 138 F.2d at 143.
[104] *Dunne v. U.S.*, 138 F.2d at 143.

Schenck case doctrine is not applicable in situations where the legislative body has, by statute, determined that "utterances of a certain kind involve such danger of substantive evil that they may be punished"."[105] His reasoning gave much greater deference to legislative decision making, and effectively prevented consideration of the free speech element of the issue, concluding that "the Nation may protect the integrity of its armed force and may prevent the overthrow of the Government by force, and that it may, as a means to those ends, punish utterances which have a tendency to and are intended to produce the forbidden results".[106] It seems that the Court was persuaded, by the context and legislative intent, that the legislation was valid despite its potential for infringing on freedom of speech. This suggests that external circumstances influenced judicial assessment of the first Smith Act decision – a decision that established important precedents for subsequent judicial interpretations.

The next significant Smith Act case to arise resulted in the Court of Appeals decision in *United States v. McWilliams et al.* in 1947.[107] That appeal decision was the result of a 1944 trial which ended, after eight months, in a mistrial after the untimely death of the trial judge.[108] Although the result of the case, a mistrial followed by a dismissal of the indictment after long delays in bringing prosecution, is somewhat anti-climactic, the length and conduct of the trial is important to acknowledge. *McWilliams* draws its relevance from the impact it had on Judge Medina in the New York trial. Medina developed the view that the attorneys in New York were seeking to conduct an antagonistic, drawn-out trial in the same manner as *McWilliams* in a conspiracy to "impair" his health "so that the trial could not continue" as was the case in *McWilliams*.[109] So although the indictment was dismissed due to a continuing delay which was "unjust and un-American", the case foreshadows the conduct of the New York trial, both in the way it was prosecuted, and defended.[110]

[105] *Dunne v. U.S.*, 138 F.2d at 145.
[106] *Dunne v. U.S.*, 138 F.2d at 145.
[107] United States v. McWilliams et al., 163 F.2d 695 (United States Court of Appeals for the District of Columbia, 1947).
[108] United States v. McWilliams et al., 163 F.2d at 696.
[109] "United States v. Foster, Transcript Extract, Verdict and Contempt Citations" (New York, October 14, 1949), 7, Box 367, Folder 2, Norman Leonard Papers, larc.ms.0027, Labor Archives and Research Center, San Francisco State University [hereafter Leonard, LARC].
[110] United States v. McWilliams et al., 163 F.2d at 696.

Investigating Subversion

The Smith Act's passage in 1940 was one of a number of measures which gave the FBI increased powers to investigate subversive activity in the USA. FBI Director J. Edgar Hoover was an ardent anti-Communist who used the increased power available to him, along with other more questionable means to further his ideological agenda. Athan Theoharis argues that as early as 1946, Hoover and the FBI selectively leaked documents and alarmist reports to both politicians and the press to try and influence public opinion against the CPUSA.[111] Along with a focus on public opinion, the FBI adopted "more creative and aggressive tactics" to deal with "Communism's subversive character", which resulted in violations of "federal law, privacy rights, and civil liberties".[112] These tactics included wiretaps and 'black bag' jobs where agents broke into offices in search of intelligence and to plant bugs. Some of this type of activity fell within an expanded Executive Order which Hoover manipulated President Harry Truman into signing in 1946, while significant parts of it remained illegal, including some of the evidence introduced during the Judith Coplon trial in 1949.[113] The illegal surveillance, discovered on appeal of Coplon's convictions for espionage and conspiracy, resulted in an overturning of the convictions despite the appeal court's conclusion that she was guilty of the offence.

FBI power and influence was also enhanced by other federal programs that required investigative work, in particular the 1947 Employee Loyalty Security Program, created by Truman's Executive Order 9835.[114] The Federal Loyalty program began as a 'Temporary Commission on Employee Loyalty', created pursuant to Executive Order 9806.[115] The temporary commission reported back in 1947, leading to Truman's March 1947 Executive Order 9835 which established a general federal loyalty program.[116] That program allowed the FBI to use illegally obtained information, as the proceedings were confidential, and it generated "a radical increase in investigations since it could not be known which citizens in the future

---

[111] Athan Theoharis, "A Creative and Aggressive FBI: The Victor Kravchenko Case," *Intelligence and National Security* 20, no. 2 (2005): 323.

[112] Athan Theoharis, *The FBI and American Democracy: A Brief Critical History* (Lawrence, Kansas: University Press of Kansas, 2004), 65.

[113] Athan Theoharis, "FBI Surveillance During the Cold War Years: A Constitutional Crisis," *The Public Historian* 3, no. 1 (Winter 1981): 4–11.

[114] Eleanor Bontecou, *The Federal Loyalty-Security Program* (New York: Cornell University Press, 1953), 26.

[115] Bontecou, 23.

[116] Bontecou, 26.

might seek federal employment".[117] Along with the investigations conducted under the Loyalty Program which cast suspicion on federal employees, the FBI played a major role in the espionage cases which came to the public's notice in the late 1940s and early 1950s. The first big investigation to capture headlines was the defection of Soviet spy Elizabeth Bentley in 1945. The Bentley case triggered more espionage investigations and prosecutions, a series of events which constituted "an earthquake in American politics".[118] Kathryn Olmsted argues that the "Alger Hiss case, the Smith Act prosecutions of Communist Party leaders, and Senator Joe McCarthy's denunciations of State Department Reds all stemmed from Bentley's decision to walk into that forbidding FBI office".[119] By December 1945 seventy-two agents had become involved in what was "the biggest espionage case in the FBI's history".[120]The Bentley case stirred up national anxiety over the threat posed by Communist espionage, an anxiety which played directly into the hands of those prosecuting the CPUSA leaders in the *Dennis* case.

The issue of subversive elements in the United States gained traction in the media in 1946, even before revelations about the Bentley case in late 1947 saw the issue become a regular headline piece. In February 1946, following the arrest of persons "charged with selling military-scientific information to a foreign power" in Canada, *The Washington Post* suggested that the danger posed by Communist espionage, to the atomic program in particular, was extensive, noting a group of people in "positions of power and influence" whose "loyalty would be to Communism" in any time of crisis.[121] A March 1946 directive from the Army barring "subversive or disaffected" personnel from serving in "sensitive assignments" including duties "connected with atomic energy and radar" soon followed.[122] Although the announcement itself only referred to subversive and disaffected personnel, a subsequent War Department statement clarified that "Communists and former Communists" were the focus of the directive after revelations that the House Un-American Activities Committee (HUAC) had uncovered "a Russian spy ring seeking to obtain United States secrets on the atomic bomb".[123] The anxiety

[117] Theoharis, *The FBI and American Democracy*, 65–69.
[118] Kathryn S. Olmsted, *Red Spy Queen: A Biography of Elizabeth Bentley*, 1st ed. (Chapel Hill: The University of North Carolina Press, 2002), 7.
[119] Olmsted, 7.
[120] Olmsted, 35.
[121] Marquis Childs, "Washington Calling: Fifth Column and the Atom Bomb," *The Washington Post*, February 18, 1946, 7.
[122] "Army Bars 'Reds' From Many Duties," *The New York Times*, March 9, 1946, 2.
[123] "Army Bars 'Reds' From Many Duties," 2.

over Communist subversion during 1946 had a clear focus on the threat to steal US atomic secrets.

During 1947, reports relating to Communist subversion increased in volume and severity. There were suggestions that the "American people are hardening their attitude towards Communism", based on statements from the State Department and the FBI about the threat posed by Soviet agents, along with the testimony of Soviet defectors. One such defection, that of Victor Kravchenko, made its way into the public eye courtesy of his testimony before HUAC. Kravchenko testified that "Russia was infesting America with spies and pursuing an international course that would make war "inevitable"."[124] Kravchenko also suggested that Soviet espionage would only increase during the post-War period.[125] These reports, coupled with Truman's new loyalty program targeting Communists in Federal employment, ratcheted up anti-Communist tensions and fears of Communist spies.

Defections and defector testimony continued to play an important role in the growth of Red Scare sentiment after the first reports of Elizabeth Bentley's defection in late 1947. On 21 November 1947 *The Washington Post* reported on a seven-month Federal Grand Jury investigation originating two and a half years previously "when a woman informant approached the FBI with sensational reports of a spy ring in which she said she had played a part". This drawn out investigation, the article suggests, "has contributed immeasurably to the current atmosphere of suspicion and distrust".[126] Bentley was not named in the article, but there were repeated references to the fact that the inquiry concerned "a woman of education".[127] Details on the investigation and grand jury proceedings were scarce until shortly after Bentley's final testimony in April 1948, when she initiated contact with the *New York World-Telegram* to provide them with an exclusive of her story.[128] That exclusive, on the same day the New York Smith Act indictments were issued, carried the headline of "Red Ring Bared by Blond Queen", and moulded the start of the sensationalised coverage of Bentley's allegations.[129]

[124] "U.S. Held Infested with Soviet Spies," *The New York Times*, July 23, 1947, 1.
[125] "U.S. Held Infested with Soviet Spies," 1.
[126] Marquis Childs, "Washington Calling: Spy Investigation," *The Washington Post*, November 21, 1947, 24.
[127] Childs, 24.
[128] Olmsted, *Red Spy Queen*, 99.
[129] Olmsted, 101.

Bentley was immediately subpoenaed by the Senate Investigations Subcommittee as well as by HUAC.

Bentley identified alleged Communist informers who had "supplied such a large volume of information, both political and military, that at one time it had to be microfilmed to be transported back to New York in safety from detection".[130] Bentley's testimony, sensational in its own right, also led directly to the testimony of ex-Communist Whittaker Chambers, who named the members of a Communist group which included "top policy-making officials of the Roosevelt-Truman administration" Alger Hiss, Lee Pressman and John Abt.[131] Chambers confirmed many of Bentley's allegations, continuing the chain reaction started by Bentley that would "transform American politics and culture".[132] There is a direct link between Bentley's defection and the Smith Act trials although the grand jury called to consider Bentley's allegations did not have sufficient evidence to produce indictments against those she named. Instead it proceeded to issue indictments under the Smith Act against the New York CPUSA leaders against whom the evidence made a prosecution more likely to succeed.[133]

Cold War Red Scare

The onset of the Cold War and the accompanying revival of the Red Scare provided a supportive context for the proliferation of Smith Act prosecutions. President Truman's foreign policy launched the Cold War officially in 1947, but in addition to the Federal Loyalty Security Program, he also introduced the Attorney-General's List of Subversive Organizations. Philip Perlman, Truman's Solicitor General from 1947-1952, suggests that there was "pressure from Congress and from the people around him to set up some method by which the government could be better assured that there were no subversives in the government".[134] The implementation of Executive Order 9835 (loyalty program) coincided with the expansion of

[130] C.P. Trussell, "Woman Links Spies to U.S. War Offices and White House," *The New York Times*, July 31, 1948, 1.
[131] C.P. Trussell, "Red 'Underground' In Federal Posts Alleged By Editor," *The New York Times*, August 4, 1948, 1; Mary Spargo, "List Includes Nathan Witt, Alger Hiss and Less Pressman," *The Washington Post*, August 4, 1948, 1.
[132] Olmsted, *Red Spy Queen*, 110.
[133] Olmsted, 98.
[134] Philip Perlman, Transcript of Interview with Philip Perlman, interview by William Hillman and David M. Noyes, December 15, 1954, 2, Interviews with Associates of President Truman, 21 of 31, Perlman, Philip B., Truman Papers, Post-Presidential Papers, www.trumanlibrary.org, accessed 28/02/2018.

the Attorney-General's List of Subversive Organizations which had existed since 1941 in the pre-war Red Scare. Attorney-General Tom C. Clark added significantly more organizations to the list during his tenure from 1945 to 1949 before Truman appointed him to the Supreme Court.[135]

Truman's anti-Communist measures, despite being wide reaching and pervasive, did not satisfy his critics. Republicans, who gained control of both houses in the 1946 midterm elections using anti-Communist accusations against the Democrats among other campaign tactics, were particularly critical. Taking charge of HUAC, Chairman J. Parnell Thomas, wrote to Truman in April 1947, arguing that "the Communist menace in America is serious. It is no myth, and it is no 'bugaboo'", before informing Truman of "the apprehension that exists among many members of Congress, over the failure of the Department of Justice to prosecute the many serious violations of the Federal Statutes by these conspirators".[136] Thomas was clearly not satisfied by Truman's actions, writing again in 1948 that "the evidence of Communist espionage was placed on your desk more than three years ago. Since that time can you recall one action that has been taken to punish those guilty of spying in the United States?"[137] By 1950, as Senator Joseph McCarthy began to gain public attention for his anti-Communist allegations, Senator Millard Tydings informed Truman that although "an overwhelming number of people support the President and his administration on our overall foreign program", the "Truman domestic plan does not command the same support" due to the anti-Communist attacks.[138]

Although the Loyalty programme and the Attorney-General's list failed to silence McCarthy or other anti-Communists, Truman's actions gave bi-partisan momentum to anti-Communism, undoubtedly influencing judges, including those Truman appointed to the Supreme Court. The Loyalty program vetted nearly half a million employees – significant by any measure, although

[135] Perlman, 13–14.

[136] J. Parnell Thomas to Harry Truman, April 23, 1947, Official File. OF263: Communism, Truman Papers www.trumanlibrary.org, accessed 28/02/2018.

[137] J. Parnell Thomas to Harry Truman, September 29, 1948, 1, Official File. OF320-B: Un-American Activities, House Committee on, Truman Papers, www.trumanlibrary.org, accessed 28/02/2018.

[138] Millard E. Tydings to Harry Truman, "Memorandum for the President," April 12, 1950, 1, Official File. OF419-K: Subcommittee on Loyalty of State Department Employees, Committee on Foreign Relations, Truman Papers, www.trumanlibrary.org, accessed 28/02/2018.

it only fired or denied employment to 560 of those.[139] It was also clearly a political tool, underpinned by "the conviction that all Communists were potential Soviet agents".[140] Moving in elite political circles in Washington, DC, the Supreme Court justices could not fail to be aware of the allegations about the CPUSA, subversion, treason, and espionage that dominated the headlines in 1950.

Amongst that atmosphere of anti-Communist sentiment, the first use of the Smith Act to target the CPUSA began in 1948 with the issuing of an indictment against twelve CPUSA leaders in New York. The trial, which became known as the 'battle of Foley Square' after the location of the courthouse used, lasted from November 1948 until October 1949.[141] The prosecution presented a case based primarily on evidence against the CPUSA, rather than the individual defendants, targeting Communism through literature and testimony to build a picture of Communism as a revolutionary and subversive ideology. The trial turned into an acrimonious political battle, with the defendants seeking to defend and promote Communist teachings, while the prosecution attempted to discredit that same ideology. William Foster, the CPUSA National Secretary, was indicted, but not tried due to illness. The remaining eleven defendants were convicted and sentenced to jail terms of between three and five years, along with $10,000 fines. The defendants in the New York trial appealed their convictions to the Court of Appeals for the Second Circuit. The Court of appeals unanimously upheld the convictions in August 1950, with specific reference to the danger posed by Communism worldwide.[142] An appeal to the Supreme Court was heard in December 1950, with a decision released in June 1951.[143]

The *Yates* decision in the Supreme Court was the result of the 1952 trial of a group of second-tier CPUSA leaders in Los Angeles. The trial, conducted under the name *U.S. v. Schneiderman*, was another long affair, but failed to reach the same level of acrimony as the New York trial. Fourteen CPUSA leaders were convicted in a trial that bore some similarities, but also considerable differences to the New York trial. An appeal from those convictions was heard

---

[139] Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States," 421–22.
[140] Ellen Schrecker, "McCarthyism: Political Repression and the Fear of Communism," *Social Research* 71, no. 4 (Winter 2004): 1062.
[141] Kutler, *The American Inquisition: Justice and Injustice in the Cold War*, 153.
[142] United States v. Dennis et al., 183 F.2d 201 (United States Court of Appeals for the Second Circuit 1950).
[143] *Dennis v. United States*, 71 S.Ct.

by the United States Court of Appeals for the Ninth Circuit, and was denied in March 1955 using the precedent set by the Supreme Court decision in *Dennis*.[144] The Supreme Court heard the appeal in October 1956, releasing its decision in June 1957.

[144] Yates v. United States, 225 F.2d 146 (United States Court of Appeals for the Ninth Circuit 1955).

Chapter 2: The Influence of Legal Strategy

The lawyers for the defendants in New York and Los Angeles utilised contrasting legal strategies and produced contrasting results. This chapter explores those strategies as contributing factors to the two Supreme Court decisions. This will involve an assessment of how the cases were presented to the Court and to the public. In terms of the Court presentation, this will include discussion of the relationship between defence counsel, the interaction of lawyers, judge and jury, and the relationship between the attorneys and their clients. In regard to the defence strategy outside of the courtroom, this will explore public relations attempts, presenting the case to the public, along with a study of the role of the CPUSA. Attention to these crucial aspects allows the exploration of the legal strategy employed, an assessment of their effectiveness, and a comparison of the influence of legal strategies upon the subsequent decisions by the Supreme Court in 1951 and 1957.

The New York Trial

Starting with the trial in 1948 and 1949, through to the Supreme Court decision in 1951 and resolution of the contempt convictions for the lawyers in 1952, the New York trial and *Dennis* decision constituted a legal marathon. The defence team was made up of five attorneys: Harry Sacher defended Benjamin Davis, Irving Potash and John Gates, Abraham Isserman defended Gilbert Green and John Williams, George W. Crockett, Jr. defended Carl Winter and Jacob Stachel, Richard Gladstein defended Robert Thompson and Gus Hall, and Louis F. McCabe defended Harry Winston.[145] Eugene Dennis represented himself, possibly in an attempt to keep the CPUSA, of which he was General Secretary, as involved in the legal strategy as possible.[146] The case did not end well for the defence team. Trial Judge Harold Medina convicted all six of contempt of court, and sentenced them to jail terms of two to six months.[147] Their conduct of the case was vigorous, resulting in a trial conducted in a hostile, at times aggressive, manner. The hostility of the trial was significantly exacerbated by Medina's conduct, who demonstrated a repeated loathing of the defence team and the defendants. The defence also took up

[145] Eugene Dennis et al., "United States of America - against - William Z. Foster, et al.: Memorandum of Law on the Clear and Present Danger Doctrine and Its Applicability in This Case" (New York, May 23, 1949), 9, Box 366, Folder 3, Leonard, LARC.
[146] Dennis et al., 9.
[147] "United States v. William Z. Foster, et al. Trial Transcript" (New York, October 14, 1949), T.R. 16,113, Box 367, Folder 2, Leonard, LARC.

considerable time in presenting its case – 82 days out of 158 days in court, compared to 39 for the prosecution.[148]

The size of the defence team is directly related to the length of the trial and provides a partial explanation for why Medina quickly became agitated at the conduct of the attorneys. Each of the five lawyers, as well as Dennis himself, wanted their chance to state the case for their clients. Each lawyer wanted his chance to present a closing argument, for example, and these were often repetitive and lengthy.[149] While it was undoubtedly the right of each lawyer to present the best case for the defendants they represented, the size of the trial and the number of lawyers meant a long trial was unavoidable. By contrast, the prosecution operated with a smaller and more cohesive team. The prosecutors did not have to worry about presenting multiple statements or emphasising different ideas, because they were representing the same entity, with the same goals and same strategy. The prosecution was even able to draw attention to the defence team's repetitive practices, describing a "flood of words" which was "overwhelming", as well as describing "long summations" and "tirades".[150] By emphasising the contrasting nature of the two approaches, the prosecution further degraded the perception of the defence team in the eyes of the judge and jury.

The prosecution used a set of tactics that reoccurred in subsequent Smith Act trials. The prosecutors extensively quoted from Communist books, speeches, and informer testimony. They stressed the importance of Marxist-Leninist dogma over understanding the specific viewpoint of individual defendants who may not have agreed with all of the doctrinal principles. The prosecution also stressed the un-American nature of Communism to play to prevailing fears and concerns of the time during the take-off phase of the post-war Red Scare.

---

[148] Public Relations Department, Trial of the 12, "Facts of the Trial" September 30, 1949, Box 363, Folder 5, Leonard, LARC.

[149] Richard Gladstein, "Draft Closing Argument in U.S. v. Foster" n.d., Box 360, Folder 7, Leonard, LARC; "US v. Foster Trial Transcript"; George W. Crockett, "Summary to Jury, U.S. v. Foster" October 11, 1949, Box 363, Folder 8, Leonard, LARC; Louis F McCabe, "Summary to Jury, U.S. v. Foster" October 7, 1949, Box 363, Folder 9, Leonard, LARC; Abraham J. Isserman, "Summation on Behalf of Defendants, U.S. v. Foster" (New York, October 7, 1949), Box 367, Folder 1, Leonard, LARC.

[150] John F. X. McGohey, "Summation on Behalf of the Government: Extract from Trial Transcript in United States v. Foster" (New York, October 12, 1949), Box 367, Folder 2, Leonard, LARC.

The indictment alleged that the defendants had conspired to "organize as the Communist Party of the United States of America", and that the Party was "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the United States by force and violence."[151] It accused the defendants of conspiring "knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."[152] The prosecution relied upon quotations from Communist texts to prove that the CPUSA was a criminal conspiracy bent on destroying constitutional government in the United States. This was in keeping with the Smith Act, which provided criminal penalties for editing, printing, distributing, or displaying "any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence", or attempts to do so and any attempt to organise to achieve that goal.[153]

The defence repeatedly attacked the practice of quoting from "the works of Marx, Engels, Lenin and Stalin", in order to "prejudice the jury to believe that since these works are basic classics of Marxism-Leninism, and since the defendants are avowed adherents of Marxism-Leninism, it presumably follows that the defendants…are committed to a course of using these classics…as blueprints, blueprints for the alleged objective of establishing socialism in the United States by the sole method of employing force and violence…"[154] The tactic persisted to demonstrate that an important part of Communist ideology was the necessity of violent revolution to replace capitalism with a workers' state. The prosecution's strategy stressed that the CPUSA leadership was dedicated to achieving the goals outlined in Marxist-Leninist texts.

Paid informers reinforced the prosecution strategy by attributing revolutionary intentions to the defendants. In particular, ex-Communist Louis Budenz testified about events occurring while he belonged to the CPUSA leadership and edited the *Daily Worker*. Budenz testified to the importance of the *Daily Worker* and the National Literature Department of the CPUSA promulgating Marxist-Leninist concepts, and the defendants' adherence to those doctrines as Party officials.[155] The combination of informers and texts constructed the case for convicting

[151] "United States v. William Z. Foster, et al., Trial Transcript" (New York, 1949), T.R. 15556, Box 363, Folder 7, Leonard, LARC.
[152] *Dennis v. United States*, 71 S.Ct. at 861.
[153] Alien Registration Act.
[154] "History of the CPSU" n.d., 1, Box 358, Folder 4, Leonard, LARC.
[155] McGohey, "Summation on Behalf of the Government," 358–60.

the defendants by demonstrating that they were devout Marxist-Leninists which included a commitment to the 'overthrow or destruction' of the American government by force and violence.[156]

To strengthen the impact of quotations from Marxist-Leninist literature and insider testimony, the prosecution sought to evoke fear in the jury. The prosecuting attorney, John F. X. McGohey, in his summation to the jury repeatedly appealed to anti-Communist sentiment. He asserted that "a few key men in a few key industries could paralyze our whole industrial machine and bring on a national crisis".[157] He argued that "by placing disciplined Communists, who are subject to their direction, in the proper positions in industry, these defendants, when the time of national crisis is upon us, intend…to bring about the violent overthrow and destruction of the Government of the United States."[158] He referred to the defendants as "professional revolutionaries" who "well fit Lenin's description of what the Party leadership should be".[159] McGohey also told the jury that "they can't plead immunity nor do their acts become any less criminal because their number is large or because they masquerade as a political party."[160] That theme continued through to the end of McGohey's summation, as he concluded by telling the jury to render a guilty verdict "as a clear warning to everybody that a crime of this character may not be committed with impunity".[161] Fear and Red Scare rhetoric thereby formed an important part of the government's case, acting as an appeal to the patriotic conscience of the jury to protect the 'American' way of life.

The prosecution strategy created a dilemma for the defence. As CPUSA officials, the defendants could not repudiate official doctrines without jeopardising their affiliation. The CPUSA position challenging the legitimacy of the US government constituted another problem making it difficult to use arguments centring on the Bill of Rights. As a result, the defendants and their lawyers faced considerable difficulty in mounting a successful response to the prosecution's strategy.

---

[156] Alien Registration Act.
[157] McGohey, "Summation on Behalf of the Government," 352.
[158] McGohey, 400.
[159] McGohey, 400.
[160] McGohey, 312.
[161] McGohey, 402.

The defence team faced an additional challenge in presenting a coherent defence due to internal disagreement over the best way to conduct the case. The CPUSA, through the defendants who constituted the Party's top leadership, wanted to use the trial as a political exposé of the hypocrisy of capitalist democracy, while the lawyers were focussed on finding a strategy that would be effective in avoiding convictions. Lawyers are duty bound to take instructions from their clients, and it appears from the evidence available that the defendants for the most part preferred to engage in a political battle within the courtroom at the expense of legal arguments which might have had greater success.

Gladstein's correspondence points to the extent of the disagreement over the best way to handle the case. In a memorandum of 9 February 1949, he wrote that "there is lacking between lawyers and clients a proper relationship, and as a result of this lack the clients do not have a proper understanding of what is involved in the professional handling of this case".[162] The lawyers also failed to coordinate themselves in the early stages of the case. A letter from Maurice Sugar, another lawyer involved in the case who was not listed as an attorney of record, to Gladstein, Sacher, Isserman and Winter noted that "we have not effected the proper organization among the attorneys for doing our work efficiently and accurately…a system must be worked out, and adhered to".[163] The lawyers resolved their issues, but the differences over strategy between lawyers and defendants persisted.

In September 1948, Gladstein wrote to Abe Unger, another attorney, discussing the defendants' approach and the problem of inconsistent public communications about the trial. Gladstein believed that "we must be agreed upon a theory of the case, [and] upon a general court-room handling of a jury trial", in an appeal to the creation of a consensus approach.[164] Gladstein wrote that "the theory of our case must be that this is a shocking and menacing case of political persecution", and that so far, "your clients have been issuing public statements wholly inconsistent with that theory and to my mind extremely bad".[165] He pointed to statements by the defendants that "they will teach Communism from the witness stand" and argued that "it is very unwise to be telling people in advance that they intend to use the court as a classroom."[166]

---

[162] Richard Gladstein, "Memorandum To Trial Counsel and Carl" February 9, 1949, 3, Box 359, Folder 13, Leonard, LARC.
[163] Maurice Sugar to Winter et al., November 10, 1948, Box 362, Folder 7, Leonard, LARC.
[164] Richard Gladstein to Abe Unger, September 27, 1948, 1, Box 359, Folder 13, Leonard, LARC.
[165] Gladstein to Unger, 2–3.
[166] Gladstein to Unger, 2–3.

There was, then, a disconnect between the way Gladstein wanted to conduct the defence and the defendants' attitudes in the lead up to the trial. This was emphasised in a September 1951 letter to Gladstein from an unknown lawyer who commented "we await receipt of a copy of your original letter regarding Foley Square [New York trial] wherein you say you made suggestions which were not followed".[167] Delays and issues paying the lawyers added to the tension, as Gladstein reported during the trial.[168]

While it is difficult to measure accurately the effect of legal representation on the outcome of a given case, it is possible to draw conclusions about the effectiveness of different legal strategies through a process of comparison. It will be useful to compare the strategy in the New York trial to the conduct of the defence in the Los Angeles trial in order to assess the impact of legal strategy on the outcome of those cases. The New York defence was primarily conducted on a political level in which the defendants criticised the trial itself as an illegitimate political attack for which the court was an inappropriate forum. The aggressive attack on the judicial proceedings helped create antagonism between the lawyers and the judge, which did not aid the defendants and ultimately resulted in contempt of court proceedings against the defence team. Over the course of the trial and subsequent appeals, the legal team threw itself into a procedural battle, including significant 'offshoot' cases relating to the jury selection process, the conduct of the judge, the conduct of the prosecution lawyers, and legal issues thrown up by the charges against the defendants.

Despite the disagreements over some areas of the defence case, there appears to also have been broad agreement over the primary line of defence for the accused. The defence team placed a great deal of emphasis on attacking the political nature of the prosecution. Sacher pointed to the key element in the defence strategy in his closing address telling the jury that "I shan't dwell at any length on the large significance which necessarily attaches in this country to a criminal trial of a political party. A criminal trial of a political party: just ponder that a moment".[169] The defence team repeatedly made the same point in their arguments to the jury. Gladstein's letter to Unger reinforces that same thought, insisting that the claim about political persecution took precedence over other legal arguments.[170] He wrote "Naturally, all legal

[167] Unsigned to Richard Gladstein, September 16, 1951, Box 362, Folder 7, Leonard, LARC.
[168] Gladstein, "Memorandum To Trial Counsel and Carl," 2.
[169] "U.S. v. Foster Transcript," 177.
[170] Gladstein to Unger, September 27, 1948, 2.

points will be made during the course of the trial, and there will always be in reserve the issue of clear and present danger" – but those remained of secondary importance to the defence case.[171]

Along with stressing the political nature of the case, the defence emphasised the negative impact of a conviction on the United States. In a draft of his closing argument, Gladstein argued that "your verdicts will affect the future of the vast majority of One Hundred Fifty Million men, women and children who constitute the American people".[172] There is also an idea that the lawyers, in representing their clients, were also performing a "duty to my country, to my people, to the Jewish people, the Negro people, the workers – all of the American people".[173] In a similar vein, Sacher told the jury that "by your verdict you affect only the lives of these eleven men…you will affect the rights of the American people in the most literal sense of the word."[174] Crockett also referred to the impact on the 'American people', first using the example of a subway poster reading "freedom is everyone's business" and then arguing, "The American people will have no part of political frame-ups".[175] Isserman likewise informed the jury that a not guilty verdict "will support the institutions of American democracy and will enable America to go forward in its traditions and not as a state ridden by fear, clamped on by censorship and turned over to reactionary forces."[176] The eloquent references to the idea of American rights and democracy, coupled with an emphasis on political repression, formed the bedrock of the defence case.

Vital parts of the defence case rested upon this foundation. As Gladstein outlined the strategy, he argued that "the defense objections will, in so far as possible, implement our basic conception of the case; that it presents political issues not triable in criminal proceedings".[177] The defence planned to object to all prosecution witnesses and documents, because "under this theory no document which the government could produce is free from objection. In fact, we insist that is so – and this constitutes another aspect of our basic position that the case is not

[171] Gladstein to Unger, 2.
[172] Gladstein, "Draft Closing Argument in U.S. v. Foster," 1.
[173] "Proposed Material for Summation" n.d., 2, Box 361, Folder 3, Leonard, LARC.
[174] "U.S. v. Foster Transcript," 177.
[175] Crockett, "Summary to Jury, U.S. v. Foster," 310.
[176] Isserman, "Summation on Behalf of Defendants, U.S. v. Foster," 61.
[177] Richard Gladstein, "Scope of the Indictment" n.d., 1, Box 358, Folder 3, Leonard, LARC.

triable in a criminal court."[178] The defence consumed a substantial part of the trial in objecting to the evidence introduced by the government on the grounds that the charge was not properly triable in a criminal court. The team also objected, unsuccessfully, to evidence introduced that related to events outside of the Southern District, where the Grand Jury had issued the indictment.[179]

As Gladstein suggested, the lawyers also presented other legal arguments. The Supreme Court's clear and present danger test, originating in *Schenck*, formed one element which was primarily dealt with in motions to the court at various stages, and only minimally discussed in statements to the jury. The substantial focus of the case as presented by the defence was on demonstrating the political nature of the trial, often by promoting or discussing Communist ideology, rather than focussing on the more technical legal arguments that could have been given greater emphasis.

The New York defence strategy exacerbated what might have already been a tense relationship between the defence team and Medina. The record of the trial suggests an antagonistic relationship that raises questions about why Medina was allowed to conduct the trial, and impose jail terms on defence attorneys for their conduct at the trial's conclusion. In the words of Justice Douglas's dissent, it is difficult to tell "whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted."[180] Subsequent study of the record, and related sources suggest that Medina failed to conduct the trial impartially, even if the lawyers provoked him to a degree through their aggressive strategy.

Medina believed in the existence of a conspiracy amongst the lawyers to drag out the trial proceedings and damage his health due to what had occurred in an earlier Smith Act prosecution, *United States v. McWilliams et al.* in 1947.[181] After 8 months of an ill-tempered trial, the judge had died.[182] In convicting the lawyers of contempt, Medina described himself as forced to conclude "that the acts and statements to which I am about to refer were the result of an agreement between these defendants", forming a conspiracy to cause "such delay and

[178] Gladstein, 2.
[179] Gladstein, 5.
[180] *Sacher v. US*, 72 S.Ct. at 491.
[181] United States v. McWilliams et al., 163 F.2d.
[182] United States v. McWilliams et al., 163 F.2d.

confusion as to make it impossible to go on with the trial", to provoke "incidents which they intended would result in a mistrial", and to impair "my health so that the trial could not continue.[183] In short, he believed that the defendants sought to create a mistrial by maliciously causing so much aggravation that he might suffer the same fate as his unfortunate colleague. The only pieces of evidence he provided to substantiate this allegation were extracts from the trial record of instances where the lawyers had acted contemptuously as evidence of a pattern of behaviour.[184]

The conflict between the lawyers and Medina is evident throughout the trial and the jail terms for the lawyers at its conclusion. The defence team attempted to publicise the judge's perceived misconduct, writing in a press release about "a pattern of judicial conduct characterized by bias against the defendants and their counsel, the effect of which tends to deprive the defendants of a fair trial and to obstruct the defense lawyers in the performance of their duty."[185] A similar sentiment was expressed in a pamphlet published by the Public Relations Department of the 'Trial of the 12', noting Medina's repeated findings during the trial that counsel had been contemptuous.[186] The legal team filed motions for a mistrial based on Medina's conduct, alleging that he had demonstrated "active bias, prejudice, partiality, temper, rudeness, impatience, sarcasm, disbelief and hostility against and towards the defendants and their counsel" and had in many instances taken on "the functions of the prosecutor."[187] In a memorandum, the defence team suggested that "the Judge has come to a deliberate decision that on the record as it now stands he is justified in broadly attack the conduct and motives of the attorneys for the defense".[188] It recommend that the attorneys conduct themselves in the most professional manner possible, despite provocation from the judge.[189]

It is clear from these extracts that the conflict between lawyers and judge was a significant one, and it is easy to see how that may have played out in front of the jury who, after all, take their

[183] "United States v. Foster, Transcript Extract, Verdict and Contempt Citations," 7–8.
[184] "United States v. Foster, Transcript Extract, Verdict and Contempt Citations," 7–8.
[185] "Due Process in a Political Trial" n.d., 2, Box 359, Folder 1, Leonard, LARC.
[186] Public Relations Department, Trial of the 12, "Facts of the Trial," 10.
[187] Eugene Dennis et al., "United States v. Foster, Motion for Mistrial" (401 Broadway, New York, n.d.), 27, Box 366, Folder 1, Leonard, LARC.
[188] "Memorandum on Conduct of Attorneys in the Face of Personal Attack by the Trial Judge" n.d., Box 358, Folder 7, Leonard, LARC.
[189] "Memorandum on Conduct of Attorneys in the Face of Personal Attack by the Trial Judge," 6–7.

cues in a trial from the judge.[190] It is also relevant that through this time period there was significant pressure being placed on the legal profession by the American Bar Association (ABA) and Attorney-General (later Supreme Court Justice) Tom Clark to remove Communists and Communist sympathisers from the profession. Tom Clark even went as far as writing an article in *Look* magazine threatening the investigation of "lawyers who act like Communists".[191] The climate of the time was hostile to lawyers acting on behalf of Communists, and Medina certainly appeared to share those views.

The anger generated by Medina's hostility during the trial persisted. When Crockett, the African-American attorney whom Medina treated disdainfully, retired from the House of Representatives in 1990, he began his final speech by pointedly informing his fellow Congressmen about the recent "death of the Honorable Harold Medina, who presided over the famous Communist trial in New York back in 1949 and 1950."[192] He told the House that "in the course of that trial, Judge Medina sentenced the five defence lawyers to prison. I am the only survivor of those five defense lawyers."[193] You can sense grim satisfaction in Crockett's words to have outlasted his judicial nemesis who had treated him contemptuously and jailed the defence team without giving them a chance to respond. Having outlasted his judicial nemesis, Crockett retired from the Congress feeling vindicated.

In contrast to the angry reaction from the left-leaning National Lawyers Guild (NLG), Medina's conduct drew a much more favourable reaction from anti-Communist groups and individuals. Indeed, J. Edgar Hoover, Director of the FBI which had supplied key witnesses, and himself a noted anti-Communist, wrote to Medina after the trial, but prior to sentencing, commending him on the way he conducted the trial.[194] The attorneys appealed the contempt convictions up to the Supreme Court in the case *Sacher et al. v. United States*, where a narrow 5-3 majority affirmed the convictions, with strong dissents from Frankfurter, Black and

---

[190] Peter David Blanck, Robert Rosenthal, and LaDoris Hazzard Cordell, "The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials," *Stanford Law Review* 38, no. 1 (November 1985): 89–164.

[191] Public Relations Department, Trial of the 12, "Facts of the Trial," 10.

[192] 137 Cong. Rec. 5699 (28 March 1990). '"Announcement of Retirement by the Honorable George W. Crockett, Jr., of Michigan"

[193] 137 Cong. Rec. 5699 (28 March 1990). '"Announcement of Retirement by the Honorable George W. Crockett, Jr., of Michigan"

[194] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 54.

Douglas.[195] Black concluded that "it is difficult to escape the impression that his [Medina's] inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs he attributed to their Communist leader clients".[196] Even the American Civil Liberties Union (ACLU), which had earlier passed a resolution barring Communists from holding office, expressed that it was "unalterably opposed" to Communism, while expressing concern about free speech issues.[197] Finding "no violations of civil liberties" in the contempt case, the ACLU refused to support the lawyers in their appeals, leaving it up to the NLG to defend the attorneys.[198]

The New York defence team faced substantial difficulties with a hostile judge and obdurate clients determined to profess their commitment to the CPUSA. What ensued was a long and rancorous trial in which they defended Communist ideology, attacked the trial as an example of political repression, and questioned its legitimacy at the expense of legal arguments which gained greater prominence in the appeals process, and in subsequent cases including *Yates.* Issues like the pertinence of the clear and present danger doctrine, the timing and location of the offence, and the sufficiency of evidence received less attention, thus making the appeals process less likely to succeed when it came before the Supreme Court as *Dennis v. United States*.

The Los Angeles Trial

Soon after the Supreme Court had rejected the appeal in *Dennis*, a Los Angeles Grand Jury indicted fifteen California Communist officials for violating the Smith Act. The trial began in February 1952 with six defence attorneys taking responsibility for two or three defendants each. Leo Branton represented Henry Steinberg and Ben Dobbs, Norman Leonard, a partner in Gladstein's law firm, defended Loretta Stack, Ernest Fox and Frank Carlson, Ben Margolis, a Los Angeles attorney, defended William Schneiderman, Oleta Yates, and Mary Doyle, Alexander Schullman defended Dorothy Healey and Philip Connelly, Leo Sullivan defended Albert Lima and Carl Lambert, and A.L. Wirrin, another Los Angeles attorney and ACLU

[195] *Sacher v. US*, 72 S.Ct.
[196] *Sacher v. US*, 72 S.Ct. at 460.
[197] The Executive Director, American Civil Liberties Union to The Board of Directors, "The Smith Act Decision and the Future," June 20, 1951, 1–2, Box 1, Folder 2, American Civil Liberties Union of Northern California records, MS 3580, California Historical Society [hereafter NC-ACLU, CHS].
[198] "The Smith Act," *Security and Freedom: The Great Challenge, 30th Annual Report of the American Civil Liberties Union*, June 1951, 14–15, Box 2, Folder 33, NC-ACLU, CHS.

member defended Rose Kusnitz, Al Richmond and Frank Spector. All six attorneys put considerable effort into the defence case, particularly at the trial stage.[199] Margolis remained the attorney of record up to the Supreme Court which issued the *Yates* decision in 1957.[200] These attorneys conducted the trial leading to conviction of the fourteen defendants, followed by a long appeals process and eventual reversal by the Supreme Court. Their conduct of the trial differed considerably to the New York strategy, suggesting that the lawyers contributed to the successful outcome in 1957.

The prosecution conducted the Los Angeles trial following the template laid down by the Smith Act and the New York case. The prosecution sought to demonstrate that Marxism-Leninism was the official ideology of the CPUSA and its officials, which included a commitment to the overthrow of the U.S. by force and violence.[201] In his closing statement for the prosecution, Walter S. Binns argued that the authors of the U.S. Constitution had demonstrated their interest "in insuring domestic tranquillity, and we know that the most flagrant breach of domestic tranquillity would be an insurrection in this country".[202] He also questioned the democratic nature of the CPUSA.[203] Rather than achieving political change "by the ballot", Communists "are going to do it as the classics say, by a civil war, they are going to do it by capturing power, then you see where the pertinency of having key people or people in basic industries come in".[204] The government's case appealed to the Red Scare fears of the jury about revolution and hostility to Communism. Binns told the jury that Marxism-Leninism "is something that I fail to see the appeal in" because it lacked "brotherly love, kindness, charity. It is all hard and harsh."[205] This is certainly what he and his fellow prosecutors had tried to prove throughout the six month trial which concluded in August 1952.

In terms of evidence, the prosecution relied on quotations from Marxist texts as the prosecutors had done in the New York trial. They stressed the Marxist-Leninist 'classics' to prove that the

---

[199] Leo Branton, Jnr. et al., "U.S. v. Schneiderman, Motion to Dismiss Indictment" (Los Angeles, January 9, 1952), Box 378, Folder 6, Leonard, LARC.
[200] *Yates v. United States*, 77 S.Ct.
[201] "Government's Theory of the Case, Extracts from Transcript of U.S. v. Scheneiderman" n.d., 1, Box 1, Folder "Court Briefs," Schneiderman, LARC.
[202] "Yates et al., v. United States, Supreme Court Transcript, Vol. 25" October 1955, 12595, Box 394, Leonard, LARC.
[203] "Yates et al., v. United States, Supreme Court Transcript, Vol. 25," 12644.
[204] "Yates et al., v. United States, Supreme Court Transcript, Vol. 25," 12644–45.
[205] "Yates et al., v. United States, Supreme Court Transcript, Vol. 25," 12596.

defendants met the Smith Act criteria relating to violent revolution.[206] The texts proved that "these people conspired to advocate the overthrow of the United States by force and violence".[207] Since the Supreme Court had upheld the convictions in *Dennis*, the federal prosecutors in Los Angeles saw no need to change a winning strategy. They continued to use the testimony of informers, while relying upon the anti-Communist sentiment already well entrenched among the juries in a city where HUAC and Senator Joseph McCarthy had convinced many people of the danger of Communist subversion.

The defence team in Los Angeles enjoyed greater success than their New York counterparts in the early stages of the case. Prior to the start of the trial, the defence had successfully appealed the amount required for bail and the framing of the indictment. They also had some encouragement from an appeal to the Court of Appeal on a *habeas corpus* petition (unlawful detainment), where they lost by a 2-1 margin but received a strong dissent from Circuit Judge Heale who felt that "their claim that the bail fixed in their cases is excessive is worthy of serious attention".[208] The question of bail bounced around the courts multiple times on a variety of different questions, with the result that the defendants received a reduction. This represented a significant success for the defendants and for the defence attorneys, given that similar motions in New York were unsuccessful.

The second notable early success came in terms of the indictment, with a motion to dismiss the initial indictment successful in December 1951.[209] In the memorandum of decision relating to that motion, Judge William Mathes noted that "the defendants at bar stand accused of what appears to be in substance the same conspiracy of which Dennis and others were convicted in the Southern District of New York".[210] The defendants in this case alleged that the indictment had failed to include the element of intent.[211] Mathes found that given a long and expensive

[206] "U.S. v. Schneiderman et al., The Government's Case" n.d., Box 380, Folder 6, Leonard, LARC.
[207] Norman Neukom, "Government's Statement of Its Theory of the Conspiracy, Extract from U.S. v. Schneiderman Transcript" January 8, 1952, Box 380, Folder 6, Leonard, LARC.
[208] "Loretta Starvus Stack, et al., v. James J Boyle, United States Marshal, United States Court of Appeals for the Ninth Circuit" (Southern District of California, October 3, 1951), 3, Box 377, Folder 10, Leonard, LARC.
[209] United States District Court for the Southern District of California, "U.S. v. Schneiderman et al., Memorandum of Decision Re: Motion to Dismiss" December 11, 1951, Box 378, Folder 7, Leonard, LARC.
[210] United States District Court for the Southern District of California, 3.
[211] United States District Court for the Southern District of California, 5.

trial was likely, "caution added to grave doubt" prompted a holding that the indictment was insufficient, and granted the motion to dismiss.[212] Unfortunately for the defendants, the prosecution amended the indictment to remove any ambiguity over the elements of the offence to be proved. Despite the hollowness of this particular victory, it demonstrates that the defence team paid a greater level of attention to legal details, and it suggested that Mathes was fairer and less hostile towards the defendants and their attorneys than Medina.

Unsuccessful motions also demonstrated greater attention being paid to the legal arguments and the specific issues of the case. In particular, a supplementary memorandum shows early recognition of the argument which became a ground for reversal in the Supreme Court in 1957.[213] The general rule that words should be given their natural and ordinary meaning developed into the argument that the offence of 'organizing' the CPUSA could only have been committed in July 1945 and was therefore barred by the statute of limitations.[214] The defence argued that "the existence of a conspiracy to commit an offense does not survive the completion of the substantive offense".[215] Although this motion did not succeed initially, it laid the legal groundwork for the subsequent Supreme Court reversal, and demonstrates a greater willingness to use legal avenues in the conduct of the case rather than engaging in political polemics.

Another legal success was conducive to creating a better relationship between the attorneys and the judge than was the case in New York. Judge James M. Carter conducted the pre-trial bail hearings in the District Court. At the arraignment, the defendants moved that he recuse himself on the grounds of personal bias and prejudice against the defendants.[216] Carter chose not to do so, leaving Connelly, one of the defendants, to appeal to the Court of Appeals for a writ of prohibition forbidding Carter from acting in the case.[217] In that hearing, an affidavit was presented to the Court detailing a conversation between a defence lawyer and Carter, during

[212] United States District Court for the Southern District of California, 15.
[213] Leo Branton, Jnr. et al., "U.S. v. Schneiderman, Defendants' Supplemental Memorandum in Support of Statute of Limitations Point of Motion to Dismiss Indictment" (Los Angeles, n.d.), Box 379, Folder 6, Leonard, LARC.
[214] Branton, Jnr. et al.; Alexander H. Schullman, "Draft Argument on Motion to Dismiss - Statute of Limitations" n.d., Box 379, Folder 6, Leonard, LARC.
[215] Schullman, "Draft Argument on Motion to Dismiss - Statute of Limitations," 1.
[216] National Lawyers Guild, "Second Report to Members of the California Bar Concerning Smith Act Prosecutions in This State" (Los Angeles, n.d.), 3, Box 377, Folder 2, Leonard, LARC.
[217] Connelly v. United States Dist. Court in and for the Southern Dist. of California, Central Division, et al., 191 F.2d 692 (United States Court of Appeals Ninth Circuit 1951).

which Carter expressed the sentiment "I am sorry to see you getting mixed up with these Commies".[218] The Court found that the facts proved "a sufficient showing of personal prejudice against the petitioner to deprive the respondent judge of the jurisdiction to hear and determine any issue, bail or otherwise, affecting petitioner".[219] The Court of Appeal's decision contained a thinly veiled rebuke of the judge's conduct. The majority opinion of Chief Judge Denman notes that "here we find the respondent judge, in the presence of another attorney, deprecating the action of…an able member of the bar of this court … having the presumption of innocence of the charge which that officer of this court has devoted his proper professional services".[220] Upon receiving the writ preventing him standing in matters involving Connelly, Carter disqualified himself from the whole case, with the matter passing to Judge Mathes.[221]

Schneiderman was unimpressed with Judge Mathes, likening him to Medina, with the qualification that "whereas Medina used a sledge hammer, Mathes concealed a stiletto".[222] However that is likely reflective of Schneiderman's own hard-line stance as the senior CPUSA official. Despite that, the relationship between Mathes and the attorneys was mostly cordial, with the case conducted in a professional and largely good natured manner. The defence overall gained a much calmer and more favourable atmosphere within which to conduct the trial. There were, as is inevitable in such a long trial, disputes between attorneys and judge, but these did not come close to rivalling the animosity seen in New York. In an indirect sense, this allowed the case on appeal to move forward in a much different manner to that used in *Dennis*. The appeal was able to shut out anti-Communist sentiment in favour of a focus on the specific legal issues that remained in play. This was a significant factor in assisting the Supreme Court in reaching its decision to reverse the convictions and either order the charges dismissed, or a new trial to be held for the defendants.

Another significant motion that was unsuccessful during the trial was an attempt by the defence to have the Court hear testimony from civil liberties experts with regard to the constitutionality of the statute itself. The defence submitted to the Court an 'Offer of Proof of the

[218] *Connelly v. US Dist. Court*, 191 F.2d at 694.
[219] *Connelly v. US Dist. Court*, 191 F.2d at 696.
[220] *Connelly v. US Dist. Court*, 191 F.2d at 696.
[221] National Lawyers Guild, "Second Report to Members of the California Bar Concerning Smith Act Prosecutions in This State," 3.
[222] William Schneiderman, *Dissent on Trial: The Story of a Political Life* (Minneapolis: MEP Publications, 1983), 126.

Unconstitutionality of the Smith Act as Applied', which argued the case for expert testimony to prove the unconstitutionality of the legislation.[223] The defence team proposed that Osmond Fraenkel of the ACLU and NLG, Roger Baldwin of the ACLU, and Joseph Rauh, one of the US's most prominent civil liberties lawyers testify that "there has been since the enactment of the statute herein involved…a general, wide-spread and pervasive restraint in the United States…upon the expression of social, economic, scientific and political beliefs", and one of the major causes of that was the Smith Act.[224] Despite the motion being denied, it showed a more creative approach in making use of constitutional principles as part of the defence. It also demonstrated that the case, being run in a more legalistic manner, could draw on broader support from lawyers, civil libertarians, and potentially from Supreme Court Justices, Douglas and Black.

Schneiderman, then State Secretary of the Communist Party in California, defended himself at the trial because "not only my political beliefs and ideals by which I live, but the meaning of my whole life is on trial here, and I must defend it myself".[225] In a series of internal memos outlining the CPUSA's position regarding the trial, Schneiderman makes it clear "that the best defense of the Party is a full and affirmative statement of its policies and activity. We must take the offense and keep it."[226] The Party's policy appears to have started out along the same lines as in New York, with a policy memorandum noting a twofold objective "to defend our party against a political frameup…and to defend our constitutional right to function as a political party advocating peace, democracy and Socialism".[227] This policy was intended to draw on the developments since the "fiction" of the Foley Square trial which would "expose the Government's hypocrisy".[228] In essence, they wanted to follow the same line of defence as they did in New York, emphasising the nature of the 'political frameup' and attacking the government's role in persecuting the CPUSA.

---

[223] Norman Leonard, Ben Margolis, and William Schneiderman, "U.S. v. Schneiderman, Offer of Proof of Unconstitutionality of the Smith Act as Applied" (Los Angeles, n.d.), Box 379, Folder 11, Leonard, LARC.

[224] Leonard, Margolis, and Schneiderman, 2.

[225] Schneiderman, "Opening Statement to Jury," 1.

[226] "Outline of Party Policy in the Trials" n.d., 1, Box 1, Folder "Smith Act CP Policy and Defense," Schneiderman, LARC.

[227] "Policy Memo" October 29, 1952, 1, Box 1, Folder "Smith Act CP Policy and Defense," Schneiderman, LARC.

[228] "Policy Memo," 4.

Schneiderman wanted to wage "a mass struggle to defend the democratic rights of Americans, which affects the rights not only of Communists, not only of those progressives who actively fight for peace, or for Negro rights, or for Labor's demands, but the rights of the whole American people…"[229] Schneiderman wrote in another internal document that "the Party shall demand and fight militantly for its full rights under the Constitution, but it shall place its basic reliance in the mass backing it is able to mobilize in support of the case."[230] He argued the need for "a complete trial of the entire issues at stake", and stated "[we] must have no pure-and-simple "civil liberties" type of defense".[231] There is also somewhat surprisingly a suggestion that "we should also stress the right of revolution, written into the Declaration of Independence and twice practiced by the American people, in 1776-83 and 1861-65" as he sought to insert the right to revolution into American historical precedents.[232]

The similarities with the approach in New York are startling. There was the same idea of attacking the political nature of the trial, the same full defence of party policy and ideas, and the same method of militant defence and mass demonstration, as opposed to a purely legal approach to the case. Schneiderman also suggested that the attorneys "shall be required to defend the Party…We cannot expect them to defend Communism as such, but we must expect them to take at least as advanced a position as the Supreme Court did in the Schneiderman case".[233] These memoranda, which appear to have been written prior to the start of the trial, suggest that CPUSA officials were unwilling to compromise their principles in search of a legal victory. Yet, over the course of the trial, the defendants appear to have taken a much less confrontational approach.

When it came to the trial, ten of the fourteen defendants rested their case at the conclusion of the prosecution's case, with only Schneiderman, Yates, Stack and Carlson electing to present a defence.[234] Those four defendants had planned to present a significant number of witnesses and other pieces of evidence, but in the end only offered one substantive witness before also resting their case. Yates was the primary witness for the defence, using a long direct testimony

[229] "Policy Memo," 1.
[230] "Outline of Party Policy in the Trials," 11.
[231] "Outline of Party Policy in the Trials," 11–12.
[232] "Outline of Party Policy in the Trials," 12.
[233] "Outline of Party Policy in the Trials," 12.
[234] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21" October 1955, 10075, Box 392, Leonard, LARC.

to present the defendants' side of the story, and their understanding of Marxism-Leninism. Yates testified that "I understand that once one learns the basic scientific theories of Marxism, then it becomes possible to be guided by these theories…in much the same way that science is used to meet the needs of action of society"[235] She points out that Marxism is not a set guide with instructions on how to do things, but rather a set of scientific principles which can be used to create positive change, without reliance on violent revolution.

On cross-examination, Yates was asked to name individuals who were involved in the CPUSA during her association with it. She refused to become "an informer", telling the court that, "I will not play the role of a witness for the Government, I will not add to the prosecution's case against people who have rested, who are defendants and who are putting no further defense. I am sorry, your Honor, I cannot answer that question".[236] Despite pressure from the Court and the threat of a contempt conviction, Yates refused to name names, noting "I stated what I did because in all conscience I cannot do otherwise and I must maintain that position…"[237] She was jailed for the remainder of the trial and subsequently received a conviction for contempt of court. The defence highlighted heroism on Yates' part in a press release seeking sympathy because "the prosecution could not shake her testimony. Hence, the prosecution resorted to the sordid expedient of seeking to imprison her for contempt by posing the alternatives – inform on others, or go to jail."[238] These communication strategies also represent a departure from the militant stance taken in the New York trial while the attractive Yates made a more appealing martyr than the pugnacious male defendants in the earlier case.

The Yates testimony and subsequent contempt citation created a dilemma for the defence team.[239] Schneiderman informed the Court that "we had intended to call possibly 10 to 15 witnesses for the defense, including the three remaining defendants who had not rested, on the position of the Communist Party and the meaning of the books and literature in evidence, as well as the intent of the defendants".[240] Due to the prosecution's insistence on seeking names

[235] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 10430.
[236] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 11239.
[237] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 11367.
[238] "For Immediate Release, Re: Oleta O'Connor Yates" n.d., 1, Box 1, Folder "Smith Act Miscellaneous," Schneiderman, LARC.
[239] "Yates et al., v. United States, Supreme Court Transcript, Vol. 24" October 1955, 11887, Box 393, Leonard, LARC.
[240] "Yates et al., v. United States, Supreme Court Transcript, Vol. 24," 11887.

from the witnesses, "we are confronted with the alternative of continuing under these trying circumstances and subjecting future witnesses to the same kind of ordeal, or resting our case."[241] This development, presented by the defence as an unsporting attack by the prosecution, was in fact predicted early on by the defence team. In a pre-trial memo regarding the scope of permissible cross-examination it was made clear that "under the broad views which the courts frequently take on the question of what is within the scope of direct, it would be exceedingly difficult, if not impossible, to frame a direct examination which would not open the question of names".[242] The defence were therefore aware that it would be near impossible to prevent questioning witnesses about names, and presumably had already prepared to cut their defence testimony short once the prosecution had asked Yates to identify CPUSA members who might be subject to indictment.

The Los Angeles defence strategy contained a strong element of conscious pragmatism. Pragmatic in the sense that they seized opportunities where available to make the argument with the most realistic chance of success, and conscious in the sense that the lawyers, and to a lesser extent the defendants, had drawn lessons from the New York trial. The defendants, as CPUSA officials, did intend to defend their ideological commitments with the same vigour that the New York defendants adopted. As the trial continued, however, particularly as they experienced some success through using the legal system, there appears to have been a shift in the dynamic of how to conduct the best defence, under the influence of the legal team.

Over the course of the trial legal strategy took precedence over political struggle. Schneiderman seems to have realised that the CPUSA tactics had not succeeded during the New York trial.[243] A note by Schneiderman details the shift. Asking about the conduct during the trial, it states emphatically, "Avoid lawyers going to jail - - Don't repeat N.Y. Experience - - Were we overly cautious? - - Effect of more militant stand? Did it have any effect in NY outside courtroom?"[244] This suggests that the CPUSA officials recognised the difficulties caused by contempt charges imposed on the lawyers and the problems created by the more militant approach to the case. Schneiderman also commented on the trial itself, noting "fairly good public image" an

[241] "Yates et al., v. United States, Supreme Court Transcript, Vol. 24," 11887.
[242] "Memorandum of Law Re: Scope of Permissible Cross-Examination of Accused as Limited by Scope of Direct Examination" n.d., 32, Box 379, Folder 8, Leonard, LARC.
[243] William Schneiderman, "Different than N.Y. Trial of 'Conspiracy'" n.d., Box 1, Folder "Smith Act Speeches," Schneiderman, LARC.
[244] Schneiderman.

"excellent legal stance" and a presentation of the CPUSA position which was "probably better understood than NY".[245] He also suggested that "winning the bail fight gives us a certain advantage" and that there is "less hysteria in LA" and "better press".[246] Schneiderman seems to have accepted a more legal approach to the defence than had been taken by the New York officials.

Schneiderman's shift in thinking started to occur between the bail hearings and the start of the trial proper. He noted in his memoirs that "our first concern was to avoid some of the pitfalls of the New York trial", while also suggesting a desire to "keep our lawyers out of jail".[247] Schneiderman wrote that "we set as our goal to make clear that the issue in this trial was our *constitutional right to advocate* the Party's principles and program", an idea he repeated in a discussion with Foster during the later stages of the trial.[248] This represents a significant shift, from Schneiderman's early discussions of defending "party policies and activities", to advocating "the right of advocacy, not the correctness of our views".[249]

The evidence of this changing CPUSA position and the situation of the defendants helps to explain how the trial progressed. In the later stages of the trial, the reluctance to put up large numbers of witnesses and evidence in the style of the New York defence suggests greater pragmatism and a reluctance to antagonise the judge and jury. The increased use of legal tools, through various motions and appeals showed a growing willingness to utilise the legal system, rather than denounce it as unjust. This consciously pragmatic approach was likely driven by the experienced legal team, who knew about the likely consequences based upon studying the mistakes made during the New York trial. Leonard's opening statement to the jury supports this point.[250] Leonard elected to make his opening statement after the prosecution had made their case, and he placed a substantial focus on the legal side of the case when he addressed the jury.[251] Leonard in particular argued that "not only must you of the jury find that the defendants conspired to advocate the ideas in question, and find that the ideas mean what the prosecution say they mean…but you must find that the defendants agreed to advocate *those* ideas with *that*

[245] Schneiderman.
[246] Schneiderman.
[247] Schneiderman, *Dissent on Trial*, 127–31.
[248] Schneiderman, 131.
[249] Schneiderman, 178; Schneiderman, "Opening Statement to Jury," 1.
[250] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 10080.
[251] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 10080.

meaning [emphasis added]" making the prosecution assume the burden of demonstrating intent rather than just imputing it by quotation from texts.[252]

The defence in Los Angeles took a much more legalistic approach relying on the law rather than a political battle. While political arguments remained a part of the case, they were presented in a much clearer, and more legally coherent manner. The defence did not take up significant time presenting evidence, nor did they antagonise the judge or alienate the jury. While this did not result in acquittal, the legal strategy laid the groundwork for the eventual reversal by the Supreme Court in 1957.

A major difference in the Los Angeles case was the level of support the defendants and their legal team received from within the California area. Leonard's correspondence extensively documents cooperation with other lawyers, particularly in terms of borrowing and sharing copies of briefs and transcripts from other relevant cases, which were either too expensive or not easily available to the defence team.[253] Leonard's files also demonstrate that he reached out to groups who may have had an interest in the case, to seek their support in filing *amicus curiae* (friends of the court) briefs with the court. One such request was made to Harry Bridges, leader of the International Longshore and Warehouse Union (ILWU), which Gladstein and Leonard had served as attorneys.[254] Leonard drew on this experience in dealing with anti-Communist forces. The legal team was also able to draw on the experience of two new attorneys for the Supreme Court appeal in the form of Augustin Donovan and Robert W. Kenny, who were experienced lawyers in their own right, volunteers, and conveniently friends of Chief Justice Warren.[255] This demonstrates that the defence team was focussed on finding outside assistance in strengthening their legal strategy, which ultimately produced a successful outcome.

The NLG provided strong support for the defence, with a focus on the legal side of the battle. It provided its members with regular updates of the court case, and urged their membership to stay involved in seeing the case decided in their favour.[256] The Los Angeles lawyers also appear to have enjoyed greater support from the ACLU than the New York lawyers did, because Wirrin was very active in the Southern California branch. Although the nationwide ACLU rules

[252] "Yates et al., v. United States, Supreme Court Transcript, Vol. 21," 10104.
[253] See examples: Box 377, Folder 1, Leonard, LARC.
[254] Norman Leonard to Harry Bridges, September 16, 1955, Box 377, Folder 1, Leonard, LARC.
[255] Schneiderman, *Dissent on Trial*, 241.
[256] There are multiple examples of this in Box 377, Folder 2, Leonard, LARC.

around membership and involvement of Communists remained in place, branches like the Northern and Southern California ACLU groups exercised a degree of independent action. Ernest Besig, Director of the Northern California branch, made it clear that he objected to the anti-Communist stance taken by ACLU headquarters in New York, stating that, "We have always taken the position that so long as Executive Committee members and staff are willing to defend the civil liberties of all without distinction nothing more is required".[257]

The defendants did, however, have similar issues to the New York defendants in finding counsel to represent them, particularly when it came to the appeal process. Margolis, on behalf of the defendants, took their complaints to the California State Bar, arguing that "it appears to us that the reasons which have led prominent counsel to refuse to act in this case constitute a problem for the bar as a whole rather than a matter which can best be solved by any individual attorney".[258] Margolis wrote to Irwin Goodman, another attorney, regarding the process, suggesting that "we had been turned down not because lawyers were unwilling to take the case but because of the fear of consequences to the lawyer".[259] That fear no doubt stemmed from the contempt convictions and jail sentences of the New York lawyers, along with attacks by the Attorney-General Clark and the ABA. The California State Bar Board of Governors responded to Margolis's request by passing a resolution specifically "referring to the necessity of lawyers taking Smith Act cases".[260] The support of the NLG, the State Bar Association, and the local ACLU branches ensured that the defence lawyers avoided the harsh treatment experienced by the New York lawyers, who included Leonard's partner, Gladstein.

Differences in legal strategies

The legal team in the Los Angeles case adopted a different strategy to that used by the legal team in New York. Of particular importance was the focus of their energies away from political arguments, instead placing much greater emphasis on technical, legal arguments, including the same arguments that would later prove successful before the Supreme Court. They also cultivated a better relationship with the judge and the jury. The evidence suggests that this change in strategy helps to explain the difference in outcomes when the cases came before the Supreme Court. From the start, the legal strategy won the Los Angeles defendants several

[257] Ernest Besig to Victor Stair, September 18, 1950, Box 7, Folder 126, NC-ACLU, CHS.
[258] Ben Margolis to DeWitt A. Higgs, June 14, 1955, Box 377, Folder 1, Leonard, LARC.
[259] Ben Margolis to Irvin Goodman, June 28, 1955, Box 377, Folder 1, Leonard, LARC.
[260] Margolis to Goodman.

important concessions and motions early in the trial, including more reasonable bail, a redrafting of the indictment, and the removal of an anti-Communist judge.

Looking at the Supreme Court reasoning in the two cases, it is possible to draw connections between the outcome and the conduct. The *Dennis* decision displayed a substantial focus on the issue of clear and present danger, the formulation of that test and the question of whether danger existed. The Supreme Court decision followed the pattern of the trial – a political, rather than a legal focus. By contrast, in the *Yates* decision the Court emphasised the legal arguments, with little reference to political issues at all. It is clear that this conscious change in strategy had an impact on the outcome. While it remains difficult to quantify exactly how much significance that impact had, it is strongly arguable that the change in legal strategy played an important role in the Supreme Court's change in position

Chapter 3: The Force of Circumstance

The external context in which the Supreme Court decided the outcome of the Smith Act cases influenced the justices in two important ways. The most direct impact on decision making occurred through the application of the concepts of 'judicial notice' and the 'clear and present danger' test. Justices gave, as Arthur Sabin notes, 'judicial notice' to world events in order to decide whether a clear and present danger existed at a given point in time.[261] This concept had particular force due to the conclusion in *Dennis* that the judge, not the jury, determined whether a specific action or advocacy constituted a 'clear and present danger'.[262] Another influence concerned the effects that external events may have exerted on judicial decision making, even where the justices did not discuss such factors in the decisions themselves. Although Supreme Court Justices theoretically make independent and rational decisions based on the Constitution and the details of the case in front of them, the historical context influenced even the most legalistic justices. As members of the political elite based in Washington, D.C., the justices could not remain impervious to Cold War events and anti-Communism in making judicial decisions during the 1950s, particularly in cases involving CPUSA members.

Red Scare Apex

Unwilling to allow Truman to show greater opposition against the CPUSA, the House and Senate took action in 1950 by passing the Internal Security Act of 1950, commonly known as the McCarran Act.[263] The legislation contained explicit findings that "There exists a world Communist movement which…is a world-wide revolutionary movement whose purpose it is, by treachery…espionage, sabotage, terrorism…to establish a Communist totalitarian dictatorship in the countries throughout the world."[264] It also noted that "the agents of Communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law".[265] The legislation contains repeated references to the overseas allegiance and control of the Communist movement, and the goal of overthrowing the legitimate United States Government.[266] For judges who sought to apply the 'clear and present danger' test, the

[261] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 92.
[262] *Dennis v. United States*, 71 S.Ct. at 869.
[263] "Internal Security Act," Pub. L. No. 81–831, 64 Stat. 987 (1950).
[264] Internal Security Act, sec. 2(1).
[265] Internal Security Act, sec. 2(11).
[266] See for example: Internal Security Act, sec. 2(1), 2(4), 2(9).

legislation clearly identified the existence of a pervasive threat from the CPUSA as subversive 'agents' of a foreign power – the Soviet Union.

The debate over the passage of the legislation, and indeed the process it went through before enactment, demonstrated the widespread support for the measure among legislators, who, in turn, not only interacted with the judiciary but approved the appointment of judges to the federal courts. When introducing the bill, Senator Pat McCarran of Nevada insisted that it was necessary to "meet the threat of Communists and other subversives in this country".[267] McCarran also claimed that "this bill does not contain one iota of hysteria, not is it the cry of alarmists, nor does it contravene any of our basic constitutional concepts", before arguing that "the Communist fifth column in the United States is a clear and present danger to this government and to all that we cherish" as he echoed the rhetoric that had assured the passage of the Smith Act a decade earlier.[268] McCarran reinforced this view in 1951, stating that "The Communist Party of the United States constitutes a sizeable army dedicated to trickery, deceit, espionage, sabotage and terrorism".[269] McCarran also referred to the "extreme drafting care" taken to ensure the legislation was constitutional, but adding that freedom of speech, while important, was not an absolute right when used by conspiratorial groups.[270]

The Internal Security Act contained important provisions designed to restrict the ability of the CPUSA to operate effectively in the United States. Many of these provisions were areas covered by existing law, with the changes mostly serving to make clear how they applied in the specific cases concerning CPUSA members and their activities. This included provisions like Section 4(a) which makes it unlawful for "any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship".[271] Beyond its explicit provisions, the legislation clearly expressed strident opposition to the CPUSA. In contrast to the Smith Act, this legislation exclusively targeted Communists in the most intense phase of the Cold War.

---

[267] 96 Cong. Rec. 12146 (10 August 1950).
[268] 96 Cong. Rec. 14170-14171 (5 September 1950).
[269] Patrick McCarran, "The Internal Security Act of 1950," *University of Pittsburgh Law Review* 12, no. 4 (1950): 482.
[270] McCarran, 489–91.
[271] Internal Security Act, sec. 4(a).

There was only limited congressional opposition to the bill, coming in particular from Marcantonio and Representative Emmanuel Celler. Marcantonio, in a similar vein to his opposition to the Smith Act, argued that the McCarran Act was "an extreme assault upon the Constitution" and a violation of fundamental free speech rights.[272] Celler noted the "shadow of Russia and the sad events in Korea" which generated a fear and hysteria that "has even gripped many members of the house".[273] Despite this opposition, the legislation received a favourable report from the ABA, emphasising the constitutionality of the legislation on the basis of the "many months of hearings and the examination of a legion of witnesses and voluminous documents" that justified Congress in making a finding of fact that the CPUSA presented a "clear and present danger to the security of the United States and to the existence of free American institutions".[274] Federal judges, who both interacted with lawyers and had often belonged to the ABA might well have taken note of this analysis by the leading members of the legal profession.

Strongly supported by both Houses, the legislation came to President Truman in September 1950. Despite being repeatedly attacked for being soft on Communism at home, Truman vetoed the legislation on 22 September 1950, arguing that "when all the provisions of H.R. 9490 are considered together, it is evident that the great bulk of them are not directed towards real and present dangers that exist from communism. Instead of striking blows at communism, they would strike blows at our own liberties".[275] The legislation was, however, passed over Truman's veto, comfortably achieving the two-thirds majority required with a 286-48 vote in Congress and 57-10 in the Senate.[276] It is clear that in 1950, anti-Communist sentiment in the United States' legislative bodies was particularly strong – something that is apparent not just in the content of the legislation that was passed, but also in the strength of the vote and the strength of the rhetoric employed in debating the various measures. Once again the judges had received a strong message about the danger posed by the CPUSA and the strength of anti-Communist sentiment among the political elite.

---

[272] 96 Cong. Rec. 13725 (29 August 1950).
[273] 96 Cong. Rec. 13722 (29 August 1950).
[274] 96 Cong. Rec. 15258 (20 September 1950)
[275] 96 Cong. Rec. 15630 (22 September 1950)
[276] "HR 9490. Passage Over the Pres.' Veto, Senate Vote #444," September 22, 1950, www.govtrack.us; "HR 9490 Pass the Bill the Objections of the Pres. to the Contrary Notwithstanding?, House Vote #264," September 22, 1950, www.govtrack.us.

Not just content to pass anti-Communist legislation, Congress and the Executive branch under Dwight D. Eisenhower also took aim at the potential defenders of those accused of Communist sympathies. HUAC did not confine its attacks to individual lawyers, but also challenged the leftist alternative to the ABA, the NLG, for its willingness to defend Smith Act clients and their civil liberties. HUAC repeatedly attacked the NLG, including issuing a 1950 report which described the Guild as a "legal Bulwark of the Communist Party".[277] In 1953, Eisenhower's Attorney General Herbert Brownell, Jr., included the Guild on a list of subversive organisations, as "at least since 1946 the leadership of the Guild has been in the hands of card-carrying Communists and prominent fellow-travellers".[278] Although the NLG managed to keep itself off the list, "in a public sense the organization had already been defined as 'subversive' by the public attacks of the Attorney General, the House Un-American Activities Committee, and Senator McCarthy".[279] These attacks on lawyers and the NLG demonstrate that administration officials, Congress, and the legal profession had embraced a degree of anti-Communism which judges could not ignore, and might also share.

Context and the Smith Act

Sixteen days after the *Dennis* decision, the FBI conducted dawn raids to round up 'second echelon' CPUSA officials for indictment and trial for Smith Act violations. The first major case after *Dennis* was *Frankfeld v. United States*, which the U.S. Court of Appeals for the Fourth Circuit heard and decided in July 1952. The Court of Appeals held that the *Dennis* case had decided the question of the constitutional validity of the Smith Act and that issue required no further comment.[280] The opinion agreed with the Supreme Court that "modern history is replete with instances of the danger to the government inherent in such conspiracies [as this one]; and there is nothing in the Constitution or in any sound political theory which forbids it to take action against that danger."[281] They also note that "there was evidence of a number of witnesses that it [the CPUSA] was actively teaching and advocating the overthrow of a

[277] Committee on Un-American Activities, "Report on the National Lawyers Guild: Legal Bulwark of the Communist Party," House Report No. 3123 (81st Congress, 2d Session, September 17, 1950).
[278] Percival Roberts Bailey, "Progressive Lawyers: A History of the National Lawyers Guild, 1936-1958" (Rutgers University, 1979), 436–37.
[279] Bailey, 450–51.
[280] Frankfeld et al. v. United States, 198 F.2d 679 (United States Courts of Appeals for the Fourth Circuit 1952).
[281] *Frankfeld v. U.S.*, 198 F.2d at 682.

government by force and violence".[282] The sum of the opinion is that the case was to concur with *Dennis*, while affirming the core arguments presented in the *Dennis* ruling.

The next case, stemming from the 1952 convictions of second tier New York officials, was *United States v. Flynn*.[283] The defendants, including Elizabeth Gurley Flynn who later became Chairperson of the CPUSA, appealed the verdict to the same Court of Appeals for the Second Circuit which had ruled on the *Dennis* case. The case, involving Flynn and twelve other CPUSA leaders, came before the Court of Appeals in May 1954.[284] In the decision issued in October 1954, Judge Harlan, soon to ascend to the Supreme Court and one of the Justices sitting in *Yates*, wrote the opinion concluding that the conspiracy charged in that case was effectively the same as the one in *Dennis*, whose defendants had been named in the indictment in this case as co-conspirators.[285] Although the appellants had not directly challenged the sufficiency of the evidence at trial, Harlan noted that the evidence was "ample to require submission of the case to the jury and to sustain its verdict".[286] The opinion concurred with the *Dennis* formulation of 'clear and present danger', arguing that "the setting in which the defendants have conspired is such as to lead reasonably to the conclusion that their teachings may result in an attempt at overthrow".[287] Harlan also pointed to a Cold War military conflict to justify a finding that the 'clear and present danger' test had been met. As he asserted, "if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war."[288] Harlan clearly situated his decision in the Cold War context.

The final substantive case between *Dennis* and *Yates* was the outcome of another FBI round-up of CPUSA leaders in Michigan in 1952. The defendants appealed their convictions to the Court of Appeal for the Sixth Circuit which upheld the verdict in *Wellman v. United States*.[289] The clear and present danger test formed a substantial part of the appeal, with the appellants arguing in particular that they were not part of the top policy making group within the CPUSA

[282] *Frankfeld v. U.S.*, 198 F.2d at 684.
[283] United States v. Flynn, 216 F.2d 364 (United States Court of Appeals for the Second Circuit 1954).
[284] *U.S. v. Flynn*, 216 F.2d.
[285] *U.S. v. Flynn*, 216 F.2d at 358.
[286] *U.S. v. Flynn*, 216 F.2d at 358.
[287] *U.S. v. Flynn*, 216 F.2d at 366.
[288] *U.S. v. Flynn*, 216 F.2d at 367.
[289] Wellman v. United States, 227 F.2d 757 (United States Courts of Appeals for the Sixth Circuit 1955).

and so should not be considered under the same grounds as the *Dennis* defendants; and that the "context of world crisis" relied on by *Dennis* had changed between 1948 and 1952.[290] The Appeals judges insisted that "Congress had the right to limit freedom of speech where the utterances found to be in violation of the statute were made under such circumstances as to present a clear and present danger of a serious, substantive evil to the continued existence of the government."[291] Despite recognising their less important position in the CPUSA, the judges declared that the appellants "are nevertheless leaders of the party in close collaboration with the defendants in the Dennis case".[292] On the question of world crisis, the Court suggested that "the War in Korea had not ended by September 22, 1952, the date of the present indictment" before referring to the decision in *Flynn* as a precedent.[293]

The Court of Appeals rejected arguments about the sufficiency of evidence provided, the discretion taken by the trial judge, and the credibility of government-paid informers who testified at trial. It dismissed any suggestion that the appellants had not been afforded a fair trial. It rejected the contention of appellants that they were denied a fair trial "because the climate of prejudicial opinion and passion made trial by an impartial jury impossible."[294] The Court did not deny that such a climate existed, but insisted that "the choice was between using the best means available to secure an impartial jury or let the prosecution lapse".[295] It further suggested that "those who have committed a crime cannot secure immunity because it is possible the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live."[296] This sentiment emphatically demonstrates that anti-Communism was a factor that judges accepted as a valid popular response to the threat that they also shared in defining Communism as dangerous.

These cases show two important trends that dominated Smith Act jurisprudence during this period. The first was the tendency for appellate judges to acknowledge the Cold War context, in particular the Korean War, as a justification for diminished protection for Constitutional rights. Most of the decisions, particularly those in the Court of Appeals level, point to the fact

[290] *Wellman v. U.S.*, 227 F.2d at 763.
[291] *Wellman v. U.S.*, 227 F.2d at 763.
[292] *Wellman v. U.S.*, 227 F.2d at 763.
[293] *Wellman v. U.S.*, 227 F.2d at 763–64.
[294] *Wellman v. U.S.*, 227 F.2d at 775.
[295] *Wellman v. U.S.*, 227 F.2d at 775.
[296] *Wellman v. U.S.*, 227 F.2d at 775.

the Korean War as evidence of the danger of Communism, without any detailed explanation of how or why this was the case. The lack of specific details, or any detailed analysis of why such a danger existed, is evidence of the influence of the Cold War framework in the judiciary and the general public. The second important trend is the role of the Supreme Court as the ultimate authority on the constitutionality of legislation, resulting in deference to the *Dennis* decision as a precedent which persisted until the Supreme Court undertook a reconsideration of the grounds for that decision in 1957. The required minimum of four sitting justices did not vote to hear any appeal of lower courts' decisions on the Smith Act between *Dennis* and *Yates*, including *Flynn* and *Wellman*.

Context in *Dennis* and *Yates*

The influence of external circumstances over the Supreme Court decisions in *Dennis* and *Yates* is abundantly clear from a thorough examination of the written judgements. The application of the 'clear and present danger' test, depended on the relevant set of circumstances in which the allegedly dangerous conspiracy took place. There are also hints in some of the judgements that the circumstances, in terms of several major Cold War issues, played a role in influencing some of the justices outside of traditional decision making processes. Justice Black, in his *Dennis* dissent, points to the influence of "pressures, passions and fears" on the judicial process, a clear reference to the widespread anti-Communist scare during the 1948-49 trial, which had reached a new peak of intensity after Joseph McCarthy started his campaign in 1950 and the outbreak of the Korean War that June.[297]

The majority opinion in *Dennis*, together with Justice Jackson's concurrence, placed significant weight on the belief that the CPUSA and Communist aggression internationally constituted an existential threat to the United States. Chief Justice Vinson repeatedly referred to the danger or threat of overthrow as "a sufficient evil for Congress to prevent" in the *Dennis* opinion.[298] In contrast to *Gitlow* the historical situation in regards to *Dennis* had resulted in "the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis".[299] He further described the CPUSA as a "highly organized conspiracy" that posed a clear and present danger that an overthrow of a lawful government

[297] *Dennis v. United States*, 71 S.Ct. at 903.
[298] *Dennis v. United States*, 71 S.Ct. at 867.
[299] *Dennis v. United States*, 71 S.Ct. at 867.

could occur.[300] Justice Frankfurter's concurrence placed much less emphasis on contextual arguments, but his approach gave greater weight to legislative decisions that inherently validated the contextual arguments made in Congress when enacting the law. Frankfurter observes that "there is ample justification for a legislative judgement that the conspiracy now before us is a substantial threat to national order and security" with the evidence given at trial, and details of 'communist doctrine' supporting the view that recruitment by the CPUSA posed a substantial danger to national security.[301]

Justice Jackson, concurring in the result, was even more forthright in his discussion of the threat posed by "dedicated, indoctrinated, and rigidly disciplined" members of the CPUSA.[302] He argued that the United States was yet to witness the CPUSA's "pattern of final action" and pointed to Czechoslovakia as an example where Communists took control in "a virtually bloodless abdication by the elected government", leading to a "reign of oppression and terror".[303] He viewed what he considered a coup d'état as evidence that Communist plotters could destroy democracy, thereby making it necessary for the U.S. government to apply all measures to prevent an overthrow. Jackson clearly believed that the CPUSA threatened American interests and democracy itself. His response was to use the law, in deference to the legislature's decision making, as a strong tool to protect democracy despite the infringement on the individual rights of the CPUSA members.

The two dissenting justices, Black and Douglas, also incorporated context into their rejection of the Smith Act decisions. Douglas charged that the record presented in the trial "contains no evidence whatsoever showing that the acts charged" had in fact "created any clear and present danger to the nation".[304] He notes that, while general comments about Communism as an ideology are somewhat relevant, taking judicial notice of the strength of the CPUSA would conclude that it had "been crippled as a political force" in the United States.[305] In his view, "if we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists are so potent or so strategically deployed that they must be suppressed for their

[300] *Dennis v. United States*, 71 S.Ct. at 867–71.
[301] *Dennis v. United States*, 71 S.Ct. at 884–86.
[302] *Dennis v. United States*, 71 S.Ct. at 895.
[303] *Dennis v. United States*, 71 S.Ct. at 896.
[304] *Dennis v. United States*, 71 S.Ct. at 906.
[305] *Dennis v. United States*, 71 S.Ct. at 906.

speech".[306] The clear and present danger test, which was accepted by the Supreme Court as the relevant legal test, inherently requires a consideration of the wider context in which the case is set. The argument of Douglas in particular, is that a proper assessment of the reality of the threat is a requirement. He argued that "the primary consideration is the strength and tactical position of petitioners and their converts in this country".[307] Looking at the danger rather than the exaggerated fears of subversion that dominated the judicial proceedings and public opinion led Douglas to conclude that no significant threat to American security existed to justify the imposition of restrictions on constitutionally protected civil liberties.

In direct contrast to the *Dennis* decision, the *Yates* opinions avoided discussions of context and the threat posed by the CPUSA. Justice Harlan's majority opinion relied upon more technical legal grounds.[308] Justices Black and Douglas, joining in a partial dissent, partial concurrence, make some general comments about the issue of trials concerning "the propriety of obnoxious or unorthodox views about the Government" and the importance of freedom of speech, but do not directly comment on the danger posed by the *Yates* defendants.[309] Only Justice Clark, in his dissenting opinion, argues that the petitioners were involved in the same conspiracy as the *Dennis* defendants, and were convicted on the basis of evidence "closely paralleling that adduced in Dennis".[310] He argues that the evidence in both cases was "equally as strong" and that such evidence clearly supports a conviction on the same grounds as *Dennis*.[311] This change in the style of reasoning, pointed out by Clark, suggests that there has been a change in the perception of the danger posed by the CPUSA. The majority does not directly address the issue, but the fact that they made their decision in *Yates* on the basis of a totally different approach suggests an awareness that a clear and present danger may not have existed, or at least had diminished six years later.

It is clear, then, that references to, and indeed reliance upon, contextual issues changed dramatically over the course of judicial decision making about the Smith Act. This change, to a significant extent, reflects a gradual reduction in anti-Communist fervour among Americans.

---

[306] *Dennis v. United States*, 71 S.Ct. at 907.
[307] *Dennis v. United States*, 71 S.Ct. at 906.
[308] *Yates v. United States*, 77 S.Ct. at 1067–87.
[309] *Yates v. United States*, 77 S.Ct. at 1088–90.
[310] *Yates v. United States*, 77 S.Ct. at 1090.
[311] *Yates v. United States*, 77 S.Ct. at 1090–91.

Hot or Cold War?

As the appellate court opinions demonstrated, the major Cold War event of the period under consideration was the Korean War, from June 1950 till the cessation of fighting in July 1953. Korea was a major hot point, with sustained combat featuring American troops. The outbreak of war in Korea enhanced McCarthy's public support for his claims about traitors in the State Department and elsewhere in American institutions. Following the Communist takeover in Czechoslovakia, the Berlin airlift and Stalin's dictatorial leadership of the Soviet Union, the Cold War entered a particularly 'hot' phase at the time the *Dennis* decision was made in 1951. That situation had changed drastically by 1957, after Stalin's death and the end to fighting in Korea. It is important to address whether this change in situation had an impact on the change to the Court's position.

By 1957, Nikita Khrushchev had replaced and then denounced Stalin, the divided Korean peninsula had entered an uneasy stalemate, and "there was an acceptable status quo in Europe" according to historian Walter LaFeber.[312] Khrushchev's 'Secret Speech' in February 1956 had a major impact on the CPUSA, which Scott Martelle argues caused "those who hadn't dropped out in fear" to now "quit because of shattered illusions".[313] By the time of the *Yates* decision in 1957, the CPUSA had lost a significant number of members, and was much less influential. Belknap argues that, added to the Smith Act prosecutions, the "foreign events in 1956" caused American Communism to "collapse under the strain".[314] While there remained strong strands of anti-Communism in America in 1956-1957, the sting had been taken out of some of the worst excesses of the Red Scare by a weakening of Communism both internationally and domestically.

In terms of context, it is also relevant to note the circumstances particular to New York and Los Angeles at the time of the respective trials. New York in 1948-1949 was home to the headquarters of the CPUSA, and a hot point for Communism in America. The hard-line stance of the CPUSA defendants in the New York trial was likely contributed to not just by the fact that those on trial were members of the national leadership group, but also by the fact of the trial being in New York where the CPUSA was based, and where anti-Communist sentiment

[312] Walter LaFeber, *America, Russia, and the Cold War, 1945-2006*, 10th ed. (Boston: McGraw-Hill, 2008), 199.
[313] Martelle, *The Fear Within*, 255.
[314] Belknap, *Cold War Political Justice*, 185.

was strong. This created an inevitably powerful clash of ideologies. By contrast, Los Angeles in 1952-1953 was a lot further removed from the headquarters of the CPUSA, which likely freed up the second tier leadership of the Party into taking a slightly less militant stance in constructing their defence.

Los Angeles also held an advantage over New York as a trial location due to a decline in anti-Communist culture in the late 1950s. The atmosphere in Los Angeles, even conducted near the peak of anti-Communist sentiment, was not as hostile as what was seen in New York. By the time the *Yates* case reached the Supreme Court, Los Angeles was beginning to move away from anti-Communism. The Hollywood blacklist, a dominant theme of the early 1950s, had been at least partially undermined by 1957, and public attitudes were becoming much more tolerant.[315] This regional differentiation, underpinned by the changing nature of American attitudes more generally, also played a role in generating a slightly less hostile atmosphere for the Los Angeles trial compared to the New York trial.

Lawyers under Fire

A feature of the pervasive anti-Communist sentiment sweeping through domestic America was the repeated attacks on lawyers prepared to represent Communist defendants. The attack on the lawyers began in 1946 with Attorney-General Tom Clark's remarks to the Chicago Bar Association. Clark commented, with tacit endorsement from the *American Bar Association Journal*, that those who use "every device in the legal category to further the interests of those would destroy our government by force" should be taken "to the legal woodshed for a definite and well-deserved admonition".[316] Jerold Auerbach argues that the New York Smith Act trial of 1949 was "the key which unlocked Attorney General Clark's legal woodshed", and that subsequently "the pool of lawyers willing to defend unpopular defendants, reduced by expulsion and intimidation, was further depleted by the diligent efforts of bar associations to exclude prospective applicants who did not satisfy prevailing political tests".[317]

---

[315] Hayden Thorne, Hist489 Honours Research Essay, "Clearance and the Hollywood Blacklist" (Victoria University of Wellington, History, Honours, 2016).

[316] Tom C. Clark, "Civil Rights: The Boundless Responsibilities of Lawyers," *American Bar Association Journal* 32 (August 1946): 457.

[317] Jerold S Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 241–49.

Lawyers who acted on behalf of Communist defendants faced charges of contempt on numerous occasions, as well as disbarment proceedings. The New York defence attorneys were all convicted of contempt of court for their conduct of that case, with the Supreme Court declining to overturn their convictions in 1954.[318] The New York Bar Association attempted to disbar Sacher, one of the New York defence attorneys, and it took a 1954 Supreme Court ruling to allow him to continue to practice.[319] Isserman was disbarred in both New Jersey and the Supreme Court, with his license not reinstated until 1961.[320] There were also a number of other cases in the Supreme Court concerning lawyers accused of being Communist. In the 1957 case of *Schware v. Board of Bar Examiners*, the Court overruled a decision of the New Mexico State Bar to refuse entry to Schware on the grounds that he had been a member of the Communist Party in the past.[321] In *Konigsberg v. State Bar of California*, the Supreme Court again overturned a refusal to grant certification, holding that the mere fact of Communist Party membership did not support a finding of poor moral character.[322] The repeated attempts to prevent membership suggests an enduring anti-Communist attitude within the profession reflected in Clark's 1946 speech and subsequent actions by judges like Harold Medina who sought to punish lawyers who defended Communists.

The pressure put on lawyers to refuse to defend Communists during the 1950s is representative of a strong anti-Communist attitude prevalent within the wider legal system. Lawyers, prosecutors, and even judges were under pressure from both public attitudes and their own private convictions to stack the deck against Communist defendants. That pressure manifested itself not just in a hostile courtroom atmosphere, but in an enduring struggle to find attorneys to represent CPUSA defendants. The New York lawyers faced repeated difficulties in finding assistance, and had to carry the case through to the Supreme Court despite their own legal battles over their contempt convictions because there were simply no other lawyers who would

[318] *Sacher v. US*, 72 S.Ct.

[319] Sacher v. Association of the Bar of City of New York, 74 S.Ct. 569 (US Supreme Court 1954).

[320] James E Moliterno, *The American Legal Profession in Crisis: Resistance and Responses to Change* (Oxford: Oxford University Press, 2013), 57.

[321] Rudolph Schware v. Board of Bar Examiners of the State of New Mexico, 77 S.Ct. 752 (US Supreme Court 1957).

[322] Raphael Konigsberg v. State Bar of California and the Committee of Bar Examiners of the State Bar of California, 77 S.Ct. 722 (US Supreme Court 1957).

take the case.[323] The Los Angeles lawyers faced the same issue, to the extent that they were forced to approach the California State Bar for assistance in securing counsel in their case and others involving CPUSA defendants.[324] The anti-Communism evident in the legal profession, both in the trials and outside, contributed to the anti-Communist atmosphere that both sets of defendants had to confront in seeking acquittal.

Context as a Factor

It is clear that the New York trial and subsequent appeals were conducted in the midst of a peak in anti-Communist tension. In terms of the Cold War and its defining events, the proximity of *Dennis* to the Korean War was particularly influential, both in a legal sense through the clear and present danger test, and as a factor influencing jurors and judges alike. By the time the *Yates* case reached the Supreme Court in 1957, the Cold War had settled into a more stable pattern, with international tension slightly decreased. Domestic tension and anti-Communist sentiment remained, albeit at a lower level, as evidenced by reaction to the Red Monday decisions. Anti-Communists remained vocal, but they were no longer as powerful as they had been in the early 1950s. This changing international and domestic context provided the Court with a situation in which opposition to the worst excesses of the McCarthy period could emerge. Context, therefore, played an important role in aiding the shift in constitutional interpretation from *Dennis* to *Yates*.

[323] Abraham J. Isserman and Harry Sacher to Richard Gladstein, George W. Crockett, and Louis F McCabe, October 6, 1950, Box 362, Folder 7, Leonard, LARC.
[324] Margolis to Higgs, June 14, 1955.

Chapter 4: The Court and its Justices

The *Dennis* and *Yates* decisions provide an example of how changes to the makeup of the bench can have a material impact on the outcome of judicial decision making, particularly in areas concerning constitutional interpretation. In *Dennis* (1951), a majority of the Court held that the free speech rights of eleven CPUSA leaders did not prevent a conviction under the Smith Act because of the clear and present danger caused by the nature of their conspiracy to overthrow the government.[325] In *Yates* (1957), a significantly different Supreme Court bench interpreted the Smith Act differently, and held that the conviction of fourteen different CPUSA members under that legislation was not permitted by the statute.[326]

This chapter will explore how the changes to the Court's membership between *Dennis* (1951) and *Yates* (1957) altered the Court's interpretation of the constitutionality of the Smith Act and their view of the convictions of CPUSA members. Exploring the voting patterns, judicial philosophy, and balance between issues of national security and civil liberties of the different justices, both during their time on the Court and prior to their appointment will provide insights into the impact of the changes in Court membership between *Dennis* and *Yates*.

Since 1869, nine justices have composed the full bench of the Supreme Court, one of whom is designated as the Chief Justice. The President nominates the Justices and the Senate must confirm the appointment. The justices are designated as equals – no one justice has a greater decision making power than another. The Chief Justice, however, arguably has the greatest degree of power of those sitting on the Court through a set of specific procedural powers.[327] The Chief Justice is responsible for assigning the writing of the Court's opinion when in the majority, as well as presiding over oral argument, speaking first in the judicial conference, and making recommendations around which cases should be heard by the Court.[328]

On the Court, because of its small size, the views and beliefs of the individual justices can have a significant impact on major issues. John Schmidhauser argues that "the interpretation of

---

[325] *Dennis v. United States*, 71 S.Ct.
[326] *Yates v. United States*, 77 S.Ct.
[327] Charles M Cameron and Tom Clark, "The Chief Justice and Procedural Power," in *The Chief Justice: Appointment and Influence*, ed. David J Danelski and Artemus Ward (Ann Arbor: University of Michigan Press, 2016), 202.
[328] Cameron and Clark, 202.

statutory or constitutional law by the Supreme Court and the Courts of Appeal bears the indelible stamp of the judges and justices who have served on them."[329] The ideological makeup of the Court, along with the personal views of the serving justices, has a decisive impact on the outcome of the cases that come before it. That means that any significant changes to the makeup of the bench can have a noteworthy impact on the outcome of cases. Indeed, as Richard Hodder-Williams notes, "a single appointment has the potential to alter the balance of the Supreme Court's output".[330] Presidents often select justices with an expectation of a particular viewpoint or ideological orientation. Although such a selection does not always produce the desired result, the political orientation and the previous actions of a judicial candidate weigh heavily in the President's decision to nominate a Justice, and with the Senate, who have the Constitutional power to confirm the President's nomination.[331]

In making a determination in a given case, the Supreme Court has a number of options when it comes to the nature and content of its decision. Each individual justice has the opportunity to write an opinion, or to sign on to the opinion of another justice. In the more clear cut cases, a unanimous decision may be made, with one justice assigned to write the opinion, with the others signing on, or agreeing with that decision and the reasons provided by the opinion. In cases where there is a divided Court, justices may choose to dissent. Justices then have the opportunity to write a dissenting opinion, explaining why they disagree with the majority opinion and how they would have determined the outcome. A justice can also choose to agree with the result of the majority opinion, but for different reasons. In that situation, they have the option to write a concurring opinion – agreeing with the result, but stating their own view of the underlying principles. It is also possible, in the more complex cases with multiple issues, to have an opinion which concurs in part, and dissents in part. The larger the majority, the more persuasive the decision is likely to be on future cases.

Upholding the Smith Act

Chief Justice Fred Vinson wrote the majority opinion in *Dennis* with the agreement of Justices Stanley Reed, Harold Burton and Sherman Minton.[332] Vinson begins by arguing that the

---

[329] John R. Schmidhauser, *Judges and Justices: The Federal Appellate Judiciary* (Boston: Little, Brown and Company, 1979), 11.
[330] Hodder-Williams, *The Politics of the US Supreme Court*, 20.
[331] Schmidhauser, *Judges and Justices*, 18.
[332] *Dennis v. United States*, 71 S.Ct. at 860.

purpose of the statute in question, the Smith Act, was to protect the Government of the United States from "change by violence, revolution and terrorism", which he believed was within the power of Congress to do.[333] He applied the 'clear and present danger' test originally formulated in *Schenck*, and cited with approval the statement of Chief Judge Learned Hand of the Court of Appeals in their *Dennis* decision. Hand had argued that the courts "in each case 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".[334] Vinson believed that the "highly organized conspiracy" in which the defendants had participated was an evil of sufficient gravity to justify Congress in intervening to prevent it.[335] The defining phrase of the opinion comes from the statement that, "The words cannot mean that, before the Government may act, it must wait until the *putsch* is about to be executed, the plans laid and the signal is awaited."[336] The result of this reasoning is that the conspiracy to organize the Communist Party constituted a 'clear and present danger' of a violent overthrow of the Government, which served to justify a limitation of the free speech rights of the defendants. The Court upheld the convictions based on this logic.

Vinson's opinion reflected his background and his experience as Chief Justice. A 1972 study in which sixty-five prominent academics reviewed and evaluated the Supreme Court Justices rated Vinson as "poor" – one of only eight justices to gain that lowest ranking, and the only Chief Justice so judged.[337] Truman appointed Vinson in June 1946, seemingly on the basis of his political skills as a Senator, rather than his facility for judicial work.[338] Francis and Neil Allen, in analysing Vinson's legal career, argue that his relationship with President Truman was "unique, both in the closeness of their friendship and perhaps the frequency of their discussion of issues facing the Presidency".[339] This closeness manifested itself in a tendency to defer to the authority of Congress and the Executive.

---

[333] *Dennis v. United States*, 71 S.Ct. at 863.
[334] *Dennis v. United States*, 71 S.Ct. at 868.
[335] *Dennis v. United States*, 71 S.Ct. at 867–68.
[336] *Dennis v. United States*, 71 S.Ct. at 867.
[337] Albert P. Blaustein and Roy M. Mersky, "Rating Supreme Court Justices," *American Bar Association Journal* 58, no. 11 (November 1972): 1186.
[338] "Fred M Vinson," *The Washington Post*, September 9, 1953.
[339] Francis A Allen and Neil Walsh Allen, *A Sketch of Chief Justice Fred M. Vinson*, vol. 13, Sketches of the Chief Justices (Washington, DC: Green Bag Press, 2005), 100.

Vinson became Chief Justice at a difficult time in the Court's history. The Supreme Court to which he was appointed was deeply fractured on both a personal and intellectual level, in part due to an ongoing dispute between Justices Black and Jackson. In a statement which was published in the *Congressional Record* shortly after Vinson's nomination, Justice Jackson starkly laid out the divide which Vinson would be faced with, noting, "It is important that the magnitude and nature of the task which faces him shall not be minimized."[340] Jackson continues, "The controversy goes to the reputation of the Court for non-partisan and unbiased decisions", and refers to a "feud" related to the *Jewell Ridge Coal Case*.[341] Vinson was able to resolve some of the personal issues creating tension among his colleagues. He was not, however, able to moderate the intellectual conflicts, and as Herman Pritchett stated in 1954, Vinson's Court was "more divided than any in Supreme Court history" if the proportion of split decisions is used as a measure of judicial cohesion.[342] In assessing Vinson's career after his death in 1953, *The Washington Post* suggested that he rubbed "off the sharp edges of the antagonism in the Court", but "less can be said about his stature as an exponent of the law".[343] Confirmed by later analysts, Vinson remains a lowly-ranked Chief Justice.

Vinson's opinion in *Dennis* demonstrated his lack of a clear legal philosophy or perspective. The opinion is muddled, and fails to demonstrate adherence to any particular legal philosophy. Vinson's deferential attitude towards the authority of Congress where he had been a member, and to the executive evidently contributed to his decision in *Dennis*, where he argued Congress had the power and the right to defend the country where it perceived a threat. It was up to Congress to determine the level of 'danger' rather than the Courts.

Vinson showed the same inclinations in one of his more memorable opinions – his dissent in *Youngstown Sheet & Tube Co. v. Sawyer* in 1952.[344] In *Youngstown*, Vinson dissented from a majority opinion which held that the President's seizure of the steel mills was not within the

[340] 92 Cong. Rec. 6722-6725 (1946).
[341] 92 Cong. Rec. 6722-6725 (1946); Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, et al., 65 S.Ct. 1063 (U.S. Supreme Court 1945). The *Jewell Ridge* case dealt with the compensation owed to mine workers for travel time. The feud between Jackson and Black arose because of a perceived conflict of interest Black had with counsel for the miners. Jackson felt strongly that Black should have recused himself.
[342] C Herman Pritchett, *Civil Liberties and the Vinson Court* (Chicago: The University of Chicago Press, 1954), 20.
[343] "Fred M Vinson."
[344] Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863 (US Supreme Court 1952).

constitutional power of the President. Vinson framed his discussion in terms of the power of the President to act in a time of crisis, arguing that such powers were extensive, and that there was no basis for "criticizing the exercise of such power in this case."[345] Vinson's willingness to defer to the powers of the two other branches made him disinclined to challenge their actions. Although he occasionally challenged the status quo, as in *Sweatt v. Painter et al.* which held that the 'separate but equal' doctrine in education required facilities that were properly equal in nature, his tenure is best characterised by a divided court and a lack of a clear judicial philosophy.[346]

Vinson's opinion in *Dennis* was therefore not unexpected – it fitted well with his general judicial profile and his political background. It also fitted well with President Truman, Vinson's close friend, who had made issues of loyalty and subversion a prominent part of his agenda since the 1947 imposition of Executive Order 9385 and the near simultaneous official launching of the Cold War with the Truman doctrine speech.

The concurrence from Justices Reed, Minton and Burton generally conformed to their judicial outlooks. Reed believed firmly in judicial restraint, stemming from his three years as Solicitor General during the New Deal phase from 1935-1938 when he appeared regularly before the Supreme Court to argue for the constitutionality of federal legislation.[347] That experience undoubtedly contributed to Reed's pro-government stance after taking his seat on the Court. Reed's service on the Court did not cause a significant impact, as Morgan Prickett has argued, stating that "history has not been overly appreciative of Justice Reed's efforts."[348] Although Prickett argues that Reed did not act as a "rubber stamp" for governmental measures, he notes that the justice was certainly not a "firebrand defender of civil liberties". Reed was unlikely to impose curbs on executive or congressional action in cases such as *Dennis*. Reed was appointed to the Court in 1938 by Franklin D. Roosevelt and was the only Justice in the four-strong majority not appointed by Truman.

---

[345] Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. at 935.

[346] Sweatt v. Painter et al., 339 U.S. 629 (US Supreme Court 1950).

[347] John D Fasset, "Stanley F Reed," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993).

[348] Morgan D.S. Prickett, "Stanley Forman Reed: Perspectives on a Judicial Epitaph," *Hastings Constitutional Law Quarterly* 8, no. 2 (Winter 1981): 345.

A particularly controversial decision authored by Reed was *Adamson v. People of the State of California* in 1947, where Reed held that the state's action in drawing attention to Adamson's refusal to testify, which would have been protected by the Fifth Amendment in a federal case, was not a breach of the 'due process' clause of the Fourteenth Amendment.[349] Although he had argued in *Pennekamp v. Florida* that for "circumstances to present a clear and present danger…a solidity of evidence should be required", the *Dennis* opinion with which he joined made no real attempt to engage with the evidence presented.

Harold Burton was another justice with close ties to Truman, a record of supporting the government, and a willingness to support Vinson's approach.[350] Burton's opinions in *Bute v. Illinois* and *Beilan v. Board of Education* give some indication of his judicial views.[351] In *Bute*, Burton delivered the majority opinion holding that "the due process clause of the Fourteenth Amendment did not require the Illinois court to make the inquiries or offer or assignment of counsel now claimed to have been the right of the petitioner".[352] That decision denied those accused in state court the same right to a lawyer as defendants in federal court. In *Beilan*, Burton for the majority found that a teacher who refused to answer questions about Communist Party affiliations could justifiably be fired for 'incompetency'.[353] Taken in the context of those opinions, Burton's vote to affirm the convictions in *Dennis* is consistent with his record.

The fourth justice to sign on to the majority opinion was Sherman Minton, a former Senator and Appeals Court judge. Minton's experience in the Senate during the 1930's gives a clear indication of where his allegiances lay. After the Supreme Court had decided that several important pieces of New Deal legislation were unconstitutional, Minton threw his weight behind Roosevelt's 'Court Packing' plan, which would have given Roosevelt the power to appoint additional justices to alter the balance of the Court. He then independently proposed legislation to limit the power of the Court which would have required a seven to two majority

[349] Adamson v. People of the State of California, 67 S.Ct. 1672 (US Supreme Court 1947).
[350] Jennifer M Lowe, "Harold Burton," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993).
[351] Bute v. People of State of Illinois, 68 S.Ct. 763 (US Supreme Court 1948); Herman A Beilan v. Board of Public Education, School District of Philadelphia, 78 S.Ct. 1317 (US Supreme Court 1958).
[352] *Bute v. Illinois*, 68 S.Ct. at 766.
[353] *Beilan v Board of Public Education*, 78 S.Ct. at 1321.

on the Court in any case involving constitutional questions.[354] In July 1937, once the 'Court Packing' plan had largely been rejected, Minton maintained his position of requiring a two-thirds majority in Constitutional cases, in an effort to limit the power of the Court to interfere with legislative decisions.[355] Minton's background shows a clear tendency to exhibit judicial restraint with respect to legislative powers, while minimising the power of the Court to interfere with legislative or executive decisions before his ascendance to the Court.

Minton's pro-legislative position is also clear in his jurisprudence after appointment to the Court. In 1950, Minton delivered the majority opinion in *United States v. Rabinowitz,* holding that the unreasonable search and seizure rules contained in the Fourth Amendment did not prevent a search of the immediate area when a person was arrested.[356] That decision drew scornful dissents from Justices Black and Frankfurter as a clear example of putting government interests above individual rights.[357] Minton also joined Vinson's dissenting opinion in *Youngstown*, advocating significant executive power in cases of 'national emergency'.[358] Minton's generally conservative outlook, coupled with a strong sense of judicial restraint, ensured that he often placed lesser weight on the protection of individual rights and liberties – *Dennis* proved no exception.

This four-strong majority group share many characteristics. All of them had generally conservative outlooks, and demonstrated an inclination towards judicial restraint, particularly in cases involving individual rights as against government actions. That combination of factors makes the decision in *Dennis* relatively predictable. The Court during Vinson's term as Chief Justice had a marked tendency to favour the executive and legislative branches, sacrificing individual rights to that principle. Three of the four justices in the majority, moreover, owed their seat on the Court to President Truman. Given that Truman was one of the architects of government concerns about loyalty, subversion and Communism, it is not surprising that all of Truman's appointments sided with his view of the Smith Act.

---

[354] Robert C Albright, "Congress Bloc Moves to Clip Court Powers: Senators Frame 7-to-2 Bill; House Forms Unit to Aid Step," *The Washington Post*, February 5, 1937, 9.
[355] Robert C Albright, "Court Plan's Friends, Foes Favor Survey," *The Washington Post*, July 29, 1937, 1.
[356] United States v. Rabinowitz, 70 S.Ct 430 (US Supreme Court 1950).
[357] *U.S. v. Rabinowitz*, 70 S.Ct.
[358] Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct.

Concurring

Justices Frankfurter and Jackson wrote separate opinions explaining why they upheld the convictions in *Dennis*. Frankfurter displayed his strong adherence to judicial restraint, while Jackson emphasised the threat posed by the Communist conspiracy. Frankfurter's opinion, for the most part, remains consistent with his judicial philosophy and other decisions, whereas Jackson's opinion, on its face, deviated markedly from the rest of his career.

Frankfurter began his concurrence with a statement of the importance of the case, remarking that "few questions of comparable import have come before this Court in recent years".[359] He then posed the case as a question of competing interests: the "right of a government to maintain its existence – self-preservation" set against the right of free speech.[360] Rather than relying on the 'clear and present danger' test, Frankfurter stressed the conflict between two competing interests. On that subject, he argued "primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress".[361] Frankfurter is emphatic in his statements of judicial restraint, further arguing that "we must scrupulously observe the narrow limits of judicial authority" which in his view did not include the task of weighing the interests involved in this case.[362]

Frankfurter devoted the second part of his opinion to an examination of the prior decisions of the Court, which he believed created a set of principles which "express an attitude toward the judicial function and a standard of values which…are decisive of the case before us."[363] Those principles continue the theme of judicial restraint, including firstly that "free speech cases are not an exception to the principle that we are not legislators".[364] He also referred to the "ample justification for a legislative judgement that the conspiracy now before us is a substantial threat to national order and security", while arguing that the type of speech involved, a conspiracy, ranks low on the scale of values to be protected.[365] Frankfurter based his opinion on the principle that Congress is the proper body to make the determination of whether the national

[359] *Dennis v. United States*, 71 S.Ct. at 872.
[360] *Dennis v. United States*, 71 S.Ct. at 872.
[361] *Dennis v. United States*, 71 S.Ct. at 875.
[362] *Dennis v. United States*, 71 S.Ct. at 875.
[363] *Dennis v. United States*, 71 S.Ct. at 883.
[364] *Dennis v. United States*, 71 S.Ct. at 883.
[365] *Dennis v. United States*, 71 S.Ct. at 884–85.

security interests outweigh the free speech rights at stake, rather than the 'clear and present danger' test that Vinson had emphasised.

Frankfurter, both as a Justice of the Supreme Court and in his previous career as a legal scholar, fervently believed in the idea of judicial restraint. Although he had a strong commitment to individual and civil rights as a member of the National Association for the Advancement of Colored People (NAACP), and a founding member of the ACLU, he often deferred to Congressional authority where he felt the legislative branch had the right to decide.[366] During a distinguished career as a Harvard academic, Frankfurter wrote extensively on the proper role of the Supreme Court in the American system. In 1930, Frankfurter argued that "the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it".[367] He felt that the Supreme Court should not be "the arbiter for all controversies in state and nation", and repeatedly discussed ways to limit the Court's jurisdiction.[368] He felt in particular that the Court should not deal with issues which were 'political' in nature, including, controversially, the due process clauses of the Constitution.[369] Frankfurter's writing provides a clear sense of his commitment to judicial restraint – a position deferential to Congressional decision making, as he demonstrated in *Dennis*.

Frankfurter's judicial career also supports the proposition that his belief in judicial restraint superseded a defence of individual civil rights. In a number of prominent opinions, Frankfurter reiterated that "it was not for the Courts to meddle with matters that require no subtlety to be identified as political issues".[370] In *Colegrove v. Green*, Frankfurter felt the petitioners asked for what was outside of the Court's power to deliver, as the issue was "of a peculiarly political nature and therefore not meet for judicial determination."[371] That same attitude was clearly present in the *Milk Wagon Drivers* case of 1941 where Frankfurter remarked that "freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society",

---

[366] Philip B. Kurland, "Felix Frankfurter," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 388.
[367] Felix Frankfurter, *The Public and Its Government* (New Haven: Yale University Press, 1930), 79.
[368] Felix Frankfurter, *Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938*, ed. Archibald Macleish and E.F. Pritchard, Jr. (New York: Harcourt, Brace and Company, 1939), 11.
[369] Frankfurter, 16.
[370] Coleman et al. v. Miller, Secretary of the Senate of State of Kansas, et al., 59 S.Ct. 972 (US Supreme Court 1939).
[371] Colegrove et al. v. Green et al., 66 S.Ct. 1198 (US Supreme Court 1946).

however it remains important "…for us not to intrude into the realm of policymaking by reading our own notions into the Constitution".[372] Similarly, Frankfurter's concurrence in *Adamson* makes clear that he supports the due process requirements placed on federal cases by the Fifth Amendment, but does not believe that the proper construction of the Fourteenth Amendment mandates the importation of these rights requirements into cases under state law.[373] A strong sense of judicial restraint was foremost in Frankfurter's interpretation of constitutional issues.

Justice Jackson earned a reputation as a strong supporter of human rights, due to several important opinions reflecting that support, along with his role in the Nuremberg war crimes trials.[374] James Marsh argues that "Jackson's opinions reflected strong support for individual rights and a revulsion for arbitrary government action at any level."[375] That attitude is reflected in particular in two of Jackson's most enduring Court opinions – his dissent in *Korematsu* (1944), and his majority opinion in *Barnette* (1943).[376] In *Korematsu,* Jackson dissented powerfully from the majority holding that the internment of persons of Japanese heritage during World War Two had been Constitutional.[377] He argued that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable".[378] He further suggests that "a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself."[379] Jackson's statement in *Barnette* provides an even more emphatic statement of the importance of individual freedoms:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or any other matters of opinion, or force citizens to

[372] Milk Wagon Drivers Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc., 61 S.Ct. 552 (US Supreme Court 1941).
[373] Adamson v. People of the State of California, 67 S.Ct. at 1679–83.
[374] James M Marsh, "Robert Jackson," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 408.
[375] Marsh, 408.
[376] West Virginia State Board of Education et al. v. Barnette et al., 63 S.Ct. 1178 (US Supreme Court 1943); Toyosaburo Korematsu v. United States, 65 S.Ct. 193 (US Supreme Court 1944).
[377] *Korematsu v. U.S.*, 65 S.Ct. at 206.
[378] *Korematsu v. U.S.*, 65 S.Ct. at 206.
[379] *Korematsu v. U.S.*, 65 S.Ct. at 207.

> confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us now."[380]

In analysing the decision in *Barnette*, Constance L Martin argues that the decision was a vital case "significantly expanding the scope of free speech".[381]

Despite this pro-free speech stance, Jackson's opinion was demonstrably the strongest of the three opinions supporting the convictions of the CPUSA leaders. Jackson argued against using the 'clear and present danger' test, believing that it was developed in a different context to deal with a different type of case, and would give Communists "unprecedented immunities".[382] Jackson analysed the Communist 'conspiracy' as a "closed system of thought" adhered to dogmatically by "a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members".[383] Communists would attempt to gain positions of power, and through them the CPUSA would seek "a leverage over society that will make up in power of coercion what it lacks in power of persuasion".[384] Jackson uses the example of Czechoslovakia, where he believed the free speech rights afforded to Communists gave them the opportunity to work their way into government and take control, leading to a "reign of terror and oppression".[385] In his view the same threat faced the United States. Given too much leeway, Communist conspirators would seize control of government and subject Americans to terror and oppression. To dispose of the case, Jackson argued that the conspiracy involved was a crime of itself, with no requirement that the Court consider the imminence or significance of the danger presented.[386]

Jackson's defence of individual liberties, particularly his position with regard to freedom of speech in *Barnette*, does not appear to sit well with his opinion in *Dennis*. If logically applied to the *Dennis* case, the strong principles he outlines supporting diversity of speech and thought in politics and other areas would not support the convictions which Jackson so strongly argues

---

[380] *Board of Education v. Barnette*, 63 S.Ct. at 1187.
[381] Constance L. Martin, "The Life and Career of Justice Robert H. Jackson," *Journal of Supreme Court History* 33, no. 1 (March 2008): 55.
[382] *Dennis v. United States*, 71 S.Ct. at 897.
[383] *Dennis v. United States*, 71 S.Ct. at 895.
[384] *Dennis v. United States*, 71 S.Ct. at 895.
[385] *Dennis v. United States*, 71 S.Ct. at 896.
[386] *Dennis v. United States*, 71 S.Ct. at 901.

to uphold. This suggests that Jackson was motivated by something beyond the bare legal reasoning required by the case – a strong dislike of Communism, or an awareness of the public distaste for Communism and Communists. Jackson had a noted dislike of totalitarianism, a view that was generally directed towards Nazism during his Nuremberg service. There is, however, a suggestion that he equated totalitarianism with Communism, as well as with Nazism. This would explain his stance in *Dennis*, and suggests that his opinion was not a departure from his judicial philosophy, but rather an extension of the distaste he felt for totalitarian ideologies.

Forceful Dissent

Justices Black and Douglas dissented from the majority opinion in *Dennis*, writing vehement opinions to criticise the result and the reasoning leading to that result. Black broke the case down to its simplest elements, arguing that the only charge in the case against the Communist defendants was that "they agreed to assemble and to talk and to publish ideas at a later date".[387] He then argued that "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".[388] Black felt that the majority had mistakenly believed that that "the advocacy of Communist doctrine endangers the safety of the Republic".[389] On the contrary, Black viewed the First Amendment as the best way to protect against unwanted ideas, arguing, "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"[390] He ended his opinion with the oft-quoted line expressing hope 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."[391] Black strongly affirmed the importance of the First Amendment, while also making clear that he feels the decision in *Dennis* stemmed from the 'red-scare' or anti-Communist hysteria that swept through the United States during the early Cold War. Black's view of the first amendment is that of an absolutist. He believed that the first

[387] *Dennis v. United States*, 71 S.Ct. at 902.
[388] *Dennis v. United States*, 71 S.Ct. at 902.
[389] *Dennis v. United States*, 71 S.Ct. at 902.
[390] *Dennis v. United States*, 71 S.Ct. at 902–3.
[391] *Dennis v. United States*, 71 S.Ct. at 903.

amendment meant exactly what it said, and did not allow any abridgement of freedom of speech, on any grounds.[392]

Despite, or perhaps because of, the controversy attached to his appointment due to his brief membership in the Ku Klux Klan in Alabama, Justice Black was a consistently strong supporter of individual rights, particularly the First Amendment, during his time on the Court.[393] Black began his 34 years on the Court in 1937 as a prolific dissenter, particularly during Vinson's tenure. His dissents were well regarded for their "flawless logic and solid research", with many laying down the principles that came to characterise the more liberal Warren Court era.[394] Dennis and Gillmore argue that "Hugo Black was a fierce champion of the First Amendment. To Justice Black the First Amendment was not something to be bargained with or compromised away. He loved the First Amendment and accepted it, literally, almost without reservation".[395] Sylvia Snowiss confirms the impact of Black's dissents, including his *Dennis* opinion, concluding that "the Court has either adopted, or moved closer to his original dissenting positions in freedom of speech and freedom of association cases."[396] Black's absolutist position is confirmed by his own words, stating "I believe the words do mean what they say. I have no reason to challenge the intelligence, integrity or honesty of the men who wrote the First Amendment".[397] Black's colleagues recognised the contribution he made, with Justice William Brennan, Jr. writing, "His contributions to constitutional jurisprudence, particularly in the construction and application of the Bill of Rights, probably were as influential in shaping our freedoms as any."[398] Black's position in *Dennis* is, therefore, entirely consistent with his

---

[392] Edmond N. Cahn, "Dimensions of First Amendment 'Absolutes': A Public Interview," in *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, ed. Everette E Dennis, Donald M Gillmor, and David L Grey (Ames: Iowa State University Press, 1978), 44.

[393] Hugo L. Black, Jr., "Hugo Black," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 379.

[394] Black, Jr., 379.

[395] Everette E Dennis and Donald M Gillmor, "Hugo Black: 'No Law' Means No Law," in *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, ed. Everette E Dennis, Donald M Gillmor, and David L Grey (Ames: Iowa State University Press, 1978), 3.

[396] Sylvia Snowiss, "The Legacy of Justice Black," in *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, ed. Everette E Dennis, Donald M Gillmor, and David L Grey (Ames: Iowa State University Press, 1978), 11.

[397] Cahn, "Dimensions of First Amendment 'Absolutes': A Public Interview," 44.

[398] Hugo L. Black and Elizabeth Black, *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black*, ed. Paul R Baier (New York: Random House, 1986), iii.

judicial philosophy, and shows an emphasis on the importance of discussion and free speech that is decidedly absent in the majority views.

Justice Douglas's dissent makes equally clear the strength of his appreciation for the First Amendment, and his strong belief that the prosecution had failed to present enough evidence to support a conviction. Douglas acknowledged that "freedom of speech is not absolute", and that if this were a case of teaching the techniques of sabotage or assassination, there would be justification for the verdict.[399] As Douglas pointed out, however, "so far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine".[400] Douglas argues that "never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct".[401] He believed that free speech in America occupied an "exalted position" and, because "it is impossible for me to say that the Communists are so potent or so strategically deployed that they must be suppressed for their speech", he sought to quash the convictions for violating the First Amendment.[402] Concluding with another enduring statement of the importance of free speech, Douglas stated, "Free speech – the glory of our system of government – should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent".[403] It is clear that Douglas felt strongly about the importance of free speech, and was convinced that the case prosecutorial case presented in *Dennis* could not support a constitutionally valid conviction.

Justice Douglas's opinion is entirely consistent with his general approach and attitude towards civil liberties. James C. Durham argues that Douglas saw the Cold War as posing a significant threat to individual liberties, and believed that the Communist threat had been "magnified and exalted far beyond its realities".[404] Douglas also felt strongly, contrary to the approach of the majority, that the Court should not extensively defer to Congress, writing, "if the judiciary bows to expediency and puts questions in a political rather than a justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, then the

[399] *Dennis v. United States*, 71 S.Ct. at 903.
[400] *Dennis v. United States*, 71 S.Ct. at 904.
[401] *Dennis v. United States*, 71 S.Ct. at 904.
[402] *Dennis v. United States*, 71 S.Ct. at 905–6.
[403] *Dennis v. United States*, 71 S.Ct. at 907.
[404] James C Durham, *Justice William O. Douglas* (Boston: Twayne Publishers, 1981), 101–2.

judiciary has become a political instrument itself".[405] Douglas himself wrote that "there is no free speech in the full meaning of the term unless there is freedom to challenge the very postulates on which the existing regime rests".[406] Although Douglas did not share the free speech absolutism of Black, he remained one of the staunchest defenders of the First Amendment, and believed that to infringe on free speech required a real and serious threat to the country.

Douglas's stance on judicial independence and defence of individual liberties is demonstrated by his own writings and his legal opinions. Douglas repeatedly stressed the importance of free speech, noting that "man's right to knowledge and the free use thereof is the very essence of the American political creed", and that "we must, as a people, be unafraid of ideas. Fear of ideas makes us impotent and ineffective".[407] Douglas was critical of American hostility towards Communists, writing in his autobiography that "the radical has never fared well in American life", particularly during the 1950s when public passions ran high.[408] In his view, "Juries were almost bound to reflect the dark suspicions which most Americans harboured about dispensers of a foreign ideology. Judges were not much more independent; it often seemed they were being whipsawed by public passions and transformed into agents of intolerance."[409] His opinion in *Terminiello v. City of Chicago* is representative of his overall attitude towards free speech, striking down a conviction for making an improper noise and a breach of the peace.[410] In that case Douglas suggested that "the vitality of civil and political institutions in our society depends on free discussion", and that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected".[411] Justice Douglas's dissenting opinion in *Dennis* exhibited the distinctive logical reasoning and clarity that made him such a force in American legal thought and the defence of civil liberties.

---

[405] Durham, 104–5.
[406] William O Douglas, *The Right of the People*, 4th ed. (New York: Pyramid Books, 1966), 9–10.
[407] Edwin S Newman, ed., *The Freedom Reader*, 2nd ed. (New York: Oceana Publications, Inc., 1963), 25–26.
[408] William O Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas* (New York: Random House, 1980), 92–93.
[409] Douglas, 92.
[410] Terminiello v. City of Chicago, 69 S.Ct. 894 (US Supreme Court 1949).
[411] *Terminiello v. Chicago*, 69 S.Ct. at 895.

Changes in the Court

In the time between the decision in *Dennis* in 1951, and *Yates* in 1957, the United States Supreme Court underwent significant changes in personnel. Of the eight justices who sat on the bench in *Dennis*, only four remained for the deliberations on *Yates*, with two new appointments and a ninth justice, Clark, who had recused himself in 1951 making up the seven-man bench who sat in *Yates*. These changes resulted in an ideological shift on the Court, as under new Chief Justice Earl Warren, the Court became much more concerned about the protection of civil liberties and civil rights.

The change in personnel between the two cases was particularly significant due to the position taken by the justices who had departed the Court in *Dennis*. Vinson was the first to leave the Court, passing away suddenly as the result of a heart attack at the age of 63 in September 1953 after only seven years on the bench.[412] In late 1954, Justice Jackson passed away, ending his thirteen years of service on the Court.[413] The retirement of Justice Minton in October 1956 for reasons of ill health, and the retirement at age 72 of Justice Reed in February 1957 followed the two deaths.[414] The deaths and retirements between 1953 and 1957 effectively gutted the *Dennis* majority – three of the four justices involved in the majority opinion, including its author Vinson, had departed, along with one of the two concurring justices. Only Burton and Frankfurter remained of those who had supported the result, alongside the two strong dissenting justices, Black and Douglas.

The ideological shift that resulted from the departure of those four conservative justices was compounded by the new appointments to the Court, particularly new Chief Justice Warren. Warren's appointment by Eisenhower in 1953 started an activist period of Supreme Court jurisprudence in American history, including the enduring decisions in *Brown v. Board of Education*, *Miranda v. Arizona*, *Gideon v. Wainwright*, *Griswold v. Connecticut*, and *Reynolds v. Sims*, cases which established fundamental civil rights, due process, reproductive freedom, one man-one vote, recognition of privacy and First Amendment protections. Justice John

[412] Associated Press, "Chief Justice Vinson Dies of Heart Attack in Capital," *The New York Times*, September 8, 1953, 1.
[413] Chalmers M. Roberts, "High Court Member Dies Seeking Aid After Stroke," *The Washington Post and Times Herald*, October 10, 1954, M1.
[414] Edward T. Folliard, "Minton to Quit High Court Oct. 15 Because of Health," *The Washington Post and Times Herald*, September 8, 1956, 1; Edward T. Folliard, "Reed Is Retiring From High Court," *The Washington Post and Times Herald*, February 1, 1957, A1.

Marshall Harlan II joined the Court in 1955, and the seven man bench that heard arguments in *Yates* included Justice Clark, who had not participated in *Dennis* due to a conflict of interest from his time as Attorney-General. The *Yates* Court therefore had a very different composition to the *Dennis* Court.

Overturning Convictions

Justice Harlan wrote the majority opinion in *Yates*, supported by Chief Justice Warren and Justice Frankfurter, supporting the idea that the changes to the makeup of the Court played a decisive role in reaching such a different decision, with both Harlan and Warren new to the Court in the time since the previous decision. The majority opinion was supported by a separate concurrence written by Justice Burton, while Justices Black and Douglas concurred in part and dissented in part. The sole true dissent came from Justice Clark. Frankfurter and Burton both adopted fairly different positions to their stance in *Dennis*, while Black and Douglas stayed true to their staunch defence of individual liberties. The influence of the newcomers to the majority is clear, particularly in the role of the new Chief Justice, while Clark's dissent is consistent with his overall judicial and political record.

Justice Harlan presented the opinion in dispassionate tones, with a focus on legal reasoning and statutory interpretation, rather than constitutional issues, or a thorough exploration of Communist beliefs. In contrast to Chief Justice Vinson's majority opinion in *Dennis*, Harlan wrote a clear, thorough, and well-structured opinion, presenting a persuasive set of arguments. Harlan began by laying out the basis for the convictions of the fourteen petitioners for "conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United State by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach."[415] He then broke down the issues raised in the case, including most relevantly: (1) whether the term 'organize' as used in the Smith Act was properly construed by the lower courts; (2) whether the instructions given to the jury properly addressed the idea of 'incitement to action'; and (3) whether "the evidence was so insufficient as to require this Court to direct the acquittal of these petitioners".[416] He then proceeded methodically to address these issues.

[415] *Yates v. United States*, 77 S.Ct. at 1067.
[416] *Yates v. United States*, 77 S.Ct. at 1068.

The first issue turned on whether the term ‘organize’ meant to establish or found, as contended by the petitioners, or whether it was an ongoing process, the contention of the government. Harlan concluded that a strict construction of the statute was required, meaning the reference to ‘organize’ meant to establish or found. The result of this was that “since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the ‘organizing’ charge”.[417] The focus of the second issue was on “the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action”.[418] Harlan held that such a distinction had been “consistently recognized in the opinions of this Court”, and that, without having to resort to consideration of constitutional issues, “the legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction”.[419] Using this approach, Harlan turned the issue of advocacy into a question of statutory interpretation, rather than a constitutional question relating to freedom of speech. He then concluded on that point that the jury should have been given a direction to make clear that the statute differentiated between abstract advocacy and advocacy leading to action.[420]

Those two points form the key parts of the judgment, with Harlan suggesting “the determinations already made require a reversal of these convictions”.[421] He did, however, briefly address the question of the sufficiency of evidence in the light of the two determinations already made. He concluded that the evidence provided was insufficient to allow a retrial for five of the petitioners, but concluded that in regard to the remaining nine petitioners, “we would not be justified in closing the way to their retrial”.[422] In direct contrast to the *Dennis* decision, Harlan’s opinion in *Yates* declines to address any constitutional issues, with no discussion of clear and present danger or the First Amendment. The decision is instead based on issues of statutory interpretation. Although the Court did not overrule *Dennis*, indeed the decision specifically distinguished the *Dennis* decision from this one, the practical effect of the two major rulings was to make Smith Act convictions near impossible to achieve.[423] The strict construction of the term ‘organize’ and the distinction drawn between types of advocacy

[417] *Yates v. United States*, 77 S.Ct. at 1073.
[418] *Yates v. United States*, 77 S.Ct. at 1076.
[419] *Yates v. United States*, 77 S.Ct. at 1076–77.
[420] *Yates v. United States*, 77 S.Ct. at 1077–81.
[421] *Yates v. United States*, 77 S.Ct. at 1081.
[422] *Yates v. United States*, 77 S.Ct. at 1082.
[423] *Yates v. United States*, 77 S.Ct. at 1077.

created a significantly higher burden for prosecuting under the Smith Act – likely requiring clear proof of advocacy with the intended and actual effect of causing the violent overthrow of the government. Although this more technical, legal reasoning is not as clear a statement as a ruling of unconstitutionality would have provided, the practical impact on future prosecutions was effectively the same.

That Justice Harlan would take a technical approach, rather than making a clear statement of unconstitutionality, is not surprising when his previous experience and tenure on the Court are considered. Harlan came to the Court with a well-established legal background stemming from a career as a private and public prosecutor, and Court of Appeals Judge.[424] His prosecutorial background likely influenced a number of dissents he authored in key cases dealing with the rights of accused criminals. Harlan significantly dissented in the enduringly famous *Miranda* case, as well as in a number of major 'Warren Court' decisions of a more liberal nature.[425] Nathan Lewin argues that Harlan was reluctant to invalidate legislation on constitutional grounds.[426] Harlan also provided the sole dissent in *Reynolds v. Sims*, arguing that the equal protection clause of the Fourteenth Amendment should not be extended to voting rights.[427] On the basis of that evidence, it is somewhat surprising that Harlan fell on the majority side in *Yates* at all.

Harlan's record in terms of free speech cases is, however, much more encouraging than his record in terms of other individual rights. That includes, most relevantly, the majority opinion in *NAACP v. Alabama*, where Harlan emphasised the importance of "the close nexus between the freedoms of speech and assembly" in holding that "the freedom to engage in association for the advancement of beliefs and ideas is an inseparable part of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech".[428] Justice Harlan's support for freedom of speech and freedom of association sits slightly at odds with his favouring of prosecution cases, and his refusal to extend the Fourteenth Amendment

[424] Nathan Lewin, "John Marshall Harlan II," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 442–43.
[425] Ernesto A. Miranda v. State of Arizona, 86 S.Ct. 1602 (US Supreme Court 1966); Lewin, "John Marshall Harlan II," 443.
[426] Lewin, "John Marshall Harlan II," 443.
[427] B. A. Reynolds, etc., et al. v. M. O. Sims et al., 84 S.Ct. 1362 (US Supreme Court 1964).
[428] National Association for the Advancement of Colored People v. State of Alabama, 78 S.Ct. 1163 (US Supreme Court 1958).

to cover voting rights. That conflict of beliefs can be seen to an extent in his *Yates* opinion, where he couched a decision favourable to free speech in technical, rather than constitutional terms. By making the decision in this way, Harlan remained true to his commitment to limited constitutional intervention, while also protecting freedom of speech.

That the terms of the decision were so strictly limited is likely due to Harlan's influence, coupled with the astute leadership of Chief Justice Warren. It is evident from the earliest stages of Warren's tenure that he had a preference for ensuring opinions were unanimous, or as close to unanimous as possible – *Brown v. Board of Education* is one example where unanimity was particularly important.[429] William H Allen, a law clerk to Warren, suggests in a 2004 interview that Warren assigned the opinion to Harlan to write "to keep the least committed justice aboard".[430] That evidence suggests that allowing Harlan to write the opinion in a narrow manner ensured a more stable and enduring opinion, thereby limiting the prospect that a similar case would be re-litigated with a different result in subsequent years.

The more technical and legalistic reasoning of the majority opinion is also likely to have appealed to Justice Frankfurter, who signed on to Harlan's opinion reversing his stance in *Dennis*. The *Yates* decision, while arriving at a different result to *Dennis* on very similar facts and the same legislation, follows a very different path, which was more likely to satisfy Frankfurter's concern for judicial restraint. The *Yates* decision is based on statutory interpretation and serves to give effect to Congressional intentions, rather than subordinating Congressional decision-making to constitutional principles. Frankfurter was able to protect individual liberties without compromising his judicial belief in the importance of deference to congressional and executive prerogatives.

Chief Justice Earl Warren, a figure who has since developed the reputation as one of the greatest Chief Justices to serve on the Court, was the third member endorsing the majority opinion. As a Justice, Warren differed markedly from his stance as a politician. President Eisenhower appointed Warren to the Court in 1953 in exchange for Warren's support for

[429] Brown et al. v. Board of Education of Topeka, Shawnee County, Kan., et al., 74 S.Ct. 686 (US Supreme Court 1954).

[430] William H Allen, The Law Clerks of Chief Justice Earl Warren: William H. Allen, interview by Laura McCreery, 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

Eisenhower's nomination as Republican Presidential candidate.[431] He had previously served as a District Attorney of Alameda County, Attorney-General of California, and then a three-term Governor of California.[432] Eisenhower had expected that he would continue the approach he had taken as a "tough, incorruptible prosecutor" in his new role on the Court.[433] His subsequent transformation into a liberal, rights-focussed defender of civil liberties came as a surprise to the President who appointed him, with Eisenhower relaying to Warren in 1965 that he had been disappointed in Warren's performance, mistakenly thinking that Warren would be a moderate justice.[434]

Jerome Cohen, another of Warren's law clerks, explained why Warren performed differently in his role on the Court, compared to his time as a prosecutor and as Governor.[435] Cohen suggests that the difference in the roles allowed Warren to perform in different ways, suggesting that in previous roles Warren had been restrained by the need to perform for the electorate, in order to continue to be re-elected.[436] Once Warren was freed of the electoral pressures and became Chief Justice, "he became devoted to the Court and he decided his place in history was going to be with the Court. And more and more he then gave vent to his strong ethical beliefs."[437] As a Supreme Court Justice with life tenure, Warren did not have to worry about representing those who had voted him into power. He was free to make the decisions he felt were *right* rather than decisions that would be popular. There is also a suggestion that Warren regretted his role in the internment of people of Japanese descent during World War Two according to Cohen and Curtis Reitz, who also clerked for Warren.[438] Indeed the only surprise with regard to Warren's involvement in the majority is that he failed to take a firmer stance on the question of freedom of speech. It is likely, however, that this was a result of his

---

[431] Stephen Wermiel, "Earl Warren," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 438.
[432] Wermiel, 436–37.
[433] Wermiel, 437.
[434] Earl Warren, *The Memoirs of Earl Warren* (New York: Doubleday & Company, 1977), 5.
[435] Jerome A. Cohen, The Law Clerks of Chief Justice Earl Warren: Jerome A Cohen, interview by Laura McCreery, 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley.
[436] Cohen, 8.
[437] Cohen, 8.
[438] Cohen, The Law Clerks of Chief Justice Earl Warren: Jerome A Cohen; Curtis R. Reitz, The Law Clerks of Chief Justice Earl Warren: Curtis R. Reitz, interview by Laura McCreery, 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

political acumen – organising and supporting an opinion that kept as many of his fellow justices on the majority side as possible.

Justice Burton, a part of the majority in *Dennis*, concurred with the result in *Yates* in an exceedingly brief concurring opinion. The totality of Burton's opinion reads: "I agree with the result reached by the Court, and with the opinion of the Court except as to its interpretation of the term 'organize' as used in the Smith Act. As to that, I agree with the interpretation given it by the Court of Appeals."[439] The important points to take from that are that 1) Burton would give 'organize' the wider meaning, thereby allowing other Smith Act prosecutions to continue with greater ease, and 2) that Burton agreed with the majority that a distinction needs to be drawn between different types of advocacy. That is, effectively, the narrowest possible ground on which the decision could be affirmed, and maintains a deferential attitude towards Congress in terms of the interpretation of the Act, instead disagreeing with the interpretation in the lower Courts. While this is an apparent change in perspective on the part of Burton, it is only a very minor change, and falls far short of strongly endorsing free speech.

Black and Douglas

Justice Black provides a concurrence in part and a dissent in part, with the support of Justice Douglas – the two dissenters in the *Dennis* decision. They do not argue that the majority reached the wrong result, but rather that it used the wrong principles to reach that result, and failed to condemn the statute, the prosecution and the verdict. Black argued for reversal of all convictions and acquittal of all petitioners on the basis that, "In my judgement the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment to the United States Constitution".[440] He refers to his own dissent and that of Justice Douglas in *Dennis* to provide the rationale for that decision, arguing that the provisions of the Smith Act are unconstitutional because of their limitations on free speech.[441] Arguing in the alternative, Black notes, "Since the Court proceeds on the assumption that the statutory provisions involved are valid, I feel free to express my views about the issues it considers."[442] He agrees with the construction of the term 'organize',

[439] *Yates v. United States*, 77 S.Ct. at 1087.
[440] *Yates v. United States*, 77 S.Ct. at 1087.
[441] *Yates v. United States*, 77 S.Ct. at 1087.
[442] *Yates v. United States*, 77 S.Ct. at 1088.

but partially rejects the construction given to the advocacy provisions.[443] Black insisted that "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal".[444] On the issue of evidence, Black criticised the "pitiful inadequacy of proof to show beyond a reasonable doubt that the defendants were guilty of conspiring to incite persons to act to overthrow the Government."[445] Black and Douglas based their decision on First Amendment grounds, rather than statutory interpretation questions, agreeing with the result, but advocating stronger protections for free speech.

Black's conclusion leaves no doubt about his commitment to the First Amendment, stating that "governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for".[446] He finished with a rhetorical flourish that expressed his civil libertarian principles that "the First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way open for people to favour, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us."[447] This staunch defence of the First Amendment is entirely consistent with the approach both Black and Douglas took in *Dennis*, using their own reasoning in that case to inform their opinion. The majority opinion in *Yates* comes closer to their views, but did not give sufficient recognition to First Amendment rights for them to join entirely with that opinion.

Status Quo Dissent

Justice Clark wrote the only dissenting opinion in the *Yates* case, providing a critical and sometimes scathing rejection of the majority decision and the departure from the *Dennis* decision. Clark agreed with the lower courts in applying the *Dennis* precedent to the *Yates* appeal, finding enough evidence to demonstrate "guilt beyond a reasonable doubt".[448] He agreed with Burton that the majority has misinterpreted the term 'organize', and argued that the Court had usurped the role of the jury, writing, "In its long history I find no case in which

[443] *Yates v. United States*, 77 S.Ct. at 1088.
[444] *Yates v. United States*, 77 S.Ct. at 1088.
[445] *Yates v. United States*, 77 S.Ct. at 1088.
[446] *Yates v. United States*, 77 S.Ct. at 1090.
[447] *Yates v. United States*, 77 S.Ct. at 1090.
[448] *Yates v. United States*, 77 S.Ct. at 1090–91.

an acquittal has been ordered by this Court solely on the *facts*".[449] He berated the majority for a statutory interpretation which "frustrates the purpose of the Congress" in trying to "curb the growing strength and activity of the party".[450] The somewhat cynical nature of Clark's opinion is evident in his closing statements, noting "I see no reason to engage in what becomes nothing more than an exercise in semantics with the majority about this phase of the case."[451] He concludes, "I would have given the Dennis charge, not because I considered it more correct, but simply because it had the stamp of approval of this Court".[452] Clark therefore relies on the doctrine of precedent to object to the *Yates* decision, but it is clear from the content of his opinion and his record outside of the Court that he considered *Dennis* the correct decision.

The strong rejection of the majority opinion in *Yates* was consistent with the views Justice Clark had previously expressed, in his judicial career and prior government experience as Attorney-General in the Truman administration. As Attorney-General he had vigorously investigated and prosecuted "American communist leaders and other alleged subversives".[453] Clark had taken responsibility for drawing up the initial list of subversive organisations and overseeing investigations into the loyalty of federal employees in accord with Executive Order 9385. He was a close ally of Truman, an issue that was raised in his confirmation hearing by Senator Fergusson, who described the appointment as "transparently political".[454] Although Clark was confirmed by a 73-8 vote in the Senate, the media criticised him, as did former members of the Roosevelt administration for his closeness to Truman and lack of judicial qualifications. *The New York Times* described him as a "personal and political friend [of Truman's] with no judicial experience", and noted that too much emphasis had been placed on political loyalties over "proven judicial abilities" in his appointment.[455] *The Washington Post* reported stinging criticism from former Secretary of the Interior Harold Ickes who called Clark

[449] *Yates v. United States*, 77 S.Ct. at 1091–92.
[450] *Yates v. United States*, 77 S.Ct. at 1092.
[451] *Yates v. United States*, 77 S.Ct. at 1093.
[452] *Yates v. United States*, 77 S.Ct. at 1093.
[453] Robert M Langran, "Tom C Clark," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman, 2nd ed. (Washington, DC: Congressional Quarterly, 1993), 428.
[454] Mary Spargo, "Senate Confirms Tom Clark and McGrath in New Posts," *The Washington Post*, August 19, 1949, 1.
[455] "The Court's Newest Member," *The New York Times*, August 19, 1949, 16; "The Minton Appointment," *The New York Times*, September 16, 1949, 26.

a "second-rate political hack" and an "inconsequential lawyer".[456] Not only a friend, Clark shared Truman's Cold War and anti-Communist agenda which he had vigorously pursued during his years as Attorney-General.

Clark's overall record as a Justice suggests a fair, even minded Justice, with the exception of cases dealing with Communism or Communists. Reitz was broadly complimentary of Clark, noting, "He was the true Southern Gentleman on the Court. He was just marvellous".[457] He then noted, however, that "he was writing these dissents on all the Communist cases. Totally out of keeping with his personal style, this rhetoric and the opinions was unbelievably strong".[458] This suggests that Clark had a particular hostility to Communists, an attitude likely stemming from his role in the Truman administration during the onset of the Cold War. That anti-Communist attitude can be seen in other opinions he wrote for the Court, including a majority opinion in *Garner v. Board of Public Works* where he held that a city could require its employees to disclose any Communist Party affiliation by affidavit.[459] That decision, in 1951, was one of Clark's early opinions on the Court, but as late as 1967, the anti-Communist attitude still influenced his decisions. In January 1967 Clark dissented in *Keyishian v. Board of Regents of the University of the State of New York* sustaining a New York law which prevented university employees from membership in the Communist Party.[460] Clark remained an ardent anti-Communist throughout his judicial career where he continued to spar with the more liberal members of the Court on this question. His opinion was not a particularly influential one, as the sole true dissent. Anti-Communism clouds the legal points that Clark makes, which did little to persuade a reader about the validity of his interpretation of the law.

Impact of Judicial Changes

The United States Supreme Court underwent dramatic changes in personnel during the 1950s, with particularly significance changes occurring between the decision in *Dennis* (1951) and *Yates* (1957). During that time, two serving justices, including the Chief Justice, passed away, while two others retired. Three of those four justices, Vinson, Reed and Minton, had been part

[456] Associated Press, "Ickes, Rogge Assail Clark Nomination," *The Washington Post*, August 11, 1949, 2.
[457] Reitz, The Law Clerks of Chief Justice Earl Warren: Curtis R. Reitz, 11.
[458] Reitz, 11.
[459] Garner v. Board of Public Works, 71 S.Ct. 909 (US Supreme Court 1951).
[460] Harry Keyishian et al. v. The Board of Regents of the University of the State of New York, 87 S.Ct. 675 (US Supreme Court 1967).

of the majority in *Dennis*, while the fourth had concurred in the result in an even stronger opinion. Of the remaining justices, only Burton had been part of the majority, while Frankfurter had concurred in the result but for vastly different reasons. Black and Douglas, the two dissenting justices, remained on the Court, along with Clark, who had not participated in the *Dennis* decision. Clark did participate in *Yates* as the sole dissenting justice, however in the interim Warren and Harlan had joined the Court. Warren and Harlan formed part of a new majority in *Yates*, falling in a very different direction to the *Dennis* Court, with the support of Frankfurter, and a concurrence from Burton. Black and Douglas maintained their stance, and concurred in the result although they dissented in part on the grounds that the *Yates* decision did not go far enough towards overturning *Dennis*.

It is clear from this analysis that the changes to the Court played a significant role in producing the different outcome in *Yates*. The old, conservative majority was replaced by a new, much more liberal majority who gave greater significance to individual rights than their predecessors had. The changes are of particular significance when it is considered that, for the most part, the votes of the different justices in the two cases were in line with their overall judicial career. This was not a case of major changes in perspective (Frankfurter and Burton switched sides to an extent, but did not undergo a major change in philosophy), but rather a case of changes to the law arising from changes to the personnel of the Court. If Hodder-Williams is correct in arguing that "a single appointment has the potential to alter the balance of the Supreme Court's output", then it is not surprising that the major changes over this short period of time had a significant impact on the Court's overall outlook.[461]

It is also clear that the changes to the Court played a major role in shaping the form of the *Yates* opinion – an opinion that took a more moderate, statutory interpretation-based solution, rather than the sweeping constitutional solution suggested by Black and Douglas. The business of the Supreme Court is inherently political, and requires compromise and debate between the justices to reach solutions that are acceptable to more than just a single justice. The majority opinion in *Yates* is an example of such compromise, and in this instance it seems that Warren's influence was particularly important. Not only did the changes to the Court result in a change in direction

[461] Hodder-Williams, *The Politics of the US Supreme Court*, 20.

on a major constitutional issue, but also helped to shape the nature and form that that change took.

The Aftermath

On 17 June 1957, the Supreme Court handed down a decision in *Yates* alongside three other decisions relating to Communism or Communists. All four decisions favoured the CPUSA position in their appeals against adverse verdicts in lower courts. Horrified FBI Director and prominent anti-Communist J. Edgar Hoover labelled the day 'Red Monday' in a phrase that expressed the outrage of other anti-Communists at the Court's curtailment of the Smith Act and other anti-Communist provisions.[462] The decisions elicited stinging criticism from top government officials, Congressional attacks on the Court and criticism from anti-Communist lawyers. The scale of the reaction demonstrated that anti-Communist views remained strong in 1957, despite the apparent waning of 'McCarthyism' after the Senator's censure in 1954.

The four cases that made up 'Red Monday' dealt with different subjects and different legal issues under the broad umbrella of anti-Communist legal penalties. Along with *Yates, Watkins v. United States* evoked the most controversy.[463] The conviction of John Watkins for contempt of Congress for failing to answer some of the questions posed to him while testifying before HUAC addressed a similar issue to part of *Yates*, but in a different institutional context.[464] When asked to name CPUSA members, Watkins had refused on the grounds that the question was outside HUAC's jurisdiction and the scope of its inquiry.[465] Watkins had responded that "I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members…but who to my best knowledge and belief have long since removed themselves from the Communist movement".[466] The Court focussed on Congress's power of inquiry, and found that while Congress has an investigative power "inherent in the legislative process", that power is not unlimited.[467] They found that such an investigation "must be related to, and in furtherance of, a legitimate task of Congress", adding that they "have no doubt that there is no congressional power to expose for the sake of exposure".[468] In the case of Watkins' testimony, he was not given information about the matter

---

[462] Elizabeth J Elias, "Red Monday and Its Aftermath: The Supreme Court's Flip-Flop over Communism in the Late 1950s," *Hofstra Law Review* 43, no. 1 (Fall 2014): 210.
[463] Watkins v. United States, 77 S.Ct. 1173 (US Supreme Court 1957).
[464] *Watkins v. U.S.*, 77 S.Ct. at 1176–77.
[465] *Watkins v. U.S.*, 77 S.Ct. at 1178.
[466] *Watkins v. U.S.*, 77 S.Ct. at 1178.
[467] *Watkins v. U.S.*, 77 S.Ct. at 1179.
[468] *Watkins v. U.S.*, 77 S.Ct. at 1179–85.

to which the questions pertained, and the authorising resolution of the committee was not clear enough to make the line of questioning legitimate.[469] The decision effectively limited HUAC's power to investigate Communism, particularly in cases where Committee members sought to obtain the names of other Communists from those giving testimony.

The decisions in *Service v. Dulles* and *Sweezy v. New Hampshire* generated less controversy, but nevertheless added fuel to the anti-Communist counterattack condemning the Court for issuing four pro-Communist decisions simultaneously. The *Service* decision dealt with a diplomat and China expert, targeted by McCarthy in 1950, who had lost his position for reasons of suspected disloyalty, despite being repeatedly cleared.[470] The decision was a procedural one, finding that Secretary of State Dean Acheson had failed to follow proper protocols and regulations when dismissing Service.[471] *Sweeezy* dealt with the case of a Marxist economist for whom the Attorney-General of New Hampshire had secured a conviction of contempt for failing to answer questions about allegedly subversive activities.[472] Sweezy had given a lecture at the University of New Hampshire attracting the attention of the state Attorney-General who had demanded that he answer questions about his political views and his associates. The Court found that the questions violated his academic freedom and his right to political expression.[473] Justice Clark, the staunchest objector to the *Yates* decision, dissented in *Sweeezy* (with Harold Burton) and *Watkins*, and did not take part in *Service* due to a conflict of interest given his previous position as Attorney-General during the time when Service was originally investigated in 1945. Chief Justice Earl Warren delivered the majority opinion in *Watkins* and *Sweezy*, while Justice Harlan wrote the *Service* opinion in addition to the majority opinion in *Yates*. Clearly Clark remained staunchly anti-Communist in keeping with his previous position as Attorney-General while Justice Burton relied upon judicial restraint as his guiding principle in both decisions which produced contrasting results in regards to the issue of Communism.[474]

---

[469] *Watkins v. U.S.*, 77 S.Ct. at 1193.

[470] John S. Service v. John Foster Dulles, et al., 77 S.Ct. 1152 (US Supreme Court 1957).

[471] *Service v. Dulles*, 77 S.Ct. at 1165.

[472] Paul M. Sweezy v. State of New Hampshire by Louis C. Wyman, Attorney General, 77 S.Ct. 1203 (US Supreme Court 1957).

[473] *Sweezy v. State of New Hampshire*, 77 S.Ct. at 1203.

[474] Eric W. Rice, "Harold Hitz Burton," in *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of The Justices*, ed. Melvin I Urofsky (Washington, DC: CQ Press, 2006), 103.

Scott Martelle argues that Red Monday "effectively ended the communist persecutions and put a legal nail in the coffin of McCarthyism".[475] If that was the end result, it was not immediately obvious as Congress, Hoover and elements of the media and legal profession attacked the Supreme Court. The most serious of the attacks came from anti-Communist elements within the House and Senate. In analysing the legislative program after Red Monday, Sabin found 101 anti-Court and anti-civil liberties bills during the 84th Congress.[476] That included eleven House Bills proposed the day after the decisions were handed down.[477] The proposed legislation was designed to constrain the Supreme Court, including changing its jurisdiction over certain issues, and changing the rules around Court membership. There were also suggestions of impeachment proceedings against the Justices, which ultimately resulted in a campaign by the anti-Communist John Birch Society to impeach Earl Warren.[478]

The legislative attacks on the Supreme Court took up considerable time in both the 1957 and 1958 terms of the House and Senate. Senators James Eastland of Mississippi and J. Bennett Johnston, Jr. of Louisiana proposed a Constitutional Amendment which would have required Supreme Court justices to be reconfirmed every four years by the Senate, in what they described as "an attempt to save our form of government".[479] Senator William Jenner introduced another bill in July 1957 which would have withdrawn the Court's appellate jurisdiction in cases relating to subversive activities, congressional committees and the loyalty-security program.[480] Legislative attempts to limit the Court's power failed, but not for lack of trying, and often by very tight margins.[481] C Herman Pritchett, in his study of the attacks on the Court, argues that it was the influence of Senate majority leader Lyndon B Johnson which prevented anti-Court legislation passing, firstly by delaying debate on most of the major bills until 1958, and then through a great deal of lobbying amongst the Senate.[482]

---

[475] Martelle, *The Fear Within*, 251.
[476] Sabin, *In Calmer Times: The Supreme Court and Red Monday*, 148.
[477] Sabin, 148.
[478] Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon and Schuster, 1997), 389.
[479] "Tighter Court Curb Proposed," *Los Angeles Times*, June 25, 1957, 17.
[480] C Herman Pritchett, *Congress Versus the Supreme Court, 1957-1960* (Minneapolis: University of Minnesota Press, 1961), 31.
[481] Elias, "Red Monday and Its Aftermath," 210.
[482] Pritchett, *Congress Versus the Supreme Court, 1957-1960*, 35–39.

Along with the attacks from legislators, the Court came under fire from other groups, both official and un-official. A major attack came from the National Convention of Attorneys General, where the New Hampshire Attorney General accused the Court of setting "the United States back 25 years" in its efforts to control and fight Communism.[483] That same Convention also recommended definite restrictions on the powers of the Court in response to the Red Monday decisions.[484] HUAC was unsurprisingly furious with the decisions, particularly *Watkins*, which placed limitations on its investigative power. Representative Donald Jackson, a HUAC member, accused the Court of lending "aid, comfort and assistance" to the Communists in what the *Chicago Daily Tribune* described as a "fiery speech".[485] Similarly, Rep. Smith, the sponsor of the Smith Act, noted that, "I do not recall any case decided by the present court that the Communists have lost", while Senator Samuel Ervin of North Carolina suggested that the Justices had shown a "willingness to substitute their personal notions for the law of the land".[486] Lawyers were also warned to "exercise restraint in their criticism…lest the public lose confidence in the judiciary", which suggests a fairly significant backlash amongst parts of the legal profession.[487]

There was also some negative reaction in the media, although this was tempered by positive articles, depending on the ideological leanings of the particular newspaper and its own political leanings. An opinion piece in the ardently anti-Communist *Chicago Daily Tribune* suggested that "the boys in the Kremlin may wonder why they need a fifth column in the United States so long as the Supreme court is willing to be helpful", in reporting on what it called a "mess of decisions".[488] The same piece suggested that many readers would agree that "the decisions demonstrate that what the country lacks is a Supreme court of lawyers with a reasonable amount of common sense".[489] A more nuanced piece in the *Los Angeles Times* supported the decisions except for *Watkins*, which the author felt "was a matter in which the court usurped

[483] "Court Decisions Held Blow to War on Reds," *Chicago Daily Tribune*, June 25, 1957, 10.
[484] "Attorneys General Urge Curb on Supreme Court," *The Washington Post*, June 27, 1957, A1.
[485] Chicago Tribune Press Service, "Court Accused of Giving Aid to Red Enemy," *Chicago Daily Tribune*, June 28, 1957, 10.
[486] Chicago Tribune Press Service, "Court Rulings Under Fire on Capitol Hill," *Chicago Daily Tribune*, June 18, 1957, 11.
[487] "Lawyers Warned on Court Criticism," *The New York Times*, June 28, 1957, 24.
[488] "The Supreme Court Jumps the Track," *Chicago Daily Tribune*, June 19, 1957, 18.
[489] "The Supreme Court Jumps the Track," 18.

jurisdiction and that Congress has every right under the constitution to ignore it".[490] *The New York Times* noted that the present court was "less disposed than some of its predecessors to stick to 'stare decisis' [previous decisions]", but did not carry the same tone of disapproval that was evident in the Chicago pieces.[491]

Ultimately, the criticism and legislative attacks produced no immediate results, with the legislative measures petering out after failing in 1958. There was, however, a partial retreat on the part of the Court in the June 1959 decision in *Barenblatt v. United States*.[492] *Barenblatt* considered a similar question to that addressed by *Watkins*, relating to the power of Congressional investigations. Elizabeth J. Elias suggests that the decision in *Barenblatt*, retreating from the *Watkins* decision, was an important reason for the failure of anti-Court legislation in the House and Senate.[493] Karen Bruner, however, in examining the two decisions in detail, suggests that the general scholarly assessment which explains *Barenblatt* "in terms of reaction to the congressional assault" does not fit the full story, arguing that "the threat of retaliatory legislation had passed before the commencement of the Court's 1958 term".[494] Bruner argues that "all the justices were consistent on their position on the two rules, except John Marshall Harlan", meaning "Harlan's shift is the key to understanding the Watkins-Barenblatt enigma".[495] She puts Harlan's shift down to a developing jurisprudence since taking his seat in 1955, with a focus on the idea of judicial restraint which was not fully developed in 1957.[496] *Barenblatt* represents a retreat from the Supreme Court's 'Red Monday' position only in regard to the *Watkins* decision, leaving *Yates*, *Sweezy* and *Service* untouched. Given that *Watkins* was the most vulnerable of the four decisions, this represents a sincere effort on the part of the Court to maintain its positions, even in the face of the attacks by Congress and the media.

---

[490] Raymond Moley, "A Judge Beside Himself," *Los Angeles Times*, June 25, 1957, B5.
[491] Luther A Huston, "High Court Has Made a New Historic Turn: 'Tilt!,'" *The New York Times*, June 23, 1957, 163.
[492] Lloyd Barenblatt v. United States of America, 79 S.Ct. 1081 (US Supreme Court 1957).
[493] Elias, "Red Monday and Its Aftermath," 210.
[494] Karen Bruner, "The Enigma of the Watkins and Barenblatt Decisions: The Supreme Court, Congressional Investigations and the First Amendment" (University of Nebraska, 1990), 116–17.
[495] Bruner, 131–32.
[496] Bruner, 133.

Despite the shift evident in *Barenblatt*, the Supreme Court generally maintained its pro-civil liberties stance throughout Chief Justice Warren's tenure and did not bow to threats from Congress to change its position with regard to the Red Monday decisions. A strong anti-Communist element still existed in the United States in 1957, and beyond, but as Wendy Wall has argued "Anti-Communism continued into the 1960s, but after 1954 it lost much of its fevered pitch".[497] Wall suggests that the "turning point came when Senator McCarthy began to investigate Communists in the Army, and powerful Republicans (including the President) decided he had finally gone too far".[498] While powerful anti-Communist elements remained, as evidenced by the reaction to 'Red Monday', the worst excesses of the period had passed. The combination of a reduction in the pressure able to be applied to the Court by anti-Communists in government, and a reduction in overall anti-Communist tension meant that the Supreme Court under Warren was not susceptible to the same pressures that had influenced the decisions of the early 1950s, creating an atmosphere in which the 'Red Monday' decisions were able to stand up to the inevitable scrutiny they came under.

[497] Wendy Wall, "Anti-Communism in the 1950s," Gilder Lehman Institute of American History, n.d., http://wwww.gilderlehrman.org/history-by-era/fifties/essays/anti-communism-1950s.
[498] Wall.

Conclusion

The Supreme Court decisions in *Dennis* in 1951 and *Yates* in 1957 show a dramatic change in the interpretation of the Smith Act, and of anti-Communist laws more generally, across a very short time span. Such a significant change over such a short time is very rare in American constitutional law, and in this case had a significant impact on the domestic political climate, as well as the current state of the law. The change in position to a pro-free speech stance also represents an important development in American civil liberties. Existing historiography tends to focus on one of two explanation for this change – either that a decrease in international Cold war tensions was responsible, or that changes to the makeup of the Court itself were of the greatest importance. It is rare, however, to find scholarship that provides a detailed analysis of both explanations, leaving a significant gap in the historical record for this important development. There is a further gap in the record in that existing scholarship has neglected to examine whether the different approaches taken by the legal teams in the two cases may have played a role in producing different outcomes.

The argument in relation to external circumstances rests on the assumption that Cold War tensions in 1957 had greatly decreased since the peak days of 1949-51. While it is true that international tensions had eased, particularly after 1953, there remained a strong anti-Communist sentiment with the United States on a domestic level. The reaction to the *Yates* decision suggests it was far from a given, and was certainly not universally accepted. The Court was the subject of regular attacks after that decision, including attempts to limit its jurisdiction and to impeach some of the justices who were part of the majority. Lawyers who acted for Communist defendants were also under attack from local bar associations, and the nationwide ABA at least until 1957. All of this combined suggests that context was not as important in provoking the Constitutional shift as is made out by the historiography.

This conclusion is supported by the way contextual factors are dealt with in the respective decisions. The *Dennis* decision is reliant on contextual factors to produce a finding of clear and present danger, focussing on the state of the Cold War, and in particular the conflict in Korea. In contrast, the *Yates* decision focussed on more technical aspects of the prosecution. Had the Justices wished, they could have overturned the convictions on the basis that the danger posed by the defendants did not justify an imposition on their right to freedom of speech. Instead, the Court chose to make its decision primarily on the basis of more technical issues including the statute of limitations and the sufficiency of the evidence provided by the prosecution. The

Supreme Court did not, therefore, make a ruling on whether the CPUSA and its members still represented a clear and present danger to the security of the United States. There are two possible reasons for this: that such a danger in fact still existed, or that the Court did not feel such a ruling would have been tenable in the existing political climate. Either of those explanations is evidence to support the view that contextual factors were not the only cause of the shift in interpretation.

In the six years between *Dennis* and *Yates*, the composition of the Supreme Court underwent a major transformation. Of the eight Justices who sat on the *Dennis* case, only four remained to consider the arguments in *Yates*, with two new appointments and Justice Clark, who had been ineligible to sit in *Dennis*, making up the new Court panel. The departures over the 6 years included three of the four members of the majority, and one of the concurrences, including Chief Justice Vinson, and Justices Minton, Reed and Jackson. These departures effectively gutted the majority bloc on the Court, and paved the way for a much more liberal court, led by new Chief Justice Earl Warren. The ideological shift in the Court became increasingly apparent as Warren's tenure became more established, and led to what many scholars have described as the most liberal Court in American history.

The changes to the makeup of the Court played a significant role in producing the shift in interpretation in the *Yates* decision. The best evidence for this is the fact that the Justices voted in *Yates* in a way that aligned well with the rest of their judicial career, or their overall judicial perspective. This was, then, not a decision that radically departed from the perspectives of the Justices, but rather a reflection of the fact that the set of Justices making up the Court in 1957 had a vastly different outlook to those on the Court in 1951. The opinion that was produced by the majority in *Yates* is also reflective of the political compromise sometimes required by the Court. The Court adopted a more considered and technical approach to the problem, rather than the sweeping constitutional resolution suggested by Black and Douglas. Consensus building in this form is a prominent feature of Earl Warren's tenure on the Court, and is likely a result of his growing influence over the other Justices, even at this early point in his career.

The final factor, and one that has largely been ignored by previous studies of this issue, is the influence of legal strategy and the actions of the legal teams in creating, or at least helping along, the shift in interpretation. The legal teams in New York and Los Angeles each adopted significantly different legal strategies, and this had a strong influence on the different result

reached in each case. The New York trial was conducted in a particularly adversarial and bad tempered manner. The defence team drew the ire of the trial judge, resulting in convictions and imprisonment for contempt of court for each member of the legal team. The hostile nature of the trial did not go down well with the appeals courts, or the public, particularly given the time taken to conduct the case, with the defence using 82 days in court to present evidence.

By contrast, the Los Angeles trial was conducted in a much friendlier, even mannered way. The lawyers focussed on exploring all legal angles in conducting their defence, rather than spending time antagonising the judge and jury. In the early exchanges, this led to some legal wins for the Los Angeles defendants, and laid the groundwork for the eventual reversal by establishing the legal arguments that the Supreme Court ruled on in their favour at early stages of the trial. Although the Los Angeles defendants were not successful at trial, the legal arguments they made reflected the eventual outcome at the Supreme Court. It is also clear that the Supreme Court decisions reflect the nature of the respective trials – the political trial that took place in New York was responded to by a largely political opinion in *Dennis*, while the focus on the legal arguments in Los Angeles was reflected by a more nuanced legal opinion from the Court in *Yates*. The impact of the legal strategy on the outcomes remains difficult to quantify in exact terms, but the evidence here shows a strong correlation between a change in strategy and a change in result. It therefore seems clear that the legal strategy employed did in fact have some influence on the outcomes in the respective cases.

In overall terms, therefore, it seems that the explanation for the change in the Supreme Court's position between the two cases requires a much deeper understanding of the legal process than the simplistic explanations of either judicial or contextual influence. To explain the decisions, it is important to appreciate the influence of the legal strategies employed, as well as the changes to the makeup of the Court. It is also important to differentiate between the Cold War context and the domestic atmosphere. Domestic anti-Communist sentiment did not directly reflect the reduction in wider Cold War tension, meaning the domestic atmosphere remained hostile at least as late as 1957 when *Yates* and the other 'Red Monday' cases were decided. The change in the interpretation of the Smith Act and the Constitutional implications of that were ultimately the combined result of significant changes to the makeup of the Supreme Court a noticeable change in legal strategy on the part of the Communist defendants, and changes to the contextual situation. Through the use of different sources, in particular the legal records

relating to the two cases, it is clear that lawyers, as well as judges, played important roles in reshaping the interpretation of the Smith Act and its conflict with the First Amendment.

Bibliography

Primary Sources

Archive Collections

American Civil Liberties Union of Northern California records, MS 3580, California Historical Society, San Francisco, California.

Hugo LaFayette Black Papers, Manuscript Division, Library of Congress, Washington, D.C.

Loretta Starvus Stack Papers, larc.ms.0249, Labor Archives and Research Center, San Francisco State University, San Francisco, California.

National Lawyers Guild Records, BANC MSS 99/280 cz, The Bancroft Library, University of California, Berkeley.

Norman Leonard Papers, larc.ms.0027, Labor Archives and Research Center, San Francisco State University, San Francisco, California.

People's World (1938-1982), Labor Archives and Research Center, San Francisco State University, San Francisco, California.

Harry Truman Papers, Truman Library and Museum Online Documents, Harry S. Truman Presidential Library and Museum, Missouri, www.trumanlibrary.org, accessed 28/02/2018.

William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.

William Schneiderman Papers, larc.ms.0026, Labor Archives and Research Center, San Francisco State University, San Francisco, California.

Newspaper Collections

Chicago Daily Tribune (1948-1957).

Los Angeles Times (1957).

The Christian Science Monitor (1947-1949).

The New York Times (1941-1957).

The Washington Post (1937-1957).

The Washington Post and Times Herald (1954-57).

Case Law – United States Supreme Court

Adamson v. People of the State of California, 67 S.Ct. 1672 (US Supreme Court 1947).

B. A. Reynolds, etc., et al. v. M. O. Sims et al., 84 S.Ct. 1362 (US Supreme Court 1964).

Baumgartner v. United States, 64 S.Ct. 1240 (US Supreme Court 1944).

Brown et al. v. Board of Education of Topeka, Shawnee County, Kan., et al., 74 S.Ct. 686 (US Supreme Court 1954).

Bute v. People of State of Illinois, 68 S.Ct. 763 (US Supreme Court 1948).

Colegrove et al. v. Green et al., 66 S.Ct. 1198 (US Supreme Court 1946).

Coleman et al. v. Miller, Secretary of the Senate of State of Kansas, et al., 59 S.Ct. 972 (US Supreme Court 1939).

Debs v. United States, 249 U.S. 211 (US Supreme Court 1919).

Dennis, et al. v. United States, 71 S.Ct. 857 (US Supreme Court 1951).

Ernesto A. Miranda v. State of Arizona, 86 S.Ct. 1602 (US Supreme Court 1966).

Frohwerk v. United States, 249 U.S. 204 (US Supreme Court 1919).

Garner v. Board of Public Works, 71 S.Ct. 909 (US Supreme Court 1951).

Gitlow v. People of the State of New York, 45 S.Ct. 625 (US Supreme Court 1925).

Harry Keyishian et al. v. The Board of Regents of the University of the State of New York, 87 S.Ct. 675 (US Supreme Court 1967).

Herman A Beilan v. Board of Public Education, School District of Philadelphia, 78 S.Ct. 1317 (US Supreme Court 1958).

Jacob Abrams, et al. v. United States, 40 S.Ct. 17 (US Supreme Court 1919).

Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, et al., 65 S.Ct. 1063 (U.S. Supreme Court 1945).

John S. Service v. John Foster Dulles, et al., 77 S.Ct. 1152 (US Supreme Court 1957).

Lloyd Barenblatt v. United States of America, 79 S.Ct. 1081 (US Supreme Court 1957).

Milk Wagon Drivers Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc., 61 S.Ct. 552 (US Supreme Court 1941).

National Association for the Advancement of Colored People v. State of Alabama, 78 S.Ct. 1163 (US Supreme Court 1958).

Paul M. Sweezy v. State of New Hampshire by Louis C. Wyman, Attorney General, 77 S.Ct. 1203 (US Supreme Court 1957).

Pennekamp et al. v. State of Florida, 66 S.Ct. 1029 (US Supreme Court 1946).

Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey, et al., 112 S.Ct. 2791 (U.S. Supreme Court 1992).

Raphael Konigsberg v. State Bar of California and the Committee of Bar Examiners of the State Bar of California, 77 S.Ct. 722 (US Supreme Court 1957).

Rudolph Schware v. Board of Bar Examiners of the State of New Mexico, 77 S.Ct. 752 (US Supreme Court 1957).

Sacher et al. v. United States, 72 S.Ct. 451 (US Supreme Court 1952).

Sacher v. Association of the Bar of City of New York, 74 S.Ct. 569 (US Supreme Court 1954).

Samuel James Johnson v. United States, 135 S.Ct. 2551 (U.S. Supreme Court 2015).

Schenck v. United States, 39 S.Ct. 247 (US Supreme Court 1919).

Stromberg v. People of the State of California, 51 S.Ct. 532 (US Supreme Court 1931).

Sweatt v. Painter et al., 339 U.S. 629 (US Supreme Court 1950).

Terminiello v. City of Chicago, 69 S.Ct. 894 (US Supreme Court 1949).

Toyosaburo Korematsu v. United States, 65 S.Ct. 193 (US Supreme Court 1944).

United States v. Rabinowitz, 70 S.Ct 430 (US Supreme Court 1950).

Watkins v. United States, 77 S.Ct. 1173 (US Supreme Court 1957).

West Virginia State Board of Education et al. v. Barnette et al., 63 S.Ct. 1178 (US Supreme Court 1943).

Whitney v. People of the State of California, 47 S.Ct. 641 (US Supreme Court 1927).

William Marbury v. James Madison, Secretary of State of the United States, 5 U.S. 137 (US Supreme Court 1803).

Yates, et al. v. United States, 77 S.Ct. 1064 (US Supreme Court 1957).

Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863 (US Supreme Court 1952).

Case Law – United States Court of Appeals

Connelly v. United States Dist. Court in and for the Southern Dist. of California, Central Division, et al., 191 F.2d 692 (United States Court of Appeals for the Ninth Circuit 1951).

Dunne et al. v. United States, 138 F.2d 137 (United States Court of Appeals for the Eighth Circuit 1943).

Frankfeld et al. v. United States, 198 F.2d 679 (United States Court of Appeals for the Fourth Circuit 1952).

United States v. Dennis et al., 183 F.2d 201 (United States Court of Appeals for the Second Circuit 1950).

United States v. Flynn, 216 F.2d 364 (United States Court of Appeals for the Second Circuit 1954).

United States v. McWilliams et al., 163 F.2d 695 (United States Court of Appeals for the District of Columbia 1947).

Wellman v. United States, 227 F.2d 757 (United States Courts of Appeals for the Sixth Circuit 1955).

Yates v. United States, 225 F.2d 146 (United States Court of Appeals for the Ninth Circuit 1955).

Case Law – United States District Court

U.S. v. Schneiderman, 106 F.Supp 906 (United States District Court, S.D. California, Central Division 1952).

Legislation

Alien Registration Act, Pub. L. No. 670, 54 Stat. 670 (1940).

Constitution of the United States.

Espionage Act, Pub. L. No. 24, 40 Stat. 217 (1917).

Internal Security Act, Pub. L. No. 81-831, 64 Stat. 987 (1950).

Sedition Act, Pub. L. No. 150, 40 Stat. 553 (1918).

Interviews

Allen, William H. The Law Clerks of Chief Justice Earl Warren: William H. Allen. Interview by Laura McCreery, 2004. Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

Cahen, Donald M. The Law Clerks of Chief Justice Earl Warren: Donal M. Cahen. Interview by Laura McCreery, 2005. Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

Cohen, Jerome A. The Law Clerks of Chief Justice Earl Warren: Jerome A Cohen. Interview by Laura McCreery, 2004. Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

Perlman, Philip. Transcript of Interview with Philip Perlman. Interview by William Hillman and David M. Noyes, December 15, 1954. Interviews with Associates of President Truman, 21 of 31, Perlman, Philip B. Truman Papers, Post-Presidential Papers, www.trumanlibrary.org, accessed 28/02/2018.

Reitz, Curtis R. The Law Clerks of Chief Justice Earl Warren: Curtis R. Reitz. Interview by Laura McCreery, 2004. Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

Legislative Sources

Committee on Un-American Activities. "Report on the National Lawyers Guild: Legal Bulwark of the Communist Party." House Report No. 3123. 81st Congress, 2d Session, September 17, 1950.

Congressional Record (1939-1940, 1946, 1950, 1990)

Personal Writings

Black, Hugo L., and Elizabeth Black. *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black.* Edited by Paul R Baier. New York: Random House, 1986.

Clark, Tom C. "Civil Rights: The Boundless Responsibilities of Lawyers." *American Bar Association Journal* 32 (August 1946): 453–57.

Cohen, William. "Justice Douglas: A Law Clerk's View." *The University of Chicago Law Review* 26, no. 1 (Autumn 1958): 6–8.

Douglas, William O. *The Court Years, 1939-1975: The Autobiography of William O. Douglas*. New York: Random House, 1980.

Frankfurter, Felix, and James M Landis. *The Business of the Supreme Court: A Study in the Federal Judicial System*. New York: The MacMillan Company, 1928.

Frankfurter, Felix. *Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938.* Edited by Archibald Macleish and E.F. Pritchard, Jr. New York: Harcourt, Brace and Company, 1939.

Frankfurter, Felix. *Of Law and Life & Other Things That Matter: Papers and Addresses of Felix Frankfurter, 1956-1963*. Edited by Philip B. Kurland. Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1965.

Frankfurter, Felix. *The Public and Its Government*. New Haven: Yale University Press, 1930.

Frankfurter, Felix. *The Right of the People*. 4th ed. New York: Pyramid Books, 1966.

Freedman, Max, ed. *Roosevelt and Frankfurter: Their Correspondence, 1928-1945*. London: The Bodley Head, 1967.

Gitlow, Benjamin. *I Confess: The Truth About American Communism*. Connecticut: Hyperion Press, Inc., 1975.

Harlan, John M. "The Bill of Rights and the Constitution." *American Bar Association Journal* 50, no. 10 (October 1964): 918–20.

Konefsky, Samuel J., ed. *The Constitutional World of Mr. Justice Frankfurter: Some Representative Opinions*. New York: MacMillan, 1949.

McCarran, Patrick. "The Internal Security Act of 1950." *University of Pittsburgh Law Review* 12, no. 4 (1950): 481.

Phillips, Harlan B. *Felix Frankfurter Reminisces: Recorded in Talks with Dr. Harlan B. Phillips*. London: Secker & Warburg, 1960.

Schneiderman, William. *Dissent on Trial: The Story of a Political Life*. Minneapolis: MEP Publications, 1983.

Warren, Earl. *The Memoirs of Earl Warren*. New York: Doubleday & Company, 1977.

Other Legal Sources

"The Communist Control Act of 1954." *The Yale Law Journal* 64, no. 5 (1955): 712–765.

"The Status of Anti-Communist Legislation." *Duke Law Journal* 1965, no. 2 (April 1, 1965): 369–85.

Abbott, Edith. "Civil Liberties and the McCarran Act." *Social Service Review* 24, no. 4 (1950): 537.

Auerbach, Carl A. "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech." *The University of Chicago Law Review* 23, no. 2 (1956): 173–220.

Cremins, James S., "The Present Legal Status of the Communist Party, U.S.A." *American Bar Association Journal* 51, no. 5 (1965): 469–472.

Haerle, Paul R. "Constitutional Law: Federal Anti-Subversive Legislation: The Communist Control Act of 1954." *Michigan Law Review* 53, no. 8 (1955): 1153–1165.

Tompkins, William. "The Communist Control Act: THE COMMUNISTS AND ORGANIZED LABOR." *Vital Speeches of the Day* 21, no. 20 (1955): 1396.

Secondary Sources

Books

Abraham, Henry J. *Freedom and the Court: Civil Rights and Liberties in the United States*. 3rd ed. New York: Oxford University Press, 1977.

Allen, Francis A, and Neil Walsh Allen. *A Sketch of Chief Justice Fred M. Vinson*. Vol. 13. Sketches of the Chief Justices. Washington, DC: Green Bag Press, 2005.

Auerbach, Jerold S. *Unequal Justice: Lawyers and Social Change in Modern America*. New York: Oxford University Press, 1976.

Belknap, Michael R. *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties*. Contributions in American History ; No. 66. Westport, Conn.: Greenwood Press, 1977.

Bontecou, Eleanor. *The Federal Loyalty-Security Program*. New York: Cornell University Press, 1953.

Caute, David. *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower*. New York: Simon and Schuster, 1978.

Ceplair, Larry. *Anti-Communism in Twentieth-Century America: A Critical History*. California: Praeger, 2011.

Chafee Jr., Zechariah. *Free Speech In The United States*. Massachusetts: Harvard University Press, 1941.

Chemerinsky, Erwin. *The Case Against the Supreme Court*. New York: Penguin Books, 2014.

Clune, Lori. *Executing the Rosenbergs: Death and Diplomacy in a Cold War World*. New York: Oxford University Press, 2016.

Cortner, Richard C. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*. Wisconsin: University of Wisconsin Press, 1981.

Craig, Campbell, and Frederik Logevall. *America's Cold War: The Politics of Insecurity*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2009.

Cray, Ed. *Chief Justice: A Biography of Earl Warren*. New York: Simon and Schuster, 1997.

Cushman, Clare. *The Supreme Court Justices: Illustrated Biographies, 1789-1993*. 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Danelski, David J, and Artemus Ward, eds. *The Chief Justice: Appointment and Influence*. Ann Arbor: University of Michigan Press, 2016.

Dimitrakopoulos, Ioannis G. *Individual Rights and Liberties Under the U.S. Constitution: The Case Law of the U.S. Supreme Court*. Boston: Martinus Nijhoff Publishers, 2007.

Durham, James C. *Justice William O. Douglas*. Boston: Twayne Publishers, 1981.

Eastland, Terry, ed. *Freedom of Expression in the Supreme Court: The Defining Cases*. Maryland: Rowman and Littlefield Publishers, Inc., 2000.

Ewing, K. D. "The Cold War, Civil Liberties, and the House of Lords." Oxford University Press, 2011.

Farber, Daniel A., ed. *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History*. New York: Russell Sage Foundation, 2008.

Finkelman, Paul, ed. *Encyclopedia of American Civil Liberties*. Vol. 1. 3 vols. New York: Routledge, 2006.

Fraenkel, Osmond K. *The Supreme Court and Civil Liberties: How the Court Has Protected the Bill of Rights*. 2nd ed. New York: Oceana Publications, Inc., 1963.

Fried, Albert. *McCarthyism: The Great American Red Scare : A Documentary History*. New York: Oxford University Press, 1997.

Fried, Charles. *Saying What the Law Is: The Constitution in the Supreme Court*. Cambridge, Massachusetts: Harvard University Press, 2004.

Fried, Richard M. *Nightmare in Red: The McCarthy Era in Perspective*. New York: Oxford University Press, 1990.

Funston, Richard Y. *Constitutional Counterrevolution? The Warren Court and the Burger Court: Judicial Policy Making in Modern America*. New York: Halsted Press, 1977.

Gaddis, John Lewis. *The Cold War*. New York: The Penguin Press, 2005.

Ginsburg, Ruth Bader. "Workways of the United States Supreme Court." Faculty of Law, Victoria University of Wellington, February 8, 2001.

Goldstein, Robert Justin. *American Blacklist: The Attorney General's List of Subversive Organizations*. Kansas: University Press of Kansas, 2008.

Hall, Kermit L., and John J Patrick. *The Pursuit of Justice: Supreme Court Decisions That Shaped America*. New York: Oxford University Press, 2006.

Heale, M. J. *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965*. Georgia: University of Georgia Press, 1998.

Hodder-Williams, Richard. *The Politics of the US Supreme Court*. London: George Allen & Unwin Ltd, 1980.

Horwitz, Paul. *First Amendment Institutions*. Cambridge, Massachusetts: Harvard University Press, 2013.

Howe, Irving, and Lewis Coser. *The American Communist Party: A Critical History*. 3rd ed. New York: Da Capo Press, 1974.

Kirchheimer, Otto. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton: Princeton University Press, 1961.

Klehr, Harvey. *The Heyday of American Communism: The Depression Decade*. New York: Basic Books, Inc., 1984.

Knight, Barbara B., ed. *Separation of Powers in the American Political System*. Fairfax, Virginia: George Mason University Press, 1989.

Kutler, Stanley I. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill and Wang, 1982.

LaFeber, Walter. *America, Russia, and the Cold War, 1945-2006*. 10th ed. Boston: McGraw-Hill, 2008.

Lasser, William. *The Limits of Judicial Power: The Supreme Court in American Politics*. Chapel Hill: The University of North Carolina Press, 1988.

Linfield, Michael. *Freedom Under Fire: U.S. Civil Liberties in Times of War*. Boston: South End Press, 1990.

Marke, Julius J, ed. *The Holmes Reader*. 2nd ed. New York: Oceana Publications, Inc., 1964.

Martelle, Scott. *The Fear Within: Spies, Commies, and American Democracy on Trial*. New Brunswick: Rutgers University Press, 2011.

Meiklejohn, Alexander. *Free Speech And Its Relation to Self-Government*. New York: Harper and Brothers Publishers, 1948.

Mendelson, Wallace, ed. *Felix Frankfurter: The Judge*. New York: Reynal and Company, 1964.

Moliterno, James E. *The American Legal Profession in Crisis: Resistance and Responses to Change*. Oxford: Oxford University Press, 2013.

Morgan, Ted. *Reds: McCarthyism in Twentieth Century America*. New York: Random House, 2004.

Newman, Edwin S, ed. *The Freedom Reader*. 2nd ed. New York: Oceana Publications, Inc., 1963.

O'Brien, David M. *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the U.S. Supreme Court*. Maryland: Rowman and Littlefield Publishers, Inc., 2010.

Olmsted, Kathryn S. *Red Spy Queen: A Biography of Elizabeth Bentley*. 1st ed. Chapel Hill: The University of North Carolina Press, 2002.

Parker, Richard A. *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*. Tuscaloosa: University of Alabama Press, 2003.

Powe, Jr., Lucas A. *The Supreme Court and the American Elite, 1789-2008*. Cambridge, Massachusetts: Harvard University Press, 2009.

Powers, Richard Gid. *Not Without Honor: The History of American Anticommunism.* New York: Free Press, 1995.

Pritchett, C Herman. *Civil Liberties and the Vinson Court*. Chicago: The University of Chicago Press, 1954.

Pritchett, C. Herman. *Congress Versus the Supreme Court, 1957-1960*. Minneapolis: University of Minnesota Press, 1961.

Rabban, David M. *Free Speech in Its Forgotten Years*. Cambridge: Cambridge University Press, 1997.

Sabin, Arthur J. *In Calmer Times: The Supreme Court and Red Monday*. Philadelphia: University of Pennsylvania Press, 1999.

Schmidhauser, John R. *Judges and Justices: The Federal Appellate Judiciary*. Boston: Little, Brown and Company, 1979.

Schrecker, Ellen. *Many Are the Crimes: McCarthyism in America*. Boston: Little, Brown and Company, 1998.

Spaeth, Harold J. *Supreme Court Policy Making: Explanation and Prediction*. San Francisco: W. H. Freeman and Company, 1979.

Starobin, Joseph R. *American Communism In Crisis, 1943-1957*. Massachusetts: Harvard University Press, 1972.

Steinberg, Peter L. *The Great "Red Menace": United States Prosecution of American Communists, 1947-1952*. Connecticut: Greenwood Press, 1984.

Strum, Philipa. *Louis D Brandeis: Justice for the People*. Massachusetts: Harvard University Press, 1984.

Theoharis, Athan. *The FBI and American Democracy: A Brief Critical History*. Lawrence, Kansas: University Press of Kansas, 2004.

Turner, William Bennett. *Figures of Speech: First Amendment Heroes and Villains*. California: PoliPoint Press, 2010.

Urofsky, Melvin I. *Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953*. South Carolina: University of South Carolina Press, 1997.

Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. 2nd ed. Carbondale: Southern Illinois University Press, 1999.

Weiner, Tim. *Enemies: A History of the FBI*. London: Penguin Books, 2012.

Wiecek, William M. *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953*. Vol. 12. 12 vols. The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States. Cambridge: Cambridge University Press, 2006.

Journal Articles

Blanck, Peter David, Robert Rosenthal, and LaDoris Hazzard Cordell. "The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials." *Stanford Law Review* 38, no. 1 (November 1985): 89–164.

Blaustein, Albert P., and Roy M. Mersky. "Rating Supreme Court Justices." *American Bar Association Journal* 58, no. 11 (November 1972): 1183–89.

Couvares, Francis. "The American Civil Liberties Union and the Making of Modern Liberalism, 1930-1960." *Journal of American Studies* 41, no. 3 (2007): 691–693.

Elias, Elizabeth J. "Red Monday and Its Aftermath: The Supreme Court's Flip-Flop over Communism in the Late 1950s." *Hofstra Law Review* 43, no. 1 (Fall 2014): 207–27.

Harris, Robert J. "The Impact of the Cold War Upon Civil Liberties." *The Journal of Politics* 18, no. 1 (February 1956): 3–16.

Haynes, John Earl. "The Cold War Debate Continues: A Traditionalist View of Historical Writing on Domestic Communism and Anti-Communism." *Journal of Cold War Studies* 2, no. 1 (2000): 76–115.

Haverty-Stacke, Donna T. "'Punishment of Mere Political Advocacy': The FBI, Teamsters Local 544, and the Origins of the 1941 Smith Act Case." *The Journal of American History* 100, no. 1 (June 2013): 68–93.

Kutulas, Judy. "In Quest of Autonomy: The Northern California Affiliate of the American Civil Liberties Union and World War II." *Pacific Historical Review* 67, no. 2 (May 1998): 201–31.

Lieberman, Robbie. "Communism, Peace Activism, and Civil Liberties: From the Waldorf Conference to the Peekskill Riot." *Journal of American Culture* 18, no. 3 (1995): 59–65.

Mack, Kenneth W. "Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941." *The Journal of American History* 93, no. 1 (June 2006): 37–62.

Martin, Constance L. "The Life and Career of Justice Robert H. Jackson." *Journal of Supreme Court History* 33, no. 1 (March 2008): 42–67.

Martin, Ruth. "Operation Abolition: Defending the Civil Liberties of the 'Un-American', 1957-1961." *Journal of American Studies* 47, no. 4 (2013): 1043–63.

McAuliffe, Mary S. "Liberals and the Communist Control Act of 1954." *The Journal of American History* 63, no. 2 (1976): 351–367.

Parrish, Michael E. "Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Imperilling It?" *North Carolina Law Review* 82, no. 1799 (June 2004).

Pollack, L H. "Securing Liberty through Litigation: The Proper Role of the United States Supreme Court." *The Modern Law Review* 36, no. 2 (March 1973): 113–28.

Prickett, Morgan D.S. "Stanley Forman Reed: Perspectives on a Judicial Epitaph." *Hastings Constitutional Law Quarterly* 8, no. 2 (Winter 1981): 343–69.

Rabban, David M. "The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History." *Stanford Law Review* 45, no. 1 (November 1992): 47–114.

Schmidt, Christopher W. "The Civil Rights-Civil Liberties Divide." *Stanford Journal of Civil Rights and Civil Liberties* 12, no. 1 (February 2016): 1–41.

Schrecker, Ellen. "McCarthyism: Political Repression and the Fear of Communism." *Social Research* 71, no. 4 (Winter 2004): 1041–86.

Sellers, Mortimer N. S. "The Doctrine of Precedent in the United States of America." *The American Journal of Comparative Law* 54, no. Fall 2006 (2006): 67–88.

Theoharis, Athan. "A Creative and Aggressive FBI: The Victor Kravchenko Case." *Intelligence and National Security* 20, no. 2 (2005): 321–31.

Theoharis, Athan. "FBI Surveillance During the Cold War Years: A Constitutional Crisis." *The Public Historian* 3, no. 1 (Winter 1981): 4–14.

Urofsky, Melvin I. "Conflict Among the Brethren: Felix Frankfurter, William O Douglas and the Clash of Personalities on the United States Supreme Court." *Duke Law Journal* 1988, no. 1 (February 1988): 71–113.

Wiecek, William, M. "The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States." *The Supreme Court Review* 2001 (2001): 375–434.

Edited Collections

Belknap, Michal R. "Cold War in the Courtroom: The Foley Square Communist Trial." In *American Political Trials*, edited by Michal R. Belknap. Connecticut: Greenwood Press, 1981.

Black, Jr., Hugo L. "Hugo Black." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Cahn, Edmond N. "Dimensions of First Amendment 'Absolutes': A Public Interview." In *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, edited by

Everette E Dennis, Donald M Gillmor, and David L Grey. Ames: Iowa State University Press, 1978.

Cameron, Charles M, and Tom Clark. "The Chief Justice and Procedural Power." In *The Chief Justice: Appointment and Influence*, edited by David J Danelski and Artemus Ward. Ann Arbor: University of Michigan Press, 2016.

Dennis, Everette E, and Donald M Gillmor. "Hugo Black: 'No Law' Means No Law." In *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, edited by Everette E Dennis, Donald M Gillmor, and David L Grey. Ames: Iowa State University Press, 1978.

Dennis, Everette E, Donald M Gillmor, and David L Grey, eds. *Justice Hugo Black and the First Amendment: "No Law" Means No Law*. Ames: Iowa State University Press, 1978.

Fasset, John D. "Stanley F Reed." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Josephson, Harold. "Political Justice During the Red Scare: The Trial of Benjamin Gitlow." In *American Political Trials*, edited by Michal R. Belknap. Connecticut: Greenwood Press, 1981.

Kurland, Philip B. "Felix Frankfurter." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Langran, Robert M. "Tom C Clark." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Lewin, Nathan. "John Marshall Harlan II." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Lowe, Jennifer M. "Harold Burton." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Marsh, James M. "Robert Jackson." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Rice, Eric W. "Harold Hitz Burton." In *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of I Justices*, edited by Melvin I Urofsky. Washington, DC: CQ Press, 2006.

Snowiss, Sylvia. "The Legacy of Justice Black." In *Justice Hugo Black and the First Amendment: "No Law" Means No Law*, edited by Everette E Dennis, Donald M Gillmor, and David L Grey. Ames: Iowa State University Press, 1978.

Wermiel, Stephen. "Earl Warren." In *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, edited by Clare Cushman, 2nd ed. Washington, DC: Congressional Quarterly, 1993.

Theses and Dissertations

Bailey, Percival Roberts. "Progressive Lawyers: A History of the National Lawyers Guild, 1936-1958." Ph.D., Rutgers University, 1979.

Brown, Sarah Hart. "'Subversive' Southerners: Three Uncommon Lawyers and Civil Liberties in the South, 1945-1965." Ph.D., Georgia State University, 1993.

Bruner, Karen. "The Enigma of the Watkins and Barenblatt Decisions: The Supreme Court, Congressional Investigations and the First Amendment." M.A., University of Nebraska, 1990.

Hosoon, Chang. "National Security v. First Amendment Freedoms: U.S. Supreme Court Decisions on Anti-Communist Regulations, 1919-1974." PhD. The University of North Carolina at Chapel Hill, 1993.

Thorne, Hayden. "Clearance and the Hollywood Blacklist." Unpublished Hist489 History Honours Essay, Victoria University of Wellington, 2016.

Reference

"Fifth Column." *Oxford English Dictionary*, 2018. www.oed.com.

"HR 9490 Pass the Bill the Objections of the Pres. To the Contrary Notwithstanding?, House Vote #264," September 22, 1950. www.govtrack.us.

"HR 9490. Passage Over the Pres.' Veto, Senate Vote #444," September 22, 1950. www.govtrack.us.

Wall, Wendy. "Anti-Communism in the 1950s." Gilder Lehman Institute of American History, n.d. http://wwww.gilderlehrman.org/history-by-era/fifties/essays/anti-communism-1950s.