Act,[77] that court review would be delayed until after the lifting of the secrecy order.

Conclusion

While national security in some areas requires secrecy order interference, the administration of this feature of the patent act should be subjected to constant reappraisal to prevent adverse effects upon the progress of scientific research and development. On the one hand, to promote optimum defense activity, those inventions validly falling into the restricted category should be liberally rewarded. Yet arbitrary application of secrecy orders together with a too liberal interpretation of the award or compensation feature of the act could lead to an undesirable change in the goals of inventiveness. Only a balance of these considerations can lead to the necessary resolution in favor of continuing national leadership in the scientific fields. Under possible lax agency administration, the inventor might strive primarily to obtain secrecy order classification and statutory compensation instead of directing his talents toward production of a more commercially acceptible commodity.

POST-DENNIS PROSECUTIONS UNDER THE SMITH ACT

The decision of the United States Supreme Court in *Dennis v. United States,*[1] upholding the validity of the Smith Act[2] on its face, and as applied, has created difficult problems in the judicial administration of the act in subsequent prosecutions. The major source of difficulty is that the language of the act itself affords no definite standard to determine the particular conduct which is within its scope.[3] Furthermore,

77. See p. 97 *supra.*

1. 341 U.S. 494 (1951). This was a prosecution brought under the conspiracy section of the Smith Act. This section, unlike the general conspiracy statute, adopted the common law crime of conspiracy which does not require that an overt act in furtherance of the conspiracy be shown. Since the indictment was returned prior to the effective date of the 1948 revision of Title 18 U.S.C., allegations of overt acts were unnecessary. The conspiracy section of the Smith Act was not included in the 1948 revised code. A conspiracy to violate the act is now governed by the general conspiracy section of Title 18 U.S.C., section 371, which does require proof of an overt act in furtherance of the conspiracy.

2. 54 Stat. 670 (1940), later amended by 62 Stat. 808 (1948), 18 U.S.C. § 2385 (1952).

3. Applying a criminal statute having a vague standard poses a procedural due process problem. One accused of violating the statute should not be punished for conduct which he reasonably could not have known was criminal. Lanzetta v. New Jersey, 306 U.S. 451 (1939). The reason for requiring a definite standard in the language of a statute is to afford guidance both to the individual in planning his future conduct, and

some conduct, possibly covered by the statute, cannot be criminally proscribed because of the first amendment limitations.[4] The trial court in the *Dennis* case[5] interpreted the act narrowly in order to give it some degree of definiteness[6] and to avoid unconstitutional breadth of application. Both the court of appeals[7] and the Supreme Court recognized that the statute was extremely broad. Finding, however, that conduct would be criminal only in the event that the accused had a criminal intent, the Court ruled that the statute was sufficiently definite to satisfy the fifth amendment.[8] By removing through interpretation some of the exacting

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to the judge and jury in adjudicating rights and duties. See Collings, *Unconstitutional Uncertainty—An Appraisal,* 40 CORNELL L.Q. 195 (1955).

4. Two kinds of conduct regulated by the statute are forms of speech. They are the advocacy or teaching of the "duty, necessity, desirability, or propriety of overthrowing . . . government . . . by force or violence. . . ." and the publication of "written or printed matter advocating . . ." the proscribed doctrine. It also forbids knowingly becoming a member of or affiliating with any group or assembly of persons who advocate the overthrow of government by force or violence.

The First Amendment language seems to impose an absolute limitation upon Congressional power to sanction speech, press and peaceable assembly. However, the Court has consistently held that these rights are not unlimitable. Schaefer v. United States, 251 U.S. 466 (1920); Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). The exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government. American Communications Association, C.I.O. v. Douds, 339 U.S. 382 (1950).

5. United States v. Foster, 9 F.R.D. 367 (S.D.N.Y. 1949).

6. *Id.* at 390-91.

7. Addressing himself to the defendants' challenge that the statute was unconstitutionally vague, Judge Hand, in the court of appeals stated: ". . . Congress has explicitly declared that it wished the words (of the statute) to govern all cases which they constitutionally could . . .", referring to the severability clause in the original act and to the provision that if ". . . the application thereof to any person or circumstance is held invalid . . . the application . . . to other persons or circumstances . . ." should not be affected. He then admitted the impossibility of drafting a statute in precise language to deal with the type of conduct the Smith Act attempts to proscribe and concluded by remarking that such a consideration is relevant in judging the constitutionality of any statute. United States v. Dennis, 183 F.2d 201, 214 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951).

8. At two points in his consideration of the statute Mr. Chief Justice Vinson encountered arguments that the statute was invalid because of insufficient intent provisions. Section 2(a) of the act contained, in express language, a specific intent provision. However, the two subsections upon which the indictment was founded, 2(a) 1 and 2(a) 3, did not. The defendants contended that Congress deliberately omitted the element and for this reason claimed that the Court should declare the statute invalid. But the Court rejected this argument and found the "structure and purpose of the statute demand the inclusion of intent as an element of the crime." It then incorporated the necessary intent element into the statute by way of interpretation. The second point at which the Court considered the intent factor was in connection with the issue of whether or not the statute was so vague that one could not know of the limitation it imposes. Here it resorted to the much used crutch that the claim of guilelessness ill becomes those with evil intent. Since the jury had found the defendants intended to cause the violent overthrow of government "as speedily as circumstances would permit," the Court felt that the defendants claim of insufficient notice was particularly non-persuasive. Dennis v. United States, 341 U.S. 494, 499, 515

requirements[9] of the "clear and present danger" test, the principal majority opinion found that the act could be constitutionally applied under the circumstances then existing.[10] Although the act has thus been pronounced valid by the country's highest judicial body, it has not been clearly established what conduct constitutes a violation.

Notwithstanding the lack of a definitive statement of the substantive offense, successful prosecutions for conspiracy to violate sections 2(a)1 and 2(a)3[11] have been maintained against the leaders of the Communist Party in the United States.[12] Use of the conspiracy device

(1951). See the discussion of the application of the scienter rationalization to avoid invalidating a statute on the ground of vagueness in Collins, *supra* note 3, at 227-31.

9. The rule is, as defined by Justice Holmes: "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). See discussion at p. 116 *infra*.

10. The opinion of Mr. Chief Justice Vinson, in which Justices Reed, Burton and Minton concurred, while indicating a belief that the literal requirements of the rule were not suitable as a standard in the case before them, nevertheless refused to wholly reject the rule. Instead, the Chief Justice adopted the interpretation given the rule by Judge Hand in the court of appeals. Dennis v. United States, 341 U.S. 494, 510 (1951). For different reasons Justices Jackson and Frankfurter, in separate concurring opinions, upheld the validity of the act. Mr. Justice Jackson believed the clear and present danger test should be entirely abandoned where conspiracy to advocate violent overthrow of government is concerned. Mr. Justice Frankfurter, however, placed the decision upon the ground that the validity of the act under the First Amendment depended upon balancing competing interests which was within the province of the legislature, and that its judgment should not be impeached since it was not outside the pale of fair judgment. *Id.* at 517, 561.

11. These subsections are now contained in paragraphs one and three of 18 U.S.C. § 2385. They provide: "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or . . . Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; . . . Shall be fined. . . ." 54 Stat. 670 (1940), as amended, 18 U.S.C. § 2385 (1952).

12. The thirteen "second string" communists were indicted in New York City on June 20, 1951. United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951). An indictment was returned against six defendants in Baltimore on January 15, 1952. United States v. Frankfeld, 101 F. Supp. 449 (D. Md. 1952). An indictment dated August 29, 1951, was returned against seven defendants in Honolulu. United States v. Fujimoto, 102 F. Supp. 890 (D. Hawaii 1952). Fifteen defendants were indicted on December 21, 1951 in Los Angeles. United States v. Schneiderman, 102 F. Supp. 87 (S.D. Cal. 1951). The indictment of the six defendants in Pittsburgh was returned January 18, 1952. United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952). Earlier this year, the Government obtained convictions against two leaders of the Communist Party for violating the membership provisions of the Smith Act. On April 21, at Greensboro, North Carolina, Junis Irving Scales was found guilty of charges that he was a member of the Communist Party, knowing that it advocates overthrow of the United States Government by force and violence. Claude Lightfoot was convicted on a similar charge in Chicago in January of this year. That clause of the Smith Act upon which

to reach group conduct is perhaps the most effective method of punishing criminal organizations,[13] but serious dangers to individual rights inhere in the elasticity of conspiracy statutes.[14] These problems are accentuated in Smith Act cases because of the nature of the offense involved. While the act has been declared not unconstitutional on its face, nothing in the *Dennis* decision precludes the possibility that in subsequent prosecutions it may be unconstitutionally applied.[15] The following analysis of the *post-Dennis* cases under the Smith Act is directed to the question of whether or not the defendants' convictions were obtained in a manner consistent with the procedural requirements of the *Dennis* case and whether they are reconcilable with the demands of the first amendment.

The Indictments

The indictments have been attacked primarily upon three grounds. The defense has contended that the act under which the indictments were returned is unconstitutional on its face. This contention has been summarily dismissed on the authority of the *Dennis* decision.[16] Secondly, the defendants have argued that the alleged beginning date of the conspiracy shows that the prosecution is barred by the statute of limitations. The third allegation has been that no offense is stated because the indictments fail to allege all the necessary elements of the offense, as defined in the *Dennis* case.

With the exception of that in *United States v. Schneiderman,* the conspiracies charged allegedly began in April, 1945.[17] The first indictment returned in the *Schneiderman* case, which was later dismissed,[18] also alleged that the conspiracy began on that date.[19] But the new in-

these convictions were based has not been tested in the higher courts. The Courier-Journal (Louisville), April 23, 1955, § 1, p. 3, col. 1.

13. See Note, 62 HARV. L. REV. 276 (1948).

14. The courts have tended to show great leniency towards the prosecution with respect to proof of the agreement and the participation of the accused. Also the criteria by which the common intent of the co-conspirators to commit the specific acts made criminal, involving difficult problems of proof, have been relaxed to some extent. See Krulewitch v. United States, 336 U.S. 440, 445-57 (1949) (concurring opinion). See also Note, 17 U. CHI. L. REV. 148, 153 (1949); Harno, *Intent in Criminal Conspiracy,* 89 U. PA. L. REV. 624 (1941).

15. Mr. Chief Justice Vinson, in the principal opinion intimated that under the broad language of the statute, there may be doubtful cases in the future which would demand that the Court review convictions with scrupulous care in order to avoid unconstitutional application. See Dennis v. United States, 341 U.S. 494, 516 (1951).

16. United States v. Frankfeld, 198 F.2d 679 (4th Cir. 1952), *affirming* 101 F. Supp. 449 (D. Md. 1952); United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952); United States v. Fujimoto, 102 F. Supp. 890 (D. Hawaii 1952).

17. See note 12 *supra.*

18. United States v. Schneiderman, 102 F. Supp. 87 (S.D. Cal. 1951).

19. *Id.* at 89-90.

dictment, under which conviction was later obtained, alleged a conspiracy beginning "from on or about June 28, 1940, and continuously thereafter up to and including the date of the filing of this indictment."[20] The defendants there were alleged to be members of the same conspiracy for which the *Dennis* defendants were convicted. Yet the Court in the *Dennis* case recognized that the Communist Party was dissolved after 1943 and the Communist Political Association was formed to take its place.[21] As persons in control of the apparatus of the Communist Political Association the defendants in the *Dennis* case were able to turn it from its previous lawful purposes into the Communist Party, which again adopted the revolutionary policies of Marxism-Leninism in 1945.[22] It was this conduct in 1945 that the Court held created the conspiracy, not the fact of the existence of the Communist Party in the United States after the passage of the Smith Act.

It is possible to assume that the defendants conspired to organize the Communist Party as a group to advocate violent overthrow of government by virtue of the fact of the existence of the Party at the time the Smith Act became law.[23] However, the conspiracy must have terminated with the dissolution of the Party in 1943 and the abandonment of its revolutionary aims. If the finding in *Dennis,* that the formation of the Communist Political Association effected a change from former unlawful purposes to lawful ones, is valid, then it would be seemingly impossible for the conspiracy alleged in *Schneiderman* to have continued over the period alleged. At the trial the accused requested instructions to the effect that, if the Communist Party was dissolved subsequent to June 28, 1940, and prior to the date of the indictment, then regardless of whether or not it was reorganized thereafter, the jury must acquit.[24] The request was denied despite the Government's own statement that it is a matter for the jury to decide whether or not a hiatus in the conspiracy occurred during the time in which the Communist Political Association existed.[25]

Concerning the requirement of intent, Judge Medina, in the *Dennis* case, held that to find that the defendants wilfully and knowingly con-

20. United States v. Schneiderman, 106 F. Supp. 906, 930 (S.D. Cal. 1952). June 28, 1940 was the date that the Smith Act became effective. See note 2 *supra.*

21. Dennis v. United States, 341 U.S. 494, 498 n.1 (1951).

22. *Ibid.* See also the discussion of the dissolution of the Communist Party and formation of the Communist Political Association in Brief for Appellants, pp. 10-13, Yates v. United States, 225 F.2d 146 (9th Cir. 1955).

23. The Communist Party began in the United States in 1919, when a split occurred in the ranks of the Socialist Party, and culminated in 1925 with the organization of the Worker's Party. The name "Communist Party" was adopted in 1929. Brief for Appellants, p. 10, Yates v. United States, 225 F.2d 146 (9th Cir. 1955).

24. *Id.* at 221, 222.

25. *Ibid.*

spired to advocate, and organized the Communist Party to advocate violent overthrow of government, was not sufficient to support their convictions.[26]. It is necessary to determine that the defendants conspired with the intent that their advocacy or teaching be of a rule or principle of action, by language reasonably and ordinarily calculated to incite persons to such action, and with the further intent to cause the overthrow or destruction of the Government of the United States by force and violence "as speedily as circumstances would permit."[27] The Court in the *Dennis* case upheld the validity of the Smith Act as construed and applied by the trial judge. Since these elements were considered to be essential to conviction, they would necessarily be requird to be alleged in future indictments under Rule 7(c) of the Federal Rules of Criminal Procedure.[28]

The district court in the *Schneiderman* case was of the opinion that Judge Medina's expansive interpretation of the statute as to intent became an essential element of the crime proscribed. Accordingly the court dismissed the indictment for failure to allege it.[29] The defendants in *United States v. Frankfeld,* after the *Schneiderman* decision, moved for a reconsideration of the court's previous ruling[30] on motions made by them to dismiss the indictment.[31] The court refused to overturn its earlier ruling and rejected the argument that intent to cause the violent overthrow of government "as speedily as circumstances would permit" must be pleaded in the indictment.[32] The Government nevertheless returned a new indictment which included the element of intent demanded

26. United States v. Foster, 9 F.R.D. 367, 390, 391 (S.D.N.Y. 1949).

27. *Ibid.*

28. ". . . The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . ."

29. The original indictment in the *Schneiderman* case alleged intent in terms of the statutory language alone. The court said, however, that "it appears to have been expressly held [in the *Dennis* case] that conduct proscribed by section 2 of the Smith Act which impinges upon freedom of speech, even though willful, cannot constitute an offense against the United States unless the acts be done with the specific intent to overthrow the Government by force and violence." United States v. Schneiderman, 102 F. Supp. 87, 94 (S.D. Cal. 1951). Further interpreting the intent provision of the statute the court stated: "To hold then that 'wilfully,' as employed in the Smith Act and in the indictments at bar, denotes an 'intent . . . to overthrow the government by force and violence' . . . would seem to expand unduly the content of that already overworked adverb. . . . Moreover, it could not reasonably be held that 'wilfully' even so much as connotes the necessary time element—intent to cause forcible and violent overthrow 'as speedily as circumstances permit.'" *Id.* at 94, 95.

30. United States v. Frankfeld, 101 F. Supp. 449 (D. Md. 1951).

31. United States v. Frankfeld, 102 F. Supp. 422 (D. Md. 1952).

32. The court based its decision on the fact that the indictment was patterned after that in the *Dennis* case, which was upheld. It felt that the question of whether or not the accused had the requisite specific intent was a matter constituting a defense. Such matters need not be negated in the indictment where it does not arise out of the language of the statute itself.

by the court in the *Schneiderman* case.[33] In *United States v. Flynn*[34] and *United States v. Fujimoto*[35] the indictments did not include this element in the intent allegation.[36] The courts in each case rejected motions to dismiss on this ground because the indictment in the *Dennis* case had been upheld even though it did not include the element. The allegation was included in the original indictment in *United States v. Mesarosh*[37] apparently in the belief that it was essential in order to charge an offense under the statute as interpreted in *Dennis*.

The question of the sufficiency of the indictment was not before the Court for review in the *Dennis* case under the limited grant of certiorari.[38] By upholding the convictions under the act as interpreted and applied the Court must be taken to have sustained the trial court's interpretation of the statute. From the language of the charge to the jury it is clear that the trial court incorporated the specific intent factor into the statute in order to avoid objectionable breadth of application.[39] Absent the requirement of specific intent, the Supreme Court could have

33. United States v. Frankfeld, 103 F. Supp. 48, 49 (D. Md. 1952), *aff'd*, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

34. United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951), *aff'd*, 216 F.2d 354 (2d Cir. 1954).

The conviction and sentence of Alexander Trachtenberg and George Blake Charney, two defendants in the *Flynn* case, were set aside and a new trial ordered on April 22, 1955. The basis for the ruling was that these two defendants might never have been convicted without the testimony of Harvey Matusow. Matusow, subsequent to the trial, recanted his previous testimony against the defendants in this case. District Judge Dimock in granting a new trial called Matusow "a completely irresponsible witness." The verdicts against the eleven other defendants were not set aside inasmuch as the court felt that these defendants would have been convicted even without Matusow's testimony. The Courier-Journal (Louisville), April 23, 1955, § 1, p. 3, col. 4.

35. United States v. Fujimoto, 107 F. Supp. 865 (D. Hawaii 1952).

36. These indictments were almost exactly like the indictment which the court held insufficient in the *Schneiderman* case. See note 29 *supra*. While not alleging the specific intent, the indictments did allege that it was a part of the conspiracy that the defendants would conduct and cause to be conducted, schools, classes, meetings in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit. Appendix to Brief for Appellants, pp. 4-5, Fujimoto v. United States, *appeal docketed*, No. 13915 9th Cir.

37. United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952). The defendant Mesarosh, also known as Steve Nelson, along with defendants Dolsen and Onda, were convicted for violating the Pennsylvania state Sedition Act which is almost identical with the Smith Act. The Pennsylvania Supreme Court reversed the convictions on the ground that federal legislation dealing with subversive activities had pre-empted the field, suspending the Pennsylvania statute. Commonwealth v. Nelson, 377 Pa. 58, 10 A.2d 133 (1954).

38. The court granted certiorari to review only two questions: (1) whether either section 2 or section 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights (2) whether either section 2 or section 3 of the act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of its definiteness. Dennis v. United States, 341 U.S. 494, 495-96 (1951).

39. See p. 109 *supra*.

reversed the convictions without invalidating the statute.[40] In finding the statute not inherently unconstitutional the Court simply held that it was susceptible of a construction not inconsistent with the minimum requirements of the first and fifth amendments.[41] Alleging intent in terms of the statutory language alone was the prosecution's only alternative in the *Dennis* indictment, for it could not have known that the court would subsequently interpret the statute to require specific intent to cause violent overthrow of government "as speedily as circumstances would permit." In subsequent prosecutions, however, the Government is not faced with this problem. The *Dennis* case supplies the standard, and the indictments should be drawn in accordance with it.

Theory of the Prosecution and the Position of the Defense

The prosecution in each of the cases has advanced the contention that the Communist Party, through its advocacy and teaching of the principles of Marxism-Leninism,[42] advocates overthrow of government in the United States by force and violence. The accused, as active members, leaders and organizers of the Communist Party conspired to use it to achieve this unlawful objective.[43] It is not necessary to show an express agreement to advocate the proscribed doctrine.[44] The jury can infer the existence of the conspiracy charged in the indictment from evidence of the nature and aims of the Communist Party and the activities of those connected with it.[45] From the evidence as to each of the defendant's connections with, and activities in, the Party it is contended that the jury can infer that each defendant was a member of the con-

40. Screws v. United States, 325 U.S. 91 (1945).

41. The Court has previously expressed the view that where the constitutionality of a federal statute is challenged it will favor that interpretation of the statute which supports its constitutionality. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). See also Screws v. United States, 325 U.S. 91, 98 (1945).

42. See for a critique of the doctrine of Marxism-Leninism, Boudin, *"Seditious Doctrines" And The "Clear And Present Danger" Rule,* 38 VA. L. REV. 143, 178-86 (1952).

43. Frankfeld v. United States, 198 F.2d 679, 684 (4th Cir. 1954); Appendix to Brief for Appellants pp. 47-49, Fujimoto v. United States, *appeal docketed,* No. 13915 9th Cir.

44. "In order to establish proof of a conspiracy, the evidence need not show that the parties to the conspiracy entered into any express or formal agreement, or that they directly, by word or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object was to be achieved. It is sufficient if they . . . positively or tacitly came to a mutual understanding to accomplish a common and unlawful design. . . ." Instruction number 24 given in the Fujimoto case. Appendix to Brief for Appellants pp. 38-39, Fujimoto v. United States, *appeal docketed* No. 13915 9th Cir. For an analysis of the agreement factor in criminal conspiracy see Cousens, *Agreement As An Element In Conspiracy,* 23 VA. L. REV. 898 (1937).

45. United States v. Schneiderman, 106 F. Supp. 906, 922 (S.D. Cal. 1952).

spiracy with the requisite specific intent.[46] The determination of the nature and aims of the Communist Party[47] is the primary issue under this theory, and this depends upon the meaning to be assigned to the principles of Marxism-Leninism.

The defense has relied primarily upon three propositions. They, the defendants, do not occupy the same position with respect to the control of the Communist Party and its policies as did the defendants in *Dennis*. Secondly, advocacy of the principles of Marxism-Leninism is not equivalent to advocacy of overthrow of government by force and violence. Finally, their activities in the Communist Party are no more than lawful exercises of rights guaranteed by the First Amendment.[48]

Determining the nature, aims, and objectives of the Communist Party by attempting to equate adherence to the politico-socio-economic philosophy of Marx and Lenin with the advocacy of violent overthrow of government in the United States, has been severely criticized[49] and even rejected by the Supreme Court in a previous case.[50] The technique employed by the prosecution in the *post-Dennis* cases to establish its theory attempts to resolve the ultimate question by resort to the books and papers setting forth the doctrines of Marx and Lenin.[51] The question of whether or not the accused in a given case actually conspired to advocate the proscribed doctrine cannot be determined by examining these

46. *Ibid.* Thus the same evidence used to establish the existence of the conspiracy may also be used to find the specific intent of the members of the conspiracy.

47. While the prosecution believed that proof of the nature, aims and objectives of the Communist Party in the United States and the accused membership and activities in the Party were sufficient to obtain convictions, it nevertheless insisted, and the court so instructed, in the *Fujimoto* case that the Communist Party itself was not the conspiracy charged in the indictment. Joint Opening Brief for Appellants pp. 62-63, Fujimoto v. United States, appeal docketed, No. 13915 9th Cir.

48. See the trial court's charge in the *Flynn* case quoted in the footnote, United States v. Flynn, 216 F.2d 354, 377-78 (2d Cir. 1954).

49. See note 42 *supra*.

50. Schneiderman v. United States, 320 U.S. 118 (1943). The petitioner in this case was the same individual involved in the California Smith Act prosecutions. The above cited case was a denaturalization proceeding to cancel the petitioner's certificate of citizenship, granted in 1927, on the ground of fraud. The complaint charged that the certificate was illegally procured in that petitioner was not at the time of his naturalization, and during the five years preceding his naturalization, attached to the principles of the Constitution of the United States. The basis for the charge was the fact of petitioner's membership in the Worker's Party of America and the Young Worker's League of America, whose principles, it was contended, were opposed to the Constitution of the United States, and advocated overthrow of government by force. The Court in an opinion by Mr. Justice Murphy, reversed the lower court's finding saying the government had not proved its contention beyond doubt.

51. Joint Opening Brief for Appellants pp. 133-156, Yates v. United States, 225 F.2d 146 (9th Cir. 1955); Joint Opening Brief for Appellants pp. 146-161, Fujimoto v. United States, *appeal docketed,* No. 13915 9th Cir.

documents alone.[52] Consideration must be given to the actual political and economic situation existing at the time and the correctness of the estimate by the accused of this situation.[53]

Proving the Conspiracy: Evidentiary Rules

A criminal conspiracy consists of two distinct elements: an agreement and the intent to effect an unlawful design or to effect a lawful objective by unlawful means.[54] Conspiracy is a separate offense from its means or object[55] and may be punished even though a substantive crime is not committed.[56] To be distinguished from the intent to enter the agreement is the intent to effect the unlawful design. Proof of the intent to enter the agreement without more is not sufficient to establish the existence of a conspiracy.[57] Even in conspiracy cases intent must be personal to the actor although it may be proved by circumstantial evidence.[58] If the principle of American criminal law that guilt is personal[59] is to prevail, it must be shown in the Smith Act prosecutions that each of the accused had the specific intent to cause violent overthrow of government "as speedily as circumstances would permit." Under the prosecution's hypothesis, the specific intent of the accused is to be inferred not from a basic fact, but from a fact which itself must be inferred from the advocacy of the principles of Marxism-Leninism.

The rule in conspiracy prosecutions is that the initial participation of an accused in the conspiracy must be determined solely on the basis of his own conduct and statements.[60] Only after this is established are the acts and declarations of alleged co-conspirators in furtherance of the objectives of the conspiracy, competent to be considered by the jury as

52. The accused have further contended that only the official utterances of the Communist Party enunciating its objectives, and their individual interpretation of the theories and principles of Marxism-Leninism were relevant in determining whether or not the Communist Party advocated overthrow of Government by force. See note 49 *supra.*

53. See note 42 *supra.*

54. Commonwealth v. Donoghue, 250 Ky. 343, 347, 63 S.W.2d 3, 5 (1933). Under the federal conspiracy statute, not only is the crime limited to combinations to commit offenses against, or to defraud the United States, but also requires the commission of an overt act to effect the object of the conspiracy. 18 U.S.C. § 371 (1952).

55. Braverman v. United States, 317 U.S. 49 (1942).

56. Goldman v. United States, 245 U.S. 474 (1918); Pinkerton v. United States, 328 U.S. 640 (1946).

57. See Harno, *supra* note 14 at 632-34.

58. See Note, 62 HARV. L. REV. 276, 280 (1948).

59. "It is of the ery essence of our deep-rooted notions of criminal liability that guilt be personal and individual." Sayre, *Criminal Responsibility for Acts of Another,* 43 HARV. L. REV. 689, 717 (1930); See also Schneiderman v. United States, 320 U.S. 118, 136 (1943).

60. See United States v. Foster, 9 F.R.D. 367, 379 (S.D.N.Y. 1949).

binding upon him.[61] In Smith Act prosecutions the rule is difficult to follow where the membership of the accused in the Communist Party is admitted. The effectiveness of an instruction directing the jury to determine an accused's participation in the conspiracy, and thus his guilt, solely on the basis of his own conduct and declarations, is negligible.[62] An instruction that membership or officership in the Party is not alone sufficient to justify conviction is likewise unavailing if evidence of his activities in the Party may yet be considered as part of the conspiracy or as an overt act in furtherance of its objectives.[63]

On the issue of determining the nature, aims and objectives of the Communist Party, there was available to the prosecution an abundance of evidence in the form of testimony of former members of the Party[64] and reports and documents of various governmental departments.[65] To prove the accused's connection with the charged conspiracy by evidence other than the fact of membership or affiliation with the Party is a problem of considerable import. In this connection it should be noted that section 4(f) of the Subversive Activities Control Act of 1950[66] clearly states that the holding of membership or official position in the Communist Party shall not constitute a violation of law. The only link between the accused in the subsequent cases and the defendants in *Dennis* has been the fact of their common membership and activities in the Communist Party.[67] In effect the prosecution has treated the Communist Party itself as the conspiracy against which the statute is

61. Mayola v. United States, 71 F.2d 65, 67 (9th Cir. 1934).

62. The manner in which courts receive proof and the general conduct of the trials make instructions purporting to limit the use of certain evidence to purposes for which it was only technically admissible highly ineffective to protect the accused from undue prejudice. These problems are magnified as the number of defendants increases. See Kotteakos v. United States, 328 U.S. 750, 776 (1946).

63. See Joint Opening Brief for Appellants pp. 164-177, Yates v. United States, 225 F.2d 146 (9th Cir. 1955); *cf.* De Jonge v. Oregon, 299 U.S. 365, 366 (1937).

64. For the names of such witnesses and the nature of their testimony see Joint Opening Brief for Appellants pp. 125-145, Fujimoto v. United States, *appeal docketed,* No. 13915 9th Cir.

65. See United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952); United States v. Mesarosh, 116 F. Supp. 345, 349 (W.D. Pa. 1953).

66. 64 Stat. 987 (1950), 50 U.S.C. § 783(f) (1952).

67. See Appellants Reply Brief pp. 6-8, Yates v. United States, 225 F.2d 146 (9th Cir. 1955). In the *Fujimoto* case the court instructed that the jury may not infer that a defendant has either such knowledge or has adopted such object as his own from mere membership in or holding position in the Communvist Party. Howeer, it permitted the jury to consider, in connection with other evidence, membership or official position as indicating such knowledge or adoption of the party objective. Appendix to Brief for Appellants pp. 47-49, Fujimoto v. United States, *appeal docketed,* No. 13915, 9th Cir. But there was no "outside" evidence unconnected with the defendants' activities in the Party which could reasonably give rise to an inference of guilt.

directed.[68] It is at this point that the *Dennis* case ceases to be authority for the proposition asserted. It was not the fact of the defendants' membership or official position in the Communist Party which established the existence of the conspiracy in the *Dennis* case. It was rather that they, as the persons in control of the Communist Political Association, brought about its dissolution and formed an agreement to organize, as the Communist Party of the United States, a group to advocate violent overthrow of government.[69]

The bulk of the prosecution's evidence relating to the issue of the nature, aims and objectives of the Party was of acts and occurrences antedating both the statute of limitations[70] and the effective date of the Smith Act. In each of the cases the defendants objected to the introduction of such evidence.[71] But despite the prejudicial nature of this evidence and its remoteness from any conduct of the immediate defendants, their objections were unavailing.[72] By use of the doctrine of continuing conspiracy[73] an agreement shown to have existed prior to the period of the statute of limitations is presumed to continue in effect. To convict

68. At every turn, the Communist Party served as a crutch upon which to lean whenever the defendants succeeded in pointing up a fallacy in the theory adopted. Throughout the cases, reference is made to the nature, aims and objectives of the Communist Party, not to the conspiracy alleged in the indictment. See, *e.g.*, United States v. Schneiderman, 106 F. Supp. 906, 922 (S.D. Cal. 1952).

69. Dennis v. United States, 341 U.S. 494, 497 (1951).

70. The period of the statute of limitations for the offense is three years. 62 Stat. 828 (1948), as amended, 18 U.S.C. § 3282 (1952).

71. See, *e.g.*, United States v. Fujimoto, 102 F. Supp. 890, 897 (D. Hawaii 1952). Evidence of this character was admitted not to prove the guilt of the accused at the time the acts were committed or the agreement entered into, but to show an illegal agreement and the accuseds' participation in it and his knowledge and intent within the period of the statute of limitations.

72. Since the Party was formed in 1945 and the date of the earliest indictment was June 20, 1951, it would appear that the statute of limitations at least as to this offense would have run. The question did not arise in the *Dennis* case because the charge in the indictment there and the proof purported to show organization of the Party in July, 1945, and the indictment was returned on July 20, 1948, before the three year statute of limitations had expired. However, the word "organize," as used in the statute has been defined as the "recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society." Under this definition, whatever activities were carried on by the accused in furtherance of the objectives of the Party rendered them organizers of the Party within the meaning of that term in the statute.

The trial court in the *Flynn* case held that part of the indictment charging the defendants with conspiring to organize the Communist Party of the United States, barred by the statute of limitations. United States v. Flynn, 216 F.2d 354, 358 (1954).

73. The concept as stated by Mr. Justice Holmes is that ". . . when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one." United States v. Kissel, 218 U.S. 601, 607 (1910).

the accused it is then only necessary to show that an overt act was committed within the period of the statute of limitations.[74]

The Clear and Preseint Danger Test

A highly controversial subject in the cases is the determination of the function of the clear and present danger test.[75] The courts are unanimous in the assertion that the existence of a clear and present danger need not be alleged in the indictment.[76] It is not clear as to whether the courts may take judicial notice of the "danger" and not require evidence of it to be given at the trial.[77] Indications are that both the evidence and external circumstances may be considered in determining whether the requisite danger exists. According to the criterion laid down in the *Dennis* case it is the duty of the court to make the finding.[78]

The content of the clear and present danger test was greatly reduced by the Supreme Court's holding in the *Dennis* case.[79] The Court found that an attempt at violent overthrow of government was a sufficient substantive evil, within the meaning of that test, to warrant restraining free speech.[80] Through Mr. Chief Justice Vinson, the Court agreed with Judge Hand's formulation of the rule which virtually eliminated all that was formerly included in the concepts "clear" and "present."[81]

74. See, *e.g.*, United States v. Schneiderman, 106 F. Supp. 892 (S.D. Cal. 1952).

75. The Holmes-Brandeis view of the test insisted that wherever speech was the evidence of the violation of a statute, it was necessary to show that the speech created a clear and present danger of bringing about the substantive evil within the power of the legislature to prevent. They would apply the test indiscriminately to federal and state legislation and would not distinguish between a situation where the legislature framed a statute in such terms as to directly inhibit speech and one where the limitation upon speech was only incidental to the enforcement of the statute. These views were not entirely accepted by a majortiy of the Court during the time Mr. Justice Holmes was on the Bench. Subsequent cases, however, have tended to adopt the Holmes-Brandeis philosophy as the better view. See Dennis v. United States, 341 U.S. 494, 505-507 (1951); Gorfinkel and Mack, *Dennis v. United States And the Clear And Present Danger Rule*, 39 CALIF. L. REV. 475 (1951).

76. See, *e.g.*, United States v. Mesarosh, 13 F.R.D. 180, 187 (W.D. Pa. 1952). *But cf.*, United States v. Schneiderman, 102 F. Supp. 87, 96 (S.D. Cal. 1951). By equating the specific intent element with proof of a "clear and present danger" of bringing about the substantive evil (attempt at violent overthrow), the court in the *Schneiderman* case in effect required that the existence of a "clear and present danger" be alleged in the indictment.

77. See United States v. Flynn, 103 F. Supp. 925, 928-929 (S.D.N.Y. 1951).

78. Dennis v. United States, 341 U.S. 494, 514-15 (1951).

79. This was achieved by the Court's adoption of the Hand interpretation of the test, emphasizing the gravity of the evil involved rather than the imminence or ability of the accused's conduct to bring it about.

80. Dennis v. United States, 341 U.S. 494, 509 (1951).

81. The terms "clear" and "present" are independent of each other and have separate meanings. "Clear" implies that the danger must reasonably be expected as a result of the utterances. "Present" refers to the time element; when the evil may reasonably be expected. It connotes an imminent or immediate danger. The requirements of the concept "present" were most affected by the Hand interpretation of the rule. It

Under this variation of the test the greater the evil sought to be suppressed by the convictions the less the degree of probability required.

Applying the test in the *Schneiderman* case, the court stated that where the doctrine is invoked to test whether a statute is constitutionally applied, the clear and present danger test furnishes the standard by which to guage the sufficiency of the evidence as to the state of mind or intent of the accused.[82] The court held that proof of unlawful intent was equivalent to proof of clear and present danger. It refused to make an independent finding, based on the extrinsic circumstances and the evidence, of whether or not a clear and present danger of overthrow of the Government actually existed. In effect the question of clear and present danger was deemed a matter of fact to be decided by the jury rather than a matter of law for the court.[83]

In the *Frankfeld* case the court was of the opinion that the clear and present danger test was not applicable.[84] It expressed in no uncertain terms its distrust of the doctrine in cases involving the national security.[85] The court emphasized that this was a prosecution for conspiracy. It relied upon the language of the concurring opinion of Mr. Justice Jackson in the *Dennis* case[86] to the effect that conspiracy may be punished without charging that the crime which is its object has given rise to a clear and present danger.[87] In the opinion of the court, the question presented was not one of freedom of speech or of the right to organize for proper political purposes, but went to the power of the Government to outlaw and punish conspiracies whose purpose is to overthrow the Government itself by force and violence.[88]

The court in the *Mesarosh* case indicated its willingness to follow the manner in which the clear and present danger issue was treated in the *Dennis* case.[89] It took judicial notice of the times and world condi-

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appears that under this interpretation, where the substantive evil is very grave, it need only be shown that the speech used possibly or probably could produce the evil. Gorfinkel and Mack, *supra* note 75, at 480.

82. United States v. Schneiderman, 106 F. Supp. 906, 923 (S.D. Cal. 1952).

83. See the argument on this point in Joint Opening Brief for Appellants, pp. 191-205, Yates v. United States, 225 F.2d 146 (9th Cir. 1955).

84. Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952).

85. Of the defendants' argument that as construed by the United States Supreme Court, the statute required that there be a clear and present danger that the accused's conduct would bring about the substantive evil, the court said: ". . . it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in clear and present danger. . . ." *Id.* at 684.

86. Dennis v. United States, 341 U.S. 494, 561 (1951).

87. "Having held that a conspiracy alone is a crime and its consumation is another, it would be weird legal reasoning to hold that Congress could punish the one only if there was 'clear and present danger' of the second." *Id.* at 576.

88. Frankfeld v. United States, 198 F.2d 679, 682 (4th Cir. 1952).

89. See United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952).

tions and concluded that, as of the date of the finding of the indictment, they had not changed so as to preclude a like determination but rather more strongly supported the court's finding of a clear and present danger.[90]

Both the trial court and the court of appeals in the *Flynn* case proceeded on the basis that the clear and present danger concept, as defined in the *Dennis* case, required no more than that the setting in which the defendants conspired be such as to lead reasonably to the conclusion that their teachings may result in an attempt at such overthrow.[91] It relied heavily upon Judge Hand's interpretation of the test, stressing the probability of a crisis at some future date which might present an opportunity for the defendants to make an attempt at violent overthrow.

The defendants in the *Fujimoto* case objected to the court's finding of a clear and present danger on the ground that it had no basis in fact.[92] It was there contended that under the holding in *Dennis* such a finding is not justified unless the jury first find under proper instructions, as a matter of fact, that the advocacy of the accused was in language of incitement reasonably and ordinarily calculated to incite persons to action. In refusing to submit the question of "incitement" to the jury, the court not only deprived the defendants of a trial of one of the elements essential to the offense, but it also nullified the court's finding that, as a matter of law, the danger was a sufficient one.[93]

From this review of the cases it is apparent that the lower federal courts are in as much a state of confusion and disagreement as to the proper application of the clear and present danger test in Smith Act prosecutions as was the Supreme Court in the *Dennis* case. In view of the requirement that it be shown that the defendants conspired with the intent to cause violent overthrow as speedily as circumstances would permit, it is questionable whether the doctrine of clear and present danger, as interpreted in *Dennis,* serves any independent purpose.[94] If the jury finds the defendants guilty under a proper indictment, including all the elements found to be essential to conviction by the trial court in the *Dennis* case, certainly the court would not be justified in finding thereafter that the requisite "danger" did not exist. A finding that the accused intended to cause violent overthrow of government as speedily as circumstances would permit would seem to be quite sufficient to

90. *Id.* at 187.
91. United States v. Flynn, 216 F.2d 354 (2d Cir. 1954).
92. Joint Opening Brief for Appellants, pp. 270-286, Fujimoto v. United States, *appeal docketed,* No. 13915 9th Cir.
93. *Id.* at 283.
94. See Corwin, *Bowing Out "Clear And Present Danger,"* 27 NOTRE DAME LAW. 325, 358-59 (1952).

satisfy the requirements of the test as defined by Mr. Chief Justice Vinson and Judge Hand.[95] A mechanical "finding" that a clear and present danger exists after a verdict of guilty has been returned affords no additional justification for restricting first amendment freedoms.

The conflicting views in the lower courts as to the essential elements of the crime which the Smith Act proscribes, together with the lack of any certainty as to what conduct will subject one to its sanction point to the need for the Supreme Court to reconsider these issues. It is questionable also whether the manner in which the guilt of the accused under the statute has been determined conforms to the normal standards of proof in criminal prosecutions which impinge constitutionally protected rights. A proper balance between national security and individual freedoms cannot be obtained by dismissing the claims of constitutional protection because of the odiousness of the ideas expressed. It is submitted that the Hand-Vinson interpretation of the clear and present danger test eliminates its former usefulness as a standard for establishing the limits of governmental action in the area of speech. The trial court's interpretation of the statute in the *Dennis* case and its findings as to the essential elements for conviction should be held as furnishing the minimum standard in cases subsequently arising under the act.

INADEQUACIES OF JOINDER PROVISIONS IN INDIANA AND THE NEED FOR REFORM

Recent legislative and judicial action relating to the question of what parties and causes may be properly combined in one action suggests that the inveterate joinder problem remains unsolved.[1] In Indiana

95. See note 81 *supra*.

1. Blume, *Free Joinder of Parties, Claims, and Counterclaims,* JUDICIAL ADMINISTRATION 13 (A.B.A. MONOGRAPH; Series A, No. 11, 1941); Brandeis, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N. C. L. REV. 1 (1946); Dutcher, *Joinder of Parties and Action,* 29 IOWA L. REV. 3 (1943); Ruddy, *Joinder of Parties, Claims,* and *Counterclaims,* 1 J. OF THE MO. BAR 85 (1945); Notes, 4 ALA. L. REV. 303 (1952), 3 GEORGIA BAR J. 54 (1941); Comment, 43 ILL. L. REV. 41 (1948); 51 MICH. L. REV. 1068 (1952), 25 WASH. L. REV. 92 (1950).

Joinder is the problem encompassing the scope of a judicial action, *i.e.,* what subjects and parties may be involved in one suit. A complete analysis of this problem would also consider impleader, intervenor, cross claim, and counterclaim practices. Because of the limits of this Note only parties and causes will be directly analyzed.

Historically, joinder is essentially a pleading problem—what a complaint may contain; but more recently it is a trial problem—what causes may be litigated together and what parties may be joined in one action. Major attention in this Note is directed toward the latter phase of the problem. The historic pleading aspect must not be completely lost sight of, for it is an important factor accounting for the present problem.