

MR. JUSTICE CLARK, dissenting.

The petitioners, principal organizers and leaders of the Communist Party in California, have been convicted for a conspiracy covering the period 1940 to 1951 in which they ^{were} engaged with the defendants in Dennis v. United States, 341 U.S. 494 (1950). The Dennis defendants, named as co-conspirators but not indicted with the defendants here, were convicted in New York under the former conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U.S.C. ^(1946 ed.) § 11. They have served or are now serving prison terms as a result of their convictions.

The conspiracy charged here is the same as in Dennis, except that here it is geared to California conditions, and brought, for the period 1948 to 1951, under the general conspiracy statute, 18 U.S.C. § 371, rather than the old conspiracy section of the Smith Act. The indictment alleges a conspiracy to violate two sections of the Smith Act: (1) to teach and advocate the violent overthrow of the Government of the United States, and (2) to organize in California through the creation of groups, cells, schools, assemblies of persons, and the like the Communist Party, a society which teaches and advocates violent overthrow of the Government.

INSERT

I would affirm the convictions here. However, the Court has freed five of the convicted petitioners and ordered new trials for the remaining nine. As to the five, it says that the evidence is "clearly insufficient." I agree ~~that~~ with the Court of Appeals, the District Court, and the jury that the evidence ^{shows} ~~of~~ ^{and} ~~their~~ ^{is} guilt ~~is~~ beyond a reasonable doubt. ^{*} It paralleled that in Dennis and Haynes and was equally as strong. In any event, this Court should not acquit ~~them~~ ^{anyone} here. In its long history I find no case in which an acquittal ^{solely} ~~on the~~ ~~facts~~ ^{solely on the facts} has been ordered by this Court. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held ~~and~~ covering the same charges. It may be - although after today's opinion ~~it is~~ somewhat doubtful - that under the new theories announced in Smith Act prosecutions that sufficient evidence might be available on remand. To say the least, the government should have an opportunity to present its evidence under these changed conditions.

States, The conspiracy ~~therefore~~ ^{same group of} includes the identical defendants in ^{as}

the Dennis case, ~~though they are not indicted here~~, because all were

~~members of the same group~~, and though petitioners ^{here} occupied a lower

^{, nevertheless,} echelon in party hierarchy, they served in the same army and were engaged

in the same mission. The convictions here were based upon evidence

closely paralleling that adduced in Dennis and in United States v. Flynn,

216 F.2d 354 (C. A. 2), ^{both of which} ~~which likewise~~ resulted in convictions. This

Court laid down in Dennis the principles governing such prosecutions and

they were closely adhered to here, although the nature of the two cases

did not permit ~~of~~ identical handling. INSERT

I CANNOT

~~Not~~ agree that half of the indictment against the remaining

^{should} nine petitioners be quashed as ^{being} barred by ^{the statute of} limitations, I agree with my

brother Burton that the Court has incorrectly interpreted the term "organize"

as used in the Smith Act. The Court concludes that the plain words of the

Act, namely, "whoever organizes or helps or attempts to organize any

society, group or assembly of persons" embodies only those "acts

entering into the creation of a new organization." As applied to the Communist

Party the Court holds that it refers only to the reconstitution of the Party

in 1945 and ~~that~~ ^{a part of} the prosecution is, therefore, barred by the statute of limitations. This frustrates the purpose of the Congress for the Act was passed in 1940 primarily to curb the growing strength and activity of the Party which was started in 1917. ^{2/} Under such an interpretation all prosecution would have been barred at the very time of the adoption of the Act. If the Congress had been concerned with the initial establishment of the Party it would not have used the words "helps or attempts" nor the phrase "group or assembly of persons." It was concerned with the new Communist fronts, cells, schools, and other groups, as well as assemblies of persons, which were being created ^{nearly} ~~most~~ every day under the aegis of the Party to carry on its purposes. This is what the indictment here charges and the proof shows beyond doubt, ^{was done} The decision today prevents for all time any prosecution of ^{of} the Party ^{members} under this section of the Act.

While ^{the} ~~this~~ holding ^{of the Court} requires a reversal of the case, ^{and a retrial,} the Court very properly ^{considers} ~~takes up~~ the instructions given by the trial judge. ~~since there must~~ ^{be a retrial.} I do not agree with the conclusion of the Court ^{regarding} ~~as to~~ the instructions, but I am highly pleased to see that it disposes of this problem so that on the new trial instructions will be given that will at least meet the views of the Court. I have studied ^{the} ~~over~~ this section of the opinion, ^{concerning} ~~and~~ the instructions.

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concludes that the charge as given was insufficient. I thought that

Dennis merely held that a charge was sufficient where it requires a

finding that "the party advocates the theory that there is a duty and

necessity to overthrow the Government by force and violence, . . . not

as a prophetic insight or as a bit of . . . speculation but as a program

for winning adherence^{ts} and as a policy to be translated into action" as

soon as the circumstances permit. I notice however that to the majority ^{341 U.S. at 546-547 (concurring opinion).} "The

essence of the Dennis holding was that indoctrination of a group in

preparation for future violent action, as well as exhortation to immediate

action, by advocacy found to be directed to 'action for the accomplishment'

of forcible overthrow, to violence 'as a rule or principle of action,'

~~by advocacy found to be directed to~~

and employing 'language of incitement,' id., at 511-512, is not

constitutionally protected" I have read this statement over and

over but do not seem to grasp its meaning for I see no resemblance

between it and what the ^{respected} ~~beloved~~ Chief Justice wrote in ^{Dennis} ~~that~~ case, nor do

I find any such theory in the ^{opinions.} ~~concurring~~ As I see it the trial judge charged

To the majority,

~~Here~~ "The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, by advocacy found to be ~~direct~~ as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action', and employing 'language of incitement' id at 511-512, ~~is~~ ^{I see} is not constitutionally protected..." Those read this ~~was~~ statement over

~~but evidently do not understand its meaning for their it has~~
~~and over still I don't seem to comprehend it.~~

~~no resemblance what to~~
~~everyday language. This difficult to meet something one does not~~
~~understand but~~ and I doubt if the beloved Chief Justice who

~~wrote Dennis would understand it either. What the majority seems to~~

~~say~~ do is to ~~recognize this~~ ^{the} what the beloved Chief Justice wrote ~~said~~ in that case. Nor do I find it in the concurrences. I thought

that Dennis ~~held~~ ^{found} in the words of a concurrence, that "the Smith Act ~~act~~ a charge was sufficient where it required Party advocates merely held that ~~an offense under the Smith Act is complete where~~ a finding that

"the Party advocates the theory that there is a duty and necessity to overthrow the government by force and violence....not as a prophetic insight or as a bit of...speculation

but as a program for winning adherents and as a policy to be translated into action" ^{as soon as} ~~where~~ ^{when} circumstances permit. ~~that is~~ ^{that is} in essence what the trial judge charged here. ^{Apparently} ~~the Court is~~

puzzled as to why the judge did not give the ^{Dennis} charge in haec verba as was requested by both the prosecution and defense. ~~this is~~

It concludes that there must be differences ^{between the two} ~~in~~ ^{else} that course would have been followed. ~~For me to attempt an explanation~~

~~whether there are differences would lead to~~ To my mind there may be distinctions between the ~~two~~ ^{charges} but they are ~~little~~ without material differences. I find as the majority intimates, that they are for me too. ~~As the majority says they are~~ "often" subtle and difficult to grasp."

In view of the result reached ~~as other~~ regardless of the charge I see no reason to engage in an exercise in semantics with the majority. ^{about this phrase, the case.} Certainly if I had been sitting at trial I would have given the Dennis charge, not because it is ^{the better} ~~more~~ ^{and} more correct, ^{the stamp of this Court.} but simply because it had been approved ~~here~~. One would not think

Now can I agree that lack of the indictment ~~to~~ against the remaining nine petitioners is justified as being barred by limitation. I agree with my brother Burton that the Court has incorrectly interpreted the term "organize" as used in the Smith Act. The Court concludes that the plain words of the Act, namely "whoever organizes or helps or attempts to organize any society, group or assembly of persons" embodies only those "acts entering into the creation of a new organization". As applied to the Communist Party, the Court holds that it refers only to the reconstitution of the Party in 1945 and that the prosecution is, therefore, barred by the statute of limitations. This frustrates the purpose of the Congress for the Act was passed ^{in 1940} primarily ~~to curb the growing strength and~~ ^{to curb the growing strength and} activity of the Party which was started in 1917^{*}. Under such an interpretation ^{all} ~~any~~ prosecution would have been barred at the very time of the adoption of the Act. If the Congress had been concerned with the initial establishment of the Party it would not have used the words "helps or attempts" nor the phrase "group or assembly of persons." It was concerned with the new communist fronts, cells, ~~groups~~, schools and other groups, as well as assemblies of persons, which were being created most every day under the aegis of the Party to carry on its ~~real~~ purposes. This is what the indictment here charges and the proof shows beyond doubt. The decision today prevents for all time any prosecution of the Party under this section of the Act.

The Court also finds fault with the ^{instructions} of the trial judge. Sprinkle, the "artillery of words" in his fifteen page section of the opinion ~~does not~~ leaves me confused as to just what the majority feels the charge ^(OVER) given is ~~more~~ ^{insufficient} given he ~~they~~ ^{they} ~~seems to~~ compare the charges with those given by the trial judge in Devinis, supra. ~~They~~ ^{They} find that here ~~they~~ ^{the judge} failed to include words such as "incite", "action" or "call for action" phrases such as "call for action" and "as a rule or principle of action." ~~It~~ ^{There} ~~can be no doubt~~ ^{this} reversal leaves no doubt but that the trial judge would have been better advised

I should perhaps add that
I am in agreement with the
Court in its holding that petitioner
Schneiderman can find no aid
from the doctrine of collateral estoppel.

in essence all that was required under the Dennis opinions, whether ^{one} you ~~you~~ take ^{the mean} that of the Chief Justice or of the concurrences in the judgment.

Apparently what disturbs the Court now is ~~the reason why~~ ^{THAT} the trial judge

here did not give the Dennis charge. ^{ALTHOUGH} Both the prosecution and the

defense asked that it be given in haec verba. Since ~~the trial judge~~ ^{HE} refused

to grant these requests I suppose the majority feels that there must be

some difference between the two charges, else the one that was given in

Dennis would have been followed here. While there may be some dis-

tinctions between the charges, as I view them they are without material

differences. I find, as the majority intimates, that they are too

"subtle and difficult to grasp."

However,

In view of the fact that the case must be retried, regardless of

the disposition made here on the charges, I see no reason to engage in what

therefore becomes an exercise in semantics with ~~the~~ the majority about this

phase of the case. Certainly if I had been sitting at trial I would have

given the Dennis charge, not because I consider it any more correct but

Perhaps this approach is too practical. But
simply because it had the stamp of approval of this Court. ^{JUDGE} ~~Upon the new~~

NOW practicality
~~I AM SURE THE TRIAL JUDGE REALIZES THAT OFTEN IT PAYS.~~
~~trial the judge will have the benefit of this experience and, I am sure, will~~

~~then give the charge that has now received the blessing of the Court on two~~

~~occasions.~~