CIVIL LIBERTIES *versus* THE SMITH ACT

On June 4th, 1951, the U.S. Supreme Court upheld, in a 6-2 decision, the constitutionality of sections 2 and 3 of the Smith Act which make it a crime to teach and advocate, or to conspire to teach and advocate, the overthrow of the government by force. Chief Justice Vinson wrote the majority opinion; Justices Frankfurter and Jackson wrote concurring opinions. Justices Douglas and Black dissented.

This leaflet sets forth the American Civil Liberties Union's position both on the Smith Act itself and on the Supreme Court's decision.

The ACLU and the Smith Act, 1940-1951

The ACLU attacked the Smith Act of 1940 when it was first proposed as legislation. It fought the law in 1942 when it was first applied to the "Trotskyites", in 1943 when it was used in the mass "sedition" trial of alleged Nazi sympathizers, and finally in 1948 when it was applied against eleven leaders of the Communist Party.

The Union took its stand in each of these cases not because it favored "Trotskyism", Nazism or Communism, but because it believed that "Congress shall make no law . . . abridging the freedom of speech. . . ." *(from the First Amendment to the Constitution.)* The ACLU held the Smith Act (which punishes advocacy and teaching—*not acts* of espionage, sabotage or revolution) to be unconstitutional.

The ACLU and the Smith Act, July 1951

Now that the Supreme Court has upheld the law, what is the Union's position?

1. The ACLU disagrees fundamentally with the Supreme Court's 6-2 decision. The Union, as always, opposes this law because it infringes upon the rights of free speech guaranteed by the First Amendment and because it is dangerously unwise legislation.

2. The Union, believing wholeheartedly in the American system of law, accepts the decision as part of the present law of the land. But the decision is no barrier to further legal testing of the Act's constitutionality, or to attacks upon its wisdom.

3. The ACLU stands ready to help obtain an overruling of the June 4th decision by participating independently (through briefs and legal argument) in further Smith Act cases, when they reach the Supreme Court.

4. The Union also stands ready, in further cases at all court levels, to help insure that (a) the limits of the Supreme Court's constitutional approval are not overstepped, and (b) the defense is allowed to present evidence, and present it to the jury, as to whether there is a *clear and present danger* of the advocacy's leading to the commission of illegal acts.

5. The ACLU will urge the repeal of sections 2 and 3 of the Smith Act, and any similar state or local legislation; and will oppose any new laws of like nature. It will stress that, not only Black and Douglas, but Frankfurter and Jackson expressed strong doubts as to the wisdom of such legislation.

6. The Union will work with other non-Communist organizations in educating the American people as a whole to support the above positions and actions. The ACLU will stress the clumsy ineffectiveness of such laws in coping with the real problem of national security. It will fight vigilantism and any actions which go beyond the scope of the Supreme Court decision.

The Constitutional Points

The ACLU disagrees with the Supreme Court's majority on the following constitutional points:

1. The Court held that while *discussion* of violent overthrow of the government is permissable, *advocacy* is not. The ACLU believes the distinction is not practical, and that it will inevitably infringe on free speech. To quote Max Lerner, it means that "if you wear a cap and gown and turn around in a swivel chair, you can discuss Marx and Lenin, but if you get serious and go into the market-place and hawk your ideas, it's no go."

2. The Court has abandoned the "clear and *present* danger" test of Justice Holmes for one of clear and *probable* danger. And the majority did not meet Justice Douglas' argument "that it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech."

3. The Court ruled that the question of whether a clear and present (or probable) danger exists is a matter of law for the judge and not a matter of fact for the jury. The Union rejects this view; it believes this question should be decided by the common sense and judgment of the members of the community who form the jury; decision by a judge takes it into a realm of legal abstraction where it does not belong in the tradition of our law.

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Pertinent quotations from concurring and dissenting opinions, and other material, will be found inside.

July 1952

ON THE CONSTITUTIONALITY OF THE SMITH ACT

Discussion versus advocacy

"These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date! The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids." *(from Justice Black's dissenting opinion)*

Clear and present—or probable—danger

"But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established 'clear and present danger' rule . . . The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk . . . *(Justice Black)*

Jury determination of the fact of danger

"I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce v. United States* to be a jury question. . . . That is the only time the Court has passed on the issue. None of our other decisions is contrary. Nothing said in any of the nonjury cases has detracted from that ruling." *(from Justice Douglas' dissenting opinion)*

ON THE UNWISDOM OF THE SMITH ACT

"While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be held unconstitutional, I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. . . . No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. . . . The Communists are not building just for today—the rest of us might profit by their example." *(from Justice Jackson's concurring opinion)*

"The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . . So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness'. Such a doctrine waters down the First Amendment to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection." *(Justice Black)*

"The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. . . . Vishinsky wrote in 1948 in The Law of the Soviet State, 'In our state, naturally there can be no place for freedom of speech, press, and so on for the foes of socialism.' Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded." *(Justice Douglas)*

"The wisdom of the assumptions underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. . . . Civil liberties draw at best only limited strength from legal guarantees. Preoccupation by our people with the constitutionality, instead of with the wisdom of legislation or of executive action, is preoccupation with a false value. . . . When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. . . . The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcized. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its uncertitudes. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved." *(from Justice Frankfurter's concurring opinion)*

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from "Six Men Amend the Constitution", an editorial in the *St. Louis Post Dispatch*

"Jefferson, Madison, Mason and the others who started the weak little republic 160 years ago were not afraid of the right to inquire and expound and advocate. By formal amendment these wise men and their fellow citizens, with great deliberation, wrote into the first article of the Bill of Rights the guarantee that 'Congress shall make no law abridging the freedom of speech.'

"Jefferson, the man who wrote the Declaration of Independence, said: 'If there by any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments to the safety with which error of opinion may be tolerated where reason is left free to combat it.'

"What a strange and distressing contrast a century and a half later present. By now the feeble little nation has grown to be the strongest power in all the world. Yet the successors of Jefferson and his compatriots in high office are not merely less bold. They even retreat in fear of the free exchange of ideas.

"This is the context in which the Supreme Court decision in the case of the Communist leaders must be set. Chief Justice Vinson, with the concurrence of Justices Reed, Frankfurter, Jackson, Burton and Minton, leads the gravest departure from the guarantee of freedom of speech in our history."

from "Miss Liberty's Bad Day in Court", an editorial in the *New York Post*

"No decision could be less American in spirit than that of the court majority. It will damage the democratic cause at home and abroad far more than it will inconvenience the Communists. It comes at a moment when the U. S. Communist movement is weaker than at any time in the last two decades. Most of the Communist false fronts have collapsed; the Communist defense of aggression in Korea has opened the eyes of thousands of innocents; the Communist daily newspaper confesses that its total circulation throughout the U.S.A. is 14,000. The effect of the court's decision is to suggest that America really fears the pro-Soviet propaganda spread by this tiny, battered band of Kremlin fans.

"At a time when we are raising the banner of freedom throughout the world, our highest tribunal has meekly surrendered to McCarthyism and chipped away at our liberties.

"The judges could have affirmed our national pride and confidence in our free institutions. Instead they displayed the timidity of scared politicians. The local Communists have lost a legal skirmish but the Cominform propagandists have won a big battle in the world-wide war of ideas."