SUBVERSIVE ACTIVITIES LEGISLATION— THE SUPREME COURT'S SUPERVISORY ROLE

United States Supreme Court decisions in 1964 and 1965 indicate that the Court will be less tolerant in its review of congressional legislation in the field of subversive activity. This further emphasizes an emerging judicial trend of close supervision over legislative restrictions upon personal liberties.[1] Where such liberties are sought to be regulated, the Court will clearly require Congress or any legislature to narrowly draft statutes and gear the legislative sanctions to the precise evils which it has the power to regulate. In short, legislative "painting with a broad brush" will not be tolerated. For the Court has announced that:

> (E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[2]

EARLIER DECISIONS

A. Subversive Activities Cases

The real importance of these recent decisions is the extent to which they modify the Supreme Court's earlier practice of giving the statute every benefit of the doubt. A review of these earlier Supreme Court decisions reveals that the Court engaged to some extent in a kind of judicial rewriting in order to save subversive activities legislation. In *Dennis v. United States,*[3] some of the top Communist Party leaders were successfully convicted in the lower court for violating the *advocacy clause* of the Smith Act of 1940.[4] That clause provided:

> Sec. 2. (a) It shall be unlawful for any person—(1) to knowingly or willfully advocate, . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, ...
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> Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title.

In reviewing the petitioners' claim that the statute prohibited constitutionally protected speech on political subjects in violation of the First Amendment, the Court narrowly construed the statute. It read into the statute a congressional intent to outlaw only "advocacy" which incited others to a course "of action" (rather than mere "advocacy in the realm of ideas")[5] "with (specific) intent" to accomplish the illegal purpose,[6] "as

[1] See Cox v. State of Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1962).

[2] Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964).

[3] 341 U.S. 494 (1951).

[4] 18 U.S.C. §§10, 11 (1946), as amended; 18 U.S.C. §2385.

[5] Dennis v. United States, 341 U.S. 494, 502 (1951).

[6] *Id.* at 499, 500.

speedily as circumstances would permit".[7] The Court then concluded that such speech presented a "clear and present danger of (bringing about) the substantive evil (in this case, the threat to the national security) which (Congress) had the right to prevent."[8] As to the argument that such a construction of the statute would present constitutional questions of lack of notice and vagueness, the Court noted that the jury under proper instructions found that these petitioners had in fact violated the statute which thus disposed of their contention.[9] But in a later case, *Yates v. United States*,[10] the Court reversed the conviction of several other Communist Party members under the *advocacy clause* because the trial court failed to properly instruct the jury that the statute only punished advocacy as a course of action.[11]

In *Scales v. United States*,[12] the petitioner was convicted in the lower court for violating the *membership clause* of the Smith Act of 1940.[13] That clause made it a felony to acquire or hold knowing membership in any organization which advocated the overthrow of the Government of the United States by force or violence. In reviewing a claim that the statute unconstitutionally infringed petitioner's freedom of political expression and association, the Court again narrowly construed the clause under consideration, reading into the membership clause a congressional intent to punish only knowing "active" membership in such an organization "with specific intent" to bring about violent overthrow of the Government "as speedily as circumstances would permit."[14] Simply proving mere membership in a prohibited organization was insufficient for punishment under this clause.[15] Thus the Court imposed a strict burden of proof on the Government; to successfully convict under the clause, the Government had to prove 1) illegal party advocacy and 2) active membership by the defendant in the party with specific intent to bring about the violent overthrow of the Government.[16] Failure to produce sufficient evidence to support each of these requisites would result in a reversal.[17] These essential elements had to be written into the statute to avoid a "close constitutional question." This was recognized by Mr. Justice Black, who in dissenting from the majority opinion in the *Scales* case, insisted that:

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[7] *Id.* at 510.

[8] *Id.* at 515.

[9] *Id.* at 515–17.

[10] 354 U.S. 298 (1961).

[11] *Id.* at 324–27.

[12] 367 U.S. 203 (1961).

[13] 18 U.S.C. §2385 (1958).

[14] 367 U.S. 203, 220–22 (1961).

[15] Noto v. United States, 367 U.S. 290 (1961).

[16] Scales v. United States, 367 U.S. 203, 220 (1961). See generally, 23 Ohio S.L.J. 762 (1962).

[17] Noto v. United States, 367 U.S. 290, 299 (1961).

> . . . in an attempt to bring the issue of the constitutionality of the membership clause of the Smith Act within the authority of the *Dennis* and *Yates* cases, the Court has practically *rewritten* the statute under which petitioner stands convicted by treating the requirements of "activity" and "specific intent" as implicit in the words that plainly do not include them.[18]

In commenting on the *Scales* case, one writer has said:

> The "active" requirement was . . . *written* into the statute because there would be constitutional problems which could be avoided by creating this requirement. . . . The *Scales* decision demonstrates the lengths to which the Court will go to save a congressional statute from unconstitutionality.[19]

B. Bill of Attainder Cases

A review of other earlier Supreme Court cases reveals that the Court also departed from established precedents when subsversive activities legislation was attacked as violating the bill of attainder clause. The words of that clause seem clear: "No bill of attainder . . . shall be passed (by the Congress)."[20] History will disclose that these words were placed in the Constitution by the Framers to prohibit the legislature from punishing individuals or groups by *legislative fiat*.[21] Although the bill of attainder clause had not been frequently invoked prior to 1950, it had received a judicial interpretation which best served to carry out the purpose for which it was adopted. In *Cummings v. Missouri*,[22] a priest was convicted under a Missouri statute for teaching and preaching without taking a loyalty oath that he had never been in sympathy with the South. In holding this provision to be an unconstitutional bill of attainder, the Court observed that it was "legislation which inflicts punishment without a judicial trial."[23] In *Ex parte Garland*,[24] the Court found that a federal act requiring all attorneys practicing in the federal courts to take an oath similar to the one in the *Cummings* case was also a bill of attainder. The Court said that:

> The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law. . . . All enactments of this kind . . . are subject to the constitutional inhibition against the passage of bills of attainder.[25]

In 1946 in *United States v. Lovett*,[26] the Court held that Section 304 of

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18 Scales v. United States, 367 U.S. 203, 260 (1961). tI should be noted that Mr. Justice Black also dissented from the majority opinion in the *Dennis* case, although he failed there to mention the fact that the majority was judicially rewriting the statute.

19 31 U. Cin. L. Rev. 161 (1962).

20 U.S. Const., Art. I, §9, cl. 3.

21 72 Yale L.J. 330 (1962–1963).

22 71 U.S. (4 Wall.) 277 (1867).

23 *Id.* at 323.

24 71 U.S. (4 Wall.) 333 (1867).

25 *Id.* at 377.

the Urgent Deficiency Appropriation Act of 1943 [27] constituted a bill of attainder. This act which prohibited payment of any of the appropriations after November, 1943, to Lovett and certain other government employees was passed as a result of charges made by the Chairman of the House Committee on Un-American Activities that the employees were affiliated with Communist-front organizations. In overturning the act as a bill of attainder, the Court stated:

> Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. . . .[28]

In light of these precedents which so facilitated the underlying purpose of the bill of attainder clause, it seems clear that the Court departed from them in *American Communications Association v. Douds*.[29] The *Douds* case involved the validity of Section 9(h) of the Taft-Hartley Act,[30] which conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of its officers attesting that they were not members of or affiliated with the Communist Party. In holding that Section 9(h) was not a bill of attainder, the Court distinguished the *Cummings, Garland,* and *Lovett* cases. The Court stated that:

> In (those cases) the individuals involved were in fact being punished for *past actions;* whereas in this case *(Douds)* they are subject to possible loss of position only because there is a substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future conduct. . . . Section 9(h) is intended to prevent future action rather than to punish past actions.*[31]

In making this distinction between the *Douds* case and the earlier cases, the Court thus held that the bill of attainder clause was violated only when the legislators atempted to punish an individual or group for *past actions.* In commenting on the departure of the *Douds* decision from the established precedents, one writer has stated:

> From the early days of the Constitution through the decision of *United States v. Lovett* in 1946, the Court treated the bill of attainder clause as a blanket prohibition of all forms of legislative punishment of specific groups. Since the decision in *American Communications Ass'n v. Douds* in 1950, however, the Court has espoused the view that the historical roots of the bill of attainder proscription limit its scope to a narrowly restricted and technically defined class of legislative acts. . . . *Douds*

[26] 328 U.S. 303 (1946).

[27] 57 Stat. 431, 450 (1943).

[28] 328 U.S. 303, 315-16 (1946).

[29] 339 U.S. 382 (1950).

[30] 61 Stat. 136, 146 (1940). 29 U.S.C. (Supp.III) §§141, 159(h), amending the National Labor Relations Act of 1935, 49 Stat. 449, 29 U.S.C. §151.

[31] American Communications Ass'n. v. Douds, 339 U.S. 382, 413 (1950).

> emphasized that historically bills of attainder inflicted punishment for past acts rather than future.[32]

Another writer, speaking on the same subject, said:

> The language of *Cummings* decision seems to state that bills of attainder always operate only against past conduct, this is not true historically. . . . There is no reason why it ought to be true since the real objection to such bills is how they operate rather than the conduct they operate against. Indications are, however, that the Supreme Court presently believes that only retrospective bills can be attainders.[33]

The *Douds* case also indicated that in order for legislation to be held in violation of the bill of attainder clause such legislation not only must punish for past actions, but also must leave no means available to the person to escape from its prohibition. The Court stated:

> Here the intention is to forestall future dangerous acts; there is no one who may not, *by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit.*[34]

By so narrowing the scope of the clause, the bill of attainder prohibition was rendered lifeless in subsequent cases, especially those involving subversive activities legislation. In 1962 it was observed that "Since (*Douds*), the Supreme Court has not condemned any statute as a bill of attainder, although the issue has been raised at least twelve times." [35]

It would appear that the reason for the Supreme Court's willingness to engage in judicial rewriting and to depart from established precedent in order to save subversive activities legislation from constitutional defect was a recognition of the strong congressional interest involved—that of the nation's security.[36] The Court could not help but take judicial notice of the fact that as a result of a long and intensive investigation Congress had discovered that there existed a world-wide Communist movement, foreign dominated, which was preparing for the overthrow of the existing Government of the United States. Moreover, Congress had recently passed legislation which was designed to prevent that movement from accomplishing its purpose." [37] With such an important interest at stake, it is under-

[32] 72 Yale L.J. 332–33, 336–37 (1962–1963).

[33] 1961 Wash. U.L.Q. 413–14.

[34] American Communications Ass'n. v. Douds, 339 U.S. 382, 414 (1950).

[35] 72 Yale L.J. 335 (1962–1963).

[36] See, e.g., 15 U.Fla.L.Rev. 381 (1962–1963). See also, 72 Yale L.J. 363 (1962–1963).

[37] 64 Stat. 978 (1950); 50 U.S.C. §781. Section 781 provides in pertinent part:

> Sec. 781. Congressional finding of necessity.
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> As a result of evidence adduced before various committees of the Senate and House of Representatives the Congress finds that
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> 1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose is . . . to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization . . . ,
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> 4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country . . . ,
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> * * *
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> 6) The Communist-action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Com-

standable why the Court over a period of fourteen years balanced heavily in favor of the governmental interest over that of the individual's personal liberties in cases attacking the constitutionality of such legislation. Yet, on the other hand, the Court over the same period in reviewing state legislation (which was not concerned with the national security and subversive activity) infringing personal liberties balanced heavily in favor of the individual's liberties.[38] Thus it appears that the Court had developed two standards by which it reviewed legislation when under constitutional attack.

RECENT DECISIONS

The emerging trend of the Court, however, seems to demand application of a uniform standard whether it is reviewing subversive activities legislation or any other legislation claimed to be in violation of the Constitution. Thus subversive activities legislation found to be overly-broad in infringing upon personal liberties will not be judicially rewritten; nor will the purpose of the bill of attainder clause be subverted when such legislation is found to be in violation of that clause. The recent Supreme Court decisions in this field seem to reveal such a new trend. In *Aptheker v. Secretary of State,*[39] the petitioners had their passports revoked under Section 6 of the Subversive Activities Control Act of 1950,[40] which made it a crime for a member of a Communist organization under final order of the Board to register, to apply for or use a passport. In holding this section overly broad in its limitation on the Fifth Amendment right to travel, the Court said:

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munist movement by bringing about the overthrow of existing governments by any available means, including force if necessary . . . ,

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15) . . . The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States . . . , and make it necessary that Congress . . . enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

[38] In NAACP v. Alabama, 357 U.S. 449 (1958), a State registration statute requiring the NAACP to produce all of its records, including its membership lists, was held unconstitutional. In overturning the statute, the Supreme Court stated "the State failed to show a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." 357 U.S. at 466. Also, in Shelton v. Tucker, 364 U.S. 479 (1960), an Arkansas statute which required every teacher (as a condition of employment) to file annually an affidavit listing every organization to which he belonged or regularly contributed within the preceeding five years was held unconstitutional. In finding this statute constitutionally defective, the Court said:

> To compel a teacher to disclose every associational tie is to impair his right to free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. . . . The unlimited and indiscriminate sweep of the statute (here involved) and its comprehensive interference with associational freedom go far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers bring it within the bar of our prior cases. 364 U.S. at 485.

[39] 378 U.S. 500 (1964).

[40] 64 Stat. 993 (1950), 50 U.S.C. §785.

> Such freedom of movement is basic in our scheme of values . . . (and) even though the governmental purpose is legitimate and substantial (here protection of national security), such purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[41]

The Court pointed out that the defects of Section 6 were that the act applied whether or not the member actually knew or believed he was associated with a Communist-action or Communist-front organization;[42] irrespective of the member's degree of activity in the organization and his commitment to its purposes;[43] regardless of the purpose for which the individual wished to travel;[44] and regardless of the security-sensitivity of the areas in which members wished to travel.[45] Since there were less drastic means of safeguarding national security, the Court concluded that:

> The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation "narrowly drawn to prevent the supposed evil," yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms.[46]

In answer to the Government's argument that the act should be held constitutional as applied to these top-ranking Party leaders, the Court said that the function of "constru(ing) legislation so as to save it against constitutional attack . . . will not (be carried) to the point of . . . judicially rewriting it." [47] Because of the clarity and preciseness of the words in the act, any attempt to narrow its scope, the Court said, "would inject an element of vagueness into the statute's scope and application," which "would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty." [48]

An even more recent case, *Brown v. United States*,[49] further illustrates

[41] Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964). It should be noted that the Court in overturning this statute cited the cases discussed in note 38, *supra*, which seems to indicate that the same standards are being applied to subversive activities legislation, as that being applied to state statutes dealing with interests other than national security.

[42] *Id.* at 507.

[43] *Id.* at 510.

[44] *Id.* at 511.

[45] *Id.* at 512. Since the Court in Zemel v. Rusk, 381 U.S. 1 (1965), upheld a State Department Order restricting travel to Cuba, it would appear that the right to travel may, even under the new trend of the Court, be restricted if the area is a sensitive one.

[46] *Id.* at 514.

[47] *Id.* at 515.

[48] *Id.* at 516.

[49] 381 U.S. 437 (1965).

the Supreme Court's new approach. There the Court re-examined the scope and purposes of the bill of attainder clause, returning to the reasoning of precedent established prior to the *Douds* case. In *Brown* the respondent was an avowed Communist who served on the Executive Board of Local 10 (a San Francisco branch of the International Longshoremen's and Warehousemen's Union). He was convicted in the lower court under Section 504 of the Labor-Management Reporting and Disclosure Act of 1959,[50] which made it a crime for a Communist Party member to hold an office in a labor union. In arriving at its decision that Section 504 constituted a bill of attainder, the Court reviewed the historical background of the bill of attainder clause noting that it was inserted as an implementation to the docrine of separation of powers, i.e., as a "safeguard against . . . trial by legislature." [51] Admittedly, Congress could keep from positions affecting interstate commerce those persons who might use their position to bring about "political strikes"—the stated purpose of Section 504. But in enacting this provision Congress had exceeded its constitutional authority. For that section

> . . . designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.[52]

But Congress' authority in such a case is limited to "setting out rules of general applicability." [53] Such rules could decree that any person who commits certain acts or possesses certain characteristics shall not hold union office, leaving for the courts and juries the job of deciding what persons have committed the specified acts or possessed the specified characteristics; [54] and still remain within constitutional bounds.

In the Brown case, the Court cited *Cummings, Garland,* and *Lovett,* stating that its decision was on firm ground with these cases. It stated that the *Douds* Court, however, had simply misread *Lovett* when distinguishing that case on the ground that the sanction imposed there was levied purely for "retributive reasons." [55] Neither was it material that *Lovett* punished a list of named individuals as distinguished from *Brown* which punished membership of the Communist Party.[56] The Court con-

[50] 73 Stat. 536 (1959), 29 U.S.C. §504. This statute replaced Section 9(h) which was upheld in the *Douds* case.

[51] Brown v. United States, 381 U.S. 437, 442 (1965).

[52] *Id.* at 450.

[53] *Id.* at 461.

[54] *Id.* at 450.

[55] *Id.* at 456. However, the requirement as espoused by *Douds* that the legislation must leave no means of escape to constitute a bill of attainder seems to have been sactioned by the Court. But the Court found that Section 504 violated this requirement since from "the moment (of its enactment, Brown) was given the choice of declining a leadership position or incurring criminal liability." 381 U.S. at 452.

[56] *Id.* at 461.

cluded that while Congress can weed out dangerous persons from the labor movement, it must do so *by rules of general applicability, without designating those upon whom the sanction it prescribes is to be levied;* that although Congress possesses full legislative authority under our Constitution, the task of adjudication must be left to tribunals; and that while the Court is always reluctant to declare that a congressional act violates the Constitution, here the Court had no other alternative.[57]

Finally, *Elftbrandt v. Russell*[58] provided further indications that the Court will no longer attempt to save federal statutes from unconstitutionality. Petitioner, a teacher, successfully challenged the Arizona loyalty oath and its "statutory gloss" which subjected to discharge and prosecution for perjury any person who took the oath and becomes or remains a member of any organization having as one of its purposes the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose.[59] The Court's objection was that the legislation subjected a citizen to prosecution for "knowing but guiltless behavior."[60]

CONCLUSIONS

There seems to be little doubt but that the *Aptheker* and *Brown* decisions point to a new trend which has emerged as the Supreme Court carries out a kind of supervisory role over congressional subversive activities legislation. Thus in the future, the Court apparently will insist on precise and narrow drafting of such legislation. Hastily drawn statutes that suffer from overbreadth in infringing personal liberties will undoubtedly continue to be overturned. Hence future statutes which aim at punishing Communist Party members for the exercise of those liberties guaranteed by the First and Fifth amendments must be so narrowly drawn as to insure that the prohibition reaches only those acts which have sufficient nexus with the relevant evil prohibited in the interest of national security. For the Court has warned that internal security legislation "cannot cut deeper into (those) freedoms . . . than is necessary to deal with the substantive evils that Congress has a right to prevent."[61] In meeting this requirement of narrow drafting, legislators must remember that the Court will not engage in "judicial rewriting" in order to save such statutes. Any legislative attempt to name the Communist Party (and apply sanctions *ipso facto*) will likewise be overturned under the Court's present trend.

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[57] *Id.* at 461–62.

[58] Elfbrandt v. Russell, — U.S. —, 86 S.Ct. 1238 (1966).

[59] *Id.* at 1239.

[60] *Id.* at 1241.

[61] Scales v. United States, 367 U.S. 203, 229 (1961). *Accord.,* Schenck v. United States, 249 U.S. 47, 52 (1919).

It is possible to speculate (based upon the fact that the *Dennis* and *Scales* cases were upheld by only a 5 to 4 margin) that neither the *advocacy clause* nor the *membership clause* of the Smith Act would satisfy the current Supreme Court. Since the Court is no longer "judicially re-writing" such statutes in order to save them, the clauses seem to fall short of the requirements established by the Court. A quote from the dissenting opinion of Mr. Justice Douglas in the *Scales* case would seem to add weight to this prophecy. There Mr. Justice Douglas said:

> Of course, government can move against those who take up arms against it. Of course, the constituted authority has the right to self-preservation. But we deal in this prosecution of Scales only with the legality of ideas and beliefs, not with overt acts. . . . We have too often been "balancing" the right of speech and association against other values in society if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights. This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation runs counter to our prior decisions. . . ." (But) (w)hat we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and nonconformity no longer cast a shadow over us.[62]

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[62] Scales v. United States, *supra* note 61 at 270.