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Constitutional Law -- Membership Clause of the Smith Act

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decisions. It will also eliminate the uncertainties which previously existed in the negotiation of property settlements by parties to a divorce. On the other hand, it does not seem quite fair to assert income tax on one party upon what amounts to a division of his property, while ignoring the tax consequences to the other party.²⁷ The far reaching effects of this decision on everyday transactions in lawyers' offices can only be suggested by reference to the number of divorce settlements handled in the United States each year.²⁸ Unless Congress sees fit to enact legislation to alter the effect of this decision in the future,²⁹ it appears that the question of realization and measurement of the transferor's gain is finally settled.

CHARLES L. RUFFNER

CONSTITUTIONAL LAW—MEMBERSHIP CLAUSE OF THE SMITH ACT

The petitioners were convicted of violating the membership clause of the Smith Act,¹ and their convictions were upheld by the respective courts of appeals.² Each petitioner had been a long-term member of the Communist Party, recruiting new personnel and instructing them in basic Party doctrine. Each petitioner had also been a lecturer and an organizer, holding offices high in the Party hierarchy. On certiorari, the petitioners contended that the evidence was insufficient to sustain the verdicts.³ *Held*: affirmed as to petitioner Scales, reversed as to petitioner Noto. *Scales v. United States*, 367 U.S. 203 (1961). *Noto v. United States*, 367 U.S. 290 (1961).

These were the first prosecutions initiated by the Government under the *membership* clause⁴ of the Smith Act, although previous prosecutions

27. Note 25 *supra*.

28. There were 395,000 divorces in the United States in 1959; 19,550 of them were obtained in the State of Florida. *WORLD ALMANAC AND BOOK OF FACTS* 302, 309 (77th ed. 1962).

29. Any prospect of contrary legislation seems remote; see note 26 *supra*.

1. "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; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof . . . shall be fined . . . or imprisoned . . ." 18 U.S.C. § 2385 (1958).

2. *Scales v. United States*, 260 F.2d 21 (4th Cir. 1958); *Noto v. United States*, 262 F.2d 501 (2d Cir. 1958).

3. Other contentions of petitioners were directed towards: (1) an alleged immunity from prosecution granted by section 4(f) of the Internal Security Act of 1950, 50 U.S.C. § 783(f) (1958); and (2) the alleged unconstitutionality of the Smith Act, for violating the First and Fifth Amendments. A minority of the Court in each case voted to reverse the conviction on the above grounds.

4. 18 U.S.C. § 2385 (1958).

had been brought under its *conspiracy* provisions.⁵ In 1951, the Supreme Court held, in its first review of a conspiracy clause prosecution, that the act was constitutional and was not violative of either the first or the fifth amendments.⁶ Other cases brought under the conspiracy clause established what evidence was necessary to survive a motion for a directed verdict.⁷ It is first necessary for the Government to prove a criminal conspiracy.⁸ In this case it is a group espousing violent overthrow of the Government. A political party based upon the doctrine of inevitability of revolution, or the superiority of communism is not illegal under the Smith Act,⁹ and the teaching and advocacy of this material is not a crime.¹⁰ The forbidden activity is the *advocacy of action*, either immediate violent action, or violent action to be taken in the future.¹¹ This activity does not encompass advocacy which may prompt a hearer to take action on his own initiative,¹² but rather advocacy in the nature of directions to the hearer to take the action.¹³ There must be an immediacy which removes it from the realm of theory.¹⁴

Once the existence of the conspiracy has been established, the individual defendant must be connected with the group. In common with the general law of conspiracy,¹⁵ a specific intent must be found on the

5. 18 U.S.C. § 2385 (1958). Prior prosecutions were brought under the general conspiracy statute, 18 U.S.C. § 371 (1952). A similar provision was made a part of the Smith Act in 1956. 70 Stat. 623 (1956), 18 U.S.C. § 2385 (1958).

6. *Dennis v. United States*, 341 U.S. 494 (1951); *accord*, *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

7. *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Fujimoto*, 102 F. Supp. 890 (D. Hawaii 1952); *United States v. Foster*, 9 F.R.D. 367 (S.D.N.Y. 1949).

8. *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Kuzma*, 249 F.2d 619 (3d Cir. 1957); *United States v. Silverman*, 248 F.2d 671 (2d Cir. 1957), *cert. denied*, 355 U.S. 942 (1958); *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952); *United States v. Foster*, 9 F.R.D. 367 (S.D.N.Y. 1949).

9. *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298, 329 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652, 664 (1925); *United States v. Kuzma*, 249 F.2d 619 (3d Cir. 1957); *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955).

10. *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Scales v. United States*, 367 U.S. 203, 232 (1961); *Yates v. United States*, 354 U.S. 298, 329 (1957); *Dennis v. United States*, 341 U.S. 494, 509-10 (1951).

11. *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Scales v. United States*, 367 U.S. 203, 251 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Wellman v. United States*, 253 F.2d 601 (6th Cir. 1958); *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950).

12. *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Scales v. United States*, 367 U.S. 203, 251 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494, 545 (1951); *United States v. Schneiderman*, 106 F. Supp. 906 (S.D. Cal. 1952); *United States v. Foster*, 9 F.R.D. 367, 391 (S.D.N.Y. 1949).

13. *Yates v. United States*, 354 U.S. 298, 320 (1957); *Dennis v. United States*, 341 U.S. 494, 502 (1951).

14. *Dennis v. United States*, 341 U.S. 494 (1951); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954); *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950); *United States v. Silverman*, 132 F. Supp. 820 (D. Conn. 1955); *United States v. Schneiderman*, 106 F. Supp. 906 (S.D. Cal. 1952).

15. See note 5 *supra*.

part of the individual defendant to engage in the advocacy of action by the conspiratorial group. Nominal membership is insufficient to show this specific intent.¹⁶ It can be ascertained from the speech or activities in which the defendant has engaged. Instances of this activity may include speeches given by the defendant in which he advocates present violent overthrow,¹⁷ or the preparations for future overthrow participated in by the defendant,¹⁸ or in his attendance at classes in which revolutionary techniques are taught.¹⁹

The crucial distinction between advocating and teaching abstract desirability of overthrow of the government, and advocating *action* towards that end was made in *Dennis v. United States*²⁰ and repeated in *Yates v. United States*.²¹ This distinction is not only the key to the constitutionality of the Smith Act, but also the differentiating factor between the success of the *Scales* prosecution and failure of the *Noto* prosecution.

The *Scales* and *Noto* cases were prosecutions under the *membership* clause²² of the Smith Act. At the time these indictments were brought, no standards had been established by the Supreme Court as to the nature or the sufficiency of the evidence required to support a conviction under the membership clause.

The *Scales* and *Noto* cases hold that the same major elements of conspiracy prosecutions defined by *Dennis* and *Yates*²³ (illegal group advocacy and participation by the individual defendant in that group activity)²⁴ are equally applicable to membership prosecutions.²⁵ They

16. *Scales v. United States*, 367 U.S. 203, 222 (1961); *Dennis v. United States*, 341 U.S. 494, 499, 500 (1951); *Noto v. United States*, 262 F.2d 501 (2d Cir. 1958); *United States v. Kuzma*, 249 F.2d 619 (3d Cir. 1957); *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952); *United States v. Schneiderman*, 106 F. Supp. 906 (S.D. Cal. 1952).

17. *Scales v. United States*, 367 U.S. 203, 233 (1961).

18. *Scales v. United States*, 367 U.S. 203, 234, 251 (1961); *Yates v. United States*, 354 U.S. 298, 323 (1957); *Dennis v. United States*, 341 U.S. 494, 510 (1951).

19. *Noto v. United States*, 367 U.S. 290, 294 (1961); *Yates v. United States*, 354 U.S. 298, 331 (1957).

20. 341 U.S. 494 (1951).

21. 354 U.S. 298 (1957).

22. 18 U.S.C. § 2385 (1958).

23. *Scales v. United States*, 367 U.S. 203, 235 (1961); *Noto v. United States*, 367 U.S. 290, 292 (1961).

24. See note 23 *supra*.

25. The trial court charged the jury that the gist of the crime is membership in the Party, with guilty knowledge and intent. Judge Harold P. Burke broke the crime down into the following elements:

- (1) The Communist Party advocates and teaches overthrow by force and violence as speedily as circumstances will permit;
- (2) Defendant was a member of the Communist Party of the United States;
- (3) That while a member defendant had knowledge that the Party taught and advocated the overthrow and destruction of the government of the United States by force and violence as soon as circumstances would permit;
- (4) That defendant intended to bring about the overthrow and destruction of

also hold that the *Yates* standards of sufficiency and quantity of evidence apply to membership clause cases.²⁸

The illegal group activity was established in *Yates*²⁷ by evidence of actual instructions to members, given by the Party, of the *techniques* of achieving the desired aim, which was the overthrow of the government by force and violence.²⁸ The criteria of illegal Party activities established by *Yates* are not restricted to actual incitement to immediate riot or revolution. Equally illegal are Party activities which teach the desirability of forceful overthrow and also the techniques to be used in that forceful overthrow, if and when the propitious time comes. Thus, when the Party steps beyond mere theory of the desirability and necessity of changing the government, and begins to equip its members with the techniques of revolution, it is then engaging in the type of activity which is condemned by the Smith Act. It matters not that the techniques taught are not intended to be used until some undefined time in the future. It is the present acts of preparation and advocacy which are forbidden.

In both *Scales and Yates*, the Communist Party was found to have engaged in the activity above described by evidence of the Party classics,²⁹ recruitment,³⁰ industrial organization,³¹ statements by Party leaders as to the purposes and aims of the Communist Party, and their rejection of peaceful co-existence and of gradual change through

the government of the United States by force and violence as soon as circumstances would permit. Brief for Appellant, *United States v. Noto*, 262 F.2d 501 (2d Cir. 1958), approved in substance, *United States v. Noto*, 262 F.2d 501, 504 (2d Cir. 1958).

26. *Noto v. United States*, 367 U.S. 290, 299 (1961); *Scales v. United States*, 367 U.S. 203, 232 (1961).

27. *Yates* also stated that proof of "the teaching of Marxism-Leninism and the connected use of Marxist 'classics' as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party's general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance with U.S.S.R." would not be sufficient evidence to establish the illegal group activity. *Scales v. United States*, 367 U.S. 203, 232 (1961).

28. Meetings at which members were taught techniques of achieving the end of violent revolution illustrate the "systematic teaching and advocacy of illegal action which is condemned by the statute." *Yates v. United States*, 354 U.S. 298, 331 (1957). Also indoctrination in methods of "moving masses of people in time of crisis." *Id.* at 332. Instructions in achieving revolution were also given via the teaching of the Party "classics," including the works of Marx, Lenin, Stalin and Engels, which fully delineate the "how" of revolution. *Noto v. United States*, 367 U.S. 290, 292 (1961); *Scales v. United States*, 367 U.S. 203, 247 n.25 (1961).

29. *Noto v. United States*, 367 U.S. 290, 291 (1961); *Scales v. United States*, 367 U.S. 203, 235 (1961); *Yates v. United States*, 354 U.S. 298, 332 (1957). See also note 28 *supra*.

30. For an example see the description of the recruitment process by government witness Ralph C. Clontz, Jr. *Scales v. United States*, 367 U.S. 203, 244, 245 (1961). See also *Yates v. United States*, 354 U.S. 298, 332 (1957).

31. Testimony of witness Childs: "The Communist Party has a program of industrial concentration in which they try to get people, that is, people who are Communist Party members, into key shops or key industries which the Party has determined or designated

evolution.³² Of course, the element of illicit Party activity must be shown by evidence of activities within the indictment period, before the statute of limitations³³ cuts off criminal responsibility.³⁴ It is possible to establish this element by inference³⁵ drawn from prior attitudes or views of the Party, which are presumed to continue during the later period, thus lowering the required proof of Party activities during the indictment period. This is a practical necessity, since after 1949 the Communist Party retrenched and went underground. Evidence of its policies subsequent to this time became much more difficult to obtain, compared to the pre-1949 period when the Party operated openly.³⁶ The establishment of this element of Party advocacy in the *Yates* and *Scales* cases was not entirely by means of this inference, although its applicability was recognized. In each case direct evidence was introduced as to the Party's then objectives.

With respect to this element, the *Noto* case differs strikingly. At trial, evidence as to Party theory was shown via the Party classics,³⁷ recruitment,³⁸ distribution of information and propaganda³⁹ and the

to be industrial concentration industries or plants. This is so that the Communist Party members in a particular plant will be able to have a cell, or a Communist Party group in which they will be able to more effectively plan for such things as attempting to control the union in that particular plant." *Scales v. United States*, 367 U.S. 203, 250 (1961). See also *Noto v. United States*, 367 U.S. 290, 292-93 (1961); *Yates v. United States*, 354 U.S. 298, 332 (1957).

32. In 1945 Earl Browder's Communist Political Association was rejected as the official Party. It had adhered to the position that the inevitable change to a Communist society in the United States could be achieved through peaceful, democratic means. The reconstitution of the Party in the July 1945 National Convention involved a return to the principles of Marxism-Leninism, with their attendant advocacy of change through overthrow by force and violence. The new leader of the Party was William Z. Foster. *Scales v. United States*, 367 U.S. 203, 235 (1961); *Yates v. United States*, 354 U.S. 298, 307 (1957).

33. The general three year statute of limitations on crimes not punishable by death applies to these prosecutions. 18 U.S.C. § 3282 (1958).

34. In *Noto* the indictment, which was found on November 8, 1954, charged the defendant with violation of the Smith Act during the period 1946 to 1954. However, the statute of limitations shortened the period during which criminal responsibility could attach, to the three years beginning September 1, 1951. This is the crucial reason for the reversal of the conviction of *Noto*. In *Scales*, the indictment covered the period from January 1946 to November 1954. In *Yates*, the indictment alleged the origination of the conspiracy on June 28, 1940, continuing to the date of the indictment, December 21, 1951.

35. 2 WIGMORE, EVIDENCE § 437 (3d ed. 1940), quoted with approval in *United States v. Noto*, 262 F.2d 501, 505 (2d Cir. 1958).

36. Part of the activities of the Communist Party were established by the actions of the individual defendants, since they, as officials of the Party, can be deemed to speak for it, as well as for themselves. *Scales v. United States*, 367 U.S. 203, 254 (1961).

37. This was testified to by John Lautner. He had been an undercover member of the Party on behalf of the Government. He also testified in *Dennis*, *Silverman*, *Yates*, *Scales* and *Noto* as to general Party theory as it was then taught. See also note 28 *supra*.

38. Especially as to Negroes. See *Noto v. United States*, 367 U.S. 290, 293 (1961).

39. By purchasing printing equipment and hiding it, in case the Party was forced underground. Testimony of witnesses Dietch and Greenberg is illustrative. *Noto v. United States*, 367 U.S. 290, 292 (1961); *United States v. Noto*, 262 F.2d 501, 506 (2d Cir. 1958).

industrial concentration program.⁴⁰ However, this evidence suffered from under-generality since it related only to Party objectives in a local geographical area⁴¹ at the particular time covered by the indictment, and within the statute of limitations.⁴² The most telling evidence adduced as to Party objectives during the critical period was evidence that defendant Noto had himself "gone underground,"⁴³ but even that related only to the activity of an individual Party member, and could not be used to show the activity or objectives of the Party as a group. Thus the Supreme Court rightly rejected the Government's contention that the illicit activities of the Party during the indictment period could be established by inference drawn from evidence relating to prior Party activities and objectives.⁴⁴ The *Noto* prosecution failed because the Government did not show that the *organization*, of which Noto was unquestionably a knowing member,⁴⁵ was engaged in illegal advocacy.

Thus it was unnecessary for the Court, in *Noto*, to consider the second element of the crime, that of the defendant's own specific intent to accomplish the illegal purposes of the group. In *Scales* and in *Yates*⁴⁶ sufficient evidence of the defendants' specific intent was established by their own statements, attendance at Party functions at which overthrow was advocated, and the action taken by the individual defendants towards achieving those Party goals.

A successful prosecution under either the membership or the conspiracy clause of the Smith Act must prove that:

- 1) The individual is personally active in the Party; this is required since guilt is personal, not associational. Nominal membership is not illegal.⁴⁷ In *conspiracy* prosecutions, personal illegal activity by the defendant must be proven in order to establish that the defendant is a member of the conspiracy and to show his specific intent. This personal

40. Witness Reagan. *Noto v. United States*, 367 U.S. 290, 294 (1961); *United States v. Noto*, 262 F.2d 501, 505 (2d Cir. 1958). See note 31 *supra*.

41. Evidence was limited to Party action in Western New York, especially in the cities of Rochester and Buffalo. *Noto v. United States*, 367 U.S. 290, 292 (1961).

42. September 1, 1951 to November 8, 1954. See also note 34 *supra*.

43. From November 1954 to July 1955, Noto went to work in the Goodyear Rubber plant in Newark, New Jersey under the false name of Louis Parisi. Brief for Appellant, *United States v. Noto*, 262 F.2d 501 (2d Cir. 1958).

44. *Noto v. United States*, 367 U.S. 290 (1961). This contention had been previously accepted by the Second Circuit. *United States v. Noto*, 262 F.2d 501, 506 (2d Cir. 1958).

45. The income tax return of defendant Noto for 1951 showed his statement that he was employed by the Communist Party as a sub-district organizer. The same was shown on the Party's withholding tax return. *United States v. Noto*, 262 F.2d 501, 505 (2d Cir. 1958).

46. Five of the fourteen defendants in *Yates* were ordered acquitted by the Supreme Court, for failure of the Government to introduce *any* evidence as to their membership in the conspiracy. As to the other nine, new trials were ordered, since from other evidence shown, it was possible that their connection could be emphasized by the Government at a retrial.

47. *Scales v. United States*, 367 U.S. 203, 225 (1961).

illegal activity can be inferred from the actions of the individual in furtherance of Party goals. In *membership* prosecutions, the statute provides that membership shall be "knowing"⁴⁸ and the specific intent can be inferred from the actions of the defendant.

2) The Party is engaged in the requisite illegal advocacy, committed in the present, and tending to "incite" either immediate or future violent action on the part of the hearer. The narrow but vital distinction between intent to advocate in the future, and present advocacy of future action, can be described as the "distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."⁴⁹ In *conspiracy* prosecutions, this establishes the conspiracy and the required overt act by a conspirator. In *membership* prosecutions this evidence is necessary to show that the organization of which the defendant is charged with being a knowing member, is in fact an organization which engages in this illegal advocacy. There is little difference between a charge of being a knowing member of a group which engages in criminal conduct (membership clause cases), and a charge of being a member of a large conspiracy, many of whose members are unknown (conspiracy clause cases).⁵⁰

The *Noto* trial was held prior to the rendering of the decision in *Yates*.⁵¹ It is probable that the Government was unaware at that time of the importance of clearly establishing that the *organization* is engaged in present overt illegal advocacy of action. In the *Scales* prosecution, the Government was alerted to the standards established by *Yates*.⁵² It therefore proved illegal activity on the part of the Party, and the Supreme Court properly affirmed.

ELLIOT L. MILLER

WILLS—PARTIAL REVOCATION FOR THE BENEFIT OF A PRETERMITTED SPOUSE

An unmarried testator executed a will in which he made a bequest to the petitioner in her married name. Two years later, the petitioner divorced her husband and married the testator. During coverture, the testator made no change in his will. He subsequently died without lineal

48. 18 U.S.C. § 2385 (1958).

49. Frankfurter, J. concurring in *Dennis v. United States*, 341 U.S. 494, 545 (1951).

50. *Scales v. United States*, 367 U.S. 203, 226 n.18 (1961).

51. The decision in *Yates* was rendered in June 1957. *Scales* and *Noto* were indicted in November 1954.

52. The first *Scales* prosecution, begun in 1954, was reversed in 1957 on a confession of error by the Government, due to the decision in *Jencks v. United States*, 353 U.S. 657 (1957). *Scales* was subsequently retried in 1958, after the decision in *Yates* had been rendered.