

DENNIS et al. v. UNITED STATES
341 U.S. 494 (1951)

Mr. Justice FRANKFURTER, concurring in affirmance of the judgment. . . .

. . . The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? . . . Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. . . .

Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment. . . .

These general considerations underlie decision of the case before us. On the one hand is the interest in security. . . . In finding that the defendants violated the statute, we may not treat as established fact that the Communist Party in this country is of significant size, well-organized, well-disciplined, conditioned to embark on unlawful activity when given the command. But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, most of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security. . . .

On the other hand is the interest in free speech. The right to exert all governmental powers in aid of maintaining our institutions and resisting their physical overthrow does not include intolerance of opinions and speech that cannot do harm although opposed and perhaps alien to dominant, traditional opinion. The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights. . . .

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends. . . .

Mr. Justice DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. . . .

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books:³ *Foundations of Leninism* by Stalin (1924); *The Communist Manifesto* by Marx and Engels (1848); *State and Revolution* by Lenin (1917); *History of the Communist Party of the Soviet Union* (1939).

Those books are to Soviet Communism what *Mein Kampf* was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

³ Other books taught were *Problems of Leninism* by Stalin, *Strategy and Tactics of World Communism* (H.R.Doc. No. 619, 80th Cong., 2d Sess.), and *Program of the Communist International*.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent--that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen. . . .

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction. . . .

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. . . . Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged viz., the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. It says, "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace. The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. . . .

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. [In] America, [Communists] are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places--these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, 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. . . . Only those held by fear and panic could think otherwise. . . .