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Sandra L. Cobden

*Benjamin N. Cardozo School of Law*

James A. Rogers

*Benjamin N. Cardozo School of Law*

David Rudenstine

*Benjamin N. Cardozo School of Law, david.rudenstine@yu.edu*

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# IMPRISONED FOR MEMBERSHIP: THE JUNIUS SCALES CASE

## INTRODUCTION

*Sandra L. Cobden, James A. Rogers, and David Rudenstine\**

On June 5, 1961, a sharply divided Supreme Court affirmed the conviction of Junius Scales for being a member of the Communist Party.<sup>1</sup> The Court's decision came after an arduous journey through the federal judicial system that included two district court trials, two appeals to the United States Court of Appeals, and three Supreme Court arguments.<sup>2</sup>

Scales was convicted under the membership clause of the Smith Act which made it a felony to be a knowing member of any organization that advocated the forceful overthrow of the United States government.<sup>3</sup> As interpreted by the Court, a conviction under the membership clause required proof of active membership in a subversive organization, knowledge of the organization's aim to overthrow

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\* Sandra L. Cobden and James A. Rogers are 1990 graduates of Benjamin N. Cardozo School of Law. David Rudenstine is a Professor of Law at Cardozo. The authors wish to thank Marla Whitman for her assistance on this Introduction.

<sup>1</sup> *Scales v. United States*, 367 U.S. 203 (1961) (5-4 decision).

<sup>2</sup> Scales was indicted in 1954 and convicted for the first time in 1955. *United States v. Scales*, MDNC CR 4320-G (M.D.N.C. 1955). The Fourth Circuit sustained his conviction later that same year. 227 F.2d 581 (4th Cir. 1955). The Supreme Court granted certiorari, scheduling the case to be heard during the 1956 Term. 350 U.S. 992 (1955). The case was argued before the Court on October 10-11, 1956, and then restored to the docket for reargument on June 3, 1957. 353 U.S. 979 (1957). Before the reargument could take place, however, the United States moved to reverse, conceding that the Court's intervening decision in *Jencks v. United States*, 353 U.S. 657 (1957), entitled Scales to a new trial. The Court granted the United States's motion and reversed Scales's conviction. 355 U.S. 1 (1957). Scales was retried and convicted for a second time in 1958. *United States v. Scales*, MDNC CR 4320-G (M.D.N.C. 1958). The Fourth Circuit again upheld his conviction. 260 F.2d 21 (4th Cir. 1958). The Court granted certiorari on December 15, 1958. 358 U.S. 917 (1958). After oral arguments on April 29, 1959, the case was rescheduled for reargument on November 11, 1959, so that the parties could address certain questions specified by the Court. 360 U.S. 924 (1959). No argument was heard in November, however, because the Court had granted certiorari in *Noto v. United States*, 361 U.S. 813 (1960), which raised questions related to *Scales*. The Court put both cases over until February 23, 1960. On February 5, 1960, the Court granted certiorari in *Communist Party of the United States v. Subversive Activities Control Board [SACB]*, 361 U.S. 951 (1960), that involved similar constitutional and statutory issues to those raised in *Scales* and *Noto*. As a result, the Court rescheduled both cases to be heard on the same day as *SACB*. 361 U.S. 952 (1960). *Scales* was argued before the Court for the final time on October 10, 1960. On June 5, 1961, the Court affirmed Scales's conviction. 367 U.S. 203 (1961).

<sup>3</sup> Act of June 28, 1940, ch. 439, 54 Stat. 670 (codified at 18 U.S.C. §§ 2385, 2387 (1988)).

the government, and specific intent to accomplish that purpose as soon as circumstances allow.<sup>4</sup> The *Scales* decision is the only time the Court directly sustained the criminal conviction of a citizen solely for membership in a political organization.<sup>5</sup>

Scales was sentenced to six years imprisonment, a longer term than that given to many top-ranking Communist Party officials previously convicted.<sup>6</sup> After Scales entered prison on October 2, 1961, many prominent citizens mounted a campaign for clemency.<sup>7</sup> In a recent interview, Nicholas de B. Katzenbach, former Deputy Attorney General, recalled that the campaign presented a political problem for the Kennedy Administration.<sup>8</sup> On the one hand, Scales's supporters effectively criticized the administration for the disproportionate penalty imposed on Scales. On the other hand, the administration knew that some members of Congress who were strongly anti-communist would condemn any decision to commute Scales's sentence. Nevertheless, as Katzenbach recalls, Attorney General Robert Kennedy believed that Scales's sentence was inequitable and recommended to the President that the commutation petition be granted. On Christmas Eve, 1962, President Kennedy commuted Scales's sentence to time served and Scales was freed.<sup>9</sup>

This Introduction briefly reviews state and federal efforts to

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<sup>4</sup> Scales's indictment charged him with these three elements. See *Scales*, 367 U.S. at 205-06. The Court, in turn, upheld each one in the face of fifth amendment and first amendment challenges. *Id.* at 224-30.

<sup>5</sup> Other Communist Party members had been convicted under the Smith Act before Junius Scales. In those cases, however, the members were indicted as organizers, advocates, and inciters. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951). Similarly, prior to *Scales*, the Court had considered the constitutionality of state statutes containing membership provisions without ever ruling on the constitutionality of those specific provisions. See, e.g., *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925). Since *Scales*, the Court has reaffirmed their interpretation of the Smith Act membership clause. See *Law Students Civil Rights Research Council v. Wadmand*, 401 U.S. 154, 165 (1971); *Noto v. United States*, 367 U.S. 290 (1961) (companion case to *Scales*).

<sup>6</sup> Taylor, *Forward to J. Scales & R. Nickson, Cause at Heart: A Former Communist Remembers* at xxiii (1987).

<sup>7</sup> A partial list of these individuals include: Roger Baldwin, Daniel Bell, Saul Bellow, John C. Bennett, Van Wyck Brooks, Theodore Draper, Nathan Glazer, Robert F. Goheen, Robert L. Heilbroner, Sidney Hook, Irving Howe, Martin Luther King, Jr., Reinhold Niebuhr, Norman Podhoretz, A. Phillip Randolph, David Riesman, I. F. Stone, Mark Van Doren, Edmund Wilson, and C. Vann Woodward. See *A Petition to President John F. Kennedy For A Presidential Pardon for Junius Scales* (J. Harlan's Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.).

<sup>8</sup> Telephone interview with Nicholas de B. Katzenbach by Sandra L. Cobden (Mar. 5, 1990).

<sup>9</sup> For a description of Scales's prison experience and release, see J. Scales & R. Nickson, *Cause at Heart: A Former Communist Remembers* 345-415 (1987).

criminalize membership in subversive political organizations.<sup>10</sup> It also discloses for the first time Justice Potter Stewart's indecisiveness over whether to vote to affirm or to reverse Scales's conviction.<sup>11</sup> Although Stewart eventually provided the critical fifth vote to affirm the conviction, he reached this result only after changing his mind at least five times during a not quite two year period that the case was pending before the Supreme Court.

Following this Introduction is an edited transcript of a videotaped discussion between Junius Scales and Telford Taylor, his attorney for the second jury trial and all three Supreme Court arguments. The discussion is facilitated by Professor David Rudenstine and takes place during his class on Free Speech and National Security. The transcript offers portraits of the personalities that shaped this dramatic and distinctive case, reveals the strategies employed during the trials and arguments, and provides a brief look at the politics of the time and its influence on the case.

## I. A BRIEF HISTORY OF CRIMINAL MEMBERSHIP

The history of the membership clause has its roots in several government efforts to control subversive activity almost always at times of substantial national stress. The earliest of these efforts transpired in 1798 when war with France appeared imminent. Anxious to quiet Republican opposition to and criticism of their political initiatives, the Federalist-controlled Congress enacted four statutes, collectively referred to as the Alien and Sedition Laws.<sup>12</sup> While the first three statutes enacted were specifically directed at aliens, many of whom were thought to support Republican policies, the fourth—the Sedition Act—targeted the general population, including citizens.<sup>13</sup> In addition to criminalizing the writing or publication of any false, scandalous, and malicious information about the government, the Sedition Act went even farther and made it “unlawful [to] combine or conspire together, with the intent to oppose any measure or measures of the

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<sup>10</sup> See *infra* text accompanying notes 12-46.

<sup>11</sup> See *infra* text accompanying notes 47-76.

<sup>12</sup> The four statutes comprising the Alien and Sedition Laws of 1798 were: (1) The Naturalization Act, ch. 54, 1 Stat. 566 (repealed 1802) (extended the period of residency required for naturalization from 5 to 14 years); (2) The Alien Act, ch. 58, 1 Stat. 570 (expired 1800) (permitted the President to deport any alien found to be a threat to the United States); (3) The Enemy Alien Act, ch. 66, 1 Stat. 577 (codified at 50 U.S.C. §§ 21-24 (1982)) (permitted the President to deport, confine, or expel all “enemy” aliens during times of war or any threat of war); (4) The Sedition Act, ch. 74, 1 Stat. 596 (expired 1801) (criminalized seditious libel and conspiracies to oppose the government). For a detailed history of the Alien and Sedition Laws, including their enactment and enforcement, see J. Smith, *Freedom's Fetters* (1966).

<sup>13</sup> See the first three statutes cited *supra* note 12.

government of the United States."<sup>14</sup> Although the act stopped short of criminalizing mere membership, the Federalist administration was able to use the act to effectively repress its political opponents. From its enactment in 1798 until its expiration in 1801, the act was employed only against Republican Party members, including at least three political officeholders and four leading Republican papers.<sup>15</sup>

The next major effort to control subversive activity came during the Civil War. In addition to a series of measures designed to suppress political opposition to the federal government,<sup>16</sup> Congress enacted the Conspiracies Act of 1861.<sup>17</sup> Similar to the Sedition Act, the Conspiracies Act also used the doctrine of conspiracy to criminalize political activity intended "to overthrow, or to put down, or to destroy by force" the federal government.<sup>18</sup> As construed, the act supplemented the treason laws; it covered many of the activities not included within the legal definition of treason<sup>19</sup> but were nonetheless considered sufficiently threatening to the federal government to warrant punishment.<sup>20</sup>

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<sup>14</sup> The Sedition Act of 1798, ch. 74., § 1, 1 Stat. 596.

<sup>15</sup> Authorities agree that the Sedition Act was used to secure at least 25 arrests, 15 indictments, and 10 convictions. All defendants were members of the Republican Party. For a brief description of these cases, including the ones referred to in the text, see 1 N. Dorsen, P. Bender & B. Neuborne, *Emerson, Haber and Dorsen's Political and Civil Rights in the United States* 25-28 (4th ed. 1976); C. Rice, *Freedom of Association* 122-25 (1962); J. Smith, *supra* note 12, at 176-87.

<sup>16</sup> During the course of the war, several measures were employed to limit subversive activity. Perhaps the most controversial was President Lincoln's suspension of the writ of habeas corpus. On April 27, 1861, Lincoln ordered the suspension of the writ from Washington to Philadelphia. Memorandum from Pres. Abraham Lincoln to Gen. Winfield Scott (Apr. 27, 1861), in 4 *The Collected Works of Abraham Lincoln* 347 (R. Basler ed. 1953) [hereinafter *Works*]. The suspension was later extended to Bangor, Maine. Memorandum from Pres. Abraham Lincoln to Gen. Winfield Scott (Oct. 14, 1961), in 4 *Works* 554. Lincoln's action was completely condemned by Chief Justice Taney in *Ex Parte Merryman*, 17 Fed. Cas. 114 (C.C.D. Md. 1861) (No. 9,487). Nevertheless, Congress retroactively ratified both Lincoln's authority to order the suspension and the suspension itself. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755.

Another measure was the requirement of loyalty oaths. See, e.g., Act of July 2, 1862, ch. 128, 12 Stat. 502; Act of Aug. 6, 1861, ch. 64, 12 Stat. 326; H. Hyman, *Era of the Oath* (1954).

<sup>17</sup> Act of July 31, 1861, ch. 33, 12 Stat. 284.

<sup>18</sup> *Id.* At least one commentator has argued that the Conspiracies Act was a more powerful weapon in the Executive arsenal than the Sedition Act because it did not require proof of an overt act for conviction. See C. Rice, *supra* note 15, at 127. His claim, however, appears to be based on little more than dicta in one circuit court case. *Id.* at 127 n.43 (citing to Charge to Grand Jury—Treason and Piracy, 30 F. Cas. 1049 (C.C.D. Mass. 1861) (No. 18,277)). The case Rice so heavily relies on did not refer to, much less compare, the Sedition Act to the Conspiracies Act. See 30 F. Cas. at 1051.

<sup>19</sup> U.S. Const. art. III, § 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."

<sup>20</sup> See J. Randall, *Constitutional Problems Under Lincoln* 78-79 (1963).

Despite the successful enforcement of these earlier laws,<sup>21</sup> states by the early 1900s had begun to abandon conspiracy statutes as a method of controlling subversive activity in favor of newly-enacted statutes, often called Criminal Anarchy Laws or Criminal Syndicalism Laws.<sup>22</sup> These statutes not only criminalized the teaching or advocating of violent overthrow of the government,<sup>23</sup> but many of them also explicitly criminalized membership in organizations or associations that espoused subversive doctrines. Although these membership provisions were frequently challenged on federal constitutional grounds, state courts regularly upheld them.<sup>24</sup> Until the *Scales* case, however, the Supreme Court never directly ruled on a membership provision in either a state or federal statute.<sup>25</sup>

As states enacted criminal anarchy and syndicalism laws, Congress pursued its own path. In 1917, during the midst of World War I, it enacted the Espionage Act,<sup>26</sup> section three of which criminalized during wartime the incitement of disloyalty and the obstruction of enlistment, among other activities.<sup>27</sup> The next year Congress amended the act to include other forms of prohibited speech such as uttering contempt for the federal form of government and provoking resistance to government measures.<sup>28</sup> After the war, Congress sought to convert these wartime statutes into peacetime tools. During the 1919-20 congressional term alone, approximately seventy peacetime sedition bills were introduced. Nevertheless, none were enacted, due to stiff opposition from a variety of quarters including prominent

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<sup>21</sup> For a discussion of the enforcement of the Sedition Act, see *supra* note 15. For a discussion of the enforcement of the Conspiracies Act and other civil war measures, see J. Rhodes, 4 *A History of the United States* 230 n.2 (1898).

<sup>22</sup> One of the first such statutes enacted was The New York Criminal Anarchy Act, ch. 371, 1902 N.Y. Laws 958 (codified at N.Y. Penal Law § 240.15 (McKinney 1989)). For a brief discussion of the enactment of other criminal anarchy and syndicalism laws, see Z. Chafee, Jr., *Free Speech in the United States* 163-68 (1941); C. Rice, *supra* note 15, at 129-33.

<sup>23</sup> For lists of the criminal anarchy and syndicalism laws enacted in each state, see Z. Chafee, *supra* note 22, at 575-97 (Appendix III); Dowell, *A History of Criminal Syndicalism Legislation in the United States*, in 57 *The John Hopkins Stud. in Hist. and Pol. Sci.* 147-52 (Appendices I & II) (1939).

<sup>24</sup> See, e.g., *People v. McClenegon*, 195 Cal. 445, 452-53, 234 P. 91, 94 (1925); *People v. Taylor*, 187 Cal. 378, 381-91, 203 P. 85, 86-90 (1921); *People v. Wagner*, 65 Cal. App. 704, 710, 225 P. 464, 467 (1923); *State v. Dingman*, 37 Idaho 253, 265-67, 219 P. 760, 765-66 (1923); *State v. Berquist*, 109 Kan. 382, 199 P. 101 (1921); *People v. Ruthenberg*, 229 Mich. 315, 354-57, 201 N.W. 358, 371 (1925); *State v. Kassay*, 126 Ohio St. 177, 184 N.E. 521 (1932); *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295 (1929). But see *State v. Tonn*, 195 Iowa 94, 115-16, 191 N.W. 530, 539 (1923) (in dicta, doubting the validity of the membership provision); *People v. Lloyd*, 304 Ill. 23, 45, 136 N.E. 505, 530 (1922) (same).

<sup>25</sup> See discussion of cases *supra* note 5.

<sup>26</sup> The Espionage Act of 1917, ch. 30, tit. 1, 40 Stat. 217 (repealed 1948).

<sup>27</sup> *Id.* § 3 at 219.

<sup>28</sup> Act of May 16, 1918, ch. 75, § 3, 40 Stat. 553 (repealed 1921).

members of the legal community, civil rights organizations, and the press.<sup>29</sup>

As the economic depression of the thirties continued and international tensions heightened, internal unrest and agitation increased,<sup>30</sup> and congressional interest in internal subversion revived and intensified. During the 1930s, for example, two House committees were formed to investigate communist and other "un-American" activities.<sup>31</sup> Out of these committees came proposals to outlaw the Communist Party, the advocacy of dissent among the armed forces, and the advocacy of violent overthrow of the government. Despite growing support for these recommendations, they were vigorously opposed and none were then enacted.<sup>32</sup> In 1939, however, circumstances changed: Germany invaded Poland, the Soviets entered into a pact with the Nazis, and the world began gearing itself for war. In the face of these developments abroad, domestic opposition to politically repressive measures that had existed during the prior twenty years faded.

## II. THE SMITH ACT

As originally enacted, the Smith Act<sup>33</sup> was an omnibus measure, encompassing various discrete efforts to control subversive activity. It consisted of three substantive titles and a fourth procedural title intended to preserve severability. Out of the three substantive titles, only the first was directed at the general population. Its first section, a revival of the House committee recommendation four years earlier, prohibited the advocacy of disobedience, disloyalty, or mutiny among the military.<sup>34</sup> The second section, which contained the membership clause, prohibited not only the advocacy for the violent overthrow of the government, but also the organization of and membership in any

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<sup>29</sup> See Z. Chafee, Jr., *supra* note 22, at 169; see also M. Belknap, *Cold War Political Justice* 16 (1977) (describing the opposition movement); Z. Chafee, Jr., *supra* note 22, at 170-95 (arguing against the enactment of a peacetime sedition law).

<sup>30</sup> See W. Foster, *History of the Communist Party of the United States* 276-395 (1952).

<sup>31</sup> The first committee was formed in 1930. Chaired by Representative Hamilton Fish, Jr. from New York, the committee focused specifically on the Communist Party. See Special House Committee to Investigate Communist Activities in the United States, *Investigation of Communist Propaganda*, H.R. Rep. No. 2290, 71st Cong., 3d Sess. (1931). The second committee was formed in 1934. Chaired by Representative John McCormack from Massachusetts, it was broader in its focus than the Fish committee. In addition to investigating the Communist Party, the McCormack committee focused on activities of the Nazi Party and other fascist organizations. See Special House Committee to Investigate Nazi and Other Propaganda, *Investigation of Nazi and Other Propaganda*, H.R. Rep. No. 153, 74th Cong., 1st Sess (1934).

<sup>32</sup> See M. Belknap, *supra* note 29, at 16-19; *Legislation*, 35 *Colum. L. Rev* 917 (1935).

<sup>33</sup> Act of June 28, 1940, ch. 439, 54 Stat. 670 (codified at 18 U.S.C. §§ 2385, 2387 (1988)).

<sup>34</sup> *Id.* tit. I, § 1 at 670.

group promoting subversive doctrines.<sup>35</sup> Finally, a third section permitted the seizure, pursuant to a search warrant, of any written materials forbidden by the previous sections.<sup>36</sup>

The second and third titles of the act were directed solely at aliens. Title II added five additional classes to the categories of aliens who could be denied entry into the United States or, if already here, could be deported upon the warrant of the Attorney General.<sup>37</sup> Included within one of these new classes were any aliens who had been members of a subversive organization at the time of entry into the United States or any time thereafter.<sup>38</sup> Title III authorized the registration and fingerprinting of all aliens entering or then in the United States.<sup>39</sup>

In contrast to the efforts of the previous twenty years, the passage of the Smith Act was relatively smooth as the alien provisions gave the act its political viability. Indeed, the focus of most of the congressional debates was on the fairness of the alien provisions.<sup>40</sup> The military disobedience prohibition that applied to all citizens was rarely discussed.<sup>41</sup> The membership clause was barely mentioned at all.<sup>42</sup> As one congressman cynically noted: "[T]he mood of this House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it."<sup>43</sup>

Nevertheless, the membership clause of the Smith Act was soon examined in the courts. In 1943, the Eighth Circuit upheld the clause

<sup>35</sup> *Id.* tit. I, § 2 at 671.

<sup>36</sup> *Id.* tit. I, § 4 at 671.

<sup>37</sup> The five classes included: (1) aliens who knowingly and for pay assisted other aliens to illegally enter the United States within five years of their own entry; (2) aliens who knowingly and for pay assisted other aliens to illegally enter the United States on more than one occasion; (3) aliens who had been convicted of possessing certain weapons (e.g., sawed-off shotguns); (4) aliens who had been convicted of violating title I of this act within five years of their entry; (5) aliens who had been convicted of violating title I of this act on more than one occasion. *Id.* tit. II, § 20 at 671-72.

<sup>38</sup> Section 20 made it illegal to become a member of a subversive organization. *Id.* tit. II, § 20 at 671-72. Section 23(b) rendered any alien who had either entered the United States as a member of a subversive organization or at any time thereafter became one vulnerable to deportation. *Id.* tit. II, § 23(b) at 673.

<sup>39</sup> *Id.* tit. III at 673-76.

<sup>40</sup> See, e.g., 86 Cong. Rec. 8342-47, 9031-35 (1940); 84 Cong. Rec. 9534-35, 9537-38, 10364-74, 10376-78 (1939).

<sup>41</sup> See, e.g., 86 Cong. Rec. 8340, 8342 (1940); 84 Cong. Rec. 10374-76, 10379-80 (1939).

<sup>42</sup> In two general descriptions of the bill, the membership clause of title I was mentioned once and omitted once. See 86 Cong. Rec. 9034 (1940) (omitting mention of the clause); *id.* at 8342 (mentioning clause). Membership in a subversive organization as a ground for deportation was mentioned frequently. See, e.g., 86 Cong. Rec. 9032 (1940); 84 Cong. Rec. 9537, 9539, 10360-62 (1939).

<sup>43</sup> 84 Cong. Rec. 10370 (1939) (statement of Rep. Ford).



against the challenge that it violated the first amendment by imposing guilt on the basis of mere association.<sup>44</sup> The court simply disagreed: [G]uilt is entirely individual and personal.

. . . .  
 . . . As to mere members, the statute expressly requires that they be or become such "knowing the purposes thereof." What the court and jury do is ascertain whether the organization has such forbidden purposes and whether such requisite knowledge exists and these must appear beyond a reasonable doubt . . . .<sup>45</sup>

In 1952, the Fourth Circuit expanded on this theme. Knowing membership in an unlawful organization, it claimed, rendered that organization aid, support, and encouragement and, therefore, was within the power of Congress to prohibit.<sup>46</sup> The Supreme Court, however, did not turn its attention to the membership clause until the *Scales* decision in 1961.

### III. THE AFFIRMANCE OF SCALES'S CONVICTION AND STEWART'S FLIP-FLOPS

The Court's vote affirming Scales's conviction was 5 to 4, as narrow a majority as could be had. If one Justice in the majority had joined the four dissenters, Scales's conviction would have been reversed. What has not been generally known until now is that Scales came much closer to securing that essential fifth vote and a reversal than either he, his attorneys, or anyone else not involved in the Supreme Court proceedings had ever realized. During the twenty-two month period that the case was pending before the Court, Justice Stewart wavered between voting to affirm and to reverse, changing his mind no less than five times. In the end, he provided the critical fifth vote and concurred in Justice Harlan's majority opinion, but that happened only after Harlan agreed to significant changes proposed by Stewart in a major portion of his opinion.

Stewart was a member of the Court when the *Scales* case was argued for a second time on April 29, 1959.<sup>47</sup> At the first conference following reargument, Stewart informed his colleagues that he ex-

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<sup>44</sup> *Dunne v. United States*, 138 F.2d 137 (8th Cir.), cert. denied, 320 U.S. 790 (1943).

<sup>45</sup> *Id.* at 143.

<sup>46</sup> *Frankfeld v. United States*, 198 F.2d 679, 683-84 (4th Cir. 1952), cert. denied, 344 U.S. 922 (1953).

<sup>47</sup> President Eisenhower nominated Potter Stewart for the Supreme Court on January 17, 1959. *N.Y. Times*, Jan. 18, 1959, at 40, col. 2. Stewart had been sitting on the Court for seven months prior to his nomination under a recess appointment. The Senate confirmed his nomination on May 5, 1959 and Stewart began his first term that same year. *N.Y. Times*, May 6, 1959, at 32, col. 3.

pected to vote to reverse the conviction because the government's evidence pertinent to illegal advocacy did not satisfy the strict evidentiary requirements the Court had defined in *Yates v. United States*.<sup>48</sup> If Stewart's inclination had held firm, the Court would have likely reversed Scales's conviction at that point since that disposition was already favored by Chief Justice Warren, and Justices Douglas, Black, and Brennan.<sup>49</sup>

But Stewart must have wavered, for eight weeks later, just before the Court recessed for the summer, the Court ordered that *Scales* be reargued on November 10, 1959, and specified five questions it wanted the parties to address.<sup>50</sup> In the fall, however, the Court granted certiorari in *Noto v. United States*,<sup>51</sup> and because it raised questions related to those in *Scales*, the Court ordered that both cases be heard on February 23, 1960.<sup>52</sup> Two weeks before the scheduled argument, the Court granted certiorari in *Communist Party of the United States v. Subversive Activities Control Board [SACB]*<sup>53</sup> which it said raised questions related to *Scales* and *Noto*, and therefore ordered that argument in all three cases be heard on October 10, 1960.<sup>54</sup>

Four days before the October argument, Stewart told his colleagues at a conference that he "had reserved his vote" in this case, that he continued to be "concerned about the sufficiency of the evidence" under *Yates*, but that he was "inclined to affirm" the conviction.<sup>55</sup> At the conference following the argument, however, Stewart announced that he had changed his mind and was now inclined to vote to reverse the conviction because the evidence in *Scales* on the issue of party advocacy did not satisfy the *Yates* requirements.<sup>56</sup>

Shortly thereafter Stewart likely changed his mind again and informed Harlan that he was willing to vote to affirm the conviction.<sup>57</sup> On that basis, Harlan drafted a majority opinion for the Court affirming Scales's conviction. This draft was circulated to the Justices

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<sup>48</sup> 354 U.S. 298 (1957); Judicial Conference Memorandum by J. Douglas, *Scales v. United States*, 367 U.S. 203 (1961) (Library of Congress, Box 1238).

<sup>49</sup> J. Douglas, *supra* note 48.

<sup>50</sup> 360 U.S. 924 (1959).

<sup>51</sup> 361 U.S. 813 (1959).

<sup>52</sup> 361 U.S. 952 (1960).

<sup>53</sup> 361 U.S. 951 (1960).

<sup>54</sup> 361 U.S. 952 (1960). For a complete history of the case see *supra* note 2.

<sup>55</sup> Judicial Conference Memorandum by J. Douglas, *Scales v. United States*, 367 U.S. 203 (1961) (Library of Congress, Box 1238).

<sup>56</sup> *Id.*; Judicial Conference Memorandum by J. Brennan, *Scales v. United States*, 367 U.S. 203 (1961) (available upon request at the Cardozo Law Review).

<sup>57</sup> See Letter from J. Harlan to J. Stewart (Feb. 13, 1961) (J. Harlan's Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.) For the pertinent part of this letter see *infra* text accompanying note 63.

on December 14, 1960.<sup>58</sup>

In early February, 1961, Stewart responded to Harlan's draft opinion by sending him a copy of his own draft memorandum. In a cover note, Stewart informed Harlan that he would not circulate it to the other members of the Court until Harlan had "an opportunity . . . to look it over and give me the benefit of any further views you may have."<sup>59</sup> Stewart's memorandum indicated that he agreed with all aspects of Harlan's draft opinion except for the critical issue of whether the government's evidence in *Scales* satisfied the *Yates* requirement.<sup>60</sup> On this decisive issue, Stewart made unequivocal his disagreement with Harlan:

[A]fter a thorough, independent search of both records, I simply cannot agree that in the present case sufficient additional evidence was adduced of the Party's activity and teaching to infuse it "with permissible inferential vitality, towards establishing 'advocacy of action.'" Indeed, I think that, although the present case was tried and submitted to the jury under the correct view of Smith Act advocacy as illuminated in the *Yates* opinion, the actual evidence here was not significantly different from that contained in the *Yates* record, and was therefore insufficient to support the jury's verdict.<sup>61</sup>

Nevertheless, Stewart was self-conscious about his disagreement with Harlan. This was only his second full term on the Court, he was not a member of the Court when *Yates* was decided, and Harlan, who now proposed to author the majority opinion affirming *Scales*'s conviction, had himself written the *Yates* opinion.<sup>62</sup>

Harlan must have sensed that Stewart was susceptible to being persuaded to change his mind yet again because he quickly answered Stewart. He reminded Stewart that he, Stewart, had told him shortly after the October argument that he had "no difficulties with the *Scales* record."<sup>63</sup> Harlan also noted that he had revised four pages of the draft opinion that discussed the proof in *Scales* in "an effort to meet your troubles on that score."<sup>64</sup> He tried to reassure Stewart that *Yates*'s "definition of Smith Act advocacy and its requirement of

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<sup>58</sup> Id.; J. Harlan's Draft Opinion of *United States v. Scales* (Dec. 14, 1960) (J. Harlan's Collected Papers, Box 104, Seeley Mudd Manuscript Library, Princeton Univ.)

<sup>59</sup> Letter from J. Stewart to J. Harlan (Feb. 2, 1961) (J. Harlan's Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.)

<sup>60</sup> Id. at Addenda.

<sup>61</sup> Id. at Addenda 2.

<sup>62</sup> Id. at Addenda 1-2.

<sup>63</sup> Letter from J. Harlan to J. Stewart (Feb. 13, 1961) (J. Harlan's Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.)

<sup>64</sup> Id.

strict proof"<sup>65</sup>—aspects of *Yates* that Harlan described to Stewart as “healthy contribution[s] to this difficult field of law”<sup>66</sup>—were still honored by the Court. To support this claim, he pointed to the “different conclusion”<sup>67</sup> the Court was reaching in *Noto*.<sup>68</sup> Harlan then stated that although he was “not an enthusiast for these Smith Act prosecutions,”<sup>69</sup> and he believed the Court “should keep a tight rein on them, . . . [a] reversal here would be almost tantamount to overruling at least that part of *Dennis* and *Yates* which allowed the application of the statute to advocacy of unspecified future violence, and to the recruitment and readying of a group to engage in violence at the . . . direction of their leaders.”<sup>70</sup> Harlan closed his letter to his colleague by appealing to him for “a further chance to thrash this thing out with you in face to face discussion, as your’s is the deciding vote.”<sup>71</sup>

Two months passed before Stewart responded to Harlan in writing. Finally, on April 13, 1961, Stewart wrote Harlan and confessed the obvious, that the *Scales* case “has caused me more difficulties than any other we have had since I have been here.”<sup>72</sup> Although Stewart remarked that he had “continuing doubts as to the sufficiency of the evidence here under the standards established in *Yates*,”<sup>73</sup> he stated that he had “concluded that I can conscientiously join in affirming the judgment.”<sup>74</sup> In the remainder of the four page letter, Stewart offered what he termed “minor suggested changes”<sup>75</sup> for Parts I, II, and IV of Harlan’s opinion and a rewrite of Part III which discussed the evidence of the Communist Party’s advocacy of action and *Scales*’s specific intent to further the Party’s purposes.<sup>76</sup> Harlan incorporated

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 367 U.S. 290 (1961). *Noto* was a companion case to *Scales* in which the defendant was convicted under the Smith Act of being a member of the Communist Party. In contrast to its decision in *Scales*, the Court reversed *Noto*’s conviction.

<sup>69</sup> Letter from J. Harlan to J. Stewart (Feb. 13, 1961) (J. Harlan’s Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.)

<sup>70</sup> *Id.* (referring to *Dennis v. United States*, 341 U.S. 494 (1951), and *Yates v. United States*, 360 U.S. 920 (1959)).

<sup>71</sup> *Id.*

<sup>72</sup> Letter from J. Stewart to J. Harlan at 1 (Apr. 13, 1961) (J. Harlan’s Collected Papers, Box 105, Seeley Mudd Manuscript Library, Princeton Univ.)

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Referring to his rewrite of Part III, Stewart wrote Harlan: “Needless to say, I have no pride of authorship. Indeed, in this instance, I have considerable lack of pride. My prime purpose is to suggest that there be included references to additional evidence in the record which seems to me essential to sustain this conviction.” *Id.* at 4.

Stewart's minor suggestions, accepted Stewart's version of Part III, and thereby secured a majority to affirm Scales's conviction.