California Western School of Law
CWSL Scholarly Commons

Faculty Scholarship

2013

Why Dennis?

Michal R. Belknap
California Western School of Law, mbelknap@cwsl.edu

Follow this and additional works at: https://scholarlycommons.law.cwsl.edu/fs

Part of the Legal History Commons

Recommended Citation
Michal R. Belknap, Why Dennis?, 96 MARQ. L. REV. 1013 (2013).

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

HEINONLINE

Citation: 96 Marq. L. Rev. 1013 2012-2013

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Wed Feb 19 12:52:27 2014

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0025-3987

WHY DENNIS?

MICHAL R. BELKNAP*

Those members of Congress who resisted the creation of the national investigative agency that became the FBI, according to Athan Theoharis, feared establishing a political police force, comparable to the ones that had terrorized Napoleonic France and tsarist Russia.[1] The way to accomplish their objective, they believed, was by restricting any organization Congress might create to detecting and prosecuting crimes against the United States. But would such a limitation have made the FBI any less of a threat to civil liberties than it became under the leadership of Director J. Edgar Hoover?[2] For an answer to that question one need look no further than the case of *Dennis v. United States.*[3] That assault on the First Amendment provides a negative answer to the question of whether restricting a national police agency to the investigation of federal crimes would indeed protect American civil liberties from the threat posed by a political police force.

Although now largely forgotten, except by historians, *Dennis* was the most important First Amendment case of the 1950s.[4] Its significance does not lie in the importance of the new constitutional principle the Supreme Court announced there. Within less than two decades, *Dennis*'s "grave and probable danger" test had been largely abandoned.[5] The case continues to occupy a prominent place in the

---

* Earl Warren Professor of Law, California Western School of Law, and Adjunct Professor of History, University of California, San Diego. Ph.D., University of Wisconsin; J.D., The University of Texas School of Law.

1. Athan G. Theoharis, *A Reassessment of the Wickersham Commission Report: The Evolution of a Security Consensus*, 96 MARQ. L. REV. 1147 (2013).

2. *See* KENNETH O'REILLY, HOOVER AND THE UN-AMERICANS: THE FBI, HUAC, AND THE RED MENACE 13 (1983).

3. Dennis v. United States, 341 U.S. 494 (1951).

4. *See* Michal R. Belknap, *Why* Dennis v. United States *Is a Landmark Case*, 34 J. SUP. CT. HIST. 289, 289–90 (2009).

5. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969). In *Brandenburg* the Court announced that in order for the punishment of speech that advocates violence or violation of the law to be constitutional, the speech had to advocate *immediate* violence or violation of the law and the violence or violation of the law advocated had to be likely to actually occur immediately. *See id.* at 447. To the displeasure of Justices Black and Douglas, the Court did not really overrule *Dennis*. Belknap, *supra* note 4, at 292. However, *Dennis*'s "grave and

legal history of the McCarthy era not because of how it changed constitutional doctrine, but because it epitomizes so well the effects of McCarthyism on the law.[6]

What the Supreme Court did in *Dennis* is quite clear. It upheld the constitutionality of a federal criminal statute, officially known as the Alien Registration Act of 1940, but more commonly referred to as the Smith Act, after its sponsor, Representative Howard Smith (D. Va.).[7] The Smith Act made it a crime to teach and advocate the violent overthrow of the government or to set up an organization that engaged in such teaching and advocacy.[8] In other words, it criminalized a certain kind of expression.

The Supreme Court nevertheless upheld the Smith Act, taking the position that it did not violate the First Amendment.[9] In order to reach that conclusion, the Court had to depart drastically from established doctrine.[10] By the 1940's, the Court had arrived at the position that legislation could constitutionally restrict expression only if it prohibited speech that posed a "clear and present danger" of some weighty substantive evil.[11] In other words, the threatened harm had to be both serious and likely to occur in the immediate future. In order to uphold convictions of eleven leaders of the Communist Party of the United States of America (CPUSA) for violation of the Smith Act, the Court substituted the "grave and probable danger" test for the established "clear and present danger" one.[12] Under its new rule, if the threatened evil was a very bad one (such as an attempt to bring about the violent overthrow of the government), then expression directed at promoting it could be restricted, even if the chances that this speech would actually lead to revolutionary violence were slight.[13] That the Court was willing to abandon the clear and present danger test in order to uphold a law such as the Smith Act indicated to Prof. Eugene Rostow of the Yale

---

probable danger" test has persisted only in one comparatively insignificant area of the law: cases in which freedom of expression and the right to a fair trial are in conflict. *Id.* at 292–93.

6. *Id.* at 289–90, 298–99.

7. *Dennis*, 341 U.S. at 516.

8. Alien Registration (Smith) Act, ch. 439, § 2(a)(1), 54 Stat. 670, 671 (1940) (current version at 18 U.S.C. § 2385 (2006)).

9. Belknap, *supra* note 4, at 290.

10. *Id.* at 292.

11. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 994 n.41 (3d ed. 2006).

12. *See id.* at 995.

13. *Id.*

Law School that America was in the midst of a grave civil liberties crisis.[14]

By the time he published his assessment of the Supreme Court's decision in *Dennis* the country was also in the middle of an all-out legal war on the Communist Party. In the wake of the Supreme Court's ruling, the Department of Justice secured the indictment of 132 so-called "second string" leaders of the CPUSA for violation of the Smith Act.[15] The Court reconsidered its decision in 1957, and in *Yates v. United States,* while not reversing *Dennis,* it imposed evidentiary requirements for obtaining a constitutional conviction under the Smith Act that the government could not meet.[16] *Yates* came too late to save the CPUSA, however. Prosecution under the Smith Act led directly to the collapse of the Communist Party, inflicting damage on the organization from which it never recovered.[17] Thus, the CPUSA, like

---

14. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 222–24 (1952) (stating that the Court attempts to use the "clear and present danger" test but that it is applied in such a way that the test is functionally abandoned).

15. Michal R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, *in* AMERICAN POLITICAL TRIALS 207, 225 (Michal R. Belknap ed., rev., expanded ed. 1994).

16. Yates v. United States, 354 U.S. 298, 320, 327–28 (1957). Justice Harlan, who wrote the Court's opinion in *Yates*, had set his clerks to work looking for a way to halt prosecutions under the Smith Act. *See* Confidential Memorandum from John Marshal Harlan to Messrs. Baror and Schlei (July 18, 1956) (available upon request, as a part of John Marshall Harlan's Papers, from Seeley G. Mudd Manuscript Library). The government could have retried the *Yates* defendants under the evidentiary standards the Court had laid down in that decision, but apparently concluding it could not satisfy them, chose not to do so. MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 259 (1977) [hereinafter BELKNAP, COLD WAR POLITICAL JUSTICE]. *Yates* did not benefit any of the *Dennis* defendants, nor the six convicted in a Baltimore trial and eleven in a second New York trial, all of whose appeals had been exhausted by the time the Supreme Court ruled. *Id.* at 258–59. But *Yates* eventually saved from prison all of the other Communist leaders who had been prosecuted for conspiring to violate the Smith Act (except for four who had been acquitted by a jury in Cleveland, and one there and one elsewhere who were acquitted by trial judges). *Id.* at 226, 259. Some defendants gained their freedom because the government chose not to bring them to trial, some because convictions it had already obtained were reversed by courts of appeal, and in one case in which it managed to obtain a conviction on retrial in a court that claimed to be following *Yates*, because this second conviction was reversed on appeal. *Id.* at 259–60.

17. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 185–206. The prosecutions inspired the Party to adopt suicidal self-protective measures that included purging thousands of members in order to eliminate any it suspected might be informers and incapacitating many of its leaders by sending them underground. *Id.* at 191–94. Some of those isolated from the Party while hiding in the underground developed doubts about recent Communist Party of the United States of America (CPUSA) policies that were exacerbated by events in the Soviet Union and Eastern Europe. *Id.* at 195. The CPUSA collapsed organizationally, and lost the bulk of its membership in 1956–1957. *Id.* at 197.

the First Amendment, became a victim of the *Dennis* case.

That all of this happened is fairly clear. More difficult is explaining why it happened. To what do we owe a prosecution of the national leadership of a small radical organization (the CPUSA never had as many as many as 75,000 members[18]) that had such disastrous consequences for the constitutional law of freedom of expression? While it may no longer be easy to "separate[] orthodoxy from revisionism" in this field,[19] for years the prevailing view has been that *Dennis* was part of the unjustified and even irrational assault on radicals and dissenters that has come to be known to as McCarthyism.[20] That phenomenon was an outgrowth of the Cold War between the United States and its Communist rival for geopolitical dominance, the USSR, that developed during the late 1940's. As Ellen Schrecker explains, "once the Cold War transformed the Soviet Union into an enemy, it took little imagination to see American Communism as a threat to national security."[21] The "plausibility of the threat—based on the connection between the commonly exaggerated image of Communism and an equally exaggerated notion of the nation's vulnerability to it . . . spurred American policymakers to protect internal security by cracking down on domestic Communists."[22] Activities that conservatives "had previously . . . opposed for political and ideological reasons now became matters of national security."[23] The result was *Dennis*. As Richard Fried puts it, the Smith Act trial of the CPUSA leaders was a "response largely to domestic political considerations" that "was far more dangerous to the republic it purported to protect than [to] those who were under indictment."[24] It was something for which there was little, if any, excuse.[25]

---

18. *Id.* at 190.

19. Erik Tarloff, *Red Faces*, FIN. TIMES, Jan. 17, 2004, at 28.

20. For examples of the point of view that might be characterized as the traditional liberal one, see generally BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16; ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 190–200 (1998); WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 551–78 (appearing as Volume 12 in THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (2006)).

21. SCHRECKER, *supra* note 20, at 161.

22. *Id.* at 155.

23. *Id.*

24. RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 84 (1990).

25. *Id.*

While this has been the standard interpretation of *Dennis* at least since the publication of my *Cold War Political Justice* in 1977, evidence that has become available in recent years raises serious doubts about its validity. As a result of the collapse of the Soviet Union in 1991, some Russian archival material was opened up to Western researchers. In 1995 Emory University professors Harvey Klehr and John Haynes Holmes and a Russian archivist, Fridrikh Igorevich Firsov published 92 of these documents under the title *The Secret World of American Communism.*[26] They provided "hard proof . . . that the Communist Party U.S.A. was active in espionage and clandestine activities."[27]

An even more important development was the 1995 release of the Venona intercepts. A super-secret World War II project of the U.S. Army's Signal Intelligence Service, Venona managed with great difficulty, and only after the war had ended, to decipher the codes used by the Soviets in transmitting correspondence, much of which involved espionage, between Moscow and the Soviet consulate in Washington.[28] "By 1948 the accumulating evidence from . . . decoded Venona cables showed that the Soviets had recruited spies in virtually every major American government agency of military or diplomatic importance."[29] Many of these recruits were American Communists.[30] For decades Venona was such a closely guarded secret that even top officials of the U.S. government, including Attorney General Tom Clark and President Harry Truman, were unaware there even was such a project, let alone of what it had learned.[31] But when Venona's explosive findings were finally released in 1995, they seemed to establish conclusively that the organization whose leaders were targeted by the *Dennis* prosecution posed a real and substantial threat to American national security.[32]

---

26. Stephen Goode, *We Told You So*, INSIGHT, Oct. 6–13, 1997, at 8.

27. *Id.*

28. JOHN EARL HAYNES & HARVEY KLEHR, VENONA: DECODING SOVIET ESPIONAGE IN AMERICA 9 (1999).

29. *Id.*

30. *Id.*

31. *Id.* at 15; ATHAN THEOHARIS, CHASING SPIES: HOW THE FBI FAILED IN COUNTERINTELLIGENCE BUT PROMOTED THE POLITICS OF MCCARTHYISM IN THE COLD WAR YEARS 9 (2002); ALLEN WEINSTEIN & ALEXANDER VASSILIEV, THE HAUNTED WOOD: SOVIET ESPIONAGE IN AMERICA—THE STALIN ERA 291 (1999).

32. HAYNES & KLEHR, *supra* note 28, at 11–12; HERBERT ROMERSTEIN & ERIC BREINDEL, THE VENONA SECRETS: EXPOSING SOVIET ESPIONAGE AND AMERICA'S TRAITORS 234 (2000); KATHERINE A. S. SIBLEY, RED SPIES IN AMERICA: STOLEN SECRETS AND THE DAWN OF THE COLD WAR 188–89 (2004). Ellen Schrecker argues that "the records that have been released" do not establish "whether the transmission of secrets actually

Only a few hardcore skeptics, the most outspoken of whom is Victor Navasky, still doubt this.[33] But is the fact that Communists actually threatened American national security enough to explain why Eugene Dennis and the other leaders of the CPUSA were put on trial for violation of the Smith Act? They were, after all, charged not with espionage but with teaching and advocating Marxism-Leninism. Fried insists this case "served justice badly,"[34] and Peter L. Steinberg has suggested that the *Dennis* prosecution was not really motivated by concerns about national security at all. Rather, Steinberg contends, the leaders of the CPUSA were the victims of an anticommunist campaign by the FBI, intended to advance the right-wing ideological agenda and bureaucratic interests of the Bureau.[35] According to him, the FBI's "role in securing Smith Act prosecutions [of the leaders of the CPUSA] . . . was direct, persistent, and persuasive."[36] His FBI-centered interpretation of the case has received support from Athan Theoharis.[37]

Their focus on the Bureau has much to commend it. So too does the contention that the *Dennis* case was a product of McCarthyism. Certainly, the Smith Act prosecution of the leaders of the CPUSA contributed to the anti-Communist hysteria that gripped the country around 1950. As Ellen Schrecker has emphasized, what was important in the rise of McCarthyism was not whatever Communist threat to America actually existed but rather the way that threat was perceived.[38] Likewise, what is important about the inception of the *Dennis* case is not whether those who taught and advocated communism posed a threat to America but the fact that others perceived they did. In March 1948 a crowd in Columbus, Ohio drove off people handing out Communist leaflets.[39] A few days later, a mob in that Ohio city wrecked a Communist leader's home.[40] Participants in a Communist meeting in

---

occurred or whether American intelligence agents just assumed that it had." SCHRECKER, *supra* note 20, at 167.

33. For Navasky's views, see Victor Navasky, *Cold War Ghosts: The Case of the Missing Red Menace*, THE NATION, July 16, 2001, at 36 and Ronald Radosh, Letter to the Editor, *Communists in America*, N.Y. TIMES, Oct. 28, 2000, at A14.

34. FRIED, *supra* note 24, at 94.

35. PETER L. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952, at 92, 95–100, 108 (1984).

36. *Id.* at 97.

37. THEOHARIS, *supra* note 31, at 80.

38. *See* SCHRECKER, *supra* note 20, at 163.

39. FRIED, *supra* note 24, at 95.

40. *Id.*

Rochester, New York were forced by a mob to disperse.[41] Such hostility toward those who advocated radical ideas was the essence of McCarthyism. It was also what caused FBI informant Angela Calomiris to fear for her safety even before she took the stand as a government witness in the *Dennis* trial and at a time when she was still believed by everyone to be a committed Communist.[42] That trial and the others of CPUSA leaders that followed it "may well have signaled to the public that Communists, never beloved, had lost what scraps of legitimacy they ever had."[43] It fueled the very anti-Communist hysteria that helped give rise to the *Dennis* prosecution.[44]

But while there is reason to believe that the attitudes associated with McCarthyism helped to bring about the *Dennis* prosecution, one cannot ignore the fact that American Communists actually did engage in spying on behalf of the Soviet Union. That made them a very real threat to national security and fully justified prosecuting those who engaged in such activity for espionage and related offenses. "The deciphered Venona messages . . . showed that a disturbing number of high-ranking U.S. government officials consciously maintained a clandestine relationship with Soviet intelligence agencies and had passed extraordinarily sensitive information to the Soviet Union . . . ."[45]

Those who engaged in such criminal conduct included some high-ranking leaders of the CPUSA. For example, Steve Nelson, a member of the Communist Party's National Committee, spied on the American atomic bomb project during World War II.[46] Even the head of the

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. HAYNES & KLEHR, *supra* note 28, at 9. The documents passed to the Soviets included ones originating at the highest level of the Treasury Department. *See* 6 F.O.I.A. JULIUS ROSENBERG ET AL., FED. BUREAU OF INVESTIGATION, SILVERMASTER CASE FILE NO. 65-56402, at 25 [hereinafter "SILVERMASTER FILE VOL. 6"] (including statement of Elizabeth Bentley "Gregory"), *available at* http://education-research.org/csr/holdings/silvermaster/summaries.htm. Elizabeth Bentley's statement was summarized in memorandum from J.C. Strisplund to D.M. Ladd on October 21, 1946. 82 F.O.I.A. JULIUS ROSENBERG ET AL., FED. BUREAU OF INVESTIGATION, SILVERMASTER CASE FILE NO. 65-56402, [hereinafter "SILVERMASTER FILE VOL. 82"] *available at* http://education-research.org/csr/holdings/silvermaster/summaries.htm. Soviet Intelligence Service also obtained information from the State Department, the War Department, the Office of Strategic Services, the Foreign Economic Administration, and the Department of Justice. *Id.* at 5.

46. ROMERSTEIN & BREINDEL, *supra* note 32, at 255; THEOHARIS, *supra* note 31, at 49–50.

CPUSA, Earl Browder, was a Soviet spy. Browder, who served as the Party's general secretary from 1932 to 1945, not only knew about but also personally participated in spying.[47] Fearful of being incriminated in espionage, he collected only economic, social, and political information himself, and did not want to see any technical production or military material.[48] But the fact of the matter is that the head of the American communist movement was actively engaged in recruiting and running spies for the Soviet Union.[49] Indeed, he handpicked those CPUSA officials who served as sources, couriers, and group handlers for the NKGB (Soviet secret police).[50] Eugene Dennis, the lead defendant in the *Dennis* case, also seems to have had some kind of involvement with Soviet intelligence.[51]

But while leaders of the CPUSA did spy for the Soviet Union, the *Dennis* case was not an espionage prosecution and the Smith Act punishes seditious expression rather than the stealing of government secrets. There were two obvious reasons why the Justice Department chose to prosecute under that law in 1948. One, emphasized by Theoharis, is that it lacked sufficient usable evidence to prove Communists had engaged in espionage.[52] Venona messages were, of course, not available for use in court, nor could prosecutors employ information obtained employing "sensitive investigative techniques," such as "access to bank records."[53] Also unavailable was evidence obtained using such illegal methods as "break-ins, wiretaps, bugs, [and] mail openings."[54]

There was, however, another, perhaps more important, reason why the Justice Department chose to prosecute the Communist leaders

---

47. SILVERMASTER FILE VOL. 82, *supra* note 45, at 4–5; ROMERSTEIN & BREINDEL, *supra* note 32, at 72, 84.

48. SILVERMASTER FILE VOL. 6, *supra* note 45, at 93.

49. ROMERSTEIN & BREINDEL, *supra* note 32, at 84; *see also* SILVERMASTER FILE VOL. 6, *supra* note 45, at 92–93. A few weeks before his death in 1973, while not admitting that he personally had engaged in espionage, Browder told a reporter for the United Press that "[w]e had people" who "would inform us from the enemy camp because they sympathized with our position." GUENTER LEWY, THE CAUSE THAT FAILED: COMMUNISM IN AMERICAN POLITICAL LIFE 81 (1990).

50. WEINSTEIN & VASSILIEV, *supra* note 31, at 302.

51. ROMERSTEIN & BREINDEL, *supra* note 32, at 288.

52. *See* THEOHARIS, *supra* note 31, at 80.

53. *Id.*

54. *Id.* The official disclosure of the Venona Project did not come until July 11, 1995, when the first batch of messages was released. *See* HAYNES & KLEHR, *supra* note 28, at 6.

under the Smith Act. Steinberg points out that J. Edgar Hoover wanted, as he told Attorney General Tom Clark, to "establish the illegal status of the Communist Party of the United States of America."[55] Clark stated publicly on February 5, 1948 that the Smith Act was not an adequate prosecutorial tool.[56] But that was true only if the objective was punishing individual Communists.[57] As far as Hoover was concerned, the real goal of this prosecution was to establish that the CPUSA taught the duty and necessity of overthrowing and destroying the government by force and violence.[58] The FBI hoped to identify the Communist Party with treason and espionage, and to do so without having to charge any particular Communists with committing one of those offenses.[59]

Dennis served very nicely what Steinberg sees as the objectives of the FBI. But there are problems with the explanation that he offers for the case. For that matter, there are also problems with trying to explain *Dennis* as an effort to combat a genuine threat to national security and to depict it as a consequence of McCarthyism. The last of these explanations is particularly problematic because it is so unclear whether McCarthyism even existed when a federal grand jury voted on June 29, 1948 to indict the *Dennis* defendants. That was a year and one half before Senator Joe McCarthy delivered the famous speech at Wheeling, West Virginia, in which he charged that members of the Communist Party, although known to the Secretary of State, were still working and shaping policy in the State Department.[60] If that is when McCarthyism began, obviously it did not inspire the *Dennis* prosecution. But while agreed that the beginning of the second Red Scare predates McCarthy's Wheeling speech, historians cannot agree on much more than that. They are in accord only in placing its commencement sometime between 1945 and 1949.[61] Schrecker rather imprecisely states that McCarthyism "dominated American politics during the late 1940s and 1950s."[62]

Thus, McCarthyism *might* have precipitated the *Dennis* case. But the argument that it actually did so is far from conclusive. The Supreme

55. STEINBERG, *supra* note 35, at 99 (internal quotation marks omitted).

56. *Id.* at 98.

57. *Id.*

58. *Id.* at 99–100.

59. *Id.* at 102.

60. *Id.* at 186.

61. DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 85 (1983).

62. SCHRECKER, *supra* note 20, at x.

Court rendered its decision in *Dennis* on June 4, 1951, so that decision clearly could be a product of McCarthyism.[63] But a federal grand jury voted to indict the defendants on June 29, 1948, and their trial started on March 7, 1949.[64] Both of these events preceded McCarthy's Wheeling speech, so if McCarthyism began earlier than that, whether the case as a whole was caused by McCarthyism depends on when within a very imprecisely defined period that phenomenon made its first appearance on the American scene. The *Dennis* case exemplifies most of the features that have made McCarthyism infamous. But that, of course, is not sufficient to establish a causal relationship between the two.

Just as it is doubtful that *Dennis* was caused by McCarthyism, so it also seems unlikely that the case was a response to the real threat that Communists posed to national security.[65] The Communist Party leader most involved in espionage was Earl Browder.[66] Yet he was not among those the Justice Department charged in 1948 with violation of the Smith Act.[67] Indeed, by the time the *Dennis* defendants were indicted, Browder had been ousted from his position as general secretary of the CPUSA and expelled from the Party for failing to support its adoption of a hard line toward the West.[68]

What finally proved that American Communists had engaged in espionage, and thus had indeed constituted the real threat to national security that conservatives had always insisted they were, was the Venona intercepts and documents long hidden from Western eyes in Soviet archives. Yet none of this evidence became available until the 1990s, long after the *Dennis* defendants had been indicted, tried, convicted, and imprisoned.[69] Whatever it may prove, it clearly had nothing to do with the bringing of the case against them.

What makes it most doubtful that the *Dennis* case was brought to protect the United States from Communist espionage, however, is simply the nature of the charges lodged against the defendants. They were accused of conspiring to teach and advocate the violent overthrow of the government. They were not accused of engaging in revolutionary action, nor even of agreeing to do so. This was a case about advocacy,

---

63. Dennis v. United States, 341 U.S. 494, 494 (1951).

64. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 51, 77.

65. *See* HAYNES & KLEHR, *supra* note 28, at 21–22.

66. ROMERSTEIN & BREINDEL, *supra* note 32, at 84.

67. *See* Belknap, *supra* note 4, at 290.

68. ROMERSTEIN & BREINDEL, *supra* note 32, at 72; SCHRECKER, *supra* note 20, at 18.

69. HAYNES & KLEHR, *supra* note 28, at 6.

and by its very nature that is something that must be done publicly. As Geoffrey Stone, one of the leading authorities on freedom of speech, says "[t]he notion that the government would be helpless to combat a truly dangerous conspiracy if it could not suppress its public *expression* is absurd."[70]

But if that notion is absurd, then what about the idea that it was the machinations of the FBI that were responsible for the *Dennis* case? Theoharis agrees with Steinberg in assigning responsibility for the prosecution to the Bureau. But he explains its motivation differently. Rather than being inspired by a mixture of right-wing ideology and a desire to advance its own bureaucratic interests, he says, the FBI was motivated by the need to prevent disclosure of the fact that it repeatedly resorted to investigative methods that were "sensitive" and even downright illegal.[71] "The less risky course was to seek indictments under the Smith Act, then rely on FBI informers who had infiltrated the Communist party to testify about Communist revolutionary plans, and question the indicted Communist officials and FBI informers about the texts of Communist publications," Theoharis concludes.[72]

He ignores, of course, the extent to which indicted CPUSA leaders could have disrupted this scheme by invoking their Fifth Amendment right to refuse to give evidence against themselves. Although flawed, however, Theoharis's explanation for the *Dennis* case gets closer to the truth than any of the others. He puts the focus where it belongs: on the incentives that motivate law enforcement agencies. In attempting to combat the "Red Menace," the FBI found itself in an awkward position. For the Bureau is both a law enforcement agency and a counterintelligence one.[73] The latter role called for it to find out everything it could about the enemy's espionage activities. If that required agents to break the law, that was acceptable—at least so long as they did not get caught. The Bureau's law enforcement role was different. In order to perform it successfully, agents not only had to catch those who broke the law, but also to obtain by legal means evidence against them that would be admissible in court. The explanation for the *Dennis* case lies in the FBI's unsuccessful efforts to perform this law enforcement role successfully.

70. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 408 (2004).
71. THEOHARIS, *supra* note 31, at 80.
72. *Id.*
73. *Id.* at 11.

Although it had not showed much interest in Soviet espionage before 1940, in that year the FBI began piecing together a picture of Russian intelligence operations in the United States.[74] Agents did enough "prowling around" to at least make themselves an annoyance to Russian spies.[75] They actually "hounded" some Soviet agents right out of the country.[76] But the FBI's main success in the counterespionage field was wiretapping all of the Soviet organizations in the United States.[77] Since wiretapping was of dubious legality, the Bureau did not often gather enough evidence to provide the basis for an espionage prosecution.[78]

Elizabeth Bentley promised to give the FBI what it had previously lacked. Bentley was a Soviet spy, although she did not immediately disclose this when she walked into the Bureau's New Haven, Connecticut field office in August of 1945.[79] Nor did she say anything about it during a second meeting with the FBI two months later.[80] It was not until nearly three months after the FBI first interviewed her that Bentley "furnished information relative to a Russian espionage ring with which she was affiliated."[81] Although slow in coming, the 107-page statement that she signed on November 30, 1945 was pure gold to an agent with counterintelligence responsibilities.[82] Filled with names and descriptions, it identified more than eighty alleged Soviet spies in the United States.[83] Some of these were highly placed government officials, such as Lauchlin Currie, the chief economist in the White House and Harry Dexter White, the chief economist at the Treasury Department.[84] Many of the individuals Bentley mentioned had long been suspected of

74. SIBLEY, *supra* note 32, at 2.

75. *Id.* at 108 (internal quotation marks omitted).

76. *Id.*

77. *Id.*

78. There was no statute authorizing wiretapping. However, in 1940 President Roosevelt issued a secret executive order authorizing it. Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1046, 1050 (2008).

79. *See* KATHRYN S. OLMSTED, RED SPY QUEEN: A BIOGRAPHY OF ELIZABETH BENTLEY 89–91 (2002).

80. *Id.* at 95–96.

81. *Id.* at 99–100.

82. *Id.* at 100, 107.

83. *Id.* at 100.

84. SILVERMASTER FILE VOL. 6, *supra* note 45, at 25.

having Communist sympathies.[85]

But there was much about Elizabeth Bentley and about her claims concerning involvement in espionage that called for skepticism. There was, of course, the fact that it was not until her third visit to the FBI that she mentioned being a spy.[86] Initially, she claimed to have come in because she feared a man she was dating, Peter Heller, might be impersonating a National Guard officer and falsely claiming to be a government spy.[87] During her second interview with the FBI, Bentley said she suspected Heller was a spy for the Soviet Union.[88] Not until her third conversation with agents did she begin telling the story, elaborated fully in her 107-page statement, about herself being a Soviet operative.[89]

It occurred to the agent who took the second of her three grossly inconsistent statements that Bentley might be a psychopath.[90] She was a "melodramatic, unstable, and alcoholic woman," who seemed to the agents who first debriefed her to be "slightly hysterical" as well.[91] In addition, this self-described Soviet spy was provably dishonest. She had taken credit for a master's thesis actually written by her faculty advisor's assistant.[92]

Small wonder that in a memorandum to his boss, White House Counsel Clark Clifford, George M. Elsey exhibited skepticism about Bentley's revelations.[93] His advice was that the White House should have the Attorney General furnish it with a description of all the data she claimed to have obtained for Russian agents and that it then seek to determine how much of this information was freely available to the Soviet government through routine official liaison.[94] "The purpose of this would be to make it clear that Miss Bentley was not successful in transmitting secret material to the Russians that they did not already have," Elsey wrote.[95]

---

85. OLMSTED, *supra* note 79, at 100.

86. *Id.* at 99.

87. *Id.* at 76–78, 90.

88. *Id.* at 96.

89. *Id.* at 100.

90. *Id.* at 96.

91. SCHRECKER, *supra* note 20, at 172.

92. OLMSTED, *supra* note 79, at 7.

93. *See* Memorandum from George M. Elsey to Clark Clifford (August 16, 1948) (available upon request from the Harry S. Truman Library).

94. *Id.*

95. *Id.*

He and his superiors at the White House were probably trying to save themselves from the embarrassment of having overlooked a Soviet spy. On the other hand, Elsey was right to be skeptical of Bentley's story. In the days when I served as an Army counterintelligence agent, I would have given her the lowest possible rating on the reliability scale we used. Because many of the people she identified as spies had long been suspected of Communist sympathies, the information she supplied would have fared a little better in such an evaluation. The FBI found impressive the fact that Bentley "has reported with a high degree of accuracy . . . [policy issues] which were only known within the Government itself."[96] But the fact of the matter is that a story implicating at least eighty people, some of them fairly prominent, in espionage merited skepticism.[97] Confronted with a somewhat unlikely story from an utterly unreliable source, the FBI did exactly what any good investigative agency would do. It set out to verify what Elizabeth Bentley had told it.

The effort the Bureau made was massive. Led by its counterintelligence chief, seventy-two agents swung into action on what the Bureau considered the biggest espionage case in its history.[98] Hoover declared that there would be "no limit" to the manpower assigned to this investigation.[99] Eventually, the Bureau had 250 agents working the case.[100]

But this massive effort yielded no convictions. In fact, it failed to produce even a single arrest.[101] One reason for this was the inability of the FBI to decide whether its mission was counterintelligence or law enforcement. Much of the furious activity that it undertook in response to Bentley's confession was illegal.[102] This included twenty-two wiretaps.[103] Agents planned a "black bag job" (i.e. a break-in) of Bentley's hotel room while she was away.[104] They opened the mail of the men and women she had accused.[105]

---

96. SIBLEY, *supra* note 32, at 120 (internal quotation marks omitted).
97. *See* OLMSTED, *supra* note 79, at 100–02.
98. *Id.* at 102.
99. *Id.*
100. SCHRECKER, *supra* note 20, at 173.
101. *See id.*
102. *See* OLMSTED, *supra* note 79, at 102.
103. SIBLEY, *supra* note 32, at 127.
104. *Id.* (internal quotation marks omitted).
105. OLMSTED, *supra* note 79, at 102; SIBLEY, *supra* note 32, at 127.

The Bureau was undeterred by the fact that such tactics violated the law. While it wanted to identify spies partly so it could apprehend them, its primary objective was determining whether the men and women Bentley had identified as spies were continuing to steal government secrets.[106] Preventing future espionage was more important than punishing that which had already occurred. The consequence of FBI prioritizing, Theoharis says, was "to forestall prosecution."[107]

But it did not have to have that effect. The way the Bureau chose to resolve what he calls "the counterintelligence dilemma" combined with bad luck to prevent prosecution.[108] Federal prosecutors actually managed to convict Soviet spy Judith Coplon.[109] But that conviction was overturned by an appellate court because of the Bureau's wiretapping and an illegal arrest.[110] Although this appears at first glance to be a case where a choice had to be made between counterintelligence and good law enforcement, it was not. The Second Circuit Court of Appeals objected to the fact that the FBI had arrested the defendant without a warrant in the absence of any apparent reason for doing so.[111] The court's problem with the wiretapping was not that it had been done, but rather that the government had refused to let the defense see the records on which the trial judge had based a ruling that the taps had not led to any evidence introduced at the trial.[112]

Unlike the Coplon wiretaps, Elizabeth Bentley's disclosures to the FBI had not become evidence in a trial.[113] But they could have. Hoover knew that without corroboration, her testimony would not have much value as evidence against others.[114] But Bentley herself could have been convicted on the basis of her own voluntary admissions. Before anyone else was likely to be found guilty of the crimes she alleged they had committed, a prosecutor would need additional evidence. While the Venona cables would have corroborated many of Bentley's allegations, they were unavailable, being "too highly classified to be produced at a

---

106. THEOHARIS, *supra* note 31, at 84.
107. *Id.*
108. *Id.* at 83.
109. United States v. Coplon, 185 F.2d 629, 631 (2d Cir. 1950).
110. *Id.* at 635–38.
111. *Id.* at 635–36.
112. *Id.* at 637–38.
113. SIBLEY, *supra* note 32, at 128.
114. *Id.*

trial."[115] Even without them an enterprising prosecutor might have successfully tried some of those she accused for conspiracy. One of the sources from whom Bentley's lover and partner in espionage, Jacob Golos, obtained information was communist journalist Louis Budenz.[116] Budenz left the Party in 1945 to return to the Catholic Church and subsequently became the star prosecution witness in the *Dennis* trial.[117] It should have been possible to establish, using his testimony and Bentley's, that the two of them and the now-deceased Golos, were part of a conspiracy. According to Bentley, she knew Golos and Budenz "were rather well acquainted," and her spy lover had indicated to the journalist that the two of them were "associated."[118] Thereafter, it "was informally arranged that Budenz would supply information to [Bentley] in the manner he formerly had to Golos."[119] Because "secrecy and concealment are essential features of [a] successful conspiracy," the law allows the conviction of alleged conspirators "upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."[120] Evidence offered to establish the existence of a conspiracy is "often admitted under [very] loose standards."[121]

They are certainly loose enough that Helen Tenney, who was one of Bentley's sources, could have been successfully prosecuted, along with Bentley, Budenz, and Golos (if he were still alive), for entering into a conspiracy having as at least one of its objectives the commission of espionage. This would have been possible, even though the only evidence the government could have offered against Tenney herself, beyond Bentley's allegations, was the testimony of FBI agents that they had observed the two women having lunch together in a Washington, D.C. restaurant.[122]

In short, there was legally acquired evidence that could have been introduced at a trial of members of Bentley's espionage ring. There was just not enough of it. The counterintelligence dilemma did not so much

115. SCHRECKER, *supra* note 20, at 177; *see also* OLMSTED, *supra* note 79, at 155.

116. OLMSTED, *supra* note 79, at 57.

117. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 83–86.

118. SILVERMASTER FILE VOL. 6, *supra* note 45, at 38.

119. *Id.*

120. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.1(b)(4) at 261 (2d ed. 2003).

121. *Id.*

122. *See* OLMSTED, *supra* note 79, at 108–09.

forestall prosecution as it forced prosecutors to find additional evidence with which to corroborate the former spy's allegations, evidence that had neither been illegally acquired nor tainted by being derived from some that had been procured illegally.[123] The *Coplon* case suggests that while difficult, that would not have been impossible. Unfortunately, although the FBI spent a year and a half trying, it failed.

The most promising approach was to substantiate Bentley's allegations by turning her into a double agent. The Bureau's idea was to have her continue what she had been doing, all the while collecting evidence about the activities of her associates.[124] Since she and agents who observed her spying could have testified from personal knowledge about crimes they had seen being committed,[125] none of the evidence the Bureau had obtained illegally would have to be employed. With the objective of becoming a double agent, Bentley set up a meeting with her Soviet handler, which agents had under surveillance.[126] But she found him "cagey" and their conversation was essentially "innocuous."[127]

The FBI's plan had been wrecked by Kim Philby. Philby was himself a double agent.[128] He was the chief of counterintelligence for the British secret service, and the United States shared intelligence information with its British allies.[129] As a result of this sharing arrangement, Hoover informed Sir William Stephenson, the British station chief in the United States, about the Bentley's statement and her defection.[130] Philby was likely given this information by Stephenson because Philby informed the NKGB of Bentley's defection less than two weeks after she began her statements.[131]

Warned by Philby that she had defected, the Soviets quickly began shutting down NKGB operations in America.[132] On November 23 they instructed all of their station chiefs in the United States to terminate immediately their connections with anyone associated with the turncoat

---

123. *See* THEOHARIS, *supra* note 31, at 84.
124. OLMSTED, *supra* note 79, at 103.
125. *See id.*
126. *Id.* at 104.
127. *Id.* (internal quotation marks omitted).
128. *Id.* at 105
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 105–06.

spy and to warn agents about her "betrayal."[133] FBI surveillance made getting the word out to the spies Bentley had supervised difficult, but soon almost all of them had been warned and the entire operation for which she had been responsible had ceased.[134] The Russians in charge of it had left the country.[135] For a year, Bentley continued to pretend she had not become an informer, while her sources and the Soviets continued to pretend they did not know she was one.[136] But it was all for show. "Thanks to Philby, Elizabeth [Bentley] would become the least successful double agent in FBI history."[137]

Unaware of what Philby had done, the Bureau kept slogging along, but its investigation was going nowhere.[138] Nor was the criminal prosecution for which this investigation was supposed to provide the key evidence.[139] Had it not been derailed, there probably never would have been a *Dennis* case. The causal relationship between the failed criminal investigation and the ideologically driven prosecution of the leaders of the CPUSA is complex, however. The Bentley probe was over by early 1947.[140] On April 15 of that year, the Bureau "descended on the homes and businesses of twelve of Elizabeth[] [Bentley's] most important former contacts."[141] Agents hoped that by simultaneously interrogating these suspects they could get at least one of them to "crack," but "none of the major figures [in the case] admitted anything."[142] The FBI's criminal investigation of the Bentley espionage case was effectively over more than a year before indictments were filed on July 20, 1948, charging the leaders of the CPUSA with violation of the Smith Act.[143]

Fortunately for the Bureau, there was a Plan B. Indeed, from Hoover's perspective, it may have been preferable to an espionage prosecution.[144] As far back as July 7, 1945 he had directed "all his field offices to gather material about the illegal status and activities of the

133. *Id.*

134. *Id.*

135. *Id.* at 106.

136. *Id.* at 107.

137. *Id.* at 106.

138. *Id.*

139. *Id.* at 117.

140. *See id.*

141. *Id.*

142. *Id.*

143. *See* Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J. concurring); OLMSTED, *supra* note 79, at 117, 125.

144. *Id.* at 115–16.

Communist Movement."[145] In early 1946, the head of the Bureau's Domestic Intelligence Division, D. Milton Ladd, had sent Hoover a "blind memorandum" proposing "prosecution of communist leaders under the Smith Act as part of the campaign to educate the American people to the real dangers of communism."[146] By early 1948, Ladd's proposal had matured into a massive investigative summary (often characterized as a "brief") that drew together all of the evidence the FBI had against the Communist Party.[147] It even included 546 exhibits that could be presented at a trial.[148] Hoover forwarded this investigative summary to Attorney General Clark on February 5, 1948, accompanied by a memorandum characterizing it as "a brief to establish the illegal status of the Communist Party."[149] What Ladd and Hoover were proposing served Clark's own needs, for he was under intense political pressure from Republicans to do something about the Communists.[150] The very day the GOP-controlled House Committee on Un-American Activities (HUAC) subjected the Attorney General to a savage grilling, demanding to know why the Justice Department had failed to use the Smith Act against the CPUSA, the attorney general asked for the FBI's brief.[151]

The prosecution the Bureau was promoting served not only Clark's needs, but also those of his special assistants, T. Vincent Quinn and Thomas J. Donegan. They had been given the job of presenting evidence to a federal grand jury in New York that had been empanelled to hear Bentley's charges.[152] The grand jurors believed the confessed spy, but no other witnesses corroborated her story.[153] Clark realized no one was going to be indicted on the basis of Bentley's unsubstantiated allegations, but he was seeking political cover from HUAC, should it ever raise the issue of why nothing had been done about them.[154] Convening the grand jury was easier than getting rid of it without indictments. In order to avoid what he recognized would be a public

145. SCHRECKER, *supra* note 20, at 191 (internal quotation marks omitted).
146. STEINBERG, *supra* note 35, at 96.
147. *Id.* at 99.
148. *Id.*
149. *Id.* at 98–99.
150. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 21.
151. *Id.* at 47.
152. OLMSTED, *supra* note 79, at 118.
153. *Id.* at 121.
154. *Id.* at 118.

relations disaster, Quinn suggested that it continue to meet while the Justice Department presented it with a different, but related, case.[155] The one he had in mind was the Smith Act prosecution of the CPUSA that Ladd and Hoover had been promoting.[156]

The case they had concocted was ideally suited to save the Attorney General and his two assistants from severe political embarrassment. Unfortunately, it was also an unsatisfactory one—at least in the opinion of the man who would have to try it, John F.X. McGohey, the United States Attorney for the Southern District of New York.[157] McGohey did not the think the espionage grand jury should be hearing this case at all.[158] Furthermore, he did not want to be identified with what had been presented to it thus far. McGohey tried to read the FBI's huge "brief," but by April 29, he still had managed to wade through only the first 657 pages.[159] By then McGohey had concluded it was possible to support a charge of violation of the Smith Act, but he believed a great deal more investigation was needed before an indictment could be drafted.[160]

It is hardly surprising that McGohey considered more investigation necessary. On March 30, Bentley had been called back before the grand jury.[161] "Quinn and Donegan peppered her with questions" about the CPUSA's "plan to overthrow the government of the U.S.A. by force and violence," and the answers they got were not helpful.[162] She "disputed their contention that violent revolution was a principle or doctrine" of the CPUSA.[163] She somewhat tentatively conceded that "the Party might use revolution as a last resort; but she also insisted that American Communists never discussed violent revolution" and that the CPUSA "would have lost an awful lot of membership" if it had done so.[164] Furthermore, she insisted, "most American Communists never read Marx or Lenin and did not understand Communist doctrine."[165] Her refusal to support any of the propositions on which a successful

155. *Id.* at 121.

156. *Id.* at 121–22.

157. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 48.

158. *See id.*

159. Handwritten notes of John F.X. McGohey on the Communist Case (prepared between April 8 and July 2, 1948) (available upon request from Harry S. Truman Library).

160. *Id.* at 3–4.

161. OLMSTED, *supra* note 79, at 122.

162. *Id.* (internal quotation marks omitted).

163. *Id.* (internal quotation marks omitted).

164. *Id.* (internal quotation marks omitted).

165. *Id.*

Smith Act prosecution of the leaders of the CPUSA would have to rest, clearly irritated Quinn.[166]

Despite it, Justice Department leaders were determined to press forward with a prosecution based on the Smith Act. Clark, supported by Quinn and Donegan, insisted that McGohey present this new case to the grand jury at the earliest possible date.[167] The U.S. attorney, however, was unwilling to go ahead without thorough preparation.[168] "[H]e managed to prevail only by threatening to withdraw from the case."[169] It was finally agreed, apparently as some sort of compromise, that George Kneip from the Appeals Section of the Justice Department's Criminal Division, would be sent up to New York to assist in drafting the indictments.[170] After reviewing the FBI's massive brief, Kneip reached a conclusion that underscored what a bad idea this prosecution was.[171] In his opinion, the government would "be faced with a difficult task in seeking to prove beyond a reasonable doubt . . . that the Communist Party advocates revolution by violence."[172] If it could not do that to the satisfaction of a jury, then the defendants would be entitled to acquittal.

Because of the anti-Communist hysteria that was building up in the country by the time the Communist leaders were tried in the summer of 1949, that was unlikely to happen. But it should have. There were Communists who were guilty of espionage, but those were not the ones put on trial in the *Dennis* case. The *Dennis* defendants were not spies but rather the victims of an unjustified and politically motivated prosecution. Despite the fact the FBI regarded counterespionage as more important than prosecuting spies, in the *Bentley* case it undertook a massive probe aimed at least in part at obtaining enough admissible evidence to send spies to prison. That effort failed, not because of any lack of commitment or effort on the Bureau's part but simply due to bad luck. Kim Philby's betrayal prevented what might have been a successful prosecution for espionage and opened the door to one under

166. *Id.*

167. BELKNAP, COLD WAR POLITICAL JUSTICE, *supra* note 16, at 48.

168. *Id.*

169. *Id.*

170. *See id.*

171. *See* Memorandum from George Kneip on the Communist Party of the United States of America (undated) (available upon request, as a part of John F.X. McGohey's Papers, from the Harry S. Truman Library).

172. *Id.* at 11.

the Smith Act. In that case, the FBI and federal prosecutors were enforcing a federal statute. But that fact did nothing to protect the targets of the prosecution. It did nothing to prevent and the sorry assault on civil liberties known to history as *Dennis v. United States.*