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THE SCHNEIDERMAN CASE: AN INSIDE VIEW OF THE ROOSEVELT COURT

Jeffrey F. Liss*

ONLY rarely in the study of Supreme Court history do events, personalities, records, and historical sources converge to afford an intimate view of that institution. *Schneiderman v. United States*,¹ in its own right an important decision in the field of denaturalization law, provides such an opportunity. The manuscript collections of the major adversaries on the Court are well-preserved,² and a surviving major figure from among the parties to the litigation has provided personal insight into the intricacies of the case.³

Decided during World War II in a political context that affected the Court's deliberations, if not its ultimate decision, *Schneiderman* was a source of deep and lasting division in the Roosevelt Court. While American armed forces struggled in the European and Pacific theaters during the early years of World War II, government officials on the home front sought to ensure internal security. A key weapon in the domestic arsenal was the statutory authority to denaturalize foreign-born citizens whose citizenship had been fraudulently or illegally procured.⁴ By the end of 1942, forty-two such denaturalization

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1. 320 U.S. 118 (1943).

2. The Frank Murphy Papers [hereinafter Murphy Papers] are located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor, Michigan. The Felix Frankfurter Papers [hereinafter Frankfurter Papers] and the Harlan Fiske Stone Papers [hereinafter Stone Papers] are located in the Manuscript Division of the Library of Congress, Washington, D.C. Frankfurter's summaries of the *Schneiderman* conferences and his diary entries relating to *Schneiderman* can also be found in J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 208-17, 248-50, 257-59 (1975).

3. The Honorable Charles Fahy, now Senior Judge of the United States Court of Appeals for the District of Columbia Circuit, was Solicitor General of the United States at the time of the *Schneiderman* case and represented the government before the Supreme Court. Judge Fahy consented to an interview with the author for purposes of this article; the interview was conducted on Aug. 15, 1975 in Judge Fahy's chambers [hereinafter Fahy interview]. The author gratefully acknowledges Judge Fahy's cooperation and assistance.

4. The relevant statutory provision for denaturalization proceedings against a citizen naturalized before 1940 was the Naturalization Act of 1906, ch. 3592, § 15, 34 Stat. 601. That provision was continued in the Nationality Act of 1940, ch. 876, § 338, 54 Stat. 1158. In the Immigration and Nationality Act of 1952, illegal pro-

actions had been successfully prosecuted, another three hundred were pending in the federal courts, and more than two thousand other cases were under active investigation.⁵

The denaturalization procedure, however, posed serious legal problems. In order to gain citizenship, a foreign-born applicant had to demonstrate to a court that for five years preceding his application he had resided in the United States and had behaved "as a man . . . attached to the principles of the Constitution"⁶ In a denaturalization proceeding, the government would typically attempt to show that citizenship had been fraudulently or illegally procured because, notwithstanding the admitting court's finding, the naturalized citizen did not have the requisite "attachment" at the time of his naturalization. It was inevitable that such proceedings, often intended to nullify citizenships granted years earlier, would be challenged in the courts.

The wartime denaturalization program was aimed primarily at citizens of Italian and German descent;⁷ however, *Schneiderman*, the first challenge to the program to reach the United States Supreme Court, involved a Russian-born citizen. An immigrant to the United States at the age of three, William Schneiderman grew up in California.⁸ In 1922, at the age of sixteen, Schneiderman became a charter member of the Young Workers League (known later as the Communist League) and remained a member for seven or eight years. He served as educational director of the League from 1922 to 1925 and as its official spokesman in 1928. In 1924 or 1925, shortly after he filed his declaration of intention to become a citizen, Schneiderman also joined the Workers Party, the predecessor of the Communist Party of the United States, and was its corresponding secretary in 1925 and 1926. In 1927, the United States District Court for the Southern District of California approved his application, and Schneiderman became a naturalized citizen. The court never asked Schneiderman whether he was affiliated with the Communist Party,⁹ although in his petition for naturalization Schneiderman

curement of citizenship was not explicitly made a ground for denaturalization. Immigration and Nationality Act of 1952, ch. 477, § 340, 66 Stat. 260. Illegal procurement was restored as a ground for denaturalization in 1961. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18, 75 Stat. 656 (codified at 8 U.S.C. § 1451 (1970)).

5. P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969*, at 228 (1972).

6. Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596.

7. P. MURPHY, *supra* note 5, at 228.

8. The discussion of Schneiderman's background is drawn from 320 U.S. at 120-31.

9. When the *Schneiderman* case was before the Supreme Court 16 years later, Schneiderman's lawyer informed the Court that Schneiderman "was never asked if

stated, "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government."¹⁰ After his naturalization, Schneiderman continued his activities with the Party, serving as its organizational secretary in California, then in Connecticut, and finally in Minnesota, where he also ran unsuccessfully as the Communist Party candidate for governor in 1932. He became a member of the Party's National Committee in 1934.

On June 30, 1939, twelve years after Schneiderman had been naturalized, the United States initiated a denaturalization proceeding against him, claiming that, at the time of his naturalization and for five years preceding it, Schneiderman "was a member of . . . certain organizations . . . whose principles were opposed to the principles of the Constitution . . . and advised, advocated and taught the overthrow of the United States by force and violence."¹¹ The United States District Court for the Northern District of California nullified Schneiderman's citizenship,¹² and the Ninth Circuit Court of Appeals affirmed.¹³ The Supreme Court then granted certiorari.¹⁴

The case was originally argued before the Court on November 9, 1942, with erstwhile presidential candidate Wendell Willkie representing Schneiderman at no charge¹⁵ and Solicitor General Charles Fahy representing the government. Only seven of the justices heard the case; there was one vacancy on the Court at the time, and Justice Robert H. Jackson disqualified himself because he had been ap-

he was a member of the Communist Party. I don't think it ever occurred to any one to ask him." N.Y. Times, March 13, 1943, at 15, col. 6 (late city ed.).

10. *Schneiderman v. United States*, 119 F.2d 500, 501 (9th Cir. 1941).

11. 320 U.S. at 121-22.

12. 33 F. Supp. 510 (N.D. Cal. 1940).

13. 119 F.2d 500 (9th Cir. 1941).

14. 314 U.S. 597 (1941). *Schneiderman* presented the Court with an opportunity to expand its assessment of the legal problems regarding denaturalization. Prior to *Schneiderman*, the Court had merely upheld the constitutionality of the 1906 denaturalization provision. See *Luria v. United States*, 231 U.S. 9 (1913); *Johannessen v. United States*, 225 U.S. 227 (1912).

15. Attorney Carol King had represented Schneiderman in the lower courts, but when the Supreme Court granted certiorari she wrote to Willkie—with whom she had no personal acquaintance or connection—and asked him to take the case in the Supreme Court. King sent along a copy of the brief she had filed in the court of appeals; the inequities of Schneiderman's situation, as reflected in the brief, apparently made a great impression on Willkie. He took the case, without compensation, notwithstanding that it seemed an act of "political suicide." E. BARNARD, WENDELL WILLKIE: FIGHTER FOR FREEDOM 400 (1966). A contrary view concerning whether it was politically courageous of Willkie to take the case is offered in J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 310 (1968): "Schneiderman's appeal was argued without fee by a defeated presidential candidate, Wendell L. Willkie, who

pointed Attorney General shortly after the case was instituted.¹⁶ When the Court met in conference a month later, four of the seven participating justices—Roosevelt appointees Hugo L. Black, William O. Douglas, Frank Murphy, and Stanley Reed—were in favor of reversing the lower courts and restoring Schneiderman to citizenship. The other three—Roosevelt appointee Felix Frankfurter, and Owen J. Roberts and Chief Justice Harlan F. Stone—favored affirmance. But the case was held over for reargument because a majority of the Justices felt that, among other reasons, consideration of the issues by a fuller Court would result in a more authoritative decision.¹⁷ After the appointment of Wiley Rutledge in January 1943, the Court again heard argument by Willkie and Fahy.¹⁸ Rutledge also favored reversal, and, three days after argument, Black—the senior member of the majority of five—assigned the opinion to Murphy.¹⁹

The forty-two page opinion was more than three months in the making and was criticized and revised almost until the day it was handed down. The key to the decision was the standard of proof that the government had to sustain. Since citizenship rights are “precious and . . . conferred by solemn adjudication,” said the Court, they could not be “lightly revoked”; to justify denaturalization the government’s supporting evidence had to be “clear, unequivocal, and convincing.”²⁰

The majority perceived the government’s argument to be that Schneiderman lacked the requisite attachment “to the principles of the Constitution” at the time of naturalization because, first, he believed in sweeping changes in the American system that were antithetical to the Constitution, and, second, he was an active and knowing member of the League and Party, both of which advocated the overthrow of the United States Government by force and violence. To the first part of the government’s argument, the Court responded that the Constitution was meant to be flexible enough to accommo-

made easy political hay by criticizing the administration’s illiberality in instituting the case.” (Footnote omitted.)

16. See text at notes 123-25 *infra*.

17. Justice Frankfurter’s conference summaries, Dec. 5 & Dec. 12, 1942, Frankfurter Papers, *supra* note 2, box 218.

18. While the nature of Fahy’s oral presentation remained the same on reargument, Willkie was apparently far less flamboyant the second time around. E. BARNARD, *supra* note 15, at 401-03. Fahy recalls that Willkie’s performance was far more “lawyer-like” on reargument and, therefore, far more effective. Fahy interview, *supra* note 3.

19. Note from Justice Black to Justice Murphy, March 15, 1943, Murphy Papers, *supra* note 2, box 62.

20. 320 U.S. at 125.

date freedom of thought; an individual could be duly attached and loyal without agreeing to the wisdom of each provision of the Constitution: "The constitutional fathers, fresh from a revolution, did not forge a political straight-jacket for the generations to come. . . . As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that [one] thinks it can be improved.'"²¹

The Court also rejected the government's argument that Schneiderman's membership in the League and Party signaled his belief in unlawful doctrines. The Court first recognized that it might be difficult to impute to Schneiderman the precepts of those organizations. But, admitting for the sake of argument the validity of such imputation, it went on to consider whether the Communist Party and related organizations did in fact, at the time of Schneiderman's naturalization, advocate overthrow of the government by force and violence. The Court examined Party literature, including works written by Marx, Lenin, and Stalin, and concluded that it was at least possible to interpret the Party's rhetoric concerning overthrow as merely a theoretical justification for the use of force and violence should all else fail: "There is a material difference between agitation and exhortation calling for present violent action . . . and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time"²² While one who believed in the use of present violent action to overthrow the government would certainly not be "attached to the principles of the Constitution," the naturalized citizen who believed in the "theoretical" use of force and violence would be protected, the Court held, by the Constitution's guarantee of freedom of thought. Where two such interpretations of political doctrine were possible, the Court would impute the more reprehensible interpretation to the political party or its knowing members only if the government could show by clear, unequivocal, and convincing evidence that such an interpretation was indeed the correct one.²³ The government, the Court

21. 320 U.S. at 137-38 (footnote omitted), *quoting* *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (dissenting).

22. 320 U.S. at 157.

23. 320 U.S. at 158-59. The Court in *Schneiderman* thus did not decide the issue whether the Communist Party, or at least the Communist Party in 1927, *see* 320 U.S. at 157, advocated the immediate overthrow of the United States government by force and violence. Eight years later, during the McCarthy era, a plurality on the Court, in a Smith Act prosecution, accepted the conclusion that the post-World War II Communist Party had as its purpose "to achieve a successful overthrow of the existing order by force and violence" as soon as practicable. *Dennis v. United States*, 341 U.S. 494, 498 (1951). The effect of this aspect of *Dennis* was limited

concluded, did not sustain its heavy burden of proof in Schneiderman's case.

Justice Douglas asserted in a concurring opinion that, under the Naturalization Act, a prospective citizen had merely to secure a *finding* of attachment to the Constitution. Any effort to nullify citizenship as illegally procured, he said, had to be based not upon a reweighing of the evidence as to attachment, but upon a claim that no proper finding had been made; citizenship could not be taken away simply "because another judge would appraise the evidence differently."²⁴

Justice Rutledge added a concurring opinion to express his belief that an alarming precedent would have been created if the government had been allowed to nullify Schneiderman's citizenship "seventeen years"²⁵ after a federal court adjudged him entitled to be a citizen. . . . No citizen with such a threat hanging over his head could be free."²⁶

Chief Justice Stone, joined by Justices Frankfurter and Roberts, vigorously attacked the majority's position in a dissenting opinion. He first chided the majority for failing to give the trial court the respect due to a finder of fact. The trial court's findings "are abundantly supported by the evidence," he said, and it is therefore not the Court's role to set them aside "even though, sitting as trial judges, we might have made some other finding."²⁷

The key issue, as Stone saw it, was not whether Schneiderman had been denied freedom of thought, but merely whether Schneiderman had met the standard legitimately prescribed by Congress—attachment to the Constitution. "My brethren of the majority do not deny that there are principles of the Constitution," Stone asserted sarcastically. "In the absence of any disclaimer I shall assume that there are such principles"²⁸ Stone emphasized both Schneiderman's knowing membership and activities in the League and Party and the nature and principles of those organizations preceding and at the time of Schneiderman's naturalization:

in another Smith Act prosecution six years later, *Yates v. United States*, 354 U.S. 298, 329-30 (1957). See note 113 *infra*.

24. 320 U.S. at 164.

25. Rutledge's arithmetic was faulty. From the time Schneiderman was granted citizenship (1927) until the Supreme Court ruled, 16 years had passed.

26. 320 U.S. at 166-67. None of the denaturalization statutes, see note 4 *supra*, provided for a statute of limitations. As a result, citizenships held for much longer periods than that involved in *Schneiderman* have been revoked. See, e.g., *United States v. Oddo*, 314 F.2d 115 (2d Cir. 1963) (affirming revocation of citizenship 32 years after naturalization).

27. 320 U.S. at 170.

28. 320 U.S. at 181.

On the record before us it would be difficult for a trial judge to conclude that petitioner was not well aware that he was a member of and aiding a party which taught and advocated the overthrow of the Government of the United States by force and violence. It would be difficult also to find as a fact that petitioner behaved as a man attached to the principles of the Constitution.²⁹

In Stone's view, even accepting for the sake of argument Murphy's "clear, unequivocal, and convincing" standard, the government had more than sustained its burden.

Because the majority made new and important law in its decision, *Schneiderman* immediately drew both public praise and public criticism.³⁰ But, from a historical perspective, the more interesting aspect of the case was not its legal analysis, but the political context in which it was decided. Surprisingly, the government had continued vigorously to pursue the prosecution once Russia had become an American ally in World War II. *Schneiderman* was instituted in the district court in 1939, the year in which the Russians signed a nonaggression pact with Nazi Germany.³¹ But in 1941, more than a year before *Schneiderman* was first argued before the Supreme Court, the Germans turned on the Russians by staging a surprise attack on the Second Front. After this attack, President Roosevelt began efforts to draw closer to Russia and to convince the American people of the necessity for such a tie.³² By November 1941, Lend Lease had been extended to Russia.³³ But keeping the Russian-British-American alliance intact during the war was never easy,³⁴ and a potentially embarrassing prosecution would seem to be one of the last things the President needed in his attempt to guide the joint war effort.³⁵

Schneiderman was one of the few cases Solicitor General Fahy discussed with the President prior to argument in the Supreme Court. Yet, despite this advance warning, Roosevelt was apparently unconcerned with the unfortunate political effects the case might engender. He gave the Solicitor General no special instructions or

29. 320 U.S. at 196.

30. See text at notes 92-105 *infra*.

31. J. BURNS, ROOSEVELT: THE LION AND THE FOX 394 (1956).

32. *Id.* at 459.

33. G. HERRING, AID TO RUSSIA 1941-1946, at 21 (1973).

34. F. FRIEDEL, AMERICA IN THE TWENTIETH CENTURY 432-33 (2d ed. 1965).

35. In fact, the government refrained from prosecuting the Communist Party during the war. As one commentator has stated, "As long as this country was an ally of the Soviet Union in fighting the war such a prosecution would have been incongruous." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 112 (1970).

advice.³⁶ Fahy was thus free to wage a vigorous legal battle on behalf of the government; he did so because such was his responsibility and because he believed, quite simply, that the government was right.³⁷

While the government was not inclined to drop the prosecution, it did recognize the political implications of the case, and it desired to delay the argument to minimize them. "It was an open secret," reported one newspaper, "that the government wished to have the issue delayed because of possible friction with Russia."³⁸ Certainly, the members of the Court were also aware of the political ramifications of the case and of the government's interest in delay. Certiorari was granted by the Court in October 1941.³⁹ In February 1942, government attorneys, acting on the initiative of Undersecretary of State Sumner Welles, suggested in an informal letter to the Court that it postpone consideration of the case to save the government from embarrassment. After tortured discussion of their roles as guardians of judicial independence and of their responsibility to the nation at war, the Justices finally denied the informal request and advised the government to make its request in open court, where Willkie would have an opportunity to reply. At that point, the government dropped the matter. But oral argument had been postponed in the interim. Justice Byrnes resigned in October 1942, and the case was finally argued before seven Justices of the eight-member Court the following month.⁴⁰

36. Fahy interview, *supra* note 3. One commentator has suggested that the Administration boxed itself in by originally instituting the prosecution: "If one wonders why no action [to denaturalize Schneiderman] was taken until 1940, the answer is simple. The Stalin-Hitler pact was now in effect, and the Administration was anxious to show that it was not 'soft' on Communism." E. BARNARD, *supra* note 15, at 400. Barnard's explanation is, however, simply wrong. The *Schneiderman* proceeding was begun on June 30, 1939, *not* in 1940. 320 U.S. at 120. The Stalin-Hitler pact was not signed until August 1939, and was thus not in effect when the original *Schneiderman* complaint was filed. Moreover, Fahy recalls that he had no idea of the origins of the case and was not even aware of it until Schneiderman's attorney applied for certiorari in the Supreme Court. Fahy interview, *supra*. Another Willkie biographer suggests an explanation that is simpler, less conspiratorial, and more believable: "In 1939, an officer of the Immigration and Naturalization Service of the Department of Labor, as a result of a routine check of the records, discovered the irregularity of Schneiderman's naturalization. He initiated proceedings for the revocation of Schneiderman's citizenship . . ." M. DILLON, WENDELL WILLKIE 1892-1944, at 304-05 (1952).

37. Fahy interview, *supra* note 3. The Solicitor General went so far as to file a petition for rehearing, denied at 320 U.S. 807 (1943). Fahy filed petitions for rehearing only in the exceptional situations in which he felt there was an opportunity to persuade the Court to reverse a decision about which the government felt strongly. Fahy interview, *supra*.

38. N.Y. Times, June 22, 1943, at 6, col. 1 (late city ed.).

39. 314 U.S. 597 (1941).

40. J. HOWARD, *supra* note 15, at 310. Justice Jackson had recused himself. See text at note 17 *supra*.

After initial argument, the still-vacant seat on the Court served as a convenient justification for further postponement. But, again, the Court was concerned with the possible effects of any decision it might reach. Roberts observed in conference that it was "very unfortunate that law officials put up this case at this time." Black recommended putting off consideration of the case for fear of "the misuse that would be made by our enemies." Frankfurter agreed that, in deciding whether and when to act, the Court had to consider the effects of its action "outside the technical record of the case," and could not understand why the government refused to "confess error . . . and let it go at that."⁴¹ After reargument, however, Frankfurter made it clear that he believed that political considerations were, but should not have been, a factor in the Court's ultimate decision. Following the initial circulation of Murphy's majority opinion, Frankfurter complained to Stone: "What is plain as a pike-staff is that the present war considerations—political considerations—are the driving force behind the result of this case."⁴² In a last-minute effort to convert Murphy, Frankfurter told him, "[W]hile it may not be true of us, you know very well, Frank, that it is true of some of the members of the Court that the dominating consideration in this case is thought of Russia and Russia's share in this war."⁴³

In his draft dissent, Stone was quick to claim that "the case obviously has nothing to do with our relations with Russia"⁴⁴ Murphy responded by inserting in the first paragraph of his opinion an assurance that "[w]e agree with our brethren of the minority that our relations with Russia . . . are immaterial to . . . this case."⁴⁵ No one was fooled. As the *Philadelphia Record* noted in an editorial, "It is odd—and amusing—that both the majority and minority decisions hasten to say that the decision has 'nothing to do with our relations with Russia.' We all know, of course, that it has."⁴⁶

Whether political, humanitarian, or legal considerations primarily moved the Justices, the majority opinion evolved only gradually. At the first extensive discussion of the case on December 5, 1942, Stone and Frankfurter, both eventual dissenters, made impassioned pleas

41. Justice Frankfurter's conference summaries, Dec. 5 & Dec. 12, 1942, Frankfurter Papers, *supra* note 2, box 218.

42. Letter from Justice Frankfurter to Justice Stone, May 31, 1943, Stone Papers, *supra* note 2, box 69.

43. Justice Frankfurter's notes on the *Schneiderman* case, June 16, 1943, Frankfurter Papers, *supra* note 2, box 218.

44. 320 U.S. at 171.

45. 320 U.S. at 119.

46. *Record* clipping dated June 23, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

for affirmance. Black, Reed, and Douglas, meanwhile, were notably tight-lipped, each announcing only that he was for reversal. Murphy, who later wrote the majority opinion, was even more unsure of his position. Apparently shaken by Frankfurter's emotional and persuasive presentation of the reasons for affirmance, Murphy uttered only that he was still "inclined the other way, though not as strongly as" before, and that he preferred to wait and see what would be written in the preliminary opinion drafts.⁴⁷

Douglas enlivened the debate in conference a week later when he articulated his reasons for favoring reversal. The record showed, according to Douglas, that Schneiderman was guilty neither of disobeying any law nor of collecting funds to incite overthrow of the government by force and violence. While "a great deal of the stuff in the record goes against my grain," he said, it was not fair to attribute the views of the Party to Schneiderman.⁴⁸

Black and Reed joined the fray as well. Black demanded to know "what right" the government had to attribute a belief in violent overthrow to Schneiderman, "when his conduct was exemplary. He never did an act of violence." Schneiderman was tried only because he was a Communist, Black asserted. Reed struck a similar note: "We should not construe him as unattached simply because he taught Communism."⁴⁹

Interest continued to mount as Murphy prepared the majority opinion. Murphy was originally inclined to rest the decision on the proposition that denaturalization based on advocacy of and participation in the Communist Party program would be an unconstitutional restriction of freedom of thought. But he was quickly dissuaded from that approach by one now-anonymous Justice who characterized it as a "non-sequitur." To be sure, the critic admitted, such beliefs were constitutionally protected. But when a foreign-born applicant "wants to become a citizen . . . he may be required to meet such conditions as the Congress deems necessary." The critic urged Murphy instead to approach the Party's advocacy of overthrow as "theoretical and not intended as a call to action." Such theoretical advocacy of overthrow could be analogized, said the critic, to Thomas Jefferson's belief that revolution could be justified as a last resort

47. Justice Frankfurter's conference summary, Dec. 5, 1942, Frankfurter Papers, *supra* note 2, box 218.

48. Justice Frankfurter's conference summary, Dec. 12, 1942, Frankfurter Papers, *supra* note 2, box 218.

49. Justice Murphy's conference notes, undated, Murphy Papers, *supra* note 2, box 62.

when all other efforts to alter an unjust or inefficient government have failed.⁵⁰

Murphy took the suggestion to heart. He attached to a partial draft of the opinion a note to his law clerk indicating that he believed he had found "the right approach to this problem. It avoids any argument or question about constitutionality It depends mainly on the proposition that the statute was not intended to apply to doctrinal utterances and academic or theoretical exhortations, otherwise one must conclude that Jefferson and Lincoln had not behaved as one attached to the Constitution."⁵¹ The final version of the opinion was similar to this draft.

Once the draft opinion was circulated to the other members of the Court, the comments poured in. Frankfurter was, of course, distressed, and he expressed his disagreement in the form of a sarcastic note: "Thorough and comprehensive as your opinion in *Schneiderman* is, you omitted one thing that, on reflection, you might want to add. I think it is only fair to state, in view of your general argument, that Uncle Joe Stalin was at least a spiritual co-author with Jefferson of the Virginia Statute for Religious Freedom."⁵² Frankfurter also proposed the following headnotes for the opinion: "The American Constitution ain't got no principles. The Communist Party don't stand for nuthin'. The Soopreme Court don't mean nuthin'. Nuthin means nuthin', and this country don't mean to us what Russia means to the Bolshies."⁵³ Murphy, replying, got the last word: "Many thanks for your original and revised headnotes. . . . [T]hey are done with commendable English understatement and characteristic New England reserve."⁵⁴

50. Unsigned memorandum to Justice Murphy, undated, Murphy Papers, *supra* note 2, box 62. See generally J. ALDEN, *A HISTORY OF THE AMERICAN REVOLUTION* 241-42 (1969).

51. Partial draft of opinion with attached note from Justice Murphy to "John" [Pickering], May 22, 1943, Murphy Papers, *supra* note 2, box 62. The decision to draw analogies to the beliefs of Jefferson and Lincoln was probably inspired by Willkie's clever tactic at the first oral argument in November 1942. In discussing the "force and violence" content of key Communist documents, Willkie read, for purposes of comparison, from statements by Lincoln and Jefferson. He identified the declarants only after reading the "revolutionary" statements, apparently to great effect. E. BARNARD, *supra* note 15, at 402-03. Fahy recalls that his response to Willkie's argument was to agree that there is a natural right to revolt against tyranny, but that the right of revolution was not a legal right that governments could be forced to recognize. Fahy interview, *supra* note 3.

52. Note from Justice Frankfurter to Justice Murphy, May 31, 1943, Murphy Papers, *supra* note 2, box 62. -

53. Note from Justice Frankfurter to Justice Murphy, undated, Murphy Papers, *supra* note 2, box 62.

54. J. HOWARD, *supra* note 15, at 315.

More serious and constructive criticism was offered by a memorandum found in Murphy's papers that claimed, much as would Stone in the dissenting opinion, that the facts of the case compelled the conclusion that Schneiderman could not have been attached to the Constitution. "It seems clear to me," the anonymous critic complained, "that Wilkie [*sic*] has confused the issue and hornswoggled the court by a line of specious reasoning. He has made it appear that the issue in this case is one of preserving freedom of opinion against unwarranted infringement (which it is not) The Court ought not to let Wilkie take it for a ride on his political wagon." This critic pointed out that the Court could deny that Schneiderman was entitled to citizenship and still "uphold the right of Communist organizations to spread their gospel." In defending the latter right, said the critic, there would be "much more justification and excuse for waving the flag of political and intellectual freedom at the outset, and doing it right."⁵⁵

Of course, the members of the majority were initially more favorably disposed to Murphy's handiwork. "You will be proud of this opinion all your life," Rutledge wrote.⁵⁶ Douglas concurred: "I thought you did a fine job."⁵⁷ Each, however, had some minor corrections and suggestions. Murphy had asserted in the circulated draft that Schneiderman could no more be judged unattached to the Constitution for his advocacy of a world union of Soviet republics than could supporters of, for example, Union Now, an organization committed to a federal union of the Atlantic democracies.⁵⁸ Douglas believed that the analogy was unfortunate and could be interpreted as an attack on Justice Roberts, a proponent of Union Now. Twice he warned Murphy to strike the reference,⁵⁹ but it remained in the opinion.⁶⁰ Murphy was, however, more receptive to another suggestion made independently by both Rutledge and Douglas. In the draft opinion, Murphy had adhered to a prior Supreme Court holding that the requirement of a finding of attachment under the

55. Unsigned memorandum with handwritten note at the top: "John, this is the other side as I see it," undated, Murphy Papers, *supra* note 2, box 62. This memorandum may have been written by Murphy himself in an effort to grasp the opposition's views.

56. Note on back of circulated opinion from Justice Rutledge to Justice Murphy, June 3, 1943, Murphy Papers, *supra* note 2, box 62.

57. Memorandum from Justice Douglas to Justice Murphy, June 4, 1943, Murphy Papers, *supra* note 2, box 62.

58. See generally C. STREIT, *UNION NOW* (1943).

59. Memoranda from Justice Douglas to Justice Murphy, June 4 & 14, 1943, Murphy Papers, *supra* note 2, box 62.

60. See 320 U.S. at 145.

Naturalization Act meant that the applicant had to demonstrate not merely that he had behaved as if he had been attached, but also that he had been *in fact* attached. Douglas and Rutledge suggested that, since the outcome of *Schneiderman* did not depend on the continued acceptance of such a "belief test," the Court should refrain from passing any judgment on it in case that test should be challenged in the future.⁶¹ Murphy accepted their suggestion and made the necessary change.⁶²

After further thought, Douglas came to the conclusion that he had a more fundamental disagreement with the majority's approach than could be remedied by minor changes. On June 6, 1943, he gave Murphy a draft of what was eventually to become Douglas' concurring opinion.⁶³ Murphy wrote to his clerk that Douglas' argument "has considerable legal merit," and conceded that the government may have erred by seeking to show through reweighing of the evidence that Schneiderman's citizenship had been illegally procured. Turning the problem over to the clerk, Murphy noted that he had asked Douglas not to circulate his concurrence until Murphy had the opportunity to explore it and decide if "we could go a little further" and incorporate Douglas' point into the majority opinion.⁶⁴ Murphy did not hear from Douglas again until June 14, when Douglas sent him a note, written just before he left Washington for his summer retreat, informing Murphy that he had decided to file the concurrence. Douglas was most apologetic, explaining that he had to be in Chicago the next day and that he could not afford to fly back to Washington and then out West for his vacation.⁶⁵ But Murphy told Frankfurter that he was "shocked by such behavior" and that he was hurt by Douglas' departure because he believed he and Douglas agreed on so many essential points.⁶⁶

61. Note on back of circulated opinion, from Justice Rutledge to Justice Murphy, June 3, 1943; memorandum from Justice Douglas to Justice Murphy, June 4, 1943, Murphy Papers, *supra* note 2, box 62.

62. *See* 320 U.S. at 135.

63. *See* note 24 *supra* and accompanying text.

64. Notes attached to Justice Douglas' draft opinion from Justice Murphy to "John" [Pickering], June 6 & 8, 1943, Murphy Papers, *supra* note 2, box 62.

65. Handwritten note from Justice Douglas to Justice Murphy, June 14, 1943, Murphy Papers, *supra* note 2, box 62.

66. Justice Frankfurter's notes on the *Schneiderman* case, June 15, 1943, Frankfurter Papers, *supra* note 2, box 218. According to Frankfurter, Murphy was "well aware that at the heart of Douglas' concurrence . . . was his desire to let himself out by agreeing with Murphy's result . . . but on the other hand, taking care of the anti-Communist sentiment by saying that of course Congress could proscribe the Communist Party." *Id.* Such a view of Douglas' motivations was consistent with the Court's suspicion that Douglas was "moved by . . . political ambition." Justice

Murphy had not been able to hammer out a final opinion for Douglas' perusal because several other issues had arisen that needed attention. Murphy was particularly concerned with a point made by Stone in the circulated dissent. Stone had argued that, at the time of his naturalization, Schneiderman had been a member of an organization that advocated overthrow of the government by force and violence, and therefore had been deportable under section 1 of the Immigration Act of 1918;⁶⁷ accordingly, Stone had continued, Schneiderman's presence in the United States had been unlawful and he could not possibly have met the five-year lawful residence prerequisite for naturalization.⁶⁸ Murphy circulated a memorandum to members of the majority in which he proposed a response to Stone's argument based on elaborate construction of the relevant statutes.⁶⁹ Douglas and Rutledge agreed that the Chief's point should be answered and approved of Murphy's solution.⁷⁰ But Reed advised Murphy not to bother with the rebuttal since, even if Stone's interpretation of the statutes was correct, the government would still have to show by an exacting standard of proof that the Communist Party was an organization committed to overthrow of the government by force and violence. As Reed pointed out, that was precisely the showing that the Court had concluded the government had *not* made.⁷¹ Murphy was swayed by Reed's intelligent approach to the problem and adopted Reed's formulation nearly verbatim in the majority opinion.⁷²

Murphy was understandably sensitive about reaction to his draft opinion, for he admitted being more certain of its moral correctness than of its legal strength. On a preliminary draft of the opinion, he scrawled a note to his clerk explaining, "This is face-lifting to introduce our not too sound views."⁷³ Five days before the opinion came down, he admitted to Frankfurter, "My instincts are satisfied with the result . . . but not my understanding of the law I

Frankfurter's notes on the *Schneiderman* case, June 1, 1943, Frankfurter Papers, *supra*, box 218.

67. Ch. 186, 40 Stat. 1012.

68. 320 U.S. at 180.

69. Memorandum from Justice Murphy to Justices Black, Douglas, Reed, and Rutledge, June 14, 1943, Murphy Papers, *supra* note 2, box 62.

70. Notes from Justice Douglas to Justice Murphy and from Justice Rutledge to Justice Murphy, June 14, 1943, Murphy Papers, *supra* note 2, box 62.

71. Memorandum from Justice Reed to Justice Murphy, June 14, 1943, Murphy Papers, *supra* note 2, box 62. See note 23 *supra* and accompanying text.

72. See 320 U.S. at 160-61.

73. Handwritten note on memorandum, undated, Murphy to "John" [Pickering], Murphy Papers, *supra* note 2, box 62.

think the Chief has the better of the law in this case but the faith of my whole life is wrapped up in support of Liberty.' ”⁷⁴

Murphy's approach was result-oriented, for he saw the prosecution of Schneiderman as a threat to all immigrants and naturalized citizens in the country. At the beginning of the majority opinion, Murphy stressed the need to protect the rights of the naturalized and noted that many native-born citizens are “only one generation . . . removed from the steerage of the immigrant ship.”⁷⁵ Long before the opinion came down, he wrote to a friend that the colonial founders “came not just on a trek to the West but for surcease from the tyranny of mind and soul drowning the spirits of men in an old world racked with hate and discrimination.”⁷⁶ For Murphy, the case had personal meaning: “My own forbears are here as the result of the old world's passion for exile of all those who did not conform to certain religious and political beliefs. Now after having one faith all my life—tolerance and justice toward those I have had least in common with—at this juncture I am not going to start the trek of exile back to the old world . . . ”⁷⁷

Both Frankfurter and Stone actively resisted reversal throughout the consideration of the case. As the Chief Justice, Stone had the opportunity to preside over and thereby orchestrate discussions in conference. He used that power effectively during debate on *Schneiderman*, beginning each session with a persuasive recitation of the facts and law that cut against the appellant's case.⁷⁸ For Stone, the case was simple. “[T]he whole program sponsored by Schneiderman is the antithesis of the Constitution,” he said. “I am as strong a man for freedom as anyone but surely Congress may say that no one should become a citizen who is not attached to the principles of the Constitution . . . ”⁷⁹ Stone was appalled that the

74. Justice Frankfurter's notes on the *Schneiderman* case, June 16, 1943, Frankfurter Papers, *supra* note 2, box 218.

75. 320 U.S. at 120.

76. Letter from Justice Murphy to Stasia Buhl, April 20, 1943, notes on Eleanor Bumgardner Wright Papers in possession of Professor Sidney Fine, University of Michigan.

77. Letter from Justice Murphy to George Murphy, June 19, 1943, notes in possession of Professor Sidney Fine, University of Michigan.

Apparently Willkie had similar feelings when he agreed to take the *Schneiderman* case: “I saw myself as the man involved in the case. Here was a radical who had followed . . . his ideal I had started as he had from pretty much the same point of thinking. My series of personal accidents had taken me down an opposite road. They might well have been different” E. BARNARD, *supra* note 15, at 401.

78. See, e.g., Justice Frankfurter's conference summary, Dec. 5, 1942, Frankfurter Papers, *supra* note 2, box 218.

79. Justice Frankfurter's conference summary, Dec. 5, 1942, Frankfurter Papers, *supra* note 2, box 218.

Court would consider overturning the reasonable findings of fact when "[t]wo courts below found this man believed and advocated overthrow of government by violence." He also seemed to anticipate Murphy's theoretical force argument; he commented that revolution "is not by force of moral ideas but by bullets and guns."⁸⁰

The most impassioned pleas in conference were made not by Stone, but by Frankfurter. Frankfurter alone on the Court was a naturalized citizen and was thus driven by a convert's zeal toward support of the American system and protection of the dignity of the gift of citizenship. "As one who has no ties with any formal religion, perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship," he acknowledged. Maintaining this country "as the last great hope of mankind as Lincoln said is as near to religion as I know it." Frankfurter said he was familiar with "the Schneidermans" of the world, but that, while he admired them for their devotion to their ideals, he saw them as adhering to "a wholly different scheme of things" than that to which America was committed. Schneiderman, according to Frankfurter, could not possibly have been part of the fellowship of American citizens, bound by their attachment to the principles of the Constitution.⁸¹

When Murphy's opinion was first circulated, Frankfurter apparently took it all in stride, expressing disapproval in his sarcastic notes to Murphy. But, in the privacy of his diary, he revealed the true intensity of his objections. Murphy had written "one of those extraordinarily short-sighted opinions" that sacrifice long-term policy for a short-term result. Frankfurter was not convinced that it was Murphy's own work: He claimed that the opinion largely reflected the "cunning and disregard of legal principles to which Hugo Black gave expression from time to time in connection with this case."⁸² Aware that Stone was about to write his dissent, Frankfurter expressed his confidence in the Chief and offered some suggestions. Stone, he was sure, would "blow away the gossamer web of evasion . . . ill-befitting the Supreme Court . . ." He observed that the majority opinion "astutely avoids committing itself" to the proposi-

80. Justice Murphy's conference notes, undated, Murphy Papers, *supra* note 2, box 62.

81. Justice Frankfurter's conference summary, Dec. 5, 1942, Frankfurter Papers, *supra* note 2, box 218; Justice Murphy's conference notes, undated, Murphy Papers, *supra* note 2, box 62.

82. Justice Frankfurter's diary, May 31, 1943, Frankfurter Papers, *supra* note 2, box 2.

tion that there are "principles of the Constitution."⁸³ He urged Stone to emphasize that there are such principles, and Stone did exactly that.⁸⁴

Frankfurter's efforts did not stop at commiserating with his fellow dissenters. Had he been able to convince just one member of the majority to change his position, the result would have been a four-four affirmance by a divided Court. He went first to Reed, for he believed that Reed's position was dictated not so much by principle as by politics. When the case first came up, he told Reed, "You, in your patriotic way, deemed yourself . . . a sort of liaison officer between hard-pressed Russia and this country." But, he continued, conditions had stabilized, there was an American ambassador to handle relations with Russia, and Reed could feel free to vote his conscience.⁸⁵ His exhortation, however, apparently fell on deaf ears.

Frankfurter's next target was Murphy himself. Murphy had already admitted to Frankfurter that he had doubts about the majority opinion; encouraged by that admission, Frankfurter attempted to persuade Murphy to switch during a discussion only five days before the decision came down. According to Frankfurter's account, he told Murphy that both Murphy's opinion and the Chief's were "full of unrealities." Murphy replied that it was the result he was after.⁸⁶ Frankfurter shot back that "we are not sitting as Santa Clauses, or as the makers of policy"; Murphy's duty ended once he determined which side had the better of the law. Murphy was duly impressed, according to Frankfurter's account, but feared that it was "too late" to switch.⁸⁷ It is likely that Murphy resisted Frankfurter's appeals for another reason as well. Literally days before their *Schneiderman* discussions, Frankfurter had asked Murphy not to file his planned dissent in *Hirabayashi v. United States*⁸⁸—the case in which the Court upheld an executive order establishing a wartime curfew applicable to all alien Japanese, Germans, and Italians located in a West Coast "military area" that included the city of Seattle. Murphy had acceded to Frankfurter's

83. Letter from Justice Frankfurter to Justice Stone, May 31, 1943, Stone Papers, *supra* note 2, box 69.

84. See 320 U.S. at 181, *quoted in the text at note 28 supra*.

85. Letter from Justice Frankfurter to Justice Reed, June 2, 1943, notes on the Frankfurter Papers in possession of Professor Sidney Fine, University of Michigan.

86. Justice Frankfurter's notes on the *Schneiderman* case, June 16, 1943, Frankfurter Papers, *supra* note 2, box 218, *quoted in the text at note 74 supra*.

87. Justice Frankfurter's notes on the *Schneiderman* case, June 16, 1943, Frankfurter Papers, *supra* note 2, box 218.

88. 320 U.S. 81 (1943).

request, and the Court issued its unanimous *Hirabayashi* opinion on the same day *Schneiderman* came down.⁸⁹ Murphy, swayed once by Frankfurter to a position he took "only with the greatest reluctance and, to a degree, against his better judgment,"⁹⁰ may have been reluctant to deny his own instincts again.

On Monday, June 21, 1943—a hot day, even for the first day of summer in the steamy town on the Potomac⁹¹—the Court announced its decision in *Schneiderman*. The reaction in the nation's newspapers was intense and voluminous, though far from one-sided. The St. Louis *Star-Times* called the decision "a triumph for American principles of freedom and justice."⁹² The Jackson *Citizen Patriot*, from Murphy's home state of Michigan, praised the Court for striking "a blow for freedom of thought."⁹³ The Macon *Telegraph*, on the other hand, asserted that "Murphy and his associates . . . are moved by political considerations, as usual . . ."⁹⁴ But the *Herald News* of Passaic, New Jersey, did not believe that the political approach was all bad: "[C]ertainly this would be no time to start depriving American Communists of their citizenship."⁹⁵ Several papers expressed the view that Murphy's opinion compared unfavorably with Stone's. The Milwaukee *Journal* found that the Chief's reasoning "is as clear as Justice Murphy's is turbid,"⁹⁶ and the Baltimore *Sun* noted that "Stone is so cogent a thinker and withal so wholly devoted to the upholding of the full constitutional rights of every citizen that when he votes on what appears superficially to be the restrictive side, prudent men will think twice before disagreeing with him."⁹⁷ Finally, a few newspapers viewed the result as downright alarming. It was to be "widely regretted," said the Phila-

89. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, 33 PACIFIC HIST. REV. 195 (1964). Fine's article was written while Frankfurter was still alive; therefore, out of courtesy, Frankfurter was not identified by the author as the Justice who persuaded Murphy to forgo his dissent. Professor Fine has informed me, however, that Frankfurter was indeed the unidentified figure discussed in his article.

90. *Id.* at 208.

91. Washington Post, June 22, 1943, at 8, col. 2.

92. *Star-Times* clipping dated June 22, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

93. *Citizen-Patriot* clipping dated June 23, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

94. *Telegraph* clipping dated June 23, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

95. *Herald News* clipping dated June 22, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

96. *Journal* clipping dated July 4, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

97. *Sun* clipping dated June 23, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

delphia *Inquirer*, "because of its weakening effect on the safeguards which the Government seeks to establish against subversive elements" ⁹⁸

Interested citizens wrote to Murphy concerning *Schneiderman*. A New Jersey man sent a postcard expressing his "love and respect for your great mind and fine character."⁹⁹ But a minister from California wrote, "I note that you not only voted Communistic but also delivered the opinion for the majority."¹⁰⁰

Reaction in law reviews around the country was more uniformly negative. One critic was dismayed because the decision made it nearly impossible for the government to obtain denaturalization decrees.¹⁰¹ In rebuttal, another author in the same journal called the decision "a judicial landmark in the history of American civil liberties" ¹⁰² A student author was at a loss to understand how the Court failed to conclude that the Communist Party and its doctrines were demonstrably incompatible with the Constitution.¹⁰³ The most prestigious critics were an assistant professor of sociology and the dean of the law school at Fordham University. The first based his attack on the by then familiar contention that it was impossible to be both a loyal member of the Party and a citizen attached to the Constitution.¹⁰⁴ The second expressed the hope that the Court might yet be won over to Stone's viewpoint.¹⁰⁵ Murphy was stung by the criticism. "All I know is that my pen was lifted in the cause of intellectual liberty and freedom," he wrote to his clerk. "I can't help how others see the issue. I don't want posterity to hate my views. But I won't have anything to say about that."¹⁰⁶

The dissenters, as well, were to resent the *Schneiderman*

98. *Inquirer* clipping dated June 22, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

99. Postcard to Justice Murphy, June 21, 1943, Murphy Papers, *supra* note 2, box 62.

100. Letter to Justice Murphy, June 22, 1943, Murphy Papers, *supra* note 2, box 62.

101. Maylott, *Schneiderman v. United States: Nullification of Naturalization Laws?*, 12 GEO. WASH. L. REV. 215, 218 (1944).

102. Crystal, *Schneiderman v. United States: Imputation of Guilt and Free Speech*, 12 GEO. WASH. L. REV. 222, 237 (1944).

103. Note, *Communism, Constitutionalism and the Principle of Contradiction*, 32 GEO. L.J. 405 (1944).

104. Timasheff, *The Schneiderman Case—Its Political Aspects*, 12 FORDHAM L. REV. 209, at 209 (1943).

105. Kennedy, *The Schneiderman Case—Some Legal Aspects*, 12 FORDHAM L. REV. 231, 251 (1943).

106. Handwritten note, attached to copies of *Fordham Law Review* articles, from Justice Murphy to "Gene" [Gressman], Jan. 9, 1944, Murphy Papers, *supra* note 2, box 62.

decision for some time. After it was delivered, a bitter Stone wrote to a friend that the majority had decided that the Court "ought to treat Communists more tenderly than Congress and the statutes have done."¹⁰⁷ A month after the decision, with the Court in recess, Frankfurter wrote to Stone that he was heartened that editorial writers around the country "went to your *Schneiderman* dissent. Retrospect makes [the majority opinion] steadily worse. No wonder Fahy has filed a petition for rehearing." But the petition was, Frankfurter predicted, a "hopeless" prospect.¹⁰⁸ He was right.¹⁰⁹

But the Justices' differences on the law, at least, grew narrower with time. Throughout the deliberations, Frankfurter had told anyone who cared to listen that he hadn't "the slightest doubt" a different result would have been reached had *Schneiderman* been a Bundist.¹¹⁰ Yet, when a Nazi sympathizer came before the Court the next term, Frankfurter wrote the unanimous opinion overturning the petitioner's denaturalization.¹¹¹ The Court applied the strict standard of evidence established in *Schneiderman* and determined that the government had again failed to sustain its burden. Murphy, joined by his allies Black, Douglas, and Rutledge, got the last sweet word in a concurring opinion that pointed out that the *Schneiderman* standard was equally applicable "whether the citizen against whom the proceeding is brought is a Communist, a Nazi or a follower of any political faith."¹¹²

107. Letter from Justice Stone to Sterling Carr, June 23, 1943, Stone Papers, *supra* note 2, box 69.

108. Letter from Justice Frankfurter to Justice Stone, July 19, 1943, Stone Papers, *supra* note 2, box 69.

109. The petition for rehearing was denied. 320 U.S. 807 (1943).

110. *See, e.g.*, letter from Justice Frankfurter to Justice Stone, May 31, 1943, Stone Papers, *supra* note 2, box 69.

111. *Baumgartner v. United States*, 322 U.S. 665 (1944).

112. 322 U.S. at 679. *Schneiderman* and *Baumgartner* were part of a pattern of liberal decisions that the Court handed down during the war years. For example, first amendment doctrine was expanded during the war years in such cases as *Thornhill v. Alabama*, 310 U.S. 88 (1940) (extending constitutional protection to the right to picket); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a compulsory flag-salute statute); *Bridges v. Wixon*, 326 U.S. 135 (1945) (overturning the deportation of Harry Bridges on, *inter alia*, first amendment grounds).

Similarly, the Court proved tolerant in its few forays into the field of internal subversion during the war effort. Convictions under the Espionage Act of 1917 and under the Selective Service Act were reversed for want of sufficient evidence, *Hartzel v. United States*, 322 U.S. 680 (1944); *Keegan v. United States*, 325 U.S. 478 (1945), and convictions under a state sedition law were reversed in *Taylor v. Mississippi*, 319 U.S. 583 (1943). On the other hand, the Court denied certiorari in a case in which 18 members of the Socialist Workers Party were convicted under the Smith Act. *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943).

The Court's wartime record was scarred, however, by *Korematsu v. United States*,

After such an inauspicious beginning, *Schneiderman* has had lasting and significant effect.¹¹³ Its evidentiary standard "profoundly affected the subsequent course of denaturalization litigation,"¹¹⁴ and the case has come to stand for the general proposition that the unlawful purposes of an organization do not warrant deprivation of its members' rights absent a showing of the members' knowledge of those purposes and specific intent to further them.¹¹⁵ The *Schneiderman* majority did not render this "fountainhead decision"¹¹⁶ without cost, however. During the Court's consideration of the case, personal antagonism developed among the justices that contributed to the Roosevelt Court's reputation as one of the most fractious in history.¹¹⁷ Some of the flare-ups were relatively minor. For example, when Black assigned the opinion to Murphy, he suggested that Roberts, who was none too strong an advocate for affirmance in conference,¹¹⁸ might be persuaded to switch if Murphy

323 U.S. 214 (1944), where the Court upheld the government's program to exclude persons of Japanese descent from areas on the West Coast. The program entailed the confinement of excluded persons in detention camps pending subsequent relocation; that aspect of the program was struck down as to an admittedly loyal citizen of Japanese descent in *Ex parte Endo*, 323 U.S. 283 (1944).

113. The effect of *Schneiderman* on the petitioner himself was apparently to assure him that he could carry on his activities with impunity. In 1952, he was prosecuted and convicted by a jury of conspiring to commit offenses against the United States in violation of the Smith Act. The district court refused to overturn the jury's verdict. *United States v. Schneiderman*, 106 F. Supp. 906 (S.D. Cal. 1952), *affd. sub nom. Yates v. United States*, 225 F.2d 146 (9th Cir. 1955). The Supreme Court again came to *Schneiderman*'s rescue in the now famous *Yates* case, in which his and 13 other convictions were overturned. 354 U.S. 298 (1957). The Court, however, rejected *Schneiderman*'s attempt to invoke the prior denaturalization holding as a bar, through collateral estoppel, to the later prosecution. 354 U.S. at 335-38.

114. 3 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* 20-11 (rev. ed. 1975). The decision established that clear, unequivocal, and convincing evidence of lack of attachment must be proved in order to set aside a naturalization decree. *See, e.g., Costello v. United States*, 365 U.S. 265, 269 (1961); *Chaunt v. United States*, 364 U.S. 350, 353 (1960). This strict standard of evidence has had the effect of reducing the volume of denaturalization prosecutions in general, C. GORDON & H. ROSENFELD, *supra*, at 20-34 to -35, and the use of the "illegal procurement" ground as a basis for denaturalization in particular, *id.* at 20-18 to -19.

115. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967); *Maisenberg v. United States*, 356 U.S. 671, 672-73 (1958); *Nowak v. United States*, 356 U.S. 660, 665-67 (1958). In *Maisenberg* and *Nowak*, both of which were denaturalization cases, the Court assumed arguendo that the Communist Party engaged in illegal advocacy during the five-year periods pertinent to the petitioners' cases; "we nevertheless hold that the Government cannot prevail For we are of the opinion that it has not been established that [the petitioner] knew of the Party's illegal advocacy." 356 U.S. at 666. *See* 1 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 68 (3d ed. 1967), where *Schneiderman* is described as "a leading case on the issue of guilt by association."

116. C. GORDON & H. ROSENFELD, *supra* note 114, at 20-34.

117. *See, e.g., J. HOWARD, supra* note 15, at 392-99; F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 257 (1955).

118. Roberts did not participate in the conference discussion as vehemently as

took a particular approach toward interpreting the denaturalization statute.¹¹⁹ Murphy apparently ignored Black's suggestion, and, as a result, when the majority opinion was circulated Roberts was "deeply disheartened" and characterized it as "one more of those efforts to bring the Court into disrepute."¹²⁰

Murphy and Jackson also had a below-the-surface dispute. Jackson disqualified himself from considering *Schneiderman* because he had become Attorney General six months after the government instituted the case.¹²¹ He had replaced none other than Frank Murphy, who had been appointed to the Court.¹²² When Jackson disqualified himself, the question naturally arose as to why the man who was Attorney General when the case was begun did not also bow out. Jackson, who more than once told justices when they should disqualify themselves,¹²³ brought the point home to Murphy in a note written two days before the decision came down: "As you know, I disqualified myself The inference from that is that this case was my responsibility. That is true to a very limited extent only, as you know." Accordingly, Jackson wrote, he would file an explanatory opinion.¹²⁴ The published opinion led one newspaper chain to comment, "We prefer Mr. Justice Jackson's concept as to the controlling ethics of the situation."¹²⁵

some of the other Justices. See conference notes, undated, Murphy Papers, *supra* note 2, box 62.

119. Note from Justice Black to Justice Murphy, March 15, 1943, Murphy Papers, *supra* note 2, box 62.

120. Justice Frankfurter's diary, May 31, 1943, Frankfurter Papers, *supra* note 2, box 2.

121. 320 U.S. at 207 (Jackson, J.).

122. See J. HOWARD, *supra* note 15, at 220.

123. In 1946, a long-standing feud between Jackson and Black became public when Jackson openly criticized Black for not disqualifying himself in a case in which Black's former law partner argued for the eventual winning side. Stone had recently resigned, and it is believed that Jackson issued his salvo in response to rumors that Black and Murphy had threatened to resign if President Truman elevated Jackson to the Chief Justiceship. Fred M. Vinson was nominated to be Chief the same day Jackson made his charges public. See *id.* at 392-94; F. RODELL, *supra* note 117, at 297-98.

124. Note from Justice Jackson to Justice Murphy, June 19, 1943, Murphy Papers, *supra* note 2, box 62. The most recent application of *Schneiderman* by the Supreme Court involved disqualification. Justice Rehnquist had participated in the decision of *Laird v. Tatum*, 408 U.S. 1 (1972), a challenge on constitutional grounds to the Army's domestic data-gathering system. The Court rejected that challenge in *Laird*. The unsuccessful plaintiffs proceeded to move that Rehnquist withdraw his concurrence because, when he served as an assistant attorney general in the Department of Justice, he had testified as an expert witness before a congressional committee on the subject of legislation going to the heart of the *Laird* case. Rehnquist rejected the motion, citing the *Schneiderman* circumstances to support his contention that varying approaches to disqualification have been taken by members of the Court. 408 U.S. at 830. Rehnquist also cited a law review article, Frank, *Disqual-*

Perhaps the most disruptive effect that *Scheiderman* had on the Court was to widen the rift between Frankfurter on one side and Murphy and especially Black on the other. At times during the Court's consideration of the case, relations between Black and Frankfurter became openly hostile. For example, Frankfurter's diary indicates that during the reargument in March 1943, Chief Justice Stone asked Solicitor General Fahy a series of questions designed to establish that Schneiderman had knowingly embraced certain principles of the Communist Party that were opposed to the principles of the Constitution. Black attempted to defuse the significance of Fahy's answers by asking, "Is there anything more than his agreement to general political talk?" According to the diary, Fahy replied that there was not, at which point Frankfurter interjected, "Is it suggested that the Communist Party has no principles?" Frankfurter's impertinence apparently enraged Black, for, according to Frankfurter, Black turned to him "with blazing eyes and ferocity in his voice and said, 'The Hearst press will love that question.'" Frankfurter, by now equally incensed, retorted, "I don't give a damn whether the Hearst press or any other press likes or dislikes any question that seems to me relevant to the argument. I am a judge and not a politician.'" Black, a down-home politician from Alabama, replied, "Of course . . . you, unlike the rest of us, live in the stratosphere.'" ¹²⁶

On the day *Schneiderman* was to come down, the Washington *Times-Herald* ran a prophetic story claiming that recent decisions indicated that Frankfurter, long the prime mover on the Supreme Court, had "lost control of the tribunal."¹²⁷ Six months later, newspaper articles all over the country heralded Black and Murphy's an-

ification of Judges: *In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 47 (1970), for the proposition that, since the Justice Department is "the largest law office in the world," the connection of assistant attorneys general to individual cases is often nil. 408 U.S. at 829.

125. *Post Register* (Idaho Falls, Idaho) clipping dated June 30, 1943, and *Star* (Terre Haute, Indiana) clipping dated June 26, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

126. Justice Frankfurter's diary, March 12, 1943, Frankfurter Papers, *supra* note 2, box 2. Incredible as it seems, this exchange between Frankfurter and Black must have been whispered, for newspaper accounts of the reargument carried no report of what certainly would have been a most newsworthy outburst. See N.Y. Times, March 13, 1943, at 15, col. 6 (late city ed.); Washington Post, March 13, 1943, at 10, col. 2. In addition, Fahy has no recollection of the exchange. As to the dialogue that preceded the exchange, Fahy does not recall responding in the negative to Black and maintains that such a response would have been inconsistent with the thrust of his argument. Fahy interview, *supra* note 3.

127. *Times-Herald* clipping dated June 21, 1943, Murphy Papers, *supra* note 2, box 62, newspaper clippings file.

nounced "official" split from Frankfurter.¹²⁸ *Schneiderman* was a principal contributor to that rift and thus had a significant effect on the ensuing direction and conduct of the Roosevelt Court.¹²⁹

128. Newspaper clippings from articles published in Jan. 1944, found in scrap-book 23, Murphy Papers, *supra* note 2.

129. *See generally* L. BAKER, *FELIX FRANKFURTER* (1969); J. HOWARD, *supra* note 15; A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956); C. PRITCHETT, *THE ROOSEVELT COURT* (1948).