> man's estate whatever provision he may have made for his successors, which depends upon his death, and which he has secured by means of "premiums" or "other considerations," paid during his life.[25]

This weight of precedent in opposition to the court's holding takes on a particular importance in view of the fact that the section of the Code dealing with estate taxation of insurance has been re-enacted many times, and Congress obviously saw no need to change or clarify the meaning given to this section by court holdings. Apparently, some stamp of approval was given by Congress to the interpretation which the courts and regulations had given this section. Repeated re-enactment of a statute, in the light of judicial and administrative interpretation of that statute, usually gives the interpretation the force of law.[26]

Another important aspect of *Noel*, which warrants consideration, is the possible repercussions which might arise as a result of its holding. Proceeds from an insurance policy were exempted from income taxation by Section 101(a) of the Code.[27] The rationale for this exemption is that it would be unfair to subject insurance proceeds to an income tax, since they are already subject to estate taxation.[28] Because *Noel* has made the determination that proceeds from certain types of insurance policies are to be excluded from a decedent's gross estate and therefore are to be immune from estate taxation, the reason for excluding these proceeds from income taxation no longer exists. The result of *Noel*, therefore, is either to create a tax "loophole," whereby these proceeds would pass with no tax being assessed on the transfer, or to subject accident and possibly forms of term insurance proceeds to income taxation.

The court, in the instant case, is on questionable ground in excluding death benefits of accident insurance from estate taxation. In the absence of a meaningful argument to the contrary, death benefits resulting from many forms of insurance fall within the clear and ordinary meaning of the words "insurance . . . on . . . life." Also, a long standing determination of an issue should not be overruled without meeting head-on the decisions of precedent cases in the area and without consideration of the serious repercussions which are likely to arise as a result of such reversal.[29]

MARK L. COHEN

Labor Law—Section 504 LMRDA—Communist Labor Officials—Constitutionality.—*Brown v. United States*.[1]—The defendant, Archie Brown, had been a member of the Communist Party since at least 1935. From 1959

[25] Id. at 293. The words "insurance of every description" used by Learned Hand were taken from the regulation which is found in Treas. Reg. 20.2042-1.

[26] United States Trust Co. of N.Y. v. Commissioner, supra note 21, at 735.

[27] Int. Rev. Code of 1954, § 101(a).

[28] 1 Bowe, Estate Planning & Taxation 437 (1957).

[29] Certiorari has been granted. Commissioner v. Estate of Noel, appeal docketed, No. 503, 2d Cir., June 17, 1964; cert. granted, 33 U.S.L. Week 3208 (U.S. Dec. 8, 1964).

[1] 334 F.2d 488 (9th Cir. 1964), cert. granted, 33 U.S.L. Week 3169 (U.S. Nov. 9, 1964) (No. 399).

until 1961 he had been elected, while still a Party member, to the executive board of Local 10 (San Francisco, Cal.) of the International Longshoremen's Union. Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act)[2] made it a criminal offense for a member of the Communist Party, during or for five years after the termination of his membership, to hold office in a labor union.[3] The defendant was convicted of violating section 504 and appealed. HELD: Reversed; section 504 conflicts with the first and fifth amendments of the United States Constitution and thus is void.

In *NLRB v. Jones & Laughlin Steel Corp.*,[4] which tested the National Labor Relations Act of 1935,[5] the United States Supreme Court upheld the constitutionality of labor legislation under the commerce clause. The NLRA was designed to remove obstructions caused by strikes and other forms of industrial unrest flowing from the inequality of bargaining power between unorganized employees and their employers.[6] It did so by strengthing employee groups, by restraining certain employer practices, and by encouraging the process of collective bargaining.[7]

In 1947, substantial evidence was presented to various committees of Congress that Communist labor leaders were undermining legitimate union objectives and calling obstructive strikes when so ordered by Party leaders, sometimes in support of the policies of a foreign government.[8] This so-called

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[2] 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1963) provides in part:

(a) No person who is or has been a member of the Communist Party . . . shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party. . . .

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

[3] 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1963).

[4] 301 U.S. 1 (1937).

[5] 49 Stat. 449 (1935).

[6] See NLRB v. Jones & Laughlin Steel Corp., supra note 4, at 41-43.

[7] 49 Stat. 449 (1935), § 9(a):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

[8] I Legislative History of the Labor Management Relations Act, 1947, 677-78 (1948). One example of the testimony before the House Committee on Education and Labor was that of Louis Bundenz, former editor of the Communist *Daily Worker*. He testified that the Communist Party Political Committee in New York decided, in 1940, that a strike should be called against the Allis-Chalmers Co., of Milwaukee, because it was one of the few firms making steel turbines for United States destroyers. This would follow the Party line at that time of opposing aid to Britain. That was before Hitler attacked Russia. Shortly thereafter, Mr. Harold Christoffel, a Communist Party member and president of the Allis-Chalmers local, called the strike.

"political strike" posed an additional impediment to the free flow of commerce, making amendment of the NLRA desirable.[9] Section 9(h) of Taft-Hartley was meant to remove this obstruction by requiring non-Communist affidavits to be filed by union officials. The facilities of the NLRB were to be barred to those unions whose officers failed to file.[10]

Section 9(h) was deemed constitutional in *American Communications Ass'n v. Douds*.[11] In that case, the unions contended that section 9(h) made it impossible for persons who could not sign the oath to be officers of labor unions and that this violated their rights under the first amendment, *e.g.*, the right of union officers to hold what political views they chose, to associate with what political groups they would, and the right of unions to select their officers without interference from government.[12] The Court agreed that the act did discourage the exercise of political rights protected by the first amendment, namely, the right to join a legitimate political party, the Communist Party, which may be presumed to have both legitimate and illegitimate political aims.[13] The *Douds* Court felt, however, that resolution of the problem required them to weigh

> the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists . . . pose continuing threats to that public interest when in positions of union leadership.[14]

The Court opted for the constitutionality of section 9(h), stating that those who, Congress had found might subvert the public interest "cannot escape all regulation" merely because they simultaneously carried on legitimate political activities.[15] The statute did not specifically forbid persons who did not sign the affidavit to hold a union office, nor did it require their discharge from office.[16] It did not prevent or criminally punish affiliation with any organization, speech-making, "or the holding of any belief."[17] The statute encouraged unions to depose Communist officials but left those individuals free to maintain their beliefs. Their only penalty was the loss of positions which, Congress concluded, were being abused to the injury of the public.

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[9] The findings and declarations of policy of subchapter II of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958) state:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce.

[10] 61 Stat. 146 (1947).
[11] 339 U.S. 382 (1950).
[12] Id. at 389.
[13] Id. at 393.
[14] Id. at 400.
[15] Id. at 412.
[16] Id. at 390.
[17] Id. at 402.

This, in the Court's view, did not contravene the purposes of the first amendment.[18]

Section 9(h), however, did not fulfill its purpose. In a 1959 report to the Senate from the Committee on Labor and Public Welfare, the then Senator John F. Kennedy stated the need for new legislation:

> The assumption upon which the present non-Communist affidavit requirement was based is that officers of unions who were Communists would not file affidavits. This assumption, on the basis of the record, has not proved sound. As the Department of Justice indicated to the committee, the Communist Party after the passage of the non-Communist affidavit requirement "instructed its members who were union officers to file affidavits and to continue their party membership on a secret basis." Indeed, the record clearly demonstrates that the officers of unions alleged to be Communist infiltrated have been most punctilious about filing non-Communist affidavits. When a union officer files an affidavit, a certificate of compliance is issued to his union. The Board has no legal power to question the authenticity of the affidavit. Consequently, the Board in issuing its certificate in effect puts a governmental stamp of approval on the union regardless of what is suspected of its leadership.[19]

Realizing the defects in section 9(h), the Committee sought to strengthen the affidavit framework by changing the time for filing, increasing the role of the NLRB in administering the procedure by giving the Secretary of Labor full investigatory power, and by allowing criminal penalties for false filing to be applied.[20] The original bill, as it passed the Senate on April 25, 1959, however, contained no criminal disability provision relating to Communists.[21]

The House Committee on Education and Labor amended the bill, as passed by the Senate, by adding the criminal sanction which became a part of the final version of section 504. As Congressman Barden stated for the committee:

> confronted with the one-sided provision of the Taft-Hartley Act which requires non-Communist affidavits from union officers, the drafters of S. 1555 extended this unwieldy oath requirement. . . . Our committee faced up to this dilemma and by unanimous action cancelled such oaths and provided a more appropriate remedy against Communist infiltration into the councils of labor or management. . . .[22]

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[18] Id. at 404, 412.

[19] S. Rep. No. 187, 86th Cong., 1st Sess. 35 (1959). I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 431 (1959) (hereafter called Legislative History [1959]).

[20] S. Rep. No. 187, supra note 19, at 34-36, Legislative History [1959], supra note 19, at 430-32.

[21] S. 1555, 86th Cong., 1st Sess. § 212 (1959), Legislative History [1959], supra note 19, at 545-46.

[22] H.R. Rep. No. 741, 86th Cong., 1st Sess. 79 (1959). Legislative History [1959], supra note 19, at 837.

Congress adopted section 504, hoping that it would be a more effective restriction on Communist infiltration of labor organizations than section 9(h) had been. The constitutionality of this new restrictive device is at issue in the instant case.

The Department of Justice, asserting the constitutionality of section 504, argued that, since the Supreme Court had already acknowledged in *Douds* that ample grounds existed for trying to eliminate Communists from union offices, Congress could provide a more effective remedy to accomplish the same purpose. It was further argued that they could do so on the same general basis, namely, that mere membership in the Communist Party, when combined with union office-holding, is conclusive of guilt.[23] This argument, however, attempted to establish the constitutionality of a regulation on the basis of its purpose and its result, and ignored the means used to implement that purpose. Although the purpose of both section 9(h) and section 504 is the same, the constitutionality of section 504 would also depend on the validity of the means used to achieve that purpose.[24] The means used in section 9(h) are distinguishable from those used in section 504 in that section 9(h) was a discouragement aimed at the union while section 504 is a flat prohibition imposing a criminal penalty directly upon the individual.[25] Since section 504's means of attacking the problem of Communist infiltration of labor leadership are different from those in section 9(h), different questions concerning the reasonableness of the regulation are necessarily raised and different considerations than those discussed in *Douds* need attention.[26]

In two recent cases,[27] the Supreme Court found that a criminal conviction for becoming a member of an organization advocating overthrow of the government could escape violation of the first amendment only if it is proved in each case (1) that the organization was engaged in the type of advocacy that is unprotected by the first amendment, and (2) that the defendant was an active member of such an organization with a specific intent to further such unlawful purposes.[28] These cases involved convictions under the Smith Act.[29] The type of conduct considered to be unprotected by the first amendment was

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[23] Brown v. United States, supra note 1, at 492-93.

[24] See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353-54 (1819).

[25] Brown v. United States, supra note 1, at 494-95.

[26] Id. at 495.

[27] Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961).

[28] Scales v. United States, supra note 27, at 253-55; Noto v. United States, supra note 27, at 299-300, (dictum).

[29] 18 U.S.C. § 2385 (Supp. V, 1963) which provides in part:

> Whoever knowingly or willfully advocates . . . overthrowing or destroying the government of the United States . . . by force or violence . . .; or. . . .
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly or persons, knowing the purposes thereof—
>
> Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. . . .

present advocacy of future violent overthrow of the government.[30] The Court, in both *Scales v. United States* and *Noto v. United States*, found that the membership clause of the Smith Act required proof of a specific intent to further the unlawful purposes of the organization involved.[31] It was this requirement of intent that eliminated the possibility of a blanket prohibition of association and the danger of impairment of legitimate political expression.[32]

The facts of the instant case place it closer to the cases under the Smith Act than to *Douds*. Section 504 is similar to the Smith Act. Section 504 relieves the Government from having to wait until a political strike is called before imposing punishment, just as the Smith Act relieves the Government from having to wait until an overthrow of the government is attempted before imposing punishment. Both also impose a criminal sanction on violators. The Government, however, under section 504, has the power both to remove and punish the threat of a political strike, with no showing that such an act was actually threatened by the person punished.[33] Such a provision is unreasonably broad. It lays an invalid restraint on the freedom of association protected by the first amendment by placing a blanket prohibition on the combining of two legitimate activities, namely, joining the Communist Party and holding union office.[34] One in sympathy with the legitimate aims of the Communist Party, with no intent to accomplish them by illegal means, would "be punished for his adherence to lawful and constitutionally protected purposes."[35] This is unlike the Smith Act, which requires the violator to have a specific, illegal intent to overthrow the government by force or violence. The Smith Act, without its specific intent requirement, would violate the first amendment.[36] The lack of a specific intent clause would likewise cause section 504 to violate the first amendment.[37] Without it, the section puts "an invalid restraint upon the freedom of association."[38]

Because of the criminal penalty imposed by section 504, a problem involving due process under the fifth amendment, which was not present under section 9(h), also arises. Under the due process clause, when criminal guilt is based on status or conduct, "the relationship of that status or conduct to other concededly criminal activity," here prevention of the free flow of commerce, "must be sufficiently substantial to satisfy the concept of personal guilt" prevailing in this country.[39] Otherwise, punishment for crime would be an assertion of arbitrary power,[40] supported only by a tenuous relationship between mere organizational membership and the activity Congress seeks to proscribe, without considering relevant matters such as the individual's

[30] See Yates v. United States, 354 U.S. 298, 321 (1957); Dennis v. United States, 341 U.S. 494, 509 (1951) (Vinson, C.J.).

[31] Scales v. United States, supra note 27, at 228; Noto v. United States, supra note 27, at 291.

[32] Scales v. United States, supra note 27, at 229.

[33] 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1963), set out supra note 2.

[34] Brown v. United States, supra note 1, at 495.

[35] Noto v. United States, supra note 27, at 299 (dictum).

[36] Scales v. United States, supra note 27, at 229.

[37] Brown v. United States, supra note 1, at 496.

[38] Id. at 495.

[39] Scales v. United States, supra note 27, at 224-25.

[40] See Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

knowledge, activity, and commitment to the illegal purpose. This would offend the due process clause.[41] In *Scales*, the Court felt that the mere relationship between membership in the Communist Party and its illegal purpose of advocacy of violent overthrow of the government was too tenuous to satisfy the due process clause.[42] Proof of active membership with intent to further the Party's unlawful purpose was required in order to make the relationship substantial and satisfy due process.[43] The *Scales* reasoning should control the instant case. The relationship between a union leader's Party membership and interference with commerce is too tenuous to satisfy the personal guilt requirement of the due process clause. A specific intent clause should be necessary in order to make the relationship substantial.[44]

The court concluded that section 504 could not be so interpreted as to include a specific intent clause.[45] Indeed, it was not the purpose of Congress to require specific intent for violation. To have done so would have imposed more stringent elements for violation of section 504 than are required for violation of the Smith Act;[46] and yet, a much lesser penalty would be imposed. A person violates the Smith Act and is guilty of a felony if he joins an organization advocating overthrow of the government and has the specific intent to further this unlawful purpose. A person would violate section 504 (if it included a specific intent requirement) and be guilty of a misdemeanor if he joined the Communist Party, had the specific intent to further its illegal purposes, and is an officer in a labor union. After membership and specific intent are proved, a defendant would be guilty of a felony under the Smith Act. To add union leadership to these other elements, in order to find the defendant guilty of a misdemeanor was not the likely intent of Congress. Therefore, Congress must have intended that the act not include a specific intent requirement.

A possible solution to the problem would be to combine the elements Congress intended to be part of section 504 (union leadership and Communist Party membership)[47] with the constitutionally acceptable penalty proscribed by former section 9(h) (loss of NLRB facilities).[48] This would accomplish the purposes originally sought in passing section 504, namely, shedding the unsuccessful non-Communist affidavit requirement and substituting an easier means of preventing political strikes.[49] The penalty of loss of NLRB facilities would bring back the indirect sanctions found to be constitutional in *Douds*. Without a personal criminal sanction, the fifth amendment problem would disappear. With the purpose, result, and the means of implementation all acceptable, the situation would be closer to *Douds* than to the Smith Act

[41] Aptheker v. Secretary of State, 378 U.S. 500, 510-11 (1964); Scales v. United States, supra note 27, at 224-28; Adler v. Board of Education, 342 U.S. 485, 494 (1952).

[42] Scales v. United States, supra note 27, at 224-25.

[43] Ibid.

[44] Brown v. United States, supra note 1, at 496.

[45] Id. at 496-97.

[46] 18 U.S.C. § 2385 (Supp. V, 1963), set out supra note 29.

[47] 73 Stat. 536 (1959), 29 U.S.C. § 504 (Supp. V, 1963), set out supra note 2.

[48] 61 Stat. 146 (1947).

[49] H.R. Rep. No. 741, supra note 22, at 33; Legislative History [1959], supra note 19, at 791.

cases. The act would not violate the first amendment, just as section 9(h) did not, because it would not prevent or criminally punish affiliation with any organization, or the holding of any belief.[50]

BARRY E. ROSENTHAL

Taxation—Recapture of Income—Depreciating an Asset in the Year of Sale.—***Fribourg Nav. Co. v. Commissioner.***[1]—The taxpayer purchased a cargo ship in December, 1955, for $469,000. He had previously secured a letter-ruling from the Internal Revenue Service advising that a straight-line method of depreciation over a useful life of three years with a salvage value of $54,000 would be acceptable. This estimate was reasonable at the date of purchase, but the Suez crisis of 1956-57 caused a scarcity of ships, which, in turn, greatly inflated their market value. As a result, the taxpayer was able to sell his ship for $695,000 in December, 1957. The taxpayer, according to his depreciation schedule, took his depreciation allowance for that portion of the tax year 1957 during which he held the ship, and reported a capital gain of about $500,000. The Commissioner did not attempt to readjust the depreciation allowances taken in 1955 and 1956,[2] but he did disallow the entire depreciation deduction taken in 1957. He declared that a taxpayer cannot depreciate an asset in the year in which it is sold at a gain. The Tax Court[3] upheld the Commissioner's position. On appeal, HELD: the Internal Revenue Code of 1954, Section 167(a),[4] provides for a "reasonable allowance" for depreciation and it would be unreasonable to allow what would be a fictional deduction when the asset has not cost the taxpayer anything during the tax year, but rather has appreciated in value.

Depreciating an asset in the year of a favorable sale will usually result in the conversion of ordinary income into capital gains. The taxpayer's ordinary income is reduced by the amount of the depreciation deduction, and his capital gain is increased by a like amount. His saving will be the difference between the rate at which his ordinary income is taxed and the capital gains rate. In the instant case, the taxpayer's saving would be more substantial than in the usual case. He was proceeding under a plan of complete liquidation within the ambit of Section 337 of the Internal Revenue Code[5] which provides that gains derived from the sale of section 337 assets shall not be recognized. The taxpayer's ship is a section 337 asset and thus

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[50] American Communications Ass'n v. Douds, supra note 11, at 402.

[1] 335 F.2d 15 (2d Cir. 1964), cert. granted, 33 U.S.L. Week 3262 (U.S. Feb. 2, 1965) (No. 679).

[2] Apparently, the Commissioner felt that he was precluded from going back to prior years because of the holding in Cohn v. United States, 259 F.2d 371 (6th Cir. 1958), which disallowed only the depreciation in the year of sale.

[3] 21 CCH Tax Ct. Mem. 1533 (1962).

[4] Int. Rev. Code of 1954, § 167(a): "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in the trade or business, or (2) of property held for the production of income."

[5] Int. Rev. Code of 1954, § 337.