

UNITED STATES *v.* ROBEL.

was certified here as properly a direct appeal to this Court under 18 U. S. C. § 3731. We noted probable jurisdiction. 384 U. S. 937.⁴ We affirm the judgment of the District Court, but on the ground that § 5 (a) (1)(D) is an unconstitutional abridgment of the right of association protected by the First Amendment.⁵

We cannot agree with the District Court that § 5 (a) (1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. The District Court relied on *Scales v. United States*, 367 U. S. 203, in placing its limiting construction on § 5 (a) (1)(D). It is true that in *Scales* we read the elements of active membership and specific intent into the membership clause of the Smith Act.⁶ However, in *Aptheker v. Secretary of State*, 378 U. S. 500, we noted that the Smith Act's membership clause required a defendant to have knowledge of the organization's illegal advocacy, a requirement that "was intimately connected with the construction limiting membership to 'active' members."

⁴ We initially heard oral argument in this case on November 14, 1966. On June 5, 1967, we entered the following order:

"This case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate 'defense facilities' satisfies pertinent constitutional standards."

We heard additional arguments on October 9, 1967.

⁵ In addition to arguing that § 5 (a) (1)(D) is invalid under the First Amendment, appellee asserted the statute was also unconstitutional because (1) it offended substantive and procedural due process under the Fifth Amendment; (2) it contained an unconstitutional delegation of legislative power to the Secretary of Defense; and (3) it is a bill of attainder. Because we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider the other constitutional arguments.

⁶ 18 U. S. C. § 2385.