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IN THE

Supreme Court of the United States

October Term, 1955.

No. 10.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

QUESTION PRESENTED.

Whether the national interest makes it necessary to recognize federal preemption of the field of anti-sedition legislation.

INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION.

The American Civil Liberties Union was founded in 1920. It is a non-profit organization devoted exclusively to the cause of civil liberties; has no interest in any political party or political dogma; and stands unalterably opposed to all forms of dictatorship including Communism and

Fascism. It is the continuing responsibility and policy of the Union vigorously to defend the civil liberties of any person, however unpopular that person or his views may be, and regardless of any political party, organization, denomination, race or nationality to which that person may belong.

In considering the rights of members of the Communist Party, the Union recognizes that problems have arisen because of the dual nature of the Communist movement. It is both a political agitational movement and a part of the Soviet conspiracy. Insofar as it is the first, its members have all the rights of members of other parties; to the extent that it is the second, its members may in some particulars be restricted by law. The Union has recognized this distinction in positions it has taken in the past with respect to various laws and governmental actions affecting totalitarian movements—Fascist, Ku Klux Klan as well as Communist—and will continue to do so in the future.

The Union's sole interest in the case at bar is in the civil liberties aspects of the case. The fact that the respondent, Steve Nelson, is an avowed Communist and is accused of spreading a doctrine generally despised in the American community points up our concern and responsibility. Our participation is not grounded upon sympathy with or endorsement of Nelson's views, but rather it springs from a conviction that constitutional liberties are tested in just the kind of atmosphere that surrounds the present case. We are mindful that the expression of popular views is not likely to be denied by state action, and that the more unpopular the expression the more crucial and meaningful its constitutional protection.

ARGUMENT.

The Enforcement of State Sedition Laws Threatens Basic Constitutional Liberties, Particularly Those Protected by the First Amendment.

The view of the Pennsylvania Supreme Court in the instant case is that

> ". . . the congressional purpose to preempt a particular field is not made to depend upon a positively expressed legislative intent to that end. Such purpose can as readily be evidenced objectively by what the circumstances reasonably indicate as being necessary for the complete and unhampered effectuation of the federal aims and objectives." 377 Pa. at 66.

This is the same principle enunciated by this Court in *Hines v. Davidowitz,* 312 U. S. 52, 81, where it was said:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. *Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.* And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand

broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. *And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.*" (Emphasis supplied.)

The danger to civil liberties which is inherent in the recognition of the power of the states to punish sedition is evidenced by the following language of the court below:

"As the defendant has, at all times, admitted his membership and position in the Communist Party, obviously his views are so extremely unpopular with a vastly preponderant majority of the citizenry of our Country as to amount virtually to an anathema in the public mind. That very circumstance makes it especially incumbent upon a court, in reviewing the conviction of such a person for an alleged offense against the body politic, to scrutinize the record with utmost care to see that he received a trial that fully comports with our concept of traditional due process—quite apart from any question of trial error in the admission or rejection of evidence or in alleged excesses or deficiencies in the court's instructions to the jury." 377 Pa. at 62.

When this statement is viewed in the light of the provisions of the Pennsylvania Sedition Act here under consideration,[1] and the fact that a reversal of the decision of

1. Section 207 of the Pennsylvania Penal Code of 1939, 18 Pa. Stat. Ann. 4207, defines sedition as any one of some eight types of activity. Six of the eight types of conduct prohibited do not embrace actual overt acts. The Section provides for a maximum sentence, upon conviction, of twenty years' imprisonment or $10,000.00 fine, or both.

the court below would permit the individual district attorneys of the sixty-seven counties of Pennsylvania to institute individual prosecutions throughout the state against all those who might be inclined to assert a controversial or unpopular political doctrine—so broad is the thrust of the Pennsylvania Act—the gravity of the harm threatened assumes its proper proportion.[2] The current Attorney General's list of subversive organizations lists almost three hundred organizations as such. If the states are to be permitted to prosecute seditious activity, each of Pennsylvania's sixty-seven district attorneys will be free to adopt the list, and augment it, and to equate membership in any of the organizations therein, for purposes of prosecution, with sedition as defined in the Pennsylvania Act.

The extent to which even the most judicious state officer, influenced by the highest patriotic motives, can react to the impact of international tension and domestic fear is illustrated by the vigor of the dissenting opinion of the court below, as follows:

> ". . . if there could be any doubt on the question—and in my opinion there is none—it should certainly not be resolved in favor of freeing one of the top leaders of the Communist Party in America, who has just been convicted of plotting the destruction of our Country." 377 Pa. at 77.

At another point, the dissenting Justice said:

> "If the majority opinion prevails, isn't it clear as crystal that all these State laws will be superseded and suspended or invalidated by the Smith Act; and if so, what will it cost the States in the way of damages and other remedial actions? And if the majority opinion

2. The office of county district attorney is an elected office. The county district attorney is not a subordinate of the State Attorney General, and can institute prosecutions and policies which are divergent to those of the State Department of Justice.

prevails, what will happen to all the traitors and dangerous criminals who have been convicted under state acts and whose sentences have not been finally determined, as well as those who are now in state jails serving sentences for violating state treason or sedition or similar laws? *And most important of all, what will happen to the security of our Country when the patriotic efforts of all state legislatures, district attorneys and Courts and of all patriotic citizens anxious to catch and punish traitors, are rejected, and the existence of our State and Nation is left exclusively to the slow processes of our sometimes apathetic or inept Federal Government?"* 377 Pa. at 85. (Emphasis supplied.)

And again:

"Congress further knew that our Country needed, in order to combat the widespread and occult perils of communism, the help not only of the FBI and of all Federal district attorneys and all officials in every Federal department and agency of Government, but it also needed the active assistance and cooperation of all States, and all State Courts, and all State officers and agencies, as well as the enthusiastic help of every patriotic American citizen. *Congress also knew that juries are sometimes fooled or duped by false testimony or by clever lawyers and thus acquit those who are guilty of grave crimes, and it would certainly be wise to have State officers, State Courts and State Juries give to our Country additional help and protection against those who are attempting to destroy our Government."* 377 Pa. at 87. (Emphasis supplied.) [3]

3. At least part of the rationale of the dissent is that Congress could not have intended to "give to a Federal Government *which had demonstrated its utter inability* to solve or effectively deal with the problem and menace of Communism, the sole and exclusive right and power to defend our State and Country from the traitors within our ranks." 377 Pa. at 89.

The Brief filed by the United States as Amicus curiae recognizes our concern, but assuages it with the statement that it "should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states must yield to the paramount federal powers" (U. S. Br. 8). But the fact is that there is a history of injudicious official action against subversive elements on the state and local level, and of irresponsible private prosecution, which create a community atmosphere dangerous to those standards of individual liberty heretofore considered consistent with federal constitutional guarantees.

It should be stated at this point that the lack of legislative findings of a need for anti-subversive control at a local level is indicative of an absence of necessity for sectional regulation in this area. See Prendergast, *State Legislatures and Communism: The Current Scene,* 44 AM. POL. SCI. REV. 556, 574 (1950). By resort to the all too common challenge: "Are you for or against Communism", statutes which offend against political freedom can be passed by near unanimous votes. See Gelhorn, *The States and Subversion,* 363-369 (1952). In fact, conscientious state legislators have acknowledged that they have voted for such measures merely to avoid political embarrassment and personal ostracism. See *e.g.,* the statement of Pennsylvania Senator Dent, made in reference to the Pennsylvania Loyalty Act of 1951, 65 PA. STAT. ANN. 211, that "I will vote for this measure because the injustices of the day demand me to vote for it." Byse, *A Report on the Pennsylvania Loyalty Act,* 101 U. OF PA. L. REV. 480, 507 (1953). In addition, when such a statute fails to result in the arrest and conviction of large numbers of "subversives", the usual legislative assumption is not that the act was not needed initially, but rather that additional legislation is called for in order to apprehend those who have managed

to evade the original enactment. Note, *Effectiveness of State Anti-Subversive Legislation,* 28 Ind. L. J. 492 (1953).

The Government states in its Brief that "so far as we know there have in recent years been prosecutions (for seditious activity) only in Pennsylvania and Massachusetts"; and that "This may well reflect regard by the states for federal activity in the field" (U. S. Br. 30n). While both of these statements may be substantially correct,[4] and while it is also true that the number of prosecutions under the Pennsylvania Sedition Act has been extremely small (Digest of the Public Record of Communism in the United States (1955), 284), there have been other forms of attack upon Communists and suspected Communists in Pennsylvania which indicate an unwillingness on the part of local officials as well as certain private citizens to leave control of the problem of subversive activities to the federal government. We believe that an analysis of these cases, all but one of which, like the instant case, arose in Allegheny County, will illustrate the threat to civil liberties which is posed by the recognition of continued state action in this area.

1. In *Milasinovich v. Serbian Progressive Club, Inc.,* 369 Pa. 26 (1951) a shareholders' bill in equity was filed by five members of a nonprofit corporation, alleging that the officers of the corporation were perverting the purpose of the corporate charter by bringing the corporation under the control of the Communist Party and were diverting its assets toward subversive uses. The Chancellor, after a hearing "but with a record which leaves much to be desired," (369 Pa. at 28) entered a final decree expelling 23 shareholders for being Communists or Communist sympathizers; ordering reinstatement of certain anti-Communist members; and permanently enjoining use of the club premises "for Communist meetings, discussion, conferences, or for the sale or distribution of anti-American or any other

4. We are aware of the case of *Commonwealth v. Braden,* now pending in the Court of Appeals of Kentucky.

treasonous literature of any character." The Supreme Court of Pennsylvania set aside the decree because only 7 of the 23 expelled members had been parties to the proceeding. In addition, the Court found that part of the decree admitting "former members who were anti-Communists" to be "too vague and indefinite for legal enforcement" 369 Pa. at 32. In remitting the record to the Allegheny County Court, the Supreme Court specifically directed the trial court to determine, after proper joinder, which members of the association were Communists and which were not; to expel those found to be so; and to order and supervise an election of directors. Notwithstanding specific directions to this effect by the Supreme Court, when the case went up on appeal a second time, it was found that: "No hearings have been held either by the Court or the Master, no findings of fact or conclusions of law have been made, no election has been held, or supervised, as ordered" 377 Pa. 385, 388 (1954).

2. In a similar case, nine years after a non-profit corporate charter was issued to the Yiddisher Kultur Farband by the Common Pleas Court of Allegheny County, a petition was filed by one Harry Allan Sherman, Esq., on behalf of two non-members of the organization, as of the same court, term and number as the original incorporation proceeding, seeking to intervene therein and obtain the revocation of the corporate charter and the liquidation of the corporate assets on the ground that a fraud had been perpetrated on the court because the corporation was in substance a Communist front and was perverting its avowed corporate purpose. On preliminary objections, the lower court upheld the jurisdictional assertion by the interveners. On appeal, the Supreme Court reversed, noting:

> "The present petitioners are merely informers, without any particular interest of their own and if they were to be permitted to institute quo warranto proceedings, the same right would exist on the part of each and every citizen of the Commonwealth however irre-

> sponsible, however improperly motivated, he might be. If the Association is what petitioners allege it to be, the situation is one of public concern and a public wrong, and not a private injury, and as such, it is for the Commonwealth and for it alone acting through the Attorney General to apply for the issuance of a writ of quo warranto."
>
> *Sherman v. Yiddisher Kultur Farband,* 375 Pa. 108, 113 (1953).

Subsequently a quo warranto proceeding was instituted in the name of the Attorney General of Pennsylvania, seeking *only* the revocation of the corporate charter. This case came on for trial before the same lower court judge as before. The Attorney General had retained the same Harry Allan Sherman, Esq., as a special assistant to the Deputy Attorney General in charge of the prosecution. During the course of the proceeding a consent decree satisfactory to the Attorney General and the defendant's attorney was agreed upon. However, Mr. Sherman, the special Deputy Attorney General "in defiance of the directions of his superior, the Attorney General, objected to the consent decree." *Truscott v. Yiddisher Kultur Farband,* No. 79, March T. 1955 (p. 4 Opin.). This position was concurred in by the trial judge, who refused to enter the agreed upon consent decree and ordered the president of the corporation either to unconditionally surrender the corporate charter or proceed to trial. Later, when counsel for the corporation asked leave to withdraw from the case, the judge ordered the defendant to obtain new counsel within 24 hours. The corporate president reluctantly agreed to the surrender of the charter, asserting that he was "physically unable to secure counsel and thereby continue with the defense of the case" (p. 6). The court then appointed a liquidating trustee, and named Mr. Sherman as co-counsel for the trustee. Upon learning these facts, the Attorney General dismissed Mr. Sherman from the case. The Su-

preme Court noted in its opinion that the trial judge "in the long run permitted him (Mr. Sherman) to indulge in violent diatribes accusing members of the defendant association of subversive activities, which unquestionably would have required the grant of a new trial if the case had gone to the jury and resulted in a verdict against the defendant" (p. 12). On appeal the Supreme Court vacated the order of the lower court appointing a liquidating trustee for the corporation. Mr. Sherman filed a brief as amicus curiae, which the court "suppressed as containing scandalous, impertinent and defamatory matter, libelling the Attorney General of the Commonwealth." Order of June 27, 1955.

3. In *Matson v. Jackson,* 368 Pa. 283 (1951) the Attorney General of Pennsylvania appointed one of his deputies to conduct a hearing on his charges of "alleged Communistic leanings, sympathies, and utterances" of an Assistant District Attorney of Allegheny County, one Marjorie Matson. Another Deputy Attorney General was appointed to present testimony to the hearing Deputy. Mrs. Matson, the Assistant District Attorney, obtained an injunction against the proceeding. In affirming the injunction order, the Supreme Court noted that to permit such a hearing by the Attorney General:

> ". . . would be equivalent to holding that the Attorney General was vested with power to conduct hearings as to the political, economic and social views of every public officer in the Commonwealth entrusted with the execution of the laws from the Governor himself down to the least important officials, including even those duly elected, in order to ascertain whether, in his opinion, they were fit and competent to perform their respective duties in enforcing the laws—a proposition the very statement of which illustrates its inherent absurdity." 368 Pa. at 288.[5]

5. Mrs. Matson was subsequently cleared of similar charges by the Allegheny County Bar Association.

4. In *Schlesinger Petition,* 367 Pa. 476 (1951), a Judge of the Allegheny County Court, prior to hearing a negligence case, emptied the courtroom and proceeded to interrogate the attorney for the plaintiff as to his Communist affiliations. When the attorney declined to answer, and started to leave the courtroom, the judge had him physically restrained by court officers. This was followed by a citation for contempt, which the attorney attacked by a petition for writ of prohibition. The Supreme Court granted the writ, vacated the trial judge's contempt order and further restrained him from "enforcing or in any manner whatsoever carrying into effect his determination that petitioner is unfit to practice law or to try cases. . . ." 367 Pa. 476, 483 (1951).

5. In *Roth v. Mussmano,* 364 Pa. 359 (1951), a Common Pleas judge conducted an *ex parte* inquiry, in chambers, of a prospective grand juror and concluded, merely on "the sworn word of an informant" (364 Pa. at 360), that the juror was a Communist and therefore unfit to serve. On petition for writ of mandamus against the judge, the Supreme Court stated (360):

> "The procedure pursued by the judge cannot be supported. It constituted an arrogation and exercise of a power beyond the jurisdiction of any judge under the existing law."

6. See also *Commonwealth v. Truitt,* 369 Pa. 72 (1951), in which a conviction for assault and battery was reversed because of improperly admitted evidence as to the Communist affiliations of two defendants.

The above cases illustrate the harm that ensues from disorganized attempts to deal with the problem of subversion on a local level. While it is true that the type of prosecution illustrated by the above cases will not necessarily be precluded in the future by a decision of this Court to the effect that the states can no longer punish the crime of

sedition *per se* because of federal preemption of the field, it is reasonable to assume that such proceedings will be less likely to occur if there is a recognition by the courts that the control of subversive activities is a matter best left to the federal government.

Moreover, it cannot be overlooked that federal enforcement agencies are better equipped to cope with the problem than their local counterparts. This factor, and the lesser likelihood that federal officials will react unfavorably to local attitudes and prejudices, lead to the conclusion that personal freedoms will be in safer hands if the federal government is held to have the exclusive power to prevent sedition.

CONCLUSION.

For the foregong reasons, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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