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## CASES CITED

## CONSTITUTION AND STATUTES CITED

## MISCELLANEOUS

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1955**

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**No. 10**

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COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON.

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## BRIEF OF INDIVIDUAL AMICI CURIAE

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### Preliminary Statement

This brief *amici curiae* is submitted in accordance with the provisions of Rule 42 of this Court. The written consent of all the parties to this case has been obtained to the filing of a brief *amici curiae* in support of the position of the respondent herein.

The individual *amici curiae* have all either been indicted or subjected to interrogation pursuant to sedition laws in several state jurisdictions, including Massachusetts, New Hampshire, Kentucky, and Florida. With the exception of one individual, further proceedings involving the *amici curiae* have been postponed or held over either by stipulation, by action of court, or by the announcement of state attorneys, pending the decision of this Court in the case at bar. Consequently, the action of this Court in the present case intimately affects each of the *amici curiae*.

## Opinions Below

The opinion of the Superior Court of Pennsylvania is reported at 172 Pa. Super. 125, 92 A. 2d 431. The majority and dissenting opinions in the Supreme Court of Pennsylvania are reported at 377 Pa. 58, 104 A. 2d 133.

## Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. A petition for reargument was denied on April 27, 1954. See 377 Pa. 58, 60. The petition for a writ of certiorari was filed on July 24, 1954, and was granted on October 14, 1954. The jurisdiction of this Court rests upon 28 U. S. C. 1257(3).

## Questions Presented

1. Does a state have the power to enact a sedition law making criminal the advocacy of, or participation in a conspiracy to advocate, overthrowing the government of the state or the United States by force and violence?

2. Did the Smith Act, as amended (June 28, 1940, c. 439, 54 Stat. 670-1, 18 U. S. C. 2385), making sedition a federal crime, supersede the Pennsylvania Sedition Act (June 26, 1919, 18 Purd. Pa. Stat. Ann. 4207)?

## Statement of Facts

### A. Kentucky

On December 13, 1954, Carl Braden, a copy reader employed by the *Louisville Courier-Journal,* was found guilty of sedition by a jury in the Jefferson Circuit Court, State of Kentucky, and sentenced to fifteen years' confinement at hard labor, and fined $5,000. *Commonwealth* v. *Carl*

*Braden,* No. 101692. An appeal to the Court of Appeals of Kentucky was granted and bail fixed in the amount of $40,000. Efforts to obtain a reduction in bail were unsuccessful, and the defendant was imprisoned for seven months until bond could be posted on July 12, 1955.

The case arises out of several indictments returned by the Jefferson County Grand Jury in connection with its investigation of the dynamiting of the home of Andrew Wade IV, a young Negro electrical contractor and Navy veteran, on June 27, 1954. At Wade's suggestion, Braden and his wife Anne had purchased this house on May 10, 1954, in an all-white neighborhood, transferring title to Wade on May 13, 1954.

Immediately upon Wade's taking possession of the house on May 15th, a series of violent incidents occurred. Shots were fired into the house, rocks were hurled through its picture window, and a cross was burned in an adjoining vacant lot. Inflammatory articles appeared in a neighborhood weekly paper, the *Shively Newsweek.* These acts were plainly designed to force the Negro family out of the neighborhood. The attacks came to a climax shortly after midnight on June 27th, when a bomb exploded under the Wade house.

The subsequent county police investigation appeared to be inconclusive. Commonwealth Attorney A. Scott Hamilton announced that the entire matter would be placed before a grand jury the following September. He suggested that there were two possible "theories" of the crime. One was that the house had been dynamited by hostile neighbors. The other was that the explosion was the work of Wade himself or his friends and supporters, in an effort to make trouble between the races.

The grand jury began its investigation on September 15, 1954. The Commonwealth Attorney directed his interrogation toward the political beliefs and associations of Wade, Mr. and Mrs. Braden, and their friends, in an increasingly

transparent attempt to implicate them in some sort of Communist conspiracy to stir up racial discord in Louisville. Several witnesses refused to answer questions about their alleged Communist ties—initially on the ground that such questions were irrelevant to the inquiry, and later on the plea of the privilege against self-incrimination. These constitutionally privileged refusals to answer questions about alleged Communist beliefs and affiliations were seized upon to buttress the "red plot" theory.

On October 1, 1954, the grand jury indicted Carl Braden; his wife Anne, a member of the board of the local chapter of the National Association for Advancement of Colored People; Larue Spiker, a social worker who had been employed in a Louisville mill and was active in labor circles; Louise Gilbert, social worker and former chairman of the Louisville branch of the Women's International League for Peace and Freedom; Vernon Bown, a truck driver who had helped protect the Wade family; and I. O. Ford, a 79-year-old retired riverboat captain. This indictment did little more than repeat the language of the sedition statute. Ky. Rev. Stat. 1953, C. 432, Sec. 432.040. It charged the defendants with—

> "the crime of advocating, suggesting or teaching the duty, necessity, propriety, or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing, or knowingly circulating, selling, or distributing, or having in their possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting, or teaching, criminal syndicalism or sedition, or of organizing or helping to organize, or becoming a member of or voluntarily assembling with any society or assemblage of persons that teaches, advocates, or suggests the doctrine of criminal syndicalism or sedition, committed in manner and form as follows, to wit:
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> "The said [defendants] * * * did knowingly and feloniously, by word or writing, advocate or suggest the duty, necessity, propriety, and expediency of physical violence, intimidation, terrorism or other un-

> lawful acts or methods to accomplish a political end or to bring about political revolution, and did advocate or suggest by word, act, or writing, public disorder, or resistance to, or the change or modification of the Government, Constitution, and Laws of the United States and the Commonwealth of Kentucky, by force, violence or other unlawful means, and did knowingly circulate, sell, or distribute, and did have in their possession for the purpose of publication or circulation, written or printed matter, advocating, suggesting, and teaching criminal syndicalism, or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence, or other unlawful means, and did become members of a society or assemblage, and did assemble with persons teaching, advocating or suggesting the doctrine of criminal syndicalism or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence or other unlawful means * * *."

Only Vernon Bown was indicted for the actual bombing. He was charged with having "exploded dynamite in or near the house."

Another indictment was returned on November 4, 1954, against Mr. and Mrs. Braden, Bown, Ford, and one Lewis Lubka, at the time of the bombing a union shop steward in a local General Electric plant. These defendants were charged with conspiring to destroy the Wade house "to accomplish a political end, or to bring about political revolution, to-wit, to incite racial disturbances and hatred between the Negro and white races * * *." *

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* It is probably indicative of the lack of occasion to use these enactments that the only previous indictments under the state sedition and criminal syndicalism statutes (a single one under each enactment) were brought over twenty years ago. Both cases were reversed because the offense which was sought to be punished, in each case obstructing an officer, did not constitute sedition or criminal syndicalism. *Gregory* v. *Commonwealth,* 226 Ky. 617, 11 S. W. 2d 432 (1928); *Loveless* v. *Commonwealth,* 241 Ky. 82, 43 S. W. 2d 348 (1931).

To date only Carl Braden has been tried, and he only under the sedition indictment. His trial began on November 29, 1954, and was concluded with a verdict of guilty on December 13, 1954.

The entire process was marked by substantial violations of constitutional rights. Prior to the opening of Braden's trial, Commonwealth officials conducted several illegal searches and seizures. The apartments shared respectively by Bown and Ford and the Misses Gilbert and Spiker were raided, the former twice, and large quantities of literature seized without warrants so far as can be ascertained. A search and seizure was likewise carried out in Lubka's apartment, but although his wife was told that there was a search warrant, she was not permitted to read it. The Bradens' house was raided twice, on October 5 and 7, 1954, while they were both in custody. In their case the warrants were issued on affidavits sworn to by the Commonwealth Attorney, which in turn based themselves on information obtained from Braden's fifteen-year-old foster daughter. On both occasions, literature and other material were seized. The warrants did not specifically describe the items to be seized, nor did the affidavits upon which they were based disclose reasonable ground to suspect the commission of a crime. The fruits of the illegal searches and seizures in the Braden house were introduced into evidence at the trial, despite the fact that it was shown that the integrity of the seized books and documents had not been preserved between the dates of the searches and the time of trial, and that certain items not seized at the Braden home were mixed with the books and documents taken from there.

The proceedings at Braden's trial clearly revealed that national rather than local issues, and ideas and associations protected by the First Amendment, were involved. Significantly, all nine of the professional ex-Communist witnesses and informers called by the Commonwealth in its

testimony in chief were from outside the state and not acquainted with the defendant.* Their testimony was substantially to the same effect. They stated that the Communist Party advocated the violent overthrow of the government and planned to establish by force and violence a Negro nation in the south, that certain of the literature and material allegedly seized was Communist and would only be owned by a Communist Party member, and that the organizations with which the defendant was said to be affiliated were Communist fronts. The other prosecution witnesses were either police officers, involved in guarding the Wade residence or in the searches of the Braden house, or local residents, including Andrew Wade IV and his father, Andrew Wade, Jr., both of whom denied ever having been members of the Communist Party and who testified on their relationship with Braden and the circumstances surrounding the acquisition of the house. Although the indictment made no reference to the bombing, and there was no evidence in the trial to connect the defendant with this incident, a radio instructor was called by the prosecution to testify concerning the possibility of setting off a bomb by means of a radio battery, such as was found in the Wade house and said to belong to Bown. With few exceptions, the hundreds of books and papers introduced against the defendant had no connection with the state of Kentucky. Two of the items given the greatest prominence by the prosecution were the *Communist Manifesto* by Marx and Engels, published in Germany in 1848, and a pamphlet issued by the House Committee on Un-American Activities, entitled *100 Things You Should Know About Communism in the U. S. A.*, which contained a quotation attributed to William Z. Foster. There was no evidence that the defendant had

* The nine informer witnesses were Martha Edmiston of Waynesville, Ohio; John Edmiston of Columbus, Ohio, Arthur Paul Strunk of Dayton, Ohio; James W. Glatis of Jamaica Plain, Massachusetts; Matthew Cvetic of Lawrenceburg, Pennsylvania; and Manning Johnson, Maurice Malkin, Leonard Patterson and Benjamin Gitlow of New York.

"circulated", "distributed", or "published" either of these items or had any intention to do so. Other documents dealt with the Korean War and the Communist government in China, and were likewise published outside the state.

Taking the witness stand, the defendant made a point by point denial of the allegations in the indictment, including past or present membership in the Communist Party, and disputed ownership of certain materials seized in the raids which prosecution witnesses had said could only belong to a member of the Communist Party. He attributed his collection of Marxist literature to his lifelong interest in and study of labor history and the social sciences. The prosecution's cross-examination of the defendant again dealt largely with national and international issues and organizations; his membership in or contributions to the Progressive Party, the American Peace Crusade and groups on the Attorney General's list, and his views on such questions as trade with China, Universal Military Training, the Internal Security Act of 1950, and the Korean War. Several defense witnesses established that the Marxist books found in Braden's library were freely available to the public and that some were used in college courses. Other defense witnesses testified that Braden, as a labor reporter for the *Louisville Times,* had been instrumental in averting or settling three major strikes, that they had never heard him advocate sedition or the overthrow of the government by force and violence, and that in his work he had been known to edit stories so that they would conform with the facts in a way inconsistent with the Communist position.

The national characteristics of the prosecution's case were further demonstrated on rebuttal. The Commonwealth called as a surprise witness Mrs. Alberta Ahearn, who described herself as a seamstress and a paid F.B.I. undercover agent in the Communist Party in Louisville since 1951. Through this rebuttal witness the prosecution for the first time produced direct evidence that the defendant had been a Communist Party member. Mrs. Ahearn

testified that she was recruited into the Communist Party by Carl and Anne Braden and had attended numerous cell meetings with them both, bought literature recommended by them and paid dues to them. She acknowledged on cross-examination, however, that none of the books which she said Mr. and Mrs. Braden recommended to her referred to the overthrow of the Kentucky or United States governments, but said they spoke of "world revolution which would include the United States". The defense was prevented from examining Mrs. Ahearn's F.B.I. reports.

On surrebuttal, Braden denied all of Mrs. Ahearn's charges. He testified that Mrs. Ahearn had been a personal friend of his wife and had frequently visited his home, discussing on these visits their common interests in the American Peace Crusade, the Progressive Party and the Militant Church movement. At her request he had lent her books from his library, but had stopped doing so when she failed to return them.

The remaining prosecutions in Kentucky on sedition and related charges have been postponed until decisions are handed down by this Court in the present case and by the Court of Appeals of Kentucky in the *Braden* case. "We do not believe," the Commonwealth Attorney has been quoted as saying, "it is necessary or desirable to incur further large expenditures of money in the prosecution of these cases until the appellate courts have ruled upon the validity of the laws upon which these prosecutions are based." (*Louisville Courier-Journal,* April 7, 1955.) Criminal Court Judge L. R. Curtis has likewise declared that the future of the Kentucky sedition cases hinges completely on the outcome of the case at bar. "The action of the Supreme Court should determine the validity of the law relating to sedition and criminal syndicalism presently in force in this state." (*Louisville Courier-Journal,* April 7, 1955.)

## B. Massachusetts

The Massachusetts criminal anarchy act (Mass. Ann. Laws, c. 264, sec. 11 (1954 Supp.)), like the Kentucky statutes discussed above, is a product of the anti-radical hysteria which gripped the nation following World War I. As amended in 1948, it authorizes a maximum punishment of $1000 fine and three years' imprisonment for anyone who

> "by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States * * *."

Until the indictments of *amici curiae* here and others, which will be discussed in detail below, there was apparently only one prosecution under this statute, that of one Bimba in 1926, whose case was dropped during his appeal from a fine of $100. Chafee, *The Inquiring Mind,* 108 ff. (1928).

This criminal anarchy act was supplemented in 1951 by even more sweeping legislation, outlawing the Communist Party and any "subversive organization". The preamble of the new enactment described it as "an emergency law necessary for the immediate preservation of the public safety". Acts and Resolves of 1951, c. 805; also appearing in Mass. Ann. Laws, c. 264, secs. 16 ff. (Supp., 1954).

Section 16 of the 1951 act defines as a "subversive organization" any association of three or more persons "for the common purpose of advocating, advising, counseling or inciting the overthrow by force or violence, or by other unlawful means, of the government of the commonwealth or of the United States." Section 16A makes the legislative

finding that the Communist Party is a "subversive organization", and Section 17 states, "A subversive organization is hereby declared to be unlawful." Section 18 provides for a judicial proceeding to adjudicate any other organization "subversive". Section 19 prohibits knowing membership in an organization found to be "subversive" on pain of punishment by a fine of not more than $1000 or by imprisonment for not more than three years, or both. Section 22 makes subject to maximum punishment of a fine of $1000 or a year's imprisonment, or both, "whoever being in charge of an auditorium, hall or other building shall knowingly permit it to be used by the Communist Party or by * * * a subversive organization * * *." Section 23 makes liable to a maximum punishment of $1000 or three years' imprisonment, or both, "whoever contributes money or any other property having a value in money to an organization which he knows to be a subversive organization * * *."

Two cases involving altogether ten persons have been brought under the old criminal anarchy statute. Neither has come to trial, and their disposition awaits a decision as to the constitutionality of the act by the Massachusetts Supreme Judicial Court, which in turn is awaiting the decision of this Court in the instant case.

On September 12, 1951, a Middlesex grand jury indicted Dr. Dirk J. Struik (*amicus curiae* here), Harry E. Winner and Mrs. Margaret Gilbert for violation of the criminal anarchy law. There are three separate indictments against Dr. Struik, an internationally known mathematician and professor at the Massachusetts Institute of Technology. The first charges him, in the words of the statute, with the substantive offense of advocating, advising, counseling and inciting the overthrow by force and violence of the government of the Commonwealth of Massachusetts. *Commonwealth* v. *Struik,* Middlesex Sup. Ct., Crim. No. 40725. The second indictment charges him with conspiring together with Harry E. Winner, Margaret Gilbert and Martha H.

Fletcher to advocate and incite the overthrow of the *government of the United States.* The third indictment is identical with the second, except that the Commonwealth of Massachusetts is substituted for the United States of America. *Commonwealth* v. *Struik, et al.,* Middlesex Sup. Ct., Crim. Nos. 40726 and 40727. Mr. Winner is a business executive from Malden, well known in Malden and Boston for his active participation in community affairs. Mrs. Gilbert was living in Chicago at the time of the indictments, and fought her extradition to Massachusetts on a charge of which she claimed complete innocence; she was extradited after considerable litigation, was brought to Massachusetts for arraignment and is now on bail.

The purported associations of Dr. Struik and Mr. Winner had been publicly advertised in federal forums as early as 1949 by the F.B.I. informer Herbert A. Philbrick.* While Philbrick's testimony dealt with alleged subversive activities in Massachusetts, the former undercover agent did not mention any threat whatever to the safety of that state as such. The dangers described by Philbrick were to American capitalism and the American system of government. Nevertheless the United States government did not see fit to take action against the individuals involved here.

In fact the Commonwealth itself can hardly claim that it felt itself in imminent peril from these three persons. Having obtained his test case indictments on September 12, 1951, District Attorney George E. Thompson announced that he would not even arrest these supposedly dangerous

* Philbrick named Dr. Struik in the trial of *Dennis* v. *United States,* 341 U. S. 494, on April 8, 1949 (6 R. 4280). On July 23, 1951, Philbrick appeared before the House Committee on Un-American Activities and charged Dr. Struik and Mr. Winner with membership in the Communist Party. 82nd Cong., 1st Sess., Committee on Un-American Activities, Hearings, *Exposé of Communist Activities in the State of Massachusetts (Based on the Testimony of Herbert A. Philbrick)*, pp. 1296-1297. Both these persons also testified in this hearing.

seditionists for "a week or so" (*Boston Daily Globe,* September 13, 1951), and it was left to Dr. Struik and Mr. Winner to appear voluntarily for arraignment.

Although motions to quash the indictments were denied in the spring of 1952, the Commonwealth did not proceed to trial.

While the *Struik* case was held in abeyance, another grand jury investigation into possible violations of the criminal anarchy act was commenced in Suffolk County in the election year 1954, to the accompaniment of sensational headlines and lurid news stories. Judging by these accounts, the proceedings were largely taken up with the testimony of such veteran federal informer-witnesses as Herbert A. Philbrick and Louis F. Budenz. See, for example, *Boston Post,* May 8, 11, and 13, 1954.

An indictment couched almost entirely in the words of the statute, charging seven persons with conspiracy to advocate and incite the overthrow of the governments of the Commonwealth of Massachusetts and the United States was handed up on May 20, 1954. *Commonwealth* v. *Hood, et al.,* Suffolk No. 2457 (1954). Again, there is not the slightest reason to suppose that those indicted were unknown to federal authorities. Several were well known functionaries of the Communist Party in Massachusetts over many years. Otis Archer Hood, *amicus curiae* here, has run four times for governor of the state on the Communist Party ticket as well as for various public offices. The other *amici curiae* involved in this case, Mrs. Anne Burlak Timpson, Mrs. Edith Abber and Franklin P. Collier, Jr., were similarly well known.

Also on May 20, 1954, a court order was issued for the seizure of books and periodicals at Mr. Hood's home. Other quantities of books were taken without authority of court order from the homes of Mrs. Abber and Herbert Zimmerman, one of the defendants. Like their owners, these books were at first put behind the bars of a jail cell (see Boston

newspaper photographs on May 21, 1954). But apparently the incarcerated volumes did not measure up to the Commonwealth's evidentiary requirements. On May 28, 1954, District Attorney Garrett H. Byrne returned the search warrant to the court with the notation:

> "* * * it is not necessary that any of the aforesaid papers, pamphlets, documents, other materials used to advocate overthrow of government by unlawful means should be longer kept for the purpose of being produced or used as evidence on any trial * * * and he prays that the same may be burned or otherwise destroyed under the direction of said Court * * *."

This attempt at book-burning was forestalled by the strenuous efforts of counsel for Mr. Hood and on November 15, 1954, Judge Edward O. Gourdin ordered the books released. However, it was not until the following January after 236 days in jail that the books, which included children's literature and the writings of Thomas Jefferson, Frederick Douglass, Franklin D. Roosevelt, George Washington and Abraham Lincoln, as well as Marxist works, were finally returned.

Although the 1951 statute illegalizing the Communist Party, the "emergency law necessary for the immediate preservation of the public safety" cited *supra,* states in its preamble that "the deferred operation of this act would tend to defeat its purpose, which is to provide without delay for the common defense and to promote our *national security* against enemies from without as well as from within in the face of a clear and present danger," it was not until April 8, 1954, that the first and so far sole indictment was obtained under it. The indictment named the same Otis Archer Hood who was a few weeks later charged with violation of the criminal anarchy act, see *supra.*

The one indictment under this statute was obtained only after the Commonwealth had been challenged by Mr. Hood.

Although Boston newspapers indicated Mr. Hood's availability in 1951 (see, for example, *Boston Globe,* July 24, 1951) it was not until after Hood's much-publicized appearance on March 18, 1954, at a public hearing of the Massachusetts Special Commission on Communism that the Attorney General told the press that he would seek an indictment against him. *Boston Herald,* March 20, 1954. In reply, Hood filed a petition in the Suffolk Superior Court on April 2, affirming his Communist Party membership and requesting a declaratory judgment on the constitutionality of the 1951 law. Hood further asked for a restraining order enjoining the Attorney General from prosecuting him under the act. A hearing was set for April 5. The Attorney General immediately arranged to raid what had once been the Communist Party headquarters in Boston, but which had been closed for some time. *Boston Traveler,* April 2, 1954. The raiders seized some plaster plaques and busts and a rent bill and had themselves photographed with a copy of *The Great Conspiracy, the Secret War Against Soviet Russia,* by Michael Sayers and Albert E. Kahn, which was published by Little, Brown & Company in 1946 and subsequently sold in hundreds of thousands of copies. *Boston Daily Globe,* April 3, 1954. The following day, April 3, 1954, the Attorney General obtained a warrant for Mr. Hood's arrest based on a District Court complaint charging him with "becoming or remaining a member of a subversive organization." Hood was arrested at his home that day. *Boston Sunday Globe,* April 4, 1954. Two days later, on April 5, the Hood petition for a temporary restraining order was denied, and on April 8 the Suffolk County Grand Jury indicted Hood on the charge for which he was already under arrest, adding a second count, that of contributing money to the Communist Party. *Commonwealth* v. *Hood,* Suffolk Sup. Ct., Nos. 1923 and 1924.

Any survey of the anti-subversive program of the Commonwealth of Massachusetts would be incomplete without mention of the activities of its legislative committees in this field. These activities further illustrate (a) the apparent lack of any local threat to the safety of the state; (b) the national character of the matters investigated; and (c) the abuses of constitutional rights which appear to be the constant accompaniment of state action in this area.

In 1950 the Massachusetts Legislature entered the field already overcrowded by federal activity with a Committee to Curb Communism. Massachusetts House Order No. 2788, 1950 states:

> "The committee appointed hereunder shall conduct an investigation of the Communist Party and Communist-front organizations within the Commonwealth which are actively engaged in Communist indoctrination or in propaganda against the *military efforts of the United States in support of the United Nations.*" (Emphasis added.)

This preoccupation with matters national and international continues through the committee's report published on March 30, 1951 (Mass. House Documents, No. 2323, 1951). After discussing "world Communism" and "Communism in the United States", the committee found:

> "The outstanding activity of the Communist-front organizations in Massachusetts during the period of this investigation is the 'peace' front movement. We found that almost every Communist-inspired activity was, in some respect, flavored with the word 'peace'" (at p. 49).

As evidence of the threat of communism, the committee cites the Lawrence textile strike of 1912 (at pp. 12-13). In a supplementary statement to this report one of the committee members, Representative William E. Hays, specifically denied the need for state legislation in this field:

> "Although I have subscribed to the report, I do not agree with the legislative recommendations appended to it. In my opinion the pressing need of the moment is not legislation but a well-informed public * * *. I do not feel there is an urgent need to enact hasty legislation. *There is adequate federal law to deal with any serious subversive activity.*" (Emphasis added.)

The successor to this committee was the "Special Commission on Communism, Subversive Activities and Related Matters Within the Commonwealth," created on June 2, 1953, and given an almost unlimited field of investigation including "the diffusion within the Commonwealth of subversive and un-American propaganda that is instigated from foreign countries." Mass. Acts and Resolves of 1953, Chapter 89. The Commission's life has been renewed from year to year, most recently on May 13, 1955. Mass. Acts and Resolves of 1955, Chapter 52.

Hundreds of witnesses have been interrogated in private sessions since 1953. No accurate figures can be given because even the records of public hearings have never been published. Witnesses and spectators alike have agreed that newspaper accounts have been hopelessly inadequate. Consequently, reliable documentation is lacking concerning the activities of this investigatory body. Just how much justification there can be for this kind of investigation in Massachusetts may be gathered from the fact that after laboring for two years the Commission produced a report listing a total of 85 persons "who have been members of the Communist Party" (Senate Documents, No. 760, 1955). Biographies of the accused consist of nothing but lists of alleged affiliations, reading habits, education, and such details designed to prejudice as "father and mother native of Russia." To each biography is appended a notation such as, "This commission had received creditable evidence of Communist and subversive activities" on the part

of that individual. The Court will recognize this as a revival of the medieval criminal sanction of infamy.*

Like its predecessor, the Commission is constantly recropping pastures already grazed by federal authorities. For example, when Attorney General Brownell proposed on December 20, 1954, to add the Massachusetts Committee for the Bill of Rights to his subversive list, the Commission immediately announced that it, too, would probe this group. *Boston Daily Globe,* December 31, 1954. Such hearings were held on January 7, 1955. Similarly, when on November 19, 1953, the late William Teto, a professional informer whose veracity was beclouded by a substantial criminal record, appeared as a witness before the Senate Permanent Subcommittee on Investigations, then headed by Senator Joseph R. McCarthy, the Commission promptly issued a subpoena for Teto to appear before it. *Boston Globe,* November 21, 1953.

Whatever benefit to national security the Massachusetts anti-subversive drive may have provided, it has been more than cancelled out by harmful duplication of the work of national agencies, imposition of repeated burdens of interrogation upon witnesses already examined by investigative

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* Pursuant to chapter 123 of the Acts and Resolves of 1954, the Commission was directed to file a final report as follows:

> "Such report shall include the name and all other identifying data available to the commission, of any individual, concerning whom, the commission, during the course of the investigation, has received creditable evidence that such individual was or is a member of the Communist Party, a Communist or a subversive."

Five prominent Massachusetts attorneys have challenged this statutory mandate in a pending action, *Kaplan, et al.* v. *Bowker, et al.* Supreme Judicial Court, No. 11,572. This matter is now scheduled for argument in November of this year. In addition, two persons named in the report of June, 1955, have brought suit, seeking to expunge the quasi-judicial finding that they are subversive persons. *Luscomb* v. *Bowker, et al.,* Suffolk Sup. Ct., No. 70,017 In Equity, and *Tormey* v. *Bowker, et al.,* Suffolk Sup. Ct., No. 69,984 In Equity.

bodies of the national government, accompanied by unwarranted stigmatization of "uncooperative" witnesses as disloyal, and indictments hastily obtained but not tried. One may seriously question whether a concern for protecting the public order or plain political demagogy is the controlling motivation.

### C. Florida

The Florida statutes contain a number of provisions prohibiting "subversive" advocacy and associations. Fla. Stat. 1953, Sec. 876.01-876.03 and Sec. 876.22-876.30. These not only proscribe membership in, association with, or the promotion of the interests of any "communistic" organization or a "subsidiary" thereof, but also membership in or support of a "subversive organization" as defined in the statute.* These enactments are comprehensively

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* The key provisions are as follows:

"876.01 *Criminal anarchy, communism, etc., prohibited.*—Criminal anarchy, criminal communism, criminal nazi-ism, or criminal fascism are doctrines that existing forms of constitutional government should be overthrown by force or violence or by any other unlawful means, or by assassination of officials of the government of the United States or of the several states. The advocacy of such doctrines either by word of mouth or writing or the promotion of such doctrines independently or in collaboration with or under the guidance of officials of a foreign state or any international revolutionary party or group is a felony.

"876.02 *Criminal anarchy, communism, etc., defined and made a felony; penalty.*—Any person who—

"(1) By word of mouth or writing advocates, advises, or teaches the duty, necessity or propriety of overthrowing or overturning existing forms of constitutional government by force or violence; of disobeying or sabotaging or hindering the carrying out of the laws, orders, or decrees of duly constituted civil, naval or military authorities; or by the assassination of officials of the government of the United States or of the State of Florida, or by any unlawful means or under the guidance of or in collaboration with officials, agents or representatives of a foreign state or an international revolutionary party or group; or

"(2) Prints, publishes, edits, issues or knowingly circulates, sells, distributes, or publicly displays any book, paper, document, or writ-

intended to cope with what is termed in their preamble the "World Communist movement". This complex of anti-subversive laws formed the legal basis for the grand jury investigation into alleged Communist and subversive activi-

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ten or printed matter in any form, containing or advocating, advising or teaching the doctrine that constitutional government should be overthrown by force, violence, or any unlawful means; or

"(3) Openly, willfully and deliberately urges, advocates, or justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any official of the government of the United States or of the State of Florida because of his official character, or any other crime, with intent to teach, spread, or advocate the propriety of the doctrines of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism; or

"(4) Organizes or helps to organize or becomes a member of any society, group or assembly of persons formed to teach or advocate such doctrines; or

"(5) Becomes a member of, associated with or promotes the interest of any criminal anarchistic, communistic, nazi-istic or fascistic organization, or helps to organize or becomes a member of or affiliated with any subsidiary organization or associated group of persons who advocates, teaches, or advises the principles of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism;

"Shall be guilty of a felony and upon conviction thereof be subject to imprisonment for not more than ten years or a fine of not more than ten thousand dollars, or both.

"876.03 *Unlawful assembly for purposes of anarchy, communism, etc.*—Whenever two or more persons assemble for the purpose of promoting, advocating or teaching the doctrine of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism, as defined in Sect. 876.01 of this law, such an assembly or organization is unlawful, and every person voluntarily participating therein by his presence, aid or instigation shall be guilty of a felony and upon conviction thereof shall be subject to imprisonment for not more than ten years or a fine of not more than ten thousand dollars, or both.

"876.22 Definitions—As used in Sections 876.23-876.31:

* * * * * *

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow,

ties in Dade County, Florida, launched in June, 1954, by State's Attorney George A. Brautigam.

On November 19, 1954, the Supreme Court of Florida reversed the contempt convictions of fourteen persons, *amici curiae* here, arising out of this inquiry. *State ex rel.*

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destruction of, the constitutional form of the government of the United States, the constitution or government of the State of Florida, or of any political subdivision of either of them, by revolution, force, violence or other unlawful means.

"(3) 'Foreign subversive organization' means any organization, directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy, or to assist in the overthrow, destruction of the constitutional form of the government of the United States, or of the State of Florida, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country, nation or group of nations other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy, or to assist in the overthrow, destruction of the constitutional form of the government of the United States, or of the State of Florida, or any political subdivision of either of them, by revolution, force, violence or other unlawful means; or who is a member of a subversive organization or a foreign subversive organization.

"876.23 *Subversive activities unlawful; penalty.*—

"(1) It shall be a felony for any person knowingly and willfully to:

"(a) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy, to assist the overthrow, destruction of, the constitutional form of the government of the United States, or of the State of Florida, or any political subdivision of either of them, by revolution, force, violence, or other unlawful means; or

"(b) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any

*Feldman, et al.* v. *Kelly,* 76 So. 2d 798. Each petitioner in that case had been convicted of contempt for refusing to answer questions before the grand jury on the ground that his answer might incriminate him.* Each had invoked the protection of the Fifth Amendment to the Constitution of the United States and Section 12, Declaration of Rights, Constitution of Florida. As summarized by the Florida Supreme Court, the questions propounded to petitioners before the grand jury "all fell under one of the following categories":

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such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the State of Florida, or of any political subdivision of either of them; or

"(c) Conspire with one or more persons to commit any such act; or

"(d) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization, or a foreign subversive organization; or

"(e) Destroy any books, records or files or secretes any funds in this State of a subversive organization or a foreign subversive organization, knowing said organization to be such.

"(2) Any person who violates any of the provisions of this section shall be fined not more than twenty thousand dollars, or imprisoned in the penitentiary for not less than one year nor more than twenty years, or both.

"876.24 *Membership in subversive organization; penalty.*—It shall be a felony for any person after the effective date of this law to become, or after July 1, 1953, to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person convicted of violating this section shall be fined not more than five thousand dollars, or imprisoned in the penitentiary for not less than one year nor more than five years, or both."

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* Up to December 1, 1954, forty-one witnesses in the grand jury's anti-subversive probe had been cited for contempt for refusing to testify under the plea of self-incrimination. *Miami Herald,* December 2, 1954. Of the thirty-one who were incarcerated for contempt, fourteen won acquittal from the Supreme Court of Florida in the case cited *supra.* In the face of this decision, the other contempt convictions fell by stipulation.

> "(1) Questions concerning the witness' contacts with or association with the Communist Party or organizations affiliated with the Communist Party.
>
> "(2) Questions concerning the witness' acquaintance with or association with various named persons allegedly members of the Communist Party or organizations affiliated with the Communist Party.
>
> "(3) Questions concerning meetings attended by the witness at which various named persons allegedly members of the Communist Party or of organizations affiliated with the Communist Party were present."

In the *Feldman* decision the court held that the privilege against self-incrimination was available to the petitioners since, because of the similarity between the Florida criminal communism statute, read in the light of subsequent legislative findings, and the federal Smith Act, the cases of *Blau* v. *United States,* 340 U. S. 159, and *Brunner* v. *United States,* 190 F. 2d 167, reversed 343 U. S. 918, are controlling. Concerning the similarity of the federal and state statutes the court said:

> "Chapter 20216, Laws of Florida, now Section 876.01-876.04 F. S. A., under which the present investigation was instituted, was passed in 1941. In legal effect the latter Florida Act is a rescript of the Smith Act, both having been designed for the same purpose. The Florida Act having been patterned on the Smith Act, we have elected to accept the interpretation of the Smith Act by the Federal Courts. * * *
>
> " * * * The act in question, Section 876.02, F. S. A., as does the Smith Act, provides that if the evidence shows that one is 'a member of, associated with, or affiliated with' any organization which 'advocates, advises, or teaches the duty, necessity, or propriety of overthrowing or overturning existing forms of constitutional government by force or violence' that is sufficient to establish guilt."

The Florida court's suggestion that the statute made it a crime to be a member of the Communist Party or of a

"Communist-front" organization, as well as its specific reference to the state statute as "outlawing the Communist Party", were received as a green light by the prosecuting authorities. State's Attorney George A. Brautigam immediately announced to the press that the court's decision was "just what we are looking for. Now we can go forward and seek indictments on mere membership in the Communist conspiracy". The State's Attorney indicated that he would seek indictments for conspiracy under the state law. The *Miami Daily News* of January 10, 1955, quoted him as follows:

> "'Up to a point,' [Brautigam] said, 'we are following somewhat the same order of procedure in the investigation as we did before the state supreme court decision. We question persons first in my office. If they invoke the Constitutional protection against self-incrimination, they then are subpoenaed to appear before the grand jury.'
>
> "Those who continue to refuse to answer inquiries before the grand jury, he indicated, will be subject to indictment as members of the Communist Party conspiracy against the state of Florida. * * * Anyone who has been involved in any way in a continuing conspiracy such as the Communist Party, the prosecutor explained, cannot quit merely by 'ceasing active participation.' 'In the eyes of the law,' Brautigam said, 'once a Communist always a Communist—unless they can prove otherwise.'"

In the course of the grand jury proceedings established legal procedures were repeatedly and flagranty violated. For example, on September 22, 1954, Circuit Judge George E. Holt signed orders requiring seventeen witnesses to show cause why they should not be cited for contempt for their refusal to answer questions before the grand jury. But none of these witnesses had as yet appeared before the grand jury; they were not subpoenaed to testify, as a matter of fact, until September 23rd. Thus the orders signed by Judge Holt recited events which had not yet

taken place. Moreover, mimeographed opinions, identical in text, stating Judge Holt's reasons for convicting the seventeen witnesses were filed in advance of the hearings on the contempt citations. In explaining this incredible procedure (reminiscent of the *lettres de cachet* of pre-Revolutionary France) State's Attorney Brautigam stated that this was done for his own convenience. *Miami Herald,* October 12, 1954.

Witnesses were questioned intensively about membership in such organizations as the Southern Conference for Human Welfare, the F. D. R. Club, the American Veterans Committee, and the Progressive Party. One witness was asked about postcards mailed to Florida's senators protesting the Walter-McCarran Immigration Act. It is noteworthy that the anti-subversive campaign reached a peak in the months immediately following the desegregation decision by this Court. According to the *Miami Herald* of August 29, 1954, a University of Miami research group reported to State Attorney General Richard Ervin that "competent officials have been reluctant to take initial steps [toward integration] for fear of being branded Communists." It is also difficult to resist the conclusion that Florida's anti-subversive program is tinged with anti-Semitism. Twenty-nine of the thirty-one persons convicted of contempt are Jews, including five leaders of Jewish community groups. The Miami Jewish Cultural Center was a repeated object of grand jury inquiries. Other witnesses subpoenaed by the grand jury, all of them Jewish, included the cantor of a synagogue whose spiritual leaders had been actively resisting the local witch hunt.

There are ample grounds for doubting the genuineness of the claims of a subversive threat in Florida expressed by state officials. The House Committee on Un-American Activities held a three-day hearing in Miami from November 29 to December 1, 1954. At the conclusion of this investigation, the *Miami Daily News* of December 2, 1954, reported that the committee had "uncovered no evidence

of Communist activity in the South in the last five years." Chairman Harold H. Velde was quoted as saying that he was convinced that "the Communist situation is not as bad in Florida or anywhere else in the Southeastern states as in other parts of the country where the committee has held hearings."

A recognition by state authorities that there is no subversive threat requiring urgent action is indicated by the position of the state's principal legal officer. Attorney General Richard Ervin announced earlier this year that he had not requested funds in his budget for anti-Communist investigations and would make no recommendations to the legislature on the subject. *Miami Herald,* February 23, 1955. On May 16, 1955, the Florida House Appropriations Committee overwhelmingly rejected a bill proposed by the American Legion and Ellis Rubin, a special assistant attorney general assigned to ferreting out Communists in Florida, which was designed to give Rubin subpoena powers in an investigation of Communism, and an appropriation of $110,000. The vote was 16 to 4 against the bill after an impassioned appeal by Rubin on behalf of the measure, in which he sought to answer charges that he wanted to conduct a "witch hunt". Committee members said they would rather leave the investigation of Communist activities to the federal government. Attorney General Ervin specifically left it up to the legislature to determine whether a "real Communist threat" exists in Florida. The appropriations committee apparently did not think so. *Miami Herald,* May 17, 1955. This rejection took place after a four-month investigation of Communist activities conducted by Rubin, culminating in a ninety-one-page report. A conference of the governor and state attorneys which considered the report in April of this year took no action to implement it. On May 17, 1955, Rubin resigned from his state post, announcing that he would campaign against the sixteen representatives who had defeated his bill. *Miami Herald,* May 18, 1955.

Thus there are ample indications that the anti-subversive campaign in the State of Florida is not actuated by the existence of any real threat but rather by local politics and social tensions.

### D. New Hampshire

The present anti-subversive program of the State of New Hampshire originated in 1949 when a former national commander of the American Legion spurred public clamor and legislative concern by referring to a "Communist cell" at the state university. Gellhorn, *The States and Subversion,* 371 (1952). However, after a year of investigation and deliberation by a legislative commission, it was concluded that, on the basis of information gathered from law enforcement agencies, there was "very meager" evidence of the existence of subversive activity in the state. Nor was this particularly surprising in view of the F. B. I. statement that there were only forty-three Communists in the entire state. *Ibid.,* 371. The legislative commission, in its final report, said that exposure of Communist activities was a job for a national, rather than a local police organization.

However, the agitation for anti-subversive action persisted, and on June 17, 1953, the New Hampshire General Court authorized the state's attorney general to make a "full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons * * * are presently located within this state." Attorney General Louis C. Wyman was "authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable." Joint Resolution, Laws of 1953, c. 307.

The New Hampshire Subversive Activities Act of 1951, N. H. Rev. Laws, c. 457-A, is practically identical in its relevant sections with Florida Statutes, Sections 876.22 ff. quoted *supra.*

The constitutionality of both the Subversive Activities Act of 1951 and the Joint Resolution of 1953 were challenged in the New Hampshire Supreme Court on the grounds, *inter alia,* that the federal government had preempted this field of legislation. *Nelson* v. *Wyman,* 99 N. H. 33, 105 A. 2d 756 (1954). The court held that both were constitutional, expressing its disagreement with the conclusion of the Pennsylvania Supreme Court in the instant case.

Acting under authority of the joint resolution as it related to the Subversive Activities Act, Attorney General Wyman adopted rules of procedure which completely disregarded established legal processes and constitutional rights. He required that the investigation proceed in executive sessions unless public hearings were sought by a witness. Another rule provided that testimony be released to the public if a witness invoked the privilege against self-incrimination. (The New Hampshire Supreme Court later ruled that such a discriminatory publication of testimony was not within the Attorney General's authority as granted by the legislature. *Nelson* v. *Wyman,* supra, at 767.) As the investigation proceeded, the distinction between criminal and non-criminal conduct or advocacy became completely blurred. As the Attorney General acknowledged, the rules of procedure were designed to allow his inquiry to range over a limitless area in order to determine "whether the activities of a given individual had involved honest dissent or actual subversion whether criminal or not." *Report of the Attorney General to the New Hampshire General Court,* viii (January 5, 1955), hereinafter called the *Wyman Report.* Although the statute on which the investigation is founded specifies the crucial elements of scienter and intent ("knowingly and willfully"), the New Hampshire Attorney General felt compelled to inquire into the activities of an individual deemed to be subversive "whether or not intentionally so or knowingly so on his part." *Wyman Report,* x. With scienter and

intent thus conveniently put aside, it is hardly surprising that the Attorney General moved away from an investigation of actual criminal acts in violation of the sedition statute into the area of individual beliefs and associations. The Attorney General candidly admits that this is the objective of the investigation: "This process must without a doubt continue as long as the spark of 'belief in communism' remains in any citizens of our state." *Wyman Report,* 58.*

The all-embracing character of the New Hampshire Attorney General's investigation is demonstrated in his report. As far as the strength of the Communist Party in New Hampshire is concerned, the report concedes that the pickings were indeed slim:

> " * * * The Communists were able to muster between two hundred and three hundred votes in the various elections in which their candidates were on the ballot in New Hampshire. The figures on Communist Party membership in New Hampshire as released by Hon. J. Edgar Hoover, Director of the Federal Bureau of Investigation, prior to the passage of the Subversive Activities Act of 1951, placed the Party membership at approximately fifty in New Hampshire. This investigation has established identities of about forty-five who were Communist Party members at approximately that time, although in many cases the exact date of departure from New Hampshire or of separation from the Communist Party is in doubt. Of those, eight have cooperated, eighteen are now beyond the jurisdiction of New Hampshire, fifteen have refused to answer as to possible present membership, and the status of a handful is in doubt due to expiration of the investigation or as to dates of their departure from New Hampshire.

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* All 275 members of the Dartmouth College chapter of the American Association of University Professors placed themselves on record as opposed to continuation of the investigation which they characterized as "hostile to the life of the mind and suspicious of those who live it." *Concord Daily Monitor,* March 23, 1955.

> "Many of the above number have died and others have left the state, and a considerable number have left the Community Party. * * *
>
> " * * * Subsequent to the adoption of the 1953 resolution, there has been virtually no discernible open Communist Party activity in this state." *Wyman Report,* 44-45, 60.

Greatest attention was focussed on Mrs. Elba Chase Nelson, reportedly the leading official of the Communist Party in New Hampshire, and her son, Homer Bates Chase, former state chairman of the Communist Party in Georgia. As to the latter, the Attorney General concluded that "no demonstrable evidence has been found to date indicating a violation of the Subversive Activities Act of 1951." *Wyman Report,* 202. A similar conclusion was reached with respect to Mrs. Nelson. *Wyman Report,* 238. In the light of such conclusions as to the activities of what are alleged to be leading Communists, it is not surprising that the Wyman Report as a whole contains no finding that any person cited therein has violated any provision of the Act.

To keep his investigation going, the Attorney General was forced to range far and wide. As the report states:

> " * * * Testimony was taken in many other states. Information was received from individuals and cooperating state and national agencies, coast to coast and border to border. Representatives of this office went outside the state several times in the course of the inquiry, seeking data pertinent to the investigation. Former Communists who held offices of both national and international scope assisted in amassing a considerable volume of information." *Wyman Report,* 45.

Further underscoring the national rather than local scope of the investigation is the New Hampshire Attorney General's dependence on the lists and citations compiled by federal agencies. For example, considerable space is devoted to Professor Gwynne Harris Daggett of the Uni-

versity of New Hampshire because he was reported to have endorsed or sponsored or signed a statement for various national organizations cited as subversive by the United States Attorney General or by the House Committee on Un-American Activities, and had been associated with the Progressive Party. There was no allegation that Professor Daggett was a Communist. *Wyman Report,* 66-77. Similarly, Professor Vilhjalmur Stefansson, residing at the time of the investigation in Vermont, was alleged to have been affiliated with various cited organizations. The report also discusses in extenso Professor Stefansson's association with Professor Owen Lattimore. *Wyman Report,* 108-118.

Dr. Willard Uphaus, another witness (and *amicus curiae* here), was likewise reported to have been affiliated with cited organizations. *Wyman Report,* 162 ff. He was called to testify primarily in connection with World Fellowship, Inc., of which he is executive director. As a witness before the New Hampshire Attorney General, Dr. Uphaus described this movement as "religiously motivated" and seeking "to bring together for fellowship and discussion the representatives of all Faiths to the end that there may be peace, brotherhood and plenty for all men, women and children." He answered fully and freely all questions about himself and his own beliefs and affiliations. He denied under oath that he was or ever had been a Communist. He stated that he was opposed to the use of violence by reason of his religious convictions. He stated freely that he had been associated with two or three organizations on the United States Attorney General's "subversive" list, but declared such connections to be religiously motivated. Asked by the Attorney General to produce the names and addresses of guests at World Fellowship camp, a summer recreational and educational center, and correspondence with speakers, Dr. Uphaus refused on the grounds that the request violated the constitutionally guaranteed freedoms of religion, speech and assembly. The witness was found in contempt

of court and fined $500. *Wyman Report,* 161. This contempt conviction was unanimously reversed by the New Hampshire Supreme Court on September 27, 1955, on the ground that Uphaus, a resident of Connecticut, had been served with a summons in New Haven. *Concord Daily Monitor,* September 28, 1955.

The terrible subversive plot presented by World Fellowship can be best savored by an examination of the *Wyman Report,* a document that can only be compared in tone and accuracy to Elizabeth Dilling's notorious *Red Network.* Some 62 participants in World Fellowship in the summers of 1953 and 1954 are described in greater or lesser detail. *Wyman Report,* 137-156. Most of them were placed under the convenient derogatory heading of "the usual contingent of 'dupes' and unsuspecting persons that surround almost every venture that is instigated or propelled by the 'perennials' and articulate apologists for Communists and Soviet chicanery." *Wyman Report,* 154. Included in this category were

> Samir Ahmed, Third Secretary of the Embassy of Egypt
>
> Dean and Mrs. Harvey F. Baty, of the American University, Beirut
>
> Miss Eleanor French, personnel secretary of the Canadian Y. W. C. A.
>
> Colonel Basil Herman, senior Israeli delegate to the Israel-Egypt Mixed Armistice Commission of the United Nations
>
> The Rev. and Mrs. Ram Krishna S. Modak, president, All-India Federation of National Churches
>
> A. I. A. Pesik, Indonesian director of publicity in the United States.

Attorney General Wyman stated that he expressed no conclusion "whether Mr. Uphaus is an unwitting dupe or

a conscious pro-Communist participant * * * it appears that his repeated association with, membership in and sponsorship of Communist-infiltrated groups and Communist Party members over many, many years raises a substantial question as to the real purposes and objectives of World Fellowship, Inc., of which he is Executive Director." *Wyman Report,* 175. On the basis of this "question," without any basis for a belief that Dr. Uphaus ever belonged to any organization that falls within the statute's proscription of intent to "overthrow the government by force and violence" and without proof of scienter, the Attorney General of New Hampshire brought contempt proceedings in court which have resulted in most damaging publicity to Dr. Uphaus and World Fellowship, Inc.

Called forth by New Hampshire's sedition statute, the Wyman investigation has uncovered no criminal activity in violation of that enactment, after an expenditure of two and one-half man years and $31,500. *Wyman Report,* 10. The state legislature this year voted to continue the probe for another two years and appropriated a further $42,500 for its work.* According to the New Hampshire Attorney General's breakdown, *supra,* there are possibly twenty Communists remaining in the state. One may well doubt the legitimacy of an investigation which contemplates an expenditure of nearly $4,000 per person in checking the possible threat to the State of New Hampshire from these twenty individuals. On the other hand, the Subversive Activities Act and the subsequent investigation have resulted in defamation of character, invasion of privacy and harassment of numerous innocent persons.

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* An additional impact upon the federal area of action is to be found in the utilization of state immunity statutes. A sweeping immunity power was recently granted the Attorney General of New Hampshire in the closing days of the last session of the General Court. The use of such a statute may well result in the deprivation of a witness' federal privilege. See, for example, *Cabot* v. *Corcoran,* 123 N. E. 2d 221 (Mass. Sup. Jud. Ct.).

The following conclusions compellingly emerge from the fact recital which we have presented:

1. The proceedings we have described are not directed to the preservation of any legitimate state interest. There is not the remotest indication that in any of the four states we have discussed there has been any threat by word or deed to the sovereignty or the security of the state involved. Moreover, if there is any legitimate interest involved to which legal sanctions might conceivably attach, it is a federal interest and not a state interest.

2. The investigations and the indictments which resulted from the investigations all seem to be motivated by partisan interests, by personal ambition, and by demagogic considerations. They all are aptly characterized by the observation of the Pennsylvania Supreme Court in this case:

> "Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is important that punitive sanctions for sedition *against the United States* be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary. If that be done, sedition will be detected and punished, no less, wherever it may be found, and the right of the individual to speak freely and without fear, even in criticism of the government, will at the same time be protected." (Emphasis in original.)

3. All of the proceedings under discussion have been marked by repeated invasions of the procedural guarantees of due process of law. There have been violations of the

right to a hearing; the right to be free of unreasonable searches and seizures; the right to face one's accusers; the right not to be punished for a crime without due accusation.

4. In all of the four proceedings under discussion, there has been a parallel disregard for the rights of free expression protected by the Bill of Rights.

## ARGUMENT

### Introduction

A span of almost fifteen years has elapsed from the enactment of the Smith Act in 1940 until the passage of the Communist Control Act in 1954. During this period a wholly new body of law and legal principles has been promulgated in response to the cold war tensions between the West and the Communist powers. The numerous statutes which comprise this body of law are unified by an effort to protect the nation against remote dangers. They are not directed against presently dangerous speech as such. They seek to provide a prophylactic therapy against some future undermining or subversion of the country and are based upon a theory of prevention. It must be recognized that this body of laws constitutes an ever-growing threat to the basic liberties of the country. It has become the instrument for imposing conformity over wide areas of political dissent and has given rise to deep-seated fears on the part of many concerned with the survival of democracy in this country.*

The basic significance of this case is that certain states in the Union have invited this Court to sanction a dual

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* The most recent expression of these fears appears in John Lord O'Brian's *National Security and Individual Freedom* (Harvard University Press, Cambridge, 1955).

system of prevention. It is proposed that the already perilous weapon of prevention be given a double barrel and be handed over to the notoriously unrestrained and uncritical hands of state prosecutors. The implications of a sanction of such a dual system can hardly be overstated. Suffice it to say here that it may well indefinitely prolong the present crisis in civil liberty and the breakdown of our traditional concepts of free press, speech and assembly.

* * * * * *

Under our federal system, the powers of government are distributed under the Constitution between the central government and the states. Consequently, this Court is frequently called upon either to reconcile the differing policies of the federal government and the states so that they may coexist, or to uphold the national policy at the expense of state statutes.

The Court has employed a number of tests in the course of the past century and a half in working out a practical allocation of authority within the federal scheme of dual sovereignty. The question as to whether state action is precluded either because of congressional action in the area or by reason of the very nature of the sphere being regulated has been tested in the light of several criteria. In *Hines* v. *Davidowitz,* 312 U. S. 52, 67, this Court pointed out:

> "This Court in considering the validity of state laws in the light of * * * 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."

Six years later, in *Rice* v. *Santa Fe Elevator Corporation,* 331 U. S. 218, 230, several of the applicable yardsticks for

congressional supersedure of state legislation were laid down:

> "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. * * * Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. * * * Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. * * * Or the state policy may produce a result inconsistent with the objective of the federal statute."

On the basis of these guiding decisions, at least four criteria emerge. These may be conveniently summarized as:

1. The pervasiveness test;
2. The conflict test;
3. The paramountcy test;
4. The exclusiveness test.

Applying these one by one to the question of federal supersedure of state sedition statutes, we suggest that these statutes will fall under any of these tests.

## I

**Federal statutes covering sedition are so pervasive as to preclude state legislation by occupying the field.**

Federal legislation directed toward the control of subversive activities and based upon a theory of prevention, must be treated as an interlocking whole if the legal issue of preemption is to be viewed fully and three-dimensionally. However, in order to set reasonable bounds to the scope of this brief, we limit our discussion to the three main pillars which form the federal statutory structure in this area—

namely, the Smith Act, 54 Stat. 670, 18 U. S. C. 2384-2385 (1952 ed.); the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff. (1952 ed.); and the Communist Control Act of 1954, 68 Stat. 775 ff.*

The Smith Act covers advocacy of the overthrow of any government—federal, state or local—by force and violence, and organization of and membership in a group which so advocates. It proscribes an extraordinarily broad range of subversive utterances and activities, and punishes advocating, abetting, advising, or teaching the duty, necessity or desirability of overthrowing the government by force and violence. Conspiracy to commit any of these prohibited acts is denounced by the general criminal conspiracy provisions in 18 U. S. C. Sec. 371 (1952 ed.).

The Internal Security Act of 1950 is aimed more directly at the Communist Party by name, although the Smith Act has been utilized by the Justice Department since the end of World War II as an almost exclusively anti-Communist legal measure. The former proceeds on a somewhat different basis. It distinguishes between "Communist-action organizations" and "Communist-front organizations," requiring such organizations to register and to file annual reports with the Attorney General giving complete details as to their officers, members and sources of funds. 50 U. S. C. 782 ff. (1952 ed.). Members of Communist-action organizations must register as individuals with the Attorney General. *Ibid.*, Sec. 787. Failure to register in accordance with the requirements of Secs. 786-787 is punishable by a fine of not more than ten thousand dollars for an offending organization, and by a fine of not more than ten thousand dollars or imprisonment for not more than five

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* While the Internal Security Act, the Communist Control Act and the Smith Act are the crucial enactments in this area, there are more than a score of additional congressional enactments policing subversion. Sutherland, *Freedom and Internal Security,* 64 Harv. L. Rev. 383, 386-388 (1951); Emerson and Haber, *Political and Civil Rights in the United States,* 458-463.

years, or both, for an individual offender—each day of failure to register constituting a separate offense. Ibid., Sec. 794(a).

The Communist Control Act of 1954 contains a legislative finding that the Communist Party is a "Communist-action organization" within the meaning of the Internal Security Act of 1950 and provides that "knowing" members of the Communist Party are "subject to all provisions and penalties" of the Act, 68 Stat. 775, Sec. 4.*

Statutes of such scope, implemented in part by a federal administrative agency (the Subversive Activities Control Board, a five-member agency created under the Internal Security Act of 1950, 50 U. S. C. 791), create a scheme of federal regulation which is so pervasive as to make reasonable the inference that Congress has left no room for the states even to supplement it. *Pennsylvania R. Co.* v. *Public Service Commission,* 250 U. S. 566. For in the words of Mr. Justice Holmes:

> "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 604.

It has been argued that the assistance of the states is necessary in order to give full force and effect to the federal sedition laws and to "fill in the gaps." See brief of *amici curiae,* Wyman, et al. Such an argument is totally

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* This newest federal law is significant in two respects for what it did *not* do. First, in refusing to impose direct criminal penalties upon Communist Party membership (or membership in "Communist-action," "Communist-front" or "Communist-infiltrated" organizations —the last, a new term introduced by this law), it leaves room for the contention that Congress intended such persons to be covered by the registration provisions of the Internal Security Act of 1950, and not prosecuted under the state laws. Second, if Congress was disturbed by the decision in *Commonwealth* v. *Nelson, supra,* here was an easy opportunity for overturning it; this it did not do.

without substance in the present case. The Smith Act and the Communist Control Act of 1954 both expressly stipulate that they are aimed at protecting not merely the federal government, but state, territorial and even local government as well. 18 U. S. C. 2385, 50 U. S. C. 781. Federal law enforcement officials have zealously implemented the provisions of these acts. Through June 30, 1955, the Justice Department had secured indictments under the Smith Act against one hundred thirty-four persons from more than a dozen states. *Annual Report of the Director of the Administrative Office of the United States Courts,* A-19, A-20 (September, 1955). Four of the accused were indicted under the membership clause of the Smith Act and two of these have already been convicted. Nor has enforcement of the Internal Security Act been less lively. A number of organizations including the Communist Party itself, have had hearings before and have been officially ordered to register pursuant to the Act by the Subversive Activities Control Board. *Communist Party* v. *Subversive Activities Control Board,* No. 48, this Term.

Thus, the scope of the legislation and the vigor with which it has been enforced have placed the federal government in active control of this area of conduct. The purpose of federal authority to occupy the field becomes unmistakable. And the existence of such a manifest purpose has caused this Court uniformly to hold that the state law is precluded. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Hill* v. *State of Florida ex rel. Watson,* 325 U. S. 538; *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767; *International Union, etc.* v. *O'Brien,* 339 U. S. 454.*

* In interstate commerce cases, the general rule adopted by this Court has been that state control is precluded if it concurs with or supplements a federal regulatory scheme. In *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605, it was held that, where Congress has occupied the field and statutes are directed to the same subject and the same object, state legislation is preempted.

## II

**The provisions and purposes of the state statutes conflict with federal statutes on the same subject.**

### A. Contradictory provisions make the two sets of statutes irreconcilable.

The most striking outright conflict between the federal and state statutory provisions is Section 4(f) of the Internal Security Act of 1950. This section provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of * * * this section *or of any other criminal statute.*" (Emphasis added.) 50 U. S. C. 783(f) (1952 ed.). The canons of statutory interpretation dictate that the phrase be interpreted in a reasonable manner. So understood, "*any* other criminal statute" must be taken to mean any and all criminal statutes, *both* state and federal.

Despite this universally applicable immunity statute, the states of Florida and Massachusetts have laws relating to subversive activity making such membership a criminal act *per se.* Fla. Stat. Ann., Tit. 44, Ch. 876, Sec. 876.02(5); Mass. Ann. L., c. 264, Secs. 16, 16A and 19.

Here is a clear example of state statutes whose terms contradict the federal statute. Under the federal statute, not only is membership in a Communist organization declared not to be a crime *per se,* but it is also declared to be non-violative of any other criminal statute; under state statutes, however, such membership becomes a crime *per se.* Under the supremacy clause of the Constitution where there is such direct repugnance between federal and state legislation, the latter cannot stand. *Sinnot* v. *Davenport,* 22 How. 227, 243.

**B. Conflicting purposes of the statutes make coexistence of the statutes impossible.**

The purpose of recent congressional legislation as evidenced in the legislative deliberations surrounding the Acts of 1950 and 1954 seems clear. Proposals to outlaw the Communist Party have been repeatedly rejected by Congress (see, *e.g.*, 81st Cong., 2d Sess., H. R. Rep. No. 2980, 5), and it has chosen instead a form of legislation calculated not to "drive the Communists underground" but to expose their activities to full public scrutiny by means of public registration. McCarran, *The Internal Security Act of 1950,* 12 U. of Pitt. L. Rev. 481, 484 (1951). A careful reading of the "Congressional Finding of Necessity" in the Internal Security Act of 1950 strongly implies this. 50 U. S. C. 781. The requirements of registration of so-called "Communist-action" and "Communist-front" organizations as defined by the statute, the filing of reports, the registration of individual members of "Communist-action" organizations, at least *prima facie* suggest such a conclusion, particularly when read against the immunity provision of Sec. 783(f). 50 U. S. C. 782 ff.

State legislation making membership in Communist organizations unlawful is totally irreconcilable with this stated congressional purpose. The purpose of state legislation is to outlaw, not to expose, such conduct, and thwarts the expressed congressional policy. This Court has refused to tolerate state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra.*

The membership provisions of the state statutes stand to frustrate the congressional purpose from a very tangible and practical standpoint. Whatever may be the prospect of voluntary compliance with the registration provisions of the Internal Security and Communist Control Acts, the reluctance of Communist organizations and their members

to register will certainly be increased considerably if they are thereby made subject to prosecution under state law.*

Still another conflict in purpose must be noted. Stringent as the provisions of the congressional statutes are, they evince a greater measure of regard for the constitutional rights of the individual than do the state enactments. The federal statutory provisions manifest some awareness that Congress is exercising power in the "delicate area" of protected rights under the First and Fifth Amendments to the Constitution. Thus, for example, even a report of the House Committee on Un-American Activities on the Internal Security Bill in 1950 states:

> "The committee approached the problem with care and restraint because it is believed essential that any legislation recommended be strictly in accordance with our constitutional traditions. How to protect freedom from those who would destroy it, without infringing upon the freedom of all our people, presents a question fraught with constitutional and practical difficulties. We must not mortally wound our democratic framework in attempting to protect it from those who threaten to destroy it." 2 U. S. Code Cong. Serv. 1950, 3888.

Although it may be seriously questioned whether the body of federal legislation reflects "care and restraint," still the registration system of the Internal Security Act of 1950 reflects at least to some small degree a concern for the forms of due process of law.

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* Of course, if the immunity section of the Internal Security Act applies to all criminal statutes of the states (and a fair reading of the words leaves little room for any other interpretation), then the danger of frustration of the congressional purpose of exposure through registration may diminish; but the irreconcilability of the federal and state statutes on their face becomes the more inescapable. There is then clear repugnance in *either* case: that is, either for the reason that what is expressly stipulated in the federal statute as no crime, federal or state, is a crime under the state statutes; or, if the clause is interpreted as having reference only to other federal laws, for the reason that the state laws militate strongly against registration under the federal law.

The states, generally, have failed to provide any safeguards. The Florida and Massachusetts statutes, as has been shown, declare the Communist Party to be an unlawful subversive organization by legislative fiat, without benefit of a hearing, administrative or otherwise. Subversive organizations are, generally, not ordered to register, as under the federal laws, but *dissolved* in total disregard of the speech and assembly provisions of the First Amendment. New Hampshire Laws, 1951, c. 193, ch. 457-A, Sec. 5; Fla. Stat. Ann., Tit. 44, Sec. 876.26 (1954 Supp.); Mass. Ann. Laws, c. 264, Secs. 17 and 18 (1954 Supp.) Knowing members of such subversive organizations are declared criminals and subject to criminal penalties, again in contrast with the federal statutes. Fla. Stat. Ann., *op cit.,* Sec. 876.24; Mass. Ann. Laws, *op. cit.,* Sec. 19; New Hamp. Laws, *op cit.,* Sec. 3. Above all, the statutes in Florida, Kentucky, Massachusetts and New Hampshire are so seriously deficient in concreteness and definition as to permit the kind of arbitrary, attainting and punitive implementation to which the facts outlined above amply attest.

Finally, the great diversity of procedures by state attorneys general, by county prosecutors and by special investigating commissions—of which the facts described above are illustrative—brings to mind the warning which this Court issued in the course of striking down a Pennsylvania statute which created certain supplemental labor management remedies, *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union,* 346 U. S. 485, 490-491:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Indeed, the situation at least in the eastern part of the United States was becoming so confused and contradictory that in 1952 the "Eastern Region of the Association of Attorneys General" asked its national association to investi-

gate the desirability of a uniform subversive activities statute.

Such conflicts in purposes, policies and procedures exemplify the kind of concurrent authority which this Court has always found intolerable and from which preemption will always be inferred. For as the Court held in *Hill* v. *State of Florida ex rel. Watson, supra,* at 543, two sets of statutes, if their coexistence is to be permitted, must "move freely within the orbits of their respective purposes without impinging upon one another."

### C. Disparate penalties under state statutes conflict with the congressional scheme of deterrents.

As we have shown, Congress has enacted a comprehensive scheme for the prevention of threats to the internal security of the United States. The punishment provided for violation of the Smith Act was an implementation of the congressional policy of establishing a uniform national system for the prevention of subversion. The deterrents established in this scheme clearly must have been intended to prevent the evil at which the laws were aimed, while at the same time over-deterrence was avoided, lest federally protected rights of freedom of speech, press and assembly be unduly undermined. While it was the congressional purpose to make violation of the Smith Act punishable by five-, six-, or ten-year maximum prison sentences (depending on the section of the Act under which conviction is had, 18 U. S. C. 2384-2385 (1952 ed.)) Florida's "Little Smith Act" imposes a maximum penalty of twenty years, (Fla. Stat. Ann., Tit. 44, Sec. 876.23), Kentucky imposes a maximum penalty of twenty-one years (Ky. Rev. Stat., 1953, c. 432, Secs. 432.020, 432.030), and even heavier penalties are imposed in certain other states. Such disparity in penalties prescribed for the same offense illustrates the conflict between the statutes and destroys the all-important balance between prevention of subversion and the protection of civil liberty.

Nor can it be said to have been within the contemplation of Congress that there should be multiple penalties for the same offense. In actual fact, an individual offender could be indicted, convicted and punished in every state which has a sedition statute (which now number thirty-one, Gellhorn, *The States and Subversion,* 397 (1952)), in addition to federal prosecution, depending on how many jurisdictions were able to obtain service of their criminal process upon him. *Commonwealth* v. *Nelson,* 377 Pa. 58, 70-71 (1954).

*United States* v. *Lanza,* 260 U. S. 377, does not help petitioner, as it seems to believe (Brief of Petitioner, 64). In the first place the concurrent power which was there upheld was expressly inserted into the Eighteenth Amendment (Section 2), and it was the Chief Justice's contention that "the probable purpose" of this section "was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded" (at 381).

More importantly, even if the *Lanza* rule permits that a defendant in a criminal case may be punished twice for the same act, it is obvious that the Pennsylvania legislature did not intend, nor did Congress, that violation of their respective seditious advocacy statutes should incur a maximum penalty of thirty years in prison, or a thirty thousand dollar fine, or both—that is, the combined penalty of the two statutes. Such punishment exceeds what either sovereign considered necessary for deterrence. As Mr. Justice Washington warned in *Houston* v. *Moore,* 5 Wheat. 1, 23:

> " * * * to subject them [the defendants] to the operation of two laws upon the same subject dictated by distinct wills particularly in a case inflicting pains and penalties is to my apprehension something very much like oppression if not worse."

There is no evidence to indicate that Congress has considered the penalties imposed by state legislatures for this type of conduct as being supplemental sanctions. Such an assumption is incredible in view of the fact that seventeen

of the states have no sedition statutes at all, and the variations in wording and penalties in the remaining thirty-one are almost infinite. Gellhorn, *The States and Subversion,* 397 (1952); Emerson and Haber, *Political and Civil Rights in the United States,* 462-463 (1952).*

The dissenting opinion of Mr. Justice Frankfurter in *California* v. *Zook,* 336 U. S. 725, 738-740, is here directly in point:

> "One would suppose that, when Congress has proscribed defined conduct and attached specific consequences to violations of such outlawry, the States were no longer free to impose additional or different consequences by making the same misconduct also a state offense. * * * When Congress deals with a specific evil in a specific way, subject to specified sanctions, it is not reasonable to require Congress to add, 'and hereafter the States may not also punish for this very offense', to preclude the States from outlawing the same specific evil under different sanctions. *To do so would impute to Congress the purpose of imposing upon a nation-wide rule the crazy-quilt of diversity—actual or potential—in State legislation,* when the federal policy was adopted by Congress precisely because it concluded that the manner in which the States, under their permissive power, dealt with the evil was unsatisfactory. * * * *It also disregards an important aspect of civil liberties, namely, avoidance of double punishment for the same act even though such double punishment may be constitutionally permissible."* (Emphasis added.)

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* Clear recent evidence of the fact that Congress, as well as the Justice Department, do not consider the dissimilar state sanctions as supplemental deterrents, may be found in the report of the House Judiciary Committee on H. R. 2854, a bill to increase the penalties for violations of the Smith Act, which was strongly supported by Attorney General Brownell. 84th Cong., 1st Sess., H. R. Report No. 922 (June 27, 1955). The Report stated:

> "The Committee finds that these Amendments fill the need for realistic uniformity as to maximum penalties for this group of related offenses. * * * It is believed that conspirators who act to the detriment of the United States in behalf of world communism should similarly be subject to much more severe penalties than the law provides for them at the present time."

The concurrence of thirty-two sets of laws regulating the same subject, even if not always inconsistently, is bound to result in such confusion and division of responsibility as seriously to impair the effective operation of all the laws. Such confusion, duplication, inefficiency and disregard for individual rights in a field of vital national importance is an intolerable exercise of concurrent power. Such effects of concurrent authority cannot rationally be ascribed to the federal legislative purpose.

Congress did not intend the development of what might be termed a "Balkanization of sedition" which permits some states to prescribe extremely heavy penalties for this offense, others milder ones, and still others none at all. Nor can Congress have intended the incredible situation to develop in which American citizens would be forced to take up residence in certain states, rather than others, in order to avoid the political climate engendered by repressive statutes such as those in Massachusetts, New Hamphire, Kentucky and Florida.

## III

**The paramount interest of the United States in the area of sedition control precludes state legislation.**

Even if this Court were to conclude that federal sedition laws are not in conflict with state legislation in this area and, further, that the former do not comprise so comprehensive a scheme of regulation as to constitute effective occupation of the field, we suggest that the interests of the national government are so dominant here as to require exclusion of the states. In the area of sedition the power of the United States is paramount. The intention of Congress to preempt the field may be inferred from (a) the relevant constitutional mandate and (b) the nature of the conduct controlled.

**A. The federal government, by constitutional mandate, has a paramount interest in the internal security of the United States and all political subdivisions.**

Article IV, Sec. 4 of the Constitution, states:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

The first part of this section reveals the national paramount interest in protecting the republican form of government of the states against attack from within or without.* Whatever one may think of either the constitutionality or the necessity of the measures which the Congress has taken to implement this paramount interest, the fact still remains that this is a matter of primary and basic federal concern.

In enacting the Smith Act, Congress reflected this interest by referring specifically to the overthrow of "the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein." 18 U. S. C. 2385. As the Pennsylvania Supreme Court observed in this regard: "Federal preemption could hardly be more clearly indicated." 377 Pa. 58, 70.

The Internal Security Act of 1950, in its finding of necessity, makes specific reference to the congressional duty "to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government." 50 U. S. C. 781.

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* To the extent that this constitutional provision suggests any initiative or responsibility at all for the states in this area, it would appear to be limited to cases of *actual domestic violence,* a matter in itself of the utmost significance, as will be shown *infra.*

The Communist Control Act of 1954, like the Smith Act, speaks of the overthrow of "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein." 68 Stat. 775, 776, Sec. 3 (1954).

The paramount interest of the national government to protect itself *as well as the states* against sedition could hardly be mirrored more vividly than in these statutory provisions. As a practical matter, "it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States,—the Union of the forty-eight component States." *Commonwealth* v. *Nelson, supra,* at 69. Nor is it surprising that no state sedition statute described above limits itself to sedition committed against that state.*

Thus, the states themselves have recognized that sedition is not really a matter of local concern, but is inextricably interwoven with the security of the United States as a whole. It is not surprising that in the case at bar there is not a single word indicating a seditious act or utterance against the state of Pennsylvania. *Commonwealth* v. *Nelson, supra,* at 69.

The problem of so-called "subversion" is a national one calling for solution on a national scale. Where the concern of the national government is as clearly dominant as here and where the area of concurrent power is as closely intertwined with the national interest, it requires little in the way of federal legislation to exclude the states from the field. For as this Court held in *Kelly* v. *Washing-*

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* Compare Fla. Stat. Ann., Title 44, C. 876; Ky. Rev. Stat., 1953, C. 432, Sec. 432.030; Mass. Ann. Laws, C. 264, Sec. 16 (1954 supp.); New Hamp. Laws, 1951, C. 193, ch. 457-A, Sec. 2. In *State ex rel. Feldman, et al.* v. *Kelly,* 76 So. 2d 798, 801 (1954), the Florida Supreme Court concluded:

> "In legal effect the latter Florida Act is a rescript of the Smith Act, both having been designed for the same purpose."

*ton,* 302 U. S. 1, 9, "if the subject is one demanding uniformity of regulation," then "state action is altogether inadmissible" even "in the absence of federal action."

**B. The federal government has a dominant interest in striking a balance between curbing sedition and protecting fundamental rights and freedoms.**

Sedition legislation involves the problem of advocacy. Whether in the form of a sedition or a criminal anarchy statute, its basic thrust is the criminal punishment of speech. This crucial element is lost sight of by the Department of Justice in its analogy of sedition to treason, Brief for the United States as *Amicus Curiae,* 14-15, as well by petitioner in its Brief, at 27-28. To equate sedition with the right of the states to "self-preservation" either misses the point or distorts it. Depriving the states of the means to enforce sedition statutes does not strip them of their "inherent" right of self-defense; to the contrary, there are numerous state statutes to deter and punish actual or threatened internal civil disturbances, whether they take the form of insurrection, riot or even incitement to riot. A finding of preemption by this Court in the instant case need have no preclusive effect whatever on such laws.

The fact that seditious utterances may conceivably and speculatively give rise to riot and other public disturbances does not empower the state, by virtue of its undeniable authority to police the latter, to police the former. The rights which anti-subversive laws seek to curb, namely, speech and assembly, are manifestly in the category of "fundamental principles of liberty and justice which lie at the base of all our civil political institutions." *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Once the smoke-screen created by terms like "self-preservation", "attacks", "force and violence", "insurrection", and the rest, is cleared away and the actual wording of the relevant statutes carefully considered, it becomes clear that this legislation "deals with the rights, liberties and personal freedoms of human

beings", a very different category from "state tax statutes or state pure food laws regulating the labels on cans." *Hines* v. *Davidowitz, supra,* at 68. The opinion by this Court in *Hines* is particularly apposite to the problem in the instant case (at 70):

> "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject. Opposition to laws permitting invasion of the personal liberties of law-abiding individuals * * * is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history * * *."

Thus, there is a direct connection between the supersedure issue and the protection of constitutional rights and liberties. The interest of the federal government in the freedoms guaranteed to all its citizens is readily understood when the term "national security" is placed in its correct historical, political and legal perspective. The security of the Republic is tied less intimately to the regulation of the elusive concept of sedition than to the guarantee of constitutional liberties. In the words of Mr. Chief Justice Hughes:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *DeJonge* v. *Oregon,* 299 U. S. 353, 365.

It is for these reasons that the legislatures of the states are not unfettered in their judgment as to the kinds of

utterances which may be penalized. And as the Pennsylvania Supreme Court interpreted the *DeJonge* opinion, *Commonwealth* v. *Nelson,* supra, at 76:

> "If this counsel is to be heeded faithfully, it is essential that criminal sanctions for conduct hostile to our Federal Government be promulgated, imposed and controlled uniformly for the nation as a whole. And that, only the central Government can accomplish."

The basic theory of sedition statutes, whether federal or state, is that certain forms of speech may possibly condition the minds of the audience to perform illegal or criminal acts when circumstances permit. But this form of offensive conduct does not vary with *local* circumstances. The teaching of Marxism-Leninism, for example, is hardly more incendiary in New Hampshire than, let us say, in Pennsylvania or Massachusetts or Florida.

Thus, the *nature* of the conduct being controlled in sedition laws requires, on the one hand, deference to the paramount interest of Congress in the protection of civil liberties and, on the other hand, uniformity in the regulation of the conduct which by definition poses a problem which is national in scope and not subject to local variability. This, the Federal Constitution requires.

Under the First Amendment this Court has traditionally held that "seditious" words become criminal only when they are used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52.

If, as Mr. Justice Holmes urged in the *Schenck* case, the character of the act depends upon the "circumstances" in which it is done, and if such delicate factors as "proximity" and "degree" must be weighed in the balance, then it can hardly be maintained that each state can judge for itself as to when the conditions are constitutionally appro-

priate for legislating against or prosecuting such seditious activity.

The impact of the First Amendment upon sedition statutes thus involves a grave national policy decision requiring the balancing of weighty and momentous considerations. Compare *Dennis* v. *United States,* 341 U. S. 494; *American Communications Association* v. *Douds,* 339 U. S. 382. This is not a decision which can rationally be assigned to the conflicting views of forty-eight different jurisdictions. It is peculiarly restricted to the federal sovereignty, and the federal sovereignty alone.

Thus, the paramount responsibility of the federal government in preserving the constitutional liberties of the nation emphasizes the necessity for a total exclusion of the separate state sovereignties from this entire field.

## IV

**The regulation of sedition has direct impact upon foreign relations which are exclusively a federal sphere of authority.**

The enforcement of federal sedition statutes is intimately tied to issues involving the foreign relations of the United States. These laws have, at least in part, been (1) prompted by foreign policy considerations, (2) aimed at what is consistently alleged to be an *international* movement, and (3) executed and enforced with a view toward anticipated reactions abroad, on the part of both friendly and unfriendly powers.

The legislative history of the three federal statutes on which attention has been focussed throughout this brief leaves little room for doubt as to the impact of foreign relations upon Congress at the time such legislation was passed. Passage of the Smith Act in 1940 followed the German-

Soviet Non-Aggression Pact and the Soviet-Finnish War. It was a time of emerging tensions with the Soviet Union. The United States appeared to be in a precarious and difficult international situation. All of these factors played an important role in the enactment of the sedition statute of that year, so reminiscent of the Alien and Sedition Acts of 1798 in its structure and phraseology. See 41 Columbia L. R. 159 (1941).

A decade later, when the Internal Security Act was passed, this nation was at war with communism in Korea. Even before the outbreak of the Korean War in June, the Senate Judiciary Committee reported favorably on the bill, stating (81st Cong., 2d Sess., Sen. Rep. No. 1358, 6):

> "Our foreign policy is currently embarking upon a course of 'total diplomacy' to curb the aggression of Communism throughout the world. To resist Communist aggression abroad and ignore its clear and present danger at home would be an utterly myopic manner of procedure."

In 1954, despite the Korean armistice, a momentary hysteria in Congress made it possible to add another panel in the anti-sedition framework, the Communist Control Act.*

The provisions of the last two statutes emphasize the international aspect of the subject matter under regulation. Thus, Sec. 2 of the Internal Security Act of 1950 declares that the Communist movement is a "world-wide revolutionary movement", that it is allegedly directed and controlled by a "foreign country", and that the United States Communist Party is controlled by "foreign agents" who

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* Actually, there was so much haste and confusion surrounding the passage of this statute that it would be presumptuous for anyone to suggest what the true legislative intent of Congress was in enacting this law. See 64 Yale Law J. 712-714 (1955).

are members of "foreign legations" and "international organizations". 50 U. S. C. 781.*

Although there is nothing in the phraseology of the Smith Act to suggest foreign policy as a factor in its enforcement, it has been so interpreted by the courts. See *United States* v. *Dennis,* 183 F. 2d 201, 213 (C. A. 2). In *Dennis* v. *United States,* 341 U. S. 494, 510-511, the Court made the factor of world conditions a crucial element:

> "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score [of clear and present danger]."

Mr. Justice Frankfurter, concurring in the judgment, pointed out that the Court will take judicial notice of the fact that "the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country." *Dennis* v. *United States, supra,* at 547.

It is a fact that a decision to undertake a program of sedition prosecution is one which is fraught with political implications at home and abroad. Our stature as a democratic people suffers abroad to the extent that we deprive our citizens of fundamental constitutional rights and liberties. If we are to face the risk of an inconsistency between our professions and our deeds, then it is eminently reasonable that such a balancing of our national need for internal security against our foreign responsibilities be

* See also Sec. 6 of the Act which denies passports to members of Communist organizations, as one of the penalties imposed. 50 U. S. C. 786.

done by those charged with the conduct of our foreign policy. It cannot conceivably be done by the New Hampshire or Massachusetts attorney general or by local prosecuting attorneys in Louisville or Miami.

The dominance of foreign policy considerations in this extremely complex area of criminal law enforcement brings into play the rule of *United States* v. *Pink,* 315 U. S. 203, 232:

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."

This Court, in *Hines* v. *Davidowitz, supra,* held a mere *affecting* of international relations (such as involved in the alien registration provisions of the Smith Act) to be sufficient basis for a finding of preemption of a state statute in the same field. As the Court there stated, foreign relations comprise "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 limits * * *."

## CONCLUSION

The witch hunt which followed the First World War did not abate when prosecutions ceased on a federal level. The fact is that invasions of civil liberties, both substantive and procedural, continued as a result of state prosecutions long after federal repression subsided. Not only did these state prosecutions prolong the prevailing atmosphere of repression, but it carried it into areas which even the federal authorities had avoided. A study of the criminal syndicalist prosecutions, for example, will reveal that these were employed in the states in order to affect legitimate competi-

tion for political and economic status. They were directed at the labor movement throughout the country. They were used by the Associated Farmers in California to prevent the organization of agricultural workers and by owners of timberlands in the Northwest for similar purposes. And they were used in the Southern states to repress attempts to eliminate racial discrimination.

A reversal of the decision of the Pennsylvania Supreme Court may very well set in motion a wave of prosecutions and abuses which will plague our country for years to come. If past history is a guide, there is substantial reason to fear that such a reversal will place in the hands of local anti-labor, anti-Negro and anti-foreign-born groups a potent weapon for a serious attack upon the democratic process itself.

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

Respectfully submitted,

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