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CITATIONS

CITATIONS—Continued

No. 10

In the
Supreme Court of the United States

OCTOBER TERM, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

AUTHORITY FOR FILING BRIEF HEREIN BY THE AMERICAN LEGION AS AMICUS CURIAE

This Brief is filed by The American Legion, *amicus curiae,* pursuant to Rule 42(2), Revised Rules of the

Supreme Court adopted April 12, 1954 and effective July 1, 1954.

PRELIMINARY STATEMENT

The respondent, Steve Nelson, was indicted October 17, 1950 (Vol. I, R. 9, et seq.) in the Court of Quarter Sessions, Allegheny County, Pennsylvania, under the Pennsylvania Sedition Act (Sec. 207 of Pennsylvania Penal Code of June 24, 1939, Pamphlet Laws 872, 18 Purdon's Stat. Ann. Sec. 4207). He entered a plea of not guilty and on December 22, 1950 filed a motion to quash the indictment (R. 24), which, after consideration, was dismissed by the court on December 26, 1950. (Vol. I, R. 28) Following a trial which commenced December 4, 1951 and ended January 30, 1952, a verdict of guilty was returned by the jury on the latter date. (Vol. I, R. 7) His motion for a new trial and arrest of judgment were denied by the court in an opinion filed by Judge Montgomery on June 26, 1952. (Vol. I, R. 28, et seq.)

He appealed to the Superior Court of Pennsylvania, which affirmed by a *per curiam* opinion the judgment of the Court of Quarter Sessions. (Vol. I, R. 50) Following this, an appeal was taken to the Supreme Court of the Commonwealth of Pennsylvania and on January 25, 1954 that court, by a majority decision, reversed the lower court and quashed the indictment. (Vol. I, R. 50 et seq.)

Following this decision, a Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District, was granted by this court. (Vol. II, R. 1421)

In this brief, the Legion as *amicus curiae,* will support the petitioner, setting forth the reasons why it believes the decision of the Supreme Court of the Commonwealth of Pennsylvania, should be reversed.

Our organization was originally chartered by Act of Congress September 10, 1919 (USCA Tit. 36, Secs. 41-51, inc.). It is composed of fifty-eight Departments, forty-nine of which are located within the continental limits of the United States, each of the latter being within the confines of the respective states and the District of Columbia, which are, in turn, organized into more than 17,000 Posts with a total membership in excess of 2,700,000, limited to veterans of World War I, World War II and the Korean hostilities.

The Legion has a profound interest in the questions presented in this case, in view of the fact that it has been in the forefront in the fight against Communism since its inception. It has witnessed the progress of this philosophy, which now embraces a large portion of the world. It has seen it creep into the communities of our nation, a philosophy entirely foreign to the American way of life, which is seeking to destroy the fundamental principles upon which this mation was founded by our forefathers.

Our efforts to combat the ideologies of Communism have been conducted, not only on the Post level in every community, but also on the Department and National levels as well, and it is the concensus of our entire organization that success will only be attained by the close cooperation of every individual, community, state and the Federal Government if it is to be won. Consequently, we consider the final decision in this case to be of prime importance to the nation.

We believe that the several states are charged with the duty of preserving peace and order within their respective borders and that they must be accorded the right to punish those who advocate the overthrow of our government by force, as its destruction would result in their annihilation;

and that the "Smith Act" should be considered as complementing the state legislation rather than pre-empting the field on this subject, as "the same act may be an offense or transgression of both Nation and state, and both may punish it without a conflict of their sovereignties."

We further believe that freedom of speech and freedom of the press should always be fully protected, but when they are employed for the purpose of destroying the structure of government, under which the right is given, by other than peaceful means, the guilty should be punished. If not, it will undoubtedly result in the destruction of our priceless heritage, which must be averted by every legal means available.

Inasmuch as the parties to this action, in their respective briefs, have supplied or will supply the opinions below, the jurisdiction of the court, the questions presented, the full statement of the case and its decision, we shall avoid repetition herein.

STATUTES INVOLVED

The pertinent Statutes are set forth in App. I and App. II of this brief.

SUMMARY OF ARGUMENT

Point 1. In the adoption of the so-called "Smith Act," Congress did not pre-empt the field of legislation covered thereby and its adoption did not void the Sedition Act of 1939 adopted by the Legislature of Pennsylvania and under which the respondent was convicted. The Federal legislation neither expresses nor implies such an intent nor is the subject matter one with which the Federal Government is solely concerned. The same act may be an offense or transgression of both Nation and state and both may punish it without a conflict of their sovereignties. The United States is composed of the states, the states are constituted of the citizens of the United States, who are also citizens of the states. Thus a citizen owes allegiance to two sovereigns and may be liable for an infraction of the laws of either or both, as the same act may constitute an offense or violation of the laws of both. Supersession never occurs unless there is a conflict or repugnance which is so direct and positive that the two acts cannot be reconciled or consistently stand together and neither conflict nor repugnance to the other is reflected in either act.

The administration of criminal justice under our federal system has always rested with the states except as such offenses have been explicitly prescribed by Congress, and prescription should never be applicable where the two acts may be consistently enforced. In the exercise of its reserve powers a State has the right, yes the duty, to punish acts which endanger not only its continued existence but the existence of the Nation as well, and in the instant case the two statutes are complementary and should be

interpreted so that the purposes of both may be effected. The fact that a greater penalty for transgressions under the state act is imposed than those under the federal legislation is no reason in support of the contention that there is conflict, as it is directed at an evil where experience indicates it to be most felt, namely, the state, and its legislation must be co-extensive with the practical need.

Point 2. State legislation defining sedition and syndicalism and fixing penalties for the violation thereof has been in existence for more than one hundred years, as the first state legislation on this subject was passed shortly after the adoption of the Federal Constitution. These laws have been upheld by the Supreme Court in many instances where their validity has been questioned, as their aim has been the preservation of law and order in the respective state jurisdictions. It would be fatal at this time to tear down this great mass of state legislation by holding that the "Smith Act" was all-inclusive and that it superseded similar state legislation, as a state is not prohibited from making the national purposes its own purposes, and it may exercise its reserve powers to prevent its own citizens from the accomplishment of these purposes. There is no provision in the Federal Constitution which gives the federal government the exclusive right to punish disloyalty. Communism, which advocates the overthrow of our government by force, has reached such proportions in our Nation that it is not only a federal problem, but a state problem as well, and in order to cope with the evil, the powers of both must be exercised.

Point. 3. Conviction of the Respondent under the Sedition Act of Pennsylvania did not result in double jeopardy merely because the "Smith Act" covers the same type of legislation in a broader field, as both the states

and Nation are deeply concerned with the preservation of a Republican form of government and the preservation of the Federal Constitution under which both must operate if the Nation is to survive, and the same act may be a transgression of the laws of both and may be punished by either or both.

I

ARGUMENT

In The Adoption of the So-called "Smith Act," Congress Did Not Pre-empt the Field of Legislation Covered by Said Act.

The respondent, Steve Nelson, was indicted under the Pennsylvania Sedition Act of 1939. (Pamphlet Laws 872, 18 Purdon's Stat. Ann., Sec. 4207, which reenacted the Sedition Act of June 26, 1919, P. L. 639) This legislation makes it a felony "(a) To make or cause to be made any outbreak * * * of violence against this state or against the United States. (b) To encourage any person * * * to engage in any conduct with the view of overthrowing or destroying * * * by any force or show or threat of force, the government of this state or of the United States." (App. II) He was tried and convicted under this indictment and was sentenced to pay a fine of $10,000.00, costs of prosecution and undergo an imprisonment of twenty years in the Allegheny County Work House. (R. 21) Prior to the time of his indictment, trial and conviction, Congress had adopted legislation known as the "Smith Act," [62 Stat. 808, 18 USCA § 2385, et seq.], which provides *inter alia* that:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying 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, by force or violence, or by the assassination of any officer of any such government; or

> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
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> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The majority opinion of the Supreme Court of Pennsylvania proceeds on the premise that by the passage of the so called "Smith Act" Congress pre-empted the legislative field in connection with the subject matter covered therein. We cannot agree with this conclusion. A careful consideration of this legislation neither expresses nor implies such an intent. Furthermore, the prosecution of individuals guilty of sedition is of vital concern to the several states, as it involves the preservation of peace and order which they have a right to protect. Each state is an integral part of the Union and is clothed with the power to and is charged with the duty of restraining "activities which are detrimental not only to the welfare of the state, but of the nation." It must be remembered that seditious acts, such as those with which the respondent was charged (Vol. I, R. 9) and convicted of (Vol. I, R. 22), were of such

nature as to result, if continued without correction, in the destruction, not only of the State, but of the nation.

In determining whether a Federal Statute results in supersession, careful consideration must be given to the analogous cases in which this question has been considered.

In Gilbert v. Minnesota, 254 U. S. 325, (1920) the court reviewed a statute of Minnesota which made it unlawful "to interfere with or discourage the enlistment of men in the military or naval service of the United States or of the State of Minnesota." Judgment of conviction was affirmed. The principle of supersession was involved. However, the court concluded that Congressional power was not usurped nor encroached upon by the enactment by a state of a statute making it unlawful to advocate or teach that men should not enlist in the military or naval forces of the United States or of the state or that citizens of the state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States. In the course of its opinion the court explained the relationship between the several states and the United States in the following language:

> "Undoubtedly, the United States can declare war, and it, not the states, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them,—whether it is repellent and adverse or eager and militant,—and to maintain it eager and militant against attempts at

its debasement in aid of the enemies of the United States is a service of patriotism, and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties, and resistance in each to any co-operation from the other, but there is opposing demonstration in the fact that this country is one composed of many, and must on occasions be animated as one, and that the constituted and constituting sovereignties must have power of co-operation against the enemies of all. Of such instance, we think, is the statute of Minnesota, and it goes no farther. It, therefore, has none of the character of the illustrations adduced against it, nor the possibility of conflict of powers which they condemn. This was the view of the supreme court of the state, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in State v. Holm, 139 Minn. 267, L.R.A. 1918C, 304, 166 N.W. 181, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, 40 Stat. at L. 217, chap. 30, Comp. Stat. Sec. 10, 212 a, Fed. Stat. Anno. Supp. 1918, p. 120, abrogated or superseded the statute, the court declaring that the fact that the citizens of the state are also citizens of the United States and owe a duty to the nation, does not absolve them from duty to the state, nor preclude a state from enforcing such duty. 'The same act,' it was said, 'may be an offense or transgression of both' nation and state, and both may punish it without a conflict of their sovereignties.'' * * *

''We concur, therefore, in the final conclusion of the court, that the state is not inhibited from making 'the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'

> "The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the state. As counsel for the state say: 'The act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the state has found objectionable * * *.'"

The Gilbert case cited with approval State v. Holm, 139 Minn. 267 (1918), 166 N. W. 181, in which the defendants were indicted for circulating a pamphlet in violation of the same statute. The defense contended that the Espionage Law, passed by Congress June 15, 1917, abrogated or superseded the state statute. The court in disposing of this question said:

> "It is the duty of all citizens of the state to aid the state in performing its duties as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty. Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525. True, the state cannot make or enforce requirements which are inconsistent with those of the national government, for those of the national government are paramount in case of conflict. But here there is no conflict between the state statute and the federal law, and both may subsist and be given effect. * * *
>
> "* * * The one is designed to enforce a duty which the citizen of the state owes to the state; the other to enforce a duty which the citizen of the United States owes to the United States. There are many acts which may violate one, but not the other, of these laws, and there are also many acts which may

> violate both, but the state statute is not necessarily invalid for that reason. There is nothing in the statute which is inconsistent with the federal law, nor which in any manner interferes with, hinders, or delays the operation of that law. The state has control of its internal affairs, and in the exercise of its police power may prescribe rules of conduct for its citizens, and may forbid whatever is inimical to the public interests, or contrary to the public policy of the state."

It will be noted from the above language that while a state cannot "make or enforce requirements which are inconsistent with those of the National Government," yet, if there is no conflict, "both may subsist and be given effect."

In the instant case we can find no conflict between the Smith Act and the Pennsylvania Statute. (App. I, App. II) The former was enacted under the sovereign powers of the Federal Government and the latter under the police powers of the state, and both are designed to preserve law and order within their respective jurisdictions.

The same conclusion was reached in Moore v. State of Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306, in which the following language was used:

> "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable * * * for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Moore v. State of Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306.

Likewise, in ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, the court concluded that "where a person owes a duty to two sovereigns he is amenable to both for its performance and either may call him to account."

This court held in Presser v. State of Illinois, 116 U. S. 252 (1886), 6 Sup. Ct. 580, that a law of that state providing *inter alia* that "it shall not be lawful for any body of men whatever other than the regular organized volunteer militia of this court and the troops of the United States to associate themselves together as a military company or organization * * *" was neither in conflict with Federal statutes in existence at that time, nor was it subject to any constitutional infirmity. The court also stated that the exercise of this power by the states was necessary to the public peace, safety and good order, as otherwise it would deny the state the right to disperse assemblages organized for sedition and treason and the right to suppress armed mobs bent on riot and rapine.

In Halter v. State of Nebraska, 205 U. S. 33, 51 L. Ed 696, (1907) this court sustained a statute of that state entitled "An Act to prevent and punish the desecration of the flag of the United States" which, among other things, made it a misdemeanor punishable by fine or imprisonment or both for any one to sell, expose for sale or have in possession for sale any article of merchandise upon which shall have been printed or placed for purposes of advertisement a representation of the flag of the United States, with certain exceptions. This court held that the protection of the national emblem against illegitimate uses was not so exclusively entrusted to the Federal Government as to prevent the state from enforcing this legislation. In the course of its opinion, the following observation was made:

> "So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One

> who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it."

The majority opinion of the Pennsylvania Supreme Court seems to lean toward the theory that the passage of a Federal Act regulating certain objectionable activities throughout the Nation precludes any legislative action on the part of a state. However, in Kelly v. Washington, 302 U. S. 1 (1937) the court stated:

> "The principle is thoroughly established that the exercise by the state of its police power which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct or positive' that the two Acts cannot 'be reconciled or consistently stand together.'"

In none of the foregoing cases has this court intimated that a state statute, adopted in the exercise of its police power, was invalidated by reason of the fact that Congress may have legislated on the same subject, especially where there was no conflict involved. In the instant case, the Pennsylvania Act was designed to preserve peace and order within its own jurisdiction, which certainly is not in conflict with the "Smith Act," as the latter adopts the same purpose in a broader field and in effect builds "upon state law." In Kelly v. Washington, *supra*, it was stated that "when the prohibition of state action is not specific but inferable from the scope and purpose of federal legislation it must be clear that the federal provisions are inconsistent with those of the state to justify the thwart-

ing of state regulations." The lower court relied, at least in part, on the case of Hines v. Davidowitz, 312 U. S. 52 (1941), in support of its conclusions. In a concurring opinion in Allen-Bradley Local v. Board, 315 U. S. 740 (1942), Justice Douglas appraised the effect of the Hines case and observed that the court in that case was "dealing with a problem which had an impact on the general field of foreign relations" involving a question "as to propriety of allowing a state system of regulation to function alongside of a federal system." This problem is not presented here, as we are dealing with a situation, primarily, of internal security, which is of vital importance to both the states and the Nation. Thus, the "foreign relations" aspect, if any, must of necessity give way to this consideration.

In United States v. Pink, 315 U. S. 203 (1942), Justice Douglas again referred to the Hines case as follows:

> "We recently stated in Hines v. Davidowitz, 312 U. S. 52, 68, that the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.' There, we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here, we are dealing with an exclusive federal function. * * *" (p. 232)

This court has recognized that the administration of criminal justice under our federal system is largely with the states. In Jerome v. United States, 318 U. S. 101 (1943), Justice Douglas, in a concurring opinion, stated that "since there is no common law offense against the United States (citing cases), the administration of crimi-

nal justice under our federal system has rested with the states except as criminal offenses have been explicitly prescribed by Congress. *We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law.*" (Emphasis supplied)

Later, in Malinsky v. New York, 324 U. S. 401 (1945), Associate Justice Frankfurter, in a concurring opinion said:

> "Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any 'Bill of Attainder' or 'ex post facto law,' Constitution of the United States, Art. I, Sec. 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws." (pp. 412-413)

Justice Frankfurter, in Rochin v. California, 342 U. S. 165 (1952) also observed that:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers.

> U. S. Const., Art. I, Sec. 8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, Sec. 10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments." (p. 168)

The lower court, in coming to the conclusion that the "Smith Act" preempted the field of legislation covered thereby, cited the following cases in support of its conclusion: *Rice* v. *Sante Fe Elevator Corp.,* 331 U. S. 218, 230 (1947); *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U. S. 566, 569 (1919); *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148 (1915); *Southern R. Co. v. Railroad Commission,* 236 U. S. 439 (1915); *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U. S. 597 (1915), *New York Central R. Co. v. Winfield,* 244 U. S. 147 (1917); *Napier v. Atlantic Coast Line R. Co.,* 272 U. S. 603 (1926); *Savage v. Jones,* 225 U. S. 501, 533 (1912). However, a careful consideration of these decisions does not disclose that the question of preserving peace and order within the states was involved.

In each of these cases, the federal legislation involved the regulation of interstate commerce, and we submit that none of them is decisive of the question now before the court, as Section 8, Article 1 of the Federal Constitution specifically gives Congress the power to regulate commerce * * * among the several states * * * and it has set up a system of regulation in connection therewith which is uniform throughout the Nation. While a state, under its police powers, can not regulate interstate commerce or impose a direct burden thereon, yet when the state regulation "has a real relation to the suitable protection of the people of the state it is not invalid because it may incidentally affect interstate commerce, provided it

does not conflict with legislation enacted by Congress pursuant to its constitutional authority." In Savage v. Jones, *supra,* this court had under consideration a statute adopted by the General Assembly of the State of Indiana, requiring registration and inspection of certain commercial feeding stuff sold or offered for sale in that state. The plaintiff manufactured, in Minnesota, a product known as "International Stock Food," which it distributed, through interstate channels, in the various states, including Indiana. The action was instituted to enjoin a state official of Indiana from enforcing the provisions of the act. Although the question of interstate commerce was an issue, Chief Justice Hughes, speaking for this court, found that the demurrer to the complaint was properly sustained. In the course of its opinion the court stated:

> "The state cannot, under cover of asserting its police powers, undertake what amounts essentially to a regulation of interstate commerce or impose a direct burden upon that commerce (citing cases) but when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

Again the court said:

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration. Chicago, M. & St. P. R. Co. v.

Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Northern P. R. Co. v. Washington, 222 U. S. 370, 379, ante, 237, 240, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 442, ante, 257, 262, 32 Sup. Ct. Rep. 140.

"In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, the supreme court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the state certain cattle alleged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the state of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, chap. 69 (23 Stat. at L. 31, U. S. Comp. Stat. 1901, p. 299), known as the animal industry act, together with the act of March 3, 1891, chap. 544 (26 Stat. at L. 1044), appropriating money to carry out its provisions, and Sec. 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), covered substantially the whole subject of the transportation from one state to another state of live stock capable of imparting contagious disease, and therefore that the state of Kansas had no authority to deal in any form with that subject * * * .

The court held that this Federal legislation did not override the statute of the state; that the latter created a civil liability as to which the animal industry act of

Congress had not made provision. The court said, *supra*, pp. 623, 624:

> "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247."

In Reid v. Colorado, 187 U. S. 137, that state had adopted a statute to prevent the introduction into the state of diseased animals. It was insisted that this act conflicted with the animal industry act of Congress, but this court sustained the state law "for the reason that although the two statutes related to the same general subject they did not cover the same ground and were not inconsistent with each other." The court further laid down the principle that "It should never be held that Congress intends *to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'* " (Emphasis supplied)

It will be noted from the foregoing cases that this court has recognized, in many decisions, the "reserve power of

the state" to adopt legislation in the exercise of its police powers unless pre-emption is clearly manifested or where the "repugnance or conflict" is "direct and positive," even though the state act may involve Congressional authority which has been pre-empted by a Constitutional grant.

The Federal Code of Crimes and Criminal Procedure of 1948 provides *inter alia:*

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." (p. 243) (June 25, 1948, c. 645, 62 Stat. 826, Title 18, USCA, Sec. 3231)

The above Act does not disclose an intent on the part of Congress "to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Otherwise, it would mean that the mass of state legislation which has been built up since the Constitution was adopted for the preservation of law and order within their respective jurisdictions would be nullified.

After reading the majority opinion of the Pennsylvania Court in this case, the Hon. Howard S. Smith, Congressman from the Eighth District of Virginia, who was the author of the "Smith Act," stated in a letter dated February 4, 1954, and directed to the Hon. Frank Truscott, who was then Attorney General of Pennsylvania, that:

> "It was the first intimation I have ever had, either in the preparation of the Act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent

> jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities." (Dissenting Opinion of Justice Bell, Vol. 1, R. 75-76)

We submit that Congress never intended, by the adoption of the "Smith Act," to pre-empt the field of legislation covering sedition.

II

Legislation by the Several States Designed to Preserve Law and Order Within Their Respective Jurisdictions Has Always Been Recognized as Being Within Their Police Powers

The punishment of sedition as a crime against the sovereignty of the states has been recognized almost since the inception of the Constitution. In Dennis v. United States, 341 U. S. 484-521, Justice Frankfurter, in defining the limitations on freedom of speech, recognized this fact.

> "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. *The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803. The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech. Madison's own State put on its books in 1792 a statute confining the abusive exercise of the right of utterance. And it deserves to be noted that in writing to John Adams' wife, Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief in unrestrained utterance as to political matter. The First Amendment, he argued, reflected a limitation*

upon Federal power, leaving the right to enforce restrictions on speech to the States.

"The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

" 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' Robertson v. Baldwin, 165 U. S. 275, 281, 41 L. ed. 715, 717, 17 S. Ct. 326. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years. See, e. g., Gompers v. United States, 233 U. S. 604, 610, 58 L. ed. 1115, 1119, 34 S. Ct. 693, Ann. Cas. 1915D 1044. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic

> society as well as the interest in national security are better served by candid and informed weighing of the competing interests within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved." (Emphasis supplied)

In the same case, this court, in concluding that "speech is not an absolute, above and beyond control by the legislature," stated:

> "But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. *Speech is not an absolute, above and beyond control by the legislature, when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction.* Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See Douds, 339 U. S. at 397, 94 L. ed. 942, 70 S. Ct. 674. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative." * * *
>
> "Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.

> "Obviously, the words cannot mean that before the Government may act, *it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.* The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." (Emphasis supplied)

The right of the several states by legislative action to adopt regulations commensurate with the need in the exercise of their reserve powers to maintain law and order and to protect the welfare of their citizens has never been questioned. There is a wealth of authority supporting this view, and we cannot better express the history and development of this type of legislation than was stated by Justice Bell in the brilliant and erudite dissenting opinion in the court below, in which he observed:

> "1. State sedition and treason laws were nothing new; they had existed for over 100 years. Congress knew that in spite of the fact that the Constitution of the United States gave it, in Article III, Sec. 3(2), the power to punish treason, *forty-seven* (47) Sovereign States of the United States of America, vitally

and patriotically concerned with the safety of their citizens, the security of our country and the preservation of their State and Country's Governments, have a Constitutional provision or had passed laws (as early as 1818) punishing the crime of treason. (Federal Bar Assn. Journal, Vol. 9, p. 71 (1947)) Congress also knew that *thirty-seven* (37) Sovereign States had over a long period of years passed statutes defining and punishing sedition, syndicalism, and other activities aimed at the overthrow of our government by force. (Annual Report of the Committee on Un-American Activities for the year 1949; House Report No. 1950, Union Calendar No. 727, 81st Congress, 2nd session, page 30.) All of these State statutes throughout our entire Country will be superseded and suspended or invalidated, if the majority opinion in this case is sustained by the Supreme Court of the United States.

"In 1790 Congress enacted an Act defining and punishing treason. (18 U. S. C. Secs. 1 and 2.) In 1861 Congress passed the Sedition Conspiracy Act. (18 U. S. C. Sec. 6.) *Never once has the Supreme Court of the United States held that the congressional act punishing treason or the congressional act punishing sedition preempted the field or superseded and nullified state acts punishing these crimes,* or prohibited states from thereafter passing complementary statutes punishing these crimes. While this is not conclusive it is certainly persuasive that Congress did not intend by the Smith Act to supersede and invalidate the mass of state legislation punishing treason, sedition, criminal anarchy, etc., some of which has been in existence for 100 years. Furthermore, *twenty-six* (26) States have passed laws which expressly or in effect *deny state employment* to persons who teach or advocate the overthrow of government by force or violence, or who print or sell documents advocating such doctrines, or who organize groups aimed at overthrowing the government. (Annual Report of the Committee on

> Un-American Activities for the year 1949; House Report No. 1950, Union Calendar No. 727, 81st Congress, 2nd session, page 45.) If the majority opinion prevails, isn't it clear as crystal that all these State laws will be superseded and suspended or invalidated by the Smith Act; and if so, what will it cost the States in the way of damages and other remedial actions? And if the majority opinion prevails, what will happen to all the traitors and dangerous criminals who have been convicted under state acts and whose sentences have not been finally determined, as well as those who are now in state jails serving sentences for violating state treason or sedition or similar laws? And most important of all, what will happen to the security of our Country when the patriotic efforts of all state legislatures, district attorneys and Courts and of all patriotic citizens anxious to catch and punish traitors, are rejected, and the existence of our State and Nation is left exclusively to the slow processes of our sometimes apathetic or inept Federal Government?" (Vol. I, R. 71, 72)

In Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 Sup. Ct. 625 (1925), this court sustained a conviction under a statute of that state which made it a crime to "advocate * * * the necessity or propriety of overthrowing the government by force * * *." The evidence showed that Gitlow had published a Manifesto attacking the government and capitalism. In sustaining the conviction, this court recognized the necessity of applying certain exceptions to the right of freedom of speech, as guaranteed under the First Amendment, in the following language:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every

possible use of language, and prevents the punishment of those who abuse this freedom. 2 Story, Const. 5th ed. Sec. 1580, p. 634; (citing cases) * * * 'Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the Republic.' * * *

"And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Freedom of speech and press, said Story supra, does not protect disturbances of the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government, or to impede or hinder it in the performance of its governmental duties. State v. Holm, 139 Minn. 275, L. R. A. 1918C, 304, 166 N. W. 881. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. People v. Most, 171 N. Y. 431, 432, 58 L. R. A. 509, 64 N. E. 175. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. People v. Lloyd, 304 Ill. 23, 34, 136 N. E. 505. See also State v. Tachin, 92 N. J. L. 269, 274, 106 Atl. 145, and People v. Steelik, 187 Cal. 361, 375, 203 Pac. 75. In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. United States ex rel. Turner v. Williams, 194 U. S. 279, 294, 48 L. ed. 979, 985, 24 Sup. Ct. Rep. 719. In Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. ed. 1186, 1193, 38 Sup. Ct. Rep. 560, it was said: 'The

> safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.' "

This court, in deciding the Gitlow case, did not adopt the "clear and present danger" doctrine advocated by Associate Justices Holmes and Brandeis, and in commenting on this fact in the later case of Dennis v. United States, *supra,* stated:

> "There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was 'reasonable.' Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable."

In Whitney v. California, 274 U. S. 272 (1927), this court approved the validity of the Criminal Syndicalism Act of the State of California, the pertinent provisions of which were as follows:

> "The pertinent provisions of the criminal Syndicalism Act are:
>
> 'Section 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

> 'Sec. 2. Any person who: * * * Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism * * *
>
> 'Is guilty of a felony and punishable by imprisonment,' ''

and in the course of its opinion held:

> *''The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need;* and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856. And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. Stebbins v. Riley, 268 U. S. 137, 143, 69 L. ed. 884, 889, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424; Graves v. Minnesota, Nov. 22, 1926 (272 U. S. 425, ante 331, 47 Sup. Ct. Rep. 122); Swiss Oil Corp v. Shanks, Feb. 21, 1927 (273 U. S. 407, ante, 709, 47 Sup. Ct. Rep. 393).'' (Emphasis supplied)

This court recognized the fact that experience has shown that evils of this sort are most felt at the source—the state —and that the legislation was ''co-extensive'' with the practical need.

In State v. Tachin, 92 N. J. L. 269, 106 Atl. 145 (1919), which was cited with approval in Gitlow v. New York, *supra,* the Supreme Court of New Jersey held that a state act making it a crime to attempt, by speech, to incite

hostility and opposition to the Government of the United States was valid. In that decision the court said:

> "* * * If the federal government, which is a government of delegated powers only, under the Tenth Amendment to the federal Constitution, can properly protect by its criminal law the honesty and purity of elections, as the Siebold Case decided, much more can the State government protect its own existence against sedition which, although aimed directly at the federal government, must indirectly affect the security of the state government. * * *"

In the above case, a writ of error was dismissed by the Supreme Court of the United States on motion of counsel for the plaintiffs in error. (254 U. S. 662.)

In the late case of Nelson v. Wyman, — N. H. —, 105 A. 2d 756 (April 30, 1954), the Supreme Court of New Hampshire, in an action asking for declaratory judgment, held that the Subversive Activities Act which had been adopted by the Legislature of that state, was constitutional. This Act, which was adopted in 1951, provided that:

> "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 or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence, or
>
> "(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any 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

> New Hampshire or of any political subdivision of either of them; * * * (N. H. Laws, 1951, pp. 412-413)''

In sustaining the constitutionality of this legislation, the court stated:

> ''* * * Whatever importance has been ascribed to these duties and powers in decisions dealing with federal legislation, their existence has not been applied in connection with state legislation, to exclude consideration of the well recognized power of each state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the state but of the nation. 'The state is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' Gilbert v. Minnesota, 254 U. S. 325, 331. 'There is nothing in the federal constitution in any way granting to the federal government the exclusive right to punish disloyalty.' People v. Lloyd, 304 Ill. 23, 33.''

The court in that case refused to adopt the reasoning set forth in the majority opinion of the Pennsylvania Supreme Court herein, and came to the conclusion that the ''Smith Act'' did not supersede the New Hampshire legislation:

> ''The enactment by Congress of the Smith Act (18 USC Sec. 2385), which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Pennsylvania v. Nelson, 104 A. 2d 133, gives support to the proposition that it does, we do not adopt it. (104 A. 2d at p. 769)''

The cases cited and from which we have quoted illustrate the inescapable fact that this court has always recognized

the right of the states to adopt reasonable legislation in their respective jurisdictions for the preservation of law and order and in the public interest; and in so doing "to consult solely their own notions of policy in formulating penal codes and in administering them, except those granted to Congress under the constitution, including the Bill of Rights," Malinksy v. New York, *supra,* as "the power to define crime belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers," Rochin v. California, *supra,* and "the administration of criminal justice under our federal system has rested with the states except as criminal offenses have been explicitly prescribed by Congress." Jerome v. United States, *supra.*

The trial in the Dennis case extended over a period of nine months, six of which were devoted to the taking of evidence involving a record of sixteen thousand pages. In the instant case, the trial commenced on December 18, 1951 and was concluded January 30, 1952. (Vol. 1, R. 7, 8) The record before this court contains fourteen hundred twenty-one pages. In view of the great mass of state legislation which has been built up and the seditious acts which are constantly occurring in the promotion of communistic philosophy, it is hardly believable that Congress, which was aware of this situation, intended to restrict the police power of the state and pre-empt the field, thus losing the aid of the State Courts. Over the past several years, communist organizers have established many fronts, too numerous to mention herein, which are ever changing to new names. This has created an extra burden on the Department of Justice. The Attorney General, in his brief filed on behalf of the United States in Dennis v. United States supra, made mention of the fact that the "Smith Act" was constitutional inasmuch as it was a part of a

large mass of valid state and federal legislation designed to punish sedition and other subversive activities. He did not intimate that Congress had pre-empted the field, and the author of the Act had no such intention. Consequently, it is difficult to conceive, yes impossible, that the "Smith Act," by implication, voided the legislative acts of the various states which had for their purpose the preservation of their sovereign rights and the very life of the Nation.

The advocates of Communism have disseminated its principles in many local communities and in every state and when exposed they always hide behind the Bill of Rights but never recognize the obligations our Constitution entails, which every loyal citizen must observe if this fundamental law is to prevail.

The Preamble bears witness to the fact that the Constitution emanated from the people. McCullough v. Maryland, 4 Wheat 316, Downes v. Bidwell, 182 U. S. 244. They, the people, established this noble document "*in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty*" to themselves and their posterity. These were the purposes behind our fundamental law, and we find nothing therein which would justify a doctrine which is the antithesis of these precepts.

Communism starts in the community, the communities make up the state and the states compose the Union. Its philosophy, like dry rot, destroys from within. While the danger is present, it does not become clear until the damage is done. The human termites, which advocate its teaching by subversive means, attack the vital spots and destroy the fundamental structure upon which our government and that of the states is based, and under which they

operate; if the fight is not continued by the states, the damage may be so great that it cannot be rectified in time by Federal action. This could mean war, which would inevitably result in the loss of the lives of our youth, as in the past. The citizenry has every right to insist that the fight against this philosophy be combatted with all the might which can be marshalled by the states as well as the nation. Wars have always been won by our nation due to the close co-operation of the states, and this force should be used to win the fight against our internal enemies. Thus, if the field of correction is pre-empted by Congress, the Federal Government would be the only agency which could deal with this problem, and the states would be helpless to preserve their sovereign powers. This was never expressed, implied or intended by the "Smith Act." Like Caesar's ambition, as described by Shakespeare's Brutus

> "Then, lest he may, prevent. And, since the quarrel
> Will bear no colour for the thing he is,
> Fashion it thus; that what he is, augmented,
> Would run to these, and these extremities;
> And therefore think him as a serpent's egg,
> Which, hatch'd, would, as his kind, grow mischievous,
> And kill him in the shell."

we must destroy Communism at its source.

The lower court, without supporting authority, cited the disparity between the penalty prescribed under the "Smith Act" and the Pennsylvania Sedition Act, which it said: "strongly argues that it was not the Congressional purpose that, after enactment of the "Smith Act," conflicting or disparate state statutes on the same subject should be called into play for the punishment of sedition against the United States." (Vol. I, R. 59)

The Federal Government could operate if the government of a state, or even a number of states, were disrupted by rebellion or insurrection. This was proven in the Civil War during which our government still functioned under the Constitution, although several states had seceded, *but no state could conceivably function under our federal system if the Federal Government were annihilated and our* fundamental constitutional structure was destroyed. As stated in Whitney v. California, *supra,* state sedition acts "must be presumed to be aimed at an evil where experience shows itself to be most felt, and to be deemed by the legislature co-extensive with the practical need." The difference between the length of sentence under the two Acts is not a conflict, as the Legislature of the Commonwealth of Pennsylvania apparently deemed it necessary to establish a penalty co-extensive "with the practical need" where it was most felt.

III

Double Jeopardy Is Not Involved In This Case

The lower court, in the course of its opinion, also stated that:

> "If conviction under the state's statutes for sedition against the Government of the United States were permitted to be operative in the face of the Smith Act, then double punishment for the same offense would be possible."

In the light of the decisions cited herein, this position is untenable.

In State v. Holm, *supra,* which was cited with approval in Gilbert v. Minnesota, *supra,* the state court said:

> "It is the duty of all citizens of the state to aid the state in performing its duties as a part of the Nation and the fact that such citizens are also citizens of the United States and owe a direct duty to the Nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty."

In Gilbert v. Minnesota, *supra,* this court stated that the "fact that the citizens of the state are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the state nor preclude a state from enforcing such duty. 'The same Act' it was said 'may be an offense or transgression of both Nation and state' and both may punish it without a conflict of sovereignties."

In Moore v. State of Illinois, *supra,* this court also said that:

> "Every citizen of the United States is also a citizen of the state or territory. He may be said to owe allegiance to two sovereigns and may be liable * * * for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both."

Again, in Ex parte Siebold, *supra,* it was stated that:

> "Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account."

This principle was also approved by this court in Presser v. State of Illinois, *supra,* Halter v. State of Nebraska, *supra,* and United States v. Lanza, 260 U. S. 377 (1922).

In each of the foregoing cases, the question of preemption by Congress was an issue.

The contention of double jeopardy is without merit.

CONCLUSION

In summa, we submit that for the reasons herein stated, the Commonwealth of Pennsylvania had an inalienable right, in the exercise of its police powers, to adopt and enforce the provisions of the Sedition Act in question herein, under which the respondent was convicted, and that this court should reverse the action of the Pennsylvania Supreme Court in quashing the indictment.

Respectfully submitted,

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APPENDIX I

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 USCA 2385.

Section 2385 and Pertinent Portion of Section 2386 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808—18 U. S. C. A. 2385, 2386:

§2385. Advocating overthrow of Government

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying 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, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

APPENDIX II

Section 4207 of the Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207:

The word "sedition," as used in this section, shall mean:

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

The word "sedition" shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both. 1939, June 24, P. L. 872, §207.