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MISCELLANEOUS

# Supreme Court of the United States

## OCTOBER TERM, 1954

## No. 236

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**Commonwealth of Pennsylvania,**
**Petitioner,**

**vs.**

**Steve Nelson,**
**Respondent.**

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**Brief of *The State of New Hampshire* as Amicus Curiae in Support of the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania**

Joined by the Attorneys General of:

| | | |
|---|---|---|
| Arizona | Maryland | New York |
| Connecticut | Massachusetts | North Carolina |
| Florida | Michigan | Ohio |
| Georgia | Mississippi | South Carolina |
| Indiana | Montana | Tennessee |
| Kansas | Nebraska | Virginia |
| Louisiana | Nevada | Washington |
| Maine | New Mexico | Wisconsin |

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### Authority for this Brief

This brief is filed by The State of New Hampshire, acting by its Attorney General, Louis C. Wyman, joined by 24 states by their respective Attorneys General, in accordance with the revised Rules of the Supreme Court of the United States, Rule 42, paragraph 4.

## Opinions Below

*Commonwealth* v. *Nelson,* Superior Court of Pennsylvania, reported in 172 Pa. Sup. Ct. 125, 92 A. 2d 431.

*Commonwealth* v. *Nelson,* Supreme Court of Pennsylvania, reported in 377 Pa. 38, 104 A. 2d 133.

Re-Argument denied by order of the Supreme Court of Pennsylvania, 377 Pa. 60.

## Jurisdiction

Remedies within the Commonwealth of Pennsylvania have been exhausted before its Supreme Court by petitioner for certiorari. Petition for re-hearing was denied on April 27, 1954. Jurisdiction is submitted to rest on 28 U.S.C. 1257 (3) and Rule 19, 1-a of Part 5 of the Rules of the Supreme Court of the United States. The decision of the Pennsylvania Supreme Court involved a federal question of substance not believed to have been heretofore determined by this Honorable Court and in a manner not in accord with applicable decisions of the Supreme Court of the United States.

## Question Presented

Whether Title 18, U.S. Code, s. 2385, enacted June 25, 1948, 62 Stat. 808, 18 U.S.C.A., s. 2385, supersedes by implication s. 4207, Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207, as set forth in the Petition for Writ of Certiorari, p. 6.

## Statutes Involved

*Section 2385* of the *Federal Code of Crimes and Criminal Procedure* of June 25, 1948, 62 Stat. 808, 18 U.S.C. 2385:

"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."

*Section 3231* of the *Federal Code of Crimes and Criminal Procedure*, June 25, 1948, c. 645, 62 Stat. 826; 18 U.S.C. 3231:

"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."

*Section 4207* of the *Pennsylvania Penal Code of 1939*, 18 Purd. Penna. State. Ann. 4207 (*Petition for Writ of Certiorari*, p. 6)

## Preliminary Statement

We, the undersigned Attorneys General of several states of the Union for our several States respectfully file this brief *amicus curiae*, believing deeply that the majority opinion of the Supreme Court of Pennsylvania in the principal case is contrary to the supreme law of the land, contrary to numerous previous decisions of this Court, unsound in theory and practice, and violative of States' Rights. If the opinion of the Pennsylvania majority should be affirmed by this Honorable Court, it will destroy long-standing

legislation in many of the States of the Union which has sought to protect the security of the States against sedition and subversion.

We believe that no provision of the Constitution expressly grants to the federal government the power to legislate exclusively in matters of subversion, sedition, or treason, whether in respect to State Sovereignty or national sovereignty. We believe, even though this Honorable Court should hold that the Constitution gives to the Federal Government power to exclude state laws prohibiting subversion or sedition, that examination of the legislative history of the *Smith Act* shows clearly that Congress never intended to assert exclusive jurisdiction in this vital field. We feel strongly that judicial doctrine of supersession by implication in such matters is dangerous doctrine and bad law, running counter to every known precept of careful statutory construction.

For our several States, we respectfully urge this Honorable Court to hold that each of the several States of the Union possesses the reserved police power to enact legislation making criminal attempts to overthrow its sovereign government or the government of the United States or either of them by force and violence or other unlawful means. For this purpose we submit that from any reasonable viewpoint an attempt to overthrow the government of the United States is *per se* a clear and present danger to the safety, security and sovereignty of any State Government within whose jurisdiction such an attempt is made, and that this is so regardless of whether the offenders seek the prior or contemporaneous overthrow of the particular State Government within whose borders they act.

We have filed this brief as friends of the Court because of the vital importance to all of the States of the decision in this matter. It is confined entirely to a discussion of what we respectfully assert to be the error of law committed by the Supreme Court of Pennsylvania in holding the *Smith Act* to have impliedly superseded all state statutes in matters of subversion or sedition.

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## Summary of Argument

Since Congress did not say in the *Smith Act* that it superseded State (anti-subversive and sedition) laws, the fiction of implied intent to supersede has been improperly ascribed to this federal law by the Pennsylvania Supreme Court. Congressional debates prior to its enactment find Congressman Smith, author of the Act itself stating on the floor of the House of Representatives that the *Smith Act* ". . . has nothing to do with state laws." And prior to this significant statement a study of hearings before the House Judiciary Committee reveals that the members of that Committee, favorably reporting the *Smith Act,* had reviewed and discussed the *Gitlow* case, which emphasized the validity and enforceability of concurrent State laws concerned with sedition and subversion. Had there been any intention to supersede State laws, Congress would have specified supersession in the *Smith Act* itself. In fields of such grave and vital importance to the safety and security of the forty-eight sovereign States, Congress should be required to specify supersession so that the States' U.S. Senators and Representatives may know the full scope of their yeas or nays.

It is respectfully contended that Congress could not constitutionally supersede the reserved police power of the States to make it a crime to advocate or seek to overthrow the *States* themselves by force and violence. It is believed to be doubtful whether Congress has power to supersede State laws making it a crime within each State to advocate or seek to overthrow the *United States* in view of the immediate inseparable danger to each State itself

from such subversive advocacy or activity, and in view of the failure of the Constitution itself to grant such an express power to the Federal Government.

However, the principal case is not believed to require a decision on what Congress could or could not do vis-a-vis State laws because the record shows no valid basis to support a finding of supersession by implication. Only in the event this Honorable Court should find such implied supersession would it reach the problem of whether Federal supersession of such basic and vital State laws is itself constitutional. Nor is there such repugnancy or conflict between the *Smith Act* and the various State laws as to warrant a finding that State anti-subversive and sedition laws hamstring or render ineffectual the Federal proscription. On the contrary, a careful examination of the provisions of all, reveals correlative, complementary, concurrent Federal and State legislation in a field of vital concern *both* to the Federal Government *and* to the separate States. None of the authorities cited by the majority are believed to support either the holding or the reasoning stated in the principal case in reference to the judicial fiction of supersession by implication.

In the current setting of national and international affairs, a more important matter for resolution by the Supreme Court of the United States would be difficult to conceive. Basic fundamental, and heretofore considered inviolate, reserved powers of each of the States in the Federal Union are rejected by the majority decision of the Pennsylvania Supreme Court, which this Honorable Court is respectfully urged herein to reverse and remand.

## Argument

### I. NEITHER EXPRESSLY NOR BY IMPLICATION HAS FEDERAL LAW ATTEMPTED TO TAKE FROM THE STATES THE POWER TO ENACT ANTI-SUBVERSIVE LEGISLATION.

a. *No express Federal supersession exists.*

The majority opinion of the Supreme Court of the Commonwealth of Pennsylvania concedes that relevant federal law (s.

2385, *Federal Code of Crimes and Criminal Procedure*, June 25, 1948, 62 Stat. 808, 18 U.S.C. 2385, otherwise known as the *Smith Act*) does not expressly provide that it shall supersede conflicting concurrent or cumulative provisions of state law.

See: *Opinion, Supreme Court of Pennsylvania*, 377 Pa. 38, 104 A.2d 133; *Appendix to Petition for Certiorari*, pp. 68a, 69a.

Neither respondent nor any other known source has ever contended that Congress expressly superseded State laws in its *Smith Act*. It is submitted that this fact, standing alone, is significant in determining the intent of Congress, inasmuch as words of art to accomplish such a purpose are well known to Congress and have been used upon repeated occasions where supersession has been intended. Furthermore, in the re-enactment in 1948 of Title 18, U.S.C., of which the *Smith Act* was a part, s. 3231 of that Title explicitly provided that:

> ". . . Nothing in this Title shall be held to take away or repeal the jurisdiction of the courts of the several states under the laws thereof." 62 State., c. 645, s. 826, June 25, 1948.

This reservation of state court jurisdiction was not new but was based in turn upon the 1940 Edition of U.S.C., Titles 12 and 18, and was formed by combination of ss. 546 and 547 of Title 18, U.S.C., 1940 Edition, with s. 588d of Title 12, without change of substance. It is apparent from even a cursory examination of this reservation, including reference to *House Report No. 304* of the *80th Congress*, 1st. Session, that the Judiciary Committee had considered such offenses as bank robbery, killing and kidnapping, (as to which concurrent federal-state jurisdiction is notorious) in merging s. 588d of Title 12 into s. 3231, *supra*. The old s. 588d read:

> "Jurisdiction over any offense defined by sections 588b and 588c of this Title shall not be reserved exclusively to courts of the United States."

The concluding notation of *House Report No. 304, 80th Congress*, 1st Session, *supra*, stated (p. A148):

"The phraseology was considerably changed to effect consolidation *but without any change of substance.*" [Emphasis supplied]

b. *Neither the Smith Act, nor any other Federal Statute supersedes State anti-subversive laws by implication, including the Pennsylvania-Sedition Act (s. 4207 of the Pennsylvania Penal Code of June 24, 1939).*

The *Smith Act* actually complements many State statutes dealing with sedition and subversion. It was first enacted at a time when numbers of State anti-sedition statutes were in existence and had been since the end of World War 1.

See: Gellhorn, *The States and Subversion* (App. B, p. 414) Cornell Univ., Press, 1952.

It is not a registration statute with attendant detailed federal administrative requirements. In no respects does it conflict with the provisions of the Pennsylvania Sedition Act, nor with other State statutory provisions. The jurisdiction of State courts, being concurrent, is dual.

*Albertson* v. *Millard,* 106 F. Supp. 635, 641 (E.D. Mich. 1952)

See: *Robb* v. *Connelly,* 111 U.S. 624

*Cross* v. *North Carolina,* 132 U.S. 131, 139.

*Pearce* v. *State,* 115 Ala. 115, 22 So. 502.

As a matter of chronology, the *Smith Act* post-dates the Pennsylvania Sedition Act. Its re-enactment in 1948 as a part of Title 18, U.S.C. post-dates other intervening legislative pronouncements such as:

*Alabama:* L. 1947, c. 60;
*North Carolina:* L. 1947, c. 1028.

In the language of Mr. Justice Frankfurter, it is essential to be continually on guard against "judicial proliferation of [legislative] purpose". In speaking of interpretation of congressional legislation regulating activities entwined with interstate commerce. Justice Frankfurter has cogently pointed out that:

"When the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically re-adjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective extension of meaning which properly deserves the stigma of judicial legislation." *Some Reflections on the Reading of Statutes by Mr. Justice Frankfurter,* THE RECORD of the Association of the Bar of the City of New York, Vol. 2, No. 6, June, 1947, pp. 213, 230, 1. 7.

*cf. State Control of Subversion: A Problem in Federalism, 66 Harv. Law. Rev. 327 (1952)*

i. *An examination of the legislative history of the Smith Act compels the conclusion that Congress did not intend to supersede State laws.*

The author of the *Smith Act* was Representative Howard W. Smith of the Eighth District of Virginia. As indicated in his letter to the Attorney General of Pennsylvania (*Appendix to Petition for Certiorari,* p. 97a), he never had the faintest notion that Congress was nullifying the concurrent jurisdiction of the sovereign states. He was the sponsor of this legislation. His voting record and his constituency are from a State in which it is submitted that traditional position as a matter of judicial notice is that of a States' Rights Southern Democrat. An examination of the debates in the House of Representatives at the time when Congress was originally considering the *Smith Act* bears out the statements of Representative Smith in his letter, *supra,* which is a part of the record in the principal case. In the *Congressional* Record of July 29, 1939, at p. 14525, appears the following exchange between Representative Smith and Representative May:

"MR. MAY: Mr. Chairman, will the gentleman yield?

"MR. SMITH OF VIRGINIA: I will be pleased to yield to the gentleman.

"MR. MAY: I notice that the title just offered as an amendment provides penalties for conspiracy to overthrow the

> government or to assassinate officers, or things of that sort. Is there any conflict in the penalty that is provided in the section referred to that fixes the penalty, and the various penalties that may be provided in the various states that have statutes on the same subject?
>
> "MR. SMITH OF VIRGINIA: *This has nothing to do with state laws.* This provides penalties for violations of this law. [Emphasis supplied]
>
> "MR. MAY: I understand it is a federal statute, or will be when enacted; but I was just wondering if there was any more severity to be exercised under this law than under the usual state law."

The *Smith Act* was originally introduced by Representative Smith as an amendment to the Alien Registration Act of 1940 (18 U.S.C. c. 439, 54 Stat. 670). It was stated by its author to be of general application and not confined to aliens. In this sense it stands alone and thus has come to be referred to as the *Smith Act*, in contra-distinction to the broader title of which it was a part and which was considered by this Honorable Court in *Hines* v. *Davidowitz*, 312 U.S. 52. As Representative Smith said at the time of offering his amendment:

> "Now I want to tell you what Title I does. We have heard a lot of talk here about abusing the poor aliens. The gentlemen who have been talking that way cannot complain about this section. We have laws against aliens who advocate the overthrow of this government by force, but do you know there is nothing in the world to prevent a treasonable American citizen from doing so? He can advocate revolution, the overthrow of the government by force, anarchy, and everything else, and there is nothing in the law to stop it. *This amendment makes it unlawful for any person, be he American citizen or alien, to advocate the overthrow of the government of the United States by force . .*" *Congressional Record*, July 29, 1939, p. 10452. [Emphasis supplied]

The amendment offered by Representative Smith on July 29, 1939 followed full consideration of the original bill (H.R. 5138)

by the Committee on the Judiciary of the House of Representatives in the 76th Congress. An examination into the hearings before Sub-committee No. 3 of the House Committee on the Judiciary, Serial No. 3, on April 13, 1939, shows that at the time the Committee itself considered the provisions dealing with advocacy of the overthrow of the government of the United States or of any State, as proposed in H.R. 5138, it had very much before it the decision of this Honorable Court in *Gitlow* v. *The People of the State of New York,* 268 U.S. 652. In fact, one of the witnesses before the Committee, appearing in support of H.R. 5138, referred specifically to the parallel between these provisions and the Criminal Anarchy Act of New York State which was passed upon by this Honorable Court in the *Gitlow* case, *supra.* This witness (Mr. Trevor) testified in part as follows:

"MR. TREVOR: I think I am quite safe in saying that this draft is expressly within the terms of the decision that was handed down by the Supreme Court. That was a question involving litigation on freedom of speech, and as covered in this bill it is clearly within the terms of this decision of the Supreme Court.

"MR. HEALY: Do you have the citation of the *Gitlow* case?

"MR. TREVOR: Yes, sir . . .

. . . . .

"MR. SPRINGER: Speaking about the *Gitlow* case, did you give us the book and page where this is recorded?

"MR. TREVOR: It is *Gitlow* v. *The People of New York,* p. 652.

"MR. SMITH: 268 U.S.

"MR. HANCOCK: 268 U.S., page 652?

"MR. TREVOR: Yes, . . ."

From the foregoing, it is clear not only that the author of the Act himself stated that his act had nothing to do with state laws,

but that the members of the House Judiciary Committee, reporting the Act itself, did so with particular reference to the *Gitlow* case, in which this Honorable Court, through Mr. Justice Sanford, cited with approval *Gilbert* v. *Minnesota,* 254 U.S. 325, and said: (p. 667)

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . . Thus it was held by this Court in the Fox case [*Fox* v. *Washington,* 236 U.S. 273], that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.
>
> "And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlaw means. These imperil its own existence as a constitutional state. . . . 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,* 314 Ill. 23, 34. See also, *State* v. *Tachin,* 92 N.J.L. 269, 274; and *People* v. *Steelik,* 187 Cal. 361, 375. 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. *Turner* v. *Williams,* 194 U.S. 279, 294 . . .
>
> "By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute . . . Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none

> the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . ."

In the same sense, none of the States of the Union may constitutionally be required to defer reasonable measures for their own peace and safety to a claim of superseding federal authority, which although admittedly possessed of such excellent organizations as the Federal Bureau of Investigation, nevertheless of necessity is incapable of adequately covering immediate local danger to all the States of the Union throughout all the breadth and length of this land from such attempts to destroy their sovereignty by force and violence. The legislative history of the *Smith Act* is not barren on the question of lack of congressional intent to supersede State laws by implication. On the contrary, there is manifest throughout the thread of its history the fact that there was no intention to supersede concurrent state legislation, whether related to attempts to overthrow the government of the various states themselves or attempts to overthrow the government of the United States. It is worthy of note that in the Second Session of the 83rd Congress the same Congressman Smith of Virginia on March 3, 1954, introduced into the House of Representatives, H.R. 8211, which provided that there should be no supersession by implication of any Act of Congress and that all such Acts would not exclude state laws on the same subject-matter with-

out express provision to that effect. In view of this legislative history, it is submitted that the statement by the Supreme Court of Pennsylvania (*Appendix to Petition for Certiorari,* p. 71a, l. 19) that "federal pre-emption could hardly be more clearly indicated" is completely without foundation in law or in fact.

After 1948 still more States of the Union enacted laws prohibiting subversive activity within their borders:

| | |
|---|---|
| *Arkansas* | Session Laws of 1951, chapter 401. |
| *California* | Deerings California Code—Corporations, sections 35000 *et seq.* |
| *Florida* | Laws 1953, chapter 392. |
| *Georgia* | Laws 1953, chapter 259. |
| *Indiana* | Laws 1951, chapter 226. |
| *Louisiana* | Acts of 1952, No. 506. |
| *Maryland* | Annotated Code of 1951, Article 85-A. |
| *Massachusetts* | Laws 1951, chapter 805, section 3. |
| *Michigan* | Public and Local Acts, 1952, chapter 117. |
| *Montana* | Laws 1951, chapter 215. |
| *New Hampshire* | Laws 1951, chapter 193. |
| *New Mexico* | Laws 1951, chapter 157. |
| *Ohio* | Laws 1953, chapter 208. |
| *Pennsylvania* | Laws 1951, chapter 454. |
| *South Carolina* | Acts and Joint Resolutions, 1951, No. 319. |
| *Texas* | General and Special Laws, 1951, chapter 8. |
| *Virginia* | Code of 1950, Title 18, sections 350, *et seq.* |
| *Washington* | Laws 1951, chapter 254. |

To read into a federal statute dealing with matters of fundamental security to State and Nation a constructive implication of proscription of security measures by separate sovereign states of the Union is dangerous doctrine. Supersession by implication is at best but a post mortem attempt to reconstruct legislative intention. Such reconstruction should never reach the proportions of judicial legislation in fields of inextricably correlative State and National security.

See: *California* v. *Zook,* 336 U.S. 725, 728.
*Ex Parte Dixon,* 41 Cal. 2d 756, 264 P. 2d 513, 517.

ii. *Congress lacks constitutional power to supersede either expressly or by implication the States' reserved right to make criminal within their borders acts seeking overthrow of their own government by force and violence.*

There is some confusion in the record in the principal case by reason of the fact that the Pennsylvania Supreme Court has stated:

> ". . . It is only alleged sedition against the United States with which the instant case is concerned." *Appendix to Petition for Certiorari*, p. 70a.

This confusion arises by virtue of the fact that the indictment against Respondent, Steve Nelson, charged him with prohibited activities seeking the overthrow of the government of Pennsylvania and of the United States by force and violence.

See: *Appendix to Petition for Certiorari*, pp. 1-a, *et seq.*

Respondent, Steve Nelson, was convicted by the jury on twelve counts, all of which involved advocacy, incitement, or attempts to overthrow by unlawful means the State of Pennsylvania, as well as the United States government. Upon what basis the Pennsylvania Supreme Court concludes that it is only sedition against the United States with which it or the indictments are concerned is difficult to perceive.

Obviously, an act of sedition against Pennsylvania or New Hampshire, or any other State in the Union, is an act of sedition against the United States. Conversely, subversive activities designed to overthrow the Federal Government by force and violence are themselves an immediate threat to the safety and constitutional security of each and every one of the States. Other than in the District of Columbia or upon isolated locations exclusively subject to the jurisdiction of the Federal Government, such criminal activities must of necessity originate within the confines and jurisdiction of a State. To contend that the duty of suppressing such seditious criminal activities within a State rests exclusively upon the Federal Government is in fact to sanction the creation

of a national police force, which in country after country has been the principal medium through which totalitarian powers have been achieved by the human beings who happen to head the government at the time. At the rate at which communists, their supporters and dupes have been showing up in the various States in testimony presented to both State and Federal Committees, the personnel of The Federal Bureau of Investigation would have to be multiplied many times over to be in a position to do anything more than make a token gesture of adequacy if all local and state police are to be divested of jurisdiction in subversive cases. Nothing, it is respectfully submitted, would have more shocked the founding fathers of the Constitution or the people of the original signatory states than to have believed at that time that the greatest living document creating a republican form of government authorized the federal government to take from the States their basic right to make criminal, attempts to destroy their sovereignty, kill their loved ones if need be, and seize their homes.

See: *Nelson* v. *Wyman,* 99 N.H. 33, 105 A. 2d 756 (1954);
*Fox* v. *Ohio,* 5 How. 410, 434;
*United States* v. *Lanza,* 260 U.S. 377, 382.

As this Honorable Court has itself stated in *Allen-Bradley Local* v. *Board,* 315 U.S. 740, in distinguishing *Hines* v. *Davidowitz* (312 U.S. 52) at p. 749, l. 12:

> ". . . Nor are we faced here with the precise problem with which we were confronted in *Hines* v. *Davidowitz,* 312 U.S. 52. In the Hines Case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local

> matters as public safety and order and the use of streets and highways. *Maurer* v. *Hamilton,* (309 U.S. 598) *supra,* and cases cited. Here we are dealing with the latter type of problem. *We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.*" [Emphasis supplied]

And in *Reid* v. *Colorado,* 187 U.S. 137, at p. 148, l. 22, this Court stated:

> ". . . 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."

With all due respect to the sweeping hypotheses of the learned Justices of the majority in the Commonwealth of Pennsylvania, *Article IV,* section 4, of the *United States Constitution* does not authorize the Federal Government to exclusively usurp the field of anti-subversive legislation, sedition, or treason. An examination of *Article IV, section 4,* indicates quite plainly that it is the *political form of government* which is involved and that it was the design of the founding fathers to protect and preserve that republican form of government throughout the component members of the Union, as well as in the national government. Coupled with the constitutional mandate of *Article IV* that every State in the Union should be guaranteed a republican form of government is the enjoinder to ". . . protect each of them against invasion", and in fact against domestic violence, but even then only upon application of the State Legislature or its executive authority.

See: *Nelson* v. *Wyman,* 99 N.H. 33, 105 A. 2d 756 (1954);
*Luther* v. *Borden,* 7 How. 1 (1849)

*Article IV, section 4,* confers authority upon the Federal Government to aid and protect the States in the Union against invasion (and upon request, against domestic violence), and to insure that in no State should there come to pass a form of government opposed in principle and practice to the precepts of the Constitution. Exclusive federal control of conspiracy to subvert by in-

dividual citizens of the State and Nation is plainly not the purpose of this Article, nor does it by any stretch of tortured interpretation authorize Congress to pre-empt States' rights to proscribe such activity within their borders.

The *Tenth Amendment* to the *Constitution* provides expressly that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Certain powers in the *Constitution* are undoubtedly expressly granted to the Federal Government. These powers are set forth expressly in *Article I, section 8*. Under these express powers it has been held repeatedly by this Honorable Court that the national Congress may provide exclusive legislation. Such decisions have rested either upon the power to regulate commerce, coin money, punish counterfeiters, raise and support armies, establish uniform rules of naturalizations, and bankruptcies, among others. None of these enumerated express powers grants to the Federal Government the exclusive right to legislate in matters of subversion against State or Nation. The contention of the Pennsylvania Supreme Court that *Article IV, section 4,* is the door through which the Federal Government may pre-empt State legislation in this field is illogical and unreasonable in the extreme as is the Court's statement (*Appendix to Petition for Certiorari,* p. 70a, l. 22) that it has not found a single word indicating a seditious utterance directed against the government of Pennsylvania. One needs look no further than daily events to see Communist activities all over the world pointed in starkly dramatic yet tragic fashion directly at the eventual destruction of the United States of America, meaning Washington, D. C., and each single sovereign State. The destruction of either inescapably involves the other.

The *United States Constitution* may perhaps be likened to a life contract between the States and the Federal Government. Under its common roof we all live—the father, Federal Government; the mother, States with the people therein, who are at once

both citizens of their States and of the United States, owing allegiance to both sovereign powers. Immediate concern with any attempt to burn the house down is the joint responsibility of all who live under the same roof. It is simply untenable to contend that only father has the power under the contract to deal with individual citizens who seek to destroy the home. The *Constitution* just does not give father this exclusive power. There was no father Federal Government until the people created it by compact (Constitution) between the States. Anti-subversion statutes sedition statutes, treason statutes—all and seriatim, involve no specialized area of foreign policy, commerce, immigration or other federal paternal orbit in which great harm and confusion might result from varying formulae for proscription of subversion in the several States.

The Sovereign States have reserved police power to prohibit subversive or seditious activities, whether directed ostensibly at their own government or at the government of the United States. The two are inseparable in this light, and it is the clearest possible correlative concern of each of the States of the Union to prohibit attempts to overthrow either the State or the Federal Government by force and violence.

See: *Halter* v. *Nebraska,* 205 U.S. 34;
*Gilbert* v. *Minnesota,* 254 U.S. 325;
*Gitlow* v. *New York,* 268 U.S. 652;
*Kelly* v. *Washington,* 302 U.S. 1;
*Thornhill* v. *Alabama,* 310 U.S. 88, 105;
*Dennis* v. *United States,* 341 U.S. 494;
*Nelson* v. *Wyman,* 99 N.H. 33, 105 A. 2d 756 (1954);
*State* v. *Holm,* 139 Minn. 267;
*People* v. *Most,* 171 N.Y. 423.

There are many other interests of a State which justify State anti-subversive legislation, including the dangers of riot, local insurrection, and other public disturbances which are inherent in advocacy of subversive doctrine amongst loyal citizenry. If some of the States see fit to be tougher on subversives than others, that is their business. The *Constitution* does not authorize the Federal Government, directly or indirectly, to take away from them their

fundamental reserved police power to so legislate in their own self-defense. Provided no other provision of the Federal Constitution is violated by a State in the process of its local legislation in these fields, it is the reserved police power of each State under the *Tenth Amendment* to provide such laws as its legislature may see fit to enact against attempts to overthrow it.

## II. NO COMPELLING REASON FOR SUPERSESSION EXISTS

The provisions of the *Smith Act* are contained in less than a single page of printed material. One has only to glance at their content and context to observe that they are not sweepingly all-pervasive. On the contrary, they merely contemplate concurrent State and Federal jurisdiction of subversion. In the language of a recent note in the *Harvard Law Review,* (67 Harv. L. Rev., No. 8, pp. 1419, 1420, l. 17):

> "State prosecutions of acts which are seditious as to the state would present the same possibility of interference with the administration of the federal statute, however, since what is subversive as to one government would ordinarily also be subversive as to the other. Thus, it would appear that if Congress intended to occupy the field in order to prevent such interference, it must have intended to exclude the imposition of criminal sanctions for most acts of subversion against the state. But, although the United States guarantees each state a republican form of government, *United States Constitution, Article IV, section 4,* it would not seem proper to confer that intent since to deprive the state of the ability to protect itself would amount to such limitation on its sovereignty as to be of doubtful constitutionality. Moreover, the legislative history of the Internal Security Act of 1950 indicates that at that time Congress did not believe the Smith Act had occupied the field. See, House Report No. 2980, 81st Congress, 2nd Session, 2 (1950); House Report No. 1950, 81st Congress, 2nd Session, 25-46, (1950) (Un-American Activities Committee)." (emphasis supplied)

The danger to State sovereignty implicit in the decision of the Pennsylvania Supreme Court is quite apparent. The decision as

it now stands, if not reversed by this Honorable Court, threatens all State anti-subversive laws, or State antisedition statutes, and in fact casts grave question on even statutes of the various States proscribing treason. All such State statutes involve lawful exercise of the reserved constitutional powers of the States. In *Hines* v. *Davidowitz*, 312 U.S. 52, it was pointed out by Mr. Justice Stone in his dissenting opinion, at page 77 that:

> "The existence of the national power to conduct foreign relations and negotiate treaties does not foreclose state legislation dealing exclusively with aliens as such. . ."

And at p. 75, Mr. Justice Stone emphasized the need to protect the States against the tendency of the National Government to grasp more and more power for itself:

> "Assuming, as the Court holds, that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that which Congress has failed to do.
>
> "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. . . . The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern."

a. *The States and the Federal Government have concurrent jurisdiction to make criminal, sedition or subversion against the United States.*

Discussing for the moment only the right and power to legislate concerning sedition or subversion against the Federal Government, as distinct from sedition or subversion solely against the sovereignty of the States, it is settled law that the States and the Federal Government together have concurrent jurisdiction to make sedition or subversion against the United States a crime.

> "Offenses which are directed against the sovereignty of a state, or which directly affect the state or its population, while punishable in such state, notwithstanding the fact that such offenses are also directed against the sovereignty of the federal government, unless the constitution gives the federal government exclusive jurisdiction over the offense; and even where the federal courts have exclusive jurisdiction over one aspect of an offense, this does not prevent a state court from prosecuting another aspect of the same offense . . ." 1 *Wharton's Criminal Law,* (12th Ed.), s. 307, 2 (1932).

Treason against a State is also treason against the United States. As set forth in Vol. 3, *Wharton's Criminal Law* (12th Ed., s. 2183:

> "The principle is as follows: Wherever a particular state in a confederacy has reserved to it the right of prosecuting in its own name and as against its own people and dignity, offenses committed within its borders; and it has the juridical right to maintain its integrity by prosecuting for treason subjects who attack its political existence. If we apply this test, there can be no question that the right to prosecute for treason against themselves is reserved to the particular States of the American Union. Each of these, not only by its own constitution and laws, but in accordance with repeated recommendations of the federal Supreme Court, prosecutes as against its own people and dignity, all offenses except those aimed specifically at the delegated powers of the federal government."

See: *State* v. *Whittemore,* 50 N.H. 245, 247 (1870), where the honorable and distinguished former Chief Justice of the Supreme Court of New Hampshire, Jeremiah Smith, in disposing of a contention that perjury committed in a state court relative to application for naturalization under the laws of the United

States, was not indictable in the court of New Hampshire as an offense against New Hampshire, said:

> ". . . We have concluded that the offense is punishable under the state law, although it may also be punishable under the United States law. . . ."

He then quoted with approval the reasoning of Grier, J. in *Moore* v. *Illinois,* 14 How. 13, pp. 19, 20:

> " '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 to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may, if they see fit, punish such offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one, in bar to conviction by the other; consequently, this court has decided in the case of *Fox* v. *The State of Ohio,* 5 How. 432, that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States* v. *Marigold,* 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.' "

It is doubtful whether Congress has power to expressly preempt State laws making it a crime to commit sedition or subversion against the United States within their respective borders. The State legislation struck down by the Pennsylvania Supreme Court is vitally concerned with the social order and safety of the people of the Commonwealth of Pennsylvania. It is respectfully submitted that any attempt within a State to overthrow the gov-

ernment of the United States by force and violence is at once, and *per se,* a clear and present danger to the sovereignty of the State itself. In terms of humanities, it is a threat to the life, liberty, property, and pursuit of happiness of each individual citizen of Pennsylvania, whether he is a state government official or engaged in private pursuits. The relationship between the States and the Federal Government for purpose of sedition and subversion is in all respects practically identical insofar as danger to either from threatened overthrow of the other by force and violence is concerned. Whether this principle may be carried to the extent of including a right within a State to make criminal an attempt to overthrow the government of another State, as distinct from the national government, is not involved in the present case. As a matter of fact, the problem of whether Congress might expressly pre-empt State anti-subversive laws insofar as they attempt to proscribe subversion against the Federal Government, is also putative inasmuch as for the reasons outlined previously in this brief, Congress has not done so.

The *Smith Act* itself does not constitute Federal legislation in a field in which the Constitution has granted the Federal Government authority for exclusive legislation. It does not fall within the treaty-making power, foreign policy, interstate commerce, naturalization, bankruptcy, declaration of war, maintenance of armed forces, coinage, insurrection, nor invasion categories. It has been suggested that the power is contained in *Article I, section 8,* which provides:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Again, for reasons hereinabove stated, it is believed that this granted power deals with military and social legislation and never was intended by the authors of the Constitution to expressly grant to the Federal Government the power to exclude the rights of the States to themselves, punish those who within their borders seek to overthrow the national government by force and violence.

## III. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IS CONTRARY TO AUTHORITY

A careful examination of the authorities cited in the majority opinion of the Supreme Court of Pennsylvania in this case compels the conclusion that, with all due respect to the learned justices, they do not support the conclusions drawn from them by the Court. It would be beyond the proper scope of this brief *amicus curiae* to discuss each and every case cited therein lest this brief assume disproportionate length. As stated in the *Preliminary Statement, supra,* p. 6, this brief is directed solely to the proposition that the opinion of the majority in the principal case has grevously erred in its conclusion of implied federal supersession of state laws. In its opinion, at p. 63a of the *Petition for Certiorari,* the Supreme Court of Pennsylvania has stated:

> "If the Pennsylvania Act was so superseded, then the defendant's conviction cannot be sustained."

By the majority's finding of implied supersession there was rendered unnecessary any further consideration of issues of double jeopardy, double punishment, passion, or prejudice, or other matters properly to be previously determined by the highest court of the Commonwealth of Pennsylvania before coming to the Honorable Court of Review. Study of the authorities cited by the Supreme Court of Pennsylvania in support of their conclusion of implied supersession reveals a total lack of apt prceedent to support the conclusions stated.

*Tennessee* v. *Davis,* 100 U.S. 257, concerned the removal of a revenue officer's murder trial to a federal court. It involved facts directly related to a power expressly granted to the Federal Government by the Constitution, to wit, the power to lay and collect taxes.

See. *Constitution, Art.* I, *s.* 8.

*Rice* v. *Santa Fe Elevator Corporation,* 331 U.S. 218, involved a warehouse licensed under the United States Warehouse Act, a federal pronouncement by virtue of express authority granted to

the Federal government to regulate commerce amongst the several states.

Likewise, all of the cases cited by the majority on pages 65a and 66a find the same common denominator, namely, express or implied supersession by virtue of authority granted to the Federal Government by clear provision of the Constitution. Even *Hill* v. *Florida,* 325 U.S. 538, involved a conflict between state law and the National Labor Relations Act and was justified under the commerce clause. *Hines* v. *Davidowitz,* 312 U.S. 52, finds a comprehensive provision for alien registration authorized by virtue of the express grant to the Federal Government concerning foreign policy and treaty power. As Mr. Justice Black so aptly stated in the majority opinion, p. 62, 67:

> ". . . That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of *The Federalist* in 1787 and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . .
> "Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; . . ."

None of the reasons compelling the conclusion of supersession reached in the *Hines* case apply with force to the case presently before this Honorable Court. On the contrary, legislation in the various states dealing with their security and with the public

safety under their reserved police power does not conflict with the federal *Smith Act* but is entirely complementary to it. Even *Savage* v. *Jones,* 225 U.S. 501, 533, relied upon by the majority as authority for "that which needs must be implied" (p. 66a) derived authority for paramount federal legislation from the express power of the commerce clause.

For the next six pages of its opinion, the majority cites no authority whatever, and at p. 73a, in discussing and attempting to distinguish *United States* v. *Lanza,* 260 U.S. 377, the opinion of the majority merely categorically states its conclusion that that authority for concurrent jurisdiction is inappropriate as not akin to sedition. Likewise, in dismissing the authority of *Fox* v. *Ohio,* 46 U.S. 410, (5 How. 410) it speaks of two separate offenses—one, federal and the other, state. This is submitted to be inaccurate for the reason that one and the same Act is involved, as is more fully emphasized in the case of *People* v. *Fury,* 279 N.Y. 433, where at p. 437 the New York Court of Appeals said:

> "The fact that the federal government has made the uttering of counterfeit bank notes a crime does not bar the state from including a similar crime in its penal law. The jurisdiction of federal courts over such crime is not exclusive unless Congress enacts legislation taking away the jurisdiction of the courts of the state. . . . It has long been decided that both governments may have concurrent jurisdiction over the emission of counterfeit monies."

And counterfeiting is an offense directly related to the power to coin money, which is by the Federal Constitution expressly granted to the Federal Government.

An examination of the facts and decision in *Gilbert* v. *Minnesota,* 254 U.S. 325, indicates compelling authority in support of the Petition for Certiorari. In that case, which involved a Minnesota law prohibiting advocacy of non-enrollment in the U. S. armed forces and non-assistance to the United States in the prosecution of war vis-a-vis the Federal Espionage Law enacted in 1917, 40 Stat. 217 this Honorable Court expressly held (McKenna, J.), p. 329, 331:

". . . 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. . . . Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties, and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many, and must on occasion be animated as one, and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all. . . .

"[The state may make] '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.' "

## IV. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA HAS BEEN EXPRESSLY REJECTED BY A SUBSEQUENT DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE

In *Nelson* v. *Wyman,* 99 N.H. 33, 105 A. 2d 756, the Supreme Court of New Hampshire rejected the contention before it that *Article IV, section 4* of the Federal *Constitution,* constituted a constitutional grant of authority to the Federal Government to pre-empt State anti-subversive legislation. The Court said, in part (105 A. 2d 756, 769):

"Whatever inference 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."

*Nelson* v. *Wyman, supra,* was argued before the Supreme Court of New Hampshire on January 22, 1954. The decision in *Commonwealth* v. *Steve Nelson* was handed down on January 25, 1954. At this point, and prior to the decision of the New Hampshire Supreme Court, counsel for petitioner in New Hampshire filed with the Court a Supplemental Memorandum urging a conclusion of supersession such as was rendered in Pennsylvania. A part of petitioner's argument, while admitting that the same act might simultaneously constitute an offense against the United States and an offense against the State, urged that this did not justify two different governmental units attempting to punish the act as a crime against the United States. In further reference to an allegedly paternal federal-state governmental scheme, petitioner urged the astonishing proposition that:

> ". . . For example, if revolution in New Hampshire was successfully attempted and a republican form of government was created to supplant the present government the people in New Hampshire would be within their rights in the revolutionary act and there would be no occasion for the federal government to interfere."

After a full consideration of the majority and minority opinions in the principal case, the Supreme Court of New Hampshire, on April 30, 1954, expressly rejected the decision of the Supreme Court of Pennsylvania in the following language (105 A. 2d 756, 769):

> "The enactment by Congress of the Smith Act (18 USC *s.* 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,*** —— Pa. ——, ***decided January 25, 1954, gives support to the proposition that it does, we do not adopt it.*** Police powers of the state are not superseded by federal legislation except where state action is either specifically prohibited or 'that was the clear and

> manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. The interest of the state, in the protection of which it now seeks to exercise its police power, is that 'primary and essential right of self-preservation, which, so long as human governments endure . . . cannot be denied' to it. *Gitlow* v. *New York*, 268 U.S. 652, 668. The Smith Act does not specifically exclude state action in support of this right and we do not believe that its provisions are such as to evidence a 'clear and manifest purpose of Congress' to pre-empt the entire field of legislation and deny the state's right to act in defense of it." [Emphasis supplied]

## Conclusion

It is respectfully submitted that the decision of the Supreme Court of Pennsylvania is in error: that it involves serious inaccuracies in interpretation of decisions of this Honorable Court and of the Constitution under which the judicial system of the nation is constituted; that each of the United States has the reserved power to proscribe subversion or sedition against the States and against the sovereignty of the Federal Government, or either of them, conjunctively or disjunctively; and that the Petition for Certiorari should be granted, the decision of the Supreme Court of Pennsylvania reversed, and the cause remanded to Pennsylvania for further disposition on the record.

Respectfully submitted,

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September 20, 1954.