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## TABLE OF CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

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No. October Term, 1954

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Commonwealth of Pennsylvania,

*Petitioner*

v.

Steve Nelson,

*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States*:

Petitioner, Commonwealth of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause.

## OPINIONS OF COURTS BELOW

The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania, is not separately reported, but is incorporated as part of the opinion of the Superior Court of Pennsylvania (App. 29a) reported in 172 Pa. Superior Ct. 125, 92 A. 2d 431. The opinion of the Supreme Court of Pennsylvania (App. 59a) is reported in 377 Pa. 38, 104 A. 2d 133. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for reargument (R. 89) is noted in 377 Pa. at page 60.

## JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for rehearing was entered on April 27, 1954.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW

1. Does a state have the power to make criminal acts committed within its territory, which advocate overthrowing of the government of the United States by force and violence?

2. Did the Smith Act of June 28, 1954, as later codified in the Federal Criminal Code of June 25, 1948, (18 U. S. C. A. 2385), supersede Section 207 of the Pennsylvania Penal Code of June 27, 1939, (Pamphlet Laws 872, 18 Purd. Penna. Stat. Ann. Section 4207)?

3. Did the Supreme Court of Pennsylvania err in quashing the indictment against the respondent and reversing the judgment of conviction?

4. Did the fact that the respondent was later convicted in the United States District Court for the Western District of Pennsylvania under Section 371 of the Federal Criminal Code amount to double punishment for the same offense, or place the respondent in double jeopardy?

## STATUTES INVOLVED

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 U. S. C. A. 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. June 25, 1948, c. 645, 62 Stat. 808."

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 ac-

complishing 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."

## STATEMENT OF THE CASE

On October 17, 1950 (R. 19), in the Court of Quarter Sessions, Allegheny County, Pennsylvania, the respondent, Steve Nelson, was indicted 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).

The indictment charged, inter alia, that the defendant, Steve Nelson:

Encouraged persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (App. 1a-2a)

Published and distributed printed matter encouraging persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (App. 5a-6a)

The indictment further charged that:

Such publications proclaimed that the dictatorship of the proletariat cannot arise by peaceful development, but can arise only as a

result of smashing the bourgeois machine and army.

That this Soviet organization alone is capable of smashing and finally destroying the bourgeois and bureaucratic and judicial apparatus and this can be done only by revolution (App. 11a).

Voting alone for the communist program is not sufficient to overthrow and destroy the dictatorship of the capitalist class in the fight to establish the dictatorship of the proletariat in the United States (App. 11a-12a).

"* * * the Communists everywhere support every revolutionary movement against the existing social and political order of things. * * *" (App. 13a).

"The Communists * * * openly declare that their ends can be attained only by the forcible overthrow of all existing and social conditions. Let the ruling classes tremble at a Communist revolution." (App. 13a)

The indictment quoted many additional passages from publications which, it charged, were distributed by the defendant. (App. 10a-18a)

The defendant pleaded not guilty and on December 23, 1950, filed a motion (App. 20a) to quash the indictment upon the grounds, inter alia, that the Pennsylvania Sedition Act of 1939

offended Amendment XIV of the Constitution of the United States by depriving citizens of their liberties and property without due process of law and punishing the defendant for exercising the freedom of speech, press and assembly; and was superseded by the Federal Sedition Act of June 25, 1948, 18 U. S. C. A. Sec. 2384-5-6, which, the motion asserted, completely covered this field of legislation (App. 22a).

By order of December 26, 1950, this motion to quash was dismissed (App. 27a). After a trial beginning on December 4, 1951 and ending on January 30, 1952, a verdict of guilty on twelve counts was returned by the jury on January 30, 1952 (R. 20).

Defendant's motions for a new trial (R. 30) and in arrest of judgment (R. 3) were denied in an opinion (App. 29a) filed by Judge Montgomery on June 26, 1952.

The defendant, Nelson, was sentenced to pay a fine of $10,000, the costs of prosecution, and to undergo imprisonment for a term of 20 years.

The judgment of sentence by the Court of Quarter Sessions was affirmed by the Superior Court on November 12, 1952. On appeal the Supreme Court reversed on the ground that the Smith Act superseded the Pennsylvania Sedition Act and conviction in the state court would result in double punishment (377 Pa. at 71),

The majority opinion was written by Mr. Justice Jones and the concurring opinion was filed by Chief Justice Stern and Justices Stearne and Chidsey. Justice Bell dissented. Justices Musmanno and Arnold took no part (App. 59a).

## REASONS FOR ALLOWING CERTIORARI

1. The Supreme Court of Pennsylvania decided a federal question of substance in a way, we submit, not in accord with applicable decisions of this Court. The majority opinion held that Section 2385 of the Federal Code of Crimes and Criminal Procedure (embodying the Smith Act of June 28, 1940, 54 Stat. 670) making it a crime to advocate overthrowing the government of the United States or of a state by force or violence, superseded the Pennsylvania Sedition Act contained in Section 4207 of the Pennsylvania Penal Code of 1939 (18 Purd. Penna. Stat. Ann. 4207) which made it a crime to encourage any person to engage in any conduct with a view to overthrowing or destroying the government of the State of Pennsylvania or of the United States by force. Inconsistency was found, not between statutory or administrative regulations of the federal and state governments, but in the fact that the federal government made an act criminal and the state legislature made a similar act criminal. The decisions of this Court are discussed infra pp. 30-45.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the decisions of the highest courts of other states which have held that a state statute making it a crime to advocate overthrowing the government of the United States by force or violence was not inconsistent with or superseded by an act of Congress. The state decisions are discussed infra on pp. 16-24.

3. The majority opinion of the Pennsylvania Court overlooks or ignores Section 3231 of the Federal Code of Crimes and Criminal Procedure which provides that:

> "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." (infra, p. 42).

4. The majority opinion of the Pennsylvania Court overlooks the fundamental principle laid down by this Court that in our federal system the administration of criminal justice is predominantly committed to the care of the states (infra, pp. 38-45).

5. The effect of the decision of the Court below is to deprive courts of every state of jurisdiction to try and punish persons accused of advocating the overthrow of the national government by force and violence. If prosecution is restricted to the federal courts, Communists,

by dilatory and frustrating tactics may protract and delay trails in federal courts to such an extent that only a comparatively small proportion of these subversive offenders will be tried or sentenced.

In the **Dennis case** (341 U. S. at p. 497), the trial lasted over 9 months and the record covered 16,000 pages. In the case at Bar, the trial began on December 4, 1951, (transcript of trial Vol. I, p. 2), and ended in a verdict on January 30, 1952 (R. 20), and the proceedings of the trial covered 2700 pages, exclusive of voluminous exhibits.

## ARGUMENT

### I.

**A State may punish acts committed within its territory, which advocate the overthrow of the government of the United States by force or violence.**

The majority opinion of the Supreme Court of Pennsylvania, we submit, is in conflict with the decisions of this Court and of the highest Courts of other states.

In **Gitlow v. New York,** 268 U. S. 652 (1925), in considering a New York statute which provided that any person who "advocates * * * the overthrowing or overturning of organized government by force or violence" shall be guilty of a felony, the Supreme Court of the United States, by Mr. Justice Sanford, said:

> " * * * 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. 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. * * * " (p. 668)

In **Whitney v. California,** 274 U. S. 357 (1927), this Court sustained the constitutionality of a California statute which made it a felony for anyone to knowingly become a member of any organization advocating unlawful acts of force and violence as a means of accomplishing change in industrial ownership or any political change.

This Court said:

"By enacting the provision of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. * * * " (p. 371)

*Argument*

In **Gilbert v. Minnesota,** 254 U. S. 325 (1920), a Minnesota statute making it a misdemeanor to advocate that citizens of the State should not aid or assist the United States in prosecuting or carrying on a war, was held to be constitutional. The Supreme Court said that the State:

> "* * * has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the **Nation and State.** To do so is not to usurp a National power, it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.
>
> "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. * * * On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the State. * * * " (pp. 331-332)

**The Espionage Act of June 15, 1917, 40 Stat. 217, was in force when the cases of Gitlow v. New York, 268 U. S. 652, and Whitney v. California, 274 U. S. 357, were before this Court.**

The statement to the contrary in the majority opinion (App. 76a-77a) (377 Pa. at p. 74) is, we respectfully submit, incorrect.

Section 3 of the Act of June 15, 1917, was as follows:

> "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mu-

> tiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine or not more than $10,000 or imprisonment for not more than twenty years, or both."

The Act of May 16, 1918, 40 Stat. 553, amended this Act of June 15, 1917. It did not strike out any of the language of Section 3 quoted above, but added additional prohibitions to this Section 3.

The Act of March 3, 1921, 41 Stat. 1359, repealed the Act of May 16, 1918. It repealed only the prohibitions which had been added by the Act of May 16, 1918, to the original Section 3 as contained in the Act of June 15, 1917.

The Act of 1921 expressly preserved the provisions of the Act of June 15, 1917, as originally contained in that act.

The language of the Act of March 3, 1921, was as follows:

> " * * * That the Act entitled 'An Act to amend section 3, title 1, of the Act entitled "An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United

> States, and for other purposes," approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes,' approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted."

The following language from the Act of June 15, 1917, "cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, * * * shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both", is substantially repeated in Section 2387 of the United States Code of Crimes and Criminal Procedure, approved June 25, 1948, except that the imprisonment is reduced to ten years.

In **State v. Tachin,** 92 N. J. Law 269, 106 Atl. 145 (February 25, 1919), the Supreme Court of New Jersey upheld a State statute, which made it a crime to attempt by speech to incite hostility and opposition to the government of the United States. That 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. * * * "

A writ of error to the Supreme Court of the United States was dismissed with costs on motion of counsel for plaintiffs in error (254 U. S. 662).

In **Nelson v. Wyman,** N. H. , 105 A. 2d 756, decided on April 30, 1954, the plaintiff filed a petition with the Supreme Court of New Hampshire asking for declaratory judgment that the Subversive Activities Act of that state was unconstitutional. This Act of 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)

The Supreme Court of New Hampshire ruled that the statute was constitutional, saying:

"* * * 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."

Further, the Court refused to follow the Pennsylvania Supreme Court in this Nelson case, and ruled that the Smith Act did not supersede the New Hampshire statute:

> "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)

What was said in **Gilbert v. Minnesota,** supra, pp. 18-19, in regard to advocating that citizens do not aid the United States in prosecuting a war, is equally applicable to acts in Pennsylvania encouraging persons to overthrow the government of the United States by force or violence.

Acts in Pennsylvania fomenting an insurrection against the government of the United States or instituting a movement to overthrow the government of the United States, would seriously affect and disturb the peace and dignity of the Commonwealth of Pennsylvania;

and would result in wide-spread destruction of lives and property of Pennsylvania citizens. Such acts might lead to the use of explosives and incendiary bombs, and sabotage of airplanes and railroad trains and widespread violations of the laws of Pennsylvania.

The Commonwealth of Pennsylvania would not be required by anything in the Federal law to keep hands completely off and leave the preservation of peace and order entirely to Federal authorities.

This Court has frequently said that the national or the state government need not wait until the subversive group has perfected its plan and only the signal is awaited for the blow to be struck: **Dennis v. United States,** 341 U. S. 494, 509 (1951); **Gitlow v. New York,** 268 U. S. 652, 669 (1925). They may make it a crime to **advocate** such measures.

An attempt to overthrow the Federal government would begin with, or at least involve, the overthrow of State governments. If an insurrection was begun, the first measure would be to summon the local or State Police or the National Guard. The fact that the primary or ultimate goal was to overthrow the Federal government would not soften the impact of a blow against the State government or lessen the slaughter of human beings or destruction of property in the State. The revolution would

have to begin in one or more states. One of the first essentials would be to wreck and destroy Pennsylvania's vast facilities for production of munitions and implements of war and the means of transportation.

The police power—the right of self preservation gives to the Commonwealth of Pennsylvania the inherent and undoubted power to suppress such insurrection, and to enact laws for the punishment of offenders.

Pennsylvania does not have to depend wholly upon acts of the Federal government in the prosecution of the guilty any more than its police and soldiers are required to stand by and wait for the Federal forces to arrive and defend.

Pennsylvania has the absolute right to protect human lives and property within its boundaries and this right the Smith Act does not, indeed, cannot, take away or impair.

As was said in **Gitlow v. New York,** 268 U. S. 652, quoted supra:

> "* * * 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. * * *"

In discussing the power of the state to make it a crime to advocate the overthrow of the government of the United States, it has frequently

been pointed out that the state is a part of the system of government which was created by the Constitution of the United States. Our government has been called a dual system, but it still is a unitary system. It has been frequently said that the constitution looks to an indestructible union of indestructible states.

Thus, in **Gilbert v. Minnesota,** 254 U. S. 325 (1920), quoted supra, Mr. Justice McKenna said:

> "* * * 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. * * * 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 cooperation against the enemies of all. * * * The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1817, 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 the laws of both' Nation and State, and both may punish it without a conflict of their sovereignties. * * * " (pp. 329-330)

In the footnote to page 330 of this opinion, the Supreme Court cited and quoted from **Gustafson v. Rhinow**, 144 Minn. 45, as follows:

"In Gustafson v. Rhinow, 144 Minnesota, 415, the Supreme Court of Minnesota sustained a law of the State giving to soldiers who served in the war against Germany $15 for each month or fraction of a month of service, against an attack that the soldiers were soldiers of the United States. The court expressed the concern and interest of the State as follows: 'It is true that the Federal government alone has power to declare war, but having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization.' "

In **People v. Lloyd**, 304 Ill. 23, 136 N. E. 505 (1922), in holding constitutional a statute

which made it a felony to advocate the overthrow by violence or other unlawful means of the form of government secured to citizens of the United States and of the several states, the Supreme Court of Illinois said:

> " * * * The citizens of this state are citizens of the United States, and the citizens of the United States residing within the borders of this state are citizens of this state. Each citizen owes a duty to these two separate sovereignties. The state is a part of the nation, and owes a duty to the nation to support the efforts of the national government to secure the safety and protect the rights of its citizens, and to preserve, maintain, and enforce the sovereign rights of the nation against public menace, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively defending itself against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duty 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 or preclude the state from enforcing such duty. * * * " (p. 511)

## II.

**Section 2385 of the Federal Criminal Code of June 25, 1948, does not supersede the Pennsylvania Sedition Act (Section 207 of the Pennsylvania Penal Code of June 24, 1939).**

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That the Pennsylvania Sedition Act is not superseded follows from the following considerations:

(a) No provision or word of Section 2385 expresses any intent whatever to supersede the Pennsylvania statute.

(b) There is no inconsistency or conflict at all between the Federal act and the Pennsylvania act.

(c) Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948, expresses clearly the intent not to supersede the Pennsylvania Sedition Act.

The provision of each statute makes it a crime to commit acts for the purpose of overthrowing the government of the United States or of Pennsylvania by force or violence.

There is, however, no inconsistency between any provision of the Federal act and any of the State act.

Even though the definitions of the crime of advocating overthrow of government by force are, in substance, identical, there is no conflict. Each crime so defined is an offense against one sovereign only. For its own preservation, each government may separately prescribe and punish acts of sedition and acts so committed with intent to overthrow the state or federal government by force or violence.

As there is no conflict, each act can be enforced independently of the other, by officials of the United States and of Pennsylvania acting separately.

In further support of our position that the Pennsylvania provision was not superseded by Section 2385 of the Federal Criminal Code, we submit:

**The decision of this Court in Gilbert v. Minnesota, 254 U. S. 25, rules the instant case.**

In that case, the Supreme Court held that Section 3 of the Federal Espionage Act of June 5, 1917 (40 Stat. 217), did not supersede the statute of Minnesota.

Section 3 of the Espionage Act provided:

> " * * * whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or

naval forces of the United States, or shall willfully obstruct the recruiting of enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." (p. 219)

The Minnesota statute provided:

"' * * * It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States * * *

"' * * * It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States. '" (pp. 326-327)

The appellant specifically objected that the Minnesota statute was superseded by the Federal act.

In holding that the Federal statute did not **supersede,** the Supreme Court said:

> " * * * The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, 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 the laws of both' Nation and State, and both may punish it without conflict of their sovereignties.***"** (Emphasis supplied) (pp. 329-330)

In most decisions in which a Federal statute has been held to supersede a State statute, there were involved conflicting **regulations** or other administrative provisions.

The majorty opinion cites no decision of this Court which holds that a statute of Congress making an act a crime superseded a State statute making the same act a crime.

The Supreme Court of the United States has repeatedly held that the intent of Congress to supersede the exercise of the police powers of the states must be clearly manifested; and that the repugnance and conflict must be so direct

and positive that the two acts cannot be reconciled or consistently stand together.

Thus, in **Kelly v. Washington,** 302 U. S. 1 (1937), Chief Justice Hughes said:

> " * * * 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 and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (p. 10)

Other decisions to the same effect are:

**Missouri, Kansas and Texas Railway Company v. Harris,** 234 U. S. 412;

**Maurer v. Hamilton,** 309 U. S. 598;

**Southern Pacific Co. v. Arizona,** 325 U. S. 761;

**Allen-Bradley Local v. Board,** 315 U. S. 740;

**Welch Co. v. New Hampshire,** 306 U. S. 79.

This rule also applies if the argument is based on some contention that the scope of the Federal act is such as to indicate an intent to supersede a State statute.

In **Cloverleaf Co. v. Patterson,** 315 U. S. 148 (1942), Mr. Justice Reed said:

> **"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."** (Emphasis supplied) (pp. 155-156)

The ruling in **Hines v. Davidowitz,** 312 U. S. 52 (1941), was based solely on the special ground that the registration of aliens by Pennsylvania would interfere with the foreign relations of the United States.

This basis was clearly pointed out in the opinion which stated:

> " * * * the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government * * *
>
> " * * * the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, * * *
>
> " * * * it is of importance that this legislation is in a field which affects **international relations, the one aspect of our gov-**

**ernment 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;** * * *

" * * * power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. * * * " (pp. 66-68) (Emphasis supplied)

The Hines case was clearly narrowed and based upon the supreme power of the Federal government in foreign relations in **Allen-Bradley Local v. Board,** 315 U. S. 740 (1942), in which Mr. Justice Douglas said:

" * * * 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 ex-

ist 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, 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." (p. 749)

Again in **United States v. Pink,** 315 U. S. 203 (1942), Mr. Justice Douglas said:

"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) (Emphasis supplied)

The Federal government has not taken and does not now take the position, we believe, that the Smith Act superseded the Sedition Act of Pennsylvania or any other state, and has not objected to the enforcement by the states of these laws.

We found little relevant material in the proceedings of Congress, but refer to a copy of a letter written by the Honorable Howard W. Smith, author of the Smith Act and quoted in the dissenting opinion of Mr. Justice Bell (App. 97a-98a).

If we look at the Federal statute from the vantage of history, we find that prior to the Federal Constitution the states possessed and exercised complete police power over crimes of every sort. The Constitution of the United States set up no federal criminal code or body of criminal law. As was said by Mr. Justice Douglas in **Jerome v. United States,** 318 U. S. 101, (1943):

> " * * * Since there is no common law offense against the United States (United States v. Hudson, 7 Cranch 32; United States v. Gradwell, 243 U. S. 476, 485), **the administration of criminal 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. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105) (Emphasis added)

Today there are no federal crimes except those created by statute within the limited and enumerated powers of Congress. The Federal Constitution conferred upon Congress no general police power and no general power to prohibit or punish crime.

In **Rochin v. California,** 342 U. S. 165 (1952), Mr. Justice Frankfurter said:

> **"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, §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, §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) (Emphasis added)

Again, in **Malinsky v. New York,** 324 U. S. 401 (1945), Mr. 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, §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) (Emphasis added)

The majority opinion cites the case of **Hines v. Davidowitz,** 312 U. S. 52, and says

> " * * * the act of Congress may touch a field in which the federal interest is so dominent that the federal system will be assumed to preclude enforcement of state laws on the same subject. * * * " (App. 68a, 377 Pa. at p. 65)

The Hines case was based on the exclusive power of Congress over foreign relations.

The majority opinion cites no case in which this court has held that the enactment of a federal statute making an act a crime supersedes a state statute making a similar act a crime.

The question whether a federal enactment creating a crime supersedes a state statute cre-

ating a similar crime must be determined in the light of the decisions which hold that the Federal "Constitution left the domain of criminal justice to the States" (**Malinski v. New York,** quoted supra at p. 40); and that "In our federal system the administration of criminal justice is predominantly committed to the care of the States" (**Rochin v. California,** quoted supra at p. 39); and that "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,** quoted supra at p. 38).

The fundamental truth so authoritatively declared by this Court in these excerpts was recognized and embodied by Congress in positive enactment in section 3231.

**Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948, expresses clearly the intent not to supersede the Pennsylvania Sedition Act.**

Section 3231 provides:

> "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)

The words "nothing in this title" mean Title 18 of the Federal Code of Crimes and Criminal Procedure. The title of the Act of June 25, 1948, 62 Stat. 683, is as follows:

"An Act

"To revise, codify, and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure'." (p. 683)

"This title", therefore, includes every provision in the Federal Court relating to sedition and particularly Section 2385, quoted supra.

"Jurisdiction", in this title, is the power to indict, try and punish crimes, and is not taken away or impaired.

If "jurisdiction" of the courts of the several states, under the laws thereof, is not taken away or impaired, then the power of the Court of Quarter Sessions is not superseded or suspended by Section 2385 of the Federal Code.

The language of the second sentence of Section 3231, quoted above supra, is broad, general and all inclusive. No intent is evidenced to except or exclude State sedition acts.

Section 2385 of the Federal Code is clearly a law "in this title".

*Argument*

The Pennsylvania Sedition Act is included in "the laws thereof", that is, the laws of the several states.

Section 3231 is one of the most fundamental provisions in Title 18. This section is inserted in the title which deals with crimes and criminal procedure, and necessarily and indubitably applies to the jurisdiction of the courts of the several states to hear and determine cases involving crimes under the laws thereof. It is difficult to conceive of any action that takes away or impairs the jurisdiction of the State courts in criminal matters more completely than a ruling that a Federal statute has superseded a State statute defining and punishing a crime.

We therefore, interpret Section 3231 to mean that it shall not take away or impair the jurisdiction of the State courts to hear and decide criminal cases if the crime is a violation of the State law.

Under point I of this petition, we have cited decisions of the Supreme Court of the United States holding that a State may make it a crime to commit acts to overthrow the government of the United States.

Therefore, nothing in Title 18 of the Federal Code supersedes the Pennsylvania Sedition

Act nor the jurisdiction of the Pennsylvania courts to enforce it.

Section 2385 of the Federal Penal Code and the Pennsylvania Sedition Act each deal solely with crime and criminal procedure, and, therefore, fall within the scope of the police powers of the respective governments.

## III.

**The defendant was not placed in double jeopardy.**

---

Amendment V of the Federal Constitution provides:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * " (p. 30)

This provision does not apply because:

(1) A crime created by the Pennsylvania Sedition Act and the crime created by the Smith Act are not "the same offense".

This point was conclusively established in **Gilbert v. Minnesota,** quoted supra, p. 31, in which this Court held that the offenses created by the Minnesota statute and by the Federal Espionage law were separate.

In **United States v. Lanza,** 260 U. S. 377 (1922), Mr. Chief Justice Taft said:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * * Here the same act was an of-

> fense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy." (382)

To the same effect see **Hebert v. Louisiana,** 272 U. S. 312, 314 (1926).

So, in **United States v. Lanza,** 260 U. S. 377 (1922), in discussing two convictions for the same act of the defendant under the Federal law and a statute of the State of Washington, Mr. Chief Justice Taft said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (382)

The Court expressly rejected any explanation that the prohibition amendment had authorized a proceeding by the State. Mr. Chief Justice Taft said:

> "To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. * * * " (381)

(2) The defense of double jeopardy is the defense of **former** jeopardy and can be set up only in a second or later trial. In the case at bar the defendant could not establish any defense of former jeopardy. The statement in the majority opinion that Nelson was later indicted and tried in the District Court of the United States is legally irrelevant.

(3) To fall within Amendment V both offenses must be against the Federal Government, not as here, one against Pennsylvania

and the other against the United States. In **Jerome v. United States,** 318 U. S. 101 (1943), Mr. Justice Douglas said:

> " * * * In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105)

(4) Amendment V is a restriction upon the Federal government only, and not upon the states. This amendment does not apply at all to a trial in a State court. As Chief Justice Taft said in **United States v. Lanza,** 260 U. S. 377 (1922):

> " * * * The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (Barron v. City of Baltimore, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of

the federal government after a first trial for the same offense under the same authority. * * * " (382)

We find no provision in the Federal Constitution against "double jeopardy", unless there are two trials in courts of the United States. Under the facts of this case, we find, Amendment V does not apply.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. [redacted]10

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

STEVE NELSON,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Pennsylvania

# MEMORANDUM FOR RESPONDENT IN OPPOSITION

Victor Rabinowitz,
Attorney for Respondent

# I N D E X

## Cases Cited.

Statutes and Miscellaneous Authorities Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Petitioner, | : | No. 236 October Term, 1954 |
| v. | : | |
| STEVE NELSON, Respondent. | : | |

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement of the Case

Respondent is in general agreement with the statement of the case contained at pages 9-12 of the petition. We merely note two additional facts.

(1) The respondent urged many grounds before the State Supreme Court for a reversal of his conviction in addition to the ground of supersedure on which the Supreme Court decided. Those arguments of the respondent are summarized by the State Court at App. pp. 60a to 63a.

(2) After the decision of the Supreme Court reversing the conviction, the Commonwealth made an application for reargument. Briefs were submitted by both the Commonwealth and the respondent and the Court, without opinion, affirmed its previous decision.

## POINT I

### THE FEDERAL GOVERNMENT, BY ENACTING THE SMITH ACT, HAS PREEMPTED THE FIELD OF SEDITION AGAINST THE UNITED STATES, SUPERSEDING THE SEDITION ACT OF PENNSYLVANIA

When the Federal Government asserts jurisdiction over a subject properly within its powers, the states must yield thereto. The Federal Government, by its enactment of the Smith Act (18 U.S.C. 2385) has occupied the field covered by the Sedition Act of Pennsylvania, and hence the operation of the latter must be suspended.

In Tennessee v. Davis, 100 U.S. 257, 266 (1880), the law was authoritatively stated as follows:

> "But when the National Government was formed, some of the attributes of state sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered, the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each state had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted."

See also: Automobile Workers v. O'Brien, 339 U.S. 454 (1950);
U.S. v. Hill, 248 U.S. 420 (1919);
Barrett v. New York, 232 U.S. 14 (1914);
Platt v. New York, 232 U.S. 35 (1914);
Missouri K. & T. R. Co. v. Harris, 234 U.S. 412 (1914).

Of course, it must be clear in each case, by express language or by implication, that it was the purpose of Congress to occupy the field.

> "Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Pennsylvania R.R.Co. v. Public Service Commission, 250 U.S. 556, 569; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52 Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [Citing cases] Or the state policy may produce a result inconsistent with the objective of the federal statute. Hill v. Florida, 325 U.S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the states undisturbed except as the state and federal regulations collide. [Citing cases]".
>
> Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230-1. (1947).

But in the case at bar, the question is not a perplexing one, for it falls squarely within the holding of this Court in Hines v. Davidowitz, 312 U.S. 52, (1941). There the validity of the Alien Registration Act of Pennsylvania (Pa. Stat. Ann. (Purdon, Supp. 1940), Title 35, §§1801-6) was called into question. This Court found that the basic subject of the state law was identical with that of the Federal Alien Registration Act (Public Act. No. 670, 76th Cong., 3d Sess., June 28, 1940, 54 Stat. at L. 670, Ch. 439) and sustained the appellant's position that by its adoption of a comprehensive scheme for regulation of aliens, Congress precluded state action: Said this Court at p. 67:

"There is not - and from the very nature of the problem there cannot be - any rigid formula or rule which can be used as a universal pattern to determine the meaning and the purpose of every act of Congress.... In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our Government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as its power to tax. And it is also of importance that this legislation deals with the rights, liberties and personal freedom of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

The subject of the legislation we are considering, namely sedition, likewise deals with those most vital and basic "rights, liberties and personal freedom of human beings." Indeed, the Court in the Hines case continues as if its opinion were written expressly for the case at bar (p.70):

"The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject. Opposition to laws permitting invasion of the personal liberties of the law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history, and champions of freedom for the individual have always vigorously opposed burdensome registration systems. The drastic requirements of the alien Acts of 1798 brought about a political upheaval in this country the repercussions from which have not even yet wholly subsided. So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed."

The Acts of 1798 referred to were not only alien laws; they were also sedition acts; for the reasons cited by the Court even more than a century elapsed before the federal government adopted a second sedition act.

In enacting the legislation we here urge as a bar to State action, Congress had in fact followed the pattern of the Acts of 1798. For the statute on which respondent relies (Public Act No. 670, 76th Congress, 3rd Sess., June 28, 1940) was also an alien and sedition act. Title I of that Act, popularly known as the Smith Act, in Sections 2, 3 and 5,[1] contains the sedition provisions herein discussed; and Title III of the very same Act[2] contains the alien registration and fingerprinting provisions which were held in the Hines case to have superseded state statutes on the same subject. Indeed, the legislative history makes clear that the same rationale, i.e., the security of our nation in a precarious and troublesome international situation, was urged by Congress as the basis for enacting both Titles I and III. It further makes clear that Congress intended to preempt the field in Title I as the court held it had preempted it by virtue of Title III.

In challenging the decision of the Supreme Court of Pennsylvania, the Attorney General of that State urges:

(1) Gilbert v. Minnesota, 254 U.S. 325, rules this case. (Petition for certiorari, p. 31)

(2) Cases such as Gitlow v. New York, 268 U.S. 652, and Whitney v. California, 274 U.S. 357, by inference, support the petitioner's case, that this Court failed to hold that the federal act then in force superseded the New York and California

1 Formerly 18 U.S.C. 9-13, now 18 U.S.C. 2385 and 2387.
2 Now in 8 U.S.C. 1302 ff.

sedition acts. At least, such is the construction we put on the argument made by petitioner at pages 16 to 21 of the petition.

(3) §3231 of the Federal Code of Criminal Procedure bars the application of the normal rules of supersedure in this case.

(4) Policy considerations militate against the holding of the State Supreme Court in this case.

We disagree with each of these contentions.

The opinion of the Supreme Court of Pennsylvania (at App. pp. 74a-76a) answers completely the argument based on Gilbert v. Minnesota. That court points out, quoting from this Court's opinion in the Gilbert case, that the state statute there was "simply a local police measure" and was applied to prevent the threat of an immediate breach of peace.[1] We merely add to the opinion of the Supreme Court of Pennsylvania the observation that there is not a scintilla of evidence in this record suggesting that respondent had ever been guilty of a breach of peace or that he had ever engaged in any conduct which might have had the effect of provoking immediate disorder. It is evident from the opinion of the trial court, adopted by the Superior Court (App. pp. 28a to 58a) that the court did not consider the statute to be a "local police measure" nor was the Commonwealth, in bringing the prosecution, interested in preventing local disorders. On the contrary, the state statute here was applied to a situation identical with that covered by the Smith Act.

Petitioner argues that at the time the Gitlow and Whitney cases were decided by this Court (1925 and 1927 respectively) "the Espionage Act of June 15, 1917, 40 Stat. 217, was in force." (Petition for certiorari, p. 18). From this, we assume, petitioner

1 The same is true of other cases cited by petitioner, such as State v. Tachin, 92 N.J.Law, 269.

concludes that, since the Espionage Act of June 15, 1917 was not held to have superseded the New York and California statutes in the Gitlow and Whitney cases, this Court should not hold that the Smith Act superseded the Pennsylvania Sedition Act.

Petitioner's argument is badly founded, for a number of reasons.

1. The Espionage Act of June 15, 1917 was not a sedition act. It contained no provisions which might conceivably have superseded the New York and California laws, applied in the Gitlow and Whitney cases. It contained only prohibitions against incitement to disaffection in the armed forces and obstruction of enlistment, subjects not covered at all by the Gitlow and Whitney statutes. The Espionage Act of May 16, 1918 (40 Stat. 553) added prohibitions against seditious libel, but it remained in effect only until the Act of March 3, 1921.[1] As petitioner admits, the Act of 1921 repealed the sedition sections of the Espionage Act and left only the disaffection and obstruction of enlistment sections intact. All of this is pointed out in detail in the opinion of the State Supreme Court at App. pp. 76a-77a.

Thus, no question of supersedure could have been raised in Gitlow, Whitney or other post-1921 cases involving state sedition laws. As the Pennsylvania Supreme Court points out, this also explains the decision of that court in Commonwealth v. Widovich,

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1 Most, if not all, of the 1917-1918 prosecutions were based only on the provisions of the 1917 Act against disaffection and obstruction of enlistment. See Debs v. United States, 249 U.S. 211; Schenck v. United States, 249 U.S. 47, Frohwerk v. United States, 249 U.S. 204. Cf Abrams v. United States, 250 U.S. 616 where the court refused to pass on the "disloyalty" count in the indictment.

295 Pa. 311 (1929) cert. den. sub. nom. Museling v. Pennsylvania, 280 U.S. 518 (1929); Commonwealth v. Lazar, 103 Pa. Superior Court, 417, appeal dismissed 286 U.S. 532 (1932) and Commonwealth v. Blankenstein, 81 Pa. Superior Court 340 (1923). The question of supersedure was not raised in Gitlow, Whitney or any of the Pennsylvania cases cited, no doubt because of the considerations above set forth.

2. The Gitlow statute was passed in 1902; the Whitney statute in 1919. Both were statutes prohibiting criminal syndicalism. The New York statute made it a crime to advocate or teach "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence." (Laws 1902, Chap. 371, Consolidated Laws 1909, Chap. 40.) The California statute prohibited "advocating, teaching or aiding or abetting any commission of crime, . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, or effecting any political change." (Stats. 1919, Chap. 188, p. 281). The Espionage Act of May 16, 1918 (40 Stat. 553), however, was a seditious libel act. It made it a crime to "wilfully utter, print, write or publish any disloyal, profane, scurrilous or abusive language about the form of the government of the United States" or to "bring the form of the government of the United States into contempt, scorn, contumely, disrespect. . . .". The Federal Act of 1918, therefore, can hardly be said to have covered the same ground as that covered by the New York and California Acts, so that the rules of supersedure above referred to were not applicable.

3. The Espionage Act of 1918, by its terms, had application only "when the United States is at war". The Gitlow and Whitney cases both arose after the end of the war.

Petitioner cites the recent decision of the New Hampshire Supreme Court in Nelson v. Wyman, 105 A.2d 756. That case arose out of the following circumstances. New Hampshire, in 1951, passed a state sedition act. In 1953 the Legislature directed that the Attorney General conduct an investigation for the purpose of determining what, if any, new legislation was necessary to strengthen the act of 1951 and further to determine the effect of the operation of the act. Pursuant to that direction, the Attorney General of the state commenced an investigation and served a subpoena on one Nelson.[1] She brought an action for declaratory judgment seeking, inter alia, an order vacating the subpoena on the grounds that the act of 1953 was unconstitutional, that the investigation was a criminal investigation rather than a legislative investigation and other similar grounds. The court denied the application, stating that the Legislature has very broad powers to investigate for legislative purposes and that it could designate the Attorney General rather than a legislative committee to conduct such investigation. The court further held that the sedition act of 1951 was, on its face, constitutional stating, in so doing, that it disagreed with the Pennsylvania Supreme Court in this case, although obviously such a conclusion as to the constitutionality of the state sedition law was not necessary to a determination of the validity of the subpoena.

We do not necessarily contend that the Pennsylvania state sedition act (or the New Hampshire state sedition act) is on its face unconstitutional. We urge rather that under the facts of this case it was superseded by the Smith Act. As the

1 Not related to respondent in this case.

Supreme Court of Pennsylvania points out and as the record here clearly indicates there was, in this case, alleged evidence only of sedition against the United States; none of sedition against the Commonwealth of Pennsylvania. Furthermore, there was no evidence whatsoever of a breach of peace or of such conduct as might cause immediate disorder.

We do not believe that there is before this Court, any more than there was before the Supreme Court of Pennsylvania, any abstract question as to the constitutionality of the statute. It is rare that a criminal statute will be held unconstitutional on its face without the help of a record on the basis of which a decision can be made. Petrillo v. United States, 332 U.S. 1. For that reason and because a decision on the constitutionality of the statute was in no way necessary to a decision of the validity of the subpoena, we do not believe the authority of the New Hampshire court to be persuasive in the present situation.

The petitioner next argues that §3231 of the Federal Code of Criminal Procedure bars the application of the normal rules of supersedure to this case. This contention was not discussed in the opinion of the Pennsylvania Supreme Court because it was raised for the first time on petitioner's motion for re-argument in that court.

§3231 reads as follows:

> "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."

The fallacy of petitioner's argument lies in its circular reasoning. §3231 of the Code preserves the jurisdiction of the state courts to enforce a valid, operable law of the Commonwealth of Pennsylvania. The very issue here, however, is whether there is a valid, operable law of the Commonwealth of Pennsylvania.

No one here challenges the jurisdiction of the state courts in this matter. Respondent challenges only the validity and operability of the state statute. If the statute were operable, the state court, no doubt, would have jurisdiction over cases arising under it. But the statute is not operable because it has been superseded by the Smith Act.

To argue the applicability of §3231 therefore is to beg the entire question before this Court. That section becomes applicable only if we assume the validity of the very law whose validity is challenged.

The meaning of the second sentence of §3231 can be understood only in context. The first sentence of the section provides for exclusive jurisdiction in the District Courts of the United States of all offenses against the laws of the United States. The second sentence obviously was added to preserve the pre-existing jurisdiction of the state courts which might otherwise have been cast in doubt by the language of the first section. There is nothing in the history of that sentence or in any case in which it has been applied to suggest that it was intended to wipe out well-established principles of supersedure.

Petitioner's next argument is basically a policy one. It argues that if prosecution were restricted to the federal courts, Communists "by dilatory and frustrating tactics" could so delay trials as to adversely affect enforcement of the laws. (Petition for certiorari, p. 15). As a policy argument, it is presumably addressed to the discretion of the court rather than to the applicable law. We shall therefore treat this argument in Point II below, together with the other arguments addressed to the Court's discretion which, we believe, lead to the conclusion that the Court ought to deny this petition.

## POINT II

### QUITE ASIDE FROM THE LEGAL ARGUMENT URGED ABOVE, THIS COURT SHOULD IN THE EXERCISE OF ITS DISCRETION DENY THIS PETITION.

We believe that the authorities cited above in Point I will serve to meet the petitioner's request for certiorari. In addition, there are additional reasons why the Court should in the exercise of its sound judicial discretion (Rule 19(1) of the Rules of this Court) deny this petition.

(1) Although the respondent here was indicted for sedition against Pennsylvania and against the United States (App. pp. 1a to 18a) this case is actually concerned only with sedition against the United States. "Out of all the voluminous testimony we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania." (Opinion of the Supreme

Court, App. p. 70a) After respondent was convicted in this case, he was indicted in the District Court of the United States for the Western District of Pennsylvania for violation of the Smith Act. He was convicted and sentenced to five years on evidence substantially the same as was offered against him in this case. (App. p. 73a) Thus respondent has been punished by both state and federal authorities for the same offense against the United States; no separate offense against the state has ever been established. Such inequitable result cannot possibly have been intended by Congress.

(2) Petitioner argues (Petition for certiorari, pp. 14-15) that if prosecution is confined to the federal courts, Communists may evade punishment. The respondent disapproves in principle the prosecution of anyone either under the Smith Act or the state sedition laws. He believes that such statutes are unconstitutional and that they violate the free speech provisions of both the State and Federal Constitutions. However if one accepts the premises of Dennis v. United States, 341 U.S. 494 and of the prosecution of alleged Communists under the Smith Act, we submit that independent state prosecutions will hinder rather than help orderly and dispassionate enforcement of the laws. This matter is discussed in some detail by the Pennsylvania Supreme Court (App. p. 79a). See also "State Control of Subversion: A Problem in Federalism" 66 Harvard Law Review 327, 334 (1952); Lowenthal, The Federal Bureau of Investigation, p. 439 (1950).

(3) That the Smith Act superseded the state act was only one of many grounds urged by respondent for a reversal of his conviction. Although the State Supreme Court did not pass upon the other grounds urged, it did hold that there were many "serious questions as to whether his conviction resulted from a fair and impartial trial,--one devoid of bias and prejudice." (App. p. 62a) We shall not, of course, at this time attempt to argue these points, but attention of this Court is respectfully called to the opinion of the Supreme Court of Pennsylvania at App. pp. 60a-63a, including the footnote at p. 61a. There is ample ground for a reversal of this conviction for many reasons in addition to that assigned by the state Supreme Court and a reversal here would merely result in sending this matter back to the state Supreme Court where, on the record before that court, a second reversal on either constitutional or other grounds is inevitable. The only effect of the granting of this petition and a reversal of this decision therefore, would be to impose tremendous additional expense and inconvenience upon the respondent, with no appreciable benefit to anyone.

(4) This petition presents a dispute between the Pennsylvania Supreme Court and the Attorney General of Pennsylvania as to the applicability of a Pennsylvania statute. It is not the function of this Court to act as referee in resolving differences between two coordinate branches of the state government as to the construction and application of a state statute.

## CONCLUSION

The petition for certiorari ought to be denied.

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