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IN THE

Supreme Court of the United States

October Term, 1956

No. 261

JOHN T. WATKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consent of all the parties filed with the Clerk of this Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of the Constitutional rights fundamental to the democratic way of life. It has no other program, either political, economic, social, or philosophical.

Amicus' primary concern with the instant case is that this Court's validation of the conviction of the petitioner would broaden the scope of permissive legislative inquiry into political belief and association by leaving undefined the First Amendment limitations thereon. Such judicial definition is necessary if we are to maintain the sanctuary

from official intrusion of rights guaranteed by the First Amendment. To limit, to diminish this vital area of privacy is to limit the use of and diminish the effect of one of the most powerful weapons in our arsenal of defense.

One of the basic safeguards against infringement of our rights is the system of checks and balances created in our branches of government. Unless the petitioner's rights are secured by judicial decision, there will result, as there has been steadily developing, an imbalance of our checks and balances by the legislative inquiry that could destroy our way of freedom.

Statement of the Case [1]

This brief is submitted in support of the petitioner herein on the single issue as to whether a legislative investigation into the nature and extent of Communist political propaganda can compel the petitioner to disclose his political associations on pain of imprisonment for refusal to do so.

Amicus recognizes that the Communist Party has a dual nature, engaging publicly in the forms of expression and association usual to political parties and organizations, but also engaging covertly in anti-democratic methods in aid of the aims of Soviet Russia. *Amicus* has recognized a similar duality, in positions it has taken in the past, with respect to various laws and governmental actions affecting totalitarian movements—Fascist and Ku Klux Klan, as well as Communist—and will continue to do so in the future. *Amicus* is concerned solely with protection of the rights of individual Communist Party members, former members, and sympathizers in the first role, because of the effect of restraints in this area on principles and practices affecting freedom of expression and association for all Americans.

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[1] The facts relied on by *amicus* are set forth in the Joint Appendix in the United States Court of Appeals for the District of Columbia submitted in *Watkins* v. *United States,* No. 12,797.

In this brief, we do not intend to deal with the legal issues ably and forcibly presented in the brief of the petitioner. Rather, we intend to show that the petitioner's right to remain silent under the First Amendment in the face of a legislative inquiry has been violated. In this context, we urge that the judgment below be reversed.

I

The Congressional subcommittee in seeking to compel petitioner to disclose his political associations has exceeded the bounds of permissive legislative incursion upon First Amendment rights.

A. First Amendment rights are not absolute but they should yield only to the exigencies which this Court has painstakingly delineated.

This Court has frequently passed on laws [2] enacted by Congress which have encroached on conduct protected by the First Amendment.

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[2] The law in this case is the statute authorizing conviction for contempt, 2 USC 192. This law is clearly valid on its face, but as applied to deny petitioner his rights under the First Amendment, it is unconstitutional. A law valid on its face may be applied in such a way as to render it unconstitutional. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The contempt statute would deny petitioner's rights if used to punish him for the valid exercise of his rights.

Alternatively, the law in this case is *P. L. 601, s. 121, 79th Congress, 2d Session,* authorizing the House Committee on Un-American Activities. The Committee acting pursuant to this law has abridged petitioner's First Amendment rights. Whether or not the law is otherwise constitutionally valid, here the abridgment of petitioner's rights may be considered the unwarranted intrusion into his political associations. The imprisonment for contempt is only the immediate consequence: the coercive effect of it is to cause petitioner in the future—and all other witnesses similarly situated—to make the choice between suffering the intrusion and going to prison, which is plainly Hobson's choice.

It is well established that the right of free speech is not absolute. *Schenck* v. *United States,* 249 U. S. 47. Speech which incites to riot may be prosecuted. *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357.

Conversely, blanket prohibitions of speech or assembly are repugnant to the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444.

The Court has established a standard essentially derived from Mr. Justice Holmes' opinion in *Schenck* v. *United States, supra,* which required a clear and present danger to national security resulting from the conduct proscribed in order to justify a Congressional limitation upon free speech and assembly.

When Congress found it necessary to cope with political conspiracy tending toward overthrow of the government, the Court, reviewing 18 U. S. C., §§ 371, 2385, the "Smith" Act, modified the clear and present danger standard to permit indirect restraints on political association only where there was found to exist a positive substantive evil which Congress had a right to combat. *Dennis* v. *United States,* 341 U. S. 494.

Thus, although the ambit of Congressional infringement upon political association has expanded validly to include certain kinds of teaching and advocating, the power of Congress to legislate in this area is not absolute.

B. The Court has recognized restrictions on the investigative functions of Congress.

The Congressional investigative power is not absolute. *Kilbourne* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135. As regards First Amendment rights, such power must be subject to restrictions substantially similar to those imposed on enacted law, since it is auxilliary to the power of Congress to legislate. First Amendment rights are illusory indeed if they are zealously safeguarded from the legislative function while subject to depredations by an auxilliary and supplemental function.

In *United States* v. *Rumely,* 345 U. S. 41, the Court clearly recognized that the Congressional investigative function is subject to First Amendment limitations, but found it unnecessary to spell out those limitations at that time.

In *Quinn* v. *United States,* 349 U. S. 155, the Court specified some of the Constitutional limitations, stating at p. 161:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

Thus the Court has yet to outline the criteria applicable in determining the circumstances under which legislative investigative encroachments on the First Amendment are justified. The Court should do so in the instant case.

Lower federal courts have repeatedly recognized that an accommodation of conflicting interests is called for—that a balance must be struck between the Congressional interest in obtaining information on the one hand, and rights historically protected under the Constitution on the other.

In directing a judgment of acquittal on a charge of perjury, Judge Keech said, in *United States* v. *Icardi,* 140 F. Supp. 383 (U. S. D. C., D. C.), on April 19, 1956, at page 384:

> "At the outset, the court is faced with two basic principles of law: the presumption of the validity of governmental proceedings, and the presumption that the accused is innocent. Since the second presumption outweighs the first the presumption of validity must be supported by proof of the validity of the legislative proceedings and materiality of the specific answers which defendant is alleged to have falsely given. *Sinclair* v. *United States,* 279 U. S. 263, 296."

The Court further stated:

> "The court does hold that if the committee is not pursuing a bona fide legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal', even though that very testimony be relevant to a matter which could be the subject of a valid legislative investigation. * * *
>
> "There are * * * limitations upon the investigative power of the legislature which must be considered in any determination of materiality. The investigation must be to aid in legislation." *Id.,* at p. 388.

If there are such limitations on the Congressional investigative power, and if a balance between rights under the First Amendment and the Congressional interest in obtaining information with respect to substantive threatening evils must be struck, the converse must also be true, namely that:

The Congressional inquisitorial power is not absolute, but depending upon the circumstances of the particular case, must yield to First Amendment rights justifiably deemed to be of greater importance. One of such rights is the right to remain silent about political associations.

Judge Edgerton, dissenting in *Barsky* v. *United States,* 167 F. 2d 241 (D. C. Cir.), observes:

> "(The) investigation also restricts freedom of speech by forcing people to express views. Freedom of speech is freedom in respect to speech and includes freedom not to speak." *Id.*, at 254.

Judge Edgerton then refers to *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, at 624:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
> *"We think the action of the local authorities* in compelling the flag salute and pledge *transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."* (Emphasis added.)

The question then is, when does the public interest in compelling a witness to break silence override the right.

Certainly not, for example, when the question is wholly irrelevant to the inquiry, *McGrain* v. *Daugherty, supra,* or when the investigating body is acting without authority. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434; *United States* v. *Rumely, supra.*

This is not to say that a witness has an unqualified right of privacy as against a proper public inquiry. He does not; but "the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary * * *". Mr. Justice Holmes in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, at 419.

A witness' right to privacy may under the proper circumstances be invaded to his discomfort. The discomfort or embarrassment of the witness is not the governing consideration. But the right not to speak, like the right to speak, is not grounded on a right to squeamishness. It is a direct guarantee of the First Amendment.[3]

The question is: Was the Congressional investigative committee, in compelling speech and political information, under all the surrounding circumstances, justified by a clear and present danger or by the threat of a future evil whose eventuality was reasonably likely?

Ready maxims unfortunately do not suffice in this area. The Court must balance Congressional need for information against the degree of infringement on First Amendment rights. " * * * [A]s cases arise, the delicate task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider* v. *Irvington,* 308 U. S. 147, at 161.

In considering whether, under the circumstances, the committee was justified in asking particular questions, *amicus* respectfully suggests that the following factors should weigh heavily in balancing Congressional inquiry against rights under the First Amendment:

The inquiry will not justify First Amendment encroachment

(1) If the committee has no purpose except to pry into the witness' private affairs. *Sinclair* v. *United States,* 279 U. S. 263.

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[3] "We assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy." *Barsky* v. *United States,* 167 F. 2d 241, at 250; Cert. den., 334 U. S. 843.

(2) If the committee has no intention of using the information obtained for possible legislation, but as for instance solely to trap the witness into perjuring himself so as to be convicted therefor, *United States* v. *Icardi, supra,* or to publicize activities or conditions rather than to gather information for possible legislation. *Sinclair* v. *United States, supra.*

(3) If the committee already has the information, *United States* v. *Icardi, supra,* whether or not it seeks to use it for a proper purpose. *Id.*

(4) If the committee could easily have obtained the information otherwise. This is not to suggest that the committee must use only the alternative method; it is simply one factor to consider in deciding that the encroachment upon the witness' right to speech, belief and silence under the First Amendment is justified.

The factors suggested above are not exclusive. Also, they imply compensating factors which might justify the question put to the witness. To illustrate, the question asked might require the witness to reveal personal beliefs, but the impossibility of obtaining the information by any other means might justify infringing the witness' right of silence as to personal belief.

Amicus recognizes that the cases which are considered in the light of the Court's standards would in all likelihood involve the weighing of not one but many such factors. Paradoxically, this would make individual cases easier to decide.

C. The Committee in compelling testimony of the petitioner in the instant case has exceeded the First Amendment limitations upon its investigative function.

It seems clear from all the facts here that the Congressional investigative committee was not acting for a proper legislative purpose but was pursuing the specific line of interrogation for the sole purpose of exposing and harassing the petitioner and those with whom he had been associated. Rather than duplicate petitioner's own presentation, we respectfully refer the Court to specific pages of his comprehensive brief.

Of the facts previously enumerated, we especially urge the following for the Court's consideration:

The Committee on Un-American Activities was engaged in an exposure function rather than gathering information for future legislation. Pages 35-52 and 58-64 of petitioner's brief.

The committee very likely could have obtained from its own files the information it sought as to whether certain of petitioner's former associates were Communists. Pages 64-69.

In this respect the committee failed to declare its need for the particular information about petitioner's associations in terms of a clear and present danger; a probable, future, substantive evil; or in any other terms.[4]

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[4] Considering that in these investigations there is no judge impartially ruling on the pertinency of the questions put to the witness, it becomes increasingly important that the witness have notice of particular areas of inquiry so as to judge the question of pertinency for himself, since if he declines to answer he does so at his peril. *Sinclair* v. *United States, supra.*

Conclusion

Congressional rights and private rights have greater meaning in their interdependence with each other than in their conflict with each other. Our society thrives on the nurture from and is secured by the formulations of free political activity. Accordingly, in our fierce struggle against world totalitarian movements, it is urgent now more than ever to maintain unimpaired personal rights guaranteed by the First Amendment.

For maintaining these rights petitioner has been indicted for contempt, convicted, fined and sentenced to prison.

The First Amendment protects persons from legislative activity which unnecessarily inquires into political associations. The rights of free speech and assembly are worthless if people can be compelled as was petitioner to account for their speech and assembly. No one is truly free to associate with others if he must fear subsequent inquiry into the details of his associations by an agency of government making an investigation such as this. Are not speech and assembly, conversing and mingling with others, the very elements of association?

Amicus concludes that the standards established by the Court for justifiable invasion of First Amendment rights have not been met; that, under all the surrounding circumstances of this case, the petitioner's constitutional rights have been violated; and that, therefore, petitioner's conviction for refusing to characterize the political beliefs of his associates cannot stand.

Respectfully submitted,

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