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Constitutional Law--First Amendment Freedoms--Kentucky Un-American Activities Committee

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Comments

CONSTITUTIONAL LAW-FIRST AMENDMENT FREEDOMS-KENTUCKY UN-AMERICAN ACTIVITIES COMMITTEE—On March 15, 1968, the Senate of the General Assembly of Kentucky passed House Resolution No. 84 [hereinafter referred to as the Resolution], a concurrent resolution creating a Joint Committee on Un-American Activities.[1] The Resolution, which had previously passed the House of Representatives became law on March 27, 1968 when the Governor failed to veto the

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[1] The preamble and the mandate for House Resolution No. 84 is as follows:
A CONCURRENT RESOLUTION creating a Joint Legislative Committee on Un-American Activities.

Whereas, this state and this country face grave public danger from enemies both within and without our boundaries, and

Whereas, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and idealogies, and

Whereas, Kentucky, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

Whereas, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

Now, therefore,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein:

Section 1. That there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Governor from the membership of the Senate, three of the five members from each House to be of the majority party and two of the five members from each House to be of the minority party. Said committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the Commonwealth of Kentucky, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

Resolution thereby allowing it to become law without his signature. (The Resolution did not become operative, however, until June 13, 1968).

On March 25, 1968, a suit was filed in Federal District Court for the Eastern District of Kentucky asking for a declaratory judgment of unconstitutionality and injunction relief to prevent formation of the Kentucky Un-American Activities Committee [hereinafter referred to as KUAC]. Joined as plaintiffs in the action were Carl and Anne Braden who had been mentioned by sponsors of the Resolution as probable targets of investigation,[2] civil rights leaders,[3] college professors,[4] student groups,[5] and other groups and organizations advocating social change.[6] They alleged, jointly and severally, that: (1) House Resolution No. 84 is vague, sweeping, overbroad and has a present inhibiting effect upon the ability of plaintiffs to carry on their activities of expression, assembly and petition protected by the first amendment; and (2) The Resolution was enacted for the purpose of harassing and intimidating the plaintiffs and others similarly situated, and to deter them from attempting to bring about social change through constitutionally-protected activity.

Joined as defendants were the Governor of Kentucky in his official capacity, the Chairman of the Legislative Research Commission of Kentucky, the Attorney General of Kentucky, and the prospective

[2] Newspaper clippings were included in plaintiff's complaint which quoted Governor Nunn as saying during his campaign for Governor that, if elected, he would, among other things, "press legislation . . . and take any legal executive action as an executive . . . to see that such organizations as the Southern Conference Educational Fund are prevented from operating in Kentucky, let alone setting up their national headquarters in the principal city in this State" and use his power "to run the type of organization the Bradens head out of Kentucky," and sponsor "legislation and an investigative body to look into it." Louisville Courier-Journal, May 7, 1967, at B-7, col. 1. Sponsors of the Resolution were quoted as asserting that the chief benefit of having the committee would be that it would, "bring into light the activities of the Southern Conference Educational Fund." The Louisville Times, March 16, 1968, at A-6, col. 6. Carl and Anne Braden are the heads of the Southern Conference Educational Fund which was also a plaintiff in the action.

[3] Civil rights leaders who were party-plaintiffs included the Reverend A. D. King, Father James Gorman, Chairman of the Louisville Peace Council, Reverend Leo Lesser, President of the Kentucky Christian Leadership Conference, Lucretia Ward, Secretary of the Kentucky Christian Leadership Conference.

[4] College professors included Laurence X. Tarpey, Professor of Economics, University of Kentucky, Abbie Marlatt, Professor of Home Economics, University of Kentucky, and Gene L. Mason, Professor of Political Science, University of Kentucky.

[5] Student groups included the Southern Student Organizing Committee, Students for a Democratic Society, and the Aunt Mollie Jackson Chapter of Students for a Democratic Society.

[6] Groups advocating social change included the Southern Conference Educational Fund, Inc., Louisville Peace Council and the Lexington Chapter of the Congress of Racial Equality.

members of the committee, yet to be named at the time of this suit.

On May 27, 1968, a hearing was held in Federal District Court to determine whether federal jurisdiction was sufficient to warrant the convening of a special three-judge panel for a decision on the merits of the case. *Held*: Federal jurisdiction was insufficient to warrant the calling of a three-judge panel because no *bona fide* controversy existed and the complaint was obviously without merit. A motion to dismiss was granted. *Braden v. Nunn*, Civil No. 316 (E.D. Ky., May 27, 1968), *appeal docketed*, No. 18849, 6th Cir., July 24, 1968.

Although the court did not actually rule on the merits of the complaint, *Braden v. Nunn* presents an interesting constitutional challenge to House Resolution No. 84. The gist of the complaint seems to be that the Resolution creating KUAC is phrased in such overbroad and vague terms[7]
that it fails the constitutional test for clarity and thereby creates a "chilling" effect on the expression of first amendment freedoms. As the reasoning goes, college professors, student groups advocating social change, *et al.*, will be afraid to express their opinions and engage in free association because of the threat of investigation and public exposure by KUAC. Thus, the mere existence of the investigative committee acts to stifle free speech even if no witnesses are ever called.

These arguments advanced in *Braden* are not without precedent. Recent Supreme Court decisions have recognized that vital first amendment freedoms may be abridged by legislative investigations.[8] The rights involved are those of speech and association. Although these

[7] *See* note 1 *supra* for the complete text of the preamble and mandate of the Resolution. Terms attacked as being vague in particular were "subversive," "foreign powers and idealogies," "foreign political theory." It was argued that the term "subversive" connotes anything which is contrary to current economic, political, and social standards among a majority of the population. Plaintiffs attempted to illustrate the broadness of the resolution by showing that the term "foreign political theory" could be interpreted as meaning the parliamentary form of government predominant in England and Canada.

[8] Although there were challenges during the McCarthy Era, the first Supreme Court case to substantially recognize that first amendment freedoms could be abridged by a legislative investigatory committee was *Watkins v. United States*, 354 U.S. 178 (1957). *See* Chief Justice Warren's majority opinion in *Watkins* for an in-depth history of Supreme Court cases involving legislative investigatory committees. Two years later in *Barenblatt v. United States*, 360 U.S. 109 (1959), the Supreme Court refused to declare the Congressional mandate of the House Un-American Activities Committee unconstitutionally vague and restated the conventional view that the Court will not attempt to assess the actual motives of Congress so long as there is a formal statement of legislative purpose. However, the four dissenting judges said the Committee's actual purpose of "exposure for exposure's sake" was so palpable that it defeats any presumption of a legitimate legislative purpose. *Barenblatt* was followed by decisions holding State investigations invalid for infringements of first amendment freedoms in *Gibson* v. *Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963) and *DeGregory v. New Hampshire*, 383 U.S. 825 (1966).

first amendment freedoms are not absolutes,[9] a compelling State interest must be shown to justify legislative intrusion.[10]

In *DeGregory v. New Hampshire*,[11] the New Hampshire Legislature had designated the State's attorney general as a one-man investigative committee and authorized him to investigate subversive activities within the State. When the petitioner was summoned before the committee and was questioned about "subversive" activities, he refused to answer certain questions and was cited for contempt. The Supreme Court reversed the contempt conviction saying that no compelling state interest had been shown to justify exposure of petitioner's past associations. In *Gibson v. Florida Legislative Investigative Comm.*[12] a similar investigation sought to link certain known Communists with the membership list of the Miami branch of the National Association for the Advancement of Colored People. The president of the Association refused to divulge information contained in the list and was convicted for contempt. Again, the Supreme Court reversed holding that the protection of petitioner's first amendment rights in this case were all the more essential because the challenged privacy was that of persons whose beliefs were already unpopular with their neighbors. In *Liveright v. Joint Comm. of the Gen. Assembly*,[13] plaintiff was the subject of a threatened state investigation into its "subversive" activities.[14] Suit was brought in Federal District Court before the investigation began, challenging the Resolution creating the committee on ground of vagueness and its chilling effect on first amendment freedoms. In holding the Resolution unconstitutionally void for vagueness, the Court said:

> . . . [E]xposure may retard the right of the individual to speak and associate freely. The exposure which issues from committee examination focuses attention on the individual and his unpopular beliefs and is capable of bringing forth reprisals from the public at large. Such re-

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[9] Konigsburg v. State Bar of California, 366 U.S. 36 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959).

[10] DeGregory v. New Hampshire, 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539 (1963); Watkins v. United States, 354 U.S. 178 (1957).

[11] 383 U.S. 825 (1966).

[12] 372 U.S. 539 (1963).

[13] 279 F. Supp. 205 (M.D. Tenn. 1968).

[14] The controversy in this suit centered about a resolution passed by the Tennessee General Assembly in 1967 which, according to its preamble, was intended to: "provide for a committee to investigate the activities of the Highlander Research Center of Knox County and organizations affiliated therewith." *Id.* at 207. The preamble continued: . . . [*I*]t has been reported that the Highlander Research Center . . . and persons and organizations affiliated therewith, may be involved in activities subversive to the government of our State. . . . *Id.*

> prisals are a form of punishment, and may be as effective as imprisonment in curbing First Amendment freedoms.[15]

Focusing its attention on the mandate of the Tennessee committee, the court said:

> The term subversion is capable of multiple meanings. Without exception, the term connotes unpopular words or deeds. Too often, subversion takes on the meaning of any activity which is not in tune with the prevailing social, political, economic or religious values of the community.[16]

Recognizing the importance of protecting first amendment rights, the United States Supreme Court has insisted that a State cannot expose the private affairs of an individual unless it is justified by a valid function of the legislative branch.[17] The interest of the state must be overriding and compelling and the State must establish a connection between the questions asked and lawful legislative purposes.[18] To insure that the committee's inquiries are directed toward these ends, the legislature must instruct the committee in the use of its powers.[19] The authorizing resolution must spell out the group's jurisdiction and purpose with sufficient particularity.[20] As the court in *Liveright* said:

> If the court does not require a defined legislative purpose before the actual demand for compliance by compulsory process, the witnesses's recourse is to comply fully and risk exposure or to refuse and accept a contempt citation. By the time that judicial review is obtained, the witness has already been publicly stigmatized, either through exposure of his unpopular beliefs and associations, or through being characterized as one who is sympathetic to movements which seek to subvert the government.[21]

There is precedent among recent Supreme Court decisions which would lend authority to plaintiff's contention in *Braden* that federal jurisdiction existed even though the committee had not become operational at the time of their suit.[22] This theory is based primarily

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[15] *Id.* at 216.
[16] *Id.* at 215.
[17] Watkins v. United States, 354 U.S. 178 (1957).
[18] Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539 (1963); Watkins v. United States, 354 U.S. 178 (1957).
[19] 354 U.S. 178 (1957).
[20] *Id.*
[21] 279 F. Supp. at 217.
[22] The District Judge seemed to lay great stress on the fact that the committee had not been formed when the complaint was filed. In his bench opinion, he stated,

> Gentlemen, I have listened to this, and this case has troubled me from the very beginning. I just don't see how you could have a case of this kind pending to seek a declaration of rights and injunctive relief where the law has not yet gone into effect, where there cannot be said to be any bonafide controversy, and where you are, in effect, seeking a prospective determination of unconstitutionality. Braden v. Nunn, Civil No. 316 at 39 (E. D. Ky., May 27, 1968).

on the landmark case of *Dombrowski v. Pfister.*[23] In this case, the plaintiffs[24] sought a declaratory judgment and injunctive relief to prohibit the Louisiana Un-American Activities Committee and other State authorities from prosecuting or threatening to prosecute the plaintiffs for alleged violations of the Louisiana Subversive Activities and Communist Control Law. Plaintiffs alleged that the Subversive Control Law was void on its face because of vagueness and its chilling effect on first amendment freedoms. A three-judge district court dismissed the complaint saying that the plaintiffs had not exhausted State remedies which would give State courts an opportunity to narrow the alleged over-broad statute. The United States Supreme Court reversed, holding it was not necessary that the plaintiffs exhaust all state remedies before going to the federal courts in cases where first amendment rights were threatened or chilled. This was a new theory, departing significantly from the traditional "abstention" doctrine whereby the federal courts refrained from passing on the constitutional validity of state criminal statutes until the state courts had an opportunity to narrow and clarify vague provisions.

In addition to the *Dombrowski* precedent, plaintiffs in *Braden* cited prior Supreme Court cases where exceptions had been made to the abstention rule. In *Pierce v. Society of Sisters,*[25] the Supreme Court allowed private schools to maintain an action to enjoin the enforcement of a statute prohibiting attendance at private schools, although it was not to become effective for several years. In the teacher loyalty oath cases,[26] teachers were allowed to challenge the validity of loyalty oaths without regard to whether any attempt was being made by the State to enforce the oath. This precedent in the loyalty oath cases was relied on by the Supreme Court when it decided *Dombrowski.*

Turning to the arguments in defense of House Resolution No. 84, it is well settled that a State does have power to make investigations in the area of subversive activities or any other area where there is a compelling State interest.[27] State legislatures have a right and the power to conduct investigations through a duly authorized committee.[28] These investigations perform a valuable service when properly executed because they provide lawmakers with a first-hand insight into current problems requiring legislative attention. The United

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[23] 380 U.S. 479 (1965).

[24] One of the plaintiffs in *Dombrowski* was the Southern Conference Educational Fund, Inc., also a plaintiff in the principal case.

[25] 268 U.S. 510 (1925).

[26] Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 60 (1964).

[27] Watkins v. United States, 354 U.S. 178 (1957).

[28] *Id.*

States Supreme Court has recognized the importance of State legislative investigatory committees and has sustained their validity.[29] However, as noted previously, the Court has laid out rather strict rules for the constituting and conduct of these committees.

Although plaintiff's complaint was dismissed as being "obviously without merit" in *Braden*,[30] it appears that the court may have misunderstood the nature of plaintiff's case. It is true that the Resolution creating KUAC had not become operative when the complaint was filed.[31] However, the injury allegedly sustained by the plaintiffs occurred when the Resolution creating KUAC was passed by the Kentucky legislature. The repression of free speech began then, because from that point plaintiffs allegedly are afraid to express themselves for fear of being called before the Committee. Fear is created, not only because the plaintiff's do not wish to be exposed, but because the Committee, pursuant to a vague and broadly written charter, has almost unlimited questioning power. It did not matter to the plaintiffs that the Resolution was not to become operative until June 13, 1968. The fact is that the Resolution had been passed and that the plaintiffs were threatened with the possibility of being called before the Committee. No specific action of KUAC was challenged; rather the Resolution creating KUAC. From the precedents set in *Dombrowski* and the loyalty oath cases, it seems that the Court in *Braden* should have found sufficient federal jurisdiction for a three-judge panel to be convened in order that the case be heard on its merits. It was not the province of the single judge to decide *Braden* on its merits; rather solely to determine jurisdiction.[32]

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[29] Uphaus v. Wyman, 360 U.S. 72 (1959).

[30] In his oral opinion, the Federal District Judge said,

> In the opinion of the Court this . . . complaint lacks necessary substance. In the opinion of the Court at this stage and at this time it is obviously without merit. And the demand for the empaneling of a three-judge court is overruled and denied. Braden v. Nunn, Civil No. 316 at 40 (E. D. Ky., May 27, 1968).

[31] The Resolution passed the Senate of the General Assembly on March 15, 1968 having been previously passed by the House of Representatives. The Resolution became law on March 27, 1968 when the Governor failed to veto thus allowing it to become law without his signature. The Resolution stipulated that the Committee would begin operations on June 13, 1968. Plaintiff's suit was filed on March 25, 1968.

[32] In *Ex Parte Poresky*, 290 U.S. 30 (1933), the Court reiterated the rule that a single judge cannot dismiss on its merits a suit seeking to enjoin enforcement of a State statute on constitutional grounds unless the complaint is plainly without substance on its face. In *Stamler v. Willis*, 371 F.2d 413, 414 (7th Cir. 1966), the Court said

> We think that if the complaints present a substantial constitutional question, the three-judge court request ought to be granted, since there is no doubt that the complaints 'at least formally alleges a basis for equitable relief . . .' and that 'the case presented otherwise comes within the requirements of the three-judge statute.'

A determination of the constitutional validity of House Resolution No. 84 creating the Kentucky Un-American Activities Committee, which could come about if plaintiffs are successful in their appeal to the Circuit Court of Appeals,[33] would involve a close scrutiny of the wording of that Resolution. There would be at least some precedent for a determination that this Resolution is unconstitutionally overbroad and vague. Specifically, the power given KUAC to investigate any activity in Kentucky which the committee deems "subversive" is as broad and sweeping as the power of any committee could be. The threat of State criminal contempt convictions for those who refuse to cooperate with the Committee adds emphasis to this broad power. Such a committee with power to brand an individual as a "subversive" by simply calling him before the committee in a public hearing could easily stifle free speech and association, especially among those whose ideas may not agree with the current majority of thinking. The Supreme Court has given a special place to rights protected by the first amendment. As the Court stated in *NAACP v. Button*,[34] "These (first amendment) freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . The threat of sanctions may deter their exercise as potently as the actual application of sanctions." It is the threat of sanctions which plaintiffs in *Braden* allege infringe on their first amendment freedoms.

J. Dan Kemp

DOMESTIC RELATIONS—FRAUDULENT REPRESENTATION OF PREGNANCY AS GROUNDS FOR ANNULMENT—For almost a year prior to their marriage the husband and wife had frequently engaged in sexual intercourse.

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[33] An appeal has been filed by the plaintiffs asking that the district court be reversed and a three-judge panel be convened for determination of the case on its merits. Braden v. Nunn, *appeal docketed,* No. 18849, (6th Cir. July 24, 1968).

A complementary suit was filed in Federal District Court for the Western District of Kentucky in July, 1968, after KUAC members had been appointed and the committee had drawn up its rules of procedure. The allegations made in this suit were essentially the same as in *Braden v. Nunn* except for the fact that the committee had become operative and functioning when the second suit was filed. A three-judge panel was convened to hear this case although no oral hearing was held because attorneys were not notified of the hearing. The three-judge court held that the plaintiff's complaint failed to state a claim for which relief could be granted and dismissed the suit. Black Unity League v. Miller, Civil No. 5980 (W.D. Ky., Sept. 4, 1968), *appeal filed,* U.S. , Nov. 4, 1968. This case has also been appealed and is pending. Plaintiff's attorneys are also appealing for "emergency relief" in that they were not notified of the convening of the three-judge panel and were not given an opportunity to make oral arguments.

[34] 371 U.S. 415, 533 (1963).