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# Constitutional Law - Right of States to Investigate Subversive Activities

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right of anonymous political association is not protected from governmental invasion to the same degree as the rights of free speech and belief.

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## CONSTITUTIONAL LAW — RIGHT OF STATES TO INVESTIGATE SUBVERSIVE ACTIVITIES

Appellant, an officer of a New Hampshire corporation which operated a summer camp, was summoned by the State Attorney General[1] to testify in regard to certain alleged subversive activities. Appellant answered all questions regarding his own activities, but refused to produce a list of names of persons who had attended the last two sessions of the camp. After refusing to comply with a state court order to produce the lists, which was issued pursuant to a motion by the Attorney General, appellant was held in civil contempt and confined to jail until he should see fit to comply with the order. The sentence was affirmed by the State Supreme Court.[2] Appellant's defenses were: (1) that the state statute authorizing the investigation had been rendered null by the United States Supreme Court's decision in *Pennsylvania v. Nelson*[3] which held that the field of subversion had been occupied by federal legislation to the exclusion of the states; and (2) that the state was precluded from compelling the disclosure by the due process clause of the Fourteenth Amendment. On the first appeal to the United States Supreme Court,[4] appellant was successful in obtaining a remand of the case for reconsideration in the light of the Court's recent decision in *Sweezy v. New Hampshire*.[5] The New Hampshire Supreme Court reaffirmed its previous decision.[6] On appeal to the United States Supreme Court, *held*, affirmed, four Justices dissenting.[7] The

1. An act of the New Hampshire legislature empowered the Attorney General of the state to act as a one-man investigating committee to ascertain if there were persons located within the state who were defined by statute as "subversive." N.H. Laws, ch. 197 (1955). See note 11 *infra*.
2. Wyman v. Uphaus, 100 N.H. 436, 130 A.2d 278 (1957).
3. 350 U.S. 497 (1956).
4. Uphaus v. Wyman, 355 U.S. 16 (1957).
5. 354 U.S. 234 (1957).
6. Wyman v. Uphaus, 101 N.H. 139, 136 A.2d 221 (1957).
7. Justice Brennan and Chief Justice Warren dissented on the ground that the rights of appellant of speech and those of assembly of the persons who attended the camp could not be subordinated to the rights of the state of New Hampshire because they could find no rational connection between the investigation and a valid legislative purpose. Although the dissent was joined by Justices Black and Douglas, they also concluded that the sentence of contempt, which grew out of

states are competent to investigate subversive activities directed against the state government, and the due process clause of the Fourteenth Amendment does not preclude the states from compelling a disclosure of this type by use of the contempt power, where the states are making a valid investigation. *Uphaus v. Wyman*, 360 U.S. 72 (1959).

In *Sweezy v. New Hampshire*,[8] the Supreme Court held a conviction under the same statute invalid under the due process clause of the Fourteenth Amendment. Four of the Justices, subscribing to the main opinion of the Court, found that there had been a denial of *procedural* due process. The basis of the main opinion was that the state legislature, in appointing the Attorney General as a one-man investigating committee, had separated its power to investigate from its responsibility to use that power. The standard of authorization, which allowed the Attorney General to act on any information which was "reasonable or reliable"[9] was found to lack an adequate safeguard for the protection of witnesses called to testify. Further, these Justices were of the opinion that, in the absence of a state court ruling that the legislature desired the particular information sought, the Attorney General was acting beyond his delegated authority. Finding that it was impossible for the witness to ascertain whether the information he was called upon to divulge was within the authority of the committee to request, the main opinion held that the use of the contempt power to elicit such information was a denial of *procedural* due process. In a concurring opinion, which was necessary to constitute a majority of the Court, Justice Frankfurter found a denial of *substantive* due process of law. He stated that the Court was precluded from looking into this delegation of state powers and was bound by the findings of the highest state court as to its validity.[10] How-

the investigation, was a violation of the constitutional prohibition against bills of attainder.

8. 354 U.S. 234 (1957).

9. *Id.* at 252.

10. Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954) merely upheld and defined the actions of the attorney general as a legislative function as opposed to an executive function and as such was held valid under the state law. The four Justices who wrote the main opinion in the *Sweezy* case would seem to require a state court decision regarding each particular individual under investigation as to the desire of the legislature in obtaining the particular information that he was being asked to reveal. In the absence of such a holding they reasoned that the attorney general was acting beyond his scope of authority because of the vagueness of the statute authorizing the investigations. See note 1 *supra*. Justice Frankfurter, on the other hand, was willing to treat this holding of the State Supreme Court as binding as to the authority of the attorney general, and would preclude inquiry of the type indulged in by the main opinion as to the *desire* of the state

ever, Justice Frankfurter determined that the Court could question the validity of the investigation in relation to the particular individual involved. To accomplish this process the need of the legislature in obtaining the information sought was balanced against the constitutional rights of Sweezy. In this balancing process, Justice Frankfurter took notice, as did the main opinion, that the rights of academic and political freedom were here involved. Taking these particular rights involved into consideration and balancing them against the inherent right of the state to self-preservation, he reached the conclusion that no rational basis had been demonstrated between this right of the state and the information sought, which would justify the invasion of Sweezy's rights. Therefore, the use of the contempt power was a violation of *substantive* due process of law under the Fourteenth Amendment.

In the instant case, it appears that the majority have adopted Justice Frankfurter's position in the *Sweezy* decision. The Court accepted the finding of the State Supreme Court as to the investigative committee's scope of authority and the desire of the legislature in obtaining the information demanded of appellant. The Court then moved into the substantive aspects of the due process problem, employing the balancing process used by Justice Frankfurter in the *Sweezy* case. Upon examination, the evidence that prompted the Attorney General to call the appellant before the committee was found to create a nexus between the corporation with which the appellant was affiliated and subversive activities, sufficient to warrant investigation. The Court then found that this investigation was based on the state's inherent right to self-preservation, which in this case was more particularly the identification of "subversive persons"[11] within the state. Assuming that the appellant was competent to assert the rights of those whose names appeared on the lists,[12] the Court

legislature in obtaining particular information from individual witnesses. He would merely ascertain through the balancing process if there was a rational basis between the interest of the state in obtaining the information, and whether or not this interest was sufficiently demonstrated to exist.

11. N.H. REV. STAT. ch. 588, § 1 (1955), defines "subversive person": " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to 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 who is a member of a subversive organization or a foreign subversive organization."

12. See NAACP v. Alabama, 357 U.S. 449 (1958).

found that their rights were those of privacy of political association. In balancing the right of the state to preserve itself on the one hand, and the rights of appellant and the others to keep their political associations private on the other, the Court concluded that the right of self-preservation was the stronger of the conflicting claims. Further, it was found that the relationship between the information desired and this interest of the state was demonstrated to exist to a degree sufficent to override the rights of appellant and the others whose names would be exposed.[13] Therefore, the court held that the use of the contempt power to elicit this information was not a denial of *substantive* due process of law under the Fourteenth Amendment.

In dealing with the appellant's contention that the decision in the *Nelson* case had rendered this type of state action null and void, the Court held that this was not a correct interpretation of that decision, noting that the same contention had been raised in the *Sweezy* case and had been denied *sub silentio*.[14] In the *Nelson* case as it finally reached the United States Supreme Court, respondent had been convicted in a state court for advocating the violent overthrow of the government of the United States.[15] The Supreme Court held that the conviction could not

13. *Cf. ibid.*, where the Supreme Court held that the State of Alabama had not shown sufficient interest to force the production of membership lists from the defendant organization on the basis of an investigation to see if laws of the state regulating intrastate business were being violated. It is to be noted that the organization produced all relevant business records and charters, refusing only to produce the names of "rank and file" members on the basis that economic and other reprisals would follow. The Court found this to be highly probable and denied the state the right to these lists on the basis that insufficient need for them had been established.

Also of note in the instant case is that New Hampshire has had a law since 1927 which requires all operators of hotels, lodges, etc., to keep a record of all guests; which record is to be open for inspection by any sheriff, deputy or local police officer. It would appear that the summer camp involved was covered by this statute. N.H. REV. STAT. ch. 353, § 3 (1955).

14. Wyman v. Uphaus, 360 U.S. 72, 77 (1959).

15. The original indictment against Nelson contained twelve counts, eight of which were for sedition against the State of Pennsylvania. However, when the case was reviewed and the conviction reversed by the Supreme Court of Pennsylvania in Commonwealth v. Nelson, 377 Pa. 58, 92 A.2d 431 (1952), Justice Jones held that the record disclosed no evidence of any sedition against the state, and upon appeal to the United States Supreme Court, the only consideration seems to have been the four counts charging sedition against the United States. At the time of the Pennsylvania prosecution under its sedition statutes, PA. STAT. ANN. 18:4207 (1945), Nelson had been convicted under the Smith Act in the federal courts for sedition against the United States. United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953), aff'd, 223 F.2d 449 (3d Cir. 1955) (the federal prosecution was brought under Nelson's Yugoslavian name, rather than his assumed American name). It is possible that in this case the United States Supreme Court was partially moved by the fact that this involved double punishment for the same offense, as was the case in United States v. Lanza, 260 U.S. 377 (1922). However, that case upheld a conviction under the federal prohibition law following a con-

stand as the Congress had occupied the field of investigation and prosecution of subversion against the United States. Therefore, all state laws, even those designed to be supplemental, must fall before this federal occupancy of the field. In the instant case, the Court held that the decision reached in the *Nelson* case does not prevent the states from enforcing laws enacted to protect the states from subversion. Thus, it appears that the present status of the *Nelson* decision is that it merely proscribes prosecution by the individual states for sedition directed against the national government, but has not in any manner restricted their inherent right of self-preservation.

In conclusion, the instant case is significant for several reasons. First, it has clarified the holding of the *Nelson* decision, which has been the subject of much speculation and proposed legislative action.[16] It now appears that the Court in that decision, as interpreted in the instant case, merely proscribed prosecution by the states for sedition against the United States, but has left the states free to investigate and punish sedition against their own political entities. This interpretation rejects the contention that sedition against the government of any state amounts to sedition against the United States, which would mean that there could be no sedition prosecutions by any state, following the *Nelson* decision.[17] Secondly, the Court in the instant case followed its repeated doctrine of accepting the decision of the highest state court on the question of delegation of state authority.[18] Further, it appears that an identification of the particular interests of the individual as opposed to that of the state is very important in this area. This is pointed up by the fact

viction under the state liquor laws. It is submitted that from the language of the Court that possibly four members thereof were ready to overrule the *Lanza* case. *But see* Bartkus v. Illinois, 359 U.S. 121 (1959), which upheld a conviction for bank robbery under a state law following an acquittal on a federal charge which makes it a crime to rob a federally insured bank. However, the question of double prosecution was avoided in the *Nelson* case by finding federal occupancy of the field of investigation and prosecution of sedition directed against the *United States*. Since the case came up for review only on those counts of the indictment which charged Nelson with this crime rather than sedition against the State of Pennsylvania, the question of whether the states can prosecute for sedition directed against their separate entities was left open for speculation. See Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287 (1957).

16. See Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287, 327-32 (1957); Note, 19 LOUISIANA LAW REVIEW 864 (1959).

17. See Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287, 326 (1957); Commonwealth v. Gilbert, 134 N.E.2d 13 (Mass. 1956).

18. See, e.g., Dreyer v. Illinois, 187 U.S. 71 (1902).

that the state court in the instant case had particularized the interest of the state to an extent which was not present in the *Sweezy* decision. It also seems to appear that the Court may be developing a distinction between the right of *anonymous* political association as presented in the instant case and the other First Amendment freedoms, such as those of political association and academic freedom as found in the *Sweezy* decision. Apparently, these latter freedoms will be given somewhat more protection from invasion than the former.[19] It is to be noted that the Court in the instant case did not treat the matter of procedural due process. This may be accounted for by the fact that the Court had before it a determination by the highest state court as to the state legislature's desire for the information sought, a circumstance not present in the *Sweezy* case. However, it is to be remembered that the Court has repeatedly stated that each due process case will largely turn on the facts there presented.[20] For this reason it is not felt that the instant case necessarily stands for the proposition that procedural due process will not be inquired into in future cases of like nature.

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CRIMINAL LAW — STRICT CONSTRUCTION OF PENAL STATUTES

Defendant was convicted of public intimidation of an officer for a battery committed while he was an inmate at the state penitentiary. The basis of the conviction was the fact that he had struck a prison guard who seized his arm when he ignored a re-

19. Compare Scull v. Virginia, 359 U.S. 344 (1959); NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957), with Barrenblatt v. United States, 360 U.S. 109 (1959) and Wyman v. Uphaus, 360 U.S. 72 (1959).

20. E.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *Cf.* Scull v. Virginia, 359 U.S. 344 (1959), where the Supreme Court reversed a conviction of contempt when petitioner refused to answer questions propounded by a Virginia state legislative committee authorized to investigate: (1) tax structure of racial organizations, (2) the effect of integration or its threat on public schools of Virginia and the state's general welfare, and (3) violation of statutes on champerty, barratry, and maintenance or unauthorized practice of law. The basis of the decision was that the petitioner was not informed of the pertinency of the questions asked and whether or not any of them fell into one of the three areas authorized for investigation. As a result, any conviction for refusal to answer under these circumstances would result in a denial of procedural due process of law under the Fourteenth Amendment. The Court cited NAACP v. Alabama, 357 U.S. 449 (1958), and said that this was an imposition on a troubled area of speech, press, and association in an area of great public interest. Four members of the Court reiterated their position announced in the *Sweezy* case that they could not at this time think of any circumstances which would be sufficient to permit an invasion by the states into these areas of constitutionally protected rights.