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Constitutional Law - Self-Incrimination

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RECENT DECISIONS

CONSTITUTIONAL LAW—Self-incrimination—That section of the Subversive Activities Control Act requiring individual members of the Communist Party to register with the Justice Department violates registrants' fifth amendment privilege against self-incrimination.

Albertson v. Subversive Activities Control Board, 86 Sup. Ct. 194 (1965).

In *Albertson v. Subversive Activities Control Board*[1] the Supreme Court of the United States held that individual members of the Communist Party of the United States cannot be compelled to register with the Attorney General, as such compulsory registration would violate those members' fifth amendment privilege against self-incrimination.

The Subversive Activities Control Act of 1950[2] was passed by Congress in an effort to burden and discourage the activities of the Communist Party of the United States. The Act requires the Party to reveal the identity of all its members to the Attorney General.[3] If the Party fails to perform this duty, the obligation devolves upon the executive officers of the Party,[4] and in the event of their default, each and every member is required to register.[5] An individual accomplishes registration by filling out and signing a standard registration form which states *inter alia* that the registrant "hereby registers as a member of a Communist-action organization."[6] The form is accompanied by a "Registration Statement" which *must* contain, (1) the name of the Communist-action organization of which the registrant is a member, (2) an enumeration of any Party offices held by the registrant, and (3) a description of the duties performed while in office.[7] The Act further provides that the Attorney General, upon reasonable belief that a certain individual is a member of the Communist Party, may petition the Subversive Activities Control Board for an order requiring the suspect to register.[8] The Board then conducts a hearing to

1. 86 Sup. Ct. 194 (1965).

2. 64 Stat. 987 (1950), 50 U.S.C. §§ 781-98 (1964 ed.).

3. Subversive Activities Control Act §§ 7(a) and 7(b), 64 Stat. 993-995 (1950), 50 U.S.C. §§ 786(a) and 786(b) (1964).

4. Subversive Activities Control Act § 7(h), 64 Stat. 995 (1950), 50 U.S.C. § 786(h) (1964).

5. Subversive Activities Control Act § 8(a), 64 Stat. 995 (1950), 50 U.S.C. § 786(a) (1964).

6. Registration Form for Individuals, Form IS-52a, set forth in the appendix to the decision, at p. 201 of 86 Sup. Ct.

7. Registration Statement for Individuals, Form IS-52, set forth in the appendix to the decision, at p. 201 of 86 Sup. Ct.

8. Subversive Activities Control Act § 13(a), 64 Stat. 998 (1950), 50 U.S.C. § 792(a) (1964).

determine whether or not the suspect is a "member" within the meaning of the Act.[9] An aggrieved party may appeal the Board's decision to the United States Court of Appeals for the District of Columbia.[10]

In the present case, the Attorney General possessed evidence indicating that petitioners were members of the Communist Party of the United States. As neither the Party nor its officers had previously registered, it was incumbent upon the individual members to do so. Therefore, the Attorney General petitioned the Subversive Activities Control Board for orders directing petitioners to register. The orders were issued by the Board and the Court of Appeals affirmed the Board's action, stating that the petitioners' self-incrimination claims were premature.[11] The Supreme Court unanimously reversed, holding that to compel petitioners to register as members of the Communist Party violated their fifth amendment privilege against self-incrimination and that circumstances were sufficiently mature for the assertion of that privilege. Mr. Justice Brennan authored the unanimous opinion of the Court.[12]

In reaching the reversal, the Court found that the case of *Communist Party v. Subversive Activities Control Board*[13] was not apposite to the present situation. In *Communist Party* the Board had issued registration orders to the Party.[14] The Party interposed the defense of the self-incrimination privilege of its officers. The Court rejected this contention by a 5-4 majority. Mr. Justice Frankfurter, writing for the majority, stated that the assertion of the officers' self-incrimination privilege was premature because if the registration orders were otherwise valid, the Party itself might choose to register;[15] thus the duty of the officers to register for the Party could foreseeably never be activated, since this duty arises only if

9. Subversive Activities Control Act § 13(c), 64 Stat. 998-99 (1950), 50 U.S.C. § 792(c) (1964).

10. Subversive Activities Control Act § 14(a), 64 Stat. 1001-1002 (1950), 50 U.S.C. § 793(a) (1964).

11. Albertson v. Subversive Activities Control Board, 332 F.2d 317 (D.C. Cir. 1964), *cert. granted*, 381 U.S. 910 (1964).

12. Mr. Justice White took no part in the consideration or decision of the case. Mr. Justice Clark wrote a short concurring opinion emphasizing the fact that when the Subversive Activities Control Act was initially proposed in Congress, the Justice Department expressed the opinion that the registration requirements might offend the fifth amendment self-incrimination privilege. Mr. Justice Black also briefly concurred and cited his dissent in *Communist Party v. S.A.C.B.*, 367 U.S. 1 (1961). In that dissent Justice Black expressed the view that the Act offends the first amendment associational freedoms and is also a bill of attainder.

13. 367 U.S. 1 (1961).

14. The orders were issued pursuant to sections 7(a) and 7(b) of the Act, *supra* note 3.

15. The five justice majority in *Communist Party v. S.A.C.B.*, *supra* note 13, held that the registration orders to the Communist Party were valid and did not violate the first amendment freedoms of expression and association. The Court also held that the Act was not a bill of attainder.

the Party fails to register.[16] In *Albertson* the Court found no intervening contingencies similar to those in *Communist Party*. The Board had issued final registration orders to petitioners as individual members. Thus, petitioners must either register and divulge incriminating information, or subject themselves to criminal prosecution.[17] Therefore, the Court concluded, petitioners were entitled to have their self-incrimination claim decided on its merits before their duty to register became final.

Having thus arrived at the substantive question of self-incrimination, the Court proceeded to find that the information which petitioners would be required to divulge upon registration could lead to criminal prosecutions under either the membership clause of the Smith Act,[18] or Section 4(a) of the Subversive Activities Control Act.[19] Upon reaching the merits of the self-incrimination claim, this conclusion was almost forgone, since the Court held in *Blau v. United States*,[20] that mere association with the Communist Party presented a sufficient threat of prosecution to support a self-incrimination claim. Furthermore, since the information required of petitioners was so intimately connected with an area permeated by criminal statutes, freedom from compulsory self-incrimination totally excused registration.[21]

Finally, the Court decided that the "immunity provision" of Section

16. Communist Party v. S.A.C.B., *supra* note 13.

17. The penalty for failure to register is $10,000 or 5 years imprisonment or both for each day of delinquency. § 15(a), 64 Stat. 1002 (1950), 50 U.S.C. § 794(a) (1964).

18. 62 Stat. 808 (1948), 18 U.S.C. § 2385 (1964). The Smith Act makes it a crime to advocate the desirability of overthrowing the government of the United States by force; to publish material implementing this advocacy; to organize a group of persons to advocate the overthrow of government by force or to be a member of any such group, knowing the purpose thereof. The penalty is a $20,000 fine or not more than 20 years imprisonment or both. The Supreme Court has interpreted the Smith Act as proscribing only "advocacy to action" as opposed to advocacy in the realm of abstract ideas. Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1951). Similarly, membership in the Communist Party can be punished under the Smith Act only if the accused is an active member with a specific intent to bring about the forcible overthrow of government as speedily as possible. Scales v. United States, 367 U.S. 203 (1961).

19. § 4(a), 64 Stat. 991 (1950), 50 U.S.C. § 783(a) (1964).

20. 340 U.S. 159 (1950). In this case, petitioner asserted the privilege against self-incrimination while under interrogation before a federal grand jury.

21. This position was in response to the government's argument that the self-incrimination privilege could not excuse *complete failure* to register, but that it might be asserted to excuse answering certain questions which might be particularly incriminating. This argument was based on *United States v. Sullivan*, 274 U.S. 259 (1927), where petitioner asserted the self-incrimination privilege as a defense for failing to file an income tax return. The Supreme Court affirmed petitioner's conviction in *Sullivan*, stating that the privilege might excuse answering certain questions, but would not support a failure to file any return at all. The Court distinguished *Albertson* from *Sullivan* by stating that: "The questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities."

4(f) of the Act[22] did not provide petitioners with complete protection from criminal prosecution, and therefore did not render immunity commensurate with the self-incrimination privilege. The immunity clause provides only that Party membership, *per se*, shall not be a crime, and that the fact of registration shall not be admitted into evidence in a criminal proceeding. The Court reasoned that since the immunity provision did not prohibit the use of the registration information as an investigatory lead, compulsory registration could result in future criminal prosecution. Therefore, the immunity clause failed to meet the standard of immunity as set forth in *Counselman v. Hitchcock*.[23]

The effect of the *Albertson* decision is to administer the *coup de grace* to the Subversive Activities Control Act. The great utility of the Act, from the standpoint of the government, was that it required the Communist Party to register and in so doing to submit a complete list of its members. This revealed the identity of many communist-affiliated individuals theretofore unknown to the government. The requirement that individual members register, in the event that the Party failed to register, was of secondary importance because the Attorney General had to prove to the Board, subject to appellate review, that an individual was actually a member of the Communist Party. If the Attorney General possessed enough information about an individual to convince the Board of Communist membership, there remained little to be gained by forcing that individual to register.[24]

Prior to the *Albertson* case, the Court in *Communist Party v. Subversive Activities Control Board*[25] held by a bare 5-4 majority that the Board's registration order to the Communist Party was valid. This decision sustained the foundation of the statute, and the critical source of information (*i.e.* the membership lists), remained intact. The success was short lived, however. The government subsequently prosecuted the Party for failure to comply with the registration order and the Court of Appeals for the District of Columbia held that there was no criminal offense, because no one could register the Party without also revealing himself as a Party member and thereby incriminate himself.[26] The Supreme Court

22. Subversive Activities Control Act § 4(f), 64 Stat. 992 (1950), 50 U.S.C. § 783(a) (1964).

23. 142 U.S. 547, at 564-585 (1892).

24. The additional useful knowledge which conceivably could be gained by requiring an individual to register, after an adverse finding by the Board, would consist of:

(1) Aliases used by the registrant in the preceding 10 years.

(2) Place of birth.

(3) Any offices held by the individual in the Communist organization and a description of the duties performed during the tenure in office.

See "Registration Statement for Individuals," Form IS-52, set forth in the Appendix to the Court's opinion, at p. 201 of 86 Sup. Ct.

25. Cited note 13 *supra*.

26. Communist Party v. United States, 331 F.2d 807 (1963). The position taken by the

denied certiorari.[27] Therefore, as a practical matter, the government's access to the membership lists of the Communist Party had been foreclosed prior to the *Albertson* decision. Only the requirement of individual registration remained operative. Now *Albertson* has removed the last weapon from the government arsenal.

Notwithstanding these developments, certain alterations in the Subversive Activities Control Act could restore a great measure of its utility. First, if the immunity provision were redrafted so as to provide complete protection from all prosecutions to which the required information was directly or indirectly related, this would overcome any self-incrimination claim.[28] However, this change, standing alone, would neutralize the provision of the Smith Act penalizing an individual for advocating action in support of the Communist cause; *i.e.* any individual who desired to actively promote the Communist cause would merely have to register with the Attorney General and thereby gain immunity from prosecution under the Smith Act. However, this neutralizing effect could be removed by simply eliminating the registration requirements for individuals. This requirement has little utility to the government. The Attorney General could then designate one known officer of the Communist Party (or any other Communist-action organization) to register for the Party and complete immunity from prosecution would be granted to this officer alone. Thus, the complete membership lists of the Party could then be obtained by the government. All of the disclosed members could be prosecuted under the Smith Act at the discretion of the Attorney General, since the self-incrimination privilege exists only for the benefit of the registering officer and cannot be claimed for the benefit of third parties.[29] Assuming that Congress would be disposed to pass alterations of this nature, the constitutional objections to the Subversive Activities Control Act[30] could be eliminated and its fundamental usefulness preserved.

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Court of Appeals in this case follows Mr. Justice Brennan's dissent in *Communist Party v. S.A.C.B.*, *supra* note 13.

27. Communist Party v. United States, 377 U.S. 968 (1964).

28. Ullman v. United States, 350 U.S. 422, at 429-431 (1955).

29. Rogers v. United States, 340 U.S. 367, 370 (1951); United States v. Murdock, 284 U.S. 141, 148 (1931).

30. In *Communist Party v. S.A.C.B.*, *supra* note 13, only Justice Black indicated that the Act would be invalid even if the self-incrimination objection were eliminated since, in Justice Black's view, the Act infringes the first amendment associational freedoms and is also a bill of attainder. The remainder of the Court indicated that the Act was a valid regulatory measure, controlling Communist activity exceeding the realm of mere speech.