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TWO DECISIONS OF THE UNITED STATES SUPREME COURT ON THE RESTRAINT OF COMMUNISTIC ACTIVITY

By

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During the term that ended in June the Supreme Court of the United States reviewed the legality of restraints on Communistic activity. The several cases that the court considered are grouped under two titles: *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General of the United States*,¹ and *Dennis v. United States*.² The group of cases first named concerned the action of the Attorney General in designating to the Loyalty Review Board, the Joint Anti-Fascist Refugee Committee, The National Council of American-Soviet Friendship, Inc. and International Workers' Order, Inc. as subversive organizations. In the second named case the court reviewed the conviction in the Southern District of New York of 11 persons for the violation of the Smith Act by activities in the organization of the Communist Party of the United States.

Here I shall state in simple language the background of these cases; and I shall explain in popular terms points of law that the justices considered in their opinions.

In the first named group of cases the Attorney General of the United States certified to the Loyalty Review Board that the organizations named were Communist.

The President's order of March 21, 1947 that fixed the responsibility of the Civil Service Commission directed the Attorney General to furnish the Loyalty Review Board with the name of each group that the Attorney General after proper investigation should designate as Communist, Fascist, totalitarian or subversive or engaged upon a policy of committing acts of violence for the purpose of denying others their rights under the Constitution or seeking to alter the form of the Government by unconstitutional means.

The executive order directed the Loyalty Review Board to communicate this information to all the departments and agencies of the Government.

The three organizations which were plaintiffs in the suit first named sued for the purpose of having the court direct that their names be deleted from the list. The Joint Anti-Fascist Refugee Committee stated in its petition that it was a charitable organization engaged in relief work. The National Council of American-Soviet Friendship, Inc. stated in its petition that it engaged in the purpose of strengthening friendly relations between the United States and Russia, and that

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¹ 341 U.S. 123, 71 S.Ct. 624.

² 341 U.S. 494, 71 S. Ct. 857.

it sought to further the interests of the American People by constitutional means, and that it never in any way engaged in Communistic activity. The International Workers' Order, Inc. stated in its petition that it was engaged as a fraternal benefit society under the insurance law of New York.

When the petitions were presented in the courts of original jurisdiction, the Attorney General of the United States moved that the complaints be dismissed as insufficient in law. The various courts dismissed the petitions. The Attorney General's motion raised questions of law alone; there was no trial of the matters of fact that the petitions contained. The Attorney General said through his motion that the court did not have the power to review the President's action in respect to the appointment of employees of the Government, and that the organizations that were named had no interest in the matter since they were not affected by the action.

Law, like every other traditional practice, has processes that become fixed over periods of time. There is a way of doing things. The law accepts such forms of practice in order to use an orderly procedure. Among the procedural rules it has long been recognized that when a party denies the sufficiency of a pleading as a matter of law, the court must accept all of the statements that are in the pleading as true for the instant purpose of determining the motion. Under this rule the Attorney General's motion admitted for the purposes of the motion the facts stated in the petitions. The petition of one of the organizations said that it was a charitable organization engaged in relief work. The petition of another stated that it was engaged in fraternal benefit insurance. The petition of the third went further and denied that it sought to act other than by Constitutional means. The admission of these claims for the purposes of the motion related back to the Attorney General's designation of the organizations as subversive. The Attorney General did not intend by the motion to admit that any of the statements in the petitions were true as ultimate facts. The motion, that was made for the purpose of raising a point of law, had the legal effect, however, of admitting the truth of the facts stated for the immediate purpose.

If the facts contained in the petition were true, then the act of designating the organizations as subversive was arbitrary. The designation then stood as contrary to the record in the case before the court.

Since the designation interfered with the legal right of the organizations to carry on their work, a case was before the court that it might consider.

Two Justices of the Supreme Court placed their decision in reversing the lower court and in sending the matter back for a full trial upon the ground of the admission of the facts stated in the petitions. These Justices did not thereby make a finding as to the facts.

The President's order was like a two-edged sword in that it brought public attention to the organizations and at the same time became evidence upon which the Loyalty Review Board might act in the removal of a Government employee.

The Loyalty Review Board could not go behind the Attorney General's designation of an organization as subversive. The Attorney General's designation made after inquiry but without a hearing and directed against an organization might become evidence against an individual in a proceeding affecting his property right in his position. Since the designation might become evidence and be used as such and the designation had not been reached after a hearing, four Justices, including one of the Justices who accepted the motion as an admission, thought it necessary to go beyond the point respecting the Attorney General's admission through his motion to dismiss the petitions and consider a point that rests in the Bill of Rights which lawyers describe as "due process." That which proceeds in the traditional way is due process of law. The basic step in the legal process is a hearing. The four Justices who were of the opinion that the order was invalid in itself, since the Attorney General had not reached the result after a hearing, were looking at the traditional procedures of the law. The designation these Justice thought to be a denial of due process of law. They impliedly treated the organizations as having legal standing to raise the point and as being injured by the action. The Attorney General's action directed at the organizations carried over to the individuals.

One Justice went further than the due process point, that point resting on the lack of a hearing, and treated the Attorney General's designation as a form of censorship inconsistent with the provisions of the First Amendment that guarantees freedom of speech. He drew an analogy with the bill of attainder. In the early English Law a bill of attainder was an act of a legislative body pronouncing a sentence of death against an accused person and causing the extinction of all the accused's civil rights.

Three Justices were of the opinion that the petitions should be dismissed and that the Attorney General's motion should be granted. These Justices treated the statements in the petitions as assumptions of law and not of facts; thereby, the Attorney General had made no admission. The First Amendment does not create a freedom so wide that it embraces a privilege of overturning law and order. The designation did not deprive the organizations of a right nor subject them to a punishment. If they were permitted to enter the investigation they were permitted thereby to interfere with the executive control of Federal employees. The designation was not conclusive in respect to employees. The removal of Federal employees for disloyalty is made after notice; the designation became only a part of the evidence. The employees had a chance to explain. Thus these three dissenting Justices met the points that the five justices, voting to deny the motion to dismiss, had made.

The problems of law that I have analyzed arose out of the nature of the executive order. The order was directed to a dual purpose. On the one hand the order engaged in the very proper purpose of combatting subversive organizations through publicity. The Attorney General as the law enforcement officer of the Federal Government was a proper agent for that function. The further purpose of the order was the control of Federal employees. Each of the purposes was proper. The joining

of the two purposes in a single order, however, confused the order. The order in discharging its publicity purpose carried a conclusive presumption into the field of property right, namely, Federal employment.

The executive control of Federal employees is a field of discretion always, and most especially, in matters that concern the national safety. The free exercise of, the effective discharge of and the executive control over Federal employment hardly required the order. The English system of control over public employment apparently rests in executive discretion. So here the publicity that was an effective sanction for the first purpose of the order, the spotlighting of subversive action, became a hindrance in the execution of the second purpose, the prevention of disloyalty in the Federal service.

The case of *Dennis v. United States*⁸ arose from the conviction of the eleven defendants in the United States District Court for the Southern District of New York for conspiring to violate the Smith Act.

Sec. 2(a) sub. sec. (3) of the Smith Act makes it unlawful for any one to engage in organizing any society or group which teaches or advocates the overthrow of any government in the United States by force or violence; and Sec. 2 (a) sub. sec. (3) also makes it unlawful for a person to affiliate with such a group knowing its purpose. Sec. 3 of the Act makes it unlawful for persons to conspire to commit any of the acts that Sec. 2 forbids.

The indictment charged that the defendants had conspired to organize the Communist Party of the United States of America, a group that teaches and advocates the overthrow of the government of the United States by force and violence, and had conspired also to teach the duty of overthrowing that government by force and violence.

The Supreme Court had accepted the case for limited review only and to determine if the Smith Act invaded the right of free speech as defined in the First Amendment, and to determine whether the Smith Act was invalid in failing to fix definite standards of action.

The Court in a limited review accepts without further enquiry the facts that the lower court has found to be true. If we take the trial court's charge to the jury and the jury's verdict we would infer that the defendants were found guilty of conspiring to organize a group of persons to teach and advocate the duty of overthrowing the Federal government by force and violence, and of conspiring to advocate and teach the overthrow of that government by force and violence as a rule of action and by language designed to incite to action.

A conspiracy is an agreement between two or more persons manifesting itself by words or acts whereby they agree to commit an unlawful act. The effective action rests in the future. The futuristic nature of the action in the *Dennis* case created the points of law that the Court decided. The relation of the points of law that

⁸ n. 2.

the Court considered in the case will perhaps not be clear unless I first bring out in the most definite way possible that the charge against the defendants concerned a plot to do an act at a later time. The indictment rested in part, if not in essence, on a conspiracy to organize the Communist Party in this Country for the purpose of overthrowing the Federal government. The means to attain this end was that of organizing people to teach the Marxian theories as modified by Lenin and Stalin. The plot was not to overthrow the government now; it was directed to the forming of a party and the teaching of doctrines that were designed to have that effect at some future time.

All of the Justices assumed that the statute limited the freedom of speech and that the point of law before the Court was where the line between permissible and non-permissible speech should be drawn.

Four Justices, after construing the statute as a protection of the "existing government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism" held that free speech is not an absolute right beyond legislative control and the overthrow of the government by force and violence was a substantial interest that justified the Congress in limiting speech. This power extended to attempts to overthrow the government. Neither the success nor the probability of success is the test. The existence of the conspiracy created the danger. The definition of the statute on which this reasoning rested removed from the coverage of the statute all peaceful forms of discussion.

The trial judge had charged the jury that the defendants must have done the acts that the indictment alleged "all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would "permit." He also charged: "that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

The four Justices held that the trial judge had acted properly in treating the existence of the danger as a matter of law and had acted properly in refusing to allow the jury to determine that matter as a question of fact. They reasoned that the point depended on a judicial construction of the First Amendment and the existence of the evil was therefore a question of law for the court to determine.

These four Justices also were of the opinion that the statute as it had been written was sufficiently definite in fixing standards of conduct; that the statute fixed standards whereby all might know what could and could not be done legally. The statute drew a line that its language clearly indicated.

One Justice was of the opinion that there is an inherent power in the Government to preserve itself; and to the end Congress might restrict freedom of speech. The immunities of the Bill of Rights are subject to exceptions. It is necessary to weigh the conflicting interests. The responsibility in the first instance for adjusting the competing interests rests with Congress. The point for the court to con-

sider is whether the statute leaves room for those safeguards that prevent concentrations of power. Congress was justified in finding that the conspiracy shown on the record was a substantial threat to the national order and security. The recruitment of additional members might well create a substantial danger to the national security. In summary, this Justice was of the opinion that the competing interests of freedom of speech and national security were a proper field for legislative action and that the action of Congress was justified for the circumstances.

One Justice was of the opinion that a conspiracy in itself is a crime; and it was not necessary to go further than that. A "present danger" test would permit a period of preparation. Congress, since it could reach the act, could also reach the attempt. Conspiracy being the test, no overt act was necessary. Congress has a power to repress force and violence and so it could punish the teaching or advocacy of it. This Justice sketched out the distinction between anarchistic terrorism and the later forms of revolutionary activity.

One Justice was of the opinion that the defendants had been charged merely with an agreement to assemble and to talk and to publish ideas at a later date. He construed the statute as it had been applied in this case as a form of prior censorship of speech and of the press that violated the First Amendment. He was of the opinion also that the decision of the majority eliminated the "clear and present danger" test that drew a line distinguishing between permissible and non-permissible conduct under the First Amendment.

One Justice was of the opinion that there was no evidence in the record of the teaching of force and violence. The evidence showed a conspiracy to form a party rather than a conspiracy to overthrow the Government. The books that the defendants had used had not been outlawed. So here speech had become seditious conduct. In order to suppress speech under the First Amendment, there must be some serious injury likely if the speech is allowed. The "clear and present danger" test should have been used; the trial judge should have submitted the existence of such a danger to the jury as a question of fact. Evidence should be in the record upon this issue. If the court were to take judicial notice of the development in political affairs it would readily see that there is no "clear and present danger."

In this case the conspiracy section of the statute was used to bar attempts to spread Communism. The statute defined the spreading of Communism as the teaching or advocating the overthrow of the Federal government by force and violence at such time as it might be possible to attain that result. The case is concerned essentially with attempts. The "clear and present danger" test has no application to attempts if they be treated as crimes. Once attempts had been made illegal by the definition set out in the statute the sole issue in the case was whether there had been an attempt.

The court did not review the conduct of the trial; the court had denied the petition for a writ of *certiorari* on that point.