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Constitutional Law—Due Process—Blacklisting—Agency Action Without a Hearing.— Kukatush Mining Corp. v. SEC

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That portion of the injunction relating to delayed broadcasts, and syndicated and feature films, may work a serious hardship to CATV because, as the court indicated, the rights of local stations in these programs extends for a period of twenty-one days after the network broadcast.[24] Thus the local station may assert its right of first-call anytime within this twenty-one day period; and, until this right is exercised and the choice made known, CATV may not safely pick up any of these broadcasts. This problem may not prove as serious a hardship as anticipated if, as is the custom, the local station makes known in advance the schedule of its anticipated broadcasts. This is not to minimize, however, the undoubted impact of this sweeping injunction on CATV.

The court did refer to the views expressed by the FCC,[25] which indicated a desire to subject CATV to its rules. These rules require the consent of the originating station before a program may be reproduced by another broadcaster.[26] Congress has consistently refused to extend control over CATV to the FCC.[27]

It is submitted that the result of the decision in the present case subjects CATV to a more stringent requirement than even the FCC advocates, for now CATV is prohibited from picking up these programs even if it has obtained the permission of the broadcaster. This demonstrates what prompted Mr. Justice Brandeis' admonition of caution on the part of courts when dealing with this sensitive problem. The decree effectively limits the available selection of television programs to the people of Twin Falls and prefers an artificial property right to the interest of the general public. It remains to be seen whether Congress anticipated this reaction to its refusal to extend the authority of the FCC.

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Constitutional Law—Due Process—Blacklisting—Agency Action without a Hearing.—*Kukatush Mining Corp. v. SEC.*[1]—A nonresident alien corporation having no assets and doing no business in the United States sought a preliminary injunction against the Securities and Exchange Commission to have its name removed from the "Canadian Restricted List."[2] The corporation alleged that (1) its name was placed on the list without any no-

[24] 211 F. Supp. at 54.

[25] Id. at 55. See also FCC 28th Ann. Rep. 65, 66 (1962).

[26] Ibid.

[27] 211 F. Supp. at 55. Two recent bills were H.R. Rep. No. 6840, 87th Cong., 1st Sess. (1961), S. Rep. No. 1044, 87th Cong., 1st Sess. (1961). See also, Inquiry into the Impact of CATV, T.V. Translators, T.V. "Satellite" Stations and T.V. "Repeaters" on the Orderly Development of T.V. Broadcasting, 26 F.C.C. 403 (1959).

[1] 309 F.2d 647 (D.C. Cir. 1962).

[2] The Canadian Restricted List is a list of Canadian companies whose securities the Commission has reason to believe have been or are being distributed in the United States in violation of the registration requirements of the Securities Act of 1933. See SEC Securities Act Release No. 3632 (1956). For SEC policy on deletions, see Release No. 4240 (1960).

tice to the appellant and without affording the corporation any opportunity to be heard; (2) that the corporation stock has never been publicly offered, sold or distributed in the United States; and (3) that the corporation has been injured financially and has been stigmatized throughout the financial world. On appeal from the order granting the SEC motion to dismiss for failure to state a claim upon which relief can be granted, the court, affirmed on other grounds. HELD: The appellants, as nonresident aliens having no assets in this country on which to base jurisdiction, have no standing to sue. In addition the court stated that the "Canadian Restricted List" is not a blacklist and is thus not violative of due process because the appellant's rights are in no way adjudicated, the list being directed toward the actions of third parties and not those of the appellants.

In *Joint Anti-Fascist Committee v. McGrath*,[3] the Attorney General published, pursuant to Executive Order 9835,[4] a list which designated plaintiffs as subversive but which afforded no basis of action against them. Plaintiffs, asserting they were charitable, fraternal and cultural, and business organizations, respectively, sought injunctive and declaratory relief against being placed on the list without notice or hearing. They alleged financial, reputation and character losses, but made no denial about being subversive. The Supreme Court, reversing a lower court decision which had dismissed for lack of a justiciable suit, held that the plaintiffs had stated a cause of action and they consequently had standing to sue. The Court, in reaching its decision, emphasized the finality of the listing by the Attorney General, the arbitrariness with which the listing was done, and the defamatory remarks which resulted in serious economic consequences for the organizations.

Prior to *Joint Anti-Fascist*, the jurisdictional requirement that a case or controversy be present was not met where the challenged governmental activity had no legally compulsive effect on the one who sought to attack it.[5] That decision seemed to extend the concept of justiciability, affording one an increased ability to be removed from the government list by granting standing to sue to one suffering irreparable injury as a result of governmental action without regard to the fact that the immediate end in view was not regulation of their organizations but internal government security.[6] However, this implication has not been followed to the extent the majority opinion in *Joint Anti-Fascist* would indicate. The courts rather have followed the concurring opinion of Mr. Justice Frankfurter,[7] where the validity of the governmental activity is viewed as flexible, varying with the particular situation and the importance of the public and private interests involved.

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is

[3] 341 U.S. 123 (1951).

[4] 12 Fed. Reg. 1935 (1947).

[5] Rochester Tel. Corp. v. United States, 307 U.S. 125 (1938); United States v. Los Angeles & Salt L. Ry. Co., 273 U.S. 299 (1912); Fay v. Miller, 183 F.2d 986 (D.C. Cir. 1950).

[6] Comment, 20 Geo. Wash. L. Rev. 294, 313 (1952).

[7] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961).

challenged, the balance of the hurt complained of and the good accomplished—these are some of the considerations that must enter into the judicial judgment.[8]

Similarly, in *Cafeteria & Restaurant Workers Union v. McElroy*,[9] the petitioner was a cook in a cafeteria operated by a private concession located in a naval gun factory. Because she failed to meet security requirements, she was denied access to the factory and thus lost her job. The Court held that the exclusion from the premises without a hearing and without advice as to the specific grounds for her exclusion did not violate due process. The Court in reaching its decision said, "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action."[10] Consistent with Mr. Justice Frankfurter's balancing of interest standard is *Greene v. McElroy*[11] where the governmental ex parte determination so directly affected Greene's employment rights, as opposed to the comparatively minor right involved in the *Cafeteria* case, that a hearing was required. In the latter decision the employer offered the employee a job in his cafeteria in another city whereas in the former the employee, after dismissal, was not able to obtain employment as an aeronautical engineer.

In the balancing of interest standard, the interest of the individual is increased as the communication or listing is more specifically directed toward his activities. The courts distinguish communications concerning a generalized type of activity[12] from one which is directed toward the plaintiff as a special target,[13] granting standing to sue in the latter. The Court in *B. C. Morton Int'l Corp. v. Federal Deposit Ins. Corp.*[14] held that there is an actual "controversy" where the FDIC issues a press release which on its face purports to be a general statement to the public, but is in fact specifically directed at the plaintiff for the purpose of interfering with and destroying the business of the plaintiff.[15]

In the field of security transactions it is recognized that "where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing."[16] Thus in *R. A. Holman & Co. v. SEC*[17] the court

[8] Supra note 3, at 163.

[9] 367 U.S. 886 (1961).

[10] Id. at 895.

[11] 360 U.S. 474 (1959).

[12] Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957); Babbitt Auto Parts Co. v. Fleming, 51 F. Supp. 360, (D.D.C. 1941).

[13] Green v. McElroy, supra note 11; Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961).

[14] 305 F.2d 692 (1st Cir. 1962).

[15] The court also held, consistent with the position taken by the Supreme Court in *Joint Anti-Fascist Committee*, supra note 3, that immunity extended against civil damage suits to individual public officials does not extend to actions for declaratory and injunctive relief against a governmental agency.

[16] R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir. 1962). Normal procedural safeguards of a hearing prior to action by a commission are set aside on the theory that speedy action is necessary and in the interest of public welfare where prompt-

held valid the temporary suspension of the Broker-Dealers' exemption to deal in regulation A offerings, even though it deprived the broker-dealer of a going business without prior notice or hearing.

Public interest was a major consideration in *Hannah v. Larche.*[18] That case involved the rules governing investigative procedures of the Commission on Civil Rights against a claim that they violated the due process clause by denying subpoenaed witnesses a fair hearing. The Court distinguished *Joint Anti-Fascist* on the basis that it involved a final adjudication as to the status of the names appearing on the list, whereas *Hannah* involved investigatory proceedings which involved no conclusions about the activities of any individual.

The court in *Kukatush* applied the *Hannah* test to the "Canadian Restricted List" to determine if it was a blacklist and thus a violation of due process since no prior hearing was allowed. However, the court supported its decision, not with *Hannah,* which differed from *Kukatush* in that the harm alleged was merely speculative and lacked a clear showing of personal interest, but with cases in which there was a strong public interest argument.[19]

The court must be seen as affirming the freedom of a government agency to speak and communicate with those whom it has been directed by Congress to regulate and protect without being subject to judicial review, particularly where no charges are made against anyone, where the agency issues no orders, and where no one is directed to do or not to do anything.

The decision in *Joint Anti-Fascist* is to be limited by the public interest argument when applied to the field of administrative law and security transactions. The case by case development of what constitutes blacklisting within "due process" indicates that the Court will not apply *Joint Anti-Fascist* in order to find standing to enjoin official action when there is an overriding public interest behind the governmental action.

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Labor Law—Legality of Trade Shop, Struck Work and Chain Shop Clauses—Section 8(e).—*NLRB v. Amalgamated Lithographers of* America.[1]—Upon complaint of an employer association the National Labor

ness of action on the part of the Commission may be the measure of its effectiveness in preventing illegal activities. They are also set aside in instances where failure to take ex parte action by the Commission before announcing investigations might lead to market fluctuations and injury to innocent persons holding the suspect stock. See Section 19 of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. § 785(a)(4) (1958), granting the SEC the authority "if in its opinion such action is necessary or appropriate for the protection of investors" and "if in its opinion the public interest so requires" to suspend summarily trading in a registered security for not more than ten days. See also Fahey v. Mallonee, 332 U.S. 245, 253 (1947) where the "delicate nature of the institution [a bank] and the impossibility of preserving credit during an investigation" justified summary action.

[17] Supra note 16.

[18] 363 U.S. 420 (1960).

[19] R. A. Holman & Co. v. SEC, supra note 16; Hoxsey Cancer Clinic v. Folsom, supra note 12; Fay v. Miller, supra note 5; Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D.D.C. 1949).

[1] 309 F.2d 31 (9th Cir. 1962), petition for cert. denied, 31 U.S.L. Week 3296 (U.S.