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Recent Developments in Communist Control Act Prosecutions

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Recent Developments In Communist Control Act Prosecutions

International tension between the Soviet Union and the United States has been reflected in America's social and political life. The effects of the cold war have been manifested in internal affairs through attacks by the federal government against the domestic Communist Party. These attacks have been levied by all three branches of the government; the Party has been declared to be an instrumentality of a conspiracy to overthrow the government by judicial,[1] legislative,[2] and executive[3] action.

The first significant attempt to destroy the American Communist Party by branding it the agent of a world-wide conspiracy led by the Soviet Union was the enactment of the Smith Act[4] in 1940. Later, the McCarran Act[5] was passed in order to make more effective the stifling of the ideology against which our foreign policy was directed. Although some authorities considered additional legislation of this type redundant,[6] its passage over President Truman's veto afforded new grounds for the anti-Communist prosecutions.

Two recent cases, however, have rendered prosecution under two important sections of the McCarran Act impossible. In *Communist Party v United States*,[7] section 7[8] which required registration of the Party was rendered impotent by a burden of proof requirement; the classic rule that the state has the burden of proving each element of an offense was not met by the government in that case. In the second case, *Aptheker v. Secretary of State*,[9] the Supreme Court struck down the section of the act

1. Barenblatt v. United States, 360 U.S. 109 (1959) Justice Harlan took notice of "the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence. " *Id.* at 128.

2. Communist Control Act of 1954 § 2, 68 Stat. 775 (1954), 50 U.S.C. § 841 (1958), which states that: "the Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."

3. Appendix A — List of Organizations Designated by the Attorney General Pursuant to Exec. Order No. 9835, 13 Fed. Reg. 9369 (1948) The list, known as the "subversive list," is a guide to the determination of "loyalty" of government employees.

4. 54 Stat. 670-71 (1940) (now 18 U.S.C. § 2385 (1958)).

5. 64 Stat. 987-1030 (1950), 50 U.S.C. §§ 781-825 (1958), as amended, 68 Stat. 775-77 (1954), 50 U.S.C. §§ 841-44 (1958) [hereinafter cited as McCarran Act].

6. See CHAFEE, THE BLESSINGS OF LIBERTY 126 (1956), wherein the author states: If American Communists and fellow-travelers are as dangerous as the supporters of the McCarran Act made out, then there are enough other statutes with teeth to take ample care of those people; so this Act is not needed. If, on the contrary, those other statutes are not violated by what these people are saying and doing, then they can't be very dangerous; so the McCarran Act is not needed.

7. 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964).

8. 64 Stat. 993 (1950), as amended, 50 U.S.C. § 786 (1958).

9. 378 U.S. 500 (1964).

which prohibited issuance to or use of passports by Communists as unconstitutional on its face.[10] That section of the McCarran Act made it a criminal offense for a member of a "Communist-action" or "Communist-front" group to apply for or use a passport after a registration order directed to such a group had become final. These two sections of the McCarran Act have been struck down through application of the fifth amendment's privilege against self-incrimination and its requirement of due process of law.

The Smith Act brings into consideration the privilege against self-incrimination by its provision that "knowing membership" is punishable by a fine of not more than $20,000 or imprisonment for not more than twenty years.[11] The privilege is therefore properly invoked by persons who might be prosecuted under the Smith Act. This is true despite the fact that the government has not always successfully prosecuted those against whom indictments have been returned under the membership section, because it is necessary to sustain the burden of proof that the accused personally had "guilty knowledge and intent."[12]

THE BALANCING TEST

Although the cases involving the membership section of the Smith Act have not produced uniform results, a prosecution charging conspiracy to violate the Smith Act was eminently successful in *Dennis v. United States*.[13] In *Dennis*, the Court recognized an adjustment of the first amendment's guaranty of free speech in light of the Government's need for survival. However, defendants, leaders of the American Communist Party, attacked the Smith Act as constituting an attempt to proscribe political activity which fell short of inciting the immediate overthrow of the Government. They argued that the Government's case did not meet the "clear and present danger" test which had until then been a classic defense against inroads on the right of free speech and other first amendment liberties.[14] Chief Justice Vinson rejected any absolute notion re-

10. 64 Stat. 993 (1950), as amended, 50 U.S.C. § 785 (1958).

11. 54 Stat. 670-71 (1940) (now 18 U.S.C. § 2385 (1958)). The pertinent paragraph states: "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of*, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. "

12. In Noto v. United States, 367 U.S. 290 (1961), conviction for "knowing membership" was reversed, the Court holding that the Government had not sustained its burden of proof that defendant had intended to accomplish the aim of the Communist Party by resorting to violence. On the same day, in Scales v. United States, 367 U.S. 203 (1961), a six year sentence under the same section was upheld.

13. 341 U.S. 494 (1951).

14. This test was initially expressed by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919). For thirty years the "clear and present danger" test was the standard by which the Court measured attempts to limit the exercise of free speech.

garding free speech in favor of a case by case approach.[15] He thereby adopted Judge Hand's position that "in each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[16] Justice Frankfurter concurred by adding that the matter of restraints on free speech is properly left to legislative determination because the "primary responsibility for adjusting [such] interests of necessity belongs to Congress."[17] He stated that Congress must be allowed to balance the nation's duty to defend its security, and if need be, to limit the rights guaranteed by the first amendment. "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on free speech."[18] The law now commands that "the demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests. "[19]

The "balancing test" did not, however, find unanimous support on the Court. Justice Black, dissenting in *Dennis*, insisted that such a doctrine "waters down the first amendment so that it amounts to little more than an admonition to Congress."[20] Justice Douglas admitted that speech was not absolutely free from restraint under all conditions and that "there comes a time when even speech loses its constitutional immunity."[21] But, quoting the philosophy of Jefferson, he stated that "it is time enough for the rightful purposes of civil government for its offices to interfere when principles break out into overt acts against peace and good order."[22] Such a determination is for the jury he said, not a matter of law, and he cited precedent to prove that the Court had so held.[23]

A second unsuccessful appeal to the first amendment was made by the Communist Party when it challenged the constitutionality of the

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15. "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." Dennis v. United States, 341 U.S. 494, 508 (1951)

16. Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950).

17 Dennis v. United States, 341 U.S. 494, 525 (1950)

18. *Id.* at 550.

19. *Id.* at 524-25.

20. *Id.* at 580.

21. *Id.* at 585.

22. 341 U.S. 494, 590 (1951) (dissenting opinion).

23. Justice Douglas stated that the only time the Supreme Court passed on the jury aspect of such a question was in Pierce v. United States, 252 U.S. 239 (1920) He quoted Mr. Justice Pitney· "Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial." *Id.* at 244.

McCarran Act's registration provisions.[24] Administrative proceedings were instituted under the act which ultimately found the Communist Party to be a "Communist-action" organization required to register with the Attorney General. A decade of litigation followed that finding,[25] climaxed by the Court's decision in *Communist Party v Subversive Activities Board*,[26] which upheld the registration section of the McCarran Act. In that case the Party challenged the administrative determination of the Board, asserting that designation as a "Communist-action" group could only follow after proof that Party objectives included overthrow of existing government by force and violence, establishment of a totalitarian dictatorship, and subservience to the Soviet Union. The Court, refusing to review the evidence before the Board, concluded that the Board was justified in ordering registration of the Party.[27] The Party also argued that application of the penalties and registration provisions of the act was in violation of the first amendment unless illegal acts were actually found to be imminent. Justice Frankfurter gave short shrift to these arguments: "We think that an organization may be found to operate to advance objectives so defined although *it does not incite the present use of force.* Nor does the First Amendment compel any other construction."[28] Once again a balancing of the exigencies of self-preservation against the values of liberty was performed on the scale of legislative and administrative findings, and was not to be set aside by "the judgment of judges."[29]

Fifth Amendment Blocks Enforcement of Registration Section

A second contention raised by the Party in *Communist Party v. Subversive Activities Board* was grounded on the protections of the fifth amendment. However, in an earlier reply to the argument that registration would raise questions involving self-incrimination, the Court had

24. Communist Party v. Subversive Activities Bd., 367 U.S. 1 (1961). The registration provisions of the act appear in 50 U.S.C. § 786 (1958). This section provides that after a final order of the Subversive Activities Control Board, the officers of the Communist Party shall register with the Attorney General their names and the names of all members together with detailed information related to the finances and duplicating devices of that organization. The penalty section, 50 U.S.C. § 794 (1958), sets a fine of not more than $10,000 per day for an organization's failure to register, and the same fine plus imprisonment for not more than five years for individual officers or members who have a duty to register. Each day of the continuing offense is a separate offense.

25. The course of the litigation may be traced through the following citations: 96 F. Supp. 47 (D.D.C. 1951); 223 F.2d 531 (D.C. Cir. 1954); 351 U.S. 115 (1956); 254 F.2d 314 (D.C. Cir. 1958); 277 F.2d 78 (D.C. Cir. 1959); 367 U.S. 1 (1961).

26. 367 U.S. 1 (1961).

27. *Id.* at 55.

28. *Id.* at 56. (Emphasis added.)

29. *Id.* at 96-97.

held that any problems which might flow from application of its decision were prematurely raised.[30] Although the four dissenting justices would have struck down the registration section as requiring self-incrimination by the Party officers, Justice Frankfurter answered that "no rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'"[31] That such a constitutional challenge to enforcement of the registration section was anticipated by Justice Frankfurter is reflected in his opinion:

> We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceedings may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue.[32]

The forum to which Justice Frankfurter had reference took form forty-two days after the Supreme Court's mandate became final. The Party sent a letter to the Attorney General, subscribed only by the Party seal, announcing that the officers declined to register.[33] The reply to this letter came in the form of a telegram from the Attorney General rejecting the claim of privilege. An indictment followed. At the trial for failing to register as a "Communist-action group" as defined by the McCarran Act, all facts pertaining to the Party's refusal were stipulated.[34] When the Party's officers raised the fifth amendment privilege against self-incrimination, it was clear that the forum which Justice Frankfurter had anticipated had arisen, but the court's instruction to the jury kept them from even considering this constitutional question.[35] Conviction followed and maximum fines totalling $120,000 were imposed.[36]

The Court of Appeals for the District of Columbia reversed. Furthermore, the court was of the opinion that the self-incrimination issue was "ripe" and that exclusion of that issue in the district court was reversible error.[37] Judge Bazelon's opinion supported the contention of the Party that registration could be successfully resisted if the fifth amendment

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30. *Id.* at 71-72.

31. *Ibid.*

32. *Id.* at 107

33. The letter stated that "these declinations are made by each officer in the exercise of his privilege under the Fifth Amendment to the Constitution not to be a witness against himself. The officers have adopted this means of asserting their respective constitutional privileges because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute waiver of his privilege." Communist Party v. United States, 331 F.2d 807, 810 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964).

34. *Ibid.*

35. *Id.* at 811.

36. *Ibid.*

37. *Ibid.*

privilege were raised.[38] The Government's application for certiorari was denied; prosecution under the registration section had reached a dead end. This roadblock stems from Judge Bazelon's determination as to allocation of the burden of proof; his opinion placed on the Government the burden of proving that an officer or other person[39] existed who ought to register for the Party, and that such a person had no valid claim to the privilege. This is impossible without a waiver of the privilege against self-incrimination.[40]

Fifth Amendment Guarantee Reinstated

Another implication of a final order to register under the McCarran Act involved application for or use of a passport. That act provided that it was a felony to apply for or use a passport if one was a member of a "Communist-action" or "Communist-front organization."[41] However, consideration of this restriction on the right to travel, previously described in the case of *Kent v. Dulles*[42] as a first amendment liberty "of which [a] citizen cannot be deprived without due process of law under the Fifth Amendment,"[43] was found to be premature in *Communist Party v. Subversive Activities Control Board.* Three years later, however, the proper forum did arise, and in *Aptheker v. Secretary of State*[44] section 6 of the act was struck down as unconstitutional on its face.

In the early phases of the *Aptheker* case, the three-judge district court[45] relied heavily on the rationale of the *Communist Party v. Subversive Activities Board* case. The judges quoted extensively from Justice

38. *Id.* at 813. It will be recalled that the dissenting justices in Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961), had considered it unnecessary to wait for a later forum in order to strike down the registration section as unconstitutional. They had cited, *inter alia,* Scales v. United States, 367 U.S. 203 (1961), supporting the proposition that a "knowing" member is liable under the Smith Act. Appellant relied heavily on the *Scales* decision. Brief for Appellant, pp. 15, 19, Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963). In regard to the immunity of an officer from prosecution resulting from refusal to disclose the location of organization records which would incriminate him, three justices cited Curcio v. United States, 354 U.S. 118 (1957)

39. The "other person" possibility stems from the regulations issued by the Attorney General, perhaps in anticipation of the defense of privilege as regards the officers of the Party. Under existing law, an officer or "other person" with intimate knowledge of the Party would face prosecution under the Smith Act, "since mere association with the Party incriminates." Communist Party v. United States, 331 F.2d 807, 814 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 968 (1964).

40. The writer has been informed by the Assignment Office of the Federal District Court for the District of Columbia that on December 14, 1964 the Justice Department, exercising the option offered by Judge Bazelon to "present the proof required," announced its intention to retry the case. Trial has been set for the week of March 15, 1965.

41. 64 Stat. 993 (1950), as amended, 50 U.S.C. § 785 (1958).

42. 357 U.S. 116 (1958).

43. *Id.* at 125.

44. 378 U.S. 500 (1964).

45. 219 F. Supp. 709 (D.D.C. 1963), *rev'd,* 378 U.S. 500 (1964).

Frankfurter's opinion in that case to the effect that legislative determination of the Communist threat should be respected even when resultant legislation restricted first amendment liberties. Supporting the prohibition against foreign travel by Communists, the district court concluded that section 6 was a "valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto."[46] The alignment of the Supreme Court which recognized probable jurisdiction in this case was different from that which had heard the *Dennis* and the *Subversive Activities Board* cases. Those justices who were previously hesitant to challenge the findings of Congress were now in the minority, and the Court held that section 6 swept too widely and indiscriminately across the liberties guaranteed by the fifth amendment.

Justice Goldberg's opinion in the *Aptheker* case is especially significant in that the Court, for the first time in two decades, declared that anti-communist legislation, in spite of the balancing test, might be declared unconstitutional. He said that the passport section was too broad because it prohibited travel by both knowing and unknowing members, failed to differentiate between innocent and non-innocent purposes for travel, and failed to differentiate between destinations which were non-sensitive as regards national security.[47] On the other hand, Justice Clark would have held that the rationale in the *Subversive Activities Board* case was sufficient to uphold the statute. He argued that Congress ought to be allowed to balance national security against first amendment freedoms such as the right to travel abroad.[48] Justices Black and Douglas would have gone even further than the majority by reasserting that the constitutional guarantees of freedom in the first amendment are absolute. Justice Black reiterated that the entire McCarran Act was a bill of attainder and that the right to travel must be held inviolate under the guarantee of the first amendment.[49]

CONCLUSION

The holding and opinion of Judge Bazelon in *Communist Party v. United States* and the denial of certiorari in that case are as effective in blocking enforcement of the registration provision of the McCarran Act as a reversal of the decision in *Communist Party v. Subversive Activities Control Board*, which upheld the registration provision. Moreover, the

46. *Id.* at 714.
47 Aptheker v. Secretary of State, 378 U.S. 500, 512 (1964)
48. *Id.* at 527
49. *Id.* at 518.

Aptheker decision indicates that the Supreme Court is now taking a more critical view of anti-Communist legislation which, by the balancing doctrine, might have been left undisturbed. The narrow decisional margin suggests that the retirement of Justice Frankfurter and the addition of Justice Goldberg is of more than passing significance. The dissimilarity of tone between the one hundred and thirty-seven page opinion in *Communist Party v. Subversive Activities Board*, which upheld the right of Congress to legislate under minimum restriction, and the twelve page decision in *Aptheker* striking down such legislation cannot escape attention. It may also be suggested that the determined efforts of the Government to minimize the threat of thermonuclear war by the nuclear test ban treaty and continued efforts to negotiate international peace have tended to minimize domestic expression of the cold war.

This problem must be viewed against the background of American history. It is perhaps speculative to suggest that the recent developments represent a shift in the balancing process in favor of the first amendment liberties. On one hand, Justice Clark, speaking for three dissenting members of the Court in *Aptheker,* was of the opinion that such a denial is still "reasonably related to the national security";[50] on the other hand, the words of Justice Black may, by a more optimistic view, prove prophetic:

> There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[51]

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50. *Id.* at 527.

51. Dennis v. United States, 341 U.S. 494, 581 (1951) (dissenting opinion).