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Freedom of Association

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Freedom of Association

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IN THE 1958 CASE OF *N.A.A.C.P. v. Alabama,*[1] the Supreme Court of the United States announced a new concept of constitutional law called "freedom of association." Using this phrase for the first time in a constitutional holding, the Court unanimously determined that an individual member of an unpopular group had a "freedom of association" which the Court would protect against state action as a "liberty" within the meaning of the due process clause of the Fourteenth Amendment. This is not the first decision to protect individuals from governmental interference with their affiliations with unpopular organizations, but it is the first to base this protection on a constitutional "freedom of association."

The conflict between the N.A.A.C.P. and Alabama arose when the state, in 1956, brought an equity suit in a state court to enjoin the Association from further activities within the state because the Association, a New York non-profit membership corporation, had failed to qualify as a foreign corporation doing business within the state. The N.A.A.C.P. admitted its activities but claimed an exemption from the statute's application. The state denied this exemption and alleged irreparable injury to the property and civil rights of the citizens of Alabama. The trial court, on state's motion, ordered the production of the Association's records, including a list of the names and addresses of all Alabama members. The defendant produced everything required except the membership lists, claiming that the state could not constitutionally compel it to disclose this information. For this refusal, the Association was convicted for contempt and fined $100,000. The Alabama Supreme Court denied certiorari,[2] and from this denial the United States Supreme Court granted certiorari.[3]

In deciding whether the petitioner had standing to assert the constitutional rights of its members, the Court followed its more recent holdings in *Joint Anti-Fascist Refugee Committee v. McGrath*[4] and *Barrows v. Jackson*[5] and held that representatives

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1 357 U. S. 449 (1958). Commented upon in 25 Brooklyn L. R. 122 (1958); 54 Nw. U. L. R. 390 (1959); 20 Ohio St. L. J. 123 (1959).

2 265 Ala. 349, 91 So. 2d 214 (1956).

3 353 U. S. 972 (1957).

4 341 U. S. 123, 183-187 (1951).

5 346 U. S. 249 (1953).

have standing where the constitutional rights of persons not before the Court can be protected effectively only through representation. The Court was then able to consider whether the disclosure order constituted an unwarranted infringement upon the members' freedom of association.[6] The Court recognized that disclosure of affiliation with a group publicly advocating an unpopular position is likely to restrain one's free association with such a group, pointing out that revelation of the identity of N. A. A. C. P. rank-and-file members in the past had exposed those members to economic reprisal, physical coercion, and other manifestations of public hostility.

To determine whether a limitation upon freedom of association by a state is constitutionally justified, the Court must balance the interests of those individuals whose rights have been restricted against the interests of the state involved. Constitutional freedoms guaranteed by the First Amendment may be restricted only when the state has a compelling interest.[7] A state may take action in the interest of public safety, health, or welfare to prevent abuse of the exercise of these freedoms, but it may not curtail the rights themselves.[8] Only the public interest or a clear and present danger would justify restriction of First Amendment freedoms.[9]

The Court concluded that Alabama did not have a compelling interest to justify disclosure by the N. A. A. C. P. of the names of its members. Such disclosure would have no bearing on the question of whether the Association is subject to the state's registration statute. Inasmuch as the Association had already complied with the other items demanded by the production order (list of officers, total number of members, and amount of dues), the names of the members would have significantly

[6] United States Constitution, Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." United States Constitution, Amendment XIV, Sec. 2: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also: Straub v. City of Baxley, 355 U. S. 313, 321 (1958); Cantwell v. Connecticut, 310 U. S. 296, 303 (1940); Palko v. Connecticut, 302 U. S. 319, 324 (1937); DeJonge v. Oregon, 299 U. S. 353, 364 (1937); Gitlow v. New York, 268 U. S. 652, 666 (1925).

[7] Sweezy v. New Hampshire, 354 U. S. 234, 265 (1957).

[8] Schneider v. State, 308 U. S. 147, 160 (1939); Hague v. C. I. O., 307 U. S. 496, 515-516 (1939); DeJonge v. Oregon, *supra*, n. 6, 364-365.

[9] Thomas v. Collins, 323 U. S. 516, 530 (1945). See also: W. Va. State Board of Education v. Barnette, 319 U. S. 624, 639 (1943); Bridges v. California, 314 U. S. 252 (1941); Gitlow v. New York, *supra*, n. 6, 672; Schenk v. United States, 249 U. S. 47, 52 (1919).

added to the inquiry. An invasion of the members' constitutional right of freedom of association in this manner was held to be unwarranted.

The Supreme Court reaffirmed this right of freedom of association in *Bates v. City of Little Rock*[10] in which it was held that a city could not constitutionally require the local treasurer of the N. A. A. C. P. to disclose the local membership to determine whether the N.A.A.C.P. was entitled to a charitable exemption from a municipal license tax.

To evaluate and understand the importance of this recently declared right of association, it is necessary to examine the background and legal setting from which this right emerged.

Government has always been confronted with the problem of suppression of unpopular organizations. Governmental attempts at suppression have, in turn, created for the courts the problem of delineating individual rights with respect to the groups involved. An additional complicating factor is the fluctuation of public opinion. Tenets of an organization generally held to be undesirable during a certain period of time may thereafter be readily accepted by the public at large. Every type of association has at one time or another been considered subversive. Religious wars in the sixteenth and seventeenth centuries reflect this belief about churches. In the eighteenth and nineteenth centuries, common law doctrines of conspiracy applied to labor unions manifest the same conviction. The history of freemasonry shows that even fraternal groups have not been free from suspicion. History indicates that opinion about the subversive nature of groups has differed among different societies at the same time and also has changed in the same society over a period of time.

Confronted with the desirability of suppressing an organization, a governmental group may use one or more of the following approaches: (1) enforce criminal laws; (2) apply administrative and regulatory powers; (3) bring the pressure of public opinion against the group and its members.

Enforcement of Criminal Laws

Of course, the easiest way to hinder an organization's effectiveness is to apprehend its members in the performance of overt criminal acts and to prosecute them in accordance with the law. However, this is not possible when no actual crime has been committed or proof of the crime is not available.

The common law theories of conspiracy have frequently been used to establish a criminal action. Criminal conspiracy was an offense known to ancient English common law and, although it has often been altered by statute, it remains an indictable offense in many of the United States. A conspiracy at common law has generally been defined as a combination between two or more

[10] 361 U. S. 516 (1960).

persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.[11] As early as 1805, this approach was used in *Philadelphia Cordwainers*,[12] during the early nineteenth century, it was followed in other legal attacks on striking unions, mostly of bootmakers and shoemakers.[13] It was said that a conspiracy among journeymen to raise their wages was an indictable offense at common law[14] and that "a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful because [it was considered that] such combination interfered with the price which would otherwise be regulated by supply and demand." [15] However, this doctrine was repudiated in the 1842 Massachusetts case of *Commonwealth v. Hunt*[16] as not being adapted to prevailing conditions in this country.

The most common statutory alteration of the common law offense of conspiracy is to require that some overt act be committed toward effecting the object of the conspiracy, except in cases specially excepted by statute from its operation. For example, the Tennessee statute reads: "No agreement shall be deemed a conspiracy unless some act be done to effect the object thereof, except an agreement to commit a felony on the person of another, or to commit the crimes of arson or burglary." [16a] Also under the federal statutes, some overt act is usually a necessary element of a conspiracy to commit any offense against the United States,[17] although some conspiracies denounced by a federal statute are indictable without the commission of any overt act.[18] It has been declared, however, in a number of decisions that, notwithstanding the fact that an overt act is made necessary by statute, the offense does not consist of both the con-

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[11] 15 C. J. S. Conspiracy, Sec. 1 (1939).

[12] 3 Commons and Gilmore, A Documentary History of American Industrial Society, 59 (1910). See also Nelles, The First American Labor Case, 41 Yale L. J. 165 (1931).

[13] See Nelles, Commonwealth v. Hunt, 32 Colum. L. R. 1128 (1932).

[14] People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501 (N. Y. 1835).

[15] Cote v. Murphy, 159 Pa. 420, 429, 28 A. 190 (1894).

[16] 45 Mass. 111 (1842).

[16a] Tenn. Code Ann., Sec. 39-1102 (1956). The requirement of an overt act also exists in Arizona (Pen. Code, 1913, Sec. 169, 1045); California (Pen. Code, Sec. 184); Kansas (State v. Robinson, 124 Kan. 245, 259 P. 691, 1927); Maine (State v. Clary, 64 Me. 369, 1875); Minnesota (G. S. 1913, Sec. 8595-8596); Missouri (Rev. St. 1899, Sec. 2153); New Jersey (S. A. 2A:98-2); New York (Pen. Law 580); Utah (State v. McIntyre, 92 Utah 177, 66 P. 2d 879, 1937); Wisconsin (Rev. St. 1898, Sec. 4568).

[17] Brady v. U. S., 24 F. 2d 405 (8th Cir. 1928), 59 A. L. R. 563; U. S. v. Baker, 243 F. 741 (D. C. R. I. 1917).

[18] Enfield v. U. S., 261 F. 141 (8th Cir. 1919); Orear v. U. S., 261 F. 257 (5th Cir. 1919); Bryant v. U. S., 257 F. 378 (5th Cir. 1919).

spiracy and the acts done to effect it, but of the conspiracy alone,[19] which still remains the gist of the offense.[20]

If no actual crime has been committed or if proof is not available, the reach of the law may be extended by a statute which provides for prima facie presumption upon proof of other acts which the legislature considers to be indicative of intent to commit a crime. Tennessee, where the Ku Klux Klan was born, used this as one of the methods for suppressing the Klan. In 1869, the Tennessee Legislature decreed:

> If any person or persons, disguised or in mask, by day or by night, shall enter upon the premises of another, or demand entrance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such demand shall be deemed an assault with intent to commit a felony, and the person or persons so offending, shall, upon conviction, be punished by imprisonment in the penitentiary not less than ten (10) years nor more than twenty (20) years.[21]

Section 1 of the same Act[22] makes it a misdemeanor to prowl masked or in disguise, disturbing the peace or alarming the citizens, and Section 3[23] provides that one committing assault with a deadly weapon while masked shall be guilty of assault with intent to commit murder in the first degree. In *Walpole v. State,*[24] the Tennessee court held that the object and purpose of this law was to strike at offenses committed in masquerade, to make them more highly penal because of the inherent difficulty of identifying offenders who wore masks, in order to secure immunity from detection.

A "hood and mask" statute was passed by the Louisiana legislature in 1924[25] which makes it a misdemeanor to wear a hood or mask in a public place. The penalty for violation of this statute is imprisonment from six months to three years.

When a new masked order, the White Caps, arose in Tennessee near the end of the nineteenth century, the state legisla-

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[19] Asgill v. U. S., 60 F. 2d 780 (4th Cir. 1932); Bell v. U. S., 2 F. 2d 543 (8th Cir. 1924); Meyers v. U. S., 36 F. 2d 859 (3rd Cir. 1929), *cert. den.* 281 U. S. 735 (1930).

[20] Meyers v. U. S., *supra,* n. 19; U. S. v. Olmstead, 5 F. 2d 712 (D. C. Wash. 1925); Wilson v. U. S., 275 F. 307 (2nd Cir. 1921), *cert. den.* 257 U. S. 649 (1922).

[21] Public Acts 1869-1870, Ch. 54, Sec. 2, Tenn. Code Ann. Sec. 39-2802 (1956).

[22] Tenn Code Ann. Sec. 39-2801 (1956).

[23] *Ibid,* Sec. 39-2803 (1956).

[24] 68 Tenn. 370, 9 Baxt. 370 (1878).

[25] La. Rev. Stat. of 1950, 14:312. For other "hood and mask" statutes, see: California (Deering's Penal Code, Sec. 185, 1959); Florida (Florida Statutes, 1957, Sec. 876.20); Arizona (Revised Statutes Criminal Code 13-981-983); Alabama (Code of Alabama, 1958, 14:358-1); Arkansas (Ark. Statutes, 1947, 41-2602); New Mexico (Statutes 1941, 41-2901, 2906).

ture passed a drastic statute[26] which made it a felony to conspire to take human life, "or to engage in any act reasonably calculated to cause the loss of life . . . or to inflict corporal punishment or injury . . . or to burn or otherwise destroy property or to feloniously take the same." The statute extended the penalty to anyone who directly or indirectly aided or abetted or encouraged anyone else to engage in such conspiracy. In 1941, the Tennessee Supreme Court reaffirmed that the statute was aimed at the White Caps and declined to apply it to members of the local union of the United Mine Workers of America convicted of conspiring to inflict serious bodily injuries on the foreman of a mine, a non-union employee.[27]

A federal act aimed at the Ku Klux Klan was enacted in 1871.[28] This act provided:

> If two or more persons within any State or Territory of the United States . . . shall conspire together; or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . . [each of said persons shall be punished.]

This act was more effective than the state legislation and practically stopped outrages in 1872. After having done its work, it was declared unconstitutional in *United States v. Harris*[29] in which the Supreme Court held that the Fourteenth Amendment gave Congress no power to legislate against the acts of individuals.

A red flag also came to be viewed by many state legislatures as a symbol of a new criminal category. The flag was considered to be the manifestation of a threat which justified legislation directed at communist and socialist groups. In the 1908 case of *People v. Burnam*,[30] display of a red flag was ruled a proper basis for conviction under a riot statute which did not mention flags, because the flag tended to incite riots.

> Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and dis-

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[26] Public Acts 1897, Ch. 52 (Tenn. Code Ann. Sec. 39-1106-7, 1956).

[27] Asbury v. State, 178 Tenn. 43, 154 S. W. 2d 794 (1941).

[28] Ch. 22, Sec. 2, 17 Stat. 13 (1871), R. S. Sec. 5519 (1873).

[29] 106 U. S. 629 (1883).

[30] 154 Mich. 150, 117 N. W. 589 (1908).

> order. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity.[31]

In 1920 and 1921, thirty-three states adopted "red flag" laws. The New York Statute makes it a misdemeanor to display the banner "in any public assembly or parade as a symbol or emblem of any organization or association, or in furtherance of any political, social, or economic principle, doctrine or propaganda." Other states go much further and forbid the display of the red flag anywhere. Some shrewdly guard against the wearing of red neckties or buttons or the evasive adoption of a green flag by punishing the use of any emblem of any hue if it is "distinctive of bolshevism, anarchism, or radical socialist"; or indicates "sympathy or support of ideals, institutions, or forms of government hostile, inimical, or antagonistic to the form or spirit of the constitution, laws, ideals, and institutions of this state or of the United States.[32]

The reported cases prosecuted under these laws are not as numerous as might have been expected from the number of states adopting them. In *Commonwealth v. Karvonen,*[33] a Massachusetts statute prohibiting the carrying of any red or black flags in parades was upheld. The court said that, inasmuch as a red flag is well recognized as a revolutionary and terroristic emblem,

> it may be assumed that the Legislature regarded it as the symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare. Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised.[34]

However, in *Ex Parte Hartman,*[35] a similar Los Angeles ordinance was invalidated:

> Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably

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[31] *Id.,* at 592.

[32] Chafee, Free Speech in the United States, 159 (1941).

[33] 219 Mass. 306, 106 N. E. 556 (1914).

[34] *Id.,* at 557.

[35] 182 Cal. 447, 188 P. 548 (1920).

> advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act.[36]

The only red flag case which reached the Supreme Court of the United States involved daily youth camp pledges of allegiance to the hammer and sickle banner of the Communist Party in the United States, identical to the flag of the Soviet Union.[37] The Supreme Court held unconstitutional the provision of the California statute making it a felony for any person to display a red flag, as a sign, symbol, or emblem "of opposition to organized government, "construed as including peaceful and orderly opposition to government by legal means. The Court took the view, however, that the other provisions of the statute, forbidding the public display of a flag as "an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a suspicious character," were constitutional, as construed by the state court to relate to advocacy of or incitement to force or violence in the overthrow of government. The court thus made the distinction, which is recognized in other decisions, between peaceable and forcible means to effect political or social changes, as regards the constitutionality of legislation of the kind under consideration.

The most extreme criminal statute directed against a certain group or association would prohibit all the organization's activities, including membership in it. An advance step in this direction was made by the criminal syndicalism statutes. These statutes, enacted in the years following the entry of the United States into World War I, were the result of immediate postwar psychology, the activities of the Industrial Workers of the World and the Communists, and old problems of economic and political dissatisfaction, combined with new labor problems. The Idaho statute, originally enacted in 1917 and amended in 1925, defines criminal syndicalism as follows:

> Criminal syndicalism is the doctrine which wilfully and maliciously advocates crime, sabotage . . . violence, or unlawful methods of terrorism as a means of accomplished industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony. . .[38]

By 1922, nineteen states, as well as Hawaii and Alaska, had passed similar laws.[39] The California statute[40] was one of the

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[36] *Id.*, at 549. See also: Annotations, 20 A. L. R. 1548 (1922), 40 A. L. R. 958 (1926), and 73 A. L. R. 1500 (1931).

[37] Stromberg v. California, 283 U. S. 359 (1931).

[38] Idaho Code Ann. Sec. 18-2002 (1947).

[39] Alaska Acts 1919, c. 6; Ariz. Acts 1918, c. 13; Cal. Stats. 1919, c. 188; Hawaii Acts 1919, c. 186 and Supp. Acts, 1921, c. 216; Idaho Acts 1917, c. 145, amended Acts 1919, c. 136; Ind. Acts 1919, c. 125; Ia. Laws 1919, c. 372; Kan.

(Continued on next page)

most diligently enforced. It provides for imprisonment from one to fourteen years of anyone who advocates, teaches, aids, abets, wilfully attempts to justify or publishes or circulates matter advocating or advising criminal syndicalism, or who organizes, assists in organizing, or knowingly becomes a member of any group organized to advocate it. The constitutionality of the California statute was sustained in *Whitney v. California.*[41] It was held that the statute was not violative of the due process and equal protection clauses of the Fourteenth Amendment, either by reason of vagueness and uncertainty of definition, or on the ground that its penalties were confined to those who advocated a resort to violent and unlawful methods as a means of changing industrial and political conditions, and that it arbitrarily discriminated between such persons and those who might advocate a resort to these methods as a means of maintaining such conditions. It was held that the statute did not constitute unlawful class legislation, or an unconstitutional restraint of the right to free speech and assembly.

On the same day the Supreme Court of the United States upheld the California law, however, it reversed a conviction under a similar Kansas law. In *Fiske v. Kansas,*[42] it was held that the Kansas syndicalism statute, as applied in this instance, constituted an arbitrary and unreasonable exercise of the police power of the state, and unwarrantedly infringed the liberty of the defendant, in violation of the due process clause of the Fourteenth Amendment. The Court pointed out that the advocacy in this instance was not of violent means for overthrow of the existing social order. The defendant, an I. W. W. organizer, was convicted of advocating criminal syndicalism primarily on the basis of the preamble of the union's constitution which did not mention violence but only an unceasing struggle between the working class and the employing class.

For the most part, the criminal syndicalism statutes were upheld in state appellate courts[43] and remained on the books. Ten years after the *Whitney* and *Fiske* cases, in 1937, the Supreme Court of the United States considered an Oregon syndicalism statute in *DeJonge v. State of Oregon.*[44] DeJonge spoke

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Laws 1920, c. 37; Mich. Acts 1919, c. 255; Minn. Acts 1917, c. 215; Mont. Acts 1918, c. 7; Nebraska Acts 1918, c. 9, Acts 1919, c. 261; Nevada Stat. 1919, c. 22; N. Dak. Acts 1918, c. 12; Ohio Acts 1919, p. 189; Okla. Acts 1919, c. 70; Oregon Acts 1919, c. 12, and 1921, c. 34; S. Dakota Acts 1918, c. 38; Utah Acts 1919, c. 127; Wash. Acts 1919, c. 173, 174; Wyoming Acts 1919, c. 76.

[40] Cal. Gen. Laws Ann. Act 8428, Sec. 1 (Deering 1954).

[41] 274 U. S. 357 (1927), *affg.* 57 Cal. App. 449, 207 P. 693 (1922).

[42] 274 U. S. 380 (1927), *reversing* 117 Kan. 69, 230 P. 88 (1924).

[43] These cases are collected in Annotations, 1 A. L. R. 336 (1919), 20 A. L. R. 1543 (1922), and 73 A. L. R. 1498 (1931).

[44] *Supra,* n. 6.

at a meeting called by the Communist Party in protest of police activity during a longshoremen's strike in Portland in 1934. He was convicted under a provision of the Oregon statute prohibiting anyone from assisting in conducting a meeting of a group which advocated criminal syndicalism, even though the stipulation of facts was that there was no evidence of any syndicalism at the meeting. The Supreme Court held this application of the Oregon statute to be unconstitutional as repugnant to the due process clause of the Fourteenth Amendment. The court said:

> If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.[45]

The Court pointed out that, irrespective of the objectives of the Communist Party, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by the Communist Party.

The most direct thrust against the Communist Party by Congress was the passage and enforcement of the Smith Act of June 28, 7940.[46] The portions of the act invoked against the leaders of the national party provided, at the time of the case:

> Sec. 2. (a) It shall be unlawful for any person—
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> (1) To knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;
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> (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.
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[45] *Id.*, at 365.

[46] 54 Stat. 670 (1940), recodified 62 Stat. 808 (1948), 18 U. S. C. 2385 (1952).

> Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title.

The law denounces a conspiracy to form, or affiliate with, an organization whose purpose it is to advocate the overthrow of government by force or violence. The broad possibilities suggested by the words of this statute have been narrowed by the construction placed upon the statute by the federal courts. In *Dennis v. United States*,[47] the top leaders of the Communist Party were convicted of violating the act, and the Supreme Court of the United States upheld the conviction. Chief Justice Vinson wote, in the opinion of the court:

> The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.[48]

Six years later, in *Yates v. United States*,[49] the Supreme Court of the United States held that the advocacy which will support conviction must not be merely of abstract doctrine but "of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow" of the government.[50]

Congress itself apparently limited the broad nature of the Smith Act conspiracy provisions in the Subversive Activities Control Act of 1950,[51] by providing:

> (f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . .

In the same Act, Congress provided a new criminal offense—conspiring to do any act which would substantially contribute to establishing a dictatorship—and also set up administrative

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[47] 341 U. S. 494 (1951).

[48] *Id.*, at 510-511.

[49] 354 U. S. 298 (1957).

[50] *Id.*, at 326.

[51] 64 Stat. 987, 50 U. S. C. Sec. 783(f) (1952).

procedures.[52] This act was held valid in *Communist Party v. Subversive Activities Control Board.*[53]

Administrative and Regulatory Powers

In addition to enforcement of criminal laws, suppression of an organization may be accomplished by the stringent application of administrative and regulatory powers. The practical power of local officials to discriminate between groups on the

[52] Section 786 of the Subversive Activities Control Act of 1950 requires all Communist organizations to register with the Attorney General and to file statements giving the names of its officers, full details of the sources of funds and purposes of expenditures, and, in the case of "Communist-action organizations," a full list of names and addresses of members. It requires the organizations to keep full records.

Section 787 requires members of "Communist-action organizations" to register individually.

Section 788 sets out the duties of the Attorney General in administering the Act, including the duty to make the registers available for public inspection, and reporting to the President and Congress.

Sections 791-792 establish a Subversive Activities Control Board to determine whether an organization comes within the purview of the Act, and establishes its procedures; Section 793 provides for judicial review.

Section 783 denounces three criminal offenses—conspiracy or attempt to establish a dictatorship, communication of classified information, and receipt of such information. It provides a penalty of up to ten years and $10,000 for violation and a ten-year limitation on prosecution for these offenses. It also provides that holding office or membership in a Communist organization shall not be per se a violation of these or any other criminal provisions and that registration as officers or members shall not be admitted as evidence against them in criminal prosecutions.

Section 784 forbids anybody to conceal membership in a registered organization when seeking, accepting or holding federal or defense jobs, for any member of such an organization to hold a federal job, or for any member of a registered "Communist-action organization" to hold a defense job.

Section 785 denies passports to members of registered organizations.

Section 789 provides that when a registered organization disseminates matter by mail, interstate commerce or on the airwaves, the source must be identified as a Communist organization.

Section 790 denies income tax deductions and exemptions for registered organizations.

Section 794 provides penalties for violation of registration provisions, and Section 797 provides penalties for violation of security regulations and orders.

[53] 223 F. 2d 531 (D. C. D. C. 1954), *rev'd. on other grounds,* 351 U. S. 115 (1956). The court said, at p. 544, "The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security. The basic theory of Communism that all presently existing nationalist governments be superseded by a stateless world organization under a proletarian dictatorship, the domination of one world power with all its assets by the Communists, the succession of national capitulations to the forces of that group, and the declared intentions of its leaders in respect to the remainder of the world, are reflected in the recitations in this statute and, moreover, are historic facts which cannot be disputed. We cannot at the present time treat the program and policies of the world Communist movement as a dialectic debate."

basis of personal judgment can be illustrated by cases involving the necessity for obtaining permits for public meetings. In *Niemotko v. Maryland*,[54] the Supreme Court of the United States reversed the convictions of some Jehovah's Witnesses for holding a meeting in a public park without a permit. Apparently, the permit had been denied by the Havre de Grace, Maryland, city council because of the council's dissatisfaction with certain of the Witnesses' views. The City of Pawtucket, Rhode Island, banned all religious and political addresses in its parks and allowed assemblies in the parks without a permit as long as no public address was made. However, it did not always enforce the speech ban against religious groups and, when it did obtain a conviction under the statute, it was held to be discriminatory.[55] In *Poulos v. New Hampshire*,[56] the Supreme Court of the United States affirmed a New Hampshire conviction of a Jehovah's Witness who preached in a park without a permit. The Supreme Court of New Hampshire had held that a preacher's relief from improper denial of a license to use a public park was an action in mandamus to require the officials of Portsmouth, New Hampshire, to issue the desired permit.

Similar opportunities for discrimination exist at the state level, particularly corporate, license, and taxation laws. Probably the most widely used regulation in this respect is the requirement for registration of foreign corporations. With regard to local activities within the state, a state may exclude a foreign corporation or prescribe the conditions for entrance. Although this principle has been held to be equally applicable to nonprofit corporations as well as to commercial enterprises, most of the decisions are concerned with the capacity of the corporation in relation to civil actions rather than efforts by a state to exclude the corporation.[57]

However, two cases concerning the Ku Klux Klan, a nonprofit corporation, are *State ex rel. Griffith v. Knights of the Ku Klux Klan*[58] and *Knights of the Ku Klux Klan v. Commonwealth*.[59] In *Griffith*, Kansas based its quo warranto action on two counts: (1) that the Klan, a Georgia corporation, was a foreign corporation doing business in Kansas without the required permission from the state charter board, and (2) that it was agitating race and religious prejudices and using threats,

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[54] 340 U. S. 268 (1951).

[55] Fowler v. Rhode Island, 345 U. S. 67 (1953).

[56] 345 U. S. 395 (1953).

[57] General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411 (1909); High v. Supreme Lodge of the World, Loyal Order of the Moose, 206 Minn. 599, 289 N. W. 519 (1940). But see: Eaton v. Woman's Home Missionary Society of The Methodist Episcopal Church, 264 Ill. 88, 105 N. E. 746 (1914).

[58] 117 Kan. 546, 232 P. 254 (1925).

[59] 138 Va. 500, 122 S. E. 122 (1924).

intimidations and violence to compel others to agree with its views and obey their commands. The Kansas court accepted a commissioner's finding that there was no evidence to support the second count, but the writ of ouster was granted because the Klan was doing business in the state without permission. In the other case, the Virginia Supreme Court of Appeals upheld a fine levied against the Ku Klux Klan for doing business in the state without complying with its registration statute. The Klan contended that it was being discriminated against because similar actions had not been taken against other foreign organizations, but the court did not consider this contention.

In another case involving a non-profit corporation, *People v. Jewish Consumptives' Relief Society*,[60] a New York court granted a temporary injunction to restrain the Society, a non-stock foreign corporation, from raising funds in New York, an activity found to be unauthorized by the corporation's certificate to do business in New York.

In the field of taxation, California, which had been very active in the enforcement of criminal syndicalism laws, passed a constitutional amendment in 1952[61] which provides that no person or organization which advocates the overthrow of the government by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall receive any tax exemption from any agency of the state. In 1953 California provided for a test oath as a means of enforcing the constitutional provision.[62] This statute requires that any one who claims a tax exemption (other than a householder's exemption) must include a declaration that he does not advocate the overthrow of the government or advocate the support of a foreign government against the United States. The Supreme Court of California upheld the constitutional amendment and the statute.[63] The court said that the limitation imposed by the constitutional amendment

> is not a limitation on mere belief but is a limitation on action—the advocacy of certain prescribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion.[64]

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[60] 92 N. Y. S. 2d 157 (1949).

[61] Cal. Const. Art. XX, Sec. 19.

[62] Cal. Rev. and Tax Code, Sec. 32 (Deering Supp. 1957).

[63] First Unitarian Church v. Los Angeles, 48 Cal. 2d 419, 311 P. 2d 508 (1957); Prince v. San Francisco, 48 Cal. 2d 472, 311 P. 2d 544 (1957); People's Church v. Los Angeles, 48 Cal. 2d 899, 311 P. 2d 540 (1957); Speiser v. Randall, 48 Cal. 2d 903, 311 P. 2d 546 (1957).

[64] First Unitarian Church v. Los Angeles, 48 Cal. 2d at 428, 311 P. 2d at 517.

On certiorari of the four cases involved, the Supreme Court of the United States reversed,[65] pointing out that

> when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake to justify a short-cut procedure which must inevitably result in suppressing protected speech. Accordingly, though the validity of Sec. 19 of Art. XX of the State Constitution be conceded arguendo, its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.[66]

The Court distinguished previous cases in which it had sustained the validity of loyalty oaths required of public employees,[67] candidates for public office,[68] and officers of labor unions,[69] by saying, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." [70]

Basing his proclamation on both the tax power and the power to exclude foreign corporations, Governor Fabus in 1958 announced that fifty-two foreign corporations, including the N. A. A. C. P., who were delinquent in payment of franchise taxes, had forfeited all rights to do business in Arkansas and were dissolved or withdrawn.[71]

A natural means of attack against political parties and other organizations having political objectives are election laws. In 1935 Arkansas provided for a denial of a place on the ballot for candidates of any party advocating the overthrow of the government by force.[72] This action was amended in 1941 to name the Communist Party specifically.[73] The statute was upheld in

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[65] Speiser v. Randall, Prince v. San Francisco, 357 U. S. 513 (1958); First Unitarian Church v. Los Angeles, Valley Unitarian-Universalist Church (previously People's Church) v. Los Angeles, 357 U. S. 545 (1958).

[66] Speiser v. Randall, 357 U. S. at 528-29.

[67] Garner v. Board of Public Works, 341 U. S. 716 (1951).

[68] Gerende v. Board of Supervisors, 341 U. S. 56 (1951).

[69] American Communications Association v. Douds, 339 U. S. 382 (1950).

[70] Speiser v. Randall, 357 U. S. at 527.

[71] Proclamation of Governor Orval E. Faubus, February 12, 1958. For other cases on licensing and tax regulations affecting free speech, see Annotations, 93 L. Ed. 1180, 1182 (1950). Cases involving the validity of governmental requirements for loyalty oaths are collected in Annotations, 97 L. Ed. 226 (1954), 18 A. L. R. 2d 268 (1951).

[72] Ark. Acts 1935, No. 33, Sec. 1.

[73] Ark. Acts 1941, No. 293, Sec. 1, as amended, Ark. Stat., Sec. 3-160405 (1947).

Field v. Hall[74] in which the Supreme Court of Arkansas declared that state legislatures have authority to establish conditions precedent to the existence and operation of political parties.

An Illinois statute requires that petitions to form and nominate candidates for a new political party must bear the signatures of at least 25,000 qualified voters, including at least 200 voters in each of at least 50 of the state's 102 counties.[75] The action of state officials on the authority of this statute in refusing to permit Progressive Party candidates on the ballot in the general election of 1948 was upheld by the Supreme Court of the United States in *MacDougall v. Green*.[76]

> It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. This is not a unique policy. See N. Y. Laws 1896, c. 909, sec. 57, now N. Y. Elec. Law sec. 137 (4); 113 Laws of Ohio 349, General Code Sec. 4785-91 (1929), now Ohio Code Ann. (Cum. Supp. 1947) Sec. 4785-91; Mass. Acts 1943, c. 334, sec. 2, now Mass. Ann. Laws c. 53, sec. 6 (1945).[77]

Publicity

The most direct way a legislative body may proceed against a particular group is to use its investigative powers to bring in the members and officers for questioning. Theoretically, this power is incidental to the law making functions and is to be used in obtaining information on which to base legislative decisions. However, legislators often frankly state that their real purpose in a given investigation is exposure,[78] and official reports of committees sometimes display a similar frankness.[79] However,

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[74] 201 Ark. 77, 143 S. W. 2d 567 (1940).

[75] Ill. Ann. Stat., C. 46, Sec. 10-2 (1947).

[76] 335 U. S. 281 (1948).

[77] *Id.*, at 283.

[78] Martin Dies, first chairman of the House Un-American Activities Committee, said, "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession. Always we must keep in mind that in any legislative attempt to prevent un-American activities, we might jeopardize fundamental rights far more important than the objective we seek, but when these activities are exposed, when the light of day is brought to bear upon them, we can trust public sentiment in this country to do the rest." 83 Cong. Rec. 7570 (1938).

[79] In a report to the House of Representatives, the House Un-American Activities Committee said, "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities." H. R. Rep. No. 2, 76th Cong., 1st Sess. 13. Footnoted in Watkins v. United States, 354 U. S. 178, 199 (1957).

with regard to exposure, the Supreme Court of the United States said:

> We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals. But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.[80]

The power of legislatures to apply pressures to individuals and organizations is great, especially if the matters about which witnesses are questioned involve violations of law. A dramatic illustration of this is the investigation of organized crime conducted by a United States Senate committee in 1950.

It has long been settled that Congress can make contempt of Congress a crime punishable in the courts,[81] and it is also well established that congressional powers are broad in conducting legislative investigations.[82] In the most recent cases, direct contempt powers have been assumed, and the Court's attention has been focused on the problem of determining when the individual witness may assert his constitutional rights as a limitation on those powers. For example, in *Flaxer v. United States,*[83] the Supreme Court of the United States held that, where there was some ambiguity in a congressional committee's ruling on time for performance and the witness could easily have concluded that he had ten days after ruling before being faced with the alternative of compliance as against contempt, conviction for contempt of Congress could not be predicated upon the witness' failure to comply with the ruling on the date thereof. In *Watkins v. United States,*[84] a conviction for contempt of Congress was reversed as being invalid under the due process clause of the Fifth Amendment, because the witness had not been given the opportunity to know the relevancy and pertinency of the questions about his past political associates to the subject of the investigation, since the subject of the investigation had not been sufficiently defined.

In *Sweezy v. New Hampshire,*[85] the Supreme Court of the

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80 Watkins v. U. S., *supra,* n. 79, at 200.

81 Re Chapman, 166 U. S. 661 (1897).

82 Jurney v. MacCracken, 294 U. S. 125 (1935); Sinclair v. U. S., 279 U. S. 263 (1929); McGrain v. Daugherty, 273 U. S. 135 (1927).

83 358 U. S. 147 (1958). See also: Sacher v. U. S., 356 U. S. 576 (1958).

84 Watkins v. U. S., *supra,* n. 79, at 178.

85 *Supra,* n. 7.

United States considered a similar situation brought about by the activities of a state, rather than a congressional, investigating committee. Here the witness, a teacher at a state university, refused to tell the committee: (1) the substance of a lecture he had given at the university, (2) his and others' activities on behalf of the Progressive Party in 1948, and (3) anything about his opinions and beliefs on the ground that such questions were not pertinent and infringed upon an area protected by the First Amendment. Chief Justice Warren announced the judgment of the Court reversing the conviction, stating that "The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from the petitioner must be treated as the absence of (legislative) authority" [86] to ask the questions, and on this ground declared the conviction a violation of the due process clause of the Fourteenth Amendment.

Exposure by an investigating committee is necessarily intermittent. When continuous inspection or observation is desired, legislators may enact some form of registration statute which enables administrative officials to maintain up-to-date information on the particular organizations. An example of such legislation is the Subversive Activities Control Act of 1950.[87]

A New York statute of this type brought about the case of *People ex rel. Bryant v. Zimmerman* [88] which has since served as leading authority to support the power of government to require disclosure of membership lists for limited classes of organizations. The New York statute [89] provided for registration and filing of detailed information, including membership lists, by any association of twenty or more persons which "requires an oath as a prerequisite or condition of membership, other than a labor union or benevolent orders of law." It also provided penalties against the organization and against members who retain membership although they have knowledge of the organization's statutory non-compliance. The law was directed at the Ku Klux Klan. The law was amended two years later to restrict the definition more closely to the Ku Klux Klan after several college fraternities had registered under the statute.[90] Bryant, who had been arrested for being a member of the Buffalo Klan with knowledge that it had not complied with the statute, brought habeas corpus proceedings in the New York Supreme Court. This petition was dismissed by that court, and the Appellate Division affirmed.[91] All of the appellate courts assumed that

[86] *Supra,* n. 7, at 254.

[87] *Supra,* n. 51.

[88] 213 App. Div. 414, 210 N. Y. S. 269 (4th Dept., 1925), *aff'd.* 241 N. Y. 405, 150 N. E. 497 (1926), *aff'd.* 278 U. S. 63 (1928). See also: 62 A. L. R. 798 (1929).

[89] N. Y. Laws 1923, c. 664, as amended, N. Y. Civ. Rights Law, Sec. 53 (McKinney 1948).

[90] N. Y. Laws 1925, c. 621.

[91] *Supra,* n. 88.

the law was designed to suppress the Ku Klux Klan, and all of them upheld the legislature's classification as a legitimate exercise of the state's police power. The Supreme Court of the United States discussed briefly but dismissed the relator's claim that he had a constitutional right under either the privileges and immunities clause or the due process clause to join a secret, oath-bound organization. The Court held that the right to be a member of such an oath-bound society is not an incident of United States citizenship that is protected by the privileges and immunities clause. Turning to the due process clause, the Court said:

> The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulations calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. . . . The requirement (that each association file with the Secretary of State copies of its constitution, membership oath, and list of current members and officers) is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowledge of its default.
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> We conclude that the due process clause is not violated.[92]

In *NAACP v. Alabama*,[93] the Supreme Court of the United States distinguished the *Bryant* case on the basis that the Klan engaged in violence, saying:

> that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. . . . The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in Bryant, because the organization there had made no effort to comply with any of the requirements of New York's statute but rather had refused to furnish the state with any information as to its local activities.[94]

[92] *Supra*, n. 88, 278 U. S. 72-73.

[93] *Supra*, n. 1.

[94] *Supra*, n. 1, at 465-466.