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Constitutional Law - Federal Occupation of Field of Control of Subversives

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CONSTITUTIONAL LAW—FEDERAL OCCUPATION OF FIELD OF CONTROL OF SUBVERSIVES—Defendant was chairman of the Communist Party for the western district of Pennsylvania. He was charged with willfully advocating the violent overthrow of the United States Government, and his conviction under state statute¹ was sustained by the superior court.² On appeal, *held*, reversed. The federal Smith Act³ pre-empted the field of control of subversive activities and the state law is therefore void. *Commonwealth v. Nelson*, 377 Pa. 58, 104 A. (2d) 133 (1954).

State laws regulating subversive activities have taken varied forms,⁴ and the attacks have been on many grounds, but absent federal legislation in the field, it is clear that a properly drafted state statute regulating subversive activities is a valid exercise of the state's police power.⁵ The effect of federal legislation on the state laws presents a complex problem. There are rulings to the effect that the state has an interest in its own existence separate from the national

¹ Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4207.

² *Commonwealth v. Nelson*, 172 Pa. Super. 125, 92 A. (2d) 431 (1952).

³ 54 Stat. L. 670 (1940), as amended, 18 U.S.C. (1952) §2385. The Internal Security Act, 64 Stat. L. 987 (1950), 50 U.S.C. (1952) §781 et. seq., should not create the same problem, as §791 declares that existing criminal laws are not affected. McCarran, "The Internal Security Act of 1950," 12 UNIV. PRTR. L. REV. 481 (1951); H. Rep. No. 2980, 81st Cong., 2d sess., p. 5 (1950).

⁴ Groner, "State Control of Subversive Activities in the United States," 9 FED. B.J. 61 (1947); 28 IND. L.J. 492 at 495-502 (1953).

⁵ *Gitlow v. New York*, 268 U.S. 658, 45 S.Ct. 625 (1925); *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927).

interest that the federal government serves, so that there are, in fact, two distinct fields involved.⁶ One writer has asserted that the federal government may act to protect a state government, short of insurrection, only when the state requests aid.⁷ But in almost all cases, subversive activity aimed at the state will affect the nation, and the primary interest of both state and nation is in the existence of a central government which is charged with a constitutional duty to insure to the states a republican form of government.⁸ While states have argued that their laws on subversives are necessary to prevent riot and public violence, the police power should be adequate in the absence of statutes controlling subversive activities.⁹ Assuming that the field of control of federal and state laws is the same, two factors must be examined in determining whether the federal law is exclusive: (1) existence of a conflict in the application of the two laws,¹⁰ and (2) the intent of Congress to preclude state law in a field in which federal law may be supreme. Courts have generally recognized that state laws relating to subversives coincide, rather than conflict, with federal law in scope and application;¹¹ the preclusion test must therefore be applied. An earlier test making "coincidence" as fatal as "conflict"¹² seems to have given way, generally, to an examination of the purposes and policies of the federal law and the effect of the state law upon that policy.¹³ It is in these purposes and policies that congressional intent is often found. The courts have two lines of authority to follow: *Gilbert v. Minnesota*¹⁴ and *Hines v. Davidowitz*.¹⁵ The former case rules that a state law making interference with the federal draft laws a crime was not precluded by the federal statute since it was designed to aid enforcement of the national law. The latter case, however, held that the federal statute relating to the registration of aliens had pre-empted the field in the interests of Congress' exclusive control of foreign affairs. In certain areas, then, federal power must be exclusive and state legislation on the same subject must fall.¹⁶ If Congress intended the Smith Act to establish a

⁶ *United States v. Lanza*, 260 U.S. 377, 43 S.Ct. 141 (1922); *Gilbert v. Minnesota*, 254 U.S. 325, 41 S.Ct. 125 (1920).

⁷ Boudin, "Seditious Doctrines' and the 'Clear and Present Danger' Rule," 38 VA. L. REV. 143, 315 (1952).

⁸ U.S. CONSR., art. IV, §4. See *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922).

⁹ *Gilbert v. Minnesota*, note 6 supra; *People v. Immonen*, 271 Mich. 384, 261 N.W. 59 (1935).

¹⁰ *Sinnot v. Davenport*, 22 How. (63 U.S.) 227 (1859); 60 HARV. L. REV. 262 (1946).

¹¹ *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918); *Gilbert v. Minnesota*, note 6 supra.

¹² *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915).

¹³ *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949); *Cloverleaf Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491 (1942).

¹⁴ 254 U.S. 325, 41 S.Ct. 125 (1920).

¹⁵ 312 U.S. 52, 61 S.Ct. 399 (1941).

¹⁶ E.g. immigration and naturalization, foreign affairs; *Hines v. Davidson*, note 15 supra.

uniform program, state laws are void.¹⁷ But Congress was aware of the existing state statutes.¹⁸ It can be argued that under such circumstances an intent to invalidate state laws would have been more clearly expressed.¹⁹ The author of the Smith Act has stated that he did not intend the law to be exclusive.²⁰ The principal case suggests that the federal law is paramount, however, and there are indications that this holding may be correct. To the extent that subversives are aliens, there may be international complications in the enforcement of state laws. State authorities do not have access to the federal files, and might seriously hamper a nationwide system of investigation by their arrests.²¹ On the other hand, the Supreme Court has shown growing tolerance for state statutes. The fact that the states have traditionally exercised police powers in a particular field has been persuasive in arguing that a federal statute has not pre-empted that field.²² The withdrawal of a power so long and so extensively exercised by state should be based on a clearer showing of congressional policy than was available in the principal case. It is difficult to say that the state subversive statutes stand in the way of "the accomplishment and execution of the full purposes and objectives of Congress,"²³ and if uniformity isn't essential, the states should retain the power to act.²⁴ The rule of the *Gilbert* case appears the better one, allowing both state and nation to prosecute subversives under otherwise valid laws.

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¹⁷ *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681 (1890); *California v. Zook*, note 13 *supra*.

¹⁸ S. Rep. No. 1358, 81st Cong., 2d sess., p. 9 (1950)

¹⁹ *Cloverleaf Co. v. Patterson*, note 13 *supra*; *Sinnot v. Davenport*, note 10 *supra*.

²⁰ Principal case at 89-90.

²¹ E.g., arrest of an FBI "plant" in a local party cell. See Hoover, "Civil Liberties and Law Enforcement: The Role of the F.B.I.," 37 *IOWA L. REV.* 175 (1952). State criminal laws against communists might make federal registration more difficult. Communist Party membership, *per se*, is not yet a federal crime.

²² *California v. Zook*, note 13 *supra*.

²³ *Hines v. Davidson*, note 15 *supra*, at 67.

²⁴ *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930 (1942).