RECENT DEVELOPMENTS

STATE'S INTEREST IN INVESTIGATING SUBVERSION QUESTIONED

Uphaus v. Wyman
350 U.S. 72 (1959)

The United States Supreme Court affirmed the conviction of Willard Uphaus for contempt of court for refusing to produce a list of the guests who had attended a camp operated by the World Fellowship, Inc., of which Uphaus was executive director. The demand for the list was made by the Attorney General of New Hampshire during an investigation, pursuant to legislative authorization, into possible subversive activities within the state.[1]

Speaking for five members of the Court, Mr. Justice Clark held (1) that although the Smith Act[2] pre-empts local statutes which proscribe the same conduct, it does not bar state prosecutions for or investigations of sedition against the state itself,[3] and (2) that Uphaus was not denied due process of law in the contempt conviction. While public disclosure of the names of members of an unpopular group has a deterrent effect on the members' freedom of association, the Court felt that the state's interest in defending against subversion justifies interfering, to a certain extent, with the rights of private individuals.[4]

The opinion did not consider the doctrine that first amendment rights occupy a preferred position in the hierarchy of constitutional freedoms.[5]

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[1] Uphaus v. Wyman, 360 U.S. 72 (1959).

[2] 18 U.S.C., § 2385 (1956).

[3] For a discussion of this part of the decision, see Schwartz, "The Supreme Court—October 1959 Term," 58 Mich. L. Rev. 165 at 178 (1959).

[4] For authority that freedom of association is among the liberties protected by due process, *see* NAACP v. Alabama, 357 U.S. 449 (1959); Thomas v. Collins, 323 U.S. 516 (1945); Hague v. CIO, 307 U.S. 496 (1939).

The Court relied in part on a state statute which requires public camps to maintain a guest register open to inspection of police officers and sheriffs. The Court reasoned that the associational privacy sought to be maintained by Uphaus was public at its inception and "tenuous at best." 360 U.S. at 80. The reason that the state did not use this statute instead of compulsory process was not indicated.

Appellant argued that the due process clause also precluded enforcement of the subpoenas because the resolution which authorized the operations of the Attorney General was vague and the documents sought were not relevant to the inquiry. The Court lumped all the above objections into the single question of whether New Hampshire was precluded from compelling the production of the documents by the due process clause of the Fourteenth Amendment. 360 U.S. at 77.

Uphaus further argued that the indefinite sentence was a denial of due process; the Court rejected the contention because it had determined that the committee's demand for the documents was legitimate. 360 U.S. at 81.

[5] The first statement of this doctrine was in a footnote by Mr. Justice Stone; see United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938).

Although these rights have been given special consideration in certain cases,[6] It has been fairly clear since *Dennis v. United States*,[7] that the present Court does not readily attribute this "preferred position" to first amendment freedoms. There is reason to believe that the Court never did completely accept the doctrine.[8] However, irrespective of the historical importance of this doctrine, the result is that today there is no presumption or inference in favor of the individual when his interests are balanced against those of the state. Now the state is only required to show a compelling societal interest to justify action which restricts the exercise of these freedoms.[9]

Whether first amendment freedoms occupy a preferred or an equal position, the decision in the instant case is susceptible to criticism on its basic premise that the state's interest in the investigation of subversive activities is a compelling societal interest sufficient to subordinate first amendment rights. The Court apparently did not question, but rather assumed, that subversion against the state[10] is a compelling societal interest. The facts of this case do not appear to warrant such an assumption.

Before reaching this conclusion several factors should have been considered. First, it does not seem possible that a state government could be overthrown by force or violence as long as the federal government is in its present form. The F. B. I. and other federal agencies such as the armed forces almost certainly could and would prevent such an attempt. Second, even if it were possible to take control of the state by force, the "subversives" would have no reason for doing so. They could not improve their overall position in the United States because, obviously, the federal government would easily be able to remove them from power in New Hampshire. Furthermore, such a grasp for power would result in the prosecution of all people involved. This would most likely destroy any organization which might exist in New Hampshire. In other words, a state subversive organization would not strike until it was reasonably sure that it could seize control on a national level also. Therefore, as long as federal agencies do their jobs well, subversion against a state appears to be a fruitless and unlikely endeavor.

Under this analysis, it does not seem that the World Fellowship camp was a real threat to the security of New Hampshire. Also, because it is

[6] Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Concurring Opinion); see, e.g., Thomas v. Collins, 323 U.S. 516, 530 (1945); Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940); Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939).

[7] 341 U.S. 494 (1951).

[8] Kovacs v. Cooper, 336 U.S. 77, 90-95 (1949) (Frankfurter, J., takes this view in a concurring opinion).

[9] NAACP v. Alabama, supra note 4; Roth v. United States, 354 U.S. 476 (1958); Dennis v. United States, supra note 7.

[10] This assumption would be valid in circumstances of a purely local nature such as a strike or political corruption, but this criticism is directed at the Court's drawing of the conclusion in circumstances similar to those of the instant case only, i.e., where the activity being investigated is thought to originate in a foreign country and to threaten the security of the entire United States. Also, it is *not* relevant to cases of actual breaches of the peace where the state clearly has authority to act.

clear that first amendment rights were infringed[11] and that an actual attempt to overthrow the government of a state was extremely unlikely, the Court should have closely examined the state's interest in "self-preservation" instead of automatically assuming it was a compelling societal interest.

Depending on the facts, such an examination could have resulted in three possible answers. First, the security of the state was seriously threatened. Second, there was no threat to the security of the state *because* federal agencies were fully capable of handling the situation. Third, the conduct complained of did not constitute a threat to the state. The *Uphaus* case clearly falls within the second category. Since any threat to the state's security is greatly diminished by the existence of extensive federal controls, the state's interest is not of a "compelling" nature. Therefore, it would seem that first amendment freedoms should have been given greater weight than those of the state in the balancing process.

Paul J. Stergios

[11] If there had been no infringement, the Court would not have found it necessary to balance the public and private interests.