MEMBERSHIP CLAUSE OF THE SMITH ACT HELD TO CARRY RIGID STANDARDS OF PROOF

Hellman v. United States
298 F.2d 810 (9th Cir. 1961)

John Hellman was indicted and tried for violation of the Smith Act of 1940.[1] This act provides a criminal penalty for anyone who "becomes or is a member of, or affiliates with any such 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], knowing the purposes thereof. . . ."[2] At the trial, the Government introduced evidence of Hellman's exceedingly active career as a member of the Communist Party. Hellman had served as an organizer of youth camps and other front organizations, participated in the underground and recruited new members. He had also taught extensively in Communist Party schools urging his students to participate in elections to learn of their futility in achieving party goals and generally to advance the conditions necessary for the success of the Communist movement. On the basis of this evidence, Hellman was convicted.

On appeal, the proceedings were delayed until final Supreme Court determination of *Scales v. United States*.[3] In that case, the Supreme Court decided that the membership clause of the Smith Act did not violate the first amendment to the Constitution and that it had not been replaced by section 4(f) of the Internal Security Act of 1950.[4] The *Scales* case, along with *Noto v. United States*[5] decided in the same term, established certain prerequisites for conviction under the membership clause of the Smith Act. In applying these standards the Court of Appeals found the evidence insufficient to establish the necessary element of specific personal intent to bring about the violent overthrow of the Government as speedily as circumstances would permit. As a result, the Court reversed the conviction.[6]

The *Scales* case was the first in which the Supreme Court considered the constitutionality of the membership clause. An earlier case, *Dennis v. United States*,[7] upheld the constitutionality of the advocacy clause of the Smith Act.[8] The constitutional issue of whether Congress could punish

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1 54 Stat. 671 (1940), 18 U.S.C. § 2385 (1958).

2 *Ibid.* The statute punishes violation with fines up to $20,000 and imprisonment up to 20 years.

3 367 U.S. 203 (1961).

4 64 Stat. 992 (1950), 50 U.S.C. § 783(f) (1958).

5 367 U.S. 290 (1961).

6 Hellman v. United States, 298 F.2d 810 (9th Cir. 1961).

7 341 U.S. 494 (1951).

8 Smith Act of 1940, 54 Stat. 670, 18 U.S.C. § 2385: "Whoever knowingly or willfully advocates, abets, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States. . . ."

innocent teaching of the desirability of forceful overthrow of the government was not decided as those particular defendants were found to have specifically intended to bring about violent revolution. The question of whether or not specific intent is an essential element of the crime was left open. The question was settled in the *Scales* case where the Supreme Court read the requirement of specific intent into the membership clause and added the requirement that the membership be "active." This element was included to avoid "close constitutional questions" as it was reasonable to infer that Congress did not mean to inflict heavy penalties on mere passive members. The Court also applied the strict evidentiary standards developed in *Yates v. United States*.[9] To convict under the membership clause of the Smith Act the Government must prove two basic propositions. The jury must find that "(1) the Communist Party advocated the violent overthrow of the Government, in the sense of present 'advocacy of action' to accomplish that end as soon as circumstances were propitious and (2) petitioner was an 'active' member of the Party, and not merely a 'nominal, passive, inactive or purely technical' member, with knowledge of the Party's illegal advocacy and specific intent to bring about violent overthrow 'as speedily as circumstances would permit.' "[10]

The *Noto* case reversed a conviction under the membership clause on the ground that the evidence was insufficient to support a finding of the first proposition, the illegal advocacy of the Communist Party. The Court held that the evidence of illegal advocacy must "be imputed to the Party as a whole and not merely some narrow segment of it."[11]

In the principal case, however, the Court of Appeals concentrated on the question of Hellman's *personal* intent to bring about the violent overthrow of the government as speedily as circumstances would permit. For this purpose, the court assumed that the evidence was sufficient to establish the Party's illegal advocacy and that Hellman was an active member with knowledge of the Party's illegal intentions. This in itself might be enough to draw a reasonable inference of personal intent if the Party had *only* illegal activities and illegal ends. However, there was evidence showing the Party also engaged in legal activities, *e.g.*, advocating racial integration and nuclear disarmament. The specific intent could also have been inferred from the nature of Hellman's activities if the only conclusion which could have been drawn was advocacy of action to bring about the violent overthrow of the present government. As an example of activities that leave only the conclusion of illegal intent, the Court mentioned the collection of arms and ammunition and planning specific acts of sabotage. Another legitimate source for evidence of illegal intent would be Hellman's own statements. This

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[9] 354 U.S. 298 (1956). Although this case dealt only with the advocacy and conspiracy clauses of the Smith Act, the Court held in *Scales* that the evidentiary standards applied to all provisions of the Act.

[10] Scales v. United States, *supra* note 3, at 220.

[11] Noto v. United States, *supra* note 5, at 299.

was the principal mode of proof in the *Scales* case,[12] but the court in the principal case found the record void of any statements from which an inference of Hellman's personal illegal intent could be fairly drawn. Moreover, Hellman's activities were such that they were equally consistent with an intent to reach the Party's ends through peaceful means.

In cataloguing the patterns of evidence from which illegal advocacy could be inferred, the court conspicuously omitted one of the principal patterns established in the *Yates* case and reiterated in *Scales*. Illegal advocacy was shown in those cases by evidence of the "teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."[13] Evidence of Hellman's activities as listed in the Court of Appeals' opinion would seem to fit this standard. If the Party's criminal advocacy is assumed, then Hellman's teaching in party schools, urging students to participate in elections to learn of their futility in achieving ends, and urging activity which would hasten the crises necessary for Communist revolution seem to be excellent examples of conduct legally undertaken to render effective the illegal aims of the Party. Also, by establishing a dichotomy of legal and illegal activities, the court seems to be naively ignoring the fact that there are many legal organizations working for the same legal goals as the Communist Party. It appears odd that an individual would knowingly participate in an organization that advocates the violent overthrow of the government to achieve peaceful ends. In effect, the Party's legal ends are not ends at all so far as the Party is concerned, but are means for creating the economic and social chaos that is essential to the real Communist goal of revolution.[14] An active, knowing member would be substantially contributing to that goal no matter what his personal intentions might be. From the plain meaning of the membership clause it would appear Congress intended to reach such activity. Whether or not Congress can constitutionally punish legal activities undertaken with the intent to achieve legal ends because of the probable contributory effect on creating conditions necessary for violent overthrow of the government is still an open question, but these three cases, *Scales*, *Noto* and *Hellman*, demonstrate just how far federal courts will go to avoid such "close constitutional questions" that might necessitate declaring an act of Congress unconstitutional.[15]

Although the *Scales* decision severely narrowed the membership clause

[12] Scales v. United States, *supra* note 3, at 255: ". . . [T]he elements of petitioner's 'knowledge' and 'specific intent' require no further discussion of the evidence beyond that already given as to Scales' utterances and activities."

[13] Yates v. United States, *supra* note 9, at 332; Scales v. United States, *supra* note 3, at 232.

[14] Hoover, Masters of Deceit 184 (1956). The Communist Party members are told, "Use anything to advance the ultimate goal: offensive and defensive tactics, legal and illegal, long and short range policies. All are part of the over all battle plan."

[15] See Communist Party, U.S.A. v. Catherwood, 367 U.S. 389 (1961). This case, decided the same day as the *Scales* case, is another example of narrow construction to avoid constitutional questions. See also Note, 23 Ohio St. L.J. 767 (1962).

by reading in the requirements of specific intent and active membership, the case was criticized because the Court did not clarify the amount of activity or the type of activity required.[16] This lack of clarification would permit either a moderately active or highly active member working only for legal ends to be convicted under the membership clause. A desire to correct this weakness seems to be reflected by dictum found in the *Noto* case. Although it was not necessary to pass on the sufficiency of the evidence of petitioner's personal intent, the Court said that the element of personal intent must be judged *stictissimi juris* to avoid prosecution of a member who is in sympathy with the legitimate aims of the Party, but who has no intention of resorting to force to attain them.[17]

The Court of Appeals, in the principal case, combined this dictum with the *Scales* test and now places an overwhelming burden of proof on the Government to gain a conviction under the membership clause of the Smith Act. The Government must first prove that the organization to which the defendant belongs as a whole advocates the violent overthrow. The "as a whole" requirement would seem to imply that a showing of substantial legitimate Party activities would prevent a finding of the essential element of illegal advocacy. If this barrier can be surmounted, the United States must then prove that the particular defendant was an active, knowing member with specific personal intent to overthrow the Government by force. The element of specific intent can only be inferred from the defendant's own incriminating statements or from activities as extreme as the storing of arms or planning sabotage. Since activities of this kind could probably be successfully prosecuted under other federal statutes which do not impose such a staggering burden of proof,[18] the courts may now have interpreted the membership clause of the Smith Act so narrowly that it has lost its intended effect.

Although the desirability of this extreme example of judicial braking might be questioned, the result is not without merit. Prior to these three cases, the membership clause had been severely criticized on several grounds and was widely thought to be unconstitutional. It was felt that its infringement of the right of association was not justified by the necessity, practicality or usefulness gained in combating internal communism.[19] Feeling was

[16] See Note, 75 Harv. L. Rev. 111 (1961).

[17] Noto v. United States, *supra* note 5. The distinction between legal and illegal activities is not without judicial precedent. In De Jonge v. Oregon, 299 U.S. 353 (1935), the Supreme Court held that to punish one who assists in the conducting of a lawful meeting held by an illegal organization was unconstitutional.

[18] Section 4 of the Internal Security Act, 64 Stat. 991 (1950), 50 U.S.C. § 783 (1958), prohibits conspiracy to perform acts which would substantially contribute to the establishment of a totalitarian dictatorship in the United States. This provision eliminates advocacy of force or violence as an essential element of the crime.

Sections 18-21 of the same act provide rather comprehensive espionage laws. Also, it was noted in *Scales* that the evidence would have been sufficient to support a conviction under the advocacy clause of the Smith Act, *supra* note 8.

[19] Comment, "Communism and the First Amendment: The Membership Clause of the Smith Act," 52 Nw. U.L. Rev. 527 (1957).

also expressed that although criminal prohibition is within congressional power, it is a totally inadequate means for dealing with the Communist movement.[20]

The Internal Security Act of 1950 may be a more desirable means of control. The primary requirement of this act is that Communist organizations must register with the Attorney-General, enabling the Government to identify and keep track of socially dangerous groups.[21] The constitutionality of this provision was recently upheld.[22] The Supreme Court, however, avoided as premature a constitutional attack on the statute, *i.e.*, that registration under the Internal Security Act would amount to self-incrimination under the membership clause of the Smith Act.[23] If, when enforcement is attempted, the Party's officers and members can successfully invoke this fifth amendment protection, the value of that statute will be lost. The judicial construction of the membership clause in the *Hellman* case may well prove to be the solution to the problem of a vacuum that would be created if the fifth amendment defeated the operation of the Internal Security Act. The almost impossible burden of proof the Government must meet limits the application of the membership clause to hard-core revolutionaries who are actively engaged in preparation for physical violence. While it might be remembered that the fifth amendment protects against coerced admissions which only tend to incriminate, the tendency to incriminate by registering under the Internal Security Act might be balanced by the unlikelihood of prosecution under the membership clause and the security interest in the exposure of Communist activities. An anology might be drawn to the requirement of registration and disclosure of certain records under the Tax Power. Although there is the possibility of self-incrimination resulting from such disclosures,

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20 Mr. Justice Jackson, concurring in Dennis v. United States, *supra* note 7, at 532: "I add that I have little faith in the long range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists."

21 Internal Security Act of 1950, 64 Stat. 995 (1950), 50 U.S.C. § 787 (1958). Once the Party has registered, section 10 of the act makes it a criminal offense to broadcast or use the mails without identifying the source. This statutory scheme, designed for exposure rather than prohibition, seems more desirable as most Communist activities are carried on through "front" organizations. Many are created by the Party; others are legitimate organizations that have been infiltrated. Through the use of fronts the Communist Party has many unknowing members working for the Communist cause. Areas most prone to infiltration are communications, labor, under-privileged minorities, education, religion, youth, and government.

Philbrick, I Led Three Lives 164, 240-44, 249-50 (1952); Ernst and Loth, Report on the American Communist 42 (1952).

22 Communist Party, U.S.A. v. Subversive Activities Control Board, 367 U.S. 1 (1961).

23 Although § 4(f) of the Internal Security Act, *supra* note 4, provides that registration can not be used as evidence in a subsequent prosecution, the Party contended that disclosure would open the way for further investigation to gather admissible evidence.

the Government's interest in the collection of revenue precludes the fifth amendment from preventing the enforcement of revenue legislation.[24]

If the membership clause of the Smith Act is a major bar to the effective operation of the Internal Security Act, the acquittal of John Hellman might well serve as the judicial precedent for denying the Communist Party, its officers and members, the privilege against self-incrimination when they balk at complying with the registration provisions of the Internal Security Act.

[24] See McCormick, Evidence 283 (1954). See also United States v. Kahriger, 345 U.S. 22, 32-33 (1953): "Under the registration provisions, a person subject to the tax is not compelled to confess to acts already committed; he is merely informed that in order to engage in the business of wagering in the future he must fulfill certain conditions."