Marquette Law Review

Volume 42
Issue 1 *Summer 1958*

Article 16

Constitional Law: Interpretation of the Smith Act

Richard T. Becker

Two of the Clayton Act so that civil relief was permitted then "selling at unreasonably low prices" should be placed in the same category as it is also an unfair trade practice.

Until this decision the majority of lower courts sustained the contention that Section Three of the Robinson-Patman Act was an anti-trust law and allowed civil relief.[5] Most of these courts failed to distinguish between the effects of the various provisions of the Robinson-Patman Act and held that the Robinson-Patman Act was an anti-trust law in its entirety. They considered "selling at unreasonably low prices for the purpose of destroying competition" just as great an evil as price discrimination, and provided the same remedy to an individual injured by a violation of anything mentioned in the Robinson-Patman Act. This line of reasoning is best expressed in the *Balian Ice Cream case*[6] where the court stated that the three main statutes dealing with monopolies and combinations are the Sherman Anti-trust Act, Clayton Act, and the Robinson-Patman Act, and they are all closely related. Each Act was enacted to curb conduct that the previous acts failed to prohibit. All three of the Acts aim to suppress combinations to restrain competition and attempts to monopolize, and maintain the freedom of commerce between the states. The treble damage provision was not only to compensate an individual for loss as a result of one of the prohibited acts, but it also induces potential violators not to act contra to the anti-trust laws, as the financial consequences are great.

The Supreme Court notes that the Justice Department has never prosecuted an individual for a violation of Section Three. If private civil remedies are not available to individuals, the policy of the Justice Department will undoubtedly change, and violators of Section Three will now be faced with criminal prosecution.

PAUL V. LUCKE

Constitutional Law — Interpretation of the Smith Act — Fourteen defendants were charged with conspiring: 1) to advocate and teach the duty and necessity of overthrowing the government of the

[5] The following held that private remedies were available for a violation of Section Three of the Robinson-Patman Act: Dean Oil Co. v. American Oil Co., 147 F. Supp. 414 (1956); Atlanta Brick Co. v. O' Neal, 44 F. Supp. 39 (1942); Spencer v. Sun Oil Co., 94 F. Supp. 408 (1950); Hershel California Fruit Products Co. Inc. v. Hunt Foods Inc., 119 F. Supp. 603 (1954); Balian Ice Cream Co. Inc. v .Arden Farms Co., 94 F. Supp. 796 (1950); Meyers v. Shell Oil Co., 96 F. Supp. 670 (1951); Kentucky-Tennessee Light and Power Co. v. Nashville Coal Co., 37 F. Supp. 728 (1941); A. J. Goodman and Son Inc. v. United Lacquer Mfg. Corp., 81 F Supp. 890 (1949); Vance v. Safeway Stores Inc., 239 F. 2d 144 (1957).

The following cases held that Section Three of the Robinson-Patman Act was not an anti-trust law and prevented private relief: National Used Car Market Report Inc. v. National Auto Dealers Association, 108 F. Supp. 692, (1951) *aff'd* 200 F. 2d 359 (1952); Nashville Milk Co. v. Carnation Co., 238 F. 2d 86 ( ).

[6] Balian Ice Cream Co. Inc. v. Arden Farms Co., 94 F. Supp. 796 (1950).

United States by force and violence, and 2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing said overthrow as speedily as possible. Convictions were sought under 18 U.S.C. §2385, the section of the present code corresponding to the Smith Act of 1940 (which shall hereafter be referred to as the Smith Act.) The defendants were convicted in the United States District Court for the Southern District of California and this conviction was upheld by the Court of Appeals in *Yates v. United States,* 225 F. 2d 146 (9th Cir. 1955). The Supreme Court granted certiorari. Petitioners contended that the lower courts misinterpreted the word "organize"; that the instructions given by the trial court were erroneous; that the evidence was insufficient to sustain the convictions; and that the doctrine of collateral estoppel applies to bar petitioner Schneiderman's conviction. *Held:* Reversed. The Court, in an opinion written by Justice Harlan, accepted the first three contentions of the petitioners, acquitted five petitioners and remanded the cases of the other nine. Justice Douglas and Black concurred in the acquittals but held that the other nine petitioners should have been acquitted as well. Justice Burton concurred in the decision but does not agree with the majority's interpretation of "organize." Justice Clark dissents, holding that the majority has misconstrued the meaning of the Smith Act. *Yates v. United States,* 354 U.S. 298 (1957).

Attention naturally centers on the holding in favor of the petitioners 1) that the term "organize" as used in the Smith Act was erroneously construel by the lower courts; and 2) that the trial court's instructions to the jury erroneously excluded from the case the issue of "incitement to action". The recent dismissal by the government of the action against all the petitioners indicates the need for a close scrutiny of the philosophy of the court.

To understand the case it is necessary to look at the statutory provisions under which the petitioners were convicted. The Smith Act of 1940[1] was revised in 1948 and became 18 U.S.C. §2385. This action was again revised in 1956 when a conspiracy clause was added to the section. There was no conspiracy clause in §2385 between 1948 and 1956 and in those years the general conspiracy section[2] applied. The 1954 revision changed the wording, but not the meaning, of the Act. The petitioners herein were charged under the first and third clauses of §2385 which are set out in the margin.[3]

[1] 18 U.S.C. §§10, 11, & 13 (1946).

[2] 18 U.S.C. §371 (1956) provides: "If two or more persons conspire . . . to commit any offense against the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than 10,000 dollars or imprinsoned not more than 5 years, or both."

[3] 18 U.S.C. §2385 (1956) provides: "Whoever knowingly or willfully advocates,

In construing the section indicated, the Court found it necessary to define the term "organize." The Court accepted the contention of the petitioners that "organize" must be defined narrowly to mean only the "acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities even though such acts may loosely be termed 'organizational'."[4] This interpretation meant that the statute of limitations had run before this action was begun. The respondent had contended that it meant a continuing process which goes on throughout the life of an organization. The respondent pointed out that to construe the word as the Court does here would have given no meaning whatsoever to the original Smith Act provision of 1940 since the Communist Party was founded in 1919 in the United States. Justice Barton in a concurring opinion and Justice Clark in his dissent accept this contention of the respondent. The majority side-stepped this contention by stating that the act was designed to deal with anarchists and syndicalists as well as Communists.

The majority supports its narrow interpretation with the words of Chief Justice Marshall in *United States v. Wiltberger*,[5] who said that: ". . . the rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." To the detriment of their argument, however, the majority also quotes from the same decision the statement: "The maxim is not to be applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend."[6] In other words, the statute should not be construed so strictly as to defeat the intent of the legislators. The Court admits that a concern over Communism was one of the chief forces leading to the passage of the Smith Act. And yet the majority claims that Congress inserted one of the major portions of the act without intending that it should apply to that Party. Justice Clark complains that: "This construction frustrates the purpose of the

abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or the assassination of any officer of any such government; or

". . . .

"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 purpose thereof

"Shall be fined not more than 20,000 dollars or imprisoned not more than 20 years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

[4] 354 U.S. at 310.

[5] *United States v. Wiltberger,* 5 Wheat. 76, quoted in 354 U.S. at 304-305.

[6] *Ibid.*

Congress for the Act was passed in 1940 primarily to curb the growing strength and activity of the Party."[7] He does not feel that the explanation that the act was to apply to anarchists and syndicalists as well as Communists is persuasive. When the threat of the latter is compared with that of the former this feeling seems quite logical.

The Court, although indicating that it must use the ordinary and plain meaning of the word "organize," nevertheless discounts some dictionary help. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. unabridged) defines "organize" as:

> 1. To furnish with organs; to give an organic structure to.
> 2. To arrange or constitute in interdependent parts, each having a special function, act, office or relation with respect to the whole; to systematize; to get into working order; as, to organize an army; to organize recruits.

FUNK AND WAGNALL'S NEW STANDARD DICTIONARY (1947) defines "organize" as:

> 1. To bring into systematic connection and cooperation as parts of a whole, or to bring the various parts of into effective correlation and cooperation; as, to organize the peasants into an army.

The example of organizing an army seems particularly apt in respect to the Communist Party as Judge Fee in the Court of Appeals decision commented. An army is not "organized" when the order to do so is issued. Nor is it "organized" when the headquarters staff is selected or even when the cadres are assigned. It is not "organized" until the component units are brought to prescribed strength and fitness.[8] Like an army, the Communist Party is also being built to strength and, fortunately for the United States, it has not advanced far in its "organization."

The trial judge in this case defined "organize" to include the recruiting of new members and forming of new units and the regrouping or expansion of existing clubs.[9] This definition, as the respondent contended, seems to fall squarely within the dictionary definitions given above, which definitions appear to give the ordinary, plain meaning of the word "organize."

The other part of the decision which requires close scrutiny is the Court's reaction to the instruction given by the trial court. The majority here holds that the instructions given by the trial court were defective. The pertinent parts of the instruction are the following:

> "The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction

[7] 354 U.S. at 348. See also Note 3 *supra*, 354 U.S. at p. 348.
[8] *Yates v. United States*, 225 F.2d 146 (9th Cir. 1955) at p. 156.
[9] *United States v. Schneiderman*, 106 F. Supp. 906, at 935 (S.D. Cal. 1955).

> of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy.
>
> "Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.
>
> "The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence."[10]

The trial court continued by warning the jury that the defendants could not be convicted for advocating ideas, divorced from action, and by telling the jury that the defendants had a constitutional right to hold, express and advocate opinions, ". . . even though their opinions are rejected by the overwhelming majority of the American people."[11] The judge emphasized the defendants' right to criticize our government and its policies. Certainly these instructions should be sufficient under the *Dennis Case* where the instructions, as given by Judge Medina in the trial court, were approved by the Supreme Court. The pertinent portion of those instructions is:

> ". . . it is not the abstract doctrine of overthrowing or destroying organized government by the unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of the purpose, by language reasonably and ordinarily calculated to *incite* persons to such action." [emphasis added][12]

The word "incite" seems to be the crux of this matter. The Court in this case holds that the absence of this word makes the trial court's instructions defective. The trial judge refused to use the word "incite" because he felt that, in its ordinary usage, the word had a connotation of immediacy which had no place here. Defense counsel shared this interpretation. The trial court, not wishing to give the jury the mistaken impression that they must find advocacy to immediate action in order to convict, couched the instruction in the terms given above.[13] Unfortunately, as Justice Clark points out,[14] the judge now finds that, from a practical viewpoint, it is better to use the exact words approved by the Court, and not those which he believes meet the requirements of the *Dennis Case* as they apply to this particular case. The Court

[10] 354 U.S. at 313.
[11] *Id.* at 314.
[12] *Dennis v. United States,* 341 U.S. 494, at 511 (1951).
[13] Brief for Respondent, p. 83, *Yates v. United States,* 354 U.S. 298 (1957).
[14] 354 U.S. at 350.

here appears to be doing just what Chief Justice Vinson warned against in the *Dennis Case* when he said: "To those who would paralyze our Government in a semantic straitjacket we must reply that all concepts are relative."[15] Justice Clark states that: "While there may be some distinctions between the charges, as I view them they are without material difference."[16]

If the instructions quoted above were not enough, at another point in the instructions the trial judge, in distinguishing unpunishable advocacy of an abstract doctrine from punishable advocacy, instructed the jury that to establish the offense of conspiracy against any of the defendants:

> "The evidence must show beyond a reasonable doubt:
> ". . . .
> "Third, that the accused, while a member of the conspiracy had the specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."[17]

This instruction, except that it does not use the vital word "incite," is very close to the Dennis Case instructions.

The Supreme Court holds that the Smith Act does not prohibit "advocacy and teaching of forcible overthrow as an abstract principle," divorced from any effort to instigate action to that end, even if such advocacy or teaching is engaged in with evil intent.[18] It would seem from the above that the trial court adequately made the point that there must be more than mere advocacy of abstract doctrine to convict. The Court admits that the distinction between the advocacy or teaching of doctrines, with evil intent, and that which is directed to stirring people to action "are often subtle and difficult to grasp."[19] Justice Clark finds them too "subtle and difficult to grasp."[20]

The Court here appears to have imposed a very effective "semantic straitjacket" upon the words of the Smith Act both in requiring the use of the exact words of the *Dennis* instructions and in its construction of "organize."

After overturning the convictions on the first two contentions, the Court then acquitted five of the defendants on the facts. As to this action Justice Clark states:

> "In any event, this Court should not acquit anyone here. In its long history I find no case in which an acquittal has been ordered by this Court solely on the facts. It is somewhat late to start in now usurping the function of the jury, especially where

[15] 341 U.S. at 508. See also 225 F.2d at 151.
[16] 354 U.S. at 350.
[17] *United States v. Schneiderman*, 106 F. Supp. at 933.
[18] 354 U.S. at 318.
[19] *Id.* at 326.
[20] *Id.* at 350.

new trials are to be held covering the same charges. . . . To say the least, the Government should have an opportunity to present its evidence under these changed conditions." (*i.e.*, in light of this decision)."[21]

While this writer agrees with Justice Clark, this question becomes rather academic in light of recent developments. The Government, apparently recognizing that this decision weakened its case against the petitioners to such an extent that convictions would be impossible to secure, moved for dismissal in the District Court, which motion was granted.

The reader should also note that two Justices, Black and Douglas, only concur in the acquittals of the five petitioners and, dissenting from the majority, hold that the other nine should also have been acquitted. Justice Douglas, in his opinion, quotes with approval a statement by Jefferson that ". . . it is time enough for the rightful purposes of civil government, to interfere when principles break out into overt acts against peace and good order."[22] One can only wonder if the entire Court is tending towards this approach. Certainly the "subtle and difficult to grasp" distinctions found by the majority do not lend themselves to a clear and distinct answer to such a query.

Application of the *Yates Case* in lower court decisions to the detriment of the Government has already been found in *United States v. Silverman.*[23] In that case a prospective Party member was not urged to immediate bloodshed but merely asked to join a group which would use such means if necessary. The Court of Appeals held that a statement that force will be necessary, accompanied by good proof of the specific evil intent of the speaker, is not an example of incitement. Statements that the Party will take action "at the proper time to overthrow the present system" and that the Party "will fight for Socialism" were considered too remote from concrete action to regarded as a violation of the Smith Act. The Court bases this decision on the *Yates Case.* This almost appears to be approaching the Douglas view.

RICHARD T. BECKER

Federal Income Taxation - Tax Accounting - When an Accrual Basis Taxpayer Should Report Prepaid Income Items — The taxpayer corporation, owner of certain hotel property, entered into a 10 year lease contract in 1949, for the period 1950-1959. The contract called for an annual rental of $30,000, with an advance payment to the taxpayer of $30,000, the latter to apply on the rental for the last year of the lease.[1] The taxpayer, in accordance with its accrual method

[21] *Id.* at 346-347.
[22] *Id.* at 340.
[23] U.S. v. Silverman, 26 *U.S.L. Week,* 2155 (2d Cir. 1957).
[1] The taxpayer had also argued that since the lessee had preferred paying the