Washington Law Review

Volume 31 | Issue 3

8-1-1956

Pre-emption of State Anti-Sedition Legislation by Federal Legislation

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RECENT FEDERAL CASES

Pre-emption of State Anti-sedition Legislation by Federal Legislation . In *Commonwealth of Pennsylvania v. Nelson*, ——U.S.——, 100 L.Ed. Adv. R. 415, Sup.Ct. 477 (1956), the United States Supreme Court, per Mr. Chief Justice Warren, sustained the decision of the Supreme Court of Pennsylvania, Western District, quashing the indictment of Steve Nelson under the Pennsylvania Sedition Act. (Under that indictment, he was tried, convicted, and sentenced to twenty years imprisonment, to a $10,000 fine and to costs of prosecution in the sum of $13,000 by the lower Pennsylvania court.) Subsequent to the state court trial, Nelson, an open and avowed communist, was tried and convicted under the federal anti-sedition act (the so-called Smith Act, 18 U.S.C. § 2385, 18 U.S.C.A. § 2385), receiving a five-year prison term. *Commonwealth of Pennsylvania*, 377 Pa. 58, 104 A.2d 133 (1954).

The United States Supreme Court based its decision, as did the Pennsylvania court, on the supersession of the state sedition statute by the federal act. The Court's holding confined itself to that narrow point; by reaching this result, the Court made it unnecessary to consider the due process questions raised by the alleged errors in the conduct of the trial. Likewise, the Court did not have to pass on the constitutionality of certain portions of the state act, possibly vulnerable to attack for vagueness and lack of a proper standard.

The Court spelled out in detail what it did *not* purport to hold by the decision. The holding does not affect the right of the states to enforce their sedition laws when the federal government has not "occupied the field." Where state and federal governments have been specifically granted concurrent jurisdiction, a state is not ousted from its jurisdiction. (The eighteenth amendment to the Constitution of the United States is an example of the express reservation of concurrent power to the state.) Nor is the state proscribed from protecting itself against sabotage or attempted violence. Where the same conduct constitutes both a federal offense and a state offense against a distinct interest of each, the state is empowered to prosecute the crime against the state. (*Fox v. State of Ohio*, 46 U.S. (5 How.) 410 (1847), illustrates this situation: counterfeiting constituted a crime against the federal government while the passing of false bills was a crime against the state government; both sovereigns had an interest which they could legitimately protect by appropriate legislation and action thereunder. In *Westfall v. United States*, 274 U.S. 256 (1927), violation of federal banking rules was held a crime against the federal government and embezzlement, a crime against the state.) The majority of the Court in the *Nelson* opinion treated *Gilbert v. Minnesota*, 254 U.S. 325 (1920) as a case involving distinct state and federal interests, prevention of breach of the peace being the state interest and prevention of interference with enlistment in the armed forces of the United States, the federal interest. However, on its face, the Minnesota statute sought to punish the identical crime which the federal statute proscribed: interference with, or discouragement from enlisting in the armed forces of the United States. The Minnesota statute dealing specifically with breach of the peace would seem to have been adequate to protect the state interest, were that its only legitimate interest. Actually the Court, in the *Gilbert* case, itself, grounded its decision on the theory that the conduct constituted a threat to the safety of both state and federal governments, against which threat each sovereign could proect itself. By this approach, sedition, too, would be a crime threatening the safety of both state and federal government.

Were the seditious utterances directed not only toward the federal government, but toward the state government as well, or only toward the state government, it would seem

that the state should not be precluded by the holding of this case from prosecuting on its own behalf. However, the Court did state in referring to the federal sedition statutes (the Smith Act, 18 U.S.C.A. § 2385; Registration of Propagandists Act, 22 U.S.C.A. § 611 *et. seq.*; Internal Security Act of 1950, 50 U.S.C.A. § 781 *et seq.*; Communist Control Act of 1954, 50 U.S.C.A. § 841, 843; Conspiracy, 18 U.S.C.A. § 371; Activities affecting the armed forces generally, 18 U.S.C.A. § 2387; Jurisdiction and Venue of the Federal Courts, 18 U.S.C.A. § 3231), "Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition ...no room has been left for the States to supplement the federal law....It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all government in the nation—national, state, and local." ——U.S.——,——, 76 Sup.Ct. 477, 481 (1956). Only sedition against the federal government was charged in this case; thus, the implication of the pre-emption of state statutes relating to sedition against the government of the state contained in this statement is necessarily dictum. The Court's specific disavowal of pre-emption where the conduct constitutes a threat to an interest peculiarly or predominantly important to the state, as discussed above, would seem to negate any implication that the states' rights to protect themselves against sedition directed toward the state government had been superseded by the federal legislation. Although article IV, section 4, of the Constitution of the United States affirmatively imposes the burden on the federal government to preserve and protect the republican government of the several states, it has never been thought that the states were in any way denied the right to protect themselves. At the present time forty-two states (including Washington, RCW 9.81) and Alaska and Hawaii have anti-sedition legislation on their books.

What is the basis for the Court's finding of pre-emption? The Court applied the same criteria utilized in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), a commerce clause case, likewise finding pre-emption by federal legislation: (1) a pervasive and complete federal regulatory scheme raising the inference that congressional regulation is to be exclusive and (2) a federal interest so dominant that it does not admit of state regulation.

As to the first criterion, the Court found, by examining the federal legislation dealing with or relating to sedition, that it evinced a scheme of comprehensive legislation completely occupying the field. Even though no such intent was explicit in the statutes themselves, the Court, in viewing them in the aggregate, considered their breadth vasive and complete federal regulatory scheme raising the inference that Congressional of coverage sufficient evidence of that intent. In support of the proposition that Congressional intent can be inferred from evidence of a pervasive scheme of legislation, the Court cited three cases. Two of the cases cited were commerce clause cases: the *Rice* case, cited above, and *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915). Mr. Justice Reed, speaking for the minority in the principal case noted in reference to the *Rice* case that the federal statute in question explicitly conferred exclusive jurisdiction with respect to persons securing a license under the federal act. Justice Reed also forcibly pointed out that the "occupation-of-the-field" argument has been developed by the Court in the setting of the commerce clause and of the legislation enacted thereunder in order to prevent the development of trade barriers inspired by predominantly provincial interests. Basically the commerce clause cases cope with a very different problem: the determination of whether state regulation of intrastate commerce or state regulation pursuant to the exercise of state power

impinges upon interstate regulation, the sole province of Congress, or unduly burdens the over-all national interest in the free flow of commerce. Contrast this with the problem posed by the present case: the determination of whether the federal government, alone, or concurrently with the states shall be charged with the protection of government (both state and federal) from acts of sedition. The question is not one of balancing conflicting interests or of striking down state regulation of exclusively federal subject matter, but rather the question is one of selecting the means of protection most effective for the nation as a whole.

The third case cited, *Hines v. Davidowitz*, 312 U.S. 52 (1941), denied the State of Pennsylvania the right to require the registration of aliens and the carrying of identification papers by such aliens, because such legislation was considered to be within the peculiar province of the federal government. That case is clearly distinguishable from the present one. The alien registration involved in the *Hines* case is fraught with international overtones. Under our federal system, the Constitution makes immigration, foreign relations, and the granting of United States citizenship exclusively the responsibility of the federal government; any such impingement by state action, even though enacted as a protective measure by the state cannot be tolerated in an area exclusively delegated to the federal government.

Nothing in the Smith Act itself or in the legislative history of the bill would seem to indicate any intent to pre-empt the area. See, for example, the Congressional discussions at the time of the 1948 amendments: S. REP. No. 1358, 81st Cong., 2d Sess., 9; H.R.REP. No. 1950, 81st Cong., 2d Sess., 2, 25-46; in these materials, notice was taken that forty-two states and the Territories of Hawaii and Alaska have such statutes, and although considerable discussion centered around the necessity for national legislation, no mention was made of its displacing any of the existing state legislation. The statute, itself, was largely patterned after the New York statute.

Representative Howard Smith of Virginia, author of the Smith Act, vigorously denies any intent on his part or that of Congress to pre-empt state sedition legislation by passage of federal legislation making sedition a federal crime. In answer to the decision of the Supreme Court of Pennsylvania in the *Nelson* case, he has introduced H.R. 3 (84th Cong.), a bill seeking to limit the finding of pre-emption by the Court to those cases in which Congress specified such intent or those cases in which an irreconcilable conflict between the federal and state laws exists. When he introduced the bill, Representative Smith stated that it was "the decision of the Supreme Court of Pennsylvania [in the principal case] that caused me to introduce this bill.... Obviously that case was merely a symptom of a dangerous disease that threatened to destroy completely the sovereignty of the States.... I decided to offer a separate bill to seek a cure of the whole malady" (rather than an amendment to the Smith Act, alone). 101 Cong. Rec. No. 3, p. A 39 (1955).

In applying the second criterion, the Court found the federal interest to be so dominant that the federal system of enforcement must be deemed exclusive. The Court supported this finding mainly by restating the point that Congress has devised an "all-embracing program for resistance to the various forms of totalitarian aggression," including huge appropriations for both external and internal defenses. The Court implied that internal defense is so inextricably interwoven with external defense that all must be made the exclusive concern of the federal government.

The Court made the further point that the state sedition acts pose dangers of conflict with federal administration. To support this, the Court quoted statements made by J. Edgar Hoover and President Franklin Delano Roosevelt stressing the necessity for nation-wide comprehensive investigation and action against subversive activities. To the extent that local activity might precipitate premature action, this point is well

taken, for the local enforcement agencies cannot be fully apprised of how a local manifestation of seditious conduct fits into the national picture. However, this objection to state action is even more validly applicable to such activities as spying and actual sabotage. Yet the Court in the principal case explicitly says that its decision does not limit the right of the state to protect itself against sabotage.

The Court mentioned in this connection its pre-emption holdings in cases in the labor-management field. (See, for example, *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485 (1953), and *Weber v. Anheuser-Busch*, 348 U.S. 468 (1955).) The Court has held the National Labor Relations Board to be the exclusive agency for handling questions coming within the purview of the Taft-Hartley Act. However, that administrative agency was created as an integral part of the national labor legislation to administer its provisions and to effectuate its policies. In the absence of such an agency there seems much less reason for the Court to find a legislative intent for exclusive federal administration.

It would seem that other more persuasive bases for the Court's decision could have been advanced. Although, because of its holding, the Court did not have to reach the constitutional question presented by multiple punishment, the Court noted that it was not unmindful of the risk of compounding punishment where both state and federal prosecution are allowed. Where penalties are severe, the problem is particularly poignant. Since the punishment set by each sovereign is theoretically commensurate with the crime, it would seem that to allow each sovereign to impose full punishment for the same act might well be open to the same type of due process objection which Mr. Justice Frankfurter made in *Rochin v. California*, 342 U.S. 65 (1952): procedure which is offensive to "a sense of justice." *United States v. Lanza*, 260 U.S. 377 (1922), cited as authority for allowing double punishment, it should be noted, was decided under a state statute specifically authorized by the eighteenth amendment. Another commonly-cited case, *California v. Zook*, 336 U.S. 725 (1949), did not involve severe penalties, but rather fines under regulatory statutes.

Due process objections, both substantive and procedural, were raised, as to the Pennsylvania statute and the proceedings thereunder. The statute, typical of many state statutes, punishes utterances or conduct intended to "incite or encourage any person to commit any overt act with a view to bringing the government of this state or of the United States into hatred or contempt." Pennsylvania Penal Code § 207, 18, P.S. § 4207, (c). Also, Pennsylvania law allows an information to be brought by a private individual. The Pennsylvania statute thus seems vulnerable to charges of lack of a sufficient standard and lack of minimal safeguards to assure impartial proceedings. The Supreme Court of Pennsylvania detailed several objections to the conduct of the trial, itself, including, among others, refusal to allow defendant sufficient time to obtain counsel, improper and inflammatory remarks by the district attorney, and refusal of the judge to disqualify himself although he was an active member of "Americans Battling Communism." 377 Pa. 58, 104 A.2d 133 (1954).

Although the due-process grounds suggested above would possibly justify the result of the principal case, it would seem that the dissent of Mr. Justice Reed, representing also the views of Justices Minton and Burton, presented the better-reasoned argument. In any event, there is a practical lesson in this case for Congress: its intention to pre-empt or not to pre-empt should be spelled out in the statute.

Viewed in another way, this decision may well represent a recognition of the superiority of national facilities for crime detection. Without doubt, local law enforcement is inadequate to deal with those crimes which are only local manifestations of a regional or national operation. This case could be a point of departure for a new line of cases finding federal pre-emption in those areas of federal activity where the Court

decides Congress must have intended pre-emption from the Court's finding that in the particular case the federal government can act more effectively single-handed.

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Habeas Corpus—Jurisdiction of a Federal District Court with Respect to State Prisoners. *Giron et al. v. Cranor*, 116 F.Supp. 92 (E.D.Wash. 1953), *aff'd sub nom. Cranor v. Gonzales*, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956) represents another significant step in the expanding supervision of state criminal proceedings by the federal courts. Petitioner was arrested without a warrant and held incommunicado for more than 24 hours by Seattle police. During this interval he was intensely interrogated and finally signed a statement which was offered as a confession at the murder trial of petitioner and his two alleged accomplices. Timely objection was made to the admission on the ground the statement was coerced, and, pursuant to established Washington practice, the trial court received evidence as to the circumstances under which the statement was made. The issue of *voluntariness* was decided by the trial court adversely to petitioner, the confession was admitted in evidence, and was submitted to the jury with instructions that the jurors were to consider the conflicting testimony regarding the circumstances of signing and were to determine whether the statement was made under the influence of fear produced by threats. In cases where the trial court has admitted a confession over objection, RCW 10.58.030 makes it a question of fact for the jury to decide whether or not the confession should be rejected as induced.

Apart from Gonzales' confession, there was substantial evidence that the murder was part of a conspiracy in which each of the three defendants took part. Both the federal district court which granted habeas corpus and the circuit court which upheld issuance of the writ tacitly assumed that a verdict based on other evidence alone would have been sustained. The defect inherent in the Washington procedure in this type of a case is the fact that a general verdict fails to disclose what, if any, use the jury has made of the confession. There are at least four distinct possibilities: 1) the jury may expressly have found the confession voluntary and used it as a basis for conviction; 2) the jury may have found the confession to be involuntary, and, in accord with the instructions, completely disregarded it and reached its verdict solely on the basis of the other evidence; 3) the jury may not have clearly decided the issue of voluntariness, simply returning an unanalytical and impressionistic verdict based on all the jurors saw and heard; (4) the jury may have decided not even to consider the question of the voluntariness of the confession, reaching a verdict on the basis of other evidence. As a practical matter, the problem is further complicated by the fact that no two jurors use the same mental processes in arriving at a verdict.

Following the verdict, Gonzales and his fellow defendants gave notice of appeal, but the appeal was never perfected and was subsequently dismissed by the Washington Supreme Court without consideration of the merits. Petition was later made to the Washington Supreme Court for writ of habeas corpus, and upon denial of the application without opinion, writ of certiorari was brought to the United States Supreme Court. Certiorari was denied without opinion, and the three prisoners petitioned the federal district court in Spokane for writs of habeas corpus. This petition alleged the confession was coerced by force and threats of further force, that it had been admitted in evidence over timely objection, and that it had been used by the jury to reach the general verdict of guilty. The federal court held an independent hearing on the issues raised by these allegations, passed upon the credibility of the various witnesses who had been subpoenaed—including several members of the Seattle police, resolved conflicts in the testimony of these witnesses, and made its own findings regarding the voluntariness of the confession. In granting the writ to Gonzales, Judge Driver held