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# Constitutional Law -- Avoidance of Constitutional Issues -- Court Policy on

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## NOTES AND COMMENTS

### Constitutional Law—Avoidance of Constitutional Issues— Court Policy on

Perhaps the most criticized section of the highly controversial "Taft-Hartley Act" has been §304, which amended §313 of the Corrupt Practices Act, and prohibited expenditures by any labor union in connection with federal elections or primaries.<sup>1</sup> The Congress of Industrial Organization and its President, Philip Murray, were indicted in the federal district court because of the publication and distribution of an issue of "The CIO News" which urged the election of Judge Ed Garmatz, then a candidate for Congress in Maryland. The publication is a weekly periodical owned and published by the CIO at the expense and from the funds of the CIO and with the consent of Mr. Murray.

The district court sustained the defendants' motion to dismiss on the ground that as "no clear and present danger to the public interest can be found in the circumstances surrounding the enactment of this legislation," the abridgment of the First Amendment asserted by the defendants was unwarranted.<sup>2</sup> The government appealed from the district court's decision that the statute was unconstitutional.

In the Supreme Court a majority of five justices held that the indictment should be dismissed for failure to state an offense within the statute, thus obviating the necessity of passing upon the constitutionality of the section.<sup>3</sup> The Court was hard-pressed to find any exceptions in the sweeping language of the statute prohibiting any "expenditure in connection with any election."<sup>4</sup> Nor was it given any assistance in the legislative history of the Act, for Senator Taft had constantly emphasized his opinion that such expenditures by a union would be

<sup>1</sup> 34 STAT. 864, 2 U. S. C. §251 (1946), as amended, 61 STAT. 159 (1947), 2 U. S. C. §251 (Supp. 1947): "It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or a Representative in . . . Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . . For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Cf. N. C. GEN. STAT. §163-196(15) (1943) (applying to corporations, but not to unions).

<sup>2</sup> United States v. CIO, 77 F. Supp. 355, 358 (D. C. 1948).

<sup>3</sup> United States v. CIO, 68 Sup. Ct. 1349 (1948) (Mr. Justice Reed, with whom Mr. Justice Burton, Mr. Justice Jackson, and Chief Justice Vinson joined; Mr. Justice Frankfurter joined in a concurring opinion).

<sup>4</sup> See note 1 *supra*.

unlawful under the Act unless separate dues were collected for support of the newspaper.<sup>5</sup> The view of the executive branch of the government, as expressed in the Presidential veto message, was that such union activity would be prohibited;<sup>6</sup> subsequent Congressional debates did not contravert this interpretation. The Court, however, reasoning that the word "expenditure" was not intended as an all-embracing term,<sup>7</sup> and acknowledging the dangers of unconstitutionality of the provision if the publication of political material by union newspapers were prohibited, concluded that the words of the statute were susceptible of the interpretation that this *particular* union political activity was not proscribed.<sup>8</sup>

Mr. Justice Frankfurter, in a concurring opinion, felt that the Court should not pass upon the constitutionality of the section because the proceedings failed to present a case or controversy.<sup>9</sup> Although the record presented no evidence of collusion, he felt the Government had shown no ingenuity in the District Court in attempting to avoid that court's passing on the constitutional question.<sup>10</sup>

The minority of four justices concurred in the result, but dissented from the Court's construction of the statute with vigor and convincing logic, decrying the rewriting of the statute, and accusing the Court of "abdicating its function in the guise of applying the policy against deciding questions of constitutionality unnecessarily."<sup>11</sup>

This case brings into focus the controversial Court policy of avoiding passing on constitutional questions except in cases of absolute necessity. In addition to the Constitutional limitation that the Court will rule on constitutional questions only in actual cases and contro-

<sup>5</sup> See 93 CONG. REC. 6436-6438, 6440, 6522 (1947).

The Legislative history of the Act showed that this particular fact situation was discussed and Congress contemplated its being covered. It further evidenced that one of the broad purposes of the Act was the protection of union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views. See Mr. Justice Rutledge, concurring in the result in *United States v. CIO*, 68 Sup. Ct. 1349, 1363 (1948).

<sup>6</sup> See H. R. REP. No. 334, 80th Cong., 1st Sess. 9 (1947).

<sup>7</sup> See *United States v. CIO*, 68 Sup. Ct. 1349, 1352-1354 (1948).

<sup>8</sup> *But cf.* *United States v. Sullivan*, 68 Sup. Ct. 331, 334 (1948) ("A restrictive interpretation should not be given a statute merely because . . . giving effect to the express language employed by Congress might require a court to face a constitutional question. . . . When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the Congressional purpose, not even if the clearly correct purpose . . . leads inevitably to a holding of constitutional invalidity.")

<sup>9</sup> *United States v. CIO*, 68 Sup. Ct. 1349, 1358 (1948) (the Justice did not rely upon the Constitutional requirement of a case or controversy per se, but rather upon the first of the Brandeis maxims to be later discussed).

<sup>10</sup> *Id.* at 1360 (apparently the Government agreed that the provision abridged the First Amendment, but argued that the abridgment was justified under the "clear and present danger" doctrine).

<sup>11</sup> *Id.* at 1361-1375 (Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy joined, concurring in the result, but on the bases of the unconstitutionality of the statute).

versies,<sup>12</sup> the Court has formulated seven principles by which it is guided when faced with a constitutional issue. These maxims are: (1) the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding; (2) it will not anticipate a question of constitutional law in advance of the necessity of deciding it; (3) no rule of constitutional law broader than is required by the precise facts to which it is to be applied will be formulated; (4) no constitutional question, although properly presented by the record, will be passed upon if there is also some other ground upon which the case may be disposed of; (5) the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation; (6) constitutionality of a statute will not be passed upon at the instance of one who has availed himself of its benefits; and (7) the constitutionality of a statute will not be determined if a construction of the statute is fairly possible by which the question may be avoided.<sup>13</sup>

In the case under discussion, the majority invoked the seventh of the principles, while Mr. Justice Frankfurter thought that the first should apply. Decisions in other cases during the present term were also limited by application of the maxims.<sup>14</sup>

Our purpose here is not to question this general policy, but is to question the judiciousness of the Court's straining to find a meaning in the statute that was patently not intended by Congress merely to avoid a determination of constitutionality. The policy is well-founded on the important considerations of judicial self-restraint and the desirability of considered constitutional decisions based upon clarified issues.<sup>15</sup> But when the Court is squarely faced with the issue, the

<sup>12</sup> See *Nashville, C. & St. L. R.R. v. Wallace*, 288 U. S. 249 (1933); *Muskrat v. United States*, 219 U. S. 346 (1902).

<sup>13</sup> See Mr. Justice Brandeis, dissenting in part in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346 (1936). See Note, 48 *Col. L. Rev.* 427 (1948) for a thorough discussion of the maxims and cases decided under them, with special emphasis on Civil Rights cases.

<sup>14</sup> See, e.g., *Oyama v. California*, 68 Sup. Ct. 269 (1948) (Court, applying the third maxim, held that the California Alien Land Law deprived American citizens of equal protection of the laws, but refused to consider the broader question of whether the act denied the right to aliens affected by the Law); *Musser v. Utah*, 68 Sup. Ct. 397 (1948) (constitutionality of a statute under the First Amendment was not passed upon because the Utah Supreme Court had not yet determined whether the statute might be unconstitutional for vagueness); *Republic Natural Gas Co. v. Oklahoma*, 68 Sup. Ct. 972 (1948) (an asserted constitutional question was not decided because there were still "loose ends" in the case). These cases are to be distinguished from those in which the Court refuses to pass upon the constitutional issue because proper procedure has not been complied with. See, e.g., *Parker v. Illinois*, 68 Sup. Ct. 708 (1948); *Phyle v. Duffy*, 68 Sup. Ct. 1131 (1948).

<sup>15</sup> See *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549, 570 (1947); *Wright v. United States*, 302 U. S. 583, 604 (1938); *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 105 (1944).

avoidance of the constitutional question as a purely dilatory strategem, even though perhaps such action is dictated by compelling political considerations, does little for the Court's prestige. Both lawyer and layman are dissatisfied.<sup>16</sup> It would seem that decision of an issue fairly presented is more consistent with the judicial function.

WILLIAM V. BURROW.

### Constitutional Law—Judicial Enforcement of Racial Restrictive Agreements\*

In the *Racial Restrictive Agreement Cases*<sup>1</sup> the Supreme Court of the United States decided that state and federal courts cannot enforce by injunction agreements which exclude persons of a designated race or color<sup>2</sup> from the ownership or occupancy of real property. Although the

<sup>16</sup> See, e.g., Editorial, N. Y. Times, June 26, 1948, p. 16, col. 2 ("Hard cases make bad law"); President Philip Murray in The CIO News, June 28, 1948, p. 3, col. 1 ("We regret that a majority of the Court did not deem it appropriate to rule at this time on the constitutionality of the entire political expenditures clause of the Act.").

\* For other comments see Lathrop, *The Racial Covenant Cases* [1948] Wis. L. Rev. 508; Frank, *The United States Supreme Court: 1947-1948*, 16 U. OF CHI. L. REV. 1, 22 (1948); 46 MICH. L. REV. 978 (1948); U. S. News & World Report, May 14, 1948, pp. 22-23, 50; Time, May 17, 1948, p. 25, col. 3; Popular Government, June, 1948, p. 4 (Institute of Government, Chapel Hill, N. C.). On the general subject see PREJUDICE AND PROPERTY (summary of the brief for the United States as *Amicus Curiae*, *Shelley v. Kraemer*, *Hurd v. Hodge*, 68 Sup. Ct. 836, 847 (1948)); LONG AND JOHNSON, *PEOPLE VS. PROPERTY* (1947).

<sup>1</sup> *Shelley v. Kraemer*, 68 Sup. Ct. 836 (1948), *reversing* 355 Mo. 814, 198 S. W. 2d 679 (1946) (recorded agreement restricting property to use and occupancy for fifty years to Caucasians only; specifically excluding Negroes or Mongolians); *McGhee v. Sipes*, 68 Sup. Ct. 836 (1948), *reversing* 316 Mich. 614, 25 N. W. 2d 638 (1947) (agreement that property "... shall not be used or occupied by any person ... except of the Caucasian race ..."); to remain in effect until Jan. 1, 1960; 80% of designated property owners must sign); *Hurd v. Hodge*, *Uricolo v. Same*, 68 Sup. Ct. 847 (1948), *reversing* 162 F. 2d 233 (App. D. C. 1947) (covenant "... that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under penalty \$2,000 ... lien against the land. ..."). No time limit). Unanimous opinions written by Chief Justice Vinson. See Arthur Krock, *The Chief Justice Closes a Loophole*, N. Y. Times, May 4, 1948, p. 24, col. 5 ("In these two rulings Chief Justice Vinson revealed his legal and political trend of mind."). Six justices participated; Reed, Jackson and Rutledge took no part. "The assumption around the Court was that one or more of them might have owned or were interested in property restricted by covenants." N. Y. Times, May 4, 1948, p. 1, col. 6. The decision in *Shelley v. Kraemer*, *supra*, governed three orders handed down by the Court one week later, *Trustees of Monroe Ave. Church of Christ v. Perkins*, 68 Sup. Ct. 1069 (1) (1948), *reversing* 147 Ohio St. 537, 72 N. E. 2d 97 (1947); *Amer v. Superior Court of Calif. in and for County of Los Angeles*, 68 Sup. Ct. 1069 (2) (1948); *Yin Kim v. Same*, 68 Sup. Ct. 1069 (3) (1948) (remanded to Calif. court to consider its decision in light of *Shelley v. Kraemer*, *supra*).

<sup>2</sup> The Justice Department has said the rulings also apply to agreements directed toward religious groups, News and Observer (Raleigh, N. C.), May 5, 1948, p. 7, col. 3. No cases have been found with restrictions against Catholics, Protestants, Democrats, or Republicans; although one case suggested the dangers of residential segregation and mentioned these groups, *State v. Darnell*, 166 N. C. 300, 302, 81 S. E. 338, 339 (1914) (validity of a municipal zoning ordinance). The four cases before the Supreme Court involved Negroes. Court noted that