BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,671

INTERNATIONAL WORKERS ORDER, INC., *Appellant*

v.

JAMES P. MCGRANERY, individually and as Attorney General of the United States, et al., *Appellees*

Appeal From the United States District Court for the District of Columbia

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QUESTION PRESENTED

Did the District Court abuse its discretion in refusing to issue a preliminary injunction where the designation of appellant as communist by the Attorney General was admittedly made without prior notice or opportunity to be heard; where, under the controlling opinions of the Supreme Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, such a designation is patently unconstitutional or, at least, raises grave doubts as to its constitutionality; where the injury therefrom to appellant is irreparable, continuing and uncontroverted; and where there is no overriding public interest in continuing a list of limited evidentiary value, admittedly not indispensable to the Federal Loyalty Program?

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CASES

STATUTES AND AUTHORITIES

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JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered November 25, 1952, denying appellant's motion for preliminary injunction (Joint Appendix 202). The order was based upon the memorandum opinion of the District Court of April 23, 1952, entered in this case, as well as in two companion cases,

Joint Anti-Fascist Refugee Committee v. *McGrath* and *National Council of American-Soviet Friendship, Inc.* v. *McGrath,* reported *sub nom Joint Anti-Fascist Refugee Committee* v. *McGrath* at 104 F. Supp. 567. (J.A. 179-188) Jurisdiction of this Court is based on 28 U.S.C. Sec. 1292 (1).

STATEMENT OF CASE

Appellant is a fraternal benefit society, organized in 1930 under the Insurance Law of New York, as a mutual benefit and non-profit corporation providing sickness, death and other benefits to its members. Prior to November 1947 it had approximately 185,000 members in the District of Columbia and eighteen states where it was licensed to and did operate, with insurance policies outstanding in excess of $120,000,000 and assets of five million dollars in a ratio of 145 per cent to its liabilities. (J.A. 4, 132-133, 157-158)

In November 1947, the Attorney General included appellant in a list of subversive organizations which he furnished to the Loyalty Review Board of the United States Civil Service Commission, claiming authority to do this under Executive Order 9835. (J.A. 131, 145, 148, 151) That list was disseminated by the Loyalty Review Board to all departments and Agencies of the United States in December 1947. (13 Fed. Reg. 1473 (J.A. 13)). Appellant filed its second amended complaint requesting a declaratory judgment and injunction against the Attorney General and the Loyalty Review Board alleging that Section 9A of the Hatch Act (53 Stat. 1148, 18 U.S.C.A. 61 i), as construed and applied by the Executive Order, and the Executive Order itself, on its face and as construed and applied by the Attorney General, and the actions of the appellees were unconstitutional. (J.A. 17, 18)

Appellees relied on a motion to dismiss and filed no answer to the complaint. The District Court granted the motion to dismiss on the ground that appellant had not shown any invasion of any legally protected right and

therefore lacked standing to sue. (88 F. Supp. 873) The order of the District Court was subsequently affirmed by this Court, one judge dissenting. (App. D.C. 182 F. 2d 368)

The Supreme Court granted a petition for writ of certiorari and on April 30, 1951, reversed the Court of Appeals and remanded the case to the District Court, with instructions to deny the respondents' motion to dismiss the complaint. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. The decision was by a divided court, five to three. Four of the majority justices held that the listing of petitioner as a subversive organization without notice or opportunity to be heard, and the Executive Order, as construed and applied to petitioner, were invalid and unconstitutional for want of due process. The fifth justice, Mr. Justice Burton, in whose opinion Mr. Justice Douglas also joined, acknowledged that if upon the allegations of the complaint it had appeared that the acts of the respondents in listing the petitioner, without notice or hearing, as a subversive organization, were authorized by the President under the Executive Order, "the case would have bristled with constitutional issues." (at 135) Mr. Justice Burton found it unnecessary to reach these issues, however, because appellees, by filing their motion to dismiss, had chosen to try the sufficiency and not the truth of the complaint. He held, therefore, that the constitutionality of the Executive Order was not before the Court on its merits. The three dissenting justices also did not reach the constitutional issue, since they agreed with the lower courts that appellant was without standing to sue.

Upon remand to the District Court, and its denial of the motion to dismiss (J.A. 130), appellees filed their answer to the complaint (J.A. 131-154) and subsequently a motion for summary judgment.

The answer admits that "designation of the plaintiff was made without notice or opportunity to be heard and without published findings of fact or conclusions of law" (J.A. 137, par. 35) and that plaintiff never received any notice of hearing with respect to the aforesaid designation. (J.A. 137,

par. 30 admitting par. V-8 of the complaint, J.A. 13) Although the answer further stated that the Attorney General, acting under the authority of the Executive Order, designated the plaintiff as a subversive organization "after appropriate investigation and determination . . . on the basis of information in his possession, including confidential investigative reports of the Federal Bureau of Investigation and upon the recommendations of the Solicitor General, the Assistant Attorneys General and the Assistant Solicitor General . . . and a careful study of all " (J.A. 131, par 3; J.A. 136, par. 29; J.A. 138, par 49), it alleges that "defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations" in the complaint as to the nature of the plaintiff as a fraternal benefit society, the extent of its operations, the number of its members, the purposes for which it was incorporated, the existence and contents of its constitution, the number of its lodges, the kinds of insurance policies which it issues, the nature and purposes of its revenues and expenses, its method of functioning as an interracial federation of national group societies, its assets and liabilities, its awards for activities in support of its fraternal, cultural, altruistic and patriotic objectives, its annual reports to the Insurance Departments of the several states and prior judicial and administrative proceedings in which the purpose and activities of the plaintiff had been held free from any illegal or improper taint. (J.A. 132-136, pars. 8, 10-15, 17-21 in answer to J.A. 4-11, pars. III 3, 5-9, IV 1, 3-7)

There is no allegation of fact, in the answer, as to the basis upon which the designation of appellant was made, other than the reference to "information in his (the Attorney General's) possession, including confidential investigative reports of the Federal Bureau of Investigation." Moreover, the answer does not deny, but merely asserts that "defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations" made by plaintiffs as to the severe, continuing and immediate dam-

ages suffered by plaintiff as a result of its inclusion on the Attorney General's list. (J.A. 137, par. 34, in answer to J.A. 14-16, par. V-12 of the complaint)

Appellant then filed motions for summary judgment or in the alternative for judgment on the pleadings and for preliminary injunction. (J.A. 155-156) Accompanying these motions and primarily in support of the motion for preliminary injunction, was the affidavit of Peter Shipka, General Secretary Treasurer of appellant (J.A. 157-166), which listed, in factual detail, the severe, immediate and continuing injuries caused the appellant as a result of its designation under the Executive Order. Among such injuries listed were the steady decline in appellant's membership; the continuing decrease in the total value of its insurance in force; the pending action by the Superintendent of Insurance in New York, in which a representative of the Attorney General appeared, to liquidate appellant's business and dissolve its corporate existence, based in part on the designation itself, regardless of its truth or falsity; the refusal of some seven states to renew appellant's license to do business, and numerous other specific acts by federal, state, municipal and private organizations, depriving appellant or its members of valuable rights and privileges. (J.A. 158-166)

In opposition to the motion for preliminary injunction, appellees filed an affidavit by Hiram Bingham, Chairman of the Loyalty Review Board, which alleged that the removal of appellant's name from the Attorney General's list would inflict great injury upon the Federal Employees Loyalty Program, thereby endangering national security, particularly since none of the Loyalty Boards has facilities for making investigations on its own account as to whether any organization in question falls within the Executive Order, but must rely on the Attorney General's designation. (J.A. 175-178) Nothing in this affidavit purports to controvert any of the factual allegations in the Shipka affidavit as to the damage sustained by appellant as a result of its inclusion on the Attorney General's list.

Appellees also filed an affidavit, dated December 21, 1951, by the then Attorney General, J. Howard McGrath, which, like the answer, stated that the designation of the appellant as a subversive organization was made on the basis of "information in his (the Attorney General's) possession, including confidential investigative reports of the Federal Bureau of Investigation. (J.A. 167, 168, 175) The affidavit then recites as follows:

> "5. Much of the evidence and information upon which this designation rests is derived from confidential reports of investigation conducted by the Federal Bureau of Investigation. *Public policy and national security will not permit the disclosure of many confidential reports nor the presentation by way of testimony through witnesses of any of the confidential information contained in such reports* since such revelation would be detrimental to the national security and would render valueless for future use confidential sources of information essential to the protection of our national security.
>
> "6. Within the limits of national security, however, I submit the following summary of information, upon which, in part, the designation of the Committee (sic), pursuant to Section 3, Part III of Executive Order 9835 was and is based. This summary does not reflect the complete factual basis upon which the determination rests but only that part which can be disclosed without jeopardizing the national security . . ." (J.A. 168-169, emphasis supplied)

The McGrath affidavit then sets forth in summary form allegations that appellant was organized and controlled by the Communist Party. (J.A. 169-175)

Nothing in this affidavit purports to controvert any of the factual allegations in the Shipka affidavit as to the damage sustained by appellant as a result of this inclusion in the Attorney General's list.

Appellant moved to strike this affidavit as not meeting the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

On April 23, 1952, the District Court filed its opinion, 104 F. Supp. 567 (J.A. 179-188) and on July 22, 1952, entered an order, denying appellant's motion for judgment on the pleadings or in the alternative for summary judgment, and also denying appellant's motion for preliminary injunction. (J.A. 188) No order was entered, granting or denying, appellant's motion to strike the McGrath affidavit.

On October 6, 1952, appellant filed a further motion for preliminary injunction on the same basis as the previous motion, including, however, new matter, in the form of an excerpt from the testimony of James P. McGranery on May 6, 1952, from Hearings Before the Committee on the Judiciary, United States Senate, Eighty-second Congress, on the Nomination of James P. McGranery to be Attorney General, and an affidavit of its counsel, Allan R. Rosenberg, concerning conferences held on May 27 and July 15, 1952 with representatives of James P. McGranery after his confirmation as Attorney General, with respect to whether the Attorney General intended to proceed with this litigation, and therefore assent to a substitution of himself as defendant in place of J. Howard McGrath, former Attorney General. (J.A. 189) The testimony [1] and the affidavit [2] indicates

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[1] Senator Ferguson: What do you say about the Attorney General's office listing Communist front organizations?

* * *

Mr. McGranery: I should think that the Attorney General should follow the will of Congress in that direction. If you gentlemen direct that they should be listed, they should be listed. But I do think that there should be legislation directing that. Should be the policy of our government rather than the whim of the individual . . . My answer was that I would prefer and I do believe that there ought to be legislation along that line. I don't think that when you leave it up to an individual to list some organization as being Communist or anti-Communist—sometimes it gets to be a matter of opinion . . .

Senator Ferguson: You were in the Attorney General's office when they were listing these Commie fronts and Fascist fronts and so forth.

Mr. McGranery: That is right.

Senator Ferguson: Then you did not approve of that?

Mr. McGranery: . . . I suppost basically you would say it did not meet with my approval.

The Chairman: Why not?

Mr. McGranery: For the reason that I said, Senator. I feel rather strongly that you can get off into your own personal likes and dislikes in a matter of that kind and without the mandate of the Congress. Now the Senator is speaking in the absence of the Security Act. It is a pretty high-handed proposi-

for preliminary injunction. Appellant noted an appeal filed December 10, 1952

disapproval of the listing procedure and doubt or unwillingness on the part of the then incumbent Attorney General to proceed with the cause or to allow himself to be substituted as defendant.

On November 5, 1952, however, defendants assented to the motion to substitute James P. McGranery as defendant and, on the same day, the District Court entered its order thereon. (J.A. 200-201)

On November 25, 1952, the District Court entered its order denying plaintiff's motion of October 6, 1952, from this order and docketed that appeal in the United States Court of Appeals for the District of Columbia Circuit on January 12, 1953.

On February 19, 1953, the Assistant Attorney General wrote to counsel for appellant, in response to appellant's request that Attorney General Brownell consent to be substituted for former Attorney General McGrath as appellee in his action and stated:

> "In the light of the history of this legislation, it would seem that the showing required by Rule 25(d) could be made here only if Attorney General Brownell affirms and continues the actions of his predecessors and declines to afford the appellant a hearing.
>
> Since Attorney General Brownell has only recently assumed office, it is apparent that he has not had sufficient opportunity to consider the matter. Accordingly, we cannot at this time consent. . . ."[3]

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tion, Senator, when you leave it up to one man to classify without a direction, as to what would be the standard. Now you gentlemen have set up standards, I understand, in your act, as to how and what constitutes something subversive. That is clear and that is simple to follow. But it is not easy to follow your own liver in the morning . . . (J.A. 191-192)

2 "Mr. Hickey informed me that Mr. McGranery had not made up his mind as to what his position was with respect to the continuation of this case and asked for a delay of a month or more before deciding whether or not he would assent to the order of substitution . . . Messrs. Baldridge and Hickey informed us that the Attorney General had asked for memoranda from his staff on the question of whether or not to proceed on these cases, that he was presently engaged in study of such memoranda, and that he would not be in a position to make his decision or announce it until the first week in August 1952 at the earliest. (J.A. 195)

3 This letter is submitted as a part of appellant's "Motion to Substitute Appellee," filed April 30, 1953, and appears in the Appendix to this brief at p. ~~25~~.

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act (Act of August 2, 1939 c. 410, Sec. 9A, 53 Stat. 1148, 5 U.S.C.A. 118 j):

(1) It shall be unlawful for any person employed in any capacity by an agency of the Federal Government, whose compensation or any part thereof is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him and therafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such persons."

Executive Order 9835, 12 Fed. Reg. 1935, issued March 21, 1947, appears in the Joint Appendix at pp. 140-148.

STATEMENT OF POINTS

1. The District Court abused its discretion in denying appellant's motion for preliminary injunction.

2. The designation of appellant by the Attorney General, made admittedly without notice or opportunity to be heard, is, under controlling decisions, patently unconstitutional, or so fraught with doubt as to constitutionality as to warrant the issuance of the preliminary injunction.

3. The injury from such designation to appellant is severe, immediate and continuing.

4. There is no overriding public interest in continuing the designation in view of its, at best, limited value and the injury to the public interest, if any, from the grant of the preliminary injunction is heavily outweighed by the injury to appellant from denial of the preliminary injunction.

SUMMARY OF ARGUMENT

The District Court abused its discretion in refusing to issue a preliminary injunction. The government's answer on remand admitted that the Attorney General's designation of appellant as communist was made without prior notice and hearing, and this admission, under the controlling opinions of the *Supreme Court in Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, rendered the designation illegal, or at the least, raised such grave doubts as to the constitutionality of the acts complained of that the acts should have been preliminarily enjoined, pending decision on the merits. Appellant's continuing, irreparable injury, as a result of the designation, was uncontroverted, and it was error for the court to ignore these facts of record; to permit appellees' past wrongs to be used to bar present relief; and to refuse to prevent further aggravation of the wrong. The designation is merely a device of limited evidentiary value, not indispensable to the Federal Loyalty Program, and there is no overriding paramount public interest in continuing it, where the harm to the plaintiff resulting therefrom heavily outweighs the harm, if any, to the public interest that might conceivably arise from preventing its continuance.

ARGUMENT

I. The District Court Abused Its Discretion in Denying Appellant's Motion for Preliminary Injunction

In *Perry* v. *Perry,* 88 App. D. C. 337, 190 F. 2d 201, this Court, quoting from the concurring opinion in *Communist Party* v. *McGrath,* D. C., 96 F. Supp. 47, 48, laid down the following tests for determining whether a preliminary injunction should be granted:

> "When a motion for preliminary injunction is presented to a court in advance of a hearing on the merits, it is called upon to exercise its discretion 'upon the basis of a series of estimates, the relative importance of the rights asserted and the acts sought to be en-

> joined, the irreparable nature of injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally. A mere listing of the guiding considerations demonstrates their intangible nature, especially when no attempt is made at this stage to decide finally the questions raised. Concurring opinion in Communist Party v. McGrath, D. C., 96 F. Supp. 47, 48'."

This formulation follows the classic test laid down by the Supreme Court in *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, 815:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted, the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love* v. *Atchison, T. & S. F. Ry. Co.* (CCA) 185 F. 321, 331, 332."

The record in the case at bar demonstrates that appellant's motion fully meets these criteria; that its denial by the District Court was error; and that this Court, as in *Perry* v. *Perry,* has authority to require the District Court to issue the preliminary injunction, as requested.

(1) The District Court erred in failing to hold that the acts of appellees complained of deprived appellant of due process of law in violation of the Fifth Amendment, or at the least, raised such a grave question as to the legality of appellee's acts as to warrant the issuance of a preliminary injunction.

In the present posture of this case, on remand, the criterion for analysis of the District Court's reasons for denying appellant the preliminary injunction requested are the several opinions of the Supreme Court, and particularly the so-called majority opinion of Mr. Justice Burton, in which

Mr. Justice Douglas joined, on which the District Court based its decision. (341 U. S. 123)

The Burton-Douglas opinion held that, on the pleadings then before the Court, the Attorney General's designation of appellant as communist was *both* arbitrary and contrary to fact. It reached this conclusion because appellant's complaint asserted that appellant had been (1) designated as communist contrary to fact, and (2) arbitrarily, without notice and opportunity to be heard, and both these assertions were admitted by appellees motions to dismiss. Holding that the Executive Order does not authorize the exercise of any such absolute power as would permit the inclusion in the Attorney General's list of a designation patently arbitrary or contrary to fact, and that the complaint sufficiently alleges past and impending serious damage by the acts complained of, the Court remanded the case with instructions to deny the government's motion that the complaint be dismissed for failure to state a claim upon which relief could be granted.

On remand, the government answered, admitting that the designation of appellant was made without notice or opportunity to be heard, but denied that the designation was contrary to fact (J.A. 137, par. 35, in answer to J.A. 16, par. 11-13). This answer, we submit, fails to meet the criteria set forth in the majority opinion of the Supreme Court, and should have required the District Court to issue the preliminary injunction requested.

The government's argument to the contrary in the court below was based on the concluding sentences of Mr. Justice Burton's opinion, in which he stated: "We have assumed that the designations made by the Attorney General are arbitrary because we are compelled to make that assumption by his motions to dismiss the complaints. Whether the complaining organizations are in fact communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await determination by the District Court upon remand (341 U. S. at 141).

On the basis of this language, the government contended that the Attorney General's listing was valid, despite the admitted lack of prior notice and hearing, because "he had such information at the time of the designations complained of that his actions in making such designations was reasonable and therefore not arbitrary and capricious." (J.A. 185-186). At the same time, however, the government asserted that "much of the evidence and information upon which this designation is based is derived from confidential reports of investigation by the Federal Bureau of Investigation. Public policy and national security will not permit the disclosure of many confidential reports nor the presentation through witnesses of any of the confidential information contained in such reports" (J.A. 168).

The District Court rightly rejected this interpretation of the Court's opinion, holding that it was not required to accept the affidavit of the Attorney General, which in effect says that he had information which he believed to be true and which convinced him that he did not arbitrarily and capriciously. (J.A. 186). But the District Court fell into error by adopting an essentially similar view based exclusively on the language of Mr. Justice Burton quoted above. It held that "Presumably it is the task of this Court, under the mandate of the Supreme Court, to determine what such basis of action the Attorney General had for the designations here complained of and it may be that in the course of that inquiry, recourse must be had to documents, reports, and similar data that would not ordinarily be admissible in proof of the substantive facts to which they relate . . . The only way that I know in which the matter can be properly dealt with is to receive evidence concerning the factual matters upon which the Attorney General based his action, and to determine whether, in the light of such evidence, there was a reasonable basis for his reaching the conclusion which he did." (J.A. 186)

The error of the District Court lies in its conclusion that the Attorney General's designation was not necessarily ar-

bitrary, although it was admittedly not preceded by any notice or opportunity to be heard, and, as the government frankly stated, would not or could not be subsequently supported by evidence ordinarily admissible in proof of the substantive fact. This error arose from the fact that the District Court construed the language of Mr. Justice Burton quoted above, in isolation from the rest of his opinion, and from the separate concurring opinion of the four other Justices.

Consideration of the Burton opinion as a whole, especially in conjunction with the separate concurring opinion of Mr. Justice Douglas, who also joined in the opinion of Mr. Justice Burton, demonstrates the error of the District Court. In construing the authority, conferred by Executive Order 9835, Mr. Justice Burton held:

> "Obviously, it would be contrary to the purpose of that order to place on a list to be disseminated under the Loyalty Program any designation of an organization that was patently arbitrary and contrary to the uncontroverted material facts. The order contains the express requirement that each designation of an organization by the Attorney General on such a list shall be made only after an 'appropriate . . . determination' as prescribed in Part III, Sec. 3. An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of determination . . ."

In similar language, Mr. Justice Frankfurter in his concurring opinion also defined due process. "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment, inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

Mr. Justice Burton's use of the word "information" must be viewed in the light of the foregoing definitions of "determination". In the opinion as a whole, "information", as used in connection with the remand, is not to be equated

to gossip, rumors, and unverified charges, which, it has been publicly admitted, become part of F. B. I. files, but is synonymous with the "known facts" necessarily arising out of a process in which the opportunity to rebut unfounded charges is afforded. See Black Law Dictionary 3rd ed. "The word (information) is also frequently used in the law in the sense of communicated knowledge".

With specific reference to the failure of the appellees to controvert the allegation that the designation was arbitrary because lacking in procedural due process, the opinion of Mr. Justice Burton quoted in footnote 11 (341 U. S. at 137) the recital of the process by which the determination is made to list an organization as a designated organization, and commented that

> "These recitals, however, relate to the mechanics used rather than to the appropriateness of the determination or the justification for the respective designations. They fall short of disclosing that there has been such an administrative hearing as would offset the admissions of the specific allegations of the complaints which are inherent in the respondents' motion to dismiss."

It will be noted that the government's recitals in its answer and in the McGrath affidavit (J.A. 131, par. 3; 136, par. 29; 138, par. 49; 168, par. 3) are in substance the same as those quoted by Mr. Justice Burton, and of course fall equally short of disclosing that there had been such a prior administrative hearing as would offset the allegation of the complaint or, in the present posture of the case, eliminate Mr. Justice Burton's criticism of the designation as "patently arbitrary" (341 U. S. at p. 137).

Of especial significance, in this context, is Mr. Justice Burton's reference to *Chin Yow* v. *United States,* 208 U. S. 8, and *Reagan* v. *Farmers Loan and Trust Co.,* 154 U. S. 362, 401-402. In *Chin Yow,* the Supreme Court remanded the cause to the District Court to determine whether petitioner, though accorded a hearing, was arbitrarily denied, as he alleged, a fair opportunity to produce the evidence that he desired. The Court held:

> "But supposing it could be shown to the satisfaction of the District Judge, that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied . . . *The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary the form* . . . But, unless and until it is proved to the satisfaction of the judge that a hearing, properly so called was denied, the merits of the case are not open and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong . . ." (pp. 12-13, emphasis supplied).

In *Reagan,* the Supreme Court pointed out, in the passage to which Mr. Justice Burton draws attention, and in connection with pleadings similar in nature to those filed in this case, that

> ". . . We should hesitate to take the filing of demurrers to these bills as a direct and explicit admission on the part of defendants that the rates established by the commission are unjust and unreasonable . . . But one conclusion can be drawn from that action (that answers were first filed and testimony taken but thereafter defendants applied for leave to withdraw their answers and file demurrers) and that is that upon the taking of their testimony defendants became satisfied that the particular facts were as stated in the bills and that the conclusions to be drawn from such facts could not be overthrown by any other matters."

In the same footnote in the case at bar, the Court through Mr. Justice Burton stated as a fact that "the designation of these organizations was not preceded by any administrative hearing. The organizations received no notice that they were to be listed, had no opportunity to present evidence on their own behalf, and were not informed of the evidence on which the designations rest." (341 U. S. at 137)

The foregoing excerpts from Mr. Justice Burton's opinion must necessarily be considered in connection with the

nature and purpose of the remand. They plainly indicate that the purpose of the remand was to enable the District Court to satisfy itself, on the government's answer, whether or not the designation was preceded by notice and hearing, and that, if the government's answer did not disclose that the designation was made "after a hearing in good faith, however summary in form" or upon some such "administrative hearing as would offset the specific allegations of the complaints which are inherent in the respondent's motions to dismiss", the designations would be invalid. The District Court failed to take these parts of Mr. Justice Burton's opinion into account. It equally failed to take into account Mr. Justice Douglas' separate concurring opinion, which is of special significance as showing, first, that Mr. Justice Douglas regarded prior notice and hearing as essential to the validity of the designation and would hardly have joined in Mr. Justice Burton's opinion for remand, if Mr. Justice Burton had taken any contrary view; and, second, that, in Mr. Justice Douglas' view, while Mr. Justice Burton's opinion would dispose of the cases on procedural grounds, the *Court* has decided them on the constitutional ground, namely, that the designations were invalid as denying the designated organizations due process of law in violation of the Fifth Amendment.

In his separate concurring opinion, Mr. Justice Douglas stated (341 U. S. at 174, 178):

> "While I join in the opinion of Mr. Justice Burton, which would dispose of the cases on procedural grounds, *the Court has decided them on the Constitution.* And so I turn to that aspect of the cases . . .
>
> Notice and opportunity to be heard are fundamental to due process of law . . . are indispensable to a fair trial whether the case be civil or criminal (citing cases). The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as subversive. No more critical governmental ruling can be made against an organization these days. It con-

> demns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and rebut the charge" (emphasis supplied).

Taking the Burton-Douglas opinion as a whole, together with the separate concurring opinion of Mr. Justice Douglas, we submit that, in the present posture of the case, the designation by the Attorney General of appellant as "communist", admittedly without notice or opportunity to be heard, was unauthorized by statute, beyond his constitutional authority, and pursuant to an unconstitutional enactment, and the District Court should have issued the preliminary injunction requested. *Youngstown Co.* v. *Sawyer,* 103 Fed. Supp. 569, 576; 343 U. S. 579; *Larson* v. *Foreign and Domestic Commerce Corp.,* 337 U. S. 682; *Land* v. *Dollar,* 330 U. S. 731; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *United States* v. *Lee,* 106 U. S. 196.

Even if this conclusion were not required by a finding that the acts of appellees were patently illegal, the pleadings and uncontroverted facts on remand raise sufficiently grave doubts as to the constitutionality of the designation as to warrant the issuance of a preliminary injunction. Four of the majority justices held the designation unconstitutional. The three dissenting justices did not reach this issue, as they upheld the judgment of this Court that appellant was not injured in its legal rights and therefore lacked standing to sue. Mr. Justice Burton disposed of the case on procedural grounds, without reaching the constitutional issue. Mr. Justice Douglas held that the *Court* had decided the case on the Constitution and had therefore held that the designation was unconstitutional. The Court of Appeals for the Second Circuit is of the view that the decision of the Supreme Court invalidated the listing of subversive organizations *United States ex rel. Mezei* v. *Shaugh-*

nessy, 195 F. (2d) 964, 967. Former Attorney General McGranery, testifying before Senate Judiciary Committee, gave it as his opinion that the listing of organizations as subversive was a matter for legislation, and should not be left to the whim of an individual (J.A. 191-192), and was in such doubt as to whether or not the government would continue the case that he deferred his consent to be substituted as a defendant for approximately five months until appellant's motion for preliminary injunction came before the District Court for decision (J.A. 194-195, 200-201). Attorney General Brownell has so far declined to consent to be substituted as a defendant, on the ground that he has not had sufficient opportunity to consider whether he will continue the actions of his predecessors and decline to afford the appellant a hearing. (Appendix to this Brief, p. 25). The least that can be said, from the foregoing recital, is that there is grave doubt as to the constitutionality of the Attorney General's designation. Under these circumstances, a preliminary injunction should have issued, and it was reversible error for the District Court to have refused it. *Youngstown Co.* v. *Sawyer, supra; Gibbs* v. *Buck,* 307 U. S. 66, 70, 76; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 13-14; *Ohio* v. *Conway, supra.*

(2) Appellant has suffered and continues to suffer irreparable injury

That appellant has suffered and continues to suffer irreparable injury from the Attorney General's designation is not open to serious question. Mr. Justice Burton stated that its effect was "to cripple the functioning and damage the reputation of these organizations in their respective communities and in the nation" (341 U. S. at 193) and held that "the complaints here amply allege past and impending serious damages caused by the actions of which the petitioners complain" (341 U. S. at 141). Mr. Justice Black held that "In the present climate of public opinion, it appears certain that the Attorney General's much publicized

findings, regardless of their truth or falsity, are the practical equivalents of death sentences and confiscation . . .'' (*ibid* 142). Mr. Justice Frankfurter observed that ''It would be blindness, however, not to recognize that in the condition of our time, such designations drastically restrict the organizations, if it does not proscribe them'' (*ibid* 161). Mr. Justice Douglas stating that ''an organization branded as subversive by the Attorney General is maimed and crippled'', described the injury to such organizations listed as ''real, immediate and incalculable'' (*ibid* 175), and Mr. Justice Reed, for the three dissenting justices recognized that ''the designation, rightly or wrongly, of petitioner organizations as communist impairs their ability to carry forward successfully whatever legitimate objects they seek to accomplish'' (*ibid* 200). Appellees in their answer do not deny the factual allegations as to the nature of the injury but merely assert their lack of knowledge or information with respect to these matters. (J.A. 137, par. 34, in answer to J.A. 14-17, par. 12). The *Shipka* affidavit (J.A. 157) filed December 10, 1951, in support of the motion, sets forth in detail, the severe, immediate and continuing injuries to which appellant is subject as a result of the designation in the loss of enrolled membership (J.A. 158-159); the decline in the value of its insurance in force (J.A. 160); the liquidations proceedings brought against it in New York and other states (J.A. 160-163); the denial of facilities, such as public schools, meeting halls, radio time, and newspaper space, to it and its members (J.A. 164); the denial or impairment of petitions for naturalization and of opportunity for government employment, or private employment on government work, for its members (J.A. 165). In addition to these sworn factual statements as to the injury, the Court may take judicial notice of the current controversy over the denial to the members of appellant of occupancy in public housing accommodations (*International Workers Order et al.* v. *New York City Housing Authority et al.* (U. S. D. C., S. D., N. Y., Feb. 4, 1953)). None of the allegations in the

Shipka affidavit as to the irreparable and continuing nature of the injury are denied by any counter affidavit of the appellees.

The District Court held, however, in entire disregard of the uncontroverted statements as to current and continuing injury in the *Shipka* affidavit, that "the designations complained of and concerning which plaintiffs claim that irreparable injury threatens, occurred in the year 1947. From the assertions made by the plaintiffs, they have already suffered substantially all of the injury which they claim resulted from the action" (J. A. 187). This is not only contrary to facts of record, but permits appellees to use the effects of their past wrongs against appellant as ground for denying present relief. The denial of preliminary relief on any such basis constitutes an abuse of discretion. *Perry* v. *Perry,* 88 D. C. 337, 190 F. 2d 201; *De Beers* v. *United States,* 325 U. S. 212. A further basis for denying preliminary relief advanced by the District Court was that "It does not appear that injunctive relief, if now granted, would or could afford to them the protection which injunctive relief is ordinarily intended to afford." (J. A. 187). This argument ignores realities and is effectively answered by the holding of this Court in *Perry* v. *Perry,* supra. "The fact that issuance of a preliminary injunction cannot remove the harm already done by appellees independent suit is no basis for denying relief against aggravation of such harm in the future. The granting of preliminary relief will tend to minimize any future harm until this suit is decided on the merits." *Youngstown Co.* v. *Sawyer, supra Gamlen Chemical Co.* v. *Gamlen,* 79 F. Supp. 62. *De Beers* v. *United States, supra.*

(3) The injury to the public interest, if any, from the grant of the preliminary injunction is heavily outweighed by the injury to appellant from the denial of the preliminary injunction

The District Court held that on balancing the equities of the parties and the public interest, the motions for preliminary injunction should be denied, because "it does appear that at this late date, substantially five years after the action complained of, its effect would be to bring about a change in governmental procedures which have been in operation for a long time and which ought not to be altered, unless and until it is determined that the action in question is illegal and invalid" (J. A. 187).

In so holding, the District Court gave an importance to the Attorney General's list which the President, the Courts, and the Attorney General, except before the District Court in this case, have almost always minimized. Thus, the President, and thereafter, the Attorney General, stated to the Loyalty Review Board that "membership in (a listed) organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case" (J. A. 154). See *Kutcher* v. *Gray,* 199 F. (2d) 783, 788 (App. D. C.) (Oct. 16, 1952). In *Wieman* v. *Updegraff,* 344 U. S. 183, 192, the Supreme Court spoke of the "limited evidentiary use (of the Attorney General's list) under the Federal Loyalty Program". In *Orloff* v. *Willoughby,* 21 Law Week 4215, — U. S. — decided March 9, 1953, the Court said "If there had never been an Attorney General's list, the President would be within his rights in asking any questions he saw fit about the habits, associations, and attitudes of the applicant for his trust and honor." In Mr. Justice Frankfurter's concurring opinion, in this case in the Supreme Court, he referred to the fact that "Congress did not think that the Attorney General's procedure was indispensable for the protection of the public interest. The McCarran Act . . . grants organizations a full administrative hearing, subject

to judicial review, before they are required to register as "Communist-action" or "Communist-front." (341 U. S. at 173).

The plain fact is that the public interest is not paramount, it is minimal, in the continuation of a list which is merely of a limited evidentiary value in the Federal Loyalty Program, to which it is not indispensable. This minimal public interest is far outweighed, we submit, by the irreparable damage to which appellant is subject from its designation by the Attorney General, without any, or, at best, under dubious constitutional authority. There is no overriding public interest in the continuation of the designation under these circumstances and the District Court committed reversible error in refusing to issue the preliminary injunction. See *Youngstown Co.* v. *Sawyer,* 343 U. S. 596, 609.

Moreover, on April 22, 1953, the Attorney General filed his petition with the Subversive Activities Control Board for an order requesting appellant to register, under the Internal Security Act of 1950 (Pub. L. No. 831, Secs. 13, 14, 50 U.S.C. Sec. 792) (New York Times April 23, 1953). This action leaves the government in the untenable position of insisting in this case, that notice and opportunity to be heard are unnecessary, contrary to overriding public interest, and would require disclosure of undisclosable secrets, while, at the same time, it initiates the new proceeding against appellant in which it is required to give notice and opportunity to be heard, must disclose its evidence, secret or otherwise, all in the name of the overriding public interest. (See H.R. No. 2980, U. S. Code Congressional Service 81st Congress, 2nd Session 3886, 3888; 50 U.S.C. Sec. 792 d (1)). In the light of this new action by the Attorney General, in reference to appellant, no justification exists for denial of the appellant's motion here for preliminary injunction.

II. Conclusion

The order of the Court below, denying appellant's motion for preliminary injunction should be reversed and the preliminary injunction should issue.

Respectfully submitted,

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UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON 25, D. C.

February 19, 1953

WEB:BF
145-12-176

Allan R. Rosenberg, Esquire
416 Fifth Street, N.W.
Washington, D. C.

Re: International Workers Order, Inc.
v. McGranery (C.A. D.C., No. 11671)

Dear Mr. Rosenberg:

This will refer to your request that Attorney General Brownell consent to be substituted for former Attorney General McGranery as appellee in the above-named action.

As you know, Rule 25(d) of the Federal Rules of Civil Procedure provides that an action commenced by or against an officer of the United States:

> * * * may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

In the light of the history of this litigation, it would seem that the showing required by Rule 25(d) could be made here only if Attorney General Brownell affirms and continues the actions of his predecessors and declines to afford the appellant a hearing.

Since Attorney General Brownell has only recently assumed office, it is apparent that he has not had sufficient opportunity to consider the matter. Accordingly, we cannot at this time consent to the substitution of Attorney General Brownell as appellee in this case. As the six-month period during which a substitution may be made under Rule 25(d) does not expire until July 1953, there will be ample time to substitute after there has been time to give the matter full consideration.

Sincerely yours,

/s/

WARREN E. BURGER
Assistant Attorney General