Supreme Court of the United States

BENJAMIN GITLOW,
Petitioner-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

MEMORANDUM OF ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO APPLICATION FOR WRIT OF ERROR.

POINT I.

The only question of law on this application is whether the New York Criminal Anarchy Law (Penal Law, Sections 160-161) is repugnant to the "due process" provisions of the Fourteenth Amendment to the Constitution of the United States.

The petitioner-in-error was convicted at a criminal term of the Supreme Court of the State of New York of the crime of criminal anarchy. So

far as applicable to this case, the section of the Penal Law under which he was convicted reads as follows:

> "Sec. 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> "Sec. 161. Advocacy of criminal anarchy. Any person who;
>
> "1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
>
> "2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; * * *
>
> "Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

At the very outset we contend that the claim of the petitioner-in-error that he was convicted be-

cause of his entertaining certain political beliefs or that he was convicted of "political heresy" is entirely false. He was convicted because through the so-called "Manifesto of the Left Wing" as pointed out in the opinion of the Court of Appeals of the State of New York, *Crane,* J., writing the opinion (234 N. Y., 131), he

> "advocated the destruction of the state and the establishment of the dictatorship of the proletariat. The way in which this is to be accomplished is by the use of the mass strike; the strike workers attempting to usurp the functions of municipal government as in Seattle and Winnipeg. The strikes advocated by the defendant were not for any labor purposes or to bring about the betterment of the working man, but solely for political purposes to destroy the state or to seize state power. Mass strike means the striking or the ceasing to work by concerted action of, and among, all working classes. Thus government and the functions of government are paralyzed and come to and end."

This is entirely different from the mere innocent advocacy of political doctrine. The petitioner-in-error, through the medium of the writings which form the basis of the indictment in this case, affirmatively urged his readers to overthrow organized government by force, violence and unlawful means.

> "There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and

afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government. * * *

"But to punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion—the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And after some additional reflections, he concludes with this memorable sentence: 'So true will it be found, that to censure the licentiousness is to maintain the liberty of the press' (1 Black. Comm., 152, 153; Rex vs. Burdett, 4 Barn. & Rld. R., 95. Mr. Justice Best, in Rex vs. Burdett, 4 Barn. & Ald. R., 95, 132, said: 'My opinion of the

> liberty of the press is, that every man ought to be permitted to instruct his fellow-subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends')." Story's commentaries, § 1884 .

The petitioner-in-error on this application relies upon that provision of the Fourteenth Amendment to the Constitution of the United States that "no State shall deprive any person of life, liberty or property without due process of law."

> "Freedom of speech and freedom of the press are the cornerstones of Anglo-Saxon democratic institutions. This freedom is guaranteed against invasion by the federal government by the *First* Amendment to the Constitution of the United States, which provides that 'Congress shall make no law * * * abridging the freedom of speech or of the press'; and it is protected against infringement by the state governments by similar guaranties in the constitutions of the respective states; *but not by the Fourteenth Amendment to the federal constitution.* The First Amendment is a limitation upon the power of Congress only" (12 Corpus Juris, Sec. 467).

The proposition that neither the first amendment to the United States constitution nor the fourteenth ever contemplated the authorization to publish either by word of mouth or in writing anything which would advocate the assassination of public officials or the destruction of the government, state or national, by violence or unlawful means, requires no citation of authorities to this court. Nor need we argue the proposition that the legislature of the State of New York was entirely within its powers when it enacted Sections 160-161 of the Penal Law. The due process contemplated by the Fourteenth amendment to the Constitution of the United States was in full measure accorded to the petitioner-in-error. It was only after the publication of the article which formed the basis of the indictment and without any previous censorship or restraint that with due process of law the petitioner-in-error was duly indicted, tried and convicted and the conviction affirmed by the Court of Appeals of the State of New York. There is no limitation either in the United States Constitution itself nor in either the first or the fourteenth amendments thereto or in any other amendments, that can be construed as a restriction upon the several states to enact such laws as have for their purpose the punishment of persons who either by word of mouth or in writing advocate the doctrine inhibited by the criminal anarchy statute of the State of New York.

The statement appearing at folio 10 of the papers on the application for the writ of error herein is definite and limited in its scope and it confines the question to be considered here only to the due process provision of the Fourteenth Amendment. In the "Slaughter House Cases," 16 Wall., 36, 74 (where freedom of speech and of the press from in-

vasion by state action are classed as privileges and immunities not of citizens of the United States but of citizens of the respective states), the court, per *Miller J.,* stated that they "are not intended to have any additional protection by this paragraph of the amendment" (referring to the paragraph immediately preceding the one in the Fourteenth Amendment which is made the basis of this application).

The plan and purpose of the petitioner-in-error in publishing the "Left Wing Manifesto" was most succinctly summarized by Mr. Justice Laughlin of the Appellate Division (195 App. Div., 782-782) in the following language:

> "It is perfectly plain that the plan and purpose advocated by the appellant and those associated with him in this movement contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, as to which in view of the recent decision of this Supreme Court of the United States sustaining the Eighteenth Amendment to the Federal Constitution (Rhode Island vs. Palmer, 253 U. S., 350) there seems to be little, if any, limitation, but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity throughout mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorhrip, taking charge of and appro-

priating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. They do not announce in advance how the dictator is to be chosen or just what kind of a government they except ultimately to have; but they make it quite plain that the property of the States and nation shall be taken over, and that every individual who has any property shall not only be deprived of it but also be deprived of any voice in the affairs of the State, such as they may be, under a government which is not to govern the people but only production. They do not expressly advocate the use of weapons or physical force in accomplishing these results; but they are chargeable with knowledge that their aims and ends cannot be accomplished without force, violence and bloodshed, and, therefore, it is reasonable to construe what they advocate as intending the use of all means essential to the success of their program."

To contend, as the petitioner here contends that the indictment, trial and conviction of a person for publishing and in writing advocating such doctrine constitutes a deprivation of liberty without due process of law, is nothing short of absurd. The primary duty and right of the state is that of self-preservation. The publication of the Left Wing Manifesto has as its object the destruction of the state. The petitioner-in-error sought to destroy the very constitution under whose protecting wing he now seeks shelter. He ought not to be heard to complain. We respectfully submit that there is no

invasion of the petitioner's constitutional rights and that there is no question presented which would require or necessitate the review of this case by this court.

It is respectfully submitted that the application for a writ of error to review the judgment of the Court of Appeals of the State of New York affirming the conviction of Benjamin Gitlow for the statutory offense designated as "criminal anarchy" be denied.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney General of the
State of New York.

SAMUEL A. BERGER,
Special Deputy Attorney General,
of Counsel.