

Eva Reid no.

**United States Court of Appeals
FOR THE FIRST CIRCUIT**

No. 5160

THE WILHELM REICH FOUNDATION, a Maine Corporation, WILHELM REICH, and MICHAEL SILVERT,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

**REPLY BRIEF FOR THE WILHELM REICH
FOUNDATION, Appellant**

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against

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**REPLY BRIEF FOR THE WILHELM REICH
FOUNDATION, Appellant**

Statement

This reply brief is submitted by the appellant The Wilhelm Reich Foundation.

The Motions to Dismiss for Fraud and Suppression

Counsel for the respondent have offered no argument against the proposition that fraud vitiates the entire judicial process. It is stated, however, that no motion can be found by this appellant to dismiss for that reason. On the contrary, the record is very clear on that score.

At Volume IV, page 89a, of the Appellants' Record Appendix appears a motion by the then attorney for the Foundation to dismiss for lack of jurisdiction. Then at page 94a appears the motion by appellant Silvert to dismiss the amended information for suppression of evidence and lack of jurisdiction.

When the latter motion was made on October 10, 1955, and argued on October 18, 1955, previous counsel for the Foundation had withdrawn. The Foundation was in Court without an attorney. In order to prevent confusion and expedite matters, the writer of this brief obtained authority and advised the Court that he had consented to "handle the procedural matters" (IV, 110a). Further to aid the Court by obviating the necessity for a new order, counsel, then acting for all of the parties, consented "that the new information containing the allegations, as in the original information and in the proposed amendments, shall be substituted for the original" (R IV, 110a). Counsel then went on with the understanding of all of the parties and with the understanding of counsel for the respondent to argue the motions for all of the appellants. That portion of the proceedings of October 18, 1955 has not been printed by the appellants.

It is submitted that if the Wilhelm Reich Foundation was not represented in the making of those motions and in the granting of those consents it was never before the Court and the amended information and conviction thereon are a nullity for that additional reason.

In order further to prove the fraud and suppression which appellants charge permeated the entire case from its inception, on November 4, 1955, the appellant Reich argued his motion to show "illegal misrepresentations in Court of pertinent facts" (R IV, 126a). The motion was denied on that day, despite the argument of Reich that he sought to proceed "with enumeration of the misrepresentations of pertinent facts" (R IV, 139a). He was prevented

from so doing by the Court, although at that time none of the appellants were represented by counsel (R IV, 130a).

Thereafter on November 17, 1955, the appellant Reich sought to further his claim of fraud and suppression of evidence by seeking to inspect material subpoenaed from the Food & Drug Administration, including reports on experiments, but that motion was denied as well. The prosecution opposed the motion and successfully sought the quashing of the subpoena (R IV, 156a).

At the trial itself, the appellants sought again to prove the fraud and suppression of evidence but were again prevented.

ARGUMENT

The cases cited by the respondent have no application.

Respondent cites three cases in support of its proposition that a contemnor may not challenge the jurisdiction of the Court in defending his actions against a charge of contempt. None of the cases have any application here.

As we pointed out in the main brief, *Howat v. Kansas*, 258 U. S. 181, deals with the violation of an order made pursuant to an unconstitutional statute prior to the declaration of its unconstitutionality. That is certainly not the situation in the case at bar.

The United Mine Workers Case, 330 U. S. 258, dealt with a temporary injunction which had been issued to maintain the status quo. The order and decision in that case proceeded on the assumption that:

"* * * the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."

No one questions the power of a Court to maintain the status quo. The question here is whether a Court order conceived in fraud by persons acting under the cloak of the government and entered as a result of that fraud, is a valid or a void order.

The respondent treats the holding in *Colgrove v. U. S.*, 176 F. 2d 614, at page 7 of its brief with the same cavalier practice of misquoting that it uses when it describes the books of the appellants. The brief says, in a seeming paraphrase of the holding of the Ninth Circuit Court of Appeals, that "They may not test the propriety of the injunction by disobedience." It omits, and excises, the very important phrase, "unless an injunction is void" (p. 616).

On the other hand, where there is a void order as the result of fraud or suppression of evidence, the overwhelming weight of judicial authority is to the effect that lack of jurisdiction may be raised by a person charged with contempt [*Ex parte Rowland* (1882) 104 US 604, 26 L ed 861; *Ex parte Fisk* (1884) 113 US 713, 28 L ed 1117, 5 S Ct 724; *Re Ayers* (1887) 123 US 443, 31 L ed 216, 8 S Ct 164; *Re Sawyer* (1888) 124 US 200, 31 L ed 402, 8 S Ct 482; *Ex parte Buskirk* (1896, CA 4th) 72 F 14; *Ex parte Robinson* (1906, CA 9th) 144 F 835; *Lewis v. Peck* (1907, CA 7th Ill) 154 F 273, cert den 207 US 593, 52 L ed 355, 28 S Ct 258; *Brougham v Oceanic Steam Navigation Co.* (1913, CA 2d NY) 205 F 857; *Abbott v. Eastern Massachusetts Street R. Co.* (1927, CA 1st Mass) 19 F2d 463; *Beauchamp v. United States* (1935, CA 9th Cal) 76 F2d 663; *Russell v. United States* (1936, CA 8th Minn) 86 F2d 389; *Graham v. United States* (1938, CA 9th Cal) 99 F2d 746; *Western Fruit Growers, Inc. v. Gotfried* (1943, CA 9th Cal) 136 F2d 98; *United States v. DeParcq* (1947, CA 7th Ill) 164 F2d 124; *Pueblo Trading Co. v. El Camino Irrig. Dist.* (1948, CA 9th Cal) 169 F2d 212, cert den 335 US 911, 93 L ed 444, 69 S Ct 482; *United States ex rel. White*

v. Walsh (1949, CA 7th Ill) 174 F 2d 49; *Evans v. Pack* (1878, CC Mich) 2 Flipp 267, F Cas No 4566; *United States v. Debs* (1894, CC Ill) 64 F 724; *Foot v. Buchanan* (1902, CC Miss) 113 F 156; *American Lighting Co. v. Public Service Corp.* (1904, CC NY) 134 F 129; *United States v. Atchison, T. & S. F. R. Co.* (1905, CC Mo) 142 F 176; *Brotherhood of R. & S. S. Clerks v. Texas & N. O. R. Co.* (1928, DC Tex) 24 F2d 426, mod on reh 25 F2d 876, affd (CA 5th) 33 F2d 13, which is affd 281 US 548, 74 L ed 1034, 50 S Ct 427].

And even if the appellants had not raised the issue of fraud and suppression of evidence in the lower Court, since it goes to the heart of the jurisdiction of the Court, the question may be raised and should be noticed by the Court at any time during the pendency of the proceeding [Rule 12(b)(2), F.R.C.P.].

The case of *Baker v. U. S.*, No. 4940, May Term 1955, 221 F. 2d 957, cert. den. 350 U. S. 482, did not involve a ruling by this Court that it upheld jurisdiction. As this Court well recalls, the lower Court refused to consider the question of jurisdiction on the ground that the proposed intervenors had no standing to raise the question, and this Court affirmed on the opinion of the District Court.

The Supreme Court of the United States held in a very early case, *Anderson v. Dunn*, 6 Wheat. 204, 231, that in contempt proceedings courts should never exercise more than "the least possible power adequate to the end proposed". (See also, *In re Michael*, 326 U. S. 224, 227). The end proposed in the entire history of this proceeding is the protection of the American people. The appellants desire that end and the Court desires that end. It is fairly obvious that the prosecution desires the liquidation of the appellants and their beliefs.

The appellants have sought only a hearing at which the question of whether or not the prosecution has com-

mitted fraud can be aired and developed. The individual appellants are staking their liberty on the outcome of that hearing, if granted as it should be. The prosecution, more impersonal, has, through the various courts, successfully avoided having to answer to a charge of fraud and having to justify the drastic action it took and the more drastic complaint for contempt of Court.

It should seem obvious that where so serious a charge is made against prosecuting officials such officials would want to air the charge and see what evidence could be developed, unless they are so guilty of the charge that they would prefer to suppress an open, adversary hearing on the question.

If this Court were to send the matter back to the District Court for a hearing pursuant to Rule 12 of the Federal Rules of Criminal Procedure, that hearing would probably end the litigation for all time, one way or the other. On the other hand, a denial of relief to appellants can only perpetuate a fraud.

CONCLUSION

The judgment of conviction should be reversed, the sentence vacated and the decree of injunction vacated.

Respectfully submitted,

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