

Phrase "in time of war" is ambiguous and susceptible to diverse interpretations. An examination of the legislative history sheds no light whatever on the issue. No reference can be found, apart from the terms of the statute itself, to any discussion of the sentencing provisions contained in the Espionage Act.

Where, as here, we have a criminal statute which contains an ambiguous sentencing provision and where the legislative history is of no significant assistance in ascertaining Congressional intent, certain rules of statutory construction must be invoked to resolve the ambiguity. The approach to be taken is clear. It is firmly established:

"When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."
Bell v. United States, 349 U.S. 81, 83.

This rule of lenity, which has peculiar applicability to sentencing provisions embodies a judicial policy that will not attribute to Congress, in the enactment of criminal statutes,

"an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." Prince v. United States, 352 U.S. 322, 329.

Further expression of this salutary rule was given in Ladner v. United States, *supra*:

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (at p. 178) =

The above expressions

"are but restatements in a specific context of the ancient rule that a criminal statute is to be strictly construed." Callanan v. United States, 364 U.S. 587, 602 (dissenting opinion).

See also, United States v. Bramblett, 348 U.S. 503; Kordel v. United States, 355 U.S. 345; Prince v. United States, *supra*; Ladner v. United States, *supra*.

What Congress intended when it provided for increased penalties for violations of the Espionage Act committed "in time of war" can only be resolved by looking to the facts as they existed at the time the statute was enacted. "Cold-war" considerations which came into play after 1945 cannot be made the basis for ascertaining the intent of Congress in 1917.

There is no indication that Congress, when it first enacted the Espionage Act in 1917 intended that the wartime penalty provisions would be applicable to violations of the Act committed after a cessation of actual hostilities. No violence is done to Congressional purpose, as that purpose was manifested in 1917, by restricting the wartime penalty provisions to violations committed during a period of actual hostilities.

The 1954 Amendment (68 Stat. 1219) which removed the distinction, for purposes of sentencing, between peacetime and wartime offenses was an implicit recognition on the part of Congress that the commission of acts of espionage during the "cold war" could be just as harmful to the Nation as when committed during actual wartime. Such a consideration, however, cannot be made a factor in determining Congressional intent with respect to the 1917 Act.

In the light of recent Supreme Court decisions, issues relating to statutory sentencing provisions, when called into question by a Rule 35 motion to correct an illegal sentence, require that the reviewing court interpret the particular statute, including its legislative history, to resolve such issues within the framework of Congressional intent and the canons and rules of construction relating to criminal statutes. This is the teaching of Prince v. United States, supra, and Heflin v. United States, 358 U.S. 415. In both these cases, where relief was sought under Rule 35, the Supreme Court endeavored to ascertain Congressional intent with respect to certain sentencing provisions of the Federal Bank Robbery Act. Finding little assistance in the legislative history of the Act, the Court employed the rule of lenity by not ascribing to Congress an intention to punish more severely "than the language of its laws clearly imports". Prince v. United States, supra, at p. 329; see also, Callanan v. United States, supra, (interpretation of Hobbs Act).

We submit that the wartime sentence of thirty years imposed by the trial court on petitioner was illegal on its face, and must be vacated and set aside.

Respectfully Submitted,

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