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## Polishing up the Language of a Sedition Statute: The Smith Act, Nixon's Smith Act, and the Smith Act in the McClellan-Hruska Criminal Code Bill

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**POLISHING UP THE LANGUAGE OF A  
SEDITION STATUTE:  
THE SMITH ACT, NIXON'S "SMITH ACT,"  
AND THE "SMITH ACT"  
IN THE McCLELLAN-HRUSKA CRIMINAL  
CODE BILL**

*by David Randall Luce\**

"From Korea to Berlin to Cuba to Vietnam, the Truman Doctrine governed America's response to the Communist world," Senate Foreign Relations Committee Chairman J. William Fulbright could say with the wisdom of hindsight.<sup>1</sup> "Sustained by an inert Congress," he continued, "the policymakers of the forties, fifties, and early sixties were never compelled to reexamine the premises of the Truman Doctrine, or even to defend them in constructive adversary proceedings. . . . Change has come not from wisdom but from disaster."<sup>2</sup> Senator Fulbright went on to characterize the temper of the times as he viewed them in retrospect, stating that "the assumptions of the Cold War were all but unchallenged."<sup>3</sup>

Operating on a set of assumptions that defined reality for them—that as a social system Communism was deeply immoral, that as a political movement it was a conspiracy for world conquest—our leaders became liberated from the normal rules of evidence and inference when it came to dealing with Communism.

. . . .

The effect of the anti-Communist ideology was to spare us the task of taking cognizance of the specific facts of specific situations. Our "faith" liberated us, like the believers of old, from the requirements of empirical thinking, from the necessity of observing and evaluating the actual behavior of the nations and leaders with whom we are dealing. Like medieval theologians, we had a philosophy that explained everything to us in advance, and everything that did not fit could be readily identified as a fraud or a lie or an illusion.<sup>4</sup>

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1. Fulbright, *Reflections: In Thrall to Fear*, THE NEW YORKER, Jan. 8, 1972, at 41.

2. *Id.* at 42.

3. *Id.*

4. *Id.* at 42-43.

"Never compelled to reexamine the premises," never compelled "to defend them in constructive adversary proceedings"—the words remind us of the second chapter of *On Liberty*.<sup>5</sup> It was there that John Stuart Mill attempted to ground an absolute principle of freedom of speech upon considerations of utility alone. Freedom of speech is good, and suppression is bad, because only when assumptions are tested by vigorous dissent can we have any reasonable assurance that they are true. Whatever inconsistencies we attribute to Mill, whatever the shortcomings of the utilitarian argument, the tragedy of Vietnam obliges us to acknowledge that very real and very terrible consequences may flow from the absence of dissent, from the too casual acceptance of the conventional wisdom, and from the dismissal of certain points of view as beyond the pale of respectability. We did not honor "the principle that debate on public issues should be uninhibited, robust, and wide-open,"<sup>6</sup> and we suffered for it.

Why were the premises never reexamined? Why was there no political force sufficient to compel the "Cold Warriors" to defend their premises in constructive adversary proceedings? We can, I think, identify some of the causes. We can point to the loyalty-security program for federal employees,<sup>7</sup> given a new direction by Executive Order 98358;<sup>8</sup> the Attorney General's list of "subversive organizations," one product of that Executive Order;<sup>9</sup> the sensational hearings conducted by the House Committee on Un-American Activities;<sup>10</sup> the many well-publicized trials involving charges of perjury, disloyalty, treason, and espionage;<sup>11</sup> section 9(h) of the Labor Management

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5. J.S. MILL, *ON LIBERTY* (1859). Chapter II bears the title *Of the Liberty of Thought and Discussion*.

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

7. Executive Order 9300, 3 C.F.R. 1252 (Comp. 1938-1943).

8. 3 C.F.R. 627 (Comp. 1943-1948). For an extended discussion of the federal loyalty-security program see 1 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 340 *et seq.* (3d ed. 1967) [hereinafter cited as EMERSON, HABER & DORSEN].

9. See EMERSON, HABER & DORSEN, *supra* note 8, at 385-88.

10. See *THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1938-1968* (E. Bentley, ed. 1971). See also R. CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1950* (1952); EMERSON, HABER & DORSEN, *supra* note 8, at 426-31; G. KAHN, *HOLLYWOOD ON TRIAL* (1948); C. McWILLIAMS, *WITCH HUNT: THE REVIVAL OF HERESY* (1950).

11. See, e.g., *Remington v. United States*, 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954); *Rosenberg v. United States*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); *Coplan v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert.*

Relations Act of 1947 (Taft-Hartley Act, the non-Communist affidavit provision),<sup>12</sup> the Internal Security Act of 1950 (McCarran Act),<sup>13</sup> the Communist Control Act of 1954,<sup>14</sup> and similar legislation enacted by the states;<sup>15</sup> and numerous decisions of the United States Supreme Court, which found none of the foregoing incompatible with the first amendment.<sup>16</sup>

I think it safe to characterize these programs and institutions as a two-edged sword, positively shaping public opinion in a definite direction while at the same time rendering any dissent exceedingly risky, quite costly in human terms, and unlikely to gain a hearing or to be effective when heard. Thus it was that the premises of the Cold War went largely unexamined and unchallenged. And as Senator Fulbright reminded us, we paid a price for it.

Among the causes operative in creating the Cold War mentality we must list the indictments of 141 American Communist Party leaders under the Smith Act.<sup>17</sup> The first indictments came down in July, 1948,

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*denied*, 343 U.S. 926 (1952); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

For materials on the Rosenberg trial see W. & M. SCHNEIR, *INVITATION TO INQUEST: A NEW LOOK AT THE ROSENBERG-SOBELL CASE* (1968); M. SHARP, *WAS JUSTICE DONE? THE ROSENBERG-SOBELL CASE* (1956); J. WEXLEY, *THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG* (1955); on the Hiss trial see F. COOK, *THE UNFINISHED STORY OF ALGER HISS* (1958); A. COOKE, *A GENERATION ON TRIAL: U.S.A. v. ALGER HISS* (1950); A. HISS, *IN THE COURT OF PUBLIC OPINION* (1957).

For general surveys on the "McCarthy Era" see J. ARONSON, *THE PRESS AND THE COLD WAR* (1970); C. BELFRAGE, *THE AMERICAN INQUISITION 1954-1960* (1973); C. McWILLIAMS, *WITCH HUNT: THE REVIVAL OF HERESY* (1950).

12. Labor Management Relations Act, 1947, ch. 120, § 9(h), 61 Stat. 146. See EMERSON, HABER & DORSEN, *supra* note 8, at 229-62.

13. Internal Security Act of 1950, ch. 1024, 64 Stat. 987.

14. Communist Control Act of 1954, ch. 886, 68 Stat. 775.

15. For a compilation of state sedition and anti-Communist legislation see AM. L. DIV., LEGIS. REFERENCE SERVICE, LIB. OF CONG., *INTERNAL SECURITY AND SUBVERSION: A STUDY PREPARED FOR THE SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE* (1965).

16. See, e.g., *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Dennis v. United States*, 341 U.S. 494 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). For a study of the politics of the anti-Communist legislation of the fifties and the role of the Supreme Court see *Wilkinson, The Era of Libertarian Repression 1948-1973: From Congressman to President, with Substantial Support from the Liberal Establishment*, 7 AKRON L. REV. 280 (1974).

17. Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (now 18 U.S.C. § 2385 (1970)).

in the midst of a presidential campaign; the last indictment was dropped in 1964. Prosecutions, vigorously pursued in over a dozen cities, had the effect of immobilizing the one organization with a vested interest in opposing the tenor of the times. And the substantial prison terms eventually served by 29 defendants became proof enough, according to the logic then current, of the wickedness of Communism.<sup>18</sup>

In those days it was only the radical few who ventured to suggest that the United States Government had anything other than the best intentions. Now, with Vietnam and Watergate behind us, we may have a more detached view, and recognize the occasional dominance of shabby political motives in the conduct of Presidents and their Attorneys General. The language of the Smith Act readily lent itself to political abuse—indeed, it provided a positive temptation. We can therefore avoid the risk of impugning the character of any President or his Attorney General by focusing our attention on the instrument—the language of the Smith Act itself.<sup>19</sup>

Taking the words at face value, the first paragraph penalizes the advocacy of revolutionary doctrine. The effect of the second paragraph is to penalize revolutionary *intent* rather than conduct, since any bookseller with Karl Marx or Thomas Jefferson on his shelves would be engaging in the proscribed conduct. The third paragraph penalizes the organization of a group or association with a group which advocates revolutionary doctrine. The fifth penalizes conspiracy to commit any of the foregoing. If we assume that *advocating* violence is one step removed from actual violence, that *advocating the propriety* of violence and *organizing a group* to advocate violence are each two steps removed, and that *conspiring with others* to organize such a group is three steps removed, we can see that the Smith Act attaches very stiff penalties to conduct far removed from the actual overthrow of government by force and violence. Hence its usefulness as a political instrument.

We may no longer take the words at face value, however, by virtue of *Yates v. United States*,<sup>20</sup> in which the Supreme Court distinguished between the advocacy of an abstract doctrine and the advocacy of action, found the former within the area protected by the first amendment, and construed the Smith Act as penalizing only the latter.

With the exception of one person (Junius Scales), no one went to prison under the Smith Act after the Court delivered its opinion in

18. For a survey of the Smith Act prosecution see EMERSON, HABER & DORSEN, *supra* note 8, at 104-57.

19. The full text of the Smith Act appears as APPENDIX 1.

20. 354 U.S. 298 (1957).

*Yates*. The *Yates* decision therefore stands as the first effective obstacle placed in the way of prosecutions under a sedition statute. Previously, the Supreme Court had upheld a World War I federal sedition statute,<sup>21</sup> the New York sedition statute upon which the Smith Act was modeled,<sup>22</sup> California's Criminal Syndicalism Act,<sup>23</sup> and the Smith Act itself.<sup>24</sup> In *De Jonge v. Oregon*,<sup>25</sup> the Court reversed a conviction brought under Oregon's Criminal Syndicalism Law, but without challenging the law itself. The *Yates* decision, again without challenging the constitutionality of sedition statutes in general, restricted their scope to the degree that prosecutions under them were no longer feasible. *Yates* thus marks a watershed.

The National Commission on Reform of Federal Criminal Laws took cognizance of the *Yates* decision, and also of the "clear and present danger" principle,<sup>26</sup> in its reformulation of the Smith Act.<sup>27</sup> Created by an act of Congress in 1966,<sup>28</sup> charged with the task of making a thorough review of federal criminal law and formulating recommendations for revision and recodification, the Commission published a *Study Draft of a New Federal Criminal Code* in 1970<sup>29</sup> and submitted its final report in 1971.<sup>30</sup>

I call attention to the following features of the Commission's reformulation of the Smith Act, paragraph (3):

21. *Abrams v. United States*, 250 U.S. 616 (1919).

22. *Gitlow v. New York*, 268 U.S. 652 (1925).

23. *Whitney v. California*, 274 U.S. 357 (1927).

24. *Dennis v. United States*, 341 U.S. 494 (1951).

25. 299 U.S. 353 (1937).

26. Justice Holmes stated:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

*Schenck v. United States*, 249 U.S. 47, 52 (1919).

27. THE NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE 74 (1970) [hereinafter cited as NATIONAL COMM'N].

28. Act of Nov. 8, 1966, Pub. L. 89-801, §§ 1-10, 80 Stat. 1516.

29. NATIONAL COMM'N, *supra* note 27.

30. See *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971). The final recommendation of the Commission has twice been introduced as legislation in the House of Representatives: in the 93d Congress, as H.R. 10047 (Kastenmeier and Edwards), and in the 94th Congress, as H.R. 333 (Kastenmeier, Edwards, Eilberg and Mikva). The *Study Draft* contains two sections under chapter 11, *National Security*, which relate to sedition and the forcible overthrow of government: section 1103, "Armed Insurrection" (replacing 18 U.S.C. §§ 2383-84 (1970)), and section 1104, "Advocating Armed Insurrection" (replacing the Smith Act, 18 U.S.C. § 2385 (1970)). In the final report, the two sections are brought together under one heading, § 1103, "Armed Insurrection," without further change. Section 1103 of the Commission's final report appears as APPENDIX 2.

—The conduct which is the target of the proposed legislation is *armed insurrection*, conduct much more specific and identifiable than “overthrowing the government by force or violence.” Mere advocacy of revolution, even violent revolution, is not covered.

—The words “duty” and “propriety” are omitted from the phrase “duty, necessity, desirability, or propriety of overthrowing” that appears in the first paragraph of the original Smith Act. A philosopher is acutely sensitive to the fact that in allowing that in some extraordinary but nonetheless conceivable circumstances, the violent overthrow of government might be morally permissible, or might even be a moral duty, he becomes liable under the Smith Act. The Commission’s rewording eliminates the liability that could arise from such propriety or duty.

—The Commission’s version requires an element of specific intent. Whereas the original Smith Act requires only that one “knowingly or willfully” advocate, the Commission’s version requires that one have the intent “to induce or otherwise cause others to engage in armed insurrection.”

—Advocacy is proscribed only under circumstances in which there is “substantial likelihood” that the advocacy will “imminently produce” actions which constitute engaging in or leading armed insurrection. The “clear and present danger” criterion receives a statutory formulation for the first time: there must be real and close causal connections between the advocacy and the action.

—Mere membership in or affiliation with a group engaging in the proscribed advocacy is not sufficient to make one liable.

The Smith Act prosecutions of the fifties would have been impossible under the language of the Commission’s proposal. Indeed, the advocacy proscribed in paragraph (3) of the Commission’s proposal is so narrowly defined that one may wonder what sort of conduct it covers that would not also be covered by paragraph (2), “Leading Armed Insurrection”.

The virtues of the Commission’s reformulation of the Smith Act are not limited to the language of paragraph (3). Paragraph (4) greatly restricts the possibilities of prosecuting someone for attempting to advocate, conspiring with others to advocate, facilitating advocacy, or soliciting someone to advocate: the conditions of “clear and present danger” must exist; not any old danger, but the specific danger of armed insurrections. The “piggybacking” of an inchoate offense upon an advocacy charge is effectively ruled out.

If we must have a sedition statute, the Commission provides us with a model about as safe as human ingenuity can devise. Perhaps it was because the model provided no scope for the harassment and disruption of radical political movements that the Justice Department attorneys who drafted Nixon's criminal code bill disregarded it entirely.

Nixon's criminal code bill was introduced in the Senate as S. 1400 and in the House as H.R. 6046. In his 1973 State of the Union message, President Nixon called it "a sweeping proposal for reform based upon a five year study by a non-partisan national commission," which was, of course, a falsehood. The bill was modeled upon the Commission's recommendation to the extent that the chapter headings and the numbering of the sections largely coincided with the original; but the substance was all Nixon, Mitchell, and Kleindienst. Section 1103 of S. 1400/H.R. 6046, now re-named "Inciting Overthrow or Destruction of the Government," indicates how far from the original is the substance of Nixon's bill.<sup>31</sup>

From the standpoint of the politician who would like to have at his disposal an instrument for "getting" the radical opposition, Nixon's section 1103 is a model sedition statute. Observe how cleverly it is worded. The element of intent defined in the preamble of paragraph (a), for instance, is the intent to bring about the overthrow or destruction of the government—it need not be by force or violence, or by any unlawful means. Thus a peaceable anarchist who wishes to call a constitutional convention for the purpose of abolishing the government has the required intent. Presumably, anyone who commits himself to a revolutionary slogan or label like "Marxist-Leninist" will be accused of having the required intent.

The incitement which is the target of the statute, moreover, is the incitement of conduct which "then or at some future time would facilitate" the overthrow of government by force. What sort of conduct might that be? It need not be violent or unlawful conduct. It need not be conduct engaged in with revolutionary intent. It need not be conduct which tends to bring about or enhance the likelihood of violent revolution. It need only be conduct which at some future time might make it easier for someone to overthrow the government.

The wording of clause (a)(2) specifies the liability of organizations or associations. It is not required that the purpose of inciting conduct which facilitates revolution be the sole purpose of the organization, or even the chief purpose; it suffices that it is *a* purpose. It is not required

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31. Section 1103 of Nixon's criminal code appears as APPENDIX 3.



that any revolutionary intent accompany that purpose. Thus the National Rifle Association (which encourages people to lobby against gun-control legislation) and the American Civil Liberties Union (which encourages people to lobby against sedition laws) would likely be liable under (a)(2).<sup>32</sup> If our peaceable anarchist is a member of either organization, he is now subject to fifteen years in prison and a \$100,000 fine. It is not required that he have any knowledge of the purpose that rendered the organization liable.

Nixon's criminal code bill died in the 93rd Congress. Nixon's Smith Act survived substantially intact, however, as section 1103 of the criminal code bill prepared within the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedure during 1974 and presented to the world on the opening day of the 94th Congress as S. 1—the McClellan-Hruska criminal code bill, bearing the title "Criminal Justice Reform Act of 1975."<sup>33</sup> The deviations from section 1103 of Nixon's criminal code are slight, and all but one serve to restrict the scope of the statute and must therefore be regarded as improvements. I list them here: (1) The definition of intent in the preamble is qualified by the addition of the word "forcible." Our hypothetical peaceable anarchist is no longer liable; the intent required is that of bringing about the *forcible* overthrow of government. (2) Persons wishing to burn down city hall are no longer liable. The reference in the original to overthrowing local government is omitted in the preamble of the McClellan-Hruska version. (3) In the original, the organizational relationship that renders one liable is "organizes, leads, recruits members for, *joins*, or *remains an active member of*." The McClellan-Hruska version omits the "joins" and replaces "remains an active member of" with "participates as an active member of." (4) Where the original says "organization," in clause (a)(2), the McClellan-Hruska version says "organization or group." This is the only change which does not serve to restrict the scope of the statute.

The changes do not give much comfort to the citizen who would like to retain the option of opposing the establishment with radical rhetoric.

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32. I reason that lobbying against effective gun control and lobbying against sedition statutes both fit the description of conduct which "then or at some future time" "would facilitate" violent overthrow: the first because the ready availability of guns and ammunition would certainly make things easier for persons bent upon revolutionary violence; the second because freedom of speech would certainly make it easier for revolutionaries to recruit and organize.

33. S. 1, 94th Cong., 1st Sess., (1975) [hereinafter cited as S. 1]. Section 1103 of S. 1 appears as APPENDIX 4.

The central innovation of the Nixon original—proscribing the incitement of conduct which *would facilitate* revolution at some future time—remains intact. This is the language of the sedition statute as it stood at the opening of the 94th Congress, when S. 1 received the endorsement of such distinguished leaders in the Senate as Birch Bayh of Indiana, Frank Moss of Utah, Mike Mansfield of Montana, and Hugh Scott of Pennsylvania.

During the first half of 1975, however, S. 1 underwent some “marking-up” within the Subcommittee on Criminal Laws and Procedure, and by August 1, when Congress recessed for the summer, section 1103 had undergone some significant changes.<sup>34</sup>

First, the specification of the required intent in the preamble is modified by dropping the phrase “as speedily as circumstances permit.” The effect of this change, I think, is to broaden rather than restrict the scope of the statute. Consider the case of a revolutionary who (a) wishes to bring about the overthrow of the government and (b) believes that circumstances are now propitious for its overthrow, but (c) refuses to act because he believes that in the circumstances currently existing, the new situation created by the overthrow of the government would be worse than the existing situation. He intends to overthrow the government, but only at a time when something better will replace it; it is therefore *not* his intention to overthrow the government “as speedily as circumstances permit.” He lacks the intent required in the earlier mentioned versions of section 1103, but he does have the intent specified in the present mark-up.<sup>35</sup>

Second, the conduct mentioned in clause (a)(1) is qualified by the addition of the adjectives “imminent” and “lawless.” It is now the incitement to *imminent lawless conduct* of a certain type that is the target of the statute. The change is a great step forward. No longer does inciting people to write to their representatives in Congress render one liable.

The phrase “imminent lawless conduct” is presumably drawn from the language of *Brandenburg v. Ohio*,<sup>36</sup> in which a unanimous Supreme

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34. S. 1, 94th Cong., 1st Sess., (Comm. Print 1975) [hereinafter cited as S. 1, Comm. Print]. The full text of section 1103 as marked-up, which, to the best of my knowledge, is the language of S. 1 as it currently stands in the Senate Judiciary Committee, appears as APPENDIX 5.

35. For both the point and the example, I am indebted to my colleague, Assistant Professor Robert G. Keim.

36. 395 U.S. 444, 447 (1969). See text accompanying note 41 *infra*.

Court struck down Ohio's Criminal Syndicalism Statute,<sup>37</sup> and said that *Whitney v. California*,<sup>38</sup> which had upheld California's Criminal Syndicalism Act,<sup>39</sup> had been "thoroughly discredited by later decisions."<sup>40</sup>

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained.<sup>41</sup>

Presumably, therefore, "imminent lawless conduct" is (a) conduct which is in violation of the law, and (b) conduct which is very likely to happen without delay, given the incitement. The scope of the sedition statute is now greatly restricted.

It should be noted, however, that the section does not require that the conduct be violent, nor that it threaten the security of the state. The wording sets no threshold for the seriousness of the offense, and fails to provide for any proportionality between the penalty due the lawless conduct and the penalty due the incitement under section 1103. An example may illustrate the odd consequences of the present wording.

X is distributing a leaflet—for example, a leaflet calling for the formation of "a new Marxist-Leninist party." It is not clear that distributing such a leaflet is conduct which facilitates the forcible overthrow of government, but a jury might be persuaded that it is and let us assume such. A police officer orders X to stop distributing the leaflets; but Y, who is a revolutionary, encourages X to defy the police

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37. Law of May 7, 1919, 108 Laws of Ohio, pt. 1, 189.

38. 274 U.S. 357 (1927).

39. Law of April 30, 1919, ch. 188, [1919] Cal. Stat. 281.

40. 395 U.S. at 447. The Court also relied on the following language from *Noto v. United States*, 367 U.S. 290, 297-98 (1961):

[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.

395 U.S. at 448.

The Court distinguished the Ohio Criminal Syndicalism Statute from the constitutionally valid Smith Act on the ground that the latter did not prohibit mere advocacy, but rather proscribed such advocacy where it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 n.2, citing *Dennis v. United States*, 341 U.S. 494 (1951). See *Yates v. United States*, 354 U.S. 298, 320-24 (1957).

41. 395 U.S. at 447-48.

order, saying, "Stick up for your first amendment rights!" *X* does so, in consequence of which *X* is arrested for failure to obey a lawful police order. In S. 1 the offense is an infraction warranting a maximum of five days imprisonment and/or a \$1,000 fine.<sup>42</sup> But *Y* is now guilty of violating section 1103 as it is presently worded, and becomes liable to 15 years imprisonment and/or a \$100,000 fine!

The example points up another difficulty with the present wording. Suppose that *X* is either acquitted of the charge of refusal to obey a lawful police order, or suppose he is convicted, but the conviction is reversed on appeal on the grounds that the police order was not lawful. Is *Y* still liable under the present wording of section 1103? If *Y* has been convicted of violating section 1103 and is in prison when *X*'s conviction is overturned, is he then released? The given language provides neither criteria nor procedures for reversing a conviction under section 1103, or for releasing a prisoner, should the alleged "imminent lawless conduct" turn out not to be lawless.

The attempt to build the language of *Brandenburg v. Ohio* into statutory law generates an enormous technical problem that is not even recognized in the language before us. There is also a question of *redundancy*. Is not the incitement of lawless conduct covered elsewhere in S. 1, specifically in chapter 4, *Complicity*? Section 401, "Liability of an Accomplice," provides that

a person is criminally liable for an offense based upon the conduct of another person if . . . acting with the state of mind required for the commission of the offense, he causes the other person to engage in conduct that would be an offense if engaged in personally by the defendant or any other person.

With reference to the foregoing example, the language of section 401 would seem to make *Y* an accomplice in *X*'s refusal to obey a lawful police order. This, of course, raises a question of *consistency*: for under section 401, *Y*, as an accomplice of *X*, would be subject to the same penalties as *X*.

The third change in the mark-up is the elimination of the phrase "then or at some future time" from clause (a)(1). It is now incitement to imminent lawless conduct "that would facilitate the forcible overthrow or destruction" of government for which one becomes liable. However, the retention of the subjunctive mood of the verb—"would facilitate"—leaves an ambiguity. Is it conduct which *would facilitate forcible overthrow if* certain conditions were fulfilled? I hesitate to

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42. S. 1, Comm. Print, *supra* note 34, § 1862.

recommend replacing "would facilitate" with "facilitates," of course, because the whole notion of conduct which facilitates forcible overthrow is exceedingly broad, indefinite, and conjectural—the improvement would be too slight to be significant.

In another section, a fourth change is made: the mark-up replaces the phrase "organization or group" in clause (a)(2) with the single word "group." This perhaps is an attempt to eliminate any inconsistency between sections 1103 and 403, "Liability of an Agent for Conduct of an Organization." According to section 403(c), it is only persons exercising supervisory responsibilities who become criminally liable for offenses committed by the organization. (May one deny a political party the privileges that a business corporation enjoys by calling it a "group" rather than an "organization"?)

Finally, the mark-up narrows the required relationship to a group in clause (a)(2) by eliminating the relation "participates as an active member in," and creates a new clause (a)(3) to cover that relationship. Under the new clause a member of a group becomes liable only if he knows that the group has among its purposes the proscribed incitement.<sup>43</sup> Also, the grading of the offense is changed to provide that "knowing membership," *i.e.*, a violation of clause (a)(3), is only a Class D felony.<sup>44</sup>

These changes define the sedition statute of S. 1, as formulated on August 1, 1975.<sup>45</sup> Two other proposed amendments should be mentioned, by virtue of the distinction of the proposer, Senator Roman L. Hruska, who has recommended: (1) Adding a definition of "incites" to the language of S. 1, presumably under section 111, "General Definitions," providing that "incites" shall mean "directly urges, with success;" (2) Replacing the verb "would facilitate" in clause (a)(1) with the expression "calculated to facilitate."<sup>46</sup>

The changes would be improvements in that each serves to further restrict the scope of the statute. The first would mean that an unsuccessful attempt to incite could not be prosecuted under section 1103, however diabolical the intent of the inciter, however monstrous the conduct urged. The second would mean that the state of mind of

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43. The criterion of *knowing* membership is in line with *Scales v. United States*, 367 U.S. 203 (1961).

44. Imposition of prison sentences is classified according to the class of felony attributed to the offense. *See* S. 1, Comm. Print, *supra* note 34, § 2301.

45. *See* APPENDIX 5.

46. Press release of Senator Hruska, Aug. 15, 1975, 121 CONG. REC. 15957 (daily ed. Sept. 16, 1975).

the person incited, as well as the state of mind of the inciter, becomes relevant to the offense; in effect, two revolutionaries are required for the offense, instead of just one.

However, throughout all these transformations in the sedition statute, from the original Nixon version to Senator Hruska's proposed refinements, two elements persist. One is the concept of conduct facilitating forcible overthrow—an exceedingly broad, indefinite, and conjectural concept, as already mentioned. (Would the multiplication of “Marxist-Leninist” political parties facilitate forcible overthrow, or make it more difficult? One could easily argue it both ways.) The other is the principle of guilt by association: by attributing a purpose to a group we “get” the leaders. These two elements leave the statute at least as subject to politically-motivated misuse as the original Smith Act.

One would like to say, “Throw Nixon's Smith Act out of the criminal code bill,” or “Replace it with the National Commission's section 1103,” except that S. 1's section 1103 is so characteristic of the ruthless spirit that pervades all 753 pages of the bill. When we link the sedition statute to the “Official Secrets Act” in S. 1,<sup>47</sup> the curtailment of the right of assembly implicit in section 1328 and numerous other sections,<sup>48</sup> the effective abolition of the insanity plea,<sup>49</sup> the provision on entrapment,<sup>50</sup> the apparent toleration of Watergate-type crimes,<sup>51</sup> the sentences and the sentencing procedure,<sup>52</sup> mandatory imprisonment and the reintroduction of the death penalty,<sup>53</sup> etc.—we may feel inclined to agree with Professors Countryman and Emerson that S. 1 is indeed “inherently amendable.”<sup>54</sup>

Nevertheless, the conscientious citizen must, I think, single out Nixon's Smith Act as especially noxious and dangerous. I do not think the point to emphasize is that section 1103 is unconstitutional. The friends of section 1103 who have been polishing up the wording are

47. S. 1, Comm. Print, *supra* note 34, §§ 1121-24.

48. Virtually every kind of civil rights, peace & other protest action would be threatened with severe penalties under [a] series of vaguely drafted infringements on [the] right of assembly, including the right to demonstrate adjacent to [a] “temporary residence” where the President may be staying.

National Committee Against Repressive Legislation, Bulletin on S. 1 (Aug., 1975) (references are to S. 1, Comm. Print, *supra* note 34, Title II, Part B, and Title I, §§ 1112, 1114-17, 1302, 1311, 1328, 1334).

49. S. 1, Comm. Print, *supra* note 34, § 552.

50. *Id.* § 551.

51. *Id.*, “Exercise of Public Authority,” §§ 541, 544, 552.

52. *Id.*, Part III, chs. 20-22.

53. *Id.*, chs. 23-24.

54. Emerson & Countryman, Statement on S. 1 (June, 1975).

satisfied it fits into current first amendment doctrine, and liberals may be inclined to leave the question of constitutionality to the courts. We may point out that section 1103 serves no *practical function*: it no more protects us from politically-motivated terrorism, assassination, kidnaping, or arson than the present Smith Act does. But the emphasis must be that we, the people, *care* for our first amendment rights; we will *not* surrender them up, and we will *turn out of office* any scoundrel who votes for section 1103 or for S. 1 with section 1103 in it.<sup>55</sup>

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55. The alternative criminal code bill recently introduced into the House of Representatives eliminates entirely any reference to "Instigating Overthrow or Destruction of the Government." H.R. 10850, 94th Cong., 1st Sess. (1975) (Kastenmeier, Edwards & Mikva).

## APPENDIX 1

The Smith Act, 18 U.S.C. § 2385 (1970) (Advocating Overthrow of Government):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

As used in this section, the terms “organizes” and “organize”, with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.



## APPENDIX 2

## FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, § 1103 (1971) (Armed Insurrection):

(1) Engaging in Armed Insurrection. A person is guilty of a Class B<sup>[a]</sup> felony if he engages in an armed insurrection with intent to overthrow, supplant or change the form of the government of the United States or of a state.

(2) Leading Armed Insurrection. A person is guilty of a Class A felony if with intent to overthrow, supplant or change the form of the government of the United States or of a state, he directs or leads an armed insurrection, or organizes or provides a substantial portion of the resources of an armed insurrection which is in progress or is impending or any part of such insurrection involving 100 persons or more.

(3) Advocating Armed Insurrection. A person is guilty of a Class C felony if, with intent to induce or otherwise cause others to engage in armed insurrection in violation of subsection (1), he:

(a) advocates the desirability or necessity of armed insurrection under circumstances in which there is substantial likelihood his advocacy will imminently produce a violation of subsection (1) or (2); or

(b) organizes an association which engages in the advocacy prohibited in paragraph (a), or, as an active member of such association, facilitates such advocacy.

(4) Attempt; Conspiracy; Facilitation; Solicitation.<sup>[b]</sup> A person shall not be convicted under sections 1001 through 1004:

(a) with respect to subsection (3)(a) unless he engaged in conduct under circumstances in which there was a substantial likelihood that it would imminently produce a violation of subsection (1) or (2); or

a. The following table represents the scale of maximum penalties according to classification of the felony:

Class A felony—30 years, \$10,000 fine;

Class B felony—15 years, \$10,000 fine;

Class C felony—7 years, \$5,000 fine.

NATIONAL COMM'N, *supra* note 27, §§ 3201, 3301.

b. Section 1001, "Criminal Attempt," section 1002, "Criminal Facilitation," section 1003, "Criminal Solicitation," and section 1004, "Criminal Conspiracy," constitute the principal sections of chapter 10, *Offenses of General Applicability*, in the Commission's report. *Id.*

(b) with respect to subsection (1), (2), or (3)(b) if his conduct constituted no more than an attempt or conspiracy to violate subsection (3)(a) under circumstances in which there was no substantial likelihood that such attempt or conspiracy would imminently produce a violation of this section.

## APPENDIX 3

"Nixon's Smith Act," S. 1400, 93d Cong. 1st Sess., § 1103 (1973); H.R. 6046, 93d Cong., 1st Sess., § 1103 (1973) (Inciting Overthrow or Destruction of the Government):

"(a) OFFENSE.—A person is guilty of an offense, if with intent to bring about the overthrow or destruction of the government of the United States, or any state or local government, as speedily as circumstances permit, he:

"(1) incites others to engage in conduct which then or at some future time would facilitate the overthrow or destruction by force of that government; or

"(2) organizes, leads, recruits members for, joins, or remains an active member of, an organization which has as a purpose the incitement described in subsection (a) (1).

"(b) GRADING—An offense described in this section is a Class C felony.<sup>1c1</sup>"

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c. The following table represents the scale of maximum penalties according to the classification of the felony:

Class A felony—life imprisonment, \$100,000 fine;

Class B felony—30 years, \$100,000 fine;

Class C felony—15 years, \$100,000 fine;

Class D felony—7 years, \$50,000 fine;

Class E felony—3 years, \$25,000 fine.

S. 1400, 93d Cong., 1st Sess., §§ 2201, 2301 (1973); H.R. 6046, 93d Cong., 1st Sess., §§ 2201, 2301 (1973).

## APPENDIX 4

“The Smith Act’ in the McClellan-Hruska Criminal Code,” S. 1, 94th Cong., 1st Sess., § 1103 (as originally introduced, Jan., 1975) (Instigating Overthrow or Destruction of the Government):

“(a) OFFENSE.—A person is guilty of an offense if, with intent to bring about the forcible overthrow or destruction of the government of the United States or of any state as speedily as circumstances permit, he:

“(1) incites other persons to engage in conduct that then or at some future time would facilitate the forcible overthrow or destruction of such government; or

“(2) organizes, leads, recruits members for, or participates as an active member in, an organization or group that has as a purpose the incitement described in paragraph (1).

“(b) GRADING.—An offense described in this section is a Class C felony.<sup>1d)</sup>”

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d. The scale of sentences provided in S. 1, §§ 2101, 2201, is the same as that in the “Nixon Bill,” except that in S. 1 every felony carries a maximum fine of \$100,000. A different scale is also used depending on whether an individual or an organization is involved.

## APPENDIX 5

“The Smith Act’ in the McClellan-Hruska Criminal Code,” S. 1, 94th Cong., 1st Sess., § 1103 (as amended within the Subcommittee, Aug. 1, 1975) (Instigating Overthrow or Destruction of the Government):

“(a) OFFENSE.—A person is guilty of an offense, if with intent to bring about the forcible overthrow or destruction of the government of the United States or of any state ~~as speedily as circumstances permit~~, he:

“(1) incites other persons to engage in *imminent lawless* conduct that ~~then or at some future time~~ would facilitate the forcible overthrow or destruction of such government;

“(2) organizes, leads, *or* recruits members for, ~~or~~ ~~participates as an active member in, an organization or a group~~ that has as a purpose the incitement described in paragraph ~~(1)~~ (1); *or*

“(3) *participates as an active member in a group that he knows has as a purpose the incitement described in paragraph (1).*

“(b) GRADING.—An offense described in this section ~~is a Class C felony~~ *is*:

“(1) *a Class C felony in the circumstances set forth in subsections (a)(1) and (a)(2);*

“(2) *a Class D felony in the circumstances set forth in subsection (a)(3).”*