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- (3) Protection of the sanctity of the jury room by a provision prohibiting the disclosure of communications emanating therefrom whether overheard or recorded.



THE SUPREME COURT, THE SMITH ACT, AND THE "CLEAR
AND PRESENT DANGER" TEST

Introduction

Recent developments in the law have emphasized a need for reconciling the freedoms of the individual citizen with the recognized right of a lawfully-constituted sovereign to protect itself from violent overthrow. Among these freedoms, none deserves greater attention at the present time than the freedom of speech protected by the first amendment of the Constitution of the United States.

Like all rights, freedom of speech ". . . is not absolute at all times and under all circumstances."¹ But to admit that this freedom is not absolute is not severely to limit it. Rather, it is to recognize that there will be times when ". . . restriction . . . is required in order to protect the State from destruction or from serious injury, political, economic or moral."²

Occasions for limitation arose early in our history. Soon after our nation had freed itself from England, threats to its life appeared.³ To meet them Congress passed the much-criticized Alien and Sedition Acts.⁴ It was not until 1917 that the next major federal curtailment of speech occurred. This time it was an act which sought to curb interference with the war effort.⁵ Forty years later, in 1957, contro-

¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). For decisions where abridgements of this freedom have been upheld, see, *e.g.*, *Chaplinsky v. New Hampshire*, *supra* (statute prohibited addressing others in offensive, derisive or annoying language in public places); *Whitney v. California*, 274 U.S. 357 (1927) (statute prohibited organization of groups to advocate and teach criminal syndicalism); *Gitlow v. New York*, 268 U.S. 652 (1925) (statute prohibited advocacy of criminal anarchy).

² *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion).

³ One author has estimated that in 1798, when war with France appeared inevitable, there were some 30,000 unfriendly Frenchmen organized into groups within our borders. 1 HARPER'S ENCYCLOPAEDIA OF UNITED STATES HISTORY 101 (1905). For background material on our relations with France during that period, see BASSETT, THE FEDERALIST SYSTEM 218-29 (Hart ed. 1906); Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act*, 18 MICH. L. REV. 615 (1920).

⁴ Act of July 6, 1798, c. 66, 1 STAT. 577; act of July 14, 1798, c. 74, 1 STAT. 596.

⁵ Espionage Act of 1917, 40 STAT. 217, repealed, 62 STAT. 862 (1948).

versy centers about a statute directed against communists and all others who advocate overthrow of our government by force.⁶

In light of the recent United States Supreme Court decision in *Yates v. United States*,⁷ the history of this type of legislation will be examined to determine whether the present Court, without straying beyond its constitutional powers, has struck the balance between the rights of the individual and the equally important right of the sovereign to protect itself.

The Sedition Act of 1798

To assure many fundamental rights which were hampered under British rule, the Founding Fathers hastened to proclaim them, once the new government was firmly established. One of these rights, that of free speech, was stated in the first amendment of the Bill of Rights:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁸

Within a very few years, however, the legislators did impose restrictions on freedom of speech in the Sedition Act of 1798.⁹ Some of its provisions, especially those concerned with criticism of government officials,¹⁰ were extremely oppressive.¹¹ Unfortunately, it is difficult to determine, from a distance of 159 years, whether it was remedial of existing evils, or merely an example of political opportunism. For, all ten prosecutions under this statute were instigated by a Federalist administration against Republican defendants.¹² After a brief, stormy life, the Sedition Act expired by its own terms on March 3, 1801.

⁶ 18 U.S.C. § 2385 (1952).

⁷ 354 U.S. 298 (1957).

⁸ U.S. CONST. amend. I.

⁹ Act of July 14, 1798, c. 74, 1 STAT. 596.

¹⁰ *Id.* at 596. ". . . [I]f any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against . . . either house of the Congress of the United States, or the President of the United States, with intent to defame the said government . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States . . . then such person . . . shall be punished . . ." *Ibid.*

¹¹ Furthermore, it did not fail to produce a violent reaction. It was vehemently denounced in resolutions by several of the state legislatures. See especially the Virginia Resolutions of Dec. 24, 1798 (drafted by Madison) and the Kentucky Resolutions of 1799 (drafted by Jefferson). DOCUMENTS OF AMERICAN HISTORY 178-84 (Commager ed. 1948).

¹² See 1 DICTIONARY OF AMERICAN HISTORY 49 (Adams ed. 1942). For a report of one of the cases, see Trial of Thomas Cooper, Whart. St. Tr. 659 (1800).

A Necessary Distinction

Statutes restricting speech may be put into two categories. A statute may be drafted which clearly, explicitly, and unambiguously provides for achievement of the legislative purpose. Or there may be a statute in which legislative purpose is expressed in general terms. In the former case, the Congress finds that a particular means tends toward a particular evil. It then sets forth a specific description of these means and proscribes them. In the latter, the Congress determines that certain ends are to be prevented; prohibits conduct aimed towards these ends; and leaves it to the court to determine whether specific acts come within the purview of the statute.

Under the Constitution, all of the legislative power is vested in the Congress.¹³ Once a law is passed, the court's function is to apply the law in cases properly brought before it, and ". . . it is . . . well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it . . . [the] Court may not inquire into the degree of their necessity; as this would be to . . . tread upon legislative ground."¹⁴ In short, the separation of powers in our government dictates that the court do nothing to restrict, expand or otherwise change the application of a clear and unambiguous statute, provided that the statute is constitutional.¹⁵

If, then, the statute is clear and unambiguous, yet the court still sees fit to apply judicial discretion, the question should immediately arise: has the court exceeded its constitutional limits?

However, while the court should not practice judicial legislation where a statute is clear and unambiguous, those statutes still remain whose terms have been deliberately left general and vague by the legislature. These require the exercise of a certain amount of judicial discretion, *i.e.*, a restricted amount of legislative power vested in the courts, the separation of powers doctrine notwithstanding.¹⁶

¹³"All legislative Powers herein granted shall be vested in a Congress of the United States . . ." U.S. Const. art. I, § 1.

¹⁴ *Eveready's Breweries v. Day*, 265 U.S. 545, 559 (1924).

¹⁵ See, *e.g.*, *United States v. Standard Brewery Inc.*, 251 U.S. 210 (1920); *Caminetti v. United States*, 242 U.S. 470 (1917); *Binns v. Lawrence*, 53 U.S. (12 How.) 7 (1851).

¹⁶ An example of a statute wherein a certain amount of legislative power has been entrusted to the courts by Congress is the Sherman Act. 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952). It provides, *inter alia*, that "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.* at 209, 15 U.S.C. § 1. Though these provisions are general, and leave room for application of considerable discretion by the courts, they have been held not to be an unconstitutional delegation of legislative power. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

The Espionage Act of 1917

American involvement in World War I was a controversial issue.¹⁷ Once the government had made the decision to enter the war, it became necessary to obtain the support of all citizens in the war effort. Apparently feeling that some citizens retained obstructive sympathies, the legislators passed the Espionage Act of 1917.¹⁸ Its prohibitions were directed chiefly against (1) prying into, withholding, or giving to unauthorized persons classified information in regard to the war effort;¹⁹ (2) communicating plans to foreign governments;²⁰ or (3) interfering with national defense, or obstructing enlistments or conscription into the armed forces.²¹ An additional section made conspiracy to do any of the above-mentioned acts punishable.²² Most subsequent developments were to be concerned with the third substantive category above. Since it is couched in general terms, the intention of the legislature to vest some judicial discretion in the courts is apparent.

The first, and probably the most important, case to arise under this statute was that of *Schenck v. United States*.²³ The defendant Schenck was accused of conspiracy to print and distribute circulars which urged young men to refuse to serve in the armed services during the war. Although there was no showing that he had been at all successful in hampering the war effort, the Supreme Court upheld his conviction. In reaching the decision, Justice Holmes, speaking for a unanimous Court, laid down the "clear and present danger" test.

"Clear and Present Danger" Test

The test arrived at by the Court was worded as follows:

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.²⁴

In thus declaring that the character of every act depends on the circumstance in which it was done, criminality in this particular area becomes at least partly a question of surrounding circumstances. Acts which are legal in one context can be crimes in another.

In subsequent cases involving subdivision (3) of the Espionage Act, the Court tended largely to follow the "clear and present danger"

¹⁷ See BARNES, GENESIS OF THE WORLD WAR 590-653 (rev. ed. 1929).

¹⁸ 40 STAT. 217, repealed, 62 STAT. 862 (1948).

¹⁹ *Id.* at 217.

²⁰ *Id.* at 218.

²¹ *Id.* at 219.

²² *Ibid.*

²³ 249 U.S. 47 (1919).

²⁴ *Id.* at 52 (emphasis added).

test set forth in the *Schenck* case. *Frohwerk v. United States*²⁵ and *Debs v. United States*²⁶ were both decided squarely on the authority of the *Schenck* case. The decisions in *Abrams v. United States*²⁷ and *Schaefer v. United States*²⁸ showed a temporary departure from the application of the test in so far as the Court did not expressly consider it in its opinion. But the Court returned to an application of it quickly in the case of *Pierce v. United States*.²⁹ Significantly enough, though the conviction in the latter case was sustained after an application of the "clear and present danger" test, the originator of the test, Justice Holmes, and Justice Brandeis dissented. They believed that defendants' anti-war, socialist pamphlet was not dangerous enough to warrant suppression.³⁰ Already we see divergent conclusions reached in the application of this test.

Gitlow v. New York

A few years later, with the makeup of the Court greatly changed,³¹ a case³² was brought before it in which the application of a New York criminal anarchy statute³³ was in question. The statute was directed against advocating, organizing groups to advocate, or publishing literature which advocates, overthrow of the government by force. Defendant Gitlow was charged with having published and distributed pamphlets advocating such overthrow. The statute by its terms made speech in furtherance of such a goal criminal per se.³⁴

²⁵ 249 U.S. 204 (1919).

²⁶ 249 U.S. 211 (1919).

²⁷ 250 U.S. 616 (1919). For support of this view, see *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion).

²⁸ 251 U.S. 466 (1920).

²⁹ 252 U.S. 239 (1920). See also *Hartzel v. United States*, 322 U.S. 680, 687 (1944).

³⁰ *Pierce v. United States*, 252 U.S. 239, 253 (1920) (dissenting opinion).

³¹ Justices Holmes, Brandeis, VanDevanter, and McReynolds were the only ones remaining from the nine who had participated in the *Schenck* decision.

³² *Gitlow v. New York*, 268 U.S. 652 (1925).

³³ N.Y. PEN. LAW § 161. "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 any unlawful means; or

2. Prints, publishes, . . . or . . . distributes . . . any book . . . or printed matter . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means. . . .

3. . . .

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine. [sic]

Is guilty of a felony. . . ." *Ibid.*

³⁴ See note 33 *supra*.

The majority, in affirming Gitlow's conviction, did not apply the "clear and present danger" test, although Justice Holmes did so in his dissent.³⁵ Rather, it expressly stated that such a test is not applicable to statutes like the criminal anarchy statute, wherein utterances of a certain kind are expressly prohibited. The Court said that such tests are to be used only where the legislature has expressed its will generally, as in the Espionage Act, in which case

. . . it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.³⁶

The statute applied in the *Gitlow* case³⁷ was the model for the Smith Act.³⁸ Thus, the above statement of the Supreme Court is entitled to careful consideration in any case where the Smith Act is being applied.

The "Smith Act Cases"

The Smith Act, in its original form, was passed in 1940.³⁹ In its present form, it provides as follows:

Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence . . . ; 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 \$10,000 or imprisoned not more than ten 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.⁴⁰

The indictment and trial of Eugene Dennis and his associates brought the questions of the constitutionality and the application of the Smith Act squarely before the Supreme Court.⁴¹ The defendants were charged with teaching and advocating the doctrines of Marxism-

³⁵ *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (dissenting opinion).

³⁶ *Id.* at 671.

³⁷ See note 31 *supra*.

³⁸ *Yates v. United States*, 354 U.S. 298, 309 (1957).

³⁹ 54 STAT. 670, 18 U.S.C. §§ 9-13 (1940).

⁴⁰ 18 U.S.C. § 2385 (1952).

⁴¹ *Dennis v. United States*, 341 U.S. 494 (1951).

Leninism, including the necessity of violently overthrowing existing governments. In deciding the case in the Court of Appeals for the Second Circuit, Judge Learned Hand rephrased the test of Justice Holmes: "In each case they [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁴² Finding, in effect, that there was a "clear and present danger," the court affirmed the conviction. Judge Chase concurred in the result reached in this case but disagreed with Judge Hand as to the need for application of the test.⁴³ He preferred directly to follow the *Gitlow* case and the finding of Congress that the danger did exist.⁴⁴

In the Supreme Court, although Chief Justice Vinson did refer to the distinction between general and specific restrictions of speech,⁴⁵ the conviction was affirmed on a finding that a "clear and present danger" did exist.

Subsequent decisions followed the *Dennis* case closely in seeking the existence of a "clear and present danger."⁴⁶ In *United States v. Lightfoot*,⁴⁷ the defendant was a member of the higher echelon of the American Communist Party, and a teacher of its doctrines. In response to a question as to how he planned to attain his ends, a witness quoted him as saying: "If we have to shed blood, we will."⁴⁸ In affirming his conviction, the United States Court of Appeals for the Seventh Circuit advanced the proposition that freedom of speech protects advocacy and teaching of only those changes which could be ". . . accomplished by processes which the Constitution provides."⁴⁹ The conviction was reversed by the Supreme Court.⁵⁰

Yates v. United States

Yates and her thirteen co-defendants were indicted under the Smith Act and charged, *inter alia*, with conspiracy to (1) organize, as the American Communist Party, a group seeking violent overthrow, and (2) advocate and teach the doctrine of the necessity of

⁴² *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

⁴³ *Id.* at 234 (concurring opinion).

⁴⁴ *Id.* at 236-37 (concurring opinion).

⁴⁵ *Dennis v. United States*, *supra* note 41, at 506.

⁴⁶ See, e.g., *Wellman v. United States*, 227 F.2d 757 (6th Cir. 1955), *rev'd per curiam*, 354 U.S. 931 (1957); *United States v. Silverman*, 129 F. Supp. 496 (D. Conn. 1955).

⁴⁷ 228 F.2d 861 (7th Cir. 1956), *rev'd per curiam*, 26 U.S.L. Week 3115 (U.S. Oct. 14, 1957).

⁴⁸ *United States v. Lightfoot*, 228 F.2d 861, 868 (7th Cir. 1956), *rev'd per curiam*, 26 U.S.L. Week 3115 (U.S. Oct. 14, 1957).

⁴⁹ *Ibid.*

⁵⁰ *Lightfoot v. United States*, 26 U.S.L. Week 3115 (U.S. Oct. 14, 1957).

violent overthrow of our government.⁵¹ They were convicted in a United States District Court in California⁵² and the conviction was affirmed by the Court of Appeals in the Ninth Circuit.⁵³ On certiorari, the Supreme Court reversed and remanded Yates and eight others to the district court.⁵⁴ The rest were acquitted.

The Court disposed of the first charge mentioned above by construing "organize" to mean "found" or "initiate," determining that the present Communist Party in the United States came into being in 1945, and ruling that the three-year statute of limitations precluded a conviction on that charge.⁵⁵

The second major charge was that the defendants taught or advocated the necessity of violent overthrow. Here the Court, while admitting that the Smith Act was modelled after the New York criminal anarchy statute involved in the *Gitlow* case,⁵⁶ did not employ the rationale of the *Gitlow* case in arriving at its decision. The Court decided that the trial court's instructions to the jury had been erroneous in that they excluded the issue of "incitement to action." In so doing, they injected a new condition into this type of statute,⁵⁷ even though the statutory wording—"advocates or teaches"—clearly shows the legislature's intent to prohibit *all* expressions of the duty or necessity of violent overthrow, *even when unaccompanied by a present urging to action.*

Justice Clark, in his dissent,⁵⁸ relies heavily on the conclusion reached in the *Dennis* case. In that case, however, there was a finding that a "clear and present danger" *did* exist.⁵⁹ But in the instant case, the majority requires the finding of an incitement to action as a condition to finding the existence of a danger. Since no such incitement was sought to be found in the district court, there is an element of consistency between the *Dennis* case and the *Yates* case which might not be readily appreciated.⁶⁰

⁵¹ *United States v. Yates*, 107 F. Supp. 412 (S.D. Cal. 1952), *aff'd*, 225 F.2d 146 (9th Cir. 1955), *rev'd*, 354 U.S. 298 (1957).

⁵² *United States v. Yates*, 107 F. Supp. 412 (S.D. Cal. 1952).

⁵³ *Yates v. United States*, 225 F.2d 146 (9th Cir. 1955).

⁵⁴ *Yates v. United States*, 354 U.S. 298 (1957).

⁵⁵ *Id.* at 310-12.

⁵⁶ *Id.* at 309.

⁵⁷ See *Gitlow v. New York*, 268 U.S. 652 (1925), where the Court said: "It was not necessary, within the meaning of the statute, that the defendant should have advocated 'some definite or immediate act or acts' of force, violence or unlawfulness. . . . Nor was it necessary that the language should have been 'reasonably and ordinarily calculated to incite certain persons' to acts of force, violence or unlawfulness." *Id.* at 671-72.

⁵⁸ *Yates v. United States*, 354 U.S. 298, 344 (1957) (dissenting opinion).

⁵⁹ *Dennis v. United States*, 341 U.S. 494 (1951).

⁶⁰ In the *Yates* trial the government submitted a request to charge on incitement to action which was identical to that given in the *Dennis* trial. The court refused so to charge. See *Yates v. United States*, *supra* note 58, at 316-17.

Conclusion

Kept within its own area, the "clear and present danger" test can be very valuable. If a rule of thumb is desired, Judge Hand's test, ". . . whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger,"⁶¹ should serve well. However, tests such as these can not be constitutionally applied by the courts when the legislature has given its mandate in specific terms.⁶² Thus, where the legislature specifically declares, as did the New York State legislature in its criminal anarchy statute,⁶³ and as the Congress did in the Smith Act,⁶⁴ that words advocating or teaching a specified course of action, to wit, overthrow of the government by force or violence, are criminal, the judiciary's function is limited.⁶⁵ Provided that the statute is not declared unconstitutional, the courts should only determine whether the defendant's acts were those described in the statute. An attempt to do more is violative of the doctrine of the separation of powers.

The wisdom of a particular piece of legislation is not the concern of courts. Such determinations are made by, and responsibility rests with, the legislators. The result reached in the instant case is relatively unimportant; Yates' possible guilt or innocence should not be our great concern. What is important is that it indicates another departure from what appears to be the clear intention of the legislature, a departure which would not have occurred had the Court followed the reasoning of its predecessors in the decision of *Gillow v. New York*.

⁶¹ *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

⁶² See, *e.g.*, *United States v. Standard Brewery Inc.*, 251 U.S. 210 (1920); *Caminetti v. United States*, 242 U.S. 470 (1917); *Thornley v. United States*, 113 U.S. 310 (1884); *Lewis v. United States*, 92 U.S. 618 (1875); *Binns v. Lawrence*, 53 U.S. (12 How.) 7 (1851).

⁶³ N.Y. PEN. LAW § 161.

⁶⁴ 18 U.S.C. § 2385 (1952).

⁶⁵ ". . . [W]hen the language is plain and explicit our [the Court's] only province is to give effect to the act as plainly expressed in the terms." *American Express Co. v. United States*, 212 U.S. 522, 535 (1909).