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SEDITIOUS CONSPIRACY, THE SMITH ACT, AND PROSECUTION FOR RELIGIOUS SPEECH ADVOCATING THE VIOLENT OVERTHROW OF GOVERNMENT

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The obligation of Allah is upon us to wage Jihad for the sake of Allah. It is one of the obligations which we must undoubtedly fulfill . . . and we conquer the lands of the infidels and we spread Islam by calling the infidels to Allah and if they stand in our way, then we wage Jihad for the sake of Allah.

—Sheik Omar Abdel Rahman, speaking in Detroit in 1991

INTRODUCTION

From the earliest time of civilization it has been a basic principle of government that a nation has an inherent right to protect its sovereignty by defending itself. Defending itself translates into safeguarding public security, and is perhaps the most basic function of government. It is what those who established our Constitution had in mind in the stated purpose of the Preamble “to insure domestic Tranquility.” The Preamble to the Constitution also provides the mandate for the Government to both “provide for the common defense” and to secure “the blessings of liberty” by “establishing justice.” Under the Constitution, the function of the federal government in providing for the common defense is to vouchsafe the safety of the people, the security of the nation, and liberty itself. One of the complaints about the Articles of Confederation was that there

1 *See Jihad in America* (WNET television broadcast, Nov. 21, 1994) (demonstrating worldwide radical Islamic conspiracy against the West).
2 United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986) (quoting the U.S. Constitution preamble).
3 U.S. CONST. pmbl.
was a need to secure the safety of the citizens of the several states, a need which was not fulfilled.4

A sovereign government has the power to resist aggression against enemies located abroad, as well as enemies at home. The power to punish domestic enemies who would threaten to put down or destroy the government has been recognized in the common law of sedition and in modern statutes enacted to punish subversive activities. Seditious conspiracy is a crime against the security of the state. The charge accuses the defendant of committing a crime against “We the people.” The charge asks the jury to decide whether the defendant is one of “us” engaging in protected speech, or one of “them,” conspiring to commit acts of sedition against our government.

Religious sermons by religious clerics have rarely imperiled the nation’s security. While the government has occasionally scrutinized “radical” religions with unpopular beliefs and practices,5 religious sects and spiritual groups have historically not been a threat to national security. Ominously, events of the past few years, particularly in the terrorist attacks of September 11, 2001, suggest that the threat posed by religious extremists against the United States is real. According to some commentators, most Americans believe that the terrorist attacks of September 11, 2001, arose from the religious zeal that seems to be central to Islam.6 Many think that Islam is intrinsically incompatible with liberal democratic values and tenets, and that it poses a serious threat to the vital interests of the West.7 After

4 See THE FEDERALIST NO. 3 (John Jay) (proposing safety as a priority).
5 During the nineteenth century, the federal government considered Mormonism to be a socially unacceptable religion, and acted to suppress its practice of polygamy. See Reynolds v. United States, 98 U.S. 145, 166 (1878) (stating “Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”).
6 See Nicholas D. Kristof, Terrorism Beyond Islam, N.Y. TIMES, Jan. 8, 2002, at A23 (proposing that most people associate terror attacks of September 11, 2001 with Islam).

The prevailing democratic system in the world is not suitable for us in this region . . . . We have our own Muslim faith which is a complete system and a complete religion. Elections do not fall within the sphere of the Muslim religion, which believes in the consultative system . . . . Free elections are not suitable for our country, the Kingdom of Saudi Arabia.

See also Gary Sick, Islam and the Norms of Democracy, in UNDER SIEGE ISLAM AND DEMOCRACY 33 (Richard W. Builliet ed., The Middle East Institute Columbia U.
the 1993 bombing of the World Trade Center, the opinion of many Americans focused on the mantra that "Islamic fundamentalists, without question, are one of the greatest threats to the United States . . . ." In 1994, the documentary, *Jihad in America* chronicled a network of Islamic extremists in the United States bent on waging religious warfare. The footage showed, among other things, a radical Islamic summer camp in the Midwest where children were taught how to wage violent jihad in the United States.

Today in the United States there is a tension between moderate Muslims and hate-filled radicals. For some years wealthy individuals in Saudi Arabia have funded the radical Wahhabism sect to espouse anti-American views in mosques within United States. In January, 1999, the U.S. State Department started to take a closer look at radical preaching in mosques after Sheik Muhammad Kabbani, head of the Islamic Supreme Council of America, warned that "the most dangerous thing that is going on now in these mosques is the extremist ideology" that has taken over "80 percent of the mosques that have been established in the U.S." Since the terrorist attacks of September 11, 2001, radical imans have been toning down their rhetoric by offering such comments as "The killing of innocents is forbidden in our religion," but Muslim clerics in the United States "are ideologically on the side of terrorists," according to moderate Muslim Khalid Duran of the Ibn Khaldun Society, a small international Muslim cultural group.

Many people believe that there is, or ought to be, an absolute privilege to criticize government and government systems, and to associate with others for this purpose without fear of criminal

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9 See *Jihad in America*, supra note 1.
10 See *Jihad in America*, WASH. TIMES, Nov. 18, 1994, at A24 (noting Islamic extremists waging religious warfare).
11 See *Jihad in America*, supra note 1 (showing radical Islamic summer camp).
12 See Jake Tapper, *The Bully Pulpit*, TALK MAGAZINE, Feb. 2002 at 38, 39 (noting Saudi Arabians "have used vast reserves of petro-dollars to promote Wahhabism").
13 Id.
14 Id. at 41.
15 Id. at 39 (noting Ibn Khaldun Society is "a small international Muslim cultural group").
prosecution. But the scope of freedom of speech under the First Amendment cannot be viewed in a vacuum, and is clearly affected by the interplay of world events and public policy. A delicate line can be crossed, whereby lawful criticism of government may become seditious speech, where associating with others in robust criticism of government may become subversive activities punishable by law.

A dramatic example of modern day sedition involved the indictment and conviction of Sheik Omar Abdel Rahman, a blind radical Islamic cleric who resided in New Jersey, and nine co-defendants, based on a plot to wage a "war of urban terrorism" against the United States in violation of the seditious conspiracy statute. Much of the case against Sheik Rahman, discussed in this article, was based on evidence of subversive sermons and religious guidance given by the cleric to members of his flock.

Except for the prosecution of Sheik Rahman and his co-defendants, modern-day sedition trials are almost unheard of. Society's preoccupation with criminal anarchy during World War I provides the most notable examples of prosecutions for seditious speech during the Twentieth Century. There were thousands of prosecutions for violation of sedition under the Espionage Acts of 1917 and 1918. A resurgence of sedition

16 "I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling..." Brandenburg v. Ohio, 395 U.S. 444, 454-57 (1969) (per curiam) (Douglas, J., concurring).

17 See 18 U.S.C. §2384 (1994) (stipulating that any two or more people who conspire to overthrow or harm U.S. Government will be subject to seditious conspiracy statute); see also United States v. Rahman, 854 F.Supp. 254, 259 (S.D.N.Y. 1994) (explaining purpose and effect of seditious conspiracy statute as noted in paragraph nine of Rahman Indictment).

18 See Jeff Barge, Sedition Prosecutions Rarely Successful: Government tries to beat the odds in trial of blind cleric's followers, 80 A.B.A. J. 16, 16 (Oct. 1994) (noting that only a few sedition prosecutions have been heard in United States within past couple of decades); see also Thomas Church, Jr., Conspicacy Doctrine and Speech Offenses: A Reexamination of Yates v. United States from the Perspective of United States v. Spoke, 60 CORNELL L. REV. 569, 569 (1975) (commenting that conspiracy charges are primary mechanism in dealing with crimes in high charged political areas).

19 See M. J. HEALE, AMERICAN ANTI-COMMUNISM: COMBATING THE ENEMY WITHIN, 1830-1970 (Johns Hopkins U. Press 1990) (1990) (noting large numbers of prosecutions under Espionage Act of 1917). See generally Pierce v. United States, 252 U.S. 239, 244 (1920) (affirming prosecution for seditious distribution of literature under Espionage Act of 1917); Abrams v. United States, 250 U.S. 616, 619 (1919) (noting that seditious acts committed during war with Germany that curtailed production of ammunition is unlawful under Espionage Act of 1917); Fohrwerk v. United States, 249 U.S. 204, 206 (1919) (holding that protections of First Amendment are not applicable to seditious acts which prevent recruiting); Schenck v. United States, 249 U.S. 47, 48 (1919) (emphasizing that circulating a pamphlet to discourage recruitment and enlistment into Armed Forces is a
cases occurred immediately following World War II, with the specter of international Communism corrupting American society from within. Underlying these cases was the attitude that any advocacy of communist ideas and opinions was inherently an extremely dangerous incitement to overthrow the existing social order. During the Vietnam War and the black liberation movement of the 1960s and 1970s there were further efforts to prosecute people for sedition in one form or another.

Whereas in the past, communism, syndicalism, and anarchism were the ideological threats under which charges of sedition were brought, today the new danger may be rooted in extremist religious views. The government's interest in protecting national security against the encroachment of subversive political ideas in the 20th century may now be resurfacing in the context of subversive religious ideas. Prosecutions of seditious conspiracy are more likely to occur in a climate of society's heightened apprehension about terrorist plots against the nation.

The use of sedition charges against clerics may be a rare occurrence in the nation's courts, and the idea of modern-day sedition presents intriguing philosophical, constitutional and practical questions. If the government decides to take an aggressive stance towards radical faiths, deploying content-based violation of Espionage Act of 1917).


The individual states of the United States deployed state sedition laws to curtail local insurrection and riots. Brandenburg involved the Ku Klux Klan and Ohio's Criminal Syndicalism statute for "advocat[ing]... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Brandenburg, 395 U.S. at 444-45. This case involved the prosecution of individuals for inciting a riot in Chicago and traveling interstate to achieve their goal; see also United States v. Delligier, 472 F.2d 340, 348-50 (7th Cir. 1972), cert denied, 410 U.S. 970 (1973). Defendants were convicted of protestig against the Selective Service draft during the Vietnam War, but the First Circuit reversed the convictions because they did not participate in criminal conspiracy activities. See generally United States v. Spoke, 416 F.2d 165, 168-69 (1st Cir. 1969) (noting indictments based on conspiracy to interfere with the Military Training and Services Act).

See Joseph Grinstein, Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism, 105 YALE L. J. 1347, 1367 (1996) (extrapolating Supreme Court's handling of issues relating to free speech and religious ideas along with protecting national security).
standards to label specific sermons and speeches uttered by clerics as “dangerous,” or to prosecute clerics for spreading a radical spiritual doctrine within a religious community, the government can in effect outlaw certain religious sects altogether. The rationale in doing so would be to prevent overt acts of terrorism against the government by stopping it at the preaching level.

Religious speech is not protected differently from other speech. As stated by Justice Reed in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*,23 "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.” In a pretrial ruling denying Sheik Rahman's motion to dismiss the indictment based on the argument that the charges involved the performance of his pastoral duties, the judge said, "[T]hat speech—even speech that includes reference to religion—may play a part in the commission of a crime does not insulate such crime from prosecution. ‘[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.’"24

**RELIGIOUS SPEECH IN THE FORM OF SERMONS AND RELIGIOUS DIALOGUES HAS A UNIQUELY MOTIVATIONAL QUALITY**

Sermons in all religions are their very nature not mere speeches that advocate ideas in the abstract; rather, they are designed to convince followers to take certain prescribed actions. Generally, a cleric or priest who disseminates a religious tenet to congregants fully intends to induce them to abide by it. Moreover, congregants do not come to listen to these teachings out of mere academic interest or for entertainment, but instead to use these to motivate themselves into action.

The February 1993 bombing of the World Trade Center demonstrated the vulnerability of the United States to terrorists with ties to radical Islamic groups.25 In July of 1993 the Federal

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25 The 1993 World Trade Center bombing culminated in the prosecution and conviction of three individuals with loose ties to Sheik Rahman and his followers. The
Bureau of Investigation broke up the extensive terrorist plot inspired by Sheik Rahman and his followers in New Jersey. Sheik Rahman was prosecuted for seditious conspiracy and convicted essentially because of the content of his sermons and his religious advice. Members of his group, inspired by Rahman's fiery sermons, assassinated the anti-Arab rabbi, Meir Kahan, in November 1990 during a speech at a New York City hotel, and plotted to blow up the United Nations headquarters, the New York Federal Building, destroy the Lincoln and Holland tunnels, the George Washington Bridge in New York City, and plotted to assassinate Egyptian President Hosni Mubarak while he was on an official visit to the United States (a plot which was foiled), among other offenses.26

Rahman's role in the seditious conspiracy was that he incited his followers to undertake subversive actions by providing encouragement to them by means of general religious advice and the religious propriety of some of their specific plans.27 Sheik Rahman's sermons and constituted seditious speech in virtue of the fact that they instructed his followers to wage violent *jihad* against the United States, thereby creating an imminent danger to the nation's security. His blindness and frailty prevented him from carrying out specific terrorist plans with the others. In fact, the evidence showed that Rahman did not even participate in any actual plotting against the government or in the preparatory activities undertaken by his co-defendants.28 Of the ten defendants found guilty in the case, all were of the Muslim faith.

The seditious conspiracy statute can also be used, among other laws, to prosecute extremists such as white supremacists and other extremists for a variety of less dramatic terrorist plots. If a radical Christian group forms a plot to "wage urban warfare" by conspiring to bomb abortion clinics, or to conspire to put down or destroy medical research institutes through acts of violence, the


26 See Robert D. McFadden, *Eight Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. TIMES, June 25, 1993, at A1 (discussing capture of suspects and various targets that bombers were planning to attack); Eleanor Randolph, "Megatrial" Prompts Questions of Fairness, WASH. POST, Nov. 20, 1994, at A25 (mentioning numerous planned targets of attack).

27 See Grinstein, *supra* note 22, at 1352 (discussing Rahman's role in terrorist attack as more inflaming others than specific planning).

28 See id.
government could readily deploy the seditious conspiracy statute against the conspirators. As a practical matter, seditious conspiracy is more likely to be used when the government believes there exists a high degree of public condemnation of the targeted group’s actions.²⁹

This article will focus primarily on the seditious conspiracy statute and its modern-day application, with an analysis of the statute as used in the Rahman case, and, as well, a discussion of the Smith Act, the companion statute to seditious conspiracy, which may also get dusted out as a prosecutorial weapon.

**HISTORY OF THE SEDITION STATUTE**

The seditious conspiracy statute³⁰ is a rarely used criminal law that allows defendants to be convicted simply for concocting general plots against the government. As one commentator put it, "seditious conspiracy deals with a crime of the mind . . . . [I]t allows a conviction based on a sense that there is antipathy or hatred. You don't have to do anything; you just have to think it."³¹ It was the intent of Congress for Section 2384 “to help the government cope with and fend off urban terrorism.”³² The interests to be protected by enforcing the statute include the government's interest "in safeguarding public security."³³

The crime of sedition dates back to Socrates.³⁴ Sedition has been defined as "a commotion; the raising of a commotion, in the state, not amounting to an insurrection; or the excitement of discontent against the government, or of resistance to lawful authority."³⁵ Sedition is usually confined to words or conduct

³¹ *See* Kevin Fedarko, *The Imaginary Apocalypse: A U.S. Court Finds a Blind Muslim Cleric and Nine of His Followers Guilty of “Seditious Conspiracy” to Conduct a Bombing Spree Throughout New York City,* TIME, Oct. 16, 1995 at 46 (quoting Fordham University Law Professor Tracy Higgins).
³² United States v. Rodriguez, 803 F.2d 318, 320 (7th Cr. 1986).
³³ *Id.* (distinguishing sedition statute from treason statute, by indicating they are rooted in different governmental interests).
without overt acts, while insurrection and rebellion involve overt acts in the form of an actual uprising against the existing organized government. Black's Law Dictionary defines sedition as:

> [a]n agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority; advocacy aimed at inciting or producing—and likely to incite or produce—imminent lawless action. ... The difference between *sedition* and *treason* is that preliminary steps commit the former, while the latter entails some overt act for carrying out the plan. But of course, if the plan is merely for some small commotion, even accomplishing the plan does not amount to treason.

The definition continues by quoting the following passage from The Book of English Law:

> This, perhaps the very vaguest of all offenses known to the Criminal Law, is defined as the speaking or writing of words calculated to excite disaffection against the Constitution as by law established, to procure the alteration of it by other than lawful means, or to incite any person to commit a crime to the disturbance of the peace, or to raise discontent or disaffection, or to promote ill-feeling between different classes of the community. A charge of sedition is, historically, one of the chief means by which Government, especially at the end of the eighteenth and the beginning of the nineteenth century, strove to put down hostile critics. It is evident that the vagueness of the charge is a danger to the liberty of the subject, especially if the Courts of Justice can be induced to take a view favorable to the Government.

Seditious conspiracy is one of a few crimes in which conspiracy alone constitutes the offense.

The modern seditious conspiracy statute reads in full:

> If two or more persons in any State or Territory, or in any

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36 Id. (establishing basis to contrast sedition from rebellion or insurrection).
37 BLACK'S LAW DICTIONARY 1361 (7th ed. 1999).
place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them [sic.], or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $20,000 or imprisoned not more than twenty years, or both.39

Elements of the Offense

To support a conviction for seditious conspiracy the Government must prove beyond a reasonable doubt the following elements:

1. That there existed a conspiracy between two or more persons to "levy war against" or "oppose by force the authority of" the United States government, to overthrow the United States, or to prevent, hinder or delay execution of any law of the United State;

2. That the conspiracy occurred in a State or Territory, or place subject to the jurisdiction of the United States;

3. That the use of force was part of the conspiracy plot.

The plain language of the modern statute requires no overt act as an element of the offense, and courts have specifically interpreted the statute to not require an overt act in furtherance of the conspiracy.40

Section 2384 does not use the word "seditious" except in the caption to the statute, perhaps because the word "seditious" in and of itself does not sufficiently convey what conduct it forbids. Courts have noted that "sedition," as a term, does not define a criminal offense with sufficient definiteness to permit ordinary people to understand what conduct is prohibited.41 The text of

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40 See Bryant v. United States, 257 F. 378, 380 (5th Cir. 1919) (involving conspiracy to prevent enforcement of Selective Draft Act, which established the precedent for notion that no overt act is necessary for conviction); see also Enfield v. United States 261 F. 141, 143 (8th Cir. 1919) (identifying that section six of Espionage Act is applicable for conspiring to oppose Selective Draft Act and thus no overt act is required).
41 See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 598 (1967) (noting that "dangers fatal to First Amendment freedoms inhere in the word 'seditious,'" and declaring invalid a law that provided for the discharge of state employees who utter "seditious words").
the statute is silent on the question of what sort of content constitutes seditious speech so as violate the law and to be stripped of the protections otherwise accorded free speech under the First Amendment.

The constitutionality of this statute has been upheld against attacks of vagueness. Most recently, the Court of Appeals for the Second Circuit held that the terms of the statute are "far more precise," than the common law crime of sedition, and that the language of the statute refers to conspiracy to levy war against the United States, or to oppose by force the authority or laws of the United States, and its elements are sufficiently clear as to inform society as to what makes up the offense.42

There have been and continue to be serious criticisms of the seditious conspiracy statute. One criticism of is this, "Essentially seditious conspiracy deals with a crime of the mind. ... [I]t allows a conviction based on a sense that there is antipathy or hatred. You don't have to do anything, you just have to think it."43 Mr. Justice Jackson once warned, "The crime [of seditious conspiracy] comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself.44

Cases of seditious conspiracy develop along common lines; the government charges the defendants with planning to "levy war"45 against the United States and, almost invariably, the defense invokes the First Amendment as a shield.46

42 See Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (narrowly construing State of Ohio's criminal syndicalism statute, similar in form and content to seditious conspiracy); Yates v. United States, 354 U.S. 298, 300 (1956) (upholding constitutionality of the Smith Act); Dennis v. United States, 341 U.S. 494, 508 (1950) (holding that speech may not be protected by First Amendment if it creates danger to nation); United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (noting that Supreme Court has only addressed seditious conspiracy statute in passing); see also discussion infra at part III.C.

43 See Fedarko, supra note 31, at 46 (noting that legal experts are concerned that people may be prosecuted for harboring inflammatory beliefs) (quoting Fordham University Law Professor Tracy Higgins).

44 Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J., concurring) (comparing "conspiratorial movements" with political assassinations, coup d'etats, putsches, revolutions, and seizures of power in modern times).

45 18 U.S.C. §2384 (2002) (explaining that penalty for levying war under this section is fine, imprisonment for up to twenty years, or both.).

46 See Rahman, 189 F.3d at 116. During the trial of Sheik Omar Abdel-Rahman asserted his First Amendment rights with respect to the fiery sermons he had given against Western imperialism; see also discussion infra at part III.E.
Conspiracy Defined

Seditious conspiracy is a completed offense at the conspiracy stage. A conspiracy is an agreement by two or more persons to commit an unlawful act. The crime of conspiracy is completed, and may be prosecuted, before any overt action occurs beyond the formation of the agreement. An "overt act" refers to any legal or illegal act in furtherance of the conspiracy. Conspiracy as a crime is thought to justify prosecution prior to an overt act because the joint illegal intent of two or more individuals is significantly more dangerous than a similar intent on the part of an individual.

When two agree to carry [a plot] into effect, the very plot is an act in itself . . . . The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement.

Conspiracy is difficult to prove at trial because the crime is "heavily mental in composition." "In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy." As a matter of substantive law, to be proven guilty of conspiracy a defendant need not know the identity of all the other members of the conspiracy and need not know every detail of the conspiracy. It is sufficient to show that the defendant

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47 See WAYNE LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 453 (1972) (explaining meaning of conspiracy).
48 See Church, supra note 18 at 572 (commenting that conspiracy prosecution aims at preventing unlawful action).
49 Id. (citing LAFAVE, supra note 47, at 459-60) (noting that only when two people's separate intents are unified in an act of agreement are they punishable).
50 State v. Carbone, 91 A.2d 571, 574 (1952) (stating common law rule that "conspiracy consists not merely in intention but in agreement of two or more persons . . . to do unlawful acts, or to do lawful acts by unlawful means . . . " if such "design rests in intention only, it is not indictable").
51 See Albert J. Harno, Intent in Criminal Conspiracy, 89 U. PA. L. REV. 624, 632 (1941) (explaining that conspiracy is complete when one manifests his intention to others).
52 Id. at 624 (explaining that conspiracy may be connected to every type of tort or crime).
53 See United States v. Sureff, 15 F.3d 225, 230 (2d Cir. 1994) (citing Blumenthal v. United States, 332 U.S. 539, 557, (1947)) (noting that knowing other parties to conspiracy is not required in order to be found guilty of conspiracy); see also United States v. Labat, 905 F.2d 18, 21 (2d Cir. 1990) (upholding a conspiracy charge when defendant did not know all participants or their actions in large cocaine deal).
simply joined in the initial illegal agreement.\textsuperscript{54} That is, once an unlawful agreement is shown to have been made, the Government need show only: some evidence from which it can be reasonably inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it.\textsuperscript{55}

Some commentators argue that conspiracy cases based on speech acts alone present considerable opportunity for unfairness to the defendants because the inquiry focuses on a morass of highly subjective and ultimately unreliable inferences.\textsuperscript{56}

\textit{No Overt Act Required in Seditious Conspiracy}

The philosophy behind allowing the charge of seditious conspiracy absent an overt act is that the state should not be powerless to prevent crimes that are still in their formative stages. It has been explicitly held that the Government need not prove an overt act in furtherance of the goal of sedition in order to prove the crime of seditious conspiracy.\textsuperscript{57} In the \textit{Rahman} case the issue of proof of overt acts was expressed this way: “The Government, possessed of evidence of conspiratorial planning, need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators.”\textsuperscript{58} The gist of the crime is agreement to promote the ends the law forbids.\textsuperscript{59}

When seditious conspiracy is charged, the Government \textit{may} decide to allege and prove certain relevant overt acts undertaken in furtherance of the conspiracy by one defendant or another.\textsuperscript{60}

\textsuperscript{54} See United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (explaining that “one beneficial purpose of conspiracy law is to permit arrest and prosecution before substantive crime has been accomplished”).

\textsuperscript{55} See United States v. Sanchez Solis, 882 F.2d 693, 696 (2d Cir. 1989) (quoting United States v. Gaviria, 740 F.2d 174, 183 (2d Cir. 1984)).

\textsuperscript{56} See Church, supra note 18, at 575 (commenting on conspiracy cases based on speech alone as possessing considerable unfairness).

\textsuperscript{57} See Dennis v. United States, 341 U.S. 494, 509 (1951) (upholding conviction for advocating overthrow of government before any overt acts were undertaken in furtherance of goal); see also United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986) (confirming that seditious conspiracy statute requires no overt act).

\textsuperscript{58} See Rahman, 189 F.3d at 117 (acknowledging that seditious conspiracy statute requires no overt act).

\textsuperscript{59} See id. at 159 (indicating that co-conspirators were all equally culpable in conspiracy because they were willing to do whatever was necessary to effectuate plans).

\textsuperscript{60} See id. at 116, 129 (introducing evidence of overt acts such as making bombs, contributing money to rent a “safe-house” in which to build the bombs, and other facts, against Sheik Rahman and his co-defendants).
Although, proof of some relevant overt action often can help pinpoint the existence of a conspiracy, and can help to show that the conspiracy proved to come "dangerously close to success," it is not required to show that an individual defendant personally knew of the overt acts performed by any of the other defendants in furtherance of the conspiracy. The evidence against Sheik Rahman showed that he was in "constant contact" with other members of the conspiracy, that he was looked to as a leader, and that he accepted that role and encouraged the other defendants to engage in violent acts against the United States.

The advisability of proving overt action in addition to speech was strongly advised by Justice Douglas in his concurring opinion in Brandenberg v. Ohio, where he said that the:

line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused.

Evidence of some type of overt action will lend credence to the prosecution's theory that seditious conspiracy occurred. The prosecution can make a stronger case by showing overt action undertaken in furtherance of anti-governmental goals—e.g., evidence that congregants took some identifiable action in

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61 See United States v. Offutt, 127 F.2d 336, 340 (D.C. Cir. 1942) (arguing that overt act is a "manifestation that a conspiracy is at work").

62 Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) at 46 (stating that in order for attempts or incitement to be punishable it must come "dangerously near success," and bad intention is one factor in determining whether actual conduct is dangerous).

63 See Rahman, 189 F.3d at 124 (noting Rahman was in "constant contact" with other members of the conspiracy).


65 Id.
furtherance of a seditious sermon such as "the collection of weapons and ammunition in substantial quantities, or the conducting of field surveys to ascertain ways and means of sabotaging public utility or defense plants."\(^6\)

The presence of an overt act can help distinguish legitimate spiritual beliefs from dangerous ones, as well as speech that calls for concrete action as distinguished from speech that simply evokes spiritual metaphors. In other words, if there is evidence of overt action, the jury will be in a better position to evaluate whether the violence spoken about passes the "clear and present danger" test, discussed below, by genuinely calling for urban terrorism, or whether it more likely constitutes symbolic imagery. Showing of overt action would make for more straightforward prosecutions so that courts and juries would not have to undertake exhaustive investigations into the meanings of particular religious doctrines or face difficult questions requiring expert testimony of religious terminology.

In light of the free and open society in which we live and the eminence accorded religious speech in our constitutional framework, it may be politically wise to require overt action in seditious conspiracy cases to allay fears concerning the prosecution of a particular religion or particular religious speech.\(^7\) In the Rahman case fears that Islam was being placed on trial would likely have been greater had the prosecution not provided evidence of a massive terrorist plot, including evidence of the defendants being caught red-handed mixing explosives to be used in bombings. In order to strengthen a case against clerics based on radical sermons evidence of relevant overt acts should be introduced consistent with the character of the seditious plot so as to convince the jury that the conspiracy in fact posed imminent danger to the nation.

The "Clear and Present Danger" and "Imminent Lawless Action" Standards in the Prosecution of Seditious Conspiracy

Criticism of government is thought to be the bedrock of our

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\(^6\) Hellman v. United States, 298 F.2d 810, 813 (2d Cir. 1962).

democracy, and therefore seditious conspiracy cases elicit serious constitutional concerns. As mentioned above, the seditious conspiracy statute gives no criteria for determining at what point colloquy between two or more people loses First Amendment protection and constitutes a conspiracy under the statute. That has been left for the courts to decide. The standard for analyzing the content of speech in seditious conspiracy cases has evolved over the years. The first modern day analysis was formulated by Justice Holmes, writing for the majority, in *Schenck v. United States*, 68 a sedition case from World War I, in which the Court held that the constitutional guaranty of free speech and press does not prevail where "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." 69 That case involved speech alone as a means by which to accomplish sedition in time of war; the "substantive evils" about which Justice Holmes was speaking were inducement of insubordination in the armed forces of the United States and obstruction of enlistment while the country was at war. Since *Schenck*, the Court has generally adhered to the "clear and present danger" test with the focus being primarily on its proper application. 70

In *Abrams v. United States*, 71 the defendants were convicted of seditious conspiracy under the Espionage Act of 1917 and 1918 72 with evidence that by today's standards may seem relatively innocuous. The defendants were accused of circulating a printed flyer in which they denounced President Wilson as a hypocrite and a coward because troops were sent into Russia. The most inflammatory section of the flyer assailed the government with these words: "The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes!

68 249 U.S. 47 (1919).
69 Id. at 51.
70 See *Abrams v. United States*, 205 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (expressing his disapproval of Court's application of "clear and present danger" standard and arguing that majority incorrectly applied the test in that there was no adequate showing of imminent threat to national security arising out of defendant's speech); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (criticizing majority for affirming conviction without adequate proof of immediate danger to government).
71 260 U.S. 616 (1919).
72 Id. at 616-17 (stating defendants were convicted of conspiring to violate provisions of Espionage Act of Congress).
friends, there is only one enemy of the workers of the world and that is CAPITALISM . . . Awake! Awake, you Workers of the World!"73

Another flyer contained the following statements:

Do not let the Government scare you will [sic] their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight. . .

We, the toilers of America, who believe in real liberty, shall pledge ourselves, in case the United States will participate in that bloody conspiracy against Russia, to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia . . .

If they will use arms against the Russian people to enforce their standard of order, so will we use arms, and they shall never see the ruin of the Russian Revolution.74

The Court took this language to be a clear appeal to the "workers" of this country to arise and put down by force the government of the United States.75 The Court held, in evaluating the overall force of these writings:

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war . . . [T]he plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible

73 Id. at 620 (articulating anti-capitalist viewpoint in propaganda).
74 Id. at 622-23 (emphasis added) (identifying additional material distributed by anti-Wilson supporters).
75 See id. (highlighting intended result of such material upon those who read material).
defeating the military plans of the Government . . . .

In a dissent objecting to the majority's application of the "clear and present danger" test under these facts, Justice Holmes, said, "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would undermine the success of the government arms or have any appreciable tendency to do so."77

The "clear and present danger test" is satisfied without any overt act in furtherance of a conspiracy based on the notion that preventing the spread of dangerous speech may be essential to national security. As Chief Justice Vinson said in Dennis v. United States, the Government need not hold its hand:

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.78

In Brandenburg, the Supreme Court laid down a substantially similar rule, which, as noted by Justice Douglas in his concurring opinion in that case, is an offspring of the "clear and present danger" test.79 The Court construed an Ohio statute, which purported to make criminal the act of associating with a group to advocate violence to achieve political reform. The Court held that prosecution for subversive advocacy of violence or joining with others to do so can pass constitutional muster only if such "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."80 There are

76 Id. (explaining underlying purpose behind circulation).
77 See Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (expressing view that published statements alone would not give rise to punishable action).
78 Dennis v. United States, 341 U.S. 494, 509 (1951) (emphasis added) (upholding conviction for advocating overthrow of government before any overt acts were undertaken in furtherance of goal).
80 Id. at 447.
two elements here with respect to prosecutions for subversive advocacy: one, that such advocacy is directed towards "imminent lawless action," and, two, that it is likely to result in "imminent lawless action." This case makes it clear that the First Amendment protects advocacy of violence in the abstract, but that the Government may step in where the speech is an attempt to incite people to undertake imminent lawless action and is likely to produce imminent lawless action. The imminence test still leaves unanswered the question of how close in time the inciting speech must be to the anticipated lawless action before the offenders can be stopped and arrested.

Temporal Relationship Between Advocacy and Action

The "imminence" standard of Brandenberg did not override the "clear and present danger" test, but was intended to clarify it. Whether the utterance is likely to bring about a danger of substantial evils sufficient to constitute a "clear and present danger" that is temporally "imminent" seems to be a question of proximity and degree. There is no algorithm; this is not rocket science. As recognized by the court in Bridges v. California, the "clear and present danger" test is a working principle, and the question of proximity and degree cannot be completely captured in a formula, but the degree of imminence of the evil at issue must be "extremely high before utterances can be punished." A seditious conspiracy advocating violent action to be taken at some unspecified future time or uttered with the hope that it may ultimately lead to violent revolution may simply count as "abstract doctrine" rather than "advocacy of action," and therefore is not enough to satisfy the "clear and present danger" test. On the other hand, "language of incitement" is not constitutionally protected "when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify

82 314 U.S. 252 (1941).
83 Id. at 263 (positing what emerges from "clear and present danger" doctrine).
apprehension that action will occur." Thus, where facts involve a "highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with . . . world conditions," the existence of a conspiracy may have advanced sufficiently so that the Government need not wait until some further "catalyst" is added to the equation.

Seditious conspiracy might be directed to action either now or in the future in order to be sufficiently "imminent" as to permit a Government response. Proof of an overt act will more clearly show that the "imminence" test is satisfied under Brandenberg, because an overt act helps to show that the defendant's call for violent action is temporally close enough in time to make it "imminent," rather than being so remote from action as to be lacking in probative value.

Temporal proximity of the danger also depends on the political state of affairs. In Schenck, Justice Holmes stated, "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Similarly, in American Communications Association. v. Douds, the Court pointed out that the "clear and present danger" test depends in its application upon the kind of danger presented in the particular context. The Schenck case, involved distribution of a circular denouncing conscription in impassioned terms and vigorously urging peaceful opposition to the selective draft, such as a petition for the repeal of the Selective Draft Act of 1917. The most inciting sentence being, "You must do your share to maintain, support and uphold the rights of the people of this country." This was deemed to satisfy the "clear and present danger test" under the circumstances of the day, but one may well question whether that would be sustained under similar circumstances in today's more tolerant society, even in an

85 Id. at 321.
89 Schenck, 249 U.S. at 51.
era of heightened concern about terrorism.

The temporal relation between the language of incitement to unlawful action and the time for action may be sufficiently imminent if the appeal is described to be "as speedily as circumstances will permit."\(^9\) In *Bary v. United States*,\(^91\) the temporal relation is described as such:

It is enough if the indictment is directed with intended precision to the taking of steps or the doing of things in preliminary preparation for the employment of force and violence in an effort to effectuate the overthrow or destruction of the Government when the propitious moment is at hand.\(^92\)

In cases involving religious sermons, the particular circumstances of delivery may be relevant. When a call to overthrow the "infidel" government is delivered by an earnest orator in a fiery manner to an impassioned, frenzied throng, the question of "proximity and degree" of danger may well be imminent, compared to a setting in which the delivery is lukewarm and the audience docile. If the adherents of the defendant's sect are an angry mob or in some other state of agitation, that circumstance is relevant because they are more amenable to be incited to undertake imminent lawless action.

**Prosecution for Religious Speech: A Case Study of Sheik Omar Abdel Rahman**

As mentioned above, the Government indicted Sheik Omar Abdel Rahman and his nine co-defendants with various crimes, including seditious conspiracy "to levy a war of urban terrorism against the United States, to oppose by force the authority of the United States, and by force to prevent, hinder and delay the execution of the laws of the United States."\(^93\)

A state of mind is sometimes difficult to prove, but in the prosecution of Rahman and his co-defendants, evidence was introduced as to the actual content of his sermons, specific

\(^9\) See *Dennis*, 341 U.S. at 512.

\(^91\) Bary v. United States, 248 F.2d 201 (10th Cir. 1957).

\(^92\) Id. at 207.

counsel, as well as advice that was given to some of his followers. The government based part of its case on evidence that Rahman incited his followers to wage religious warfare against the United States through the content of the Sheik’s fervent sermons and religious advice. The government endeavored to prove that the Sheik’s sermonizing and counseling incited his followers to wage religious warfare.94

The central allegation of the seditious conspiracy portion of the indictment was that the defendants conspired to wage a “war of urban terrorism” against the United States, and to forcibly to oppose its authority.95 The prosecution adduced evidence at trial showing that Sheik Rahman was the leader of the seditious conspiracy, the purpose of which was *jihad* in the sense of a struggle against the enemies of Islam. As evidence of this purpose, he had given a speech to his followers instructing them to “do *jihad* with the sword, with the cannon, with the grenades, with the missile . . . against God’s enemies,” and that the Koran mandates this *jihad*.96

According to his speeches and writings, Sheik Rahman perceived the United States as the primary oppressor of Muslims worldwide, given its efforts to assist Israel in gaining power in the Middle East.97 According to Sheik Rahman, formation of a *jihad* army made up of small “divisions” and “battalions” to carry out this *jihad* was necessary in order to combat oppressors of Islam, including the United States. In a January, 1993, appearance at a conference in Brooklyn, New York, Sheik Rahman voiced his beliefs in violent *jihad*. He stated, among other things, “that being called terrorists was fine, so long as they were terrorizing the enemies of Islam, the foremost of which was the United States and its allies.”98

One prosecutorial strategy in seditious conspiracy cases is to introduce evidence of writings and speeches that alone do not

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94 *See* Grinstein, *supra* note 22, at 1349 (commenting that government tried to prove defendant encouraged followers to engage in religious warfare).

95 *See* United States v. Rahman, 189 F.3d 88, 104 (2d Cir. 1999) (stating defendants plan to wage “urban terrorism” on U.S.).

96 *See id.* at 104 (reviewing contents of Rahman’s speech).

97 *See id.* (discussing Rahman’s position that United States is foremost oppressor of Muslims).

98 *See id.* at 107 (reviewing statements made by Rahman during January 1993 conference in Brooklyn).
constitute sedition, but are relevant for the purpose of showing motive and intent. In the Rahman case, evidence was introduced of a press conference in which the cleric warned that the United States would pay a terrible price for supporting Mubarak, the President of Egypt. Although this evidence was not seditious it was relevant to show the sheik's resentment and hostility towards the United States motivated his solicitation and procurement of illegal attacks against the United States.

Among the possessions seized from one defendant, the Government found notebooks describing "war" on the enemies of Islam and the manner of prosecuting them, including "exploding ... their high world buildings," as well as manuals on guerrilla warfare tactics and explosives.

A handwritten notebook of, El Sayyid Nosair, another defendant who was convicted of the murder of Rabbi Meir Kahane, a founder of the Jewish Defense League, stated that to establish a Muslim state in the Muslim holy lands it would be necessary:

99 See Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (holding that "[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

100 See Rahman, 189 F.3d at 125 (discussing warning made by Rahman during June 17, 1993 press conference).

101 See Rahman, 189 F.3d at 105, 123 (describing contents of notebook found among possessions of El Sayyid Nosair).

102 In the Rahman case, one defendant was charged under the RICO statute for the murder of Rabbi Kahane. The RICO statute, 18 U.S.C. §1959(a) states:

> Whoever ... for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, ... assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, ... or attempts ... so to do, shall be punished ....

To be convicted of this crime, the Government must prove beyond a reasonable doubt:

(1) that the organization was a RICO enterprise; (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in doing so was to maintain or increase his position in the enterprise.

United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992).

In the RICO portion of the Government's case, Rahman and his followers were characterized as the Jihad Organization, which it claimed was "opposed to nations, governments, institutions and individuals that did not share the group's particular radical interpretation of Islamic law," and that an objective of this group was "to carry out, and conspire to carry out, acts of terrorism - including bombings, murders, and the taking of hostages - against various governments and government officials, including the United States government and its officials." Rahman, 189 F.3d at 126. Under the RICO statute, the Government must prove that the defendant "committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." Concepcion, 983 F.2d at 381.
to break and destroy the morale of the enemies of Allah. (And this is by means of destroying) (exploding) the structure of their civilized pillars. Such as the tourist infrastructure which they are proud of and their high world buildings which they are proud of and their statues which they endear and the buildings in which they gather their heads (leaders).\textsuperscript{103}

Evidence showed that Rahman counseled a co-defendant to murder the President of Egypt and issued a \textit{fatwa}, a religious opinion on the holiness of an act calling for the murder.\textsuperscript{104}

As mentioned above, the prosecution introduced into evidence a number of overt actions taken by various defendants in furtherance of their plot to show they had moved well beyond the mere agreement stage. Evidence of overt action in furtherance of the conspiracy included the fact that many of the defendants participated in military training exercises, the purpose of which was to train them to carry out \textit{jihad} "operations."\textsuperscript{105} Evidence also showed that several of the defendants "purchased fuel, fertilizers, and timers, and actively sought to locate detonators.\textsuperscript{106} They had begun construction of the explosives when they were arrested."\textsuperscript{107} In addition to providing assistance to the bombing of the World Trade Center in February 1993, they had:

recruited sufficient participants to carry out the plan; contributed money to rent a safe house in which to build the bombs; reconnoitered the potential targets of the bombs, by driving through and videotaping the tunnels and discussing the structure of the tunnels with an engineer; purchased, or attempted to purchase, what they believed to be the necessary components for the bombs, including actually purchasing oil, fertilizer, timers, and barrels in which to mix the explosives; attempted to find stolen cars in which to carry the bombs; and obtained a submachine gun to assist in carrying out the plan.\textsuperscript{108}

One of the more damaging statements used against the sheik

\textsuperscript{103} \textit{Rahman}, 189 F.3d at 105.
\textsuperscript{104} \textit{Id.} at 123 (reviewing facts supporting sufficiency of evidence of Rahman's conviction).
\textsuperscript{105} \textit{Id.} (using evidence that plot went past mere agreement to support jury finding).
\textsuperscript{106} \textit{Id.} (explaining that defendants purchased materials used in making bombs).
\textsuperscript{107} \textit{See} United States v. Rahman, 189 F.3d 88, 123 (2d Cir. 1999) (explaining defendants began constructing bombs when arrested).
\textsuperscript{108} \textit{Id.} at 129 (noting defendants were beyond mere preparation stage).
was a tape in which he said,

The Koran makes it (terrorism) among the means to perform jihad in the sake of Allah, which is to terrorize the enemies of God and (who are) our enemies too . . . . We must be terrorists and must terrorize the enemies of Islam and frighten them and . . . disturb them.\textsuperscript{109}

On a tape recording, one of the conspirators had laughed as he spoke of his anticipation of commuters drowning.\textsuperscript{110}

In a case of this kind, where the prosecution is initiated in order to prevent the accomplishment of an illegal objective, clear evidence is difficult to obtain, but much of the evidence in the Rahman case came by way of a paid informant.\textsuperscript{111}

"Sheik Rahman's role in the conspiracy was generally limited to overall supervision and direction of the membership," issuing \textit{fatwas} to members of the group sanctioning proposed courses of conduct, and advising others whether the acts would be in furtherance of \textit{jihad}.\textsuperscript{112} Rahman argued on appeal that he had limited contact with most of the other defendants, that he was physically incapable, due to his blindness, of participating in the "operational" aspects of the plots, and that there was little direct evidence of his knowledge of many of the events in question. Andrew McCarthy, one of the federal prosecutors on the case, was quoted as saying: "'There is no difference between being the engineer of a specific act and someone who is the spiritual and ideological leader of the conspiracy' . . . 'What the evidence I think sensibly shows is that there is an organisation for terrorism in the United States.'"\textsuperscript{113}

"On January 17, 1996, Judge Michael Mukasey gave Sheik Rahman a life sentence for his role in the conspiracy."\textsuperscript{114} The

\textsuperscript{109} Gail Appleson, \textit{Sheik Heard Endorsing Terrorism Against Foes,} \textit{CHICAGO SUN-TIMES,} Feb. 3, 1995, at 25 (commenting on evidence used at trial to show Rahman's guilt).


\textsuperscript{111} \textit{See Rahman,} 189 F.3d at 106, 132 (noting Salem was FBI informant in Rahman case).

\textsuperscript{112} \textit{Id.} at 104 (outlining Rahman's responsibilities including supervision and promulgation of religious opinions on holiness of acts).


\textsuperscript{114} \textit{See Grinstein, supra} note 22, at 1349 (discussing Rahman's sentence).
Court of Appeals affirmed the convictions of all the defendants and upheld the constitutionality of the seditious conspiracy statute.\textsuperscript{115}

In the appeal, Sheik Rahman argued that the use of his religious speeches and writings as evidence of his participation in the conspiracy violated his freedom of speech and of religion. The court of appeals noted, not unexpectedly, that conspiracy by its very nature is characteristically committed through speech, and that that the conviction of Sheik Rahman for the sermons and counseling he gave in his capacity as a Muslim cleric did not infringe his First Amendment rights.

[O]ne is not immunized from prosecution for \ldots speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible.\textsuperscript{116}

The court of appeals found that Sheik Rahman’s speeches and counseling of others as being “\ldots not simply the expression of ideas,” but rather his speeches and counseling constituted the crime of conspiracy to wage war on the United States in violation of 18 U.S.C. §2384. For instance, he was quoted as saying to a co-conspirator in response to a question about the propriety of bombing the United Nations Headquarters: “Yes, it’s a must, it’s a duty.”\textsuperscript{117}

Sheik Rahman later advised a co-defendant “against making the United Nations a bombing target because that would be bad for Muslims, and advised him instead to seek a different target (U.S. military installations) for bombings, and to plan for them carefully.”\textsuperscript{118} The court went on to say:

Words of this nature—ones that instruct, solicit, or persuade

\textsuperscript{115} See Rahman, 189 F.3d at 88 (noting court upheld seditious conspiracy statute as well as defendant’s conviction).
\textsuperscript{116} United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (distinguishing protected speech from criminal solicitation).
\textsuperscript{117} Id. (discussing Rahman’s criminal solicitation).
\textsuperscript{118} Id. at 124 (outlining Rahman’s advice not to attack U.N. but to seek U.S. targets).
others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry. The fact that [Rahman’s] speech or conduct was “religious” does not immunize him from prosecution under generally-applicable criminal statutes.\textsuperscript{119}

The Court of Appeals ruled that Sheik Rahman’s sermons instructing his impassioned followers to wage violent \textit{jihad} against the United States met the “clear and present danger” test in the context of the plot uncovered by the FBI, and created an imminent danger to the nation’s security. The ruling pointed out that the buildings and tunnels that were the target of the plot were pinpointed to disable major commercial activity of the United States. The court felt that this was a sufficient basis for a conviction of seditious conspiracy even though the tunnels and targeted buildings were not, properly speaking, “property of the United States.” under Section 2384.\textsuperscript{120} The totality of the conspiracy was deemed, as a whole to be an effort to overthrow or destroy the Government of the United States by force. According to this ruling, conviction of seditious conspiracy does not require a plot designed to put down government buildings per se, but may apply to a conspiracy that aspires to disable commercial activity.

The appellants also argued that a conviction for seditious conspiracy has to satisfy the requirements of the Treason Clause of the U.S. Constitution, Art. III, §3, which provides in relevant part: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” The argument was that the defendants were being tried for all the elements of treason, but under a different name, and without conforming to the two-witness requirement of the Treason Clause in support of

\textsuperscript{119} \textit{Id.} at 117 (explaining Rahman’s speech is criminal and gains no protection from religious overtones).

\textsuperscript{120} \textit{Id.} at 127 (citing United States v. Sanchez Solis, 882 F.2d 693, 696 (2d Cir. 1989) (noting that although targets were not “property of the United States” it was a sufficient basis for conviction).
the same overt act.\textsuperscript{121}

The Court of Appeals said that the Supreme Court had not resolved the question of whether the Treason Clause applies to offenses that include all the elements of treason but are not charged as "treason."\textsuperscript{122} It is an open question "whether a defendant who engaged in subversive conduct might be tried for a crime involving all the elements of treason, but under a different name and without the constitutional protection of the Treason Clause . . . ."\textsuperscript{123}

The court further stated that the crime of seditious conspiracy "differs significantly from treason, not only in name and punishment, but also in definition."\textsuperscript{124} Mainly, the court believed that seditious conspiracy "by levying war includes no requirement that the defendant owe allegiance to the United States, an element necessary to convict someone of treason" under 18 U.S.C. §2381.\textsuperscript{125} However, I believe the Court of Appeals misconstrued the treason statute. The statute reads as follows, "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason . . . ." It is well settled that aliens, while domiciled in this country, owe a local and temporary allegiance, which continues during the period of their residence, in return for the protection they receive, and that for a breach of this temporary allegiance an alien may be punished for treason.

Perhaps a better disposition of this point would have been that seditious conspiracy is a lesser included offense of treason, that it is in the nature of "attempted" treason by conspiring to levy war or to put down the Government. Also, treason is broader in its reach, in that it applies to a defendant who owes allegiance to the Government no matter where he is living, while the seditious

\textsuperscript{121} See Rahman, 189 F.3d at 113. Cf. Ex Parte Quirin, 317 U.S. 1 (1942) (suggesting, in dictum, that citizens could be tried for offenses against the law of war that included all the elements of treason), with Cramer v. United States, 325 U.S. 1, 45 (1945) (noting in dictum that it did not "intimate that Congress could dispense with [the] two-witness rule merely by giving the same offense [of treason] another name.").

\textsuperscript{122} See United States v. Rahman, 189 F.3d 88, 113 (2d Cir. 1999) (explaining Supreme Court did not decide whether Treason Clause applies to offenses that contain all elements but are not charged as "treason").

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} Id.
conspiracy statute applies only to persons who commit the offense in a place subject to the jurisdiction of the United States.

Sheik Rahman also contended that he was denied a fair trial because the judge would not allow expert testimony to help the jury understand his function as a religious cleric. The proffered evidence would have provided general information about Islam and would have adduced that Rahman’s actions and statements were governed by Islamic law.

The Court of Appeals held that the proffered testimony was not relevant to the issues before the jury, and that the evidence would not have constituted a defense that Sheik Rahman was justified within a framework of Islamic law in conspiring to levy war against the United States or to solicit others to commit crimes of violence. The court of appeals held that the trial judge also did not abuse his discretion in excluding expert testimony concerning the concept of jihad. In any event, another defense witness had provided testimony on the meaning of the term “jihad.”

It’s a struggle. That’s what the word jihad means, it means struggle. It could take on another meaning for instance in Afghanistan, Muslims fighting for their liberation against the Russians. That’s jihad also. But for us, in the context of our environment, jihad is cleaning up our community of drugs, getting our family, our men, strong, getting them jobs, taking care of their family. That’s a kind of jihad or struggle.

Another witness was permitted to testify as to the meaning of the term “fatwa.” The witness testified to the effect that a fatwa is an opinion. When asked, “Are you commanded to follow that opinion?” the witness responded, “No, he does not command us anything. There is something I would like to know, and I ask him what is right and what is wrong, and he would answer, and it’s all up to me what I see.”

The prosecution in seditious conspiracy cases must convince the jury that the defendant’s utterances issued a strong enough warning to meet the “imminent lawless action” standard, and often this is an area where the jury ought not be left with little guidance. In a case involving religious speech, the jury must invariably examine dogma of the defendant’s religious beliefs and
have the difficult task of deciding whether they are protected as abstract teaching of principles, even if they teach "the moral propriety or even moral necessity for a resort to force and violence," as distinguished from teachings deployed in "preparing a group for violent action and steeling it to such action." That is, juries must be able to determine whether the speeches or passages presented into evidence call for some concrete action or evoke mere spiritual metaphors. In other words, is the violence spoken about merely symbolic—a literary device designed to embellish the adherents' religious experience—or does the speech call for war in terms that are objectively manifest?

Judges who hear seditious conspiracy cases should allow expert testimony on behalf of the accused for the purpose of informing the jury about the development and dissemination of the particular spiritual theory over time, the nature of the social interaction between clerics and congregants, and of the counseling and instruction of the accused, and to provide the meanings of particular religious terms. That will help insure that abstract principles and other metaphoric language might be separated from doctrine that may truly pose a "clear and present danger" to the Government.

For instance, a prosecution could be directed to one of the prominent teachings of radical Islamic fundamentalism, namely *jihad*. There is ample authority for the proposition that Muslims take *jihad* to mean that it is incumbent upon them to seek to expand Islam at the expense of the non-Islam world, or the "land of war." Islamic philosophy has been asserted to mean that "it is only right that the peaceful part of the world [i.e., the Islamic world] should eventually come to increase at the expense of the rest of the world. This is just, since it results in benefits not only to Muslims but also to non-Muslims . . . [who] benefit through

128 For instance the Koran states: "O Prophet, strive against the disbelievers and the hypocrites and press hard on them. Their abode is hell and an evil destination it is." KORAN 9:73 (Muhammad Zafrulla Kahn trans., 1970.) Does the term "press hard" urge a grisly death for all disbelievers, or does "press hard" simply describe disbelievers' treatment in the afterlife? It is difficult to ascertain from the text alone the extent to which this passage speaks in metaphor or just how the passage should be taken. Extremists take passages like that to be a call for actual violence, calling upon the believers themselves to inflict harm upon the target.
129 See OLIVER LEAMAN, A BRIEF INTRODUCTION TO ISLAMIC PHILOSOPHY, 135 (1999).
proximity to Islam and the opportunity to become Muslims!"\textsuperscript{130} 
"[I]t might well be thought to be acceptable to intervene militarily to bring the truth more speedily before the minds of unbelievers."\textsuperscript{131}

There are many warlike passages of the Koran that appear to readily concur with the foregoing interpretation of Islam:

O Prophet, struggle with the unbelievers and hypocrites, and be harsh with them. Their refuge is Hell. (9:74)

Fight them until there is no persecution and the religion is entirely God's. (8:40; see also 2:193)

If we had wanted, we would have raised up a warner in every city. So do not obey the unbelievers, but struggle with them powerfully. (25:34)

When you meet the unbelievers, smite their necks, then, when you have killed a lot of them, take them prisoner. When the war is over, you can set them free, either for ransom or grace. If God had wished he would have avenged himself against them. He may use them as a means of testing you. Those who are killed in the way of God he will not send awry. He will guide them and dispose their minds correctly, and will admit them to Paradise, which he has made known to them. (47:48)

Many religious authorities argue that \textit{jihad} can be declared for the killing of any polytheist enemies, including women and children.\textsuperscript{132} The Sunnis sect of Islam claim that any relevant \textit{de facto} political authority can declare war, while for the Shi'i it must be an iman, a divinely appointed leader.\textsuperscript{133} While the importance of free will in religious matters is frequently mentioned in the Koran, there is room to argue that toleration of unbelievers is a threat to Islam, and that it "needs to be challenged militarily in order to preserve the community."\textsuperscript{134}

Another area with which an expert witness could assist the jury is whether the adherents of the sect themselves interpret

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 135.
\item \textsuperscript{131} \textit{Id.} at 136.
\item \textsuperscript{132} \textit{Id.} at 138 (explaining jihad as it relates to killing of women and children).
\item \textsuperscript{133} \textit{Id.} at 139.
\item \textsuperscript{134} \textit{Id.} at 139 (commenting on who declares war in different Islamic sects).
\end{itemize}
the sermons to be a call for actual violence that they are to perform (as opposed to being performed by God or other deities). If we trust the jury system, then we will have to trust that the jury is positioned to weed out beliefs that are truly "dangerous" from "innocent" beliefs that may pass muster rather than be swept away in the national-security interest. But the jury may well need the guidance of expert testimony from the defense as well as from the prosecution.

There is no doubt that the government has the power to punish seditious conspiracy, whether couched in spiritual sermons or by a more explicit terrorist plot. The Court of Appeals, in affirming the convictions of Sheik Rahman and his followers, acknowledged that charges of seditious conspiracy "must be scrutinized with care to assure that the threat of prosecution will not deter expression of unpopular viewpoints by persons ideologically opposed to the government."\textsuperscript{135} It appears that Rahman's conviction stands on solid First Amendment grounds.\textsuperscript{136} The arguments that religious speech should be treated differently than other speech failed to garner any judicial sympathy: "[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."\textsuperscript{137}

The seditious conspiracy statute can be used to proscribe or limit religious unorthodoxy, and to literally target certain heretical or unorthodox religious doctrines. Congress has apparently never enacted any law to specifically proscribe unorthodox religions, but in effect that is what the statute allows.\textsuperscript{138} That is, the government is permitted to regulate to the point of effectively outlawing the doctrines of organized religions, if the "clear and present danger" test is met.

\textbf{The Smith Act}

The companion statute to the seditious conspiracy law is the

\textsuperscript{135} United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999).
\textsuperscript{136} See Grinstein, supra note 22, at 1365 (positing Rahman was convicted based upon First Amendment).
\textsuperscript{138} See Grinstein, supra note 22, at 1366 (explaining statutes restriction on unorthodox religions).
Smith Act,\textsuperscript{139} which makes it a crime to knowingly or willfully advocate or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States, or of any state or political subdivision, by force or violence; to publish or distribute any material advocating such action, if done with intent to overthrow the government; or to be a member of, or to organize, any group which has as its purpose the overthrow of the government, knowing the purposes of the group. The Smith Act differs from the seditious conspiracy statute in that it pertains to the \textit{mere advocacy} or teaching of concrete violent action. Like seditious conspiracy, it has been interpreted to apply only to concrete violent action as distinguished from the teaching of abstract principles related to the forcible overthrow of the Government. Seditious conspiracy pertains to plots directed at overthrowing the government, while the Smith Act pertains to the mere teaching or advocacy of the violent overthrow of government. The seditious conspiracy statute is directed at a conspiracy of two or more persons who plot to overthrow the government by force, while the Smith Act’s focus is on organizations and members who teach or advocate the violent overthrow of government.

Sheik Rahman and his co-defendants were not charged under the Smith Act, although prosecution for membership in a radical religious sect that advocates the overthrow of government would seem to be a prosecutorial option. The Smith Act states:

\begin{quote}
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 \ldots the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
\end{quote}

\begin{quote}
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
\end{quote}

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—is guilty of this section.\textsuperscript{140}

The Smith Act also contains a conspiracy section:

If two or more persons conspire to commit any offense named in this section, each shall be fined under this title... and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.\textsuperscript{141}

The constitutionality of the Smith Act, enacted in 1940, was upheld by the Supreme Court in \textit{Dennis v. United States},\textsuperscript{142} in the context of defendants who were charged with being organizers of the Communist Party

as a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and ... knowingly and willfully advocate[ing] and teach[ing] the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.\textsuperscript{143}

The Supreme Court also held in that case that the “clear and present danger” test applies to any prosecution under the Smith Act.\textsuperscript{144} As discussed in more detail below, the Supreme Court has held that violation of the Smith Act is a specific intent crime, i.e., the statute “requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence.”\textsuperscript{145}

\begin{footnotes}
\item[140] \textit{Id}.
\item[141] \textit{Id}.
\item[142] \textit{Dennis v. United States}, 341 U.S. 494 (1951).
\item[143] 341 U.S. at 561 n.1 (Jackson, J., concurring).
\item[144] \textit{See Dennis}, 341 U.S. at 506, 512, 517 (explaining how standard of “clear and present danger” applies to any analysis of Smith Act necessarily includes First Amendment issue).
\item[145] \textit{Id} at 499-500 (citation omitted)
\end{footnotes}
Separate Sections Under the Smith Act

The Smith Act contains three sections, with separate categories of conduct that violate the statute: (1) The advocacy clause makes it a crime to knowingly advocate or teach the desirability or propriety of overthrowing or destroying the Federal government or the government of any state or political subdivision, by force or violence. There are two elements here: (a) advocacy and (b) violence. (2) The publication clause makes it a crime to publish, distribute, display, etc., printed material that violates the advocacy clause. There are three elements here: (a) publishing, printing, circulating, etc., (b) of material that advocates the violent overthrow of government, and (c) the defendant intends that such publishing, printing, or circulating will have the intended result. (3) The membership clause makes it a crime to organize or attempt to organize a group that teaches the advocacy referred to in the advocacy clause, or to become a member of such an organization, knowing the purposes thereof. There are two elements here: (a) organizing or becoming a member of an organization with the requisite intent or knowledge, and (b) the organization advocates the violent overthrow of government (i.e., the elements of the advocacy clause are applied to the organization).

Advocacy Clause of Smith Act

Like the seditious conspiracy statute, the Smith Act is silent as to where the line is drawn between protected speech and prohibited speech. The Dennis case left the standard for ascertaining what constitutes "advocacy" somewhat uncertain, but this was clarified in Yates v. United States, reversing the convictions of five of fourteen defendants accused of violating the Smith Act based on their Communist Party advocacy. The Yates court articulated the elements of the crime of advocating violent overthrow this way: "[T]hose to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something." Thus, a crime of advocacy

147 Id. at 324-25.
under the Smith Act must consist of inciting present or future violent acts.148

The Yates court also held that the advocacy clause requires that a defendant have specific intent to accomplish the overthrow of government.149 The specific intent requirement means that the defendant must advocate, preach or teach people to take concrete action toward the violent overthrow of the government, and to do so as soon as possible.150 The advocacy must be directed to action as distinguished from advocacy of abstract doctrines in order to be punishable under the Act. That is, the advocacy must be uttered with a specific intent to accomplish such overthrow. In order to convict, the jury must find that the advocacy, teaching or preaching of forcible overthrow was “of a kind calculated to ‘incite’ persons to action for the forcible overthrow of the Government.”151 By contrast, “advocacy of forcible overthrow as a mere abstract doctrine is within the free speech protection of the First Amendment . . . .”152 In other words, “advocacy” is construed to mean “in a manner to incite.”153 Thus, mere abstract teaching of the moral propriety or even the necessity for resort to force and violence to overthrow the government is not, in itself, a violation of the Smith Act unless it is accompanied by substantial evidence of a call to violence.154 “[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.”155 Furthermore, advocacy of forcible overthrow, “divorced from any effort to instigate action to that end,” even if such advocacy is uttered with a specific intent to accomplish that

148 See id. at 326 (alluding to requirement that advocacy “incites” others to affirmatively participate in violent overthrow of government).
149 See id. at 320 (explaining requirement of specific intent).
150 See United States v. Kuzma, 249 F.2d 619, 621-22 (3d Cir. 1957) (comparing other cases and their interpretations of what Smith Act requires with respect to specific intent).
151 Yates, 354 U.S. at 312.
153 Id. at 319 n. 26 (quoting Representative John W. McCormack: “. . . Government has a right to make it a crime for a person to use language specifically inciting to the commission of illegal acts . . . . [I]t is advocacy in the manner to incite, knowingly to advocate in a manner to incite to the overthrow of the Government . . . .”).
155 Id. at 297-98.
purpose, is not enough.\textsuperscript{156}

Smith Act offenses require rigorous standards of proof. That is, charges of advocating or teaching of violent overthrow under the Smith Act, "involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy."\textsuperscript{157} The type of evidence needed is (a) that there was "advocacy of action" and (b) the organization was responsible for such advocacy.\textsuperscript{158}

The prosecution thus has the task of making a distinction between advocacy as an abstract principle or academic discussion from advocacy having the quality of incitement directed at promoting concrete action to forcibly overthrow the government by unlawful means.\textsuperscript{159} Evidence to support the assertion that there was "advocacy of action" within the constitutional requirements of the Smith Act may consist of a showing that leaders were instructing "particularly trustworthy" members "in tasks which would be useful when the time for violent action arrived."\textsuperscript{160} That is, when the group being given instruction are "thought particularly trustworthy, dedicated, and suited for violent tasks," a jury could find that the advocacy was done in a manner to incite the violent overthrow of the government.\textsuperscript{161}

In the \textit{Yates} case, the type of evidence that was not deemed sufficient to show illegal advocacy consisted of the following:

\begin{quote}
[T]he teaching of Marxism-Leninism and the connected use of Marxist "classics" as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party's general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance
\end{quote}

\textsuperscript{156} \textit{See Yates}, 354 U.S. at 318 (holding Smith Act requires effort regardless of evil intent).

\textsuperscript{157} \textit{Id.} (noting need for stricter evidentiary standards).

\textsuperscript{158} \textit{Id.} (describing type of evidence jury needs to convict).

\textsuperscript{159} \textit{See Yates}, 354 U.S. at 318 (holding Smith Act does not prohibit abstract teaching).

\textsuperscript{160} \textit{Id.} at 332.

\textsuperscript{161} \textit{Id.} (explaining when jury may find advocacy of action).
However, such evidence, while insufficient in itself, "in the context of other evidence, may be of value in showing illegal advocacy." The kind of evidence that would be sufficient to sustain a conviction under the advocacy clause of the Smith Act was described by Yates and reiterated in Scales. Evidence of meetings at which "the systematic teaching and advocacy of illegal action" was taught would be probative. Evidence would be relevant of meetings where:

[A] small group of members were not only taught that violent revolution was inevitable, but ... were also taught techniques for achieving that end. ... [M]embers were directed to be prepared to convert a general strike into a revolution and to deal with Negroes so as to prepare them specifically for revolution.

Evidence sufficient for conviction might also be the fact that the advocacy did not stop with teaching of the inevitability of eventual revolution, but went on "to explain techniques, both legal and illegal, to be employed in preparation for or in connection with the revolution."

Meetings at which there occurs the systematic teaching and advocacy of illegal action could constitute a violation of the Act, depending on whether there is a strong enough showing of "advocacy of action." For instance, Yates discussed the following situation:

It might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to

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162 Scales, 367 U.S. at 232.
163 Id. at 233.
164 See Yates, 354 U.S. at 331 (commenting on what was advocated at meetings).
166 Id. at 232.
seize local vantage points.\textsuperscript{167}

In \textit{Yates}, one member was "surreptitiously indoctrinated in methods ... of moving 'masses of people in time of crisis'"; others were told to develop a special communication system through a newspaper similar to Pravada.\textsuperscript{168}

Thus, there are two strands of evidence either of which is sufficient to show illegal advocacy: "(a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and (b) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."\textsuperscript{169}

Evidence should also be introduced as to the "doctrines, organization, and tactical procedures" and policies of the organization in order to furnish a background about the organization's theory and terminology "which is crucial to the proper appreciation of the tenor" of pronouncements made by the organization.\textsuperscript{170} It is important for the jury to correctly understand the "tenor" of pronouncements of the organization, for certain statements, taken out of the larger context that is shown by an analysis of the theory and terminology of the organization, "might appear harmless and peaceable without in reality being so."\textsuperscript{171} Testimony as to the theory and terminology of the organization is also important to help the jury distinguish between theoretical advocacy and advocacy of violence as a rule of action. "[W]hen the teaching is carried out in a special vocabulary, knowledge of that vocabulary is at least relevant to an understanding of the quality and tenor of the teaching."\textsuperscript{172}

Perhaps the most difficult prosecutorial hurdle of the \textit{Yates} decision is that those to whom the advocacy is addressed must be

\textsuperscript{167} \textit{Yates}, 354 U.S. at 331.
\textsuperscript{168} \textit{id.} at 332 (finding general teaching of Communism as sufficient evidence in proving illegal advocacy).
\textsuperscript{169} \textit{Scales}, 367 U.S. at 234 (listing standards of evidence sufficient in showing illegal advocacy).
\textsuperscript{170} \textit{id.} at 234-35 (noting additional evidence important in addition to two standards of evidence in proving illegal advocacy).
\textsuperscript{171} \textit{id.} at 235 (explaining jury should be made aware of special vocabulary used in advocacy teaching as necessary in determining whether advocacy of violence exists).
\textsuperscript{172} \textit{id.} at 233 (highlighting importance in comprehending special terms used in advocacy teachings to grasp whether illegal advocacy is present).
urged "to do something, either now or in the future, rather than merely to believe in something." Thus, in a prosecution involving religious speech advocating the violent overthrow of government, the prosecution may be put to task to prove that a cleric's speeches and sermons regarding *jihad* and calling for the overthrow of "infidels" – meaning the United States and its allies – were not given merely in the course of doctrinal disputation. The prosecution must be able to show that the advocacy went beyond mere metaphor or abstract doctrine and was directed to advocacy of action.

**Membership Clause of the Smith Act**

The membership clause of the Smith Act makes it a felony to organize or help or attempt to organize any organization or assembly of persons which advocates the overthrow of the government by force or violence, or to knowingly become a member in such organization. There are two targets here: those who organize and those who join the organization.

The language of the statute itself requires only that a member have knowledge of the organization's illegal advocacy, however, the statute has been interpreted to require specific intent to accomplish the aims of the organization. The membership clause has been narrowly construed by the Supreme Court to mean that in order to convict, the jury must find that:

the organization to which membership is ascribed is one that advocates the "violent overthrow of the Government, in the sense of present 'advocacy of action' to accomplish that end as soon as circumstances were propitious; and . . . [the defendant] was an 'active member of the [organization], and not merely 'a nominal, passive, inactive or purely technical' member, with knowledge of the [organization's] illegal advocacy and a specific intent to bring about violent overthrow 'as speedily as circumstances would permit.'"

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173 Yates v. United States, 354 U.S. at 289, 325 (emphasis added) (finding trial court did not accurately emphasize distinction between advocating action and thought).
175 See id. (stating "knowing the purpose thereof" as sufficient in establishing guilt).
177 Id. at 220 (quoting with approval instructions given to jury).
The Supreme Court explained the distinction between “active” and “nominal” membership “is well understood in common parlance... and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court’s guidance to the jury by way of instructions in a particular case.”[178] There must be the showing that the defendant was an “active” member. According to the Court, Congress could not have intended a purpose to punish nominal membership, even if accompanied by “knowledge” and “intent.”[179] Active membership accompanied by specific intent to further the unlawful aims of the organization is required in order to be punished under this statute.

The Court was concerned that some people might be active members in sympathy with the aims of the organization, but not personally intend to accomplish the aims, such as the revolution or the violent overthrow of the government. Thus, it is important to distinguish the element of specific intent. It is not enough to show that the defendant had knowledge of the organization’s illegal activity and endorsed the aims of the organization.[180] An “active” member must be someone who does more than indicate his approval of the enterprise and sympathy with its goals. Someone can be an “active” member “without thereby necessarily committing himself to further it by any act or course of conduct whatever.”[181] An “active” member might approve of the aims of the organization, but personally intend to bring about only those aims that are lawful.[182] Also, a member may embrace the organization’s doctrines but intend to bring about those goals by peaceable means, rather than violent or illegal means; thus would lack the requisite specific intent to violate the Smith Act.[183] It must be shown that the member of the organization

178 Id. at 223 (citations omitted).
179 See id. at 222 (commenting that Congress did not intend to impose on passive members the heavy penalties imposed by Smith Act).
180 See id. at 221-22 (remarking that specific intent is to be implied into “advocacy” and “organizing” elements of Smith Act).
181 Id. at 228.
182 See Hellman v. United States, 298 F.2d 810, 814 (9th Cir. 1961) (indicating that members under Smith Act must have personal views in order to satisfy “specific intent” requirement).
183 See id. at 812 (explaining “If this [illegal intent] was not proved the conviction cannot stand however strong the proof may be that he was an active and knowledgeable member of an organization which advocated the violent overthrow of the Government.”).
has the requisite personal intent to bring about the violent overthrow of the government as speedily as circumstances would permit. The trier of fact must analyze the relationship between the active member and the organization to find not only that he knew of the unlawful purposes of the organization's agenda, but also that it was his purpose to further the criminal advocacy—that is, that the defendant had knowledge and intent in addition to active membership. An active member, not having the requisite specific intent, "may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal."

During the McCarthy era, this provision of the Smith Act was used to prosecute active members of the Communist Party, but some prosecutions failed by not showing that the member himself was primed for advocacy of action towards the end of overthrowing the government. Mere presence at a meeting at which someone else makes an incriminating statement advocating the violent overthrow of the government is not likely sufficient to show anything beyond the simple intent to be at the meeting. On the other hand, that could be sufficient if the context of the meeting indicated that this was a planning session for future acts of revolution (e.g. where the people at the meeting were preparing bombs, then a defendant would be hard-pressed to argue that he only intended to be present at the meeting without further intentions of involving himself in the plans). That is, presence at a meeting at which either illegal advocacy of revolution or the revolution itself was being plotted might support an inference of intent to further the illegal advocacy through violence. Evidence to fulfill the specific intent requirement may be shown by a defendant's "significant action" or "commitment to undertake such action." Circumstantial evidence to adduce specific intent of an active member, according to Scales, involves looking at such issues as "the nature of the

184 Id. at 811-12, 814 (holding that evidence was insufficient to meet burden because mere urging to take action was not directly advocating overthrow of government).
186 Id. at 229-30 (explaining statute requires more than mere "sympathy" for criminal enterprise for conviction).
187 Id. at 228 (stressing Supreme Court's careful scrutiny devoted to constitutional analysis of statute).
organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy."¹⁸⁸ The Court likened being a member of a group that engages in criminal conduct to being a member of a large conspiracy.¹⁸⁹ The trier of fact must be able to distinguish legal political discussion from that which is undeniably bent on illegal advocacy of the incitement to violent acts.

The membership clause does not directly distinguish between those holding leadership positions and ordinary members.¹⁹⁰ But knowledge and specific intent, for purposes of the membership clause, can be shown against one who "actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities . . . ."¹⁹¹

It may be somewhat difficult for a jury to distinguish active members in sympathy with the organization's agenda from active members who have the requisite specific intent, for once a jury determines that a member was "active" in an organization that advocates the illegal overthrow of Government, particularly if he occupies a leadership position in the organization, it is hard to divorce that from the conclusion that he had committed himself to further the purposes by action on his part, whether by means of directing others, planning, or other such action.

When enacted in 1940, the Smith Act was patterned on state anti-sedition laws directed against the Communist Party and the leaders of the movement, and, as well, anarchists and syndicalists.¹⁹² However, the Act clearly applies to any organization that advocates the illegal overthrow of government.¹⁹³

¹⁸⁸ Id. at 226 n.18.
¹⁸⁹ Id. (commenting that membership in conspiracy and membership in a criminal group can be viewed as similar).
¹⁹⁰ See Yates v. United States 354 U.S. 298, 308 (1956) (holding that there is no proof that Congress wished to treat members who hold organizational positions specially).
¹⁹¹ See Scales v. United States, 367 U.S. 203, 227 (1961) (noting that member will be no more immune from prosecution than group member who "carries out the substantive criminal act").
¹⁹³ Representative John W. McCormack, one of the sponsors of the Smith Act, said in the Subcommittee of the Committee on the Judiciary, House of Representatives: "And by the way, this bill is not alone aimed at Communists; this bill is aimed at anyone who
The Term "organize" Under the Smith Act

The statute when originally enacted did not define what Congress meant by "organize" with respect to those who organize, help or attempt to organize any "society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any [government of the United States] by force or violence . . . ." The definition of "organize" was therefore left to the courts, and was specifically decided upon by the Yates court, which narrowly construed the term "organize." The Court held that this section of the Act was directed solely "at the activities of those responsible for creating a new organization of the proscribed type," and not "to reach beyond this, that is, to embrace the activities of those concerned with carrying on the affairs of an already existing organization." Thus, "organize" was construed to mean "establish," "found," or "bring into existence" the sense of the formal founding, incorporation or chartering, and not to the continuing process of internal realignment and recruitment of additional members which goes on throughout the life of an organization, or the formation of new units or "cells," regrouping or expansion of existing cells. This was a big blow to the Government, for the Yates court concluded that "since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the 'organizing' charge, and required the withdrawal of that part of the indictment from the jury's consideration."

In 1962, in response to the Yates decision, Congress amended the Smith Act to define the term "organize." The Senate Report on the Amendment stated that

as a matter of common sense, the committee [i.e., the Committee on the Judiciary] is of the opinion that the term "organize was intended to mean a continuous process of organizing groups and cells and of recruiting new members who advocate the overthrow of Government by violence and force." Hearing on H.R. 4313 and H.R. 6427 Before the House Comm. on the Judiciary, 74th Cong. 3 (1935) (cited in Yates v. United States, 354 U.S. at 307 n.8) 18 U.S.C. §2385 (1994). The quoted statutory language remains unchanged from the statute as originally enacted.

Yates, 354 U.S. at 308.

Id. at 312.

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and not merely the original organization of the Communist Party or some other party or society whose aims are inimical to the security of the United States.\(^{197}\)

The Committee cited with favor the definition of "organize" used by the trial court that the *Yates* decision had reversed, to include such things, "as the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of any society, party, group, or other organization."\(^{198}\) The 1962 Amendment to the Smith Act has remained unchanged, and states:

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.\(^{199}\)

**Modern Application of the Smith Act**

Today, a prosecution under the Smith Act might be modeled after the indictment charged in the *Yates*, by substituting for "Communist Party" the name of a the targeted organization and specific members, charging that the defendants (a) became members and officers of the organization with knowledge of its unlawful purposes, and assumed leadership in carrying out its policies and activities; (b) caused to be organized units of the organization in [Name of State] and elsewhere; (c) wrote and published the [Name of Publication or Circular] and other organs, articles on the proscribed advocacy and teaching; (d) conducted schools for the indoctrination of the organization's members in such advocacy and teaching, and (e) recruited new members, particularly from among persons employed in the key industries of the nation.\(^{200}\)

The *Yates* indictment also alleged a number of overt acts in

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\(^{198}\) Id.


\(^{200}\) See *Yates*, 354 U.S. at 301-02 (noting the indictment charges for defendants and co-conspirators in carrying out the conspiracy).
furtherance of the conspiracy. However, under the Smith Act, as is the case with seditious conspiracy as discussed above, there need not be any overt act charged in the indictment. “The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.” The substantive offense in a violation of the Smith Act or in seditious conspiracy is speech and speech itself rather than a specific act.

CONCLUSION

There is a limit to the inviolability of religious freedom. While the Government may never be able to take away a person’s inner thoughts and beliefs about his or her religious views, the Government can stop an individual or group from acting on those ideas if the “clear and present danger” test is met. In Rahman the prosecution showed that the FBI had exposed a massive terrorist plot on the verge of completion, where the defendants actually had begun to mix the explosives to be used in the bombing.

Because terrorism has become the top national security concern, trials like that of Sheik Rahman and his followers could occur with increasing frequency in the United States should terrorist plots be uncovered within religious extremist groups. The breadth and severity of the seditious conspiracy statute and the Smith Act make them logical tools to constrain terrorist plots. In the wake of the terrorist attacks of September 11, 2001, the question remains whether the government will use these laws to stop less “subversive” preachers than Sheik Rahman. As long as a jury can be convinced that some religious utterances or tenets pose a danger to the nation, the government can succeed in suppressing the doctrines. Will such a move impair religious freedom more than it would protect national security? Will such prosecutions have the effect not only of regulating the content of religious teachings but also of censoring the sermons of peaceful religious leaders? Will use of these laws have the effect of

201 See id. at 302 (explaining what defendants would do to carry out conspiracy).
202 See id. at 334 (noting that overt act need not be criminal in character) (quoting Carlson v. United States, 187 F.2d 366, 370 (1951)).
essentially outlawing certain beliefs altogether?

There are fundamental problems inherent in speech conspiracy charges, and this area of criminal law is peculiarly adapted to political and societal circumstances. Justice Holmes, who first articulated the constitutional parameters for prosecution of sedition, said that the power of the government to prosecute "undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times."203 In a period characterized by excessive fear of subversion, such as during World War I, prosecution for speech conspiracy was robust, as was the case during the McCarthy era, while during times of peace seditious conspiracy and the Smith Act are relegated to a kind of legal limbo.

One may want to keep in mind the words of Justice Black, in his dissent in the Yates case, saying: "When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest of circumstances."204 Also, one must recognize how easily "clear and present danger" can be manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions . . . ." by argument and discourse, even in time of war.205

Under the Smith Act and the seditious conspiracy law, the government has enormous power to attack religious beliefs. The threat of terrorism may inspire prosecutors to start taking a more aggressive stance toward "radical" faiths—a move that could well be consistent with the purposes and intent of these statutes, but fundamental freedom requires that great caution be employed in distinguishing between religious groups that truly threaten the nation from those that in fact might be less dangerous and less vocal than was Sheik Rahman..

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203 See Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (explaining situation where speech imposes clear and imminent danger allowing it to be constitutionally prevented); see also Schenck v. United States, 249 U.S. 47, 52 (1919) (stating "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured . . . .").

204 Yates, 354 U.S. at 339 (Black, J., concurring in part and dissenting in part).

205 See Pierce v. United States, 252 U.S. 239, 273 (1920) (referring to securing freedom through argument to fellow citizens).