CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 6 FALL/WINTER 2006 NUMBER 1

Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?

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The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech or of the press," but there are exceptions to every rule.[1] Several times in the nation's history, during national crisis or war, Congress passed laws that limited the right to free speech,[2] and the U.S. Supreme Court upheld many of them.[3] Laws, such as the World War One era Espionage and Sedition Acts, criminalized criticizing or obstructing the military draft, giving aid to the enemy, or criticizing the American government.

Over the years, government officials cited a need for national unity in order to protect Americans from perceived internal and external threats. For example, in 2001 Attorney General John Ashcroft flatly stated: "to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's

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[1] U.S. CONST. amend. I.

[2] *See, e.g.*, Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 50 U.S.C.); Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385 (2000)); Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed Mar. 3, 1921); Espionage Act of 1917, ch. 30, 40 Stat. 217 (repealed Mar. 3, 1921).

[3] *See* discussion *infra* Parts II-III.

enemies and pause to America's friends."[4] The Attorney General's viewpoint on safeguarding against threats parallel those from an earlier era when U.S. Supreme Court Justice Frederick Vinson wrote in 1951: "To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."[5]

In 1919 Harvard University law professor Zechariah Chafee warned that in times of national distress, the government insists on "an artificial unanimity of opinion behind the war."[6] At the time of his writings, he believed the government often strived for national unity by attacking people whom it considered unpatriotic.[7] Chafee's thoughts can still offer the country lessons from history; the need to protect the country from suspected dangerous dissenters in times of war can clash with views that free speech and press should be protected - especially in wartime.[8]

Since the tragic events of September 11, 2001, the nation has fought a war against terrorism. Part of that effort includes prosecuting people who may belong to and support terrorist organizations. Three active laws may help law enforcement arrest suspected terrorists and their sympathizers. The Smith Act and the Voorhis Act are aimed at prosecuting people who engage in political or military activity with the goal of violently overthrowing the U.S. government.[9] While still enforced today, these laws were conceived from an earlier time period, the Cold War, when the U.S. government feared Communist infiltration.[10] A third law, Section 411 of the Patriot Act, allows the government to exclude aliens from the United States based on their speech and support for terrorist organizations.[11] Both the Smith and Voorhis Acts are tools that federal prosecutors can use against suspected terrorists. For example, in the recent trial of September 11th co-conspirator Zacarias Moussaoui, the government could have simply

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[4] *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 313 (2001) (statement of John Ashcroft, Attorney General of the United States).

[5] Dennis v. United States, 341 U.S. 494, 508 (1951).

[6] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 973 (1919).

[7] *See id*.

[8] *Id*. at 959-60.

[9] Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385 (2000)) (making it a crime to print, publish, edit, circulate, or display materials that advocate or teach the overthrow of the United States government by force); Voorhis Act of 1940, ch. 897, 54 Stat. 1201 (codified as amended at 18 U.S.C. § 2386 (2000)) (requiring the registration of any American based political organization that is subject to foreign control or whose purpose is to overthrow the United States government).

[10] *See* Alien Registration Act of 1940; Voorhis Act of 1940.

[11] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345 (codified at 8 U.S.C.A. § 1182(a)(3) (2000)).

prosecuted him under the Voorhis Act or Section 411 of the Patriot Act for being a member of Al Qaeda.

Throughout the Twentieth Century, Congress enacted several laws to prosecute people who might "aid" the enemy through spoken or printed words. The first two of these laws were passed and signed into law during World War One in the forms of the Espionage Act of 1917 and the Sedition Act of 1918.[12] During this period, there were over 200 prosecutions and judicial proceedings brought against people for speaking out against the war or associating with organizations that opposed it.[13] Often referred to as the "Palmer Raids," between 1918 and 1921 U.S. Attorney General Mitchell Palmer prosecuted hundreds of Americans and legal immigrants in an effort to root out Communists, socialists, and anarchists.[14] Similar prosecutions against Communists were again the norm in the 1950s and early 1960s.[15]

This article, by looking back through almost the last 100 years of American history, will show that the current laws on sedition and free speech in the post-9/11 era parallel those adopted from two other time periods in American history, i.e. World War One and the Cold War. It will also argue that changes in current sedition laws are not needed to fight the war on terrorism five years after the attacks on September 11, 2001. World War One and the Cold War are the time periods under examination because the United States Supreme Court upheld several sedition laws.[16]

Part One of the article will explore the historical and contemporary literature on sedition laws. The literature helps the reader understand the political climate that existed during several important speech-related court cases. Part Two will then examine the speech laws from the First World War and the pivotal court cases based on these laws. Next, Part Three of this article will examine Cold War era speech laws that focused on rooting out a perceived Communist threat to the country and the landmark court cases prosecuted under these laws. Part Four examines contemporary laws that accommodate the federal government's war on terrorism. Finally, Part Five, the Conclusion, will show that these laws serve as a tool for the government to prosecute suspected terrorists in a similar vein to the World War One and Cold War era laws.

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[12] Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921); Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917) (repealed Mar. 3, 1921).

[13] Chafee, *supra* note 6, at 932-33.

[14] *See* NAT'L CIVIL LIBERTIES BUREAU, WAR-TIME PROSECUTIONS AND MOB VIOLENCE: INVOLVING THE RIGHTS OF FREE SPEECH, FREE PRESS AND PEACEFUL ASSEMBLAGE (1919).

[15] *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951).

[16] For examples of World War I related court cases, see Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919); United States v. Pape, 253 F. 270 (S.D. Ill. 1918). For examples of Cold War era cases, see *Scales*, 367 U.S. at 203; Yates v. United States, 354 U.S. 298 (1957); *Dennis*, 341 U.S. at 494.

I. A HISTORICAL REVIEW OF SEDITION

Several books and legal journal articles discuss sedition laws from World War One and the Cold War. Many of these secondary sources give the reader a first hand account of the fear and anxiety that pervaded the country during both time periods. They also document the court trials of suspected traitors and the repercussions that followed those trials. While there is an abundance of literature that discusses the First World War and the Cold War, there is not as much on the post-9/11 era. The several books and journal articles about post-9/11 laws so far are largely advocacy oriented rather than analytical in nature. This literature review reflects a small sample of available materials that provide insight into all three time periods.

In 1919 Professor Zechariah Chafee Jr. wrote *Freedom of Speech in War Time,* in which he criticized the federal government's prosecution of hundreds of political dissenters during the war.[17] Chafee stated that speech should remain unrestricted unless it is likely to cause direct and dangerous interference with the conduct of a war.[18] He advocated that sedition laws were unnecessary because many other laws had forbidden open criminal conduct.[19] Chafee warned that sedition laws punish words for a "supposed bad tendency" before there is any realistic danger they will turn into unlawful acts.[20]

The same year Chafee wrote about his views on the 1917 Sedition Act, the American Civil Liberties Union (ACLU) documented the federal government's prosecutions of anti-war activists between 1917 and 1919.[21] The ACLU published a pamphlet that detailed the convictions and acquittals by Attorney General Palmer's office. It compiled a list of hundreds of individuals detained for questioning including names, locations, and the verbal or written statements that led the authorities to investigate these people.[22]

James Mock's *Censorship 1917* examined the 1917 sedition laws from the perspective of local communities.[23] He listed numerous examples of city and town leaders who took it upon themselves to arrest suspects who did not support the war.[24] Before Congress passed the espionage and sedition laws, some states resurrected Civil War-era statutes that outlawed

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[17] Chafee, *supra* note 6.
[18] *Id*. at 960.
[19] *Id*. at 948.
[20] *Id*. at 949.
[21] NAT'L CIVIL LIBERTIES BUREAU, *supra* note 14. In 1920, one year after publication of the pamphlet, the National Civil Liberties Bureau changed its name to the ACLU. The organization will be referred to as the ACLU throughout this article.
[22] *See id*. at 14-16.
[23] JAMES R. MOCK, CENSORSHIP 1917 (1941).
[24] *Id*. at 29-36.

opposition to the military draft.[25] Mock described the panicked national atmosphere in the country where people easily suspected one another of treason.[26]

The impact of the Palmer Raids on local communities was discussed by Fairmont State College history professor Charles McCormick.[27] McCormick detailed Attorney General Mitchell Palmer's round-up of suspected Communists and radicals in the Pittsburgh, Pennsylvania mill district during the war.[28] He examined declassified files from the Departments of Justice, War, and the Navy to describe the procedures the government used to root out suspected traitors.[29]

Wake Forest University Law Professor Michael Kent Curtis reviewed several U.S. Supreme Court decisions from World War One and the 1950s that consistently upheld several anti-speech sedition laws.[30] Curtis explained how the Court, during World War One, shifted from the bad tendency test to the clear and present danger test.[31] He asserted that the goal of both tests was to defend the United States from a violent overthrow of the government.[32] The bad tendency test assumed that speech would lead to bad consequences in the long run, and that was enough to make it criminal.[33] Curtis showed how the bad tendency test evolved into the clear and present danger test when speech could be banned if there was a danger of an immediate form of violence.[34] As Curtis demonstrated, once the Palmer Raids ended in 1921, the next major movement towards censorship was during the Cold War.[35]

David Cole, a professor at Georgetown University Law Center, provided a historical view of censorship in the 1950s.[36] He argued that government censorship was not simply about limiting Communist ideas and speech, but also about prosecuting suspected Communists for their political associations.[37] For Cole this equaled guilt by association and had the "chilling effect" of making society fearful of engaging in any political

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[25] *Id*. at 24.

[26] *Id*. at 39.

[27] CHARLES H. MCCORMICK, SEEING REDS: FEDERAL SURVEILLANCE OF RADICALS IN THE PITTSBURGH MILL DISTRICT, 1917-1921 (1997).

[28] *Id*.

[29] *Id*. at ix.

[30] MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 389-400 (2000).

[31] *Id*. at 389-91.

[32] *Id*. at 386.

[33] *Id*. at 385.

[34] *Id*. at 391.

[35] *Id*. at 400.

[36] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

[37] *Id*. at 6.

activity that could be condemned.[38] He explained that this was the technique used by the federal government in the McCarthy era.[39] In 1950 Attorney General J. Howard McGrath had placed nearly 200 groups and individuals on a list of suspected Communists and other subversive organizations, many of whom were forced to testify before the House Un-American Activities Committee (HUAC).[40] Cole contended this was a subtle warning to the public that the government might track certain political activities, and activists could be investigated for subversive activities.[41]

In moving the analysis from the Cold War to the present post-9/11 era, Professor Cole and the Executive Director of the Center for Democracy and Technology, James Dempsey, have argued that since the terrorist attacks, the federal government has tried to exclude aliens based on speech through Section 411 of the Patriot Act.[42] This section of the Patriot Act excludes aliens who espouse terrorist activity or who persuade others to support terrorist activity.[43] Cole and Dempsey believe that Section 411 undermines the concept of political debate in this country.

Another civil rights activist, Nancy Chang, an attorney with the Center for Constitutional Rights, has accused the Bush administration of trying to silence dissent since the 2001 terrorist attacks.[44] She advocates that during national security threats the government abandons First Amendment values in favor of authoritarian rule.[45] In the post-9/11 era, Chang argues the government places a lot of pressure on suspected groups who oppose the war on terror.[46] Chang discusses examples of Americans who were investigated by the FBI in October 2001 for uttering statements against U.S. foreign policy.[47]

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[38] *Id*. at 7.

[39] *Id*. at 6.

[40] *Id*. at 6-7.

[41] *Id*. at 7.

[42] DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 158 (2002).

[43] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345 (codified at 8 U.S.C. § 1182(a)(3) (2000)).

[44] NANCY CHANG, CENTER FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT 92-93 (2002).

[45] *Id*. at 92.

[46] *Id*. at 94.

[47] Chang briefly mentions two FBI visits. The first visit was to sixty-year-old Barry Reingold from San Francisco who was overheard for having stated, "This war [on terrorism] is not just about getting terrorists, it's also about money and corporate oil profits." *Id*. at 95. The second FBI visit was to A.J. Brown, a college freshman in 2001 living in North Carolina, who owned a poster protesting President Bush's support of the death penalty when he was governor of Texas. *Id*.

II. WORLD WAR ONE'S SEDITION LAWS

One of the first efforts in the Twentieth Century to limit anti-war rhetoric began when the United States was fighting in Europe in 1917-1918. The government supported domestic efforts to limit speech by Americans and legal immigrants that could have subverted the nation's military goals. On June 15th, 1917, Congress passed the Espionage Act, a law that criminalized interfering with the operations of the military and the draft.[48] Violation of this law meant a $10,000 fine or twenty years imprisonment.[49] Nearly a year later, on May 16, 1918, Congress amended and expanded the Espionage Act with passage of the Sedition Act. It became illegal to utter or print any profane language that interfered with the operation or success of the U.S. military or criticized the government or Constitution.[50] Punishments carried the same $10,000 fine or twenty years in prison.[51] While both laws were repealed in 1921, they left a legacy of more than 2,000 prosecutions.[52]

As noted in Part One, the ACLU kept detailed lists of the wartime prosecutions based on its correspondence with prisoners and press clippings of the era.[53] These lists included a defendant's name, hometown, and specific criminal charges.[54] The government often arrested Americans and legal immigrants under the Espionage and Treason laws and accused them of personal disloyalty to the country and the war effort.[55] The report noted that several raids across the country were conducted without search warrants.[56] According to the ACLU, between January 1, 1918 and June 30, 1918 there were 988 prosecutions by U.S. Attorney General Palmer's office resulting in 363 convictions, 57 acquittals, and 72 dismissed charges.[57]

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[48] Espionage Act of 1917, ch. 30, §3, 40 Stat. 217 (1917). It was a crime to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies . . . ." *Id*.

[49] *Id*.

[50] Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918). This law expanded the Espionage Act by making it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States . . . ." *Id*.

[51] *Id*.

[52] NAT'L CIVIL LIBERTIES BUREAU, *supra* note 14, at 4.

[53] NAT'L CIVIL LIBERTIES BUREAU, *supra* note 14.

[54] *Id*. For example, Henry Von Bank of Fargo, North Dakota was convicted for stating, "I would rather see a pair of old trousers flying from the school house flag pole than an American flag." *Id*. at 14. His conviction was later reversed. *Id*. John Kunz from New Britain, Connecticut was found guilty for stating, "Young men are fools to enlist and go across [to Europe] to be blown up" and "Germany had a perfect right to sink the Lusitania." *Id*. at 16.

[55] *Id*. at 4.

[56] *Id*. at 38.

[57] *Id*. at 4.

The ACLU's record seems to verify the uneasy feelings of the government and the public during the war. Historian James Mock stated the country came close to losing its civil liberties "entirely."[58] Across the country local authorities, including state governments, prosecuted individuals or prevented anti-war protestors from peacefully gathering, essentially denying them their First Amendment assembly privileges.[59] A fear of German spies pervaded several communities across the country: "The United States was at war with a nation whose secret agents in this country, the American people thought, were present in every key city and key industry, striving to hinder the war effort of the United States."[60] Within this atmosphere of sabotage, fear, and spying, Congress passed the Espionage and Seditions laws.

Historian Charles McCormick explained that the government justified its wartime domestic intelligence activities to prevent subversion of the war effort, including the production of war materials (weapons) and the military draft.[61] The Espionage and Sedition Acts gave the Justice Department an "open-ended" power to conduct domestic spying and allowed the federal government to suspend the nation's First Amendment rights by imposing censorship and outlawing criticism of the government's war efforts.[62] Several federal court cases dealt specifically with the issue of how far an individual could criticize the government. One of the first prosecutions centered on a man who did not give money to the war effort.

A. United States v. Pape

In *United States v. Pape*, the Quincy, Illinois "patriotic committee" accused the defendant of violating the Espionage Act of 1917.[63] He had not purchased liberty loans or thrift stamps, both programs that helped finance the war effort.[64] Members of this "patriotic committee" accused Pape of an "omission of patriotic duty."[65] Even though Pape told the committee that he did not purchase the liberty loans and thrift stamps out of personal principles, the local authorities charged him with a violation of the Espionage Act.[66]

Federal District Court Judge Louis Fitzhenry acquitted Pape of the charges, ruling that a citizen has the legal right not to buy or subscribe to

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[58] MOCK, *supra* note 23, at 24.

[59] Mock describes how in Oakland, California, the mayor refused to allow the Women's Home Protective League to use the city's auditorium to protest sending American troops to Europe. *Id.* at 30.

[60] *Id.* at 39.

[61] MCCORMICK, *supra* note 27, at 13.

[62] *Id.*

[63] 253 F. 270, 271 (S.D. Ill. 1918).

[64] *Id.*

[65] *Id.*

[66] *Id.*

patriot bonds, liberty loans, or give money to the Red Cross.[67] Since Pape did not attempt to convince others of his views and was, therefore, not trying to sabotage the war effort, Judge Fitzhenry wrote "a criminal prosecution cannot be based upon the failure of a citizen to subscribe for bonds, or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to get others to do likewise . . . ."[68] Fitzhenry ruled that loyalty could not be coerced and that criminal laws could not be used to force someone to contribute to the war effort.[69]

B. Schenck v. U.S.

While Pape's charges were dismissed, the U.S. Supreme Court upheld the constitutionality of the Espionage and Sedition laws in three seminal cases. In *Schenck v. United States*, the Court upheld an Espionage Act conviction against Charles Schenck for distributing leaflets opposing the military draft.[70] His leaflets warned Americans that if "you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[71] Few military draftees actually received the leaflets, and those who did testified the leaflets did not influence their decision to join the military.[72] Even though the U.S. Postal Inspector impounded 610 leaflets, authorities never knew how many total leaflets were mailed.[73]

The fact that so few of the leaflets landed in the hands of military inductees did not matter to the Court's majority. It ruled that a person could still be found guilty of conspiracy even when that conspiracy failed.[74] Writing for the Court, Justice Oliver Wendell Holmes stated that in non-war time, Schenck would have had the constitutional right to distribute his opinions about the draft, but the "character of every act depends upon the circumstances in which it is done."[75] In this case the circumstance was the war.

Justice Holmes emphasized that the Espionage Act punished both conspiracies to obstruct the military draft as well as actual physical acts of obstruction.[76] According to the Court, Schenck's words were of such a nature as to present a "clear and present danger," and they would have

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[67] *Id*. at 272.
[68] *Id*.
[69] *Id*.
[70] 249 U.S. 47, 48-49 (1919).
[71] *Id*. at 51.
[72] RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 215 (1987).
[73] *Id*.
[74] *Id*.
[75] *Schenck*, 249 U.S. at 52.
[76] *Id*.

brought about "substantive evils" to the country that Congress had the right to protect the government from.[77] It worried that an "evil" could have arisen from the leaflet that described conscription as "despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."[78] This case is important because Justice Holmes noted that it is during times of war when there are likely to be First Amendment controversies surrounding anti-government speech: "[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."[79]

The *Schenck* case demonstrates that, in this era, the Court was willing to limit First Amendment speech rights to protect the war effort.

C. Debs v. U.S.

Just one week after the *Schenck* decision, the Court upheld the 1918 Sedition law.[80] In June of 1918, a widely known socialist, Eugene Debs, gave a speech in Canton, Ohio, where he encouraged the crowd of onlookers to oppose the military draft.[81] While he spoke about the draft and the war, most of his speech focused on socialism's ideology.[82] When Debs did touch on the war, he commented on it in a critique of capitalism, arguing that war perpetuates inequality.[83] The U.S. Attorney for the Northern District of Ohio, E.C. Wertz, was able to convince a Cleveland grand jury to indict Debs for violating the 1917 Espionage Act.[84] A federal district court's jury convicted Debs, and he appealed to the U.S. Supreme Court.[85] The defendant never tried to convince the Court that he was not guilty; he admitted to the district court jury that he obstructed the war efforts and added that he hated war in general.[86]

The Court upheld Debs' conviction under the premise that his words could have interfered with the draft.[87] In the Court's majority opinion, Justice Holmes stated that Debs' utterings about socialism were legal but any part of the speech that urged Americans to obstruct the military draft

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[77] *Id*.
[78] *Id*. at 51.
[79] *Id*. at 52.
[80] Debs v. United States, 249 U.S. 211 (1919).
[81] *Id*. at 212.
[82] DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH 98 (1998).
[83] *Id*.
[84] *Id*. at 99.
[85] *Id*. at 101.
[86] POLENBERG, *supra* note 72, at 217.
[87] Debs v. United States, 249 U.S. 211, 216 (1919).

were not legal.[88] He wrote that if Debs used words "tending to obstruct the recruiting service he meant that they should have that effect."[89] The Court convicted Debs with the same reasoning it used in *Schenck*: any speech that posed a danger to interfering with the government's conduct of the war must be restricted.

D. Abrams v. U.S.

Later that year, in *Abrams v. United States*, the Court again dealt with a case that centered on Jacob Abrams's attempts to interfere with U.S. foreign policy.[90] The government indicted him on four counts of violating the 1918 Sedition law.[91] Each count revolved around resisting the American war effort. The first three indictments were based on conspiring during wartime to unlawfully print, write, and publish literature against the U.S. government in an attempt to bring contempt and scorn to it, as well as lead the resistance against the U.S. war effort.[92] The government's fourth charge indicted Abrams on the grounds of publishing leaflets that attempted to induce Americans to stop producing war materials such as ammunition.[93] The Court affirmed the judgment of the District Court upon the guilty verdict of the jury.[94]

Unlike the *Schenck* and *Debs* cases, Abrams's leaflets were directed at the Wilson administration's policy towards Russia, not the war effort in Germany.[95] The United States had sent troops to Russia to fight against the Bolshevik revolution.[96] The Court did not distinguish between Abrams's focus on Russia and the war in Germany, citing Abrams's writings as indirectly interfering with the war effort against Germany.[97] In the majority opinion, Justice John Clarke stated that Abrams's support of a general strike would have interfered with the country's war efforts: "[e]ven if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States . . . ."[98] The Court criticized the words used by Abrams and his associates in trying to deter the American war effort.[99]

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[88] *Id.* at 212-13.
[89] *Id.* at 216.
[90] 250 U.S. 616 (1919).
[91] *Id.* at 617.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 624.
[95] *Id.* at 620.
[96] *Id.* at 623.
[97] *Id.* at 621.
[98] *Id.*
[99] *Id.* at 623.

The Court accused Abrams of trying to foment a rebellion in the country with comments such as, *"[k]now you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home*."[100] Justice Clarke pointed to a danger in another set of Abrams' writings that stated, "[i]f 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."[101] The Court claimed these were explicit threats of internal armed rebellion.[102] In the Court's eyes, Abrams' overall goal was a general resistance to the war that included attempting to foment factory strikes to stop the production of war materials and interfering with the government's foreign policy.[103]

While Holmes wrote the majority opinion in the *Debs* and *Schenck* decisions, he dissented in the *Abrams* case.[104] He introduced the concept of clear and present danger.[105] With the clear and present danger test, the government can only restrict speech if there is a "present danger of immediate evil."[106] Holmes doubted that Abrams' pamphlets would have interfered with the American war effort or brought about a substantive evil.[107]

E. Disagreement with the Court's Decisions

As the U.S. Supreme Court decided these landmark speech cases, Professor Zechariah Chafee Jr. of Harvard Law School disagreed with the Court's decisions.[108] He argued that the government's insistence "on an artificial unanimity of opinion behind the war" was a major flaw in both the Espionage and Sedition laws.[109] Chafee defended many of the people convicted of violating the 1918 Sedition law.[110] During wartime, Chafee argued, is when speech should remain unrestricted unless it is likely to cause a direct interference with the conduct of a war:

> Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to

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[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*. at 624.
[104] *Id*. (Holmes, J., dissenting).
[105] *Id*. at 627.
[106] *Id*. at 628.
[107] *Id*.
[108] Chafee, *supra* note 6, at 967-69.
[109] *Id*. at 973.
[110] *See id*. at 955.

> improper ends, or conducted with an undue sacrifice of law and liberty, or prolonged after its just purposes are accomplished.[111]

Chafee believed that freedom of speech can act as a check on the government's power.[112] He pointed out that in the Court's free speech cases, the controversies centered on words that have a "tendency" to bring about violent acts that are already against the law.[113] He agreed with Justice Holmes's dissent in *Abrams*, in that words should only be criminalized if there is an immediate likelihood of a breach of peace.[114] Chafee admitted that sedition laws are popular because without them there is a perception that a "limited power to punish utterances rarely satisfies the zealous in times of excitement like a war."[115]

III. COLD WAR ERA ANTI-SPEECH LAWS

The *Schenck*, *Debs*, and *Abrams* cases were not the only speech-related controversies in U.S. history to test sedition laws. The Cold War is the second period in the Twentieth Century when Congress passed laws that prohibited speech in an attempt to protect the country. Even before the Cold War, on the eve of World War Two, fears of subversive attempts to overthrow the government pervaded the country. On June 28, 1940 Congress passed the Alien Registration Act of 1940,[116] commonly referred to as the Smith Act because U.S. Representative Howard W. Smith of Virginia authored it. While it became law before the Second World War, the Smith Act is relevant to the Cold War era of the 1950s and 1960s because this is the time period when the government based many of its prosecutions on this law.[117]

Under the 1940 Smith Act, it was illegal to print, publish, or circulate printed matter advocating, or teaching the overthrow of the U.S. government.[118] The law also criminalized belonging to any association that promoted the overthrow of the government, focusing on the advocacy

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[111] *Id*. at 958.
[112] *Id*. at 960.
[113] *Id*. at 967-68.
[114] *Id*. at 948.
[115] *Id*.
[116] Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2000)).
[117] *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951); United States v. Kuzma, 249 F.2d 619 (3d Cir. 1957).
[118] Alien Registration Act of 1940 § 2. The law made it "unlawful . . . to print, publish, edit, issue, circulate, sell, distribute, or publicly display 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 . . . ."

and teaching of concrete actions that could endanger the government.[119] The government successfully prosecuted under the law when it showed that teachings by a political organization could have led to the overthrow of the government in a timely manner.[120] Today, violation of the Smith Act is punishable by up to twenty years in prison and, after imprisonment, ineligibility for employment in the U.S. government for five years.[121]

In the same year that Congress passed into law the Smith Act, it also approved the Voorhis Act.[122] It requires that organizations register with the Attorney General if they engage in political or civilian military activities with the goal of overthrowing the U.S. government.[123] Registration includes the addresses of the organization's chapters and the names of every individual "who has contributed any money, dues, property, or other thing of value to the organization or to any branch, chapter, or affiliate of the organization."[124] The organization must also provide the Attorney General's office with copies of any printed materials it has distributed.[125]

Ten years after the Smith and Voorhis Acts became law, Congress passed, over President Truman's veto, the McCarran Internal Security Act of 1950, a law aimed at Communists and their sympathizers.[126] The McCarran Act required most Communist associations and organizations to

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[119] *Id*. ("It shall be unlawful . . . to organize . . . any society . . . of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society . . . .").

[120] *See, e.g*., *Kuzma*, 249 F.2d at 619. In this case, the U.S. Circuit Court of Appeals for the Third Circuit ordered a new trial for Joseph Kuzma if the U.S. government could "show a conspiracy to teach people to take concrete action toward the violent overthrow of the existing government as soon as possible." *Id*. at 621-22. The court also stated:

> [A]n individual defendant cannot be convicted of willful and knowing adherence to such a Smith Act conspiracy unless something said by him or communicated to him shows his understanding that, beyond endorsing the idea and objective of violent overthrow of the existing government, particular action to that end is projected and is to be advocated.

Id. at 622.

[121] 18 U.S.C.A. § 2385 (West 2006).

[122] Voorhis Act of 1940, ch. 897, 54 Stat. 1201 (1940) (codified as amended at 18 U.S.C. § 2386 (2000)).

[123] The Act stated that an organization in the United States must register with the Attorney General if its goal is "the establishment, control, conduct, seizure, or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats of any one or more of the foregoing." *Id*. § 2(a)(4).

[124] *Id*. § 2(c)(5)-(6).

[125] *Id*. § 2(c)(10). Section 2(c)(10) states that printed materials include:

> A copy of each book, pamphlet, leaflet, or other publication or item of written, printed, or graphic matter issued or distributed directly or indirectly by the organization, or by any chapter, branch, or affiliate of the organization, or by any of the members of the organization under its authority or within its knowledge, together with the name of its author or authors and the name and address of the publisher.

[126] Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 50 U.S.C.).

register with the Attorney General and to submit a detailed report listing all the machinery they owned that was used for printing books and pamphlets.[127] While Section 1 of the McCarran Act stated it was not establishing "military or civilian censorship," it can be argued that it impacted the free speech of Communist organizations.[128] For example, Section 10 made it illegal for a "Communist-infiltrated organization" or one of its members to use the U.S. Post Office for mailing materials unless they obtained a label for shipping that marked the package as Communist material.[129] Section 10 also limited a Communist organization's use of radio or television airwaves unless it broadcast a statement that said, "The following program is sponsored by _____, a Communist organization."[130]

In vetoing the Act, the President wrote that the "idea of requiring communist organizations to divulge information about themselves is a simple and attractive one. But it is about as practical as requiring thieves to register with the sheriff."[131] Truman said a few of the bill's provisions would suppress "opinion and belief" and "make a mockery of the Bill of Rights and of our claims to stand for freedom in the world."[132] Several court cases during the Cold War tested the constitutionality of the Smith and McCarran laws. The first of these cases, *Dennis v. United States*, dealt with organizing the Communist Party as a first step toward overthrowing the U.S. government.[133]

A. Dennis v. U.S.

In 1951, the U.S. Supreme Court upheld the 1948 conviction of Eugene Dennis for knowingly and willingly conspiring to organize the Communist Party for advocating the overthrow and destruction of the U.S. government.[134] In *Dennis*, the Court stated that the government had adequately proven that Dennis and his associates organized a national Communist Party with the goal of destroying the government.[135] More

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[127] The Act made it mandatory for every Communist-action organization to register with the Attorney General. *Id.* § 7(a). The registration statement had to include information about the organization, its members, and monies received. *Id.* § 7(d). Section 7(d) was amended in 1954 to include in the registration statement a listing "of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines . . . or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material . . . ." Act of July 29, 1954, ch. 646, 68 Stat. 586.

[128] Internal Security Act § 1.

[129] *Id.* § 10. In order to be mailed using the U.S. Post Office all publications, envelopes, wrappers, or containers had to bear the designation: "Disseminated by ____, a Communist organization." *Id.*

[130] *Id.*

[131] Veto of the Internal Security Bill, 1 PUB. PAPERS 645, 648 (Sept. 22, 1950).

[132] *Id.* at 649-50.

[133] 341 U.S. 494 (1950).

[134] *Id.* at 516-17.

[135] *Id.*

importantly, the Court upheld the right of Congress to pass the law as worded; it did not violate the First Amendment.[136] Chief Justice Frederick Vinson, the majority opinion's author, stated the Smith Act is aimed at outlawing advocacy, not discussion.[137] Vinson believed that had Dennis pursued peaceful studies and generic discussions of ideas—and not planned to overthrow the government—he would not have been convicted.[138] The Court did not believe the defendants' argument that they could not know their organizing and advocacy-related activities were illegal.[139]

In addressing the wider issue of free speech, Vinson said the societal value of free speech does have its limits; free speech is not an "unlimited, unqualified right."[140] In a reference to the earlier World War One related cases such as *Debs*, *Schenck*, and *Abrams*, Vinson stated that the nation's overall sense of security must be taken into consideration when deciding a speech related case.[141] The Chief Justice supported the idea that it is the duty of the Court to reinforce the concept that a nation must be able to protect its very existence from armed internal attack: "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."[142]

Under these dangerous national security related circumstances, Chief Justice Vinson urged Congress to take actions to defend the constitutional basis of governance with a warning: "To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."[143]

B. Yates v. U.S.

While the Court in *Dennis* focused on the organizing of a political party whose aim is to overthrow the government, in *Yates v. United States* the Court focused on the two issues of advocating *and* teaching the overthrow of the government.[144] Fourteen defendants, who were leaders of the Communist Party in California, were arrested in 1951 for conspiring to advocate and teach the overthrow of the U.S. government by force and

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[136] *Id.* at 501-02.
[137] *Id.* at 502.
[138] *Id.*
[139] *Id.* at 516.
[140] *Id.* at 503.
[141] *Id.* at 505.
[142] *Id.* at 509.
[143] *Id.* at 508.
[144] 354 U.S. 298 (1957).

violence.[145] The Court acquitted five of the defendants and remanded to the District Court for a new trial for the nine other defendants.[146] It overturned the convictions for three important reasons.[147] The first was that the term "organize," as used in the Smith Act, was improperly applied to the defendants.[148] Secondly, the trial court did not instruct the jury to consider the charge of incitement to action.[149] The third issue was insufficient evidence.[150]

Yates was a second case that upheld the constitutionality of the Smith Act. The salient part of this case is that the Court stated the Smith Act does not prohibit advocacy and teaching the violent overthrow of the government as an abstract principle.[151] The Court reviewed this issue because the lower court never instructed the jury to consider the defendants' actions as abstract discussions of creating new forms of government which was legal under the law.[152] By focusing on the terms "organizing" and "advocacy," the Court more narrowly interpreted this part of the Smith Act in *Yates* than it did in *Dennis*.

C. Scales v. U.S.

While *Dennis* and *Yates* dealt with the Smith Act's organize and advocacy principles, *Scales v. United States* centered on membership to an organization that promoted the violent overthrow of the U.S. government.[153] In 1954 Junius Scales was indicted for violating the membership clause of the Smith Act.[154] A jury convicted Scales because of his association with an organization that advocated the violent overthrow of the U.S. government at the soonest possible time.[155] The jury also convicted the defendant for being an active Communist member

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[145] *Id*. at 300.
[146] *Id*. at 328-29.
[147] *Id*. at 303.
[148] The Court interpreted "organize" to refer to "acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed 'organizational.'" *Id*. at 310.
[149] The Court disagreed with the lower court's jury instructions that all advocacy is punishable. *Id*. at 317-18. The Court stated the Smith Act does not prohibit advocacy and teaching of the forcible overthrow of the government as an abstract principle, yet the jury was never told this information. *Id*. at 324.
[150] With the Court clarifying the terms "organize" and "advocacy," it felt that five of the defendants should be acquitted while nine others retried with the burden on the government to prove advocacy in light of the Court's clarification of the term. *Id*. at 328-29.
[151] *Id*. at 318.
[152] *Id*. at 324.
[153] 367 U.S. 203 (1961).
[154] Scales v. United States, 260 F.2d 21, 23 (4th Cir. 1958).
[155] *Id*. at 24.

because he knew of the party's political goal to overthrow the government.[156]

In appealing his conviction before the Court, Scales relied on the McCarran Internal Security Act of 1950.[157] The law required Communist organizations to identify themselves in any published materials or broadcast programs.[158] He contended that the McCarran law repealed the Smith Act's provision that barred membership in a Communist organization.[159] The Court disagreed, stating that the Smith Act did not explicitly list membership in Communist organizations as a crime, but rather any organization that advocates the violent overthrow of the government.[160] Justice John Harlan, the majority opinion's author, contended the two laws are compatible because the government can investigate Communist Party membership when there is a possibility of a crime stemming from advocating the violent overthrow of the government.[161] The Court reaffirmed that both laws are tools for investigations and upheld the lower court's jury verdict:

> [W]e can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.[162]

Harlan stated that members of an illegal organization should not receive any greater degree of protection just because they personally are not actively advocating the overthrow of the government.[163]

The Court affirmed that there was sufficient evidence to prosecute Scales because "[t]he advocacy of action was not 'sporadic,' the instances of it being neither infrequent, remote in time nor casual."[164] According to the Court, the jury was right in determining that Scales had an active membership in an organization that was planning specific actions to violently overthrow the U.S. government.[165]

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[156] *Id*.
[157] *Scales*, 367 U.S. at 206-07.
[158] *See supra* notes 129-30 and accompanying text.
[159] *Scales*, 367 U.S. at 206-07.
[160] *Id*. at 207.
[161] *Id*. at 211.
[162] *Id*. at 226-27.
[163] *Id*.
[164] *Id*. at 253.
[165] *Id*. at 254.

The *Scales* case shows that the government has a mandate to prosecute someone who is affiliated with a group that sponsors violence and the destruction of the U.S. government even if they are not personally associated with the effort. The legal precedent may prove useful in the post-9/11 war on terrorism.

IV. POST-9/11 SPEECH LAWS

While the McCarran Act was repealed in 1990, the Smith and Voorhis Acts are still active laws.[166] While there have not been any prosecutions based on the Smith Act since September 11, 2001, it is a tool the federal government could use to prosecute suspected terrorists. It remains illegal to print, publish, and circulate materials advocating or teaching the violent overthrow of the U.S. government.[167] More pertinent to the war on terrorism, the law criminalizes organizing or assisting any group that teaches the destruction of the government.[168] The U.S. Supreme Court's precedents have demonstrated that the government can successfully prosecute under the law.[169] Under the Voorhis Act, it remains mandatory for any American-based political organization whose purpose is to overthrow the U.S. government to register with the Attorney General.[170]

One law passed since 9/11, Section 411 of the Patriot Act, authorizes the government to exclude aliens from the country based on their speech.[171] The U.S. Secretary of State has the authority to keep an alien out of the country if it is determined that person belongs to a group that sponsors terrorism.[172] The Secretary of State can impose this judgment on any terrorist organization, including Al Qaeda, Hamas, and Islamic Jihad. Twenty years ago this could have applied to other organizations formerly denoted as terrorist such as the African National Congress (ANC) and the Palestine Liberation Organization (PLO). Georgetown University Law Professor David Cole and James Dempsey, the Executive Director of the Center for Democracy and Technology, argue this part of the Patriot Act targets people for their words, not actions.[173] They believe it undermines the concept of open political debate: "The First Amendment is designed to protect a wide-open and robust public debate, and if our government can

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[166] 18 U.S.C. §§ 2385-2386 (2000).
[167] 18 U.S.C. § 2385.
[168] *Id*.
[169] *See* discussion *supra* Part III.B-C.
[170] 18 U.S.C § 2386.
[171] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 345, 8 U.S.C.A. § 1182(a)(3)(B)(i)(VI) (2000).
[172] Any alien representative of a "political, social, or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities" is ineligible for admission into the United States. 8 U.S.C.A §1182 (a)(3)(B)(i)(IV)(bb)(2000).
[173] COLE & DEMPSEY, *supra* note 42, at 158.

keep out persons who espouse disfavored ideas, our ability as Americans to hear and consider those ideas will be diminished."[174] Both scholars argue that freedom of speech should include an unlimited debate on contentious issues that includes unpopular sentiments.[175]

Cole and Dempsey advocate that condemning someone for membership in a terrorist group means automatic guilt by association.[176] The government can then legally prosecute an individual for materially supporting a terrorist organization.[177] It does not have to prove that an individual intended to further any terrorist activity.[178] As Justice Harlan stated in the 1961 *Scales* decision, members of an illegal organization may not receive any greater degree of protection just because they are not actively advocating the overthrow of the government.[179]

According to Cole, under current and recent American law, any citizen who donated to the ANC in the 1980s could have faced prison for assisting what was then a terrorist organization as defined under U.S. law.[180] Cole explains that the problem with this law is that it imposes liability regardless of an individual's own intention.[181] Convictions could be based on an innocent individual's connection to others who may have committed illegal acts.[182] Al Qaeda member Zacarias Moussaoui could have been prosecuted simply for being a member of Al Qaeda whether or not he was actually involved in the 9/11 terrorist plot. This also applies to any future member of Al Qaeda who is apprehended by the United States government.

Several organizations labeled "terrorist" by the government, such as the ANC and PLO in the 1980s, used violence as one of a variety of means of accomplishing their goals; they also served the social and economic interests of their communities.[183] Today, in addition to supporting suicide bombers, a terrorist organization such as Hamas provides education and health care resources in the Middle East.[184] In a war on terrorism, it's easy to overlook the different ways each organization pursues its agenda. Al Qaeda is actually a different type of organization in that its sole agenda is

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[174] *Id*.
[175] *Id*.
[176] *Id*. at 178.
[177] 18 U.S.C.A. § 2339A(a) (West 2000 & Supp. 2006). Material support is defined as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C.A. § 2339A(b)(West 2000 & Supp.2006).
[178] Cole, *supra* note 36, at 9.
[179] Scales v. United States, 367 U.S. 203, 227 (1961).
[180] Cole, *supra* note 36, at 10.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *See id*. at 13.

violence.[185] Cole posits that it is easier to prosecute someone who supports Al Qaeda than someone who supports the PLO or ANC because Al Qaeda's sole means of activity is violence.[186]

According to Cole, guilt by subversive speech and by association are similar to one another.[187] Both produce a chilling effect, making members of the public leery of engaging in any political activity that might be potentially condemned.[188] From the government's point of view, this chilling effect is a preventative law enforcement measure in its own right.

Cole advances that guilt by association is now the government's "linchpin" strategy for the war on terrorism.[189] Similar to its successful 1961 prosecution in *Scales*, under current law the United States can penalize people under criminal and immigration laws for providing "material support" to selected terrorist groups without regard to whether an individual's support was intended to further any terrorist activity.[190] If the government can disrupt people for their associations, it can also disrupt the organization of movements that could lead to criminal or terrorist activity without having to prove anyone intended to act.[191] Cole points out that during the Cold War, the U.S.-based Communist Party never actually took any concrete steps to overthrow the U.S. government by force, but its rhetoric was interpreted as advocating a violent destruction of the government.[192]

V. CONCLUSION

The post-9/11 era reflects similar attempts in American history by the government to protect the homeland from attack. Laws such as the Smith Act, the Voorhis Act, and Section 411 of the Patriot Act, in conjunction with efforts by the FBI, are efforts to prevent the planning and implementation of another terrorist attack. The monitoring and prosecutions parallel those of anti-American groups from World War One and the Cold War. When the country faces a major crisis and an external threat, court cases such as *Schenck*, *Debs*, and *Yates* show a tendency by the government to look inwards for domestic threats and to point fingers at unpatriotic voices in the country. The government, often with good reason, has feared domestic subversives, and the U.S. Supreme Court has upheld several convictions in an attempt to protect the country from internal threats. Often times, it has also gone too far, such as in the *Debs* and

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[185] *Id*. at 14.
[186] *Id*.
[187] *Id*. at 7.
[188] *Id*.
[189] *Id*. at 2.
[190] 18 U.S.C. §2339A (West 2000 & Supp. 2006); Cole, *supra* note 36, at 2.
[191] Cole, *supra* note 36, at 7.
[192] *Id*.

Scales cases, in suspecting unpatriotic elements when people simply disagree with their government's policies and have no intention of overthrowing the government.

This article has shown that the current laws on sedition and free speech in the post 9/11 environment parallel those adopted in earlier time periods in American history, i.e. World War One and the Cold War. The evidence indicates that there are parallels especially since the Smith and Voorhis Acts are still active laws. In times of war, the government, with validation by the courts, will seek to restrict speech that might aid in an attack on the country. During the Cold War and World War One, the U.S. Supreme Court supported the efforts of the government to prosecute individuals who are affiliated with organizations that promote violence against the country even if they were not personally involved in the efforts. This includes donating money and other resources in support of others' violent actions.

The evidence indicates that changes in current sedition laws five years after the September 11th 2001 attacks are not needed. Under current American law it is a crime to publish, print, distribute, and give material aid to any group attempting to harm the country. With the Smith Act, Voorhis Act, and Section 411 of the Patriot Act in hand, the government can pursue suspected terrorists as easily as it prosecuted anarchists during World War One and Communists during the Cold War. The words of Justice Oliver Wendell Holmes in *Schenck v. United States* still ring true today: "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 so long as men fight . . . ."[193] The First Amendment does not apply to all speech during wartime.

[193] Schenck v. United States, 249 U.S. 47, 52 (1919).