DO WE NEED MORE SEDITION LAWS?

TESTIMONY OF
ALFRED BETTMAN
Until May, 1919, Special Assistant U. S. Attorney General in Charge of Sedition Prosecutions

and

SWINBURNE HALE
Late Captain Military Intelligence Division, General Staff, U. S. A.

before the
COMMITTEE ON RULES
OF THE HOUSE OF REPRESENTATIVES

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When the following testimony of Mr. Alfred Bettman and of Capt. Swinburne Hale was given before the Rules Committee of the House of Representatives, that committee had before it the proposed Graham peace-time sedition law. Many of the features of the Graham Bill are to be found in all of the other proposals for sedition legislation for peace time. Particularly is this true in respect to those provisions, so forcefully criticized by Mr. Bettman, which impute criminality from the mere membership in an association, irrespective of personal guilt. —Editors.
Do We Need More Sedition Laws?

TESTIMONY GIVEN BEFORE THE RULES COMMITTEE OF THE HOUSE OF REPRESENTATIVES, JANUARY 23RD, 1920

STATEMENT OF MR. ALFRED BETTMAN
(Until May, 1919, Special Assistant U. S. Attorney General in Charge of Sedition Cases at Washington)

Mr. Bettman: As I see it is the custom of those who have preceded me to tell something about themselves, I will say that I never belonged to any socialistic or radical organization. I have never represented any such organization as an attorney, and I do not know that I am personally acquainted with any socialist or radical. I do not believe I am. My own connection with the subject of free speech has been on the government's side. In politics I am a Democrat and always have been. Of course as soon as the war broke out I had the impulse to devote myself exclusively to war work. I then used every endeavor that I could to get into war work, and the first opportunity that came was in October of 1917 and was in the war division of the Department of Justice, which had charge, among other things, of the enforcement of the Espionage Act. I was in immediate charge of the Espionage Act cases in Washington until May, 1919. So I cannot claim to represent anybody, but simply feel that it is a critical question that is before you.

The interest that my experience in Washington gave me in this subject of freedom of speech led to a very extensive study of it, historically and legally which has made me feel that perhaps I could contribute something to the problem. At any rate, it has made me, as one who has a most intense desire that American democracy as set forth in our Constitution be preserved, want to express how I feel that this is endangered by this sort of legislation at this time.

Now if you will carefully read the history of the period of
any country when there were sedition laws in effect, you will find that the period is accompanied, inevitably accompanied—it occurs too frequently to doubt that it is inevitably accompanied—by certain sinister things. In the case of the ordinary crime defined with exactitude in the language of a penal statute in American and Anglo-Saxon jurisprudence, these things do not happen. But in the case of the vagueness of language which is inevitably incident to so-called sedition laws—I am speaking of laws relating to seditious utterances—they are always accompanied by certain things which we must all deplore; raids on peaceable assemblages, raids on headquarters of associations, in which stuff there is seized without Constitutional search warrant; the action of the officials supplemented by mob action here and there throughout the country, committing raids on peaceable assemblages and on headquarters; the use of the inevitably vague language of such statutes for the suppression of all sorts of political and social issues so that inevitably many persons and many things which the writers of the statute never intended, should be brought into the ignominy of prosecution—all those things have always occurred in the enforcement of sedition laws in every period of history, at all times, and are inevitable accompaniments of it.

Now during the war we all believed in giving up as one of our contributions to the winning of a victory a good many of our ordinary habits and ordinary freedoms. But that was a war service, and that was a war sacrifice. The lesson that we have had since the war is that the emotions and passions that are engendered by the enforcement of such laws as this, unfortunately cannot immediately be cut off, but continue. The panic, the exaggeration of the facts, the seeing of danger in a few corners where it does not exist, the tremendous hysterical exaggeration of the dangers apparent, cannot just be cut off with the signing of an armistice. So that the sinister side of this thing which, as I stated, historically accompanies it, tends to continue, and I feel that it is the peculiar duty of the leaders of public opinion, amongst whom are the members of Congress, since they are official leaders of public opinion, to take the lead in calling attention to the exaggerations, in calming the panic, in bringing the habits of American administration of justice back to the traditions of American administration of justice, and not in continuing the exaggeration, continuing the hysteria, continuing all these sinister accompaniments by a continuous passage of more and more sedition laws.

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So I ask a few minutes of your time this afternoon to place before you the features of this act which strike me as violative of the Constitution of the United States, to discuss to what extent, if any, any legislation of this sort is necessary, and to discuss wherein any legislation of this sort will defeat rather than promote the purpose behind it.

Now there runs through this law from beginning to end, but particularly in sections 2, 3, 5 and 9, an unconstitutional principle, and one that is a violation of the principle of the division between the powers of the states and the powers of the nation. It is one of the most elementary principles that the national government has no police power. It has the power of running a post office. It has the power of regulating interstate commerce. But that which we know as police power, the power to regulate or protect private persons and private property, is exclusively reserved to the states. So that it is beyond the province of the national government to legislate for the protection of a piece of private property against the action of a private person, or for the protection of a private person against the action of private persons. The point I am making does not apply to those powers which relate to the protection of federal officials against violation, or of federal property against violation. But in so far as it relates to the protection of either private persons or private property, or of state property against violation, this legislation is an invasion of the police power of the states and is therefore unconstitutional.

* * *

It seems to be perfectly clear from that principle that the only power given to the federal government to protect state or private property, is in case an uprising reaches a stage where the state authorities cannot handle it. They may then appeal to the United States government to send in troops. The United States has not even the right to send in troops of its own accord where it is only private persons or private property or state persons or state property that is involved. It has to be requested by the state governor or the state legislature.

Mr. Rodenberg: There was one very notable exception to that, in the time of the riots in Chicago, when President Cleveland sent in troops to protect the mails.

Mr. Bettman: The United States can protect interstate commerce.

Mr. Rodenberg: He did that over the protest of the governor.
Mr. Bettman: Yes, that was in In Re Debs. It was settled in that case that property which is engaged in interstate commerce is within the jurisdiction of the federal government.

Mr. Rodenberg: I think President Cleveland took the position that that was interfering with the mails.

Mr. Bettman: Yes, the same thing would be true of the mails. But without elaborating further, all the provisions here, in so far as they relate to private persons or property or to state property, are beyond the power of the federal government.

Now one of the essential ingredients of our form of government is expressed by the proverb that this is a government of law and not of men, which means that the law is laid down, the penal law is laid down, is phrased with such definiteness that the arbitrary bias or prejudice of the tribunal, judge or jury, has no play. A man is guilty or not guilty because the crime is defined with exactitude. Any offense which is defined in a statute in such vague terms as the word "suggested," for instance, in section 4, or the words "tends to incite" in section 5, is a violation of the fundamental notion of criminal justice, because "suggested" leaves it open to any judge or prosecutor to give free play to his prejudices. One man may think that any bitter criticism of any clause of the Constitution is a suggestion of violence. Language which penalizes not what a man actually did, but the tendency of what he may have said, or the tendency of what he may have written, is the kind of thing which was in the old English law of seditious libel, which was repudiated by the states when the first amendment was put in the Constitution—"Congress shall make no law abridging the freedom of speech or of the press." It was repudiated by them. They were rebelling partly against that very type of legislation.

The history of freedom of speech begins with the birth of the licensing system in England. When printing and newspapers began to appear, the king claimed the right to forbid any of it without his license, and that licensing system was administered by the star chamber, and became one of the disgraces of English history. In 1695 the House of Commons refused to re-enact the licensing act, and since 1695, over two centuries ago, and about one century before the Constitution of the United States, it became the settled law of England that no advance interference with publication was constitutional in Anglo-Saxon countries—no advance interference. So that to allow the Postmaster General to state in advance what shall or shall not go out and be published, to allow the fear of what
the Postmaster General will or will not allow to exert a palsy-
ing effect on the freedom of intelligence of the American public, is turning back the hands of the clock over two centuries in this country.

Mr. Dale: How do you draw the distinction between prohi-
bition of obscene matter. That is prohibited.

Mr. Bettman: I was coming to that. Now the guarding of the public against obscene literature has of course always been recognized as a sort of implied exception to the principle. But the Supreme Court of the United States in sustaining the right to exclude obscene matter from the mails, stated that it is not as a government controlling morals that it did that, but that it, as the head of the post office business, in deciding what it shall carry in the mails, may do that. But that if in addition to stating what shall be carried in the mails, the government attempted to state what shall be transported by other means, that would be an absolutely unconstitutional combination. That is the principle of the case, that they have a certain amount of right to say what they will and what they will not carry as the post office business, but if they make any attempt to join other means of distribution, such a joinder would be un-
constitutional. You take sections 6, 7 and 8 together of this bill, and they absolutely violate that constitutional principle, because they not only prohibit the use of the mails, but also other means of transportation. So that the plain language of the case of Ex parte Jackson, 96 U. S., 727, would make sections 6 and 7 or 6 and 8 absolutely unconstitutional, as interfering with publication in advance. To my mind, today the carriage in the mails is a government monopoly, and is so usual and customary and necessary a means of transportation of printed matter, that that old doctrine that the United States is a mail carrier and can as a mail carrier decide what it will and what it will not carry, should not be considered as applying; that the effect of refusing to carry in the mails is the effect of sup-
pression, under modern conditions where the mail has grown to be such a tremendous factor. And suppression in advance vio-
lates the very minimum definition of freedom of speech settled in England for 200 years. So that I think section 6 alone, just that section, certainly violates our democratic traditions in that it gives one man power to decide what the rest of us shall read and see and hear and think, absolutely autocratically.

Now under sections 9, 10 and 11, there is incorporated in this bill another absolutely and complete departure from our tradi-
tional democratic doctrines. One of the fundamental concep-
tions of our law, gentlemen, of Anglo-Saxon law, is that guilt is personal and not by association. Now therein it differs from the law, for instance, of Prussia. Prussia, under the leadership of Bismarck, enacted the anti-socialist laws against the then budding social democratic party of Germany, and in these anti-socialist laws men became offenders by reason of membership in the socialists' associations. Now that idea that guilt is not necessarily personal but can result from association only, is absolutely abhorrent to every American tradition or conception of criminal justice. That idea is best illustrated on the continent by the existence of what are called political prisoners, men imprisoned on account of their beliefs, and not on account of their overt acts. And so careful were the framers of our Constitution that the conception of the political prisoner, of the man prosecuted for his beliefs, should not enter into American jurisprudence, that in addition to the free speech and free press clause of the first ten amendments, they put in the treason clause, which requires an overt act, an overt act testified to by at least two witnesses in order to constitute the offense of treason. And the United States court held during the war that mere propaganda, mere newspaper propaganda, which itself did not attempt to convey information to the enemy, was not an overt act within the meaning of the treason clause of the Constitution. So that when you put, if you would put by the enactment of this statute, on the American statute books these sections to which I have referred, 9, 10 and 11, you would be putting a Prussian institution on the statute books, one which is a tremendous departure from all Anglo-Saxon and American traditions.

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Now, gentlemen, I do not think it would be going very far afield in this discussion if I would point out that the mood and temper of things which causes such acts as this to be introduced has a complete historical parallel in the history of England, and if you want some fascinating reading, read the history of England during the early years of the French Revolution, and you will be positively startled at the parallel between things that are right here in our country today and what happened there. In the reaction of the people of England to the terror of the French Revolution, absolutely the same kind of things happened that are happening now in the reaction of the American people toward the Russian revolution. Among those happenings, was a constant introduction and passage of sedition bills, based on a complete panicky appraisal of the facts, and the historians, in looking back at it, consider it a
shameful black page in English history, and point out that
the actual amount of rebellion, the actual chance of revolution
in England, was absurdly small. One of the ablest of the
historians says that they brought sedition case after sedition
case in the courts of England, but that they did not prove
enough actual facts to keep a crown lawyer in bread and cheese.

I have brought here with me the second volume of May's
Constitutional History of England, chapter 9 of which is one
of the most famous chapters, called Liberty of Opinion. It is
the history of liberty of opinion in England, and if any of you
have time, I advise you to read it because it is a warning of
how hysteria and fears and panics that can be created in one
country by revolution in another, will cause that country to
desert its traditional liberties for the time being. That is
chapter 9 of the second volume of Erskine May's Constitutional
History of England.

Now there were in England at the time some associations
and radical societies, that were pictured as dangerous con-
spiracies to attempt to repeat in England the terror of the
French revolution in France. As a matter of fact, their size
was insignificant, their power was nil, and just as in the United
States today, 99 out of every 100 persons in England would
have been ready to rush to the defense of her institutions if
anybody attacked. They never proposed to attack. It is inter-
esting to us in this time to know that what these fearful revo-
lutionaries proposed and the reason they were indicted for
treason was the advocacy of universal manhood suffrage.

Now May says:

"In ordinary times, the insignificance of these societies
would have caused contempt rather than alarm; but as
clubs and demagogues originally not very formidable, had
obtained a terrible ascendency in France, they aroused
apprehensions out of proportion to their real danger. In
the presence of a political earthquake, without a parallel
in the history of the world, every symptom of revolution
was too readily magnified."

And he goes on to describe the situation of English society
and it applies absolutely today. None of the sort of things
which precipitated a revolution in Russia exist here today.
You cannot have a revolution resulting from mere talk. There
has to be the condition that produces it. My personal opinion
is that mere talk has a rather small influence.

He goes on to say:
“It was a crisis of unexampled difficulty—needing the utmost vigilance and firmness. Ministers, charged with the maintenance of order, could not neglect any security which the terror of the time demanded. They were secure of support in punishing sedition and treason: the guilty few would meet with no sympathy among a loyal people. But, counseled by their new chancellor and convert, Lord Loughborough, and the law officers of the Crown, the government gave too ready a credence to the reports of their agents; and invested the doings of a small knot of democrats—chiefly working men—with the dignity of a widespread conspiracy to overturn the constitution. Ruling over a free state, they learned to treat the people in the spirit of tyrants. Instead of relying upon the sober judgment of the country, they appealed to its fears; and in repressing seditious practices, they were prepared to sacrifice liberty of opinion. Their policy, dictated by the circumstances of a time of strange and untried danger, was approved by the prevailing sentiment of their contemporaries; but has not been justified—in an age of greater freedom—by the mature judgment of posterity.”

I have just read a couple of passages to show that the government was the victim of a hysteria which had no basis in the actual situation in England, and in some cases increasing it by stirring up the panic for this or that purpose. The government passed sedition laws and alien laws and every kind of law just like this, and instituted sedition prosecution after sedition prosecution, and crushed for the time being the traditional Anglo-Saxon liberty of opinion, without any reasonable basis in fact, a piece of hysteria which all history recognizes as a piece of hysteria, and it would be—if I may make bold to say so—the same sort of reaction today to enact a statute which has no requirement in the face of the situation behind it.

What necessity is there as a matter of fact? I think Captain Hale read you section 6 of the federal penal code (reading):

“If two or more persons in any state or territory conspire to overthrow, put down or destroy by force the government of the United States, or levy war against them, or oppose by force the authority thereof, or by force prevent, hinder or delay the execution of any law of the United States,” etc.

A conspiracy means an unsuccessful conspiracy. You do not have to succeed to be indicted under a conspiracy statute. If you plan something you come under a conspiracy statute, and
all you have to do is an overt act. The mailing of a letter could be an overt act if there were a plan to attack the authority of the United States, and you mailed a letter notifying the people that a meeting would be held in such and such a hall. This is in fact an overt act, sufficient to bring you within this seditious conspiracy statute. Now there has not been one successful trial under this conspiracy statute and it takes only two persons to make a conspiracy. If there have not been two persons conspiring against the government of the United States, with its 110,000,000 people—if there are not two persons anywhere who have conspired since the armistice, I cannot feel that we are in a very parlous and dangerous situation. So I say that the fact that, with all the tremendous amount of investigation, there has been nothing to bring one successful case under that section where it requires only two persons; the fact that the only case brought, as described by Captain Hale, failed absolutely—for it was not even allowed to go to the jury, demonstrates that we are not in the parlous state, in which Congress needs to be appealed to to add to the sedition laws already on the statute books.

Now is there necessity as a matter of law, leaving out the facts for a minute? The only thing that is not already covered in the statute books is the individual advocacy of violence against the United States which is not a part of any conspiracy with any other person. Now you cannot hold a meeting without two persons being involved in calling that meeting. You cannot hire a hall and gather a thousand people alone. If there is a meeting, there is surely more than one person, and then there is a conspiracy, which comes under that section. The only situation that is not absolutely covered by that statute today is where one fellow all by himself, conspiring with nobody else, advocates forcible resistance to the United States. Now you can imagine what danger that one fellow could be, what chance he would have if he is not with anybody else. Moreover, if he succeeds in stirring up the least act of violence against the United States, then the present statutes cover him, because an act of violence is a crime, and under section 332 of the penal code, whoever incites or advises the commission of a federal crime, is himself guilty as a principal. So I cannot conceive of any case that is worth the thought of any American for two minutes which is not already covered by one or more of these sections of the penal code.

Now just a few words in closing—

The Chairman: Do you know or think of any condition today
in the country, of any agitation by speech or by publication in writing, or of any attempt to overt acts against the government, that could not be prosecuted under section 6 of the penal code?

Mr. Bettman: I cannot think of any case which I have read about in the newspapers—now of course I am not speaking of anything relating to the files of the Department of Justice—I cannot think of any case which I have read about in the newspapers since I have been out, which on reading either turned out to be nothing or would not have been within one of the present federal statutes. And the remote case of the individual who talks without inducing anybody to commit violence, and who is not associated with anybody else, that remote case I cannot consider important and dangerous enough, Mr. Chairman, to warrant keeping up this turmoil, to warrant putting another sedition law on the federal statute books. Of the two dangers, that of the occasional individual talking, who does not succeed in creating violence, and that of adding another monarchic type of statute—because all sedition laws are of the monarchic type, except those which relate to overt acts—of the two dangers, the latter is decidedly greater.

Mr. Hale: Would the speaker and the Chairman allow me to ask a question?

The Chairman: Yes.

Mr. Hale: I should like to ask about section 4, whether in his expert opinion section 4 would cover the lone individual who incites insurrection?

Mr. Bettman: I am inclined to disagree with your interpretation of section 4.

Mr. Hale: I have to yield to your more authoritative interpretation.

Mr. Bettman: I have always taken the view, when the question has arisen in the Department of Justice, that that section relates to someone who succeeds in starting something.

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Mr. Bettman: I want to state—I think this may be an appropriate time to state to you what Police Commissioner Woods, who certainly has had some experience in the police business, stated to the American Sociological Society about the effect of speculative talk in creating violence. He said:

"It cannot be considered as provocative of immediate disorder if speakers criticize, no matter how vehemently, the existing order of things, or if they recommend, no matter how enthusiastically, a change which they believe would
improve things. The history of the world is a history of successive changes from the old order to the new, and the present order can certainly stand a free, orderly discussion of the advantages it has to offer as opposed to the advantages of different theories of the conduct of human affairs.” That is the testimony of the police chief.

Now just a word more. The purpose of these laws is I presume to prevent disorder, to prevent what is conceived in most of our minds to be revolution, violent attacks on something or somebody. I think that the history of any country proves that it has the opposite effect. I presume that other speakers have said this same thing, but I do not believe we can repeat it too often. Repression has the opposite effect. Personally I think it is a psychological or physiological fact that suppression increases the rebellious feeling so that there is a certain safety in not instituting a policy of suppression. I am not now talking about acts against the state. I am not talking about the man who commits any act against the state, or about a man who induces another to commit any act against the state. The man who incites a riot—and a riot means that somebody attacks somebody or something—the man that incites that thing should be held guilty, and should be punished accordingly. Now I think one of the favorite quotations, and one of the best ones is from the speech of Lord Erskine to the jury in the famous case of Thomas Paine. Thomas Paine, during the period that I am describing to you, was indicted in England under the seditious libel act for Book Second of the Rights of Man. Erskine said:

“When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course.—Let reason be opposed to reason, and argument to argument, and every good movement will be safe. Thus I have maintained, by English history, that, in proportion as the press has been free, English government has been secure.”

And I think that it is true of America, and that it is true of all countries. That in proportion as speech is free, every good government is safe.

Just a few historical examples of how it works. I refer to the fact that after Karl Marx’s Communist Manifesto, which was referred to by Captain Hale, the social-democratic party
in Germany began to grow, and fearing them, because they were bitter opponents of the existing system in Prussia, Bismarck enacted the anti-socialist laws. Under the anti-socialist laws violence grew and the socialists grew in numbers until they became so numerous and so powerful that they forced the repeal of those laws. And from the time of the repeal of those laws, those same socialists became more and more conservative. They became more and more a part of the regular constituted political government of the state, and their revolutionarism, or whatever you want to call it, decreased just as their freedom increased.

We have in Russia an example of the opposite. Russia is cited for all kinds of things, but it seems to me that it plainly cannot be cited in favor of suppression of freedom, because, if her revolution has been as violent and terrific as has been described, then certainly we can say that where the suppression of freedom has been greatest, there revolution has been most bitter and violent. We know that England, after this siege of sedition laws and prosecutions to which I have referred, and which are described by May, became the freest country in the world as far as communication and expression is concerned. We know that on three occasions, in the 1830 revolution in France, the 1848 revolution in every country on the continent, and in 1871, the time of the Paris commune—in all these three revolutionary periods on the continent, just across the Channel, in England, where there was the greatest freedom of communication, there was practically no uprising whatever. So if history points to anything, it points to the fact that attempts at suppression do not reduce but rather tend to increase the dangers of violence.

Mr. Dale: You would not give that as the sole reason for the harmonious conditions in England, would you? You would not confine it to their freedom of speech, I mean the reason for the difference.

Mr. Bettman: I think, England, of course has the greatest talent, certainly of all European countries, for progress by evolution, by orderly political change. But I think that that itself is a result of freedom. I think that the capacity for orderly political change is itself the product of freedom.

Mr. Dale: If France at that time had had a government like the government of the British Isles, it would have been physically impossible for them to have gone through with those various revolutions.

Mr. Bettman: Well of course, but the government of Eng-
land was no accident. The government of England was the result of the successive fights for the fullest freedom. They had had uprisings in the time of George III, who was a despot, and that was when the seditious prosecutions occurred.

Mr. Dale: But my point is that the revolutions in England were prevented not because of the broader liberties that they had under the statutes, but because of their broad government there was no occasion for these revolutions.

Mr. Bettman: But if the broad government had tried repressive measures, there would have been occasion, and they did not try.

Mr. Dale: That is true, but the government itself was so constituted that they could not have had these repressive measures that they had in France.

Mr. Bettman: Of course England was more representative of the people undoubtedly, but if the Paris Commune had caused the then government of England to be stampeded into a policy of repression at the time of the great revolution, there would have been rioting in England.

Mr. Dale: But along that line of argument, you mention the passage of the sedition laws aimed to restrain freedom of speech, and yet that did not disturb the people.

Mr. Bettman: Those laws were repealed. The panic died down and they were repealed. They did away with them, but before they did away with them, there was an era of terror.

Mr. Dale: It would not make any difference in England, under their form of government, how strong the sedition laws were, because there would not be the occasion for the uprising that there was in France.

Mr. Bettman: Of course. I think we agree, but we express it differently.

Mr. Dale: Probably.

Mr. Bettman: Now my main thought is that the time has come in the United States when you, the members of Congress, as official leaders of our public opinion, should say that we have had enough of this sort of thing, which inevitably causes these violations of American methods of administering justice. There is now no dangerous situation which requires us to depart from our past traditions. In war there was. But now that the great war is over, there is no necessity, no occasion for us to continue this departure from our traditional methods of administering justice. If a man commits crime, let him be punished. If a man incites another to crime, let him be punished. But inevitably, if you try to reach the
talk of violent things, then inevitably you will reach much talk that should be allowed. You cannot write these statutes and then so control the administration of them that only the persons who ought to be reached will be reached. As a matter of fact, all history shows, just as the history of England shows, when they went after the fellows advocating universal suffrage, that the power which generates these laws and which is generated by them, crushes a great deal of the freedom that ought to exist, and that we all want, no matter what our sentiments are. If you will actually restrict your suppression to inciting to crime, there are enough statutes to reach all such cases, and you will really reach everything that needs to be reached, at least in the present state of affairs. For personally, I believe that even what amount of revolutionary agitation there is today, under a more liberal administration of the laws, will dissolve away in the sunlight of our traditional freedom.

STATEMENT OF MR. SWINBURNE HALE,
Attorney-at-Law
(Late Captain, Military Intelligence Division,
General Staff, U. S. A.)

Mr. Hale: Mr. Chairman and gentlemen, I have come here to Washington to oppose this bill, in three capacities: First, in the capacity of an American citizen; second, as a lawyer; and third, as an ex-officer of the Army.

Now, when I say I am an American I mean that I am a Yankee. All my people came to this country long before the Revolution was ever thought of. I had some 12 or 14 ancestors in the Revolution, from the Battle of Bunker Hill to the Surrender of Cornwallis. One of my ancestors was governor of one of the New England colonies before they ever thought of becoming a State. My people fought in the War of 1812, the Civil War and the Spanish-American War. My uncle, Rear Admiral Swinburne, made the first capture of a vessel in the Spanish-American War. And when this last war came on, I was accused of being a jingo, because I said from the very beginning, in the year 1914, that the duty of beating Germany was a world job, and was not the job of any particular country. And my father and I tried to induce President Wilson at that time not to publish the neutrality proclamation. I then was entrusted with certain work for the French government in this country, and did all I could, without violating the neutrality proclamation, for the cause of the allies. And when
this country entered the war, my wife and I put our children with their grandparents and disposed of our house, demobilized everything we had; and the same day that I went into the army my wife went into the Food Administration and became one of the principal speakers in their campaign.

I am not a socialist. I voted for Mr. Wilson in the last election, and voted for Theodore Roosevelt in the election before the last.

As an American, I think there are certain things in this country which are higher than the Constitution, higher, even, than the Declaration of Independence. There is a certain amount of freedom of spirit in the American people as a people. There is a certain proud challenge that this country has thrown out across the world, for many generations, and that is the challenge of freedom and liberty; and that challenge is violated, to my mind, by the spirit of this bill.

I want first to discuss the absolutely legal aspect of this thing. We have a very full statement from the Attorney General as to the legal aspects of the proposed legislation in the letter which he submitted to the Senate on November 17, 1919, Document No. 153, 66th Congress, First Session. He then submitted his reasons why additional legislation was necessary; and he submitted the text of a statute which he wanted to have passed. It was exactly the same text as that which was read yesterday in the Attorney General's letter to the chairman of this committee. I followed the text word for word all the way through when the letter was being read.

In that letter of the Attorney General he says that the legislation at present existing is insufficient for the purpose of curbing the dangerous radical movement in this country. He tells us that section 6 of the Penal Code is insufficient to punish dangerous radicals.

That section, if I may strip it of the unnecessary words, reads as follows:

"If two or more persons conspire to overthrow, put down, or to destroy by force the Government of the United States, 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, they shall each be punished," etc.

The Attorney General has said that that is insufficient to enable the Government to get after dangerous radicals; and he says that he caused a test case to be brought in order to obtain an interpretation of the section. He reprints in his letter to the Senate committee the entire text of the opinion
of the court which resulted from that case which he calls a
test case.

I have read that opinion very carefully; and I venture to
say that it is not a test case of anything, except of the incom-
petency of the assistant district attorney who tried it.

The case came up, according to the Attorney General's let-
ter, in this way: I quote the words of his letter:

"On July 24, 1919, the case came before Judge Hazel,
of the western district of New York, on motion to dismiss
the indictment."

There are lawyers who are members of this committee; and
any lawyer who read that the case came before the judge on
a motion to dismiss the indictment would infer from that, quite
reasonably, that a motion to dismiss the indictment was made
by the defendant in advance of the trial.

"The case came before Judge Hazel of the western district
of New York, on motion to dismiss the indictment."

Mr. Pou: Does that letter claim that the cause of the dis-
missal of the indictment was that the indictment did not charge
an indictable offense?

Mr. Hale: The Attorney General does not state as to that.
Now, I turn to the opinion of the court, which is printed as
an exhibit to the letter; and when I come to the opinion of the
court I find a very different situation from that which the
Attorney General has set forth. I find that a motion was not
made to dismiss the indictment in advance of the trial, but
that the prosecution put in all its evidence and the defense
put in all its evidence; and after all the evidence was in, a
motion was made to direct a verdict by the jury and not to
dismiss the indictment.

The Chairman: A verdict of acquittal?

Mr. Hale: Yes, sir, a motion to direct; the usual motion
made by the defense at the close of all the testimony.

The case was brought against a certain society known as
"El Ariete Society," which, I take it, is Spanish, and which
the Attorney General said was anarchistic. The Attorney Gen-
cral says that case holds that the statute is not sufficient
to enable the Government to obtain the conviction of those
guilty of advocating anarchy and violence.

What did the court hold? The court held two things abso-
lutely definitely. I read from the opinion of the court; this is
the first thing it held:

"There is nothing in it (the manifesto of the society)
that advocates the destruction of society by the use of
violence, and it is open to the construction that it was designed to be sent out for the purpose of bringing about a change in the Government by propaganda—by written documents.”

In other words, Judge Hazel held that this was not a document which advocated the overthrow of the Government by force and violence; and he simply disagreed with the Attorney General’s interpretation of it.

The second thing held in the opinion of Judge Hazel, which is not mentioned in the Attorney General’s letter, is this:

“It is not shown that the defendants announced any of these anarchistic statements set forth in the manifesto. It was not shown that any of them read it or were aware of its contents before their arrest; it was not shown that they had predilections toward such a subject. It was not shown that there was any incitement by them or others to such views. They were not shown to have any direct or substantial connection with the printing of the manifesto, or with causing it to be brought to the house of this man Rodriguez; and I think, in order to establish the claim of conspiracy under this statute, assuming that it applies, it was necessary for the Government to go further than it did, and, gentlemen of the jury, in my opinion, there is nothing to be submitted to you.”

Mr. Rodenberg: That would seem to indicate that the Attorney General brought a very poor test case?

Mr. Hale: That is what I venture to suggest, that this was not a test case of anything, except the ability of his assistant to try the case before the jury. He proved nothing. The case was not a test case; and for the Attorney General to tell the Senate that it was a test case is an indication either that he relied upon the perversion of the facts by some assistant who prepared his letter, or did not take the trouble to look into it himself.

The Chairman: Under what statute was the case brought?

Mr. Hale: That was brought under section 6 of the Penal Code.

The Chairman: Is there anything in the opinion or argument of counsel to indicate that the law is not sufficient?

Mr. Hale: There is nothing whatever in the opinion as to whether the law is or is not sufficient. The only statement as to the law is:

“And I think, in order to establish the claim of conspiracy under this statute, assuming it applies, it was neces-
sary for the Government to go further than it did, and, gentlemen of the jury, in my opinion, there is nothing to be submitted to you."

The Chairman: It all hinges upon a question of fact, rather than of law?

Mr. Hale: It hinges entirely upon a question of fact.

Mr. Pou: It seems from that decision that the indictment would have to charge a conspiracy?

Mr. Hale: Yes, sir, under the statute the indictment would have to charge a conspiracy. In other words, the statute is designed to cover two or more persons who actually conspire or plot to bring about the overthrow of the Government by force and violence, either by a written document, or in any other manner.

Mr. Pou: It would not apply to one man?

Mr. Hale: It would not apply to one man; that is a two-man statute.

Mr. Pou: Yes; that is what I understood.

Mr. Hale: I will come in a few moments to the one-man statute, which I mentioned yesterday.

There is another decision on section 6, which the Attorney General does not mention in his letter to the Senate, which is a decision of a great deal more importance than the decision of a single district judge, because it is a decision of the Circuit Court of Appeals. That is the case of Wells v. United States, 257 Fed. 605. In that case, which was brought in the State of Washington, the defendant and three others were indicted and convicted under section 6, for having conspired by force to prevent, hinder or delay the execution of certain Federal statutes—the declaration of war against Germany and others. In other words, this was a case before the espionage law had become effective, and where they used this statute to get after a man who obstructed the war against Germany. The evidence was to the effect that prior to the passage of the selective service act, the defendants had collaborated in the preparation and distribution of a certain anti-conscription circular urging forcible resistance to conscription.

The court held that it appeared quite definitely from the language of the anti-conscription circular that force and violence were called upon to avoid conscription; and said (p. 614):

"We think, therefore, that the evidence was sufficient upon which to submit the case to the jury. It was not necessary to show that force was actually employed, but only that there was a conspiracy entered into that con-
templated the employment of force as a means to the accomplishment of a common purpose to oppose the execution of a law of the United States or the authority of the Government to prosecute the war."

Now, there is the Circuit Court of Appeals holding, squarely and definitely, that if two or more persons conspire by words—by black marks on white paper—to advocate the opposition by force to any statute of the United States, they may be convicted.

So that the law is quite clear on the two-man statute, namely, section 6.

Yesterday Mr. Gompers was good enough to yield to me for a moment when a question was asked, and I quoted section 4 of the Penal Code, which I shall call the "one-man statute."

Section 4 provides:

"Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than $10,000, or both, and shall, moreover, be incapable of holding any office under the United States."

That is the one-man statute. Now, inciting an insurrection against the laws would, I think, be done by publishing a document which said, "I appeal to all persons agreeing with me to arm themselves and attack the jail for the purpose of liberating a political prisoner," or which said, "I advise all of those to whom I am talking to to resist the conscription laws by force."

I have only found one decision on that section; that is In re Grand Jury, 62 Fed. 832. In that case, a person had made a speech the night before. The grand jury was sitting; and the court instructed the grand jury that they were to look into the speech that the man made, in order to find out whether he was inciting an insurrection.

That was in combination with the fact that there was then pending a strike on the lines of the Southern Pacific railroad; and in the atmosphere of that strike that instruction was given. Obviously, although we cannot tell exactly what the nature of the speech was, it had something to do with the urging on of the strikers.

Mr. Pou: Of course, you have to read the statute as a whole
in order to interpret it correctly. Now, reading that as an entire statute, do you not think that it presupposes that an insurrection is already in existence.

Mr. Hale: I should not think so, sir, because it says, "whoever incites an insurrection."

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