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THE ENFORCEMENT OF THE CRIMINAL LAWS OF THE UNITED STATES IN TIME OF WAR

Wendell Berge¹

Internal security is the first concern of the Department of Justice. Before Pearl Harbor we had accumulated vast files of information about residents of this country whose conduct or utterance indicated that if war came they ought at least to be watched. Some of these were aliens, some were naturalized citizens, and some were native-born citizens.

As for alien enemies, we were ready with a program providing for the internment of those regarded as a threat to our internal security.

Denaturalization Program

As for our naturalized citizens, there was a considerable number whose disloyal activities and membership in un-American organizations indicated that though naturalized they retained a mental reservation and did not in fact renounce absolutely and forever all allegiance and fidelity to the country of their origin. Indeed, there was evidence in some cases that persons coming to this country with subversive design had obtained citizenship as a cloak and protection for their activities. We had evidence of criminal violation against relatively few of these naturalized citizens. And yet a study of their files in many cases left little doubt that they were here for no good purpose. If these persons were denaturalized they could be treated like other alien enemies. Accordingly, we launched a program to cancel the citizenship of persons falling into this class. While not technically criminal actions, these suits are instituted under the supervision of the Criminal Division and are important in the internal security plan.

These proceedings are instituted by the filing of a petition under Section 738 (a), Title 8, U. S. C., which prescribes that a petition may be filed for the purpose of setting aside an order admitting a person to citizenship. The theory is that the citizenship was procured by fraud. Mental reservation of allegiance to a foreign state at the time of naturalization is a fraud within the meaning of the statute.² The same is true of a mental reservation in the avowal of attachment to the principles of the Constitution,³ or of an insincere representation of intention to reside permanently in the United States.⁴

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² *Schurmann v. United States*, 264 F. 917 (C. C. A. 9th, 1920) App. dismissed 257 U. S. 621 (1922); *United States v. Kramer*, 262 F. 395 (C. C. A. 5th, 1919).

³ *United States v. Tapolecaanyi*, 40 F. (2d) 255 (C. C. A. 3rd, 1930).

⁴ *Luria v. United States*, 231 U. S. 9 (1913).

Fraud in naturalization may of course be proved by conduct subsequent to naturalization from which the courts may infer a fraudulent intent at the time of naturalization.⁵

We have about seventeen hundred cases under consideration and investigation for denaturalization. One hundred and fifteen petitions have already been filed and twelve cancellation orders have already been entered. The statute allows the defendant to a cancellation proceeding sixty days in which to answer the petition which to some extent slows down these cases, but there should be many actions of this type completed within the next few months. When the citizenship is finally revoked, the persons concerned are apprehended under the Alien Enemy Control program.

As for native-born citizens, the problem is principally one of criminal law enforcement. Our criminal laws apply, of course, to all persons within the jurisdiction, but as to aliens and naturalized citizens we have the additional remedies already discussed.

The F. B. I. is receiving more complaints than at any time in its history. Some of the complaints are frivolous but many of them must be investigated.

Espionage

When the facts developed by investigation show that prosecution is warranted, we proceed under Section 31, Title 50, U. S. C., which relates to unlawfully obtaining or permitting to be obtained information affecting national defense; Section 32, Title 50, U. S. C., which relates to unlawfully communicating to a foreign government information concerning the national defense; or, Section 34, Title 50, U. S. C., which relates, among other things, to conspiracy to violate Section 32. Until it was amended in 1940, Section 31 provided only a maximum penalty of two years imprisonment, or a fine of not more than \$10,000, or both. As amended March 28, 1940, this section now provides for a maximum prison term of ten years. Section 32 provides for the death sentence, or imprisonment for not more than thirty years; and conspiracy to violate this section carries the same penalty (Section 34, Title 50, U. S. C.).

One of the difficulties under both of these sections is that they do not punish acts of preparation which fall short of the legal concept of an attempt. This may be illustrated by the *Bahr* case which, at the time this is written, is being tried in New Jersey. The indictment alleges in effect that Bahr came to this country for the purpose of committing acts of espionage; that he had a commission to obtain industrial information and send it back to Germany; and that he brought with him instrumentalities, such as invisible ink, for transmitting information back to Germany. But Bahr was apprehended by the F. B. I. before he ever left the ship at Hoboken. He had not

⁵ *Glaser v. United States*, 289 F. 255 (C. C. A. 7th, 1923).

yet committed espionage, and it is certainly doubtful that his acts had progressed far enough to constitute an attempt.

Bahr was indicted under Section 34, Title 50, U. S. C., for conspiracy to violate Section 32. The alleged conspiracy was hatched in Germany and we believe that his attempt to get into this country in pursuance of it constitutes a sufficient overt act for jurisdictional purposes. But in many cases perhaps it would be impossible to prove a conspiracy which originated outside the territorial confines of the United States and in an enemy country, and we might find ourselves powerless to deal with spies who are apprehended before they have committed acts sufficient to constitute attempts to commit crimes under Sections 31 and 32.

This is total war. We should at once strengthen our law so that it clearly covers the case of a spy who comes to this country for the purpose of illegally obtaining and transmitting war information and is apprehended before he has had a chance to get in his deadly work.

Foreign Agent Registration Act.

During the year the Foreign Agent Registration Act of 1938 has been amended and its administration transferred from the State Department to the Department of Justice. The amendments resulted from the experience of several years' administration and enforcement of the original McCormack Act, and from the needs of wartime. The original statute required all persons acting in this country as agents for foreign principals in the dissemination of information to register with the State Department and fully disclose the nature of their agency. The new act contains a number of provisions not found in the previous law. Agents of foreign principals who are required to register must now label the political propaganda disseminated by them so that recipients may appraise such propaganda in the light of the agent's associations. The act further provides that copies of such propaganda must be filed with the Librarian of Congress and the Attorney General. Other new provisions have been added.

There have been no prosecutions under the amended act, which has been effective only since June 28, 1942. During the past year, however, there have been a number of prosecutions under the original McCormack Act, and in each case the Government has been successful.

Sedition

The line between seditious utterance and legitimate criticism is often a difficult one to draw. The clear and present danger doctrine enunciated by Mr. Justice Holmes⁶ has frequently been quoted as constituting the criterion for sedition prosecutions. As a statement of policy or general objective it is still valid. As a guide for the

⁶ *Schenck v. United States*, 249 U. S. 47 (1917).

determination of action in specific cases, it falls short. We are fighting a war in which propaganda is one of the weapons; a war in which civilian population is engaged in almost as important a sense as the military and naval forces. It would be quite unrealistic to say that utterances and writings cannot directly interfere with the prosecution of the war unless they specifically counsel insubordination, disloyalty, mutiny, or refusal of duty by the armed forces, and unless they are spoken or written under conditions that make them amount to an immediate incitement to action. On the other hand, if too broad a rule is adopted, persons will be convicted for bona fide criticism of war methods and objectives merely upon a superficial showing that the words spoken or written may have some tendency to discourage civilian morale.

After we had been at war for several months it became apparent that certain individuals were making repeated and consistent misstatements of fact concerning the war. Some of these people had very small audiences and we could afford to ignore them. Others, however, were increasingly active both in talking and writing. Further study and analysis showed that many of these persons were constantly repeating most or all of the Axis propaganda themes. It is understandable, of course, that a loyal American citizen might be expected to hold some opinions critical of the policies and conduct of the war. But when he repeats frequently each and every one of the Axis propaganda themes, and when he appears to be active in his desire to spread them, then the Government can well afford to scrutinize his whole conduct more closely in an effort to determine whether his actions should be deemed seditious.

We have restricted prosecutions for sedition to cases which we regard as flagrant. We are not anxious to prosecute for statements made in private conversation, or made casually, or made impulsively under the stress of temper, or made to small groups assembled by chance in barber-shops, taverns, and the like, or made while the speaker was under the influence of liquor.

But the Pelleys, the Christians, and the Nobles we will call to account, because they are not speaking as honest critics exercising their right of freedom of speech, but as consistent advocates of the enemy, doing his work as effectively as though they wore his uniform.

The type of sedition case which we will prosecute vigorously when the evidence is sufficient is illustrated by the indictment alleging a seditious conspiracy which was recently returned in the District of Columbia against twenty-eight defendants. It is alleged in this indictment that the defendants agreed to make use of certain publications, groups, organizations, committees, and even the *Congressional Record*, to publish certain statements for the purpose of

obstructing our national defense and impeding our war operations. The indictment contains page after page of recitation of the themes which were broadcast by members of this alleged conspiracy. Many of the statements taken by themselves, if uttered sporadically or casually, might not be harmful. But it is alleged that the publications participating in this conspiracy carried on a continuous and systematic campaign of written and printed opposition against every effort of the Government to arouse the people to a realization of the grave and imminent danger threatening the United States, and that the defendants carried on a systematic campaign of vilification and defamation of the persons entrusted with the conduct of the war. Many of these publications printed nothing else but vilification and abuse of the war effort. This is not, in my judgment, the kind of freedom which the Constitution guarantees.

As a protection against prosecutions for sedition getting out of hand, the Department requires that no prosecutions of this type shall be instituted by United States Attorneys without prior approval of the Attorney General.

Sabotage

I want briefly to comment upon some of our problems growing out of complaints of alleged sabotage. We are engaged in this country in tremendous industrial expansion. We are trying to speed up production. This puts an added burden upon the capacity of machines and upon the physiques and nervous systems of men. The result is that accidents inevitably occur and some men go berserk. Even in peacetime, under normal conditions of industry, there are a few employees who for motives in no way connected with lack of patriotism deliberately damage machinery or interfere with its functioning. These men may have a personal grudge against some individual, or they may think they have not had a square deal from the management.

Such cases have always been regarded as ordinary malicious mischief cases and in my judgment ought to continue to be regarded as such. While the facts in some of them could perhaps be made to support sabotage indictments, since the statute applies to wilful injury or destruction of war material, premises or utilities "with reason to believe" that it will obstruct the United States or associate nations in carrying on war, yet I do not think that it would serve the national interest to treat all these malicious mischief cases as Federal sabotage cases; particularly do I think this since I believe that the penalties for real sabotage ought to be increased.

The present penalty for sabotage is imprisonment for not more than thirty years, or a fine of not more than ten thousand dollars, or both.⁷ Thus, if domestic saboteurs, in execution of the enemy's designs, shall carry on large operations in destruction of vital de-

⁷ Section 102, Title 50, U. S. C.

fense industries and materials, under present law we can not impose the death penalty even though such persons are just as effective in destructive work as technical enemies would be. The saboteurs recently executed actually had committed no depredations because they were apprehended before they had a chance to carry out their designs. They were subject to the jurisdiction of a military commission and were subject to the death penalty under the Articles of War. But I believe that the crime of sabotage in and of itself should carry the discretionary death penalty so that the death penalty in this type of case will not be determined merely by the fortuitous circumstance that in a particular case a military commission has jurisdiction. I also think that the law should be amended so as to apply to domestic saboteurs whose acts fall short of the classical concept of an attempt. Effective F. B. I. investigation will often result in apprehending saboteurs before their acts have progressed much beyond the planning stage. There should be some adequate penalty, however, where the proof of intent is clear.

Moreover, as the law stands today, there is no adequate penalty for conspiracy to commit sabotage. Persons caught in a conspiracy can, under present law, be prosecuted only under the general conspiracy statute, Section 88, Title 18, U. S. C., and the maximum penalty under this statute is imprisonment for not more than two years, or a fine of not more than ten thousand dollars, or both.

Legislation seeking to remedy these defects is now being prepared, and the Department of Justice will shortly make recommendations to Congress.

Treason

Something ought to be said about treason, especially since recently there occurred the first conviction for treason in the U. S. in the twentieth century. Section 1, Title 18, U. S. C., provides that whoever, owing allegiance to the United States levies war against them or adheres to their enemies, giving them aid or comfort within the United States or elsewhere, is guilty of treason. Section 2, Title 18, U. S. C., provides that whoever is convicted of treason shall suffer death, or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars. The Constitution⁸ defines treason in substantially the same language the statute has adopted, and provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

There have been very few treason prosecutions in our history. Levying war against the United States by those owing allegiance certainly is not common. As for aiding and comforting the enemy, the vast majority of those persons owing allegiance to this country live here. Since our participation in foreign wars heretofore, at least in the lifetime of all of us, has been on foreign soil, the oppor-

⁸ Article III, Section 3, Clause 1.

tunity for traitors to commit acts of treason through aiding and comforting the enemy has been very limited. But now we are engaged in a new kind of warfare in which enemy saboteurs, spies, and escaped prisoners may often be in our midst. The war in a practical sense this time has come to our shores. This presents more opportunities to extend aid and comfort to the enemy, and it suggests that there may be more occasions for treason prosecutions in this war than we have ever known before. We hope and believe that there are not many traitors in our midst. But the *Stephan* case and the cases of the accomplices who aided the Nazi saboteurs demonstrate that when persons owing allegiance to this country aid and comfort the enemy, they will be apprehended and prosecuted for treason.

In a prosecution for aiding and comforting the enemy, it seems that there are four elements that must be proved:

- (1) Allegiance of the defendant owing to the United States;
- (2) The enemy character of the person aided and comforted;
- (3) Intent;
- (4) An overt act in furtherance of the hostile design of the enemy.

(1) Although there is very little case authority for treason prosecutions, it would seem from some of the early decisions and charges to grand juries that allegiance, as used in the treason statute, is not restricted to the allegiance of citizenship. It seems that there is a type of allegiance due from aliens residing within the United States, and that every sojourner who enjoys our protection is bound to good faith toward our government. I would construe this to mean that resident aliens owe an allegiance within the treason statute.

(2) The enemy character of the person aided and abetted must, of course, be proved and by witnesses who will confront the accused.

(3) The intent to aid the enemy must be proved. Whether the intent must be an intent to aid a person *qua* enemy, and whether it would be a defense to show that the defendant was merely helping the enemy as an individual, is a point which has been the subject of some discussion. To my mind some of the cases confuse intent and motive. I think that the requirements of intent should be considered as met if a defendant rendered aid and comfort to a person knowing him to be an enemy, even though the motives might have been personal solicitude for his welfare as an individual. Of course you can always find extreme and absurd cases, like the case of a doctor who renders first aid treatment to an enemy, knowing him to be such. But I am quite confident that the doctor would have no trouble if he promptly reported the case, especially if he kept the enemy in custody until he could get the F. B. I.

- (4) The requirement of two witnesses to each overt act is a

constitutional safeguard against promiscuous prosecutions for such a flagrant crime. It relates, of course, to the problem of proof, and there is very little case authority on the subject.

Revision of Rules of Criminal Procedure

The Criminal Division of the Department of Justice is much interested in the work of the Advisory Committee of the Supreme Court on Federal Rules of Criminal Procedure. From the standpoint of securing more effective and more fair federal criminal enforcement, this committee's studies are most timely. I have selected a few of the questions that are under discussion and will comment briefly upon them.

Short Form of Indictment

There has been much discussion about a short form of indictment. There are some who feel that the adoption of a short form will simply invite more motions for bills of particulars. I also know that there are many offenses which from their very nature ought to be described in the indictment with a great deal of particularity. I fully agree that indictments should allege sufficient facts to inform the defendant adequately of the case against him and that they should be drawn wherever possible to avoid the necessity for bills of particulars. But I do think that the new rules should encourage simple and succinct allegations and the avoidance of technical verbiage, repetition and redundancy. The rules of civil procedure have introduced a simple form of pleading in civil cases. There is no reason why the rules of criminal procedure should not present a simple form of indictment, setting forth all of the elements of the offense in modern English. We should get away from archaic, prolix verbiage which has characterized so many criminal indictments over the last several centuries.

Waiver of Indictment

Another suggestion with which I am very much in sympathy is the proposal for a rule permitting the defendant to waive trial by indictment and to plead and proceed to trial on information. In many districts the federal grand jury meets but twice a year. It is not unusual for a defendant to spend five months or more in jail waiting for the opportunity to plead guilty and begin the service of his sentence. If he is without funds and unable to furnish bail, that time must be spent in jail and cannot be credited on a sentence subsequently imposed. If the defendant were permitted to waive indictment and plead to an information, criminal cases could be disposed of with greater expedition. Guilty defendants unable to furnish bail could exchange the hours of waiting in an inferior jail for the better facilities for rehabilitation afforded by the modern institutions to which they would be assigned after sentence. The

innocent defendants would more speedily be given the opportunity to clear their name of a charge which might hang on until witnesses were unavailable. It seems desirable to me from every viewpoint that provision should be made to permit defendants at their option to waive indictment by grand jury and to consent that the prosecution be conducted by information.

Special Dilatory Pleas

In the federal courts we have inherited pleas in abatement, demurrers, and motions to quash. Each of these pleadings may be used successively with dilatory effects. On the other hand, they at times constitute a trap for the unwary defense counsel who files a demurrer to raise an objection that should have been interposed by plea in abatement, or who moves to quash when he should have demurred. We have before us a splendid model in the civil rules which abolish demurrers and pleas and substitute a consolidated motion by which all objections either technical or going to the merits, with certain exceptions, must be raised simultaneously. A similar innovation in criminal cases has much to commend it.

Depositions

I think that serious consideration should be given to permitting the use of depositions in criminal cases. This use, of course, would necessarily be restricted to witnesses who for good reason probably could not be present at the trial. If the privilege of taking depositions is extended to the prosecution, care must be taken to comply with the constitutional requirement that the accused shall enjoy the right to be confronted with the witnesses against him. This could be handled by providing in such circumstances that the defendant shall attend at the taking of the depositions. While the need for depositions in criminal cases is not as important as in civil cases, yet it seems to me that it would be in the public interest to make some appropriate provision for the taking of depositions in criminal cases under certain limited circumstances.

Removal

Serious consideration should be given to improving our machinery for the removal of federal prisoners. As matters stand today, some courts practically require a trial of the whole case in order to determine whether there shall be removal of a defendant to the jurisdiction where he has been indicted. The Department of Justice has experienced a good deal of delay and confusion in removal cases which I believe could be eliminated without in any way prejudicing the rights of defendants. This is a subject which I am sure is receiving the careful consideration of the Advisory Committee and we are looking for very beneficial results from this aspect of their study.