

## 1518 AMENDING SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950

the government of any state by force or violence, by adding at the outset the phrase, "Without regard to the immediate provable effect of such action".

While the meaning of this proposed amendment to the Smith Act is not entirely clear, it would appear to be an attempt to escape or mitigate the consequences of the "clear and present danger test" or its equivalent. This test, as you may know, has been applied by the Supreme Court in practically all cases involving the punishment or curtailment of speech commencing with *Schenck v. United States*, 249 U.S. 47. The "clear and present danger" test was utilized in the first Smith Act case involving the top echelon of the Communist Party, *Dennis v. United States*, 341 U.S. 494, and in *Yates v. United States*, 354 U.S. 298. Chief Justice Vinson stated in *Dennis*, "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts" (341 U.S. 513).

In the cases involving freedom of speech such as *Schenck* and *Dennis*, the Supreme Court has imposed the "clear and present danger test," or its legal equivalent, as a means of determining whether the words spoken or written are outside of the area of constitutionally protected speech, as guaranteed by the First Amendment to the Constitution. To circumscribe or eliminate the "clear and present danger test," as is apparently attempted in the proposed amendment, would appear to constitute an attempt to eliminate the very mechanism the courts have created to assist them in determining what speech has gone beyond the protection of the First Amendment. We are therefore opposed to the enactment of Section 102(a) of the Bill.

Section 102(b) of the Bill would further amend Section 2385 of Title 18, United States Code, by inserting immediately after the first paragraph thereof a new paragraph:

Whoever with intent to cause the overthrow or destruction of any such government, in any way or by any means advocates, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying any such government by force or violence; . . .

The foregoing is an apparent attempt to bring the Smith Act expressly into conformity with the holding of the Supreme Court in *Dennis v. United States*, 341 U.S. 494, 499. The *Dennis* case held that even though the Smith Act in paragraphs one and three did not expressly require the specific intent to cause the violent overthrow of the government, it was the purpose of Congress to require such an intent and that the structure and purpose of the statute demanded the inclusion of intent as an element of the crime. The amendment, however, would have no effect on paragraphs one and three since intent has been judicially declared as an element of the crime in these sections. Since this amendment does not appear to meet any genuine need in the Smith Act, we are consequently opposed to its enactment.

Section 102(c) amends the last paragraph of Section 2385 to provide that the term "organize" with respect to any society, group, or assembly of persons, includes encouraging recruitment or the recruiting of new and additional members and the forming, regrouping, or expansion of new or existing units, clubs, classes, or sections of any such society, group, or assembly of persons.

The final paragraph in the Smith Act defining the terms "organize" and "organizes" was amended by Congress in 1962 to obviate the effect of the decision of the Supreme Court in the *Yates* case, *supra*, where the Court held that the term "organize" meant the organization of the Communist Party, as such, and not the recruiting of new members and the forming of new groups. The new amendment would delete the word "organizes," and adds the phrase "encouraging recruitment" and the words "recruiting of new or additional members."

While the proposed amendment would not appear to alter the purpose and the effect of the existing provision of Section 2385, except in a minor way, we have no objection to its enactment, if deemed desirable.

Section 103 would amend Chapter 115 of Title 18 of the United States Code dealing with treason, sedition and subversive activities by adding a new section 2392. The new section would punish anyone owing allegiance to the United States who gives aid or comfort to an adversary of the United States by an overt act within the United States or elsewhere. The term "adversary" of the United States would include a foreign nation or armed group which is engaged in open hostilities against this country or with which the Armed Forces of the United States are engaged in open hostilities.