August 2015

The Era of Libertarian Repression - 1948 To 1973: From Congressman to President, With Substantial Support from the Liberal Establishment

Frank Wilkerson

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: http://ideaexchange.uakron.edu/akronlawreview

Part of the Criminal Law Commons

Recommended Citation

Available at: http://ideaexchange.uakron.edu/akronlawreview/vol7/iss2/2

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
THE ERA OF LIBERTARIAN REPRESSION—
1948 TO 1973:
From Congressman to President, With Substantial Support from the Liberal Establishment

By Frank Wilkinson*

Prior to Watergate and its subsequent revelations of ex delicto actions and domestic intelligence decisions,1 the nation had taken several long strides down the road toward a police state through the enactment of repressive laws. The law and order responses to the problems of our time on the part of the Nixon-Agnew-Mitchell Administration and the majority of Congress, caused one of our foremost historians to characterize the trend as portending the dissolution of the Republic.2 In reference to the overwhelming—in some instances unanimous—votes in the Congress for these law and order measures, another historian has speculated that “we might be the first people to go fascist by the democratic vote.”3

The resulting repression of civil liberties from this law and order legislation which we have experienced in the past five years, is qualitatively different in both cause and scope from the attacks on the Bill of Rights following World War II and continuing into the McCarthy Era. In both periods, the repressive laws (and/or Executive Orders) were partially by-products of the political manipulation of public fears. In the earlier McCarthy era the manipulated fear was communism, both domestic and foreign. While the record is still far from complete, an increasing number of scholars is finding that the fears were more myth than fact; in many instances, deliberate and fabricated hoaxes; and, at most, ephemeral.

Such is not the case today. Crime, the modern fear, whether street or organized, is real and is increasing. Year after year, according to the understatements available4 on the problem from the FBI’s Uniform Crime Reports, crime has increased—both in actual number committed and in proportion to the population growth. The political manipulation of the public’s well-founded fear of crime in the present era has taken

* A.B., University of California, Los Angeles; Executive Director, National Committee Against Repressive Legislation.
4 FBI, CRIME IN THE UNITED STATES—UNIFORM CRIME REPORTS [hereinafter cited as UCR], Index of Crime, Table II, at 61 (1972); Law and Order Four Years Later, NEW REPUBLIC, September 23, 1973, at 5-9 [hereinafter cited as Law and Order].
rhetorical form in the political appeals for *law and order* during the 1968, 1970, and 1972 national campaigns, resulting in overwhelming and bi-partisan Congressional approval of ill-conceived and patently repressive laws in 1968 and 1970.5

Following a pre-1972 election speech for the Nixon-Agnew ticket, Attorney General Richard Kleindienst received headlines proclaiming “Kleindienst Sees Era of Decreasing Crime.”6 A nonanalytical examination of his talk to the Los Angeles Chamber of Commerce that day would lead the listener to conclude that crime was up only 1% to date in 1972, compared with a 17% rise in 1968. Further, he credited the success in part to the fact that, unlike his predecessor, Ramsey Clark, who refused wiretapping as an instrument of law enforcement, “Mr. Nixon’s first steps in office were to direct the attorney general to use court-authorized wiretaps where appropriate in cases involving organized crime.”7

On October 15th, President Nixon in a national broadcast declared that he had brought the “frightening trend of crime and anarchy” to a standstill. He cited, again, the 1% increase to that point in 1972, but juxtaposed this against his charge that “serious crimes had risen by 122% in the eight years” before he took office.8

However, at the time of this broadcast in 1972, the facts as to Mr. Nixon’s first three years in office were readily available by way of the FBI’s *Uniform Crime Reports* released in August. In response to the alleged war on crime, the figures clearly indicated that crime rates had not been reversed, nor stabilized, but had increased in each of the seven categories covered by the UCR.9 The President’s campaign statement of progress was regrettably misleading because of his omission of statistics for 1969 through 1971. Not only did Mr. Nixon fail to mention to his radio listeners that crime had actually risen by 38% in his first three years in office,10 but he engaged in the same statistical legerdemain that the Justice Department had initiated the preceding year, claiming that the corner on crime had been turned inasmuch as “the rate of increase [crime] has decreased.”11 In addition, noting that in 1968 it had been necessary for him to describe the District of Columbia as the “crime

7 Id.
9 *Law and Order*, note 5 supra, at 5-6.
11 *Law and Order*, note 5 supra, at 6.
capital of the world," he proceeded to cite favorable statistics as of 1972, claiming a 50% drop in crime in the nation's Capital. However, again, readily available facts at the time from the Brookings Institute and others, reported that the statistics indicating a decline in serious crime in Washington stemmed primarily from the fact that the D.C. police had downgraded the value of some stolen items, thereby eliminating a number of larcenies and burglaries from the statistics.12

The known facts regarding the measurable effect of the 1968 and 1970 law and order statutes in controlling crime will be discussed below. But in summation at this point, those inclined toward acceptance of the constitutional restrictions contained in the additions to the Criminal Code in 1968 and 1970, as the necessary and effective means to resolve the crime problem, would do well to think about the non-manipulated record: 14 million more property crimes and over 2 million violent crimes in the first three years following the inauguration of what was proclaimed to be a law and order administration.13

Of greater importance in distinguishing the quality and scope of civil liberties repression during the McCarthy era and the present epoch, has been the development of coordinate repression by the executive, legislative, and judicial branches of our federal government; and, the corollary breakdown of the "checks and balances" protection inherent within the doctrine of the separation of powers. In the Fifties, the Congress was as subservient to the political manipulation of the fear of communism, as the Congress in 1970 was to the real issue of crime. But, unlike President Nixon, the prolocutor of the law and order forces, Truman and then Eisenhower, who both initiated and enforced repressive laws and Executive Orders,14 did on notable occasions strike stands for civil liberty.15 In addition, the United States Supreme Court, especially in the darkest days of the McCarthy witch hunts—between 1954 and 1957, rendered numerous decisions16 of historic importance for civil rights and liberties, to aid

12 Semple, note 9 supra.
13 UCR (1971), note 5 supra, at 61 (Property crimes: 14,390,000; Violent crimes: 2,199,480). See also UCR (1972) at 61 (if data are added for 1972, respective four-year totals are 19,453,900 and 3,027,630).
15 Veto message from President Truman to the House of Representatives, September 22, 1950, 81st Cong., 2d Sess., 96 Cong. REC. 15629 (1950) [Vetoing H.R. 9490, the proposed Internal Security Act of 1950, later passed over Truman's veto].
in turning the tide against racism and reaction. That is not to say, as the author well knows,\textsuperscript{17} that the High Court's holdings against the anti-civil liberties forces was altogether consistent. The demonstrable point is that at least one of the separate branches, and occasionally two, did effectively check the illiberal acts of the Congress in that period.

As to the present period, our civil liberties in general are threatened by all components of the federal government. First by a Congress, which has failed to safeguard its own authority and has yielded to the Executive's demagogic exploitation of the peoples' fears and frustrations on the crime issue, has enacted a series of statutes which jeopardize individual freedom, and which has had little or no effect in curbing criminal actions.\textsuperscript{18} Secondly by a President, who has been labeled the most repressive, and politically deceptive within memory of living Americans.\textsuperscript{19} And finally, a Supreme Court, which this layman sees charted on a collision course with the Bill of Rights; under the euphemism of "strict construction."\textsuperscript{20} A

\textsuperscript{17} Wilkinson v. United States, 365 U.S. 399 (1961).
\textsuperscript{18} Supra note 14.
\textsuperscript{20} Semple, note 9 supra.
court which, with granted and notable exceptions, has rendered in the 1971 and 1972 terms well over twoscore decisions which erode, inter alia, basic first amendment and due process clauses, not only of the

21 It is recognized that only a small proportion of the United States Supreme Court decisions are of significance to civil libertarians. For example, Melvin L. Wulf, Esq., Staff Counsel of the American Civil Liberties Union (hereinafter referred to as ACLU) cites only 22 of the 143 full opinion decisions in the 1971 Term of the Court which he viewed as "significant" to the ACLU. Civil Liberties, October, 1972. The author cites "notable exceptions to the collision course." See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (held Texas anti-abortion law unconstitutional); Furman v. Georgia, 408 U.S. 238 (1972) (holding capital punishment to be unconstitutional, as applied); Healy v. James, 408 U.S. 169 (1972) (extended first amendment protection to S.D.S. Chapter denied college recognition); Gelbard v. United States, 408 U.S. 41 (1972) (denied use of wiretapped information as a basis for interrogating federal grand jury witnesses); United States v. United States District Court, 407 U.S. 297 (1972) (held unconstitutional government's assertion of domestic warrantless wiretaps); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the right to counsel); Dunn v. Blumstein, 405 U.S. 330 (1972) (reduced one-year residence requirement to thirty days, for voter registration); Reed v. Reed, 404 U.S. 71 (1971) (eliminated sex discrimination from qualification to serve as administrator of an estate). However the author cites many decisions as erosions of prior Court holdings in the area of civil liberties. See, e.g., Cupp v. Murphy, 412 U.S. 291 (1973) (allowing the taking of fingernail dirt without warrant and over protest); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (disparate financial resources of rich and poor school districts do not violate Equal Protection Clause of fourteenth amendment); United States v. Dionisio, 410 U.S. 1 (1973) (fifth amendment protections do not apply on taking of voice or handwriting samples); California v. LaRue, 409 U.S. 109 (1972) (in effect, making criminals of all persons who in any way disseminate any material describing sexual intercourse or depicting nudity); Kleindienst v. Mandel, 408 U.S. 753 (1972) (denial of visa to Belgian journalist and Marxist to participate in academic conferences, based on application of McCarthy Era statute); Branzburg v. Hayes, 408 U.S. 655 (1972) (requiring reporters to reveal confidential sources in grand jury proceedings); United States v. Caldwell, 408 U.S. 665 (1972) (following Branzburg); Gravel v. United States, 408 U.S. 606 (1972) (limiting application of Speech and Debate Clause to the aides of United States Senators); Laird v. Tatum, 408 U.S. 1 (1972) (dilution of citizen's right to sue government for first amendment violating surveillances unless tangible injury can be shown); Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551 (1972) (allowing privately owned shopping centers to prohibit the peaceful distribution of political material on their premises); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that Pennsylvania's state liquor laws do not constitute sufficient state involvement to invoke fourteenth amendment's prohibition against racial discrimination); Adams v. Williams, 407 U.S. 143 (1972) (informant's tip held to be reasonable grounds for a forcible stop and frisk); Kirby v. Illinois, 406 U.S. 682 (1972) (no counsel required at lineup prior to indictment); Kastigar v. United States, 406 U.S. 441 (1972) (upholding "use" immunity); Apodoca v. Oregon, 406 U.S. 401 (1972) (reading sixth amendment as not requiring unanimous jury verdicts with 10 to 2 verdicts in Oregon); Johnson v. Louisiana, 406 U.S. 356 (1972) (like Apodoca, reading sixth amendment as not requiring unanimous jury verdicts upholding 9 to 3 verdicts in Louisiana); Cole v. Richardson, 405 U.S. 676 (1972) (upholding Massachusetts loyalty oath); Ham v. South Carolina, 404 U.S. 1057 (1971) (denial of voir dire regarding potential juror's prejudice against beards); Lego v. Twomey, 404 U.S. 477 (1972) (allowing "preponderance of evidence" as against the tougher "beyond a reasonable doubt," in determining voluntary nature of confessions); Harris v. New York, 401 U.S. 222 (1971) (statement procured without warning of fifth amendment rights is admissible to impeach accused at trial); Younger v. Harris, 401 U.S. 37 (1971) (limitation on Dombrowski rule to enjoin state violations of first amendment); Wyman v. James, 400 U.S. 309 (1971) (welfare recipient may not refuse a warrantless home visit without risking termination of benefits).
liberal momentum established under the Warren Court, but of High Court
decisions dating back more than eighty years.\footnote{Compare Kastigar v. United States, 406 U.S. 441 (1971) with Counselman v. Hitchcock, 142 U.S. 547 (1892).}

Before addressing this paper to those sections of the recently enacted
criminal statutes and pending legislation which are deemed to be
repressive, it is essential to review in some detail the legislative history
and subsequent enforcement of comparable legislation enacted 25 years
ago. Optimistic talk about repealing the law and order statutes of 1968
and 1970 is quickly tempered by such study. However, it may serve
to motivate timely political concern sufficient to abort Congressional
approval of the even more repressive pending legislation.\footnote{See pp. 302-309 infra.}

Herein considered is the legislative history, adjudication, and political
action efforts directed at repeal, of the Internal Security Act of 1950.\footnote{The Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified in scattered
sections of 8, 18, 22, 50 U.S.C.).}

Twenty-five years ago, in 1948, then Representative Richard Nixon
was chairman of the subcommittee of the House Committee on Un-Amer-
ican Activities (HUAC), responsible for reporting out what was then
called the Mundt-Nixon bill.\footnote{H.R. 7595, 81st Cong., 2d Sess. (1950).}

For the first time in the nation’s history, the
Nixon measure compelled the registration of a political party (the
Communist Party), its members, and a vaguely defined organizational
category called “Communist-Fronts.” As existing law\footnote{18 U.S.C. §§ 2385, 2387 (1940); 18 U.S.C. § 2386 (1940).}
made it a crime to

attempt to establish a “totalitarian dictatorship” (and the bill made a
finding of fact that the Communist Party was trying to do exactly that),
his bill then required the Party and its members to register. Thus, on its
face it was seen in conflict with constitutional proscriptions against bills
of attainder. However, the bill was overwhelmingly approved\footnote{H.R. 5852, 80th Cong., 2d Sess., 94 Cong. Rec. 6149 (1948).}
by the

House in the hysterical atmosphere of the international and domestic
Cold War then underway. Senate hearings were held a month later, but
failed to act on the controversial proposal.

As the Anti-Communist hysteria mounted, particularly after the
outbreak of Korean hostilities, the next Congress revived interest in
the Mundt-Nixon proposal. Sensing a pre-election stampede, President
Truman—who must himself be credited with initiating many of the
repressive measures associated with the Cold War,\footnote{See, e.g., Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).} had his second
thought on the nation's anti-civil liberties trend and tried in early August, 1950, to ward off the threatening legislation, declaring: "Some of the proposed measures would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists... This kind of legislation is unnecessary, ineffective and dangerous." 29 His words went unheeded not only by the pro-Nixon forces in the House and Senate, but were almost immediately followed by what can only be described as the paradigm of liberal capitulation.

In the Senate, the freshman Senator from Minnesota, Hubert Humphrey, in concert with six30 of his colleagues—led by Senator Kilgore of West Virginia, proposed as a substitute for Nixon's "registration" proposal, the ultimate weapon of repression: concentration camps to intern potential troublemakers on the occasion of some loosely defined future "Internal Security Emergency." 31 The Senate rejected the motion as a "substitute," but cheerfully tacked it on as an amendment to the Mundt-Nixon "registration" scheme32—with only 7 Senators and 1 Representative in opposition.

When Truman subsequently vetoed the combined measures, citing support from the Departments of Justice, Defense, and State, and the C.I.A., Humphrey reversed his field and voted against the bill; but the evil seed he and other liberals had planted, flourished, and the veto was overridden. 33 Lest the impression be given that Humphrey suddenly reverted to "religious instinct"34 or belatedly "came clean... to rectify the miserable mistake,"35 one need only study the full record. "Because I felt that it was most important that we have some kind of anti-

---

30 Senator Humphrey was joined by Senators Benton, Douglas, Graham, Kefauver, Kilgore, and Lehman.
31 Emergency Detention Act of 1950, ch. 1024, Tit. II, 64 Stat. 1019. Section 102 of this Act states:
(1) In the event of any one of the following:
(2) Declaration of war by Congress, or
(3) Insurrection within the United States in aid of a foreign enemy, and if, upon the occurrence of one or more of the above, the President shall find that the proclamation of an emergency pursuant to this section is essential to the preservation, protection and defense of the Constitution, and to the common defense and safety of the territory and people of the United States, the President is authorized to make public proclamation of the existence of an "Internal Security Emergency."
(b) A state of "Internal Security Emergency" (hereinafter referred to as the "emergency") so declared shall continue in existence until terminated by proclamation of the President or by concurrent resolution of the Congress.
33 The House passed the Bill 286 to 48, 96 Cong. Rec. 15632-33 (1950). The Senate passed the Bill 57 to 10. Id. at 15726.
34 96 Cong. Rec. 15526 (1950).
35 Id. at 15525-6.
communist legislation," he rationalized his earlier vote, "I swallowed my feelings of frustration and of despair about some of the inequities of the bill and cast a vote 'yea.'" But far from retreating from his concentration camp proposal, his aim focused on the solicitude on the part of so-called anti-communists on the House-Senate conference committee, whom he complained brought "back a weaker bill, not a bill to strike stronger blows at the Communist menace, but weaker blows," whereby those interned in the detention centers to be established under the proposal would have "the right of habeas corpus so they can be released and go on to do their dirty business."36 Such was the political morality of the dissenters, as Congress approved its most repressive law to that time—a quarter century ago. And, thus the nation obtained Title I of the Internal Security Act of 1950—the compulsory "registration" of the unorthodox—from Richard Nixon, and, Title II—the euphemistically characterized "detention" camps—from Hubert Humphrey.

The point here, however, is not the fact that the law was passed, and later expanded.37 Rather, that once such hysteria-sponsored measures do become law, it becomes an all but impossible task for the people to redress their grievance and secure repeal. This is the message of reality for this generation, confronted as it is now by the enactment of the repressive law and order statutes of 1968 and 1970, and, the pendency of what is here deemed to be the most repressive of all legislation—the so-called "Criminal Code Reform Act of 1973," as currently proposed by the Nixon Administration.

For the next decade and a half, the "registration" provisions of the Internal Security Act38 served as the primary threat to the right of dissent, casting its pale of fear far beyond those selected as its initial targets. President Truman named the 5-man Subversive Activities Control Board (SACB), the administrative agency under the law, within 30 days of the time that his veto was overridden.39 A month later the Attorney General filed a petition with the Board to compel the Communist Party to register as a "Communist action organization" and, the track-down was officially under way. Additional petitions against "Communist-front organizations"
were filed in the fiscal years ending June, 1954, 1955, and 1956. And, after an elapse of 12 years from the time Congress enacted the law, proceedings were initiated to compel the first ten individuals to register as "members of a Communist-action organization." The cost to the directly affected organizations and individuals was staggering. However, the chilling effect on the right of association of all citizens was unquestionably greater. From the outset, many organizations established their own "do-it-yourself" loyalty screenings of their membership, and the number of individuals who subsequently decided to join no organizations at all was beyond measure.

As President Truman had predicted in his veto message, the Act was subjected to massive legal challenge. It was not until 1961, after 11 years of near continuous hearings and litigation, that a sharply divided Supreme Court upheld the SACB's built-in finding that the U.S. Communist Party was a "Communist-action organization," and, therefore, should proceed to register as prescribed the Act. Three of the dissenting Justices argued in effect that the decision was an exercise in futility, inasmuch as the act of compulsory registration, under existing law, would be self-incriminating, and thereby the Act itself was an unconstitutional "violation of the Fifth Amendment,"—a position soon to be sustained

40 SACB 4th ANNUAL REP. at 7 (1954). (American Committee for Protection of Foreign Born; American Slav Congress; Civil Rights Congress; Committee for a Democratic Far Eastern Policy; Council on African Affairs, Inc.; International Workers Order, Inc.; Jefferson School of Social Science; Joint Anti-Fascist Refugee Committee; Labor Youth League; National Council of American-Soviet Friendship, Inc.; United May Day Committee, and Veterans of the Abraham Lincoln Brigade).
43 David Jenkins, Defense Coordinator for the Mine, Mill and Smelter Workers Union, estimated that the union expended $800,000 on litigation and related costs between 1955 and 1966.
45 E.g., From the moment the Attorney General filed his initial petition against the Communist Party on November 22, 1950, suit was filed to enjoin the Board from proceeding. The stay was ultimately denied by the Supreme Court. Communist Party of the United States v. McGrath, 340 U.S. 950 (1951). Hearings soon thereafter began before the Board, and 15,000 pages of testimony and 507 documentary exhibits were received. In 1956 the Supreme Court reversed and remanded the ruling of the Court of Appeals for D.C. upholding registration under the Act. Communist Party of the United States v. SACB, 351 U.S. 115 (1956). Over 9 years after enactment, the case worked its way back up to the Supreme Court. 361 U.S. 951 (1960).
46 Communist Party of the United States v. SACB, 367 U.S. 1 (1961). This was a 5 to 4 decision with Chief Justice Warren, Justices Black, Brennan and Douglas dissenting.
47 Warren, C.J.; Douglas, Brennan, J.J.
48 367 U.S. at 137, 188-90, 200-02.
by a unanimous Court. Justice Black, alone, read the entire Act as a patent violation of the first amendment.

The majority, however, had a poignant message for those who would abdicate the prime responsibility of Congress and disallow the enactment of repressive law, from the outset—whether in 1948-50 or 1968-70. Speaking for the majority, Mr. Justice Frankfurter concluded the 112-page decision by stating: "[w]e must decline to enter into discussion of the wisdom of this legislation." Further, in reference to the 35-year record of the House Committee on Un-American Activities, the Court majority offered the admonitory notice:

The purpose of the Subversive Activities Control Act is said to be to prevent the world-wide Communist conspiracy from accomplishing its purpose in this country. It is not for the courts to reexamine the validity of these legislative findings and reject them. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. We certainly cannot dismiss them as unfounded or irrational imaginings.

With the exception of this single, pro forma, and temporary victory, the government's multiple prosecutions under the Act, dissipated during the mid-'60s. Almost $6 million in operating costs for the SABC, and unreported millions for litigation costs for the staff of attorneys within the Internal Security Division of the Justice Department, were expended in a futile effort to enforce an unenforceable law. In summary, not one "subversive organization—'action,' 'front,' or 'infiltrated'—harkened to the registration" call. The Act drowned in the calm of an all-protecting fifth amendment sea. As the United States Chamber of Commerce wistfully editorialized against the SABC in October, 1967:

After all, in its 17-year life it never controlled a subversive. It never has accomplished anything at all. This witch hunt had a fast start and a short life. The Act of Congress establishing it was so full of

49 Albertson v. SABC, 382 U.S. 70 (1965). Mr. Justice White took no part in the consideration or decision of this case.
50 367 U.S. at 137 where Mr. Justice Black states:
I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country. That moment seems to have arrived for this country.
51 367 U.S. at 115 [emphasis added].
52 HUAC was founded as a Temporary Committee of the House in 1938 and established as a Standing Committee on Jan. 3, 1945.
53 367 U.S. at 94, 95 [emphasis added]. See also n.37 at 94 where the Court cites 17 reports on hearings before House Committees.
fault, principally in its violations of the Constitution, that the Board soon became inoperable. 55

With the Supreme Court's landmark decision of November 15, 1965, which held the Act to be unenforceable insofar as the registration of alleged individual members of the Communist Party, 56 the SACB was all but dead. Further, the political climate in the country might have permitted an orderly burial. No longer was the Court divided on the constitutional questions of the domestic Cold War; the decision was unanimous. 57

Furthermore, the chief critics of the Warren Court in years past found Jeffersonian words with which to praise the Court for its defense of the most unorthodox: Albertson and Proctor were not mistakenly identified Communists, as had happened so frequently in the preceding era; both were avowed members and leaders of the Party. In this context, note Senator Barry Goldwater's comment two weeks after the Albertson decision:

Without softening for a moment any of my past and current criticisms of the court, I applaud it wholeheartedly in this instance ... it would be worse than irritating if a basic protection of our freedom were thrown out the window simply to inconvenience the Communist Party. 58

He was even preceded by an editorial by William F. Knowland in the Oakand Tribune on the day following the decision stating: "Before any one should start hurling charges at the Court, he should first remember he too has the same constitutional guarantee, and that if an exception was made once—it could be made again and again and, one day, he might not have the protection of the Constitution." 59 It is significant to note that these remarks are directed towards the only Nixon-sponsored law to that time.

In spite of the Supreme Court and surrounding supporters, the then discredited HUAC had moved as only HUAC could, to prepare new legislation to nullify several decisions of the courts, and revive the SACB. 60 Despite the serious constitutional questions involved in circumventing the several recent decisions of the courts, the late Senator Dirksen, with cooperation from Mississippi's Senator James O. Eastland, pressured a divided Senate Judiciary Committee into reporting out his HUAC-sponsored bill, without hearings of any kind, and without so much as the customary elicitation of an opinion from the Attorney General and

56 Albertson v. SACB, 382 U.S. 70 (1965).
57 Id. White, J., not participating.
60 Saturday Evening Post, Sept. 24, 1966, at 59.
Justice Department. On October 11, 1967, in the face of all facts here recited, a cynical Senate in an acrimonious debate, marked by extreme anti-Communist, anti-Warren Court speeches, voted to fund the SACB with an additional $295,000 for fiscal 1967-68; and, having done so, proceeded the following week to pass the Dirksen-HUAC bill—albeit with a face-saving amendment of compromise with the opponents. In a gesture that resulted in bipartisan repression, Dirksen covered over the recognized patronage motivations behind the measure in the climax of his emotional appeal: "I have had several discussions with the President of the United States on this matter," he pressed, and "He would like to see this bill passed and see this Board [the SACB] go back into action."

The House action was more expedient. The entire HUAC package was overwhelmingly approved, and economy minded Republicans who had introduced bills for outright repeal went down to defeat. Subsequently, the House-Senate Conference Committee accepted the far more comprehensive HUAC version, qualified only by the Senate amendment—which provided for the termination of the SACB if no proceedings were undertaken under the revised law in 1968.

For the grand finale of this year of Congressional contempt for our liberties, in the closing hours of the 1st Session, on December 14th, the Senate met to decide on the many additions to the bill accepted by their conferees, but which had never been subjected to Senate debate. Ironically, they met just three days after the Supreme Court had driven one more nail into the coffin of the original 1950 Act. As their vote that day included the reaffirmation of that section of the law prohibiting

---

61 On all pending legislation, especially amendments to existing law that has been subject to judicial interpretation, it has been the policy to solicit the opinion of the Justice Department.

62 Subversive Activities Control Act of 1950, 81 Stat. 765 (codified in scattered sections of 26, 50 U.S.C.) (1968), amending 50 U.S.C. § 781 (1950). The Mansfield-Dirksen-Proxmire Amendment provides that the SACB shall cease to exist on June 30, 1969, unless a proceeding shall have been instituted by the Attorney General, and a hearing conducted by the SACB during 1968. If the Attorney General does not institute a proceeding before the SACB, he is required to report to the Congress before June 30, 1968, stating his reasons for not having done so; similar provisions are provided in regard to a hearing by the SACB.

63 113 Cong. Rec. 28375 (1967). In addition Dirksen remarked: "I ask who wants this? I am pretty confident that the President of the United States wants it." 113 Cong. Rec. 28514 (1967).


66 United States v. Robel, 389 U.S. 258 (1967); see Gunther, Reflections on Robel—It's Not What the Court Did, But the Way that It Did It, 20 Stan. L. Rev. 1140 (1968).
employment in "defense" facilities of alleged "Communist-action" members, and, was thereby in direct contradiction with the Court's most recent holding, it is significant to note the Court's language. Chief Justice Warren declared that this Title of the Act:67

Is an unconstitutional abridgment of the right of association protected by the first amendment... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile. . . . The Statute quite literally establishes guilt by association . . . The inhibiting effect on the exercise of first amendment rights is clear.68

With this profound stricture upon the actions of the earlier 81st Congress spread across the news and editorial columns of the nation's press, the Senate convened that day and "approved" the full HUAC-Dirksen bill—thereby breathing new life into the dead body.69

It is a little hard to see how there could have been much doubt as to the outcome in the mind of the presiding officer... For there were only five Senators in the chamber... Thus by the margin of one vote out of a grand total of five the ayes had it, giving the do-nothing SACB in effect nothing to do, with pay... Which is, in the words of an old expression, nice work if you can get it.70

The President affixed his signature on January 2, 1968, making the rebirth official.71

The above narrative illustrates the non-democratic setting of the enactment. Nevertheless the record of the perfidious implementation of the resuscitated Act continues. In 1968, at the eleventh hour, a reluctant Ramsey Clark72 filed the life-saving petition, as required by the Senate compromise. The target: a fifth-generation Utah Mormon and 21 additional alleged "action" group members. There had been a problem locating suitable test cases which had not been tainted by illegal government wiretapping.73 In short order, the Court of Appeals disposed

69 On October 23, 1967, when the Senate voted for the Mansfield-Dirksen-Proxmire Amendment, the vote was 65 to 10; 113 Cong. Rec. 29722-29723 (1967).
72 July 1, 1968; see supra, note 62.
73 The Supreme Court in Kolod v. United States, 390 U.S. 136 (1968), reargued sub nom. Alderman v. United States, 394 U.S. 165 (1969), by holding and dicta implied that all cases with warrantless wiretaps will have special fourth amendment exclud- tionary protection. The government's position was contradictory, as Attorney General Ramsey Clark agreed with the Court's implied protections; however, the picture changed with the enactment of the wiretapping section of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20 (1968).
of these, holding the relevant sections of the revised Act to be "contrary to the First Amendment"; and, the new Burger Court denied certiorari on April 20, 1970.\textsuperscript{75}

In 1971, the Senate at last moved to cut off further appropriations for the Board. As the annual appropriation moved toward the Senate floor that summer, President Nixon took unprecedented executive action to accomplish by \textit{fiat} that which the Congress was clearly unwilling to do by legislative action. Namely, provide the second-time-dead SACB with something to do.\textsuperscript{76} Angered by this violation of Congressional prerogative, a bipartisan coalition, including Mr. Nixon's own Minority Leader,\textsuperscript{77} voted to deny funding to implement the President's Executive Order. However, led by the House Committee on Internal Security (HISC)\textsuperscript{78} which had won House approval on a bill ratifying Mr. Nixon's Order and granting the necessary authority for compulsory processes for his purpose, a stalemate between the two houses developed. A Conference Report which agreed to continue funding, without any new authority to act, later carried in the Senate by a margin of just two votes.\textsuperscript{79}

By 1972, while the House was still subject to the continuing influence of HISC's several moves to rename or substitute some form of replacement for the SACB, an adamant Senate voted against any funding or new powers whatsoever for the Board, although as yet no one was prepared to repeal the Act. As a result, a "compromise" was agreed to, singularly fitting for the \textit{Watergate} summer of 1972. It was agreed that the SACB should receive enough money to pay its members their $36,000 for 1972-73, plus rent and entourage, but with the stipulation that they would not perform any function whatsoever. Senator Ervin quipped at the time: "let us not go through the mockery of doing nothing but drawing salaries and breath."\textsuperscript{80}

With the opening of the 93rd Congress, the man who started it all 25 years ago, threw in the sponge. In submitting his budget for the upcoming year, Richard Nixon wrote the appropriate obituary, and left

\textsuperscript{75}Id.
\textsuperscript{77}117 Cong. Rec. 25874, 25887, 25898, 28854, 29031 (1971).
\textsuperscript{78}This refers to two HISC-sponsored bills. The first, H.R. 9669, 92d Cong., 1st Sess. (1971), ratified President Nixon's Executive Order 11605, \textit{supra} note 77. The second H.R. 11120, 92d Cong., 1st Sess. (1971) would have changed the name of SACB to the Federal Employee Security and Appeals Commission (FESAC) and expand its duties.
\textsuperscript{79}117 Cong. Rec. 29053 (1971).
the isolated HISC plot to its own “loyalty-security” intrigues.\textsuperscript{81} In the place where next year’s budget for SACB should have been, the President inserted a series of little dashes.\textsuperscript{82}

Concomitant with the budget slash, Francis J. McNamara, Executive Secretary of the SACB, complained to a reporter: “Someone has to determine what groups are ‘subversive’... It bugs me when people come in here with smug looks on their faces and suggest that anyone who still thinks the Soviet Union is trying to take over the world is a stupid ass.”\textsuperscript{83}

But it was left for Senator Sam Ervin to say the last word. In a colloquy with SACB supporter Senator Hruska of Nebraska, who had suggested that a change of name might help, he imparted: “I say to my good friend, the Senator from Nebraska, that it is said a rose by any other name would smell as sweet, but a crushed gentian weed by any other name would smell just as bad.”\textsuperscript{84}

Prior to this most recent death of the SACB, the repeal of the concentration camp section of the Act, Title II—The Emergency Detention Act of 1950, occurred on September 25, 1971, 21 years after its enactment as an amendment to the Mundt-Nixon proposals, discussed supra. The repeal vote was unanimous in the Senate, and by an overwhelming 356 to 49 in the House—the one notable civil liberties response to emanate from the Congress in these law and order years.\textsuperscript{85} For those who question the power of redemption for original sin, it should be noted that Hubert Humphrey was among the 200 Senators and Representatives

----


\textsuperscript{82} President Nixon’s Budget Message, 119 CONG. REC. H513-519 (daily ed. January 29, 1973); Savings Expected to Be Made Through Reductions and Terminations in Federal Programs in 3 Fiscal Years, N.Y. Times, Jan. 30, 1973, at 83, col. 4. “Subversive Activities Control Board: Terminated as a result of court decision limiting workload...” Id.


\textsuperscript{84} Senator Ervin also remarked: “I cannot see that there is much that the members can do during this fiscal year except to draw their breaths and their salaries.” 118 CONG. REC. S17969 (daily ed. Oct. 13, 1972).

\textsuperscript{85} 117 CONG. REC. 31,781 (1971) (vote in the House): 117 CONG. REC. 32,145 (1971) (vote in the Senate). Note: While the votes against appropriations for HUAC and then HISC showed steady increase and nearly one-third of the House (133 members) voted to recommit for public hearings the resolution to change the name of HUAC on February 18, 1969, this was the first and only defeat to be suffered by the Committee to that point in time. As in the SACB votes, the House consistently voted in favor of continuing the Board, until the Senate finally checked it in 1972. On the side of counter repression, Representatives have introduced many bills dealing with the right of privacy in the past three years, but none of them moved out of committee; as an example, Representative John Conyers introduced H.R. 11567 to repeal the Anti-Riot Act, on May 21, 1969, but no other member did so much as co-sponsor, and, a similar bill has been introduced in this 93d Congress.
who joined in co-sponsoring the repeal legislation. Further, Mr. Nixon on two occasions dispatched Justice Department Internal Security Division chiefs to testify that he was “unequivocally in favor of repealing” the Act.

This strong desire for repeal was not concurred in by HUAC (HISC) and the result came only after a long battle. In fact, without HUAC’s strident 1968 call for its application for the “temporary imprisonment” of those involved in ghetto uprisings such as occurred in Newark and Detroit in 1967, the Act might very well be on the books to this day. While the general public was oblivious to the danger, this was not so in the Black community. “I see a ghetto perhaps cordoned off into a concentration camp,” Dr. Martin Luther King, Jr., told a Look Magazine reporter six days before his assassination, “we face the danger of a right-wing take-over, and eventually a Fascist society.” At that time, Dr. King, Rap Brown of the Students’ Non-Violent Coordinating Committee, and other Black activists, were viewed as extremists on the issue by other sections of the Black community. But within a day after the release of HUAC’s ominous report, the alarm became widespread. For example, the conservative Washington Afro-American editorialized: “Now an instrumentality of the legislative branch of the federal government has admitted that in its sinister mind it is prepared to follow the morally verminous route of Hitler’s Germany by using concentration camps in which to detain colored political militants.”

In terms of this paper’s argument, it is essential to note that 18 years elapsed after the enactment of the ultimate in repressive laws before Congress took its first steps toward repeal of Title II, or even civil

---

86 Senator Daniel K. Inouye of Hawaii led the repeal forces in the Senate when, without HISC, there was never vocal opposition. In the 91st Congress, he received wide support for his repeal bill S1872, 115 Cong. Rec. 9527 (1969). On February 4, 1971, he introduced the identical bill, S592, 117 Cong. Rec. 1656 (1971) and was co-sponsored in his effort by 28 Senators, including Mr. Humphrey. In both instances his legislation repealed Title II, but left intact the 15 “findings” of legislative necessity which introduced the 1950 Act. The Senate later accepted the House repeal language, as amended by its Judiciary Committee.


88 HOUSE COMM. ON UN-AMERICAN ACTIVITIES, GUERRILLA WARFARE ADVOCATES IN THE UNITED STATES, H.R. REP. No. 1351, 90th Cong. 2d Session (1968). On page 59 of this report the following language appears and was given wide national publicity: Conclusion . . . once the ghetto is sealed off . . . the following actions could be taken by the authorities . . . (6) Acts of overt violence by the guerrillas would mean that they had declared a “state of war” within the country and, therefore, would forfeit their rights as in wartime. The McCarran Act [popular title of the Internal Security Act of 1950, derived from the name of the Senate sponsor in 1950, Senator Pat McCarran of Nevada] provides for various detention centers to be operated throughout the country and these might well be utilized for the temporary imprisonment of warring guerrillas.


90 Washington Afro-American, May 7, 1968 at 1, col. 1.
liberties organizations attempted a formal legal challenge. In the intervening years, the government had appropriated the necessary funds and established six concentration camps throughout the country, on a "standby" basis. Although the Department of Justice claimed that the camps were abandoned in 1957, a New York-based civil liberties group commissioned an investigative reporter who verified their status as of 1966. His report confirmed by photographic evidence and direct interviews that the camps, while utilized for alternative purposes, were in fact readily available for use should the President make the necessary findings to trigger the application of the law.

Unique and primary credit for the political actions that led to the repeal of the Act, belongs to the Japanese American Citizens League (JACL), representing the only citizens who actually have experienced life in American concentration camps. Following the provocative report by HUAC, a group of Nisei succeeded in establishing a "Committee to Repeal the Emergency Detention Act," in the summer of 1968. After three years and a wealth of practical experience in coping with HISC's in-fighting, they led the nation to its first and only repeal of a repressive law within the memory of living Americans. The victory did more than simply expunge this part of the 1950 statute. Recognizing that the law did not exist when President Roosevelt interned the Japanese-Americans in 1942, Republican Representative Thomas F. Railsback of Illinois successfully amended the repeal legislation to prevent any future President from imprisoning any citizen "except pursuant to an Act of Congress."

The repeal served other purposes as well. It represented the first defeat ever sustained by the House Committee on Internal Security since

---

91 Bick v. Clark, Civil Doc. No. 2856-68 (D.D.C. Nov. 18, 1968). The author was one of 16 plaintiffs in this suit, calling for nullification of Title II for its chilling effect on first amendment rights of freedom of association. The case was dismissed as moot on February 3, 1971.
93 Id. Florence, Arizona; Wickenburg, Arizona; Avon Park, Florida; Allenwood, Pennsylvania; El Reno, Oklahoma; Tule Lake, California.
94 Charles R. Allen, Jr., for Citizen's Committee for Constitutional Liberties.
95 E.g., the Allenwood, Pennsylvania, Camp is now used as a Minimum Security Prison for Lewisburg Penitentiary.
96 Supra, note 31.
97 On February 19, 1942, President Roosevelt promulgated the orders establishing the camps, Exec. Order No. 9066, 3 C.F.R. 1092 (1942), Exec. Order No. 9102, 3 C.F.R. 1124 (1942), whereby 112,000 persons of Japanese ancestry, approximately two-thirds of whom were natural-born citizens of the United States, were removed from their homes and placed in ten detention camps in several western states. Congress, by enacting former § 97(a) of Title 18, U.S.C., "ratified" Exec. Order No. 9066 and all further sanctions in 1948, 18 U.S.C. § 1383 (1948). The Supreme Court had upheld the orders in Hirabayash v. United States, 320 U.S. 81 (1943).
98 Second generation Japanese Americans.
99 117 CONG. REC. 31,768 (1971).
its establishment 35 years ago as the original HUAC. Additionally, two entire years were lost before the campaign leadership, in and out of the House, recognized the deceptive, delaying role played by HISC, and transferred their efforts to the House Judiciary Committee. Even then, HISC fought to the end, trying to substitute legislation that would perpetuate the concentration camp authority, and extend its applicability to contemporary "movements" of protest. And, when the Committee failed in a transparent effort to co-opt the JACL leadership into retaining the law, by amending it to prevent detention of anyone because of race, HISC resorted to its historical red-baiting theme.

**CURRENT REPRESSION**

It is from the perspective reality obtained by reviewing the above record regarding repressive laws passed by Congress 25 years ago, that citizens can best appreciate the long range damage wrought by the enactment of the law and order statutes in 1968 and in 1970, and the enormity of the task to secure their repeal. Therefore, while addressing the principles and some of the already available practical arguments necessary for an educational campaign directed toward ultimate repeal of these recent repressive laws, it is the better part of wisdom to focus attention toward the defeat of pending repressive legislation—the point on which this paper concludes.

As exemplars of the repressive law and order statutes, the following are selected for brief discussion: in 1968, the Anti-Riot Act and the Wiretapping and Electronic Surveillance section of the Omnibus Crime Control and Safe Streets Act of 1968; in 1970, the "No Knock" and "Preventive Detention" sections of the D.C. Court Reform and Criminal Procedure Act of 1970 and the "Special Dangerous Offenders" and

---

100 Supra, note 85.
101 91st Cong.: 115 Cong. Rec. 80 (1969), 115 Cong. Rec. 16,212 (1969); 92d Cong.: 117 Cong. Rec. 177 (1971). Bill referrals are made by the speaker, based on the language of the legislation. In 1969, the repealer referred to "repeal of Title II of the Internal Securities Act of 1950," and because HISC handles legislation re the 1950 Act, they were referred to HISC. In 1971, the repealer referred to "Amendments of Title 18, United States Code," and were automatically referred to the Judiciary Committee which handles such amendments. Note: Representative Mikva and 22 others introduced H.R. 11373, which was identical to H.R. 234 in the 92d Congress, but primary attention focused on the bills referred to HISC.
103 From its inception as HUAC in 1938, and continuing under its change in name to HISC in 1969, these committees have engaged in the practice of describing their role as opposition to "reds," Communists, etc., and alleging that their opponents to the contrary support "reds," etc. This is generally what is meant by HUAC's and HISC's "historic red-baiting theme."

The primary argument against the Anti-Riot Act is that it is wholly unnecessary. A full panoply of state and local laws was already available, and fully enforced. In addition, the loose wording of the Act presented serious infringements on the rights of peaceable assembly. Speakers protesting conditions in ghetto areas, criticizing poverty or welfare programs, or even addressing a hostile crowd, could find themselves shortly afterwards charged with Federal crime.108 The then Attorney General Ramsey Clark warned against the Act’s constitutional infirmities and that “it will have very little impact” in controlling civil disorders.109 Once enacted he refused to enforce it.

With the advent of the Nixon Administration, the Act became one of the threatening tools to curb dissent. Assistant Attorney General Will Wilson, who became the Justice Department’s Chief Prosecutor under John Mitchell, expressed the attitude of the Administration: “I’d call something a riot sooner than maybe other people might. Don’t you think that’s the attitude generally of this Administration?”110 And, on March 20, 1969, the Justice Department filed its first charges under the Act in what has come to be called the Chicago Conspiracy.111 Subsequently, it was applied against students in Seattle, demonstrating against the manner in which Judge Julius Hoffman conducted the Chicago trial; against students protesting the R.O.T.C. in St. Louis; against 67 occupants and supporters at the confrontation at Wounded Knee, South Dakota, and eight members and supporters of the Vietnam Veterans Against the War in Gainesville, Florida, in connection with demonstrations at the time of the 1972 Republican Convention. The best evidence that the Act has not proven to be workable, even from the standpoint of the Administration, is demonstrated by the fact the government has redrafted the 1968 statute as part of its Criminal Code Reform Act of 1973.112

The most serious criticism against the application of the Anti-Riot Act developed in the Seattle Liberation Front cases,113 where a mistrial occurred, and the government subsequently asked for and received dismissal of the original indictments.114 From the outset of this case, the
shocking role of undercover government agents provocateurs, who admitted to numerous illegal actions in the course of entrapping the defendants, aroused public concern. It is argued that in order to prove "intent" as defined under the law, as well as developing evidence to prove conspiracy, the Anti-Riot Act invites just such illegal entrapments.

"For over 30 years, bills to relax the total ban on wiretapping had been unsuccessfully introduced in each session of Congress." Then, quite swiftly, a combination of Southern resentment against the Supreme Court, together with decisions of the Court itself in 1967, which appeared to inch toward limited eavesdropping, provided rationale and political muscle making possible the passage of the wiretapping legislation in the law and order year of 1968. Prior to recent disclosures of wiretapping not sanctioned under the Act, it has been all but impossible to rally public concern in the civil liberties issues involved. In fact, reports of wiretapping have been so widespread over such a long period that there was general public confusion, if not a presumption of legality, before the 1968 law was passed. The legal argument against wiretapping (in regard to the all but impossible problem of meeting fourth amendment demands for specificity in the issuance of warrants, even where probable cause is clearly indicated) is unfortunately, far too abstract to motivate public actions for repeal. However, even more important than the revelations surrounding United States v. United States District Court and the Watergate argument for warrantless taps, in developing and focusing public concern, is the data available from the reports of the Administrative Office of the United States Courts. Regardless of how many tens of thousands of conversations are tapped or bugged, legally or illegally, the public's prime concern is, as always, results. However, from a civil liberties standpoint, the one positive factor flowing from the 1968 Act is the requirement that prosecutors and judges involved in authorizing court-ordered wiretapping and bugging report annually on this surveillance, setting forth the type of surveillance, where and how long it was in operation, the crimes it was installed for, the number of people and conversations, the cost, and, the amount of actual incriminating evidence.

obtained, the causal relation between the arrest and the tap, and, above all, the number of convictions resulted therefrom.\textsuperscript{120}

While it is still too early to fully assess the results for definitive conclusions, it is already demonstrably clear that in weighing the immeasurable chilling effect upon free speech and association, as against effective results in any true war against crime, wiretapping is neither necessary nor effective. Through 1971, 77,227 people have been tapped or bugged under the 1968 Act.\textsuperscript{121} These have involved 1,118,912 conversations.\textsuperscript{122} And, as a result 726 persons have been convicted; half of which have involved gambling offenses.\textsuperscript{123} While the rhetoric in support of wiretapping claimed that it was necessary primarily for serious crimes like homicide, kidnaping, and espionage, at the federal level in the first three years, there has been only one device installed for kidnaping, and none for either homicide or espionage.\textsuperscript{124} These are the facts that should cause the average citizen to stop, think, question, and take the first steps toward repeal. Isn't it just possible that good old-fashioned police work could have obtained the same evidence, secured the same convictions, without the people wondering if their phones are tapped, or even their bedrooms bugged?

In 1969, the Nixon Administration announced that it intended to utilize the repressive laws enacted in 1968, notwithstanding that Attorney General Ramsey Clark had refused to enforce them because of his belief that they were not only unnecessary and ineffective, but patently unconstitutional. Continuing further with the 1968 trend, the Administration in 1970 with strong bipartisan support pushed through its own law and order legislative program. Enormous pressure was applied. But before it became clear after the 1970 Congressional elections that a vote against law and order was not political suicide, the pressure was frequently self-afflicted. There were outstanding examples of Administration misrepresentation: Senator Ervin, for example, was induced by the Justice Department to sponsor the D.C. Crime bill, after being assured that it only reformed the court system in the capital, only to find out too late that the 439 pages contained "literally a garbage pail of some of the most repressive, nearsighted, intolerant, unfair and vindictive legislation that the Senate has ever been presented."\textsuperscript{125}

The so-called "no-knock" and "preventive detention" proposals were

\textsuperscript{122}Id.
\textsuperscript{123}Id. at 11, 12.
\textsuperscript{124}Id. at 7.
\textsuperscript{125}Harris, Reflections: The New Justice, The New Yorker, March 25, 1972 at 44.
a part of this pall. Senator Ervin and others argued both the practical and constitutional objections to both, but the ears of the majority were cocked to the uncertain fate in November for those who opposed such measures. When other arguments failed and Ervin’s constitutional remonstrances were heard, the pro argument was altered. The argument stressed that the law would not affect Congressional districts throughout the United States, but, was just an experiment within the District of Columbia. For those who succumbed to such arguments in regard to the welfare of the 80% Black population of the District of Columbia, they soon found that the same “no-knock” proposal had been made applicable to all federal jurisdictions in legislation to be enacted 90 days later. In fact, the District of Columbia is about the only place in the nation where the no-knock breakins are not occurring. Washington’s Chief of Police is quite a pragmatist. At first, he developed a four-foot-long solid steel battering ram, equipped with handles for four policemen to swing it at one time. However, second thoughts evolved when it was noted that gambling establishments installed metal doors and converted their working papers to soluble stock. Further, the chief lawyer for the D.C. Police Department reported that the use of no-knock may increase the possibility of injuries to both police and occupants. “It’s most effective from a safety viewpoint to announce who we are,” he explained. “Generally, we don’t need no-knock,” he added. Elsewhere in the nation, where the no-knock entries have been authorized by the subsequently enacted Drug Abuse Act, there have now been so many reports of mistaken breakins at the wrong house, that it is now altogether possible that “No-Knock” may be the first of the law and order statutes to be repealed.

The Organized Crime Control Act of 1970 became law just three

---


“Preventive Detention” has shared a similar, limited implementation in the District of Columbia. Challenged at the time of its enactment as both a denial of the presumption of innocence, it was soon reported that the procedures established under the law were too cumbersome to merit frequent use. However, when challenged by reporters as to why the Administration was pressing to make it applicable to other jurisdictions, Justice Department spokesmen frankly admitted that it was their belief that the District Courts were “too liberal” and they wished to try it in other areas. In recent months, Administration spokesmen have been quoted in conflicting positions. In December, 1972, a Justice Department statement indicated that the Justice Department would just as soon forget about preventive detention for other jurisdictions, because of the unsatisfactory D.C. experience. However, in July, 1973, the Department reported that it had doubled its usage in two months, and expected to expedite its further revival.

weeks before the November elections in 1972. On final passage, it cleared
the Senate unanimously, and in the House only 26 Representatives voted
their opposition.\textsuperscript{130} This occurred, despite Senator Kennedy's earlier
charge that one section, the "Special Dangerous Offender" provision, was
so loosely worded that it might be more aptly applied to civil rights and
peace activists than to so-called organized crime;\textsuperscript{132} and, a well-publicized
plea from a 3-man House Judiciary Committee Minority Report that
"the bill takes great chunks out of the Bill of Rights."\textsuperscript{133}

Unlike the District of Columbia Crime bill, at least 25% of which
was devoted to progressive improvements in the administration of justice
in the District, there are no sections of the Organized Crime Control Act
meriting civil liberties support. The "Special Dangerous Offender" section,\textsuperscript{133}
which in some ways was similar to an equally dangerous
"Multiple Offender" section of the District of Columbia bill, provides for
a trial judge to mete out a 25-year prison term for a recidivist found
guilty on an immediate charge, which normally would carry only a
year's count for a simple felony. Under the sentencing, and, in reaching
judgment, the court hears "all information" against the defendant,
including information withheld from the defendant for national security
reasons. Further, should the court reject the "information" and render
only the year's sentence which the jury acted on, the government can
appeal to higher courts to "increase the sentence."

Another section of the Act selected as an example of the repressive
nature of the law, not only undermines the historic meaning and
protections of the self-incrimination clause of the fifth amendment, but
nullifies the 80-year-old Supreme Court Counselman rule,\textsuperscript{134} by allowing
grants of either "use" or "transactional" immunity.\textsuperscript{135} The government
has utilized the measure in a number of instances in the past two
years. This provision has unfortunately been sustained by the Burger
Court in \textit{Kastigar v. United States}.\textsuperscript{136}

\textbf{FUTURE REPRESSION}

In the full context of the foregoing, this paper is concluded with an
analysis of what is deemed here to be the most repressive legislative

\textsuperscript{130} 116 CONG. REC. 35363 (1970).
\textsuperscript{131} Remarks by Senator Kennedy, 116 CONG. REC. 847 (1970).
\textsuperscript{132} Representatives John Conyers, Jr., Abner Mikva, and Wm. F. Ryan, 116 CONG.
\textsuperscript{134} Counselman v. Hitchcock, 142 U.S. 547 (1892). A person shall not be compelled,
when acting as a witness in any investigation, to give testimony which might tend to
show that he himself had committed a crime.
\textsuperscript{136} \textit{Kastigar v. United States}, 406 U.S. 441 (1972), \textit{reh. denied}, 408 U.S. 931 (1972)
("Use" and "derivative use" immunity is all that is required by the fifth amendment).
proposal to have been submitted to Congress in 25 years: the Criminal Code Reform Act of 1973.\textsuperscript{137} Under the guise of long overdue reform of the Federal Criminal Code, President Nixon has submitted legislation which would in the author's opinion turn back the clock of justice on a wide range of progressive judicial precedents and legislative enactments in the area of criminal law.

Notwithstanding Watergate, the legislation is quietly moving through the United States Senate's Judiciary Subcommittee on Criminal Law and Procedures, since introduction on March 27, 1973. With practically no press or other media coverage to date,\textsuperscript{138} a score of hearings has been held, and the sponsors have expressed hope for speedy Senate approval.\textsuperscript{139} Hearings on the identical measure in the House\textsuperscript{140} have not started, but the bill has been co-sponsored by all but one of the 16 Republicans comprising the minority contingent of the House Judiciary Committee.

The omnibus proposal is extremely complex. When combined with an earlier draft\textsuperscript{141} which was introduced on the opening day of the 93rd Congress, the bill runs 874 pages. The need for reform of the Criminal Code is manifest. Originally, in 1966, Congress established a National Commission on Reform of the Federal Criminal Laws under the chairmanship of California's former Governor Edmund G. Brown. Five years and a new Administration later, in 1971, this Commission submitted its final report, which was generally viewed by legal scholars as a significant advancement over nearly 200 years of haphazard evolution of the criminal law. Thereafter, President Nixon assigned Attorney General John Mitchell to review and revise the recommendation for submission as Administration legislation. After the resignation of Mitchell, the revisions were completed under Attorney General Richard Klendienst and presented to the Congress. President Nixon’s remarks at the presentation to Congress of the new criminal code included this comment: "There are those who say that law and order are code words for repression and bigotry... This is dangerous nonsense. Law and order are code words for goodness and decency... the only way to attack crime in America is the way crime attacks our people—without pity."\textsuperscript{142} Selected below are 14 features of the proposed revision of the Criminal Code which, depending on the viewpoint, might be characterized as the

\begin{itemize}
\item \textsuperscript{138}Hearings on S.1400 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973).
\item \textsuperscript{139}Senators Roman Hruska (R-Neb.) and John L. McClelland (D-Ark.), see 119 CONG. REC. 5777 (Daily ed. Mar. 27, 1973).
\item \textsuperscript{141}S.1, 93d Cong., 1st Sess. (1973).
\item \textsuperscript{142}119 CONG. REC. 5780-81 (1973); N.Y. Times, Mar. 18, 1973, § IV, at 3, col. 1.
\end{itemize}
“goodness and decency” or “repression and bigotry” sections of the pending legislation.

**RESTORATION OF THE DEATH PENALTY**

S. 1400 and a separate version which deals exclusively with the Death Penalty, S. 1401, sidesteps the 1972 Supreme Court decision which held the extreme penalty to be unconstitutional, as applied. In an effort to circumvent the Court’s ruling, the bill makes executions mandatory for certain crimes, in the absence of “mitigating” factors—with the burden of proof on the defendant—and the existence of “aggravating” factors. No provision is made for appellate review. A little noticed clause would permit the judge who might mete out the sentence to determine if material shall be withheld from the defense for reasons of “national security.”

**REVIVAL OF THE SMITH ACT**

The bill provides for the restoration of this McCarthy era witch hunt law, which the Supreme Court held to be unconstitutional in *Yates v. United States* in 1957. The proposal provides for 15 years in prison and a $100,000 fine for mere advocacy or membership in an organization that allegedly calls for revolutionary change in the United States “or any state or local government, as speedily as circumstances permit...at some future time.”

**“LEADING” A RIOT**

This section redrafts the Anti-Riot Act of 1968. As rewritten, the bill would provide for a 3-year prison sentence and a $25,000 fine for the “movement of a person across a state” boundary, or, for even the use of the mails or the telephone “in the course of the planning or promotion” of a “riot.” And, a “riot” is redefined as “an assemblage of five” which “creates a grave danger” to “property.” This is an improvement—it took only 3 people to constitute a riot under the 1968 Act.

---

143 CCRA 1973 § 2401.
146 *Yates v. United States*, 354 U.S. 298 (1957). Here the Supreme Court, per Justice Harlan, held that when the charge of conspiring to organize the Communist Party of the United States with intent to cause the violent overthrow of the government was barred by the statute of limitations but was submitted to the jury along with the charge of conspiring to advocate violent overthrow of the government, the convictions could not be upheld when it could not be determined upon which charge the defendants had been convicted.
147 CCRA 1973 § 1801.
SECRECY\textsuperscript{148}

It is worthy to note that the Administration was busy rewriting the laws under which Dr. Ellsberg and Anthony Russo were tried, months before the "dirty tricks" burglaries gave the Court cause for acquittal. From the following it can be seen that the Administration believed that under present law the jury might have found Ellsberg and Russo innocent on the grounds that the Pentagon Papers should not have been kept secret from the public. S. 1400 provides for 3 years in prison and a $25,000 fine for any federal employee who "communicates...Classified information" to an unauthorized recipient, even if the information was "improperly classified at the time." And (in a pointed attack upon the New York Times, Washington Post, the Unitarian-Universalist press, Jack Anderson, et al) the bill provides for a 7-year sentence and a $50,000 fine for any person who receives "information relating to national defense" and "fails to deliver it promptly" back to government authorities.

The most frightening section of the proposed legislation concerns a redefinition of "espionage" as one of the "aggravating" circumstances under which the death penalty would be reinstated. By holding that disclosed "information relating to the national defense...may be used, to the prejudice of the safety or interest of the United States."\textsuperscript{149} Dr. Ellsberg or the publisher of the New York Times could have been convicted and sentenced to death under this new provision.

WIRETAPPING\textsuperscript{150}

This reaffirms, without qualification, the 1968 law permitting the President to wiretap domestic activities which he deems to be a "danger to the structure" of the government. In so doing, the legislation ignores the stinging rebuke rendered the Administration in United States District Court\textsuperscript{151} which held that such authority was subject to a court showing of "probable cause," under the strictures of the fourth amendment.

Further, S. 1400 proposes to expand the Attorney General's authority to wiretap alleged offenses related to first amendment protected actions. It also reaffirms the 1968 proviso for 48-hour "emergency" wiretaps \textit{without} prior court approval. And, still unknown to the public, although slipped through under the deceptive title of "Conforming Amendments" to the District of Columbia Crime Act, the Administration proposes to perpetuate the ominous adjunct to the entire wiretapping scheme, by ordering

\textsuperscript{148} CCRA 1973 §§ 1124, 1121, 1123. Section 1124 would establish federal control of information flow, making it a felony for a federal employee to give "classified information" to an unauthorized recipient and precludes the defense of improper classification. Section 1123 would proscribe the mishandling of national defense information.

\textsuperscript{149} CCRA 1973 § 1121.

\textsuperscript{150} CCRA 1973 ch. 206 § 312 9(d).

\textsuperscript{151} United States v. United States District Court, 407 U.S. 297 (1972).
telephone company workers, landlords, custodians, building superintendents, etc., to cooperate "forthwith" and "unobtrusively" with the F.B.I. and police "to accomplish the interception . . . of a wire or oral communication" within homes or offices.\textsuperscript{152}

CONTEMPT OF CONGRESS\textsuperscript{153}

Another throwback to the McCarthy era is the bill's proposal for increasing the penalties for those who refuse to cooperate with Congressional Committees, such as HUAC, HISC, or the Eastland counterpart in the Senate. Hereafter, the price tag for unsuccessful first amendment challenges of such inquisitorial bodies would be 3 years in prison, not 1; and, a $25,000 fine, not $1,000.

DEMONSTRATIONS\textsuperscript{154}

Virtually every kind of civil rights, peace and other protest action would be threatened with severe penalties under a series of vaguely drafted infringements upon the right of assembly, with penalties ranging from 5 days and $500 fines up to life imprisonment and a $100,000 fine. For example, under the "Sabotage" section,\textsuperscript{155} an overt act could include interference with the delivery of defense materials of the United States or an "associate nation" (South Vietnam, Cambodia, etc.).

Another provision entitled "Obstructing Military Recruitment or Induction,"\textsuperscript{156} could include such offenses as sit-ins or mass picket lines at induction centers or at campus military recruitment drives, with penalties ranging up to 15 years in prison and a $100,000 fine. Still another, entitled "Inciting or Aiding Mutiny, Insubordination or Desertion,"\textsuperscript{157} appears to be aimed at GI underground papers, rank-and-file peace and civil liberties organizations of military personnel, and GI coffee houses, among other objectives.

\textsuperscript{152} CCRA 1973 ch. 206 § 3129(d).
\textsuperscript{153} CCRA 1973 § 1333.
\textsuperscript{154} CCRA 1973 § 1116. Section 1116 deals with the obstruction of military recruitment or induction and makes the creation of a physical interference, the use of a threat of force, or the excitation of either a class "D" felony.
\textsuperscript{155} CCRA 1973 § 1111. Under this section a person is guilty of an offense if he has the intent to "impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities . . ." and commits an act which is listed as a type of sabotage.
\textsuperscript{156} CCRA 1973 § 1116. To violate this section a defendant would have to have the specific intent to "hinder, interfere with, or obstruct, the recruitment, conscription, or induction of a person into the armed forces of the United States . . . ."
\textsuperscript{157} CCRA 1973 § 1117. This section as it is written in S.1400 gives a broad proscription against the inciting, aiding, abetting, counseling or commanding of a person who mutinies, is insubordinate, or deserts the armed forces of the United States.
ENTRAPMENT\textsuperscript{158}

This part of S. 1400 so limits the definition of what constitutes the "unlawful entrapment" defense as to substantially modify existing case law. The bill places the burden on the defendant to prove that he was "unlawfully entrapped," even though the evidence reveals that an undercover agent provocateur had employed "deception," provided "a facility or an opportunity," or engaged in "mere solicitation which would not induce an ordinary law-abiding person to commit an offense."

OBSCENITY\textsuperscript{159}

This title of the bill is patently offensive to the first amendment. It would make criminals of all persons who in any way disseminate any material describing sexual intercourse or depicting nudity. Even good faith belief that the material in question is not obscene is specifically ruled out as a defense. The proposal would give legislative sanction to recent Supreme Court decisions in this general area,\textsuperscript{160} and offers a convenient vehicle for political censorship as well. To appreciate just how reactionary a trend is being pressed here, it should be noted that as recently as 1970, the 18-member Commission on Obscenity and Pornography, established by Congress and named by President Johnson, recommended the repeal of all federal, state, and local laws prohibiting the sale, exhibition or distribution of sexual materials to consenting adults.\textsuperscript{161}

INSANITY\textsuperscript{162}

The provision in this area returns the law to a primitive state which was abandoned over a century ago. In effect, the Administration's proposal would wipe out the defense of insanity, since the defendant's defense—whether he was insane or not—would be, to quote the President: "only if the defendant did not know what he was doing... the only question considered germane in a murder case, for example, would be whether the defendant knew whether he was pulling the trigger.


\textsuperscript{159} CCRA 1973 § 1851. This section uses as its criterion for obscenity, "... a close-up of a human genital" or "explicit representation or detailed description of sexual intercourse." Section 1851(d) excludes the defense that the person reasonably believed that the material was not obscene.

\textsuperscript{160} California v. La Rue, 409 U.S. 109 (1973); Miller v. California, 413 U.S. 15 (1973); Pub. L. No. 90-100, Report, September 1970. For reasons given for its general recommendation refer to pages 52-60.


\textsuperscript{162} CCRA 1973 § 502. See also M'Naghten's case, 10 Cl. F. 200, 8 Eng. Rep. 718 (H.L. 1843); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); \textit{Model Penal Code} § 4.01 (Tent. Draft No. 4, 1955).
of a gun." Would Mr. Nixon thereby steer unequivocally sick people to jail or execution, rather than mental hospitals?

**CIVIL RIGHTS**

This section is proposed to provide only a minor misdemeanor punishment of 1 year to public officials or private parties who injure, threaten or intimidate another person in the free exercise of his rights under the Constitution. In addition, it would eliminate any punishment for those who use threats of economic retaliation against those attempting to enjoy such rights.

**MARIJUANA**

S. 1400 provides for 1 year in prison and a $10,000 fine for mere possession of minor amounts of marijuana for personal use; and, increases this amount to 3 years and a $25,000 fine, if the possession is detected when arriving or departing from a trip out of the country.

**POLICE FORCE**

While this proposed reform of the Criminal Code rejects effective national control of handguns, as had been recommended by the original National Commission on Reform of the Federal Criminal Laws, the bill sanctions the use of deadly force by a police officer to prevent escape of a person arrested for any crime, however petty, and without regard to the danger to the life of others. In fact, a whole catalogue of justifications is written into the legislation to protect law officers from effective prosecution from charges of using unnecessary force. The record is manifest of killings, under color of law, at both federal and local levels, particularly against residents of the nation's ghettos; but the Administration's "Reform" Act of 1973 pays no heed.

**THEFT OF INTELLECTUAL PROPERTY**

The "Espionage" section discussed above becomes even more drastic under novel redefinitions where "theft" is made applicable to theft of "information." This is accomplished by expanding the definition of "property" to include "intellectual ... information." It can readily be seen how such a statute could be used against the press by any federal bureaucrat who wished to suppress embarrassing information against governmental wrongdoing.

---

164 CCRA 1973 §§ 1501, 1502.
165 CCRA 1973 § 1822.
166 CCRA 1973 § 521.
167 CCRA 1973 § 111.
CONCLUSION

As this is written, there are hopeful signs that the obsequious role of the legislative branch in the law and order years since 1968, may be coming to an end. However, this is far from certain, and the injurious legislative enactments of 1968 and 1970 remain without serious challenge.

Finally, the repressive features of the Criminal Code Reform Act of 1973 can be defeated, if, the public is alerted in time. Although not publicized in the general press, a number of prominent individuals have written or testified against S. 1400.¹⁶⁸ Their statements of authority can be of great help in the educational tasks ahead on this issue.