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Seditious Conspiracy Is Not a Real Crime

Last Thursday, Enrique Tarrio, a reputed national leader of the Proud Boys organization was convicted in federal court of seditious conspiracy along with three-co-defendants [1]. This conviction in a District of Columbia court represents a victory for the Justice Department which has now charged more than a thousand people with "crimes" related to the January 6 riot at the US capitol. Most of the charges related to the riot have been for small-time offenses that amount to vandalism and trespassing. A handful of those allegedly involved in the riot, however, have been convicted of seditious conspiracy.

Notably, Tarrio wasn't even in Washington, DC on the day of the riot, and thus could not have engaged in any violent acts against Capitol personnel. Yet, he has nonetheless been convicted on grounds that he was involved in some sort of "agreement" to "hinder" federal laws [2], and thus is guilty of *saying* things that allegedly led to the riot. The Tarrio case is an excellent example of how federal "crimes" can be spun by federal prosecutors from actions that are neither violence, nor fraud, nor any other act that a normal person would recognize as a real crime.

Seditious Conspiracy Was Invented to Get Around Limitations on Treason Prosecutions

Seditious conspiracy must not be confused with the act of treason legally defined in the US Constitution, however. Generally speaking, while treason requires an overt act of some kind, seditious conspiracy is a charge that a person has *said* things designed to undermine government authority. In other words, it is a “crime” of intent as interpreted by state authorities. This is fundamentally different from picking up a weapon and using it against agents of a government.

Of course, as we’ve noted here at mises.org before [3], the very idea of treason is itself problematic, since it assumes that violence against a government agent is somehow worse than a crime against a private citizen. Governments love this double standard because it reinforces the idea that the regime is more important than the voluntary private sector. Ultimately, however, violence against a person or property should be prosecuted as exactly that, and not as some separate category of crime against the “special” human beings who work for a regime.

Seditious conspiracy suffers from this same problem but is even more problematic because it relies primarily on circumstantial evidence to “prove” that a person was saying things in favor of obstructing or overthrowing a government. Indeed, the supposed necessity of such a “crime” is belied by the fact that no such crime existed even in federal law between the repeal of the hated Alien and Sedition Acts and the advent of the Civil War. Nor did seditious conspiracy laws play an important role in the US regime’s military success against the Southern secessionists.

Instead, what we find is that seditious conspiracy is a crime that is both prone to abuse [4]by state authorities and unnecessary in terms of preventing violence to life and property. In cases such as the January 6 riot, crimes against persons and property ought to simply be considered violent crimes and property crimes of the usual sort. Seditious conspiracy, in contrast, is merely a type of “thought crime.”

The Origins of Seditious Conspiracy

The framers of the Constitution defined treason in very specific and limiting terms:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. 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.

Note the use of the word “only” to specify that the definition of treason shall not be construed as something more broad than what is in the text. As with much of what we now find in the Bill of Rights, this language stems from fears that the US federal government would indulge in some of the same abuses that had occurred under the English crown, especially in the days of the Stuart monarchs. Kings had often construed “treason” to mean acts, thoughts, and “conspiracies” far beyond the act of actually taking up arms against the state. By contrast, in the US Constitution, the only flexibility given to Congress is in determining the punishment for treason.

Naturally, those who favored greater federal power chafed at these limitations and sought more federal laws that would punish alleged crimes against the state. It only took the Federalists ten years to come up with the Alien and Sedition Acts, which stated [5]:

> That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty, and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor.

Note the references to “intent,” “counsel,” and “advise” as criminal acts so long as these types of speech are employed in a presumed effort to obstruct government officials. This part of the act, however, was never used by the regime. Those prosecuted under the Alien and Sedition Acts were charged under the section on seditious libel, which was heartily opposed for being obviously and blatantly against basic rights of free expression. Nonetheless, the Sedition Act was allowed to expire, thanks to the election of Thomas Jefferson and the Republicans (later known as Democrats).

For sixty years, the United States government had no laws addressing sedition on the books. But the heart of the 1798 Sedition Act would be revived. As passed on July 1861, the new Seditious Conspiracy statute [6]stated

> that if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States. . . . Shall be guilty of a high crime.

Given the timing of the legislation—i.e., in 1861, following the secession of several Southern states—it is assumed that the legislation originated to address alleged Confederate treason. This is not quite the case. The legislation did enjoy considerable support from those who were especially militant in their opposition to the Confederacy. For example, Rep. Clement Vallandigham of Ohio—who would later be exiled to the Confederacy for opposing the war—supported the bill precisely because he thought it would help punish those engaged in "conspiracies to resist the fugitive slave law [7]." But the Congress had initially become serious about punishing "conspiracies" not in response to Southern secession, but in response to John Brown's 1859 raid at Harper's Ferry.

Southern secession and fears of rebellion helped enlarge the coalition in favor of a new sedition law. The new sedition law represented a significant expansion of the idea of "crimes against the state" in that the sedition law did not require overt acts against the government, but merely "conspiring," vaguely defined. Stephen Douglas understood this perfectly well, explaining the benefits of his bill as such [8]:

> You must punish the conspiracy, the combination with intent to do the act, and then you will suppress it in advance. There is no principle more familiar to the legal profession than that whenever it is proper to declare an act to be a crime, it is proper to punish a conspiracy or combination with intent to perpetrate the act. . . . If it be unlawful and illegal to invade a State, and run off fugitive slaves, why not make it unlawful to form conspiracies and combinations in the several States with intent to do the act?

Others were more suspicious of expanding federal power in this way, however. Sen. Lazarus Powell and eight other Democrats presented a statement opposing the passage of the bill. Specifically, Powell and his allies believed the new seditious conspiracy law would be a de facto move in the direction of allowing the federal government to effectively expand the definition of treason offered by the federal constitution. The statement read [9]:

> The creation of an offense, resting in intention alone, without overt act, would render nugatory the provision last quoted, [i.e., the treason definition in the Constitution] and the door would be opened for those similar oppressions and cruelties which, under the excitement of political struggles, have so often disgraced the past history of the world.

Even worse, the new legislation would provide to the federal government "the utmost latitude to prosecutions founded on personal enmity and political animosity and the suspicions as to intention which they inevitably engender."

Seditious conspiracy legislation gives the federal government far greater leeway to punish *political* opponents. Certainly, such legislation could have been used against opponents of the fugitive slave acts, as well as against opponents of federal conscription. After all, opponents of both the Civil War draft [10] and the Vietnam War draft "conspired" to destroy government property—as with the heroic draft-card burnings of the Catonsville Nine, for example [11]. It would be far harder to prove in court that such acts constituted treason. Unfortunately, the new legislation was ultimately approved in 1861, and the United States government had its first permanent laws against seditious conspiracy.

We now have the same reasons to fear seditious conspiracy laws as Powell did in 1861. Such measures allow the federal government to construct laws addressing intent, thoughts, and words, rather than overt acts. This greatly expands federal power and allows for prosecution of mere inflammatory rhetoric against the federal government.

As a practical matter, seditious conspiracy laws are simply unnecessary. A commonsense foundation for addressing violence in the Capitol building would be to simply prosecute those who engaged in actual violence and trespass. It is clear, however, that gaining convictions for seditious conspiracy has been an important goal for the administration because it furthers the narrative that Donald Trump's supporters attempted some sort of coup.

Unfortunately, these sorts of political prosecutions are just the sort of thing we've come to expect from the Justice Department. The FBI can't be bothered with investigating sex criminals such as Larry Nassar [12], but they'll pull out all the stops to prosecute hundreds of those who entered the Capitol on January 6, many of whom simply stood around gawking at the scenery. But when Congress gives the FBI a near carte blanche, as it has done with seditious conspiracy laws, we should expect as much.

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