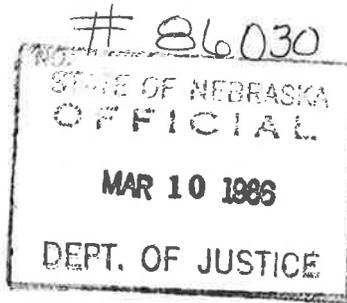


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 7, 1986

SUBJECT: Constitutionality of LB 772 -- Restriction of
Paramilitary Training Activities

REQUESTED BY: Senator Jerry Chizek
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
John Boehm, Assistant Attorney General

This is in response to your request and that of several other senators for an opinion on the constitutionality of LB 772. This legislation would prohibit the teaching of paramilitary activities and the assembly of individuals to train in such activities where such training and techniques will be used in or in furtherance of a civil disorder. A civil disorder is defined in the act as "any public disturbance involving acts of violence which causes an immediate danger of or results in damage or injury to persons or property." Your questions are generally whether or not this legislation infringes upon the rights of free speech and lawful assembly guaranteed by the First Amendment to the United States Constitution.

The key provisions of LB 772, in addition to the definition of civil disorder, are found in Section 2 wherein it provides that

It shall be unlawful within the boundaries of this state: (1) For any person to teach or demonstrate to any other person the use, application, or making of any firearm, explosive or incendiary device, or any technique capable of causing injury or death to persons when such person knows or has reason to know or intends that such information or ability will be unlawfully employed for use in or in furtherance of a civil disorder; or (2) For any person to assemble with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons when such

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persons intend to unlawfully employ such training, practice, instruction, or techniques for use in or in furtherance of a civil disorder.

It should be noted that the definitions of LB 772 and Section 2(1) quoted above are virtually identical to provisions of the federal Civil Obedience Act of 1968, 18 U.S.C.A. §§231 and 232. These provisions have been challenged upon similar grounds in federal court and have been upheld by those courts. In the case of United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972), cert. denied 409 U.S. 991 (1972), the court first dismissed an argument that the statute was void for vagueness in which it was contended that the "knowing or having reason to know" language used in this provision created criminal liability in terms so broad and vague that men of common intelligence must guess at its meaning and application. The court noted that this same argument was rejected by the court in National Mobilization Committee To End The War In Vietnam v. Foran, 411 F.2d 934 (7th Cir. 1969).

There the court construed the language of the statute to require an intent that the use, application, and making of incendiary devices be employed in the furtherance of a civil disorder. The court concluded that "The requirement of intent of course 'narrows the scope of the enactment by exempting innocent or inadvertent contact from its proscription.'" 411 F.2d at 937. Appellants urge us to reject this interpretation of § 231(a) (1). However, we do not perceive that such a result is required by the Constitution nor permitted by Supreme Court precedent.

. . . .

We are thus led to the conclusion that § 231(a) (1) is not unconstitutional on its face. The language is substantially the same as that sanctioned by the Supreme Court in Gorin (Gorin v. United States), 312 U.S. 19) and we hold that it is sufficiently definite to apprise men of common intelligence of its meaning and application.

. . . .

In sum, the statute does not cover mere inadvertent conduct. It requires those prosecuted to have acted with intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder.

Featherston, supra, at 1121-22.

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In regard to the First Amendment challenge to this statute the court noted as follows:

The First Amendment argument is two-fold. First, the contention is that since the statutory language does not require knowledge or intent, it permits prosecution for the dissemination of ideas without a showing of clear and present danger. In view of our decision that the statute as construed here and in the district court does require a showing of knowledge or intent, this contention is rejected.

Second, it is urged, despite our holding in regard to the language of § 231(a) (1), that the statute was unconstitutionally applied because the government failed to prove the happening or pendency of a particular civil disorder and thus failed to show a clear and present danger justifying an interference with activity protected by the First Amendment. We find this argument unpersuasive.

The words "clear and present danger" do not require that the government await the fruition of planned illegal conduct of such nature as is here involved. As stated in *Dennis v. United States*, 1950, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137:

[T]he words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required. 341 U.S. at 509, 71 S.Ct. at 867.

Id. at 1122.

In the Featherston case the evidence demonstrated that a group led by the defendant had engaged in the preparation for "the coming revolution." The group was regularly trained in explosives and incendiary devices and in striking transportation and communication facilities and law enforcement operations. In that factual setting the court determined that there was "a sufficient showing of clear and present danger to justify governmental intervention and the prosecution of appellants for teaching the use and manufacture of explosives and incendiary devices, as provided in §231(a) (1)." Id. at 1122-23.

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As indicated above, the court in National Mobilization Committee To End The War In Vietnam v. Foran, supra, rejected a void for vagueness attack on this provision. In so doing the court noted as follows:

Their brief does assert that the phrase "technique capable of causing injury or death to persons" in Section 231(a) (1) includes techniques of self-defense or sporting activities and then argues that "the requirement that an instructor or teacher know whether his pupils will use their skills unlawfully or in a 'civil disorder which may in any way' interfere with interstate commerce is certainly too broad and vague." But this ignores the "knowing, or having reason to know or intending" language of the statute.

Id. at 937. The court, of course, went on to state that the requirement of intent narrowed the scope of the enactment sufficiently to eliminate any substantial question as to this provision. In any event, it is clear that the court gave little credence to the contention that innocent activities would be included within the scope of the prohibition.

It should also be noted that in the case of United States v. Mechanic, 454 F.2d 849 (8th Cir. 1971), the court there rejected an argument that the statute was vague and overly broad because the term "civil disorder" was inadequately defined.

Thus, in view of this court precedent upholding substantially identical language as that contained in §2(1) of LB 772, and the definition of civil disorder as found in LB 772, we believe that these provisions of the bill are sufficient to withstand any constitutional attack arising under the First Amendment or in the form of an argument as to vagueness and over breadth.

The language contained in Section 2(2) of LB 772 prohibiting the assembly of individuals for the purpose of training in paramilitary activities, has not been challenged to our knowledge, even though the similar statutory language has been enacted by at least eleven other states. Obviously, the rationale of the courts in upholding language identical to that contained in Section 2(1), would apply equally as well to the prohibitions contained in Section 2(2).

In addition, this provision appears to regulate only the conduct of individuals, training with firearms, etc., rather than speech itself. In the case of Vietnamese Fishermen's Ass'n. v. Knights of Klu Klux Klan, 543 F.Supp. 198, (S.D. Texas) (1982), the court upheld an injunction against the defendants prohibiting

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them from engaging in private or paramilitary activities including, "carrying on military or paramilitary training, including all forms of combat and combat related training." In so doing the court stated as follows:

The Court's research has disclosed no authority for the proposition that military operations, of the type in issue here, are protected by the First Amendment rights of free speech and freedom of association. As a preliminary matter, it is not clear that defendants' military activities involve "speech" at all, as distinguished from "conduct." While the line between these two is not always clear, the Supreme Court has explicitly endorsed the distinction. In United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968), for example, the Supreme Court declared that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Defendants' conduct of military operations involves such grave interferences with the public peace and such minimal elements of communication, that, the Court views these activities as impermissible "conduct" not "speech."

Id. at 208.

The court went on to note that "Even if defendants' military operations were characterized as 'speech', defendants still would not be able to avail themselves of First Amendment protection." Id. at 208. The court analogized the defendants' conduct in this case to provocations or "fighting words" which the Supreme Court has long recognized to constitute a category of speech which simply does not fall within the protection of the First Amendment. "Similarly, the threat of violence which defendants communicated through their military activities is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words,' and therefore is not protected by the First Amendment." Id. at 208.

The court also found that even if the defendants' conduct were an exercise of free speech this conduct could be properly regulated under standards established by the United States Supreme Court, and in particular applied this analysis to training in such activities:

Weighty governmental interest also counsel against acceptance of any argument that the First Amendment protects military operations. As a New York Appellate Court has observed:

There can be no justification for the organization of such an armed force. Its existence would be incompatible with the fundamental concept of our form of government. The inherent potential danger of any organized private militia, even if never used or even if ultimately placed at the disposal of the government, is obvious. Its existence would be sufficient, without more, to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates.

Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, 205 (1944), aff'd, 296 N.Y. 926, 73 N.E.2d 41, (1947). This governmental interest is not intended to, nor does it, suppress free expression. Finally, any restriction which an injunction of military activities would place on defendants' free expression is minimal; defendants remain free to express their views by means other than the threat of military force.

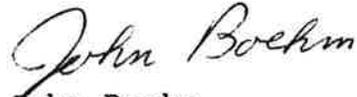
Defendants' military training operations are similarly outside the scope of First Amendment freedom of speech and association. Professor Laurence Tribe defines an abridgement of the First Amendment freedom of association as "any insufficiently justified governmental rule, practice or policy that interferes with or discourages a group's pursuit of ends having special first amendment significance--such as literary expression, or political change, or religious worship." Tribe, supra, § 12-23, at 703. An injunction against defendants' military training operations in no way hinders defendants from meeting together as a group. Rather, it simply limits their ability to engage in a certain pattern of noncommunicative conduct which threatens to incite a breach of the peace. The First Amendment is no defense to a charge of conspiracy even if the act was committed for political or ideological reasons. So too, defendants' particular political motivations do not entitle them to transgress the law under the guise of the First Amendment.

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Thus, it would appear that courts have not been hesitant to conclude that training in military or paramilitary activities is not protected under the First Amendment. Consequently, we are of the opinion that LB 772 is constitutional, and in particular is not in contravention of the First Amendment to the United States Constitution.

Sincerely,

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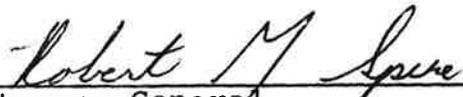
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