THE WASHINGTON POST, THURSDAY, JULY 6, 1978

John Shattuck and David Landau

The Dangers of the Proposed Criminal Code

Five and a half years ago the Nixon administration launched an extraordinary legislative attack on civil liberties. It did so by transforming the 1971 recommendations of the National Commission on Reform of Federal Criminal Laws into a far broader proposal, S.1, aimed in large part at protecting the government from the people. Although passage of S.1 would not have kept Nixon in office, it certainly would have strengthened his hand against journalists, protesters and other persistent government critics.

Remarkably, many of the ingredients and much of the underlying philosophy of S.1 are preserved in a bill, S.1437, that recently passed the Senate and is now pending in the House Judiciary Committee. Supporters of this 682-page legislative tome concede that it is the product of a broad political compromise, but claim that the present criminal code is sufficiently "outmoded" and "confusing" to justify the civil-liberties costs of enacting a new one. They stress the fact that the most onerous provisions of S.1 have been deleted, and assure us that life under the new code just won't be that different. A close examination of the bill, however, leads to the opposite conclusion.

John Shattuck is the director and David Landau a staff counsel of the American Civil Liberties Union Washington office.

S.1437 is neither a recodification nor a meaningful reform of existing law. Instead, it is a significant expansion of federal criminal law at the expense of constitutional rights, inviting abuse by law-enforcement officials and prosecutors and raising serious questions of due process and notice.

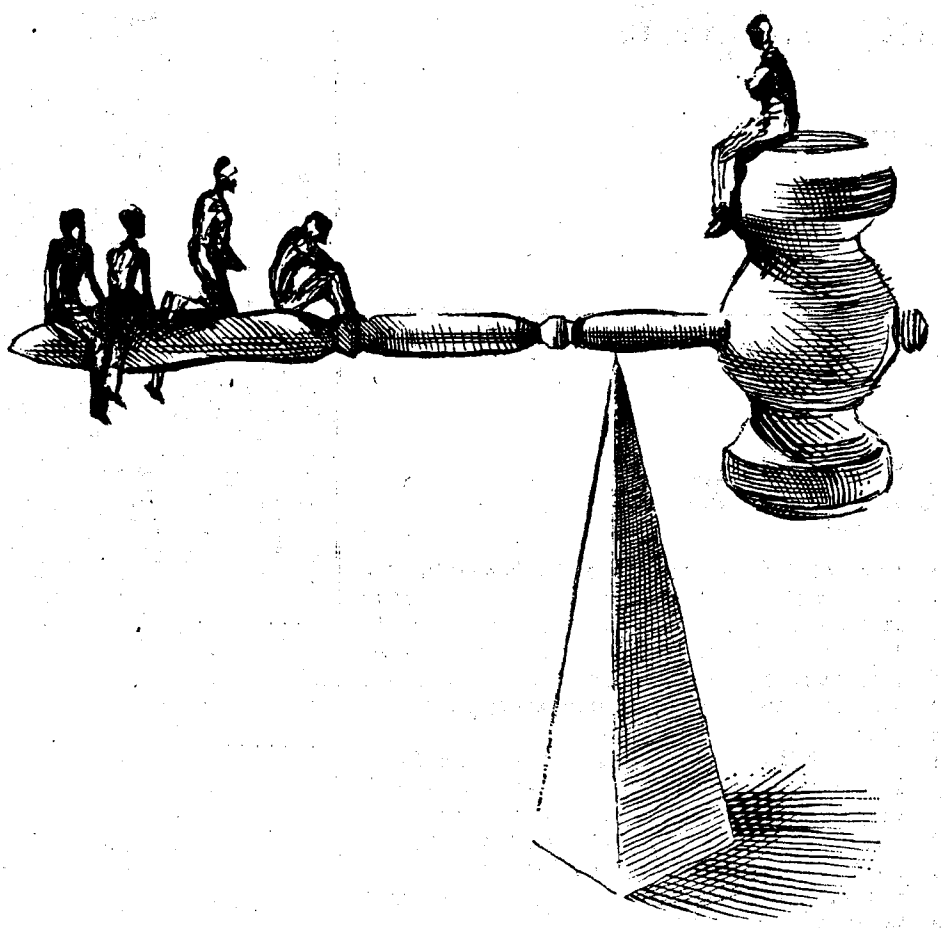
One of the most dangerous features of the bill is its potential effect on what is now considered lawful dissent. Take, for example, a group of citizens who are disturbed about a proposed federal nuclear-power facility in Colorado. They meet to plan a demonstration on the building site. That meeting could subject them to prosecution under the broadened conspiracy provisions of S.1437 since the demonstration may "obstruct a government function by physical interference," a new crime created by the bill. Those who persuade others to join the demonstration would risk prosecution for the new crime of solicitation. Participants in the protest could run afoul of several other new provisions of law, such as "violating a public-safety order." Finally, if the event resulted in a public disturbance, participants who merely "disregarded the risk" that violence might occur could be punished under the revised anti-riot statute.

Among the many other expansive provisions in the bill are those that would for the first time explicitly make it a crime to utter a false unsworn *oral* statement to a law-enforcement official, discourage and even criminalize "whistleblowing" by federal employees, broadly expand accomplice liability, and make it a crime to "defraud" the government in any manner.

Further restricting First Amendment freedoms, S.1437 would create a new federal obscenity crime based on widely varying "community standards." Since the standards to be applied are those generally accepted in the judicial district where an obscenity prosecution occurs, the bill invites a jury in Wichita, for example, to dictate its morals to the rest of the country in passing judgment on a book or film produced in New York.

In addition to expanding these and other crimes, S.1437 would broaden federal law-enforcement powers by creating new jurisdiction for federal prosecutors, FBI agents and other U.S. investigators. While this may not directly affect civil liberties, the expansion of federal police power without a showing of compelling governmental interest would be a dangerous constitutional development. The bill would also erode Sixth Amendment rights by reducing the role of juries in trying criminal cases. Jurisdiction would be eliminated as an element of the offense and would therefore be determined by the judge rather than the jury.

Additional dangers were added to S.1437 when it passed the Senate. These include new authority for "preventive detention" of persons charged with murder, rape, kidnapping, armed robbery and drug trafficking; reinstatement of a prohibition against using the mails to advertise abortion services; deletion of the definition of "person" so as to leave ambiguous the status of an unborn fetus; and reenactment of the Logan Act barring private individuals from carrying on any discussions with for-



By David Suter

eign officials regarding U.S. foreign relations.

In short, the proposed criminal-code bill remains a serious threat to individual rights and bears a striking resemblance to its predecessor, S.1. While it is true that S.1437 would accomplish some reforms, such as the repeal of the notorious Smith Act and a sharpening of the definition of certain civil-rights crimes, the price of those improvements would be high. Rep. James Mann (D-S.C.), chairman of the House subcommittee on criminal justice, was correct, therefore, when he stated that the choice facing Congress is whether, for the sake of streamlining the criminal law, it will compromise the Constitution.

In careful and deliberate hearings and briefing sessions over the past six months, the Mann subcommittee has been examining S.1437, line by line. The suggestion that it should abandon that effort and enact the Senate bill on faith borders on the irresponsible. If, after its study, the subcommittee rejects the legislation, it will have ample justification, having discovered an old albatross with a new name.