

THE ORIGINS OF THE ESPIONAGE ACT OF 1917: Was Judge Learned Hand’s Understanding of the Act Defensible?

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In the spring offensives of 1915, England and France lost 240,000 men and Germany 140,000, with no net change in position.¹ The following summer, the British suffered 60,000 casualties on a single day in the Battle of the Somme.² Between the outbreak of war in Europe and the decision of the United States to enter the conflict in the spring of 1917, there was continuing debate about the nation’s best course of action. Most Americans believed that the war in Europe did not implicate vital interests of the United States. What finally drew the United States into the war was the German submarine blockade.³

Unlike the British, who could deny Germany essential supplies by laying minefields in its narrow shipping routes, the Germans had to resort to submarine warfare to cut off shipping to England and France, which had broad access to the sea.⁴ These blockades infuriated the neutrals, who maintained that they were entitled under international law to trade freely with all belligerents. Although Americans valued the “freedom of the seas,” most did not find it a sufficiently compelling reason to spill American blood on the

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1. See ROBERT A. DOUGHTY, *PYRRHIC VICTORY: FRENCH STRATEGY AND OPERATIONS IN THE GREAT WAR* 165 (2005); ROBERT T. FOLEY, *GERMAN STRATEGY AND THE PATH TO VERDUN: ERICH VON FALKENHAYN AND THE DEVELOPMENT OF ATTRITION, 1870–1916*, 156–57, 157 n.3 (2005).

2. Paul Johnston, *The Myth of Manoeuvre Warfare: Attrition in Military History*, in *THE CHANGING FACE OF WAR: LEARNING FROM HISTORY* 22, 22 (Allan D. English ed., 1998).

3. JUSTUS D. DOENECKE, *NOTHING LESS THAN WAR: A NEW HISTORY OF AMERICA’S ENTRY INTO WORLD WAR I* 286 (2011).

4. *The Blockade of Germany*, NAT’L ARCHIVES, <http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/blockade.htm> (last visited Sept. 30, 2018).

battlefields of Europe.⁵ The more sensible course was to stand aside, forego trade with the belligerents, and let the storm pass.

Nonetheless, in the winter of 1917, after German submarines sank three American vessels,⁶ President Woodrow Wilson—who had won reelection the preceding fall on the slogan that he had “kept America out of war”—sought a declaration of war.⁷ He proclaimed that the United States could not “choose the path of submission and suffer the most sacred rights of our nation and our people to be ignored or violated.”⁸

The voices of dissent were immediate. On April 4, during Congress’s debate over the war resolution, Republican Senator George Norris of Nebraska stated that “we are about to put the dollar sign upon the American flag.”⁹ Like Norris, many Americans saw the conflict not as a war to make the world “safe for democracy” but as a war to make the world safe for munitions manufacturers and armaments traders.¹⁰ Wilson’s proposal to reinstitute the draft also triggered bitter attacks.

Wilson was a man with little tolerance for criticism. In seeking a declaration of war, he cautioned that “if there should be disloyalty, it will be dealt with with a firm hand of stern repression.”¹¹ Disloyal individuals, he explained, “had sacrificed their right to civil liberties.”¹² In these and similar pronouncements, he set the tone for what was to follow. Wilson understood that, if dissent was allowed to fester, it could undermine the nation’s morale and make it more difficult to prosecute the war. Wilson knew that war is not merely a battle of armies but a contest of wills, and that defeat could come from collapse of the home front as readily as from failure in the trenches.

Opposition to our entry into the war in Europe came from many quarters, Americans of German ancestry made up almost twenty-five percent of the population in 1917.¹³ They did not relish the prospect of war between the

5. Edward H. Buehrig, *Freedom of the Seas: 1917, 1941*, 6 J. POL. 3, 8 (1944); see also R. ALTON LEE, *FROM SNAKE OIL TO MEDICINE: PIONEERING PUBLIC HEALTH* 129 (2007) (explaining that Americans in Kansas did not find freedom of the seas to be an overpowering reason to participate in the war).

6. DOENECKE, *supra* note 3, at 207.

7. *Id.* at 289.

8. Woodrow Wilson, Address to a Joint Session of Congress (Apr. 2, 1917), in 41 THE PAPERS OF WOODROW WILSON 519, 521 (Arthur S. Link ed., 1983).

9. 55 CONG. REC. 186,214 (1917).

10. Wilson, *supra* note 8, at 525.

11. *Id.* at 526.

12. Paul L. Murphy, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 53 (1979) (discussing Woodrow Wilson’s Third Annual Address to Congress).

13. DON HEINRICH TOLZMANN, *THE GERMAN-AMERICAN EXPERIENCE* 268 (2000).

United States and Germany.¹⁴ Internationalists and pacifists also opposed our entry into the war.¹⁵ Jane Addams and Crystal Eastman, for example, despised war as an archaic and immoral means of resolving international disputes.¹⁶ The Socialists also protested America's declaration of war. With a sharper edge than the pacifists, the Socialists argued that war was a capitalist tool contrived by industrialists to boost armament sales and enforce social order, while bringing only misery, demoralization, and death to the working class.¹⁷ Anarchists also opposed American participation in World War I. Mostly recent European immigrants, the anarchists were more radical—and more militant—than the Socialists.¹⁸

Alexander Berkman, an anarchist leader, told a mass rally in New York City, “When the time comes we will not stop short of bloodshed to gain our ends,” and Emma Goldman, known in the press as the High Priestess of Anarchism,¹⁹ wrote that “at this critical moment it becomes imperative for every liberty-loving person to voice a fiery protest against the participation of this country in the European mass-murder.”²⁰

Less than three weeks after Congress voted a declaration of war, it began debate on what would become the Espionage Act of 1917.²¹ Although directed primarily at such matters as espionage and the protection of military secrets, the bill included three sections directly relevant to free speech in wartime.

For the sake of convenience, I shall refer to them as the “press censorship” provision, the “disaffection” provision, and the “nonmailability” provision. An understanding of the debate over these three provisions is essential to

14. *See id.* at 270–72.

15. *See* ELIZABETH MCKILLEN, *MAKING THE WORLD SAFE FOR WORKERS* 54–55 (2013); Wendy E. Chmielewski, *Opposition to the War in the United States*, *HOME BEFORE THE LEAVES FALL*, <https://wwionline.org/articles/opposition-war-united-states/> (last updated July 15, 2014).

16. *See* JANE ADDAMS, *PEACE AND BREAD IN TIME OF WAR* 61–62 (1922); LINDA K. SCHOTT, *RECONSTRUCTING WOMEN'S THOUGHTS* 102 (1997).

17. *See* MCKILLEN, *supra* note 15, at 56, 91.

18. *Compare* DOENECKE, *supra* note 3, at 256, 276 (discussing how socialists proposed and engaged in strikes), *with* Emma Goldman, *The Promoters of the War Mania*, *MOTHER EARTH*, Mar. 1917, at 5, 5 (“At this critical moment it becomes imperative for every liberty-loving person to voice a fiery protest against the participation of this country in the European mass-murder.”), *and* Alexander Berkman, *Anarchist Rally in Union Square* (July 14, 1914), *quoted in* RICHARD POLENBERG, *FIGHTING FAITHS* 22 (1987) (“When the time comes we will not stop short of bloodshed to gain our ends.”).

19. *The Police May Turn Hose on Anarchists*, *PUBLIC LEDGER*, Sept. 28, 1909, at 2, *microformed on* The Emma Goldman Papers: A Microfilm Edition, at Reel 47 (Candace Falk et al. eds., 1990).

20. Goldman, *supra* note 18, at 5; Berkman, *supra* note 18, at 22.

21. 55 CONG. REC. 827,829 (1917).

understanding what went wrong in the United States over the next eighteen months.

As presented to Congress, the “press censorship” provision would have made it unlawful for any person in time of war to publish any information that the President declared to be “of such character that it is or might be useful to the enemy.”²² The “disaffection” provision would have made it unlawful for any person willfully to “cause or attempt to cause disaffection in the military or naval forces of the United States.”²³ The “nonmailability” provision would have granted the Postmaster General authority to exclude from the mails any writing or publication that violated “any of the provisions of this act” or was otherwise “of a treasonable or anarchistic character.”²⁴

The *press censorship provision* provoked the most heated discussion. The Wilson administration’s support of this section triggered a firestorm of protest from the press, which objected that it would give the President the final authority to decide whether the press could publish information about the conduct of the war.²⁵ Opposition to the provision was fierce. Senator Hiram Johnson of California reminded his colleagues that “the preservation of free speech” is of “transcendent importance,”²⁶ and Representative William Wood of Indiana warned that it could become “an instrument of tyranny.”²⁷ Describing the provision as “un-American,” Representative Martin B. Madden of Illinois protested that “[w]hile we are fighting to establish the democracy of the world, we ought not to do the thing that will establish autocracy in America.”²⁸

When it began to appear that the press censorship provision would go down to defeat, President Wilson made a direct appeal to Congress, stating that the “authority to exercise censorship over the press . . . is absolutely necessary to the public safety.”²⁹ Members of Congress were unmoved. On May 31, 1917, the House defeated the provision by a vote of 184–144,

22. 55 CONG. REC. 1661, 1695 (1917).

23. H.R. REP. NO. 64-1591, at 1 (1917); *see* 55 CONG. REC. 769, 793 (1917) (discussing the use of the word “disaffection”).

24. H.R. 291, 65th Cong. § 1100 (1st Sess. 1917), *reprinted in* 55 CONG. REC. 1563, 1595 (1917).

25. *See* Resolutions of the Am. Newspaper Publishers’ Ass’n (Apr. 25, 1917), *reprinted in* 55 CONG. REC. 1844, 1861 (1917); *see generally* H.R. REP. NO. 65-30, at 2, 10 (1917).

26. 55 CONG. REC. 2081, 2097 (1917).

27. 55 CONG. REC. 1725, 1773 (1917).

28. *Id.*

29. *Wilson Demands Press Censorship*, N.Y. TIMES, May 23, 1917, at 1 (quoting a letter from President Woodrow Wilson to Representative Edwin Yates Webb).

effectively ending consideration of the “press censorship” provision for the duration of the war.³⁰

The *nonmailability provision* also generated controversy. Several members of Congress objected to granting the Postmaster General such broad authority to exclude political material from the mail.³¹ Senator Charles Thomas of Colorado, for example, argued that this provision would produce “a far greater evil than the evil which is sought to be prevented[.]”³² and Representative Meyer London of New York declared the provision a “menace to freedom,” adding that “there is nothing more oppressive . . . than a democracy gone mad.”³³

After vigorous debate, Congress amended the “nonmailability” provision to replace the phrase “treasonable or anarchistic character” with the much narrower phrase “containing any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States.”³⁴ It is noteworthy that as a result of this amendment only *express advocacy* of unlawful conduct could fall within the catchall clause of the provision. Statements that did not expressly advocate “treason, insurrection or forcible resistance” could not be excluded from the mail. As we know, this is a critical distinction in later debates about the meaning of both the Espionage Act and the First Amendment.

The *disaffection provision*, which turned out to be the most important part of the bill, received less attention. But even this provision was amended in a significant manner. The potential difficulties with this provision were made clear in hearings before the House Committee on the Judiciary. Gilbert Roe, a civil liberties lawyer who represented the Free Speech League, explained that under the “disaffection” provision every effort to discuss or criticize the war could be “brought under the ban.”³⁵ In light of these concerns, the Judiciary Committee found the term “disaffection” to be “too broad,” “too elastic,” and “too indefinite.”³⁶ In order to narrow and clarify the provision,

30. JUHANI RUDANKO, DISCOURSES OF FREEDOM OF SPEECH: FROM THE ENACTMENT OF THE BILL OF RIGHTS TO THE SEDITION ACT OF 1918, at 161 (2012).

31. 55 CONG. REC. 2045, 2056–71 (1917).

32. *Id.* at 2062.

33. 55 CONG. REC. 1725, 1779 (1917).

34. H.R. REP. NO. 69, at 16 (1917) (Conf. Rep.); *see also* 55 CONG. REC. 3093, 3124–29 (1917) (reading H.R. REP. NO. 69 into the record); 55 CONG. REC. 3273, 3301–07 (1917) (reading H.R. REP. NO. 69 into the record).

35. *Espionage and Interference with Neutrality: Hearing on H.R. 291 Before the H. Comm. on the Judiciary*, 65th Cong. 39 (1917).

36. 55 CONG. REC. 1563, 1594 (1917) (statement of Rep. Webb).

it replaced the phrase “cause or attempt to cause disaffection” with “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty.”³⁷

After nine weeks of grueling debate, Congress enacted the Espionage Act of 1917, as amended.³⁸ Violations were punishable by prison terms of up to twenty years. As the congressional debate suggests, the legislation, as enacted, was not a broadside attack on all criticism of the war. It was, rather, a carefully considered enactment designed to deal with specific military concerns. But what would the Act mean in practice? Would passing out antiwar leaflets be regarded as a willful “attempt to cause insubordination”? Would a public speech denouncing the draft be deemed a deliberate obstruction of “the recruiting or enlistment service”?

Much would depend on the attitude and approach of the Wilson Justice Department. The administration was clearly disappointed with the legislation. Not only had Wilson’s personal appeal to Congress been rebuffed, but a year later Attorney General Thomas Gregory publicly expressed the administration’s frustration with the Act. Gregory complained that when war broke out the administration had “secured the passage of the Espionage Act, but most of the teeth which we tried to put in it were taken out.”³⁹ In light of the President’s caustic statements about disloyalty, and the Attorney General’s evident disappointment in the legislation, there was little reason to expect much prosecutorial restraint. Any doubt on this score was erased when Attorney General Gregory, referring to war dissenters, declared in November 1917, “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”⁴⁰

Because there had been no direct attack on the United States, and no direct threat to America’s national security, the Wilson administration needed to *create* an “outraged people.” To build a sense of patriotic fervor, Wilson established the Committee on Public Information (CPI), under the direction of George Creel, a journalist and public relations expert.⁴¹ The CPI produced a flood of pamphlets, news releases, speeches, newspaper editorials, political cartoons, and even motion pictures. Its efforts concentrated on two main

37. See Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917).

38. *Id.*

39. Thomas Gregory, *Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice*, 4 A.B.A. J. 305, 306 (1918).

40. ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 108 (G.K. Hall & Co. 1978).

41. Christopher B. Daly, *How Woodrow Wilson’s Propaganda Machine Changed American Journalism*, CONVERSATION (Apr. 27, 2017, 9:51 PM), <https://theconversation.com/how-woodrow-wilsons-propaganda-machine-changed-american-journalism-76270>.

themes: feeding hatred of the enemy and promoting a suspicion of anyone who might be “disloyal.”

As the CPI whipped the nation into a frenzy of patriotism, many communities went so far as to ban German-language teaching and burn German-language books.⁴² In the first month of the war, Attorney General Gregory asked loyal Americans to act as voluntary detectives and to report their suspicions directly to the Department of Justice. The results were staggering. Each day, thousands of accusations of disloyalty flooded into the department.⁴³ Adding to the furor, the CPI encouraged citizens to form voluntary associations dedicated to informing the authorities of possible disloyalty.

The activities of these organizations went well beyond reporting alleged disloyalty. With implicit immunity, they engaged in wiretaps, bugged offices, and examined bank accounts and medical records.⁴⁴ Vigilantes ransacked the homes of German Americans.⁴⁵ In Oklahoma, a former minister who opposed the sale of Liberty bonds was tarred and feathered.⁴⁶ In Illinois, an angry mob wrapped an individual suspected of disloyalty in an American flag and then murdered him on a public street.⁴⁷

Wilson, Gregory, and Creel helped create not only an “outraged public” but a fearful and intolerant nation.

It was in this atmosphere of accusation and suspicion that federal judges were called upon to interpret and apply the Espionage Act of 1917. And it was in this atmosphere that Judge Learned Hand entered the fray.

42. Katja Wüstenbecker, *German-Americans During World War I*, IMMIGRANT ENTREPRENEURSHIP, <https://www.immigrantentrepreneurship.org/entry.php?rec=214> (last updated Sept. 25, 2014).

43. MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 96 (1992).

44. *Id.* at 97.

45. David Dechenne, *Recipe for Violence: War Attitudes, the Black Hundred Riot, and Superpatriotism in an Illinois Coalfield, 1917–1918*, 85 ILL. HIST. J. 221, 230, 234 (1992) (describing incidents where “pro-Germans” were forced out of their homes and made to prove their loyalty to the United States by kissing the American flag and other “manifestations of patriotism”).

46. MARY GRAHAM, *PRESIDENTS’ SECRETS: THE USE AND ABUSE OF HIDDEN POWER* 56 (2017).

47. *Lynching of Robert Prager Underlined Anti-German Sentiment During World War I*, NPR (Apr. 6, 2017, 4:30 PM), <https://www.npr.org/2017/04/06/522903398/lynching-of-robert-prager-underlined-anti-german-sentiment-during-world-war-i>.