LAWYER FOR *THE MASSES*: The Role of Gilbert Roe in *Masses Publishing Co. v. Patten*

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Masses Publishing Co. v. Patten is justly celebrated for the courageous, if futile, opinion of Judge Learned Hand. *The Masses* itself is justly celebrated for its courageous, if futile, opposition to American involvement in World War I. Gilbert Ernstein Roe, lawyer for *The Masses*, who both influenced Hand's decision and contributed to the magazine's brief survival, has most unjustly never been celebrated and is all but unknown today.

Who was Gilbert Roe? And what was his role in that famous Espionage Act case of a century ago? Certainly, I had no idea when I began my inquiries more than five years ago now. I was hoping to write an article about the Hand opinion but couldn't come up with anything that hadn't already been written. So I started looking into some of the people involved in that case.

Both Hand and *The Masses* editor Max Eastman had been written about extensively, and Patten was just a patronage appointee. At first, there didn't seem to be much about Gilbert Roe. But David Rabban had written a brief biographical sketch of him,[1] which led me to further references, in Rabban's classic, *Free Speech in Its Forgotten Years*,[2] Mark Graber's *Transforming Free Speech*,[3] and a few others.

I learned that Roe was an 1890 graduate of the University of Wisconsin Law School,[4] so I wrote the law librarian there to see if they might have some materials by or about him. They did not, but she did send me a printout of his reported cases. When I saw a lot of familiar names—Goldman, Debs, Sanger,

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1. David M. Rabban, *Roe, Gilbert Ernstein*, *in* 18 AMERICAN NATIONAL BIOGRAPHY 740–41 (1999) [hereinafter Rabban, *Roe*]; David M. Rabban, *Schroeder, Theodore*, *in* 19 AMERICAN NATIONAL BIOGRAPHY, *supra* at 430–31.
2. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 55 (1997).
3. MARK A. GRABER, TRANSFORMING FREE SPEECH 54 (1991).
4. *See* Rabban, *Roe*, *supra* note 1, at 740–41.

Sinclair—I started digging further. Before discussing Roe's role in *Masses*, a little personal and professional background might be useful.

Upon graduation from law school, Roe joined the firm of Robert M. La Follette in Madison.[5] He became a very close friend of La Follette and would continue to serve as La Follette's consigliere during his terms as Governor of Wisconsin and U.S. Senator and his unsuccessful presidential campaigns.[6] Indeed, it was in the La Follette Papers in the Library of Congress that I found nineteen file boxes of Roe's papers.

Roe's practice in Madison was a conventional general practice.[7] His first wife died very young, and in 1900, at age 35, he married Gwyneth King Roe. Netha Roe was a Chautauqua teacher of movement and physical health.[8] They moved to New York City, where she opened a studio on the Upper West Side and he opened a practice on Wall Street.[9] In a fairly short period of time, he had developed a solid business practice, including a substantial number of insurance cases.[10] His first speech case came from his La Follette connection.

La Follette had given an interview with the legendary muckraker Lincoln Steffens and suggested that the journalist meet Gilbert Roe when he returned to New York.[11] That relationship grew into representation when Steffens' employer, *McClure's Magazine*, its publisher S.S. McClure, and fellow journalist Ray Stannard Baker were sued for libel by one of La Follette's political enemies, Emanuel Philipp, then a Wisconsin railroad executive.[12]

The case involved a series of articles by Baker on the railroads' corrupt practices regarding the leasing of rolling stock, based in part on a report by La Follette's transportation commissioner.[13] The report, and thus Baker,

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5. *Id.*

6. *Id.*

7. *See* David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. Rev. 47, 79 (1992).

8. *See* WOMAN'S WHO'S WHO OF AMERICA 697 (John W. Leonard ed., 1914).

9. Letter from Gilbert Roe to Alfred Rogers (Dec. 15, 1906) (on file with Library of Cong.). *See generally* ERIC. B. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER'S BATTLES FOR FREE SPEECH, ch. 1 (2018).

10. *See* 3 CHARLES HIGGINS, THE MAKING OF AMERICA 459 (Robert M. LaFollette et al. eds., 1906); Rabban, *supra* note 7, at 79.

11. *See* Letter from Robert M. LaFollette to Gilbert Roe (July 27, 1904) (on file with Library of Cong.); *see also In the Mirror of the Present: Lincoln Steffens' Quest for a Moses*, 40 ARENA, July 1908, at 80, 88.

12. S.S. McClure Co. v. Philipp, 170 F. 910, 911 (2d Cir. 1909); *see also* EASTON, *supra* note 9, at 212 n.4.

13. *Id.* at 911–12.

misidentified Philipp's railroad, and Philipp sued. Roe lost the case, and a jury awarded Philipp $15,000.[14]

Roe could be described as a La Follette Progressive Republican for his entire life, but his social and professional circles became increasingly radical. In 1905 or so, he became involved in the Free Speech League, a precursor of the ACLU, along with fellow Wisconsinite Theodore Schroeder—also a lawyer but more philosopher than practitioner.[15] Roe became the League's principal trial lawyer, even as he maintained a conventional practice.[16]

The League was founded primarily to fight for the free speech rights of anarchists and against the obscenity prosecutions of Anthony Comstock.[17] Comstock was the head of the New York Society for the Suppression of Vice and progenitor of virtually all American obscenity laws.[18] Roe's involvement with the League brought him into contact with the elite of New York's radical society, including anarchists Emma Goldman and Alexander Berkman, who had been recently released from prison for attempting to murder industrialist Henry Frick, and for whom Roe would later provide legal services.[19]

Goldman and Berkman became family friends, and that in turn led to Roe's U.S. Supreme Court debut in defense of a Washington State anarchist, Jay Fox, editor of the *Agitator* in Home Colony, Washington.[20] Fox was convicted for advocating nude bathing in Puget Sound—which, of course, was illegal. Fox's editorial, called *The Nudes and the Prudes*, was held throughout the state courts as violating a state statute that prohibited advocating disrespect for the law.[21]

Before the U.S. Supreme Court, Roe made a Fourteenth Amendment due process argument[22]—following Schroeder's view that free speech was a liberty interest, and far more fundamental than the freedom of contract so

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14. *Id.* at 911, 915.

15. *See* Rabban, *Roe*, *supra* note 1, at 740–41.

16. *See* Rabban, *supra* note 7, at 79.

17. 2 EMMA GOLDMAN, A DOCUMENTARY HISTORY OF THE AMERICAN YEARS 57 (Candace Falk et al. eds., 2005).

18. *See* Anthony Comstock et al., *The Suppression of Vice*, 135 N. AM. REV. 484, 486 (1882); *Finding Women in the Archives: The New York Society for the Suppression of Vice and Anthony Comstock's War on Contraception*, N.Y. HIST.: WOMEN CTR. (Mar. 27, 2018), http://womenatthecenter.nyhistory.org/new-york-society-for-the-suppression-of-vice.

19. *See* PAUL AVRICH & KAREN AVRICH, SASHA AND EMMA: THE ANARCHIST ODYSSEY OF ALEXANDER BERKMAN AND EMMA GOLDMAN 239 (2012); RABBAN, *supra* note 2, at 44; Rabban, *supra* note 7, at 80.

20. Fox v. Washington, 236 U.S. 273, 274 (1915), *aff'g* 127 P. 1111 (Wash. 1912).

21. *Fox*, 127 P. at 1112.

22. *See Fox*, 236 U.S. at 276.

prized by conservative jurists of the *Lochner* era.[23] Roe lost again, of course, with a pre-conversion Oliver Wendell Holmes writing the opinion. Holmes found that the state supreme court had sufficiently narrowed the statute to advocating lawlessness and that there was no constitutional infirmity.[24]

Roe also took on other anarchist-inspired representations, including the Paterson, New Jersey, silk weavers strike by the Industrial Workers of the World, or Wobblies.[25] But Roe's personal cause, along with that of his wife, was women's suffrage, and he labored mightily on state and national men's committees favoring suffrage.[26] Despite some tension between suffragists and birth control advocates, Roe was drafted to represent William Sanger, estranged husband of the much-better-known Margaret.[27]

William Sanger was prosecuted by Anthony Comstock himself for giving an undercover agent a copy of Margaret's birth control booklet, *Family Limitation*.[28] Anything to do with birth control was deemed obscene, and Margaret Sanger was a prime target for Comstock's private prosecutions. At the last minute, however, William Sanger fired Roe in a dispute over legal strategy—Sanger refused to allow character witnesses and wanted rather to make a stand on the rightness of his cause.[29] Of course, Sanger lost his own case.[30] This was Comstock's last prosecution; he died shortly thereafter.[31]

Roe's most important clients, by far, were *The Masses*, a socialist magazine of art and politics, and its artists and editors led by Max Eastman.[32] *The Masses* was often called the heart and soul of the Greenwich Village bohemian society in which Roe was rapidly becoming a fixture (even though he lived alternately on the upper west side and in Westchester County). When

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23. *See* GRABER, *supra* note 3, at 62. *See generally* Lochner v. New York, 198 U.S. 45 (1905).

24. *Fox*, 236 U.S. at 277–78.

25. *See* State v. Boyd, 91 A. 586 (N.J. 1914); Rabban, *Roe*, *supra* note 1, at 740–41.

26. *See* GILBERT E. ROE, DISCRIMINATIONS AGAINST WOMEN IN THE LAWS OF NEW YORK 2–3 (1914).

27. *See Observations and Comments*, 10 MOTHER EARTH 66, 59 (1915); *see also* BROOKE KROEGER, THE SUFFRAGENTS 140–41, 152, 308–09 n.141 (2017). *See generally* EASTON, *supra* note 9, at ch. 4.

28. People v. Sanger, 154 N.Y.S. 414, 415 (App. Div. 1915).

29. Letter from William Sanger to Gilbert Roe, (June 21, 1915) (on file with the Library of Cong.).

30. *Sanger*, 154 N.Y.S. at 415.

31. *Anthony Comstock Dies in His Crusade*, N.Y. TIMES, Sept. 25, 1915, at 1.

32. WILLIAM B. SCOTT & PETER M. RUTKOFF, NEW YORK MODERN: THE ARTS AND THE CITY 75–80 (1999).

the Associated Press brought a criminal libel suit against *The Masses*, Eastman, and art director Art Young, Roe was a natural to lead the defense.[33]

The subject of the suit was an editorial by Eastman, accompanied by a cartoon by Art Young, that accused the AP and its founder, Frank Noyes, of biased coverage of the deadly coal miners' wars in West Virginia in 1912–13.[34] Although the case dragged on forever, Roe eventually won when the AP and the government decided to drop the matter.[35]

One of the reasons AP gave up was the extensive evidence Roe collected regarding collusion between the AP's local reporter and the state militia, called in to break the strike.[36] Roe worked with another chronicler of those wars, the socialist muckraker Upton Sinclair, whose account was published in 1919 as *The Brass Check*.[37]

World War I and the Espionage and Sedition Acts that accompanied U.S. entry into the war brought an exponential increase in the demand for Roe's largely pro bono services. When *The Masses* was barred from the U.S. mails by Postmaster Thomas Patten for its antiwar articles and artwork, like the cartoon *Conscription*, Roe won a brilliant proto-First Amendment decision from Judge Learned Hand, only to be quickly reversed by the Second Circuit.[38] But it is Hand's opinion that we read and honor today, even though it was decided entirely on statutory grounds.

I. THE COMING OF WAR

By the beginning of 1917, it must have appeared to the antiwar left that President Wilson—who had won reelection in November 1916 on the slogan "He kept us out of war"—was rapidly losing his ability or willingness to hold out against irresistible pressure to enter the war.[39] That pressure had been growing since the outbreak of war in 1914. It only intensified after the British passenger ship *Lusitania* was sunk in May 1915, with considerable loss of

33. *See* Indictment, New York v. Eastman, No. 97005 (N.Y. Cnty. Ct. Gen. Sess. June 20, 1913). *See generally* EASTON, *supra* note 9, at ch. 5.

34. UPTON SINCLAIR, THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM 363 (1919).

35. *Id.*

36. Letter from Gilbert Roe to John O'Hara Cosgrave (Aug. 24, 1916) (on file with the Library of Cong.).

37. *See generally* SINCLAIR, *supra* note 34.

38. *See* Masses Publ'g Co. v. Patten 244 F. 535, 543 (S.D.N.Y. 1917), *rev'd*, 245 F. 102, 106 (2d Cir. 1917).

39. *See* 1 BELLE CASE LA FOLLETTE & FOLA LA FOLLETTE, ROBERT M. LA FOLLETTE 593–602 (1953).

American lives, and was further enhanced by political calculations in the 1916 presidential campaign. By 1917, the pressure had become irresistible.

Wilson had firmly resisted the "preparedness lobbies" of major industrialists, which had begun to coalesce as early as 1914.[40] In that effort, he had the strong support of progressives and socialists who saw in "preparedness" a rapacious capitalist class intent on profiting from new investments in arms.[41] But in the summer of 1915, to protect his political right flank in the run-up to the 1916 election, Wilson reversed his position and began calling for "reasonable preparedness," including the expansion of both the Army and Navy.[42]

Oswald Garrison Villard, progressive publisher of the New York *Evening Post*, condemned the reversal as "anti-moral, anti-social and anti-democratic . . . sowing the seeds of militarism."[43] The pacifist Villard had earlier professed gratitude that Wilson had been in office when the *Lusitania* went down. Other members of the progressive leadership formed the American Union Against Militarism to continue the fight against preparedness into 1916.[44] La Follette expressed his opposition in a speech on the Senate floor on Jan. 27, 1916—timed to coincide with Wilson's speaking tour to promote the program.[45]

Despite Wilson's advocacy of military expansion, La Follette was still cautiously optimistic about the prospects for peace when Wilson defeated Charles Evans Hughes to win reelection in November 1916.

> [The] elections have clearly shown that the great mass of the Americans desire nothing so much as to keep out of the war . . . . The President must accept the outcome of this election as a clear mandate from the American people to hold steadfastly to his course against war.[46]

That notion was reinforced in January 1917 when Wilson gave his famous "peace without victory" speech; La Follette was the first to applaud.[47]

Two weeks later, however, Wilson was back before Congress, this time to say he was cutting off diplomatic relations with Germany over its submarine

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40. DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 30–31 (25th ed. 2004).
41. *Id.* at 31–32.
42. *Id.* at 32–33.
43. *Id.*
44. *Id.* at 33–34.
45. 1 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 551.
46. *Id.* at 585.
47. *Id.* at 590.

warfare, which had resumed on February 1. Later that month, he asked Congress for authority to arm American merchant ships. La Follette led what Wilson called "a little group of willful men" opposed to that legislation,[48] and they were able to filibuster it to death in the Senate despite the administration's release of the infamous Zimmermann telegram outlining German plans to support a Mexican conquest of its "lost" territory in Texas, Arizona, and New Mexico.[49]

According to La Follette's daughter Fola, Gilbert Roe had been spending as much time in Washington as his law practice permitted, "working with Bob and [his wife] Belle on questions of international law."[50] These two men, former law partners and intimate friends, had entered upon one of the most important of their many collaborations. Fola wrote:

> United in an undertaking they believed of vital import to the future of their country, it is often difficult in this period to distinguish where the work of one leaves off and the other's contribution begins. Their thought functioned in extraordinary harmony; a similar background had determined their measure of values and objectives. It never occurred to either to weigh the cost of differing with a powerful President on the eve of war.[51]

Despite their best efforts, the antiwar coalition was badly frayed. Some progressives were looking upon the war as an opportunity to launch sweeping social and political reforms.[52] Others may have calculated that continuing to oppose the war would work against their principal cause. Of particular interest to the Roes was the capitulation of the suffragist leadership, like Carrie Chapman Catt, who had helped organize the Woman's Peace Party in January 1915.[53] Two years later, Catt—as president of the National American Woman Suffrage Association—was offering "war service" to President Wilson.[54] A similar pledge was offered by Mrs. Norman de R. Whitehouse, who chaired the New York State Woman Suffrage Party.[55]

Netha Roe was outraged. Her letters to Catt and Whitehouse protesting the pledges were couched in legal argument—questioning whether the

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48. KENNEDY, *supra* note 40, at 11.
49. 1 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 606–07.
50. 1 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 656.
51. *Id.* at 656.
52. KENNEDY, *supra* note 40, at 34.
53. *Id.* at 30.
54. Letter from Gwyneth King Roe to Carrie Chapman Catt (Feb. 25, 1917) (on file with the Wis. Hist. Soc'y).
55. Letter from Mrs. Norman de R. Whitehouse to Gwyneth King Roe (Feb. 28, 1917) (on file with the Wis. Hist. Soc'y).

organizations' constitutions permitted advocacy of any cause save suffrage—but the sense of betrayal was unmistakable. "I find myself not merely shocked by being handed over to the Governor and the President for war service but particularly humiliated by what I have done to other women," she wrote Catt, noting that many had joined the suffragist cause on her assurance that they would be serving no other cause.[56]

> Dear even as is the cause of Peace to me I could never feel for one moment that we were justified in pledging the Women's Suffrage Party to that or any other cause without a referendum which would reach every member, nor had I dreamed the Constitution would permit such a thing. The President's own voice and his policy (admitted by those who criticize equally with those who approve) have clearly shown, and still show, that he is seeking every possible means to avoid war, that he is eager to know the voice of the people even to individual voices, and that his supplication now is, for any and every suggestion that can be given him on how to avoid war. He has all the [counsel] necessary on the other side. Is it not hampering the President in his efforts for Peace, to come forward at this time solely with an offer of what we will do if war comes? Is not that subject to the criticism of anticipating something the President hopes to avoid, and you have said you hope to avoid? And is it not absolutely unfair to the women in our ranks who are earnestly working for Peace, to pledge a united organization for war service under these conditions?[57]

Netha Roe made similar arguments in her letter to Whitehouse, who actually announced the pledge of war service at a meeting in the Roe home at Pelham Manor.[58] Whitehouse denied that the pledge of service was anything other than humanitarian. "The Woman Suffrage Party . . . takes no side on any controversial questions; it doesn't now take a side on the question of war or peace," she wrote.[59] Roe rejected Whitehouse's characterization of the pledge as humanitarian, calling it just the reverse. "[It] has rejoiced every [munitions] maker and seller, every gambler in war stocks and war contracts, and all the sinister forces that are striving to bring this country into war," she wrote, expressing the hope that any further pronouncements would make clear that the organization was neither pro- nor anti-war.[60]

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56. Letter from Gwyneth King Roe to Carrie Chapman Catt, *supra* note 54.

57. *Id.*

58. Letter from Gwyneth King Roe to Mrs. Norman de R. Whitehouse (Feb. 25, 1917) (on file with Wis. Hist. Soc'y).

59. Letter from Mrs. Norman de R. Whitehouse to Gwyneth King Roe, *supra* note 55.

60. Letter from Gwyneth King Roe to Mrs. Norman de R. Whitehouse (Mar. 2, 1917) (on file with Wis. Hist. Soc'y).

Gilbert Roe praised his wife's efforts in a letter to La Follette. "In common with all the country, we are all, of course, watching events closely in Washington," he wrote.

> Netha is much more wroth up about the situation than I am . . . . She has written what I regard as one of the best and briefest statements of the situation from the woman's point of view. [T]hat has been prepared and sent to the suffrage leaders. Probably it won't do any good; possibly, nothing will do any good, but be that as it may, it relieves one's feelings to do their bit.[61]

Of course, it made little difference that the suffragists were divided on the war. Netha Roe's plea to support Wilson's quest for peace seemed naïve when she wrote Catt; days after her response to Whitehouse, the President delivered his second inaugural address, asserting that, "Our own fortunes as a nation are involved, whether we would have it so or not."[62] On April 2, Wilson asked Congress for a declaration of war;[63] two days later, despite the best efforts of La Follette and a handful of antiwar senators, the Senate approved the war resolution 82–6.[64] The House followed on April 6, voting 337–50 for war with Germany.[65]

The first American troops would land in France on June 25,[66] but the first casualty of the war—freedom of speech—occurred even before war was declared. On the evening of April 2, legislation aimed at preventing wartime espionage—legislation that had been twice rejected during the past year—was reintroduced by Sen. Charles Culberson (D-Tex.) and Rep. Edwin Webb (D-N.C.).[67] Key provisions of the bill would impose censorship of the press, criminalize interference with military recruitment or causing disaffection in the ranks, and allow the post office to bar dissenting publications from the mails.[68] The significance of the bill was not lost on Gilbert Roe.

"I have heard the rumor that a bill to abridge freedom of speech and of the press has been introduced in Congress," he wrote La Follette, presuming that

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61. Letter from Gilbert Roe to Robert La Follette (Feb. 27, 1917) (on file with Library of Cong.).

62. KENNEDY, *supra* note 40, at 11.

63. President Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917) (transcript available in the National Archives).

64. 1 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 666–67.

65. *Id.*

66. JANE KAMENSKY ET AL., A PEOPLE AND A NATION 582 (11th ed. 2018).

67. KENNEDY, *supra* note 40, at 25.

68. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 345–46 (2003).

the bill was thought necessary because of the declaration of war.[69] "There are worse calamities even than war. One of them would be the destruction of free speech and of free press—both of which have already been much restricted even in times of peace."[70] Roe asked La Follette to find out if the rumor was true and, if so, to arrange for him to testify before the appropriate committee as a representative of the Free Speech League.[71] Roe speculated that he only heard about the legislation because of his position with the League. "I do not suppose that there is one person in a million outside of official life who knows that a measure of the sort is under consideration," he wrote.

> Unless public hearings are held and some information given to the public about it, we may have our most cherished and fundamental right swept away over night. The forces at work in this country to curtail freedom of speech and of the press will make it very hard to repeal a law now passed after the war is over even though such a measure could get no support at this time except for the war.[72]

In fact, hearings on "Espionage and Interference with Neutrality," H.R. 291, began two days later, and Roe testified on April 12, along with Charles T. Hallinan of the American Union Against Militarism; lawyer Harry Weinberger, representing the Free Speech League of America; activist social worker Jane Addams; and radical journalist John Reed, among others.[73] Roe focused specifically on the disaffection clause of the bill, which provided that "[W]hoever in time of war shall willfully cause or attempt to cause disaffection in the military or naval forces of the United States, shall be punished by imprisonment for not less than 20 years or for life."[74] The nonmailability clause was apparently not in the copy of the House bill that Roe had when he testified.[75]

Roe began his testimony by pointing out that the Constitution did not provide for any suspension of freedom of speech or the press during wartime; even the suspension of habeas corpus was limited to times of rebellion or invasion, not an offensive on foreign soil.[76] Noting that the Sedition Act of

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69. Letter from Gilbert Roe to Robert La Follette (Apr. 7, 1917) (on file with Library of Cong.).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Espionage and Interference with Neutrality*: *Hearings on H.R. 291 Before the H. Comm. on the Judiciary*, 65th Cong. (1917) [hereinafter *Espionage and Interference with Neutrality*].

74. *Id.* at 36.

75. Letter from Gilbert Roe to Robert La Follette (Apr. 30, 1917) (on file with Library of Cong.).

76. *Espionage and Interference with Neutrality*, *supra* note 73, at 36–38.

1798 was far less sweeping than the bill before the committee, he reminded the members that the "indignation with which this legislation was received by the American people . . . swept out of power the administration which passed it."[77]

Roe asserted that any speech or publication that causes "disaffection, discontent, disgust, or like feelings in the military," even if truthful, would clearly violate the bill if it became law.[78] "The matter published or spoken may be the truth, and probably the greater the truth the greater the disaffection its dissemination would cause," he said. "Every right to discuss the conduct of the war, the causes which led up to it, and the methods by which it can be terminated are brought under the ban of the proposed statute."[79]

While Roe claimed to express no opinion on the war itself—although he certainly opposed U.S. involvement[80]—he insisted that the people retained the right, if they wished to exercise it, to remove from office those who would continue prosecuting the war against their judgment. "But how is any voter to form an intelligent opinion unless there is the fullest discussion permitted of every phase of the war, its origin, its manner of prosecution, and its manner of termination?" he asked.[81] He cited a *New York Evening Mail* editorial pointing out that the weakness of England and France during the first two years of the war resulted from covering up blunders. "This country," he quoted the *Mail*, ". . . must not pay its blood for silence about blunders . . . because of hysterical and mistaken loyalty of silence when outspoken criticism is needed."[82]

Roe tried to answer questions about what conduct the bill covered, although he found it so indefinite that no one could tell what it meant.

> Candidly, if you will pardon the statement, I hardly see how it would be safe to say the Lord's Prayer if this bill became a law. When we pray that our trespasses might be forgiven us as we forgive those who trespass against us, I think it might be construed that we were praying for the forgiveness of our enemies, the Germans.[83]

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77. *Id.* at 38.
78. *Id.* at 39.
79. *Id.*
80. *Id.* at 40–41.
81. *Id.*
82. *Id.* at 41 (quoting Editorial, *Senator Root's Mistaken Plea*, N.Y. EVENING MAIL, Apr. 11, 1917, at 10.).
83. *Id.* at 42.

He urged the committee not to pass this question up to the courts. "It is no more the duty of a court to declare a law unconstitutional than it is the duty of Congress to refrain from passing an unconstitutional law."[84]

During the hearings, Rep. Warren Gard (D-Ohio) redrafted the disaffection provision Roe addressed, but the change was more cosmetic than substantive.[85] "[E]ven modified as suggested," Roe said, "it does not seem to me it helps the situation very much . . . ."[86] Ultimately, the provision was amended to read,

> [W]hoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[87]

If the disaffection clause survived essentially intact, the press censorship clause did not survive at all—although not because of any persuasion from the left. Rather, the opposition came from the mainstream press, toward which Roe was frequently cynical. "It looks as though the newspapers would shoot that [censorship clause] to pieces," Roe wrote La Follette. "They would of course be glad to slip over something against free speech if they could do that without interfering with their right to publish. I think the bill will need to be watched in this particular."[88] Cynical or not, the publishers' opposition was effective.

In language that could have been written by Gilbert Roe, the American Newspaper Publishers Association (ANPA) said the censorship provision "strikes at the fundamental rights of the people, not only assailing their freedom of speech but also seeking to deprive them of the means of forming intelligent opinion."[89] Also echoing Roe's earlier testimony, ANPA said "in war especially the press should be free, vigilant, and unfettered."[90]

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84. *Id.* at 43.
85. *Id.* at 62.
86. *Id.*
87. Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (indicating punishment for making false statements to interfere with operations of national forces) (repealed 1948).
88. Letter from Gilbert Roe to Robert La Follette (Apr. 19, 1917) (on file with Library of Cong.).
89. 55 CONG. REC. 1861 (1917) (resolutions of the American Newspaper Publishers Association).
90. *Id.*

Mainstream newspapers expressed similar hostility,[91] and the only press support for the clause came from the ethnic and foreign language press, which saw censorship as a shield against accusations of disloyalty.[92] On May 31, over Wilson's very strong objection, the House voted 184–144 to strip the censorship clause from the bill.[93]

Although Roe was busy gathering materials for La Follette to oppose legislation funding the war and raising an army through conscription,[94] he was sufficiently aware of the Espionage Act's progress to recognize that the nonmailability clause was the most "dangerous" portion of the bill.[95] Specifically, Roe pointed out that the provision was not temporary, but would last forever unless repealed. "No one can appeal to the Courts from a decision of the Postoffice Inspector who may declare anything to be anarchistic or treasonable or seditious that he pleases," Roe wrote, incorrectly as it turned out. "I have been through this with other publications which the Post Office officials suppressed on the ground that they were obnoxious to other portions of the Statute and I know what a tremendous instrument of tyranny this rather innocent looking provision of the bill will become."[96]

Lacking a powerful counter-constituency like the newspaper publishers, however, the nonmailability provision remained part of the bill when it was enacted on June 15, 1917:

> Section 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier . . . .
>
> Section 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby considered to be nonmailable.

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91. *See* Stone, *supra* note 68, at 346.
92. KENNEDY, *supra* note 40, at 25–26.
93. Stone, *supra* note 68, at 349.
94. Letter from Gilbert Roe to Robert La Follette, *supra* note 88.
95. Letter from Gilbert Roe to Robert La Follette (May 8, 1917) (on file with Library of Cong.).
96. *Id.*

> Section 3. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable, shall be fined not more than $5,000 or imprisoned not more than five years, or both. Any person violating any provision of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.[97]

Shortly after the law was enacted, Roe wrote to Roger Baldwin of the American Union Against Militarism, presciently predicting that before the question of the mailability of any material could be decided by the courts, "the work desired will be done and [the] publisher ruined."[98] Indeed, Postmaster General Albert Sidney Burleson of Texas "began to ban socialist publications from the mails even before the Act had passed, and continued to do so at an accelerating pace thereafter."[99] The day after enactment, Burleson secretly directed local postmasters to keep a

> close watch on unsealed matter, newspapers, etc., calculated . . . to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval service, or to obstruct the recruiting, draft or enlistment services . . . or otherwise to embarrass or hamper the Government in conducting the war.[100]

Copies of suspect publications were to be sent to Washington for instructions.[101]

Within a month, about fifteen major publications, most of them socialist, were excluded from the mails. Among them were the *International Socialist Review*, *Appeal to Reason*, *American Socialist*, the *Milwaukee Leader*, and, most famously, *The Masses*.[102]

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97. Act of June 15, 1917, ch. 30, §§ 1–3, 40 Stat. 217, 230–31 (indicating punishment for making false statements to interfere with operations of national forces) (repealed 1948).

98. Letter from Gilbert Roe to Roger Baldwin (June 30, 1917) (on file at Princeton University Library), *cited in* Donald Johnson, *Wilson, Burleson, and Censorship in the First World War*, 28 J. S. HIST. 46, 47 (1962).

99. KENNEDY, *supra* note 40, at 27; *see also Socialist Paper Held Up*, N.Y. TIMES, July 1, 1917, at 12 (reporting *American Socialist* held up by mail prior to enactment).

100. Johnson, *supra* note 98, at 48.

101. *Id.*

102. *Id.*

II. MASSES PUBLISHING CO. V. PATTEN

At the very beginning of July 1917, in the normal course of business, the Ricker News Co. delivered hundreds of copies of the August issue of *The Masses* intended for nationwide circulation to the post office in New York City.[103] They were wrapped as usual for second-class delivery and the proper postage was paid.[104] Following the instructions of the Postmaster General, the postmaster at New York City, Thomas G. Patten, sent a copy of the magazine to Washington with a request for instructions. William H. Lamar, solicitor for the Post Office Department, received the request on or about July 3.[105] A day or two later, Ricker informed Merrill Rogers, the magazine's business manager, that the magazines would not be permitted to go through the mail. Rogers immediately telephoned Frederick G. Mulker, superintendent of second-class matter at the New York Post Office to verify Ricker's report. Mulker verified that the magazine had been held up pending receipt of instructions from the solicitor of the Post Office Department in Washington.[106]

Shortly thereafter, Rogers received a telephone call from Mulker, to the effect that the magazines would be held non-mailable under the Espionage Act.[107] On or about July 5, Rogers received a letter from Patten confirming the information in the telephone call that "according to advice from the Solicitor for the Post Office Department, the August 1917 issue of *The Masses* is non-mailable under the Act of June 15, 1917."[108] There was no further explanation.[109]

Rogers immediately traveled to Washington to meet with Lamar and to determine what portions of the issue were regarded as objectionable. Rogers offered to remove those portions from the magazine, but Lamar refused to specify what portions had triggered the decision or what provisions of the law were being enforced. Instead, Lamar said the whole tone and tenor of the magazine constituted a violation of the Act.[110]

Later, the government would reveal that, in reaching his decision, the Postmaster had considered not only the August issue, but also the June and

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103. Transcript of Record at 17, Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123) (affidavit of Merrill Rogers).

104. Brief of Complainant-Appellee at 2, *Masses Publ'g Co.*, 246 F. 24 (No. 123).

105. Transcript of Record, *supra* note 103 at 26 (affidavit of William H. Lamar).

106. *Id.* at 17 (affidavit of Merrill Rogers).

107. *Id.* at 7 (bill of complaint).

108. *Id.*

109. *Id.* at 17 (affidavit of Merrill Rogers).

110. *Id.* at 17–18.

July issues of *The Masses* and the June issue of *Mother Earth* magazine,[111] published by Emma Goldman and Alexander Berkman—then on trial in New York City for conspiracy to violate the Selective Service law.[112] The additional materials were reviewed to show a "persistent and continuing policy in violation of the purposes and intent of the . . . Conscription and Espionage Acts," as well as to appreciate "the interpretation that would be placed [on the offending articles and cartoons] by habitual readers and subscribers . . . ."[113] Goldman and Berkman were convicted on July 9.[114]

On July 12, Gilbert Roe filed a bill of complaint against Patten in U.S. District Court for the Southern District of New York.[115] The complaint alleged that mail delivery was "absolutely necessary to the . . . continued publication and circulation" of *The Masses*[116] and that the magazines held up by the Post Office were, in all respects, mailable under the law.[117] Roe complained that the magazine's officers had never been given an opportunity to be heard on the issue of mailability and that the Post Office's refusal to mail the magazines, if continued, would completely ruin the business.[118] Accordingly, he said, the court should enjoin the Post Office from treating the magazines as non-mailable and command it to transmit them through the mail in the usual way.[119]

To the great, if short-lived, benefit of *The Masses*, the case was assigned to District Judge Learned Hand, a brilliant young jurist with whom Roe corresponded when Hand lost an election to become Chief Judge of the New York Court of Appeals on the Bull Moose ticket in 1913.[120] In a previous speech-related case, Hand had sharply criticized as too restrictive the prevailing common law rule on obscenity, although he felt bound by precedent to follow it.[121] American courts began to relax that rule in the 1930s,[122] but it was not until 1957 that the U.S. Supreme Court formally

111. *Id.* at 20 (affidavit of A.S. Burleson).

112. *Emma Goldman and Berkman Get Two Years*, SUN (N.Y.), July 10, 1917, at 1.

113. Transcript of Record, *supra* note 103, at 20, 23 (affidavit of A.S. Burleson).

114. *Emma Goldman and Berkman Get Two Years*, *supra* note 112, at 1.

115. Transcript of Record, *supra* note 103, at 5 (bill of complaint).

116. *Id.*

117. *Id.* at 8.

118. *Id.*

119. *Id.* at 9.

120. *See* Letter from Gilbert Roe to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Nov. 6, 1913), *in* REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 42 (Constance Jordan ed., 2013).

121. United States v. Kennerly, 209 F. 119, 120 (S.D.N.Y. 1913); s*ee also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 148–51 (1994).

122. *See, e.g.*, Massachusetts v. Friede, 171 N.E. 472, 473 (Mass. 1930).

abandoned it.[123] That would not be the last time that Hand's insights on freedom of speech would be influential decades later.

Responding to Roe's complaint, Hand ordered Patten to appear in court on July 16 to show cause why the injunction Roe requested should not be issued.[124] When that day arrived, however, he adjourned the hearing until July 21, a Saturday, at the request of Patten's attorney, Earl B. Barnes.[125] Roe objected strenuously to the postponement, arguing that the delay cost the financially strapped magazine $100 a day, but Barnes prevailed on the ground that he needed time to study previous issues of the magazine to prove that its obstruction of military recruiting was deliberate.[126] "The government got it over on me," Roe told La Follette.[127]

That same day, a high-profile committee of socialists and their representatives, alarmed by the assault on socialist publications, met with the Postmaster General and the Department of Justice in Washington, not only to protest the suppression campaign, but also to try to identify the criteria for mailability under the Act.[128] The delegation was headed by socialist lawyer Morris Hillquit and included socialist leader Seymour Stedman, lawyers Amos Pinchot and Clarence S. Darrow, socialist editor Thomas Hickey, antiwar activist Roger N. Baldwin, and Frank P. Walsh, former chairman of the Industrial Relations Commission.[129] The trip would prove futile.

"Mr. Burleson received us very pleasantly," Hillquit reported,

> [B]ut he did not seem inclined to recognize the validity of our point of view . . . . He promised to give our representations general consideration, but declined to give us any definite guide for future conduct, leaving the question of mailability to be decided by himself or some one appointed by him in the case of each issue of each publication.[130]

Hillquit said the committee found a more sympathetic ear at Justice, but "unfortunately, the Department of Justice has no jurisdiction in the matter of

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123. *See* Butler v. Michigan, 352 U.S. 380 (1957), s*ee also* Roth v. United States, 354 U.S. 476 (1957).

124. Transcript of Record, *supra* note 103, at 12 (order to show cause).

125. The Masses *Must Wait,* N.Y. TIMES, July 17, 1917, at 7.

126. *Id.*

127. Letter from Gilbert Roe to Robert La Follette (July 18, 1917) (on file with Library of Cong.).

128. *Hillquit Reports on Mail Protest*, N.Y. TIMES, July 18, 1917, at 4.

129. *Id.* According to Dennis Johnson, the group consisted of Hillquit, Darrow, Walsh and lawyer Seymour Stedman. Johnson, *supra* note 98, at 49. Baldwin's name appears in 2 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 739.

130. *Hillquit Reports on Mail Protest*, supra note 128.

closing the mails to publications."[131] A private report to La Follette was more direct: "They reported to Bob that they had been given an ultimatum to 'Cut-out war criticism or stay out of the mails.'"[132]

Walsh was so angry that he wrote to Burleson, denouncing the "ultra-bureaucratic method adopted by you for suppressing newspapers."[133] When he complained that anyone at the Post Office could apparently destroy a business on a whim, Burleson responded that he assumed responsibility for any action taken by his subordinates and that Walsh's letter was both impertinent and offensive.[134] Burleson later recalled threatening to resign when Wilson suggested he let the socialists "blow off steam," and Wilson let him have his way.[135] Wilson adopted a similar position when Eastman sent a letter of protest directly to the President.[136]

Roe and Barnes met in Hand's chambers on Saturday morning, July 21; the argument lasted from about 10 a.m. to 5 p.m.[137] Roe began by pointing out that the publishers had been unable to learn what might be objectionable to the Post Office Department and instead offered to withdraw anything shown to be illegal.[138] Barnes then submitted affidavits from Burleson and Lamar, prepared two days earlier, setting out in detail and for the first time exactly what prompted the nonmailability order.[139]

Specifically, Burleson's affidavit listed four cartoons—*Liberty Bell*, *Conscription*, *Making the World Safe for Capitalism*, and *Congress and Big Business*—and four articles—*A Question*, *A Tribute*, *Conscientious Objectors*, and *Friends of American Freedom*—as violating the Espionage Act. The affidavit also listed items from the June and July issues of *The Masses* and the June issue of *Mother Earth* to assist in interpreting the offending cartoons and articles.[140]

Conscription, by Henry J. Glintenkamp, depicted three naked figures bound to a cannon, with a young man labeled "Youth" bent backwards over the muzzle, a woman labeled "Democracy" tied to one wheel, and a man

131. *Id.*
132. 2 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 739.
133. Johnson, *supra* note 98, at 49.
134. *Id.* at 50.
135. *Id.* at 50 n.21.
136. *Id.* at 51.
137. Deposition of John M. Scoble at 2 (Aug. 15, 1917), Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
138. *Judge Makes Point in* Masses *Favor*, N.Y. TIMES, July 22, 1917, at 7.
139. *Id.*; *see* Transcript of Record, *supra* note 103, at 19–27 (affidavits of A.S. Burleson & William H. Lamar).
140. Transcript of Record, *supra* note 103, at 19–20 (affidavit of A.S. Burleson).

labeled "Labor" on the carriage. In the foreground, a woman on her knees representing "Motherhood" appeared to be wailing over the body of a dead child who lay before her.[141] *Liberty Bell*, also by Glintenkamp, showed the iconic symbol breaking apart.[142]

Making the World Safe for Capitalism, by Boardman Robinson, was a two-page spread, showing a Russian worker concentrating on "Plans for a Genuine Democracy" while being threatened on one side by figures representing a militaristic Japan and the English symbol John Bull and on the other by figures representing Americans Elihu Root and Charles Edward Russell of the Root Commission, dispatched to Russia between the two revolutions of 1917 in hopes of keeping the Kerensky government in the war.[143]*Congress and Big Business*, by Art Young, sometimes called *War Plans*, showed a lonely figure representing Congress seeking access to a room where businessmen are poring over a map labeled "War Plans." Congress asked: "Excuse me, gentlemen—where do I come in?" Big Business responded: "Run along now!—We got through with you when you declared war for us."[144]

A Question was an essay by Max Eastman that asked how many people admired the "self-reliance and sacrifice of those who are resisting the conscription law," and how many agreed with the American press that characterizes resisters as "slackers."[145]*A Tribute* was a poem by Josephine Bell that paid homage to Emma Goldman and Alexander Berkman, "in prison tonight."[146] *Conscientious Objectors* sympathetically introduced a number of letters from conscientious objectors in English prisons compiled by Floyd Dell,[147] while *Friends of American Freedom* was an unsigned essay soliciting contributions for the defense of Goldman and Berkman.[148]

Lamar's affidavit said Judge Advocate General Enoch Crowder had expressed the opinion that these items in the magazine would "cause insubordination, disloyalty, mutiny and refusal of duty in the naval and military forces of the United States and would obstruct the recruiting and

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141. H.J. Glintenkamp, *Conscription*, MASSES, Aug. 1917, at 9.

142. *Id.* at 4.

143. Boardman Robinson, *Making the World Safe for Capitalism*, MASSES, Aug. 1917, at 26–27.

144. Arthur Young, *Congress and Big Business*, MASSES, Aug. 1917, at 33.

145. *A Question*, MASSES, Aug. 1917, at 10–11.

146. Josephine Bell, *A Tribute*, MASSES, Aug. 1917, at 28.

147. *Conscientious Objectors*, MASSES, Aug. 1917, at 29–30.

148. *Friends of American Freedom*, MASSES, Aug. 1917, at 36. Excerpts from all four text items appear in an appendix to the Hand decision. Masses Publ'g Co. v. Patten, 244 F. 535, 543–45 (S.D.N.Y. 1917).

enlistment service."[149] Barnes added that the cartoon, *Making the World Safe for Capitalism*, lampooning the Root mission to Russia, would interfere with the successful conduct of the war.[150] Hand asked whether that same argument might be applied to efforts to repeal conscription or other laws, or whether any political agitation for cessation of the war might not be banned on the same charge.[151] Barnes replied that, in passing the Espionage Act, Congress intended to ban from the mails anything that could obstruct the war effort, not merely treasonable matter.[152]

Roe challenged the constitutionality of the nonmailability provisions of the Espionage Act, but Hand pointed to precedent holding that the mails were always considered a privilege, which Congress, on occasion, could take away.[153] Roe also urged that the magazine had not violated the law, but was merely expressing opinions.[154] Hand said he found nothing in the cartoons to support the claim of non-mailability. "They did not go beyond the argument against conscription and the horrors of war," he said.[155]

Roe argued that a publication could not be condemned as unmailable on the basis of material that would not make its publishers criminally liable. As long as *The Masses* did not commit any overt act in violation of the law, and confined itself to expressions of opinion, it could not be considered in violation of the Act and, therefore, could not be unmailable.[156] Judge Hand agreed, saying the government could not make a distinction between matter that was unmailable, but not indictable, and matter that was indictable under the Act. "You cannot expound the meaning of the statute to apply to mailability and contrast it as applied to indictability," Hand reportedly said. "You cannot play fast and loose with it. That violates all idea of law and its intent."[157] Otherwise, Hand reserved judgment and brought the argument to an end.[158]

On Monday, Eastman filed an affidavit pointing out that the June and July issues of *The Masses* were published and mailed before the Espionage Act was enacted, and that he never read the *Mother Earth* issue in question.[159] The

149. *Judge Makes Point in* Masses *Favor*, *supra* note 138.
150. *Id.*
151. *Id.*
152. *Id.*
153. Masses *in Court Called Foe of U.S.*, SUN (N.Y.), July 22, 1917, at 9.
154. *Cartoon Caused Suppression of* The Masses, N.Y. TRIB., July 22, 1917, at 16.
155. *Judge Makes Point in* Masses *Favor*, *supra* note 138.
156. *Id.*
157. *Id.*
158. *See id.*
159. Transcript of Record, *supra* note 103 (affidavit of Max Eastman).

next day, Roe submitted an amendment to his complaint, alleging that the Espionage Act was itself unconstitutional, depriving his clients of due process of law and violating their First Amendment freedoms of speech and press.[160] Neither filing seems to have made any difference, because on Tuesday, July 24, Judge Hand filed his opinion in the *Masses* case, holding that the Espionage Act's non-mailability provisions could only be enforced against publications that directly advocated violating the law.[161] His order granting a preliminary injunction was filed on Thursday.[162]

Hand began his opinion by asking whether the words and pictures of the banned magazine, interpreted as broadly as permissible, must necessarily violate the Espionage Act. If so, he said, the Postmaster's decision must stand.[163] Hand rejected the notion that the power of Congress to do anything required during times of war—including restricting personal rights such as freedom of speech—was at issue in this case. "Here is presented solely the question of how far Congress after much discussion has up to the present time seen fit to exercise [such] a power . . . ."[164] If Congress left any necessary, if repressive, measures out of the Espionage Act, it was up to Congress to deal with that.[165]

Hand conceded the government's argument that the cartoons and articles at issue may have the effect of interfering with the success of the military by enervating public opinion at home and encouraging the success of the enemy.[166] They were not, however, covered by the provision of the Act pertaining to false statements of fact, he said, as they were all "within the range of opinion and of criticism," and "believed to be true by the [speaker]."[167] Whether the criticism is temperate reasoning or indecent invective is the speaker's choice "in countries dependent upon the free expression of opinion as the ultimate source of authority."[168]

Hand noted that the government also relied on a provision of the Act that prohibited "willfully causing insubordination, disloyalty, mutiny, or refusal of duty."[169] Here, too, Hand conceded that men who believe that the war is unjust may be more prone to insubordination than men who have faith in the

160. *Id.* at 29 (specification).
161. Masses Publ'g Co. v. Patten, 244 F. 535, 540–41 (S.D.N.Y. 1917).
162. Transcript of Record, *supra* note 103, at 50 (order granting temporary injunction).
163. *Masses Publ'g Co.*, 244 F. at 538.
164. *Id.*
165. *Id.*
166. *Id.* at 538–39.
167. *Id.* at 539.
168. *Id.* at 539.
169. *Id.*

cause. "Yet to interpret the word 'cause' so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism," he said.

> Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.[170]

Hand concluded that the language of the statute did not support the government's position regarding the suppression of the free utterance of abuse and criticism of the existing law, or of the policies of the war.[171] Of course, that begged the question of what Congress thought it was prohibiting when it passed the law. Hand's answer: Congress, in adopting the Espionage Act, meant only to prohibit advising or counseling others to violate the law as it stands, that is, to urge that it is their duty or interest to break the law.

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.[172]

Applying his view of the law to the facts of the case, Hand said none of the language and none of the cartoons in the August issue of *The Masses* "can be thought directly to counsel or advise insubordination or mutiny."[173] As to the third provision on which the government relied, prohibiting willful

170. *Id.* at 540.
171. *Id.*
172. *Id.*
173. *Id.* at 540–41.

obstruction of recruiting or enlisting services, Hand said he disagreed with Roe's argument that the provision refers only acts other than words and that the obstruction must be successful.[174] But he did limit the scope of the provision to "direct advocacy of resistance to the recruiting and enlistment service."[175] Again, neither the cartoons nor the articles met Hand's test of direct advocacy.[176]

Of the cartoons, he said, *Conscription* comes closest to meeting his test, but "the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant."[177] But there is no intimation that resisting the draft is either a one's duty or in one's interest. Likewise, the articles praising Goldman and Berkman and draft resisters, interpreted "in the most hostile sense," only go so far as to say: "These men and women are heroes and worthy of a freeman's admiration. We approve their conduct; we will help to secure them their legal rights. They are working for the betterment of mankind through their obdurate consciences."[178]

Such words, Hand said, contain "not the least implied intimation . . . that others are under a duty to follow" these subjects of admiration.[179] "I cannot see how the passages can be said to fall within the law," he wrote.[180] Hand reiterated his position during the argument—and Roe's position—that the question in this case was indistinguishable from a motion to dismiss an indictment. If the issue was non-mailable, then the editors committed a crime in publishing it. "I cannot think that upon such language any [guilty] verdict would stand," he concluded.[181]

Hand then turned to the question of the magazine's "general tenor and animus [as] . . . subversive to authority and seditious in effect" as evidenced by the introduction of materials from the June and July issues of *The Masses* and from *Mother Earth*.[182] "I cannot accept this test under the law as it stands at present," Hand said. "The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law."[183]

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174. *Id.* at 541.
175. *Id.*
176. *Id.* at 540–41.
177. *Id.* at 541.
178. *Id.*
179. *Id.* at 542.
180. *Id.*
181. *Id.* at 542.
182. *Id.* at 542–43.
183. *Id.*

While Hand conceded that Congress might be able to establish a broader censorship of the press under the war power, "it has not as yet chosen to create one."[184]

Hand's order granting the temporary injunction against the Postmaster and ordering the magazine transmitted through the mails "without delay" was dated July 26, two days after the decision became known.[185] During that brief period, the company pulled back the copies sent to the Post Office so the edition could be delivered by alternate means.[186] On the same day the order was issued, U.S. Attorney Francis G. Caffey filed an assignment of error listing grounds on which he would rely in his appeal from Hand's decree.[187] In all, there were seven alleged errors, although essentially all of them went directly to the bottom line: Hand was wrong in finding for the magazine under every provision of the Espionage Act raised by government and wrong in granting the injunction.[188] A hearing date on the appeal was originally set for August 23, 1917,[189] but the government was not about to wait that long.

On July 26, the Postmaster secured an order from Second Circuit Judge Charles M. Hough, who had ruled against Roe in *Philipp v. S.S. McClure* in 1908 as a district court judge, staying Hand's order and setting a hearing for Aug. 2, at Windsor, Vermont, near Hough's country home in Hanover, New Hampshire. "It is easy to understand why this order is made returnable in the most remote point in this district," Roe wrote La Follette, "and why Hough was selected. *The Masses* are game, however, and I expect to be in Windsor, Vermont, a week from today if the trains run and *The Masses* can raise carfare."[190]

On a personal note, Roe told La Follette that Netha was away for a few days, "looking for some place where we can send the children out of this heat here for a couple of weeks, and still have them near."[191] Roe said he had hoped to spend some time in Washington to work on La Follette's latest legislative initiative, but "[this] Windsor business has put me a good deal up in the air."[192] Having been defeated on both the Espionage Act and the Conscription Act, La Follette was now working on the War Revenue bill to insure that the

184. *Id.* at 543.
185. Transcript of Record, *supra* note 103, at 50 (order granting temporary injunction).
186. Masses Publ'g Co. v. Patten, 245 F. 102, 104 (2d Cir. 1917).
187. Transcript of Record, *supra* note 103, at 53–54 (assignment of error).
188. *Id.*
189. *Id.* at 55 (citation on appeal).
190. Letter from Gilbert Roe to Robert La Follette (Aug. 3, 1917) (on file with Library of Cong.).
191. *Id.*
192. *Id.*

$2 billion it would raise to finance the war came largely from surplus incomes and war profits.[193] Despite the Windsor interruption, Roe spent a good deal of time on the bill. "Night after night [Roe and La Follette] returned to the office, staying until two o'clock in the morning, drafting amendments, working with experts from the Treasury Department assigned at Bob's request, and assembling data to be used on the Senate floor."[194]

Roe did make it to Windsor and, again, the argument lasted all day.[195] "The solicitor for the Department [Lamar] was there in person," Roe wrote La Follette.

> I have little doubt of the result but at least I raised up a few difficulties which I think they had not anticipated, and made them look rather glum. Anyway, I have a plan blocked out which will keep the *Masses* going, anyway, and, I hope, increase its readers. They are running off more copies this month than ever before.[196]

Roe's "plan" apparently included several new initiatives. On August 3, Merrill Rogers personally delivered two copies of that September issue of *The Masses* to the Post Office with the request that they be forwarded to Washington to determine their mailability.[197] Meanwhile, newsboys were hawking copies on the streets, reportedly shouting, "Get your latest issue of *The Masses*, suppressed by the Post Office Department."[198] Additional copies were shipped by express to about 300 cities and towns, where copies were distributed by news dealers.[199]

In addition, letters were sent out to all subscribers urging them to fight the ban. Despite Hand's order, the letters said:

> [T]he post office is still exercising bureaucratic powers. We are going to fight this straight through to the Supreme Court. We are not going to swerve one hair's breadth in our policy. We are going to establish, [once and] for all whether free speech in America is a reality or a grim joke.[200]

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193. 2 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 740–41.

194. *Id.* at 742.

195. Letter from Gilbert Roe to Robert La Follette, *supra* note 190.

196. *Id.*

197. Deposition of Frederick G. Mulker at 1 (Aug. 22, 1917), Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

198. The Masses *Now Using Mails to Increase Sales Cut Down by Postal Ban*, N.Y. TRIB., Aug. 23, 1917, at 4.

199. *Id.*

200. *Id.*

The letter went on to appeal to every subscriber to contact local news dealers and request them to order the magazine in lots of at least ten copies, the smallest number that could be sent economically by express.[201]

On August 6, Hough filed his opinion granting the government's motion to stay Hand's order.[202] The opinion began with Hough acknowledging that his opinion would be, and should be, based on the facts as found by the lower court. "And by facts, I mean, not only facts physical, phenomena seen or heard, but mental conditions or intents . . . ."[203] Hough also conceded that the company still had a legally cognizable case, even though the issues in question had already been distributed by other means.[204] On the other hand, the failure to issue a stay in the matter would render any appeal by the government moot.[205]

Hough summarized Hand's findings of fact, his test of law, and his conclusion that none of the words or pictures raised by the Post Office Department met the test of "urging upon others that it is their duty or their interest to resist the law."[206] The questions before him on this motion, then, were "(1) Is such view of the law correct? (2) Is it so clearly correct that the courts should interfere?"[207] As to the second inquiry, Hough said the courts should not interfere with an executive department in interpreting law that affected it except in the clearest cases, and as to the first, "it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act."[208]

Hough also pointed out that the postal service was not a common carrier, but rather was pursuing a high governmental duty.

> [I]t is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination and distribution of something which proclaims itself 'revolutionary,' which exists, not to reform, but to destroy, the rule of any party, clique, or faction that could even give lip service to the Constitution of the United States.[209]

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201. *Id.*
202. Masses Publ'g Co. v. Patten, 245 F. 102, 106 (2d Cir. 1917).
203. *Id.* at 104.
204. *Id.*
205. *Id.* at 104–05.
206. *Id.* at 105.
207. *Id.*
208. *Id.* at 105–06.
209. *Id.* at 106.

With that declaration, Hough continued his stay of Hand's order,[210] provided the government post a $10,000 bond to cover any damages that might be awarded the company on appeal.[211]

The same day, August 6, the company delivered another thirteen copies of the September issue to the Post Office and paid second-class postage for their delivery. At the same time, however, Postmaster Patten received instructions from Lamar in Washington to hold any copies of the September issue until further advised. Rogers was informed of those instructions on August 7.[212] The Post Office Department then issued the company an order to show cause why its second-class mailing privilege should not be revoked altogether. The cynical ground for revocation? Since the August issue was not mailed, *The Masses* was no longer being mailed in the regular course of business and was therefore no longer eligible as second-class matter.[213]

The order set a hearing on the matter for August 14. Roe argued the case again, in Washington, pointing out that Judge Hand had ruled that the August issue had been "illegally and wrongfully" barred from the mails, and that the Post Office Department had no right to take advantage of its own wrongful and illegal act to deny the magazine its second-class privilege.[214] He cited a letter from Burleson to Chairman John A. Moon of the House Committee on Post Office and Post Roads declaring that "any publisher who may question the validity of the rulings of the Postoffice Department" has the right of judicial review.[215] "That can only mean that a publisher has the protection of the courts against illegal rulings of the department," Roe said. "But this proposal to bar *The Masses* from the second class privileges is a plain violation of the assurance given to the public by the Postmaster General that no publisher is wholly at the mercy of the department."[216]

The hearing ended with the third assistant Postmaster taking the case under advisement, but the very next day, August 15, Patten received letters from both Lamar and Burleson formally revoking *The Masses*' second-class mailing privileges;[217] Patten so informed the company on August 16.[218] The

210. *Id.*
211. Deposition of John M. Scoble, *supra* note 137, at 3.
212. Deposition of Frederick G. Mulker, *supra* note 197, at 2–3.
213. 55 CONG. REC. 6258 (1917) (statement of Postmaster General A.S. Burleson).
214. *Ban on* Masses *Is Denounced*, N.Y. TRIB., Aug. 15, 1917, at 3.
215. *Id.* (quoting 55 CONG. REC. 6259 (1917)).
216. *Ban on* Masses *Is Denounced*, *supra* note 214.
217. Deposition of Frederick G. Mulker, *supra* note 197, at 2–3 (Aug. 22, 1917).
218. *Id.* at 3–4.

magazine sent representatives to Hough, who reportedly called Burleson's order "a rather poor joke," but did nothing about it.[219]

Roe again moved for an injunction in the U.S. District Court to block the action,[220] arguing that Hough's stay had been predicated on his opinion that "any wrong suffered by [the Masses Publishing Co.] can be wholly redressed by damages, apparently (only) measured by the expense of the different transportation arrangements now confessedly perfected."[221] Roe said Hough would have ended the stay had he known that the Post Office planned to attack the magazine's second-class privileges, and he asked the court to require the Post Office Department to order the September issue of the magazine mailed immediately.[222]

In reply, Patten submitted a deposition from his superintendent of second-class matter, Frederick Mulker, listing the addressees of the thirteen copies of the magazine on deposit at the Post Office, and noting that no instructions had been received from Washington on their mailability.[223] As to the claim that failure to mail those thirteen copies would result in irreparable damages, Mulker quoted an interview that Merrill Rogers gave the *New York Tribune* on August 17. Calling the revocation of second-class privileges a "technical trick to ruin us," Rogers said,

> The tactics of the postoffice tickle one's sense of ironic humor. Personally, I am glad they have revoked the privileges because it gives us a further opportunity to fight and show the people just what sort of bureaucratic tyranny we have in this country. We shall, however, continue to publish *The Masses* regularly and sell it on the newsstands all over the country.
>
> In Washington our sales have doubled many times since the war began, and *The Masses* is said to be the favorite magazine of Congressmen. Moreover, since the September number of the magazine has not been deemed unmailable, we still have the privilege to mail copies to our subscribers at the first class postage rate.[224]

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219. John Sayer, *Art and Politics, Dissent and Repression:* The Masses *Magazine Versus the Government, 1917–1918*, 32 AM. J. LEGAL HIST. 42, 50 (1988) (quoting ART YOUNG, ART YOUNG: HIS LIFE AND TIMES 318 (John Nicholas Beffel ed., 1939)).

220. *Paper Barred, Opens Suit*, BROOK. DAILY EAGLE, Aug. 18, 1917, at 2.

221. Deposition of John M. Scoble, *supra* note 137, at 4 (quoting Masses Publ'g Co. v. Patten*,* 245 F. 102, 106 (2d Cir. 1917)).

222. *Id.* at 5.

223. Deposition of Frederick G. Mulker, *supra* note 197, at 4.

224. *Id.* at 6 (quoting N.Y. TRIB., Aug. 18, 1917).

This time, Judge Augustus Hand, cousin of Learned Hand, heard Roe's motion for an injunction. "I have spent most of today trying to save the wreck of the second *Masses* case," Roe wrote La Follette on August 24, "and doubt if I have done it."[225] He was certainly right about that; Hand would come down foursquare for the government on September 12. "The August issue of the *Masses* was filled with glorification of those who refused to enlist and violated the law, and the September issue contained similar matter in diluted form," he wrote in a four-page unpublished opinion.[226]

> In September the editor adopted a somewhat milder and less pronounced tone than in August, but continued to hold up violators of the conscription act to admiration and to say what he thought he safely could to promote opposition to the war and to undermine the successful conduct of it.
>
> . . . .
>
> . . . It is always to be remembered that *The Masses* is not attacking a mere party programme or executive policy but is seeking to undermine those means which the nation had adopted to protect the people of the United States as well as civilization itself from the assaults of a powerful foe after a declaration of war made by an overwhelming majority of both Houses of Congress.[227]

On the technical issue of second-class privileges, Hand asserted that the

> [P]osition of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law, it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue. It was for this reason that *The Masses* was held by the Department not to be regularly issued and not for the absurd reason suggested at the argument that transmission had been interrupted by the stay of Judge Hough. A

225. Letter from Gilbert Roe to Robert La Follette (Aug. 24, 1917) (on file with Library of Cong.).

226. Masses *Mail Ban Upheld by Court*, SUN (N.Y.), Sept. 15, 1917, at 4 (quoting Masses Publ'g Co. v. Patten (S.D.N.Y. Sept. 12, 1917) (unpublished)).

227. *Id.*

> more important ground of revocation than irregularity of publication was the illegality of matter contained in recent issues.[228]

In this conclusion, Hand echoed a report that Burleson had provided the Senate on August 22, in which the Postmaster denounced the magazine as a leader in organized propaganda "to discourage enlistments, prevent subscriptions to the Liberty Loan, and obstruct the draft act."[229] As submitted to Chairman John H. Bankhead (D-Ala.) of the Senate Committee on Post Offices and Post Roads, in response to a Senate resolution of inquiry sponsored by Sen. Thomas Hardwick (D-Ga.), Burleson's report said in the case of *The Masses* and other publications covered by the Hardwick resolution,

> [N]ot only have the particular issues which have been declared to be nonmailable but various other issues of the publication have been taken into consideration in determining their right to the second-class privilege, so that the final action was necessarily based principally on other and very much broader grounds than the break in the continuity of the publication.[230]

At the time Hand's decision came down, *The Masses* was also facing a threat from the American Defense Society to have the magazine excluded from the New York public libraries.[231] "Since the Postoffice Department has found *The Masses* too unpatriotic to be sent through the mails, it seems improper that it should be available in the reading rooms of the public libraries," the Society's chairman, Richard M. Hurd, declared September 11.[232]

> There is no place in America to-day for any literature that cloaks itself in the garb of the enemy. The publishers of such papers are standing close to the treason zone. They have been quietly 'getting over' editorials that are not only false, but are misrepresentative of the aims of the Administration. They serve to incite sedition and treason.[233]

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228. Sayer, *supra* note 219, at 51 (quoting Masses Publ'g Co. v. Patten (S.D.N.Y. Sept. 12, 1917) (unpublished) (printed in U.S. Dept. of Justice, Interpretation of War Statutes Bulletin No. 6)).

229. *Burleson Calls* The Masses *and Watson Seditious*, N.Y. TRIB., Aug. 23, 1917, at 4.

230. Sayer, *supra* note 219, at 50 (quoting Masses Publ'g Co. v. Patten (S.D.N.Y. Sept. 12, 1917) (unpublished)).

231. *May Bar* The Masses *from City Libraries*, N.Y. TRIB., Sept. 12, 1917, at 5.

232. *Id.*

233. *Id.*

Desperate, Eastman wrote directly to Wilson asking him to review Burleson's actions.[234] Wilson wrote back on September 18:

> I think that a time of war must be regarded as wholly exceptional and that it is legitimate to regard things which would in ordinary circumstances be innocent as very dangerous to the public welfare. But the line is manifestly exceedingly hard to draw, and I cannot say that I have any confidence that I know how to draw it. I can only say that a line must be drawn and that we are trying—it may be clumsily, but genuinely—to draw it without favor or prejudice.[235]

Eastman commented on the President's response. "I think the Government is making a grievous mistake in discouraging the popular discussion of the war aims and peace terms," he said.

> This is an impractical way to conduct a war for democracy. It is important that when peace is made, it should be made not only with the German people, but by the American people. And this will not happen unless the terms of peace are fully and freely discussed beforehand by everybody.[236]

Toward the end of September, Roe spotted yet another existential threat to the magazine.

> I notice by the newspapers that they have a Bill in the Senate, I think it has been added as a rider to some other bill, by which it is not only going to be unlawful to publish papers in foreign languages but it is also going to be unlawful to transport via express the magazines which have heretofore been shut out of the mails by the Postmaster,

he wrote La Follette's private secretary John Hannan. "I wish you would get hold of the Bill . . . . I would certainly like to be heard on it. The 'Express' feature of the Bill certainly does put us out of business if it passes."[237]

It did pass. On October 6, Congress enacted the bill—known as the Trading with the Enemy Act[238]—that threatened to cut off the last distribution channels remaining for *The Masses*. Specifically, Section 19 of the Act, which dealt primarily with regulations governing foreign-language publications, also made it "unlawful for any person, firm, corporation, or

234. Sayer, *supra* note 219, at 51.

235. *Mr. Wilson Writes to Max Eastman*, N.Y. TRIB., Sept. 28, 1917, at 1.

236. *Hard to Draw Line, Wilson Tells Eastman; Things Innocent in Peace Perilous in War*, N.Y. TIMES, Sept. 28, 1917, at 1.

237. Letter from Gilbert Roe to John Hannan (Sept. 20, 1917) (on file with Library of Cong.).

238. ch. 106, 40 Stat. 411 (1917).

association, to transport, carry, or otherwise publish or distribute any matter which is made nonmailable" by the Espionage Act.[239]

On the same day, Burleson finally outlined what could and could not be sent through the mail. "There is a limit. And that limit is reached when it begins to say that this government got into the war wrong, that it is in it for the wrong purpose, or anything that will impugn the motives of the Government for going into war," he said.[240]

> They cannot say that this government is a tool of Wall Street or the munitions makers. That kind of thing makes for insubordination in the army and navy and breeds a spirit of disloyalty through the country. It is a false statement, a lie, and it will not be permitted.
>
> And nothing can be said exciting people to resist the laws. There can be no campaign against conscription and the Draft Law, nothing that will interfere with enlistments or the raising of an army. There can be nothing said to hamper and obstruct the Government in the prosecution of the war.[241]

Department Solicitor Lamar added,

> You know I am not working in the dark on this censorship thing. I know exactly what I am after. I am after three things and only three things—pro-germanism, pacificism, and 'high-browism'.[242]

Eastman wrote to Burleson, promising to abide by the regulations and refrain from publishing any matter detrimental to the interests of the United States in its prosecution of the war.[243] He reserved only the right to criticize, "as far as it does not give aid to the enemy," and to "discuss the demand for peace with freedom of seas, peoples and markets, world union, and disarmament."[244] Nothing changed; everything would now depend on the decision of the U.S. Court of Appeals for the Second Circuit.

The government's brief for the Second Circuit, submitted on September 16 by Francis G. Caffey, U.S. Attorney for the Southern District of New York, argued that the Learned Hand decision was in error when it declared the August issue of *The Masses* to be mailable, when it disturbed the

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239. ch. 106, §19, 40 Stat. 411, 426 (1917).

240. Sayer, *supra* note 219, at 52 (quoting *Mr. Burleson to Rule the Press*, 55 LITERARY DIG., Oct. 6, 1917, at 12).

241. *Id.*

242. *Id.* at 53 (citing OSWALD GARRISON VILLARD, FIGHTING YEARS: MEMOIRS OF A LIBERAL EDITOR 357 (1939)).

243. Masses *Seeks Mail Rights; Barred Socialist Magazine Promises Not to Oppose War Activities*, N.Y. TIMES, Oct. 25, 1917, at 15.

244. *Id.*

Postmaster General's decision that it was not mailable, and when it granted an injunction, irrespective of the publisher's legal rights.[245] Following a detailed analysis of the Espionage Act, Caffey asserted that the courts had no business interfering with mailability decisions of the Postmaster General "unless it appears that he has overstepped his authority or that his action was clearly wrong."[246]

To show that the Postmaster was *not* wrong as to mailability, Caffey dissected each of the cartoons and texts on which Hand ruled to find that they satisfied the requirements of the Espionage Act, particularly in "*attempting to cause*" disaffection in the military.[247] Caffey took direct aim at Hand's holding that the law required a publisher to "directly advocate resistance" to the law before being found in violation: "[No] possessor of a free soul fed and nourished upon the seditious diet of the June and July *Masses* could accept the article on conscientious objectors in the August issue without feeling that it was his duty as such to suffer any punishment rather than obey the Conscription Act."[248]

Caffey also found ammunition in Judge Hough's language to the effect that holding violators up to admiration was tantamount to direct incitement,[249] and added even more damning language from another non-mailability case involving the Georgia-based *Jeffersonian*. "Had the Postmaster General longer permitted the use of the great postal system which he controls, for the consumption of such poison," wrote U.S. District Court Judge Emory Speer in that case, "it would have been to forego the opportunity to serve his country afforded by his lofty station."[250]

On the second point of his argument—that Hand erred in disturbing the Postmaster General's determination that the issue was not mailable—Caffey relied largely on precedent to the effect that, when Congress has entrusted a question of fact, or even a mixed question of fact and law, to the head of a department, the executive's decision "will carry with it a strong presumption of its correctness and the courts will not ordinarily review it."[251] Finding in Hand's own opinion substantial evidence that the Postmaster General's position was at least arguable, Caffey concluded that Hand simply

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245. Brief of Defendant-Respondent at 4, Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

246. *Id.* at 8.

247. *Id.* at 6.

248. *Id.* at 16 (internal citations omitted).

249. *Id.*

250. *Id.* at 17 (quoting Jeffersonian Publ'g Co. v. West, 245 F. 585, 589 (S.D. Ga. 1917)).

251. *Id.* at 18 (quoting Bates & Guild Co. v. Payne, 194 U.S. 106, 109 (1904)).

"overlooked the well established limitations upon the courts in reviewing the determination of the Postmaster General."[252]

Finally, to show that the injunction was issued in error even if the publisher's rights were violated by the Postmaster General's order, Caffey argued that a mandatory injunction—i.e., to mail the August issue—rather than an injunction that merely preserved the status quo until the case could be heard, was an extraordinary remedy "not to be granted except in the clearest case of a violation of legal rights under circumstances of immediate impending irreparable injury and after careful consideration of the interests of the public as well as those of the parties to the action."[253]

In this case, Caffey charged, the injunction was "in disregard of public interest and contrary to public policy," the plaintiff did not come into court with "clean hands" as required for an equitable remedy; and there was insufficient facts offered to show immediate impending irreparable injury if the injunction were not issued.[254] Caffey noted that public interest issue had not been raised below, but if it had been, he insisted the outcome would have been other than it was.[255] As to "clean hands," Caffey referred to *The Masses*' claim to be a "revolutionary" magazine: "Compared to this complainant," he quipped, "the historic highwayman who sought in a Court of Equity to obtain an accounting from the partner of his crimes was a petitioner of modest and unassuming disposition."[256] And, Caffey concluded, with no facts to show irreparable injury, Hand's order should be reversed.[257]

Roe's brief for *The Masses*, filed October 1, sought to distance the violation the magazine allegedly committed—"willfully attempting to cause insubordination, disloyalty, mutiny or refusal of duty" in the military, in Section 3 of Title I of the Espionage Act—from the nonmailability provision in Section 1 of Title XII of the Act. Although the latter referred to matter in violation of any provision of the act, Roe argued that Title I violations were solely focused on espionage and could not relate to "public discussions, expressions of opinion, or to criticism or condemnation of the government, its policies or its laws."[258] Otherwise, Roe said, nonmailability was limited to matter "advocating or urging treason, insurrection or forcible resistance"

252. *Id.* at 21.
253. *Id.* at 23.
254. *Id.* at 24.
255. *Id.* at 28.
256. *Id.* at 30.
257. *Id.* at 32.
258. Brief of Complainant-Appellee, *supra* note 104, at 20–21.

under Section 2 of Title XII[259]—none of which were alleged against *The Masses*.

Following an overlong and largely unhelpful discussion of antiwar criticism during the Mexican and Boer Wars, Roe turned to the offending text and cartoons from the August issue. Before commenting on each, Roe noted that *The Masses* was in no way pro-German and that it rarely if ever circulated among military members.[260] Roe defended each item, ultimately relying on an opinion in *U.S. v. Baker*,[261] which acquitted individuals who circulated directly to soldiers literature "which went much further than anything in *The Masses* in its opposition to the draft law and the present war policy . . . ."[262]

In the last seven pages of his fifty-eight-page brief, Roe puts forth four arguments, the first three of which are implicit in the rest of the brief.

> There is nothing in the August issue of *The Masses* that by any possibility can be construed as an advocacy of 'treason, insurrection or forcible resistance to any law of the United States.' . . . There was no evidence before the postmaster of any violation of Section 3 of Title I of the Espionage Act. . . . [And the] defendant postmaster had no authority, under Section 3 of Title I, to exclude the entire magazine because he claimed certain articles in it to be non-mailable,[263]

particularly where the publisher had expressed the willingness to remove any offending material.

The final point that Roe asserted takes just over a page in the brief: "The Espionage Act, if construed as the Post Office Department construes it, plainly violates the First and Fifth Amendments to the Federal Constitution."[264] Five cases are cited for this bare constitutional conclusion that the Act would violate both freedom of the press and due process of law if the government's construction were accurate.[265] There is no analysis or argument on either issue, but, Roe concluded, "this brief is already much too long."[266] In all probability, it would have made no difference in the outcome anyway.

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259. *Id.* at 24–28.

260. *Id.* at 43.

261. 247 F. 124, 126 (D. Md. 1917).

262. Brief of Complainant-Appellee, *supra* note 104, at 52.

263. *Id.* at 52–56.

264. *Id.* at 57.

265. *Id.* (citing Kroschel v. Munkers, 179 F. 961 (D.C. Or. 1910); Patterson v. Colorado, 205 U.S. 454 (1907); Reynolds v. U.S., 98 U.S. 145, 168 (1878); Hoover v. McChesney, 81 F. 472 (C.C. Ky. 1897); Ex parte Jackson, 96 U.S. 727 (1877)).

266. Brief for Complainant-Appellee, *supra* note 104, at 58.

Roe argued the *Masses* case before Circuit Judges Henry G. Ward and Henry W. Rogers and District Judge Julius M. Mayer on October 8.[267] Their decision came less than a month later. In an opinion written by Rogers and joined by Mayer, reversing Learned Hand's injunction, the court made short work of Roe's arguments. "It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute."[268] There would be no de-linking of the espionage title from the mailability title.

The opinion answered Roe's First Amendment argument with considerably more discussion than Roe accorded it, but it largely came down to the court's Blackstonian view of the amendment—that freedom of the press consists "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published."[269] The court found no prior restraint in the Espionage Act, and no restraint afterwards beyond the mailability restrictions. "Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden."[270] The restrictions on alternate means of distribution imposed by the new Trading with the Enemy Act were never raised below and the court did not address them.

As to Roe's perfunctory Fifth Amendment due process claim, the court cited precedent for the proposition that "due process of law does not necessarily require the interference of the judicial power," and held the Espionage Act constitutional "in so far as it excludes from the mails certain matter declared to be unmailable."[271] As to who makes that declaration, the court held that, where, as here, "the Postmaster General has been authorized . . . to determine whether a particular publication is nonmailable under the law . . . his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong."[272] Accordingly, the court once again examined each of the items in the August issue to determine whether the Postmaster General was "clearly wrong" about any of them. Considering the "natural and reasonable effect of the publication,"[273] only the cartoon *Liberty Bell* survived that test.[274]

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267. Telephone Logs (on file with Wis. Hist. Soc'y).
268. Masses Publ'g Co. v. Patten, 246 F. 24, 27 (2d. Cir. 1917).
269. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151).
270. *Masses Publ'g Co.*, 246 F. at 27.
271. *Id.* at 29 (citing Pub. Clearing House v. Coyne, 194 U.S. 508 (1904)).
272. *Id.* at 33.
273. *Id.* at 39.
274. *Id.* at 36.

Finally, the court confronted Hand's opinion that, where "one stops short of urging upon others that it is their duty or their interest to resist the law," no violation of the Act occurred.[275] "This court does not agree that such is the law."[276] Instead, the court agreed with Judge Hough's view that "to hold up to admiration those who do act" to violate the law constitutes a sufficiently direct incitement to action by the reader.[277] Judge Ward's brief concurrence emphasized the finality of the Postmaster General's decision, "whether we agree with him or not," and suggested a bit more breathing room for honest opinion.[278] In the end, though, he agreed that certain of the items in the August issue could have been intended to obstruct recruitment.[279] The court made no mention of Eastman's offer to edit those items out of the August issue.

The defeat was total, and the repercussions were devastating. The day after the decision was filed, Caffey announced that publishers of materials found to be in violation of the Espionage Act could face imminent prosecution unless they took steps at once to comply with the law.[280] On November 19, the federal grand jury indicted seven members of *The Masses* staff and contributors—Eastman, Dell, Rogers, Young, cartoonist Glintenkamp, writer Reed, and bookstore manager Bell—for violating the Espionage Act and conspiracy. Two other indictments for attempting to use the mails for non-mailable material were returned against Masses Publishing Co. and Rogers as business manager. Judge Julius Mayer, who had joined the Second Circuit panel, issued the arrest warrants.[281]

Eastman, Dell, Rogers, and Young entered not-guilty pleas and were released on bond to the custody of their new lawyer, Morris Hillquit.[282] Bell, whose *A Tribute* was her first published poem, also entered a plea of not guilty and was released on bond.[283] Reed was still in Europe, trying to return to the U.S. from Russia, where he had been covering the revolution and working for the Comintern, and Glintenkamp was said to be somewhere in New Jersey when the indictments were handed up.[284]

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275. *Id.* at 38 (quoting Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917)).

276. *Id.* at 38.

277. *Id.*

278. *Id.* at 39.

279. *Id.*

280. *Seditious Publications Face Grand Jury Act*, EVENING WORLD (N.Y.), Nov. 3, 1917, at 3.

281. *Indict Seven Members of* The Masses*—Bench Warrants Are Issued*, BROOK. DAILY EAGLE, Nov. 19, 1917, at 1.

282. Masses *Pleads Not Guilty*, BROOK. DAILY EAGLE, Nov. 21, 1917, at 2.

283. *Her First Poem Gets Her Indicted*, N.Y. TRIB., Nov. 21, 1917, at 6.

284. *See Max Eastman Held Under $5,000 Bail*, N.Y. TRIB., Nov. 22, 1917, at 7.

Immediately following the Second Circuit decision, newspaper and magazine distributors cut off service to *The Masses* and other radical publications in anticipation of the government's enforcement of the Trading with the Enemy Act, which criminalized the handling publications declared nonmailable.[285] The November-December issue of *The Masses* had just come off the press and had nowhere to go. On December 7, the editors threw in the towel at a party at Tammany Hall. "There is no room in the United States at this time for a free magazine," said a statement issued by Eastman, Dell, Rogers and Young.[286]

> *The Masses* has made every effort consistent with the intellectual and artistic liberty which is its being to secure from the United States government the privilege of distribution. If we were a hard working, self-supporting paper we could perhaps find means to exist without consent of the government. But being what we are, a luxury like truth and beauty, a child of play and energetic idleness, it is financially impossible for us to survive this organized hostility. To those thirty thousand friends who bought us and read us and believed in us every month, we say farewell until a happier time. We do this with a smile, because between us it is only a proof and an authentication of certain prophetic things we have been saying.[287]

There was yet one more casualty from this struggle: Judge Learned Hand was passed over for a seat on the U.S. Court of Appeals for the Second Circuit.[288] Hand had known Max Eastman slightly through his wife, Frances, also an ardent suffragist.[289] In 1916, Eastman had asked for Hand's help when Ward & Gow—the distributor of magazines to newsstands in New York City subway stations—refused to distribute *The Masses* because of an allegedly blasphemous poem comparing the Virgin Mary to an unwed mother.[290] Eastman asked Hand to write a letter on the magazine's behalf to a legislative committee holding hearings on the ban. It would be, he said, "the favor of a lifetime."[291]

Hand responded that he did not agree with Eastman's ideology, preferring another way, but that "does not blind me to the wisdom of giving you the

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285. *Cut Off Radical Press:* Masses *and Other Publications Barred by News Company*, N.Y. TIMES, Nov. 6, 1917, at 8.

286. The Masses *Sings Swan Song at Ball*, N.Y. TRIB., Dec. 8, 1917, at 18.

287. *Id.*

288. GUNTHER, *supra* note 121, at 152.

289. *Id.* at 154.

290. *Id.*

291. *Id.*

chance to persuade men of yours."[292] Good or bad, Hand said, yours is a way of

> getting men to think and feel about those things in which it is most important that they should think and feel. I can conceive of no possible defence for excluding you except either that such matters must not be discussed, or that they must be discussed only in a way which accords with the common standards of taste. One alternative is tyrannous absolutism, the other, tyrannous priggism.[293]

Despite Hand's defense, the ban remained in force.[294]

When *The Masses*' 1917 case was assigned to him, he told Frances that he found nothing illegal in magazine's content. "I should think that in fairness I should be obliged to protect them," he said.[295] But he also recognized the danger to his career. If his decision went against the government, he wrote, "then whoop-la your little man is in the mud."[296] Still, he said,

> I must do the right as I see it . . . . There are times when the old bunk about an independent and fearless judiciary means a good deal. This is one of them; and if I have limitations of judgment, I may have to suffer for it, but I want to be sure that these are the only limitations and that I have none of character.[297]

In the months following the Second Circuit decision, Judge Augustus Hand would preside over the first trial of *The Masses*' staff and contributors. He dismissed all counts of the indictment against Josephine Bell and the conspiracy counts against everyone else.[298] The charge of obstructing recruiting and enlistment was left to the jury, which could not reach a unanimous decision. Hand declared a mistrial.[299] A second trial commenced after Judge Learned Hand refused to quash the remaining indictments.[300] This time, the defendants—including John Reed—were represented by Seymour Stedman, Charles Recht, and Walter Nelles and tried before Judge Martin Manton.[301] Again, the jury deadlocked; they were discharged on October 5,

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292. *Id.*
293. *Id.* at 154–55.
294. *Id.* at 155.
295. *Id.*
296. *Id.*
297. *Id.*
298. Sayer, *supra* note 219, at 60.
299. *Id.* at 63.
300. *Id.* at 66.
301. *Id.* at 67.

1918, and the government declined to prosecute further.[302] *The Masses*' ordeal was over, but the magazine was dead.

III. ROE'S LEGACY

Gilbert Roe played no role in the criminal trials. He had dedicated countless hours to the cause of *The Masses* and its editors, before and during the war, with little prospect of remuneration. There is nothing in the record to show that his services were either sought or rejected following the Second Circuit opinion, but it is clear that, during December 1917, Roe was working "under high pressure" on a private lawsuit involving more than a million dollars.[303]

Roe defended many other antiwar activists, before, during, and after the war, but none more important than La Follette himself. La Follette had given a speech asserting that the *Lusitania* had carried munitions for England. It had, of course, but his enemies in the Senate tried to expel him for saying so publicly.[304] Roe also submitted an amicus brief in the Espionage Act of socialist labor leader Eugene Debs.[305]

Fallout from the war also fell on New York City teachers, particularly Jews. When three teachers from DeWitt Clinton High School were dismissed for disloyalty, Roe came to their defense.[306] That would be the beginning of a long association with the New York City Teachers Union that included the defense of teachers suspected of communist leanings during the Red Scare that followed the Bolshevik Revolution.[307]

Roe died in December 1929, so he never saw the First Amendment become an effective tool in free speech litigation. That would not happen until 1931, when the Supreme Court held in *Near v. Minnesota* that the First Amendment barred government from imposing prior restraints on

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302. *Id.* at 74 n.147.

303. Letter from Gilbert Roe to Belle La Follette (Dec. 5, 1917) (on file with Library of Cong.).

304. 2 LA FOLLETTE & LA FOLLETTE, *supra* note 39, at 761–78. *See generally* EASTON, *supra* note 9, at ch. 7.

305. Brief for Gilbert Roe as Amicus Curiae Supporting Plaintiff in Error, Debs. v. United State, 249 U.S. 211 (1919). *See generally* EASTON, *supra* note 9, at ch. 7.

306. *See* TEACHERS UNION OF THE CITY OF NEW YORK, TOWARD A NEW EDUCATION: THE CASE AGAINST AUTOCRACY IN OUR PUBLIC SCHOOLS 155 (1918). *See generally* EASTON, *supra* note 9, at ch. 8.

307. *See* TIMOTHY REESE CAIN, ESTABLISHING ACADEMIC FREEDOM 79–80 (2012). *See generally* EASTON, *supra* note 9, at ch. 8.

publication.[308] Even further into the future were the Court's condemnation of sedition laws in *New York Times Co. v. Sullivan*[309] and adoption of an incitement standard for punishable speech in *Brandenburg v. Ohio*.[310]

But Gilbert Roe had anticipated and advocated for a strong First Amendment doctrine half a century earlier. Perhaps the most complete articulation of Roe's early views on free speech, outside of the courtroom, came in the spring of 1915, when he testified before the Commission on Industrial Relations. The Commission, also known as the Walsh Commission after its chairman, labor lawyer and activist Frank P. Walsh, was created by Congress in 1912 to study working conditions in the industrial economy throughout the country.[311] Roe's testimony on May 10 covered a wide range of labor issues—including the legality of strikes, boycotts, and blacklists, and the use of martial law in labor disputes—and related legal doctrines, such as judicial review and due process. Roe explained his view that the common law was never designed to help the laboring class and that, absent a statute, judges who generally came from the upper classes were largely bound by unfavorable common law precedent.[312]

Asked whether the courts were protective of workers' rights of free speech and assembly, Roe noted that Congress and state legislatures had enacted "many foolish statutes" abridging those rights, but said the courts had the power to declare those statutes unconstitutional, as they had done in other areas.[313] Specifically, Roe mentioned a very recent U.S. Supreme Court decision declaring unconstitutional a Kansas statute that prohibited firing an employee because he had joined a union.[314] "Now, that . . . looks to me as though it did not leave very much of labor's rights to organize," he said, adding that unless something is done to correct decisions like that, "they may become the Dred Scott decisions of the labor movement."[315]

To remedy that situation, Roe suggested changing the personnel on the court or passing a constitutional amendment allowing states to enact laws that prohibit the blacklisting of union workers.[316] Public sentiment could also play a role in such reform, Roe said, pointing to a recent New York decision

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308. Near v. Minnesota, 283 U.S. 697, 720 (1931).

309. 376 U.S. 254, 264 (1964).

310. 395 U.S. 444, 447–48 (1969).

311. COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY, S. REP. NO. 64-415, at 6 (1916).

312. *Id.* at 10469.

313. *Id.* at 10472.

314. Coppage v. Kansas, 236 U.S. 1, 26 (1915).

315. S. REP. NO. 64-415, at 10472.

316. *Id.* at 10472–73.

upholding a statute limiting the hours of night work for women in factories, after years of finding such a law "unconstitutional in that it invaded the women's divine right to work all night."[317] Either that reflected a change in public sentiment, Roe said, or the court has found out more about what public sentiment is and is trying to follow it.[318]

Amplifying his views on freedom of speech and assembly, Roe argued that "the courts have failed of their duties in respect to those fundamental rights" in several respects.[319] "In the first place," he said,

> so far as I am aware, the courts have upheld and enforced every statute that has been passed on the abridgment of those rights. Now, whether the courts are going into the business of passing upon the validity of statutes at all or not is another question; but if they are going to declare statutes unconstitutional that relate to property when they are in conflict with the Constitution, it would seem that they ought to apply the same principle to statutes which invade personal rights.[320]

As an example, Roe described the *Fox* case that he had recently argued in the Supreme Court,[321] contrasting the Court's upholding an indefinite standard prohibiting speech while striking down an indefinite standard regulating railroad freight rates. "[T]here are many decisions along that line," Roe said. "[A] study of the cases shows very clearly, I think, that the courts are not applying the same rule when they deal with statutes [involving freedom of speech] as they apply to statutes that deal with property."[322]

Roe also discussed the class of cases exemplified by Emma Goldman's being locked out of halls where she was to speak, and then being unable to obtain redress on the ground that her speech might incite listeners to breach the peace. "The effect of . . . decisions of that kind is to make the police department the censor in advance of what is to be said," he said, calling them "utterly subversive of free assemblage and free speech."[323] Roe said it had always been supposed that police could decide what constituted unlawful speech after it was said, "but in this line of cases they justify the police in going farther than that, and virtually saying whether a lecturer, whose

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317. S. REP. NO. 64-415, at 10473; *see also* People v. Charles Schweinler Press, 108 N.E. 639, 642–43 (N.Y. 1915).

318. S. REP. NO. 64-415, at 10473.

319. *Id.*

320. *Id.* at 10474.

321. Fox v. Washington, 236 U.S. 273, 278 (1915).

322. S. REP. NO. 64-415, at 10475.

323. *Id.*

sentiments they understand are such as may create disorder, shall be heard or not."[324]

Commissioner Harris Weinstock, a California businessman, asked at what point public speech ceases to be lawful and begins to be seditious and lawbreaking in character. "Where would you draw the line?"[325] Roe replied that he would not draw a line "short of the point where some overt act results from the abuse of free speech." Weinstock pressed: "You mean, if a man got up in a public place and denounced the Government and the authorities and charged them with all sorts of crimes and misdemeanors you would treat it with contempt unless some unlawful act followed, in which event you would hold them responsible?" Roe replied, "Yes; I would ignore it. I think that is the right way, in principle; and I think that in practice it is the best way to get along."[326]

Roe conceded that the answer to Weinstock's question would probably have to be settled by arresting speakers and subjecting them to the judicial process.

> [But] there is a very big practical question here, and that is the question that it seems to me we are all of us interested in, and that is this utterly arbitrary and unwarranted, inexcusable interference with free speech by the police and by the courts by their injunctive processes.[327]

Two years after Roe's death, the Supreme Court would declare prior restraint by injunction unconstitutional,[328] and begin to build the First Amendment doctrine Roe demanded.

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324. *Id.*
325. *Id.* at 10482.
326. *Id.*
327. *Id.*
328. Near v. Minnesota, 283 U.S. 697, 720 (1931).