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{ REPORT
{ No. 442

REPEALING CERTAIN PROVISIONS OF ESPIONAGE ACT

MARCH 23, 1932.—Ordered to be printed

Mr. WALSH of Montana, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1058]

The Committee on the Judiciary, to which was referred the bill (S. 1058) repealing various provisions of the act of June 15, 1917 (40 Stat. L. 217), having considered the same, report favorably thereon, with the recommendation that it do pass without amendment.

The bill deals with certain provisions of the so-called espionage act passed to meet conditions presented on the entrance of the United States into the World War and immediately prior thereto, namely, section 3 of Title I, section 4 of the same title, and sections 1, 2, and 3 of Title XII of the same act.

The section first above named is as follows:

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, 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.

As it now appears in the law it was a part of the act referred to as originally passed. It was amended and enlarged by an act passed in 1918, but the amended act was afterwards repealed, at the cessation of hostilities, along with a very considerable amount of legislation commonly referred to as war measures. The repealing act, however, reenacted section 3 as it stood before being amended. Section 4 deals with conspiracies to violate either section 2 or section 3 of Title I of the act. The bill proposes to amend section 4 so as to confine its operations to section 2. The bill also proposes the repeal of sections 1, 2, and 3, of Title XII, which declares to be unmailable material offending against any provision of the espionage act, and

in effect authorizes a postmaster to determine whether any particular matter does or does not offend against the statute and to exclude it from the mails if he concludes that it does.

Under section 3 of Title I, either in its original form or as it was amended, innumerable prosecutions were instituted and convictions had resulting in sentences of imprisonment for long periods, in most cases for words spoken or written, the statute having been construed and the verdicts rendered under the influence, or at least in the midst of the passions incident to the war. After it was over Executive clemency was exercised in most, if not all the cases, largely because of a general recognition that the circumstances under which the trials took place negatived the idea that a calm judgment could have been rendered. If one could conceive that the statute would be administered with the same dispassionate reflection that ordinarily is given to the law and the facts in criminal trials, it might not be altogether questionable in point of wisdom, but applicable as it is only when the country is at war it may easily become an engine of oppression. That it has been such is indicated by a review of its operation in the statement hereto appended, supplied by advocates of the bill, marked "Exhibit A."

Whatever view may be taken in that regard, it is to be borne in mind that the statute has no application except in the existence of a state of war. It would seem as though Congress might safely be relied upon, in the deplorable event of the occurrence of another war calling for legislation of an extraordinary character, to meet the emergency as it may arise. There seems to be no sound reason for anticipating such a contingency. If section 3 is repealed, as in the opinion of the committee it should be, there would be no reason for retaining reference to that section in that following it relating to conspiracy.

The committee is further of the view that it is unwise to invest the post-office authorities with the power to determine whether an article or articles in a newspaper does or does not offend against the statute, a question often so delicate as that learned judges of the Supreme Court has differed in the conclusion at which they have respectively arrived when called upon to solve it. Prompt delivery of its copies is essential to the existence of a newspaper. The exclusion from the mails of even a single issue may signify its ruin, indeed is likely to result in forced suspension. The act, accordingly, gives to administrative officers authority to suspend publication. Indeed the statute has been so administered as to make it to all intents and purposes a censorship law.

MEMORANDUM IN BEHALF OF THE REPEAL OF VARIOUS PROVISIONS OF THE ESPIONAGE LAW

STATEMENT OF FACT

The espionage act (act of June 15, 1917, 40 Stat. 217) comprises a vast body of law which has taken its place under various titles of the United States Code. We are not concerned with "most of the espionage act" which deals with "subjects like actual espionage, the protection of future military secrets, and the enforcement of neutrality in conflicts between other nations." (Chafee, *Freedom of Speech*, p. 43.) In the appendix (p. 28) we give in full the provisions of the act which it is now sought to repeal. The complexity of the law makes it difficult to present the situation accurately and yet simply. The provisions with which

we are primarily concerned are what were designated in the original espionage act as section 3 of Title I, and Title XII.

Section 3 of Title I as originally enacted provided:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, 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 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."

On May 16, 1918, this provision was amended (c. 75, sec. 1, 40 Stat. 553) so as to make it far more elaborate and so as specifically to include many offenses not named in the earlier and simpler form. Congress repealed the amendatory act and revived and restored the section as originally enacted, by the resolution of March 3, 1921 (c. 136, 41 Stat. 1359). This provision by its very wording, though it remains on the statute books, is suspended until the next war.

The essential provision of Title XII (contained in sec. 2 of that title) reads as follows:

"Letters or writings advocating treason declared nonmailable. 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 declared to be nonmailable."

Section 1 declares nonmailable letters, etc., in violation of any of the provisions of the espionage act. Section 3 fixes a maximum penalty of not more than \$5,000 and/or five years' imprisonment for violation of these sections. A section 4 was added to Title XII by the act of 1918 authorizing the Postmaster General "when the United States is at war" to declare all mail undeliverable addressed to any person "using the mails in violation of any of the provisions of this act." But the resolution of March 3, 1921, repealed this section 4. This title in its original form not only remains in the body of our law but is not even suspended until the next war. It is now operative and ready for use at any time.

By a series of decisions the United States Supreme Court upheld the constitutionality of section 3 of Title I. Illustrative authorities are:

Pierce v. U. S., 252 U. S. 239—1920.

Schenck v. U. S., 249 U. S. 47—1919.

Frohwerk v. U. S., 249 U. S. 204—1919.

In the famous Milwaukee Leader case (*U. S. v. Burleson*, 255 U. S. 407—1921) the Supreme Court upheld Section XII.

ITS OPERATION DURING THE WORLD WAR PROVED WHOLLY UNSATISFACTORY

General character of conduct for which prosecutions were instituted.—There were approximately 2,000 prosecutions under the espionage law (Chafee, *Freedom of Speech*, p. 56), mostly under section 3 of Title I.

"Under the second and third clauses against causing insubordination or obstructing recruiting, only a few persons have been convicted for actually urging men to evade the draft or not to enlist. Almost all the convictions have been for expressions of opinion about the merits and conduct of the war. It became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional though the Supreme Court had not yet held it valid, to say that the sinking of merchant vessels was legal, to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christ. Men have been punished for criticizing the Red Cross and the Y. M. C. A. It was in no way necessary that these expressions of opinion should be addressed to soldiers or men on the point of enlisting or being drafted. Most judges held it enough if the words might conceivably reach such men" (*idem*, p. 57).

On the other hand, Judge Van Valkenburgh in the prosecution against Rose Pastor Stokes for the words in a private letter, "I am for the people and the Government is for the profiteers" indicated that he would regard it as criminal to argue thus to women because "our armies in the field and our navies upon the sea can operate and succeed only so far as they are supported and maintained by the folks at home."

¹Although this conviction was reversed it indicates the kind of conduct for which prosecutions will be instituted under the statute. Not all defendants have the money to appeal.

Convictions for expressions used in such private intercourse were not unusual. "Many men have been imprisoned for arguments or profanity used in the heat of private altercation, on a railroad train, in a hotel lobby, or at that battle ground of disputation, a boarding-house table" (idem, p. 59).

One of the difficult problems involved in these prosecutions was whether the statements made were false. In a number of instances we find convictions upheld where the expressions used, as in the Stokes case, sound to-day more like matters of opinion than matter of fact.

Thus J. P. Doe (son of the Chief Justice of New Hampshire) was sentenced for an endless-chain letter stating that although the President and Secretary of State had said Germany had broken her promise to end submarine warfare, Germany had made no such promise but reserved complete liberty of decision in the Sussex note. The court held it a fair construction of the circular that the United States was wrong in relying on the alleged promise as a cause of war; "such an argument would have a direct tendency to obstruct the recruiting and enlistment service." (Chafee, p. 60.)

D. H. Wallace received a 20-year sentence and died in jail for saying when a soldier went away he was a hero and that when he came back he was a bum, that soldiers were giving their lives for capitalists, and that 40 per cent of the allies' ammunition was defective because of graft. (Bull. Dept. Justice on the Interpretation of War Statutes, No. 4.)

D. T. Blodgett received the same sentence from the same judge (Wade) for circulating a pamphlet urging Iowa voters not to reelect Congressmen who voted for conscription and reprinting an argument of Thomas E. Watson, of Georgia, against the constitutionality of the draft act. (Nelles, *Espionage Act Cases*, p. 48.) This was all done before the Supreme Court had passed upon the constitutionality of the act.

Judge Amidon, before whom many of these prosecutions came, characterized them as follows:

"It has very seldom occurred in the midst of this war that anybody has attempted in the United States to obstruct the Government by overt acts. Nearly all the opposition has come through the use of language. So all the decisions are addressed to that subject." (U. S. v. Mills, Bulletin No. 204, p. 1.)

Length of sentences.—We have already noticed a few of the excessive sentences imposed. "Our judges have condemned at least 11 persons to prison for 10 years, 6 for 15 years, and 24 for 20 years." (Chafee, p. 87.) This does not include 16 of the defendants in U. S. v. Haywood (Bulletin No. 175), convicted for violation of the espionage act, among other counts. In his dissenting opinion in the Abrams case (U. S. v. Abrams, 250 U. S. 616), Justice Holmes, dealing with the 20-year sentences there imposed, said:

"In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow" (629).

Exercise of Executive clemency.—That the sentences imposed were extravagant becomes apparent when we realize that none of the prisoners in jail for violation of the espionage act served 20 years. At the close of the war sentences were cut and prisoners released. (Cf. Report of Attorney General 1919, Exhibit 21, Chafee *Freedom of Speech*, Appendix 2.)

Divergent views of judges.—The extraordinary and unworkable character of this legislation becomes evident from a consideration of the varying emphasis in the decisions.

In the United States Supreme Court dissents of Justices Holmes and Brandeis marked all the later espionage act cases.

Judge Wade's charge in the Blodgett case stating that "there is no better way of unsettling the confidence of the people and stirring their souls against the war than to paint it as a war of capitalism" (Nelles, *Espionage Act Cases*, p. 48) is in striking contrast with Judge Learned Hand's objective standard laid down in the Masses case of limiting punishment to those who urge upon others that "it is their duty or their interest to resist the law."

² For the reversal of this opinion see *infra*, pp. 20-21. No error in Judge Hand's interpretation of the scope of the espionage law can be predicated upon a reversal on such grounds.

Uncertain standards embodied in the act.—Nor was this divergence limited to the judges. United States attorneys throughout the country held extremely different views as to what was punishable under the act. In the district of Massachusetts no prosecutions whatsoever were brought. (Chafee, *Propaganda and Conscription of Public Opinion*, reprint pp. 9-10.) But throughout the country the difficulty was apparently to stop rather than to encourage prosecutions. To quote John Lord O'Brian, assistant to the Attorney General in charge of espionage act prosecutions:

"It has been quite unnecessary to urge upon the United States attorneys the importance of prosecuting vigorously, and there has been little difficulty in securing convictions from juries. On the contrary, it has been necessary at all times to exercise caution in order to secure to defendants accused of disloyalty the safeguard of fair and impartial trials. In addition to the causes already recited there were the patriotic agitations continually being carried on by the Liberty loan speakers, four-minute men and others, all of which worked the whole country up to a pitch of intense patriotism, resulting in instinctive aversion toward anyone even under suspicion for disloyalty."

On May 23, 1918, after the amended act was in force, the Attorney General sent circulars to all United States attorneys advising that it be administered with discretion and so as not to suppress legitimate criticism. (Rep. Atty. Gen. 1918, 674.) About a month before the end of the war the Attorney General issued a circular directing district attorneys to send no more cases under the amended act to grand juries without first submitting the facts to the Attorney General and receiving his opinion whether they constituted an offense. (O'Brian, 306.)

Prior legislation sufficient to prevent incitement to disobey law.—Many honest-minded individuals, while deploring some of the effects of the espionage law, may nevertheless have regarded section 3 of Title I of that act as necessary to the public safety during the World War. Except for the excesses represented by some of the prosecutions, they argue, legislation to curb interference with the Government's war program was essential. But such legislation was already on the statute books. If the laws previously in effect had been adequately enforced such interference could have been completely curbed. If section 3 of Title I is repealed these other laws will remain in effect.

Title 18, section 6, United States Code (Criminal Code, sec. 6) provides:

"Seditious conspiracy.—If two or more person in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than \$5,000, or imprisoned not more than six years, or both." (R. S., sec. 5336; Mar. 4, 1909, c. 321, sec. 6, 35 Stat. 1089.)

This statute was successfully invoked in *Wells v. United States* (257 Fed. 605, C. C. A. 9, 1919) to punish four persons for having conspired by force to prevent, hinder, or delay the execution of certain Federal statutes—the declaration of war against Germany and others. The case arose before the espionage law became effective. Section 6 was used to punish defendants who had collaborated in the preparation and distribution of a certain anticonscription circular urging forcible resistance to conscription.

The court said:

"It was not necessary to show that force was actually employed, but only that there was a conspiracy entered into that contemplated the employment of force, as a means to the accomplishment of a common purpose to oppose the execution of a law of the United States, or the authority of the Government to prosecute the war" (614).

So much for the law making it punishable for two or more to conspire to urge forcible resistance to law. It was and is equally punishable for a single individual to incite to forcible resistance to law. Thus section 4 of title 18, United States Code (Criminal Code, sec. 3) provides:

"Inciting rebellion or insurrection.—Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than \$10,000, or both; and shall, moreover, be incapable of holding any office under the United States."

Two further provisions of the Criminal Code were successfully relied on by the Government in securing the conviction of Emma Goldman. (*Goldman v.*

U. S., 245 U. S. 474—1917.) These were sections 37 and 332 of the then Criminal Code, now, respectively, sections 88 and 550 of title 18. The former reads as follows:

"Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000 or imprisoned not more than two years, or both." (R. S. sec. 5440; May 17, 1879, ch. 8, 21 Stat. 4; Mar. 4, 1909, ch. 321, sec. 37, 35 Stat. 1096.)

And the latter provides:

"Principals defined.—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." (R. S. secs. 5323, 5427; Mar. 4, 1909, ch. 321, sec. 332, 35 Stat. 1152.)

She was held guilty of violating these laws by conspiring to induce persons subject to the draft act to refuse to register. Under section 37 the doing of overt acts in furtherance of the conspiracy was held to be unlawful "irrespective of whether the result of the conspiracy has been to accomplish its illegal end" (p. 477).

Under these four provisions of law, together with the provisions of the Constitution (sec. 3, Article III), all serious interference with governmental authority during the war could have been adequately taken care of.

No need of a war statute in peace times.—With the close of the war all possible necessity for retaining section 3 of Title I came to an end. Mr. Volstead, the chairman of the committee in charge of the resolution to terminate the operation of war legislation, had this to say specifically of the espionage act in connection with that resolution:

"Now the espionage act is an omnibus act and contains many provisions that are intended to be permanent law, and which you would not want to repeal, but that portion of the act to which objection has been made will be suspended by the passage of this resolution." (Congressional Record, 66th Cong. 3d sess., p. 291.)

Section 3 of Title I of the espionage act is a statute to which since its enactment "objection has been made" and which was not "intended to be permanent law." To suspend it rather than repeal it merely increases the likelihood of reviving during the next war the spy mania and groundless prosecutions with which the Department of Justice had to contend and of which it complained in the World War. (O'Brian, Civil Liberty in War Time, 42 Rep. N. Y. Bar Assn., 292 passim, Report of the Atty. Gen. 1918, p. 23.)

To quote again from Professor Chafee:

"We can no longer cherish the delusion that this provision (first amendment) of the Constitution protects open discussion of the merits and methods of a war. We can predict with certainty what will happen in the next war from what happened in the last war." (Propaganda and Conscription of Public Opinion pp. 7-8.)

Legislative requirements of any future war should be met in the light of the conditions that present them.—Quite regardless of the unsatisfactory operation of section 3 of Title I of the espionage act during the World War and the unnecessary burden of keeping it on the statute books until another war there is no assurance that its provisions will in any wise be appropriate to a future war. The World War was unique and such a tremendous conflict may never recur. If it does and the necessity of additional legislation becomes apparent, appropriate laws can then be enacted. But suppose there is a petty conflict over American oil rights in Mexico or American marines in Nicaragua. Such a situation would by its own terms call into existence section 3 of Title I for it becomes operative "when the United States is at war." Shall we then have 20-year sentences for circulating literature which at least Justice Holmes thinks an individual has as much right to distribute as he has to distribute the Constitution? The necessities of the World War may have explained and excused the strong measures taken against a protesting minority. But if the necessity is not there shall the law remain nevertheless to be unequally and excitedly applied to persons who do not fall into line with the Government policy?

In ex parte Milligan (4 Wall. 2—1866) the Supreme Court after the Civil War recognized that war could not suspend the protection of the Constitution. Mr. Justice Davis said:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men

at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." (120-1.)

There is even some question whether a law which was held constitutional in the circumstances surrounding the World War could be upheld if the United States was at war in a desultory fashion with some unimportant South American antagonist. Justice Holmes was writing for the court when he said in *United States v. Schenck* (249 U. S. 47, 52—1919):

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights * * *. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

But quite regardless of the constitutional aspects presented in such a situation Section 3 of Title I of the espionage act would as a practical matter be utterly inappropriate and extremely dangerous in such a situation. The only way to make sure that this will not occur is to repeal that section now so that it can not revive "when the United States is at war."

TITLE XII OF THE ESPIONAGE ACT (NOW U. S. C. TITLE 18, SECS. 343-345) SHOULD BE REPEALED

Introductory.—As enacted this title rendered unmailable all matter which violated the espionage law,³ as well as matter advocating treason, insurrection, or forcible resistance to law and made the mailing of such matter punishable.

Apparently the Government kept no records of prosecutions under this section. There are, however, reports of a few typical cases which demonstrate how these provisions operated.

The reported cases.—The most striking of the post-office cases was the famous Milwaukee Leader case (U. S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407) affirming the Postmaster General's order denying the Milwaukee Leader second-class mailing privileges because it habitually published matter which was unmailable under Title XII of the espionage act. Justice Clarke, writing for the court, holds that the power to revoke the privilege is inherent in the power to carry out the postal laws, and especially the classification act of 1879, accorded to the Postmaster General.

He notes that such an order does not exclude the paper from the mails absolutely but only from the lower second-class rates until further order. "Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue." The presumption is that a newspaper which has published nonmailable matter for five months will continue to do so. It must show its reformation before getting back its second-class privileges.

In his dissenting opinion Justice Brandeis, answering the argument that the paper might have been carried either first or third class or by other means of transportation, says:

"The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression" (431).

³ Because the espionage law has become incorporated in the U. S. Code, the first section of Title XII, U. S. C., Title 18, sec. 343, declares nonmailable writings violating a large number of specified sections of the code.

And further:

"In conclusion I say again—because it can not be stressed too strongly—that the power here claimed is not a war power. There is no question of its necessity to protect the country from insidious domestic foes. To that end Congress conferred upon the Postmaster General the enormous power contained in the espionage act of entirely excluding from the mails any letter, picture, or publication which contained matter violating the broad terms of that act. But it did not confer—and the Postmaster General concedes that it did not confer—the vague and absolute authority practically to deny circulation to any publication which in his opinion is likely to violate in the future any postal law. The grant of that power is construed into a postal rate statute passed 40 years ago which has never before been suspected of containing such implications. I can not believe that in establishing postal classifications in 1879 Congress intended to confer upon the Postmaster General authority to issue the order here complained of. If, under the Constitution, administrative officers may, as a mere incident of the peace-time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our bill of rights and in every extension of governmental functions lurks a new danger to civil liberty" (436).

Justice Holmes, concurring in this dissent, likewise recognizes that "the regulation of the right to use the mails by the espionage act has no peculiarities as a war measure."

No reports were discovered of most of the proceedings by the Post Office Department against newspapers and private individuals under the espionage act. However, in addition to the Milwaukee Leader case, which finally demonstrated the length to which the courts would go in sustaining the Postmaster General's power in excluding matter from the mails there were three other reported litigations against (1) the Masses, (2) the New York Call, and (3) the Jeffersonian.

The Masses litigation was the best known. In the United States district court (Masses Pub. Co. v. Patten, 244 Fed. 535, S. D. of N. Y.—1917) Judge Learned Hand issued an injunction requiring the postmaster to carry the August, 1917, issue of the Masses. He held that none of the articles or pictures objected to urged upon men that it was their duty or their interest to violate the law, and said:

"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."

The Circuit Court of Appeals (245 Fed. 103) first stayed the injunction, and thereafter reversed it (246 Fed. 24). Judge Rogers, after quoting the Blackstonian theory that—

"Every free man has an undoubted right to lay what sentiments he pleases before the public, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity," nevertheless concluded: "If the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail and is to determine whether a particular publication is nonmailable under the law, he is required to use judgment and discretion in so determining, and his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong."

On an application by the Masses for the transmission of its September issue as second-class matter, Judge Augustus N. Hand held that because one issue had not circulated it could no longer lay claim to regularity of issue. (Bulletin No. 26.)

In the case against the Jeffersonian (Jeffersonian Pub. Co. v. West, S. D. of Ga.—1917, Bulletin No. 24) Judge Speer denied an injunction against the Postmaster General where the paper in vituperative language charged President Wilson and Congress with the illegality of the conscription act and urged conscripts to await the decision of the Supreme Court on the constitutionality of that act. According to the court, for the Postmaster to have carried this paper "would have been to forego the opportunity to serve his country afforded by his lofty station." Judge Speer, bringing up an entirely different issue, asks this rhetorical question:

"Can one be said to come with clean hands when the policy, methods, and efforts he would maintain may cause his hands to be imbrued in the blood of the demoralized and defeated armies of his countrymen?"

The Call, like the Masses, obtained in the court of first instance an injunction restoring its second-class mailing privilege. But the Circuit Court of Appeals of the District of Columbia reversed this judgment (*Burleson v. U. S. ex rel*

Workingmen's Coop. Pub. Co., 274 Fed. 749—1921—writ of error dismissed 260 U. S. 257) after the Supreme Court's decision in the Milwaukee Leader case. The Call's articles dealt largely with the war as a class war and called on the American workingmen to follow the example of their Russian brothers.

Opinions of Government officials entrusted with the enforcement of Title XII.—This law with which we are dealing is not, as we have already shown, a war measure. It is, until repealed, part of the permanent law of the land, not even suspended during peace time, but ready at any time for use against publishers of an unpopular cause. That it has apparently fallen into disuse is only evidence of its unsuccessful operation.

Almost contemporaneously with the close of the war Mr. Burleson ceased to be Postmaster General. When Mr. Hays came in we notice in the annual reports of the Postmaster General, beginning with the annual report for the fiscal year ended June 30, 1921, that the paragraph dealing with the enforcement of the espionage act is conspicuously absent. Under the modest heading "Second-class matter" Mr. Hays writes that applications pending for three years have finally been granted. He explains the change of policy as follows:

"The fourth requirement of section 14 of the classification act is that, to entitle matter to the second-class mailing privilege, it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry. It has been suggested that it was the intent of Congress in the passage of this provision that the privilege of second-class rate should only go to publications disseminating information of a public benefit. If this were true then the responsibility is lodged somewhere to determine what is and what is not information of public benefit. There is a vast difference between what is 'information of a public character' and what is information of public benefit. * * * The arbitrary power to decide what is and what is not a public benefit was never intended to be lodged in the Postmaster General, and it shall not be assumed by the present postal management. * * *

"The war is over and it has been the purpose of the department to return to ordered freedom. Our method of safeguarding the public welfare, while at the same time maintaining freedom of the press, has been through a long period of stable civil liberty better for the public welfare and personal security of citizens than to establish a bureaucratic censorship which in its nature becomes a matter of individual opinion, prejudice, or caprice. There is a certain cost in free institutions in which the institution of freedom of the press shares, but, we in this country, have preferred to pay such costs from time to time rather than to seek protection through the historically discredited devices of bureaucratic government.

"Either these publications should be entirely suppressed and their publishers prosecuted or they should be given equal mailing rights in common with the other periodicals of the country. * * * There shall be no hesitancy in suppressing any publications that fall within the prohibitions of the public law, but there are also laws in this country safeguarding the integrity of the freedom of the press and these laws must and shall be also scrupulously observed" (pp. 88-90).

Mr. Alfred Bettman until May, 1919, Special Assistant United States Attorney General in charge of seditious prosecutions, expressed strikingly the same idea in testimony before the Committee on Rules of the House of Representatives opposing a peace-time sedition law. He said:

"The history of freedom of speech begins with the birth of the licensing system in England. When printing and newspapers began to appear, the King claimed the right to forbid any of it without his license, and that licensing system was administered by the star chamber, and became one of the disgraces of English history. In 1695 the House of Commons refused to reenact the licensing act, and since 1695, over two centuries ago, and about one century before the Constitution of the United States, it became the settled law of England that no advance interference with publication was constitutional in Anglo-Saxon countries—no advance interference. So that to allow the Postmaster General to state in advance what shall or shall not go out and be published, to allow the fear of what the Postmaster General will or will not allow to exert a palsing effect on the freedom of intelligence of the American public, is turning back the hands of the clock over two centuries in this country * * *. But the Supreme Court of the United States in sustaining the right to exclude obscene matter from the mails, stated that it is not as a government controlling morals that it did that, but that it, as the head of the post-office business, in deciding what it shall carry in the mails, may do that. But that if in addition to stating what shall be carried in the mails, the Government attempted to state what shall be transported by other means, that would be an absolutely unconstitutional combination. That is the

principle of the case, that they have a certain amount of right to say what they will and what they will not carry as the post-office business, but if they make any attempt to join other means of distribution, such a joinder would be unconstitutional * * *. To my mind, to-day the carriage in the mails is a Government monopoly, and is so usual and customary and necessary a means of transportation of printed matter, that that old doctrine that the United States is a mail carrier and can as a mail carrier decide what it will and what it will not carry, should not be considered as applying; that the effect of refusing to carry in the mails is the effect of suppression, under modern conditions where the mail has grown to be such a tremendous factor. And suppression in advance violates the very minimum definition of freedom of speech settled in England for 200 years."

Prior legislation sufficient.—A mere inspection of section 1 of Title XII in its present form makes obvious its complexity. As originally enacted the section declared unmailable all matter in violation of the espionage act. Now that that act has taken its place in the United States Code all the various sections must be specified. There is no apparent reason for declaring matter unmailable which violates this particular law rather than any other and the arbitrary power thus accorded an administrative official is both contrary to our free tradition and unworkable in practice.

Finally if there is objection to the post office transmitting propaganda advocating violent revolution the law provided for this long prior to the enactment of Title XII of the espionage act. Thus section 334 of title 18 of the United States Code (Criminal Code, sec. 211) fixes a maximum penalty of a fine of \$5,000 and/or five years' imprisonment for the mailing of "matter of a character tending to incite arson, murder, or assassination." The decision of the Postmaster General in refusing reinstatement to the New York Call was based in part upon this provision (274 Fed. at 750).

CONCLUSION

The legislation sought to be repealed is contrary to the best American tradition. Thus President Wilson, just prior to transmitting his war message to Congress, is reported to have said, "Conformity would be the only virtue * * * and every man who refused to conform would have to pay the penalty. "He thought the Constitution would not survive it; that free speech and the right of assembly would go." (Nelles, *Freedom of Opinion and Expression*, Am. Yearbook, 1925, p. 85.)

James Kent almost a hundred years earlier had sensed the menace of war to constitutional safeguards. He wrote:

"It may be observed, on the one hand, that no gross violation of those absolute private rights, which are clearly understood and settled by the common reason of mankind, is to be apprehended in the ordinary course of public affairs; and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty. When the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private rights." (2 Kent's Commentaries, 1st ed., p. 5.)

The repeal of the laws now under attack can give no assurance that the excesses indulged in during the World War will not recur. But our armies are now demobilized. We have signed the Kellogg peace pact. It is time that war legislation should be wiped from our statute books and persons convicted under it be restored to full citizenship. If, unhappily, we should participate in a future war the American people can be trusted to then enact such laws as will insure its successful prosecution.

APPENDIX

United States Code, title 50, section 33:

"*Seditious or disloyal acts or words in time of war.*—Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval

forces of the United States or to promote the success of its enemies and whoever, 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 of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years, or both." (June 15, 1917, ch. 30, Title I, sec. 3, 40 Stat. 219; March 3, 1921, ch. 136, 41 Stat. 1359.)⁴

United States Code, title 18, secs. 343-345:

"SEC. 343. *Certain letters or writings nonmailable; opening letters.*—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 sections 25, 27, 31 to 38, inclusive; 98, 130 to 132, inclusive; 288, 381, 502, 611 to 633, inclusive, of this title; sections 213, 221 to 223,⁵ inclusive; 231 to 235, inclusive; and 238 to 245, inclusive, of title 22, and sections 31 to 42 and 191 to 194 of title 50 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; but no person other than an employee of the dead-letter office, duly authorized thereto, or other person upon a search warrant authorized by law, shall be authorized to open any letter not addressed to himself." (June 15, 1917, ch. 30, Title XII, sec. 1, 40 Stat. 230.)

"SEC. 344. *Letters or writings advocating treason declared nonmailable.*—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 declared to be nonmailable." (June 15, 1917, ch. 30, Title XII, sec. 2, 40 Stat. 230.)

"SEC. 345. *Using or attempting to use mails for transmission of matter declared nonmailable by title; jurisdiction of offense.*—Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by sections 343 and 344 of 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 said sections 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." (June 15, 1917, ch. 30, Title XII, sec. 3, 40 Stat. 230.)

⁴ The two words "and 33" should be stricken from title 50, sec. 34, making punishable conspiracies to violate secs. 32 and 33 of title 50.

⁵ "221 to 223" should be "220 to 222."

