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POLITICAL CRIMES

ELMER M. MILLION*

The treatment of political offenses properly begins with a consideration of the offense of treason.¹ For reasons noticed herein, treason itself presents no great problem at the present time, and its development may therefore be summarized briefly.

By the English common law what constituted treason became very largely a matter of judicial discretion, or indiscretion, the royal judges arbitrarily extending it to cover a vast field of constructive treasons so that it became more and more extensive and uncertain in scope, engendering by its oppression both fear and hatred. The clamor for relief from its operation subsequently resulted in an English statute² defining and limiting its application to specified classes of acts, only two of which were retained by the American constitutional fathers in framing an even more stringent definition for the people of this country, which definition provided:

“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”³

Many state constitutions similarly limit the offense of treason as a state offense.⁴ Moreover, judicial construction, both state and federal, has generally served to limit rather than extend the scope of the offense. Although early decisions inclined to the view that forcible resistance to

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1. As used herein, treason means the offense of high treason, as distinguished from petit treason, modern criminal law abolishing the latter as an offense except as included in the homicide category.

2. 25 Edw. III, St. 5, c. 2.

3. U. S. CONST. Art. III, § 3. The last sentence of the section, dealing with Congressional power to punish treason, and forbidding corruption of blood, is not quoted. The federal statutes on treason and misprision of treason were passed in 1790 and survive today. REV. STAT. §§ 5331-5333 (1875), 18 U. S. C. §§ 1-3 (1934). See McKinney, *Treason Under the Constitution of the United States* (1918) 12 ILL. L. REV. 381.

4. For typical state provisions, see OKLA. CONST. art. II, § 16; GA. CONST. art. I, §§ 2-202; N. C. CONST. art. IV, § 5.

a particular statute would constitute treason,⁵ subsequent opinions and statutes have argued that even an actual armed movement, where directed merely against a particular statute or person or group of enforcement officers, and not for the purpose of overthrowing the federal government or forcibly overthrowing the Constitution, is not treason against the United States, however great another offense it may be,⁶ and the same rule holds true, *mutatis mutandis*, as to treason against a state.⁷ Thus "levying war" requires an overt act of war and not a mere conspiracy to levy war, and such war must be directed against the government, and not be mere forcible resistance against a statute or government troops seeking to enforce it.⁸ "Adhering to enemies" has been construed to cover almost all friendly relations with the enemy, but not with rebellious citizens of this country.⁹

Treason against the state is said to include all common-law treason of waging war against the government except that which is distinctly aimed at federal authority,¹⁰ state treason being separable from treason against the federal government, and not merged in the latter.¹¹ Treason against a state is not necessarily treason against the United States, nor is treason against the United States an offense against the state,¹² in the absence of the state definition of treason expressly so providing.¹³

Thus the scope of the offense of treason seems rather well defined, with little threat of its extension, at least under that name. There has been a trend toward an extension of political offenses, but in the form

5. *United States v. Vigol*, 2 Dall. 346 (U. S. 1795); *United States v. Mitchell*, 2 Dall. 348 (U. S. 1795) (riots aimed not against a particular official as an individual but against the enforcement of the excise statute generally).

6. 3 WHARTON, CRIMINAL LAW (12th ed. 1932) § 2160. Compare *United States v. Hanway*, 26 Fed. Cas. No. 15,299 (C. C. E. D. Pa. 1851), which concedes that armed resistance to a particular official or against a particular statute for a personal reason is not treason, but asserts that if the resistance is for a general purpose it is treason although directed against a particular statute and not including an intent to completely overthrow the government.

7. 3 WHARTON, *op. cit. supra* note 6, § 2159; but see *Homestead Case*, 1 Pa. Dist. 785 (1892) (grand jury charge).

8. *Ex parte Bollman and Swartwout*, 4 Cranch 75 (U. S. 1807); MILLER, CRIMINAL LAW (1934) § 172.

9. See *United States v. Greathouse*, 26 Fed. Cas. No. 15,254 (C. C. N. D. Cal. 1863); *cf. The Prize Cases*, 2 Black 635 (U. S. 1862). MILLER, *op. cit. supra* note 8, § 172 (d); Warren, *What is Giving Aid and Comfort to the Enemy?* (1918) 27 YALE L. J. 331.

10. 3 WHARTON, *op. cit. supra* note 6, § 2179 (citing Story's Charge to Grand Jury, 30 Fed. Cas. No. 18,275 (C. C. R. I. 1842)). See similar charges, 30 Fed. Cas. Nos. 18,270 to 18,277, inclusive.

11. 3 WHARTON, *op. cit. supra* note 6, § 2181.

12. *People v. Lynch*, 11 Johns. 549 (N. Y. 1814); *cf. 4 Am. L. Mag.* 318; 3 WHARTON, *op. cit. supra* note 6, § 2178.

13. *Ship Ewing*, 15 STAT. (1846) tit. 18, § 143 (levying war and assisting enemies of the state or the United States is a high misdemeanor).

of other designated offenses, the validity of which has been determined independently of the treason limitation, by reference to other constitutional provisions and, if the thesis of this study be accepted, by the whole current of contemporary thought.

It is hardly necessary to observe that many of the offenses defined by these different statutes consist of acts which once were considered as constituting treason, and against which the constitutional limitation might be said to have been directed. Strict construction of the definition of treason has not prevented punishment of offenses under these statutes, but on the contrary, the enactment of the latter statutes has probably been responsible in part for the continued strict limitations upon treason prosecutions.¹⁴ It is obviously arguable that such statutes violate the constitutional provision as to treason,¹⁵ but such arguments have met with very little success. Thus, in *Berg v. State*,¹⁶ the Oklahoma Criminal Syndicalism statute was held not to violate the limitations placed upon treason prosecutions by the Oklahoma constitution. In *Frohwerk v. United States*,¹⁷ in denying a similar argument made with reference to the Espionage Act of 1917, the court said ". . . it was suggested . . . that some of the matters dealt with in the Act of 1917 were treasonable and punishable as treason or not at all, and . . . that the acts complained of not being treason could not be punished. *These suggestions seem to us to need no more than to be stated.*"¹⁸ Again, in *Wimmer v. United*

14. The same conclusion is indicated in the statement: "If Congress had not enacted the Espionage Act or some equivalent measure, it is likely that the Government would have had frequent recourse, in endeavoring to repress disloyalty, to the statutes punishing treason, and that consequently the constitutional definition of treason would have received further elucidation from the Courts." Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act* (1919) 17 MICH. L. REV. 621, 660.

15. See Note (1919) 32 HARV. L. REV. 724, in which the Act of Feb. 14, 1917, c. 64, 39 Stat. 919, 18 U. S. C. § 89, making it an offense to threaten the life of the President, is discussed. Note the statement at page 725: "The federal statute doubtless finds its ancestry in the Statute of Treason, which made it criminal 'to compass and imagine the death of the King.'"

16. 29 Okla. Cr. 112, 233 Pac. 497 (1925).

17. 249 U. S. 204 (1919).

18. *Id.* at 210. Italics supplied. Accord: *Ex parte Bollman and Swartwout*, 4 Cranch 75, 126 (U. S. 1807); *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211 (1921); *State v. Moilen*, 140 Minn. 112, 167 N. W. 345 (1918). Cf. *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921), in which the court said that the definitions of treason in the state and Federal Constitutions were merely for purposes of limiting the number of offenses which could be punished as treason under the common law, and in no wise limited the power of the legislature to provide for the punishment of acts inimical to the public welfare which theretofore might have been punished as constructive treason. Notice the Proclamation of April 16, 1917, stating that the courts of the United States had declared to be treasonable various enumerated acts, including the "use or attempted use of any force or violence against the Government of the United States, or its military or naval

States,¹⁹ a conviction under the Espionage Act was affirmed despite the defendant's contention that the Act violated the treason provisions. Said the court:

"Treason requires both adherence and giving aid. To 'favor or support' is, very likely, to 'adhere'; but it does not carry the idea of giving aid and comfort, unless by a rather remote implication. Hence it may well be said that adherence by words only is an offense quite distinct from treason."²⁰

The refusal of the courts to outlaw the statutes by reference to the treason provision of the Constitution is not very important since the Supreme Court finds little difficulty in voiding objectionable federal statutes by reference to the First Amendment.²¹ True, this guaranty is not binding on the states but by construing the due process clause of the Fourteenth Amendment to include such rights, the same result is obtained as to state statutes,^{21a} which must also face in the state courts a similar Bill of Rights in the state constitution.

FEDERAL OFFENSES

In considering the political offenses other than treason, let us look first to the federal offenses. All of the existing federal laws of this nature were enacted in periods of intense emotional strain, either during or immediately after the occurrence of a war. An examination of the present statutes, together with a few important enactments already repealed, should provide a better understanding, so attention is directed to these offenses, grouped according to their period of enactment.

The Sedition Act of 1798,²² passed during a Federalist administration harassed by strained relations and "limited warfare" with France, defined two offenses:

(1) Unlawful combination to oppose any measure of the Government, intimidate persons from taking or performing federal office, or advise or attempt to procure a riot or insurrection.

(2) Publication of a libel against the Government, either house of Congress, or the President, with intent to defame or bring into disrepute, or excite against them the hatred of the people, or stir up sedition, or

19. 264 Fed. 11 (C. C. A. 6th, 1920).

20. *Id.* at 13.

21. The guaranties of freedom of speech, press, and assemblage, and of petitioning the government for redress of grievances.

21a. *Gitlow v. New York*, 268 U. S. 652 (1925).

22. Act of July 14, 1798, 1 Stat. 596 (1850).

excite unlawful combinations to resist any law, or to abet the hostile design of any foreign nation against the United States.

Prosecutions were had principally under the second offense, which provided a maximum penalty of two years imprisonment and a fine of not over \$2000, and which provided that truth should be a defense and that the jury should determine the question of the criminality of the publication.

The Act was never declared unconstitutional, although that question was raised by the defense in more than one of the prosecutions, but there was widespread opposition to it and fierce resentment to the prosecutions under it. Representative Matthew Lyon, a member of Congress, was convicted²³ of libelling President Adams, and was sentenced to four months imprisonment and fined \$1000, an action which aroused his constituents to such a pitch as to lead to a popular uprising to tear down his prison. Lyon himself succeeded in suppressing this movement, and was re-elected to Congress while still imprisoned. In *United States v. Haswell*,²⁴ a supporter of Lyon was convicted because of articles published in his paper in support of Lyon, and was sentenced to two months imprisonment and fined \$200. Even more curious is the record in *United States v. Cooper*,²⁵ where the prosecution was for publication of an allegation that President Adams had "countenanced a navy and brought forward measures for raising a standing army." In charging the jury Judge Chase said:

"There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government."²⁶

Cooper was convicted and sentenced to six months imprisonment, fined \$400, and ordered to find sureties for his good behavior thereafter!

Jefferson, a determined opponent of the sedition prosecutions, upon becoming president issued pardons to all those still imprisoned under the Act. It expired by its own terms March 3, 1801, but the opposition its enactment and enforcement aroused lasted much longer.²⁷ Another

23. Lyon's Case, 15 Fed. Cas. No. 8,646 (C. C. D. Vt. 1798).

24. 26 Fed. Cas. No. 15,324 (C. C. D. Vt. 1800).

25. 25 Fed. Cas. No. 14,865 (C. C. D. Pa. 1800).

26. *Id.* at 642.

27. See *United States v. Callender*, 25 Fed. Cas. No. 14,709 (C. C. D. Va. 1800), another prosecution and conviction under the Act, resulting in a \$200 fine and nine month imprisonment. Chafee, *Freedom of Speech in War Time* (1919) 32 HARV. L. REV. 932, at 952, observes that the Sedition Act and these prosecutions

statute enacted during the same period²⁸ declared it to be a high misdemeanor for any citizen, without authority of the United States Government, to correspond with any foreign government with an intent to influence the conduct of any foreign government or its agent in relation to disputes with the United States, or defeat measures of the United States Government.²⁹ Unlike the Sedition Act, this statute has remained in force with slight alteration ever since its enactment. Making allowance for the differences in the two enactments, it can still be asserted that the survival of the latter statute is due to its not having been used as a basis for unpopular prosecutions. The reported cases contain not even one instance of a prosecution under it. Four instances exist where it has been cited, but always in some other connection.³⁰ In none of these has its constitutionality or desirability been questioned, and in the one instance where it is cited by the Supreme Court, its validity is assumed.³¹

The period of the Civil War also furnished a number of statutes punishing political offenses. Several of these statutes survive today,³² including the two following modern forms:

- (1) Inciting rebellion or insurrection.

defeated the open discussion of public affairs and aroused popular indignation which wrecked the Federalist party. See also, Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act* (1920) 18 MICH. L. REV. 615. President Washington pardoned both Vigol and Mitchell, whose convictions appear in note 5, *supra*. On July 4, 1840, a bill to pay to Lyon's legal representatives the amount of the fine imposed in *Lyon's Case* was signed by the president, having passed both houses. 15 Fed. Cas. p. 1191, note. "In 1844 an act passed Congress refunding this fine to the defendant's representatives, with over forty years' interest." 26 Fed. Cas. p. 218, note.

28. Act of Jan. 30, 1793, c. 1, 1 STAT. 613 (1850).

29. The punishment provided was a fine not exceeding \$5000 and imprisonment not less than 6 months nor exceeding 3 years.

30. Sprague, Dist. J., in Charge to Grand Jury—Treason, 30 Fed. Cas. No. 18,274 (D. Mass. 1863), and 30 Fed. Cas. No. 18,277 (C. C. D. Mass. 1861), directs attention to the Act as forbidding communications by citizens in Northern states to members of the British parliament, urging recognition by England of the independence of the Confederacy, both of these charges being given during the Civil War. The Act is also cited in *Burke v. Brotherhood*, 286 Fed. 949 (D. Md. 1922), but the case itself deals with the right of a union to expel one of its members.

31. In *Blackmer v. United States*, 284 U. S. 421 (1932), the issue before the court was the constitutionality of the action of the supreme court of the District of Columbia in assessing the petitioner fines for contempt because of his failure to answer subpoenas requiring him to appear before that court as a government witness in a criminal trial. The subpoenas had been served upon the petitioner while he was in France. The court cited this Act as illustrative of Congressional acts applicable to citizens abroad. This Act applies to all citizens, whether at home or abroad.

32. See, for less important surviving enactments of this period, 18 U. S. C. § 2 (1934) (punishment for treason), §§ 7, 8 (recruiting for or enlisting for service against the United States), §§ 94, 95 (enticing desertion from Army or Navy), and § 10 (enticing desertion from Army or Navy).

“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.”³³

The best known prosecution under this statute is reported in *United States v. Greathouse*,³⁴ in which a conviction was had against persons securing letters of marque from the Confederacy, and outfitting a ship in California with the purpose of capturing federal merchant ships. Justice Field, in charging the jury, said that the Constitution limited the offenses punishable as treason, and that Congress could neither expand nor restrict the crime; that the term “enemies” did not embrace rebellious citizens of the United States, hence the defendants could be guilty of treason only if levying war (and were guilty of that offense, equally with the rebels). Justice Field added that all the offenses mentioned in this statute, except possibly that of “inciting,” were themselves treason so the statute merely enabled the defendants, who were in fact on trial for treason and entitled to all the privileges of parties accused of treason, to escape the death penalty universally meted out as punishment for that offense.³⁵

It seems pertinent to observe that this statute not only permitted a lighter punishment for those convicted of similar treasons, but enabled the prosecution to obtain convictions that otherwise might not have been possible had the death penalty been demanded.

(2) Seditious conspiracy.

“If two or more persons 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.”³⁶

33. 18 U. S. C. § 4 (1934); drawn from REV. STAT. § 5334 (Act of July 17, 1862, c. 195, 12 STAT. 590).

34. 26 Fed. Cas. No. 15,254 (C. C. N. D. Cal. 1863).

35. *Id.* at 23.

36. 18 U. S. C. § 6 (1934); drawn from REV. STAT. § 5336 (Act of July 31, 1861, c. 33, 12 STAT. 284; Act of April 20, 1871, c. 22, 17 STAT. 13). See also 18 U. S. C. § 88 (1934).

Of the many prosecutions had under this statute, the overwhelming majority of those reported occurred either during the period of the Civil War or the World War. Until the time of the original enactment of this statute,³⁷ there was no law making punishable treasonable conspiracies not consummated by an overt act, but the Civil War decisions held that no overt act was needed under its provisions.³⁸ The point was apparently not raised again until the World War period, in which the courts reiterated their position that no overt act was necessary.³⁹

Next for consideration are the developments in the field of political offenses during the World War period. Shortly before the entry of the United States into that war, Congress enacted an act to punish persons who make threats against the President of the United States:

“Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1,000 or imprisoned not exceeding five years, or both.”⁴⁰

An examination of nine opinions handed down in prosecutions under that Act, reveals a surprising conflict among the judges as to the legal questions involved, although the constitutionality of the Act is never questioned.

In *United States v. French*,⁴¹ a demurrer was sustained because the indictment alleged neither that the accused, in writing the offending letter to another individual, intended that it be communicated to the president, nor that it was in fact so communicated.⁴²

37. 1861.

38. Charge to Grand Jury—Treason and Piracy, 30 Fed. Cas. No. 18,277 (C. C. D. Mass. 1861); Charge to Grand Jury—Treason, 30 Fed. Cas. No. 18,272 (C. C. S. D. Ohio 1861).

39. *Bryant v. United States*, 257 Fed. 378 (C. C. A. 5th, 1919), *cert. denied*, 40 Sup. Ct. 117 (1919); *Enfield v. United States*, 261 Fed. 141 (C. C. A. 8th, 1919); *Reeder v. United States*, 262 Fed. 36 (C. C. A. 8th, 1919), *cert. denied*, 252 U. S. 581 (1920).

40. Act of Feb. 14, 1917, c. 64, 39 STAT. 919 (1917), 18 U. S. C. § 89 (1934).

41. 243 Fed. 785 (S. D. Fla. 1917).

42. In form the letter was hardly intelligible. It claimed that the writer could destroy a navy without a sound. Without directly threatening the President, it said, “if the german people can pay \$20,000.00 for Wilson . . . answer yes . . .” (by cutting certain shrubs). This could be construed as a solicitation for employment as an assassin or terrorist, but the court intimated it thought the writer might have been patriotically attempting to test the Americanism of his addressee, a man with a German name, or that the writer was harmlessly crazy.

But in *United States v. Jasick*,⁴³ a demurrer was overruled in a similar prosecution where the indictment charged a verbal threat that "if he got a chance he would shoot President Wilson." Holding that it was no defense that the threat was conditioned on the defendant's ability and that it was not communicated to the President, the court said:

"The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements. . . . The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. It tends to create among the anarchistic . . . a suggestion which may lead to most . . . harmful consequences. It arouses resentment and concern on the part of patriotic citizens; and in general it constitutes a breach of the peace and incitement to disorder and violence."⁴⁴

In *Ragansky v. United States*,⁴⁵ the court in affirming a conviction for oral threats rejected as no defense the accused's contention that he spoke in jest.⁴⁶ In *United States v. Stickrath*,⁴⁷ the indictment was for saying "President Wilson ought to be killed. . . . If I had an opportunity I would do it myself." In overruling a demurrer the court said that the motive of the speaker was immaterial and that it was not necessary that the indictment should state in whose presence the threat was made. But the next year, in *United States v. Stobo*,⁴⁸ whether the statement "The President ought to be shot and I would like to be the one to do it." amounted to a threat was held to be a jury question, to be considered in view of the surrounding circumstances. The indictment was held bad, moreover, for failure to allege that the words were said within the hearing of someone other than the speaker, since the purpose of the Act was to curb such statements because of their tendency to incite the hearers. The court expressly stated that the bill of particulars would have cured this omission insofar as concerned the right of the accused to have the charge sufficiently definite to enable him to set it up as a former acquittal or conviction in the event of a later prosecution for the same offense.

43. 252 Fed. 931 (E. D. Mich. 1918).

44. *Id.* at 933.

45. 253 Fed. 643 (C. C. A. 7th, 1918).

46. The court further weakened this rule by stating that the accused did not allege that his hearers understood his words to be a joke, or that he intended them so to understand.

47. 242 Fed. 151 (S. D. Ohio 1917).

48. 251 Fed. 689 (D. Dela. 1918).

Later in *Pierre v. United States*,⁴⁹ an indictment similarly defective was thrown out solely because the conviction thereunder could not have been set up by the defendant as a former conviction in the event of a later prosecution for the same offense. Similarly, *United States v. Metzdorf*,⁵⁰ reached quite an opposite result from *Clark v. United States*.⁵¹ The *Metzdorf* opinion sustained a demurrer to an indictment alleging that the accused said "If I got hold of President Wilson I would shoot him." The reason for its decision was that Congress had the power to pass laws to protect federal officials in their official capacities only and not as individuals, and the indictment did not allege that the threats complained of were spoken of President Wilson as an official, not merely of one Woodrow Wilson whom the accused disliked personally.⁵² In the *Clark* case, the words used did not include the official title at all, being merely "I wish Wilson were in hell, and if I had the power I would put him there," but the conviction was affirmed.⁵³

In *Hall v. United States*,⁵⁴ the circuit court reversed a conviction where the district court had permitted the indictment to charge violations of both the Espionage Act and the statute punishing threats against the President, evidence of violations of the latter statute being heard by the jury before convicting the defendant under the Espionage Act, a prejudicial error the occurrence of which in more placid times might be less believable.⁵⁵

The necessities of war, or at least the passions war engendered, re-

49. 275 Fed. 352 (C. C. A. 8th, 1921).

50. 252 Fed. 933 (D. M. Ct. 1918).

51. 250 Fed. 449 (C. C. A. 5th, 1918).

52. Recognizing that the statute itself had not expressly required that the threats be against the President as an official rather than as an individual, the court reasoned that it would presume Congress acted only within its authority, and therefore referred only to threats of the former class. By such reasoning, a person charged under a statute providing the death penalty for attempted assassination of visiting diplomats could escape by proving he merely disliked his victim personally; but the opposite consequence seems inescapable.

53. The offending statement in the *Clark* case had an additional, less printable line, "Wilson is a wooden-headed son of a bitch." This was included in the indictment although not in itself threatening, and although the statute under which the prosecution took place did not outlaw defamatory words *per se*, as the Espionage Act did. Possibly these words helped show intent, but very likely they were far more prejudicial in effect, especially since the trial took place in Texas, a state which at that time had a statute making the use of insulting language toward a female relative of the slayer an adequate provocation which would reduce a homicide to manslaughter. TEX. PEN. CODE (1925) art. 1248. (Repealed by Acts 1927, c. 274, § 3.) See TEX. STAT. (Penal Code, Vernon, 1936) art. 1257c.

54. 256 Fed. 748 (C. C. A. 4th, 1919).

55. For a review of the cases under this Act, see Note (1919) 32 HARV. L.

sulted in the passage of the federal Espionage Act of June 15, 1917,⁵⁶ which not only made punishable the divulging of information as to the national defense, but also contained the more drastic provisions:

"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 . . . shall be punished by a fine . . . or imprisonment for not more than twenty years, or both."

"Sec. 4. If two or more persons conspire to violate [the above Act] and one . . . does any act to effect the object of the conspiracy, each . . . shall be punished . . ."⁵⁷

Moreover, the Act made it a felony to send in the mails any material containing matter in violation of any of the provisions of the Act.⁵⁸

In *United States v. Dembowski*,⁵⁹ an indictment was quashed for duplicity because its one count followed the wording of Section three, the court holding that Section to state three distinct offenses and not merely three different ways of committing the same offense. Usually, however, objections to the sufficiency or form of the indictments met with scant success.⁶⁰ Persons were convicted for attempting to obstruct enlistment or cause insubordination, not only where they addressed members of the armed forces, but where the audience contained men who were required to register, since such men were subject to conscription.⁶¹ Indeed, it was said that even the presence of men eligible for service was unnecessary; that it was enough if the acts were committed or words spoken in a public place and to the public, with the *intent* to cause any of the prohibited results. As almost any place could be a public place and even one hearer might be sufficient,⁶² and the evil intent would be presumed from the words used, conviction actually required very little in the way of technical elements of crime.

56. 40 STAT. 217 (1919), 50 U. S. C. 31 (1934).

57. *Id.* at 219, §§ 3, 4.

58. *Id.* at 230.

59. 252 Fed. 894 (E. D. Mich. 1918).

60. See *United States v. Nearing*, 252 Fed. 223 (S. D. N. Y. 1918); *United States v. Eastman*, 252 Fed. 232 (S. D. N. Y. 1918); *Sugar v. United States*, 252 Fed. 79 (C. C. A. 6th, 1918).

61. *Goldstein v. United States*, 258 Fed. 908 (C. C. A. 9th, 1919); *Coldwell v. United States*, 256 Fed. 805 (C. C. A. 1st, 1919).

62. *United States v. Nearing*, 252 Fed. 223 (S. D. N. Y. 1918).

Some of the most remarkable cases under Section three resulted from the exhibition of a movie dealing with the American Revolution. In addition to many unobjectionable historical scenes, the film showed the Wyoming Valley Massacre, in which British soldiers were shown impaling babies on bayonets, shooting women, and seizing helpless girls. Although the accuracy of these scenes was not seriously questioned by the court, the film was confiscated⁶³ and the producer convicted.⁶⁴ As to the truth of the film, the court said:

"History is history, and fact is fact. . . . At the present time, however, the United States is confronted with . . . the greatest emergency . . . in our history. There is now required . . . the greatest amount of devotion to a common cause, the greatest amount of co-operation . . . that can be conceived, and as a necessary consequence no man should be permitted to . . . in any way detract from the efforts which the United States is putting forth . . . Great Britain is an ally . . . whatever occurred there [during the Revolution] is written upon the pages of history and will have to stand, whomsoever may be injured . . . by the . . . recollection of it. But this is no time . . . for the exploitation of those things that may have the tendency or effect of sowing dissension among our people or [creating] want of confidence between us and our allies."⁶⁵

Even advising an eligible against volunteering for military service might be an offense under the Act, although done in good faith. A *dictum* in *United States v. Nearing*,⁶⁶ stated that such advice was privileged where given at the eligible's own request, or where given by a near relative without a request, but not where given by a stranger whom the eligible had not requested, the statute not recognizing any right by strangers "to intervene gratuitously in the decisions of [other] citizens."

By the Act of May 16, 1918, the first section quoted above was amended to make punishable the intentional obstruction of the sale of govern-

63. *United States v. Motion Picture Film "The Spirit of '76"*, 252 Fed. 946 (S. D. Cal. 1917). That this meant a loss of over \$100,000 to innocent stockholders of the company who had known nothing of the objectionable scenes did not deter the court.

64. *Goldstein v. United States*, 258 Fed. 908 (C. C. A. 9th, 1919), rehearing denied, Oct. 14, 1919. Goldstein allegedly was not in good faith, however. A controversy had arisen as to whether the film was offensive, so Goldstein had exhibited it to government officials with the objectionable scenes omitted, then inserted them again for public exhibition after obtaining official approval of the expurgated film.

65. *United States v. Motion Picture Film "The Spirit of '76"*, 252 Fed. 946, 947-948 (S. D. Cal. 1917).

66. 252 Fed. 223, 230 (S. D. N. Y. 1918).

ment bonds, the incitement of disloyalty in the military or naval forces, the obstruction of recruiting or enlisting, the disloyal abuse of the government or the use of language intended to bring the Government or Constitution of the United States into disrepute, etc.⁶⁷ This amendment has been called the "Sedition Act of 1918," but despite the far-reaching nature of their provisions, both acts were upheld in a series of famous cases, the first of which, however, involved only the 1917 Act.

In *Schenck v. United States*,⁶⁸ decided in March, 1919,⁶⁹ Justice Holmes wrote the opinion for a unanimous Court upholding a conviction under the 1917 Act although the strongest statements of the pamphlets mailed by the accused were quotations from well known public men. The Court said: ". . . 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. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances . . . as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . . When a nation is at war many things that might be said in time of peace are such a hindrance . . . that their utterance will not be endured. . . ."⁷⁰

In *Debs v. United States*,⁷¹ which was decided but one week after the *Schenck* case, a unanimous Court upheld Debs' conviction for obstructing and attempting to obstruct recruiting and enlistment, the only overt act charged being a public address by the accused, most of which was devoted to praise of the Socialist party, which the Court professed to regard as innocent and unpunishable. Although the opinion relied on the *Schenck* case in another connection, comments have generally termed this decision a departure from the *Schenck* test although Justice Holmes wrote both opinions.

67. May 16, 1918, c. 75, 40 STAT. 553-554. The 1918 amendment was repealed and the 1917 Act reaffirmed, in Act of Mar. 3, 1921, 41 STAT. 1359, 50 U. S. C. § 33 (1934).

68. 249 U. S. 47 (1919).

69. The acts *Schenck* committed occurred before the passage of the 1918 amendment, but the *Debs* case, although decided only a week after the *Schenck* case, arose after the 1918 amendment took effect, a fact ignored by most comments upon these decisions.

70. This opinion prompted Heywood Brown to say, in the World-Telegram, March 7, 1935, that even Justice Holmes' calm tolerance weakened once. "I have always felt," says Brown, "that during the great war he lost touch for a time with his own liberal philosophy. The bugles and the drums stirred in him old memories and opened ancient wounds."

71. 249 U. S. 211 (1919).

A rather extreme comment, written more than twelve years after the two decisions, attributes to the Court an intentional abandonment of the *Schenck* test in order to "get its man" in the *Debs* case.⁷² The same writer states that the *Debs* case revived the old doctrine of constructive treason, violating a great Anglo-American tradition of free expression of political opinion. It must be admitted that the phrases used by Debs are no more violent, if not less so, than the remarks made by Charles Sumner in a public speech during the Mexican War in which he said "The Mexican War is an enormity . . . base in its object . . . atrocious . . . immoral . . . a war of infamy . . ."⁷³ Even Debs' courtroom confession that he opposed war would seem little basis for a conviction when it is remembered that General McClellan was nominated for the presidency in 1864 on a platform condemning the Civil War, which conflict was then at its height.⁷⁴ In *Abrams v. United States*,⁷⁵ decided eight months after the *Schenck* case, another conviction under the Act was upheld, the offense consisting of the publication of I. W. W. and "Revolutionist" pamphlets denouncing capitalism, urging world union of workers, requesting munitions workers not to make bullets for use against the Russian workers. The majority opinion held these pamphlets counselled and were intended to rouse forcible resistance to the Federal Government, holding the American form of government up to scorn, and urging obstruction of American war activities. Brandeis joined in the dissent by Holmes, the latter asserting that the "clear and present danger" test he had pronounced in the *Schenck* case did not warrant the *Abrams* conviction, and declaring that:

"Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"⁷⁶

Still later, in an opinion of March, 1920,⁷⁷ the Court upheld several convictions under the Espionage Act arising out of the publication of

72. Black, *Debs v. The United States—A Judicial Milepost on the Road to Absolutism* (1932) 81 U. OF PA. L. REV. 160.

73. *Id.* at 175.

74. One of Debs' objectionable remarks concerned the conviction of Rose Pastor Stokes, Debs saying she had done no more than he, and that if she were guilty, so was he. Mrs. Stokes had at that time been sentenced to the penitentiary, but was given a reversal a year after the *Debs* decision, thus substantiating in part the allegations which Debs had made, but speaking even more eloquently of the change of attitude commencing after the War ended.

75. 250 U. S. 616 (1919).

76. *Ibid.* But see Wigmore, *Abrams v. U. S.: Freedom of Speech and Freedom of Thuggery in War Time and Peace-Time* (1920) 14 ILL. L. REV. 539.

77. *Schaefer v. United States*, 251 U. S. 466 (1920).

German language newspapers, the majority finding the defendants guilty of false reports. Brandeis, in whose dissent Holmes concurred, objected that the *Schenck* test did not support the convictions, and that the falsification proved was little more than a misprint whereas only such "wilfully untrue statements . . . which might mislead public opinion . . . or officials in the execution of the law . . . are made criminal, under any rational construction of the act."⁷⁸

In *Pierce v. United States*,⁷⁹ also decided in March, 1920, convictions of conspiracy under the Act were affirmed under circumstances which, as outlined by the dissent,⁸⁰ made the conviction rather extreme. The conspiracy charged dealt with the distribution of a socialist pamphlet which, although blaming our entry into the war on Wall Street and J. P. Morgan and seeking recruits to socialism, did not counsel forcible resistance to the Government.⁸¹ The dissent cited the *Schenck* case as *contra* and attacked the finding of "false reports," insisting that a conviction of that offense not only required proof that the report was made with the intent to produce the result which Congress sought to prevent but also required that:

- (1) The report must be of something capable of being proved false in fact.
- (2) The report must be proved to be false.
- (3) The report must be known by the defendant to be false when made.⁸²

The dissent stated that the defendants had withheld distribution of the offending pamphlets until another prosecution involving the same pamphlets but in another jurisdiction had resulted in a directed acquittal on the ground that the pamphlets were not shown to be an attempt to persuade men to disobey the law.⁸³

78. *Id.* at 492, Brandeis continues, "The jury (which found these men guilty) . . . must have supposed it to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance."

79. 252 U. S. 239 (1920).

80. Brandeis, J.; joined by Holmes, J.

81. The pamphlet is reprinted in full in the dissent.

82. Brandeis, J., in 252 U. S. at 255 (1920). Brandeis said that the only false report made was the statement that it was an offense not to stand when the national anthem was being played. Admitting this to be false and unfair, Brandeis maintained it was not made with intent to interfere with the operation of the military forces.

83. The situation is summarized by Chafee, *Freedom of Speech in War Time* (1919) 32 HARV. L. REV. 932, at 965, "The courts have treated opinions as statements of facts and then condemned them as false because they differed from the President's speech or the resolution of Congress declaring war."

Gilbert v. Minnesota,⁸⁴ another 1920 opinion, sustained a conviction under a Minnesota statute making it a gross misdemeanor to deter enlistment in the military or naval forces of the United States or of Minnesota. The defendant had made a speech attacking American participation in the war, assailing the lack of democracy in the Federal Government and asserting that our war activity would have been ended in forty-eight hours had capital been conscripted as well as men. Justice Holmes concurred in the result, but Justice Brandeis found the statute infringing on the exclusive legislative domain of the Federal Government and abridging freedom of speech. Moreover, he termed the statute not a war measure but applicable in peacetime as well and forbidding the teaching of pacifism even though futile and done in time of peace without intent to obstruct. Without invoking the Fourteenth Amendment, Justice Brandeis inferred that the statute violated it, too.

In *Stilson v. United States*,⁸⁵ decided in November, 1919, the Court upheld convictions of defendants who were indicted on two conspiracy counts, (one under the Espionage Act and the other under the Selective Service Act), and whose convictions were under general verdicts. The second count was not pressed, and Justices Brandeis and Holmes dissented on the ground that one count not being sustained, the general verdict was unsupportable, but the majority upheld the convictions nevertheless.

Before concluding this summary of the Espionage Act decisions,⁸⁶ it is to be remembered that the Act was a war-time measure, dealing with offenses committed during the war, and the convictions thereunder but evidenced the emotional stress of the times and the extent of power which the people suffered the government to exercise during the emergency of war.

The stirring dissents of Justices Holmes and Brandeis in the later decisions might be taken to represent the beginnings of the return to normalcy, the reaction against war-time restriction, so symptomatic of post-war days. Although these dissents largely relied on the fact that there did not exist the "clear and present danger" set up as the test in the *Schenck* case, they are themselves hardly reconcilable with the

84. 254 U. S. 325 (1920).

85. 250 U. S. 583 (1919).

86. See also *Sugarman v. United States*, 249 U. S. 182 (1919); *United States v. Kraft*, 249 Fed. 919 (C. C. A. 3d, 1918) (public speaker convicted); *United States v. Hall*, 248 Fed. 150 (D. Mont. 1918) (for mere loose, slanderous talk; acquitted).

unanimous decision of the court in *Frohwerk v. United States*,⁸⁷ in which Justice Holmes wrote the opinion affirming a conspiracy conviction based on articles no more objectionable in content than those figuring in the other cases, and holding unnecessary any allegation that false reports were made or intended to be made, or that any specific means of carrying out the conspiracy was agreed upon.

Assuming the publications in the later cases to be equal in violence to those in the *Schenck* and *Frohwerk* cases, and this assumption seems warranted from the reports, no other circumstance appears to prevent the existence of that present danger relied upon in the earlier cases. The offenses prosecuted in the later opinions occurred during the same period of the war as those in the *Schenck* case, and it is as of the time of the commission of the offense that the existence of the danger justifying the enforcement of the statute is material from the standpoint of constitutional principles. The conclusion seems justified, however, that the absence of such a danger at the time of the post-war opinions was nevertheless a material factor in Justice Holmes' estimate of the war-time danger.⁸⁸

An example of the extreme lengths to which the Espionage Act was applied is found in the case of Rose Pastor Stokes, a feminine opponent of American entry into the War, and an advocate of "Internationalism." The Kansas City Star had carried an article which stated that Mrs. Stokes, although an opponent of war, was in support of the government and its war program. In requesting a correction, Mrs. Stokes sent the Star a signed letter in which she quoted its misleading statements and added: "I am *not* for the government. . . . No government which is *for* the profiteers can also be for the people, and I am *for* the people, while the government is for the profiteers." The publication of this letter led to her indictment and conviction in federal district court for attempting to cause insubordination, obstructing enlistment, and conveying false reports with intent to interfere with the military and naval forces. Sentenced to serve ten years in prison, Mrs. Stokes appealed, finally having her conviction set aside by the circuit court of appeals in 1920, the opinion of the court⁸⁹ upholding the indictment but finding grounds for reversal in the instructions given the jury. As seen by the appellate court.

87. 249 U. S. 204 (1919).

88. Compare this peacetime perspective with Dean Wigmore's free speech comments. *supra* note 76.

89. *Stokes v. United States*, 254 Fed. 138 (C. Ct. 10, 1920).

Mrs. Stokes' words had been written of the government as it was operating at the time of her letter, in March, 1918, and her use of the word "government" referred to the Wilson administration, but the trial court had permitted the jury to decide whether she had meant that regime or had referred to the American system of government ("the constitutional government of 1787"). Since the latter was obviously not for the profiteers and since she had not referred to it, the court held that her conviction of making false statements was unsupportable since possibly not based on a finding by the jury that the Wilson regime was *not* for the profiteers. The constitutionality of the Espionage Act was not even raised in the *Stokes* case, but comment as to its vitality in that instance is unnecessary.⁹⁰

Again, in *United States v. Nagler*,⁹¹ it was held that an indictment stated an offense under the Espionage Act where it alleged that the defendant had made "false statements with intent to interfere with the . . . military" by his remarks, made during a drive for Y. M. C. A. and Red Cross funds, that those organizations were private grafts and that only fifteen percent of the money collected by them went to the soldiers or was used for the purposes for which collected; that he would not contribute to them, and that the munitions makers were running the war. The court held that the organizations in question, although technically and private and not government enterprises, were authorized by the government to do their work, and the false statements made concerning them had an effect upon the effectiveness of the military forces. A law journal comment of December, 1918,⁹² in approving the decision, said:

"No doubt it will be a source of great satisfaction to most people that the circulation of such vicious lies as were repeated by [this] defendant . . . can be reached by criminal proceedings".

In *Granzow v. United States*,⁹³ the court agreed that, "while the Red Cross is not itself within the term 'military and naval forces' . . . yet to cripple the Red Cross as operated in this war is to interfere with such forces", so that statements which tended to destroy public confidence

90. Concerning the wisdom and effectiveness of the Act, see Chafee, *Freedom of Speech in War Time* (1919) 32 HARV. L. REV. 932, 972: "Men have been imprisoned, but their words have not ceased to spread. . . . The mere publication of Mrs. Stokes' statement in the *Kansas City Star* . . . was considered so dangerous . . . that she was sentenced to ten years in prison, and yet it was repeated by every important newspaper in the country during the trial."

91. 252 Fed. 217 (W. D. Wis. 1918).

92. (1918) 17 MICH. L. REV. 186.

93. 261 Fed. 172 (C. C. A. 8th, 1919).

in the Red Cross, thus interfering with voluntary contributions to that organization, would be within the Espionage Act. Such language is more surprising since in an opinion rendered in November, 1919, a year after the armistice, than similar language in the *Nagler* decision a year previously would have been, but it must be added that the *Granzow* opinion ended in a reversal of the conviction because of two errors:

First, the improper admission of a financial statement of the Red Cross, with itemized statements of receipts and expenditures.

Second, the striking out of testimony of witnesses to the defendant's remarks, such testimony being offered for the defendant apparently to show that his words had no successful effect upon his hearers.

The opinion concluded,

“The statute does not make it a crime to intend to obstruct, or to attempt to obstruct, but to intentionally obstruct. Where the utterance is calculated to result in obstruction, and is uttered under conditions which would naturally so result, there is a presumption that such a result followed, *but that presumption is rebuttable.*”

In *Schoborg v. United States*,⁹⁴ three prominent members of a German community at Covington, Kentucky, were convicted under the Espionage Act because of words “supporting the cause of the enemy.” The words were spoken by the defendants in the privacy of one's shoe shop and, although favorable to German war activity, did not partake of the nature of a plot or of attempts to persuade anyone else to that cause. The evidence was obtained by a dictaphone installed by a voluntary association of patriots. In affirming the convictions, the circuit court of appeals held that the effect of these private conversations, even in the absence of plots or plans to help Germany, “would be to aggravate, if not cause, an extremity and recklessness in the opposition to the war which would be an incitement to direct obstruction and injury. . . .”

Under this decision, private conversations between old friends, without any evidence of a plot or conspiracy, became criminal upon mention of forbidden subjects—almost a step toward primitive taboos. Actually, under the influence of the mass feeling of the time, being of German descent and bearing a “Germanic” name became in many instances almost a *prima facie* case of unlawful activity,⁹⁵ more than sufficient for abuse by local four hundred percenters.

94. 264 Fed. 1 (C. C. A. 6th, 1920), *cert. denied*, 253 U. S. 494 (1920).

95. Examples occurred in almost every locality. Even post offices were

To complete the picture of war-time restrictions on freedom of expression, reference must be made to the direct encroachments on freedom of the press during the World War. Theoretically, emergencies may change what is reasonable but do not change the validity of constitutional provisions. Arguments that war may suspend those privileges have been too often denied to require citation here. It is agreed that:

“Freedom of speech, being a constitutional guaranty, cannot be abridged in times of stress and strain any more than when the country is at peace.”⁹⁶

However, look briefly at the record:

On April 2, 1917, an “Espionage Bill” was introduced into the Senate, providing punishment for the publication of information in violation of presidential regulations. The bill expressly provided it was to be for the duration of the war only, and not to interfere with freedom of discussion or criticism of the Government. Nevertheless it was strongly protested as an unconstitutional abridgment of freedom of the press and as setting up government censorship. The bill was defeated but practically the same control was gained by the provisions of title twelve of the Espionage Act which made it a felony to send unmailable matter through the mails. Postmasters began to exercise a practical censorship function by holding suspected periodicals until their transmission in the mails was approved by the postal department.⁹⁷

When Postmaster Patten of New York withheld the August, 1917, issue of *Masses*, a radical publication, its publishers protested and eventually secured an injunction on the ground that the passages objected to did not counsel resistance to the law and were, therefore, not in violation of the Act.⁹⁸ A stay was granted by the circuit court of appeals,⁹⁹ and the publication of the September issue resulted in its exclusion and a ruling by the latter court¹⁰⁰ that such exclusion was proper, that the Act did not violate freedom of the press, that the exercise of discretion by a postmaster in excluding materials he considered unmailable under the Act would not be interfered with by the courts unless clearly wrong, and that it was sufficient ground for exclusion that the periodical had a reasonable ef-

changed from German to American names, for example: Corn, Oklahoma, formerly Korn.

96. Note, *The Espionage Cases* (1919) 32 HARV. L. REV. 417.

97. Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act* (1919) 17 MICH. L. REV. 621.

98. *Masses Pub. Co. v. Patten*, 244 Fed. 535 (S. D. N. Y. 1917).

99. *Masses Pub. Co. v. Patten*, 245 Fed. 102 (C. C. A. 2d, 1917).

100. *Masses Pub. Co. v. Patten*, 246 Fed. 24 (C. C. A. 2d, 1917).

fect the encouragement of resistance to a law although it did not directly counsel resistance. This decision overruled the trial court which, speaking through Justice Learned Hand, had held that:

"If one stops short of urging upon others that it is their duty or their interest to resist the law . . . [he] should not be held to have attempted to cause its violation. [Otherwise] every political agitation . . . apt to create a seditious temper is illegal. I am confident . . . Congress had no such revolutionary purpose in view."¹⁰¹

The opinion also praised the traditional freedom of the American press, and conceded that there was no distinction between what constituted unmailable matter in an indictment under the Act and in exclusion from the mails under the same Act, but pointed out that the Act did not forbid publication of such matter, or even its transmission in interstate commerce, but merely denied its carriage in the United States mail.

The Trading with the Enemy Act, October 6, 1917,¹⁰² made it unlawful to send unmailable matter in interstate commerce, thus extending the denial of circulation beyond the limits approved in the *Masses* case. However, conceding that Congress had the right to penalize the publications under the Espionage Act, it could not only exclude them from the mails, but also from interstate commerce, and, still more drastically, from circulation even within the confines of a state.

"There can be no right of circulation for that which there is no right to utter."¹⁰³

Presidential proclamations determined who and what constituted "enemies" within the Act, and each proclamation broadened its scope.¹⁰⁴ Moreover the Act is still in effect,¹⁰⁵ but there are no prosecutions under it because there do not exist any "enemies" at the present time. With the resumption of hostilities, this statute is ready for use, still capable of further extensions.

A resume of the foregoing war-time federal enactments reveals that the trend has not been simply that in each succeeding war the amount of restrictions has been increased, since the Mexican War did not have legislation comparable to the original Sedition Act, and the Spanish-American War did not engender legislation of this nature to the extent of

101. *Masses Pub. Co. v. Patten*, 244 Fed. 535, 540 (S. D. N. Y. 1917).

102. Act of Oct. 6, 1917, c. 106, 40 STAT. 411 (1919).

103. Carroll, *supra* note 97, at 639.

104. See digest of proclamations and decisions, 50 U. S. C. A. pp. 189-311 (1928).

105. *Commercial Trust Co. v. Miller*, 281 Fed. 804 (C. C. A. 3d, 1922).

the Civil War decades before, although the World War saw the extension of the scope of such acts far beyond the limits set during any of the preceding periods. Nor is it only the size of the war which determines such enactments. The World War was less important than the Civil War, both in proximity of the civilian population to the battlefields, and in the number of Americans seeing active service. It might be that people have but lately come to feel the big-business aspect of war which requires a unified and harmonious control similar to the control exercised over complex industrial enterprises, or that the modern growth of population and increase in effectiveness of communication and transportation facilities have heightened the interdependence of the people. Certainly closer communication has made possible the quicker and more thorough spread of information (or propaganda) which means more intensive development of widespread attitudes or emotional feelings, including the realization of danger, actual or imaginary, and the growth of patriotic fervor, hatred, or other attitudes that makes possible such enactments and their enforcement. So, in the excitement of the war period, many prosecutions were brought and convictions sustained for threats against the president, but in recent years that statute, though still upon the statute books, has become virtually a dead letter with respect to the types of "threats" so vigorously prosecuted then.

The foregoing statutes have been called "war-inspired", and it is true that it has generally required a period of actual conflict for such laws to develop. However, since it is the growth of beliefs (or prejudices) which cause such legislation, the actual source is rather the conditions giving rise to the fears, jealousies, or loyalties upon which such attitudes rest. Therefore, if conditions exist which arouse widespread fear of a threat to cherished institutions, the resulting popular opinion will enact the required legislation, just as though a conflict were in progress. So, convictions under war-time enactments may be had during times of peace when fears are widespread against communism, fascism, or other unpopular revolutionary ideas. Thus far, however excited the people of some of the states have become over the prevalence of "foreign" political doctrines, the anxiety has not become sufficiently strong the country over to result in much federal legislation on the point. In 1935 Congress saw a large number of such measures introduced, but none of them became law, although one passed the Senate and another was reported with amend-

ments in the House.¹⁰⁶ Subsequent attempts *thus far* have fared no better.

MISCELLANEOUS FEDERAL POLITICAL OFFENSES

The foregoing discussion has sought to avoid those purely military offenses¹⁰⁷ which are applicable only to members of the armed forces rather than to people generally. Similarly, little attention is given the draft statutes and other war-time enactments which operate only during war and concern only military objectives. Such statutes are governed more by rules of military expediency than by general constitutional principles. They may be invoked despite theoretical personal rights, provided that the dominant governing group considers them acceptable as instruments of policy. They support the hypothesis of pragmatic constitutionality in too over-simplified a way for illustrative use.

The history of compulsory military service in this country is adequately reviewed in the *Selective Draft Law Cases*,¹⁰⁸ in which it is pointed out that in the War of 1812 the compulsory draft was first suggested for this Government. but opposition developed preventing its enactment; that the Mexican War did not require one, but that in 1863 the Civil War Draft Act decreed that all males between twenty and forty-five were subject to the call to arms. The Spanish-American War did not necessitate conscription. The Selective Draft Act,¹⁰⁹ enacted during the World War, was an attempt by the use of appropriate words to get away from the idea of conscription, but still achieve the same effect. In upholding this Act as constitutional, and not infringing on personal rights, freedom of religion or state's rights, and not being involuntary servitude, the Court conveniently disregarded troublesome legal objections, and concluded:

"Finally, . . . we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his . . . noble duty of contributing to the defense . . . and honor of the nation, as the result of a war declared by [Congress] . . . can be said to be . . . involuntary servitude. . . ." ¹¹⁰

106. These bills are discussed in (1935) 35 COL. L. REV. 917-927.

107. 41 STAT. 800-806 (1921), 10 U. S. C. A. §§ 1526-1568 (1927), deal with military offenses, principally misconduct of officers and men. *Id.* § 1554: "Any person who in time of war shall be found lurking or acting as a spy in or about any fortification . . . of the United States, or elsewhere, shall be tried by a general court-martial . . . and shall, on conviction thereof, suffer death."

108. 245 U. S. 366 (1918) (eight cases).

109. May 18, 1917, c. 15, 40 STAT. 76 (1919).

110. 245 U. S. 366, 390 (1918).

The Court might have well added,

“The argument needs only to be stated to refute itself.”

The ease with which the Court in *The Draft Cases* evaded various Constitutional objections had a counterpart in the prosecutions of persons obstructing the Draft. Some of these have already been mentioned, but an additional instance is illuminating. In *United States v. Bergdoll*,¹¹¹ the defendants, including Mrs. Bergdoll, were convicted of conspiracy to aid soldiers in the military service in deserting. In fact, the “soldiers” had never enlisted, but had been drafted and without even reporting for duty had automatically become soldiers at the end of a prescribed number of days. In refusing a motion for a new trial, the court pointed this out, asserting that it was not conscription, but universal service, a machinery merely existing to select the best fitted from those volunteering. All the people had volunteered; all had placed themselves voluntarily at the disposal of their country, to whatever service called. In other words, a pacifist became a volunteer by legislative fiat. The opinion nowhere mentioned that Mrs. Bergdoll was the mother of the “soldiers” she helped desert. The Supreme Court never had to pass on the question, partly because of the leniency of the trial court. Mrs. Bergdoll was sentenced to serve a year and a day in the federal penitentiary and was fined \$5000, but it was provided that the prison sentence should be remitted if the fine were paid by the end of the court term. Mrs. Bergdoll brought error, but her writ was dismissed because she had paid the fine (at the last minute) and had, therefore, discharged her sentence, the questions involved becoming moot.¹¹²

While not a criminal proceeding, the libelling of enemy ships under the war-time prize statutes has provided some interesting pronouncements. This was particularly true during the Civil War period when the property of other United States citizens could be seized as prize. In *United States v. The Schooner Sally Mears*,¹¹³ a schooner owned by Virginians and manned by them sailed for Barbadoes before the war began, and was captured upon her return to Baltimore, her destination. The master, a part owner, and his crew all knew nothing of the War, and protested their loyalty to the Federal Government, promising to support it against their native states. The court held the ship lawful prize, being enemy property. Said the court:

111. 272 Fed. 498 (E. D. Pa. 1921).

112. *Bergdoll v. United States*, 279 Fed. 404 (C. C. A. 3d, 1922).

113. 6 D. C. 36 (1864).

"The laws of war may appear harsh . . . [but] were war to be carried on in any other way it would soon languish into effeminacy . . . [!] The citizen of Virginia whose vessel is found upon the high seas, is an enemy so far as the fate of his vessel is concerned, although he . . . denounce the wickedness [of Secession] and acknowledge a paramount allegiance to the [Federal] Government. He is an enemy by reason of his residence. . . ." ¹¹⁴

In *United States v. The Allegheny*,¹¹⁵ a ship belonging to a New Orleans resident was condemned, although the owner professed himself loyal. Nor did the fact that New Orleans was occupied by federal troops alter the case, since the remainder of the state of Louisiana was held by Confederates. The court concluded:

"Although by law we are bound to declare a sentence of forfeiture, the secretary of the treasury has power to relieve. And, as we are satisfied of the inflexible loyalty [of the owner], we recommend that it be remitted by the secretary upon payment of costs. Decree accordingly." ¹¹⁶

The difference in result in the two cases, if not explained on the basis of the difference in the personalities of the judges, might be accounted for by assuming that of owner of the *Sally Mears* had not proved his loyalty, the court avoiding the questions of proof and evidence by stating that his loyalty was immaterial. In the other case, the loyalty of the owner not being doubted, the stringency of the ruling was softened by recommending remission of the forfeiture.

The doctrine of these cases, that a citizen could become an enemy merely by reason of his residence elsewhere in the union, and that his property could be confiscated despite his continued loyalty, seems very extreme. It is not entirely inconceivable, however, that the future might see additional attempts to impose statutory penalties on persons, irrespec-

114. *Ibid.* Accord: *The Sally Magee*, 21 Fed. Cas. Nos. 12,259 and 12,260 (S. D. N. Y. 1863); *The Prize Cases*, 2 Black 635 (U. S. 1862). *The Peterhoff*, 19 Fed. Cas. No. 11,024 (S. D. N. Y. 1863), upheld the seizure as prize, of a cargo belonging to a naturalized citizen who, living in Texas when that state joined the Confederacy, promptly fled to Mexico where he established a business. Deeming him an enemy by virtue of his residence, the court held that all evidence as to his personal loyalty was immaterial. The Supreme Court reversed this ruling, saying that its own holdings that persons residing in rebel states at any time during the Civil War must be considered enemies, did not apply ". . . to persons faithful to the Union, who have escaped from those States, and have subsequently resided in the loyal States, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country." *The Peterhoff*, 5 Wall. 28, 60 (U. S. 1866).

115. 24 Fed. Cas. No. 14,429 (W. D. Pa. 1863).

116. *Ibid.*

tive of personal guilt, solely on the basis of the region of domicile or residence.¹¹⁷

OFFENSES AGAINST NEUTRALITY

From a very early period in the history of this nation federal statutes have defined several offenses against neutrality.¹¹⁸ These statutes have survived through the years with relatively little change,¹¹⁹ existing today in the form of several distinct offenses, all referring to acts done within the jurisdiction of the United States, but only one requiring that the defendant be a United States citizen. These offenses¹²⁰ include:

(a) Accepting a commission to serve a foreign country in war against any other country or people with whom the United States is at peace.¹²¹

(b) Enlisting, or hiring the enlisting, or going beyond the jurisdiction of the United States for the purpose of enlisting, in the service of any foreign power.¹²²

(c) Arming any vessel against a friendly power.

(d) Augmenting the armaments of any foreign armed vessel when this country is at peace with any power with which such country is at war.

(e) The organization of, or furnishing money for, any military expedition against any foreign power with whom the United States is at peace.

Prosecutions under these statutes have not been uncommon, having occurred in the late eighteenth century where French ships were outfitted in American ports to raid British shipping,¹²³ with subsequent prosecu-

117. Several southern states have statutes permitting recovery against the county by the representative of any lynched person, such statutes being a step short of a mulct of the citizens severally. Nazi Germany's multi-million dollar fine on Jews for the murder of a nazi underling is an extreme example of the latter.

118. See Act of April 20, 1818, c. 88, 3 STAT. 447 (1850). Even before this Act, such offenses existed and were prosecuted. See *Ex parte Needham*, 17 Fed. Cas. No. 10,080 (C. C. D. Pa. 1817); *United States v. Burr*, 25 Fed. Cas. No. 14,694a (C. C. D. Va. 1807) (expedition against Mexico).

119. A principal change in the statute deletes the words "high misdemeanor" and makes the offenses felonies.

120. REV. STAT. §§ 5281-5286 (1878); 18 U. S. C. §§ 21-25 (1934) (in the order named).

121. Applies only to citizens of the United States.

122. Amendment of May 7, 1917, c. 11, 40 STAT. 39, excepts citizens of foreign countries at war with a country with which the United States is at war, except where they get United States citizens to enlist in the service of a foreign country. In other words, this permitted citizens of the Allied countries to get their nationals in the United States to enlist in the armies of their homelands.

123. In *United States v. Guinet*, 2 Dall. 321 (U. S. 1795), the defendant

tions arising from the case of pre-Civil War filibustering expeditions to Cuba,¹²⁴ of contemplated invasions of Canada during the Civil War period,¹²⁵ of fitting out ships in New York for the use of Spain during that country's war with Cuba,¹²⁶ or where ships were fitted out for use by Mexico against Texas,¹²⁷ or where aid was extended to Mexican revolutionaries against the Carranza government which was not then officially recognized by the United States.¹²⁸ Filibustering expeditions to Cuba in 1895 again resulted in prosecutions and convictions, some of which were reversed on appeal.

In *Wiborg v. United States*,¹²⁹ the Supreme Court reversed several convictions on the theory that the various members of the expedition were not bound together for concerted action under definite leadership, but consisted only of various individuals with a common resentment against Spain and each willing to go to Cuba to fight. The conviction of the captain of the ship was alone affirmed, Justice Harlan dissenting. The development of a widespread conviction that Spain was oppressing the Cubans may have influenced the Court in adopting such a narrow construction of the statute in that case. This seems possible especially since such a construction did not prevent successful prosecutions in the second decade of the next century, against German sympathizers attempting to cripple England. It seems significant that the reported cases show several convictions and adverse rulings against German sympathizers who sought to

was convicted of violating the federal statute prohibiting the arming of a vessel to war against a friendly power. The defendant had armed a French ship in Philadelphia to prey upon British shipping, the United States at that time being at peace with both powers. In upholding the conviction the Supreme Court pointed out that this was the first prosecution under the statute. A treaty between the United States and France had expressly made it illegal for other powers to use American ports in outfitting ships to war against the French, so it was contended that by implication the French were to be permitted to use the ports in arming French ships. It was also contended that no action would lie against Americans enlisting to fight for France. The opinion concedes that this interpretation had received some support, the Boston grand jury having refused to indict persons who had so aided the French, but notes that the president had taken the contrary view and had this statute passed to apply to all belligerents. That popular opinion had favored aiding the French and, but for the folly of the French envoy Genet, might have achieved that end, see BASSETT, *THE FEDERALIST SYSTEM, 1789-1801* (1906), pp. 105-112.

124. *United States v. O'Sullivan*, 27 Fed. Cas. No. 15,975 (S. D. N. Y. 1851): Charge to Grand Jury—Neutrality Laws, 30 Fed. Cas. Nos. 18,265, 18,266 and 18,267.

125. Charge to Grand Jury—Neutrality Laws, 30 Fed. Cas. No. 18,264 (N. D. N. Y. 1866).

126. 13 Op. Att'y Gen. 177 (1869).

127. 3 Op. Att'y Gen. 739 (1841).

128. *De Orozco v. United States*, 237 Fed. 1008 (C. C. A. 5th, 1916).

129. 163 U. S. 632 (1896).

hurt England by bombing Canada's Welland Canal,¹³⁰ encouraging natives of India to return to that country and foster insurrection against the British,¹³¹ or seeking to disrupt the arms trade between this country and various Allied power,¹³² but reveal practically no prosecution of British sympathizers. Conceding that not all efforts to enforce the statutes resulted in prosecutions, and that not all prosecutions were reported, the reported cases still reveal a vast disparity between prosecutions of Allied sympathizers, as compared to prosecutions of German adherents. In the principal case reported of prosecutions for violations in the interest of the Allies, six of the eight defendants who were indicted for procuring British subjects to go to England for enlistment in His Majesty's forces, won a directed acquittal in the lower court,¹³³ and the circuit court of appeals reversed the convictions of the only two convicted.¹³⁴ The trial had been based on an agreed statement of facts, without other evidence, but the action of the judge in directing a verdict of guilty against the two defendants was held by the latter court to constitute a flagrant invasion of their constitutional right to jury trial. The convictions had occurred in 1915, the reversals in 1917, antedating by only three months the statute exempting from prosecution activities of this nature.¹³⁵

Is it unreasonable to conclude that sympathy for the Allied cause, and growing resentment against the Germans, played a part in the adverse decisions against pro-German offenders, and the dearth of prosecutions against Allied workers? The world famous Lafayette Escadrille consisted largely of Americans who necessarily violated the statute in joining that organization.¹³⁶

In more recent days, little was done to prosecute Americans who went

130. *United States v. Tauscher*, 233 Fed. 597 (S. D. N. Y. 1916) (demurrer to indictment, on ground that defendants had no organization but had in common only their hatred of England, was overruled).

131. *United States v. Chakraberty*, 244 Fed. 287 (S. D. N. Y. 1917); *Jacobsen v. United States*, 272 Fed. 399 (C. C. A. 7th, 1920) (the acts complained of took place in 1915; conviction was sustained in 1920), *cert. denied*, 256 U. S. 703 (1920).

132. *United States v. Bopp*, 237 Fed. 283 (N. D. Cal. 1916) (motion by the prosecution to consolidate indictment for restraint of trade, under Sherman Act, with an indictment charging an offense against neutrality).

133. *United States v. Blair-Murdock Co.*, 228 Fed. 77 (N. D. Cal. 1915).

134. *Blair v. United States*, 241 Fed. 217 (C. C. A. 9th, 1917), *cert. denied*, 244 U. S. 655 (1917) (the defendants vainly appealed from that portion of the decision ordering a new trial).

135. See note 122, *supra*. See also *Mead v. United States*, 257 Fed. 639 (C. C. A. 9th, 1919) (convicted for attempting to *dissuade* recruits of the Canadian army).

136. See articles in *The Nation*, vol. 105, pp. 33-34; *Scribners*, vol. 63, pp. 514-529, and other periodicals of the same period.

to fight and fly under the banner of Loyalist Spain. The Congressional inquiry which heard testimony from Bert Acosta on his return from that front was apparently not followed by prosecutions.¹³⁷

The development of the Chinese-Japanese War in the last few years have aroused principally passive interest except for the extra-legal informal embargo of munitions to Japan, but it is submitted that if sympathy for China and ill-feeling against Japan continue to grow, without any declaration of war, the activities of those who seek financial support for China, and the voluntary enlistment of persons within the jurisdiction of this country, will meet little determined prosecution. This will be even more true as regards pro-Allied workers, if the current European war continues and our sympathies increasingly outweigh our determination to remain strictly neutral.

Admittedly the statutes defining offenses against neutrality are desirable attempts to avoid embroiling this country in foreign conflicts, but in this class of offenses the realization of the dangers of the prohibited activities may not come until feeling has gone past the point where restraint is considered reasonable or desirable. Ironically enough, it is possible that the very offenders whose activities lead this country into the evils sought to be avoided might escape prosecution because the resulting change of opinion would make them heroes, or at least comrades in arms against the common enemy.

[To be concluded]

137. According to an Associated Press dispatch from Washington, D. C. dated September 2, 1939, as reported in *The Spokane Spokesman-Review*, September 3, 1939, p. 1, "Available records (in Washington, D. C.) show no convictions on charges of violating the statute, resulting from participation by American soldiers in the Spanish Civil War."