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Of Pragmatism and Principle: A Second Look at the Expulsion of Elizabeth Gurley Flynn from the ACLU's Board of Directors

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OF PRAGMATISM AND PRINCIPLE: A SECOND LOOK AT THE EXPULSION OF ELIZABETH GURLEY FLYNN FROM THE ACLU'S BOARD OF DIRECTORS

Burt Neuborne*

I. INTRODUCTION: A POINT OF PERSONAL PRIVILEGE

I am delighted to participate in this well-earned tribute to Nadine Strossen, whose dedicated service as president of the American Civil Liberties Union ("ACLU") in a troubled time has contributed greatly to the ACLU's success in defending American freedom. Nadine's tireless advocacy of liberty and her hardheaded effectiveness in articulating the case for civil liberties has earned her the respect and gratitude of millions of Americans. Nadine's success in leading the organization, both internally and in the public arena, warrants special thanks from those of us who feel a particular emotional and intellectual attraction to the ACLU.

Year 2005 celebrates my fortieth year of association with the ACLU. My first task for the ACLU was to write a New York Civil Liberties Union ("NYCLU") amicus brief in New York City traffic court challenging the failure to provide a due process hearing in connection with the seizure of a car for unpaid traffic tickets. I lost. The NYCLU assignment grew out of a chance encounter with Alan Levine, who transferred into my Army Reserve unit in 1965 and changed my life. Alan, who was an NYCLU staff counsel in those days, persuaded me to do more and more volunteer work for the NYCLU until, on May 1, 1967, much to the chagrin of my in-laws, I left my Wall Street tax practice to work full-time as an NYCLU staff counsel. Ira Glasser and I started work at NYCLU on the same day.

My five years at NYCLU, working closely with Aryeh Neier, Ira Glasser, Art Eisenberg, Paul Chevigny, Alan Levine, Bruce Ennis, Eve Carey, Ken Norwick, and Richard Emery, were among the happiest and most fulfilling of my life.[1] In 1972, I went upstairs[2] to serve as Assistant Legal Director of the national ACLU under Mel Wulf.

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1. The intellectual energy that characterized the NYCLU staff in those heady days was remarkable. Lunch was an adventure. I remember a lunch with Alan Levine sketching out on a napkin the "enclave" theory of constitutional law that identified closed settings like prisons, schools, police stations, the military, and mental hospitals into which the United States Constitution did not reach. We organized much of our program around efforts to import the Constitution into those enclaves.

2. In those years, the ACLU was lodged in rented quarters at 156 Fifth Avenue in Manhattan.

In our spare time, led by Marvin Karpatkin and Norman Dorsen, both of whom served in those years as ACLU general counsel, we litigated the first wave of flag desecration cases,[3] early efforts to reform the democratic process,[4] the legality of the war in Vietnam,[5] the Pentagon Papers,[6] and the Nixon Impeachment.[7] In 1974, with Norman Dorsen's invaluable help, I began my teaching career at New York University ("NYU") Law School. Seven years and a couple of law review articles later, when Bruce Ennis, perhaps the finest lawyer ever to work for the ACLU, retired as National Legal Director in 1981,[8] I took a leave of absence from NYU to serve as National Legal Director.[9] My service extended through the bulk of the Reagan years aided by an exceptionally able national legal staff headed by Chuck Sims and Jack Novik.[10] In 1986, I gratefully

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The NYCLU rented smaller quarters one floor down. Our neighbors were a button company that did no business and was almost certainly an FBI front, and an eccentric brother-sister team who were the last keepers of the Esperanto flame. Alger Hiss sold paper to us, and the Four Winds Bookstore, the city's leading radical bookstore, was on the ground floor. That space is now inhabited by an upscale fashion boutique. So it goes.

3. *Cahn v. Long Island Vietnam Moratorium Comm.*, 418 U.S. 906 (1974), *aff'd*, 437 F.2d 344 (2d Cir. 1970); *Spence v. Wash.*, 418 U.S. 405 (1974); *Radich v. N.Y.*, 401 U.S. 531 (1971), *aff'd by an equally divided Court, on habeas corpus, U.S. ex rel. Radich v. Crim. Ct. of N.Y.C.*, 385 F. Supp. 165 (S.D.N.Y. 1974); *Street v. N.Y.*, 394 U.S. 576 (1969).

4. *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970), *aff'd*, 400 U.S. 806 (1970).

5. The cases challenging the Vietnam War were divided into two categories: Chuck Morgan and Marvin Karpatkin defended in-service resisters like Howard Levy and Dale Noyd who were charged with disobeying unlawful orders, while Leon Friedman, Norman Dorsen, and I worked on affirmative federal court challenges to Congress's failure to have authorized the war. *See DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *see also Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (Douglas, J.); *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J.). Three memories stand out—Marvin Karpatkin's kindness to Dale Noyd's wife and children who were living in a dusty motel near the Clovis, New Mexico Air Force base, where Dale was detained while we successfully maneuvered to keep him out of Leavenworth Prison; Norman Dorsen's brilliant argument in *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), when he turned a quixotic theory into a serious legal argument and convinced me that an academic could play an effective role as a courtroom lawyer; and my oral argument in *Holtzman v. Schlesinger* before Justice Douglas in the Yakima post office.

6. *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971). Mel Wulf and I worked all night on the ACLU brief in the Pentagon Papers case and filed a printed amicus brief with the United States Supreme Court at dawn. When Solicitor General Erwin Griswold began his oral argument to the Court later that morning, he noted wryly that the ACLU was the only litigant with enough resources to produce a printed brief.

7. *U.S. v. Nixon*, 418 U.S. 683 (1974). When the Supreme Court rejected Nixon's theory of unilateral executive power, we breathed a sigh of relief thinking that the Nation had avoided a dangerous shoal. Little did we imagine that a generation later, the current Bush administration would launch a theory of executive unilateralism that would dwarf Nixon's shallow pretensions. The ACLU's proudest moments these days are in opposition to unilateral executive power.

8. Bruce's untimely death deprived the civil liberties bar of one of its most effective voices. Once he entered private practice, Bruce emerged as one of the most respected Supreme Court appellate advocates of his time.

9. NYU was generous in granting me four years of leave to serve as Legal Director. Most schools would have forced me to resign.

10. Strangely, my most intense memories of those years are centered in North Dakota. Alan Levine and I successfully represented Bruce Severy, a high school teacher in Drake, North Dakota, who was fired for assigning Kurt Vonnegut's *Welcome to the Monkey House*, (Dell Publg. 1968), to his eleventh grade English class. I recall Alan deposing the school's superintendent in the Drake High School gym with about half the town cheering and booing in the bleachers. I returned to North Dakota to litigate a successful nationwide class action aimed at protecting family farmers from unfair foreclosure proceedings by the Farmers' Home Loan Administration. *See Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983).

returned to my classroom at NYU.[11]

In the ensuing years, I have continued to work as a volunteer ACLU lawyer, proud of the achievements of the legal staff first under my immediate successor, john a. powell, and then for the past fifteen years under Steve Shapiro's brilliant guidance. My affection for, and dedication to, the ACLU has never diminished, even when I found myself surprisingly in opposition to the organization on campaign finance reform issues.[12] Thank you, Nadine, for the years of hard work that have played such an important role in making it possible for the ACLU family to flourish both internally and in the marketplace of ideas.

During Nadine's stewardship, the ACLU has continued to evolve into one of the premier institutions of American democracy—an evolution that began under the leadership of Norman Dorsen, Aryeh Neier, and Ira Glasser, and has continued under Nadine and Anthony Romero. Membership is approaching 400,000. Finances have stabilized. The combined full-time legal staff exceeds one hundred lawyers. That, of course, is only the tip of the legal iceberg, since one of the unparalleled strengths of the organization is the ability to mobilize literally thousands of volunteer lawyers in defense of the Bill of Rights. Under Anthony Romero's leadership, legislative sophistication and the ability to engage effectively in the public debate reached impressive new heights. Even internal organization, never an ACLU strength, has been professionalized.

Measured by any yardstick, the modern ACLU is a remarkable example of an American phenomenon first described by Alexis de Tocqueville—a voluntary private association organized to advance public purposes.[13] Indeed, I have often described the ACLU as the Nation's most important law enforcement agency—it is just that we enforce the law against the United States government.

Given the important role played by the ACLU in our national life, surprisingly little attention is paid to the organization as an object of scholarly study. Several general histories exist, including an excellent insider history by Sam Walker,[14] and Roger Baldwin, the ACLU's founder, has been the subject of thoughtful biographical studies.[15] But other scholars have not viewed the ACLU as an object of study. For example, the sociology of the ACLU remains to be charted. Who joins the ACLU? What issues get priority within the ACLU? Who gets to be its leaders? Where does the ACLU's money

11. As I recall, my 1986 departure memorandum noted that the ACLU Legal Director could rely on only three techniques to get things done: fear, greed, and sex. I observed that once someone got to know me, they were rarely frightened of me. I also observed that the tight ACLU budget left me almost no ability to vary compensation. I concluded by noting that I was leaving office a necessarily exhausted man.

12. In recent years, I have worked closely with former senior officials of the ACLU including Norman Dorsen, Aryeh Neier, and John Shattuck, jokingly referred to among ourselves as the "ACLU Dinosaurs," in seeking to limit the role of wealth in American politics. Our work has occasionally brought us into opposition to the ACLU's First Amendment position opposing limits on campaign contributions and campaign spending. *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (ruling on the Vermont's ceiling on campaign expenditures); *McConnell v. Fed. Election Commn.*, 540 U.S. 93 (2003) (ruling the McCain-Feingold regulation of soft money, corporate contributions, and phony issue advertisements).

13. *See* Alexis de Tocqueville, *Democracy in America* vol. I, ch. 12 (Francis Bowen ed., Henry Reeve trans., U. Press 1862).

14. Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (2d ed., S. Ill. U. Press 1999).

15. *E.g.* Robert C. Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* (Columbia U. Press 2000).

come from? What, if any, effect do donors have on the organization? How are policy decisions made at the various Byzantine levels of the national and state affiliates? Is there an ACLU theory of federalism allocating power between the national and the state affiliates? Is there an ACLU theory of separation of powers allocating authority between board and staff? Why do some affiliates thrive, while others languish? How well does the ACLU governance structure work? How effective is the ACLU in influencing public policy in the courts, the legislatures, and the public square?

Similarly, the political science role of the ACLU remains to be defined. Is the ACLU elitist and anti-democratic? How do we harmonize respect for democracy with a strong commitment to judicial review? Is democracy fundamentally plebiscitary? Can there be a democratic refusal to let the majority rule? How should we decide what rights are protected in the Constitution? Does the ACLU have a coherent philosophy of reading the constitutional text? How does the ACLU explain non-textual constitutional rights? Does the ACLU have a political theory for what it does?

In the years when the ACLU was a relatively powerless group meeting in a Manhattan phone booth, worrying about its internal care and feeding was not particularly important. In the modern era, though, where the ACLU has morphed into a quasi-official organization that is responsible for organizing the Constitution's most important line of defense, the governance of the ACLU is itself a locus of concern. Thus, in view of my lifelong association with the ACLU, and my affection and respect for Nadine as a builder of the organization, I propose to devote my symposium article in her honor, not to an analysis of an "external" legal issue, but to a second look at an "internal" issue that has haunted the ACLU for sixty-five years—the 1940 decision to expel Elizabeth Gurley Flynn, a board member since 1937 and a charter member since 1919, from the ACLU Board of Directors because she had become a member of the American Communist Party in 1937 and a member of its National Governing Committee in 1938.[16]

When I joined the ACLU legal staff in 1967, the decision to expel Flynn from the ACLU Board was the functional equivalent of organizational original sin—an almost inexplicable failure of principle that we pledged never to repeat.[17] I viewed the

16. *See* ACLU Bd. of Dirs., *Minutes* (Mar. 4, 1940). The definitive record of the expulsion proceedings is in *The Trial of Elizabeth Gurley Flynn by the American Civil Liberties Union* (Corliss Lamont ed., Monthly Rev. Press 1969) [hereinafter *The Trial of Elizabeth Gurley Flynn*]. The proceedings are also discussed in Helen C. Camp, *Iron in her Soul: Elizabeth Gurley Flynn and the American Left* 153–67 (Wash. St. U. Press 1995) and in Walker, *supra* n. 14, at ch. 7. Flynn's autobiography, *The Rebel Girl*, published posthumously in 1955 and in a revised edition in 1973, sheds no light on the expulsion proceedings, although it is a fascinating glimpse into a remarkable life. *See* Elizabeth Gurley Flynn, *The Rebel Girl: An Autobiography: My First Life (1906–1926)* (Intl. Publishers 1973) [hereinafter Flynn, *The Rebel Girl*]. For contemporaneous accounts by Flynn of the proceedings, see Elizabeth Gurley Flynn, *Why I Won't Resign from the A.C.L.U.* (Mar. 19, 1940), in *The Trial of Elizabeth Gurley Flynn*, *supra*, at 157 [hereinafter Flynn, *Why I Won't Resign from the A.C.L.U.*]; Elizabeth Gurley Flynn, *I Am Expelled from Civil Liberties!* (Mar. 17, 1940), in *The Trial of Elizabeth Gurley Flynn*, *supra*, at 153 [hereinafter Flynn, *I Am Expelled from Civil Liberties*]. Flynn's articles were the basis for the second and third charges against Flynn leading to her expulsion. *See also* "Flynn, Elizabeth Gurley," in *Notable American Women: The Modern Period: A Biographical Dictionary* vol. 4, 242–46 (Barbara Sicherman & Carol Hurd Green eds., Belknap Press 1980); *Words on Fire: The Life and Writings of Elizabeth Gurley Flynn* (Rosalyn Fraad Baxandall ed., Rutgers U. Press 1987).

17. Although it often gets lost in the emotional rhetoric, Flynn's expulsion was from the ACLU Board, not the organization.

expulsion as proof that you really could not trust anyone over thirty.

Much of the internal rhetoric that surrounded the ACLU's deeply principled, but controversial, decision to defend the Nazi Party's right to march in Skokie, Illinois was driven by a fear of repeating the 1940 betrayal of principle.[18] In 1976, at the urging of George Slaff, the ACLU Board formally apologized to Flynn—twelve years after her death—and revoked the policy under which she had been expelled.[19]

To my surprise, after reviewing the historical material, I argue that the case for excluding high-ranking leaders of the Communist Party from policy-making positions in the ACLU in 1940 was much stronger than is generally assumed today. It may well be that the painful decision in 1940 to bar the leadership of the American Communist Party from positions of influence in the ACLU is one of the reasons that we celebrate the success of the ACLU as a potent force for freedom, instead of dissecting a well-intentioned failure. More generally, the incident poses difficult questions about the relationship between pragmatism and principle in the care and feeding of one of the country's most important private institutions. For example, when should the ACLU, as a private organization, submit itself to the constraints that the Constitution imposes on the government? More importantly, when, if ever, in the ACLU's effort to preserve civil liberties principles, is it permissible for the ACLU to compromise with strict adherence to principle in its own conduct? The easy answers are "always" and "never." But easy answers may not provide completely reliable guidance when the ACLU's real-world ability to provide effective defense to constitutional values matters most.

I acknowledge immediately that powerful, perhaps even conclusive, arguments of principle and pragmatism exist against the 1940 decision.[20] Despite the powerful counterarguments, however, I believe that the ACLU's mission as a credible and effective defender of constitutional values would have been seriously compromised if the organization had allowed itself to be perceived as an arm of the Communist Party. Moreover, I am virtually certain that our mission would have been compromised if the Communist Party had actually exercised real influence over ACLU policy. I will contrast the happy fate of the ACLU with another organization, the American Committee for Protection of Foreign Born ("ACPFB"), at one time one of the Nation's pre-eminent immigrants' rights organizations.[21] Both organizations were founded by Roger Baldwin.

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18. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

19. In 1951, at the height of the McCarthy-era, the ACLU enshrined the bar on communists in its constitution. The policy was gradually relaxed, until its abrogation in 1976. *See* ACLU Bd. of Dirs., *Minutes* (Apr. 10–11, 1976; Apr. 20–21, 1974; June 8, 1964); *see also* Camp, *supra* n. 16, at 163; Edith Evans Asbury, *A.C.L.U. Reverses Ouster of Elizabeth Gurley Flynn*, 125 N.Y. Times K38 (June 22, 1976).

20. The most obvious cost of expelling Flynn solely because she was a leader of the Communist Party was to erode the ACLU's ability to raise a credible protest when the government moved against members of the Communist Party. *See* Camp, *supra* n. 16, at 165, 165 n. 65 (describing rejections of ACLU protests in 1940 against Senator Martin Dies's Committee's demands for lists of Communist Party members).

21. The ACPFB was founded in 1933. *See* John W. Sherman, *A Communist Front at Mid-Century: The American Committee for Protection of Foreign Born, 1933–1959*, at 1 (Praeger 2001). It flourished initially, spearheading the defense of Australian-born labor leader Harry Bridges against deportation, and successfully resisting the denaturalization of William Schneiderman, a leader of the California Communist Party. *See id.*; *see also Am. Comm. for Protect. of For. Born v. Subversive Activities Control Bd.*, 331 F.2d 53 (D.C. Cir. 1963) (upholding Subversive Activities Control Board ("SACB") finding that ACPFB was a "Communist-front organization"). Chief Judge Bazelon dissented, arguing that the SACB had not carried its

As of 1940, both were extremely successful. Both received earnest birthday greetings from President Roosevelt in 1940. In 1940, the ACLU banned members of the Communist Party from leadership positions. At the same time, the ACPFB welcomed Communist Party members into key positions of influence. By 1944, the ACPFB, formed to protect immigrants, was attacking the ACLU for challenging the World War II Japanese concentration camps in *Korematsu v. U.S.*[22] because the Stalinist line opposed any assistance to pro-Japanese elements.

Worse, in at least one crucial United States Supreme Court immigrants' rights case, *Harisiades v. Shaughnessy*,[23] the ACPFB appears to have subordinated its primary mission of protecting the rights of vulnerable immigrants to the strategy and tactics of the Communist Party, with disastrous results for the development of immigrants' rights in the United States.[24]

II. THE ACLU BOARD'S DECISION TO EXPEL ELIZABETH GURLEY FLYNN

Elizabeth Gurley Flynn's life is the stuff of legend.[25] Born in Concord, New Hampshire in 1890, her family moved to New York City in 1900.[26] 1906 was a watershed year. Flynn celebrated her sixteenth birthday, gave her first speech (at the Harlem Socialist Club), was arrested for the first time (along with her father) for speaking on Broadway without a permit, and was expelled from high school for political activities.[27] By her seventeenth birthday in 1907, she was a full-time organizer for the International Workers of the World ("IWW") touring Western mining camps as a charismatic platform speaker. She worked with Big Bill Haywood, visited Joe Hill in jail in 1914 (he wrote a song, "*Rebel Girl*," dedicated to Flynn[28]), and played prominent roles in strikes and IWW free speech movements[29] in Spokane, Missoula, Philadelphia, Lawrence, Paterson, Duluth, Chicago, and the Mesabi Range. Theodore Dreiser called her a young Joan of Arc.[30] Along with Roger Baldwin, she was a charter member of the

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burden of proving that ACPFB was "primarily" operated to aid the Communist Party. *Am. Comm. for Protect. of For. Born*, 331 F.2d at 61–64.

22. 321 U.S. 760 (1944).

23. 342 U.S. 580 (1952).

24. *See* Burt Neuborne, Harisiades v. Shaughnessy*: A Case Study in the Vulnerability of Resident Aliens*, in *Immigration Stories* ch. 4 (David A. Martin & Peter H. Schuck eds., Found. Press 2005).

25. The narrative facts of Flynn's life until 1926 are drawn from her autobiography, *The Rebel Girl. Supra* n. 16. Additional biographical material is drawn from Camp, *supra* n. 16. To find valuable on-line biographical material, see American Rhetoric, *Elizabeth Gurley Flynn: Statement at the Smith Act Trial*, http://www.americanrhetoric.com/speeches/elizabethgurleyflynn.htm (Apr. 24, 1952); Joe Hill, *More Labor Leaders: Elizabeth Gurley Flynn: "The Rebel Girl,"* http://kued.org/joehill/faces/flynn.html (accessed Mar. 3, 2006); Spartacus Educational, *Elizabeth Flynn*, http://www.spartacus.schoolnet.co.uk/USAflynn.htm (accessed Mar. 3, 2006).

26. Flynn, *The Rebel Girl*, *supra* n. 16, at 23, 30, 36.

27. *Id.* at 53–55, 61–64.

28. Joe Hill, *The Rebel Girl* (IWW 1915); *see* Flynn, *The Rebel Girl*, *supra* n. 16, at 9.

29. An IWW free speech movement consisted of repeated efforts to speak in a given town in violation of patently unconstitutional anti-speech rules. As each speaker was arrested, another would take his or her place, until the jails could no longer hold the detainees. The local response was occasionally violent. Concern over free speech violations generated by the IWW campaigns was one of the principal forces leading to the creation of the ACLU. The IWW free speech approach was eventually upheld by the Supreme Court in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

30. Flynn, *The Rebel Girl*, *supra* n. 16, at 64–66.

ACLU in 1919.[31] Her membership was not surprising since one of the ACLU's reasons for existence in the early days was the protection of IWW organizers, both from prosecution for opposing World War I and from arrest for organizing activities. Beginning in 1921, Flynn worked tirelessly to free Nicola Sacco and Bartolomeo Vanzetti.

Flynn's unconventional personal life rivaled her radical politics. Strikingly handsome, Flynn married Jack Jones, an IWW organizer on the Measbi Range, in 1908, but the marriage lasted only two years, long enough to produce a son, Fred.[32]

In 1912, Flynn met the great passion of her life, Carlo Tresca, a colorful Italian-American anarchist leader, bitter opponent of Mussolini, future-FBI informant, and womanizer.[33] Flynn and Tresca lived and worked together for thirteen years until 1925, when, at the behest of agents of Mussolini, Tresca was arrested by federal agents and eventually convicted of publishing an advertisement for birth control in his Italian-language newspaper.[34] Over the objection of his friend, Fiorello LaGuardia, Tresca was sentenced to a year and a day in federal prison.[35] United States President Calvin Coolidge commuted the sentence to four months after the New York newspaper, *The World*, obtained documents detailing the role of the Italian government in fomenting the prosecution.[36]

After Tresca's release in 1925, Flynn learned that Tresca had been carrying on affairs with both Flynn and her sister, and had fathered a child with her sister in 1923.[37] Tresca eventually abandoned both women and his son.[38] Tresca was murdered in New York in 1943 allegedly by Italian fascists.[39]

In 1926, clearly on the rebound, Flynn fell in love with Albert Weisbord, a young Harvard Law-trained Communist Party organizer leading the Passaic textile strike, the first mass strike in the United States under communist leadership.[40] The strike and the love affair were both disasters. Although the Communists used tactics developed by the IWW in the successful Lawrence strike, the revolutionary rhetoric of the strike leaders alienated many sympathizers and the strike collapsed.[41] Weisbord's ego could not deal with Flynn's cult status, and the affair ended when Flynn learned that Weisbord had failed to terminate a romantic liaison.[42] Flynn collapsed later that year on a speaking tour of the West.[43]

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31. *Id.* at 244–46.
32. *Id.* at 83–86, 112–15.
33. *Id.* at 147.
34. *Id.* at 152, 332–35; *see* Camp, *supra* n. 16, at 108.
35. Camp, *supra* n. 16, at 108.
36. *Id.* at 109.
37. *Id.* at 111–13.
38. *Id.* at 113.
39. *Id.* at 185–89.
40. Camp, *supra* n. 16, at 114, 117.
41. *Id.* at 119–20.
42. *Id.* at 117–19.
43. *Id.* at 125–26.

Medical diagnoses included an obscure heart ailment, an impacted wisdom tooth, and a strep infection, but the root cause of her collapse appeared to be emotional[44]—the combined weight of Tresca's betrayal, the end of her affair with Weisbord, the failure of the Passaic textile strike, and, finally, in 1927, the execution of Sacco and Vanzetti.[45] Flynn remained in Portland, Oregon for almost ten years, living quietly with Dr. Marie Equi, a leader of the Oregon women's movement who had treated Flynn after her collapse.[46]

In 1936, at the urging of her sister, Flynn returned to New York, where she was welcomed as a prodigal daughter by the left.[47] The ACLU unanimously elected her to its board of directors.[48] The Communist Party welcomed her as a new member in 1937, elected her to the Central Committee in 1938, and to the Political Bureau in 1941.[49] In 1942, Flynn ran for Congress at large from New York on the Communist Party ticket and received more that 50,000 votes.[50] In 1951, she led the mass movement in support of the defendants in the first wave of Smith Act prosecutions and was, herself, indicted in the second set of indictments.[51] She was convicted of membership in the Communist Party and served two years in federal prison.[52] In 1961, Flynn became chairperson of the American Communist Party.[53] She died in Moscow in 1964 and received a hero's funeral in Red Square.[54]

The initial demand for Flynn's ouster from the ACLU Board did not come from the troglodyte right.[55] Rather, it came from an icon of the left, Norman Thomas, who published a broadside in *The Call*, the organ of the Socialist Party, on December 16, 1939, four months after the Hitler-Stalin pact,[56] calling for a purge of Communist Party members in positions of influence on the ACLU Board, especially its long-time chairman, Dr. Harry Ward.[57] Thomas argued that the effectiveness of the ACLU, as a defender of liberty for all, was compromised by the presence of a communist bloc on the ACLU Board that applied a double standard to civil liberties violations by Communists.

Thomas's efforts were initially opposed by Roger Baldwin, who had issued a celebrated document entitled *Why We Defend Free Speech for Nazis, Fascists, and Communists*, in April 1939, in response to criticism of ACLU representation of

44. *Id.* at 126.
45. Camp, *supra* n. 16, at 126.
46. *Id.* at 125–30.
47. *Id.* at 137.
48. *Id.* at 143.
49. *Id.* at 145.
50. Camp, *supra* n. 16, at 171.
51. *Id.* at 221–53.
52. *Id.* at 250–51, 256–70.
53. *Id.* at 293.
54. *Id.* at 321.
55. The general narrative of Flynn's expulsion from the ACLU Board is drawn from *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16.
56. The 1939 Hitler-Stalin pact stunned the American left. The non-communist left viewed it as a betrayal. The Communist Party adopted the Stalinist line, defending the pact as a necessary response to Neville Chamberlain's appeasement of Hitler. Norman Thomas's article is set forth in *The Trial of Elizabeth Gurley Flynn*. Norman Thomas, *"Your World and Mine"* (Dec. 16, 1939), in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 147–53; *see* Camp, *supra* n. 16, at 154, 161–62.
57. Camp, *supra* n. 16, at 154.

totalitarian speakers.[58] Baldwin's paper remains one of the most trenchant explanations of the ACLU's role in preserving free speech for all. Indeed, in December 1939, Baldwin rejected a demand by John Dos Passos that the ACLU bar Communists, precipitating Dos Passos's resignation from the ACLU.[59]

But Baldwin's paper said nothing about placing Communist Party members in positions of influence in the ACLU. It focused solely on providing ACLU defense for Communists when their free speech rights were threatened by the government. That fragile distinction gained traction in the months after the Hitler-Stalin pact, when American Communist Party leaders appeared to slavishly follow the instructions of Moscow by supporting the pact as a necessary response to the failure of the West to confront Hitler at Munich, and by defending the Soviet invasion of Finland and the occupation of Poland.

Pressure from the right increased, as well. Congressman Martin Dies, chair of the newly-formed House Un-American Activities Committee, publicly called for prosecution of the ACLU.[60] In October 1939, two leading ACLU counsel, Arthur Garfield Hays and Morris Ernst, met with Dies in Washington and sought to persuade him that the ACLU was not a front for the Communist Party.[61] Dies was persuaded, and said so publicly, but the influence of Dies's threats on subsequent events cannot be discounted.[62]

On February 5, 1940, less than two months after Norman Thomas's broadside and four months after the meeting with Martin Dies, the ACLU Board adopted a resolution drafted by Baldwin stating, in part:

> The Board of Directors . . . of the American Civil Liberties Union . . . hold it inappropriate for any person to serve on the governing committees of the Union or on its staff, who is a member of any political organization which supports totalitarian dictatorship in any country, or who by his public declarations indicates his support of such a principle.[63]

The same day, Baldwin released a statement defending the purge resolution, arguing that the resolution was prompted by "the increasing tension which has resulted everywhere from the direction of the Communist international movement since the Soviet-Nazi pact."[64] The statement concluded:

> The abandonment of the struggle against Fascism and the other changes in Communist policy have raised sharp issues which were reflected in the attitudes of members of our Board of Directors.
>
> Nobody suggests that any person should be excluded from membership in the Union, nor that the Union should be any less zealous in the defense of Communists' rights.

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58. ACLU Bd. of Dirs., *Why We Defend Free Speech for Nazis, Fascists, and Communists: An Answer to Critics Who Would Deny Liberty to Those They Characterize as Enemies of Democracy* (Apr. 1939), in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 183–86 (providing a reprint of Baldwin's document); *see* Camp, *supra* n. 16, at 152–53.

59. *See* Camp, *supra* n. 16, at 158–59.

60. *Id.* at 153.

61. *Id.* at 154.

62. *See The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 21.

63. *Id.* (internal quotation marks omitted, second ellipses in original).

64. ACLU, *"A Statement to Members and Friends of the American Civil Liberties Union"* (Feb. 5, 1940), in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 187–88.

> The sole issue raised is one of propriety affecting the governing committees in terms of a consistent attitude in support of the principle of civil liberties.
>
> The present resolution merely states what has been always the unwritten policy of the Union in elections or appointments. Its sole effect will be to apply that policy to present membership.[65]

The most striking aspect of the February 5, 1940 explanation was the revelation that Baldwin had followed a policy of excluding Communist Party leaders from positions of influence in the ACLU since its founding twenty years earlier. According to Baldwin, apart from Elizabeth Gurley Flynn, whose ACLU membership antedated her Communist Party membership by eighteen years, only two Communist Party members had ever served on the ACLU Board—William Z. Foster, who was elected in 1922 when he was an American Federation of Labor organizer and before he joined the Communist Party, and who resigned when tension developed between civil liberties' positions and Communist Party policy, and Anna Rochester, whose Party membership was apparently unremarked when she was elected to the ACLU Board in the 1920s, and who played a minor role in the organization.[66] Thus, while application to Elizabeth Gurley Flynn of the general principle of excluding Communist Party members from positions of influence in the ACLU was particularly painful because her commitment to free speech pre-dated her membership in the Communist Party, the general principle of excluding supporters of totalitarian ideologies from the ACLU Board appears to have been an unspoken policy since the founding of the organization.

The immediate effect of the February 5, 1940 purge resolution was arguably much more important internally than the expulsion of Flynn. On March 2, 1940, in response to the resolution, the ACLU's long-time board chair, Dr. Harry Ward, resigned.[67] Professor Ward, who was not a Communist Party member, was closely associated with the American League for Peace and Democracy, a group that Norman Thomas charged was closely connected to the Communist Party. His resignation removed the principal target of Thomas's December 1939 broadside.

Ward was replaced by Reverend John Haynes Holmes, a longtime board member with ties to the labor movement, but no link to communism. Ironically, Holmes had recently been purged from Norman Thomas's Socialist Party because of ideological disagreements.[68] Most importantly, Ward's resignation led to Holmes's serving as presiding officer at the board hearing on May 7, 1940 that voted 10–9, with two abstentions, to expel Flynn because of her membership in the Communist Party.[69] Since the board's vote initially split 9–9, Holmes, as presiding officer, cast the tie-breaking vote in favor of expulsion.[70] A meeting with Ward as chairman would almost certainly

65. *Id.* at 188.

66. Camp, *supra* n. 16, at 159.

67. *See* Harry F. Ward, *Letter of Resignation* (Mar. 2, 1940), in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 211–13 (providing a reproduction of Dr. Ward's letter). Corliss Lamont dedicated *The Trial of Elizabeth Gurley Flynn* to Dr. Ward's memory. *Id.* at 2.

68. Camp, *supra* n. 16, at 161–62.

69. *Id.* at 152–62.

70. *Id.* at 162.

have come out the other way.

The February 5, 1940 purge resolution also triggered protests from state affiliates and from prominent civil libertarians who charged that the organization was betraying its principles.[71] Seventeen prominent liberals, including I.F. Stone, Theodore Dreiser, and James Wechsler, protested the policy.[72] Three members of the national committee, the parent body of the ACLU, including Alexander Meiklejohn, the ACLU's principal First Amendment theoretician, opposed the resolution. Meiklejohn argued that while individual disloyalty to civil liberties principles would disqualify an individual from board membership, it was a disastrous mistake to equate membership in, or support for, an organization with personal disloyalty to the principles of the Bill of Rights.[73]

Despite the opposition, when Flynn refused to resign, Baldwin moved forward with the plans to expel her from the board.[74] On March 4, 1940, one month after the purge resolution, Baldwin handpicked Dorothy Dunbar Bromley, a board member who wrote for the women's page of the Scripps-Howard newspapers, to move to terminate Flynn's board membership. The motion requested a board hearing to determine if Flynn was a member of the Communist Party and, if so, to remove her from the board. The board hearing was originally scheduled for late March, but was postponed because of the death of Flynn's only child, Fred, from cancer.[75] In the meantime, two additional seemingly petty charges were lodged against Flynn arising out of two newspaper articles she wrote defending herself and attacking the board for excluding Communist Party members.[76] In effect, the two new charges sought to expel her from the ACLU Board for impolite newspaper articles critical of the board.

When the board hearing finally convened on the evening of May 7, 1940, twenty-two members were present, including Flynn, with Reverend Holmes presiding.[77] Nine board members, including Norman Thomas and Thurgood Marshall, were absent.[78] Roger Baldwin was present in a non-voting capacity.

The board hearing lasted six grueling hours, ending in the early morning hours of May 8, 1940. Much of the time was spent in procedural wrangling over the content of the record, the order of voting on the three charges, and other procedural issues.[79] Given the astonishing range of talent in the room, the discussion was disappointingly lacking in substantive analysis of the rights and wrongs of the policy. It quickly became apparent that Arthur Garfield Hays, Osmond Fraenkel, and Abraham Isserman, three of the ACLU's most prominent lawyers, opposed the expulsion.[80] The case for expulsion, such

71. *Id.* at 157.

72. Their letter of protest is reproduced in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 21.

73. *See* Alexander Meiklejohn, Edward L. Parsons & George P. West, *Protest to the A.C.L.U. National Committee and Board of Directors by Three Members of the National Committee* (Mar. 21, 1940), in *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 214–17.

74. Camp, *supra* n. 16, at 157–58.

75. *Id.*

76. *Id.*; *see* Flynn, *Why I Won't Resign from the A.C.L.U.*, *supra* n. 16; Flynn, *I Am Expelled from Civil Liberties*, *supra* n. 16.

77. Camp, *supra* n. 16, at 160.

78. *Id.* at 160–62.

79. *Id.* at 160.

80. *Id.* at 154, 160–61.

as it was, was made by Morris Ernst. Holmes presided in a fair manner, although he declined to adjourn the proceedings at the request of Raymond Wise, who complained that it was midnight and the participants were exhausted.[81] When Holmes declined to adjourn, Wise went home.[82]

When the vote finally took place, it was incredibly close. The vote on the first charge—that of expelling Flynn for being a member of the Communist Party—was 9–9, with two abstentions and with Wise having gone home.[83] No effort was made to poll the nine absent board members or to permit Wise to cast an absentee ballot. Moreover, no effort was made to permit Flynn, who was waiting outside for the results, to vote. If, as I believe, Flynn was not improperly excluded from voting,[84] the vote should have been 10–9 *against* expulsion, with no need for the chair to break a tie.[85] Instead, with a tie vote of 9–9, Reverend Holmes, as chair, cast the deciding tenth vote for expulsion.[86]

Thus, the expulsion of Flynn on grounds of Communist Party membership—initially approved by only nine members of a thirty-two member board (including Flynn)—was effectuated by the tenth vote of the newly installed chair on the basis of an apparently false tie that was generated by the failure to allow Flynn to vote, the failure of Walter Frank to label his abstention a negative vote, the failure to allow Wise to cast a proxy, and the failure to poll the nine absent members of the board, a group that included Norman Thomas and Thurgood Marshall. It was not the ACLU's finest procedural hour. Arthur Garfield Hays is reported to have wept.[87]

The balloting on the two remaining charges based on Flynn's newspaper articles defending herself against expulsion was almost comical. One supporter of Flynn on the first ballot, John Finerty, announced that while he could not apply the rules retroactively to remove Flynn because she was a Communist,[88] her rude newspaper articles precluded her from serving further as a board member.[89] Given the tone of Norman Thomas's December 1939 broadside, which precipitated board censure but not removal, and the

81. *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 135.

82. *Id.*

83. Camp, *supra* n. 16, at 162; *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 176. The nine votes in favor of expulsion were cast by Dorothy Dunbar Bromley, Carl Carmer, Morris Ernst, Ben W. Huebsch, Florina Lasker, William L. Nunn, Elmer Rice, Roger W. Riis, and Whitney North Seymour. Nine votes against expulsion were cast by Roger W. Dunn, John F. Finerty, Osmond Fraenkel, Nathan Greene, Arthur Garfield Hays, Abraham J. Isserman, Dorothy Kenyon, Corliss Lamont, and Reverend William B. Spofford. The chair, Reverend John Haynes Holmes, broke the tie in favor of expulsion. Alfred M. Bingham and Walter Frank abstained. Raymond L. Wise, who was present until midnight, left the meeting and did not vote. *See The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 135, 176.

84. No apparent basis existed to disqualify Flynn from voting, especially since her accusers were not eligible to vote. For example, Dorothy Dunbar Bromley, who had moved to expel Communists from the ACLU Board on February 5, 1940, cast one of the original nine votes for Flynn's expulsion. It seems that the participants simply forgot about Flynn, to the point of failing to tell her the results of the voting before disbanding. *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 19–20, 179. Letters of apology for the rudeness were sent to Flynn the next day by Baldwin and Holmes. *Id.* at 20. There is no indication that Flynn made any attempt to vote.

85. Since Walter Frank explained his abstention as opposing action against Flynn, his failure to have voted against expulsion is inexplicable. *Id.* at 177. He would have been the eleventh negative vote if Flynn had voted, or the tenth even without her vote.

86. *Id.* at 176.

87. Camp, *supra* n. 16, at 154.

88. *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 176–77.

89. *See* Camp, *supra* n. 16, at 157–58.

relatively mild nature of Flynn's articles defending herself, Finerty's vote was a monument to hypocrisy.

Walter Frank's vote is even less understandable. Frank abstained on the first charge, stating that he did not think that action against Flynn based on her membership in the Communist Party was appropriate, but then voted to expel on charges two and three because he claimed that Flynn's relatively mild attacks on the board made it impossible to serve with her.[90] If, in fact, Communist Party membership was insufficient in Frank's view to warrant expulsion, his abstention in a 9–9 vote setting was genuinely incoherent. Finally, Alfred Bingham, who had abstained on the first count, also voted to expel on the petty second and third counts without explanation.[91]

Whatever the justification for the vote shifts, the tally on the second and third charges was 12–8, without the necessity of the chair voting.[92] Thus, Wise's absence could not have affected the outcome of the voting on the second and third charges, but the charges themselves bordered on the absurd.

Acting pursuant to the bylaws, the national office then polled the fifty-one members of the national committee of the ACLU, but not the nine absent board members. The national committee voted 27–13, with eleven abstentions, to uphold the board's action.[93] Flynn's formal expulsion was announced on August 12, 1940, to great applause in the mainstream press. In 1951, the exclusion policy was placed into the ACLU's Constitution. By 1966, a powerful movement existed within the ACLU to repeal the exclusionary policy. The membership-card language was revised in 1967 and in 1976, at the urging of George Slaff, the board formally apologized for the purge, repealed the February 5, 1940 resolution, and posthumously restored Flynn to membership in good standing.[94]

Ironically, the principal opponent of repealing Flynn's expulsion in 1976 was Osmond Fraenkel, Flynn's staunchest defender at the expulsion hearing.[95] Fraenkel, with characteristic wisdom, reminded the 1976 board that it was impossible for it to judge the actions of the 1940 board, which was acting against the backdrop of a different place and time.[96] Fraenkel argued that you cannot pass judgment on history.[97]

Putting aside the almost farcical procedural irregularities in the expulsion vote and Osmond Fraenkel's wise counsel in 1976, can we, as people who love the ACLU, pass judgment on this history?

90. *The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 153–63, 178 (setting forth Flynn's two articles). Judge for yourself whether an organization devoted to free speech would have expelled Flynn for writing the articles if she had not been a leader of the Communist Party.

91. *Id.* at 176–78; *see id.* at 176–77 (providing Finerty's and Frank's explanation of their votes).

92. *Id.* at 178.

93. Camp, *supra* n. 16, at 162.

94. *See id.* at 163.

95. *Id.*

96. *Id.*

97. *Id.*

III. How Would You Have Voted in 1940?

The negative judgment of history on Flynn's expulsion is both obvious and painful. By acting as though membership in the American Communist Party were a proxy for dangerousness, the 1940 board inadvertently created a blueprint for the persecution of thousands of innocent persons. Right-wing zealots, with no conception of civil liberties, used the blueprint to hunt for Communists in the government, schools and colleges, arts, libraries, and unions. The Smith Act prosecutions were themselves clones of the 1940 purge resolution, equating membership in the Communist Party with dangerousness, this time in a criminal context. The sad irony of the second victimization of Elizabeth Gurley Flynn was that the blueprint for her Smith Act conviction and resulting two years in prison had been drawn by her expulsion from the ACLU Board. When the ACLU sought to intervene to mitigate McCarthy-era excesses, it was often met with the taunt that if Communists are too dangerous for you, why are they not too dangerous for the rest of us?

Eventually, after enormous suffering, the Supreme Court developed a distinction between rank-and-file Communist Party members and the Party's leadership, equating dangerousness with leadership in the Communist Party, not mere membership in the Party.[98] Such a distinction is wholly lacking in the 1940 resolution, which goes beyond membership to sympathy; although, as applied to Flynn, who was a leader of the Party, it would not have made any difference. Such a distinction might, however, have made it easier for the ACLU to defend against McCarthyism, which equated sympathy for the Communist Party with disloyalty. This is why many of us still feel guilty about the Flynn expulsion. Hays was right to have wept.

The positives of history are harder to marshal. One obvious positive is the current pre-eminence of the ACLU as a force for civil liberties. The unknown counterfactual is whether we would be even stronger if we had adhered to principle in 1940. The known positive is the fate of the ACPFB, the sister organization founded by Roger Baldwin in 1933. The early years of the ACPFB were extraordinarily promising. President Roosevelt saluted the group at its Fourth Annual Congress in 1940. The ACPFB tenaciously defended William Schneiderman, leader of the California Communist Party, against the government's sustained effort to revoke his naturalized American citizenship on the ground that, as a dedicated Communist, Schneiderman could not have taken the oath of citizenship in good faith.[99] Wendell Willkie, Republican nominee for President in 1940, successfully argued the ACPFB's appeal in the Supreme Court.[100] At Willkie's urging, the *Schneiderman* Court held that there was no necessary inconsistency between belief in communism and loyalty to the American Constitution.[101] In the context of denaturalization, where the government bore a heavy burden of proof, leadership in the Communist Party could not be equated with disloyalty to the Constitution.[102]

98. *See U.S. v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Sec. of St.*, 378 U.S. 500 (1964); *Noto v. U.S.*, 367 U.S. 290 (1961); *Scales v. U.S.*, 367 U.S. 203 (1961); *Yates v. U.S.*, 354 U.S. 298 (1957).

99. *See Schneiderman v. U.S.*, 320 U.S. 118 (1943).

100. *See id.* at 119.

101. *Id.* at 142–46.

102. *Id.* at 158–59.

The ACPFB also successfully defended Harry Bridges, an Australian citizen, from deportation for his activities as a leader of the Longshoremen's Union.[103]

But, over time, the leadership of the ACPFB overlooked officials with a close association with the Communist Party. In 1959, the Attorney General listed the ACPFB as a Communist-front organization. The listing was upheld in *American Committee for Protection of Foreign Born v. Subversive Activities Control Board*,[104] with Judge Bazelon dissenting on the ground that the government had not proved that the "primary" purpose of the organization was to advance the interests of the Communist Party.[105] In 1982, the organization ceased to exist.[106]

Worse, as it fell under the sway of the Communist Party, the ACPFB became ineffective in protecting immigrants' rights, and unreliable in its tactical and strategic judgments. Witness, for example, the debacle of an immigrants' rights organization criticizing the ACLU for representing Fred Korematsu.[107] The disaster in *Harisiades v. Shaughnessy*[108] is another case on point.

Harisiades was the test case challenging the government's effort to deport thousands of resident aliens because of a past connection with communism.[109] In 1939, in *Kessler v. Strecker*,[110] the Supreme Court had narrowly construed the governing statute as requiring present membership in the Communist Party to warrant deportation.[111] The Communist Party responded to *Kessler* by terminating the formal membership of all non-citizens in an effort to shield them from deportation.[112] Termination of formal membership was, however, often merely a formality, with the ex-Party-member continuing to maintain close ties to the Party. Congress responded to what it deemed a ploy by overruling *Kessler* to permit deportation for Communist Party membership at any time in the past. Once Hitler invaded Russia, bringing the Soviet army into the war, no effort was made to deport Communists during the Second World War. With the emergence of the Cold War, however, the United States began a program of mass deportations of anyone with a history of Communist Party affiliation, no matter how long ago the affiliation ceased. By 1947, deportation proceedings were pending against more than one hundred persons for past membership in the Communist Party.

Who would you select for a test case of the government's retroactive deportation program—a dedicated Communist who was involuntarily removed from formal membership in 1939 as part of the Communist Party reaction to the *Kessler* case, but who had continued to operate openly as a party functionary; or someone who had voluntarily resigned from the Party in the 1920s or early 1930s and had had no contact with the Party since? Who could make the stronger *ex post facto* argument? Who would

103. *See Bridges v. Cal.*, 314 U.S. 252 (1941).
104. 331 F.2d 53 (D.C. Cir. 1964).
105. *Id.* at 61 (Bazelon, C.J., dissenting).
106. *See generally* Sherman, *supra* n. 21.
107. *See Korematsu v. U.S.*, 323 U.S. 214 (1944).
108. 342 U.S. 580.
109. *See id.* at 581.
110. 307 U.S. 22 (1939).
111. *Id.* at 28–29.
112. *See Harisiades*, 342 U.S. 580.

make a more sympathetic First Amendment client? Who would Wendell Willkie have chosen? Who would Osmond Fraenkel and Arthur Garfield Hays have chosen?

The ACPFB, staffed with competent lawyers, chose Peter Harisiades, and ignored Luigi Mascitti and Dora Coleman. Harisiades, who had emigrated from Greece in 1916 when he was thirteen years old, had joined the Communist Party in 1925, worked for the Party as a labor organizer, been arrested numerous times, and ceased being a member only when the Party terminated his membership in 1939 after the *Kessler* decision.[113] In the years after 1939, Harisiades professed continuing loyalty to the Party and edited the Greek-American Party newspaper.

Mascitti had joined the precursor of the American Communist Party in 1923, but had resigned by 1929 because he disagreed with its program.[114] Coleman had joined the Party in 1919 when she was eighteen years old, but had resigned within a year.[115] She had rejoined twice, in 1928 and 1936, because of the Party's stance on racial issues, but had definitively resigned by 1937.[116]

The decision to lead with Harisiades was a tactical disaster. Justice Jackson's hostile opinion in *Harisiades* reeks with suspicion and distrust. Not only did the opinion uphold the deportation of thousands, it established a hostile analytical framework for the approach to the rights of aliens that continues to haunt us today. In later cases, plaintiffs like Mascitti and Coleman eked out individual exemptions from deportation,[117] but the chance to invalidate the program, or at the least to cut back its parameters, was lost when the Communist Party took over tactical control of the litigation. Would you have risked an ACLU prone to similar tactical myopia?

When Elizabeth Gurley Flynn died in Moscow in 1964, discovered among her papers was a list of regrets, presumably compiled for use in her planned autobiography.[118] Three are particularly relevant to the painful 1940 decision to purge Communist Party leaders from the ACLU Board. First, she regretted the idolatry of the Soviet Union that was imposed on American communists ironically by William Z. Foster, who had once been an ACLU Board member before his rise to leadership of the American Communist Party.[119] Second, she regretted the overly close identification of the American Communist Party with the Communist International that robbed American communists of independence in developing a homegrown political program.[120] Finally, she regretted the unwillingness of the Party to admit its mistakes and to tolerate dissent within the ranks.[121]

She was right. That is why it was so important in 1940 to wall the Party's leadership off from the policy-making organs of the ACLU. That is why Osmond Fraenkel refused to pass judgment on history in 1976.

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113. *Id.* at 581–82.
114. *Id.* at 582.
115. *Id.* at 583.
116. *Id.*
117. *See Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).
118. Camp, *supra* n. 16, at 321, 323.
119. *Id.* at xxvi.
120. *Id.*
121. *Id.*

How would I have voted in 1940? I have made fun of the contortions of John Finerty and Walter Frank, but I would have had a contortion of my own. I would have supported Roger Baldwin's twenty-year-old policy of excluding communist leaders from the ACLU Board. But I would have made the policy into a strong presumption; not an absolute prohibition. I would have been prepared to make an exception for individuals, like Elizabeth Gurley Flynn, whose magnificent contributions to free speech had demonstrated an understanding of civil liberties. I take comfort from the fact that Arthur Garfield Hays advocated a similar approach.[122] But I would have vigorously opposed ceding power to the people who helped to bring us *Harisiades v. Shaughnessy*.

122. *See The Trial of Elizabeth Gurley Flynn*, *supra* n. 16, at 176.