

## **INDEX**

	<b>PAGE</b>
Statement .....	1
Assignments of Error.....	11
Points and Authorities.....	11
Point I.....	11
Point II.....	42
Argument .....	11
Point I:	
The indictment does not charge and the evidence does not prove a crime.....	11
Point II:	
The First Amendment to the Constitution makes the Espionage Law unconstitu- tional .....	42
Conclusion .....	51

## AUTHORITIES CITED.

	PAGE
Chappel v. United States, 160 U. S., 499, 509..	11
Cooley's Constitutional Limitations, pp. 527, 604 .....	40
Debs v. United States, 249 U. S., 211.....	42
Erskine Speeches.....	46
First Amendment, Constitution.....	42
Frohwerk v. United States, 249 U. S., 207, 208	42
Gaynor, William J., Mayor.....	32
Goldman v. United States, 245 U. S., 474, 476.	13
Gulf etc. v. Ellis, 165 U. S., 160.....	41
Jefferson, Thomas, Inaugural Address.....	48
Johnson, Senator, California.....	35
Journal of the Continental Congress.....	51
Masses Publishing Co. v. Patten, 244 Fed., 539	18
Masses Publishing Co. v. Patten, 246 Fed., 39.	19
Milligan Case, 71 U. S., 2.....	49
Milton's Areopagitica.....	48
Nation, The.....	33
Patterson v. Colorado, 205 U. S., 454, 462...	43
Ransome, Arthur.....	25
Reynolds v. United States, 98 U. S., 163.....	46
Robins, Raymond.....	27
Stevens, Alexander H.....	21
Sugarman v. United States, 249 U. S., 183...	12
Sumner, Charles.....	21
Tucker, St. George, Prof. (Blackstone).....	44
United States Attorney General Instructions.	17
United States v. Max Eastman.....	20
United States v. Ves Hall, 248 Fed., 150.....	18
Virginia Bill of Rights.....	47
Webster, Daniel.....	22
White, William Allen.....	38
Wilson, Woodrow, President.....	17, 34
Wilson, Woodrow, President, New Freedom..	49

IN THE

**Supreme Court of the United States**

OCTOBER TERM—1918.

No. 316.

JACOB ABRAMS *et al.*,  
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,  
Defendant-in-Error.

IN ERROR TO DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR PLAINTIFFS-IN-ERROR**

**Statement of Case.**

*(Citations to Transcript are to Printed Record.)*

On the 27th day of September, 1918, in the United States District Court for the Southern District of New York, the Grand Jury presented an indictment against the plaintiffs-in-error and one other, consisting of four counts (2-19). All were

under Section 4, Title 1, Act of June 15, 1917, for conspiracy to violate the provisions of Section 3, Title 1, of the Act of Congress approved June 15, 1917, as amended by the Act of Congress approved May 16th, 1918, known as the Espionage Act. Motions to dismiss the indictment and each count on the ground of unconstitutionality of the Espionage Law and that the indictment does not state a crime were denied (21).

The plaintiffs-in-error were convicted on all four counts (239-241). Motions for a new trial and to set aside the verdict as contrary to the evidence and contrary to law were denied (241). Judgment was rendered accordingly, and plaintiffs-in-error, Jacob Abrams, Hyman Lachowsky and Samuel Lipman, were sentenced to serve twenty years in the Penitentiary of the State of Maryland and \$1,000 fine on each count, to run concurrently; Hyman Rosansky was sentenced to three years and \$1,000 fine, to run concurrently, and Mollie Steimer was sentenced to fifteen years in Missouri State Penitentiary and \$5,000 fine under each count, to run concurrently.

The indictment contains four counts in conspiracy to violate the Espionage Act. The overt act is the giving out of two pamphlets, one in English and one in Yiddish, being Government's Exhibits 1 and 2 (245, 247), herewith set forth in full.

## Government's Exhibit 1.

### THE HYPOCRISY OF THE UNITED STATES AND HER ALLIES.

“Our” President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy.

Know, you people of America, that a frank enemy is always preferable to a concealed friend. When we say the people of America, we do not mean the few Kaisers of America, we mean the “People of America.” You people of America were deceived by the wonderful speeches of the masked President Wilson. His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

The President was afraid to announce to the American people the intervention in Russia. He is too much of a coward to come out openly and say: “We capitalistic nations cannot afford to have a proletarian republic in Russia.” Instead he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the Russian Revolution. Do you see how German militarism combined with allied capitalism to crush the Russian revolution?

This is not new. The tyrants of the world fight each other until they see a common enemy—WORKING CLASS—ENLIGHTENMENT as soon as they find a common enemy, they combine to crush it.

In 1815 monarchic nations combined under the name of the “Holy Alliance” to crush the French Revolution. Now militarism and capitalism combined, though not openly, to crush the Russian revolution.

What have you to say about it?

Will you allow the Russian Revolution to be crushed? You: Yes, we mean YOU the people of America!

THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP.

The Russian Revolution cries: "WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!"

Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.

It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight THE WORKERS' REPUBLIC OF RUSSIA.

AWAKE! AWAKE, YOU WORKERS OF THE WORLD!  
REVOLUTIONISTS

---

P. S. It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.

**Government's Exhibit 2.**

*(Leaflet in Yiddish; Translation as Follows:)*

**WORKERS—WAKE UP.**

The preparatory work for Russia's emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!

America, together with the Allies, will march to Russia, not, "God Forbid," to interfere with the Russian affairs, but to help the Czecko-Slovaks in their struggle against the Bolsheviki.

Oh, ugly hypocrites; this time they shall not succeed in fooling the Russian emigrants and the friends of Russia in America. Too visible is their audacious move.

Workers, Russian emigrants, you who had the least belief in the honesty of our government, must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the Workers Soviets? Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?

America and her Allies have betrayed (the workers). Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of revolution.

Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

Three hundred years had the Romanoff dynasty taught us how to fight. Let all rulers remember this, from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.

Woe unto those who will be in the way of progress. Let solidarity live!

#### THE REBELS.

Jacob Abrams, the oldest of the four defendants, is twenty-nine years of age, born in Russia, and not a citizen of the United States (162-163). Samuel Lipman and Hyman Lachowsky are also Russian citizens (198-222). Mollie Steimer, born in Russia 1897 (twenty-one years of age at time of indictment) (213).

The Government offered no proof, other than Government's Exhibits 1, 2, 11, 13, as to the intent of the defendants in giving out Exhibits 1 and 2, and offered no evidence in rebuttal to the defendants' testimony that their sole purpose was to object to American intervention in Russia.

I will quote from the testimony of the defendants as to defendants' intent in the distribution of the pamphlet :

Jacob Abrams testified :

“Q. Tell your intention in giving out these pamphlets and what led you to give them out? A. My intention to give out those pamphlets was for the sole purpose to speak to those that love Russia and the Russians and would sympathize with Russia, and to protest against the intervention in Russia. That was my purpose” (168).

\* \* \* \* \*

“Q. Are you in favor of the United States crushing German militarism? A. I should say every Russian Revolutionist is in favor of that.

Q. Are you in favor of Russia fighting German militarism? A. We have pledged ourselves to go and fight it, but didn't get a chance.

Q. Would you be willing to go to Russia to fight German militarism? A. At any time.

Q. Wouldn't you help send propaganda from Russia into Germany, to start a revolution there? A. We have done that in '97, where I was sent to Siberia for it, just on the border of Austria, and I was sent to Siberia for it” (180).

\* \* \* \* \*

“Q. You are opposed to German militarism in every form? A. Absolutely.

Q. You would overthrow it and help overthrow it if you could? A. First chance” (182-183).

\* \* \* \* \*

“Q. And you were opposed and denounced German militarism? A. Yes. Leading anarchists right here in New York are fighting German militarism. It is a question of fighting German militarism” (184).

\* \* \* \* \*

Under cross-examination by Mr. Miller:

“Q. Did you, in connection with other Russians, offer the President of the United States, to go to Russia and fight on the side of the revolution? A. Certainly. We sent a telegram and we received an answer by the—the Russian Soviets of America sent a telegram to President Wilson, asking permission that we organize recruiting stations. We never received any reply.

Q. You were willing to join that kind of a regiment? A. Any moment” (197).

“Q. After the Russian Czar was overthrown? A. After the Russian Czar was overthrown.

Q. You would not fight in the Russian army against German militarism, for what reason? A. Because the Russian militarism and the German militarism was the same object, and I had no reason to shed blood for it” (198).

Samuel Lipman in answer to:

“Q. What was your intent? A. My only intent to write this leaflet was to raise a protest against intervention in Russia by capitalistic nations.

Q. What were the facts which made you have the intent and made you write this pamphlet? A. Since I came to my understanding I have always thought that the government by the people, for the people and from the people, the workers, were the only ones. They produce all the necessities of life. They are the only ones that build the prisons where we are put and build the court rooms where we are tried, and I, therefore, thought the workers' government should be established. We should keep in power. I was overjoyed with the idea for the first time in the history of the world that we have a government by the people, for the people

and from the people. When the Bolsheviks came into power President Wilson delivered speeches in various parts of the country favoring the Russian Government—that is, the Soviet Government. In his speech to Congress he said, ‘I stretch out my hand to the Bolsheviks.’ On another occasion he said, I think it was July 4th, he said, ‘We will not conclude peace without Russia.’ On another occasion——

Q. Just leave the other occasions out of all those speeches; and then what was the next thing that happened, that made you write the pamphlet? A. Then, after all these speeches, President Wilson sent a telegram on the 12th of March to the Soviet Government where he appreciated the work of the government, and he said that the heart of the people of America was with the Soviet Government, and then in a few weeks later he sent, without announcing to the people, a military expedition to crush the Russian Revolution. That was my intent to write this leaflet.

Q. Those are the facts that made you have the intent and made you issue the pamphlet? A. Yes, sir” (200, 201).

*“By Mr. Weinberger.*

Q. Didn’t you know, Mr. Lipman, that the Congress of the United States has never declared war against Russia? A. I did.

Q. Did you know from your study of history, that only Congress has the right to declare war? A. Yes, sir.

Q. You know that the President of the United States, even though he is Commander-in-Chief of the Army and Navy, can never use it against another nation until Congress declares war? A. Yes, sir; I do.

Q. Did you have any intention in writing any part of this pamphlet or the other ex-

hibits in the case, in helping Germany in its war against the United States? A. I did not. I am always against German militarism and the militarism of the world" (202, 203).

Mollie Steimer in answer to:

"Q. Now, what was your intention in giving these leaflets out? A. To call the attention of the workers to the fact that international capitalism seeks to crush the Russians Revolution; that the Allies were acting just as tyrannic, just as cruel as the Germans, by invading a neutral country and assailing those workers who were defending the revolutionary freedom. I called on the workers to raise their voice of protest against such a despotic action.

Q. You did not have any intention to uphold German militarism against the United States? A. Not at all.

Q. You are not in favor of German militarism? A. I despise militarism throughout the entire world, for it is an unnecessary evil."

Hyman Lachowsky in answer to:

"Q. You are opposed to intervention in Russia? A. Yes.

Q. And the purpose of giving out the pamphlets was only to protest on that score? A. Yes.

Q. You are not in favor of German militarism? A. Certainly not.

Q. Or Germany victory? A. No.

Q. You have no intention to hinder the United States in its war with Germany? A. No" (223).

It is admitted that the defendants agreed to print and distribute the pamphlets in question, and if it is a violation of law, where the intent was solely

to create public opinion against Russian intervention, they are guilty as charged.

### **Assignments of Error.**

These will be found *in extenso* on pages 258 to 261 of the transcript of record.

### **POINTS.**

The argument on the errors above set forth will be made under headings as follows:

I. The indictment does not charge and the evidence does not prove a crime.

II. The acts charged against the defendants are protected under the First Amendment to the Constitution.

#### **I.**

**The indictment does not charge and the evidence does not prove a crime.**

In *Chappel v. United States*, 160 U. S., 499, 509, the Court said:

“This court \* \* \* has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits.”

See also :

*Sugarman v. United States*, 249 U. S., at  
p. 183.

*Goldman v. U. S.*, 245 U. S., 474, 476.

FIRST COUNT OF THE INDICTMENT.

It charges defendants with conspiring to violate provisions of Section 3 of Title I of the Act of Congress approved June 5th, 1917, as amended by Act of Congress approved May 16th, 1918, commonly known as the Espionage Act, in that "defendants unlawfully and wilfully did conspire together and agree among themselves and with divers other persons," etc., "unlawfully and wilfully to utter, print, write and publish disloyal, scurrilous and abusive language about the form of government of the United States," etc.

There is not a single word in either Government's Exhibit 1 or 2 against the form of government of the United States. Not a single word can be pointed at to show that it was the desire of the defendants that the form of our government should be changed. Nothing disloyal, nothing scurrilous and nothing abusive about the form of government of the United States, and nothing to show that defendants desired or wished others to desire any other form of government.

The insufficiency of this count and of the evidence under this count is so plain it requires almost no argument. Calling the President or the action of those in control of the Government hypocritical and pointing out in what respect they can so be called is certainly not advocating a change in the form. It is what is done all year round by the opposing political parties, and especially done at election time, or at any time that the opposing

political party thinks that those in control of the Government have done what they believe to be unpopular or that they believe they can help make unpopular. The pamphlets in this case and the action of political parties are only another way of trying to convince the public that we need a change of administration or a change of public policy and is in no way connected with the question of the form of government, no more than the showing of actual corruption of public officials would or could be considered as advocating a change of the form of government, or disloyalty to the form, or scurrilous or abusive language about the form of government of the United States.

The right to criticize is the foundation of our Government

#### SECOND COUNT.

This count charges that defendants "unlawfully and wilfully did conspire together," etc., "unlawfully and wilfully to utter, print, write and publish language intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute," etc.

The argument under the first count applies to this. If one political party, a newspaper, magazine or these defendants point out wherein, in their opinion, the action of the officials of the Government is hypocritical or even corrupt, can it possibly be said that the form of government is brought into contempt, scorn, contumely or disrepute? If that could be claimed, then if the President of the United States or his cabinet or some of the high government officials or generals should be actually guilty of treason or corruption, the man or woman who would tell the truth about it or write about it

would also be guilty under this second count of the indictment. To state the proposition is to dispose of this count.

### THIRD COUNT.

This count charges defendants with violating the Espionage Act in that defendants "unlawfully and wilfully did conspire together," etc., "unlawfully and wilfully, to utter, print, write and publish language intended to incite, provoke and encourage resistance to the United States in said war with the Imperial German Government," etc., and proceeds to charge that it was to be effectuated by the distribution of the two pamphlets, Exhibits 1 and 2.

The reading of the pamphlets clearly proves without argument that it dealt only with the question of Russian intervention; that it was not pro-German. The pamphlet (Exhibit 1) specifically states:

"P. S. It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants" (246).

The appeal is made to the people of America. It speaks against the crushing of the Russian Revolution. It compares that crushing with the "Holy Alliance" of 1815, formed to crush the French Revolution. And it ends with:

"It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight the workers' Republic of Russia" (246).

If the same appeal is made to the workers of Germany and other countries as well as to the workers of the United States, how can it be said to be on the side of Germany? How can it be said to incite, provoke and encourage resistance to the United States in said war with the Imperial German Government, when it does not take the side of the Imperial German Government, and does not discuss the war with the Imperial German Government? In Government's Exhibit 2 (247), in order to arouse the workers to thought and action, the pamphlets call their attention to the fact, and it was and is a fact, that "you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom." This Espionage Law was intended to prevent resistance to the United States in the war with Germany or to encourage, incite or provoke such resistance. That was the only purpose, while these pamphlets dealing only with Russia asks:

"Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleeing blood from the hearts of the best sons of Russia?" (247)

\* \* \* \* \*

"Workers, our reply to the barbaric intervention has to be a general strike" (248).

Arguing against intervention in Russia, trying to arouse public opinion, even to the calling of a general strike for that purpose, is certainly not to aid Germany, not to incite, provoke and encourage resistance to the United States in the war on Germany. These young people, citizens of Russia, were trying to stop intervention and invasion of Russia,

and the intent cannot be stretched to include a consideration of the war with Germany or a desire to interfere with said war on behalf of Germany, or to intend to incite, provoke and encourage resistance to the United States in said war with Germany.

#### FOURTH COUNT.

This count charges defendants with conspiracy "when the United States was at war with the Imperial German Government as aforesaid, unlawfully and wilfully by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnances and ammunition, necessary and essential to the prosecution of the war in which the United States now is, and from April 6th, 1917, to the date of presentation and filing of this indictment, continuously has been engaged, to wit, said war with the Imperial German Government, *with intent by such curtailment to cripple and hinder the United States in the prosecution of said war;*" and again the method of carrying out that intent was giving out Government's Exhibits 1 and 2.

No other evidence but that of the distribution of the pamphlets by the defendants was submitted by the Government as to the defendants' intent. If language means anything, no intent to cripple and hinder the United States in the prosecution of said war with Germany can possibly be found in said pamphlets. There can be found in none of the pamphlets any expressions of sympathy for Germany or its aims. In fact, the whole trend of the evidence is that these Russian Anarchists (Lipman, however, is a Socialist) were opposed to all government, and so certainly opposed to the autocratic

militaristic government of Germany. The uncontradicted testimony of all the defendants, Russian citizens, was that they were in favor of Russia and opposed to intervention, and that that was their sole purpose.

Can an individual in America, with honest for the public good motives, tell what he believes is the real truth on public questions? Can he tell the truth as he sees it, with the desire to form public opinion according to his own? Was President Wilson correct when he said:

“If there is one thing that we love more deeply than another in the United States, it is that every man should have the privilege, unmolested and uncriticized, to utter the real convictions of his mind. I believe that the weakness of the American character is that there are so few growlers and kickers among us. \* \* \* Difference of opinion is a sort of mandate of conscience.”

The United States Attorney-General issued the following instructions to United States attorneys as to the enforcement of Section 3 of the Espionage Act as amended:

“The prompt and aggressive enforcement of this Act is of the highest importance in suppressing disloyal utterances and preventing breaches of peace. It is also of great importance that this statute be administered with discretion. It should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of government policies; \* \* \*”

That is defendants' contention under all the four counts, that these pamphlets were an attempt at

honest, legitimate criticism of the administration, and a discussion of government policies. It is well known that the Espionage Law was drawn by the office of the Attorney-General, and, therefore, the purpose of the law, as construed by the Attorney-General's instructions, is almost binding upon this Court as to its meaning.

In *United States v. Ves Hall* (District of Montana), 248 Fed., 150, Judge Bourquin said:

"The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts wilfully put forward as true and broadly, with the specific intent to interfere with army or navy operations. The more or less public impression that for any slanderous or disloyal remark the utterer can be prosecuted by the United States is a mistake."

Judge Learned Hand, in the *Masses Publishing Co. v. Patten*, 244 Fed., at page 539, said:

"They are all within the range of opinion and criticism; they are all certainly believed to be true by the utterer. As such they fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question. To modify this provision, so clearly intended to prevent the spreading of false rumors which may embarrass the

military, into the prohibition of any kind of propaganda, honest or vicious, is to disregard the meaning of the language, established by legal construction and common use, and to raise it into a means of suppressing intemperate and inflammatory public discussion, which was surely not its purpose."

Nothing could better describe the pamphlets in this case. Intemperate they were and inflammatory they were, but it was a public discussion of a public policy in reference to a country with which we were not at war and are not at war, and against which country the use of troops has never been legal.

Judge Ward, in the higher court, in the *Masses Publishing Co. v. Patten*, 246 Fed. Rep., at page 39, said :

"I think it important, however, to say that not every writing, the indirect effect of which is to discourage recruiting or enlistment, is within the statute. *In addition to the natural effect of the language on the reader, the intention to discourage is essential.* Arguments in favor of immediate peace, or in favor of repealing the Conscription Act, do this indirectly. It is, notwithstanding, the constitutional right of every citizen to express such opinions, both orally and in writing, and Congress cannot be presumed to have intended by the Espionage Act to authorize the Postmaster-General to exclude such articles, written honestly and without the intention of advising resistance to the law."

Judge Rogers, in the same case, said (p. 31):

"The purpose of the act (Espionage Act) as we understand it was not to repress legitimate criticism of Congress or of the officers of

the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted.”

In the case of *United States v. Max Eastman* (Southern District of New York, May, 1918), Judge Augustus N. Hand, in his charge to the jury, said:

“Every citizen has a right, without intent to obstruct the recruiting or enlistment service, to think, feel, and express disapproval or abhorrence of any law or policy or proposed law or policy, including the Declaration of War, the Conscription Act, and the so-called sedition clauses of the Espionage Act; belief that the war is not or was not a war for democracy; belief that our participation in it was forced or induced by powers with selfish interests to be served thereby \* \* \* belief that the Allies’ war aims were or are selfish and undemocratic; \* \* \*

It is the constitutional right of the citizen to express such opinions, even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment. \* \* \*

If it was the conscious purpose of the defendants to state truth as they saw it; to do this clearly and persuasively in order to lead others to see things in the same way, with the object to bring about modification, reconstruction, or reshaping of national policy in accordance with what they believed right and true, and obstruction of the recruiting and enlistment service was not their object, the jury cannot find them guilty.”

The charge against defendant, however, was the advocacy of curtailment of ordnance and ammuni-

tion in the war with Germany, while defendants' purpose was to reshape the national policy in reference to Russia, and if Judge Hand was correct, no violation of the Espionage Act occurred.

We are a government of and by discussion. The greatest right in the world is the right to a wrong opinion. Suppose the defendants were wrong in their honest opinion? Is that a crime? But suppose their opinion and statement was right, and history should so state? Their imprisonment would be a crime. These defendants merely brought to the bar of public opinion intervention in Russia by President Wilson.

If they were wrong, a counter-statement of the truth alone would be a sufficient answer.

The denunciation of governmental policies even in war times is not new.

Alexander H. Stevens, of Georgia, in a speech on February 15, 1847, while the Mexican War was at its height, said :

“The President has more than once told us that the war is not waged for conquest. Is there a friend of his on this floor who supposes that anybody familiar with the unparalleled duplicity of his administration will do the President the injustice to believe him. Every act of his toward Mexico before the war began and since the war began displays his policy too clearly to be mistaken.”  
(See *McMaster's History of the United States*, p. 477; also *Cong. Globe*, 29th Cong., 2d sess., p. 401.)

Charles Sumner, in a speech at Tremont Temple, Boston, November 5, 1846, said :

“The Mexican War is an enormity born of slavery. \* \* \* Base in object, atrocious in

beginning, immoral in all its influences, vainly prodigal of treasure and life, it is a war of infamy which must blot the pages of our history."

Daniel Webster, at Faneuil Hall, on November 6, 1846, speaking of the Mexican War, said :

"Mr. Chairman, I wish to speak with all soberness in this respect, and I would say nothing here to-night which I would not say in my place in Congress or before the whole world. The question now is, For what purposes and to what ends is this present war to be prosecuted? \* \* \* It is time for us to know what are the objects and designs of our Government. \* \* \* We are, in my opinion, in a most unnecessary and therefore a most unjustifiable war."

*McMaster's History of the People of United States*, in Volume VII, page 497, and subsequent pages, gives various quotations from newspapers which condemn in the most violent language the conduct of the administration in the Mexican War. These publications appeared during the war.

The philippics delivered by Fox, Burke and Chatham against the British Government for the prosecution of the war against the American Colonies are among the classics of English literature and familiar to every schoolboy, while the terrific indictment of his government by John Bright for its part in the Crimean War was a work for which his name is now most honored by his fellow-countrymen.

But we are not at war with Russia, and surely if the condemnation of government or policy in reference to an actual war was proper, legal and constitutional, a denunciation of the Government in reference to a policy against a country with which

we are not at war is legal and constitutional and in no way violates the Espionage Law. Congress has never declared war against Russia even to this day, and Article I, Section 8, states:

“The Congress shall have power \* \* \*  
Subd. 11. To declare war, \* \* \*”

There was only one object in the giving out of these pamphlets, to stop Russian intervention by creating public opinion against it. Nothing in the furthest stretching of the language of the pamphlet could be construed as intending to aid Germany in the war or to hinder the United States in the war with Germany, and no conspiracy to violate the Espionage Law or conspiracy to aid Germany, directly or indirectly, was proved.

Disapprove of defendants' opinion, perhaps, but the defendants' right to have a different opinion from the President or Congress or even the majority of the people of the United States, and to express that opinion, cannot be denied.

If the utterance of unpopular opinion shall be punished, the public cannot be properly informed so that the unpopular opinion may become the popular and the Government directed in a new course.

If these defendants told the truth, and their motives were the public good, or if they told what they believed to be the truth, and their motives were for the public good, it is an absolute defense.

In the recent case of *Frohwerk v. United States*, 249 U. S., 207, 208, Mr. Justice Holmes has well said:

“We do not lose our right to condemn either measures or men because the country is at war.”

The discussion of public questions is absolutely immune under the First Amendment to the Constitution, when that is the only intention in the discussion. The manner or matter of the discussion can make no difference. If the truth interferes with the action of the Government, then the Government is at fault. If the statements are untrue, though the defendants believe them to be true, the answer should not be an indictment and jail, but the truth. For the predisposition of the people is toward the Government, and, as stated in the Declaration of Independence: "All experience hath shown that mankind are more disposed to suffer, while evils are sufferable." A discussion of public questions and statements of facts believed to be true cannot be stopped by jail, but can only drive people to underground propaganda. The defendants did not urge resistance to a law; they called for an act which would call forcibly to the Government's attention that the public were against its action or its policy of intervention in Russia.

The sole intent was to make public opinion against Russian intervention, and not to interfere with the war with Germany.

Nothing can be clearer from the reading of the pamphlets distributed, and nothing can be clearer after reading the actual evidence of witnesses in the case.

This indictment and conviction punishes these defendants for attacks on governmental policies in Russia. Since their trial, and still during the war, the same opinions have been expressed by public men in Congress and out of Congress, in magazines and in newspapers, in many instances in language even more bitter.

The press has been filled with anonymous lies and libels in reference to the Bolshevik and the

revolution in Russia; these defendants pleaded for the truth. The article by Arthur Ransome, an Englishman, in the *New Republic* of July 27, 1918, entitled "An Open Letter to America," and his book "Russia, 1919," and the articles of Raymond Robins, an American, in *The Metropolitan* for June, July, August, September and October, 1919, must be read for the unbiased facts in reference to Russia and the Bolsheviki.

Russia was first to declare for no annexation, no indemnity and the self-determination of nations. That is what these defendants pleaded for, that Russia be allowed to settle her own affairs and her own form of government.

I would quote here from Arthur Ransome's open letter:

"America was young once, and there were men in America who would have brought in foreign aid to re-establish their dominion over a revolted nation. Are those the men to whom America now looks back with gratitude and pride?

Well, writing at a speed to break my pen, and with the knowledge that in a few hours the man leaves Moscow who is to carry this letter with him to America, I have failed to say much that I would have said. I write now with my messenger waiting for my manuscript and somehow or other, incoherent, incomplete as it is, must bring it to an end. I will end with a quotation from your own Emerson. 'What is the scholar, what is the man for, but for hospitality to every new thought of his time? Have you leisure, power, property, friends? You shall be the asylum and patron of every new thought, every unproven opinion, every untried project, which proceeds out of good will and honest seeking. All the newspapers, all the

tongues of to-day will of course at first defame what is noble; but you who hold not of to-day, not of the Times, but of the Everlasting, are to stand for it; and the highest compliment man ever receives from heaven is the sending to him its disguised and discredited angels.' No one contends that the Bolsheviks are angels. I ask only that men shall look through the fog of libel that surrounds them and see that the ideal for which they are struggling, in the only way in which they can struggle, is among those lights which every man of young and honest heart sees before him somewhere on the road, and not among those other lights from which he resolutely turns away. These men who have made the Soviet government in Russia, if they must fail, will fail with clean shields and clean hearts, having striven for an ideal which will live beyond them. Even if they fail, they will none the less have written a page of history more daring than any other which I can remember in the story of the human race. They are writing it amid showers of mud from all the meaner spirits in their country, in yours and in my own. But, when the thing is over, and their enemies have triumphed, the mud will vanish like black magic at noon, and that page will be as white as the snows of Russia, and the writing on it as bright as the gold domes that I used to see glittering in the sun when I looked from my windows in Petrograd.

And when in after years men read that page they will judge your country and mine, your race and mine, by the help or hindrance they gave to the writing of it."

Raymond Robins, head of the Red Cross in Russia, in *The Metropolitan Magazine* for July, 1919, said:

“But General Hoffman lived to cease to despise the power of Trotsky and Lenin and Bolsheviks. Fifteen months later, with the war ended and with Germany in defeat and revolution, he said to Ben Hecht of the *Chicago Daily News*:

‘Immediately after conquering those Bolsheviks, we were conquered by them. Our victorious army on the Eastern front became rotten with Bolshevism. We got to the point where we did not dare to transfer certain of our Eastern divisions to the West. Our military machine became the printing press of Bolshevik propaganda. It was Bolshevik propaganda that rotted Germany from the East and broke her morale and gave us defeat and this revolution you now see ruining us.’”

And in the same article Robins further said:

“In Russia, in the territory of the old Russia, along its eastern frontier, there had emerged three governments. There was one in Finland. There was one at Petrograd. There was one in the Ukraine. The one at Petrograd was Red. The other two were White. In all three regions there was a struggle between Whites and Reds. It was the same struggle, involving everywhere the same fundamental social issue.

In Finland the French gave formal recognition to the White government. It was a ‘law and order’ government. It was fighting and killing Trotsky’s and Lenin’s Red Guards. It was a ‘good’ government. It at once called in the Germans and accepted German troops and turned Finland into a German dependency.

In the Ukraine the Allies gave the White Government their active favor and support. This government also was a 'good' and a 'law and order' government. It also was fighting Lenin's and Trotsky's Red Guards. From Allied money it received an official present of 130,000,000 francs. Four days later it called in the Germans and filled the Ukraine with German troops; and, of its own free will, not under foreign compulsion, but purely for domestic reasons, in order to down its domestic Red enemies, it turned the wheat fields of all southern Russia into German wheat fields and Odessa into a German port.

The Government at Petrograd, among these three governments, was the only one that was Red, but it also showed another difference. It was the only one that never called in German troops against its domestic enemies and also the only one that at any time ever did Germany the slightest harm. It did it the prodigious harm described by General Hoffman. It rotted the fiber of imperial loyalty out of a whole section of the German army and out of a whole section of the German population.

But this Government was as weak in physical power as it was strong in propaganda. Its army was dissolved—dissolved by economic and moral exhaustion ensuing upon intolerable effort. The American Committee on Public Information, which co-operated with the Bolshevik Government in propaganda but then became one of the Bolshevik Government's bitterest enemies, said, nevertheless:

'Russia fought on to utter exhaustion, and her army yielded only when the power of further effort was gone.'

If the Court will read Robins' articles and documents showing American interference in Russia,

how America blundered time and again and "backed the wrong horse," the fact that these defendants, Russian citizens, decried and denounced Russian intervention becomes understandable and not pro-German, but pro-Russia, pro-idealism, pro-democracy, pro-letariat—all of which fundamentally is pro-American. It is clear from Robins' articles and speeches that the Russian Bolsheviks were never pro-German, and that even the peace was signed at Brest Litovsk because of necessity, and because the Allies blundered, and because America and England would not promise military equipment, transportation, supplies, living necessities as a basis of Russia continuing the war, and refusing to ratify the Brest Litovsk Peace Treaty.

Twenty-year jail sentence for distributing circulars on a public question! Could that be the intent of Congress in passing the Espionage Law? Could Congress believe that it had the power to stop discussion of public questions by making the punishment almost equivalent to life imprisonment? Was it not the intention solely to prevent the helping of Germany, directly or indirectly? No other construction is possible, without writing America down as the new home of an old despotism. Twenty years for bitterly denouncing American military intervention in Russia, against which country no declaration of war has ever been made.

Whether it is believed that the circulars were justified and that revolutionary Russia actually had been betrayed by the Allies—though we were not allowed to prove it at the trial—the defendants were entitled to express that belief if their intent was to arouse public opinion by the public expression of their opinion. Russia had been surrounded by a stone wall of lies—and these young defendants protested against the lies and against

military intervention in Russia—not to help Germany—not to hurt America—but to bring America back to its idealism—back to the road it had travelled since its revolutionary birth.

We attempted to prove that the Sisson documents were forgeries. We attempted to prove that the Bolsheviki were not pro-German. We attempted to prove that they were really pro-Ally and against German militarism, German autocracy, and that these defendants, in giving out these leaflets, were standing with the Bolsheviki for Russian liberty, and not for German militarism. Even the Government will probably admit that the defendants were not pro-German. These defendants brought the acts of the President of the United States in intervening in Russia to the bar of public opinion.

It came into the evidence, as far as Abrams was concerned, his past in trying to overthrow the Russian Czar; the fact that he was sent to Siberia fighting against autocracy in Russia, would he now help German war aims in America? Surely no one can question that Abrams or the other defendants were not in favor of German autocracy, and if that is so, the Government's case falls. Not pro-German, but liberty-loving Russians, are these defendants.

If our Government was true, if our Government was right, in intervening in Russia, a discussion would not hurt us. If we were wrong—being awakened by a fire-bell would not be too much—and these defendants were doing a service to humanity and to us. Using the Espionage Law in a case like this by a long jail sentence to stop discussion was and is futile—the action of the United States in Russia is being weighed around the world, and thoroughly questioned in the Senate and in the magazines and in the newspapers and in the homes of America.

These defendants, these idealists, wanted to help Russia and not hurt the United States. They wanted to help Russia and not help Germany; they had no thought of Germany in their minds; they had no thought of interfering in the war between the United States and Germany. They had one big idea—to carry to the Americans, a liberty-loving people, calling to their attention what they thought was an illegal, or, rather, they would not use the word illegal, but I will—what they thought was a wrongful act by the President of the United States, without authority of Congress, sending an army to invade a nation we were at peace with, calling to the American public to protest.

All the fighting in Russia to-day is being done either by Allied or American troops or by counter-revolutionary troops, instigated, financed and supplied by the Allies (according to the frank admission of Mr. Lloyd George in the House of Commons on April 16, 1919).

These defendants were engaged in issuing leaflets protesting against military intervention in Russia on the ground that it was against the best interests of the workers of Russia and the world, and the further ground that war had never been declared on Russia by the Congress of the United States. The defendants had no animosity against the prosecution of the war with Germany. Defendant Abrams testified on the trial how he and other Russians, after the overthrow of the Czar, had offered to the President of the United States to form a Russian regiment in the United States and proceed to Russia to fight Germany and the Kaiser on the Eastern front.

*The defendants' stand of protest by leaflets is bitter, their choice of language harsh, but mostly it is proper criticism, and it is the kind of act we*

*would be proud of if made by Americans in Russia, if Russia were invading the United States with an army after promises of economic help.*

As to the secretly giving out of the pamphlets protesting against intervention by these plaintiffs-in-error, as evidence of evil intent, this Court can judicially take note of the fact that lawful public meetings and distribution of leaflets were prevented by agents of the Department of Justice and public officials during the war, and even an appeal for defense fund for men on trial was stopped and legal defense committees broken up, while the Postmaster stopped all mail of certain individuals and newspapers, without giving them their day in court. The wisest philosopher statesman since Benjamin Franklin was Mayor William J. Gaynor, and he protested against driving people to underground presses to get their ideas before the people. He said :

“It is the worst policy in the world to drive people to secret meetings and plottings. It is hard to make a little ‘pin head’ in authority understand this in this free country, where, of all the world, it should be understood. He prefers the (old) Russian methods of force.”

The conviction in this case was the result of frenzied fear. The pamphlet was an unwelcome truth, but even if it was error, truth was the answer and not jail. So democracy has always decided.

The President has never explained why the Big Four refused to proceed with the negotiations with Soviet Russia after Lenin had accepted peace proposals. The Soviet did accept peace proposals delivered by Messrs. Bullitt and Steffens. (See Bul-

litt's testimony before the Foreign Relations' Committee of the United States Senate.) The Soviet even agreed to acknowledge the financial obligations of the former Russian Empire. Lenine was ready to stop hostilities. Were the Russian emigres too powerful in Paris, London and Washington?

In the *Nation* of September 6th, 1919, under a heading "Mr. Asquith on Intervention," they print the following:

"The policies of the Coalition Government were severely criticized by Mr. Asquith, former Prime Minister, in a recent speech before the Willesden Liberal Association. We reprint from *The Times* (London) for July 28, that portion of the speech which deals with Russia: 'At this moment war—I might almost say a number of wars—is still going on. What I said the other day in private to some of our fellow-workers I will repeat in public here, that the one great menacing and overshadowing figure is the problem of Russia.

I confess to you that I regard with bewilderment and with apprehension the part which this country is playing in that quarter of the world. We want, the nation wants, the world wants, clearer definition than has yet been given to us of our commitments, actual and prospective, there. (Hear, hear.) We are constantly being assured that the forces of the Allies still engaged in that theatre of belligerency are small in number, are always on the decrease, and every now and again on the point of withdrawal. Yet we see month by month the continuing expenditure of British blood and British treasure. (A voice, 'Shame.')

So far as I can discover, all this time we are doing neither one thing nor the other. Meanwhile, attempts are being made in quarters still not

wholly without influence to agitate for an increase both in the scale and in the scope of our intervention. I trust and believe that those attempts will be strenuously and successfully resisted. (Hear, hear.) This, believe me, is not a time when we can afford to embark on crusades for the extermination of what is called Bolshevism. (Hear, hear.)

Whence have we derived any mandate for any such mission? At Paris during these last few months the representatives of the Allies have been paying homage, legitimate and well-merited homage, to the principle of self-determination. That is a principle which is good for great as well as for small communities. It is not for us, if I may presume to say so, it is not for the Allies to take sides in the domestic controversies and the constitutional developments of independent nations. (Hear, hear.) We are quite capable of defending our own interests and those of our Allies if and when they should be attacked. But we have all, I hope, a friendly feeling for the great Russian people, who during the first two years of the war fought manfully and heroically in defence of the cause of freedom, and who are now called on to pass through at home a fiery ordeal of their own. The future Government of Russia is a matter for the Russian people (cheers), and for no one else but the Russian people to decide."

On May 10th, 1919, before the French Academy of Moral and Political Sciences, President Wilson said:

"My view of the state is that it must stop and listen to what I have to say, no matter how humble I am. \* \* \* I have always been among those who believe that the greatest freedom of speech was the greatest safety.

\* \* \* In this free air of free speech men get into that sort of communication with another which constitutes the basis of all common achievement."

Senator Johnson of California (Cong. Rec., Feb. 13, 1919) said :

"I know the fact that we are making war ; and no amount of specious argument can convince the American people that when you kill in fighting and you are killed in return, when armies go forth in battle array and indulge in shooting one another down, it is not warfare. What is it, if it is not warfare?"

\* \* \* \* \*

"Do you know who make Bolsheviki in America? You and I are making the Bolsheviki of this country when you and I, seeing the law violated, the Constitution rent and torn, dare not take our stand in behalf of American blood and American soldiers, who, without warrant of law, and in violation of the Constitution of the United States, are killing and being killed in Russia to-day. That is the sort of thing that makes Bolsheviki, using the word in the aspect and in the characterization to which I have just alluded. When the men who are intrusted with the enforcement of the law, who have held high their hands and sworn that they would protect the Constitution of the United States, trample it under foot and permit boys of theirs to be murdered in Russia, in violation of that Constitution, that is the sort of thing, my Senators, that makes Bolsheviki in a nation, and that is the sort of thing that makes unhappy, discontented, and rebellious people."

Senator Johnson of California, in Congressional Record, January 29, 1919, said:

“Russia, Mr. President, is a marvelous country. It contains one-sixth of the earth’s surface, with fertility of soil and wealth in mineral resources surpassing those of any other part of the earth. This Soviet government to which our President for us spoke so kindly, begged us for economic aid and wished to make us the most-favored Nation. We, in the rigidity of our virtue, though asking the aid of the anarchists in our midst, with the Bolsheviki over there, and though publicly proclaiming our friendship and our love, would not accept the proffer. Weak and vacillating, stupid, and ignorant has *been our policy with Russia*. We solemnly promised we would not intervene, and then, prating of our love for the Russian people, we did intervene. Prating about guarding stores at Archangel, we advanced from 100 to 300 miles from that port, took and burned little Russian towns, and upset little Soviet governments. In the name of protecting military supplies, which were offered to us again, and again, and again, and which we could have had for the asking, we shot down Russian peasants, and our boys are shot down by them. The Senator from Nebraska insists our only purpose in landing at Archangel was to protect the stores. Our only advance beyond Archangel was to prepare military bases. He is wrong. We were marching down from Archangel—and the facts will demonstrate it—that we might make conjunction with the Omsk Government and might perfect the ring of steel which we had thrown around interior Russia, and which was starving innocent women and children. The Senator from Virginia gravely speaks of the German menace. What German menace since November 11? Are

our people children to be lulled into repose by such stuff as this? The very learned and logical Senator from Colorado tells us that we are not making war upon Russia; that Russia is making war upon us. Apparently his argument seems to be that if the Russians had not resisted when we advanced into their territory there would have been no conflict and no killing. What a strange and fantastic doctrine is this! If an army landed in New York, marched to Buffalo, and the people in central New York resisted and fought them, by that fact, then, New York was making war upon the invading army and the invading army was innocent of wrong. The French are under no illusions in this matter.

They are for intervention, and they believe they are intervening upon a small scale, too small, as they put it, now. They make no pretense that they wish supplies guarded. They wish Russians killed and another government set up. What hypocrisy upon our part to say to our people, and to the Russians, in our pronouncement last year when we commenced our intervention, that we contemplated 'no interference with the political sovereignty of Russia, no intervention in her internal affairs, not even in the local affairs of the limited areas which her military force may be obliged to occupy, and no impairment of her territorial integrity, either now or hereafter.' No sooner had we landed at Archangel than we shot the Soviet Government there existing out of town and set up a government of our own. No sooner did we go into the interior than everywhere we found a local soviet we shot it to death and set up our own mode of government. Then we tell our people that we intend no interference with the internal or local affairs of Russia?"

William Allen White, when he returned to this country, said:

“There is no red terror in Russia to-day; the peasants are supporting the Soviet government; schools are open throughout Soviet Russia, school children are getting food, and education is managed according to the most modern methods; the Soviet government wants peace and is willing to make terms.”

Leading public men, Senators, newspapers and magazines have demanded that we withdraw our troops from Russia both before the armistice and since the armistice. On August 20th, 1919, the *New York Evening Sun* reported the presentation of 100,000 signatures to the President of the United States asking for the withdrawal of our troops in Russia.

In the *Nation* of May 31st, 1919, it states:

“The loathsome hypocrisy of the Administration’s Russian policy becomes clearer with every passing week. On January 8, 1918, Mr. Wilson declared that the treatment of Russia would be the ‘acid test’ of our goodwill, and stated as one of the Fourteen Points ‘the evacuation of all Russian territory (it was Germany which held it then) and such a settlement of all questions affecting Russia as will secure the best and freest co-operation of the other nations of the world in obtaining for her an unhampered and unembarrassed determination of her own political development and national policy and assure her of a sincere welcome into the society of free nations under institutions of her own choosing.’ Since that time we have seen Russia invaded from at least three directions by American, British, French, and other Allied troops, with Mr. Wilson’s con-

sent. We have seen public opinion in the United States systematically poisoned concerning Russia, with the connivance of high-placed Government officials, and Mr. Wilson has spoken no word. We have blushed with shame at the perfidy and dishonor of the Sisson documents, and Mr. Wilson was busy elsewhere. We have seen Russia invaded from the north to meet the German menace, and from the east to aid the heroic Czechoslovaks. The Germans are disarmed, and the very existence of the Czechoslovaks is all but forgotten, but American armies are still unwillingly fighting in the north and in Siberia.

After honest and simple-minded Americans had protested so loudly that the Administration no longer dared ignore their demands, we were promised that our troops would be withdrawn from Archangel—and straightway a new force of engineers was dispatched to Northern Russia. Now we read that 'American railroad troops are playing an important part in the rapid advance of the Allied troops southward along the Murmansk railway.' Meanwhile our troops remain in Siberia, and the War Department is recruiting 8,000 volunteers for service there. An Associated Press dispatch from Omsk states that the so-called All-Russian Government there has requested Major General Graves not to send American troops farther into the interior of Siberia, the desire being 'to preserve the existing friendly relations with America which, in view of the American Government's undefined stand on Bolshevism, might otherwise be jeopardized.' The Omsk Government need not worry. Mr. Wilson has been carrying on war against Soviet Russia for ten months, and General Graves, in a message to his troops, declares that 'the policy to be followed by our troops in any country is one to be determined by the

Executive.' So much for Wilsonian Realpolitik by comparison with the old-fashioned theory that it is the business of Congress to declare war. And General Graves has apparently caught even the President's phraseology, for he adds that 'every nation has its own ideals and traditions which should be respected by all, and especially by guests, as we are.' Having seized long stretches of the Trans-Siberian Railway, we appear to be the kind of 'guests' who make their entrance by climbing up the back porch. It is hard to believe that the American people, who are for the most part honest and kindly folk, can much longer stomach the Administration policy in Russia of combined burglary and starvation, coupled with pious phrases. There is surely honesty and courage enough in Congress to put an end to this iniquity."

These few extracts are quoted to show that these defendants are not alone in their opinions, and that the same opinions were expressed both before and since the armistice, when the question of Germany could not be considered in the intent, and held by magazines, newspapers and public men whose patriotism was beyond question.

Judge Cooley in his book on Constitutional Limitations, page 527, said:

"It is very easy to lay down a rule for the discussion of constitutional questions; that they are privileged if conducted with calmness and temperance, and that they are not indictable unless they go beyond the bounds of fair discussion. But what is calmness and temperance, and what is fair in the discussion of supposed evils in the government? And if something is to be allowed 'for a little feeling in men's minds,' how great shall be the allowance? The heat of the discussion

will generally be in proportion to the magnitude of the evil as it appears to the party discussing it. Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance and fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less and its correction by public sentiment more speedy than if the terrors of the law were brought to bear to prevent discussion."

In *Gulf etc. v. Ellis*, 165 U. S., 160, this Court said:

"It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."

The Declaration of Independence provides that when any form of government becomes destructive of these ends it is the right of the people to alter or abolish it. If the people have the right to alter or abolish the Government, they certainly have the right to discuss every act of the Government, to condemn it or approve it, and to attempt to create public opinion by laying their arguments and their beliefs before all the people.

## II.

### **The First Amendment to the Constitution makes Espionage Law unconstitutional.**

The First Amendment to the Constitution provides that:

“Congress shall make no law \* \* \* abridging the freedom of speech or of the press \* \* \*.”

This case turns on the question whether the right of free speech and free press guaranteed in the First Amendment protected the defendants in the issuance of the two pamphlets, Government's Exhibits 1 and 2. If the answer is they were, the conviction of the defendants should be set aside. If the Espionage Law was violated, is that law constitutional?

In *Frohwerk v. United States*, 249 U. S., 207, 208, this Court, by Mr. Justice Holmes, said:

“We do not lose our right to condemn either measures or men because the country is at war.”

In *Debs v. United States*, 249 U. S., 211, the Court, by Mr. Justice Holmes, approved of the charge to the jury on the trial as follows:

“We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonable probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind.”

The intent in the minds of these defendants was objection to Russian intervention, and nothing more. (See argument under Point I.)

In *Patterson v. Colorado*, 205 U. S., 454, 462, the Court states that the constitutional provision, free speech and free press, is only for the purpose of preventing previous restraints, and says:

“The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”

In the same case, at page 465, Mr. Justice Brewer states what I believe to be the correct meaning of the First Amendment to the Constitution when he said:

“It (the Court) yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such ‘previous restraints’ upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges. \* \* \*”

As a matter of fact, the right the colonists thought and intended to guarantee was the unabridgable liberty of discussion as a natural right, not to be abridged on the plea of furthering the public welfare. To give to the Government the power to

control what others may hear or see is, of course, to that extent a limitation upon their right to acquire and have opinions, thus abridging the liberty of conscience, since one cannot well acquire opinions the materials of which are withheld from him.

To say that the right of free speech and free press applies only to prior restraint is a pure quibble, as the statute imposing a penalty of twenty years' imprisonment is even more effectual than any previous restraint that could be devised.

In 1803 an edition of Blackstone was edited and published by Prof. St. George Tucker, and in "Note G" he discussed the meaning of free speech and free press and makes a distinction between the English idea and the American, and defines free press as follows:

"Every individual, certainly, has a right to speak or publish, his sentiments on the measures of government; to do this without restraint, control, or fear of punishment for so doing, is that which constitutes the genuine freedom of the press."

Opposition to governmental policies up to the time of the armistice was almost absolutely silenced, and discussion of the facts remained unheard.

If the liberty of free speech and a free press can be taken away by the Government in war time on the pretext of the public welfare, it can be taken away in peace time on the same pretext. No opinion other than such as had been deemed contrary to the public welfare by those in governmental authority ever had been suppressed at any time in history. Can it be contended that what had really been intended to be written in the Constitution was:

“Congress shall make no law abridging freedom of speech or of the press, except in the interest of the public welfare.”

“Shall make no law abridging,” etc., cannot properly be interpreted to mean that, in the alleged interest of the public welfare, Congress may enact any abridging laws it sees fit, if thereby no restraint is imposed prior to publication. To construe it that way is to make it a nullity. As a matter of fact, during the war, district attorneys, United States marshals and other government officials and self-appointed patriotic censors did exercise, for perhaps what they believed for the public welfare, restraints prior to publication and expression, ideas that were considered inimical, by warning and often arresting printers and owners of public halls, and by the action of postal authorities in denying the mails to publications and books, and censoring mail. So that even that right was no longer available in time of the war.

If the Constitution gives us the right of free speech and free press, then this right cannot be destroyed by the arbitrary decree of Congress, even though done in the alleged interest of the public welfare, and by calling the decree an Espionage Law, and even though the Courts concur that the decree is for the benefit of the public welfare. The right guaranteed in the Constitution was intended to enlarge intellectual opportunity as against abridgment either by prior restraint or subsequent punishment. The existence of the power to suppress any opinion is, in the long run, more destructive to human well being than the ideas against which the power is exercised.

A speech or article is not an overt act. Americans have always assumed the right of unrestricted

discussion of public affairs. It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. Tyrannical government can only be fought by armed rebellion or the moulding of public opinion by free speech and free press perfectly unrestrained on every subject within the field of government.

In *Reynolds v. United States*, 98 U. S., 163, this Court approved the statement prepared by Thomas Jefferson that :

“To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy which at once destroys all liberty because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. It is time enough for the rightful purpose of civil government for its officials to interfere when principles break out into overt acts against peace and good order.”

Though speaking of religion at the time, the same policy applies to opinions on other subjects. The expression of an honest opinion on a public question is the doing of a public service. We are bound to respect the honesty, and weigh the arguments fearlessly.

Thomas Erskine said (“*Erskines Speeches*,” Vol. II, p. 104, Ed. 1810, Paine Case) :

“I maintain that opinion is free, and that conduct alone is amenable to law.”

A man who points out wherein the country is making a blunder, or forgetting its ideals and justice, should not be jailed even in war time, even if perchance he is wrong in his belief, or cannot convince a majority that he is right. If we are really a government of and by discussion, we should be ready to listen to the most unpopular argument on any question of public policy at any time, and more so when that policy of sending troops into Russia for any purpose, by the sole action of the executive, is in the opinion of many an unconstitutional action on the part of the executive.

Even if the expression of an opinion on a public question should be injurious to the public welfare, the prevention of its free expression is unconstitutional, and an abridgment of free speech and free press, no matter what the method is, the pretext or how hidden by verbiage its denial. Patriotism, like charity, covers a multitude of sins as well as virtues, and under its cloak greater liberties may be lost with the consent or acquiescence of the people than by any other means, not excepting military despotism, for despotism brings rebellion, while patriotism usually finds acquiescence.

In the famous Virginian "Bill of Rights," unanimously adopted June 12, 1776, is this clause:

"The freedom of the press is one of the bulwarks of liberty, and can never be restrained but by despotic government."

Cooley, in his "Constitutional Limitations" (7th Ed., p. 604), said:

"The liberty of the press might be rendered a mockery and a delusion and the phrase itself a by-word, if, while every man was at liberty to publish what he believes,

the public authorities might nevertheless punish him for harmless publication. \* \* \* Their purpose has evidently been to protect parties in the free publication of matter of public events and public measures, and to enable every citizen at any time to bring the Government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. \* \* \* The evils to be prevented were not the censorship of the press merely, but any action of the Government by means of which it might prevent such free and general discussion of public matters as seem absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

I would commend in this discussion the immortal words of the Areopagitica of Milton :

"Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? \* \* \* What a collusion is this, when we are exhorted by the wise Man to use diligence, to seek for wisdom as for hidden treasures, early and late, that another order shall enjoin us to know nothing but by statute."

The spirit of Jefferson and his faith in the Republic are revealed in his inaugural address, March 4, 1801, when he said :

"If there be any among us who wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opin-

ion may be tolerated, where reason is left free to combat it."

And let me quote another President—President Wilson—who, in his book "The New Freedom," goes to the heart of the matter:

"I believe that the weakness of the American Character is that there are so few growlers and kickers among us. We have forgotten the very principle of our origin if we have forgotten how to object, how to resist, how to agitate, how to pull down and build up even to the extent of revolutionary practices, if it be necessary, to readjust matters.

We must learn," he says, "we free men, to meet as our fathers did, somehow, somewhere, for consultation. What are the right methods of politics? Why the right methods are those of public discussion. The only thing that can ever make a free country is to keep a free hopeful heart under every jacket in it. The whole purpose of democracy is that we may hold counsel with one another so as not to depend upon the understanding of one man, but to depend upon the common counsel of all."

In the *Milligan* case, 71 U. S., 2, this Court said:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arrive, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of con-

stitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

\* \* \* But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true it could be well said that a country preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily it is not so."

The question of our intervention in Russia is a matter of public policy debated in Congress and throughout the country.

We are still a government of and by discussion, and absolute freedom of speech is the only basis upon which the Government can stand and remain free.

Sections 3 and 4 of Title I of the Act of June 5th, 1917, as amended May 16th, 1918 (commonly known as the Espionage Law) is unconstitutional,

if construed and applied so as to punish any individual for speaking or publishing his opinion on any public measure of the Government.

The conviction in the present case must be set aside either because the law is unconstitutional or has been erroneously applied.

In an address issued by the Continental Congress to the inhabitants of Quebec on October 28th, 1774 (see "Journal of the Continental Congress," Vol I, p. 108, Ed. 1904), it said:

"The last right we shall mention, regards the freedom of the press. The importance of this consists \* \* \* whereby oppressive officials are shamed or intimidated into more honorable or just modes of conducting affairs."

### **CONCLUSION.**

**It is respectfully submitted that the judgment of conviction should be reversed and indictment dismissed.**

HARRY WEINBERGER,  
Attorney for Plaintiffs-in-Error,  
261 Broadway,  
Borough of Manhattan,  
City of New York.