

Free speech in World War II: “When are you going to indict the seditionists?”

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Every student of constitutional law is familiar with the effort of the United States government to suppress dissent during World War I. The decisions in such landmark cases as *Masses*,¹ *Schenk*,² *Debs*,³ and *Abrams*⁴ are the grist of every major constitutional law casebook and every major historical treatment of the First Amendment, as well they should be. Also familiar are the constitutional controversies of the Cold War. The Supreme Court’s decisions in *Dennis*⁵ and *Yates*⁶ are required reading for anyone even remotely interested in free expression. But what of the period in-between? What of World War II? If one examines the leading constitutional law casebooks, it appears that this era was a First Amendment cipher. Presumably, nothing happened. As it turns out, nothing could be further from the truth.

1. On the eve of war

After the excesses of World War I and the postwar Red Scare, an increasingly civil libertarian view of free expression began to emerge. Through the 1920s and ’30s, many Americans came to realize that war protesters and other dissidents of that earlier era had not been as menacing as the Wilson administration had led them to believe. To an ever greater extent, Americans began to

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¹ *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917). On *Masses*, see Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003) [hereinafter *Judge Learned Hand*].

² *Schenck v. United States*, 249 U.S. 47 (1919). On *Schenck*, see Geoffrey R. Stone, *The Origins of the “Bad Tendency Test”*: *Free Speech in Wartime*, 2002 SUP. CT. REV. 411.

³ *Debs v. United States*, 249 U.S. 211 (1919).

⁴ *Abrams v. United States*, 250 U.S. 616 (1919).

⁵ *Dennis v. United States*, 341 U.S. 494 (1951).

⁶ *Yates v. United States*, 354 U.S. 298 (1957).

discuss the protection of civil liberties as a public responsibility. This development was reflected in new attitudes within the government, the academy, the media, and the courts.⁷

With the Depression, however, and with the advent of fascism in Europe, fringe political movements began, once again, to challenge the central tenets of American society. On the left, the Communist Party of the United States, formed after World War I, gained significant support during the misery of the Depression. On the right, a disparate array of new fascist organizations, united by a fervent anti-Semitism and a fear of national moral decline, sprang into existence in the mid-1930s. The most visible of these fascist organizations was the German-American Bund, whose members sported Nazi-style uniforms and gave the Hitler salute. In 1935, a House Committee proposed legislation to prohibit such groups from inciting disaffection with American institutions and values. Reflecting the more open spirit of the times, this proposal was resoundingly defeated in Congress.⁸

With the rumblings of war in Europe, however, the activities of these organizations increasingly tested the depth of America's renewed commitment to tolerance. In the late 1930s, groups such as the Non-Sectarian Anti-Nazi League, the Mobilization for Democracy, and Friends of Democracy (whose advisory board included John Dewey, Thomas Mann, and Paul Douglas) came into being in an effort to expose and thwart American-based fascism.

Members of these antifascist groups were concerned, as Sinclair Lewis had suggested in *It Can't Happen Here*, that Americans, who had grown accustomed to being duped by con men and ad artists, were especially vulnerable to fascist propaganda.⁹ Reflecting these concerns, in 1936, Warner Brothers released

⁷ See PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 30, 272 (W. W. Norton 1979); JEROLD S. AUERBACH, *The Depression Decade*, in *THE PULSE OF FREEDOM: AMERICAN LIBERTIES 1920–1970s*, at 65 (Alan Reitman ed., Norton 1975). There were occasional prosecutions for seditious speech in the state courts during this period. For example, Israel Lazar was convicted of violating the Pennsylvania sedition law. During the 1928 presidential campaign, Lazar made a soapbox speech in support of the Communist Party candidate for president in which he declared: "This government murdered Sacco and Vanzetti. This is a strike-breaking government. Let us teach our young workers in time of war to shoot down people who ordered us to shoot other people." He was sentenced to serve from two to four years in prison. See *Lazar Conviction Upheld*, N.Y. TIMES, Dec. 27, 1931, at 26; *Sedition Term is Upheld*, N.Y. TIMES, June 29, 1932, at 3. In Chicago, the Illinois sedition act was invoked against twenty-six defendants who were arrested in Grant Park during a Communist meeting. See *26 Accused of Sedition*, N.Y. TIMES, Sept. 10, 1929, at 10. Such incidents were rare, however.

⁸ Those who opposed this bill argued not only that it was unnecessary but also that, like the Espionage Act of 1917, it would be misused to punish "the honest peacetime expression of opinions . . . by decent American citizens." Hanson W. Baldwin, "Disaffection" Bill Draws Opposition, N.Y. TIMES, Aug. 11, 1935, at E12. See RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* 29 (St. Martin's Press 1999).

⁹ SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (Sun Dial Press 1935).

the movie *Black Legion*, in which a common man (Humphrey Bogart) is misled into joining a paramilitary group, and *Life* magazine, in an article on “fascism in America,” warned that small-town folk were “easy meat” for right-wing demagogues.¹⁰

Antifascist commentators like Walter Winchell, Lewis Mumford, and Max Lerner sharply criticized advocates of Justice Holmes’s clear and present danger test as dangerously naive. They argued that fascist movements could easily lay the groundwork for their agendas through the use of insidious propaganda, and that such propaganda must be squelched. Traditional liberals, who had long championed civil liberties, were suddenly calling for an end to “anti-democratic propaganda.”¹¹

The outbreak of hostilities in Europe in September of 1939, created a mood of high anxiety in the United States. Attorney General Frank Murphy declared that there would be no witch hunt for subversives, but he emphasized that there would be “no laxity” either. Pressured by the House Un-American Activities Committee’s incessant accusations that the Roosevelt administration was lax on radicals,¹² and “by clear signals” from the president, who insisted upon a “no-nonsense approach to un-Americanism,” Murphy promised Roosevelt that he would demonstrate that “we are not a soft, pudgy democracy.”¹³

In the fall of 1939, Martin Dies, the chairman of the House Committee on Un-American Activities, publicly insisted that Murphy prosecute communist and Bundist organizations. Congressman J. Parnell Thomas, a member of the Dies committee, sarcastically chastised “our dynamic Attorney General” for being “indifferent” when it came to prosecuting un-American activities.¹⁴ Dies warned Murphy that if he failed to act, the House Committee on Un-American Activities would act for him.

Under constant pressure from Roosevelt to placate Dies and to defuse criticisms that the administration was soft on communists and Bundists, Murphy ordered the arrest, in January 1940, of the leaders of the Christian Front, a virulently anti-Semitic group with several thousand members in the New York area. The government prosecuted seventeen members of this group

¹⁰ *Fascism in America*, LIFE, Mar. 6, 1939, at 57–63, quoted in LEO P. RIBUFFO, *THE OLD CHRISTIAN RIGHT: THE PROTESTANT FAR RIGHT FROM THE GREAT DEPRESSION TO THE COLD WAR* 180, 182 (Temple Univ. Press 1983).

¹¹ *Waging War Against the Whole American Democratic Heritage*, NEW REPUBLIC, Oct. 6, 1941. See RIBUFFO, *supra* note 10, at 178–84; GEOFFREY PERRETT, *DAYS OF SADNESS, YEARS OF TRIUMPH: THE AMERICAN PEOPLE, 1939–1945*, at 100–1 (Univ. of Wisconsin Press 1985).

¹² Robert Jackson observed that the Dies committee “was one long headache” for the Department of Justice. SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS* 99 (Univ. of Michigan Press 1984).

¹³ STEELE, *supra* note 8, at 38; FINE, *supra* note 12, at 119.

¹⁴ See FINE, *supra* note 12, at 116.

on the theory that they had conspired to establish by force of arms a Nazi rule in the United States.¹⁵ J. Edgar Hoover charged that the defendants planned to “knock off about a dozen Congressman” and “blow up the goddam Police Department.”¹⁶ There was little evidence of guilt, however, and the jury refused to convict. After succeeding Murphy as Attorney General, Robert Jackson observed that the charge was “a bit fantastic.”¹⁷

Jackson also inherited from Murphy an indictment in Detroit against sixteen members of the Abraham Lincoln Brigade for conspiring to persuade Americans to fight against the fascists in the Spanish Civil War. Although the defendants had almost certainly violated the law, Jackson regarded the prosecution as an embarrassment to the Department of Justice and promptly ordered the charges dismissed.¹⁸

In April 1940, Jackson addressed the nation’s federal prosecutors. He warned that “[i]n times of fear or hysteria” groups and individuals often “cry for the scalps” of others “because they do not like their views.”¹⁹ Jackson exhorted his United States attorneys to steel themselves to be “dispassionate and courageous in those cases which deal with so-called subversive activities.”²⁰ Such cases, he cautioned, pose a special threat to civil liberties because the prosecutor has “no definite standards to determine what constitutes a subversive activity.”²¹ Jackson concluded that “[i]n the enforcement of laws which protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion.”²²

Shortly after Roosevelt signed the Smith Act²³ in the summer of 1940, he appointed Jackson to the Supreme Court. He then appointed Francis Biddle Acting Attorney General. Before this appointment, Biddle, a member of the ACLU,²⁴

¹⁵ See PERRETT, *supra* note 11, at 89; STEELE, *supra* note 8, at 44–46.

¹⁶ PERRETT, *supra* note 11, at 89.

¹⁷ *Id.*; STEELE, *supra* note 8, at 44–46.

¹⁸ The Abraham Lincoln Brigade consisted of individuals who were fighting alongside communists against Franco and the fascists in Spain. For a description of the events surrounding the arrest, see RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 235–36 (The Free Press 1987). Secretary of the Interior Harold Ickes speculated that Murphy had approved “this rotten thing” as the result of “Catholic church influence,” although Murphy’s biographer rejects that judgment. Rather, he concludes that Murphy initiated the prosecution because of the constant harping of the Dies committee and his desire not to be charged with lax law enforcement. See FINE, *supra* note 11, at 125–26.

¹⁹ 76th Cong., 3d Sess. (Mar. 4, 1940), 86 CONG. REC. SA1840 (Apr. 3, 1940).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 18 U.S.C. § 2385 (2003).

²⁴ See PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES: 1918–1969* 224–25 (Harper & Row 1972).

took a strong pro-free speech stand. In the summer of 1941, he told the California bar that “[w]e do not lose our right to condemn either measures or men because the country is at war.”²⁵ In September of 1941, he promised “to see that civil liberties in this country are protected” and that we will “not again fall into the disgraceful hysteria of witch hunts . . . which were such a dark chapter in our record of the last World War.”²⁶ This position did not sit well with Roosevelt, who questioned whether Biddle “was ‘tough enough’ to deal with the subversive element.”²⁷

After his appointment as acting attorney general, and largely at Roosevelt’s insistence, Biddle reluctantly softened his stance regarding free speech. He urged civil libertarians to be more realistic and to recognize that limitations of civil liberties might be necessary. Although he was dubious about the constitutionality of the Smith Act, he nonetheless endorsed it. In the summer of 1940, he wrote Roosevelt that it would be difficult to obtain convictions under the act, but conceded that bringing some prosecutions might have a “salutary effect.”²⁸

In July 1941, the United States filed charges under the Smith Act against twenty-nine leaders of the Socialist Workers Party (SWP) in Minneapolis, which had instigated several work stoppages in the local defense industry. The SWP, a small Trotskyite sect, argued that the United States should not become embroiled in another European war and opposed Roosevelt’s armaments program. It proclaimed that “[w]e have a war of our own to fight” against injustice and inequality at home and that such a “war can be won only if it is fought against the capitalist class and its chief executive in Washington.”²⁹

The defendants were charged with conspiring to advocate the forceful overthrow of the government. Eighteen of the defendants were convicted, and the Supreme Court denied review. John Dos Passos observed at the time that “[i]f the United States was really in danger from ‘a few fanatics who control a single local of a trade union,’ . . . then the country was in bad shape indeed.”³⁰ Attorney General Biddle later admitted that by “no conceivable stretch” of the imagination could these defendants be said to have created a clear and present danger.³¹ He added that the defendants had been guilty of no more than

²⁵ Francis Biddle, *The Power of Democracy: It Can Meet All Conditions*, Oct. 15, 1941, *quoted in* PATRICK S. WASHBURN, *A QUESTION OF SEDITION: THE FEDERAL GOVERNMENT’S INVESTIGATION OF THE BLACK PRESS DURING WORLD WAR II* 51 (Oxford Univ. Press 1986).

²⁶ Cabell Phillips, *No Witch Hunts*, *N.Y. TIMES MAGAZINE*, Sept. 21, 1941, at 8.

²⁷ STEELE, *supra* note 8, at 121.

²⁸ *Id.* at 110.

²⁹ MURPHY, *supra* note 24, at 225 n.39; STEELE, *supra* note 8, at 129–31.

³⁰ *Quoted in* William Preston, Jr., *Shadows of War and Fear*, in *THE PULSE OF FREEDOM*, *supra* note 7, at 105, 115–16.

³¹ FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 152 (Doubleday 1962).

rhetorical excess “in the time-honored Marxist lingo.”³² Over the years, Biddle expressed regret at having authorized the prosecution.³³

2. “A good chance to clean up . . . these vile publications”

After the attack on Pearl Harbor, Biddle was determined to avoid what he regarded as the grievous mistakes of World War I. On December 15, 1941, he attempted to help set the national tone in a speech commemorating the 152nd anniversary of the Bill of Rights. He reminded the nation that “although we had fought wars before, and our personal freedoms had survived, there had been periods of gross abuse, when hysteria and fear and hate ran high, and minorities were unlawfully and cruelly abused.”³⁴ He added that “[e]very man . . . who cares about freedom must fight [to protect it] for the *other* man with whom he disagrees.”³⁵

Two days later, Biddle directed all United States attorneys that prosecutions for “alleged seditious utterances must not be undertaken unless consent is first obtained from the Department of Justice.”³⁶ A few days later, several men were arrested in Los Angeles for allegedly praising Hitler, stating that Japan had done a “good job” in the Pacific, asserting that “the Japanese had a right to Hawaii” because there “are more of them there than there are Americans,” and declaring that they would “rather be on the side of Germany than on the side of the British.”³⁷ Another man, Ellis Jones, was arrested for saying that

³² *Id.*

³³ *Id.* at 150–52, 233–51. The Court of Appeals affirmed the convictions, relying on the Supreme Court’s 1925 decision in *Gitlow*. See *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943). Interestingly, Biddle later explained his decision to authorize this prosecution as a means of enabling the Supreme Court to hold the Smith Act unconstitutional. If this was, indeed, Biddle’s strategy, it did not succeed because the Supreme Court declined to review the convictions. See BIDDLE, *supra* note 31, at 151–52.

³⁴ BIDDLE, *supra* note 31, at 211.

³⁵ *Id.*

³⁶ This action was applauded by the *New York Times*:

[I]t is reassuring to note that . . . there is an absence of hysteria in regard to this war that contrasts sharply with the feeling in the last war. To say so is not to discredit our predecessors but to thank them for having taught us. . . .

[During World War I], there were prosecutions and convictions that astonish us now. . . . We have reason to hope that that sort of thing is over; and just now when we have been commemorating the Bill of Rights we may be expected to have a deeper toleration of “the thought we hate.”

Civil Liberties, N.Y. TIMES, Dec. 21, 1941, at E6. See BIDDLE, *supra* note 31, at 235.

³⁷ STEELE, *supra* note 8, at 148.

“the President should be impeached for asking Congress to declare war.”³⁸ They were charged with violating the Espionage Act of 1917.³⁹ Biddle immediately dismissed the charges, stating that free speech “ought not to be restricted” unless public safety is “directly imperiled.”⁴⁰ We had come a long way since World War I.

In fact, after Pearl Harbor few people questioned our participation in the war. Most of those who did had long been alienated from American society. They believed that national policy was set by an international conspiracy of Jews, communists, international bankers, and the British, that the attack on Pearl Harbor was due largely to our own unwise policies, that the war could serve no legitimate national purpose, and that we should promptly extricate ourselves from the conflict through negotiation.

After Pearl Harbor, the often vitriolic attacks of such individuals began to grate on the nation’s nerves. Even Biddle conceived of the central question not as “a question of a man’s right to his own opinion, but of whether the government should take steps to prevent a campaign seeking defeat, apparently well organized and springing from a central direction.”⁴¹ Nonetheless, although public pressure mounted on Biddle to punish the dissenters, he refrained from doing so, believing that critics of the war were protected by the First Amendment.⁴²

Biddle’s inaction led to a direct rebuke from the president.⁴³ Indeed, according to Biddle, it was Franklin Roosevelt who exerted the most pressure on him to prosecute dissent:

The President began to send me brief memoranda to which were attached some of the scurrilous attacks on his leadership, with a notation: ‘What about this?’ or ‘What are you doing to stop this?’ I explained to him my view of the unwisdom of bringing indictment [*sic*] for sedition except where there was evidence that recruitment was substantially being interfered with, or there was some connection between the speech and propaganda centers in Germany. . . . He was not much interested in the theory of sedition, or in the constitutional right to criticize the government in wartime. He wanted this anti-war talk stopped. . . .

After two weeks, during which F. D. R.’s manner when I saw him said as plainly as words that he considered me out of step, he began to go for me

³⁸ BIDDLE, *supra* note 31, at 235.

³⁹ 18 U.S.C. § 2388 (2003).

⁴⁰ *Sedition Cases Dropped*, N.Y. TIMES, Dec. 21, 1941, at 21. See BIDDLE, *supra* note 31, at 234–35; MURPHY, *supra* note 19, at 225; ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 264 (Schenkman 1978).

⁴¹ BIDDLE, *supra* note 31, at 236.

⁴² STEELE, *supra* note 8, at 143–44.

⁴³ *Id.* at 144.

in the Cabinet. . . . When my turn came, as he went around the table, his habitual affability dropped. . . . 'When are you going to indict the seditionists?' he would ask; and the next week, and every week after that, . . . he would repeat the same question.⁴⁴

In January 1942, Roosevelt sent a note to J. Edgar Hoover asking "what was being done about William Dudley Pelley," an admirer of Hitler, whose writing, Roosevelt observed, comes pretty close to being seditious.⁴⁵ "Now that we are in the war," he concluded, "it looks like a good chance to clean up a number of these vile publications."⁴⁶ Over the next few months, the liberal press continued their attack on fascists and former isolationists. The editor of the *Nation* complained that "[t]olerance, democratic safeguards, trust in public enlightenment" had all proved inadequate and demanded that government "Curb the Fascist Press!"⁴⁷ In April 1942, Roosevelt directly confronted Biddle, demanding to know what was being done about Pelley and pointedly asking him, yet again, "[W]hen are you going to indict the seditionists?"⁴⁸ Two months later, the arrests began.

3. "I am the Hitler of America"

William Dudley Pelley was born in 1885, in Lynn, Massachusetts. The only son of an itinerant preacher, Pelley's childhood was steeped in a world of Protestant orthodoxy and somber reflections about free will, salvation, infant damnation, and fire and brimstone.⁴⁹ In his early teens, he left school and began work in a toilet-paper factory. An avid reader, Pelley was largely self-educated. At the age of eighteen, he was hired as a junior reporter for a local newspaper. Over the next decade, he worked as a police reporter for the *Boston Globe*, served as a writer and editor for several New England journals, and published more than a hundred feature articles and short stories in such national magazines as *Red Book*, *Collier's*, the *Saturday Evening Post*, and the *American Magazine*. One of his short stories, which focused on blood ties and Christian self-sacrifice, was included in *The Best Short Stories of 1918*.⁵⁰

⁴⁴ BIDDLE, *supra* note 31, at 237–38.

⁴⁵ STEELE, *supra* note 8, at 151. See also PERRETT, *supra* note 11, at 227.

⁴⁶ STEELE, *supra* note 8, at 151.

⁴⁷ Freda Kirchwey, *Curb the Fascist Press!*, *NATION*, Mar. 28, 1942, at 357, 358.

⁴⁸ BIDDLE, *supra* note 31, at 238.

⁴⁹ See William Dudley Pelley, *Seven Minutes in Eternity*, *AMERICAN MAGAZINE*, March 1929, quoted in DONALD S. STRONG, *ORGANIZED ANTI-SEMITISM IN AMERICA: THE RISE OF GROUP PREJUDICE DURING THE DECADE 1930–40*, at 41 (American Council on Public Affairs 1941).

⁵⁰ See Suzanne G. Ledebner, *The Man Who Would be Hitler: William Dudley Pelley and the Christian Right*, 65 *CAL. HIST.* 126, 127–28 (1986); RIBUFFO, *supra* note 10, at 25–33.

Pelley was one of five men selected by the Methodist Centenary and the Rockefeller Foundation to travel to the Far East to survey Protestant foreign missions. After America's entrance into World War I, he became a publicity man for the International YMCA and a war correspondent for the Associated Press, the American Red Cross, and the *Saturday Evening Post*. He traveled more than eight thousand miles across Siberia to cover the Russian Revolution.⁵¹ He was transformed by what he saw there. As a witness to what he described as the dreadful atrocities committed by the Bolsheviks, Pelley came to understand communism as a barbaric movement led by Jews to destroy Christian society.⁵²

After returning from Russia, Pelley endorsed the League of Nations and praised Attorney General A. Mitchell Palmer's assault on domestic subversion. He eventually worked his way to Hollywood, where he was hired as a screenwriter for M.G.M. and Universal Studios. Pelley wrote screenplays for Lon Chaney, Hoot Gibson, and Tom Mix and published several critically acclaimed novels about small-town America. He was included in *Who's Who in America*. But he grew disillusioned with the "money-drunk" climate of the film industry.⁵³ He suffered a string of business reverses, his wife deserted him, and he became enmeshed in a series of unpleasant conflicts with editors and filmmakers. By 1925, he was on the verge of a nervous breakdown.⁵⁴

Then, in the early morning hours of May 29, 1927, in his small cabin in the Sierra Madre mountains, Pelley had an out-of-body experience. He later wrote that he had "died" for seven minutes. He left his physical body, "plunged down into a mystic depth of cool, blue space," bathed in a crystal-clear Roman pool, and conversed with ethereal beings who inspired him to change his life by leading a national movement to reform society.⁵⁵ In 1929, Pelley published the story of this experience in *The American Magazine*. Some ten million people read "Seven Minutes in Eternity." He claimed that, wherever it is "humans go after being released, I [went] there that night."⁵⁶ Pelley had rediscovered his voice.

He moved to Asheville, North Carolina, established a printing press and began publishing newspapers, religious tomes, and pamphlets advocating his increasingly bizarre theories. Typical titles included *That Great Migration of Souls to this Planet, Which Souls Make Up the Dark Forces?* and *Do Those Who Are Dead Meet God?* He claimed to possess a built-in "mental radio"

⁵¹ See RIBUFFO, *supra* note 10, at 33–34.

⁵² See GEOFFREY S. SMITH, *TO SAVE A NATION: AMERICAN COUNTERSUBVERSIVES, THE NEW DEAL, AND THE COMING OF WORLD WAR II* 54 (Basic Books 1973).

⁵³ RIBUFFO, *supra* note 10, at 45.

⁵⁴ *Id.* at 43–48.

⁵⁵ See Pelley, *Seven Minutes in Eternity*, quoted in SMITH, *supra* note 52, at 55; STRONG, *supra* note 49, at 42–43.

⁵⁶ SMITH, *supra* note 52, at 55.

through which he could tune in “the minds and voices of those in another dimension of being.”⁵⁷ He established Galahad College, which offered mail-order courses in such subjects as spiritual eugenics, cosmic mathematics, and ethical history.⁵⁸

On January 31, 1933, the day after Adolph Hitler was appointed chancellor of Germany, Pelley founded the Silver Legion of America, an organization dedicated to bringing fascism to the United States. Pelley’s goal was to “preserve the form of constitutional government set up by the forefathers.”⁵⁹ Pelley had been chosen to lead “the cream, the head, and the flower of our Protestant Christian manhood.”⁶⁰

Pelley stood five feet, seven inches tall, weighed 130 pounds, and was slightly deaf. He had a long, narrow face, sharp features, piercing eyes, large wolfish teeth, and silver gray slicked-back hair. He wore pince-nez glasses and a distinctive goatee. Expressing his own sense of style, Pelley personally designed both the Silver Legion’s flag (a square white banner emblazoned with a scarlet “L”) and its Nazi-like uniform (dark blue corduroy trousers and leggings, dark blue tie, silver shirt with a scarlet “L” on the breast).⁶¹ The “Silver Shirts” were Pelley’s version of Hitler’s “S.S.” Pelley traveled across the nation recruiting members, establishing training sites, speaking at rallies, and spreading his message that a cabal of Jews planned to take over the Christian nations of the world.

In his weekly newsletter, *Liberation*, Pelley blamed the Depression on a worldwide Jewish conspiracy and accused Roosevelt of being the dupe of an insidious Jewish and communist plot. A 1934 Silver Shirt pamphlet warned that this “era of corruption is—culminating—in the greatest crime ever perpetrated on the American people” because this “Jewish-controlled administration is selling the people into bondage and leading them straight on to Communism.”⁶² Pelley reported that a Jewish leader had informed him that “in only a few more months” the Jews will be in “full control of the United States,” which will then be a “tributary nation to Zion, with headquarters in Jerusalem.”⁶³ Pelley vilified Franklin Roosevelt as the “Dutch Jew” who headed the “Great Kosher Administration.”⁶⁴

⁵⁷ *Id.*

⁵⁸ *See id.*; STRONG, *supra* note 49, at 44–45.

⁵⁹ Ledeboer, *supra* note 50, at 129.

⁶⁰ SMITH, *supra* note 52, at 58. *See also* STRONG, *supra* note 49, at 43–47.

⁶¹ *See* RIBUFFO, *supra* note 10, at 63–64.

⁶² *Quoted in* SMITH, *supra* note 52, at 203 n.32.

⁶³ *Quoted in id.* at 60.

⁶⁴ *Quoted in* DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* 246 (Univ. of North Carolina Press 1988).

By 1934, there were 15,000 Silver Shirts⁶⁵ and *Liberation* had attained a circulation of 50,000. Pelley was featured in articles in *Harper's Magazine* and the *New Republic*, which warned that he was dangerous and needed watching.⁶⁶ Pelley explained his views about Hitler: "I know what those fellows [in Germany] were up against before Hitler took over. And if we have inflation here we'll be in the same boat. I believe that what Hitler is trying to do is set up a United States of Europe to do away with tariff barriers and racial prejudices."⁶⁷ With respect to anti-Semitism, Pelley said that he "absolutely and definitely would not' treat the 'Jewish problem' in this country as was done in Germany."⁶⁸ "The happier solution," he explained, "would be to have one city in each State for Jews. Let them live there and run it and have their own culture."⁶⁹

"Chief Pelley," as he was addressed by his followers, generally counseled his Silver Shirts to obey the law. In some instances, however, his subordinates disregarded this advice.⁷⁰ In 1933, a group of Silver Shirts in Salt Lake City kidnapped and severely beat a suspected communist, leaving him for dead. The San Diego branch of the Silver Legion, the most violent of the organization's local units, expressly advocated the forceful overthrow of the Roosevelt administration. In 1934, it began military training with arms and ammunition. On the whole, however, the Silver Shirts showed more bluster than bite.⁷¹

In 1934, Pelley ran into serious financial and legal difficulties. He filed for bankruptcy and was charged by the state of North Carolina with fraud, misuse of funds and the sale of unregistered stock. He was sentenced to a fine and two years in prison, with the prison sentence suspended as long as he remained on good behavior. It is unclear whether this prosecution was instigated as a means of harassing Pelley. He certainly believed this to be the case,

⁶⁵ Approximately 25 percent of the Silver League's members were women, most were middle class, most lived in rural communities in the Pacific West, and many were ex-Klansmen.

⁶⁶ See Johan Smertenko, *Hitlerism Comes to America*, HARPER'S MAGAZINE, Nov. 1933, at 660–70; Harold Loeb & Selden Rodman, *American Fascists in Embryo*, NEW REPUBLIC, Dec. 27, 1933, at 185–87; Ella Winter, *California's Little Hitlers*, NEW REPUBLIC, Dec. 27, 1933, at 188–90, all cited in Ledebor, *supra* note 50, at 155 n.34.

⁶⁷ *Pelley is Jailed in Indianapolis*, N.Y. TIMES, Apr. 6, 1942, at 7.

⁶⁸ *Id.*

⁶⁹ *Id.* In 1937, Pelley proposed sending the following Christmas card to Jews:

Dear Shylock, in this season
When we're all bereft of reason,
As upon my rent you gloat,
I would like to cut your throat.

RIBUFFO, *supra* note 10, at 60.

⁷⁰ SMITH, *supra* note 52, at 62.

⁷¹ See RIBUFFO, *supra* note 10, at 66.

and the timing of the indictment, which followed hard on the heels of his national publicity in *Harper's* and the *New Republic*, lends credence to his belief. Whatever the reason for the prosecution, it effectively drained Pelley's time, energy and attention, with the result that the Silver Legion suffered a significant loss of membership.

Undaunted, in 1935 Pelley announced his candidacy for president of the United States on the Christian Party ticket. Pelley's campaign slogans were "Christ or Chaos?" and "For Christ and Constitution."⁷² He proclaimed that "the time has come for an American Hitler."⁷³ Pelley proposed "to disfranchise the Jews by Constitutional amendment" and to restrict "Jews in the professions, trades, and sciences" according to their "quota of representation in the population."⁷⁴ Only one state—Washington—permitted Pelley on the ballot. He received 1,598 votes out of approximately 700,000 cast.⁷⁵ Pelley blamed his disappointing performance on Jewish sabotage of the voting machines.⁷⁶ Despite this defeat, the following year Pelley's name headed a German list of "National Men in America" who could be expected to cooperate with the Nazis.⁷⁷

In 1940, the Dies committee observed that a large number of organizations sympathetic to Nazi and fascist ideals had recently emerged in the United States.⁷⁸ It noted that many of these groups received literature directly from Nazi propaganda agencies in Germany and that many advocated the use of violence to change the American form of government. The committee identified Pelley's Silver Shirts as "the largest, best financed, and certainly the best published" of these groups.⁷⁹ It added that Pelley had anointed himself "the American Hitler" and characterized him as a "racketeer engaged in mulcting thousands of dollars annually from his fanatical and misled followers."⁸⁰

⁷² Quoted in Ledeboer, *supra* note 50, at 134.

⁷³ *Id.*

⁷⁴ Quoted in SMITH, *supra* note 52, at 85.

⁷⁵ See Ledeboer, *supra* note 50, at 134.

⁷⁶ See SMITH, *supra* note 52, at 86.

⁷⁷ See O. JOHN ROGGE, THE OFFICIAL GERMAN REPORT 187 (Thomas Yoseloff 1961), *cited in* Ledeboer, *supra* note 50, at 136, 155 n.63.

⁷⁸ Other such groups included Art J. Smith's "Khaki Shirts" and Gerald Winrod's "Defenders of the Christian Faith." See BENNETT, *supra* note 64, at 244–45; RIBUFFO, *supra* note 10, at 81, 88, 119.

⁷⁹ Investigation of Un-American Propaganda Activities in the United States, H.R. REP. No. 1476, 76th Cong., 3d Sess., 18–21 (Jan. 3, 1940).

⁸⁰ *Id.* The Dies committee had a difficult time getting Pelley to testify. When it first subpoenaed him, Pelley went into hiding and sought an injunction against the subpoena. Pelley finally showed up on his own, in January 1940, stating that he wanted to appear at a time and in circumstances that preserved his dignity.

4. America first

From the mid-1930s until December 7, 1941, a strong isolationist movement sprang up in the United States to oppose Roosevelt's inclination to shift away from a position of neutrality. The isolationists drew support from a wide range of business leaders, lawyers, educators, journalists, progressives, and pacifists. Such otherwise diverse figures as Oswald Villard of the *Nation*, Colonel Robert McCormick of the *Chicago Tribune*, news analyst Boake Carter, aviator Charles Lindbergh, novelist Kathleen Norris, businessman Robert E. Wood, General Hugh Johnson, former Republican presidential candidate Alf Landon, architect Frank Lloyd Wright, former Illinois governor Frank Lowden, the redoubtable Alice Roosevelt Longworth, historian Arthur J. May, and liberal journalist John Flynn all campaigned against America's participation in the war that now raged both in Europe and the Far East.

A central theme of the isolationists was that the war was not a contest between right and wrong, but a struggle between different conceptions of what is right. Thus, the United States could best serve its own interests, and the interests of the world community, by attempting to broker a negotiated peace. The isolationists argued that for the United States to involve itself directly in the war would serve no useful purpose but would destroy its ability to mediate the conflict. Fearing the strains of wartime, and recalling the experience of World War I, isolationists warned that if the United States entered the war to defend democracy abroad, it would risk losing democracy at home. Other isolationists argued that Nazi Germany was simply too powerful to thwart and that our safest course was to steer clear of what would almost surely be a disastrous military defeat.

Roosevelt was especially concerned about the activities of America First, the most mainstream and most visible of the isolationist organizations. He viewed America First not only as defeatist but as treasonable. He called for a congressional investigation to determine whether America First received financial support from Nazi Germany, but there was too much isolationist sentiment in Congress to muster sufficient support for such an investigation. Roosevelt also urged Attorney General Biddle to initiate a grand jury inquiry of America First, but Biddle concluded that there were no legal grounds for such an investigation.⁸¹

For the most part, the positions advanced by America First and its supporters were grounded in a sincere, if naive, desire to preserve America from the horrors of another foreign war. As the distinguished historian Charles Beard observed in *Harper's*, in September 1939, "Those Americans who refuse to plunge blindly into the maelstrom of European and Asian politics are not defeatist or neurotic. They are giving evidence of sanity, not cowardice."⁸² But

⁸¹ BIDDLE, *supra* note 31, at 189. See PERRETT, *supra* note 11, at 61–63.

⁸² Charles Beard, *Giddy Minds and Foreign Quarrels*, HARPER'S, Sept. 1939. See PERRETT, *supra* note 11, at 120, 158–61. In a speech on the floor of the House, Congressman John Rankin of

the isolationist movement was also fatally tainted by strains of anti-Semitism, and the support of groups like the Silver Shirts and the German-American Bund helped poison the well of American isolationism.

Defenders of the Roosevelt administration responded sharply to the isolationists who maintained that the president was attempting to drag the nation into war. The *New Republic* clamored for an investigation of America First and demanded that the National Association of Broadcasters ban Lindbergh from the radio. There were physical attacks on America First meetings in New York City, and prominent liberals accused America Firsters of being “Fifth Columnists” for the fascists. Roosevelt himself condemned members of America First as “those who unwittingly help” the “agents of Nazism,”⁸³ and Interior Secretary Harold Ickes charged that those who criticized the administration were prepared to make terms with Hitler “at the expense of this country’s welfare.”⁸⁴ Advocates of isolationism were tarred as pro-Hitler. In April 1941, the president described Charles Lindbergh as a “Copperhead” and a modern “Vallandigham.”⁸⁵

Pelley was one of the most vitriolic supporters of American isolationism. His endorsement of the cause surely did it no good. In September 1939, for instance, Pelley warned in *Liberation* that patriotic citizens must join together to oppose a conspiracy, led by “Jewish internationalists” and the “New Deal Crackpot in Washington,” designed to push the nation into a global war.⁸⁶ Pelley argued that the United States should not fight for “Mongolic Judaists.”⁸⁷ He even penned a song, “The Doughboy Blues,” to be sung by American soldiers after Roosevelt succeeded in pushing the U.S. into the war:

O haven’t you heard the news?
We’re at war to save the Jews;

Mississippi declared that “Wall Street and a little group of our international Jewish brethren are still attempting to harass the President . . . and the Congress . . . into plunging us into the European war unprepared.” 77th Cong., 1st Sess., 87 CONG. REC. 4726 (June 4, 1941). Although Lindbergh was not seen as an anti-Semite before his involvement in the isolationist movement, in September of 1941 he added fuel to the fire when he singled out “the British, the Jewish, and the Roosevelt Administration” as the forces driving the nation to war. *Assail Lindbergh for Iowa Speech*, N.Y. TIMES, Sept. 13, 1941, at 1. For an excellent discussion of Lindbergh during this period, see SMITH, *supra* note 52, at 158–81.

⁸³ Franklin D. Roosevelt, *The Time Calls for Courage and More Courage* (Mar 29, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 82–86 (Samuel I. Rosenman ed., Harper & Bros. 1950). See PERRETT, *supra* note 11, at 94, 100.

⁸⁴ Quoted in SMITH, *supra* note 52, at 172.

⁸⁵ *President Defines Lindbergh’s Niche*, N.Y. TIMES, Apr. 26, 1941, at 5; and Frank L. Kluckhohn, *Greenland Alarm*, N.Y. TIMES, Apr. 26, 1941, at 1 (“He Likens Lindbergh to Civil War Copperhead”). On Clement Vallandigham, see Geoffrey R. Stone, *Abraham Lincoln’s First Amendment*, 78 N.Y.U. L. REV. 1 (2003).

⁸⁶ SMITH, *supra* note 52, at 141.

⁸⁷ RIBUFFO, *supra* note 10, at 77.

For a hundred years they pressed our pants,
Now we must die for them in France!

So we sing the Doughboy Blues—
It's a helluva fate to choose,
To die to save the Jews;
But the New Deal busted and left us flat,
So this war was hatched by the Democrat,
To end our New Deal Blues.⁸⁸

When the United States finally entered World War II, Pelley was distraught. He dissolved the Silver Legion because it was no longer advisable—or safe—to parade about in Nazi-style uniforms. After a few weeks of sulking, however, he launched two new magazines, *Roll Call* and *The Galilean*, to resume his attack. In these journals, Pelley aggressively criticized Roosevelt, asserting that he had imposed a prewar oil embargo on Japan in order to strangle its economy and force it into war, that the president's policies had led the nation to the verge of bankruptcy, and that Roosevelt had instigated the war in order to save his faltering New Deal economy. He gloated over every American and Allied defeat and predicted a swift and glorious victory by the Axis.

In March 1942, Pelley wrote in *The Galilean* that Roosevelt had lied to the American people about Pearl Harbor when he assured them that, “although damage has been severe, our Pacific fleet is still intact.”⁸⁹ In fact, Pelley reported, the Japanese had completely destroyed the Pacific fleet. As he put it, “Japanese bombers made Pearl Harbor look like an abandoned WPA project in Keokuk!”⁹⁰ It was this issue of *The Galilean* that triggered Roosevelt's demand that Biddle “indict the seditionists.”⁹¹ (Pelley's characterization of the scope of American losses at Pearl Harbor was, in fact, more accurate than the administration's misleading reports, which attempted to calm the public by minimizing the scale of the disaster.)⁹²

⁸⁸ William Dudley Pelley, *The Doughboy Blues*, *LIBERATION*, Sept. 14, 1939, quoted in SMITH, *supra* note 52, at 141.

⁸⁹ RIBUFFO, *supra* note 10, at 77.

⁹⁰ *Id.*

⁹¹ This was not the first time Roosevelt wanted to prosecute Pelley. In 1938, Pelley questioned Roosevelt's family claim to Hyde Park in *Liberation*. A furious Roosevelt asked J. Edgar Hoover whether it would be possible to prosecute Pelley “for a thing like this.” Hoover suggested an indictment for criminal libel, but the matter went no further. The following year, Pelley accused Roosevelt of embezzling funds from the Warm Springs Foundation. Roosevelt again demanded action. Attorney General Frank Murphy said he was willing to prosecute Pelley for criminal libel, but warned the president that Pelley might subpoena him to testify. Again, the matter went no further. See RIBUFFO, *supra* note 10, at 74.

⁹² See MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 218 (Oxford Univ. Press 1992):

The first official communiqués from the islands indicated that only one old battleship and a destroyer had been sunk, that other ships had been damaged, and that American forces

5. The prosecution of William Dudley Pelley

The following month, Pelley was indicted. He was charged under the Espionage Act of 1917 with making “false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.”⁹³ The indictment included numerous counts based on statements Pelley had made in *The Galilean* between December 8, 1941, and February 23, 1942. The following are illustrative of these statements:

“To rationalize that the United States got into the war because of an unprovoked attack on Pearl Harbor, is fiddle-faddle.”

“Mr. President . . . might, easily, by the turn of a phrase . . . have prevented the attack on Pearl Harbor.”

“We have by every act and deed performable, aggressively solicited war with the Axis.”

“Mr. President chose to surround himself with Zionists and a fearful war resulted from their counsels.”

“From North Carolina to Seattle, . . . you can . . . scarcely hear a word of condemnation of the Nipponese, Germans or Italians.”

“No realist in his senses would contend that there is unity in this country for the war’s prosecution.”

“There is not the slightest enthusiasm anywhere in all America for this war—with the sole exception of the Jewish ghetto sections of our swollen cities. And those ghettos will not fight. Gentile boys from factory and farm must do the fighting.”

“[T]he losses which Britain has taken in the Far East . . . may mean the end of the war.”

The United States is “bankrupt.”⁹⁴

At the time these statements were published, *The Galilean* had a national circulation of between 3,500 and 5,000. The trial began in Indianapolis on July 28, 1942. Charles Lindbergh appeared in the courtroom to support the defense. Although Lindbergh had never met Pelley, he said he was concerned that Pelley would not receive a fair trial and that freedom of expression would be sacrificed under the pressure of war hysteria.⁹⁵

had inflicted heavy losses on the Japanese. . . . Shortly after the attack, Secretary of the Navy Knox visited Pearl Harbor and, in a press conference after his return, . . . announced that the battleship *Arizona* had been lost and that the battleship *Oklahoma* had capsized but could be righted; the rest of the Pacific fleet was fine. In reality, the *Arizona*, the *Oklahoma*, the *California*, the *Nevada*, and the *West Virginia* were all at the bottom of Pearl Harbor. . . . Full disclosure of the Pearl Harbor disaster awaited the end of the war.

⁹³ *United States v. Pelley*, 132 F.2d 170, 172 (7th Cir. 1942).

⁹⁴ *Id.* at 172–74 n.1, 175 n.2.

⁹⁵ See CHARLES A. LINDBERGH, *THE WARTIME JOURNALS OF CHARLES A. LINDBERGH* 683–89 (Harcourt Brace Jovanovich 1970).

Pelley's lawyers proved profoundly inept. Not only did they fail to assert many possible objections but, at one point, Pelley's own attorney inadvertently referred to him as "Mr. Hitler." In his closing argument to the jury, the federal prosecutor compared Pelley to Benedict Arnold, Aaron Burr, and Vidkun Quisling, proclaiming that no murderer ever "had a blacker heart than you, who tried to murder the country that nurtured you." After seven days of testimony, the jury found Pelley guilty on eleven counts of seditious libel. Declaring that his "clever mind" made him especially dangerous, Judge Robert Baltzell sentenced Pelley to fifteen years in prison.⁹⁶

The United States Court of Appeals for the Seventh Circuit affirmed Pelley's conviction. The Court of Appeals acknowledged that the very "nature" of these statements made their "refutation" difficult because many were mere "generalities with insidious connotations."⁹⁷ Nonetheless, the Court of Appeals rejected Pelley's contention that his utterances were statements of "opinions, criticisms, arguments and loose talk" that could not properly be "proved" false.⁹⁸ The Court of Appeals explained that the readers of *The Galilean* had not been "candidly informed of the true character and value of the statements," which had been stated as "definite or inevitable facts" rather than as mere opinions or conclusions.⁹⁹ Hence, Pelley's statements could reasonably be found to be false.

At Pelley's trial, the government resorted to some creative lawyering to prove the falsity of his statements. To prove that the nation was not "bankrupt," the prosecution called a banker to offer his expert opinion that this was not so. To prove that there was "national unity" behind the president, the prosecution called traveling salesmen to testify to what they heard as they journeyed about the country.

To meet the requirements of the Espionage Act, the government had to prove "evil intent" as well as falsity. That is, the government had to prove that Pelley had made false statements with the intent of hindering the war effort. To meet this burden, the prosecution presented evidence about the activities of the Silver Shirts in the mid-1930s, Pelley's 1936 campaign for president, his expressions of admiration for Hitler, and his extensive personal library of German, Italian, and Japanese "originated propaganda." The prosecution also called an expert witness to testify that Pelley's utterances "were consistent and almost identical with the fourteen major themes of German propaganda."

Ultimately, however, the Court of Appeals concluded that the "argument that proof of intent is lacking hardly needs consideration."¹⁰⁰ The Court of Appeals explained that, "[i]n time of war, when success depends on unified

⁹⁶ See RIBUFFO, *supra* note 10, at 78–79.

⁹⁷ *Pelley*, 132 F.2d at 176.

⁹⁸ *Id.* at 178, 179.

⁹⁹ *Id.* at 179.

¹⁰⁰ *Id.* at 177.

national effort,” an individual who falsely reports the country’s “failure in battle,” falsely asserts that the nation is “bankrupt,” falsely claims that it has “incompetent leadership,” and “extols the virtues” of the nation’s enemies cannot plausibly deny that he had “a criminal intent to interfere with the operation or success of the military or naval forces.”¹⁰¹ It is inconceivable, the Court of Appeals reasoned, that an individual would publish “such propaganda, at a time when his country was at war,” other than in the hope of “weakening the patriotic resolve of his fellow citizens.”¹⁰²

The Supreme Court declined to review the case. Pelley spent ten years behind bars at the Terre Haute penitentiary. He was paroled in 1952, on the condition that he not participate in any “political activities” in the future.¹⁰³

6. How far had we come?

It may be instructive to compare the prosecution of Pelley in 1942 with the prosecutions of the Republicans for “false” political statements under the Sedition Act of 1798. The Sedition Act of 1798 declared it unlawful for any person to make “false, scandalous, and malicious” statements about the government, the president, or the Congress with the intent of bringing them into “contempt or disrepute” or to excite against them the “hatred of the good people of the United States.”¹⁰⁴ Under this act, Congressman Matthew Lyon was convicted for “falsely” asserting that in the administration of President John Adams “every consideration of the public welfare” was “swallowed up in a continual grasp for power”;¹⁰⁵ Republican journalist Thomas Cooper was convicted for “falsely” accusing Adams of saddling the nation “with the expense of a permanent navy” and undermining the nation’s credit;¹⁰⁶ and Charles Holt was convicted for “falsely” stating that the citizens of the United States

¹⁰¹ *Id.*

¹⁰² *Id.* Pelley attempted unsuccessfully to challenge his conviction on two other occasions. See *Pelley v. Matthews*, 163 F.2d 700 (D.C. Cir. 1947); *Pelley v. United States*, 214 F.2d 597 (7th Cir. 1954). In his 1954 challenge, Pelley argued that he had been denied a fair trial because, he alleged, his attorney at the 1942 trial had been warned by the prosecution that “if he did not ‘pull his punches,’” and help put “Pelley away,” his wife, a German alien, would be deported. A divided Court of Appeals denied him a hearing on this question. *Pelley*, 214 F.2d at 601.

¹⁰³ STEELE, *supra* note 8, at 206–8. See also Ledeboer, *supra* note 50, at 136. Pelley died on July 1, 1965, in Nobelsville, Indiana.

¹⁰⁴ An Act for the Punishment of Certain Crimes Against the United States, 5th Cong., 2d Sess., ch. 74, 1 Stat. 596 (1798).

¹⁰⁵ FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 333 (Carey and Hart 1849).

¹⁰⁶ *Id.* at 660.

held a “just abhorrence for standing armies.”¹⁰⁷ These statements are illustrative of the assertions that were prosecuted under the 1798 Act.

The first question worth asking is whether Pelley would have been convicted under the Sedition Act of 1798. The answer, surely, is “yes.” Pelley’s statements were essentially indistinguishable from those of Lyon, Cooper, and Holt.

The more interesting question is how far we had come from 1798 to 1942. The Sedition Act of 1798 was hardly the gold standard of First Amendment protection. As Justice Oliver Wendall Holmes rightly observed in his opinion in *Abrams*, “the United States through many years had shown its repentance for the Sedition Act of 1798.”¹⁰⁸ Indeed, during the congressional debates on the Espionage Act of 1917, under which Pelley was convicted, even the most fervent proponents of the act fell all over each other insisting that the Espionage Act of 1917 was a far cry from the Sedition Act of 1798.¹⁰⁹

What was so bad about the Sedition Act of 1798? One problem was that the act made truth a *defense*, rather than requiring the prosecution to prove falsity as an essential element of the crime. But the Espionage Act of 1917 had been crafted with this history in mind, and, as the Court of Appeals recognized in *Pelley*, in prosecutions under the false statement provision of the act the government had the burden of proving falsity. Thus, an important objection to the Sedition Act of 1798 had been addressed.¹¹⁰

A second objection to the Sedition Act of 1798 was that it prohibited “false” statements of *opinion* as well as false statements of fact. Throughout the congressional debates in 1798, opponents of the act voiced this concern. Congressman Albert Gallatin, for example, observed that “writings of a political nature” usually “contain not only facts but opinions.”¹¹¹ He and other Republicans argued that it is impossible to prove statements of opinion “true” or “false,” and that the proper response to so-called “false” political opinions is public debate, not criminal prosecution for alleged “falsity.” The Republicans warned that if opinions could be declared “false,” then those who criticize the government in times of high excitement will be in grave danger that hostile judges and jurors will simply declare their opinions “ungrounded, or, in other words, false.”¹¹²

¹⁰⁷ NEW LONDON BEE (Apr. 2, 1800), at 3.

¹⁰⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁰⁹ See Stone, *Judge Learned Hand*, *supra* note 1, at 345–54. Compare Espionage Act of 1917, 18 U.S.C. § 2388 (2003), with Alien and Sedition Act of 1798, 1 Stat. 596.

¹¹⁰ The Supreme Court has since made this a constitutional requirement. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

¹¹¹ 8 Annals of Congress 2109–10 (Gales and Seaton 1851).

¹¹² 8 Annals of Congress 2109–10, 2162 (Gales and Seaton 1851).

These fears were confirmed. In prosecutions under the Sedition Act of 1798, defendants insisted that, in case after case, statements of political opinion could not constitutionally be deemed “false.” James Thompson Callender, for example, who was prosecuted for accusing President Adams of contriving a French war in order to secure a large standing army and additional taxes, argued that the Sedition Act should be construed to apply only to false statements of fact that are not susceptible to proof “by direct and positive evidence.” Justice Samuel Chase ruled otherwise, however, branding Callender’s statements “false” without regard to whether they were couched as “opinions.”¹¹³

The Court of Appeals in *Pelley*, acknowledging the lessons of history and the intent of the drafters of the Espionage Act of 1917, properly held that statements of political opinion could not be deemed “false” under the act. Thus, a second objection to the Sedition Act of 1798 had been addressed.¹¹⁴

But had it? The line between a statement of fact and a statement of opinion is often elusive. As the Court of Appeals conceded, the very “nature” of Pelley’s assertions made their “refutation” difficult because they tended to be mere “generalities with insidious connotations.”¹¹⁵ Rather than accepting Pelley’s contention that his utterances consisted of “opinions, criticisms, arguments and loose talk,” which could not constitutionally be declared false, the Court of Appeals reasoned that because Pelley had not “candidly informed” his audience of the “true character” of his statements—that is, because he had not informed his readers that these were statements of opinion rather than statements of “definite” fact—the jury could find them to be false.

What are we to make of this? Given this logic, the statements prosecuted under the Sedition Act of 1798 could also be deemed “false.” Certainly, Lyon, Callender, Holt, and Cooper, like Pelley, did not “candidly inform” their audiences that their utterances were mere statements of opinion. It would thus appear that we had made less progress from 1798 to 1942 than we first thought.

Moreover, if we cast our eyes over Pelley’s statements, it seems evident that most, if not all, of his assertions cannot fairly be characterized as containing

¹¹³ WHARTON, *supra* note 105, at 692–93, 695.

¹¹⁴ In the years since 1798, the Supreme Court has held that statements may not constitutionally be punished as “false” unless they “contain a provably false factual connotation.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). To illustrate the point, the Court observed that the assertion that someone “shows his abysmal ignorance by accepting the teachings of Marx and Lenin” cannot constitutionally be declared “false.” *Id.* Similarly, the Court has held that an individual cannot constitutionally be punished for “falsely” accusing another of “blackmail” or of being a “traitor” in circumstances where the accusation should reasonably be understood as hyperbole or metaphor. *See Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6, 7 (1970) (“blackmail”); *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (“traitor”).

¹¹⁵ *Pelley*, 132 F.2d at 176.

false statements of fact. Such statements as the president “chose to surround himself with Zionists”; it is “fiddle-faddle” to suggest that the attack on Pearl Harbor was “unprovoked”; there “is not the slightest enthusiasm anywhere in all America for this war”; and the “losses which Britain has taken in the Far East . . . may mean the end of the war” seem no different from the statements of the defendants in the Sedition Act prosecutions, and they are certainly not “definitive” assertions of fact.¹¹⁶ They are, rather, statements of argument, opinion, puffery, exaggeration, criticism, metaphor, and hyperbole, none of which can properly be deemed “false.” As Albert Gallatin warned in 1798, these are mixed statements that “contain not only facts but opinions.” And even Pelley’s more arguably factual statements, such as his claim that the United States was “bankrupt,” should fairly be construed, in context, as political hyperbole.

The danger of allowing the government to treat Pelley’s statements as falsifiable assertions is illustrated by the government’s efforts to prove “falsity” by resort to the testimony of a banker, a traveling salesman, and an “expert” witness on German propaganda. This way of proceeding, though clever, does not provide much comfort regarding the deeper realities of the proceeding. As Albert Gallatin presciently cautioned, more than two hundred years ago, what jury, in the face of war fervor and Pelley’s odious rhetoric, would hesitate to declare his opinions “ungrounded, or, in other words, false?”¹¹⁷

Consider Pelley’s statements that “to rationalize that the United States got into the war because of an unprovoked attack on Pearl Harbor, is fiddle-faddle”; that the president “might, easily, by the turn of a phrase . . . have prevented the attack on Pearl Harbor”; and that “we have by every act and deed performable aggressively solicited war with the Axis.”¹¹⁸ At the time, these statements were considered self-evidently and dangerously “false.” The judgment of history is more complex. Professor John Mearsheimer, for example, offers the following analysis:

Japan was anxious to avoid a fight with the United States, so it moved cautiously in Southeast Asia. . . . Unfortunately for Japan, it was in a position in 1941 to affect the Soviet Union’s chances for survival. . . . American policymakers were deeply worried that Japan would attack the Soviet Union from the east and help the Wehrmacht finish off the Red Army. [To prevent this], the United States employed massive coercive

¹¹⁶ *Id.* at 172–74 n.1, 175 n.2.

¹¹⁷ 8 *Annals of Congress* 2109–10 (Gales & Seaton 1851). Even the Court of Appeals seemed uneasy about this, noting that the government had “attempted” to prove these statements false, “apparently to the jury’s satisfaction.” *Pelley*, 132 F.2d at 176.

¹¹⁸ *Pelley*, 132 F.2d at 172–74 n.1, 175 n.2.

pressure against Japan to transform it into a second-rate power. . . . On July 26, 1941, with the situation going badly for the Red Army . . . and Japan having just occupied southern Indochina, the United States and its allies froze Japan's assets, which led to a devastating full-scale embargo against Japan. . . .

The embargo left Japan with two terrible choices: cave in to American pressure and accept a significant diminution of its power, or go to war against the United States, even though an American victory was widely agreed to be the likely outcome. Not surprisingly, Japan's leaders tried to cut a deal with the United States in the late summer and fall of 1941. . . . But U.S. policymakers . . . refused to make any concessions to the increasingly desperate Japanese. . . . In effect, the Japanese would be defanged either peacefully or by force. . . . Japan opted to attack the United States, knowing full well that it would probably lose, but believing that it might be able to hold the United States at bay in a long war and eventually force it to quit the conflict. . . . [The Japanese] were willing to take that incredibly risky gamble . . . because caving in to American demands seemed to be an even worse alternative.¹¹⁹

Pelley's accusations about the administration's foreign policy, like his charges about the magnitude of American naval losses at Pearl Harbor, were certainly not "false." Yet it was on precisely that premise that the government outlawed them. Just as the accusations of the Republicans in 1798 and of the antiwar dissenters in World War I had considerable merit insofar as they challenged the government's asserted reasons for going to war and should have been part of a healthy and robust political debate, so too were Pelley's accusations against the Roosevelt administration inappropriately deemed "false" as a way to excise them from public consideration.

In the patriotic fervor of the moment, legitimate criticism was transformed into false, seditious, and criminal conduct. Although Congress had clearly intended the false statement provision of the Espionage Act to apply only to false statements of *fact*, and although the Court of Appeals gave lip service to this principle, in practical effect the Court of Appeals accorded no more constitutional protection to Pelley's opinions in 1942 than the Federalist judges gave to Lyon's, Callender's, Cooper's, and Holt's opinions in 1798.

One further issue is worth exploring. Even if Pelley's statements could not fairly be characterized as false statements of fact, could they nonetheless have been punished under the other provisions of the Espionage Act of 1917? Suppose Pelley had made his statements (or statements like them) during World War I. Could he have been punished under the provisions of the act prohibiting any person to "attempt to cause insubordination" or to "obstruct the recruiting or enlistment service of the United States"?

¹¹⁹ JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 222–24 (Norton 2001).

Under the standards used by the courts during World War I, Pelley could certainly have been convicted under those provisions. If Charles Schenck and Jacob Abrams were guilty of violating those provisions, then surely Pelley violated them as well. His statements in *The Galilean* certainly had a “bad tendency” to hinder the war effort, and a jury certainly could have inferred constructive intent to interfere with the war. Thus, even though Pelley should not have been punished for uttering “false” political opinions, he could have been punished under the bad tendency/constructive intent standard of World War I.

This does not end our inquiry, however, for the World War I-era standard had been discredited by 1942, and the Supreme Court was well on its way to embracing a variant of the Holmes/Brandeis clear and present danger standard.¹²⁰ Whatever else one might say about Pelley’s statements, there was certainly no clear and present danger that his comments in *The Galilean* would significantly and immediately disrupt the war effort.

Thus, although Pelley could have been punished during World War I because his statements satisfied the “bad tendency” standard, he could not have been punished on that basis in 1942. Indeed, this is precisely why he was charged under the “false statement” provision of the act, and why the Court of Appeals emphasized that the falsity of his statements “was *sine qua non* to the existence of the offense.”¹²¹

This is important because it implies a clear recognition in 1942 that criminal prosecutions for expression of the sort that were commonplace during World War I were now of doubtful constitutionality. Although both the Department of Justice and the Court of Appeals in *Pelley* can be faulted for not working out the fine points of a prosecution for false statement, there is no question that the insistence on this form of prosecution marked an important, if imperfect, leap forward.

7. The “Great Sedition Trial” of World War II

In July 1942, under continuing pressure from the public, the press, and the president, Attorney General Biddle announced the indictment of twenty-six American fascist leaders, charging them under both the Espionage Act of 1917 and the Smith Act of 1940 with conspiracy to undermine the morale of the armed forces. Although these defendants were vehemently antiadministration, anticommunist (now our allies), anti-Semitic, pro-German, and enthralled with Hitler, even lawyers in the Department of Justice were uneasy about how politics and public pressure had led to this sudden rash of indictments.

¹²⁰ See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Bridges v. California*, 314 U.S. 252 (1941).

¹²¹ *Pelley*, 132 F.2d at 172, 176.

Zechariah Chafee condemned the indictment as “indefensible,” Roger Baldwin described it as “monstrous,” and Senator Robert Taft “assailed [it as] ‘witch hunting’ reminiscent of World War I.”¹²²

Representative of the views of the defendants is the following passage from “The Political Genius of Hitler,” published in the *Weckruf*, on July 6, 1939:

Unpalatable as it may be for us to accept the idea, it must be recognized that Hitler, when analyzed simply on the basis of historical fact, is not only the greatest political genius since Napoleon, but also the most rational. During five years, Hitler has not made one important mistake or suffered one serious setback. . . . He has transformed Germany from a vanquished nation . . . into the master of Europe. . . . A rational political genius who gets what he wants is incomprehensible to a people steeped in the irrational rationalism of men like Woodrow Wilson and Franklin D. Roosevelt who start things they cannot finish. . . .

The Haves are on the defensive, but they must not expect to be able to solve their problem through a victorious war over the Have-nots. The Haves cannot afford to fight; the Have-nots can. However distasteful it may seem, the only policy for the survival of the Haves is one of appeasement. . . .¹²³

Most of the defendants in this prosecution had nothing in common but a shared hatred of Jews, communism, and Roosevelt and a general faith in the principles of fascism. Nonetheless, they were charged with conspiracy. The defendants were aptly described in the *New York Times* as “as queer a kettle of fish as was ever assembled by such means.”¹²⁴ Another writer noted at the

¹²² STEELE, *supra* note 8, at 214, 211–17; RIBUFFO, *supra* note 10, at 194, 195.

¹²³ MAXIMILIAN ST. GEORGE & LAWRENCE DENNIS, A TRIAL ON TRIAL: THE GREAT SEDITION TRIAL OF 1944, at 441–43 (National Civil Rights Committee 1946) (Government Exhibit No. 4295). Another example of their public statements is Government Exhibit No. 4348, an extract from the *Weckruf* of January 16, 1941, entitled “The Story Behind the Dies Committee”: “The White House saw the possible utility of the Committee for warmongering purposes. It could provide war hysteria and smear isolationists. The purpose of the . . . smear tactics is purely to intimidate American or native isolationists. . . . The technique of the Dies smear is to identify opposition to American entry into the war with activities of German agents too terrible to particularize. German agents, good Germans and German sympathizers are guilty of the twin crimes of being German and opposing American entry into the war. Any American who opposes American entry into war is a fellow conspirator and a criminal. . . . The big idea is to damn, persecute or punish people for offenses which are not punishable under statutory laws.” *Id.* at 441. Other statements of the defendants described Roosevelt as “a warmonger, liar, unscrupulous, and a pawn of the Jews, Communists and Plutocrats” and charged that the laws of the United States were “illegal, corrupt, traitorous and in direct violation of the Constitution.” *Id.* at 119.

¹²⁴ According to the indictment, the defendants used various organizations to implement their conspiracy, including the Ku Klux Klan, the Black Legion, the America First Committee, the

time that “[s]eldom have so many wild-eyed, jumpy lunatic fringe characters been assembled in one spot, within speaking, winking, and whispering distance of one another.”¹²⁵

The defendants included such characters as Lawrence Dennis, the so-called “fascist philosopher”; Elizabeth Dilling, a Bible-thumping “child of God” who had given up her career as a concert harpist to enlist in the “cause”; Robert Noble, who preached that Germany had already won the war and that the United States should accept the “New Order”; Hans Diebel, a former Bund leader who ran the Aryan Bookstore in Los Angeles; and anti-Semitic prophet Gerald L. K. Smith; among others.

Although newspapers across the political spectrum applauded the indictment, the prosecution, in Francis Biddle’s words, soon dissolved into a “dreary and degrading experience.”¹²⁶ “Nothing like [it],” he added mournfully, “had ever happened in an American court of law.”¹²⁷ In April 1944, almost two years after they had been indicted, and after several strained revisions of the indictment, the defendants finally went on trial.

The proceeding was popularly known as the Great Sedition Trial of World War II and was covered widely in the press by Walter Winchell, the *Washington Post*, the *New York Times*, and *Life* magazine. It was a legal and public relations nightmare for the government. Amid scenes of “uproar approaching the dimension of a riot,” Judge Edward Eicher was determined to be fair.¹²⁸ But the defendants were “obstinate and unruly.”¹²⁹ Their forty attorneys raised every conceivable objection to every item of evidence, and “turbulent scenes were the order of the day.”¹³⁰ While the judge and the government attempted to follow conventional judicial procedures, the defendants wore Halloween masks, “moaned, groaned, laughed aloud, cheered and clamored.”¹³¹ Throughout the trial, they “wailed hysterically that it was all a Jewish-Communist plot to curb their freedom of speech.”¹³²

The crux of the government’s case was that the defendants had acted in concert with the enemy. But the government could present no evidence to

German-American Bund, We the Mother United, and the National Committee to Keep America Out of War. See Lewis Wood, *28 are Indicted on Sedition Charge*, N.Y. TIMES, July 24, 1942, at 1.

¹²⁵ James Wechsler, *Sedition and Circuses*, NATION, May 6, 1944, at 530–31, quoted in RIBUFFO, *supra* note 10, at 99.

¹²⁶ BIDDLE, *supra* note 31, at 241.

¹²⁷ BIDDLE, *supra* note 31, at 242. See also GOLDSTEIN, *supra* note 40, at 266–70.

¹²⁸ GOLDSTEIN, *supra* note 40, at 269, quoting EDWIN CORWIN, *TOTAL WAR AND THE CONSTITUTION* 115 (Alfred A. Knopf 1947).

¹²⁹ BIDDLE, *supra* note 31, at 242.

¹³⁰ *Id.*

¹³¹ PERRETT, *supra* note 11, at 361.

¹³² *Id.*

support this charge. The tenor of the trial was set by prosecutor O. John Rogge, whom Robert Jackson had demoted because of his excessive zeal and ruthlessly antifascist views.¹³³ A brief excerpt from Rogge's opening statement gives one a sense of his style:

As the Nazi war on the democratic world grew more intense, the evidence will show that the defendants increased their propaganda campaigns. They attacked . . . every step which our Government took to defend itself. When our country began to enlarge its army through the Selective Service Act, the defendants first fought against the enactment of the statute and then . . . preached to the soldiers that they were being trained, not because our country needed to be defended, but because our public officials and the Congress were betraying the American prople. . . .

While it is true that many Americans in good faith opposed our steps to prepare ourselves for the coming attack and to help fight the Nazis, the defendants cannot be identified with such persons . . . since the intent of the defendants was not a patriotic one, not an American one, but an intent . . . to promote the Nazi cause throughout the world.¹³⁴

As the trial progressed, it quickly devolved into a circus that threatened to go on indefinitely. Even though the *Washington Post* had initially demanded the prosecution, by midtrial it was editorializing that the proceeding would “stand as a black mark against American justice for years to come” and urged the government to “end this sorry spectacle.”¹³⁵ On November 30, 1944, before the case was submitted to the jury, an exhausted and miserable Judge Eicher suddenly died. As Biddle sadly observed, “[t]he trial had killed him.”¹³⁶ This caused a mistrial.

There the matter languished until December 1946, when the government finally dismissed the indictments—four months after the war had ended and four and a half years after the defendants had been arrested. Although the public had lost interest in the Great Sedition Trial well before it dragged to its sorrowful conclusion, few people protested this attack on speech that was so “despised by the majority.”¹³⁷ The Great Sedition Trial left no legal precedent and put no one behind bars, but it did curtail far-right propaganda during the war, compel thirty American fascists to defend themselves in court for four years, and set an important political precedent for the Smith Act prosecutions of communists during the Cold War, which was just around the corner.

¹³³ STEELE, *supra* note 8, at 219–24, 195.

¹³⁴ ST. GEORGE & DENNIS, *supra* note 123, at 288–89.

¹³⁵ STEELE, *supra* note 8, at 224.

¹³⁶ BIDDLE, *supra* note 31, at 243.

¹³⁷ Preston, *supra* note 30, at 114. For an excellent account of the case, see RIBUFFO, *supra* note 10, at 193–215.

8. "A dark chapter in our record of the last World War"

These were not the only Espionage Act and Smith Act prosecutions during World War II, but they were the ones that attracted the most attention. In total, some 200 individuals were indicted under these acts during the course of the war.¹³⁸ In addition to criminal prosecutions, the federal government also invoked its authority to exclude seditious material from the mail. In the spring of 1942, for example, in response to President Roosevelt's demands, Attorney General Biddle worked out a plan with postal authorities to deny mailing privileges to Father Charles Coughlin's *Social Justice*, the most widely read of the virulently antiadministration publications.¹³⁹

Between 1926 and 1936, Father Coughlin rose from obscurity as a Roman Catholic parish priest to prominence as a national figure who was both worshipped and reviled. The secret of Father Coughlin's influence was his inimitable radio voice. Coughlin's brogue had a "rich, mellow, and musical" tone that lulled, charmed, and inspired; his "was a voice made for fervent hopes."¹⁴⁰ Coughlin began his radio career in Royal Oak, Michigan, in an effort to confront the forces of Ku Klux Klan intolerance. He soon turned his energies against communism, however, which he linked to divorce, birth control, and free love. Coughlin connected so effectively with the despair and discontent of the Depression that, by the mid-1930s, his weekly radio audience ran into the tens of millions and placed him ahead of even Gracie Allen and *Amos 'n Andy*. He was "the radio star of his age."¹⁴¹

Within a few years, Coughlin became not only a powerful religious leader but a political force to be reckoned with. He mailed out millions of copies of his sermons each week. Although initially enamored of Roosevelt, Coughlin changed his tune when the president declined to follow his advice about how to deal with the Depression (he counseled Roosevelt to print large amounts of unbacked paper money). In 1934, Coughlin founded his own social movement, the National Union for Social Justice.

By 1936, the National Union had more than five million members, and *Social Justice* had a circulation of more than a million. Coughlin's

¹³⁸ See GOLDSTEIN, *supra* note 40, at 268. One series of prosecutions was directed against black nationalist leaders who identified with the Japanese. They saw the war as furthering the racist policies of the United States and maintained that the attack on Pearl Harbor was a blow for freedom because the Japanese would "redeem the Negroes from the white men in this country." STEELE, *supra* note 8, at 185. See GOLDSTEIN, *supra* note 40, at 270.

¹³⁹ F. D. R. was responding, in part, to the fact that for several months the government had been "bombarded with requests 'to do something about *Social Justice*.'" Lewis Wood, *Attack on Axis-Line Press*, N.Y. TIMES, Apr. 19, 1942, at E7.

¹⁴⁰ SMITH, *supra* note 52, at 12–13.

¹⁴¹ BENNETT, *supra* note 64, at 254.

crusade offered a charismatic “Father” figure to his legions of followers. After a disastrous effort to unseat Roosevelt in 1936, Coughlin moved even more sharply to the right.¹⁴² By 1938, he was sounding more and more like a European fascist. He advocated a corporative state in America and praised the social justice of the Third Reich.

Only a month after *Kristallnacht*, Coughlin roared that it was time for the American people to halt the international Jewish conspiracy’s spread of communism. According to the *New York Times*, Coughlin’s radio sermons now made him the German hero in America, and the Bund celebrated him as one of the few Americans who had the courage to withstand the intimidation of the Jews. He was soon railing against “the problem of the American Jews.”¹⁴³ He frequently lifted entire passages verbatim from Nazi propaganda, including a particularly notable speech by Goebels.¹⁴⁴

Father Coughlin’s anti-Semitic outbursts horrified many Catholic leaders, but these tirades diminished neither his appeal nor the size of his audience. Over the next year, Coughlin’s *Social Justice* declared that any war to aid the Jews of Europe was unthinkable, justified Hitler’s seizure of Czechoslovakia, and named the Führer “Man of the Week.”¹⁴⁵

Once the United States entered World War II, *Social Justice* ruthlessly castigated Roosevelt, belittled the American military, cited Allied setbacks as signs of impending collapse, and blamed the war on a British-Jewish-Roosevelt conspiracy against Germany and Italy. Attorney General Biddle observed that there was a “striking similarity” between *Social Justice* and “Axis propaganda” and noted that it had “made a substantial contribution to a systematic and unscrupulous attack upon the war effort of our nation.”¹⁴⁶ In April 1942, *Social Justice* was banned from the mails under the Espionage Act of 1917, pending a final determination. Biddle defended this action on the ground that *Social Justice* violated the “false statement” provision of the act.¹⁴⁷

Coughlin responded with a letter to Biddle, which Coughlin also released to the press, in which he offered to appear at any time before a grand jury to testify to the truth of the statements in *Social Justice*. Recognizing that

¹⁴² See BENNETT, *supra* note 64, at 255–63.

¹⁴³ See *WMCA Contradicts Coughlin on Jews*, N.Y. TIMES, Nov. 21, 1938, at 7; *Coughlin Defends Address on Jews*, N.Y. TIMES, Nov. 28, 1938, at 1.

¹⁴⁴ See STRONG, *supra* note 49, at 61–63.

¹⁴⁵ See SMITH, *supra* note 52, at 129.

¹⁴⁶ *Mailing Ban Put on Social Justice*, N.Y. TIMES, Apr. 15, 1942, at 1, 7. According to Lewis Wood, “[b]ecause of its prominence, *Social Justice* was singled out as the keystone in the arch of publications the government wants to demolish.” “Drives against others,” he reported, “will begin next week and be carried on continuously.” Lewis Wood, *Attack on ‘Axis-Line’ Press*, N.Y. TIMES, Apr. 19, 1942, at E7.

¹⁴⁷ See BIDDLE, *supra* note 31, at 245.

Coughlin was attempting to set up a situation in which he could play the role of martyr, and that a criminal prosecution of Coughlin would throw the country “into a rift that would do infinite harm to the war effort,”¹⁴⁸ Biddle appealed to the Church hierarchy. In May 1942, the Catholic Church assured the government that Father Coughlin would remain silent for the duration of the war (on pain of being defrocked), and *Social Justice* permanently and voluntarily surrendered its second-class mail permit.¹⁴⁹

The other major publication excluded from the mails during World War II was *The Militant*, the weekly journal of the Socialist Workers Party. According to Postmaster General Frank C. Walker, *The Militant* was barred because it attempted “to embarrass and defeat the government in its effort to prosecute the war to a successful termination.”¹⁵⁰ Attorney General Biddle added that *The Militant* “openly discouraged participation in the war by the masses of the people.”¹⁵¹ Post Office Attorney William O’Brien explained that “[i]t does not make any difference if everything *The Militant* [says] is true. We believe that any one violates the Espionage Act who holds up and dwells on the horrors of war with the effect that enlistment is discouraged by readers.”¹⁵² By mid-1942, the postal service had excluded some thirty publications from the mail.¹⁵³

As in World War I, state and local governments also sought to involve themselves with issues of loyalty and security.¹⁵⁴ For the most part, however, the Roosevelt administration was effective at restraining state and local governments. As Biddle later recalled, he and Robert Jackson were “anxious to avoid the hasty and harmful state legislation which had broken out like a rash when the United States entered the First World War.”¹⁵⁵ Various committees at a 1940 conference recommended that the “[u]se of private organizations and persons other than the constituted authorities” should be “carefully restricted,” that states should not enact sedition laws, and that aliens “should be spared from harassment and persecution.”¹⁵⁶ State and local officials

¹⁴⁸ *Id.* at 247, 245–48.

¹⁴⁹ *Id.* at 247–48.

¹⁵⁰ *Militant, Weekly, Barred from Mail*, N.Y. TIMES, Mar. 8, 1943, at 17.

¹⁵¹ *Id.*

¹⁵² *The Militant Case*, N.Y. TIMES, Apr. 28, 1943, at 22.

¹⁵³ See GOLDSTEIN, *supra* note 40, at 268–71; STEELE, *supra* note 8, at 161–72; BLANCHARD, *supra* note 92, at 209–10.

¹⁵⁴ See GOLDSTEIN, *supra* note 40, at 255–59; SMITH, *supra* note 52, at 153–54.

¹⁵⁵ BIDDLE, *supra* note 31, at 111.

¹⁵⁶ Frederick R. Barkley, *Crime Parley Puts Spy Issue up to FBI*, N.Y. TIMES, Aug. 7, 1940, at 2. Much of the conference was devoted to ensuring that the FBI had primary control over the investigation of espionage and sabotage.

agreed to take seriously their responsibility to restrain vigilantes and to cede responsibility in combating disloyalty to the federal government.¹⁵⁷

Throughout the war, the Roosevelt administration attempted to maintain clear lines of authority and to foster restraint at the state and local levels.¹⁵⁸ Attorneys general Jackson and Biddle campaigned actively against vigilantism and consistently spurned suggestions from private groups urging the revival of organizations like the American Protective League, which had played so significant a role during World War I. Biddle pledged publicly that civil liberties would be protected, and that we will “not again fall into the disgraceful series of witch hunts . . . and minority persecutions which were such a dark chapter in our record of the last world war.”¹⁵⁹

FBI director J. Edgar Hoover also played a positive role in these efforts. His “primary goal” during the war was to prevent the kind of mass hysteria that had infected the nation during World War I.¹⁶⁰ He knew that such hysteria would lead to abuses of civil liberties and that this eventually would come back “to haunt him and discredit his Bureau.”¹⁶¹ His message throughout the war was “leave it to the FBI.”¹⁶²

As a result of these efforts, no state passed a sedition act during World War II, there were very few state prosecutions for disloyalty, and incidents of vigilantism were rare. The most frequent targets of vigilantism were Jehovah’s Witnesses, who opposed all war and refused to salute the flag. During the course of World War II, some 1600 Jehovah’s Witnesses were beaten by mobs, tarred and feathered, tortured, castrated, and killed in more than forty states. In some of these incidents, local officials participated in the mob actions.¹⁶³ Violent persecution of Jehovah’s Witnesses declined after May 1942, however, when the civil rights division of the Department of Justice began to threaten local officials with federal prosecution if they failed to protect the constitutional rights of American citizens.¹⁶⁴

¹⁵⁷ The Supreme Court helped in this effort as well. See *Hines v. Davidowitz*, 312 U.S. 52 (1941) (invalidating a Pennsylvania statute requiring aliens to register because federal law had preempted state action in this area).

¹⁵⁸ BIDDLE, *supra* note 31, at 111–12.

¹⁵⁹ GOLDSTEIN, *supra* note 40, at 264.

¹⁶⁰ POWERS, *supra* note 18, at 253, 253–55.

¹⁶¹ *Id.* at 255.

¹⁶² *Id.*

¹⁶³ See PERRETT, *supra* note 11, at 91–92; *Curbs on Freedom by States Feared*, N.Y. TIMES, Jan. 2, 1941, at 8 (citing an ACLU report that from May through December 1940, more than 1,600 Jehovah’s Witnesses were “forcibly interfered with, mobbed, tarred and feathered, or assaulted, with comparatively little restraint by local authorities”). See BLANCHARD, *supra* note 92, at 194–202.

¹⁶⁴ See GOLDSTEIN, *supra* note 40, at 282–83.

9. The Supreme Court of the United States

Where was the Supreme Court during all this activity? For the most part, the Court played a cautiously speech-protective role. In several narrowly drawn but important First Amendment decisions, the Court consistently upheld the rights of dissenters.

Schneiderman v. United States,¹⁶⁵ for example, involved the issue of denaturalization. For most purposes, citizenship acquired by naturalization is indistinguishable from citizenship acquired by birth. But federal law provides for the cancellation of naturalized citizenship if it was obtained by fraud.¹⁶⁶ Acting under such provisions, the government instituted a series of legal actions beginning in the late 1930s to cancel the naturalization of persons who had “indicated by disloyal conduct that they were not at the time of naturalization ‘attached to the principles of the Constitution’ ” or “whose oath of allegiance to the United States was accompanied by a mental reservation of foreign loyalty.”¹⁶⁷

By the end of 1943, the United States had issued 146 decrees of cancellation. Most of these cases involved former German nationals who had promoted Nazi doctrines in the United States or had been active in the German-American Bund. Illustrative of the statements that led to the initiation of denaturalization proceedings were “no one can force us to give our souls to America” and “the term German is higher than German-American citizen.”¹⁶⁸ Other denaturalizations involved members of the Communist Party, although there were relatively few of these cases because of our desire not to alienate our Soviet ally. The effect of a decree of cancellation was to reinstate the individual’s original nationality and, if that nationality was German, to render the individual subject to internment or deportation as an enemy alien.¹⁶⁹

Schneiderman arrived in the United States from Russia in 1909 when he was three years old. In 1922, when he was sixteen, he joined the Young Workers League. In 1927, he became a naturalized American citizen. Throughout this period, Schneiderman remained active in the Young Workers League and the Workers Party, which later became the Communist Party of the United States. In 1932, he was the Communist Party’s candidate for governor of Minnesota. In 1939, the United States instituted denaturalization

¹⁶⁵ 320 U.S. 118 (1943).

¹⁶⁶ See An Act to Establish a Bureau of Immigration and Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens throughout the United States, Pub. L. No. 59–338, § 15, 34 Stat. 596, 601 (1906); Nationality Act of 1940, Pub. L. No. 76–853, § 338, 54 Stat. 1137, 1158–59 (1940) (Codified by 8 U.S.C. § 738).

¹⁶⁷ 1943 Annual Report of the Attorney General of the United States 11 (June 30, 1943).

¹⁶⁸ *Naturalized Foes to Lose Citizenship*, N.Y. TIMES, Mar. 26, 1942, at 25.

¹⁶⁹ 1943 Annual Report of the Attorney General of the United States 11 (June 30, 1943). See STEELE, *supra* note 8, at 189–203.

proceedings against him on the premise that in 1927 he could not sincerely have accepted attachment to the principles of the Constitution when he was, at the same time, a member of the Communist Party.

Writing for the Court, Justice Frank Murphy rejected this reasoning, holding that even Schneiderman's belief in the "nationalization of the means of production" was not necessarily inconsistent with the "general political philosophy" of the Constitution and that Schneiderman's membership in the Communist Party did not establish his opposition to the principles of the Constitution.¹⁷⁰ Murphy distinguished sharply between radical political dissent, which is protected by the First Amendment and is consistent with the principles of the Constitution, and "exhortation calling for present violent action which creates a clear and present danger."¹⁷¹

Murphy explained that this distinction is essential to protecting naturalized citizens against the ever-changing "stresses of the times."¹⁷² The Court, therefore, held that the government could not constitutionally denaturalize an American citizen for membership in the Communist Party unless it could prove by "clear, unequivocal, and convincing evidence" that the individual had personally endorsed the use of "present violent action which creates a clear and present danger of public disorder or other substantive evil."¹⁷³

The following year, in *Baumgartner v. United States*,¹⁷⁴ the Court considered the case of a German-born individual who had become a naturalized citizen of the United States in 1932. Because Baumgartner later embraced Hitler and his doctrines of Aryan supremacy, the government cancelled his naturalization on the theory that he had not been loyal to the United States at the time of his naturalization. Expanding on *Schneiderman*, the Court held that an individual could not be denaturalized for speaking "foolishly and without moderation," or for making even "sinister-sounding" statements "which native-born citizens utter with impunity."¹⁷⁵ *Baumgartner* effectively ended the government's program to denaturalize former members of the Bund.¹⁷⁶

¹⁷⁰ 320 U.S. at 141.

¹⁷¹ *Id.* at 157–59.

¹⁷² *Id.* at 159.

¹⁷³ *Id.* at 157, 158.

¹⁷⁴ 322 U.S. 665 (1944).

¹⁷⁵ *Id.* at 674, 677.

¹⁷⁶ For a full discussion of the denaturalization cases, see HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 423–36 (Harper & Row 1988). The Court also overturned the decision to deport labor leader Harry Bridges, ruling, in 1945, that there was no evidence showing that Bridges had any connection with any organization advocating the illegal overthrow of the government, except in "wholly lawful activities." *Bridges v. Wixon*, 326 U.S. 135, 143 (1945). For a decision upholding a denaturalization order, see *Knauer v. United States*, 328 U.S. 654 (1946) (holding that the defendant had falsely sworn loyalty to the United States).

The Court also dealt with several prosecutions for subversive advocacy during World War II. In *Taylor v. Mississippi*, the defendant was prosecuted for stating that “it was wrong for our President to send our boys . . . to be shot down for no purpose at all.”¹⁷⁷ The Court held unequivocally that even in wartime “criminal sanctions cannot be imposed for such communication.”¹⁷⁸ In *Hartzel v. United States*, the defendant was convicted for distributing pamphlets that depicted the war as a “gross betrayal of America,” denounced “our English allies and the Jews,” and assailed the “patriotism of the President.”¹⁷⁹ Although the case was, in many respects, a rerun of *Schenck*, the Court reversed the conviction because the government had failed to prove that Hartzel had specifically intended to obstruct the draft. The Court added that “an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act.”¹⁸⁰ This decision went a long way toward ending government efforts to prosecute antiwar dissent.¹⁸¹

The Court also grappled with issues posed by Jehovah’s Witnesses, especially the question of the compulsory flag salute and pledge of allegiance. Before our entry into the war, the Court held in *Minersville School District v. Gobitis*¹⁸² that school children could constitutionally be expelled from public schools for refusing to salute the American flag. Three years later, however, in 1943, at the height of the war, the Court overruled *Gobitis* and in *West Virginia State Board of Education v. Barnette*¹⁸³ held unconstitutional a state law requiring all children in the public schools to salute and pledge allegiance to the flag.

10. Conclusion

Overall, then, the nation’s free speech record in World War II was mixed. On the one hand, the government clearly felt the tension between respect for

¹⁷⁷ 319 U.S. 583, 586 (1943).

¹⁷⁸ *Id.* at 590.

¹⁷⁹ 322 U.S. 680, 683 (1944).

¹⁸⁰ *Id.* at 689. *See also* Keegan v. United States, 325 U.S. 478 (1945) (overturning the convictions of twenty-four members of the Bund who had been charged with advocating draft evasion); Viereck v. United States, 318 U.S. 236 (1943) (overturning the conviction of a German propaganda agent).

¹⁸¹ *See* MURPHY, *supra* note 24, at 226–27; KALVEN, *supra* note 176, at 185–87; BLANCHARD, *supra* note 92, at 205–6. The federal courts upheld several treason prosecutions of individuals who had served as paid propaganda agents for the enemy. *See, e.g.*, Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (German broadcaster); D’Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (“Tokyo Rose”). *See* BLANCHARD, *supra* note 92, at 207–9; STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 3–32 (Hill and Wang 1982).

¹⁸² 310 U.S. 586 (1940).

¹⁸³ 319 U.S. 624 (1943).

constitutional values and the pressure to accommodate public opinion. The activities of the Dies committee, the Great Sedition Trial, and the government's aggressive denaturalization proceedings all reflected overreactions to the necessities of the day.

Franklin Roosevelt, who enthusiastically supported free speech in principle, often exerted a negative influence, particularly when the protection of free expression conflicted with his political self-interest. Without his often-aggressive insistence on "action," his attorneys general would have exercised greater restraint.

The community of lawyers and other citizens who came to a deeper appreciation of free expression in the wake of World War I too often fell back into a stance of passivity in the face of wartime anxiety and antifascist, anticommunist fervor.¹⁸⁴ As the experience of World War II demonstrates, it takes a good deal more fortitude to stand up for free speech for the opinions "we loathe" when a nation is at war than when it is at peace.

On the other hand, there were many fewer prosecutions for seditious expression in World War II than in World War I, and there can be little doubt that widespread concern over the excesses of World War I, the rhetorical power of the Holmes/Brandeis dissents in cases like *Abrams*, *Gitlow*, and *Whitney*, the Supreme Court's increasingly speech-protective prewar decisions, the public's celebration of free expression in the decade leading up to World War II, and the commitment of attorneys general Murphy, Jackson, and Biddle not to repeat the mistakes of the past generated a significant counterweight to the pressures to suppress dissident speech.

Moreover, the federal government in this era was quite effective in dampening state and local efforts to punish dissent, and the new civil liberties division of the Department of Justice helped guide state and local officials in their protection of free expression. And although the Supreme Court played a cautious role, its decisions during World War II consistently cabined the tendency of government to punish those who criticized the war or embraced "anti-American" values.¹⁸⁵

¹⁸⁴ STEELE, *supra* note 8, at 156–58.

¹⁸⁵ See BLANCHARD, *supra* note 92, at 228. One noteworthy failure of the Supreme Court was its refusal to review the *Pelley* and *Dunne* cases. See *Pelley v. United States*, 318 U.S. 764 (cert denied); *Dunne v. United States*, 320 U.S. 790 (1943) (cert denied). See also KALVEN, *supra* note 176, at 629 n.8. Robert Goldstein, who is generally critical of the nation's response to free speech issues during World War II, gives high marks to the Supreme Court, noting that to the extent the nation did well in this era, the Supreme Court "bears a good deal of the responsibility." GOLDSTEIN, *supra* note 40, at 280. His overall view, however, is that in terms of the " 'ratio' of repression to dissent . . . there was probably more repression during World War II in relation to the amount of dissent voiced, than in any period in American history." *Id.* at 284.