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## Righting a Wrong: Woodrow Wilson, Warren G. Harding, and the Espionage Act Prosecutions

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# RIGHTING A WRONG: WOODROW WILSON, WARREN G. HARDING, AND THE ESPIONAGE ACT PROSECUTIONS

*David F. Forte*<sup>†</sup>

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## INTRODUCTION

For all its horrors, war can sometimes bring out the best in men. For all their good intentions, wartime laws can sometimes trigger the worst. Courage and self-sacrifice attends the soldier, yet fear and intolerance can strike at home. While thousands of valorous men hurled themselves at the beaches of Normandy, loyal Americans of Japanese lineage remained confined in isolated internment camps. While the doughboys at Belleau Wood gave their lives in openhanded sacrifice, back at home, their government prosecuted thousands for what they said, and mobs persecuted others for who they were.

This is a story of excess and reparation. It is a chronicle of one President from the elite intellectual classes of the East, and another from a county seat in the heartland. Woodrow Wilson was the college president whose contribution to the art of government lay in the principle of expertise and efficiency. When he went to war, he turned the machinery of government into a comprehensive and highly effective instrument for victory. For Wilson, it followed that there could be little tolerance for those who impeded the success of American arms by their anti-war propaganda, draft resistance, or

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ideological dissent. Nor would there be any compromise with those who later opposed his plan for peace.

Warren G. Harding was a middling sort of person, simple in his virtues, mundane in his vices. Inadequately educated—as he always admitted—he nonetheless became a successful newspaper editor by overcoming the shared monopoly of two established dailies. His persistence brought him political success in the rough world of Ohio Republican politics. Where Wilson thought efficiency the hallmark of a successful administration, Harding believed it to be harmony. While Wilson sought to confine those who opposed his war aims, and unseat those who rejected his peace aims, Harding did not think a man should be in jail for what he said. Where Wilson oversaw the segregation of the civil service, Harding confronted Jim Crow in the Deep South.

Between the two stood Eugene V. Debs, the Marxist Socialist who could gather nearly a million votes for President but who looked forward to a revolution that would unseat the capitalists from their positions of power. There was nothing that Debs stood for that either Wilson or Harding could abide. But while Wilson wanted to keep Debs in prison, Harding wanted to shake his hand.

## I. DEBS

On Christmas Eve 1921, a tearful Eugene V. Debs waved to the cheers of more than 2,000 inmates at the Atlanta Penitentiary as he took leave of them and his incarceration, his commutation in hand signed by President Warren G. Harding.<sup>1</sup> Now former prisoner 9653, Debs was taken to the train, but he did not travel directly to his home in Terre Haute, Indiana. Instead, the train took him to Washington, D.C., for President Harding had appended a request to the commutation: would Mr. Debs be kind enough to allow the President to receive him at the White House?<sup>2</sup>

An early labor organizer, Debs, who was first a Democrat, read *Das Kapital* and other socialist writings in jail when he had been convicted of violating a court injunction during the Pullman strike of 1894.<sup>3</sup> Thereafter, on January 1, 1897, he announced his conversion to

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1. *Debs Quits Prison, To See Daugherty*, PLAIN DEALER (Cleveland), Dec. 26, 1921, at 2.

2. ROBERT K. MURRAY, THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION 168 (1969); DAVID PIETRUSZA, 1920: THE YEAR OF SIX PRESIDENTS 262 (2007); NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 328 (1982).

3. PIETRUSZA, *supra* note 2, at 263–64.

socialism.<sup>4</sup> Debs soon became one of the most influential leftist politicians America has ever seen. He helped to found the Industrial Workers of the World (“IWW”) in 1905,<sup>5</sup> and in 1901, he had a hand in organizing the Socialist Party of America.<sup>6</sup> As a Socialist, he ran for President in nearly every election since 1900. In the 1912 contest, with Woodrow Wilson, Theodore Roosevelt, and William Howard Taft as his opponents, he had gained nearly six percent of the popular vote.<sup>7</sup> Over his activist lifetime, he had addressed millions.<sup>8</sup> Debs was a master politician, but his manner was not compromise. It was theatre. Cutting a slim and kindly mannered figure, he always surprised and moved his audiences with his words. In 1910, an Ohio newspaper reported on one of his perorations:

Bending his lean figure far over the edge of the platform, his clearly chiseled features gleaming with intensity, he fairly hissed forth his denunciation of the moneyed interests. . . . His six feet of sparseness quivered as he spoke and he gesticulated constantly with his long arms. Sometimes his words conveyed the most acrid sarcasm and sometimes the most impassioned appeal.<sup>9</sup>

In person, Debs struck everyone as genuinely compassionate, someone who bore no animus to any individual. After a personal interview with Debs in 1921, Harding’s Attorney General Harry Daugherty said of him, “I found him a charming personality, with a

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4. SALVATORE, *supra* note 2, at 161.
  5. *Id.* at 205–06. RAY GINGER, EUGENE V. DEBS: A BIOGRAPHY 253–55 (1949). The IWW, also known as “the Wobblies,” was formed in response to the craft union idea of Samuel Gompers and the American Federation of Labor (“AFL”). The Wobblies wanted one national union of workers as proletarians, committed to an undermining of the capitalist system. HOWARD KIMELDORF, BATTLING FOR AMERICAN LABOR: WOBBLIES, CRAFT WORKERS, AND THE MAKING OF THE UNION MOVEMENT 2 (1999). Debs came around to thinking that members of the AFL were just capitalist lackeys. *Id.* at 2–3. For a history of the IWW, see generally PATRICK RENSHAW, THE WOBBLIES: THE STORY OF SYNDICALISM IN THE UNITED STATES (Anchor Books ed. 1968) (1967).
  6. SALVATORE, *supra* note 2, at 188–90.
  7. PIETRUSZA, *supra* note 2, at 265–66. He had run on the Social Democratic Party ticket in 1900. SALVATORE, *supra* note 2, at 174–77.
  8. DAVID KARSNER, DEBS: HIS AUTHORIZED LIFE AND LETTERS 11 (1919).
  9. Gary Brown, *The Monday After: Vitriolic Socialist Eugene V. Debs Spoke, Was Arrested in Canton*, CANTONREP.COM (Feb. 2, 2010), <http://www.cantonrep.com/x690804441/The-Monday-After-Vitriolic-socialist-Eugene-V-Debs-spoke-was-arrested-in-Canton> [https://perma.cc/MD4Z-GUB9].

deep love for his fellow man.”<sup>10</sup> While in prison, his personality stilled the conflicts among the inmates, much like Melville’s Billy Budd.<sup>11</sup> His cell door was left unlocked.<sup>12</sup> “The Warden couldn’t say enough good things about him,” Daugherty reported.<sup>13</sup> Another person described him as “a stooping figure of infinite tenderness, mercy, compassion, and love.”<sup>14</sup> But he was ever passionate in the defense of his convictions. In 1919, when a visitor to Debs in prison relayed that Attorney General A. Mitchell Palmer had hinted that “things might be made easier for him” if he “repented,” Debs exclaimed, “No! Not in a thousand years shall I repent for a single principle that I possess.”<sup>15</sup> The visitor noted, “Debs was on fire. His great frame was hot in the molten passion of his spirit.”<sup>16</sup> Until 1919, Debs’s charisma and leadership helped to mitigate the incessant ideological squabbles and schisms within the Socialist movement. He would run a fifth time for President in 1920—receiving over 900,000 popular votes—but this time from his jail cell in Atlanta.<sup>17</sup> He was there because of his oratory.

On June 16, 1918, Debs inspired his fellow Socialists when he spoke out against the draft in a speech at the Ohio State Socialist Party convention.<sup>18</sup> He was far from the first to rail against conscription. On April 14, 1917, barely a week after the United States entry into World War I, the Socialist Party adopted an anti-war—but pro-revolutionary—proclamation at its convention in St. Louis. In it, the Socialist Party declared that it was “unalterably opposed to the system of exploitation and class rule which is upheld and strengthened

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10. HARRY M. DAUGHERTY, *THE INSIDE STORY OF THE HARDING TRAGEDY* 118 (1932).
  11. When Billy was impressed out of the merchant ship, *The Rights of Man*, his captain, bemoaning the loss, said that Billy had calmed “my fore-castle,” which had been “a rat-pit of quarrels,” because “a virtue went out of him, sugaring the sour ones. . . . Ay Lieutenant,” the captain concluded, “you are going to take away my peacemaker!” HERMAN MELVILLE, *BILLY BUDD, SAILOR: AN INSIDE NARRATIVE* 46–47 (Harrison Hayford & Merton M. Sealts, Jr. eds., 1962).
  12. RAY GINGER, *THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS* 388 (1949).
  13. DAUGHERTY, *supra* note 10, at 116; *see also*, GINGER, *supra* note 5, at 406, 409.
  14. KARSNER, *supra* note 8, at 3–4.
  15. *Id.* at 3.
  16. *Id.*
  17. PIETRUSZA, *supra* note 2, at 410.
  18. *Id.* at 268.

by military power and sham national patriotism.”<sup>19</sup> It went on: “The only struggle which would justify the workers in taking up arms is the great struggle of the working class of the world to free itself from economic exploitation and political oppression . . . .”<sup>20</sup>

The proclamation assured its readers that “[t]he working class of the United States has no quarrel with the working class of Germany or of any other country. The people of the United States have no quarrel with the people of Germany or any other country.”<sup>21</sup> It pledged:

Continuous, active, and public opposition to the war through demonstrations, mass petitions, and other means within our power. . . . [And u]nyielding opposition to all proposed legislation for military or industrial conscription. Should such conscription be forced upon the people we pledge ourselves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription.”<sup>22</sup>

Mass protests against the war and the draft developed, one drawing as many as 20,000 persons.<sup>23</sup> Debs, being ill, had not been present at the drafting of the proclamation, but he fully supported it.<sup>24</sup>

On June 15, 1917, Congress approved the Espionage Act.<sup>25</sup> Among its provisions, the law provided:

Whoever . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.<sup>26</sup>

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19. *War Proclamation and Program Adopted at the National Convention of the Socialist Party of the United States*, WORKERS WORLD (Apr. 1917), <https://www.workers.org/marcy/cd/sambol/bolwar/bolwar15.htm> [<https://perma.cc/V5YU-EHHU>].

20. *Id.*

21. *Id.*

22. *Id.*

23. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 355 (1980).

24. SALVATORE, *supra* note 2, at 288.

25. Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 791–794, 2388 (2012)).

26. *Id.* tit. 1, § 3.

It also punished conspiracy to obstruct the draft.<sup>27</sup> Moreover, any writing the contents of which offended any other part of the Act was declared nonmailable,<sup>28</sup> and Postmaster General Albert Burleson, with the approval of the President, pressed this provision to its outer limits,<sup>29</sup> despite the efforts of Judge Learned Hand.<sup>30</sup>

There would be more. A year later, in May 1918, Congress amended the Espionage Act with what came to be known as the Sedition Act.<sup>31</sup> The Amendment added further offenses and penalties to those who were opposing the war.

[W]hoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment services of the United States, and whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States . . . into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in

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27. *Id.* tit. 1, § 4.

28. *Id.* tit. 12.

29. DAVID A. SHANNON, *THE SOCIALIST PARTY OF AMERICA: A HISTORY* 110–11 (1955); HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES: 1917–1921*, at 36 (1960). Academic opinion is virtually unanimous in characterizing Burleson’s actions as a pattern of arbitrary censorship. *Id.* at 29–30.

30. In *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), Judge Learned Hand attempted to the cabin the statute’s prohibition to words of direct incitement. *Id.* at 540. Hand’s position was reversed on appeal in *Masses Publ’g Co. v. Patten*, 246 F. 24, 38–39 (2d Cir. 1917), but he continued to defend his position in *United States v. Nearing*, 252 F. 223, 227–28 (S.D.N.Y. 1918).

31. Pub. L. No. 65-150, 40 Stat. 553 (1918) (amending Espionage Act, Pub. L. No. 65-24, tit. 1, § 3, 40 Stat. 217, 219 (1917) (codified as amended at 18 U.S.C. § 2388 (2012))).

which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or the imprisonment for not more than twenty years, or both.<sup>32</sup>

Such a law had not been seen since the Sedition Act of 1798. The 1918 law also increased the power of the Postmaster General, on his own initiative, to prevent the delivery of any printed matter that he regarded as violative of the act.<sup>33</sup> Ultimately, the federal government brought thousands of prosecutions under the Espionage Act.

In Canton, the delegates who had come to hear Debs in Nimisila Park were among the more radical wing of the Socialist Party. Others were there too. Cleveland Police, federal agents, and members of the American Protective League were also in the audience.<sup>34</sup> The Cleveland *Plain Dealer* reported that federal agents detained fifty-five men who could not produce their draft cards.<sup>35</sup>

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32. *Id.* § 3.

33. *Id.* § 4. The act states:

When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words "Mail to this address undeliverable under Espionage Act" plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe.

*Id.*

34. C.R. Miller, *Debs Urges Aid for Bolsheviks from America*, PLAIN DEALER (Cleveland), June 17, 1918, at 1. The American Protective League was a private organization that worked with government officials to identify those thought to be disloyal to the war effort. *See generally* EMERSON HOUGH, *THE WEB* (1919); JOAN M. JENSEN, *THE PRICE OF VIGILANCE* (1968); BILL MILLS, *THE LEAGUE: THE TRUE STORY OF AVERAGE AMERICANS ON THE HUNT FOR WWI SPIES* (2013).

35. Miller, *supra* note 34.



The 1,200 persons in attendance were anxiously awaiting what their leader would say, for newspaper reports had suggested that Debs and the Socialists were ready to repudiate or at least modify the St. Louis Anti-War Platform.<sup>36</sup> Perhaps the wave of prosecutions and local vigilante violence had caused the Socialists to become more wary.<sup>37</sup> With the overthrow of the Czarist regime in April 1917, some Socialists thought that the war could now be supported.<sup>38</sup> Debs seemed to signal continued resistance to the war, however, when prior to his speech, he visited three prominent Socialists who had been jailed under the Espionage Act for their anti-war activities.<sup>39</sup>

Debs did not disappoint the cheering faithful. The speech was long. The speech was passionate. The speech was radical. He did, however, begin warily.

Comrades, friends, and fellow-workers, . . . I realize that, in speaking to you this afternoon, there are certain limitations placed upon the right of free speech. I must be exceedingly careful, prudent, as to what I say, and even more careful and prudent as to how I say it. I may not be able to say all I think; but I am not going to say anything that I do not think.<sup>40</sup>

But as he continued, prudence began to diminish, and he demonstrated that he remained as much a revolutionary as ever. He condemned the “lying” capitalist newspapers that had planted stories

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36. GINGER, *supra* note 5, at 371.

37. Ben F. Allen, *Debs & Co. Flop from Platform*, PLAIN DEALER (Cleveland), May 14, 1918, at 10.

38. SALVATORE, *supra* note 2, at 289.

39. Miller, *supra* note 34. They included C.E. Ruthenberg, Alfred Wagenknecht, and Charles Baker. They had each been convicted of violating the Espionage Act and sentenced to one year in jail. KARSNER, *supra* note 8, at 25. They were released in December 1918. OAKLEY C. JOHNSON, *THE DAY IS COMING: LIFE AND WORK OF CHARLES RUTHENBERG, 1882–1927*, at 137 (1957). Ruthenberg had been a prime drafter of the St. Louis Platform, and later in 1919, became the first General Secretary of the Communist Party of America. Wagenknecht, meanwhile, had formed the rival Communist Labor Party of America. The two parties later merged. Philip Bart & William Weinstone, *The Founding of the Communist Party in America*, PEOPLE’S WORLD (Sept. 1, 2017), <https://www.peoplesworld.org/article/the-founding-of-the-communist-party-in-america/> [<https://perma.cc/K643-CRKJ>]; Michael O’Malley, *Charles E. Ruthenberg the Clevelander Who Founded the American Communist Party Is Remembered Both as an Incredible Visionary and a Bitter Antagonist*, PLAIN DEALER (Cleveland), Jan. 21, 1996.

40. E.V. Debs, *The Canton, Ohio Speech, Anti-War Speech*, CALL (June 16, 1918), <https://www.marxists.org/archive/debs/works/1918/canton.htm> [<https://perma.cc/GNS8-MAUP>].

that he had undergone “a marvelous transformation.”<sup>41</sup> “But Socialists were not born yesterday,” he declared.<sup>42</sup> “They know how to read capitalist newspapers; and to believe exactly the opposite of what they read.”<sup>43</sup> He affirmed the St. Louis Anti-War Platform,<sup>44</sup> though as he told a newspaper reporter, “in the light of the Russian situation, it might require some restatement.”<sup>45</sup>

In the most extensive part of his speech, Debs railed against Germany. At the same time as those words might protect himself against the charge that he was aiding the country’s enemies, he was also formulating a defense for the revolution in Russia:

Are we opposed to Prussian militarism? Why, we have been fighting it since the day the Socialist movement was born; and we are going to continue to fight it, day and night, until it is wiped from the face of the earth. Between us there is no truce—no compromise.<sup>46</sup>

He targeted Theodore Roosevelt, perhaps the most jingoistic anti-German of the time, as being no more than a toady to Kaiser Wilhelm. “Birds of a feather flock together,” was his verdict.<sup>47</sup>

Then he took aim at the polity itself. “They tell us that we live in a great free republic; that our institutions are democratic; that we are a free and self-governing people. This is too much, even for a joke.”<sup>48</sup> Moreover, the federal judiciary is an integral part of the capitalist oppression, he declaimed.

Who appoints our federal judges? The people? In all the history of the country, the working class have never named a federal judge. There are 121 of these judges and every solitary one holds his position, his tenure, through the influence and power of corporate capital. The corporations and trusts dictate their appointment. And when they go to the bench, they go, not to

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41. *Id.*

42. *Id.*

43. *Id.*

44. Miller, *supra* note 34.

45. *Try to Prove Debs Adhered to Party Cry*, PLAIN DEALER (Cleveland), Sept. 11, 1918, at 5.

46. Debs, *supra* note 40.

47. *Id.*

48. *Id.*

serve, the people, but to serve the interests that place them and keep them where they are.<sup>49</sup>

Less than a year later, nine members of the United States Supreme Court would read these words.

He threaded through the pylons of revolution and of non-violence. He proclaimed that:

[O]ur hearts are with the Bolsheviki of Russia. Those heroic men and women, those unconquerable comrades have by their incomparable valor and sacrifice added fresh luster to the fame of the international movement. Those Russian comrades of ours have made greater sacrifices, have suffered more, and have shed more heroic blood than any like number of men and women anywhere on earth; they have laid the foundation of the first real democracy that ever drew the breath of life in this world.<sup>50</sup>

The Cleveland *Plain Dealer* reported that during the convention Debs had approved a plan of sending a million American volunteers to Russia to defend their revolution.<sup>51</sup> A year later after the Bolsheviks had gained control, he declared, “[f]rom the crown of my head to the soles of my feet I am a Bolshevik and proud of it.”<sup>52</sup> At the same time, he said that he eschewed violence, at least against individual persons. “We do not attack individuals. We do not seek to avenge ourselves upon those opposed to our faith. We have no fight with individuals as such.”<sup>53</sup> But his political message was, still, revolution: “Political action and industrial action must supplement and sustain each other. You will never vote the Socialist republic into existence.”<sup>54</sup> Later in an interview, Debs explained, “although I would not kill a man in self-defense, I am in favor of shedding as much blood as is absolutely necessary in order to emancipate the people. But not one drop more.”<sup>55</sup>

Then, in a few rhetorical flourishes, he uttered words that would later be interpreted as urging people to resist the draft.

They have always taught and trained you to believe it to be your patriotic duty to go to war and to have yourselves

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49. *Id.*

50. *Id.*

51. Miller, *supra* note 34.

52. SALVATORE, *supra* note 2, at 291.

53. Debs, *supra* note 40.

54. *Id.*

55. GINGER, *supra* note 12, at 402.

slaughtered at their command. . . . You need at this time especially to know that you are fit for something better than slavery and cannon fodder.<sup>56</sup>

In the audience were stenographers sent by E. S. Wertz, United States Attorney for the Northern District of Ohio.<sup>57</sup> Dispatching a copy of the speech to Attorney General Thomas W. Gregory, Wertz inquired whether there was sufficient evidence to prosecute Debs. He was disappointed in the reply: “All in all the Department does not feel strongly convinced that a prosecution is advisable.”<sup>58</sup> Attorney General Gregory, in particular, was opposed to indicting Debs.<sup>59</sup> He believed that a prosecution would only make of Debs an attractive martyr.<sup>60</sup> At the same time, however, the Department offered advice on how to formulate the strongest case, should Wertz wish to proceed.<sup>61</sup> It was a pattern for Attorney General Gregory. Although he might counsel U.S. Attorneys in his circulars to use prudence, he always backed them up when they went ahead and prosecuted.<sup>62</sup> And so Wertz went forward. He obtained a grand jury indictment on June 29, charging Debs with ten counts of violating the Espionage Act—six of which were later nulled before trial—including attempts to cause insubordination and statements in violation of the Sedition Act amendments to the Espionage Act.<sup>63</sup> The *Plain Dealer* editorialized, “Debs’ voice is now stilled, as it should have been stilled long ago. Doctrines such as he has been pleased to preach are not to be

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56. Debs, *supra* note 40.

57. SALVATORE, *supra* note 2, at 294. Apparently, the stenographer Wertz hired was incompetent, but a more accurate rendition of the speech was recorded by a person employed by the convention authorities. KARSNER, *supra* note 8, at 19–20; GINGER, *supra* note 5, at 385.

58. SALVATORE, *supra* note 2, at 294.

59. David L. Sterling, *In Defense of Debs: The Lawyers and the Espionage Act Case*, IND. MAG. HIST., Mar. 1987, at 17, 21 n.10 (1987).

60. JOHN MILTON COOPER, JR., *WOODROW WILSON: A BIOGRAPHY* 432 (2009). Gregory had also thought the same about any charge against the Socialist leader, Morris Hillquit. MICHAEL KAZIN, *WAR AGAINST WAR: THE AMERICAN FIGHT FOR PEACE, 1914–1918*, at 236 (2017); Letter from Thomas Watt Gregory to Woodrow Wilson (Nov. 3, 1917), in *THE PAPERS OF WOODROW WILSON DIGITAL EDITION*, [http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-8-6&expandNote=on\[https://perma.cc/X29F-9AG9\]](http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-8-6&expandNote=on[https://perma.cc/X29F-9AG9]).

61. Letter from Thomas Watt Gregory to Woodrow Wilson, *supra* note 60.

62. SCHEIBER, *supra* note 29, at 51.

63. *Debs Arrested; Sedition Charged*, N.Y. TIMES, July 1, 1918, at 1; Sterling, *supra* note 59, at 36.

tolerated. The question of free speech is in no wise involved. It is a question of national safety.”<sup>64</sup>

Predictably, a nationwide campaign to raise funds for Debs’s defense ensued, and a highly competent defense team of lawyers was assembled.<sup>65</sup> At his trial at the elegant federal courthouse on Superior Avenue in Cleveland, the prosecution began: “This man is the palpitating pulse of the sedition crusade. [B]y his words shall he be judged, and by his words shall he be condemned.”<sup>66</sup> Over objections by the defense, the government entered into evidence the Socialists’ St. Louis Anti-War Platform, and U.S. Attorney Wertz made much of it later during his closing argument.<sup>67</sup> Clyde R. Miller, a reporter for the *Plain Dealer* testified, “[h]e told me it was his opinion that the Bolsheviki of Russia were the inspiration of the world, and that he hoped their ideas would come to prevail in America.”<sup>68</sup> Finally, after two days of hearing prosecution witnesses, the government rested. Debs and his defense team decided to put on no witnesses of their own, but instead requested that Debs be allowed to address the court. The district court judge, David C. Westenhaver—a Wilson appointee—agreed, and Debs had his platform. Except for his attorney’s motions, opening statement, and cross examinations, Debs’s two-hour declaration was the only statement that the defense would make. He reaffirmed much of his message at Canton, but this time allied himself with the American founding. “Washington, Adams, Paine—these were the rebels of their day.”<sup>69</sup> He defended his right of free speech, castigated Woodrow Wilson for his hypocrisy and asserted, “American institutions are on trial here before a court of American citizens.”<sup>70</sup> As usual, his delivery was spellbinding. Some of the jurymen wept.<sup>71</sup>

In his lengthy closing argument, the prosecution’s E. S. Wertz attempted to blunt Debs’s invocation of freedom of speech. Wertz employed an analogy that Justice Oliver Wendell Holmes, Jr., would soon adopt to become one of the longest lasting clichés in American legal history. Said Wertz of Debs, “[a]ccording to his theory, a man could go into a crowded theatre, or even into this audience, and yell

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64. *Exit Debs*, PLAIN DEALER (Cleveland), July 2, 1918, at 8.

65. *Debs out on Bail, Pleads not Guilty*, N.Y. TIMES, July 2, 1918, at 8.

66. KARSNER, *supra* note 8, at 18.

67. Transcript of Record at 386–92, *Debs v. United States*, 249 U.S. 211 (1918) (No. 714).

68. KARSNER, *supra* note 8, at 19.

69. *Id.* at 30.

70. *Id.* at 44.

71. GINGER, *supra* note 5, at 390.

‘fire’ when there was no fire, and peopled trampled to death, and he would not be punished for it because the Constitution says he has the right of free speech.”<sup>72</sup>

On September 12, 1918, after six hours of deliberation, a jury of twelve of Debs’s “American citizens” returned a verdict of guilty on three counts: “1—Attempting to incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces; 2—Obstructing and attempting to obstruct the recruiting and enlistment service; 3—Uttering language intended to incite, provoke and encourage resistance to the United States and to promote the cause of the enemy.”<sup>73</sup> Debs was acquitted, under the instruction of the judge, however, of two of the counts, including that based on the Sedition Act charges of:

Uttering . . . language intended to bring the form of Government of the United States, the Constitution of the United States, and the military and naval forces of the United States, and the Flag of the United States, and the uniform of the Army and Navy of the United States into contempt, scorn, contumely and disrepute.<sup>74</sup>

The jury also, on its own, acquitted Debs of one other count, that of “advocat[ing for] the curtailment of the production . . . of” war necessities.<sup>75</sup>

Judge Westenhaver’s charge to the jury had been lengthy and detailed. He explained the difference between motive and intent and stated that neither Socialism nor the fact that Debs was a Socialist was the subject of the trial.<sup>76</sup> Moreover, “[d]isapproval of the war or advocacy of peace is not a crime unless the words uttered shall be willfully intended by the person uttering them to have the effect and the consequences forbidden by law.”<sup>77</sup> Debs’s lawyer, Seymour

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72. Transcript of Record, *supra* note 67, at 370–71. Holmes first used the example in *Schenck v. United States*, 249 U.S. 47, 52 (1919). For a thorough historical examination of the source, and the reality, of the image, see Carlton F. W. Larson, *Shouting Fire in a Theater: The Life and Times of Constitutional Law’s Most Enduring Analogy*, 24 WM. & MARY BILL OF RTS. J. 181 (2015).

73. *Debs Guilty on 3 Counts, Jurors Find*, PLAIN DEALER (Cleveland), Sept. 13, 1918, at 1.

74. Transcript of Record, *supra* note 67, at 110.

75. *Id.* at 149.

76. *Id.* at 276.

77. *Debs Guilty on 3 Counts, Jurors Find*, *supra* note 73, at 12.

Stedman, characterized the charge as a “masterly and unbiased exposition.”<sup>78</sup>

It seems that no one was dissatisfied by the verdict. Debs declared, “I haven’t one word of complaint either against the verdict or the trial. . . . The evidence was truthful. [I]t was fairly presented by the prosecution. [T]he jury was patient and attentive and the judge’s charge was masterly and scrupulously fair.”<sup>79</sup> Rose Pastor Stokes, a prominent Socialist and friend of Debs, stated, “[t]he verdict will greatly help the movement and makes us tremendously hopeful and joyous.”<sup>80</sup> The prosecution was equally pleased. U.S. Attorney Wertz said that the verdict “emphasizes the fact that no man is too big to be prosecuted for opposing the cause of the nation in this war.”<sup>81</sup>

On September 14, 1918, the court overruled defense motions for a new trial and arrest of judgment and sentenced Debs to ten years imprisonment concurrently on each of the three counts.<sup>82</sup> The court also disenfranchised him for life. That day, Debs had arrived in court somewhat inebriated<sup>83</sup>—Debs had a fondness for bourbon and cigars<sup>84</sup>—but when asked if he had any statement to make, he issued one of his most moving utterances, effectively taking on the role of martyr:

Your honor, years ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest on earth. I said then, I say now, that while there is a lower class I am in it; while there is a criminal element, I am of it; while there is a soul in prison, I am not free.<sup>85</sup>

But Judge Westenhaver would not leave Debs’s remarks unanswered.

The spectators in the courtroom sat and listened fixedly as the two men debated. Even though Westenhaver had directed the jury to find Debs not guilty on the charges of seditious speech, he now focused on loyalty and the cost of dissent.

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78. *Id.*

79. *Id.* at 1, 12.

80. *Id.* at 12.

81. *Id.*

82. Transcript of Record, *supra* note 67, at 157.

83. GINGER, *supra* note 12, at 374–75.

84. Debs’s smoking preference was noted in KARSNER, *supra* note 8, at 61, 63. Liquor reportedly made him “even more eloquent.” GINGER, *supra* note 5, at 394.

85. PIETRUSZA, *supra* note 2, at 269.

I do not regard the idealism of the defendant, as expressed by himself, as any higher, any purer, or any nobler than the ideals and idealism of the thousands upon thousands of young men that I have seen marching down the streets of Cleveland to defend the constitution and the laws of their country and its flag. . . . In the time of war, when the nation is defending its life against foreign enemies, the domestic enemy who undertakes to strike from the hands of the defenders the sword with which they are defending the life of the nation and their own lives must be held answerable.<sup>86</sup>

The judge described how he had had to impose “sentence after sentence” on those who resisted their duties “because of the activities of Mr. Debs and other persons.”<sup>87</sup> These were “the poor and ignorant, mostly foreign-born people who have been led into their criminal attitude toward society because they listened to the leadership and accepted the guidance of persons expressing sentiments like those expressed here this morning.”<sup>88</sup> Debs’s position, the judge averred, was “anarchy pure and simple and not, according to my reading and understanding, socialism.”<sup>89</sup>

Pending Debs’s incarceration at the federal penitentiary in Moundsville, West Virginia—he would later be sent to Atlanta<sup>90</sup>—Judge Westenhaver allowed Debs bail to return home to Terra Haute until his appeal to the United States Supreme Court was disposed of.<sup>91</sup> The Supreme Court heard oral arguments on January 27 and 28, 1919 on two counts before the court, for the government had dismissed the conviction of the third count—encouraging “resistance to the United States” and promoting “the cause of its enemy”—the brief stating, “[t]he Government . . . is not convinced that the facts of the case clearly demonstrate a violation of this clause.”<sup>92</sup> The Court issued its unanimous opinion on March 10, upholding Debs’s conviction on the remaining two counts.<sup>93</sup>

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86. *Debs Is Given 10-Year Term; Appeals Case*, PLAIN DEALER (Cleveland), Sept. 15, 1918, at 1.

87. *Id.* at 2.

88. *Id.*

89. *Id.* at 1.

90. *Debs in Atlanta Prison*, N.Y. TIMES, June 15, 1919, at 16.

91. GINGER, *supra* note 5, at 399.

92. Brief for the United States at 13, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

93. *Debs v. United States*, 249 U.S. 211, 217 (1919).



Having found a week earlier in *Schenck v. United States*<sup>94</sup> that words urging an obstruction of the draft could be analyzed under the common law of attempts, rather than the First Amendment,<sup>95</sup> Holmes glossed Debs's Canton address.

The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech.<sup>96</sup>

After quoting from some parts of the address, Holmes declared that the jury would have been warranted

in finding the one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.<sup>97</sup>

Holmes also indicated that Debs's approval of the St. Louis Anti-War Platform, introduced at trial, would also show that he had the intention of attempting to have his listeners obstruct the recruitment service.<sup>98</sup>

When the news of the Supreme Court's decision arrived at Debs's home in Terra Haute, he issued a statement to the press. "The decision is perfectly consistent with the character of the Supreme Court as a ruling class tribunal. . . . The decision just rendered places the

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94. 249 U.S. 47 (1919). Schenck was the General Secretary of the Socialist Party. *Id.* at 50. The *Schenck* opinion was announced March 3, 1919. In *Frohwerk v. United States*, 249 U.S. 204 (1919), announced along with *Debs v. United States* on March 10, 1919, Holmes continued analyzing the Espionage Act prosecutions under the common law paradigm of attempt, and, in the case of *Frohwerk*, of conspiracy. *Id.* at 205.

95. See Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1119 (1989); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208–09 (1983).

96. *Debs*, 249 U.S. 211, at 212–13.

97. *Id.* at 214–15.

98. *Id.* at 216.

United States where old Russia under the Czar left off. It is good for, at least, a million Bolshevik recruits in this country.”<sup>99</sup> While the Court considered his lawyer’s motion for a rehearing, Debs made a number of “farewell addresses.” In mid-April 1919, he began his sentence at Moundsville, West Virginia, and on June 14, was transferred to Atlanta.<sup>100</sup>

While in jail, Debs remained absent from the growing divisions within the Socialist Party, the attempt of the Soviet Comintern to bring the party under its control, the expulsion of thousands of East Europeans for being too radical, and the subsequent split that ultimately led to the formation of the Communist Party of America.<sup>101</sup> There was a report that the Soviet government tried to gain the release of Debs in exchange for the release of an American held in Russia who had been charged with sabotage.<sup>102</sup> That failed, but in the end, Debs remained steadfast in his admiration for the Bolsheviks and their revolution. After his release from prison, he declared that he would remain with the Socialist Party and not join any of the more radical offshoots, but he continued to insist that the Russian Revolution was the door to revolution throughout the world. “All hail, then, the Russian revolution and the Soviet Government, the crowning glory of the twentieth century!”<sup>103</sup>

## II. WILSON

On November 7, 1916, Woodrow Wilson, running on the platform of “[a] vote for Wilson is a vote for peace,” barely won re-election to the Presidency.<sup>104</sup> He bested Republican Charles Evans Hughes by twenty-three electoral votes. Hughes would have triumphed if he had carried California, but he lost the state by the slim margin of 3,806 votes.<sup>105</sup> Wilson was benefitted by the weak challenges from third parties. Theodore Roosevelt refused the Progressive Party nomination and supported Hughes, as did most of the remaining Progressive leaders.<sup>106</sup> In the end, there was no Progressive Party nominee. Similarly,

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99. KARSNER, *supra* note 8, at 56–57 (internal quotations omitted).

100. *Debs Taken to Federal Prison*, PLAIN DEALER (Cleveland), Apr. 14, 1919, at 10; KARSNER, *supra* note 8, at 1–2.

101. *American Socialists Expel 25,000 Reds*, N.Y. TIMES, May 30, 1919, at 7.

102. GINGER, *supra* note 12, at 389.

103. HAROLD W. CURRIE, EUGENE V. DEBS 94 (1976) (internal quotation marks omitted).

104. A. SCOTT BERG, WILSON 416 (2013).

105. *Id.*

106. S.D. LOVELL, THE PRESIDENTIAL ELECTION OF 1916, at 50 (1980).

Eugene V. Debs decided not to run for President, but chose to attempt to gain a congressional seat in Indiana. Without Debs at the head of the ticket, the Socialist popular vote fell to a little more than half a million.<sup>107</sup> Likely, if Debs had been in the race, he would have siphoned off enough votes from Wilson to turn the election to Hughes. By not running, Debs unwittingly may have allowed an implacable enemy to put and keep the Socialist leader in a federal penitentiary.

Still, half a million votes for a relatively unknown Socialist candidate is a substantial cohort, especially one that would be staunchly against American involvement in the European war. From the beginning, however, anti-war sentiment had been broad, cutting across wide segments of American popular opinion: Socialists such as Debs and Morris Hillquit, left labor leaders like Bill Haywood of the IWW—opposed by Samuel Gompers of the American Federation of Labor (“AFL”)—Progressives including Robert La Follette and George Norris, radicals like Max Eastman, plutocrats such as Henry Ford, anarchists like Emma Goldman, reformers like Jane Addams, populists such as William Jennings Bryan and his followers, and Irish and German Americans who resisted the Wilson administration’s early tilt towards the allies.<sup>108</sup> The Socialists were the political anchor of the anti-war movement, having cut ties to fellow Socialists in Europe, like those in Germany, who had opted to support their government in the war. Most of America’s leading socialists continued their opposition, which would reach a crescendo once the die for war had been cast.<sup>109</sup> The government’s response to them would be formidable.

The slide to war began on January 31, 1917, when Germany announced that henceforth all shipping in the seas around the territory of the European allies would be subject to unrestricted submarine attack.<sup>110</sup> Ever since the sinking of the *Lusitania* in May of 1915, the United States had made clear that immunity of non-belligerent shipping from attack was the line that Germany dare not cross. After the announcement of unrestricted submarine warfare, Attorney General Thomas Watt Gregory speedily sent a wire to all U.S. Attorneys “to take prompt measures to locate and prosecute, so far as Federal law can reach them, all persons who may attempt to engage in activities detrimental to the United States in connection with the foreign situation. If necessary request active cooperation of State and local

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107. Allen L. Benson was the Socialist Party candidate. KAZIN, *supra* note 60, at 133.

108. *See generally* KAZIN, *supra* note 60.

109. SHANNON, *supra* note 29, at 99–103.

110. *See* BERG, *supra* note 104, at 423.

officials.”<sup>111</sup> Over the next few weeks, Gregory issued more directives and circulars to federal and local officials to observe and restrict activities of enemy aliens.<sup>112</sup> His instructions—telegraphing how he would later enforce wartime measures—included the assurance that “no German alien enemy in this country . . . need fear action by the Department of Justice so long as he obeyed the law and refrained from discussing the war.”<sup>113</sup>

A few days later on February 3, 1917, the United States acknowledged that the tipping point had been reached by breaking off diplomatic relations with Germany, though for the time being, Wilson remained restrained in his rhetoric.<sup>114</sup> For its part, the government of Germany had known what it was getting into. Once the German government had decided to open submarine warfare, it believed that war with the United States would be inevitable. It sent preliminary diplomatic feelers to Mexico and Japan to try to strengthen its hand against the Americans. On February 25, the British relayed to Wilson a decoded telegram, known subsequently as the Zimmerman telegram after the name of the official who sent it, in which Germany had proposed to Mexico an alliance against the United States, promising Mexico territorial gains at the expense of the United States.<sup>115</sup> Then a U-boat sunk an armed merchant cruiser, killing some passengers, and American popular opinion surged for war. But most peace activists did not go along. They remained steadfast in their opposition.<sup>116</sup>

In his inauguration speech of March 5, 1917, Woodrow Wilson all but signaled that the United States would soon be at war: “We are provincials no longer. The tragic events of the thirty months of vital turmoil through which we have just passed have made us citizens of the world. There can be no turning back. Our own fortunes as a

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111. 1917 ATT’Y GEN. ANN. REP. 54 (internal quotations omitted).

112. By June 30, 1917, 295 enemy aliens had been arrested. *Id.* at 56. Ultimately, over 6000 cases of dealing with enemy aliens were referred to the Justice Department, most which resulted in internment or release on parole. JOHN LORD O’BRIAN, CIVIL LIBERTY IN WAR TIME, S. Doc. No. 434, at 8–10 (3d Sess. 1919). O’Brien was Special Assistant to the Attorney General and had supported the Sedition Act. STANLEY COBEN, A. MITCHELL PALMER: POLITICIAN 201 (1963); *Fears Speech Curb in Sedition Bill*, N.Y. TIMES, Apr. 25, 1918, at 12.

113. 1917 ATT’Y GEN. ANN. REP. 60.

114. BERG, *supra* note 104, at 423–24.

115. *Id.* at 425.

116. KAZIN, *supra* note 60, at 172–74.

nation are involved whether we would have it so or not.”<sup>117</sup> On March 20, he and his cabinet met and decided to go to war.<sup>118</sup> On April 2, when Wilson asked Congress for a declaration, he not only called for war against Germany, but also against those within the United States who opposed the war. Concerned about German-Americans and others in opposition, Wilson threatened, “If there should be disloyalty, it will be dealt with with [*sic*] a firm hand of stern repression . . . but, if it lifts its head at all, it will lift it only here and there and without countenance except from a lawless and malignant few.”<sup>119</sup> On April 6, Congress passed the Declaration of War. Undeterred, the Socialists proclaimed their continued resistance in their St. Louis Anti-War Platform on April 14.<sup>120</sup>

Wilson’s views towards the unpatriotic were not new. Two years earlier, in his 1915 State of the Union Address, he had declared,

I am sorry to say that the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt, . . . I urge you to enact such laws at the earliest possible moment and feel that in doing so I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out.<sup>121</sup>

Now at war, the Congress was ready to pass such a law, but when it debated the proposed Espionage Act, Congress balked at some of its more draconian provisions. Contrary to even the most minimal understanding of the First Amendment, Wilson had asked for the power of censorship, that is, a prior restraint, over the press, and declared it as

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117. President Woodrow Wilson, Inaugural Address (March 5, 1917). March 4, the official day for taking office, fell on a Sunday. BERG, *supra* note 104 at 426.

118. BERG, *supra* note 104, at 430–32.

119. 55 CONG. REC. 101, 120 (1916).

120. Morris Hillquit, Keynote Address to the 1917 Emergency National Convention of the Socialist Party (April 7, 1917), *in* WORLD, Apr. 1917, at 6.

121. 53 CONG. REC. 63, 99 (1915).

“absolutely necessary to the public safety.”<sup>122</sup> The Republicans, Senator Warren G. Harding included, were implacably opposed, and Congress defeated that proposal.<sup>123</sup> Congress did permit the Postmaster General to refuse the mails to certain kinds of publications, but it limited the power of refusal only to those publications that expressly advocated treasonable actions. Nonetheless, the Postmaster General used this tool vigorously to suppress leftist newspapers and other publications.<sup>124</sup>

In the section of the act targeting individual action, Congress removed the criminalization of any attempt to cause “disaffection,” and replaced it with an “attempt to cause insubordination.”<sup>125</sup> Even as modified by Congress, however, the Espionage Act would turn out to be a powerful weapon against anti-war advocates like Debs. Congress passed the act on June 15, 1917. A month later, the Selective Draft Act became law.<sup>126</sup> The battle lines were drawn. What Congress had intended to be a law to protect the military effort, Attorney General Gregory turned into a disloyalty law. The Attorney General established a War Emergency Division and vastly expanded the Division of Investigation within the Department to deal with the burgeoning prosecutions.<sup>127</sup> Over the months of the war, almost twenty-five million men registered for the draft, but 350,000—many, it was thought, Socialist-inspired—resisted.<sup>128</sup>

Already by June 30, 1917, the Attorney General reported that prosecutions had been instituted against those violating the Espionage and Draft Acts, as well as those, including IWW leader Bill Haywood

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122. *Wilson Demands Press Censorship*, N.Y. TIMES, May 23, 1917, at 1 (quoting Letter from President Woodrow Wilson to Rep. Webb); see also BERG, *supra* note 104, at 455.

123. Walker S. Buel, *Ohio Thinks Only of Draft, Bonds*, PLAIN DEALER (Cleveland), June 3, 1917, at 6c.

124. H. C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR: 1917–1918*, at 47–48, 95–97 (1957).

125. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 352 (2003) (citing the Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 791–794, 2388 (2012))); BERG, *supra* note 104, 453.

126. Pub. L. No. 65-12, 40 Stat. 76 (1917). In the *Selective Draft Law Cases*, the Supreme Court upheld the constitutionality of the act. 245 U.S. 366, 374 (1988).

127. 1918 ATT’Y GEN. ANN. REP. 14.

128. JAMES TRACY, *THE MILITARY DRAFT HANDBOOK: A BRIEF HISTORY AND PRACTICAL ADVICE FOR THE CURIOUS AND CONCERNED* 24 (2006); *Debs Is Given 10-Year Term*, *supra* note 86, at 2.

and 150 IWW members, who were accused of violating other federal laws.<sup>129</sup> His policy was, as he later wrote the President, “to arrest and try the leaders of the I.W.W. for interference with the war effort and for criminal conspiracy to block industrial production and incite draft evasion, desertion, and insubordination in the armed forces.”<sup>130</sup> Commenting on those arrests, Attorney General Gregory declared, “[t]he effect of these prosecutions is already having a far reaching and highly beneficial influence toward the maintenance of order and obedience to law throughout the country.”<sup>131</sup> In September 1917, the government conducted dozens of further raids on IWW offices and homes, gathering materials for indictments, which swiftly followed.<sup>132</sup>

The Justice Department also took primary responsibility for apprehending draft evaders and deserters. The policy was to induce the recalcitrant to register, rather than prosecuting them.<sup>133</sup> Deserters were turned over to the military authorities.<sup>134</sup> Attorney General Gregory listed the number of men induced into military service at 23,439 as of June 30, 1918.<sup>135</sup> By war’s end the Justice Department had caught and forced into induction into the army 40,000 men.<sup>136</sup> Further, a number of critics of President Wilson were arrested and convicted under an earlier law, passed February 14, 1917, criminalizing threats against the President.<sup>137</sup>

In addition to a massive reorganization of the government and the economy to further the war effort,<sup>138</sup> and in tandem with wartime statutes, the Wilson administration sought to marshal public opinion and quell dissent. The President formed the Committee on Public

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129. 1917 ATT’Y GEN. ANN. REP. 74–76. A more effective weapon against the IWW were state criminal syndicalism laws. PETERSON & FITE, *supra* note 124, at 51.

130. Letter from Thomas W. Gregory to President Woodrow Wilson (Aug. 21, 1917), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-chron-1910-1917-08-21-18&mode=deref> [<https://perma.cc/BF5S-DW95>].

131. 1917 ATT’Y GEN. ANN. REP. 76.

132. PETERSON & FITE, *supra* note 124, at 62–63.

133. 1917 ATT’Y GEN. ANN. REP. at 74.

134. 1918 ATT’Y GEN. ANN. REP. at 24.

135. *Id.*

136. O’BRIAN, *supra* note 112, at 11 n.1.

137. Act of Feb. 14, 1917, Pub. L. No. 64-319, 39 Stat. 919 (codified as amended at 18 U.S.C. § 871 (2012)); PETERSON & FITE, *supra* note 124, at 139–41.

138. BERG, *supra* note 104, at 443–47.

Information (“CPI”),<sup>139</sup> which was, in fact, simply a governmental propaganda agency. The CPI developed close relationships with the press, published millions of pamphlets, sent out speakers—over 750,000 speeches by 75,000 speakers were made—created motion pictures, and spread the American viewpoint abroad.<sup>140</sup> Out of the Justice Department’s Bureau of Investigation, Attorney General Gregory, over President Wilson’s objections,<sup>141</sup> helped to establish the American Protective League, which, by 1918, had approximately 250,000 members.<sup>142</sup> This private vigilante organization ferreted out draft evaders by stopping men and asking them to produce their draft card, seizing anti-war literature wherever and however illegally found and turning it over to the government for prosecution, and attending rallies by Socialists and IWW members to listen to and take down seditious utterances.<sup>143</sup> Samuel Gompers, and most of the AFL, joined in opposing the Socialists.<sup>144</sup> As early as June 1917, President Wilson had written Gregory of his concerns about the actions of American Protective League, but Gregory responded that the civilian informants were vital, and he continued to support the League.<sup>145</sup> In a speech in November 1917, the Attorney General declared his department’s policy: “To all the disloyal in this country a message will be sounded which they can understand through the criminal courts. May God have mercy on them for they need expect none from an outraged people and an avenging Government.”<sup>146</sup>

Despite the far-reaching measures already on the books, and the aggressive prosecution of hundreds under the Espionage Act, Attorney General Gregory had been unhappy with the limited scope of the Act.

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139. Exec. Order No. 2594 (Apr. 13, 1917).

140. BERG, *supra* note 104, at 449–52; KAZIN, *supra* note 60, at 188. The head of the CPI effectively censored the press. PETERSON & FITE, *supra* note 124, at 95.

141. Letter from Thomas W. Gregory to President Woodrow Wilson (June 14, 1917), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-chron-1910-1917-06-14-7> [<https://perma.cc/8XGP-GF2K>].

142. 1918 ATT’Y GEN. ANN. REP. 15. When A. Mitchell Palmer became Attorney General in March of 1919, he discontinued use of the League. KAZIN, *supra* note 60, at 209–10.

143. BERG, *supra* note 104, at 495.

144. SHANNON, *supra* note 29, at 117.

145. Letter from Thomas W. Gregory to President Woodrow Wilson, *supra* note 141.

146. *All Disloyal Men Warned by Gregory*, N.Y. TIMES, Nov. 21, 1917, at 3.



On April 18, 1918, before the Executive Committee of the American Bar Association, he declared:

It is hardly necessary to say that when war broke out we had no real, substantial set of laws with which to confront the emergency. The department therefore attempted to procure additional legislation. We secured the passage of the Espionage Act, but most of the teeth which we tried to put in were taken out. We got what we could, but Congress itself did not realize at that time the conditions that would confront us.<sup>147</sup>

Gregory then castigated Judge George M. Bourquin, who had directed a verdict of acquittal of the trial of a man accused of violating the Espionage Act.<sup>148</sup> “It seems practically impossible in the district in which that judge presides to punish the disloyalty denounced by this statute.”<sup>149</sup> Gregory wanted more: “an amendment to the Espionage Act which will make it much more drastic and which it is hoped will form the basis for convictions in all federal districts.”<sup>150</sup> In April, when that amendment—the Sedition Act—was introduced, Bourquin’s decision was read into the record in the Senate as a reason for the necessity of a stronger law.<sup>151</sup> Bourquin was the anomaly. Most judges interpreted the sweep of the original Espionage Act beyond the intent of its drafters, and they were abetted by juries too ready to convict.<sup>152</sup>

Even so, Gregory wanted more, and, the next month, May of 1918, he obtained it. He later reported:

[I]ndividual disloval utterances . . . occurring with considerable frequency throughout the country, naturally irritated and

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147. *Suggestions of Attorney-General Gregory to Executive Committee in Relation to the Department of Justice*, 4 A.B.A. J. 305, 306 (1918) [hereinafter *Suggestions*]. Earlier, in August 1917, Gregory opined to the President that no such legislation was necessary. Letter from Gregory to Wilson (Aug. 22, 1917), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION, <http://rotunda.upress.virginia.edu/founders/WILS-01-44-02-0041> [<https://perma.cc/MVF3-TPKH>] (last visited Mar. 8, 2018).

148. *United States v. Hall*, 248 F. 150, 154 (1918); see also Arnon Gutfield, *The Ves Hall Case, Judge Bourquin, and the Sedition Act of 1918*, PAC. HIST. REV., May 1968, at 163, 163; PETERSON & FITE, *supra* note 124, at 210–11.

149. *Suggestions*, *supra* note 147, at 307.

150. *Id.* He was referring to the Alien Enemies Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577.

151. 56 CONG. REC. 4559–60 (1918).

152. SCHEIBER, *supra* note 29, at 43–44.

angered the communities in which they occurred, resulting sometimes in unfortunate violence and lawlessness and everywhere in dissatisfaction with the inadequacy of the Federal law to reach such cases. Consequently, there was a popular demand for such an amendment as would cover these cases. As a result of the request of this department . . . and because of the apparent need of amendments which would reach disloyal utterances of all kinds, Congress enacted . . . the “Sedition act.”<sup>153</sup>

Over strong Republican opposition—Senator Hiram Johnson from California, in particular, condemned its incursion into free speech<sup>154</sup>—Congress passed the Sedition Act.<sup>155</sup> As noted above, the Sedition Act’s amendment of the Espionage Act punished any person with fine or imprisonment who would:

[W]illfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States . . . into contempt, scorn, contumely, or disrepute.<sup>156</sup>

Republican Senator Henry Cabot Lodge from Massachusetts stated that this amendment really did not have much to do with espionage. He warned that the bill was “rather sweepingly and loosely drawn; and I think as it stands it might be subject to very serious abuse for purposes not contemplated in the statute at all.”<sup>157</sup> He pointed out the obvious. “This bill will not touch a single spy or a single German agent,” to which Senator Lee Overman, a Democrat from North Carolina and the chief sponsor of the bill replied, “I call everybody a spy who aids the enemy; that is what I call a spy.”<sup>158</sup> Democratic Senator Thomas W. Hardwick from Georgia noted, like Lodge, that the bill was not designed to catch some German spies, but rather “to get some men called I.W.W.’s.”<sup>159</sup> Hardwick called up the obvious his-

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153. 1918 ATT’Y GEN. ANN. REP. 7, 18.

154. *Senate Accepts Sedition Bill*, N.Y. TIMES, May 5, 1918, at 7.

155. Sedition Act, Pub. L. No. 65-150, 40 Stat. 553 (1918) (amending Espionage Act, Pub. L. No. 65-24, tit. 1, § 3, 40 Stat. 217, 219 (1917) (codified as amended at 18 U.S.C. § 2388 (2012))).

156. *Id.*

157. 56 CONG. REC. 4561 (1918).

158. *Id.* at 4562.

159. *Id.* at 4638.

toric parallel. “*Oh, Senators*, I tell you when you pass legislation of this character you will have gone further and faster than the Federalists ever went when under Alexander Hamilton’s whip and spur they signed the death knell of their own party as they passed the sedition bill of 1798.”<sup>160</sup>

Most other Senators were not supportive of Hardwick. Lodge himself offered an amendment: “The use of the mails shall not be permitted to any newspaper, magazine, or periodical, circular or pamphlet which is printed in whole or in part in the German language.”<sup>161</sup> Republican Senator Albert Fall from New Mexico predicted that “if guilty persons can not be punished under such statutes because of legal technicalities, the people of the United States will see that they are punished in some way.”<sup>162</sup> Democratic Senator J. Hamilton Lewis from Illinois proposed an amendment to strip those convicted of their citizenship.<sup>163</sup>

On the other side, Republican Senator Joseph I. France from Maryland offered an amendment: “[N]othing in this act shall be construed as limiting the liberty or impairing the right of any individual to publish or speak what is true, with good motives, and for justifiable ends.”<sup>164</sup> The administration vigorously opposed the proposal. John Lord O’Brian, special assistant to the Attorney General and co-director of Sedition Act prosecutions, argued,

The proviso referred to would make the question of motive not only relevant, but essential, and would introduce an element of proof, which would greatly increase the condition of successful prosecution and greatly decrease the value of the Espionage Act as a deterrent of propaganda.

For example, the most dangerous type of propaganda used in this country is religious pacifism: i.e., opposition to the war on the ground that it is opposed to the word of God . . . . The statements used in it generally consist of quotations from the Bible and various interpretations thereof. Convictions against this type of propaganda are only possible where the motive is

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160. *Id.* at 4642. Hardwick was defeated for re-election in the Democratic primary later in the year. *See Hardwick Beaten in Georgia Senate Race; George, Backed by Watson’s Friends, Wins*, N.Y. TIMES, Oct. 18, 1922, at 1.

161. *Id.* at 4650.

162. *Id.* at 4648.

163. *Id.* at 4650.

164. PETERSON & FITE, *supra* note 124, at 219.

irrelevant and where juries can be made to infer the intent from the natural effect of a propaganda.

Another class of propaganda extensively used is that of slowing down production or opposing the war on the ground that this war is one between the capitalists and the proletariat. This is the type of propaganda which produced the most serious results in Russia. It contains, however, assertions of fact; on its face the motive is not treasonable; or where a treasonable motive exists it would be difficult to prove it. A third type of propaganda now apparent in the South, is that affecting the status of the negro in connection with the war. Here again few facts are stated; the facts which are stated are generally true and it is difficult to disprove good motives.<sup>165</sup>

The France Amendment passed in the Senate, but was dropped in conference committee with the House of Representatives, prompting Senator Hiram Johnson to exclaim, “[t]he act of the conferees is a stroke at a privilege that has been ours since we became a republic. . . . What a travesty it is for us today to refuse to permit the people of the Union to speak what is true with good motive and for justifiable end.”<sup>166</sup>

Gregory also asked for, and obtained from Congress, the Sabotage Act,<sup>167</sup> aimed primarily at the Wobblies. It criminalized attempts to disrupt war production.<sup>168</sup> Not embarrassed by the 1918 Sedition Act’s replication of the Sedition Act of 1798, he called for another duplication. “The most effective machinery so far for dealing with alien enemies is furnished by the old Act of 1798, giving the President power to intern alien enemies when their being at liberty would probably constitute a menace to public safety.”<sup>169</sup> He did not mention that John Adams had never utilized the Alien Enemies Act.<sup>170</sup> Congress

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165. *Fears Speech Curb in Sedition Bill*, *supra* note 112.

166. *Id.*

167. Act of Apr. 20, 1918, Pub. L. No. 65-135, 40 Stat. 533 (1918) (codified as amended at 18 U.S.C. §§ 2151–2156 (2012)).

168. There were ten arrests under this Act. THOMAS L. PURVIS, A DICTIONARY OF AMERICAN HISTORY 354 (1997).

169. *Suggestions*, *supra* note 147, at 307. Gregory was upset that the Alien Enemies Law only covered men. “In many instances[,] women are the most dangerous of our alien enemies.” *Id.* at 307–08.

170. *The Alien and Sedition Acts: Defining American Freedom*, CONST. RTS. FOUND., <http://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html> [<https://perma.cc/AE5L-KNZV>] (last visited Apr. 12, 2018).

amended the Alien Enemies Act in April 1918 to cover women<sup>171</sup> and added, in October, in the face of a growing anarchist threat, a provision that permitted the deportation of aliens by a non-appealable administrative proceeding.<sup>172</sup> That year, 11,625 persons were deported.<sup>173</sup>

The revised Espionage Act was effective. The Attorney General reported that his energized Justice Department had brought hundreds of cases. As of June 30, 1918, there were 496 cases pending, 968 cases commenced—one of them was the indictment of Eugene V. Debs—and 1,179 cases terminated through convictions, acquittals, and dismissals that had been brought under the amended Espionage Act.<sup>174</sup> In fact, more cases were brought under the amended Espionage Act than under any other wartime federal law, except for the Selective Service Act.<sup>175</sup> Moreover, each “case” may have had multiple defendants.<sup>176</sup> The Attorney General boasted, “It is safe to say that never in its history has this country been so thoroughly policed as at the present time.”<sup>177</sup>

In April 1918, a number of lynchings of alleged German sympathizers took place, which became a topic of denunciation in the German Reichstag. As local instances of violence and intimidation became more and more commonplace,<sup>178</sup> the Attorney General took notice and claimed that the “department has made every effort to put down disorders of this character,” including making reports to local police.<sup>179</sup> President Wilson, who had been criticized for allowing such local violence to pass without comment for a long time, finally spoke out against lynching in July.<sup>180</sup> But contrary to Attorney General Gregory’s prediction, the passage of the Sedition Act only made

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171. Act of Apr. 16, 1918, Pub. L. No. 65-131, 40 Stat. 531.

172. Act of Oct. 16, 1918, Pub. L. No. 65-221, 40 Stat. 1012; GEOFFREY R. STONE, *PERILOUS TIMES* 181 (2004).

173. STONE, *supra* note 172, at 181.

174. 1919 ATT’Y GEN. ANN. REP. 22, 49. Only ten persons arrested under the Espionage act were accused as German agents. KAZIN, *supra* note 60, at 189.

175. 1918 ATT’Y GEN. ANN. REP. 47.

176. NAT’L CIVIL LIBERTIES BUREAU, *WAR-TIME PROSECUTIONS AND MOB VIOLENCE* 4 (1919).

177. 1918 ATT’Y GEN. ANN. REP. 15.

178. *See* NAT’L CIVIL LIBERTIES BUREAU, *supra* note 176, at 5–13.

179. 1918 ATT’Y GEN. ANN. REP. 23.

180. O’BRIAN, *supra* note 136, at 12–13; *Suggestions*, *supra* note 147, at 313; PETERSON & FITE, *supra* note 124, at 202–07.

things worse. When local abuses of citizens' rights grew in number and intensity, Attorney General Gregory issued a circular:

The prompt and aggressive enforcement of this act is of the highest importance in suppressing disloyal utterances and preventing [breaches] of peace. It is also of great importance that this statute be administered with discretion. It should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of Government policies; nor should it be permitted to become a medium for personal feuds or persecution.<sup>181</sup>

The advice did little good. The Sedition Act “fanned animosities into [a] flame” and induced such a torrent of complaints that even the augmented U.S. Attorneys' offices were overwhelmed.<sup>182</sup> Even before the passage of the Sedition Act, the Justice Department “[n]ot infrequently” was receiving over 1500 complaints each day—95 percent, Gregory declared, were without foundation.<sup>183</sup> President Wilson was one of those who referred suspicious actions and publications to Gregory, often asking if something could be done.<sup>184</sup>

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181. O'BRIAN, *supra* note 136, at 18 n.1.

182. *Id.* at 18.

183. *Suggestions*, *supra* note 147, at 312. Earlier, he had written William Gibbs McAdoo that in “ninety per cent. of these cases the information furnished was of no value, but in a small number of them it proved to be very valuable indeed, and it thus became necessary to investigate everything called to our attention.” Letter from Thomas Watt Gregory to William Gibbs McAdoo (June 12, 1917), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-7-9&expandNote=on> [<https://perma.cc/9VQ5-QT6R>].

184. *See, e.g.*, Letter from Woodrow Wilson to Thomas Watt Gregory (Jan. 10, 1918), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-6-2&expandNote=on> [<https://perma.cc/W3WC-UBN9>] (“I would be very much obliged if you would look over the enclosed papers. If true, they state a very grave situation and it is thoroughly worth our while to consider what, if anything, should and can be done about the influences proceeding from Seattle.”); Letter from Woodrow Wilson to Thomas Watt Gregory (June 25, 1917), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-1-6&expandNote=on> [<https://perma.cc/P7ZJ-HXNS>] (“Here is another item for your list of activities by the pro-Germans.”); Letter from Woodrow Wilson to Thomas Watt Gregory (June 4, 1917), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-2-4&expandNote=on> [<https://perma.cc/WEG9-ZTX8>] (“Has your attention been called to the enclosed association? It seems to me that it would be very dangerous to have such an organization operating in the United States, and I wonder if there is any way in which we could stop it.”).

After the passage of the Sedition Act, “the volume of accusations increased enormously.”<sup>185</sup> “The number of complaints under this law presented to the Department of Justice has been incredibly large,” Gregory reported, and “[e]very day hundreds of articles or passages from newspapers, pamphlets, books, or other printed matter, transcripts of speeches, reports of private conversations, etc., have been reported to officials of the department for decision as to whether or not the matter justified prosecution under the espionage act.”<sup>186</sup> Moreover, each U.S. Attorney’s office had the discretion whether or not to pursue indictments, notwithstanding, as in Debs’s case, the advice of the Department. Control by the Department over U.S. Attorneys’ prosecutorial decisions had been minimal.<sup>187</sup> Early on, the Justice Department had weakly tried to “admonish United States attorneys to use care in prosecutions.”<sup>188</sup> It was not enough, and the situation deteriorated markedly after the passage of the Sedition Act.

Raids against draft resisters had also surged. During the summer federal agents spread throughout the country, focusing on such cities as Minneapolis, Chicago, Detroit, Cleveland, Atlantic City, and New York, and rounding up thousands of suspects.<sup>189</sup> In particular, in September 1918, there occurred the “slacker raid” in New York City. “American Protective League volunteers, soldiers and sailors, and Justice Department agents summarily arrested 20,000 men, dragging many from streetcars and offices.”<sup>190</sup> Though some claimed that the Attorney General had been behind the raids,<sup>191</sup> Gregory protested to Wilson that the raids were launched against his “specific instructions.”<sup>192</sup> Gregory’s successor, Attorney General A. Mitchel Palmer, reported that in the twelve months after July 1, 1918, 15,262 prosecutions had been initiated under the Selective Service Act,<sup>193</sup> and in the next year, there were an additional 19,790 prosecutions.<sup>194</sup>

Finally, in October 1918, Attorney General Gregory forbade any submission of a Sedition Act case to a grand jury until the U.S. Attorney had submitted a statement of facts to the Department and

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185. PETERSON & FITE, *supra* note 124, at 223.

186. 1918 ATT’Y GEN. ANN. REP. 21.

187. SCHEIBER, *supra* note 29, at 42.

188. 1918 ATT’Y GEN. ANN. REP. 21.

189. PETERSON & FITE, *supra* note 124, at 231–32.

190. SCHEIBER, *supra* note 29, at 47.

191. STONE, *supra* note 172, at 157.

192. SCHEIBER, *supra* note 29, at 47–48.

193. 1919 ATT’Y GEN. ANN. REP. 21.

194. 1920 ATT’Y GEN. ANN. REP. 126.

had received its opinion.<sup>195</sup> As would be expected, after the Armistice, Espionage Act prosecutions fell off dramatically, but there were still 968 new prosecutions after July 1, 1918.<sup>196</sup>

Following the Armistice of November 11, 1918, the attitude of Attorney General Gregory towards war resisters predictably eased. He directed that the Department cut its ties to the American Protective League.<sup>197</sup> Previously, he had protested that civil liberties ought to be respected, but his words seemed formulaic, and he failed to follow through with protective measures. In fact, his speeches and his actions stoked the suppression of anti-war sentiment. At the end of the war, however, there was a change in the policy of the Department. By the time that Gregory retired from his office in March of 1919, four hundred Espionage Act prosecutions had been terminated, though forty-six more would be brought after June 1919 under his successor.<sup>198</sup> From 1917 to 1921, of the thousands of persons who were detained or arrested under the Espionage Act, 2,168 came to trial. There were 1,055 convictions, 181 acquittals, 665 were allowed to lapse, and 135 were dismissed.<sup>199</sup>

With the success of Allied arms, Woodrow Wilson was determined to see a peace based on his Fourteen Points, which he had earlier promulgated in January 1918. The man who had been doggedly single-minded in prosecuting the war, now became unwavering in his quest to see his vision of peace come to pass. As some anti-war activists had evinced hopeful support when the President had announced his Fourteen Points in January of 1918,<sup>200</sup> it was now logical that they might be induced or at least mollified to help to accomplish his post-war goals.

On December 4, 1918, Wilson embarked for Europe and did not return until February 24, 1919, for a brief respite.<sup>201</sup> The first of Wilson's Espionage Act commutations came on February 26. It was of an evangelical minister, P.E. Twining, who had been convicted of statements made at a number of revival meetings in which he had de-

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195. O'BRIAN, *supra* note 112, at 18.

196. 1919 ATT'Y GEN. ANN. REP. 22. By June 30, 1920, there were still 294 Espionage Act cases pending. 1920 ATT'Y GEN. ANN. REP. 126.

197. COBEN, *supra* note 112, at 199.

198. SCHEIBER, *supra* note 29, at 46.

199. *Id.* at 46–47.

200. KAZIN, *supra* note 60, at 247–51; BERG, *supra* note 104, at 469–71.

201. *Woodrow Wilson*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/departmenthistory/travels/president/wilson-woodrow> [<https://perma.cc/R4VQ-L8TK>] (last visited Apr. 17, 2018).



clared that he opposed “war in general.”<sup>202</sup> He was sentenced to one year in jail.<sup>203</sup> The grounds for, and the extent of, the commutations were less than generous. Although “[t]he United States Attorney did not believe that Twining had any specific intention to interfere with the Government in the prosecution of the war,”<sup>204</sup> the Attorney General believed “the sentence was a proper one and necessary to restrain others who might be disposed to make like statements.”<sup>205</sup> Nonetheless, because the war was over and in light of “the circumstances under which the utterances were made,”<sup>206</sup> Gregory recommended a commutation to the sentence to 9 months, hardly a boon to a man who was still left with over three months to serve.<sup>207</sup>

Meanwhile, Attorney General Gregory had been receiving petitions and letters asking that there be a general amnesty of those who had been convicted under the Espionage Act. He resolutely rejected the idea that these were “political prisoners.” In November 1918, he had written to Wilson,

Permit me again to suggest that these people are in no sense political prisoners, but are criminals who sided against their country; and, while the punishment meted out to some of them was more severe than it should have been, there are many others who are out on bond, have not been in prison for a single day, and who richly deserve substantial punishment.<sup>208</sup>

He determined, nonetheless, to review the sentences that his sometimes overzealous U.S. Attorneys had been able to procure, with his acquiescence or support. He apprised the President of his plans.<sup>209</sup> Upon review of the 329 persons still in prison,<sup>210</sup> he concluded that

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202. 1919 ATT’Y GEN. ANN. REP. 502.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Letter from Thomas Watt Gregory to Woodrow Wilson (Nov. 29, 1918), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-12-1&expandNote=on> [<https://perma.cc/6DBS-83C9>].

209. Letter from Thomas Watt Gregory to Woodrow Wilson (Mar. 1, 1919), *in* THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-print-01-55-02-0254-0002> [<https://perma.cc/A77L-9WYJ>].

210. *Palmer Requests Clemency for 52*, N.Y. TIMES, Apr. 12, 1919, at 7. The *Times* reported that Palmer had reported a figure of 239, but a Senate

most had been justly convicted, but, he reported to President Wilson on March 1, 1919, that in some cases, “I am satisfied that the ends of justice do not now require that the sentences imposed by the court during the war need be enforced with full severity.”<sup>211</sup> Gregory, who was about to leave office, submitted a list of persons whose commutations he recommended to the President.<sup>212</sup> But once again, Gregory trimmed. Most of the recommended actions, like that given to P.E. Twining, were only reductions of sentences.

Wilson’s private secretary, Joseph Patrick Tumulty, was outraged at Gregory’s half-hearted recommendations. Wilson had earlier asked Tumulty about the idea of a general amnesty, and Tumulty now urged it. “In looking through the warrants you will find that they are simply reductions of sentences—in many cases the reductions are not at all considerable. I think it would be much better if you would keep in mind the idea of a general amnesty.”<sup>213</sup> Alternatively, Tumulty advised that Wilson should grant a full pardon to those who had been convicted because of the “aroused emotions” of the jurors.<sup>214</sup> Woodrow Wilson was not a forgiving man<sup>215</sup>—he would later expel Tumulty from his company.<sup>216</sup> He was focused entirely on the European situation and had little or no interest in other matters and he had only a few days stateside left in which to conduct business. On March 3 and 4, the day he left for Europe again, he supported Gregory’s “compromise” recommendations and issued fifty-one commutations and one pardon.<sup>217</sup> Wilson did not return to the United States until July 8, after the peace treaty had been signed.<sup>218</sup> Tumulty was correct. Out of the fifty-one commutations, none were for time served, and only a few were for new terms that were set to expire in a short amount of time.<sup>219</sup>

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report stated in January 1921 that there were 329. *Amnesty and Pardon for Political Prisoners: Hearings on S.J. Res. 171 Before the Subcomm. of the S. Comm. on the Judiciary*, 66th Cong. 87 (1921).

211. Letter from Thomas Watt Gregory to Woodrow Wilson (Mar. 1, 1919), *supra* note 209.

212. SCHEIBER, *supra* note 29, at 46.

213. Letter from Thomas Watt Gregory to Woodrow Wilson (Mar. 1, 1919), *supra* note 209.

214. *Id.*

215. PIETRUSZA, *supra* note 2, at 24.

216. BERG, *supra* note 104, at 720.

217. 1919 ATT’Y GEN. ANN. REP. 506–11.

218. *Woodrow Wilson*, *supra* note 201.

219. 1919 ATT’Y GEN. ANN. REP. 506–11; *Wilson Commutes Espionage Terms*, N.Y. TIMES, Mar. 6, 1919, at 9. The pardon was for Frederick

On the day of the President's departure, Thomas Watt Gregory vacated the Attorney General's office to be replaced the next day by A. Mitchell Palmer, former Alien Property Custodian.<sup>220</sup> Palmer continued the review of the 179 persons still incarcerated,<sup>221</sup> and on April 22, 1919, Wilson, from Paris, pardoned two persons, and commuted an additional forty-nine others.<sup>222</sup> In contrast to Gregory, thirteen of Palmer's recommended commutations were "to expire at once."<sup>223</sup> Palmer also disbanded the American Protective League, and, after consulting with United States attorneys, dropped hundreds of additional suits still pending. He also lifted the parole of over 10,000 enemy aliens.<sup>224</sup>

During this time, on April 13, 1919, Eugene V. Debs, having exhausted his appeals, began his prison sentence.<sup>225</sup> When that news came, Cleveland Socialist leader C.E. Ruthenberg called for a protest march for May 1.<sup>226</sup> In a few months Ruthenberg would found the

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Krafft, Secretary of the Socialist Party of New Jersey, who had dissented from the Socialist Party's Anti-War Proclamation of April 1917. *Id.*

220. COBEN, *supra* note 112, at 128, 150–54; Wilson had accepted Gregory's resignation on January 11, 1919. Letter from Woodrow Wilson to Thomas Watt Gregory (Jan. 11, 1919), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-7-1&mode=deref> [https://perma.cc/BJ5H-WE9S]; Gregory had opposed Palmer as his replacement, predicting to Wilson that Palmer would "cause you much trouble & regret." Letter from Thomas Watt Gregory to Woodrow Wilson (Jan. 17, 1919), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-9-8&expandNote=on> [https://perma.cc/2AF2-PVCY].
221. Letter from A. Mitchell Palmer to Woodrow Wilson (Apr. 4, 1919), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-1-3&expandNote=on#match1> [https://perma.cc/382U-GS9T]; *Palmer Requests Clemency for 52*, *supra* note 210.
222. Letter from Gilbert Fairchild Close to Joseph Patrick Tumulty (Apr. 22, 1919), in THE PAPERS OF WOODROW WILSON DIGITAL EDITION <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=WILS-search-1-4&expandNote=on#match1> [https://perma.cc/7N2U-F36G]. 1919 ATT'Y GEN. ANN. REP. 515–18.
223. 1919 ATT'Y GEN. ANN. REP. 515–18. Carl Gleeser, the co-defendant in the case of *Frohwerk v. United States*, 249 U.S. 204 (1919), had his sentence commuted to one year and one day. *Id.* at 516. Jacob Frohwerk's sentence was similarly commuted on June 19, 1919. *Id.* at 527.
224. COBEN, *supra* note 112, at 199–201.
225. KARSNER, *supra* note 8, at 1–2.
226. Jim Dubelko, *Charles E. Ruthenberg: America's Most Arrested Man*, CLEVELAND HIST., <https://clevelandhistorical.org/items/show/722> [https://perma.cc/4KPC-DPAP] (last visited Mar. 26, 2018).

Communist Party of America.<sup>227</sup> Meanwhile, in Europe, Wilson ran into trouble with Italy, whose foreign minister left the peace conference in protest of Italy's not receiving the territorial concessions that she desired.<sup>228</sup> And then, Wilson, who had already been ill since April 3,<sup>229</sup> suffered what may have been a stroke, one that prefigured his massive cerebral hemorrhage that was to come on October 2, 1919.<sup>230</sup> The date of the apparent affliction, April 28, was significant, for on that day, a bomb exploded at the office of the mayor of Seattle, a progressive anti-anarchist activist. The next day, another bomb exploded at Senator Thomas Hardwick's home, severely injuring the maid. Hardwick had vigorously opposed the Sedition Act but had sponsored a restrictive immigration bill. Then, on May Day, sixteen bombs that were undelivered because of insufficient postage were discovered in the New York City post office. The targets of the bombs were some of the most prominent figures in the United States.<sup>231</sup>

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227. *Id.*

228. COOPER, *supra* note 60, at 492.

229. PIETRUSZA, *supra* note 2, at 31–32; BERG, *supra* note 104, at 568–69.

230. RICHARD STRINER, WOODROW WILSON AND WORLD WAR I: A BURDEN TOO GREAT TO BEAR 208–09, 229–30 (2014); *see also* Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL'Y 295, 354 (2008).

231. PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 140–43 (1991). The list of intended targets included A. Mitchell Palmer, Attorney General; Albert S. Bursleson, Postmaster General; William H. Lamar, Solicitor of the Post Office Department; Oliver Wendell Holmes, Jr., Associate Justice of the U.S. Supreme Court; William B. Wilson, Secretary of Labor; Anthony Caminetti, Commissioner General of Immigration; Frederic C. Howe, Commissioner of Immigration, Port of New York; Lee S. Overman, Senator from North Carolina; William H. King, Senator from Utah; Reed Smoot, Senator from Utah; Thomas W. Hardwick, former Senator from Georgia; John L. Burnett, Congressman from Alabama; Albert Johnson, Congressman from Washington; Kenesaw Mountain Landis, U.S. District Judge, Chicago; Frank K. Nebeker, Special Assistant to the Attorney General; Charles M. Fickert, District Attorney of San Francisco; Edward A. Cunha, Assistant District Attorney of San Francisco; John J. Hylan, Mayor of New York City; Richard E. Enright, Police Commissioner of New York City; R.W. Finch, Special Agent, Bureau of Investigation; Ole Hanson, Mayor of Seattle; William C. Sproul, Governor of Pennsylvania; William J. Schaffer, Attorney General of Pennsylvania; T. Larry Eyre, State Senator of Pennsylvania; John D. Rockefeller; J.P. Morgan; William M. Wood, President of the American Woolen Company; Theodore G. Bilbo, Governor of Mississippi; Walter Scott, Mayor of Jackson, Mississippi; Frederick Bullmers, editor of Jackson, Mississippi, *Daily News*. *Id.* at 143.

That May Day, there were marches, demonstrations, and riots across the United States.<sup>232</sup> Cleveland's was the most violent, when a veteran tried to take away a red flag from a marcher. Hundreds attacked the Socialists and destroyed their headquarters. Police and the military intervened, including a tank, and there was gunfire. Two were killed, forty injured and 116 arrested, nearly all of them foreign born, contributing to the growing nativist movement.<sup>233</sup> The Bolshevik triumph had inspired more than Debs. A radical cohort of East European immigrants so threatened the American socialist movement that the Socialist Party expelled 25,000 of them in May.<sup>234</sup> There were more bombings in June, culminating in an explosion that destroyed the home of Attorney General A. Mitchell Palmer. Palmer and his family were unhurt, as the bomber had tripped and fallen, blowing himself to pieces on the front lawn.<sup>235</sup> But it signaled that the era of the "Red Scare" had begun. Palmer, holding that the wartime statutes lapsed in their effectiveness once the war ended, asked for new legislation. When Congress balked, Palmer urged the passage of state criminal syndicalism laws, which, in fact, came in a rush, and he made increasing use of the Alien law of October 1918 to deport those who were seen as threats. He declared his "determination to drive from our midst the agents of Bolshevism with increasing vigor and with greater speed, until there are no more of them left among us."<sup>236</sup>

With his famous raids in late 1919 and early 1920, Attorney General Palmer was able to deport thousands of suspected anarchists,<sup>237</sup> but his plea for a federal peacetime sedition law never succeeded, despite the vigorous support for such a measure from an ailing President Wilson.<sup>238</sup> Samuel Gompers opposed any new law, and Senator Robert Latham Owen, a Democrat from Oklahoma, declared,

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232. *Widespread Disturbances Mark May Day Here and Abroad*, N.Y. TIMES, May 2, 1919, at 8.

233. THE ENCYCLOPEDIA OF CLEVELAND HISTORY 667 (David D. Van Tassel & John J. Grabowski eds., 1987); *1 Killed, 40 Injured in Riots*, PLAIN DEALER (Cleveland), May 2, 1919, at 1.

234. *American Socialists Expel 25,000 Reds*, *supra* note 101.

235. *A Byte Out of History: The Palmer Raids*, FBI (Dec. 28, 2007), [https://archives.fbi.gov/archives/news/stories/2007/december/palmer\\_122807](https://archives.fbi.gov/archives/news/stories/2007/december/palmer_122807) [<https://perma.cc/FN55-N9AU>].

236. A. Mitchell Palmer, *The Case Against the "Reds"*, FORUM, Feb. 1920, at 173, 181.

237. COBEN, *supra* note 112, at 217.

238. 59 CONG. REC. 29–30 (1920) (reciting President Wilson's 1919 Annual Message that called for criminal legislation empowering the federal government to address political protesters who "incite crime and insurrection").

“Ninety per cent. of the talk about the danger of a Bolshevik ‘revolution’ in this country is nonsense. It is high time to discount hysteria and return to normal thinking.”<sup>239</sup> By the spring of 1920, the threat seemed to subside, civil libertarians joined to attack Palmer, while he saw his own presidential ambitions foundering.<sup>240</sup> Ironically, the worst bombing occurred in late September 1920 on Wall Street, killing over thirty people, but it failed to engender a renewed campaign against the left, despite the efforts of Palmer.<sup>241</sup> In December 1920, the House delivered the coup de grace by voting to repeal the 1918 Sedition Act.<sup>242</sup> President Wilson had vetoed an earlier repeal measure.<sup>243</sup>

After Wilson’s commutations of March and April 1919, further clemency was episodic. The public had reacted negatively to the commutations, and, with the campaign against the radical left, it is no wonder that Palmer had lost his enthusiasm for commutations of the World War I war resisters. Still, in the last twenty-four months of the Wilson Presidency, thirty-nine additional persons still in jail for violating the Espionage Act received clemency—six of them on condition that they be deported.<sup>244</sup>

One who did not receive clemency was Eugene V. Debs. After Debs’s conviction, Wilson was inclined to consider a “respite” for Debs, though he doubted “the wisdom and public effect of such an action.”<sup>245</sup> He asked for Attorney General Palmer’s opinion. Palmer had already consulted with the Judge Westenhaver, who recommended against pardon or commutation.<sup>246</sup> Palmer’s answer to Wilson was adamant opposition to any clemency, and Debs went off to jail.<sup>247</sup>

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239. *Gompers to Oppose Palmer on Sedition Bill; Hearing on Contested Measure Begins Today*, N.Y. TIMES, Jan. 22, 1920, at 1.

240. STONE, *supra* note 172, at 225.

241. *Wall Street Bombing 1920*, FBI, <https://www.fbi.gov/history/famous-cases/wall-street-bombing-1920> [<https://perma.cc/9DBV-82AH>] (last visited Apr. 12, 2018).

242. 60 CONG. REC. 290–304 (1921). The joint resolution was enacted in March 1921. H.R.J. Res. 382, 66th Cong., 41 Stat. 1359, 1360 (1921) (repealing the Sedition Act and restoring the amended section of the Espionage Act to its original form).

243. *War Laws Repeal Voted by House*, N.Y. TIMES, Dec. 14, 1920, at 1.

244. 1919 ATT’Y GEN. ANN. REP. 464–528; 1920 ATT’Y GEN. ANN. REP. 705–64; 1921 ATT’Y GEN. ANN. REP. 662–726. Among the deportees were the defendants in *Abrams v. United States*, 250 U.S. 616 (1919). 1921 ATT’Y GEN. ANN. REP. 717. Their commutations and deportations were completed under Harding. *See infra* note 359.

245. COBEN, *supra* note 112, at 201–02.

246. *Id.*

247. SALVATORE, *supra* note 2, at 300.

Nonetheless, petitions and letters for clemency continued to come into the Attorney General's office. In July 1919, Clarence Darrow intervened on behalf of Debs with Palmer, but Palmer had seen that the commutations previously issued had abetted a backlash, and he told Wilson that, although Debs's sentence was too long, commuting it at the present time would only raise opposition to Wilson's passionate desire for approval of the peace treaty. On January 31, 1921, with Harding to be inaugurated in little over a month, Palmer changed his mind, and he twice strongly urged Wilson to relieve Debs, describing Debs's failing health.<sup>248</sup> The ill Wilson, more embittered than ever, told Tumulty, "[w]hile the flower of American youth was pouring out its blood to vindicate the cause of civilization, this man, Debs, stood behind the lines, sniping, attacking, and denouncing them . . . . This man was a traitor to his country and he will never be pardoned during my administration."<sup>249</sup> He scribbled "[d]enied" on Palmer's memo.<sup>250</sup>

The country, meanwhile, enthusiastically awaited the inauguration of a new Republican President.

### III. HARDING

Barely six weeks into the war, the Wilson administration had already been ginning up patriotic fervor. The President established the Committee on Public Information, the Attorney General prepared restrictive legislation, and the powerful Secretary of the Treasury, William G. McAdoo, toured the country demanding subscriptions to war bonds, and implying disloyalty of those who failed to commit their due share.<sup>251</sup> On May 26, 1917, McAdoo visited Columbus, Ohio, which was over a million dollars short of the quota that the administration had set for the residents of the city. "[E]very man and woman in this country," he seemed to scold, "must realize that the first duty they can perform for their country is to take some of these bonds."<sup>252</sup> Senator Warren G. Harding, in Ohio at the time, took umbrage at McAdoo's tone. Harding had also begun to recoil from President Wilson's overweening rhetoric about the objectives of the war.

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248. COBEN, *supra* note 112, at 202–03.

249. GINGER, *supra* note 12, at 405.

250. Eric Goldman, *A Sort of Rehabilitation of Warren G. Harding*, N.Y. TIMES, Mar. 26, 1972, at SM42.

251. *McAdoo in Ohio Lauds U.S. Loan*, PLAIN DEALER (Cleveland), May 27, 1917, at 6A.

252. *Id.*

On Memorial Day, the senator was invited to a reception sponsored by the women of “the Just Government League of Columbus,” who wanted to know his views on women’s suffrage. But McAdoo was on Harding’s mind. The perturbed Harding said that the bond sales campaign was “hysterical and unseemly” and “calculated to give America’s enemies the impression that only by such intensive measures could she raise the sinews of war.”<sup>253</sup> He also had declared that it was the lack of confidence in the administration that was hampering bond sales.<sup>254</sup> He then hurried back to Washington to cast his vote against the censorship provision in Wilson’s proposed Espionage Act draft.<sup>255</sup> However, the House of Representatives struck first. The Republicans, with some Democratic allies, killed the administration’s censorship proposal.<sup>256</sup>

On June 8, the full Espionage Act was brought to the Senate floor by conference committee, but it was put off, leaving space for a prophetic moment.<sup>257</sup> Democratic Senator J. Hamilton Lewis from Illinois, who had earlier proposed that persons who violated the Espionage Act should lose their citizenship,<sup>258</sup> took the floor. He began what the *Plain Dealer* called a “sneering[]”<sup>259</sup> attack on Republican Senator Warren G. Harding from Ohio for his remarks “to the luncheon tendered him by the ladies” in Columbus.<sup>260</sup> Harding, with false seriousness, asked for the floor. “[T]here was no such thing,” he said.

“[N]o ladies or no luncheon?” Lewis rejoined.

“[N]o luncheon,” Harding replied.

Well in that case, Lewis continued, there must at least have been some “beverage.”<sup>261</sup>

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253. 55 CONG. REC. 3323 (1917) (statement of Sen. Lewis) (quoting an article containing Harding’s reported statements).

254. *Harding Under Fire for Hit at War Loan*, N.Y. TIMES, June 9, 1917, at 3.

255. *Stage All Set to Reanimate G.O.P.*, PLAIN DEALER (Cleveland), June 1, 1917, at 2.

256. *House Rejects Censorship on Press by 184 to 144*, BOS. HERALD, June 1, 1917, at 1.

257. 55 CONG. REC. 3323 (1917) (statement of Sen. Overman).

258. 56 CONG. REC. 4650 (1918) (recording Sen. Lewis’ proposed amendment).

259. *Treason Politics, Sneer at Harding*, PLAIN DEALER (Cleveland), June 9, 1917, at 3.

260. 55 CONG. REC. 3323 (1917) (statement of Sen. Lewis).

261. *Id.* (statements of Sen. Lewis & Sen. Harding).



Lewis pressed on. “He was surrounded by this bevy of beauty and those tantalizing influences of beauteous women.”<sup>262</sup> Possibly Lewis was making oblique reference to Harding’s amorous adventures, if they were known at the time, and to the fact that he moderately imbibed—Harding would later vote against wartime prohibition, but for the Volstead Act.<sup>263</sup>

It was not the first time that Lewis and Harding had at each other. They had recently campaigned for their respective candidates in a special election in New Hampshire. Harding’s supported candidate, the Republican, won.<sup>264</sup> But Harding, becoming more combative on the war issue, perceived that Lewis would charge disloyalty against anyone who opposed the President or his candidates. Lewis’s campaign statement for the New Hampshire Democrat was read into the Congressional Record by Representative Williams from Illinois:

Will the citizens of Manchester district stand by the president in his effort to maintain a war for democracy and justice and give him a supporter in congress who will support his policies and hold up his hands? Or will the district select a gentleman of whom it could be said he was an opponent of the policies of the president and of whom thereafter throughout the world it will be said was elected upon the issue of dishonoring the president and defeating America?<sup>265</sup>

Wilson would use the same tactic in the upcoming 1918 Congressional campaign with the similarly disastrous results for the Democrats.<sup>266</sup> During that time, while the war was in its hottest phase for American troops, Wilson had tried to make loyalty to the cause a reason to vote for the Democratic Party. The Republicans, believing themselves as loyal as any—including those reluctant to go along with the more draconian wartime laws—naturally resented Wilson’s implied characterization of them. So did the electorate. The Republicans took over both houses of Congress.<sup>267</sup>

But on the Senate floor, in June of 1917, Senator Lewis did not yet know that what had happened in New Hampshire would become nationwide the following year. He was, instead, seeking his revenge against Harding. “Waving a newspaper in the air,” Lewis directed the

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262. *Id.* at 3324 (statement of Sen. Lewis).

263. MURRAY, *supra* note 2, at 119.

264. *Congressional Contest in New Hampshire Ends*, BOS. HERALD, May 29, 1917, at 1.

265. 55 CONG. REC. 7858 (1917) (statement of Rep. Williams).

266. BERG, *supra* note 104, at 504–06; PIETRUSZA, *supra* note 2, at 52.

267. BERG, *supra* note 104, at 504–06.

Senate to the words that Harding said of the bond campaign: It was “hysterical and unseemly.”<sup>268</sup> Lewis, retreating into the same tactic he had used in the New Hampshire campaign, then leveled the worst charge: “May I remind my eminent friend, . . . that utterances less in their effect than these given vent by him, from persons of lesser position, are today being answered for by processes citing them toward the jails on the grounds of seditious speech or sentiments disloyal?”<sup>269</sup> This would be the policy of the administration in enforcing the soon to be enacted Espionage Act, namely, to call into question the war policies of the administration was to be seditious.

Lewis quickly added, “Mr. President. I know the Senator is in nowise seditious.”<sup>270</sup> But the barb had been set, and Harding answered. He stood and affirmed all that he had said. The bond campaign, Harding insisted, was indeed hysterical and unseemly. He saw the administration flailing against domestic enemies, especially the German population, to cover up the state of America’s unpreparedness. “I could stand upon this floor today with criticisms well founded and substantiated by facts which would prove a sensation to the hundred millions of Americans who are on the anxious seat today.”<sup>271</sup> He had no doubt that the American people could buy 17 billion dollars of bonds “on any day” were it not for “its lack of confidence in the present administration” and because the administration had failed to develop a tax policy to fund the war properly.<sup>272</sup>

Harding believed that it was futile to seek what later generations would call “regime change” in the place of core American interests.

I did say this, and I choose to repeat it here: That it is not up to the United States to force democracy onto the world; that it were better that by our own proof that democracy can defend itself we make the ideal example which shall enlist the devotion of the world to the cause of democracy. . . . [Y]ou can not justify this war and you can not unify the American people in the defense of the American Nation except on the justifiable ground of defending and preserving American national rights.<sup>273</sup>

And he saw nothing but courage in German people, both here in the United States and in Germany.

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268. *Harding under Fire for Hit at War Loan*, *supra* note 254, at 3.

269. 55 CONG. REC. 3324 (1917) (statement of Sen. Lewis).

270. *Id.*

271. *Id.* at 3325 (statement of Sen. Harding).

272. *Id.* One of the strengths of the Harding administration would be its handling of the federal budget. *See* MURRAY, *supra* note 2, at 172–79.

273. 55 CONG. REC. 3325 (1917) (statement of Sen. Harding).

[A]nd if it be treason to say it I repeat it now—I can not wish for anything more loyal from the citizenship of the United States of America than a devotion to the Stars and Stripes, like the German citizen shows to the Fatherland; and there is not an ounce of pro-German sympathy in my body. I should like American devotion similar to that which the people of Germany show to the Government of that country; and I say it now, and I will repeat it again and again, it is not any business of the American people what class of government any nation on earth may have so long as that government respects the requirements of international law and the tenets of civilization. I think it ill becomes the United States of America to measure a man's patriotic devotion in accordance with his determination that the houses of Hohenzollern and Hapsburg shall be destroyed.<sup>274</sup>

Harding had already perceived what the excesses of Wilson's war aims would drive him to, and he may have detected the peril in Wilson's transformative objectives that lay awaiting for the country and the international order. Already nursing Presidential ambitions, he could have imagined himself picking up the pieces. The debate stirred comment around the country.<sup>275</sup> The *New York World* likened Harding to the Copperheads of the Civil War.<sup>276</sup> McAdoo called Harding's comments "so profoundly [partisan] that they call for no comment on my part."<sup>277</sup>

There were two rhetorical faces to Warren Harding. He had banked his political success on what he called "harmonization." In the run-up to his nomination for President in 1920, he stuck to "the rule that has guided me throughout my political career, which is not to hurt anyone's feelings or to step on anybody's toes if I could find foot room elsewhere."<sup>278</sup> He had learned the art of patience. All his life he had to contend with the racist charge that there was African blood in his ancestry. The adjective "n—" was frequently appended to his name, even by his irascible father-in-law.<sup>279</sup> There is no record of him reacting angrily to what was intended to be an insult. As owner and editor of an upstart weekly, the *Star*, in Democratic Marion, Ohio, Harding displayed his typical mien in announcing his newspaper's policy:

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274. *Id.*

275. *Treason Politics, Sneer at Harding*, *supra* note 259, at 3.

276. *Copperheadism*, PLAIN DEALER (Cleveland), June 13, 1917, at 8.

277. *McAdoo Ignores Harding*, N.Y. TIMES, June 10, 1917, at 8.

278. PIETRUSZA, *supra* note 2, at 221.

279. *Id.* at 73.

Never needlessly hurt the feelings of anybody.

Be decent; be fair; be generous. I want this paper to be so conducted that it can go into homes without destroying the innocence of any child.<sup>280</sup>

But when someone touched the nerve of a fundamental principle or insulted his honor, the man—not known for his rhetorical skill—could pour forth with moments of eloquence, or, if need be, invective. In Marion, Harding's *Star* had to wedge its way into the town dominated by two other newspapers, one Democratic, the *Mirror*, and one Republican, the *Independent*.<sup>281</sup> Harding's real conflict was with the editor of the other Republican paper, George Crawford. Eventually, their conflict degenerated into personal derision, and Harding let loose with an unrestrained jeremiad.

This Crawford, who works the temperance and pious racket for church support, while his inebriate associate caters to the saloon patronage, has no business questioning anyone's loyalty. His co-workers know him. Instead of being a political writer for the sake of principle, he is a Republican for patronage, as his support of kicked-out Democrats indicates. It was Crawford who picked out Doctor Hahn from the Democratic ashpile and supported him for auditor, after abusing him in the *Independent* three years continuously, simply to get financial support of the auditor's office. There are plenty of instances. He plays the lickspittle to a class of men who like such parasites. Then he swells up, and believing no good can be done without his sanction and advice, he foams at the mouth whenever his sordid mind grasps anything done politically without his counsel; and he rolls his eyes and straightway evolves from his inner consciousness a double-twisted, unadulterated, canvas-back lie, that would make the devil blush. His sordid soul is gangrened with jealousy. This sour, disgruntled and disappointed old ass gets frenzied at the prospects of a successful rival, and must vent the feelings of his miserable soul by lying about those he cannot browbeat or cajole. He belittles men whose shoes he is unfit to lace, and his mind has become a heterogeneous mass of jealous ideas and dissatisfaction. But his colossal self-adulation is tumbled mightily, for no one trembles when he barks. His acquaintance is tottering him; he only remains an imbecile

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280. *Id.*

281. FRANCIS RUSSELL, *THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING IN HIS TIMES* 55–56 (1968).

whose fits will make him a paralytic, then his way of spitting venom will end.<sup>282</sup>

Harding had also experienced the sting of the law on his publication. He was arrested under a charge of criminal libel for a piece in which the paper mistakenly reported that a woman of the town had left her husband and eloped. After the *Star* published a retraction, the grand jury voted fourteen to one not to indict.<sup>283</sup> In June 1917, an admiring *Plain Dealer* credited Harding's success as a "newspaperman" for his vigorous opposition to President Wilson's plan to gain censorship power over the press.<sup>284</sup> After he became President, Harding enjoyed one of the closest and friendliest relationships with the press of any modern President.<sup>285</sup> Harding also supported the right of conscientious objectors to the war, and he denounced, along with others, the New York Assembly's expulsion of five Socialists who had been elected to its body.<sup>286</sup>

Harding's opposition to Wilson's leadership style and policies remained throughout the war years and after, and it would have much to do with the manner in which Harding would conduct his own Presidency. Although Harding himself acknowledged that he was Wilson's intellectual inferior, he did not shy away from a face-to-face battle with the President. In August 1919, attempting to dissuade the solidifying opposition to the League of Nations, Wilson had members of the Senate Foreign Relations Committee, which included Harding, to lunch and a Wilsonian lecture.<sup>287</sup> The central issue was—and would ultimately be the death knell of the League in the Senate—Article X of the proposed covenant: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of Members of the League."<sup>288</sup> This sounded like it would require the United States to become militarily involved in chronically unstable Europe. Not at all, Wilson insisted. These were "moral" obligations, not legal require-

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282. *Id.* at 71–72.

283. *Id.* at 78.

284. *Harding Has News Nose*, PLAIN DEALER (Cleveland), June 3, 1917, at 24.

285. MURRAY, *supra* note 2, at 114.

286. Ernest Freeberg, *After the Red Scare: Civil Liberties in the Era of Harding and Coolidge*, in LITTLE 'RED SCARES': ANTI-COMMUNISM AND POLITICAL REPRESSION IN THE UNITED STATES, 1921-1946, at 4 (2014).

287. The colloquy is recorded in HENRY CABOT LODGE, THE SENATE AND THE LEAGUE OF NATIONS 297–379 (1925).

288. *The Covenant of the League of Nations*, AVALON PROJECT, [http://avalon.law.yale.edu/20th\\_century/leagcov.asp](http://avalon.law.yale.edu/20th_century/leagcov.asp) [https://perma.cc/MCW3-UZ4Z] (last visited May 7, 2018).

ments.<sup>289</sup> Then why do we need Article X at all? Harding parried. Wilson answered with a professorial distinction, though one that was beside the point. A legal obligation can be enforced by a sanction. “A moral obligation [is] superior [to a legal obligation], [and] had greater binding force . . . .”<sup>290</sup> But it still remains matter of “judgment” by each nation, Wilson assured Harding.<sup>291</sup> But the moral judgment of any nation in Europe, Harding answered, “may be warped by its prejudices, racial, geographical and otherwise.” In that case, Harding went on, the clause would be “surrendering the suggestion of a moral obligation for this Republic to the prejudices or necessities of the nations of the Old World.”<sup>292</sup>

Wilson tried to dodge the point. “I do not understand that we make such a surrender.”

Harding closed in.

Senator HARDING. What becomes of our standing among nations if the council fixes a moral obligation upon us and we reject the judgment of the council as to the moral obligation?

The PRESIDENT. Pardon me if I have to remind you that we always have to concur in that.

Senator HARDING. Precisely; but the council states what constitutes the moral obligation, if we agree; but if we do not agree, then in the eyes of the world we have rejected its judgment as to a moral obligation.

The PRESIDENT. Certainly; and I hold that we are at liberty to do that, if our moral judgment honestly differs from the moral judgment of the world.

Senator HARDING. Then, let us go back to the original inquiry. What permanent value is there, then, to this compact?<sup>293</sup>

In the end, Wilson’s intransigence over compromises that even the French and British said were acceptable doomed his plan.<sup>294</sup>

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289. ROBERT H. FERRELL, *WOODROW WILSON AND WORLD WAR I: 1917-1921*, at 173 (1985).

290. *Id.*

291. LODGE, *supra* note 287, at 352.

292. *Id.* at 352–53.

293. *Id.* at 353.

294. ALEXANDER L. GEORGE & JULIETTE L. GEORGE, *WOODROW WILSON AND COLONEL HOUSE: A PERSONALITY STUDY* 310–11 (1956).

1919 was a wretched year. The President was single-mindedly fixed on the Versailles Treaty and the League, neglecting domestic affairs even before his massive stroke significantly incapacitated him on October 2.<sup>295</sup> The country's economic and political structure was fraying. At the end of the war, unemployment jumped, farmers had to hold surpluses, inflation shot above 10 percent.<sup>296</sup> In 1919, there were 2665 strikes by over four million workers—20 percent of the workforce.<sup>297</sup> The Bolshevik Revolution was cheered by Debs and many others. In Seattle, there was the beginnings of a general strike, turned back by the AFL unions.<sup>298</sup> Throughout the year, mail bombs circulated throughout the country, some of them exploding, and one, as noted, destroying Attorney General Palmer's house. Palmer retaliated with his legendary raids. In Centralia, Washington, Legionnaires and Wobblies exchanged deadly fire. Lynchings, not only of African-Americans, were seen in many parts of the country. By his neglect, Wilson was killing Progressivism.<sup>299</sup>

Republican Progressivism also died, when the heir apparent to the 1920 nomination, former President Theodore Roosevelt, died in January of 1919.<sup>300</sup> The country cried for stability, economic progress, peace, predictability. And Warren G. Harding knew it.

On June 12, 1920, Warren G. Harding accepted the nomination for President tendered by the Republican Party. He would offer the country "normalcy."<sup>301</sup> In a very long address—Harding wrote all his major speeches himself<sup>302</sup>—he let it be known that his normalcy would not be passive, but a dynamic program of change. First, and most significantly, he wanted to change the manner of Constitutional governance from the presidential unilateralism and self-isolation of Woodrow Wilson. He called for "party government," an active cabinet in which the Vice-President would participate, and a greater respect

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295. See PIETRUSZA, *supra* note 2, at 36–47.

296. *Id.* at 142.

297. *Id.* at 143.

298. *Id.*

299. See *supra* notes 231–241 and accompanying text.

300. MURRAY, *supra* note 2, at 20.

301. *Warren G. Harding Address Accepting the Republican Presidential Nomination*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=76198> [<https://perma.cc/P3AQ-WHDD>] (last visited Mar. 11, 2018).

302. MURRAY, *supra* note 2, at 122–23.

for the role of Congress. At the same time, he ticked off a long list of major legislative and policy changes that he would pursue.<sup>303</sup>

On social issues, he was forthright. He welcomed women's suffrage and sought to calm those, including women, who feared its implications.<sup>304</sup> For Black Americans, he stated, "I believe the Negro citizens of America should be guaranteed the enjoyment of all their rights," and that "the Federal Government should stamp out lynching and remove that stain from the fair name of America."<sup>305</sup>

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303. The objectives included international disarmament; an "association" of nations, but not the League; a new peace treaty with the Central Powers; competition; industrial peace; collective bargaining, but not union shops; rehabilitation of railroads and better pay for railroad workers; deflation; government frugality; budgetary planning; farm co-operatives; reclamation and irrigation; development of the merchant marine; strong navy; small army; protective tariff; ending child-labor and protecting female workers; reconciliation with Mexico; immigration reform; tax reduction. *Warren G. Harding Address Accepting the Republican Presidential Nomination*, *supra* note 301. Many of these objectives came to pass in his administration.

304. He stated:

The womanhood of America, always its glory, its inspiration, and the potent uplifting force in its social and spiritual development, is about to be enfranchised . . . . By party edict, by my recorded vote, by personal conviction, I am committed to this measure of justice . . . . Enfranchisement will bring to the polls the votes of citizens who have been born upon our soil, or who have sought in faith and assurance the freedom and opportunities of our land. It will bring the women educated in our schools, trained in our customs and habits of thought, and sharers of our problems. It will bring the alert mind, the awakened conscience, the sure intuition, the abhorrence of tyranny or oppression, the wide and tender sympathy that distinguish the women of America. Surely there can be no danger there. And to the great number of noble women who have opposed in conviction this tremendous change in the ancient relation of the sexes as applied to government, I venture to plead that they will accept the full responsibility of enlarged citizenship, and give to the best in the Republic their suffrage and support.

*Id.*

305. *Id.* Even more dramatically, and with not a little courage, Harding journeyed to Birmingham, Alabama in October 1921. There is a speech that silenced the whites in the audiences and enlivened the blacks, Harding noted the sacrifice of black Americans in World War I, and how they had experienced respectful treatment in Europe. He declared the race problem was no longer sectional, but national. And he declared that members of both races were entitled to "full citizenship." WARRREN G. HARDING, ADDRESS OF THE PRESIDENT OF THE UNITED STATES AT THE CELEBRATION OF THE SEMICENTENNIAL OF THE FOUNDING OF THE CITY OF BIRMINGHAM, ALABAMA 7 (1921), <https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t2794ft27;view=1up;seq=9> [<https://perma.cc/84UF-542S>].



But on civil liberties, he was more ambiguous. He said:

It would be the blindness of folly to ignore the activities in our own country which are aimed to destroy our economic system, and to commit us to the colossal tragedy which has both destroyed all freedom and made Russia impotent. This movement is not to be halted in throttled liberties. We must not abridge the freedom of speech, the freedom of press, or the freedom of assembly, because there is no promise in repression.<sup>306</sup>

On the other hand, he also stated, “We do hold to the right to crush sedition, to stifle a menacing contempt for law, to stamp out a peril to the safety of the Republic or its people, when emergency calls, because security and the majesty of the law are the first essentials of liberty.”<sup>307</sup> Yet the clear weight of his speech was in favor of civil freedom and the protection of minorities.<sup>308</sup> He emphasized much more the crime of war profiteering, and in fact, his administration actively prosecuted war profiteers when Wilson had done none.<sup>309</sup> During his campaign, he downplayed the threat of a Communist revolution, and it would soon become clear that he had committed to undo the excesses of Wilson.

Harding conducted a successful “front porch” campaign against Democrat James M. Cox. The ailing Wilson continued his all or nothing campaign for the League during 1920 and asserted that the election was a referendum on the League of Nations. It was that, and more. Warren G. Harding was elected with the second largest popular majority, 60.3 percent, of any president.<sup>310</sup> One commentator has written, “As Warren Harding took office in 1921, the United States had just come through the worst self-inflicted assault on its tradition of civil liberties in the nation’s history.”<sup>311</sup>

Of Wilson’s imminent departure, Eugene V. Debs had pronounced in February:

Woodrow Wilson is an exile from the hearts of his people. The betrayal of his ideals makes him the most pathetic figure in the world. No man in public life in American history ever retired so

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306. *Id.*

307. *Id.*

308. Freeberg, *supra* note 286, at 3.

309. DAUGHERTY, *supra* note 10, at 103.

310. *1920 Presidential Election, 270TOWIN*, [https://www.270towin.com/1920\\_Election/](https://www.270towin.com/1920_Election/) [<https://perma.cc/N9PR-JVL2>] (last visited May 7, 2018).

311. Freeberg, *supra* note 286, at 1.

thoroughly discredited, so scathingly rebuked, so overwhelmingly impeached and repudiated as Woodrow Wilson.<sup>312</sup>

During the campaign, Clyde R. Miller, the reporter for the Cleveland *Plain Dealer* who had been a witness at Debs's trial, had begun experiencing some remorse for helping to convict Debs and two other prominent socialists by his testimony.<sup>313</sup> Miller turned to Harding, who assured Miller that if his campaign for the presidency was successful, he would consider pardoning Debs.<sup>314</sup> In fact, he reportedly mused to Miller, July 4 might be a good day for a pardon.<sup>315</sup> Back in 1919, when going to prison, Debs had struck an adamant position: "I should refuse to accept [a pardon], unless the same pardon were extended to every man and woman in prison under the Espionage Law."<sup>316</sup> He did not know it then, of course, but that would turn out to be the policy that President Warren Harding was considering.

Harding was a master politician at harmonizing disparate factions. For example, he was a leader in keeping Teddy Roosevelt from capturing the Republican nomination in 1912 and was rewarded by being tapped to nominate President William Howard Taft at the convention.<sup>317</sup> But five years later, he championed Roosevelt's desire to lead a volunteer force to France, and Harding successfully obtained Congressional support.<sup>318</sup> Wilson, as commander in chief, declined to effectuate the appointment.<sup>319</sup>

During the 1920 campaign, Harding steered successfully around the issue of the League of Nations among his fellow Republicans by denouncing it, and, at the same time, declaring that he would be willing to "associate" with other nations.<sup>320</sup> The Republican "irreconcilables," the "reservationists," and those who backed the League all came around to supporting him.<sup>321</sup>

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312. PIETRUSZA, *supra* note 2, at 278.

313. MURRAY, *supra* note 2, at 166.

314. *Id.* at 166–67.

315. GINGER, *supra* note 12, at 408.

316. KARSNER, *supra* note 8, at 68.

317. RUSSEL, *supra* note 282, at 227–35.

318. EDWARD M. COFFMAN, *THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I* 26 (1968).

319. *Id.*

320. RUSSEL, *supra* note 282, at 411.

321. *See id.*

The question was whether Harding was fully sincere in relieving the situation of those whom he frankly called “political prisoners.” He was sometimes evasive in the campaign, but did say that he was willing to review their cases.<sup>322</sup> In fact, at one point during the campaign he wired the candidate of the Farmer-Labor Party that, as far as political prisoners were concerned, he was in favor of having a general amnesty.<sup>323</sup> He was assisted in his purpose by Republican Senator Joseph I. France from Maryland who had, at the behest of Samuel Gompers and the AFL, proposed a Joint Resolution calling upon the President to grant amnesty and pardon “to those political prisoners who have been in prison for words spoken or written, [and] expressing opinions.”<sup>324</sup> Although the Resolution never came to a vote, the committee’s hearings revealed the dozens of influential groups and figures calling for clemency for those who had merely expressed political views.<sup>325</sup>

Predictably, as soon as Harding took office on March 4, a flurry of letters and petitions arrived, asking for Debs’s release.<sup>326</sup> The Debs amnesty movement remained in high gear throughout the year. But Harding had already made up his mind. Two weeks before inauguration, Harding told his campaign manager, Harry Daugherty, who would soon be his Attorney General, to see what could be done about releasing Debs. Daugherty opposed giving Debs any clemency. Harding brushed off Daugherty’s opposition.<sup>327</sup>

Once in office, Harding immediately ordered a review of all wartime protest cases,<sup>328</sup> and renewed his directive concerning Debs. Daugherty dutifully arranged to meet with Debs in Washington. Only three weeks after inauguration, Debs was released on his own recognition for the meeting and arrived at the Attorney General’s office without escort or guard.<sup>329</sup> After the meeting, he returned to the penitentiary in Atlanta.<sup>330</sup>

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322. Freeberg, *supra* note 286, at 6.

323. GINGER, *supra* note 12, at 407.

324. *Amnesty and Pardon for Political Prisoners*, *supra* note 210, 6 (statement of Sen. Joseph I. France).

325. *See generally Amnesty and Pardon for Political Prisoners*, *supra* note 210 (reporting testimony from various individuals on the topic).

326. Freeberg, *supra* note 286, at 6–7.

327. *Id.* at 7.

328. *Id.* at 6.

329. *Debs, Minus Guard, Visits Washington to Plead His Cause*, N.Y. TIMES, Mar. 25, 1921, at 1.

330. MURRAY, *supra* note 2, at 167.

Daugherty prepared a long memorandum and recommendation to the President. His report was similar to what Gregory had sent Wilson. Debs was justly convicted, Daugherty said. His views had impeded the war effort. He was unrepentant. But because of his age and health, mercy could be shown. Though he continued to have doubts, Daugherty reluctantly told Harding that the President could safely release Debs soon.<sup>331</sup> Harding had originally thought of releasing Debs on July 4, symbolic of what Harding wanted from the clemency.<sup>332</sup> But he ran into stiff opposition. His wife lobbied against it.<sup>333</sup> The *New York Times* wrote of Debs, “[h]e is where he belongs. He should stay there.”<sup>334</sup> Much of Harding’s cabinet resisted the President. The state of war with Germany still existed, they expostulated, and the Espionage Act remained in the background. Releasing one of the most prominent opponents to the war now would be domestically, and perhaps, internationally embarrassing.<sup>335</sup>

Harding accommodated, that is, until the ratifications of the peace treaty with the Central Powers was complete in November 1921.<sup>336</sup> Then he moved and directed Daugherty to have Debs released. Harding had also been persuaded that a pardon for Debs’s anti-war activities would send the wrong message, and so he resolved on a commutation instead.<sup>337</sup> But behind the publicity, Harding had already begun to move. In the spring, he had commuted or pardoned five men convicted under the Espionage Act.<sup>338</sup> Evidently at Harding’s direction, the Justice Department also dismissed convictions that were on appeal from a number of wartime prosecutions hanging over from the Palmer days.<sup>339</sup> Moreover, his Postmaster General, Will Hays, had ordered a stop to the practice of his predecessor in forbidding use of the mails for radical publications. In fact, Hays reimbursed the legal expenses of one journal that had fought the practice.<sup>340</sup>

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331. ERNEST FREEBERG, *DEMOCRACY’S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT* 292–93 (2008).

332. RUSSELL, *supra* note 282, at 462.

333. FREEBERG, *supra* note 331, at 292.

334. MURRAY, *supra* note 2, at 167.

335. *Id.*

336. Numerous petitions of amnesty continued. LUCY ROBINS, *WAR SHADOWS: A DOCUMENTAL STORY OF THE STRUGGLE FOR AMNESTY* 263 (1922).

337. FREEBERG, *supra* note 331, at 294.

338. 1921 ATT’Y GEN. ANN. REP. 736–41.

339. Freeberg, *supra* note 286, at 7.

340. *Id.* at 5.

Daugherty proceeded to draw up a commutation for Debs as well as for twenty-four other “political prisoners.”<sup>341</sup> Debs’s release was scheduled for December 31, 1921, but Harding told his Attorney General to have Debs released before Christmas so that he could celebrate with his wife in Terra Haute, Indiana. He also directed that the other twenty-four political prisoners be freed on Christmas Eve. To the commutations, Daugherty also attached an oath to be taken by all those freed that they pledged to “lead an upright life and obey and respect all the laws of the United States.”<sup>342</sup> Daugherty did opine that in the case of Debs, the oath could be forgone. But Harding refused requiring any released prisoner to swear an oath. It would look like “bargaining for amnesty,” he declared.<sup>343</sup> Harding obviously thought that freedom was freedom, given voluntarily by the President, not the result of some deal. Debs would have agreed. Shortly before leaving his home to go to prison, he said that he would never ask for a pardon. “To ask a pardon would be to confess guilt.”<sup>344</sup> Two years later, in regard to members of the IWW, whose opposition to the war included more active measures, Harding modified his position and agreed that an oath to be law-abiding would be appropriate.<sup>345</sup>

Debs was late getting home. Acceding to the President’s request, he called at the White House on December 26. When shown into the President’s office, one commentator writes that, “[b]ounding out of his chair, Harding exclaimed: ‘Well, I have heard so damned much about you, Mr. Debs, that I am now very glad to meet you personally.’”<sup>346</sup> After the meeting, Debs said to the press, “Mr. Harding appears to me to be a kind gentleman, one whom I believe possesses humane impulses.”<sup>347</sup> No other act in Harding’s first year had such an effect to heal and reconcile the country. As he put it in a letter to a friend, “[I]t was the right thing to do . . . . I thought the spirit of clemency was quite in harmony with the things we were trying to do here in Washington.”<sup>348</sup>

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341. FREEBERG, *supra* note 331, at 293.

342. *Id.*

343. MURRAY, *supra* note 2, at 168.

344. KARSNER, *supra* note 8, at 59. In a public statement, Harding trimmed. He said that Debs’ conviction was just, but that changed circumstances required clemency. Freeberg, *supra* note 286, at 7.

345. ERIC THOMAS CHESTER, *THE WOBBLIES IN THEIR HEYDAY: THE RISE AND DESTRUCTION OF THE INDUSTRIAL WORKERS OF THE WORLD DURING THE WORLD WAR I ERA* 219–20 (2014).

346. MURRAY, *supra* note 2, at 168.

347. *Id.*

348. *Id.* at 169.

Warren Harding had just begun. By the end of his first year in office, Harding had granted clemency to 364 persons, most of them, of course, were not “political” prisoners.<sup>349</sup> Still, it represented the highest number of clemency grants of any President in his first year in office to date. But those convicted of anti-war activities, or of labor unrest, were a special case that Harding was determined to address. Unfortunately, his Attorney General remained an obstacle. Daugherty’s review of the remaining wartime cases was desultory, and it caused a slowing of the releases that Harding wanted his administration to get past.<sup>350</sup> In addition, each time there was a commutation or pardon, organized groups raised a protest, causing Harding to accommodate once again. The releases came, steadily but slowly.<sup>351</sup>

Harding’s strength had become his weakness. Wilson was brilliant, supremely self-confident, arrogant, uncompromising and cruel to those—advisors, friends, and the populace—who opposed him. Harding was intelligent and principled, but felt under-educated. In the colloquy with the President regarding the League in which Harding bested the evasive and disdainful Wilson, Harding began one of his questions, “To clear my slow mind, . . .”<sup>352</sup> But his mind was not slow. As a skillful newsman, he knew when someone was trying to dodge a tough question, and he was being ironic. Harding, a hard worker, had the skill of listening to and appreciating the positions of others. Nonetheless, the combination of his method of “harmonization,” a political skill Wilson did not possess, with his respect of those more expert than he, caused him to accommodate and give way.<sup>353</sup> Thus, his principles suffered from want of speedy execution.

Noting President Harding’s explicit program of freeing wartime offenders, the United States Senate requested a list of prosecutions under the Espionage Act. Attorney General Daugherty provided that list in March of 1922.<sup>354</sup> But Harding had already dictated his policy. Upon a review of all prisoners held in violation of wartime statutes, particularly the Espionage Act, those who had not committed acts of

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349. P.S. RUCKMAN, JR., *FEDERAL EXECUTIVE CLEMENCY IN THE UNITED STATES, 1789–1995: A PRELIMINARY REPORT* 16 tbl.2 (1995), <https://ssrn.com/abstract=2214593> [<https://perma.cc/529N-JP7X>].

350. *See* Freeberg, *supra* note 286, at 7.

351. *Id.* at 8.

352. LODGE, *supra* note 287, at 323.

353. RUSSEL, *supra* note 282, at 411.

354. *See generally* UNITED STATES ATTORNEY GEN., *GOVERNMENT PROSECUTIONS UNDER THE ESPIONAGE ACT*, S. Doc. No. 67-159 (1922).

violence were to be given clemency. There was no clear and present danger test. Those who merely protested were to go free.<sup>355</sup>

Wilson's commutations were mainly for individuals, some of whom were clearly not guilty of any cognizable offense. For example, a pardon was given to two underage youths who, "for a short period supported the stand of the conscientious objectors and associated themselves with an organization formed to finance the testing of the constitutionality of the selective service act."<sup>356</sup> But since their "attitude toward the Government and society had entirely changed," a pardon was appropriate.<sup>357</sup> Another man had received a fifteen month sentence more for "his controversial disposition than to any intention to hinder" the war effort.<sup>358</sup>

Harding's acts of clemency swept more widely to include overt activists, such as Debs, or those who were part of the IWW. By the time Harding began, most of those convicted had served their sentences, and those remaining often included more difficult cases that had been passed over for commutation by Wilson. From July 1, 1921 until June 30, 1922, Harding commuted 187 persons, and pardoned 162.<sup>359</sup> Six of those shown clemency were connected to the IWW.<sup>360</sup> During the next fiscal year, July 1, 1922 through June 30, 1923, 199 were commuted, a large number of which had either been active in the IWW or associated with its radical leader, Bill Haywood.<sup>361</sup>

On August 2, 1923, when President Warren G. Harding died, there were only thirty-one persons left under federal incarceration for having violated the Espionage Act. In an undoubted act of homage to the recently deceased President, Calvin Coolidge freed them all.<sup>362</sup>

## CONCLUSION

The Article is not the place to re-evaluate Warren G. Harding's presidency. Historians are well into a reconsideration. But in undoing

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355. See Freeberg, *supra* note 286, at 8.

356. 1921 ATT'Y GEN. ANN. REP. 673.

357. *Id.*

358. *Id.* at 690.

359. See 1922 ATT'Y GEN. ANN. REP. 382-453. It was in this group that Abrams and his associates were finally deported. *Id.* at 398.

360. CHESTER, *supra* note 345, at 217.

361. 1923 ATT'Y GEN. ANN. REP. 368-420. Some refused commutation until the required oath was withdrawn. President Coolidge withdrew the oath requirement in December. 1924 ATT'Y GEN. ANN. REP. 387.

362. *Coolidge Frees Political Prisoners*, PLAIN DEALER (Cleveland), Dec. 16, 1923, at 1, 12.

some of the most egregious violations of constitutional liberties ever committed by a president and his attorneys general, Harding showed courage and persistence. In the face of continuing opposition from within and without his administration, he continued to empty the jails of the war resisters. He may have accommodated diversions and delays, but he never backed away from his objective. Running a newspaper as a young man, braving a criminal libel charge, this “newspaperman” never could accept jailing a man for his rhetoric. Though he could pummel opponents with his words, and out-argue a Princeton president, harmonization and conciliation were Harding’s trademark political strengths. Public image and theatre were Eugene V. Debs’s assets. On the day after Christmas 1921, in the seat of government, the revolutionary was welcomed. Warren G. Harding merged both conciliation and theatre into one handshake. And Debs knew it.