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Free Speech and World War II

Abstract: This article presents a history of free speech in wartime in the United States from the end of World War I to the end of World War II.

Keywords: Free Speech, World War II, Espionage Act, Fascist Speech, Franklin Roosevelt, William Dudley Pelley, Supreme Court

Over the past century, our Supreme Court has wrestled with the challenge of reconciling the First Amendment's textually ambiguous commitment to "the freedom of speech, and of the press," with many countervailing government interests in restricting and punishing various forms of speech. This struggle has been most divisive in times of war. Over the course of this century, though, we have moved gradually from a very limited understanding of this freedom, especially in wartime, to a much more speech-protective understanding. The period between the beginning of World War I and the end of World War II reflected a continuing struggle to reconcile these two competing concerns. As this essay suggests, during that era we made significant progress in recognizing a broader understanding of the First Amendment, but even at the end of World War II we still had a long way to go.

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Between 1920 and 1940, Americans confronted a range of contentious and often divisive issues, including Prohibition, evolution, labor reform, the rise of the Ku Klux Klan, and the economic and social upheavals caused by the Depression. These conflicts gradually fostered a new social consciousness about many traditional norms and mores, a heightened awareness of the earlier suppression of dissent, and new questions about how American society ought to define, promote, and protect the freedom of speech.[1] After the excesses of World War I, a more expansive view of free expression began to emerge. Americans came to recognize that World War I–era dissenters had not been as menacing as they had been led to believe. Increasingly, they discussed the protection of civil liberties as a civic responsibility. This was reflected in new attitudes in government, the academy, the media, and the courts.

In 1939, the *New York Times* observed that the sesquicentennial of the Bill of Rights provided the perfect occasion for the nation to reflect on "our American values and institutions" and to consider the extent to which they are "dependent upon the maintenance of free discussion."[2] In that same year, Attorney General Frank Murphy explained that the "maintenance of civil liberties" is one of the "bulwarks of democracy." To make this more than mere rhetoric, Murphy established a new Civil Liberties Unit in the Department of Justice to ensure that the rights of citizens, however unpopular, would be vigorously defended by the federal government.[3]

Nowhere was this shift more evident than in the Supreme Court. In two significant decisions during the 1920s, *Gitlow v. New York*[4] and *Whitney v. California*,[5] the Court considered the constitutionality of state laws making it a crime for any individual or organization to advocate the violent overthrow of government. Although the Court upheld these laws, it also, for the first time, seriously engaged the First Amendment. Echoing Judge Learned Hand's approach in *Masses*, the Court in *Gitlow* and *Whitney* emphasized that the challenged laws did not penalize "the advocacy of changes in the form of government by constitutional and lawful means" but only the express advocacy of "the overthrow of organized government by *unlawful* means."[6] The Court clearly implied that utterances that stopped short of express advocacy of unlawful action would pose a very different constitutional question.

Equally important, Justices Holmes and Brandeis continued to hammer away at the majority on the question of clear and present danger. As Professor Harry Kalven observed, "[l]ike twin Moses come down from Mount Sinai bearing the true Commandment," Holmes and Brandeis insisted that the proper standard, "rightly derived from the First Amendment," was clear and present danger.[7]

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Justice's Brandeis's concurring opinion in *Whitney* in 1927 merits particular attention. At the outset, Brandeis set forth his view of the intentions and beliefs of the Framers of the Constitution:[8]

> Those who won our independence believed … liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.
>
> [T]hey knew that … it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Brandeis then explained how these beliefs gave meaning to the First Amendment:[9]

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech

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> can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Unlike the speech at issue in the World War I cases, the political program of the Communist Labor Party, at issue in *Whitney*, expressly advocated "unlawful acts of force [and] violence" as a "means of accomplishing … political change." Would Brandeis afford constitutional protection even to that form of expression? Brandeis, joined by Justice Holmes, concluded that even advocacy of law "violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[10]

Although Holmes and Brandeis still spoke only for themselves in these cases, their arguments began to take hold. Between 1927 and the beginning of World War II, the Court consistently sustained First Amendment claims.[11] Increasingly, the Court invoked the "clear and present danger" standard, so forcefully articulated by Holmes and Brandeis.[12]

Would this new attitude toward free speech hold in a wartime atmosphere? World War II presented a very different problem than World War I. In World War I, there had been no direct attack on the United States. Dissenters could therefore argue that the nation did not *need* to go to war. In World War II, however, after Pearl Harbor, Americans felt the United States had no choice but to declare war. They were therefore generally united in a common cause. In terms of tolerance of what little dissent existed, this could cut in one of two ways. Americans could either more comfortably tolerate dissent, which could readily be dismissed as misguided but not dangerous, or they could bluntly crush dissent because war opponents were so marginal that their suppression would hardly be noticed. In this sense, World War II posed an issue quite distinct from those posed in 1798, 1861, or 1917.

THE LEAD-UP TO WORLD WAR II

With the Depression and the advent of fascism in Europe, new fringe movements began once again to challenge the central tenets of American society.

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On the left, the Communist Party of the United States, formed after World War I, gained significant support during the misery of the 1930s. On the right, a disparate array of fascist organizations, united by a fervent anti-Semitism and a fear of moral decline, sprang into being. The most visible of these fascist organizations was the German-American Bund, whose members sported Nazi-style uniforms and aped the Hitler salute.[13]

With the rumblings of war in Europe, these organizations increasingly tested the depth of America's renewed commitment to tolerance. In the late 1930s, groups such as the Non-Sectarian Anti-Nazi League and Friends of Democracy came into existence with the goal of thwarting American-based fascism. Members of these anti-fascist groups worried that Americans would be vulnerable to fascist propaganda. Anti-fascist commentators criticized Justice Holmes's clear and present danger test as dangerously naïve. They argued that fascist movements could lay the groundwork for their programs through the use of insidious propaganda and that such propaganda should therefore be nipped in the bud.[14]

In April 1937, Representative Samuel Dickstein, who had made a name for himself campaigning against "Nazi rats, spies and agents," proposed that the House of Representatives establish a new committee to investigate un-American propaganda. The House defeated his proposal by a vote of 184 to 38.[15] A year later, though, as the situation in Europe deteriorated, the House voted to convene the House on Un-American Activities Committee (HUAC) by a vote of 191 to 41. Chaired by Representative Martin Dies, HUAC was charged with investigating "the extent, character and objects of un-American propaganda activities in the United States."[16]

The Dies Committee planned initially to focus on the German-American Bund, which had gained substantial membership from 1936 to 1938. Amidst flowing swastikas and American flags, the Bund defined itself as "a militant group of patriotic Americans" determined to stand fast against "[r]acial [i] ntermixture" and the "liberal-pacifist forces undermining" the traditional values of the United States.[17] In 1939, the Bund drew 32,000 enthusiastic supporters to a rally in New York's Madison Square Garden.

As it turned out, however, the Dies Committee directed most of its attention at the Communist Party. Dies was eager to expose alleged Communist "influences" in the New Deal. HUAC launched extensive investigations of liberal organizations whose activities it tarred as "un-American." The Dies Committee's proceedings were often wildly irresponsible and, as a consequence, were given spectacular coverage by the media. The first volume of the Committee's hearings named 640 organizations, 483 newspapers, and

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280 labor organizations as "Communistic," including the Boy Scouts, the ACLU, the Catholic Association for International Peace, and the Camp Fire Girls. The Committee was especially concerned about Communist infiltration of Hollywood. One witness went so far as to suggest that Shirley Temple served communist interests.[18]

In 1940, Dies asserted that there were "six million Communist and Nazi sympathizers" in the United States and that they "constituted a real menace" to the nation's security.[19] The following year, the Dies Committee recommended that the United States ban the use of the United States mails for any "totalitarian" propaganda.[20] Despite its excesses, the Committee remained popular with the public.[21]

In 1936, President Franklin secretly authorized the FBI, under the leadership of J. Edgar Hoover, to investigate suspected fascists and Communists in the United States. Hoover then confidentially instructed his agents "to obtain from all possible sources information concerning subversive activities being conducted in the United States.[22] Hoover later circulated a directive defining "subversive activities" as including, among other things, "the distribution of literature … opposed to the American way of life."[23]

The outbreak of the war in Europe in September 1939 forced the FBI's actions into the open, and in November 1939 Hoover revealed to a House subcommittee that the FBI had "compiled extensive indices of individuals, groups and organizations engaged in … subversive" and other activities that might be "detrimental to the internal security of the United States."[24] Several years later, Attorney General Francis Biddle informed Hoover that there was no legal justification for keeping such a list of citizens and that Hoover's list should "not be used for any purpose whatsoever." Hoover, however, simply renamed the project and directed his agents to continue their work. He cautioned that this program "should at no time be mentioned or alluded to in investigative reports discussed with agencies or individuals outside the Bureau."[25]

The shocking fall of France in 1940 triggered a sense of alarm and vulnerability in the United States. Germany's stunning victory was attributed, especially by the humiliated French military, to the work of a "fifth column" of Nazi sympathizers within France. Congress then reenacted the Espionage Act of 1917, making its provisions applicable for the first time in peacetime.[26]

Three months later, Congress enacted the Smith Act, which among other things, prohibited any person "knowingly or willfully" to "advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." [27]

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President Roosevelt declined to veto the Smith Act, insisting that its provisions could "hardly … constitute an improper encroachment on civil liberties in the light of present world conditions."[28] There were only two prosecutions under the Smith Act during World War II, largely because Attorneys General Frank Murphy, Robert Jackson, and Francis Biddle opposed the law.[29]

The outbreak of hostilities in Europe created a mood of high anxiety in the United States. Attorney General Murphy declared that there would be no witch hunt for subversives, but he emphasized that there would be "no laxity" either. Pressured by the Dies Committee's incessant accusations that the Roosevelt administration was lax on radicals, and "by clear signals" from the President, who insisted upon a "no-nonsense approach to un-Americanism," Murphy promised Roosevelt that he would demonstrate that "we are not a soft, pudgy democracy."[30]

Under constant pressure from Roosevelt to placate Dies and to defuse criticisms that his administration was soft on Bundists, Murphy ordered the arrest in January 1940 of the leaders of the Christian Front, a virulently anti-Semitic group with several thousand members in the New York area. The government prosecuted seventeen members of this group on the theory that they had conspired to establish "by force of arms" a Nazi rule in the United States. There was little evidence of guilt, however, and the jury refused to convict.

In April 1940, after Roosevelt had appointed Murphy to the Supreme Court, his successor, Robert Jackson addressed the nation's federal prosecutors. He warned that "times of fear or hysteria" have often resulted in cries "for the scalps" of those with dissenting views. He exhorted his United States Attorneys to steel themselves to be "dispassionate and courageous" in cases dealing with "so-called subversive activities." Jackson urged the nation's prosecutors to keep in mind that in times of national crisis, "[t]hose who are in office are apt to regard as 'subversive' the activities" of anyone who would bring about a significant change of policy or "a change of administration." He declared that, "[i]n the enforcement of laws which protect our national integrity and existence, we should prosecute [only] overt acts, not the expression of opinion."[31]

In the summer of 1940, Roosevelt appointed Attorney General Jackson to the Supreme Court. He then appointed Francis Biddle as acting attorney general. Before this appointment, Biddle, a member of the ACLU,[32] had taken a strong pro-free-speech stand, cautioning against hysterical overreaction and endorsing Justice Holmes's view that the appropriate response to un-American speech was counterspeech, not suppression. In September of

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1941, he promised "to see that civil liberties in this country are protected" and that we will "not again fall into the disgraceful hysteria of witch hunts … which were such a dark chapter in our record of the last World War."[33] This position did not sit well with Roosevelt, who questioned whether Biddle "was 'tough enough' to deal with the subversive element."[34] After his appointment as acting attorney general, and largely at Roosevelt's insistence, Biddle reluctantly softened his stance. He urged civil libertarians to be more realistic and to recognize that limitations of civil liberties might be necessary.

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

A few days later, several men were arrested in Los Angeles for allegedly praising Hitler, asserting that "the Japanese had a right to Hawaii" because there "are more of them there than there are Americans," and declaring that they would "rather be on the side of Germany than on the side of the British."[36] They were charged with violating the Espionage Act of 1917. Biddle immediately dismissed the charges, stating that free speech "ought not to be restricted" unless public safety is "directly imperiled."[37] We had come a long way since World War I.

After Pearl Harbor, few people questioned our participation in the war. Most of those who did had long been alienated from American society. They believed that national policy was set by an international conspiracy of Jews, Communists, international bankers, and the British; that the attack on Pearl Harbor was due largely to our own unwise policies; that the war could serve no legitimate national purpose; and that we should promptly extricate ourselves from the conflict through negotiation. The often vitriolic attacks of such individuals began to grate on the nation's nerves. Nonetheless, although public pressure mounted on Biddle to punish these dissenters, he refrained from doing so, believing that critics of the war were protected by the First Amendment.[38] Biddle's inaction led to a direct rebuke from the President.[39] Indeed, according to Biddle, it was Franklin Roosevelt who exerted the most pressure on him to prosecute dissent.[40]

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In January 1942, Roosevelt sent a note to J. Edgar Hoover asking "what was being done about William Dudley Pelley," an admirer of Hitler whose writing, Roosevelt observed, "comes pretty close to being seditious." "Now that we are in the war," he concluded, "it looks like a good chance to clean up a number of these vile publications."[41] Over the next few months, the liberal press continued their attack on fascists. The editor of the *Nation* complained that "[t]olerance, democratic safeguards, trust in public enlightenment" had all proved inadequate, and demanded that government "Curb the Fascist Press!" In April 1942, Roosevelt directly confronted Biddle, demanding to know what was being done about Pelley and pointedly asking him, yet again, "[W]hen are you going to indict the seditionists?"[42] Two months later, the arrests began.

"I AM THE HITLER OF AMERICA"

William Dudley Pelley was born in 1885 in Lynn, Massachusetts. An avid reader, Pelley was largely self-educated. Over the years, he worked as a police reporter for the *Boston Globe*, served as a writer and editor for several New England journals, and published more than a hundred feature articles and short stories in a broad range of national magazines.

On January 31, 1933, the day after Adolph Hitler was appointed Chancellor of Germany, Pelley founded the Silver Legion of America, an organization dedicated to bringing fascism to the United States. His stated goal was to "preserve the form of constitutional government set up by the forefathers."[43] The "Silver Shirts" were Pelley's version of Hitler's "S.S." Pelley traveled across the nation recruiting members, establishing training sites, speaking at rallies, and spreading his message that a cabal of Jews planned to take over the Christian nations of the world. By 1934, there were 15,000 Silver Shirts and his journal had attained a circulation of 50,000.

In 1935, Pelley announced his candidacy for President of the United States on the Christian Party ticket. His campaign slogan was "For Christ and Constitution." He proclaimed that "the time has come for an American Hitler."[44] Only one state—Washington—permitted Pelley on the ballot. He received 1,598 votes out of 700,000 cast.[45] He blamed his disappointing showing on Jewish sabotage of the voting machines.[46] Despite this defeat, the following year Pelley's name headed a German list of "National Men in America" who could be expected to cooperate with the Nazis.[47] In 1940, the Dies Committee observed that a large number of organizations sympathetic to Nazi and Fascist ideals had recently emerged in the United States.[48]

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It identified Pelley's Silver Shirts as "the largest, best financed, and certainly the best published" of these groups. It added that Pelley had anointed himself "the American Hitler."

When the United States finally entered World War II, Pelley was distraught. He dissolved the Silver Legion because it was no longer advisable—or safe—to parade about in Nazi-style uniforms. After a few weeks of sulking, however, he launched two new magazines, *Roll Call* and *The Galilean*, to resume his attack. He aggressively criticized Roosevelt, asserting that he had instigated the war in order to save his faltering New Deal economy. In March 1942, Pelley wrote in *The Galilean* that Roosevelt had lied to the American people about Pearl Harbor when he assured them that, "although damage has been severe, our Pacific fleet is still intact." In fact, Pelley reported, the Japanese had completely destroyed the Pacific fleet. It was this issue of *The Galilean* that triggered Roosevelt's demand that Attorney General Biddle "indict the seditionists."[49]

The following month, Pelley was indicted. He was charged under the Espionage Act of 1917 with making "false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." The indictment included numerous counts based on statements Pelley had made in *The Galilean* between December 8, 1941, and February 23, 1942. The following are illustrative of these statements:[50]

- "To rationalize that the United States got into the war because of an unprovoked attack on Pearl Harbor, is fiddle-faddle."
- "Mr. President … might, easily, by the turn of a phrase … have prevented the attack on Pearl Harbor."
- "Mr. President chose to surround himself with Zionists and a fearful war resulted from their counsels."
- "There is not the slightest enthusiasm anywhere in all America for this war—with the sole exception of the Jewish ghetto sections of our swollen cities. And those ghettos will not fight. Gentile boys from factory and farm must do the fighting."
- The United States is "bankrupt."

The trial began in Indianapolis on July 28, 1942. Pelley's lawyers proved profoundly inept. Not only did they fail to assert many possible objections,

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but at one point Pelley's own attorney inadvertently referred to him as "Mr. Hitler." After seven days of testimony, the jury found Pelley guilty on eleven counts of seditious libel. Declaring that his "clever mind" made him especially dangerous, Judge Robert Baltzell sentenced Pelley to fifteen years in prison.[51]

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

To meet the requirements of the Espionage Act, the government had to prove "evil intent" as well as falsity. That is, the government had to prove that Pelley had made false statements with the intent of hindering the war effort. To meet this burden, the prosecution presented evidence about the activities of the Silver Shirts in the mid-1930s, Pelley's 1936 campaign for President, and his expressions of admiration for Hitler. Ultimately, however, the court of appeals concluded that the "argument that proof of intent is lacking hardly needs consideration." The court of appeals explained that, "[i]n time of war, when success depends on unified national effort," an individual who falsely reports the country's "failure in battle," falsely asserts that the nation is "bankrupt," and falsely claims that it has "incompetent leadership," cannot plausibly deny that he had "a criminal intent to interfere with the operation or success of the military or naval forces."[52]

The Supreme Court declined to review the case. Pelley spent ten years behind bars at the Terre Haute penitentiary. He was paroled in 1952, on the condition that he not participate in any "political activities" in the future.[53]

THE PROSECUTION OF WILLIAM DUDLEY PELLEY AND THE SEDITION ACT OF 1798

How does the prosecution of Pelley in 1942 compare with the prosecutions of Republicans in 1798? The Sedition Act of 1798 declared it unlawful for any person to make "false, scandalous, and malicious" statements about the government, the president, or the Congress with the intent to bring them

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into "contempt or disrepute" or to excite against them the "hatred of the good people of the United States." Under this Act, Republican Congressman Matthew Lyon was convicted for "falsely" asserting that in the administration of President Adams "every consideration of the public welfare" was "swallowed up in a continual grasp for power," Republican journalist Thomas Cooper was convicted for "falsely" accusing Adams of undermining the nation's credit, and Republican Charles Holt was convicted for "falsely" stating that the citizens of the United States held a "just abhorrence for standing armies." These statements are illustrative of the assertions prosecuted under the 1798 Act.

Would Pelley have been convicted under the Sedition Act of 1798? Surely, "yes." Pelley's statements were legally indistinguishable from those of Lyon, Cooper, and Holt. The more interesting question is how far we had come from 1798 to 1942. As Justice Holmes rightly observed in his opinion in *Abrams*, "the United States through many years had shown its repentance for the Sedition Act of 1798."[54] Indeed, during the congressional debates on the Espionage Act of 1917, under which Pelley was convicted, even the most fervent proponents of the Act fell all over themselves insisting that the Espionage Act of 1917 was a far cry from the Sedition Act of 1798.

What was so bad about the Sedition Act of 1798? One problem was that the Act covered statements of *opinion* as well as statements of fact. Throughout the congressional debates in 1798, opponents of the Act voiced this concern. Indeed, the Republicans maintained that the very notion that political opinions could be deemed "false" was itself subversive of the Constitution.[55] The court of appeals in *Pelley*, acknowledging the lessons of history and the intent of the drafters of the Espionage Act, properly held that statements of political opinion could not be deemed "false" under the Act.

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

Thus, in the patriotic fervor of the moment, angry, ill-tempered, "disloyal" criticism of the government was readily transformed into criminal falsehood. Although Congress had clearly intended the false statement

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provision of the Espionage Act to apply only to false statements of *fact* and although the court of appeals gave lip service to this principle, in practical effect the court of appeals accorded no more constitutional protection to Pelley's opinions in 1942 than the Federalist judges had given to Lyon's, Cooper's, and Holt's opinions in 1798.

But that does not end the matter because even if Pelley's statements were not factually false, could he nonetheless have been punished for violating *other* provisions of the Espionage Act of 1917? Under the standards used during World War I, Pelley could certainly have been convicted of attempting to "cause insubordination" and to "obstruct the recruiting or enlistment service." If Charles Schenck and Eugene Debs were guilty of violating those provisions, so too was Pelley. His statements in *The Galilean* certainly had a "bad tendency" to hinder the war effort.

But, as we have seen, the World War I standard had been discredited by 1942, and the Supreme Court was already well on its way to embracing a variant of the Holmes/Brandeis clear and present danger standard.[56] Whatever else one might say about Pelley's statements, there was certainly no clear and present danger that they would substantially and immediately impair the war effort. Thus, although Pelley could have been punished under the World War I–era "bad tendency" standard, by 1942 he could not have been punished for uttering words having a mere "bad tendency." Indeed, this is precisely why he was charged under the false statement provision.[57]

The question, then, is whether the clear and present danger standard, rather than the bad tendency standard, should govern when the defendant is prosecuted for making allegedly *false* statements with the intent to hinder the war effort. Should false statements of fact receive the same protection under the First Amendment as true statements of fact and statements of opinion? As the Supreme Court recognized in *Chaplinsky v. New Hampshire*,[58] decided in the same year as *Pelley*, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." The Court offered false statements of fact as an illustration of such speech. The Court explained that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[59]

In effect, then, the Court recognized in *Chaplinsky* that some types of speech are of only "low" First Amendment value and are therefore not fully within "the freedom of speech." Such low-value expression, the Court implied in *Chaplinsky*, may be restricted in circumstances that would not justify the

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suppression of speech that merits full First Amendment protection. It is difficult to disagree with the proposition that false statements of fact are not the sort of expression the First Amendment was meant to promote. Thus, although it may be appropriate to protect false statements of fact because "erroneous statement is inevitable in free debate," there is no reason to protect them because they are valuable in their own right.

There is one final twist that should not pass unnoticed. Although civil and even criminal liability for knowingly false statements that defame a particular *individual* have been held consistent with the First Amendment, it does not necessarily follow that defamation of the *government* is similar. There is no deeply rooted historical tradition of criminal prosecutions for false statements that defame the government (other than the discredited concept of seditious libel). From this view, Pelley may have been right in arguing that even if he had made a false statement of fact about the government, he still could not constitutionally be punished absent some proof of "actual harm" to the war effort. In Pelley's case, it is highly unlikely the government could have presented such proof.

One final, but essential, observation is warranted. As the Court of Appeals emphasized, "the gist of the substantive counts" against Pelley "is the publication and dissemination of 'false statements.'"[60] This implies a clear recognition in 1942 that criminal prosecutions for expression of the sort that were commonplace during World War I were now of doubtful constitutionality, if not downright unthinkable. Although both the Department of Justice and the court of appeals in *Pelley* can be faulted for not working out the fine points of prosecutions for false statement, there is no question that the insistence on this *form* of prosecution marked a *critical* leap forward.

THE "GREAT SEDITION TRIAL" OF WORLD WAR II

In July 1942, under continuing pressure from the public, the press, and the President, Attorney General Biddle announced the indictment of twenty-six American fascist leaders, charging them under both the Espionage Act and the Smith Act with conspiracy to undermine the morale of the armed forces. Although these defendants were vehemently antiadministration, anti-Semitic, pro-German, and enthralled with Hitler, even lawyers in the Department of Justice were uneasy about how politics and public pressure had led to this sudden rash of indictments. President Roosevelt, however, heartily congratulated Biddle on his capitulation to his demands.[61]

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Representative of the views of the defendants is the following passage from "The Political Genius of Hitler," published in the *Weckruf* on July 6, 1939:[62]

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

Most of the defendants in this prosecution had nothing in common but a shared hatred of Jews and Roosevelt and a general faith in the principles of fascism. Nonetheless, they were charged with conspiracy. The defendants were aptly described in the *New York Times* as "as queer a kettle of fish as was ever assembled by such means."[63] Another writer noted at the time that "[s]eldom have so many wild-eyed, jumpy lunatic fringe characters been assembled in one spot, within speaking, winking, and whispering distance of one another."[64]

Although newspapers across the political spectrum applauded the indictment, the prosecution, in Francis Biddle's words, soon dissolved into a "dreary and degrading experience."[65] In April 1944, almost two years after the defendants had been indicted, the defendants finally went on trial. The proceeding was popularly known as the "Great Sedition Trial" of World War II and was covered widely in the press. It turned out to be a legal and public relations nightmare for the government. Amidst scenes of "uproar approaching the dimension of a riot," Judge Edward Eicher was determined to be fair. But the defendants were unruly and obstructionist. While the judge and the government attempted to follow conventional judicial procedures, the defendants wore Halloween masks, "moaned, groaned, laughed aloud, cheered and clamored." Throughout the trial, they "wailed" that it was all a "Jewish-Communist plot to curb their freedom of speech."[66]

The crux of the government's case was that the defendants had acted in concert with the enemy. But the government had no evidence to support this charge. The trial quickly devolved into a circus that threatened to go on

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indefinitely. Even though the *Washington Post* had initially demanded the prosecution, by mid-trial it was editorializing that the proceeding would "stand as a black mark against American justice for years to come" and urged the government to "end this sorry spectacle."[67] On November 30, 1944, before the case was submitted to the jury, an exhausted and miserable Judge Eicher suddenly died. As Biddle sadly observed, the "trial had killed him."[68] This resulted in a mistrial.

There the matter languished until December 1946, when the government finally dismissed the indictments—four months after the war had ended and four-and-a-half years after the defendants had been arrested. Although the public had lost interest in the Great Sedition Trial well before it dragged to its sorrowful conclusion, few people protested this attack on speech that was so despised by the majority.

The Great Sedition Trial left no legal precedent and put no one behind bars, but it did curtail right-wing propaganda during the war, compel thirty American fascists to defend themselves in court for four years, and set an important *political* precedent for the Smith Act prosecutions of Communists during the Cold War, looming just around the corner.

"A DARK CHAPTER IN OUR RECORD OF THE LAST WORLD WAR"

These were not the only Espionage Act and Smith Act prosecutions during World War II, but they attracted the most attention. In total, some 200 individuals were indicted under these Acts during the course of the war.[69] In addition to criminal prosecutions, the federal government invoked its authority to exclude seditious material from the mail. In the spring of 1942, for example, in response to President Roosevelt's demands, Attorney General Biddle worked out a plan with postal authorities to deny mailing privileges to Father Charles Couglin's *Social Justice*, the most widely read of the virulently antiadministration publications. [70]

Between 1926 and 1936, Father Coughlin rose from obscurity as a Roman Catholic parish priest to prominence as a national figure who was both worshipped and reviled. The secret of Father Coughlin's influence was his inimitable radio voice. Coughlin connected so effectively with the despair and discontent of the Depression that by the mid-1930s his weekly radio audience ran into the tens of millions and placed him ahead of even *Amos 'n Andy.*

Within a few years, Coughlin became not only a powerful religious leader but also a serious political force. In 1934, Coughlin founded the National Union for Social Justice. He characterized Roosevelt as the "Great Betrayer"

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and adopted the battle cry "Roosevelt and Ruin!" In 1935, Roosevelt asked Frank Murphy to intercede with Coughlin on the theory that as two Catholics from Detroit they could find common ground. After their meeting, Murphy thought he had made progress, but the reconciliation proved only momentary. By 1936, the National Union had more than five million members and *Social Justice* had a circulation of more than a million. After a failed effort to unseat Roosevelt in 1936, Coughlin moved even more sharply to the right. By 1938, he was sounding more and more like a European fascist. He now praised the "social justice" of the Third Reich.[71]

A month after *Kristallnacht*, Coughlin roared that it was time for the American people to halt the international Jewish conspiracy. Coughlin's radio sermons now made him the German hero in America, and the Bund celebrated him as one of the few Americans who had the courage to withstand the intimidation of the Jews. He frequently lifted entire passages of his sermons verbatim from Nazi propaganda.[72]

Once the United States entered World War II, *Social Justice* castigated Roosevelt, belittled the American military, and blamed the war on a British-Jewish-Roosevelt conspiracy. In April 1942, *Social Justice* was banned from the mails under the Espionage Act, pending a final determination. Attorney General Biddle defended this action on the grounds that Coughlin's journal had violated the "false statement" provision of the Act.[73] Coughlin responded with a letter to Biddle, which Coughlin released to the press, in which he offered to appear at any time before a grand jury to testify to the truth of the statements in *Social Justice.* Recognizing that Coughlin was attempting to set up a situation in which he could play the role of martyr and that a criminal prosecution would divide the nation, Biddle appealed to the Church hierarchy. In May 1942, the Catholic Church assured the government that Father Coughlin would remain silent for the duration of the war (on pain of being defrocked), and *Social Justice* permanently and "voluntarily" surrendered its second-class mail permit.[74]

As in World War I, state and local governments also sought to address issues of loyalty and security. "Little Dies" committees sprang up in several states to investigate un-American activities at both state and local levels.[75] The German-American Bund was a target of such actions. By September 1939, several states had outlawed the wearing of Bund uniforms, and the Bund and its members were frequently harassed with charges of tax, financial, and zoning violations and investigated by state committees. By the end of 1941, the Bund had been harassed out of existence.[76]

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For the most part, though, the Roosevelt administration was effective at restraining state and local governments. As Biddle later recalled, he and Robert Jackson were anxious to avoid the kind of reckless state legislation that had sprung up during World War I.[77] In 1940, at a conference of governors, the President warned against the "cruel stupidities of the vigilante" and Attorney General Jackson cautioned that "mob efforts almost invariably seize upon people who [merely] hold opinions of an unpopular tinge."[78] Various committees at the conference recommended that states should not enact sedition laws, and state and local officials agreed to take seriously their responsibility to restrain vigilantes and to cede responsibility to combat disloyalty to the federal government.[79]

As a result of these efforts, no state passed a sedition act during World War II, there were very few state prosecutions for disloyalty, and incidents of vigilantism were rare. The most frequent targets of vigilantism were Jehovah's Witnesses, who opposed all war and refused to salute the flag. During the course of World War II, some five hundred Jehovah's Witnesses were beaten by mobs, tarred and feathered, tortured, castrated, or killed in more than forty states. In some of these incidents, local officials participated in the mob actions.[80]

"NO OFFICIAL, HIGH OR PETTY"

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

Schneiderman v. United States,[81] for example, involved the issue of denaturalization. For most purposes, citizenship acquired by naturalization is indistinguishable from citizenship acquired by birth. But federal law provided for the cancellation of naturalized citizenship if it was obtained by fraud.[82] Acting under such provisions, the government instituted a series of legal actions to cancel the naturalization of persons who had "indicated by disloyal conduct that they were not at the time of naturalization 'attached to the principles of the Constitution.'"[83] By the end of 1943, the United States had issued 146 "decrees of cancellation." Most of these involved former German nationals who had promoted "Nazi doctrines" in the United States or had been active in the German-American Bund. The effect of a decree of cancellation was to reinstate the individual's original nationality and, if that nationality was

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German, to render the individual subject to internment or deportation as an enemy alien.[84]

Schneiderman arrived in the United States from Russia in 1909 when he was three years old. In 1922, when he was sixteen, he joined the Young Workers League. In 1927, he became a naturalized American citizen. Throughout this period, Schneiderman remained active in the Young Workers League and the Workers Party, which later became the Communist Party of the United States. In 1932, he was the Communist Party's candidate for governor of Minnesota. In 1939, the United States instituted denaturalization proceedings against him on the premise that in 1927 he could not sincerely have accepted attachment to "the principles of the Constitution" when he was at the same time a member of the Communist Party. Writing for the Court, former Attorney General, now Justice, Murphy rejected this reasoning, holding that Schneiderman's membership in the Communist Party did not establish his opposition to the principles of the Constitution. Murphy distinguished sharply between radical political dissent, which is protected by the First Amendment, and "exhortation calling for present violent action which creates a clear and present danger."[85]

The following year, in *Baumgartner v. United States*,[86] the Court considered the case of a German-born individual who had become a naturalized citizen in 1932. Because Baumgartner later embraced Hitler and his doctrines of Aryan supremacy, the government cancelled his naturalization on the theory that he had not been loyal to the United States at the time of his naturalization. Expanding on *Schneiderman*, the Court held that an individual could not be denaturalized even for making "sinister-sounding" statements "which native-born citizens utter with impunity."[87] *Baumgartner* effectively ended the government's program to denaturalize former members of the Bund.[88]

The Court also dealt with several prosecutions for "subversive" advocacy during World War II. In *Taylor v. Mississippi*, [89] the defendant was prosecuted for stating that "it was wrong for our President to send our boys … to be shot down for no purpose at all." The Court held that even in wartime "criminal sanctions cannot be imposed for such communication."[90] In *Hartzel v. United States*, [91] the defendant, a crude anti-Semite, was convicted for distributing pamphlets that depicted the war as a "gross betrayal of America," denounced "our English allies and the Jews," and assailed the "patriotism of the President." Although the case was in many respects a rerun of *Schenck*, the Supreme Court reversed the conviction because the government had failed to prove that Hartzel had specifically intended to obstruct the draft. The Court

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added that "an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective, without running afoul of the Espionage Act."[92] This decision went a long way toward ending government efforts to prosecute antiwar dissent and demonstrated just how far the Court had come since World War I.[93]

Overall, then, the nation's free speech record in World War II was mixed. On one hand, the government clearly felt the tension between respect for constitutional values and the pressure to accommodate public opinion. The activities of the Dies Committee, the wide-ranging investigations of the FBI, the Great Sedition Trial, and the government's aggressive denaturalization proceedings all reflected significant overreactions to the very real dangers of the times.

Franklin Roosevelt, who enthusiastically supported free speech in principle, frequently exerted a negative influence, particularly when someone else's free speech conflicted with his political self-interest. Without his often-aggressive insistence on "action," his attorneys general would have exercised even greater restraint. The community of lawyers and other citizens who came to a deeper appreciation of free expression in the wake of World War I too often fell back into a stance of passivity in the face of wartime anxiety and antifascist, anticommunist fervor.[94] As the experience of World War II demonstrates, it takes a good deal more fortitude to stand up for free speech for the opinions "we loathe" when a nation is at war than when it is at peace.

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

Moreover, the federal government in this era was quite effective in dampening state and local efforts to punish dissent, and the new Civil Liberties Division of the Department of Justice helped guide state and local officials in their protection of free expression. Perhaps most important, the Supreme Court for the first time played a critical role in cabining the tendency of wartime governments to punish those who dissent or otherwise advocate "anti-American" values.[95]

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NOTES

1. See Richard W. Steele, *Free Speech in the Good War* (New York: St. Martin's, 1999), 9.

2. Lewis Wood, Bar Urged to Help Set Up "'Hyde Parks,'" *New York Times*, July 12, 1939, 17.

3. *1939 Annual Report of the Attorney General of the United States* (June 30, 1939), 2.

4. Gitlow v. New York, 268 U.S. 652 (1925).

5. Whitney v. California, 274 U.S. 357 (1927).

6. *Gitlow*, at 664–65 (emphasis added).

7. Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988), 158.

8. *Whitney*, at 375 (Brandeis concurring).

9. *Whitney*, at 376–77.

10. *Whitney*, at 371 (majority), 377 (concurrence).

11. See, for example, Fiske v. Kansas, 274 U.S, 380 (1927) (invalidating the conviction under the Kansas criminal syndicalism statute of a member of the IWW); Stromberg v. California, 283 U.S. 359 (1931) (invalidating California's "red flag" law); Near v. Minnesota, 283 U.S. 697 (1931) (invalidating an injunction against speech); Grosjean v. American Press Co., 297 U.S. 233 (1936) (invalidating a tax on newspapers); De Jonge v. Oregon, 299 U.S. 353 (1937) (invalidating the conviction under the Oregon criminal syndicalism statute of a member of the Communist Party); Herndon v. Lowry, 301 U.S. 242 (1937) (invalidating the conviction under a slave insurrection statute of an organizer for the Communist Party); Lovell v. Griffin, 303 U.S. 444 (1938) (invalidating a standardless licensing ordinance); Hague v. CIO, 307 U.S. 496 (1939) (invalidating a municipal ordinance prohibiting all public meetings in streets and other public places without a permit); Thornhill v. Alabama, 310 U.S. 88 (1940) (invalidating a statute prohibiting picketing); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940) (invalidating the conviction of a Jehovah's Witness for "inciting a breach of the peace" by attacking the Catholic religion).

12. See Frank R. Strong, "Fifty Years of "Clear and Present Danger": From *Schenck* to *Brandenburg*—and Beyond," *Supreme Court Review* 1969:41–80.

13. Those who opposed this bill argued not only that it was unnecessary, but also that, like the Espionage Act of 1917, in would be misused to punish "the honest peacetime expression of opinions … by decent American citizens." Hanson W. Baldwin, "'Disaffection' Bill Draws Opposition," *New York Times*, August 11, 1935, E12. See Steele, *Free Speech in the Good War* 29.

14. Waging War against the Whole American Democratic Heritage, *New Republic*, October 6, 1941.

15. 75th Cong., 1st Sess. 81 Cong. Rec. H3289 (daily ed. April 8, 1937). See Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Rochester, VT: Schenkman, 1978), 240.

16. H.R. 282, 75th Cong., 3d Sess. 83 Cong. Rec. H6562 (daily ed. May 10, 1938). See August Raymond Ogden, *The Dies Committee: A Study of the Special House Committee for the Investigation of Un-American Activities: 1938-1943* 43-45 (Beltsville, MD: Murray & Heister, 1944).

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17. Quoted in Geoffrey S. Smith, *To Save a Nation: American Countersubversives, the New Deal, and the Coming of World War II* 94 (New York: Basic Books, 1973).

18. See Goldstein, *Political Repression*, 243–44; Ogden, *The Dies Committee*, 53–65. James Cagney objected to the Committee's reports that Hollywood was filled with communists as "so exaggerated they are ridiculous." Dies Clears Four Accused as Reds, *New York Times*, August 21, 1940, 21.

19. Ogden, *The Dies Committee*, 213.

20. See Investigation of Un-American Propaganda Activities in the United States, H.R. Rep. No. 1, 77 Cong., 1st Sess. 23–24 (January 3, 1941).

21. See Ogden, *The Dies Committee*, 113, 183.

22. Frank Donner, *The Age of Surveillance* (New York: Knopf, 1980), 55.

23. Goldstein, *Political Repression*, 253. See Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia, Temple University Press, 1978), 65–71.

24. *Hearings Before the House Committee on Appropriations*, 304–5 (Nov 30, 1939), cited in Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Book III) S. Doc. No. 94-755, 94 Cong., 2d Sess. 405, 407–8 (April 23, 1976).

25. Goldstein, *Political Repression*, 248; Theoharis, *Spying on Americans*, 40–44.

26. Espionage Act of 1917, 40 Stat 217 (1917), codified at 50 U.S.C. § 31, reenacted as Pub. L. No. 443, 54 Stat. 79 (1940). See Chafee, *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1941), 464, 466; Goldstein, *Political Repression*, 244.

27. Alien Registration Act, 1940 ("The Smith Act"), Pub. L. No. 670, 54 Stat. 670, 671 (1940). The Act also made it a crime to attempt to commit, or to conspire to commit, any of the acts prohibited, or to be a member of any organization that advocates or teaches the prohibited doctrine. On October 17, 1940, Congress enacted the Voorhis Act, which required the registration of all organizations that had as one of their purposes the overthrow of the government of the United States. See Goldstein, *Political Repression*, 245–46.

28. Donner, *The Age of Surveillance*, 61.

29. Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* (Camden, ME: The Free Press 1987), 239,

30. Steele, *Free Speech in the Good War*, 38.

31. 76 Cong., 3d Sess. (March 4, 1940), in 86 Cong. Rec. SA1840 (daily ed. April 3, 1940).

32. See Paul Murphy, *The Constitution in Crisis Times: 1998-1969* (New York: HarperCollins, 1972), 224–25.

33. Cabell Phillips, "No Witch Hunts," *New York Times Magazine*, September 21, 1941, 8.

34. Steele, *Free Speech in the Good War*, 121.

35. Francis Biddle, *In Brief Authority* (New York: Doubleday, 1962), 211.

36. Steele, *Free Speech in the Good War*, 148.

37. "Sedition Cases Dropped," *New York Times*, April 18, 1941, 21. See Biddle, *In Brief Authority*, 234–35; Murphy, *The Constitution in Crisis Times*, 225; Goldstein, *Political Repression*, 264.

38. Steele, *Free Speech in the Good War*, 143–44.

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39. Steele, 144.

40. Biddle, *In Brief Authority*, 237–38.

41. Leo P. Ribuffo, "*United States v. McWilliams*: The Roosevelt Administration and the Far Right," in *American Political Trials*, ed. Michal R. Belknap (Westport CT: Greenwood Publishing Group, 1994), 198.

42. Freda Kirchway, "Curb the Fascist Press!" *Nation*, March 28, 1942; Steele, *Free Speech in the Good War*, 151.

43. See Strong, *Organized Anti-Semitism in America*, 43–47; Smith, *To Save a Nation*, 58; Suzanne G. Ledeboer, "The Man Who Would be Hitler: William Dudley Pelley and the Silver Legion," *California History* 65, no. 2 (June 1986): 129–30.

44. Quoted in Ledeboer, "The Man Who Would be Hitler," 133–34.

45. See Ledeboer, 134.

46. See Smith, *To Save a Nation*, 86.

47. See O. John Rogge, *The Official German Report Nazi Penetration, 1924-1942* (New York: T. Yoseloff, 1961), 187, cited in Ledeboer, 136.

48. Other such groups included Art J. Smith's "Khaki Shirts" and Gerald Winrod's "Defenders of the Christian Faith." See Leo P. Ribuffo, *The Old Christian Right: The Protestant Far Right from the Depression to the Cold War* (Philadelphia: Temple Univeristy Press, 1983), 81, 88, 119.

49. See Ribuffo, *The Old Christian Right*, 74.

50. United States v. Pelley, 132 F.2d 170, 172–74n1, 175n2 (7th Cir. 1942).

51. See Ribuffo, *The Old Christian Right*, 7879.

52. *Pelley*, 132 F.2d 176–77, 179.

53. See Ledeboer, 136; Steele, *Free Speech in the Good War*, 206–8.

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

55. 8 Annals of Cong. 2109–2110, 2162 (Gales and Seaton, 1851).

56. See, for example, Stromberg v. California, 283 U.S. 359 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); Bridges v. California, 314 U.S. 252 (1941).

57. *Pelley*, 132 F.2d at 172, 176.

58. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

59. *Chaplinsky*, at 571–72.

60. *Pelley*, 132 F.2d 172.

61. See Ribuffo, *United States v. McWilliams*, 183–84.

62. Maximilian St. George and Lawrence Dennis, *A Trial on Trial: The Great Sedition Trial of 1944* (Government Exhibit No. 4295) (National Civil Rights Committee, 1946), 441–43.

63. See Lewis Wood, "28 are Indicted on Sedition Charge," *New York Times*, July 24, 1942, 1.

64. James Wechsler, "Sedition and Circuses," *Nation*, May 6, 1944, 530–31, quoted in Ribuffo, *The Old Christian Right*, 199.

65. Goldstein, *Political Repression*, 268–69; Biddle, *In Brief Authority*, 239, 242. See also Ribuffo, *The Old Christian Right*, 80–178.

66. Biddle, *In Brief Authority*, 241–42; Goldstein, *Political Repression*, 269.

67. Steele, *Free Speech in the Good War*, 224.

68. Biddle, *In Brief Authority*, 243.

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69. See Goldstein, *Political Repression*, 268.

70. FDR was responding, in part, to the fact that for several months the government had been "bombarded with requests 'to do something about *Social Justice*.'" Lewis Wood, "Attack on 'Axis-Line' Press," *New York Times*, April 19, 1942, E7.

71. See David H. Bennett, *The Party of Fear The American Far Right from Nativism to the Militia Movement* (New York: Vintage, 1995), 255–63.

72. See Strong, *Organized Anti-Semitism in America*, 59–63.

73. See Biddle, *In Brief Authority*, 245.

74. Biddle, 245–48.

75. See Goldstein, *Political Repression*, 255–58.

76. Goldstein, *Political Repression*, 258–59. See Smith, *To Save a Nation*, 153–54.

77. Biddle, *In Brief Authority*, 111.

78. Harold M. Hyman, *To Try Men's Souls: Loyalty Tests in American History* (Berkeley: University of California Press, 1959), 327–28.

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

80. See Geoffrey Perrett, *Days of Sadness, Years of Triumph* (Madison: University of Wisconsin Press, 1973), 91–92; "Curbs on Freedom by States Feared, *New York Times*, January 2, 1941, 8 (citing an ACLU report that from May through December 1940, more than 1,600 Jehovah's Witnesses were "forcibly interfered with, mobbed, tarred and feathered, or assaulted, with comparatively little restraint by local authorities").

81. Schneiderman v. United States 320 U.S. 118 (1943).

82. See Section 15 of the Act of June 29, 1906, Pub. L. No. 338, 34 Stat. 596, 601 (1906); Nationality Act of 1940, Pub. L. No. 853, 54 Stat. 1158 § 338, 1158–59 (1940), codified by 8 USC § 738.

83. *1943 Annual Report of the Attorney General of the United States* (June 30, 1943), 11.

84. *1943 Annual Report*, 11. See Steele, *Free Speech in the Good War*, 189–204.

85. *Schneiderman v. United States*, 320 U.S. at 141, 157–59.

86. *Schneiderman v. United States*, 322 U.S. 665 (1944).

87. *Schneiderman v. United States* at 674, 677.

88. For a full discussion of the denaturalization cases, see Kalven, *A Worthy Tradition*, 423–36. The Court also overturned the decision to deport labor leader Harry Bridges, ruling in 1945 that there was no evidence showing that Bridges had any connection with any organization advocating illegal overthrow of the government, except in "wholly lawful activities." Bridges v. Wixon, 326 U.S. 135, 143 (1945). For a decision upholding a denaturalization order, see Knauer v. United States, 328 U.S. 654 (1946) (holding that the defendant had falsely sworn loyalty to the United States).

89. Taylor v. Mississippi, 319 U.S. 583 (1943).

90. *Taylor*, 319 U.S. at 586, 590.

91. Hartzel v. United States, 322 U.S. 680 (1944).

92. *Hartzel*, 322 U.S. at 683, 689. See also Keegan v. United States, 325 U.S. 478 (1945) (overturning the convictions of twenty-four members of the Bund who had been charged with advocating draft evasion); Viereck v. United States, 318 U.S. 236 (1943) (overturning the conviction of a German propaganda agent).

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93. See Murphy, *The Constitution in Crisis Times*, 227; Kalven, *A Worthy Tradition*, 185–87; Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (Oxford: Oxford University Press, 1992), 205–6. The federal courts upheld several treason prosecutions of individuals who had served as paid propaganda agents for the enemy. See, for example, Gillars v. United States, 182 F.2d 962 (DC Cir. 1950) (German broadcaster); D'Aquino v. United States, 192 F.2d 338 (9th Cir 1951) ("Tokyo Rose"). See Blanchard, *Revolutionary Sparks*, 207–9; Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982), 3–32.

94. Steele, *Free Speech in the Good War*, 156–58.

95. See Blanchard, *Revolutionary Sparks*, 228. One noteworthy failure of the Supreme Court was its refusal to review the *Pelley* and *Dunne* cases. Pelley v. United States, 318 U.-S. 764 (cert denied); Dunne v. United States, 320 U.S. 790 (1943) (cert denied). On *Dunne*, see note 111, supra. See also Kalven, *A Worthy Tradition* 629n8. Robert Goldstein, who is generally critical of the nation's response to free speech issues during World War II, gives high marks to the Supreme Court, noting that to the extent the national did well in this era, the Supreme Court "bears a good deal of the responsibility." Goldstein, *Political Repression*, 280. His overall view, however, is that in terms of the "'ratio' of repression to dissent," there "was probably more repression during World War II in *relation* to the amount of dissent voiced, than in any period in American history" (284).

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