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FREE SPEECH AND THE ESPIONAGE ACT

G. P. GARRETT¹

“Congress shall make no law abridging the freedom of speech.”
So reads the Federal Constitution.

Whoever wilfully utters, prints, writes or publishes disloyal, profane, abusive or scurrilous language about our government, constitution, military forces or their uniforms or flags, or language intended to incite or encourage resistance to the United States or promote the cause of its enemies or advocates or defends any of the above acts is denounced by the amended Espionage Act.

In view of the constitutional privilege of free speech, what shall be considered disloyal, what abusive, what promotive of the cause of the enemy? Are the acts and policies of Congress no longer subject to criticism? Is the conduct of the dominant political party above censure? If so, there are many men who say that the coercive control of opinion asserted by the Espionage Act is opposed to our charter of liberty. The protests of the outraged exponents of syndicalism rise even now from the streets, the courts and the internment camps. The tears of Rose Pastor Stokes mingle with the curses of the I. W. W., and find concord in the resigned resistance of Eugene V. Debs. Each a partisan of a different revolutionary doctrine, each has found his doctrine opposed to the ruling influence of the American spirit, and all believe that their constitutional liberties have been outraged because that spirit refuses them utterance of their heresies.

Although it is but fair to grant these misguided propagandists acquittal of wanton intention to attack the cause of their countrymen, in the day of public danger, it is yet obvious that they are bearing the kaiser gifts for which, did they demand the price, he would pay a largess. And so, without much need as to them for submitting the act to the test of constitutionality, we turn material of this kind into the jails.

Another variety of the zealots for free speech, however, present the act in another aspect. This consists of loyalists of independent mind. Obviously such men are not indifferent to the country's welfare. Obviously their activities are actuated by their enthusiasm for its best interest, and they speak, at least by intention, solely to that

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best interest. And yet their speeches do not always fall in harmony with the diapason of our martial music and they often march out of step with the rank and file of true American citizens.

Again, there is a third species of trouble-makers that cannot be stigmatized as pro-German. This is the political minority. One of the first principles of Americanism is the privilege of the minority to oppose prevailing opinion. In using this privilege, members of the out-parties stand well within the sacred precincts of the constitution. And the day-to-day history of these times has frequently exemplified the value of their corrective contributions to our war programme. Yet, it is indubitable, that there is but a thin line of demarkation between the patent right that they use, and that patent license which the Espionage Act condemns.

We come, therefore, to study what force that canon of free speech, which the constitution concedes us, has in this hour. History and reason unite to deny that a state of war suspends the constitutional guaranties, so long as martial law is absent. And we are not yet subject to military supervision in our civil business. Doubtless, such a juncture might occur as would justify executive control of ordinary affairs by the military arm of the government. Happily, the occasion for such action is not yet. Meantime the constitution is the charter of our liberties, and writ in a fair round hand thereon we find the guaranty of free speech.

Apparently, if the Espionage Act is constitutional, that guaranty has a new meaning. The very purpose of the above-mentioned clause of the act is to restrict the propagation of opinions and the sowing of sentiments, which, while derogatory to the present course of the government, were not forbidden until the enactment became law. Hence, if we are to justify the act by the constitution, we must admit that, in the presence of war, the face of the guaranty has strangely changed. No longer are we at liberty to censure the government in unmeasured phillipics. No longer may we disclose our knowledge of its activities with careless freedom. No longer may we advocate the accomplishment of social reforms by the radical steps of syndicalist violence. What, therefore, remains of free speech if the constitution retains its virtue, or what of the constitution if one of its most sacred principles has been impinged upon?

The question cannot be begged by accepting the convenient explanation that we have consented to ignore temporarily the true meaning of our constitutional guaranties. If the sinews of our political body cannot bear the strain of war, they fail of their fundamental pur-

pose. That body was born into the world to live through all phases of life and to sustain the many exigencies that life put upon it. If our creed is merely a peace-time panacea, it is wholly unfitted to exist. For the world is forever at war. In consequence, to abandon our Ark of the Covenant while the Philistines emperil us, hoping merely to return when the crisis passes, is to be recreant to the faith. We cannot, therefore, simply explain away the present restrictions of speech on the ground that abnormal times excuse unwarranted interference with the constitution. We must justify the restrictions by the constitution, or admit the constitution to be another of the political nostrums of the past that time has demolished as impracticable.

Can we square the police regulations that now seem to hamper free speech with the tenets of the constitution? We can, and simply.

All government is for the benefit of the governed, and, with us, proceeds from the governed. Whatever the construction of our engine of government, its motive power is public opinion. Long ere this we had discovered that through all the pipes and cylinders of the machinery of our government, public opinion travels freely, and that no system of gadgets or cocks can shut it off without instant danger to the safety of the whole mechanism. Cautious folk meticulously building against the future, and in mortal fear of the force that resides in the proleteriati devised all manner of means for hampering the transmutation of public opinion into law. They divided the arms of government into executive, legislative and judicial, they made the legislature bi-cameral, they created an electoral college, they invented a veto power. And, now as they look down upon their labors, they see that the monster force that they sought to control, has shaken itself loose of their restraints and breathes its will throughout the system.

So public opinion makes the laws as it made the constitution. And, speaking now in the Espionage Act, it is but giving a contemporary interpretation of the constitutional guaranty of free speech. Free speech shall exist, but free speech consists in the use of language not calculated to disrupt the government, nor impede its operations.

The personal liberties guaranteed by the constitution were not created by that instrument. They were liberties of long standing recognition, which were simply preserved there against future forgetfulness. They came to us by way of inheritance. Other rights even more fundamental were inherent in the compact, which were so clearly implied in the nature of society as to require no covenant. One of the very first of these is expressed by the maxim *Alterum non laedere*. Injure not one another. The right of freedom of speech must be

read in consonance with this other principle upon which the constitution was reared. Therefore, the guaranty is that we shall be secure in freedom to use such speech as does not injure the rest of the community. Interpreted by the Espionage Act, certain language and certain expressed thoughts are, at this time injurious to the nation and its people, which possibly, in a day of peace would be harmless. Therefore, they are inhibited. Evidently the inhibition is constitutional, because it is the expression, in a republican form, of the present interpretation by public opinion of meaning of the constitutional guaranty of free speech.

Thus we find ample justification for the restrictions of the act within the "four-corners" of the constitution. But we have not yet furnished a criterion to guide our conduct in accordance with these restrictions. We are again at the portals of the Temple of Justice seeking knowledge of the ultimate bounds of the free speech defined by exclusion from the act. What is promotive of the cause of the enemy? What is disloyal?

Possessed of the compass of the evident intention of the act, we are not likely to find difficulty in ascertaining the safe rule of interpretation.

For instance: The right of free speech clearly has reference, with regard to policies, only to those in the making, not to past and irrevocable acts. Thus the government has declared war. Controversy therefore as to the right or the wrong of the declaration is *ex post facto*. It cannot alter the case. It can raise pernicious dissension. Yet, even so, discussion of the justice of the war is not foreclosed. Simply the citizen must not preach sedition or crime. To oppose the draft law is now a crime. To preach such opposition is, therefore, prohibited. It is because the pacifist, having had his day of debate while the measures now in force were in the making, urges now a disregard of these measures which carry penal fangs that he finds himself in the grip of the Espionage Law. It is not the closure of debate that is effected, but the closing of a nursery for crime. Surely, the right of free speech was never intended by any government to cover language subversive of the sanction of that government itself. And thus we dispose of the militant pacifist. Likewise is the syndicalist subject beyond question to the penalties of the act. He, who, in his fervor of proselytism, advocates the brand of sabotage or the knife of nihilism, must naturally find his soap-box overturned.

What, then, of the rabid party man? Is political discussion taboo, and he who attacks the policies of the majority a felon? Not while

here, as in ancient Rome, the forum rules the palace. How, then, do we know where to find the point at which the gavel is replaced by the policemen's club as the symbol of authority? Most easily. Speech which is not advocacy of crime is permitted. However much it reflects upon existing functionaries and policies, however much it brings into question the divine right of the majority, it may be freely exercised. Only when it becomes the partisan of crime does the law intervene, on behalf of its own dignity, to denounce it.

With such a criterion appealing to reason and to patriotism and scrupulously regardful of personal rights, all men should be content.