In Defense of Debs: The Lawyers and the Espionage Act Case

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The 1918 indictment, trial, and conviction of Eugene Victor Debs for violation of the Espionage Act of June 15, 1917, is a set piece in American history texts. Although many historians and biographers have written about the trial, none have analyzed the tactics used by Debs's lawyers. Most, in fact, have argued that Debs "offered no defense" except his First Amendment rights; that he "refused to permit his lawyers to conduct a defense"; that his attorneys found themselves with "almost nothing to do"; or that, "following the example of political prisoners the world over, Debs demanded that his lawyers not contest the charges."[1] These and

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[1] Quotations, in order, are from David Allen Shannon, "Anti-War Thought and Activity of Eugene Victor Debs, 1914-1921" (M.A. thesis, Department of History, University of Wisconsin, 1946), 40; Herbert M. Morais and William Cahn, *Gene Debs: The Story of a Fighting American* (New York, 1948), 99, 103; Ray Ginger, *The Bending Cross: A Biography of Eugene Victor Debs* (New Brunswick, N.J., 1949), 362; Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (Urbana, Ill., 1982), 294. See also David Karsner, *Debs: His Authorized Life and Letters . . .* (New York, 1919), 15; David Allen Shannon, *The Socialist Party of America: A History* (New York, 1955), 115; Harold W. Currie, *Eugene V. Debs* (Boston, 1976), 46. Floy Ruth Painter, *That Man Debs and His Life Work* (Bloomington, Ind., 1929), 116-42, contends that Debs "rested his entire defense on the First Amendment" but also includes materials showing that his attorneys raised other issues. Some writers may have been led into error by Debs himself. A week after his indictment, but before his trial had begun, Debs wrote that he expected to be convicted and that it was only on behalf of his party and "the cause" that he had "consented to any defense at all." Eugene V. Debs to Bolton Hall, July 6, 1918, in J. Robert Constantine and Gail Malmgreen, eds., *The Papers of Eugene Victor Debs, 1834-1945*, microfilm (New York, 1983), Series I, Reel 2.

other similar comments that pervade the literature are simply wrong. Although no one can doubt Debs's devotion to the First Amendment—his defense of it dates back at least as far as 1887[2]—the fact of the matter is that Debs's attorneys, presumably with his blessing, used every legal maneuver that they could think of to keep their client out of jail. They tried to take advantage of every loophole and attempted to exploit every technicality. A detailed examination and explication of the legal strategems that the Debs defense used is the first step in a reassessment of the legal—as opposed to the political—history of the case.

Eugene Victor Debs, it could be argued, courted indictment. At the end of 1917, after Kate Richards O'Hare's conviction under the Espionage Act, Debs wrote to his fellow Socialist: "I cannot yet believe that they will ever dare to send you to prison for exercising your constitutional right of free speech, but if they do, then . . . I shall feel guilty to be at large."[3] His commitment to freedom of expression and his empathy with other Socialist "comrades" indicted, tried, convicted, and incarcerated became almost constant themes. In March, 1918, he denounced the indictments of Adolph Germer, Victor L. Berger, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker; argued that the Socialist party was the real target of the Woodrow Wilson administration; and expressed his chagrin that "no call has been made upon me by a federal grand jury to defend myself against the charge of disloyalty." He continued: "Free speech, free assemblage and a free press, three foundations of democracy and self-government, are but a mockery under the espionage law administered and construed by the official representatives of the ruling class."[4] In April he added O'Hare's name

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[2] See Debs's editorial concerning the death sentences in the Haymarket case. "The Chicago Anarchists," *Locomotive Fireman's Magazine*, XI (January, 1887), 11-13.

[3] Eugene V. Debs to Kate Richards O'Hare, December 15, 1917, quoted in Painter, *That Man Debs*, 117. O'Hare was convicted of obstructing the recruitment and enlistment of United States soldiers during World War I. She reputedly said at a lecture in Bowman, North Dakota, on July 17, 1917, "that any person who enlisted in the army of the United States for service in France would be used for fertilizer, and that is all he was good for, and that the women of the United States were nothing more nor less than brood sows to raise children to get into the army and be made into fertilizer." O'Hare was sentenced to five years in prison, and her conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on October 29, 1918. *O'Hare* v. *United States*, 253 F. 538 (1918). For O'Hare's version of the lecture and for Judge Martin Wade's charge to the jury and his speech at sentencing, see Walter Nelles, comp. and ed., *Espionage Act Cases* . . . (New York, 1918), 45-47. Judge Wade was characterized by a contemporary as a "Bourbon, anti-Bryan Democrat . . . [who] has recently developed a sort of mania for denouncing 'traitors' on all possible occasions." Lawrence Todd to Roger Baldwin, December 28, 1917, quoted in H. C. Peterson and Gilbert C. Fite, *Opponents of War, 1917-1918* (Madison, Wis., 1957), 36. For a brief biography of O'Hare see David Allen Shannon, "Kate Richards O'Hare," in Edward T. James, ed., *Notable American Women, 1607-1950* (3 vols., Cambridge, Mass., 1971), I, 417-20.

[4] "Indicted, Unashamed and Unafraid," *The Eye-Opener*, March 16, 1918, *Papers of Eugene V. Debs*, Series II, Reel 8.

to the list of the indicted, protested the innocence of "our comrades" and the "wanton suspension" of constitutional rights, and was incensed by the sentencing of a woman "void of offense save that of giving herself body and soul to suffering humanity."[5]

It is not surprising then that Debs incorporated these beliefs and sentiments in his speech in Canton, Ohio, on June 16, 1918. In a long address he alluded to the convictions of Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, imprisoned in a nearby jail, and noted ironically: "it is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make democracy safe in the world."[6] He spoke glowingly of O'Hare: "Why yesterday they sent a woman to Wichita penitentiary . . . . The United States is the only country which would send a woman to the penitentiary for exercising the right of free speech. . . . Personally I know her as if she were my own younger sister. She is a woman of absolute integrity. She is a woman of courage. She is a woman of unimpeachable loyalty to the Socialist Movement."[7] Of Rose Pastor Stokes, found guilty for having the temerity to write to the Kansas City *Star*, "I am for the people, while the Government is for the profiteers," Debs asked, "What has she said," and then answered: "Nothing more than I have said here this afternoon. I want to say that if Rose Pastor Stokes is guilty, so am I. If she should be sent to the penitentiary for ten years, so ought I. . . . Rose Pastor Stokes never said a word she did not have a right to utter . . . ."[8]

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[5] "The Indictment of Our Leaders," Socialist party organization leaflet (Chicago, April, 1918), *ibid.*

[6] Eugene V. Debs's Canton, Ohio, speech of June 16, 1918, United States Department of Justice, Subject File 77175-A, Box 700 (National Archives, Washington, D.C.). Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker were charged and convicted of aiding, abetting, and counseling Alphons J. Schue not to register for the draft. They were sentenced by Judge David C. Westenhaver of the Federal District Court for the Northern District of Ohio to one year imprisonment in the Canton, Ohio, workhouse. Their conviction was affirmed by the United States Supreme Court in January, 1918. *Charles Ruthenberg et al.* v. *United States*, 245 U.S. 480 (1918). For a description of the trial see Oakley C. Johnson, *The Day is Coming: Life and Work of Charles E. Ruthenberg, 1882-1927* (New York, 1957), 118-21.

[7] Debs's Canton, Ohio, speech, Department of Justice File.

[8] *Ibid.* Rose Pastor Stokes was indicted and convicted of violating all three clauses of the Espionage Act of June 15, 1917. The case was notorious for the charge of Judge Arba S. Van Valkenburgh of the United States District Court, Western District of Missouri, who stated, in part: "Now, gentlemen of the jury, the newspaper in which this publication was made reaches a great number of people even in the Army camps of the United States. Among those outside such camps are men within the age of enlistment, to wit, between the ages of 18-45, and within the age of conscription, to wit, between the ages of 21 and 30 years. There are those who have already registered and received their serial numbers as a preliminary to entrance upon active service in the Army and Navy of the United States; there are the mothers, fathers, wives, sisters, brothers, sweethearts and friends of these men . . . . If the statement made in this letter and the resulting attitude therein voiced should meet with credence and acceptance by any appreciable number of its readers, could they fail to produce a temper and spirit that would interfere and tend naturally and logically to interfere with the operation and success of the military and naval forces

Debs had his wish. The very next day the process that led to his jailing began. Edwin S. Wertz, the United States attorney in Cleveland, sent a long letter to Attorney General Thomas W. Gregory; to it he appended a transcript of Debs's speech, scrawled over with question marks, underlinings, and comments. Wertz set the scene: a picnic on the last day of the convention of the Ohio Socialist party; a "pilgrimage" to the city of Canton, selected because of the incarceration there of Ruthenberg, Wagenknecht, and Baker; an audience estimated at three thousand. He then scrutinized the speech, looking for passages that would bring Debs within the scope of the Espionage Act. Page 1: Debs's reference to the three imprisoned Cleveland Socialists—a tendency "to bring the form of government of the United States into contempt, scorn, contumely or disrepute," and to "incite, provoke and encourage resistance to the United States." Pages 2 and 3: Debs endorses the St. Louis antiwar platform. Page 6 and "in many other places": Debs alludes with sarcasm to President Woodrow Wilson's war message and to his objective "to make the world safe for democracy." Debs praises the Bolsheviks, denounces the convictions of the trio of Cleveland Socialists and of O'Hare and Stokes, and admits that if the last is guilty, "so is he." At the bottom of page 12: the sentence, "You need to know that you are fit for something better than slavery and cannon fodder." Although earlier in his letter Wertz acknowledged that the Socialist orator had probably not violated Section 3 of the Espionage Act "before it was amended" in May, 1918, he now judged the quoted sentence as a Title I, Section 3, Clause 2 offense under the original congressional legislation. Wertz pointed out that there were in the audience a number of young men of draft age. They heard the speech, listened to the sneers at patriotism, absorbed the emotive words, "slavery and cannon fodder." Although the United States attorney expressed some doubt about the criminality of the Canton speech, he was reasonably certain that a conviction could be obtained in his judicial district. He was aware that the arrest of Debs, "a man with a national reputation," would cause "wide-

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of the United States?" United States, Department of Justice, *Interpretation of War Statutes*, Bulletin 106 (Washington, D.C., 1919), 4. The conviction was reversed by the Court of Appeals for the Eighth Circuit in January, 1920. *Stokes* v. *United States*, 274 F. 18 (1920). "This court," wrote Chief Judge Sanborn, "is unable to resist the conclusion that the patriotic zeal of the court below led it to place too heavy a burden on the defendant in her endeavor to meet the evidence which the government produced against her . . . ." *Ibid.* at 26. Even Alfred Bettman, assistant to the attorney general of the United States, admitted "considerable doubt" that the *Stokes* case, "having arisen before the amendment of the Espionage Act" in May 16, 1918, came within the terms of the law. "The ten year sentence," he wrote, "was, upon the facts . . . ridiculously excessive, being due to the notoriety surrounding the case." Alfred Bettman to Attorney General Thomas W. Gregory, February 19, 1919, Gilbert Bettman Papers (University of Cincinnati Library, Cincinnati, Ohio). For Stokes, see David Allen Shannon, "Rose Pastor Stokes," in James, ed., *Notable American Women*, III, 384-85.

spread comment"; in his letter he asked the Justice Department for instructions whether to begin proceedings before the current grand jury.[9]

Three days later, on June 20, John Lord O'Brian, special assistant to the attorney general, replied to the Wertz communication. "It is highly important," he wrote, "that prosecutions be avoided in cases of this kind which do not violate . . . [the] express provisions" of the Espionage Act. The Debs "case is not without serious doubts . . . ." O'Brian noted that most of the passages marked by the United States attorney did not "in and of themselves" violate the law. Although the boundary between the legally innocuous opinion and criminality might have been breached in the Debs speech, the Justice Department, O'Brian informed Wertz, was not "strongly convinced" tht a prosecution was advisable. The Department of Justice was not "strongly" opposed to a prosecution either. O'Brian pointed to various sentences from the transcript, as well as to a few of the Wertz citations, that were not qualitatively different from "many expressions on which successful prosecutions have been based." "They tell us," wrote O'Brian quoting Debs, "that we live in a great republic . . . . They taught you that it is your patriotic duty to go to war and slaughter yourselves at their command . . . . When Wall Street yells war . . . ." In fact, O'Brian suggested that if Wertz went forward, he should "make the whole speech a part of the indictment."[10] Attorney General Gregory wired six days later advising Wertz that "covering other speeches of Debs as accumulation may make stronger case than Canton speech alone."[11]

The indictment against Debs, handed down on June 29, 1918, just thirteen days after his speech, ran 139 pages. It was a laundry

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[9] Edwin S. Wertz to Thomas W. Gregory, June 17, 1918, Subject File 77175-A, Box 700, Department of Justice File. At the St. Louis convention in April, 1917, a Committee on War and Militarism, composed of fifteen members, was formed to establish a socialist position relative to the entrance of the United States into World War I. The committee produced three reports for debate on the convention floor; the majority report, signed by eleven members, condemning the war as a struggle between capitalist nations and advocating among other things opposition to the draft, higher taxes, and the sale of war bonds, was adopted, after amendments, by 140 of the 176 delegates. Shannon, *Socialist Party*, 93-98.

[10] John Lord O'Brian to Edwin S. Wertz, June 20, 1918, *ibid.*; Clyde R. Miller, reporter for the Cleveland *Plain Dealer*, later recalled that he was shown by Assistant United States District Attorney Francis Kavanagh a telegram from Gregory to Wertz which "in substance read: 'For God's sake don't indict Debs. We don't want him indicted.' " Clyde R. Miller, "The Man I Sent to Prison," *The Progressive*, XXVII (October, 1963), 34. The O'Brian letter gives no support for Miller's recollection. In his characterization of the Wertz-Justice Department correspondence, Nick Salvatore asserts that, "disregarding Washington's advice, [Wertz] obtained a federal grand jury indictment in Cleveland against Debs on 29 June . . . . " Salvatore, *Eugene V. Debs*, 294.

[11] Thomas Gregory to Edwin S. Wertz, June 26, 1918, Subject File 77175-A, Box 700, Department of Justice File.

list of charges, ten counts corresponding to ten of the twelve offenses enumerated in the amended Espionage Law. There were no specific citations taken from the Canton address; instead, after each count the whole speech was reprinted. In the cadence of legal language Debs was alleged willfully to have made or conveyed "false reports or false statements . . . to a general assembly of people among whom were Clyde R. Miller, Dennis R. Smith, A. F. Owen, and Virgil Steiner . . . and divers other persons . . . with intent to interfere with the operation or success of the United States or to promote the success of its enemies." He was supposed to have incited "insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States." According to the charges he attempted to obstruct "the recruiting or enlistment service"; published disloyal language about the form of government, the federal Constitution, the flag and the uniform; provoked resistance to and opposed the cause of the United States; and advocated the elimination of war production.[12] Theoretically, if convicted on all counts of the indictment, Debs could have been sentenced to two hundred years imprisonment and fined $100,000.[13] Realistically he could expect a penalty of ten years confinement.

Debs had a relatively large team of attorneys. Seymour Stedman of Chicago, a member of the executive board of the Social Democratic party in 1898, attorney for Stokes, and after the *Debs* case was over, the Socialist vice-presidential candidate in 1920, served as chief counsel.[14] He was assisted by another Chicago attorney, William Cunnea. Joseph Sharts, a sometime novelist and editor of the Dayton, Ohio, *Miami Valley Socialist*, had argued *Ruthenberg* before the United States Supreme Court; and Morris H. Wolf, on brief in the *Ruthenberg* case, coordinated Debs's defense in Cleveland, filed papers, handled correspondence, and paid court costs.[15] Morris Hillquit, signer of the majority report at the St. Louis convention in 1917 and candidate for mayor of New York, was for a time involved.[16] Isaac E. Ferguson assisted in the preparation of the brief to the United States Supreme Court, and Gilbert

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[12] Grand Jury Indictment, S.S.4057, Eugene V. Debs File (Federal Record Center and Archives Branch, Chicago, Illinois).

[13] The longest sentence for violation of the Espionage Act, twenty years and a $4,000 fine, was meted out in the *Abrams* case. *Abrams* v. *United States*, 250 U.S. 616 (1919).

[14] Ginger, *Bending Cross*, 199; Justice Department, *Interpretation of War Statutes*, Bulletin 106, pp. 23-27; *Stokes* v. *United States*, 264 F. 18 (1920); H. Wayne Morgan, *Eugene V. Debs: Socialist for President* (Syracuse, N.Y., 1962), 174.

[15] *Ruthenberg* v. *United States* 245 U.S. 480 (1918); United States Supreme Court, File 26800 (National Archives). For Joseph Sharts, see Solon DeLeon, ed., *The American Labor Who's Who* (New York, 1925), 210-11.

[16] Ginger, *Bending Cross*, 341; Morris Hillquit to Eugene V. Debs, August 5, 1918, *Papers of Eugene V. Debs*, Series I, Reel 2.

LEADING FIGURES IN DEBS' TRIAL

PICTURED ARE:

JUDGE DAVID C. WESTENHAVER
ATTY. SEYMOUR STEDMAN
MRS. ROSE PASTOR STOKES
EUGENE V. DEBS
ATTY. FRANCIS KAVANAGH

Reproduced from Milwaukee *Leader*, September 13, 1918.

E. Roe, critic of the federal judiciary and attorney in the *Masses* case, entered as *amicus curiae*.[17]

The outlines of the Debs defense were in part embodied in the Motion to Quash and the Demurrer to the Indictment filed respectively on August 6 and August 15, 1918, and signed by Stedman, Sharts, and Wolf. Accompanying the demurrer was a memorandum of authorities, and on August 31 a thirty-five page brief on the Motion to Quash and the Demurrer was filed. Taken together, the arguments posed in these papers were technical, constitutional, and comprehensive. Debs's attorneys claimed that: 1) the grand jury had been illegally drawn from the Eastern Division rather than from the entire Northern District of Ohio without "any public notice or opportunity afforded defendant or the public to be present"; 2) every count in the indictment was "insufficient" and "bad" because the Canton speech "uttered by the defendant" was composed of opinions, not facts; thus, separately and collectively the charges failed to state "an offense against the laws of the United States"; 3) the persons named in the indictment were not alleged to have heard "or become cognizant" of the false reports or false statements, and the others "alleged to have been present and alleged to be known to the Grand Jury . . . [were] not by name or description set forth"; and 4) most importnat of all, Title I, Section 3 of the Espionage Act as amended was in violation of the First Amendment.[18]

On September 3, 1918, District Judge David C. Westenhaver ruled on the Motion to Quash and the Demurrer to the Indictment. Citing *United States* v. *Ruthenberg*, over which case he had earlier presided and which had been upheld by the Supreme Court, he disposed of the Motion to Quash in a single paragraph. Of the Demurrer he noted that the United States attorney had announced his intention to *nolle prosequi* the charges relating to the false statement and disloyal language about the form of government, the Constitution, the flag, and uniform clauses of the Espionage Act; reserved three other counts for further deliberation; and overruled on the allegations of incitement to insubordination among

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[17] *Debs* v. *United States*, 249 U.S. 211 (1919); Gilbert E. Roe, *Our Judicial Oligarchy* (New York, 1912); Roe to James D. Maher, January 21, 1919, Supreme Court File. The *Masses* case involved the exclusion from the mails by the New York postmaster of the August, 1917, issue of the Socialist periodical on the ground that the sentiments expressed in the magazine violated Title I, Section 3 of the Espionage Act. District Judge Learned Hand granted an injunction against the postmaster but was reversed by the United States Court of Appeals for the Second Circuit. *Masses Publishing Company* v. *Patten*, 244 F. 539 (1917); *ibid.*, 246 F. 24 (1919); Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass., 1942), 42-51; for Roe, see Wallace S. Sayre, "Gilbert Ernstein Roe," *Dictionary of American Biography*, and New York *Times*, December 12, 1929.

[18] All of these legal documents are located in the Debs File (Federal Record Center and Archives Branch).

military personnel, of obstruction to the draft and to enlistment, and of opposition to the cause of the United States in World War I. About the First Amendment argument he was succinct. "Any contention," he wrote, "that the Espionage Act is unconstitutional is, in my opinion, frivolous and entirely devoid of merit."[19]

The Cleveland courtroom where the trial of *United States* v. *Debs* began on September 9, 1918, has been described as "oak and marble" with impressively tall windows and a "ceiling of gold" graced by a "splendorous" picture of angels "with beautiful bodies, and stern faces and swords of flame, guarding the tablets of stone upon which are inscribed the ten commandments . . . ."[20] Broad-jowled Judge Westenhaver, his mouth "tightly gripped," rocked back and forth in his chair. He was fifty-three years old.[21] A graduate of Georgetown Law School and a former law partner of Secretary of War Newton D. Baker, he had moved from his native West Virginia to Cleveland in 1903, served on the city's Board of Education, and in 1917 had been appointed by President Wilson to the federal bench.[22] United States District Attorney Wertz was ten years Westenhaver's junior, a Spanish-American War veteran, a bank vice-president, and a former member of the Ohio House of Representatives.[23] The jury was composed of men mostly in their seventies with "an average wealth of over $50,000."[24] Present in the courtroom were Stokes, out on bail pending appeal of her Espionage Act conviction; the writer Eastman, indicted under the same law; and Marguerite Prevy, who a few months earlier had introduced Debs to the crowd at Canton. Prevy had helped to furnish Debs's $10,000 bail bond.[25]

It is not necessary to detail here the course of the trial or to examine exhaustively the substance of the testimony. As the trial progressed, two versions of the Canton address, one shorter than the other, were read aloud, the words of the Socialist leader reverberating through the chambers, once and again. Five men, all of draft age, testified that they had been present on June 16 and had listened to Debs. Ruthenberg, taken from his cell and brought to Cleveland, was called to authenticate the St. Louis antiwar plat-

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[19] *Ibid.*

[20] Max Eastman, "The Trial of Eugene Victor Debs," *The Liberator*, I (November, 1918), 8.

[21] The description of Judge Westenhaver is a composite drawn from Eastman's article, cited above, and a speech made by Stokes at Beethoven Hall in New York City in September, 1918. New York *Times*, September 23, 1918.

[22] Ginger, *Bending Cross*, 363; "David C. Westenhaver," *Who's Who in America, 1918-1919.*

[23] "Edwin S. Wertz," *Who's Who in America, 1918-1919.*

[24] Eastman, "Trial of Eugene Victor Debs," 9.

[25] Nelles, *Espionage Act Cases*, 28-30; *United States* v. *Eastman*, 252 F. 232 (1918). The *Eastman* case ended after two mistrials. Chafee, *Freedom of Speech*, 389; Ginger, *Bending Cross*, 355, 359.

form. His indictment and those of Wagenknecht, Baker, Stokes, and O'Hare were entered into evidence. A reporter for the Cleveland *Plain Dealer*, Clyde R. Miller, who had acted for the government in earlier cases, including that of Ruthenberg, Wagenknecht, and Baker, testified to two interviews with Debs during which the Socialist leader had endorsed the majority report of the St. Louis program.[26] Finally, Joseph Triner, attached to Naval Intelligence in Chicago, recalled erratically a speech that Debs had made a month earlier in which he allegedly said "the only war in which I have any interest is that of the workers against the capitalists. They may call me a disloyalist and brand me a traitor, but I shall stick to my principles . . . ."[27]

The tactics and arguments of the defense in the Debs trial, particularly in the jury selection and the cross-examination of witnesses, are especially significant. Far from being left with nothing to do, as some historians have claimed, the defense attorneys were intent on obtaining as favorable a jury as possible, making legal points, taking exceptions, and probing potential weaknesses in the prosecution.[28] The *voir dire*—the formal jury selection process—takes up almost a quarter of the trial transcript. Twenty-eight prospective jurors were examined by Wertz for the government and by Sharts, Cunnea, and Stedman for the defense. There were objections to five men for cause by the Debs team of attorneys; of these, three were excused by Judge Westenhaver. The prosecution removed three others, a retired Episcopalian minister, a former

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[26] Defendant's Bill of Exceptions, Debs File; Edwin S. Wertz to Thomas Gregory, June 17, 1918, Subject File 77175-A, Box 700, Department of Justice File. The text of the majority report from the St. Louis program can be found in Nathan Fine, *Labor and Farmer Parties in the United States, 1828-1928* (New York, 1928), 310-14. The Espionage Act case in which Miller testified, involved Amos L. Hitchcock, Socialist member of the Cleveland Board of Education, who on April 18, 1918, was charged with violating the 1917 law in a conversation with friends in a private home in Sandusky, Ohio. Hitchcock reputedly attacked the purchase of Liberty Bonds and characterized the war as a commercial scheme to "make the rich richer and the poor poorer." His sentence of ten years imprisonment was later commuted to two. James R. Mock, *Censorship 1917* (Princeton, N.J., 1941), 209-10; memorandum for Mr. Bettman, February 7, 1919, Bettman Papers; Alfred Bettman to Thomas Gregory, February 28, 1919, *ibid.* "The sentence," wrote Bettman in recommending commutation, "is exceedingly excessive, almost enough to make a political prisoner of Hitchcock." Alfred Bettman to Thomas Gregory, February 7, 1919, *ibid.* Miller claimed in his 1963 article that he called Wertz from Canton to quote Debs's speech and to offer the opinion that the Espionage Act had been violated. Miller, "The Man I Sent to Prison," 34.

[27] Defendant's Bill of Exceptions, pp. 265-76, Debs File. A report of the Debs speech in St. Louis *Labor* does not corroborate the Triner testimony. St. Louis *Labor*, August 24, 1918, *Papers of Eugene V. Debs*, Series II, Reel 8.

[28] Ginger, *Bending Cross*, 366. Peterson and Fite state that "there was no long debate over evidence, no squabble over the suitability of jurors, or any of the other things that had characterized the trials of so many other antiwar radicals." Peterson and Fite, *Opponents of War*, 252. The trial transcript discloses, however, that there were frequent disputes over the introduction of evidence and the qualifications of jurors.

member of the Socialist party, and a naturalized citizen from Poland, by exercising peremptory challenges, while the defense exhausted its ten such challenges by excusing, among others, a Republican legislator, a retired manufacturer, and a Cleveland city employee.[29]

The Debs defense, sometimes perfunctory, sometimes searching, often wrangling with judge and federal attorney, was impeded by Westenhaver's ruling on the proper grounds for exercising a challenge for cause. Josiah T. Grant, retired farmer and the first juryman called, conceded under questioning by Sharts that he harbored a hostility toward Socialist doctrine; he was also an army veteran who received a pension from the United States government.

Q. Mr. Grant, having that feeling and conviction of opposition to the Socialists and their ideas, do you feel that you can sit here as an impartial juror in this case?

A. I wouldn't hardly.[30]

On these facts his presence on the jury was challenged and a lengthy discussion followed between Judge Westenhaver and Stedman. Westenhaver first referred to the decision of the United States Supreme Court in 1878 in *Reynolds* v. *United States*:

> The general rule is that where the juror has received an impression of that kind, not based upon evidence, or upon a personal acquaintance with the facts of the case to be tried if he feels and the Court is satisfied that he in good faith that such impressions can be laid aside, that he take the evidence as it is produced in court and apply the law and follow the law as the court gives it, that he is not a disqualified juror.[31]

He then ruled that Debs was not on trial "because he was a Socialist"; neither was the Socialist party on trial in his case. Debs was similarly situated to a Democrat or a Republican accused of a specific crime and confronted by a juror of the opposite political party with an antipathy toward its competitor. Grant's admitted anti-Socialist bias, therefore, was not grounds for his removal from the jury.[32]

Grant, however, was also a pensioner of the federal government and thus might consider himself beholden to it. Earlier in his interrogation of the prospective juror, Sharts claimed that Westenhaver himself had decided in another case that "when a juror is receiving money from the Government, he is not in a position to act as an impartial juror." The judge had a different recall: "I did

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[29] Defendant's Bill of Exceptions, pp. 32, 62, 64, 68, 71, 74, 84, 88, 106, Debs File.

[30] *Ibid.*, 8.

[31] *Reynolds* v. *United States*, 98 U.S. 145 (1878); Defendant's Bill of Exceptions, p. 13, Debs File.

[32] Defendant's Bill of Exceptions, p. 14-15, Debs File.

"Are you a Socialist?"
"Certainly."
"Show your indictment."

Reproduced from Max Eastman, "The Trial of Eugene Debs," *The Liberator*, I (November, 1919), 7.

not agree that it was a ground for disqualification, but as a matter of favor I permitted to be set aside such jury men as were thus situated." No favor was to be shown in the *Debs* case; the rule, as Westenhaver read precedent, was that the juror would have to be in the government's employ before he was subject to a challenge for cause.[33] Judge Westenhaver overruled the objection to Grant; Stedman duly excepted; and the *voir dire* proceeded.

The Debs defense was particularly alert to opinions, articulated by prospective jurors, about the First Amendment. Cunnea's examination of James Decker is a case in point:

Q. Do you believe that a man has a right to differ in his opinion as to war aims and to discuss it . . . ?

A. So long as his opinion and his expression does not interfere with the aims of this government in the prosecution of this war, I have no objection to it.

Q. And you believe in a limited discussion on certain lines.

A. Sure . . . .

Q. Do you believe in the right of free speech and free discussion under the Constitution . . . .

A. Well, as stated before, as long as it does not conflict with the Government's aim in the prosecution of this war.

Q. Do you understand—do you mean that free speech—free discussion along the government line is permissable and otherwise not?

Mr. Wertz. Object.

The Court. Objection sustained . . . .[34]

Decker, bank director and president of an insurance company, had to be removed by a peremptory challenge.[35]

The twelve men who survived the challenges, peremptory and for cause, and who constituted the Debs jury included a real estate operator who expressed the opinion that unions "go a little too far sometimes," a sixty-eight-year-old former county commissioner, two farmers, and a painter-barber. There were two retired farmers, a retired merchant, and a retired grain dealer who knew the father of one of the prosecutors. C. F. Dickerman was a laborer, fifty-nine years old, who didn't "read much"; Charles H. Slingcoff was in the telephone business; and Stephen McGowan was an Akron contractor.[36]

It was with some dismay and disquiet that Stedman addressed the jury on the afternoon of September 9; given its composition, he believed that only a miracle could save his friend and client, and he did not believe in miracles. His opening remarks stirred the

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[33] *Ibid.*, 6, 16-17.
[34] *Ibid.*, 57-58.
[35] *Ibid.*, 90.
[36] *Ibid.*, 20, 32, 39, 51, 86, 88-89, 92-95, 101, 106, 110.

spectators, many of whom were Socialists, to applaud at their conclusion; what effect they had on the jury is impossible to determine. Stedman conceded that Debs abhorred war; he told the jury that by the end of the trial it would know the Socialist leader "by his works, by the works of his whole life." He pointed out that the transcript of the Canton speech, on which the indictment was based, was incomplete, that it omitted "words and even whole paragraphs." "You would not," he asserted, "indict Woodrow Wilson because he wrote in his book, *The New Freedom*, that wars are brought by the rulers and not by the people."[37]

It has been customary in narratives describing the trial to credit Debs with an almost saintlike charity toward those who testified against him. "Mr. Miller," he told the Cleveland *Plain Dealer* reporter, "I don't want you to ever feel that you have done me an injury by testifying against me. You had to do it and you did it like a gentleman." He said to Virgil Steiner, the young Canton stenographer who was hired by the Justice Department, who was not sufficiently skilled to record Debs's speech verbatim, and who left out long passages: "Never mind, sonny, you did the best you could under the circumstances. It wasn't fair to ask you to take that all down."[38]

Cunnea and Stedman, however, were not so kind. During the direct and redirect examination of Miller, they objected nineteen times to questions asked by the district attorney. The cross-examination was often intense and sometimes fractious. It involved in part the conversation in the lobby of the Courtland Hotel between Debs and Miller an hour before the Canton address:

Mr. Stedman: I want to know whether Mr. Debs particularized or said in what particular he would modify the St. Louis platform.

The Witness: Why I haven't understood you. He didn't go into any details.

Q. As you know that program was a rather long statement.
A. Yes, sir.

Q. It analyzes economic reasons, and goes into the reasons alleged for our entrance into the war?
A. Yes, sir.

Q. That was a hurried conversation.
A. Not so hurried as it was brief.

Q. How long would you say that conversation lasted?
A. Oh, between five and eight minutes.[39]

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[37] New York *Times*, September 10, 1918; Karsner, *Debs*, 18.

[38] *Ibid.*, 20-21; Morais and Cahn, *Gene Debs*, 100; quotation regarding Steiner from McAlister Coleman, *Eugene V. Debs: A Man Unafraid* (New York, 1930), 290-91; quotation regarding Miller from Ginger, *Bending Cross*, 365.

[39] Defendant's Bill of Exceptions, pp. 29-30, Debs File.

Steiner was subjected to a long series of questions during which Stedman demonstrated that the inexperienced Justice Department stenographer had failed to transcribe words, phrases, even paragraphs of the Canton address. There were at least thirty-five discrepancies between the speech recorded and the speech delivered. Most were minor; only a few appeared to misshape the meaning of the speech.

Q. Your notes show generally, however, that he was quoting what these men said, do they not?
A. No, sir, they do not.

Q. How do you explain the words, "They say that the I.W.W."
A. The way this sentence I just read appears in my notes it is as though Debs himself said it.

Q. You will not state that he didn't say the following: "Look into this pamphlet. Don't take the word of the Wall Street press for that. Get the pamphlet of truth about the I.W.W. by five men who are incorruptible, uncontaminated—five men who dared to want to know the truth and tell the truth to the American people, with the truth in this pamphlet. They say that the I.W.W. in all of its career never committed as much violence against the ruling class as the ruling class has committed against the I.W.W." Was that in his speech literally, and the context said by Mr. Debs at that time?
A. I have in my notes what I just read to you.

Q. Will you say that he did not say that at that time?
A. No, sir; I will not . . . .[40]

Stedman in his interrogations of Miller and Steiner attempted to cast doubt upon the reliability of the testimony of the government witnesses. He was not kind to Miller; he did not commiserate with Steiner. He demonstrated that the speech delivered by Debs in Nimisilla Park was not the speech that formed the basis of the indictment. He showed that the Steiner version was about 75 percent of the speech as taken down by Edward R. Sterling, the official stenographer of the Socialist party. But his efforts were futile. Judge Westenhaver overruled both the motion to exclude Steiner's evidence and the objection to Sterling's testimony on grounds of variance; if he had agreed with Stedman, neither form of the speech would have remained in evidence, and the trial would have been over.[41]

Whatever drama there was in the Debs trial occurred when the prosecution rested its case and the Socialist leader rose to speak in his own defense. The "tall, gaunt" figure in his threadbare grey suit stood in the hush of the courtroom, and for two hours his words came quickly and eloquently. ". . .we are not yet free," he declared.

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[40] *Ibid.*, 186-87.
[41] *Ibid.*, 142-44, 190-91.

"We are engaged today in another mighty agitation. It is as wide as the world. It means the rise of the toiling masses who are gradually becoming conscious of their interests, their power, and their mission as a class . . . who are slowly but surely developing the economic and political power that is to set them free." Later in his address he stated: "I am not on trial here. There is an infinitely greater issue that is being tried today in this court . . . . American institutions are on trial here before a court of American citizens. The future will render the final verdict."[42]

Wertz listened to Debs with ostensible impatience and boredom. In his summation to the jury the United States district attorney mocked the Socialist leader; he called Debs a self-righteous liar, a self-proclaimed Christ who believed that he held a monopoly over virtue and principle, a theorist "with a smattering of knowledge," the champion of the "half-baked" and "the non compos mentis." At Canton, with no patriotic decorations on the stand, with no American flag in sight, Debs poured out "his poison" to a "crowd of cheering and hollering men of all ages." The spectators "did not hesitate to voice their approval of what he said." The man who addressed the convention of the Ohio Socialist party on June 16, 1918, in the midst of war, "at a time when the very life of this nation . . . [was] at stake, and its honor in the balance," and advocated the St. Louis program, was "a traitor to the United States" and ought to be "imprisoned or shot, if there were such a law permitted in this country." Wertz enmeshed the Canton speech with the St. Louis platform; the address, he argued, was a means by which the Socialist antiwar program would be effectuated.

> Let us see what they say in this platform: "The Socialist party of the United States in the present grave crisis . . . ." Let us see what he says on that subject: "It is true that these are anxious, trying days for all of us—testing days for the women and men who are upholding the banner of the working class . . . a time in which the weak and cowardly will falter and fail and desert . . . . They who have the moral courage to stand erect and assert their convictions, stand by them; fight for them; go to jail or to hell for them . . . , they are writing their names in fadeless letters in the history of mankind."

Wertz had no doubt what Debs had in mind, about what he intended. "Debs would bring," he concluded, "the Bolsheviki to the United States."[43]

Despite his vitriol and vituperation the United States district attorney was capable; in his summation he made an important constitutional argument, pointing out that the men who falsely shouted fire in a crowded theater and started a panic with tragic result could be indicted, tried, and convicted of murder and "sent to the

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[42] New York *Times*, September 12, 1918; Eugene V. Debs, *Writings and Speeches of Eugene V. Debs* (New York, 1948), 435, 436.

[43] Defendant's Bill of Exceptions, pp. 340-75, Debs File.

Reproduced from Cleveland *Plain Dealer*, September 12, 1918.

electric chair." According to Debs, Wertz averred, such a punishment would be an abridgement of free speech, but certainly the First Amendment afforded no protection to the accused. The district attorney offered further examples. Debs would say, he claimed, that the man who, against Ohio law, made false reports and statements about the solvency of a bank could not be punished because he was safeguarded by the First Amendment. Similarly, the person who slandered a woman's reputation would be immune from prosecution. The difficulty with the Debs construction of the First Amendment, Wertz concluded, was that the Socialist knew "just enough about the Constitution and the law to get him in trouble."[44]

Although less dramatic, perhaps the most important part of the Debs trial from a legal perspective was the dispute between judge and defense over the issue of intent. The government had the burden of proof to demonstrate a specific intent by Debs to violate those clauses of the Espionage Act for which he was being tried. Miller's testimony, the calling of Ruthenberg and Triner to the witness stand, the introduction into evidence of the indictments of Ruthenberg and his associates and of O'Hare and Stokes, all were for the purpose of proving intent. Stedman objected to the reading of the Canton speech and the St. Louis antiwar program into evidence. He contended that Miller's testimony did not demonstrate what "portion" of the Socialist program, "what paragraphs or what sections Mr. Debs endorsed." He urged, "An intent goes to the method of accomplishing a result. . . . [It is] the means used to accomplish the executing the motive to carry out." The defense attorney compared Miller's conversation with Debs to a revolver: "If I say I am going to kill a man with a revolver and I repeat it a dozen times, and the man is killed, you introduce it [the revolver] to show what? Intent. The method of accomplishing the execution of the individual whose life I wish to destroy." In Debs's general endorsement of the St. Louis platform, however, there was no evidence to show what was in his mind, to elucidate what was his intent. There was "no unqualified approbation or approval of the contents of that document. On the contrary, the evidence shows that there was not such an approval."[45]

Judge Westenhaver's immediate response was to overrule the objection. He returned to the issue of intent in his instructions to the jury. Debs, he said, contended that by the Canton address he intended merely "to convey information to his fellow citizens of the United States in the exercise of a constitutional right of freedom of speech and of freedom of assembly for the purpose of canvassing and discussing public affairs." In the process of distinguishing be-

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[44] *Ibid.*, 340-42.
[45] *Ibid.*, 242-45.

tween "motive" and "intent," the judge confused the definitions of the two words by analogizing Debs to the father of a large family. The father steals bread for his starving children and "also to deprive the owner of its value." The father has two motives, Westenhaver stated, one good and one evil, but he is still guilty, "for he law says he may not steal at all."[46]

In order to preserve the distinction between "motive" and "intent," what Westenhaver should have said was that the father had a good motive and a bad intent, words that he did use to characterize the Canton address. Debs made the speech. He may have had a good motive—to convey information—but he also had a criminal intent—to violate the Espionage Act. But good motive is irrelevant; the law says that he may not infringe the congressional proscriptions.[47] Like all other persons, argued Westenhaver, Debs was "presumed to intend the natural and probable consequences of his word and acts." The question in his case was "did he intend or expect" that his Canton address would influence his audience, composed in part of men of draft age. "Ought he not to have reasonably foreseen that the natural and probable consequences of such words and utterances would or might be to cause insubordination, disloyalty, or refusal of duty in the military forces of the United States? Or to obstruct the recruiting or enlistment services of the United States? Or to incite, provoke, encourage people to resist the United States? Or to promote the cause of its enemies?" Westenhaver said that as "a part of [his] burdensome and unpleasant task," it was incumbent upon him to hold that the Espionage Act as amended was constitutional; it was the supreme law of the land, enacted to protect the "public peace and public safety during war." The wisdom of passing the Espionage Act was not for him or for the jury to decide; it was their duty "to accept that law from the Court and to apply it." "Disapproval of war," he admonished the jury, "is not a crime, nor is the advocacy of peace, unless the words or utterances . . . shall be willfully intended by the person making them to commit the acts forbidden . . . and further, not even then unless the natural and reasonably probable tendency and effect of such words and language . . . will have the effect and consequences forbidden by the law."[48]

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[46] *Ibid.*, 402-404.

[47] The text of Westenhaver's instruction reads in part: "You should be careful not to mix motive and intent. Motive is that which leads to the act; intent is that which qualifies it. . . . So in this case, no matter if the defendant's motive and purpose may have been good and had been merely that which I have above stated is a part of his contention, to convey information to his fellow citizens in the assumed exercise and in the belief that he was rightfully exercising a constitutional right of free speech, he is nevertheless guilty if he has the specific intent to accomplish the acts and to produce the effects and results forbidden by the specific provisions of the law to which I have called upon your attention." *Ibid.*, 404.

[48] *Ibid.*, 408-10.

The jurymen retired for their deliberations at about eleven o'clock on the morning of Friday, September 13, 1918. Four of the original ten counts of the indictment survived: the causing of insubordination in the armed forces, the obstruction of enlistment and conscription services, the incitement to resistance, and the opposition to the cause of the United States. Each carried a prison term of twenty years or a fine of $10,000 or both. The jury returned to the courtroom at 6:00 p.m. Foreman Cyrus H. Stoner read the verdict of not guilty on the charge of opposing the cause of the United States in World War I and guilty on the other three counts. The next day, after denying motions for a new trial and an arrest of judgment, Westenhaver sentenced Debs to ten years in the federal penitentiary at Moundsville, West Virginia. "Across the face of the County Court House, as the train pulls out of Cleveland," wrote Eastman, "you read in great marble letters the motto 'Obedience to Law is Liberty.' And by means of just such fatuous sophism as that the powers that want industrial feudalism and bureaucracy perpetuated after the war ends, will get it if they can."[49]

But the Debs case was not yet over. On the same day as the sentencing the defense lawyers filed a Writ of Error and on October 8, 1918, an Amended Assignment of Errors in the Federal District Court for the Northern District of Ohio. The assignment restated old arguments and added, with extracts from precedent, the refusal of Westenhaver to restrict the district attorney's summation, to remove for cause jurymen Josiah T. Grant and Charles H. Harris, and to permit James Decker to answer certain questions relating to his view of the First Amendment. It referred, moreover, to the admission of incompetent evidence and to the failure to sustain exceptions to the instructions in whole or in particular.[50] A Bill of Exceptions of over 250 pages was later submitted to the United States Supreme Court followed by a 126-page Brief for the Plaintiff in Error.

Although seemingly ignored by historians, the preface to the brief is perhaps as important as the technical arguments raised within the brief itself. An explanation of the role of Debs's lawyers in the defense of their controversial client, as Stedman and his associates perceived it, the preface stated that Debs came before the court "like any other person, charged with crime," entitled to a defense incorporating the raising of every error that has "thwarted the established requirements of a criminal proceeding." In addition, Debs was unique. Four times a presidential candidate, he was to millions of Americans the symbol of integrity and liberty under

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[49] Eastman, "Trial of Eugene Victor Debs," 12.
[50] Writ of Error, Supreme Court File.

the First Amendment. Admitting the content of the Canton speech as "actually made," the defense would no longer argue about differences between the speech as made and as recorded in the indictment. Instead, it would address other issues considered "highly prejudicial." Debs's attorneys practiced the arts of their profession, yet remained mindful of the primacy and centrality of the First Amendment. The presentation of other legal errors would not detract from the Socialist leader's "firm stand upon his public expressions as within his right of free speech under the Constitution."[51]

With this understanding of its legal duty, the defense, with citations of precedent, complained of an indictment that failed to charge a crime and argued the impropriety of the definitions of "military and naval forces" and "the recruitment and enlistment services" contained in the judge's instructions. They further protested the improper admission of the St. Louis platform and of court records in the Ruthenberg, Stokes, and O'Hare cases. For what purpose were the indictments in other cases, the St. Louis platform, and the testimony of Joseph Triner entered into evidence? Judge Westenhaver had said that it was to demonstrate Debs's intent, to explore his state of mind. In the judge's instructions to the jury there was "a reiterated suggestion that this intent could be read into . . . [the Canton] speech by the jury, from all these other sources, and then read out again as if coming from the language of the Canton speech itself." The Canton address and the St. Louis platform were, therefore, "merged into one," and so were intent and motive. Motive, the defense argued, was irrelevant: the "only 'state of mind' which comes within the issues of this case is the specific criminal intent to effect the criminal results charged." The brief insisted that "other utterances which do not incorporate themselves in the 'particular means' as affecting the Canton audience—can have no application to the issue of intent in this case."[52]

In solemn and stately language the Debs defense then reached the First Amendment argument. "The millions in many countries who respond to the idealism of Eugene V. Debs, from one angle to another," it noted, "will bluntly speak of the . . . case as a free speech fight." They will ask: "What degree of tolerance of minority sentiments is to be read out of or into the American Bill of Rights in the year 1919 by the court of the last resort?" Twenty years ago Professor Woodrow Wilson had characterized the origins of the United States as a nation. "*We have forgotten*," he said, "*the very principles of our origin if we have forgotten how to object, how to resist, how to agitate, how to pull down and build up, even to the*

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[51] The Brief for the Plaintiff in Error is included in National Socialist Party, *The Debs Case: A Complete History* (Chicago, n.d.), 1-87. For the preface to the brief, denominated as the Statement of Case, see pp. 1-32.

[52] *Ibid.*, 48-54.

extent of revolutionary practices, if it is necessary, to readjust matters."[53] Debs's lawyers argued that the guarantee of freedom to object and to agitate was the same during wartime as in peace; it was not diminished by the exigencies of conflagration or heightened by the calmness of peace. War was a crucial subject matter of public discussion. The war just ended had been hotly and bitterly "debated in Congress and throughout the country." The verbal conflict might have been divisive, even subversive of governmental purpose, but could not under the First Amendment be deferred until war had run its destructive course for it would then no longer have possessed the "vitality of national immediacy."[54]

Debs's lawyers insisted that the speech made to the Canton audience fell within the ambit of the Bill of Rights. Debs hated war, and he spoke against it. He urged his listeners to embrace the Socialist crusade. He exhorted them to enlist in the emancipation of the human race. "Join the Socialist Party [he evangelized]. Don't wait for the morrow. Come now. Enroll your name; take your place where you belong. . . . You need to find yourself—to know yourself. You need to know that you are fit for something better than slavery and cannon fodder. . . . You need to know that you are on the edge of a great new world."[55]

If the Supreme Court of the United States affirmed Debs's conviction, the brief continued, it would lend credence to the proposition that the topics of war and of Socialism were unmentionable during wartime. It would demonstrate that the Espionage Act could be used for the purpose of "suppressing during war an exposition and exhortation toward Socialism." The First Amendment stated unequivocally that "Congress shall make no law . . . ." "No law" meant no law. Either, Debs's defense argued, it "means all that it says . . . or it means absolutely nothing." It "must be declared in the broad terms of its universal understanding as the primary condition of human progress."[56]

In January, 1919, there was yet another brief submitted to the Supreme Court on behalf of Debs. As *amicus curiae*, Gilbert E. Roe, the former law partner of Senator Robert M. La Follette, concentrated almost exclusively upon freedom of speech as guaranteed by the Constitution. In his preface Roe noted: "Because of my interest in other litigation involving the same questions as those involved in . . . [*Debs*], I am particularly desirous of having called to the attention of this Court those authorities and suggestions which seem to me to bear upon the questions to be decided."[57] Roe discounted

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[53] *Ibid.*, 61-63.
[54] *Ibid.*, 75-77.
[55] *Ibid.*, 82.
[56] *Ibid.*, 86-87.
[57] Gilbert E. Roe, *Amicus Curiae* Brief, p. 2, *Debs* v. *United States*, Box H11, La Follette Family Papers (Library of Congress, Washington, D.C.)

the views of William Blackstone. The Englishman's definition of a free press as being protected solely against prior censorship makes the First Amendment "utterly useless as a guarantee of liberty." Blackstone died in 1780, eleven years prior to the ratification of the Bill of Rights, and his *Commentaries* had been completed by 1769. Besides, the English judge also believed in "witchcraft and sorcery" as the "revealed will of God," a fact of "historical interest," along with his construction of the rights of a free press. "There is," Roe argued, "no more reason for accepting his belief about one than about the other as a measure of liberty and freedom in this country today."[58]

Instead, Roe emphasized the Kentucky and Virginia resolutions as the true indicators of the preferred position that free speech and press enjoyed in the United States. Like the Espionage Act of 1917 the Sedition Law of 119 years earlier—as interpreted by the courts—protected the federal government, "which really meant the Administration in power, from hostile criticism and condemnation."[59] But James Madison and Thomas Jefferson had both repudiated the congressional usurpation of power over speech and press. The Sedition Act was repealed; prisoners convicted under its clauses were pardoned; and fines paid were returned. Congress may have a delegated power to lay and collect taxes, said Roe, but by the First Amendment it may not penalize criticism of the taxing policies of the government. Congress may declare war; it may raise and support an army and a navy; but it may not, without flouting constitutional guarantees, act to quell verbal opposition to war and to conscription. "Our historic freedom of speech and of the press remains inviolate," Roe declared. "If the breach" made by the Espionage Act" in the wall of constitutional liberty is not speedily and permanently repaired, it will certainly be enlarged as one exigency after another seems to make it necessary, until the whole structure will give way before the assaults of the real enemies of constitutional and democratic government."[60]

The briefs filed, the oral argument of Case No. 714, *Debs* v. *United States*, took place before the Supreme Court on January 27 and 28, 1919, Seymour Stedman from the petitioner, John Lord O'Brian for the government. The arguments of counsel followed those set forth in their respective briefs.[61] Less than two months later on March 10, in a unanimous opinion written by Justice Oliver Wendell Holmes, Jr., occupying only five pages in *United States Reports*, the conviction of Eugene Victor Debs for obstructing the nation's recruitment and enlistment services was affirmed.

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[58] *Ibid.*, 23-24.
[59] *Ibid.*, 33.
[60] *Ibid.*, 21.
[61] The briefs of counsel are summarized in *Debs* v. *United States*, 63 L.Ed. 566 (1919) at 566-68.

Significant in Holmes's decision was the justice's placement of the opinion in the context of the Canton address and the trial, in Westenhaver's instructions to the jury and in the conflict over the admission of testimony and documents. Holmes conceded that Debs's primary intent was to enlist new members in the Socialist cause: "The main theme of the speech was socialism, its growth, and a prophecy of ultimate success." "With that," Holmes wrote, "we have nothing to do . . . ." Holmes then, however, adopted Westenhaver's theory of intent. The Canton speech was not immunized "if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service . . . ." In short, Debs may have had two intents, one innocuous, one criminal, and "if in passages such encouragement was directly given" he had violated the Espionage Act.[62] In the Canton speech Debs alluded to Ruthenberg, Wagenknecht, and Baker, who had been convicted of aiding and abetting Alphons J. Shue in his refusal to register for the draft. Debs had been coy. He stated that he had to be "prudent" and might not be able to say "all that he thought." Nevertheless, he did praise the Cleveland Socialists, and he did laud their efforts "to better the conditions of mankind." Debs discussed and criticized the convictions of O'Hare and Stokes and confessed that if the latter "were guilty, so was he." He had told his audience at Canton: "the master class has always declared wars and the subject class has always fought the battles," and "you need to know that you are fit for something better than cannon fodder." All this, averred Holmes, went to demonstrate the illegal intent of the Socialist leader. And there was more. In his speech to the trial jury Debs had admitted that he hated war in general and the war then being fought "in particular." In the conversation with Miller "an hour before his speech," during which Debs had endorsed the Socialist antiwar program, and again, although his attorney had strenuously objected to its admission, in the address to the jury, the defendant had referred to the St. Louis platform "seemingly with satisfaction and willingness that it should be considered as evidence."[63]

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[62] *Debs* v. *United States*, 249 U.S. 211 (1919) at 212-13.

[63] *Ibid.*, at 213-15. Holmes was later criticized for the inconsistencies between his *Debs* opinion and his dissent in *Abrams* v. *United States*. In a speech before the New Jersey Bar Association on June 18, 1921, Henry W. Taft pointed out that Holmes in his *Abrams* dissent argued that "the conduct of the defendant was not 'with intent' to curtail production of munitions . . . so as 'to cripple or hinder the United States in the prosecution of the war,' because a man 'does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.' " The rule was different, Taft said, in the *Debs* case. "In the *Debs* case," he noted with approval, "where bad intent was inferred from a speech mainly dealing with socialism, Justice Holmes had said that 'if a part of 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'; and he added that the evidence

Holmes disposed of the argument that the Espionage Act was unconstitutional on its face by citing as authority his own opinion in *Schenck* v. *United States*, which had been decided a week earlier.[64] In regard to the Espionage Act as applied, he found the instructions of Westenhaver "most carefully" given and scrupulously correct: the jury could not "find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting services, & c., and unless the defendant had the specific intent to do so in his mind."[65]

Like Wertz and Westenhaver before him, Justice Holmes had merged the Canton address and the St. Louis platform, and like the district attorney, he had used Debs's words in the speech to the jury against the defendant. Less than an opinion about the friction between freedom of speech and the Espionage Act, the affirmance of conviction revolved around the issue of intent and the admissibility of evidence to probe Debs's "state of mind." Applauding Holmes's opinion the New York *Times* called Debs an "enemy" of the Constitution. "How could he reasonably expect that it would fail to defend itself against him?"[66]

The enemy of the Constitution had no such expectations; nor did his attorneys. Nevertheless, on March 27 they filed a Petition for a Rehearing, which the court denied four days later without opinion. The petition focused primarily and tellingly on Debs's speech to the trial jury. Insisting that neither his professions of antipathy toward war nor his allusion to the platform were evidence, Debs's lawyers claimed that both were merely expressions of opinion and were simply arguments made during a summation, thus equivalent to statements made by the district attorney in his closing address to the jury. Debs had not taken the witness stand, been sworn, or cross-examined. According to his lawyers, he had acted as his own attorney; therefore, no matter what he said, his remarks should not have been utilized in Holmes's opinion as tes-

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justified the conclusion that bad intent existed." Henry W. Taft, "Freedom of Speech and Espionage Act," *American Law Review*, LV (June, 1919), 695-721, esp. 704-705.

[64] *Debs* v. *United States*, 249 U.S. at 215. In *Schenck* v. *United States* Holmes had enunciated the "clear and present" danger test as the proper construction of the free speech guarantee. See *Schenck* v. *United States*, 249 U.S. 47 (1919). Holmes was later taken to task for not applying clear and present danger to the *Debs* case. Chafee, "Freedom of Speech," 90. See also Fred D. Regan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *Journal of American History*, XVIII (June, 1971), 24-45. Regan argues that clear and present danger as initially conceived by Holmes was a narrowing gloss on the First Amendment and that it was by reference applied in both the *Debs* and *Frohwerk* cases decided on March 10, 1919. He also credits Chafee, along with Ernest Freund and Learned Hand, with causing Holmes to change his mind about the First Amendment protection in the *Abrams* case. *Ibid.*, 36-43.

[65] *Debs* v. *United States*, 249 U.S. at 216.

[66] New York *Times*, March 12, 1919.

timony to his state of mind. "Does it become evidence," the petition asked rhetorically, "because the defendant 'seemingly' was willing that it should so become? Is law made that way? What a strange character is introduced here without credentials."[67] Debs's far from perfunctory legal defense had ended.

From the time of Debs's indictment to the rejection of the final petition, June 29, 1918-March 31, 1919, Stedman and his associates had used every legal maneuver to save their client from his rendezvous with prison. They tried to take advantage of every loophole and to exploit every technicality. Filing motions, petitions, briefs, and memoranda, they challenged the grand jury on the ground that it was unlawfully composed. They argued for an acquittal on the basis of variance between the Canton speech as recorded by Edward Sterling and the version contained in the indictment. They draped the mantle of the First Amendment around the Canton address. They tried to insure that the trial jury was unprejudiced and that incompetent evidence not be made part of the record. They pursued their arguments to the Supreme Court of the United States. That they failed should not detract from their skilled and spirited defense. Their legal skills have too long been slighted by historians.

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[67] James D. Mayer to Seymour Stedman, March 31, 1919, Supreme Court Files; *The Debs White Book* (Girard, Kans., n.d.), 91-93.