



Transcript of Record

**Masses Publishing Co. v. Patten**

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278

Sept 7 1917

Yulius E. Pore.  
Attorney for appellee

**United States Circuit Court of Appeals**

FOR THE SECOND CIRCUIT.

T. A. PATTEN, Postmaster of the City of New  
York,

Appellant,  
(Defendant below),

vs.

MASSES PUBLISHING COMPANY,

Appellee,  
(Complainant below).

**TRANSCRIPT OF RECORD**

APPEAL TO THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF NEW YORK.

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1

**Notice of Appeal and Order Allowing Appeal.**

**United States District Court**

SOUTHERN DISTRICT OF NEW YORK.

2

MASSES PUBLISHING COMPANY,  
Complainant,

against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

In Equity  
E 14-225.

To the Honorable the Judges of the District Court  
of the United States for the Southern Dis-  
trict of New York:

3

*John J. Riely*

~~T. G. Patten~~, Postmaster of the City of New  
York, by Francis G. Caffey, United States Attorney  
for the Southern District of New York, his at-  
torney, feeling aggrieved by the interlocutory de-  
cree made and entered in the District Court of the  
United States for the Southern District of New  
York on the ~~26th~~ day of ~~July~~, 1917, in the above  
entitled suit, granting an injunction pendente  
lite as prayed for in the bill of complaint here-  
in, does hereby appeal from said decree to the

*Ernest P. ...*

*4 June 1926*

4

*Subpoena.*

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Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignments of Error hereto annexed and filed herewith, and prays that this appeal be allowed and that a transcript of the papers and proceedings upon which said decree was made, duly authenticated, be sent to the said Circuit Court of Appeals for the Second Circuit.

Dated, New York, ~~July 26, 1917.~~

*June 1926*  
*Ernest R. Bushnell*

5

**FRANCIS G. CAFFEY,**  
United States Attorney,  
Solicitor for Appellate-Defendant.

Appeal as prayed for is hereby allowed.

Dated ~~July 26, 1917.~~

*June 1926*

**MANTON,**  
U. S. D. J.

---

**Subpoena.**

6

The President of the United States of America, to  
T. G. Patten, Postmaster of the City of New  
York:

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Masses Publishing

*Subpoena.*

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Company, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two hundred and fifty dollars (\$250).

WITNESS, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 12th day of July in the year one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty

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ALEX. GILCHRIST, JR.,  
Clerk.

GILBERT E. ROE,  
Plaintiffs Sol'r.

The defendant is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

9

(Seal) ALEX. GILCHRIST, JR.,  
Clerk.

10

**Bill of Complaint.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY,  
Complainant,

against

11 T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

In Equity  
No. 14-225.

To the Honorable Judges of the United States  
District Court for the Southern District of  
New York:

The complainant above named brings this, his  
bill of complaint, against the defendant and com-  
plains and alleges as follows:

12 FIRST.—Complainant is and was at all times  
herein mentioned a corporation duly organized and  
existing under the laws of the State of New York,  
with its principal office and place of business at  
34 Union Square, East, Borough of Manhattan,  
City of New York, and engaged in the business of  
publishing, among other things, a monthly maga-  
zine known as "The Masses," owned by said com-  
plainant.

SECOND.—The defendant is and was at all times  
herein mentioned the Postmaster of the City of  
New York, in said State of New York, and in his

official capacity as Postmaster in said City of New York has the control of the receiving and distribution of mails in and through said Post Office in the City of New York.

THIRD.—The said magazine called “The Masses” is a monthly publication of about fifty (50) pages, with a circulation of from twenty to twenty-five thousand copies and circulates extensively through the City and State of New York, as well as other states, and that for a number of years last past the said magazine has so circulated and has been received freely at the Post Office of the City of New York and elsewhere and transmitted through the same and circulated therefrom upon the payment to the postal authorities of the amount required upon second class mail matter. It is absolutely necessary to the maintenance of said magazine and to its continued publication and circulation that the said magazine should be freely received at and delivered and circulated from the said Post Office in the City of New York and not be held up or discriminated against or the delivery thereof delayed by the said defendant or other person exercising control over the delivery of mail from said Post Office. The retail price of said magazine is fifteen (\$.15) cents a copy and the subscription price One and 50/100 (\$1.50) Dollars a year. For more particular description of said magazine, complainant begs leave to attach a copy of the August, 1917, number or issue of said magazine, more particularly hereafter referred to, and alleges that all other August, 1917, numbers of said magazine are identical with the copy hereto attached and marked “Exhibit A.”

16

FOURTH.—According to the usual course of business of said complainant in publishing its said magazine, called "The Masses," the said issues of the magazine designed for circulation through the mails and particularly those intended for circulation in different portions of the United States are delivered properly wrapped and postage paid at the Post Office at the City of New York from the 1st to the 10th of each month. Pursuant to this course of business, the complainant caused to be delivered many hundred copies of said magazine of the August, 1917, number, identical with Exhibit A herein, to the defendant as Postmaster of said City of New York on and between the 1st and 5th days of July, 1917, for the purpose of having the same transmitted through the mails to their destination, and that said magazines were properly wrapped and addressed in the usual way, and the postage thereon duly paid to the proper Post Office Official in said Post Office, agent of said defendant, as required by law, which said money was duly received and has ever since been retained by said defendant in his said official capacity. Shortly after said magazines were received at said Post Office for mailing and the postage paid thereon as above stated, and on or about July 5th, 1917, complainant received from said defendant the following letter:

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*Bill of Complaint.*

19

“Office of the Postmaster,  
United States Post Office,  
TFM New York, N. Y.

In replying  
please refer  
to initials and  
date. SMC.

Publishers of “The Masses,”  
34 Union Square, East,  
New York, New York.

Gentlemen :

Confirming the information telephoned to  
you to-day you are informed that according to  
advice from the Solicitor for the Post Office  
Department, the August 1917 issue of “The  
Masses” is non-mailable under the Act of June  
15, 1917. 20

Very respectfully,

T. G. PATTEN,  
Postmaster,  
Per THOS. F. MURPHY,  
Assistant Postmaster.”

M-jj

21

The reference in said letter to a telephone con-  
versation is to a communication received by Merrill  
Rogers, the business manager of the complainant,  
over the telephone, from some assistant of the de-  
fendant in said Post Office to the effect that said  
magazines would not be mailed or transmitted  
from said Post Office, but said conversation adds  
nothing to the information contained in said letter.  
Although complainant has repeatedly applied to  
the defendant, his agents and representatives and  
to the solicitor for the Post Office Department to  
ascertain more definitely than is stated in said

22

letter the grounds for the exclusion of said magazine from the mails, complainant has been able to obtain no further information upon said subject, but said magazines are still held at said Post Office by order of the said defendant as Postmaster and he refuses to permit the same to be delivered or transmitted therefrom.

23

FIFTH.—Complainant further shows that said magazines so held by said defendant and refused access to the mails, as above stated, are, as complainant is informed and verily believes, in every respect mailable under the Act of June 15, 1917, and under any and all other laws of the United States, and that complainant has, in all respects, duly complied with all provisions of the law to entitle complainant to have said numbers of said magazine duly mailed and transmitted through the Post Office as ordinary second class matter, and that the act and conduct of said defendant in refusing to mail said magazines and holding the same to be non-mailable is wrongful and unlawful and not authorized by law. Complainant further

24 alleges that it was not and never has been accorded any opportunity to be heard in the matter of determining said magazines to be non-mailable either by said defendant or any other post office official. The action of said defendant in treating said magazines as non-mailable matter and refusing to mail the same, if continued, will work irreparable injury to the complainant, will completely ruin the business thereof and damage said complainant in the sum of many thousands of dollars and that said loss, damage and injury will amount to a sum far in excess of \$3,000 and that complainant is wholly without any remedy at law, in con-

sideration whereof, complainant is remediless in the premises by the rules of the Common Law and is relievable only in a Court of Equity in this suit,

WHEREFORE complainant prays that this Honorable Court will grant unto him due process of subpoena directed to said defendant commanding said defendant to appear herein and to answer but not under oath, answer under oath being hereby expressly waived, and to abide and perform such directions and decrees as may be made in the premises; that an injunction forthwith issue enjoining and restraining the defendant, his agents, servants and employees and all persons whomsoever from treating the August, 1917, issue of said magazine, known as "The Masses" as non-mailable under the Act of June 15, 1917, or any other Act or Law whatsoever and that said defendant, his agents, servants and employees be forthwith commanded to transmit said magazines through the mail in the usual way and accord to complainant thereon the rights and privileges of second class mail matter whereon the lawful postage has been duly paid and received by the proper post office officials; that it be adjudged and determined by this Honorable Court that said magazines, particularly the August, 1917, issue thereof, is mailable under the Act of June 15, 1917. That an order to show cause forthwith issue requiring said defendant, at the time and place therein specified to show cause why an injunction should not issue pendente lite, enjoining and restraining the defendant, his agents, servants and employees and all other persons whomsoever from treating the August, 1917, issue of said magazine,

*Bill of Complaint.*

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known as "The Masses" or any numbers thereof, as non-mailable, under the Act of June 15, 1917, or any other Act or Law whatsoever, and that said defendant, his agent, servants and employees be forthwith commanded to transmit said magazines through the mail in the usual way and accord to the complainant thereon the rights and privileges of second class mail matter whereon the lawful postage has been duly paid and received by the proper post office officials. That it be adjudged and decreed that the said defendant was wholly without authority or jurisdiction to determine that said magazines were non-mailable and that the order and action of said defendant in the premises is wholly void. That complainant recover its costs and disbursements in this action and have such other further order, judgment or relief in the premises as may be just and proper.

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GILBERT E. ROE,  
Solicitor and of Counsel for Complainant,  
55 Liberty Street,  
Borough of Manhattan,  
City of New York.

30

State of New York, }  
County of New York, } ss.:

Max Eastman being duly sworn, says that he is President of the Masses Publishing Company, the complainant herein. That he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true within the knowledge of this deponent, except as to the matters therein stated to be alleged on information

*Bill of Complaint.***31**

and belief, and as to those matters he believes it to be true.

That the reason why this verification is not made by the complainant is that the complainant is a corporation; that deponent derived his knowledge of the facts set forth in the foregoing Bill of Complaint in the discharge of his duties as president of the corporation as aforesaid, and through investigations caused to be made as to the subject matter thereof by this deponent.

**MAX EASTMAN.****32**

Subscribed and sworn to before me this  
12 day of July, 1917.

**JOHN M. SCOBLE,**  
Notary Public,  
Kings Co. No. 405.  
Kings Co. Reg. No. 9165.  
Cert. filed N. Y. County.  
N. Y. County Reg. No. 9358.

**33**

34

**Order to Show Cause.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY,  
Complainant,

against

35 T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

E 14-225.

Upon the duly verified bill of complaint, duly verified and filed this 12th day of July, 1917, and the writ of subpoena herein, and the affidavits of Merrill Rogers and Max Eastman, duly verified and filed this 12th day of July, 1917, and upon motion of Gilbert E. Roe, Esq., solicitor for complainant, it is

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ORDERED, that the defendant show cause, if any he have, before the undersigned, one of the judges of the District Court of the Southern District of New York, at his Chambers, in the Woolworth Building, in the Borough of Manhattan, City of New York, on the 16 day of July, A. D. 1917, at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an injunction should not issue pendente lite, as prayed in the bill of complaint herein, and enjoining and restraining the defendant, his agents, servants and employees, and all other persons whomsoever from treating the

*Order to Show Cause.*

37

August, 1917, issue of said magazine, or any numbers thereof, known as "The Masses" as non-mailable, under the Act of June 15th, 1917, or any other Act or law whatsoever, and that said defendant, his agents, servants and employees, be forthwith commanded to transmit said magazines through the mail in the usual way, and accord to the complainant thereof, the rights and privileges of second class mail matter, whereon the lawful postage has been duly paid and received by the proper Post Office officials. And that the defendant show cause, at the same time and place, why the complainant should not have such other and further relief in the premises may be just and proper.

38

**ORDERED FURTHER**, that sufficient cause having been shown, service of this order, with copies of said bill of complaint, and of said affidavits, on the defendant on or before the 13 day of July, 1917, shall be sufficient service.

Dated, New York, July 12, 1917.

LEARNED HAND,  
D. J.

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*Affidavit of Max Eastman.*

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UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY,  
Complainant,

against

41

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

State of New York, }  
County of New York, } ss.:

42 Max Eastman, being first duly sworn, says that he is the president of the complainant above named, and the editor of the magazine known as "The Masses." Deponent has read the bill of complaint herein and knows the contents thereof, and hereby makes the several allegations and statements therein contained part of this affidavit, with the same force and effect as though herein specifically repeated. Deponent is familiar with the condition and business of the complainant and states that the holding up of said August, 1917, issue of the magazine referred to in the bill of complaint herein is ruining the business of complainant, and unless said magazines can be speedily released and the issue thereof received and transmitted through the mail in the usual way the business of complainant will be practically ruined, and the right to transmit the said magazine through the

mail, if accorded to complainant at a later date, would be unavailing.

The complainant is about to apply to this Court for a temporary injunction requiring the defendant to receive and transmit through the mails the August, 1917, issue of said magazine, and is advised by his counsel, Gilbert E. Roe, Esq., that it is within the discretion of the Court to hear said motion upon an order to show cause instead of giving the usual notice of motion and bringing said motion on at a later date, and the order to show cause is therefore asked in order that said matter may be brought on for hearing and determination by the Court as speedily as possible.

(Sgd.) MAX EASTMAN.

Subscribed and sworn to before me  
this 12th day of July, 1917.

(Sgd.) JOHN M. SCOBLE,  
Notary Public, Kings Co. No. 405.  
Kings Co. Reg. No. 9165.  
Cer. filed in N. Y. County No. 435.  
N. Y. County Reg. No. 9358.

46

*Affidavit of Merrill Rogers.*

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY,  
Complainant,

against

47

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

State of New York, }  
County of New York, } ss.:

Merrill Rogers, being first duly sworn, on oath deposes and says:

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That he is the business manager of said complainant and has occupied that position during all the times herein mentioned. That it is a part of his duties, as said business manager, to supervise the publishing and mailing of the magazine owned and published by complainant, known as "The Masses." Deponent has read the bill of complaint, duly verified and filed this 12th day of July, 1917, and is familiar with all the facts and matters in said bill of complaint stated, and the same are true, and deponent herewith re-alleges the same and makes the same a part of this affidavit, with the same force and effect as though the said statements and allegations of said bill of complaint were herein repeated and set out in full.

Deponent had supervision of the presentation and delivery to the post office of the August, 1917, issue of "The Masses," as more particularly set out in the bill of complaint herein. That after said magazines had been presented to and received by said

post office, and postage thereon received and retained by the proper post office officials, deponent was notified, through the Ricker News Company, who, as agent, acted under deponent's directions, in delivering said magazines, that said magazines would not be permitted to go through the mail. This information was received by deponent on or about the 3rd day of July, 1917, following the delivery of said magazines to the post office a day or two previously. Deponent immediately called up the said post office on the telephone to inquire concerning said information, and talked with Mr. Mulkern, one of the assistants to the defendant, who advised deponent that said August, 1917, issue of the magazine had been held up in the post office awaiting advices from the solicitor of the Post Office Department at Washington. Thereafter, and on or about the 5th day of July, 1917, deponent received another telephone message from the said Mulkern, advising deponent that, according to advices from the solicitor for the Post Office Department, the said August, 1917, issue of the said magazine would be held non-mailable under the Act of June 15th, 1917. Thereafter the letter, a correct copy of which is set out in the complaint herein, was duly written to and received by deponent on or about the date thereof. Said letter constitutes the only written order or direction received by deponent or complainant concerning said matter, and neither deponent nor complainant has been able to obtain any further advice or information of the grounds of the said order of defendant, holding the said issue of magazine to be non-mailable than as herein stated.

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Deponent, on or about the 5th day of July, 1917, went to Washington, to see the solicitor for the Post Office Department, and did see the said solicitor, and inquired what, if any, portions of

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the August, 1917, issue of said magazine were regarded as objectionable, and what portions of the Act of June 15th, 1917, it was thought had been violated; and deponent, in behalf of complainant, offered to strike out from said magazine any matter which the solicitor for said Post Office Department might hold to be objectionable. The said solicitor, however, refused to specify any portion of the issue of said magazine which he regarded as objectionable, or the provision of law against which he thought it offended, but stated that he regarded the whole tone and tenor of the magazine as being in violation of the Act of June 15th, 1917. Deponent further says that no notice of any hearing was ever given to complainant or deponent upon the question of the mailability or non-mailability of said issue of said magazine, either by defendant, the solicitor of the department, or anyone else.

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54

Deponent further says that the detention of the magazines, so delivered to the post office, and the refusal to transmit them through the mails, is causing great and irreparable damage to the complainant and ruining its business, and that unless an order can be promptly obtained, requiring the transmission of said magazines through the mail, the business of the complainant will be ruined, and for that reason a short order to show cause is asked for herein, in order that said matter may be speedily heard and determined.

(Sgd.) MERRILL ROGERS.

Subscribed and sworn to before me this  
12th day of July, 1917.

JOHN M. SCOBLE,

Notary Public, Kings Co. No. 405.

Kings Co. Reg. No. 9165.

Cert. filed in N. Y. County No. 435.

N. Y. County Reg. No. 9358.

**Affidavits in Opposition to Motion. 55**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

<p style="text-align: center;">MASSES PUBLISHING COMPANY, Complainant,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">T. G. PATTEN, Postmaster of the City of New York, Defendant.</p>	}	56
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City of Washington, }  
District of Columbia, } ss. :

A. S. Burleson, being duly sworn, says that he is Postmaster General of the United States and has his official residence in the City of Washington, D. C.

The August number of the publication "The Masses" was declared non-mailable by the Solicitor for the Post Office Department, whose official duty it is to pass upon non-mailable matter, pursuant to personal directions of deponent after examination thereof by deponent as being in violation of Title XII of the Act approved June 15, 1917, and commonly known as the "Espionage Act." 57

The cartoons and articles in said issue considered by deponent to be more particularly in violation of said Espionage Act are:

58

*Cartoons:*

- Page 4 "Liberty Bell."  
 Page 9 "Conscription."  
 Page 26 "Making the World Safe for Capitalism."  
 Page 33 "Congress and Big Business."

*Articles:*

- 59 Page 10 "A Question."  
 Page 28 "A Tribute."  
 Page 29 "Conscientious Objectors."  
 Page 36 "Friends of American Freedom."

In connection with the meaning intended to be conveyed by said cartoons and articles in the current issue and the interpretation which would be placed thereon by habitual readers and subscribers of this periodical, the attention of the Court is respectfully drawn to the following extracts from the June and July, 1917, issues of "The Masses," copies of which are hereto annexed:

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*JUNE.*

Page 6, Article by Max Eastman, Editor of "The Masses," extract reading as follows:

"We wish to persuade those who love liberty and democracy enough to give their energy or their money or their lives for it, to withhold the gift from this war, and save it to use in the sad renewal of the real struggle for liberty that will come after it. We want them to resist the war-fever and the patriotic de-

lirium, the sentimental vanity, the sentimental hatred, the solemn hypocrisies of idealists, resist the ceremonious installations of petty tyranny in every department of our lives, resist conscription if they have the courage, and at whatever cost to their social complaisance save themselves for a struggle of human liberty against oppression that will be what it says it is."

Page 24, Article by Max Eastman, referring to majority resolution of Socialist Party, to wit:

62

"The only struggle which would justify the workers in taking up arms is the great struggle of the working class of the world to free itself from economic exploitation and political oppression. As against the false doctrine of national patriotism, we uphold the ideal of international working class solidarity. In support of capitalism we will not willingly give a single life or a single dollar; in support of the struggle of the workers for freedom we pledge our all."

63

\* \* \* \* \*

"We brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world."

Mr. Eastman says, at page 25:

"That these heretofore militant Socialists are so ready to forget the class character of our institutions, to talk about a citizen army 'controlled by the people,' to put it in the power of a capitalistic government to call out

the working class in the form of a trained army when and where and to what ends it will this shows how quickly the acceptance of national war brings surrender in the war for human liberty. It justifies the strong language of the majority report of the Socialist Party, and makes us the more joyful that they were able to stand up against the patriotic stampede."

65 *JULY.*

Page 5, Article by Bertrand Russell, entitled "War and Individual Liberty," with concluding paragraph, page 6, as follows:

66 "The young men of America will be performing the greatest possible service to their less fortunate contemporaries in Europe by maintaining, throughout the remainder of the war, the right of the individual to judge for himself whether he will engage in destruction at the bidding of men less wise and humane than himself, or whether he will preserve inviolate the claim that a Man's own estimate of right and wrong should be the ultimate arbiter of his conduct."

Page 18, Article by Max Eastman, entitled "Conscription for What?" and containing paragraph, bottom page 18:

"For my part I do not recognize the right of a government to draft me to war whose purposes I do not believe in. But to draft me to a war whose purposes it will not so

much as communicate to my ear, seems an act of tyranny, discordant with the memory even of the decent kings."

Page 22, Article by Rev. John Haynes Holmes, entitled "What Shall I Do?" advocating refusal to register and refusal to obey the draft.

Attention is also called to the following cartoons and articles in said issues as showing a persistent and continuing policy in violation of the purposes and intent of the laws commonly called the Conscription and Espionage Acts.

*JUNE ISSUES.*

*Cartoons.*

Page 4 "Come on in, America, the Blood's Fine!"

Page 11 "Empty Shells."

*Article.*

Page 25 "The Great Illusion."

*JULY ISSUE.*

*Cartoons.*

Page 4 Taken from "The Blast."

Page 7 "1920—Still Fighting for Civilization."

*Article.*

Page 8 "The Religion of Patriotism" (with which compare advertisement inside page 2, June, 1917, issue).

*Cartoons.*

Page 11 "After Elihu Root Gets Through with Russia."

Page 24 "Soldiers of the Common Good."

Page 26 "The New Freedom."

70

In connection with the articles on pages 28 and 36 of the August issue of the "The Masses," in which Emma Goldman and Alexander Berkman are spoken of as friends of American freedom for having advocated refusal to register in their paper "Mother Earth," deponent is informed and believes that the arrest and prison incarceration therein referred to arose by reason of the publication by said Emma Goldman and Alexander Berkman, in the June issue of "Mother Earth" of certain articles advocating resistance to the Act approved May 18, 1917, and popularly known as the "Conscription Act." Annexed hereto is a copy of the publication in question, and reference is respectfully made to the following extracts as showing that forcible resistance to the law was advocated by said persons:

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Page 107 "The conscription bill, to which liberals, generally, are opposed, carries hidden beneath it well defined facts which must be revealed. In its entirety this act is the instrument of a powerful despotism, more harmful by far than are visible and destructible armaments. We know that this bill perverts the meaning of the much advertised war theme—Democracy. These facts are too manifest for reiteration. There are no subtle distinctions made by liberty loving people in their objection to conscription in toto. Why, then, should there be no militant objection to the first integral part of it—REGISTRATION?"

Page 111. "Conscription is now a law, but that law in itself can't do things. It has to have 'force' behind it, and in a few months you may see all of those dear boys who volunteered into the army and navy, trained

soldiers, armed to the teeth, compelling and punishing American citizens who refuse to be conscripted. We will need about fifty thousand soldiers to enforce conscription and we will need a great many more soldiers to keep the workers in line and prevent strikes."

Page 113 "We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted."

Deponent is informed and believes that the said Emma Goldman and Alexander Berkman were, subsequent to the publication of said issue of "Mother Earth," duly convicted in the United States District Court for the Southern District of New York of a conspiracy to defeat the operation of the Conscription Act and are now serving sentence in and by virtue of said conviction. 74

(Sgd.) A. S. BURLESON.

Sworn to before me this  
19th day of July, 1917.

CHARLES E. DUNBAR,  
Notary Public.

(Seal) My commission expires May 18, 1921.

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*Affidavit of William H. Lamar.*

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSÉS PUBLISHING COMPANY,  
Complainant,

against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

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City of Washington,  
District of Columbia, } ss. :

78

William H. Lamar, being duly sworn, deposes and says that he is the solicitor for the United States Post Office Department. That as such, one of his duties is to pass upon the question of the non-mailability of matter deposited in the United States mails or offered for mailing and to instruct postmasters with respect thereto. That on or about the third day of July, 1917, he received from the Postmaster at New York a copy of the August number of the publication called "The Masses," with the request of the Postmaster for instructions as to its mailability.

Deponent has read the accompanying affidavit of Postmaster General Burleson, verified the 19th day of July, 1917, and states that the June and July, 1917, issues of "The Masses" thereto annexed and the June issue of the publication called "Mother Earth," also thereto annexed, were read by deponent prior to the time that he conferred with the Postmaster General with respect to the mailability of the August issue of "The Masses," and that they were taken into consideration in determining the

question as to the mailability of the August issue of "The Masses."

That the Postmaster at New York was instructed that the August issue of "The Masses" was non-mailable upon the direction of the Postmaster General; that before the Postmaster General directed this deponent to so instruct said Postmaster he, the Postmaster General, arranged a conference between deponent, the Attorney General of the United States, and Judge Advocate General Crowder of the United States Army, the latter being a lawyer and charged with the administration of the Draft Act; and that such conference was held at which the Attorney General, after examining portions of the said issue of "The Masses" of August, 1917, advised this deponent that its circulation would constitute an offense under the Espionage Act; that at said conference and immediately following the same, said Judge Advocate General Crowder also advised this deponent that the August issue of the said publication would constitute an offense under said Espionage Act and that as the military officer charged with the administration of the Draft Act and other laws affecting the military establishment of the United States, he expressed the view that the necessary effect of the said issue of the publication, "The Masses," would be to cause insubordination, disloyalty, mutiny, and refusal of duty in the Naval and Military Forces of the United States and obstruct the recruiting and enlistment service of the United States to the injury of the service and of the Government during the present war.

(Sgd.) WM. H. LAMAR.

Sworn to before me this  
19th day of July, 1917.

CHARLES E. DUNBAR,  
Notary Public. Seal.

My commission expires May 13, 1921.

82

**Affidavit.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

\_\_\_\_\_  
MASSES PUBLISHING COMPANY,  
Complainant,  
vs.

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.  
\_\_\_\_\_

83

State of New York, }  
County of New York, } ss.:

84 Max Eastman, being duly sworn deposes and says; that he is the President of the Masses Publishing Company and Editor of the "Masses." That the June and July issues of the Masses were both printed, published and mailed before the enactment of the Espionage Law. The June issue was printed, published and mailed before the enactment of the Draft Law, it having been published and mailed May 10th. The July issue was published and mailed on June 10th.

Deponent has never seen the copy of "Mother Earth" referred to in defendant's affidavits and in fact has only seen one copy of that publication and that was about two years ago.

MAX EASTMAN.

Sworn to before me this  
21st day of July, 1917.

JOHN M. SCOBLE,  
Notary Public, Kings Co.  
Cert. filed in N. Y. Co. No. 435.  
Filed July 23rd, 1917.

## UNITED STATES DISTRICT COURT,

85

SOUTHERN DISTRICT OF NEW YORK.

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MASSES PUBLISHING COMPANY,  
Complainant,

against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

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In Equity

No. E. 14—225.

86

Now comes the complainant, by Gilbert E. Roe, his attorney, on the argument of the motion for a temporary injunction herein, and specifies as grounds, among things, why the acts of the Postmaster complained of are void, that the Act in question of June 15, 1917, is unconstitutional and in violation of the Constitution of the United States and particularly in violation of the Fifth Amendment to the Constitution of the United States, in that it deprives the complainant and stockholders of complainant and others of property without due process of law, also that said Act violates the First Amendment to the Constitution of the United States in that it abridges freedom of speech and of the press.

87

Respectfully submitted,

GILBERT E. ROE,  
Attorney for Complainant,  
55 Liberty Street,  
Borough of Manhattan,  
City of New York.

Filed July 24, 1917.

88

**Opinion.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY

against

T. G. PATTEN, Postmaster of the  
City of New York.

89

The plaintiff applies for a preliminary injunction against the Postmaster of New York to forbid his refusal to accept its magazine in the mails under the following circumstances: The plaintiff is a publishing company in the City of New York engaged in the production of a monthly revolutionary journal called "The Masses," containing both text and cartoons, each issue of which is ready for the mails during the first ten days of the preceding month. In July, 1917, the Postmaster of New York, acting upon the direction of the Postmaster-General, advised the plaintiff that the August number to which he had had access would be denied the mails under the Espionage Act of June 15, 1917. Though professing willingness to excerpt from the number any particular matter which was objectionable in the opinion of the Postmaster General, the plaintiff was unable to learn any specification of objection, and thereupon filed this bill and now applies for a preliminary injunction upon a statement of the facts.

90 Upon return of the rule to show cause the defendant, while objecting generally that the whole purport of the number was in violation of the law, since

it tended to produce a violation of the law, to encourage the enemies of the United States and to hamper the Government in the conduct of the war, specified four cartoons and four pieces of text as especially falling within sections one and two of Title XII of the Act and by the reference of action one as within section three of Title I. These sections are quoted in the margin.

#### TITLE I.

##### Espionage.

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Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or 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 and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

93

#### TITLE XII.

##### Use of Mails.

Section 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be

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non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: *Provided*, that nothing in this Act shall be so construed as to authorize any person other than an employe of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

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Section 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be non-mailable.

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The four cartoons are entitled respectively, "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," "Congress and Big Business." The first is a picture of the Liberty Bell broken in fragments. The obvious implication, taking the cartoon in its context with the number as a whole, is that the origin, purposes and conduct of the war have already destroyed the liberties of the country. It is a fair inference that the Draft Law is an especial instance of the violation of the liberty and fundamental rights of any free people.

The second cartoon shows a cannon to the mouth of which is bound the naked figure of a youth to the wheel, that of a woman, marked "Democracy," and upon the carriage that of a man, marked "Labor." On the ground kneels a draped woman marked "Motherhood" in a posture of desperation, while her infant lies on the ground, the import of this cartoon is obviously that conscription is the destruction of youth, democracy and labor, and the desolation of the family. No

one can dispute that it was intended to rouse detestation for the Draft Law.

The third cartoon represents a Russian workman symbolizing the Workmen's and Soldiers' Council, seated at a table, studying a paper entitled "Plan for a Genuine Democracy." At one side Senator Root furtively approaches the figure with a noose marked "Advice," apparently prepared to throw it over the head of the workman, while behind him stands Mr. Charles E. Russell, the Socialist member of the Russian Commission, in a posture of assent. On the other side a minatory figure of Japan appears through a door carrying a raised sword marked "Threat," while behind him follows a conventional John Bull, stirring him up to action. The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its Allies into continuance of the war for purposes prejudicial to true democracy. 98

The fourth and last cartoon presents a collection of pursy magnates standing about a table on which lies a map, entitled "War Plans." At the door enters an apologetic person, hat in hand, diffidently standing at the threshold, while one of the magnates warns him to keep off. The legend at the bottom runs as follows: "Congress: 'Excuse me, gentlemen—where do I come in?' Big Business: 'Run along now—we got through with you when you declared war for us.'" It is not necessary to expatiate upon the import of this cartoon. 99

The four pieces of text are annexed to the end of this report as addenda, A., B., C. and D. After that part of B., so set forth, the article continues, showing the hardships and maltreatment of a number of English conscientious objectors, partly from

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excerpts out of their letters, partly from reports of what they endured. These statements show much brutality in the treatment of these persons.

The challenged text, omitting the excerpts just mentioned, total about one page out of a total of twenty-eight. Throughout the rest are sprinkled other text designed to arouse animosity to the draft and to the war, and criticisms of the President's consistency in favoring the declaration of war.

101

The defendant attaches to its papers as well copies of the June and July numbers of "The Masses" and a number of "Mother Earth," a magazine edited by Emma Goldman and Alexander Berkman, recently convicted in this Court for a conspiracy to resist the draft. The earlier copies of "The Masses" contain inflammatory articles upon the war and conscription in revolutionary vein, some of which go to the extent of counselling those subject to conscription to resist. This case does not concern them except in so far as the defendant's position is correct that in the interpretation of the August number the purpose of the writers may be inferred from what preceded and that an audience addressed in the earlier numbers would put upon the later number a significance beyond what the contents would naturally bear if it stood alone. It is not necessary for a determination of this case to set forth in detail the contents of these numbers. The copy of "Mother Earth" also need not be referred to.

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GILBERT E. ROE, for the Plaintiff.

EARL B. BARNES, Assistant United States Attorney, for the Defendant.

LEARNED HAND, D. J.: It is well settled that this Court has jurisdiction to review the act of

the Postmaster, School of Magnetic Healing vs. McAnnulty, 187 U. S., 94; Post Publishing Co. vs. Murray, 230 Fed. R., 773; Bruce vs. United States, 202 Fed. R., 98; United States vs. Atlanta Journal, 210 Fed. R., 275. If it appears that his proposed official course is outside of the authority conferred upon him by law, this Court cannot escape the duty of so deciding, just as in the case of any other administrative officer, Noble vs. Union River Logging Co., 147 U. S., 165; Gegiow vs. Uhl, 239 U. S., 3. However, again, as in the case of other such officers, the Postmaster's decision is final if there be any dispute of fact upon which his decision may rest, and even where it must turn upon a point of law, it has a strong presumption of validity. Bates & Guild Co. vs. Payne, 194 U. S., 106; Public Clearing House vs. Coyne, 194 U. S., 497. In this case there is no dispute of fact which the plaintiff can successfully challenge except the meaning of the words and pictures in the magazine. As to these the query must be, what is the extreme latitude of the interpretation which must be placed upon them, and whether that extremity certainly falls outside any of the provisions of the Act of June 15, 1917. Unless this be true the decision of the Postmaster must stand. It will be necessary, first to interpret the law and next the words and pictures.

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It must be remembered at the outset—and the distinction is of critical consequence throughout—that no question arises touching the war powers of Congress. It may be that Congress may forbid the mails to any matter which tends to discourage the successful prosecution of the war. It may be that the fundamental personal rights of the individual must stand in abeyance even including the right of the freedom of the press, though that

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is not here in question. *Ex parte Jackson*, 96 U. S., 727; *Re Rapier*, 143 U. S., 110. It may be that the peril of war which goes to the very existence of the State justifies any measure of compulsion, any measure of suppression, which Congress deems necessary to its safety, the liberties of each being in subjection to the liberties of all. *The Legal Tender Cases*, 12 Wall., 457. It may be that under the war power, Congress may mobilize every resource of men and materials, without impediment or limitation, since the power includes all means which are the practice of nations in war. It would indeed not be necessary, perhaps in ordinary cases it would not be appropriate, even to allude to such putative incidents of the war power, but it is of great consequence at the present time with accuracy to define the exact scope of the question at bar, that no implication may arise as to any limitation upon the absolute and uncontrolled nature of that power. Here is presented solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered, but necessary to the existence of the State as such. No one suggests that the exercise of such power, however wide it may be, does not rest in Congress alone, at least subject to martial law which may rest with the President within the sphere of military operations, however broadly that may be defined. The defendant's authority is based upon the Act of Congress and the intention of that act is the single measure of that authority. If Congress has omitted repressive measures necessary to the safety of the nation and success of its great enterprise, the responsibility rests upon Congress and with it the power to remedy that omission.

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Coming to the act itself it is conceded that the defendant's only direct authority arises from Title XII of the Act, sections one and two. His position is that under section one any writing which by its utterance would infringe any of the provisions of other titles in the Act becomes non-mailable. I may accept that assumption for the sake of argument and turn directly to section three of Title I, which the plaintiff is said to violate. That section contains three provisions. The first is in substance that no one shall make any 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 defendant says that the cartoons and text of the magazine constituting as they certainly do, a virulent attack upon the war and those laws which have been enacted to assist its prosecution, may interfere with the success of the military forces of the United States. That such utterances may have the effect so ascribed to them is unhappily true; publications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project, or of the correctness of the defendant's position. 110

All this, however, is beside the question whether such an attack is a wilfully false statement. That phrase properly includes only a statement of fact which the utterer knows to be false, and it can- 111

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not be maintained that any of these statements are of fact, or that the plaintiff believes them to be false. They are all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer. As such they fall within the scope of that right to criticise either by temperate reasoning, or by immoderate and indecent invective which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question. To modify this provision, so clearly intended to prevent the spreading of false rumors which may embarrass the military, into the prohibition of any kind of propaganda, honest or vicious, is to disregard the meaning of the language, established by legal construction and common use, and to raise it into a means of suppressing intemperate and inflammatory public discussion, which was surely not its purpose.

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The next phrase relied upon is that which forbids anyone from wilfully causing insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States. The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be

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more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to interpret the word "cause" so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the State, its exercise is so contrary to the use and want of our people, that only the clearest expression of such a power justifies the conclusion that it was intended.

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The defendant's position, therefore, in so far as it involves the suppression of the free utterance of abuse and criticism of the existing law, or of the policies of the war, is not, in my judgment, supported by the language of the Statute. Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the State itself. One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. The defendant asserts not only that the magazine indirectly through its propaganda leads to a disintegration of loyalty and a disobedience of law, but that in addition it counsels and advises resistance to existing

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law, especially to the draft. The consideration of this aspect of the case more properly arises under the third phrase of section three, which forbids any wilful obstruction of the recruiting or enlistment service of the United States, but as the defendant is to urge that the magazine falls within each phrase it is as well to take it up now. To counsel or advise a man to an act urges upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they import, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violate resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

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It seems to me, moreover, quite plain that none of the language and none of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding. I come, therefore, to the third phrase of the section which forbids anyone from wilfully obstructing the recruiting or enlistment service of the United States. I am not prepared to assent to the plaintiff's position that this only refers to acts other than words, nor that the act thus defined must be shown to have been successful. One may obstruct without preventing and the mere obstruction is an injury to the service, for it throws impediments in its way. Here again, however, since the question is the expression of opinion I construe the sentence, so far as it restrains public utterance, as I have construed the other two, and as therefore limited to the direct advocacy of resistance to the recruiting and enlistment service. If so, the inquiry is narrowed to the question whether any of the challenged matter may be said to advocate resistance to the draft, taking the meaning of the words with the utmost latitude which they can bear. 122

As to the cartoons it seems to me quite clear that they do not fall within such a test. Certainly the nearest is that entitled "Conscription" and the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant. There is no intimation that, however, hateful the draft may be one is in duty bound to resist it, certainly none that such resistance is to one's interest. I cannot, therefore, even with the limitations which surround the power 123

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of the Court, assent to the assertion that any of the cartoons violate the act.

The text offers more embarrassment. The poem to Emma Goldman and Alexander Berkman, at most goes no further than to say that they are martyrs in the cause of love among nations. Such a sentiment holds them up to admiration and hence their conduct to possible emulation. The paragraph in which the editor offers to receive funds for their appeal also expresses admiration for them, but goes no further. The paragraphs upon conscientious objectors are of the same kind. They go no further than to express high admiration for those who have held and are holding out for their convictions even to the extent of resisting the law. It is plain enough that the paper has the fullest sympathy for these people; that it admires their courage and that it presumptively approves their conduct. Indeed, in the earlier numbers and before the draft went into effect the editor urged resistance. Since I must interpret the language in the most hostile sense, it is fair to suppose, therefore, that these passages go as far as to say:

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126 "These men and women are heroes and worthy of a freeman's admiration. We approve their conduct; we will help to secure them their legal rights. They are working for the betterment of mankind through their obdurate consciences." Moreover, these passages it must be remembered occur in a magazine which attacks with the utmost violence the draft and the war. That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. Literally at least they do not, and while, as I have said, the words are to be taken not literally, but according to their full import, the literal meaning is the start-

ing point for interpretation. One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that if others do follow they will get the same admiration and the same approval. Now there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation I cannot see how the passages can be said to fall within the law. If they do, it would follow that while one might express admiration and approval for the Quakers or any established sect which is excused from the draft, one could not legally express the same admiration and approval for others who entertain the same conviction, but do not happen to belong to the Society of Friends. It cannot be that the law means to curtail such expressions merely, because the convictions of the class within the draft are stronger than their sense of obedience to the law. There is ample evidence in history that the Quaker is as recalcitrant to legal compulsion as any man; his obstinacy has been regarded in the act, but his disposition is as disobedient as that of any other conscientious objector. Surely, if the draft had not excepted Quakers, it would be too strong a doctrine to say that any who openly admired their fortitude or even approved their conduct was wilfully obstructing the draft.

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When the question is of a statute constituting a crime it seems to me that there should be more definite evidence of the act. The question before me is similar to what would arise upon a motion to dismiss an indictment at the close of the proof; could any reasonable man say, not that the indi-

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rect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft? I cannot think that upon such language any verdict would stand. Of course the language of the statute cannot have one meaning in an indictment and another when the case comes up here, because by hypothesis if this paper is non-mailable under section three of Title I, its editors have committed a crime in uttering it.

131

After the foregoing discussion it is hardly necessary to speak of section two of Title XII. The plaintiff insists that refusal to comply with the provisions of the draft cannot be classed as forcible resistance; that such a refusal is at most only inaction, the neglect of an affirmative duty even to the extent of submitting to imprisonment. It may be plausibly contended that by forcible resistance Congress meant more than passive resistance; but even if this be not true, the result is the same, because so construed the section goes no further than the last phrase of section three of Title I as I have construed it here. What was, therefore, said upon that section will serve here.

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The defendant's action was based, as I understand it, not so much upon the narrow question whether these four passages actually advocated resistance, though that point was distinctly raised, as upon the doctrine that the general tenor and animus of the paper as a whole were subversive to authority and seditious in effect. I cannot accept this test under the law as it stands at present; the addition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the State point with exactness to just that conduct which violates the law. It is difficult and often impossible to meet the charge that

one's general ethos is treasonable; such a latitude for construction implies a personal latitude in administration which contradicts the normal assumption that law shall be embodied in general propositions capable of some measure of definition. The whole crux of this case turns indeed upon this thesis. I make no question of the power of Congress to establish a personal censorship of the press under the war power; that question, as I have already said, does not arise. I am quite satisfied that it has not yet chosen to create one, and with the greatest deference it does not seem to me that anything here challenged can be illegal upon any other assumption.

Finally, the question arises as to how far the earlier numbers of the paper should be considered. The theory is that the August number covertly refers to the explicit counsel of resistance in the numbers of June and July. A priori such a reference might legitimately incorporate the earlier expressions; I do not doubt that the memory of those expressions may in fact remain in the minds of readers, and that they may be revived by the sympathy and accord with conscientious objectors, expressed in the August number. Yet the plaintiff is still entitled to ask, whatever the results of its past utterance may be, that some words be pointed out which by some reference fairly inferable from the words themselves relate back to earlier and more explicit statements. I think there are no words in the four passages which admit of such an interpretation.

It follows that the plaintiff is entitled to the usual preliminary injunction.

July 24th, 1917.

L. H.,  
D. J.

"A."

136

**A Question.**

Often I wish we had a continuing census bureau to which we might apply, and have a census taken with classifications of our own choosing. I would like to know to-day, how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a "Round-up of Slackers"? Are there none to whom this picture of the American republic adopting toward its citizens the attitude of a rider toward cattle is appalling? I recall the Essays of Emerson, the Poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. It painted the quality of her culture for those in the old world who loved her. It was a revolt of the aspiring mind against that instinctive running with custom and the support of numbers, which is an hereditary frailty of our nerves. It was a determination to worship and to love, in the living and laughing present, the same heroisms that we love when we look back so seriously over the past.

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I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the State, because they will not do what they do not

believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world.

**"B."**

140

**A Tribute.**

Emma Goldman and Alexander Berkman  
 Are in prison,  
 Although the night is tremblingly beautiful  
 And the sound of water climbs down the rocks  
 And the breath of the night air moves through  
 multitudes and multitudes of leaves  
 That love to waste themselves for the sake of the  
 summer.

Emma Goldman and Alexander Berkman  
 Are in prison tonight,  
 But they have made themselves elemental forces,  
 Like the water that climbs down the rocks:  
 Like the wind in the leaves:  
 Like the gentle night that holds us:  
 They are working on our destinies:  
 They are forging the love of the nations:

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\* \* \* \* \*

Tonight they lie in prison.

### Conscientious Objectors.

We publish below a number of letters written last year from English prisons by conscientious objectors. It is as yet uncertain what treatment the United States government will mete out to its thousands of conscientious objectors, but we believe that our protestors against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion and not as free men.

143

Some discussion has arisen as to whether those whose objection to participating in war is not embodied in a religious formula, have the right to call their objection a "conscientious" one. We believe that this old-fashioned term is, however, one that fits their case. There are some laws which the individual feels that he *cannot obey*, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. This fundamental stubbornness of the free soul against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of *this* war can express itself in the same heroic firmness that has in England upheld the Christian objectors to war-as-murder. We recommend to all who intend to stick it out to the end, a thorough reading of the cases which follow, so that they may be prepared for what is at least rather likely to happen to them.

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**Friends of American Freedom.**

Alexander Berkman and Emma Goldman have been arrested, charged with advocating in their paper, *Mother Earth*, that those liable to the military draft, who do not believe in the war, should refuse to register. That they would be arrested, on some charge, and subjected to bitter prosecution, has been inevitable ever since they appeared as the spokesmen of a working-class protest against the plans of American militarism. Whatever you may think of the practicability of such a protest, you must, with their friends, pay tribute of admiration for their courage and devotion. 146

Alexander Berkman is one of the few men whose character and intelligence ever stood firm through a quarter of a lifetime in prison. Emma Goldman has followed her extreme ideal of liberty for thirty years, up and down, in better places and worse than the federal penitentiary. They can both endure what befalls them. They have more resources in their souls, perhaps, as they have the support of a more absolute faith, than we have who admire them. But let us give them every chance for acquittal that the constitution of the times allow. Let us give them every chance to state their faith. The Masses will receive funds for this purpose. 147

**148 Order Granting Temporary Injunction.**

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the United States Court House in the Borough of Manhattan, City, County and State of New York, on the 26th day of July, 1917.

Present—Hon. LEARNED HAND, Judge.

149

MASSIS PUBLISHING COMPANY,  
Complainant,  
against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

In Equity  
No. E 14-225.

150 This cause came duly on to be heard this term upon motion duly made for a temporary injunction herein upon the Bill of Complaint duly verified and filed, and upon the affidavits of Max Eastman and Merrill Rogers, each duly verified and filed herein on behalf of complainant, and the affidavits of the Hon. A. S. Burleson and the Hon. William H. Lamar, on behalf of the defendant, and Gilbert E. Roe, Esq., appearing as counsel for the complainant in support of said motion, and Earl B. Barnes, Esq., Assistant United States District Attorney, appearing on behalf of the defendant, and after due deliberation, it is

**ORDERED, ADJUDGED AND DECREED,**  
that the motion for the temporary injunction here-

*Stipulation.*

151

in be and the same hereby is granted and the said defendant, his agents, servants and employees, is hereby restrained and enjoined from treating the August, 1917, issue of said magazine known as "The Masses" as non-mailable matter, and the said defendant, his agents, servants and employees hereby are commanded forthwith to transmit said issue of said magazine known as "The Masses," through the mails from the New York Post Office on the usual way, without further delay.

FURTHER ORDERED, that the complainant's bond herein (under the Clayton Act) be and hereby is fixed at Two hundred and fifty Dollars. 152

Dated, New York, July 26, 1917.

LEARNED HAND,  
United States District Judge.

**Stipulation.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

153

THE MASSES PUBLISHING  
COMPANY,  
Complainant,

against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

E 14-225.

IT IS HEREBY STIPULATED AND AGREED that Complainant's Exhibit A, being the August, 1917, issue of the publication "The Masses," con-

154

*Stipulation.*

tained in complainant's bill of complaint; and defendant's exhibits, contained in defendant's opposing affidavits to preliminary injunction, as follows:

The June, 1917, issue of the publication "The Masses";

The July, 1917, issue of the publication "The Masses";

The June, 1917, issue of the publication "Mother Earth";

155 need not be printed in the record on appeal, but may be produced and referred to on the argument of this appeal with the same force and effect as if same were printed in the said record, provided that three copies of each of the said exhibits be handed to the Court.

Nothing contained in the foregoing stipulation shall be construed as a waiver of the objection taken by solicitor for complainant on the argument below to the consideration of the June and July issues of "The Masses" and the June issue of "Mother Earth."

156

GILBERT E. ROE,  
Solicitor for Complainant.

FRANCIS G. CAFFEY,  
U. S. Attorney,  
Solicitor for Defendant.

So ordered

C. M. HOUGH,  
U. S. J.

**Assignment of Error.**

157

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY,  
Complainant,  
against

T. G. PATTEN, Postmaster of the  
City of New York,  
Defendant.

In Equity,  
E 14-225.

158

Comes now the defendant and files the following Assignments of Error upon which he will rely upon his appeal from the interlocutory decree made by this Honorable Court on the 26th day of ~~July, 1917~~, in the above entitled cause:

1926

4 June

April 1926

FIRST.—That the Court erred in holding that the August, 1917, issue of "The Masses" was not non-mailable matter within the meaning of §1, Title XII, of the Act of Congress approved June 18, 1917.

The American Mercury

159

SECOND.—That the Court erred in not holding that the August, 1917, issue of "The Masses" was non-mailable matter within the meaning of §1, Title XII, of the Act of Congress approved June 18, 1917.

§ 211 of

the U.S. Criminal Code +

THIRD.—That the Court erred in holding that the August, 1917, issue of "The Masses" was not non-mailable within the meaning of §2, Title XII, of said Act.

Sec 470 of

the Postal Laws and

Regulations of 1924

FOURTH.—That the Court erred in not holding that the August, 1917, issue of "The Masses" was non-mailable within the meaning of §2, Title XII, of said Act.

FIFTH.—That the Court erred in overruling the decision of the Post Office Department that the said August, 1917, issue of "The Masses" was non-mailable matter within the meaning of Title XII of said Act.

161 SIXTH.—That the Court erred in granting the motion for an injunction pendente lite as prayed for in the bill of complaint herein.

SEVENTH.—That the Court erred in not denying the motion for an injunction pendente lite as prayed for in the bill of complaint herein.

162 WHEREFORE appellant-defendant prays that the decree of the said Court may be reversed and in order that the foregoing assignments of error may be a part of the record the appellant-defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided.

All of which is respectfully submitted.

Dated, New York, July 26, 1917.

FRANCIS G. CAFFEY,  
United States Attorney for the  
Southern District of New York,  
Attorney for Appellant-Defendant.

**Citation on Appeal.**

163

By the Honorable Martin T. Manton, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Masses Publishing Company. GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 23rd day of August, 1917, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein T. G. Patten, Postmaster of the City of New York, is appellant, and you are appellee to show cause, if any they be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

164

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 26th day of July, in the year of our Lord One Thousand Nine Hundred and Seventeen, and of the Independence of the United States the One Hundred and Forty-second.

165

MANTON,  
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

166

**Stipulation.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MASSES PUBLISHING COMPANY vs. T. G. PATTEN, Postmaster of the City of New York.	}	E. 14—225.
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IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, August 24, 1917.

GILBERT E. ROE,  
Attorney for Complainant.

168

FRANCIS G. CAFFEY,  
United States Attorney,  
Attorney for Defendant.

**Clerk's Certificate.**

169

United States of America,  
Southern District of New York, } ss.:

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MASSES PUBLISHING COMPANY

vs.

T. G. PATTEN, Postmaster of the  
City of New York.

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E. 14—225.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

170

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this sixth day of September in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-first.

171

ALEX. GILCHRIST, JR.,  
Clerk.

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