GILBERT ROE, THE *MASSES* CASE IN THE SECOND CIRCUIT, & RELATED MATTERS

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Judge Learned Hand's order granting the temporary injunction against the postmaster and ordering the magazine transmitted through the mails "without delay" was dated July 26, two days after the decision became known.[1] During that brief period, the company pulled back the copies sent to the Post Office so the edition could be delivered by alternate means.[2] On the same day the order was issued, U.S. Attorney Francis G. Caffey filed an Assignment of Error listing grounds on which he would rely in his appeal from Hand's decree. In all, there were seven alleged errors, although essentially all of them went directly to the bottom line: Hand was wrong in finding for the magazine under every provision of the Espionage Act raised by government and wrong in granting the injunction.[3] A hearing date on the appeal was originally set for August 23, 1917,[4] but the government was not about to wait that long. On July 26, the postmaster secured an order from Second Circuit Judge Charles M. Hough, who had ruled against Gilbert Roe in *Philipp v. S. S. McClure* in 1908 as a district court judge, staying Hand's order and setting a hearing for August 2, at Windsor, Vermont, near Hough's country home in Hanover, New Hampshire. "It is easy to understand why this order is made returnable in the most remote point in this district," Roe wrote La Follette, "and why Hough was selected. 'The Masses' are game, however, and I expect to be in Windsor, Vt., a week from today if the trains run and 'The Masses' can raise carfare."[5]

On a personal note, Roe told La Follette that Netha was away for a few days, "looking for some place where we can send the children out of this heat here for a couple of weeks, and still have them near." Roe said he had hoped to spend some time in Washington to work on La Follette's latest legislative initiative, but "[this] Windsor business has put me a good deal up in the air." Having been defeated on both the Espionage Act and the Conscription Act, La Follette was now working on the War Revenue bill to insure that the $2billion it would raise to finance the war came largely from surplus incomes and war profits.[6] Despite the Windsor interruption, Roe spent a good deal of time on the bill. "Night after night [Roe and La Follette] returned to the office, staying until two o'clock in the morning, drafting amendments, working with experts

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[1]Order Granting Temporary Injunction, Transcript of Record at 50, Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[2]Masses Pub. Co. v. Patten, 245 F. 102, 104 (2d Cir. 1917).
[3]Assignment of Error, Transcript of Record at 53, Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[4]Citation on Appeal, Transcript of Record at 55, Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[5]Letter from Gilbert Roe to Robert La Follette (July 26, 1917), in Roe Papers, Box 5, Folder 1917.
[6]2 LA FOLLETTE, *supra* note 35, at 741–42.

from the Treasury Department assigned at Bob's request, and assembling data to be used on the Senate floor."

Roe did make it to Windsor, and, again, the argument lasted all day. "The solicitor for the Department [Lamar] was there in person," Roe wrote La Follette. "I have little doubt of the result but at least I raised up a few difficulties which I think they had not anticipated, and made them look rather glum. Anyway, I have a plan blocked out which will keep the *Masses* going, anyway, and, I hope, increase its readers. They are running off more copies this month than ever before."[7] Roe's "plan" apparently included several new initiatives. On August 3, Merrill Rogers personally delivered two copies of that September issue of *The Masses* to the Post Office with the request that they be forwarded to Washington to determine their mailability.[8] Meanwhile, newsboys were hawking copies on the streets, reportedly shouting, "Get your latest issue of *The Masses*, suppressed by the Post Office Department."[9] Additional copies were shipped by express to about three hundred cities and towns, where copies were distributed by news dealers. In addition, letters were sent out to all subscribers urging them to fight the ban. Despite Hand's order, the letters said, "the post office is still exercising bureaucratic powers. We are going to fight this straight through to the Supreme Court. We are not going to swerve one hair's breadth in our policy. We are going to establish, [once and] for all whether free speech in America is a reality or a grim joke." The letter went on to appeal to every subscriber to contact local news dealers and request them to order the magazine in lots of at least ten copies, the smallest number that could be sent economically by express.

On August 6, Hough filed his opinion granting the government's motion to stay Hand's order.[10] The opinion began with Hough acknowledging that his opinion would be, and should be, based on the facts as found by the lower court. "And by facts, I mean, not only facts physical, phenomena seen or heard, but mental conditions or intents." Hough also conceded that the company still had a legally cognizable case, even though the issues in question had already been distributed by other means. On the other hand, the failure to issue a stay in the matter would render any appeal by the government moot. Hough summarized Hand's findings of fact, his test of law, and his conclusion that none of the words or pictures raised by the Post Office Department met the test of "urging upon others that it is their duty or interest to resist the law." The questions before him on this motion, then, were "(1) Is such view of the law correct? (2) Is it so clearly correct that the courts should interfere?" As to the second inquiry, Hough said the courts should not interfere with an executive department in interpreting law that affected it except in the clearest cases, and as to the first, "it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act." Hough also pointed out that the postal service was not a common carrier but rather was pursuing a high governmental duty. "[It] is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination and distribution of something which proclaims itself 'revolutionary,' which exists, not to reform, but to destroy, the rule of any party, clique, or faction that could even give lip service to the Constitution of the United States." With that

[7]Letter from Gilbert Roe to Robert La Follette (August 3, 1917), in Roe Papers, Box 5, Folder 1917.
[8]Deposition of Frederick G. Mulker at 1 (August 22, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[9]*"The Masses" Now Using Mails to Increase Sales Cut Down by Postal Ban,"* N.Y. TRIB., August 23, 1917, at 4.
[10]Masses Pub. Co. v. Patten, 245 F. 102, 104–106 (2d Cir. 1917).

declaration, Hough extended his stay of Hand's order, provided the government post a $10,000 bond to cover any damages that might be awarded the company on appeal.[11]

The same day, August 6, the company delivered another thirteen copies of the September issue to the Post Office and paid second-class postage for their delivery. At the same time, however, Postmaster Patten received instructions from Lamar in Washington to hold any copies of the September issue until further advised. Rogers was informed of those instructions on August 7.[12] The Post Office Department then issued the company an order to show cause why its second-class mailing privilege should not be revoked altogether. The cynical ground for revocation? Since the August issue was not mailed, *The Masses* was no longer being mailed in the regular course of business and was therefore no longer eligible as second-class matter. The order set a hearing on the matter for August 14. Roe argued the case again, in Washington, pointing out that Judge Hand had ruled that the August issue had been "illegally and wrongfully" barred from the mails, and that the Post Office Department had no right to take advantage of its own wrongful and illegal act to deny the magazine its second-class privilege. He cited a letter from Burleson to Chairman John A. Moon of the House Committee on Post Office and Post Roads declaring that "any publisher who may question the validity of the rulings of the Postoffice Department" has the right of judicial review. "That can only mean that a publisher has the protection of the courts against illegal rulings of the department," Roe said. "But this proposal to bar 'The Masses' from the second class privileges is a plain violation of the assurance given to the public by the Postmaster General that no publisher is wholly at the mercy of the department."[13]

The hearing ended with the third assistant postmaster taking the case under advisement, but the very next day, August 15, Patten received letters from both Lamar and Burleson formally revoking *The Masses'* second-class mailing privileges;[14] Patten so informed the company on August 16. The magazine sent representatives to Hough, who reportedly called Burleson's order "a rather poor joke," but did nothing about it.[15] Roe again moved for an injunction in the U.S. district court to block the action,[16] arguing that Hough's stay had been predicated on his opinion that "any wrong suffered by [The Masses Publishing Co.] can be wholly redressed by damages, apparently (only) measured by the expense of the different transportation arrangements now confessedly perfected."[17] Roe said Hough would have ended the stay had he known that the Post Office planned to attack the magazine's second-class privileges, and he asked the court to require the Post Office Department to order the September issue of the magazine mailed immediately. In reply, Patten submitted a deposition from his superintendent of second-class matter, Frederick

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[11]Deposition of John M. Scoble at 3 (August 15, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

[12]Deposition of Frederick G. Mulker at 2–3 (August 22, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

[13]*Ban on "Masses" Is Denounced*, N.Y. TRIB., August 15, 1917, at 3.

[14]Deposition of Frederick G. Mulker at 2–4 (August 22, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

[15]John Sayer, *Art and Politics, Dissent and Repression: The Masses Magazine versus the Government*, 32 AM. J. L. HIST. 42, 50 (1988) (quoting ARTHUR YOUNG, ART YOUNG: HIS LIFE AND TIMES 318 [1939]).

[16]*Paper Barred, Opens Suit*, BROOKLYN DAILY EAGLE, August 18, 1917, at 2.

[17]Paper Deposition of John M. Scoble at 4–5 (August 15, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123) (quoting *Masses Pub. Co.*, 245 F. at 106).

Mulker, listing the addressees of the thirteen copies of the magazine on deposit at the Post Office and noting that no instructions had been received from Washington on their mailability.[18] As to the claim that failure to mail those thirteen copies would result in irreparable damages, Mulker quoted an interview that Merrill Rogers gave the *New York Tribune* on August 17. Calling the revocation of second-class privileges a "technical trick to ruin us," Rogers said the magazine would continue to be mailed regularly, at the first-class postage rate if necessary.[19]

This time, Judge Augustus Hand, Learned Hand's cousin, heard Roe's motion for an injunction. "I have spent most of today trying to save the wreck of the second 'Masses' case," Roe wrote La Follette on August 24, "and doubt if I have done it."[20] He was certainly right about that; Hand would come down foursquare for the government on September 12. "The August issue of the *Masses* was filled with glorification of those who refused to enlist and violated the law, and the September issue contained similar matter in diluted form," he wrote in a four-page unpublished opinion.[21] "In September, the editor adopted a somewhat milder and less pronounced tone than in August, but continued to hold up violators of the conscription act to admiration and to say what he thought he safely could to promote opposition to the war and to undermine the successful conduct of it." On the technical issue of second-class privileges, Hand asserted that the "position of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law, it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue. It was for this reason that the *Masses* was held by the Department not to be regularly issued and not for the absurd reason suggested at the argument that transmission had been interrupted by the stay of Judge Hough. A more important ground of revocation than regularity of publication was the illegality of matter contained in recent issues."[22]

In this conclusion, Hand echoed a report that Burleson had provided the Senate on August 22, in which the postmaster denounced the magazine as a leader in organized propaganda to discourage enlistments, prevent subscriptions to the Liberty Loan, and obstruct the draft act.[23] As submitted to Chairman John H. Bankhead (D-Ala.) of the Senate Committee on Post Offices and Post Roads, in response to a Senate resolution of inquiry sponsored by Sen. Thomas Hardwick (D-Ga.), Burleson's report said in the case of *The Masses* and other publications covered by the Harwick resolution, "not only have the particular issues which have been declared to be nonmailable but various other issues of the publication have been taken into consideration in determining their right to the second-class privilege, so that the final action was

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[18]Deposition of Frederick G. Mulker at 4 (August 22, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[19]*Id.* at 6 (quoting N.Y. TRIB., August 18, 1917).
[20]Letter from Gilbert Roe to Robert La Follette (August 24, 1917), in Roe Papers, Box 5, Folder 1917.
[21]*'Masses' Mail Ban Upheld by Court*, (N.Y,) SUN, September 15, 1917, at 4 (quoting Masses Pub. Co. v. Patten (S.D.N.Y. September 12, 1917) (unpublished) (printed in U.S. Dept. of Justice, *Interpretation of War Statutes Bulletin No. 6*).
[22]Sayer, *supra* note 68, at 51 (quoting Masses Pub. Co. v. Patten (S.D.N.Y. September 12, 1917) (unpublished) (printed in U.S. Dept. of Justice, *Interpretation of War Statutes Bulletin No. 6*).
[23]*Burleson Calls "The Masses" and Watson Seditious*,N.Y. TRIB.,August 23, 1917, at 4.

necessarily based principally on other and very much broader grounds than the break in the continuity of the publication."[24]

At the time Augustus Hand's decision came down, *The Masses* was also facing a threat from the American Defense Society to have the magazine excluded from the New York public libraries.[25] "Since the Postoffice Department has found 'The Masses' too unpatriotic to be sent through the mails, it seems improper that it should be available in the reading rooms of the public libraries," the society's chairman, Richard M. Hurd, declared September 11. "There is no place in America to-day for any literature that cloaks itself in the garb of the enemy. The publishers of such papers are standing close to the treason zone. They have been quietly 'getting over' editorials that are not only false, but are misrepresentative of the aims of the Administration. They serve to incite sedition and treason."

Desperate, Eastman wrote directly to Wilson asking him to review Burleson's actions.[26] Wilson wrote back on September 18: "I think that a time of war must be regarded as wholly exceptional and that it is legitimate to regard things which would in ordinary circumstances be innocent as very dangerous to the public welfare. . . . I can only say that a line must be drawn and that we are trying—it may be clumsily, but genuinely—to draw it without favor or prejudice." [27] Eastman commented on the president's response. "I think the Government is making a grievous mistake in discouraging the popular discussion of the war aims and peace terms," he said. "This is an impractical way to conduct a war for democracy. It is important that when peace is made it should be made not only with the German people, but by the American people. And this will not happen unless the terms of peace are fully and freely discussed beforehand by everybody."[28]

Toward the end of September, Roe spotted yet another existential threat to the magazine. "I notice by the newspapers that they have a Bill in the Senate, I think it has been added as a rider to some other bill, by which it is not only going to be unlawful to publish papers in foreign languages but it is also going to be unlawful to transport via express the magazines which have heretofore been shut out of the mails by the Postmaster," he wrote La Follette's private secretary, John Hannan. "I wish you would get hold of the Bill. . . . I would certainly like to be heard on it. The 'Express' feature of the Bill certainly does put us out of business if it passes."[29] It did pass. On October 6, Congress enacted the bill—known as the Trading with the Enemy Act—that threatened to cut off the last distribution channels remaining for *The Masses*. Specifically, Section 19 of the act, which dealt primarily with regulations governing foreign-language publications, also made it "unlawful for any person, firm, corporation, or association, to transport, carry, or otherwise publish or distribute any matter which is made nonmailable" by the Espionage Act.[30]

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[24]Sayer, *supra* note 68, at 50 (quoting Masses Pub. Co. v. Patten (S.D.N.Y. September 12, 1917) (unpublished) (printed in U.S. Dept. of Justice, *Interpretation of War Statutes Bulletin No. 6*)).
[25]*May Bar "The Masses" from City Libraries*, N.Y. TRIB., September 12, 1917, at 5.
[26]Sayer, *supra* note 68, at 51.
[27]*Mr. Wilson Writes to Max Eastman*, N.Y. TRIB., September 28, 1917, at 1.
[28]*Hard to Draw Line, Wilson Tells Eastman; Things Innocent in Peace Perilous in War*, N.Y. TIMES, September 28, 1917, at 1.
[29]Letter from Gilbert Roe to John Hannan (September 20, 1917), in Roe Papers, Box 5, Folder 1917.
[30]Ch. 106, §19, 40 STAT. 411, 426 (October 6, 1917).

On the same day, Burleson finally outlined what could and could not be sent through the mail. "There is a limit. And that limit is reached when it begins to say that this government got into the war wrong, that it is in it for the wrong purpose, or anything that will impugn the motives of the Government for going into war," he said.[31] "They cannot say that this government is a tool of Wall Street or the munitions makers. That kind of thing makes for insubordination in the army and navy and breeds a spirit of disloyalty through the country. It is a false statement, a lie, and it will not be permitted. And nothing can be said exciting people to resist the laws. There can be no campaign against conscription and the Draft Law, nothing that will interfere with enlistments or the raising of an army. There can be nothing said to hamper and obstruct the Government in the prosecution of the war." Department solicitor Lamar added, "You know I am not working in the dark on this censorship thing. I know exactly what I am after. I am after three things and only three things—pro germanism, pacificism, and high browism."[32]

Eastman wrote to Burleson, promising to abide by the regulations and refrain from publishing any matter detrimental to the interests of the United States in its prosecution of the war.[33] He reserved only the right to criticize, as far as it does not give aid to the enemy, and to discuss the demand for peace with freedom of seas, peoples and markets, world unions, and disarmament. Nothing changed; everything would now depend on the decision of the U.S. Court of Appeals for the Second Circuit.

The government's brief for the Second Circuit, submitted on September 16 by Francis G. Caffey, U.S. Attorney for the Southern District of New York, argued that Learned Hand's decision was in error when it declared the August issue of *The Masses* to be mailable, when it disturbed the postmaster general's decision that it was not mailable, and when it granted an injunction, irrespective of the publisher's legal rights.[34] Following a detailed analysis of the Espionage Act, Caffey asserted that the courts had no business interfering with mailability decisions of the postmaster general "unless it appears that he has overstepped his authority or that his action was clearly wrong."

To show that the postmaster was *not* wrong as to mailability, Caffey dissected each of the cartoons and texts on which Hand ruled to find that they satisfied the requirements of the Espionage Act, particularly in "attempting to cause" disaffection in the military. Caffey took direct aim at Hand's holding that the law required a publisher to "directly advocate resistance" to the law before being found in violation. "[No] possessor of a free soul fed and nourished upon the seditious diet of the June and July 'Masses' could accept the article on conscientious objectors in the August issue without feeling that it was his duty as such to suffer any punishment rather than obey the Conscription Act." Caffey also found ammunition in Judge Hough's language to the effect that holding violators up to admiration was tantamount to direct incitement, and added even more damning language from another nonmailability case involving

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[31]Sayer, *supra* note 68, at 51 (citing 55 LITERARY DIGEST 12 (October 6, 1917)).
[32]*Id.* (citing letter from Lamar to Oswald Garrison Villard, in OSWALD GARRISON VILLARD, FIGHTING YEARS: MEMOIRS OF A LIBERAL EDITOR 357 (1939)).
[33]*Masses Seeks Mail Rights*, N.Y. TIMES, October 25, 1917, at 15.
[34]Brief of Defendant-Respondent at 4–32 (September 16, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

the Georgia-based *Jeffersonian*. "Had the Postmaster General longer permitted the use of the great postal system which he controls for the consumption of such poison," wrote U.S. District Court Judge Emory Speer in that case, "it would have been to forego the opportunity to serve his country afforded by his lofty station."

On the second point of his argument—that Hand erred in disturbing the postmaster general's determination that the issue was not mailable—Caffey relied largely on precedent to the effect that when Congress has entrusted a question of fact, or even a mixed question of fact and law, to the head of a department, the executive's decision "will carry with it a strong presumption of its correctness and the courts will not ordinarily review it." Finding in Hand's own opinion substantial evidence that the postmaster general's position was at least arguable, Caffey concluded that Hand simply "overlooked the well established limitations upon the courts in reviewing the determination of the Postmaster General."

Finally, to show that the injunction was issued in error even if the publisher's rights were violated by the postmaster general's order, Caffey argued that a mandatory injunction to mail the August issue—rather than an injunction that merely preserved the status quo until the case could be heard—was an extraordinary remedy "not to be granted except in the clearest case of a violation of legal rights under circumstances of immediate impending irreparable injury and after careful consideration of the interests of the public as well as those of the parties to the action." In this case, Caffey charged, the injunction was in disregard of the public interest and contrary to public policy; the plaintiff did not come into court with "clean hands" as required for an equitable remedy; and insufficient facts were offered to show immediate impending irreparable injury if the injunction were not issued. Caffey noted that public interest issue had not been raised below, but if it had been, he insisted the outcome would have been other than it was. As to "clean hands," Caffey referred to *The Masses'* claim to be a "revolutionary" magazine: "Compared to this complainant," he quipped, "the historic highwayman who sought in a Court of Equity to obtain an accounting from the partner of his crimes was a petitioner of modest and unassuming disposition." With no facts to show irreparable injury, Hand's order should be reversed, Caffey concluded.

Roe's brief for *The Masses*, filed October 1, sought to separate the violation the magazine allegedly committed—"willfully attempting to cause insubordination, disloyalty, mutiny or refusal of duty" in the military, in Section 3 of Title I of the Espionage Act—from the nonmailability provision in Section 1 of Title XII of the Act. Although the latter referred to matter in violation of any provision of the act, Roe argued that Title I violations were solely focused on espionage and could not relate to "public discussions, expressions of opinion, or to criticism or condemnation of the government, its policies or its laws."[35] Otherwise, Roe said, nonmailability was limited to matter "advocating or urging treason, insurrection, or forcible resistance" under Section 2 of Title XII—none of which were alleged against *The Masses*. Following an overlong and largely unhelpful discussion of antiwar criticism during the Mexican and Boer Wars, Roe turned to the offending text and cartoons from the August issue. Before commenting on each, Roe noted that *The Masses* was in no way pro-German and that it rarely if ever circulated among military members. Roe defended each item, ultimately relying on an

[35]Brief of Complainant-Appellee at 20–43 (October 1, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

opinion in *United States v. Baker*,[36] which acquitted individuals who circulated directly to soldiers literature "which went much further than anything in *The Masses* in its opposition to the draft law and the present war policy."[37]

In the last seven pages of his fifty-eight-page brief, Roe asserted four arguments, the first three of which were implicit in the rest of the brief: "There is nothing in the August issue of *The Masses* that by any possibility can be construed as an advocacy of 'treason, insurrection or forcible resistance to any law of the United States.' There was no evidence before the postmaster of any violation of Section 3 of Title I of the Espionage Act. [And the] defendant postmaster had no authority, under Section 3, Title I, to exclude the entire magazine because he claimed certain articles in it to be unmailable," particularly where the publisher had expressed the willingness to remove any offending material. The final point took just a over a page in the brief: "The Espionage Act, if construed as the Post Office Department construes it, plainly violates the First and Fifth Amendments to the Federal Constitution." Roe cited five cases to support this bare constitutional conclusion that the Act would violate both freedom of the press and due process of law if the government's construction were accurate. There was no analysis or argument on either issue, but, Roe concluded, "this brief is already much too long." In all probability, it would have made no difference in the outcome.

Roe argued *The Masses* case before Circuit Judges Henry G. Ward and Henry W. Rogers and District Judge Julius M. Mayer on October 8.[38] Their decision came less than a month later. In an opinion written by Rogers and joined by Mayer, reversing Learned Hand's injunction, the court made short work of Roe's arguments. "It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute."[39] There would be no de-linking of the espionage title from the mailability title. The opinion answered Roe's First Amendment argument with considerably more discussion than Roe accorded it, but it largely came down to the court's Blackstonian view of the amendment—that freedom of the press consists "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published."[40] The court found no prior restraint in the Espionage Act, and no restraint afterward beyond the mailability restrictions. "Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden."[41] The restrictions on alternate means of distribution imposed by the new Trading with the Enemy Act were never raised below, and the court did not address them.

As to Roe's perfunctory Fifth Amendment due process claim, the court cited precedent for the proposition that "due process of law does not necessarily require the interference of the judicial power" and held the Espionage Act constitutional "in so far as it excludes from the mails certain matter declared to be unmailable." As to who makes that declaration, the court held that, where, as here, "the Postmaster General has been authorized . . . to determine whether a

[36]247 F. 124 (D.C. Md. 1917).
[37]Brief of Complainant-Appellee at 52–58 (October 1, 1917), Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).
[38]Telephone Logs, in GKR Papers, Box 7, Folder 7.
[39]Masses Pub. Co. v. Patten, 246 F. 24, 27 (1917).
[40]*Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151).
[41]*Masses Pub. Co.*, 246 F. at 27–39.

particular publication is nonmailable under the law . . . his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong." Accordingly, the court once again examined each of the items in the August issue to determine whether the postmaster general was "clearly wrong" about any of them. Considering the "natural and reasonable effect of the publication," only the cartoon "Liberty Bell" survived that test. Finally, the court confronted Hand's opinion that where "one stops short of urging upon others that it is their duty or their interest to resist the law," no violation of the act occurred. "This court does not agree that such is the law." Instead, the court agreed with Judge Hough's view that "to hold up to admiration those who do act" to violate the law constitutes a sufficiently direct incitement to action by the reader. Judge Ward's brief concurrence emphasized the finality of the postmaster general's decision, "whether we agree with him or not," and suggested a bit more breathing room for honest opinion. In the end, though, he agreed that certain of the items in the August issue could have been intended to obstruct recruitment. The court made no mention of Eastman's offer to edit those items out of the August issue.