

The Indictment

Scott Nearing and the American Socialist Society were indicted by a Federal Grand Jury in the District Court of the United States for the Southern District of New York in April, 1918. They were not tried until February, 1919. The indictment contained four counts. The first count charged that, while the United States was at war with the Imperial German Government, the defendants unlawfully conspired to violate the provisions of Section 3 of Title 1 of the act of Congress, approved on June 15th, 1917, commonly known as the Espionage Law, by unlawfully agreeing to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States through the publication of the pamphlet known as "The Great Madness." The second count of the indictment charged that the defendants conspired unlawfully and wilfully to obstruct the recruiting and enlistment service of the United States by the publication of said pamphlet. The third count charged the defendants with attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States by the publication of the said pamphlet. And the fourth count charged the defendants with unlawfully obstructing the recruiting and enlistment service of the United States by the publication of the pamphlet.

The Jury

Thursday morning, February 6th, found the Federal court room on the third floor of the old Post Office Building filled with the talesmen from among whom the Jury was to be selected. The members of the tale were characteristic jurors; men of the type that have been trying Espionage Act cases all over the United States.

They were for the most part old, retired, comfortable men,—men who had been well treated by life. Most of them had struggled, but successfully. They had won out in the brutal melee of industrialism and by rising from its depths they had escaped many of its worst consequences.

Thirty talesmen in all were examined in picking the jury. The first was about 70 years of age; the second about 55; the third about 50; and the fourth about 65; the fifth gave his age as 38; the sixth gave his as 55; the seventh was about the same age; the eighth gave his age as 59; the ninth stated his age as 38; the tenth as 65; the eleventh as 60. These men were typical as far as one could judge of the entire panel.

Most of the talesmen were foreign born and the group contained a surprisingly large proportion of Germans and Austrians. Among the first thirteen talesmen examined seven were born in Germany or in Austria. One of the talesmen came from Posen; another from Scotland; a third from Berlin.

The talesmen examined were business men—active and retired. Not a single wage-earner appeared among the first thirty names drawn. The first talesman examined was a real estate dealer; the second

was a corporation official; the third was a diamond merchant; the fourth a retired merchant; the fifth a steel contractor; the sixth a repairer of organs; the seventh a retired grocer; the eighth, retired; the ninth, a corporation official; the tenth, a retired merchant; the eleventh, a retired jobber in foreign merchandise; the twelfth, a real estate man; the thirteenth, a manufacturer of laces and embroidery; the fourteenth, an electrical jobber; the fifteenth, a retired contractor. The list ran on in this way throughout the entire thirty.

All of the talesmen, except two, expressed an utter ignorance of Socialism and displayed a disinclination to political action, which was truly astonishing. Talesman Number 1, born in Scotland, stated that he had "never voted in his life." Others voted but took no interest in politics. A few were able to name the candidates at the last election.

Most of the talesmen examined had heard of Socialism. One of them had read a dozen copies of the New York Call. One or two of them had read, casually, articles or books on Socialism. The member of the tale who had read the Call on various occasions was challenged by the Prosecution, which apparently regarded him as unfitted to sit on such a case.

Every member of the tale who was examined, stated that he favored the entrance of the United States into the war. All of the members were likewise in favor of conscription as a method of raising an army, although one or two were not particularly enthusiastic on the subject of the draft. One answered that he was in favor of conscription, but added "I don't believe in having anything to do with it myself." Another one stated, "As long as no one wanted to enlist that was the only way to raise an army." Barring such slight expressions of opinion, the sentiment of the Jury

on this subject was unanimous.

After two days during which thirty persons were examined the Jury was completed. It was constituted as follows:

1. Irving D. Zimmer, 55 years of age, born in New York; a salesman for malted extracts. Mr. Zimmer, who had a daughter in the service stated, "I would have liked to keep out of it (the war) if we could, but I did not see any way to keep out of it." He was "not interested" in politics. To the question, "Have you any near friends or relations, who happen to be Socialists?" he answered "No." Mr. Zimmer stated that he owned some bonds.

2. Stanley R. Ketchem, about 50 years of age; was born in the United States. He was officially connected with the Lackawanna-Wyoming Transit Co., the Carolina-Tennessee Power Co., the Caroline Construction Co., the Union Metallurgical Co.

3. Gustave Gumpertz, retired, was formerly a manufacturer of clothing. He had been retired for three years. One of his sons had volunteered for the service. Mr. Gumpertz was born in Alsace. He had been in the United States for over 60 years.

4. Joseph Hecht, a steel contractor, 38 years of age, had been associated with the National Iron and Steel Co., for fifteen years. His company had had some war contracts. Mr. Hecht was born in Austria, and stated that he had read nothing on Socialism.

5. Samuel R. Welser, retired, was formerly a contractor for electrical and metal work. Mr. Welser was American born of American parents, and had lived in New York for 40 years. He was about 60 years of age. Asked about his property holdings, he replied that he owned some stock. Asked whether they were war stocks, he replied, that "there has been no increase in dividends." During the war he was an active

worker in the Red Cross.

6. William Edebohls, a retired grocer, born in Germany, had been in the United States for over 40 years. Mr. Edebohls was about 60 years of age. When asked about the declaration of war he answered, "At the time I did not think anything of it." A son was working in the Brooklyn Navy Yard. Like the other members of the panel, he had read little or nothing about Socialism.

7. Sam Gordon, an importer and exporter of merchandise, born in Russia and about 55 years of age. When asked as to his reading, Mr. Gordon promptly replied, "The Times and the Journal of Commerce."

8. Alfred W. Trotter, a civil and construction engineer for more than 40 years; president of a building company; born in the United States; 63 years of age. Mr. Trotter was a veteran of the Seventh Regiment; had read very little about Socialism, but professed an interest in it. He stated it as his opinion that Socialism would not work "because it was against human nature." He added, that he would be interested to hear an exposition of the Socialist philosophy.

9. Solomon Marcus, a retired merchant; 65 years of age; born in Russia; had been in the United States since 1868. When asked as to his reading he answered, "I don't read books."

10. Albert W. Walburn, retired, was president and treasurer of a foundry and machine shop; about 60 years of age. Mr. Walburn read the Tribune and the Post regularly. He was interested in Socialism in a casual way and had read one of Walling's books. He could not remember the title. He was the only member of the Jury who stated that he had read a book on the subject of Socialism. Mr Walburn was born in Pennsylvania and acted as a draft board registrar during the war.

11. Isaac Anhalt, a diamond broker of about 50 years of age. He had read nothing about Socialism; was interested in the war and believed in conscription. Mr. Anhalt was of German birth.

12. P. R. De Bracke, secretary of a chemical corporation and stockholder of the same corporation. Mr. De Bracke was born in Paris, and knew "very little" about Socialism. In answer to the question, "Have you any Socialist friends?" he replied, "No." Mr. De Bracke stated his age as 38.

The Government's Case

MR. BARNES: May it please your Honor, Mr. Foreman and gentlemen of the jury, . . . the real issue that you have to decide is not whether these defendants are right in their economic theories, or whether they are wrong. It does not make any difference. The question is whether what they did was done with a purpose which the law forbids.

This indictment was filed in the month of May, 1918, and brought, as are all indictments, by the grand jury of the United States District Court. It is founded upon one of the great war statutes that were enacted by Congress shortly after the entrance of this country into the war. It is filed upon a statute which is popularly known as the Espionage Act, and which among other things was enacted by Congress for the purpose of insuring a successful raising of an army, and for the purpose of preventing any obstruction, or any effort made to impair the loyalty or the obedience or the discipline of the army, or to demoralize it in any way, shape or form.

On April 6, 1917, you will recall, Congress declared that a state of war existed between this country and Germany, and thereafter it took certain steps to insure not only the vigorous prosecution of that war, but a successful termination.

The first thing needed after a war is declared is money. The next thing is men. The next thing, of course, is ships and equipment.

As you will recall, immediately after the war was declared, provisions were made for raising money, and the first Liberty loan was authorized, and then

in the middle of May, 1917, was passed the act known as the Selective Service Act, also commonly called the Conscription Act, although the act is more properly designated as a selective service act than as a conscription act, and that act provided two ways for raising an army, one by the process of selective service, the taking of those men who could be spared, between the ages of 21 and 30, and the other way, and a way, however, which it is very important for you to bear in mind in this case, was for the raising of an army by voluntary enlistment, by taking men who did not wait for the draft, but men who voluntarily came forward to offer their services, and their lives, if necessary, for the prosecution of the war.

That was May, 1917, that that law was passed, May 18, the law authorizing the raising of the army. On June 15, 1917, there was passed the Espionage Act, the act which we have to consider in this prosecution. That act is the one upon which this indictment is based.

The persons against whom this indictment is found are two, one of them a natural person, like you and I, and the other a corporation. So that while we see at the defendants' table here only one person in the flesh, you must remember always there is on trial here before you a corporeal body, an organization created by the laws of the State of New York, which has been indicted, and which has duly pleaded, and which is duly represented by counsel.

The individual is Mr. Scott Nearing, a gentleman who has been a member of the faculty of the University of Pennsylvania, and of Toledo. He has been a lecturer and a writer upon economic subjects.

The corporation is The American Socialist Society, and that is not to be confused with the Socialist Party, which is a political organization, although we shall

show you that no one may be a member of The American Socialist Society, this defendant, unless he is a believer in the general doctrines of the Socialist Party.

This corporation runs, among its activities, a school called The Rand School of Social Science, which occupies a building on 15th Street in this City, which I believe is called the People's Home, and this school is devoted, among other things, to the teaching and propagation of the theories of the socialist movement.

So please remember now and at all times that there is before you on trial two persons—one the individual and the other the corporation.

The sections or provisions of the Espionage Act upon which this indictment is based are Sections 3 and 4, and the first title, and the material parts of those sections which are concerned in this prosecution are as follows:

“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.”

And this Section 4 provides that if two or more persons conspire to violate the provisions of Sections 2 and 3 of this title, and what I just read to you was in Section 3, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided.

In other words, there are two offenses made by the statute, or three, practically, that we are here concerned with.

One is the attempt to cause disloyalty, insubordination, mutiny or refusal of duty in the military or the naval forces of the country.

The second is obstructing the recruiting or enlistment service of the United States, and the third is conspiring to effect those objects.

You will notice that the penalty is one of very wide scope. It is a punishment and a fine of not more than \$10,000. In other words, the fine may be imposed from one dollar up to the limit of \$10,000, or imprisonment for not more than twenty years. In other words, if a verdict of guilty should be found, the court would have the discretion to impose a sentence of from one day in the custody of the Marshal up to as high as twenty years.

This charge in this case concerns itself with the publication, the writing, and the distribution of a pamphlet consisting of some 44 pages called "The Great Madness. A Victory for the American Plutocracy."

It is claimed by the Government, and I think will be conceded, that Mr. Scott Nearing is the author of the pamphlet, and that it was published by and distributed by The Rand School of Social Science, which, as I have pointed out, was an activity of the defendant, The American Socialist Society.

The Government claims that when Mr. Nearing and The Rand School collaborated in the writing and the publication and the distribution of this pamphlet, that they were acting together in a concerted plan to effect a particular purpose. That is, they were both acting together in concert, the one to write, the other to publish and distribute.

The Government claims that this pamphlet was an obstruction to the recruiting and enlistment service of the United States, and that it was published and dis-

tributed, with the intention, in the minds of Mr. Nearing and of the Society, if the Society may have a mind—but it was done with the intention of obstructing the recruiting and enlistment service of the United States, and with the intention of creating among our soldiers a spirit of disloyalty and insubordination sufficient to amount to an attempt, practically, to cause disloyalty and insubordination and refusal of duty among our soldiers.

Now, by obstruction, as I understand the law, we do not mean necessarily the successful obstruction—we do not mean necessarily that any one man read this book and decided that he would not obey the draft, or that he would not enlist. It is not necessary, it is not practicable for the Government to go out and find men who would come here on the stand and say, "Yes, I read this particular book, and it persuaded me not to enlist," or "It persuaded me to attempt to evade the draft," or "It persuaded me not to register for the draft."

And by recruiting and enlistment service, we do not mean exclusively the draft, but we mean all those agencies of the Government which are used and employed in getting men to go into the army.

The Government will claim that the recruiting and enlistment service embraces the appeal to the heart that every citizen has, the feeling that every citizen has, to fly to the defense of his country, and to enter its service, and to give his all for the successful prosecution of a war, when it once has declared that war.

In other words, the recruiting and enlistment service is everything, practically, that we have, both the organized and instinctive natural appeal to men who are citizens of a country to rally to its defense, to rally to its colors, and to take their part in accomplishing the objects for which it enters a war.

It will be claimed by the government that this pamphlet is an obstruction of those appeals, and that it was designed and intended to dull the enthusiasm, and that it was designed and purposed and intended to persuade its readers that this was not a war for which they should be prepared to offer their services to the government. That it was a war which did not concern them, a war in which their own true interests would be best consulted by keeping out of, themselves.

It is that sort of an obstruction to the recruiting and enlistment service that the Government will contend was caused by the particular pamphlet.

It will also be claimed and we will attempt to show that from the statements and the arguments in this pamphlet, distributed as it was at a time when the draft was in course of operation; at a time when you would meet your neighbor on the street in civilian clothes, and he would tell you he had registered, and he expected to be called shortly—it was distributed at that time, that it was intended to cause those people when they became soldiers to be disloyal and insubordinate, and that the statements therein contained are calculated—that statements of that character are calculated to make soldiers who would not be the loyal and brave men that we wanted and that Congress wanted in the army.

It is not contended by the Government that there was any formal meeting between Mr. Nearing and the directors of the American Socialist Society, at which a resolution was passed that they would formally conspire together to obstruct the raising of the army and so forth. It is claimed, though, that they were working together with a common object, using a common means to accomplish this end, which Congress has made a crime.

Now, we will show that the pamphlet was written

by Mr. Nearing in the summer of 1917, after war had been declared, and after the Selective Service Act was passed, and after the Espionage Act was passed.

We will prove that there were two editions published, each edition consisting of ten thousand copies, and that it was distributed all over the United States by the Rand School of Social Science, through its book store called the Rand Book Store, which it maintained.

The hardest point always in any case of this kind is proving the intent, proving what is in the mind of a man when he does a particular act. That, of course, as you can see, is something that is not capable of photographic proof. We have no means yet of taking a photograph of a man's mind to determine just what he intended when he did a thing, so we have to resort to certain rules, and certain lines of evidence which will be resorted to in this case.

First, the ordinary rule that a man is presumed to intend natural ordinary and reasonable consequences of what he says and does.

Then we may look at and we will look at other statements, other publications made by these defendants at or about the time that this pamphlet was being published and distributed, because that may give us a line on what they had in mind at the time they were doing this—their other activities.

Then we shall endeavor to show the fact that Mr. Nearing and the defendant, The American Socialist Society, at this time were acting under the inspiration of a declaration of a war policy adopted at a convention of the Socialist Party held in St. Louis in April, 1917, and ratified thereafter by a referendum of the party.

We have asked and you have heard a great many questions of you gentlemen with regard to socialism and socialists. Now, of course, you understand nobody is being prosecuted because he is a Socialist.

That would be abhorrent to our Constitution, and to our conception of justice, to yours and to mine or to anyone's, but we are interested in the belief and doctrine of these people and the acceptance of the Socialist principles, if it throws any light upon what they intended at the time they printed and distributed this pamphlet, and it is for that reason that we shall look at what was the well defined or the defined and accepted war policy of the Socialist Party, by reason of the fact that these people are Socialists, and that they did accept it.

We will show you that Mr. Nearing became an enrolled Socialist in the month of July, 1917, whereas this war platform was adopted, the majority report—in April, 1917, and that Mr. Nearing then became a Socialist, and we shall show you that the two of the committee that adopted this particular war platform, were directors of The American Socialist Society.

So that we will then feel that we are entitled to look at this war platform to see what it pledges the Socialist Party to do in connection with the war, as throwing light upon what Mr. Nearing and the American Socialist Society had in mind when they did make this publication.

Now, Mr. Stedman, of course, has very properly said to you that because a man is opposed to a tariff, you do not necessarily believe that a man is a smuggler, and because a man is opposed to national prohibition, you do not brand him as running a blind pig.

MR. STEDMAN: Now, you see, Judge, they do know that term here. Even the District Attorney knows it.

THE COURT: He learned it from you.

MR. BARNES: I thought when you first used the term "blind pig", that that was a term of opprobrium for capitalists.

MR. STEDMAN: We have better ones than that for capitalists.

MR. BARNES: But, gentlemen, if you find a man who says he is opposed to any protective tariff, and will never pay a penny of duty, and then you catch him walking through the Customs House with his pockets full of diamonds, you are entitled then to look back at his activities to give you light as to whether or not he intended to smuggle, or whether he denied he had diamonds in his pocket, and so with the blind pig, if you have a man who says that national prohibition is an outrage upon the rights of individuals, and the rights of free men, and that he won't stand for it, and he will oppose it, and then you thereafter see him placing a twenty-cent piece right over a place where there is a separate section or a compartment, you have a right then to think, or to take into consideration his declaration with regard to prohibition, so as to determine the question whether he is trying to get a drink, or whether he is merely trying to buy some cigars.

Gentlemen, something has been said about a fair trial. We want a fair trial here. Mr. Stedman has told you very truly that we are all a part of the Government; I am a part of the Government, and he is a part of the Government, and it is tremendously important to us all that we give fair trials to everybody. He has told you the District Attorney does not want innocent people convicted, and he is right, we do not, and we are going to try to present the case just as fairly as it is possible to present it, and to appeal to your reason, and to appeal to your understanding, but, gentlemen, when they ask for a fair trial for the defendants, do not forget also that we are entitled to a fair trial for the government.

We are entitled to your best judgment, and that is all we want. That is all we ask for, and we are en-

titled to that. We are entitled to a judgment in which sympathy shall not play any part, and we are entitled to a judgment in which the feeling, "Oh, well, the war is over," shall not play any part, and both sides, both the Government and the defendants, are entitled to your attention, and I am sure they will get it, every moment of the trial, and I know that we will have your very best efforts to give us a just verdict.