REPRESENTING BENJAMIN GITLOW: CHARLES RECHT AND WALTER NELLES

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INTRODUCTION

As we celebrate the 100th anniversary of *Gitlow v. New York*,[1] it is only natural that we focus on the landmark presumption of incorporation in the majority opinion and the dissenting opinion that would foreshadow today's incitement standard.

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[1] 268 U.S. 652 (1925), *aff'g* 234 N.Y. 131 (1922).

But perhaps we can spare a moment to consider the dedicated lawyers who represented Gitlow and his fellow radicals throughout the process. That their efforts, at least in the short term, were largely futile is certainly attributable to the historical moment and the prevailing interpretation of the First Amendment, not to any lack of competence or commitment on their part.

Indeed, the lawyers who represented Benjamin Gitlow were among the best of a small cadre of lawyers who represented leftist radicals of various persuasions in the early 20th Century. Some, like Clarence Darrow, would achieve great fame in their own time; others, most in fact, would labor in relative obscurity and are largely forgotten today. And while all were dedicated to their radical clients, their backgrounds, career paths, and personal motivations could be quite different. This article will profile two of Gitlow's lawyers, Charles Recht and Walter Nelles. Both were involved from the earliest stages of Gitlow's representation, although only Nelles played a significant role in the U.S. Supreme Court proceedings. Along the way, we will encounter Darrow, Walter Pollak, and others who made substantial contributions to the *Gitlow* litigation.[2]

In examining the representation of Benjamin Gitlow, let us keep in mind the various interests that powered it. Fundamental, of course, is the interest that all criminal defense lawyers have in the acquittal of their clients. But then some lawyers and clients may have political or personal interests that color their litigation strategy and tactics. And some may have philosophical or ideological goals that transcend mere acquittal and seek to alter the legal landscape as much for the future as the present. All of these factors are present in the *Gitlow* representation.

I. RECHT CONDEMNS PALMER RAIDS

Benjamin Gitlow was arrested on November 8, 1919, in the middle of a speech celebrating the second anniversary of the Bolshevik revolution.[3] Gitlow was a prominent leader of the Left Wing socialists and one of the founders of the American Communist Party. Gitlow was one of hundreds of leftist radicals arrested in the

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[2] Darrow's association with Gitlow began and ended with his trial, and Pollak's with the Supreme Court proceedings. I believe the focus on Recht and Nelles offers a broader picture of the kind of representation that Gitlow and other radicals received.

[3] MARC LENDLER, GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT 17 (2012).

notorious Palmer Raids of November 7–9 carried out on orders of Attorney General Mitchell Palmer. A subsequent raid on Gitlow's Brooklyn home yielded two revolvers and six boxes of cartridges.[4]

Charles Recht was one of the first lawyers to condemn the Palmer Raids, issuing a lengthy statement covered extensively in the press. "The spectacular raids are simply a continuation of the stupid procedure by the Lusk Committee [of the New York legislature] and its cohorts with the ulterior motive of creating public excitement, and with a view of further appropriations for their ridiculous work" investigating seditious activities, Recht declared.

Decrying the sensational reports of revolutionary and anarchic literature found in the raids, Recht said the literature seized "was of the same type as has been published and read for more than seventy years, ever since social and economic problems have been formulated and advocated." Recht charged that the group responsible for "this hysterical outburst" either could not understand the literature or "maliciously perverted its meaning for their selfish purposes. It is an indictment of their own intelligence and integrity."

> The methods used by the raiders were worthy of the palmiest days of Czarist Russia. People were herded by hundreds into patrol wagons and then released. The force and the violence used by the raiders is an outrage to public decency and belied the pretenses to law and order of which they continually prate. The people subjected to these indignities are the ones charged with advocating force and lawlessness, but there is not an iota of proof and there will not be produced a particle of evidence to justify the charge.
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> On the other hand, the agents of the Department of Justice and those conducting the raid were most brutal in their methods. Even the people who were released were badly beaten, so that they had to get medical attention. They were also subjected to the additional outrage of having been photographed, measured, finger printed and put through the process of avowed criminals. And this by people who scream from the housetops their love of order and their desire to protect liberty and American institutions.
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> It is hardly believable that the public will continue to be fooled by these sensational stories, such as the May Day plots, the Fourth of July bomb plots and others, which, strange to say, have never been uncovered and no one ever caught. There is no doubt but that there is much unrest. That anyone would be foolish enough to believe that any individual or group of individuals causes unrest is hardly possible.

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[4] *Majority Arrested Here Are Released,* N.Y. TRIB., Nov. 19, 1919, at 3.

> In other countries attempts to suppress dissatisfaction by forceful and brutal methods have failed. They will fail here, too, for the simple reason that most people are law-abiding and will not tolerate wanton raids and unlawful methods, for if they can be used with impunity against one group the same thing can be done to any other not meeting with the approval of the Administration.
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> It is unfortunate that at a time when clear, level-headed action and intelligent discussion are so necessary, a Democratic Administration should use all its power to prevent such discussion by using Cossack methods. [5]

II. CHARLES RECHT: PROFESSIONAL PROFILE

Charles Recht was born on April 30, 1887, in Varvazor (Warwaschan), Pisek County, Bohemia, Czechoslovakia, Austrian Empire, to Jewish parents Marcus Recht and Adele (Adla) Kraus Recht. An older sister, Emily, had been born two years earlier; a brother Joseph was born two years later, and a brother William seven years later, in 1894. The family emigrated to the United States in September 1901. Marcus, who loved German idealist literature and rebelled against political oppression, died before the emigration, but remained a role model for Charles.[6] At the time of the New York Census of 1905, Adele and the four children were living at 2797 8th Avenue.[7]

Recht had studied at the gymnasium in Prague and graduated from New York University Law School in 1910, the same year he became a naturalized U.S. citizen. At the time, he had been working as a librarian, studying law part time, and living at home on East 79th St. with his mother and siblings. Recht had a strong literary bent and spent much of his pre-war years with "literary people," including clients like H.L. Mencken, other lawyers like Edgar Lee Masters, playwrights like Eugene O'Neill and Sherwood Anderson, poets like Edna St. Vincent Millay, and Greenwich Village socialists like Max and Crystal Eastman, John Reed, and Floyd Dell.[8]

On Jan. 2, 1915, Recht married Dr. Aristine Pixley Munn, then 28 and a surgical resident at Volunteer Hospital in lower Manhattan. Dr. Munn-Recht had received a B.A. from Bryn Mawr in 1909 and an M.D. from Johns Hopkins University in 1913. She was appointed director of the New York Beekman Street Hospital and

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[5] *Id.*

[6] FRANCES H. EARLY, A WORLD WITHOUT WAR 31–32 (1997).

[7] Census, selective service, immigration, and other records from Ancestry.com.

[8] EARLY, *supra* note 6, at 30, citing Recht's unpublished memoir, Objection Overruled, in Taminent Library.

would go on to serve as the first Dean of Women at New York University's Washington Square College, lecturer in Anatomy and Physiology, and assistant attending physician at NYU and Bellevue Medical College. She had one child with Recht, John Munn Recht, on Jan. 17, 1916.[9] The Rechts moved to 331 Van Cortlandt Park Ave., Yonkers, Westchester County, in April 1916, while Recht had moved his law offices to 110 West 40th St.

Soon after the United States formally entered the war on April 6, 1917, Recht registered for the draft as a nonreligious conscientious objector, claiming his eligibility was limited by his dependents and an unspecified, but apparently not serious physical disability. He was 30 years old, 5'5" tall, medium build, with brown eyes and slightly balding brown hair.[10] Recht looked back upon the war as a fateful moment in his life: "The America I wanted to belong to, the literary world, was to be ignored. Creative forces were being mobilized for [war] propaganda."[11]

Resolving to use his legal skills to support the pacifists opposed to the war, as well as other subversives, Recht joined the executive committee of the newly formed New York Bureau of Legal Advice (NYBLA). The Bureau had been formally organized on May 22, initially as the New York Bureau of Legal First Aid, to look into civil liberties cases arising from the war and connect prospective defendants with appropriate legal representation. The NYBLA was headed by eight women who were active in the suffrage and peace movements, including Marion Cothren, Jessie Ashley, and Fannie May Witherspoon.[12]

Enactment of the Espionage Act and Selective Service Act kept Recht and other volunteer lawyers busy, so much so that Recht described his 40th Street law office as the "clinic" of the NYBLA. Many of his cases involved convictions for "disorderly conduct," code words for the soapbox oratory relied upon by the radical movement at the time.[13] The soapbox orators of 1917 represented many diverse

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[9] Information on Aristine Pixley Munn Recht is available in the James Buell Munn Collection at the New York University Archives, subseries B and C; *see also* EARLY, *supra* note 6, at 30–31; FIND A GRAVE, https://www.findagrave.com. Aristine filed for divorce in 1925, alleging infidelity.

[10] EARLY, *supra* note 6, at 31; World War I Draft Registration Cards, June 5, 1917, Ancestry.com.

[11] EARLY, *supra* note 6, at 31.

[12] *Id.* at 21, 31.

[13] *Id.* at 34.

causes—pro-Irish, anti-Jewish,[14] anarchists and suffragists[15]—but it was the anti-war speakers that prompted the Manhattan District Attorney to convene an investigative grand jury to look into the incidence of seditious soap box oratory and the steps being taken to control it.[16]

As chief counsel for the NYBLA,[17] Recht also found himself challenging the new Selective Service Act of 1917, at least with respect to aliens in the United States. The NYBLA's support for exempt aliens and conscientious objectors apparently came under investigation by military authorities in early March 1918, when it issued a leaflet describing the work that the NYBLA had done in helping men of draft age to present claims of exemption.[18] Although Recht was sympathetic—"a different kind of heroism began to crystallize among those in contact with objectors to the war that the more poignant courage was required from those who stood alone"[19]—he does not seem to have played a leading role in the NYBLA's defense of non-alien exemptees.

Recht was also involved in the representation of New York City public school teachers who had come under attack during the early months of the war for questionable loyalty. "Teachers who would not actively support the war or participate in war work in the schools, and those suspected of questionable loyalties, were suspended and often dismissed on charges of 'conduct unbecoming a teacher,'" according to one scholar. "At least ten teachers were fired (and many more transferred to less desirable posts)."[20] Recht explained the situation in the NYBLA's 1918 yearbook by quoting Dr. John Finley, the state's Commissioner of Education: "A school-teacher must be absolutely loyal and do with her mind what the soldier does with his body, namely, give it without reserve to the Government."[21]

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[14] *See, e.g.*, *Donne Sentenced; 2 Attack Justice*, N.Y. SUN, Aug. 29, 1917, at 6.

[15] Mary Anne Trasciatti, *Athens or Anarchy: Soapbox Oratory and the Early Twentieth-Century American City*, 20 BUILDINGS & LANDSCAPES 43, 60 (2013).

[16] *Grand Jury Widens Sedition Inquiry*, N.Y. SUN, Sept. 11, 1917, at 5.

[17] EARLY, *supra* note 6, at 32.

[18] *Draft Aid Bureau Faces Inquiry for Exemption Work*, N.Y. TRIB., Mar. 2, 1918, at 15.

[19] EARLY, *supra* note 6, at 95 (quoting Recht's later writings).

[20] Stephen F. Brumberg, New York City Schools March Off to War, Paper Presented at the Annual Meeting of the American Educational Research Association (April 6, 1988) (available through Educational Resources Information Center (ERIC)).

[21] EARLY, *supra* note 6, at 41.

It is difficult to pinpoint a single moment when Recht began representing Soviet interests in America. As noted above, Recht's literary work brought him into contact with the radical intelligentsia of Greenwich Village, including John Reed,[22] who would later embrace the Russian Revolution and participate in Comintern activities. In the spring of 1918, Recht teamed up with Gilbert Roe, who had represented *The Masses* in the civil Espionage Act case,[23] to defend Agnes Smedley, who would also become a Comintern agent and Soviet spy, then charged with involvement in German-supported, anti-British subversion in India.[24]

In October 1918, Recht joined the defense team for the second criminal trial of *The Masses* magazine's staff and contributors. The defense was headed by Seymour Stedman, a midwestern leader in the Socialist Party, filling in for the ailing Morris Hillquit, a leader of the eastern socialists, who had won a hung jury in the first criminal trial. Recht may have been chosen for the team because Reed, an indicted *Masses* contributor who had been in Russia during the first trial, had returned to the United States for the second. In any event, Recht would become the foremost attorney in the United States for the still-unrecognized Soviet Union.

The second *Masses* trial also brought Recht into a working relationship with Walter Nelles, who would play a major role during all stages of the *Gitlow* case.

III. WALTER NELLES: PROFESSIONAL PROFILE

Walter Ralston Nelles was born on April 21, 1883, in Leavenworth, Kansas, where his father, George Thomas Nelles, was a civil engineer, serving two terms as city engineer. The senior Nelles was the son of George W. Nelles, said to be one of the "old settlers" of the city of Leavenworth.[25] Walter's middle name was his mother's maiden name.[26]

In stark contrast to Charles Recht, young Walter, an only child, enjoyed a privileged childhood. At five years old, he participated in a costume ball sponsored by the *Leavenworth Times,*[27] an annual social event. Walter did not go to high school

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[22] *Id.* at 30.

[23] *See* ERIC B. EASTON, DEFENDING THE MASSES 103 (2018).

[24] *Id.* at 170.

[25] *George T. Nelles Died Last Week at Cleveland, O.,* W, LEAVENWORTH TIMES, Nov. 20, 1907, at 4.

[26] Federal Census, 1900, at Ancestry.com.

[27] *Annual Fancy Dress Party Last Night,* LEAVENWORTH TIMES, Apr. 30, 1898, at 4.

in Leavenworth, however, but went on to the prestigious Phillips Exeter Academy in New Hampshire. The Leavenworth newspaper published an enthusiastic letter from Walter about a football game between Exeter and its arch-rival, Phillips Andover Academy, when Walter was about 17.[28] That Walter was bound for the Ivy League was unmistakable, even though his family appears to have taken in lodgers while he was away.[29]

Walter excelled at Harvard, graduating *magna cum laude* in 1905 with final honors in English and winning the Sohier prize of $250 for the best thesis in modern languages.[30] Following a summer job with the War Department's Engineer Department at Large in Cleveland, where his family had moved,[31] Walter accepted a position as instructor in English at the University of Wisconsin at Madison.[32] After two years, however, Walter returned to Cambridge, where he took a master's degree in 1908, then enrolled at Harvard Law School, earning an LL.B. in 1911. While at Harvard, he taught as an instructor at Lowell Institute and Radcliffe College.[33]

Nelles spent the summer of 1910 in Europe, returning to the U.S. aboard the *S.S. Oceanic* via Southampton, at the end of September.[34] His passport application describes him as 27 years old, 5' 7½" tall, dark of hair and complexion, and sporting a moustache.[35] According to the 1910 census, he was living in Cambridge with a roommate, Gilbert E. Fuller.[36] Four years later, on October 22, 1914, Nelles married Mary Pastorius Damon in Newton, Massachusetts.[37] The Nelleses subsequently

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[28] *Interesting Letter from Walter R. Nelles*, LEAVENWORTH TIMES, Dec. 1, 1900, at 6.

[29] U.S. Census, 1900, at Ancestry.com.

[30] *Senior Spread in Memorial Hall*, BOSTON GLOBE, June 23, 1905, at 4; *Harvard's Honor Men of This Year*, BOSTON GLOBE, Dec. 19, 1905, at 11.

[31] OFFICIAL REGISTER OF THE UNITED STATES CONTAINING A LIST OF THE OFFICERS AND EMPLOYEES IN THE CIVIL, MILITARY, AND NAVAL SERVICE (1905).

[32] *Now a Professor in Wisconsin University*, LEAVENWORTH TIMES, Sept. 20, 1905, at 4.

[33] THE AMERICAN LABOR WHO'S WHO 170 (Solon DeLeon, Irma C. Hayssen & Grace Poole eds. 1925).

[34] Manifest, Sept. 21, 1910, at Ancestry.com.

[35] Passport Application, June 27, 1910, at Ancestry.com.

[36] U.S. Census, 1910, at Ancestry.com.

[37] Massachusetts, U.S. Marriage Records, 1840–1915, at Ancestry.com.

moved to New York City and, together with his friend Swinburne Hale, Walter formed the law firm of Hale, Nelles & Schorr.[38]

In April 1917, Nelles's old college classmate Roger Baldwin invited him to leave his practice to serve as house counsel for the new National Civil Liberties Bureau (NCLB) of the American Union Against Militarism.[39] Nelles was admitted to practice before the United States Supreme Court on November 21, 1917.[40] The following month, his name appeared in a legal column advising that his motion to file an amicus curiae brief in the case of *Charles E. Ruthenberg et al. v. United States*.[41] It was the first public notice of Nelles's involvement in a series of cases challenging the conscription laws.

On May 18, 1917, some weeks after the declaration of war on April 6, Congress enacted a statute entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States."[42] Among other provisions, the act subjected "all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service" and "providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary."[43]

These goals would be accomplished by requiring all men subject to the call to present themselves for registration. The act explicitly exempted designated federal and state officials, those already in the military service, ordained ministers and theological students, and provided for local rules for physical disability and other exemptions. Notably, the law also exempted members of religious sects whose tenets prohibited engagement in war, though it required such conscientious objectors to perform non-combatant services.[44]

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[38] Swinburne Hale Papers, N.Y. Public Library, Archives & Manuscripts, archives.nypl.org.

[39] ROBERT C. COTTRELL, ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION 57 (2000).

[40] *The Daily Legal Record, United States Supreme Court*, WASH. POST, Nov. 22, 1917, at 11.

[41] *The Daily Legal Record, United States Supreme Court*, WASH. POST, Dec. 11, 1917, at 12.

[42] 40 Stat. 76 (1917).

[43] Selective Draft Law Cases, 245 U.S. 366, 375 (1918).

[44] *Id.* at 376.

Of course, any number of men failed to register for the draft for any number of reasons. Among them, and of particular interest to the NCLB, were Joseph F. Arver, Alfred F. Grahl, Otto Wangerin, Walter Wangerin, Louis Kramer, and Meyer Graubard. When they were prosecuted for failure to register, they defended by denying that the Constitution gave Congress the power to compel military service through a draft and that, even if it did, the terms of the Conscription Act itself were "beyond the power and repugnant to the Constitution."[45]

Those arguments failed decisively below, and all of the conscription cases were consolidated and argued before the Supreme Court on December 13 and 14, 1917, along with separate cases involving defendants Louis Kramer, who had been convicted of conspiring to induce draft resisters;[46] Charles E. Ruthenberg, convicted of failure to register for the draft;[47] and Albert Jones, also convicted of failure to register.[48]

Although it had severed formal ties with its parent American Union Against Militarism on Oct. 1,[49] the NCLB took an active interest in the conscientious objector cases. In an *amicus* brief for all the defendants, Walter Nelles had written that the framers of the Constitution meant to protect the right to think and believe, regardless of religious affiliation. The Constitution, he wrote, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."[50]

Nelles's brief focused on the exemption accorded members of "religious sects or organizations opposed to war," citing "wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God," he

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[45] *Id.* Defendants' names appear at 62 L. Ed. 349.

[46] Kramer v. United States, 245 U.S. 478 (1918).

[47] Ruthenberg v. United States, 245 U.S. 480 (1918).

[48] Jones v. Perkins, 245 U.S. 390 (1918).

[49] *U.S. Detectives Raid Objectors' Bureau*, BROOKLYN DAILY EAGLE, Sept. 1, 1918, at 47.

[50] Brief for the NCLB as Amici Curiae Supporting Petitioners, Selective Draft Law Cases, 245 U.S. 366 (1918) (as reported in *To Hell with The Constitution, Says Elihu Root, Anarchist*, THE NEW AGE (Buffalo, N.Y.), Jan. 5, 1918, at 2).

wrote, "others upon their duty towards man. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one."

> It lies deep in the foundations of everyone who has been an American schoolboy that the cardinal excellence of our government is that it assures to all men at all times freedom to believe as individual conscience and judgment may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such freedom both indirectly by recognizing the retention by the people of their unenumerated natural rights, and directly by forbidding Congress to make laws prohibiting the free exercise of religion.
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> The Conscription Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or man. . . .
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> The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces. Conscientious refusal to take part in the war is an exercise of religion. He who believes in democracy and more democracy as the means for carving out for populations the possibility of good lives and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by the war, may believe that he cannot put on a uniform and go out and kill and die without a shame at least as deep as that of his fellow citizens whose spirit was abased because America held off so long.[51]

Nelles's plea fell on deaf ears. Writing for a unanimous Court in January 1918, Chief Justice Edward Douglass White held that authority to enact the conscription law could be found in the congressional power to "declare war . . . to raise and support armies," along with the provision authorizing Congress to "make all laws which shall be necessary and proper" for exercising those powers. Any suggestion that Congress could not provide the men for those armies "would seem to be too frivolous for further notice," he said.[52] Nevertheless, White did notice the historical precedent for conscription at some length, concluding by dismissing out of hand other constitutional challenges that did not involve congressional authority. As to the First Amendment argument raised by Nelles and the NCLB, White flatly rejected the proposition that the act's qualified exemption for religious reasons was

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[51] *Id.*

[52] Arver v. United States, 245 U.S. 366, 377 (1918).

repugnant to the establishment or free exercise clauses. "[We] think its unsoundness is too apparent to require us to do more."[53]

In June 1918, Nelles was identified as one of the authors of an NCLB pamphlet entitled "The Truth About the I.W.W." At the time, some 113 leaders of the I.W.W.—Industrial Workers of the World or Wobblies—were on trial in Chicago for seditious conspiracy to interfere with preparations for war in the Western mining districts; the pamphlet was part of a fund-raising effort to support the defense and counter a national anti-Wobbly propaganda campaign.[54]

In all, 166 Wobblies had been indicted on four counts encompassing hundreds of crimes, but many of them had died or recanted by the time the trial began on April 1. U.S. District Judge Kenesaw Mountain Landis presided, former *Masses* staffers John Reed and Art Young covered the trial for various publications, and attorney George Vanderveer led the defense. After four months of testimony, highlighted by Big Bill Haywood's two-day appearance, it took the jury less than one hour to convict all defendants on all counts of the indictments. On August 31, Landis handed down harsh sentences, including 15 years imprisonment for Haywood; all subsequent appeals ended in failure.[55]

That same day, agents of the Department of Justice and Military Intelligence Service entered the offices of the National Civil Liberties Bureau, and specifically Walter Nelles's office, examining whatever records, documents, correspondence, and literature they could find. Nelles initially challenged the search warrant, but backed off when an agent drew his gun. When questioned, Nelles proclaimed, "I am a pacifist. I don't believe the United States should have participated in the war, but having participated, I hope it will result in some good. I am also a conscientious

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[53] *Id.* at 390.

[54] *To Tie Up Production*, CINCINNATI ENQUIRER, June 5, 1918, at 3; *I.W.W. Inspired the Kaiser's Agents in Outrages of Sabotage*, BISBEE (ARIZ.) DAILY REV., July 7, 1918, at 13.

[55] MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 243–61 (2000).

objector."[56] After the raid, Nelles warned members of the NCLB executive committee that "all or most" of them might be indicted.[57] In less than two weeks, Nelles, then 35 years old, would register for the draft.[58]

Meanwhile, the government continued to prosecute Espionage Act cases, and in 1918, Nelles found himself on the defense team in the second *Masses* criminal trial, along with Seymour Stedman and Charles Recht.

IV. THE *MASSES* TRIALS

In June 1917, Congress enacted the Espionage Act, which threatened left-wing publications with crippling, often fatal postal sanctions, and their editors and contributors with prison terms. Among the earliest victims of the new law was the monthly socialist magazine *The Masses*. In early July, the magazine was declared unmailable by the Postmaster under the Espionage Act because of articles, poems and cartoons that criticized the war. Represented by Gilbert E. Roe, a progressive Republican close to Sen. Robert La Follette (R-Wisc.), *The Masses* won a significant victory at its civil trial to have the mailability order rescinded, with a landmark free-speech opinion by Judge Learned Hand, only to be reversed on appeal. Ultimately, the magazine failed.[59]

In short order, the government indicted the Masses Publishing Company, editor-in-chief Max Eastman, editor and writer Floyd Dell, reporter John Reed, poet Josephine Bell, cartoonists Henry J. Glintenkamp and Arthur Young, and business manager C. Merrill Rogers, Jr. The first count of the indictment accused all the defendants of "unlawfully, wilfully, knowingly and feloniously [conspiring] together and [agreeing] among themselves, and with divers other persons whose names are to the Grand Jurors unknown, to . . . cause, and attempt to cause, insubordination,

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[56] *U.S. Detectives Raid Objectors' Bureau*, BROOKLYN DAILY EAGLE, Sept. 1, 1918, at 47; *U.S. Agents Digging in Pacifists' Lairs*, N.Y. SUN, Sept. 1, 1918, at 12; SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 38 (1990).

[57] WALKER, *supra* note 56, at 38. The Post Office did put dozens of NCLB pamphlets on a list of publications banned by the mails, but Nelles persuaded a federal court to remove the ban. PHILIPPA STRUM, SPEAKING FREELY 90–91 (2015).

[58] Registration Card, Sept. 12, 1918, at Ancestry.com. Nelles's closest associate, Roger Baldwin, also registered for the draft, but, when called up on October 9, he refused to submit to a physical examination. He pleaded guilty and was sentenced to one year in prison by U.S. District Judge Julius M. Mayer. He refused to accept bail as a matter of principle.

[59] EASTON, *supra* note 23, at 103.

disloyalty, mutiny and refusal of duty in the military and naval forces of the United States . . . through and by means of the publication . . . of a certain monthly magazine called *The Masses* and the circulation and distribution of the same."[60]

That count also set out the basis for the charge against each individual defendant: Eastman, for an article entitled "A Question," which extolled the courage of those who resisted the draft on moral grounds; Dell, for an article entitled "Conscientious Objectors," that reprinted letters from imprisoned British C.O.'s and commended their example to American men; Reed, for an article entitled "Knit a Strait-Jacket for Your Soldier Boy," a report on a study of mental illness in the military by the National Mental Hygiene Center, reprinted from the *New York Tribune,* and implying that the frequency of mental disease among soldiers had been unexpectedly high during the war; Bell, for a poem entitled "A Tribute," an homage to Emma Goldman and Alexander Berkman, recently convicted of violating the Conscription Act; Glintenkamp, for a cartoon "representing a skeleton symbolizing 'Death' taking the measurements of a drafted soldier for his coffin"; and Young, for a cartoon entitled "Having Their Fling," featuring characters representing the press, business, government and the church, all dancing under a shower of money. Rogers was indicted simply for managing the business of co-defendant Masses Publishing Company.[61] Reed was in Russia and did not stand trial.

Count two cited the same content, but focused on the aim of the conspiracy to "obstruct the recruiting and enlistment service of the United States military by publishing articles, poems, and pictures calculated and intended to induce persons . . . to refuse to submit to registration and draft or enlistment for service."[62] The indictment was signed by United States Attorney Francis G. Caffey, who then moved successfully to impound the company's books and records.[63]

The trial began on April 15, 1918, before Judge Augustus Hand, Learned Hand's cousin. Assistant U.S. Attorneys Earl Barnes and Vincent A. Rothwell prosecuted, along with Candler Cobb. *The Masses* staff was represented by socialist leader Morris Hillquit and Dudley Field Malone, most recently a confidant of

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[60] Indictment, United States v. Masses Pub. Co., No. C10-327, at 1–2 (S.D.N.Y. Nov. 19, 1917).

[61] *Id.* at 3–4.

[62] *Id.* at 6.

[63] Order, United States v. Masses Pub. Co., No. C10-327 (S.D.N.Y. Nov. 19, 1917) (signed by U.S. District Judge Julius M. Mayer).

Woodrow Wilson. They persuaded Hand to dismiss the charges against the poet Bell[64] and, later, the first count of the indictment for the remaining defendants.[65] After more than 40 hours of deliberations, the jury reported it was hopelessly deadlocked. Hand discharged the jury and set a June date for the retrial. [66] John Reed returned from Europe the day after the jury was discharged and was met at the dock by federal agents who searched his person and property. Walter Nelles posted his bail.[67]

On May 24, 1918, the government filed a new indictment against Eastman and his colleagues which differed from the previous indictment in that it alleged several substantive offenses in addition to the conspiracy count.[68] Specifically, the second, third and fourth counts involved elements of the August issue of *The Masses* allegedly intended to obstruct the enlistment service, while the third and fourth counts referred to elements of the September and October issues for the same offense. The last three counts alleged that elements of the August, September and October issues constituted attempts to cause insubordination in the military.[69]

The second *Masses* trial would not begin until October, but by then Hillquit would be out of the picture. Hillquit, who had long suffered from tuberculosis, had a major attack in the summer of 1918 and retreated to Saranac Lake, New York. From then on, Seymour Stedman would take over the *Masses* case, assisted by Charles Recht and Walter Nelles. The trial was held before Judge Martin Manton; Barnes again handled the prosecution. This time defendant Reed was present in the courtroom, and his colorful and moving description of the war in France proved to be one of the highlights of the second trial, along with Max Eastman's address to the jury. The jury deliberated two days, then reported themselves deadlocked. There would be no third trial.

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[64] MORRIS HILLQUIT, LOOSE LEAVES FROM A BUSY LIFE 227 (De Capo Press 1971) (1934).

[65] WALTER NELLES, ESPIONAGE ACT CASES WITH CERTAIN OTHERS ON RELATED POINTS 28 (1918).

[66] *Jury in 'Masses' Trial Disagrees*, N.Y. SUN, Apr. 28, 1918, at 7. There are some minor discrepancies in the sources as to how long the jury deliberated (42–48 hours) and how many jurors held out for acquittal (2–3), but the *Sun's* account is as reliable as any.

[67] Order for Return of Cash Bail, United States v. John Reed, No. C20-327 (Jan. 20, 1919).

[68] United States v. Eastman, 252 F. 232 (S.D.N.Y. 1918), *nolle prosequi filed* Jan. 9, 1919 (No. C13-245).

[69] *Id.* at 232–33.

Following the trial, a juror approached Recht to say, in effect, "You fellows were just lucky in not having a Jew or a foreigner (Recht, of course, was both) among the defendants or you wouldn't have gotten off without any acquittal votes except mine." [70] Indeed, Reed would recall, six Jewish defendants from Eastern Europe, tried in the same courtroom soon thereafter, received sentences ranging from 15 to 20 years for passing out leaflets protesting United States intervention in Russia.[71]

Masses was the first major case that Recht and Nelles worked on together—and good preparation for *Gitlow*. While the New York law under which Gitlow was prosecuted was some 15 years older than the Espionage Act, both implicated the right of political radicals to speak freely in times of national crisis. And although the two men were from vastly different backgrounds, both had extensive experience representing such radicals.

V. GITLOW ARRAIGNED, INDICTED

With so many agencies involved in the Palmer Raids, and so many radicals detained or arrested, some confusion was perhaps inevitable. Recht had obtained a writ of habeas corpus for Gitlow and others—including Irish agitator James Larkin—from Judge Leonard A. Giegerich, but found himself unable to serve it, declaring that the prisoners were being kept incommunicado. "I was told by the Lusk committee that the prisoners belonged to the Federal government, and by the [government] that they didn't know anything about them," Recht said. "When our process server went to the Lusk committee's headquarters at the Prince George Hotel they refused to admit him. I expect to try tomorrow."[72]

On Monday, November 10, 1919, Gitlow and others were brought without representation before Chief Magistrate William McAdoo, who charged them, set bail at $15,000, and sent them off to The Tombs after receiving an affidavit from Archibald E. Stevenson, special counsel to the Lusk Committee, and Samuel Berger, deputy attorney general. The affidavit said that Gitlow and Larkin "wilfully and feloniously printed, issued and caused to be circulated a publication known as 'The Revolutionary Age,' which advises, advocates and teaches the doctrine that organized

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[70] John Sayer, *Art and Politics, Dissent and Repression: The Masses Magazine versus the Government*, 32 AM. J. L. HIST. 42, 74–75 (1988).

[71] *Id.*, alluding to Abrams v. United States, 250 U.S. 616 (1919).

[72] *Red Agitators to Be Driven out of City*, N.Y. TRIB., Nov. 11, 1919, at 1.

government should be overthrown by force and violence or by unlawful means." Gitlow declined to comment.[73]

On Wednesday, November 12, Gitlow and Larkin were formally arraigned before McAdoo. Gitlow's attorney of record was Walter Nelles, with Recht appearing at the hearing as well. Nelles moved to dismiss the charges against all the prisoners on the ground that the law under which they were held was unconstitutional. "The statute which defines the alleged crime [of criminal anarchy] is in violation of the constitution both of the state and of the nation," he said. Nelles and Recht also moved to reduce the $15,000 bail.[74] "These men are poor," Recht had told McAdoo, "and cannot raise the amount of the bail. They have been maltreated as prisoners and were not permitted their rights under due process of law."[75] McAdoo denied both motions, expressing the view that the Communist Party, as it was now called, was organized solely to destroy the government.

"Our government is at war with Russia," McAdoo told Recht at one point.

"We are not legally at war with Russia," Recht replied. "In fact, our troops have been withdrawn from Russia."

"We do not recognize the government of Russia and to the United States, Russia is but a state of chaos and anarchy," McAdoo answered.

Recht repeated, "We are not at war with Russia."

"Who killed the 111 American soldiers whose bodies are being brought back from Russia?"

"I don't know."

"Well, it was the Soviet Guards of Russia. Now let's get back to the law."

McAdoo insisted that "The Communist Party has declared a state of war against the United States . . . and the establishment of the Communist Party in the state of New York is the highest crime known to the law." Both Gitlow and Larkin were remanded to The Tombs, while McAdoo sent the case to the grand jury empaneled at an extraordinary trial term of the Supreme Court convened by the governor. with a strong statement of condemnation: "I am of the opinion beyond any doubt, reasonable or otherwise, that these defendants in their writing, concocting,

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[73] *Id.*

[74] *Radicals Plead Anti-Anarchy Law is Invalid*, N.Y. TRIB., Nov. 13, 1919, at 2.

[75] *7 Brooklynites Held Following Radical Raids*, BROOKLYN TIMES UNION, Nov. 12, 1919, at 9.

. . . printing and circulation of the manifesto, are clearly guilty as charged in the complaint."[76]

The following week, Nelles and Recht secured a second writ of habeas corpus from Justice Giegerich, and arguments on the merits were set for the morning of November 19.[77] On that date, Recht argued that nothing Gitlow and Larkin had said or done constituted criminal anarchy and that the Communists were no more radical than members of the Sinn Fein movement in Ireland. Magistrate Francis McCloskey reserved his decision until December 2. At least Gitlow and Larkin were able to await the decision in freedom; friends and supporters "interested in the cause" had pooled their resources to come up with $30,000 in cash and Liberty Bonds for their bail. Recht contributed $500 of his own money. [78]

Before McCloskey's decision was due, however, Gitlow, Larkin and two others were indicted on November 26 by the grand jury. Gitlow would be tried separately beginning January 21, 1920,[79] with the legendary Clarence Darrow now leading the defense team that included both Recht and Nelles.[80]

VI. Recht Represents the Soviet "Ambassador"

The armistice signed on November 11, 1918, brought a period of "stock-taking and worry" to members of the New York Bureau of Legal Advice. Early notes Recht's recollection of how jaded and empty he felt when the armistice was announced: "I was immeasurably weary. Weary of reading of the slaughter of millions of human beings, weary of carrying on the fight—a fight of a tiny group pitting itself against the juggernaut of the war machine." Recht spent a few hours with friends at the Hotel Brevoort in Greenwich Village "in a mood of sober calm."[81]

The calm would not last long. Recht spent most of his time during 1919 defending I.W.W. members and other potential deportees, many of them Russian. Even

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[76] Lendler, *supra* note 3, at 18–21.

[77] *Gitlow and Larkin Again Seek Release; Martens Is Grilled*, Brooklyn Daily Eagle, Nov. 17, 1919, at 1.

[78] *15 Teachers Summoned as 'Red' Suspects*, N.Y. Trib., Nov. 20, 1919, at 1; *Woman Put out as Red Teacher*, N.Y. Herald, Nov. 20, 1919, at 6.

[79] People v. Gitlow, 195 A.D. 773, 1921 N.Y. App. Div. LEXIS 4835, at *4 (Prior History).

[80] John A. Farrell, Clarence Darrow: Attorney for the Damned 308 (2012).

[81] Early, *supra* note 6, at 124.

as he fought against their deportation, Recht urged that any transportation to Russia would have to be to a "port not under control of the Kolchak, Denikin, Semenoff, or other reactionary groups."[82]

One of the first articles to publicly associate Recht with the still-evolving Soviet Union came in early June 1919, when the *Tribune* identified Recht as "one of the lawyers of the Russian Soviet Bureau" in New York City. The story concerned a document allegedly found by a woman in Grand Central Station, signed "Nikolai Lenine," purporting to commission one Harold C. Keyes for a "secret mission" in the United States on behalf of the "Government of Russian Soviets." Keyes, said to be a member of the Brotherhood of Railroad Trainmen, was reportedly "thrown out" of "The Young Democracy," identified as an organization of conscientious objectors, because he was suspected of being a government agent.

Deriding the so-called Lenine Commission, Recht was quoted as saying "people ought to be very careful these days about alleged agents from Soviet Russia. It is really surprising that the Federal authorities still fall for that time-honored game of dropping alleged important papers in a conspicuous public place."[83]

The Russian Soviet Government Bureau was real enough, however, although its status as an informal embassy went unrecognized by American authorities. The bureau was founded in March 1919 and headed by its founder, Ludwig Christian Alexander Karl Martens, until he was deported in 1921. Martens had emigrated to the United States from Russia in 1916, working as a vice president of the engineering firm Weinberg & Posner in New York City. Following the February 1917 revolution, Martens returned to Russia along with nearly 300 revolutionaries, including Leon Trotsky. He came back to the United States in March 1919 to set up the Bureau, seek recognition for the new regime, and oversee Russian commercial interests. With the formation of the New York State Legislature's Joint Legislative Committee to Investigate Seditious Activities or [Sen. Clayton R.] Lusk Committee in March, and its raid on the Bureau's West 40th Street offices in June, however, legal

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[82] *Id.* at 28 (Case of Charles Bernat). The allied forces would recognize the "white Russian" government of Admiral Alexander Vasilyevich Kolchak at Omsk in June. *Government of Kolchak Is Recognized by Allies*, N.Y. TRIB., June 13, 1919, at 1.

[83] *Lenine Letter Hints at U.S. Secret Mission*, N.Y. TRIB., June 3, 1919, at 2.

issues would dominate his life for the next two years. And Charles Recht would be with him every step of the way.[84]

On June 13, 1919, virtually every newspaper in New York City carried headlines announcing the raid by 10 agents of the Department of Justice and 10 members of the New York State police. Martens and four others were served with subpoenas duces tecum to appear before the committee. Two loads of papers, including many publications characterized as "propaganda," were also taken. The Russians appeared later that afternoon at City Hall, where the Lusk Committee was sitting in secret session. Recht had demanded to represent them before the committee, but was denied access to the proceedings. Martens also identified Gilbert Roe and Dudley Field Malone as lawyers for the Bureau. That evening, Martens gave a lengthy statement that began:

> The unwarranted and brutal raid on the office of the representative in the United States of the Russian Socialist Federal Soviet Republic I brand as an outrage and as an uncalled-for insult to the people of Russia. The activities of my office have avoided interference in American affairs and the publicity work conducted by my office has had as its only object the bringing about of friendly relations between my Government and the United States.

Martens went on to say he had notified his government of "this outrage" and had filed a protest with the U.S. Department of State.[85]

Recht was circumspect in dealing with the press. Asked whether he believed the raid was an "overt act . . . against the Soviet Republic," he responded: "I do not wish to go into that phase of the matter until later. I will say that we deeply resent the action of the committee, on the ground that it was entirely unwarranted. I shall make a formal statement after I have had an opportunity to converse with my client."[86]

Notwithstanding all the furor over the raid, Martens and staff were back on the job by the following day. Recht told reporters that the raid had been undertaken

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[84] At the height of his representation of the Bureau, in August 1920, Recht was reportedly paid $300 per month. *Ex-U.S. Employee on Soviet Payroll*, BROOKLYN DAILY EAGLE, Aug. 15, 1920, at 47.

[85] *Five Russians, Caught in Raid, Must Testify*, N.Y. HERALD, June 13, 1919, at 1. *See also Bolshevik Embassy Here is Raided*, N.Y. TRIB., June 13, 1919, at 1; *Alleged Bolshevik Agent Says Raid Is "An Outrage"; Dudley Field Malone to Defend Him*, THE BUFFALO COMMERCIAL, June 13, 1919, at 2; *Papers of Reds Seized*, POUGHKEEPSIE EAGLE-NEWS, June 13, 1919, at 1.

[86] *Bolshevik Embassy Here Is Raided*, N.Y. TRIB., June 13, 1919, at 1.

illegally in some respects. He said that he was considering legal action for the return of the Bureau's papers, but that a search for the original papers upon which the search warrant was issued had proved fruitless.[87] Recht said the Bureau would have no difficulty convincing any court that it was entitled to the return of its papers seized under the circumstances.[88] That prediction proved to be overly optimistic, but subsequent efforts to recover the papers were handled by another lawyer, George Gordon Battle.

The Lusk Committee raids were a precursor to the more devastating Palmer Raids that triggered Benjamin Gitlow's arrest. In addition to working on Gitlow's case, Recht continued to represent Martens before the Lusk Committee; assisted Stedman in the ultimately successful defense of Rose Pastor Stokes, one of the founders of the Communist Party of America; [89] and handled the contempt proceedings against Dr. Michael Mislig, treasurer of the Russian Federation of Workers.[90]

Charles Recht's principal focus during the early 1920s was on preventing the deportation of Martens and his closest aide, Gregory Weinstein, chief clerk of the bureau. On January 5, 1920, Weinstein was arrested and, upon his refusal to answer any questions, also sent to Ellis Island for deportation. Dubbed "the chancellor" by the press, Weinstein was a Russian Jew who had escaped from exile in Siberia. He was described as "a most violent and dangerous Bolshevist," by the Justice Department's George F. Lamb:

> Weinstein is the most influential man in the Communist Party next to Martens. He came to this country with Trotsky and was associated with him for some time in the publication of the *Novy Mir*, a radical Russian newspaper. After [Trotsky] went back to Russia and seized control of the government with Lenine, Weinstein became editor of *Novy Mir* and directed revolutionary activities here. As Martens' "chief of staff" he

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[87] *Raid on Their Bureau Illegal, Say Bolsheviki*, N.Y. TRIB., June 14, 1919, at 3.

[88] *Raided Bolsheviki Willing to Go Back*, N.Y. HERALD, June 15, 1919, at 15.

[89] *Parlor Reds Here Hunted in Studios*, N.Y. HERALD, Nov. 21, 1919, at 20. *See also* Stokes v. United States, 264 F. 18, 20, 26 (8th Cir. 1920).

[90] *Argue Case to Jail "Red" for Contempt*, BROOKLYN DAILY EAGLE, Dec. 26, 1919, at 2; *Refuses to Clear Mislig of Contempt*, N.Y. TIMES, Jan. 24, 1920, at 14.

> is said to know more about radical activities in this country than anyone except the so-called "ambassador" himself.[91]

According to Recht, Weinstein was denied bail, despite his offer of $10,000 in Liberty Bonds—the amount set by the Department of Labor[92]—because he refused to answer questions unless he was furnished with a lawyer. He named Recht as his attorney, but Recht was refused admission to Ellis Island by immigration inspectors claiming to be acting on the order of the Secretary of Labor and Department of Justice. Recht went to Washington to discuss the matter, but received only excuses.[93]

At the January 13 hearing before Judge Knox, Recht pointed out that on December 31, 1919, the immigration rules were changed back to a wartime standard, which enabled inspectors to detain aliens indefinitely until they had answered questions to the inspectors' satisfaction. Judge Knox then sustained the writ, stating that Weinstein was entitled to bail as a matter of right. Knox ordered the release of all other prisoners who applied for the writ, as well as others on whose behalf the writ was taken out, unless the Labor Department was willing to accept bail in the amounts fixed, $10,000 for Weinstein and $1,000 for most others.[94]

Recht shuttled between New York and Washington, presumably to counsel Martens on his appearance before the Senate committee. Two of his associates, Rose Weiss and Irving Klein, assisted with the other Ellis Island cases, while Recht focused on Martens. A number of lawyers from various organizations were also representing Ellis Island detainees, among them were Harry Weinberger, best known for his representation of Emma Goldman,[95] and Swinburne Hale and Isaac

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[91] *Martens' Chief Aid [sic] Seized as 'Red' Net is Drawn Again; 46,000 on Palmer's Plot List*, N.Y. DAILY HERALD, Jan. 6, 1920, at 13, 16 (Part II, p. 1, 4).

[92] *Refuse $10,000 Bail for [Weinstein] and Other Red Leaders*, ITHACA J., Jan. 9, 1920, at 1; *Refuse Bail on Weinstein*, ELMIRA STAR-GAZETTE, Jan. 9, 1920, at 5; *Martens' Chief Aide Held Without Bail, His Counsel Avers*, BROOKLYN DAILY EAGLE, Jan. 9, 1920, at 3; *Weinstein Is Mum So Bail Is Denied Him,* BUFFALO COMMERCIAL, Jan. 9, 1920, at 12.

[93] *Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcomm.*, S. Comm. on the Judiciary, 66th Cong. 371 (1921) (testimony of Charles Recht) [hereinafter "*Illegal Practices*"]. *See also Martens Ready to Surrender to Congress*, N.Y. TRIB., Jan. 9, 1920, at 13.

[94] *Illegal Practices*, *supra* note 93, at 371–75. At the hearing, Recht also represented a detainee named Eugene Neuwald. *Only 14 Reds Now on Silence Strike*, N.Y. EVENING WORLD, Jan. 12, 1920, at 2.

[95] *Refuse $10,000 Bail for [Weinstein] and Other Red Leaders*, ITHACA J., Jan. 9, 1920, at 1.

Shorr,[96] both well-known civil liberties lawyers of the firm Hale, Nelles, and Shorr. Isaac A. Hourwich, who had previously been a lawyer for the federal government, had been appointed acting director of the Soviet Bureau's legal department in April 1919.[97]

In Washington, Martens was now scheduled to begin his testimony before a subcommittee of the U.S. Senate Committee on Foreign Relations on January 19; two days earlier, he issued a statement expressing hope that the subcommittee hearings would refute the "wild and unfounded charges" made against him and would "clearly bring out before the American public the whole uncolored truth about Russia."[98]

Martens's testimony before the subcommittee continued intermittently over the next ten weeks, ending on March 29. Martens asserted that the primary purpose of his mission was to restore trade between the U.S. and Soviet Russia and that he had not supported any organization that advocated a Soviet America. He denied that his mission was to destroy the United States government, going so far as to file a libel suit seeking $1 million in damages from the *Review of Reviews* for an article entitled "The Reds in America." The article called Martens "the self-styled ambassador" whose mission was to "spread all kinds of propaganda looking to the destruction of the Government of the United States."[99] Nevertheless, the subcommittee concluded that Martens had no status as a diplomat and recommended his immediate deportation as an undesirable alien. At the close of the hearings, Martens surrendered to the Department of Labor to face the charge that he was in the country in violation of the Immigration Act of 1918 by virtue of his Communist affiliation.[100]

Recht's brief on behalf of Martens made five points. First, that Martens was an accredited official of a foreign government, albeit unrecognized, and, thus, was ex-

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[96] *Martens Ready to Surrender to Congress*, N.Y. TRIB., Jan. 9, 1920, at 13.

[97] *Russian Soviet Government Bureau*, MARXIST HISTORY, http://www.marxhistory.org/subject/usa/eam/rsgb.html. Noted Socialist Party Leader Morris Hillquit was officially the staff lawyer for the Bureau, but was unable to participate because of his health.

[98] Frederick C. Giffin, *The Martens Mission*, 73 INT'L SOC. SCI. REV. 91, 98 (1998).

[99] *'Review of Reviews' Sued by Martens*, N.Y. HERALD, Mar. 25, 1920, at 20.

[100] *Id.*

plicitly exempted from Immigration Act coverage. Second, that the evidence produced against Martens was mostly irrelevant newspaper clippings and the like, and that Martens's testimony before the Senate subcommittee and the Lusk Committee was privileged and inadmissible in this proceeding. Third, that much of the evidence concerned an alleged conspiracy to smuggle diamonds into the United States and, thus, beyond the jurisdiction of the Labor Department. Fourth, that the evidence failed to prove that Martens believed in, advocated, or belonged to any group that advocated the violent overthrow of the U.S. government. And fifth, that any evidence pertaining to the legal system of the Soviet government was irrelevant and immaterial.[101]

More than a dozen separate hearings were held in both Washington and New York between March 31 and December 7 before August P. Shell, the immigration inspector at Ellis Island.[102] At some of those hearings in Washington, Governor-elect Thomas W. Hardwick of Georgia served as lead counsel for Martens, with Recht and Hourwich assisting; Recht conducted the defense at sessions held at Ellis Island.[103] In the end, Recht's vigorous defense was unavailing, and Martens was ordered deported on December 15. Labor Secretary Wiliam Wilson said Martens's status as an official of the Soviet regime, "taken in conjunction with his expressed belief in and approval of the Third International," established beyond doubt that he favored the forcible overthrow of the American government.[104] Martens issued a response two days later, asserting that Wilson had made a "political decision, dictated by the policy of the present Administration toward the Soviet Government." Martens expressed confidence that "the American people will demand a sensible consideration of the whole question of Russian-American relations."[105]

The following day, Recht told reporters that Moscow would decide whether to contest Wilson's order or not. "It is possible that the Soviet Government will decide to take no steps to resist the decision," Recht said. "We will do nothing until I have received [Wilson's] decision and it has been communicated to Moscow. I am going

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[101] Brief of Behalf of Mr. Martens at 3–6, In the Matter of Martens (Dep't of Labor, Bureau of Immigration 1920), https://babel.hathitrust.org/cgi/pt?id=coo1.ark:/13960/t4cn7ph9v&seq=1.

[102] Giffin, *supra* note 98, at 98.

[103] *Immigrants Sail in Quarters Not Fit for Swine*, N.Y. TRIB., Dec. 7, 1920, at 5.

[104] Giffin, *supra* note 98, at 98–99 (quoting MONTHLY LAB. REV., Jan. 1921, at 187–94).

[105] *Id.* at 99.

to Washington shortly, and it is probable that I will be asked to surrender Mr. Martens, and that arrangements will then be made for his deportation. That is the usual procedure, I believe."[106] Recht had his answer by the end of the month when Soviet Foreign Commissar Grigori Chicherin, who had appointed Martens to his position in January 1919, wired Martens ordering him to return to Russia on his own accord.[107] Martens's staff voted to go with him.[108]

Recht surrendered Martens to Wilson on January 3, 1921, who immediately released Martens on his own recognizance.[109] On January 22, Martens, his family, and 46 members of the Bureau staff sailed from New York aboard the *Stockholm*, a Swedish-American liner.[110] Martens landed at Reval, now Tallinn, Estonia, on February 7 or 8,[111] then arrived at Moscow on February 13.[112] Among the Bureau officials who traveled with him was Gregory Weinstein.[113]

Throughout this period, Recht continued to represent deportees under the auspices of a newly formed Deportee's League, which operated out of the Bureau's building at 110 W. 40th St.[114] But with Martens no longer in the country, Recht's role became somewhat ambiguous. Called to testify on February 1, 1921, before a Senate Judiciary Subcommittee investigating charges of illegal practices by the U.S. Department of Justice, Recht spent a substantial amount of time trying to clarify whom he represented and whom he did not.[115]

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[106] *Martens to Inform Moscow*, N.Y. TIMES, Dec. 17, 1920, at 4.

[107] Giffin, *supra* note 98, at 99.

[108] *Martens' Staff Vote to Go with Him to Russia*, N.Y. TRIB., Dec. 30, 1920, at 2.

[109] *Martens Surrendered [to] Secretary Wilson by His Counsel Today*, N.Y. HERALD, Jan. 3, 1921, at 1.

[110] Giffin, *supra* note 98, at 99.

[111] *Martens Lands at Reval*, N.Y. EVENING WORLD, Feb. 8, 1921, at 3.

[112] Associated Press, *Martens Reaches Moscow*, BUFFALO COMMERCIAL, Feb. 16, 1921, at 1. On Feb. 19, Martens cabled Recht to say he had arrived safely in Russia. *Martens in Russia*, BROOKLYN DAILY EAGLE, Feb. 21, 1921, at 18; *Attorney Recht Receives Cablegram from Red "Ambassador"*, N.Y. TRIB., Feb. 22, 1921, at 7.

[113] *Martens Requests Labor Department Rush Deportation*, BUFFALO COURIER, Jan. 4, 1921, at 2.

[114] *See, e.g., 23 Reds, Against Their Wills, Must Go Back to Russia*, N.Y. TRIB., Dec. 19, 1920, at 11.

[115] *Illegal Practices, supra* note 93, at 365.

When Attorney General Palmer testified before the subcommittee on February 18, he seemed to praise Recht for his testimony. "[He] struck me as probably the most intelligent, clear thinking, and plain-spoken man of all those who testified before the committee, and therefore his testimony, I have no doubt, will be taken, as it ought to be taken if its face value is to be accepted, very seriously. He was, as he said very frankly, counsel for practically all the persons who were arrested for deportation in the city of New York."[116]

VII. NELLES DEFENDS FINNISH ANARCHISTS

Following the second *Masses* trial, Walter Nelles compiled and edited an NCLB pamphlet entitled *Espionage Act Cases with Certain Others and Related Points*. Its primary focus was the charge to the jury in most of the Espionage Act and related trials, including several not reported elsewhere.[117] Nelles's work was cited by Professor Zechariah Chafee in his landmark article *Freedom of Speech in War Time.*[118] In early 1919, Nelles joined the defense team representing socialist Scott Nearing of the Rand School in a major Espionage Act case. As in the case of the *Masses* staff, Nelles would once again work with Seymour Stedman. The trial began in February, and Nearing was acquitted in late March.[119]

Around the same time, Nelles found himself defending the charge that the NCLB had secretly circulated its literature among draftees. "Our publications largely were reprints of the War Department's regulations as to conscientious objectors and kindred subjects," Nelles said. "We furnished these tracts to anyone interested, including the War Department, and distribution was made through the mails from headquarters in New York. We had no branch offices and no agents in the vicinity of the cantonments. Most of our literature was sent out in response to requests for it received by mail from men who had heard of our organization, from friends, or through reading newspapers or periodicals."[120]

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[116] *Illegal Practices, supra* note 93, at 426 (testimony of Att'y Gen. Mitchell Palmer).

[117] *Espionage Act Cases Compiled*, OKLA. LEADER (Oklahoma City), Oct. 17, 1918, at 1. WALTER NELLES, ESPIONAGE ACT CASES WITH CERTAIN OTHERS AND RELATED POINTS (2009), is available as a reprint from the collections of the University of Michigan Library on Amazon.com.

[118] *Zecharia Chafee, Freedom of Speech in War Time,* 32 HARV. L. REV. 932, 932 (1919).

[119] AM. SOCIALIST SOC., THE TRIAL OF SCOTT NEARING AND THE AMERICAN SOCIALIST SOCIETY 249 (1919).

[120] *Charges Denied by Liberties Bureau*, N.Y. HERALD, Mar. 22, 1919, at 8; *Charges of Major Branded as False*, SUMTER (S.C.) DAILY NEWS, Mar. 22, 1919, at 6.

In late summer 1919, Nelles represented two editors of a Finnish language newspaper called *Luokkataistelu* or *Class Struggle* who had been charged with criminal anarchy—the first to be charged under the state's 1902 Criminal Anarchy law, enacted in the wake of President McKinley's assassination. The publishers, Carl Paivio (alt. Paivo) and Gustave Alonen, both Finnish emigrés, were indicted by the extraordinary grand jury empaneled for the purpose of investigating criminal anarchy as a result of the Lusk Committee inquiries.[121] The publishers were remanded to The Tombs by Justice Bartow S. Weeks. Weeks initially set bail at $25,000,[122] but Nelles managed to get the bail reduced to $10,000 when Weeks returned from a brief vacation.[123]

Paivio and Alonen belonged to a splinter faction of the I.W.W. dedicated to the doctrine of "decentralism."[124] Alonen had been expelled from the union because of his revolutionary views.[125] Elizabeth Gurley Flynn explained the rift in their Bronx local in her autobiography:

> Alonen and Paivo were brought up on charges prepared by their accusers, giving all the "evidence" of their Communist sympathies and attachments. This was turned over to a higher body—a central committee of all IWW locals, with offices downtown. When the Lusk Committee raided these offices, the document fell into their possession. The prosecution built their case on it . . . .[126]

The indictment charged that, "On the 21st day of June 1919, the defendants feloniously did advocate, advise and teach the duty, necessity and propriety of overthrowing and overturning organized government by force and violence by certain writings prepared and composed by the defendants for wide circulation and distribution." The grand jury relied on the publication's own "program of principles,"

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[121] *Anarchist Trial Begins; First of Its Kind Under Statute*, BROOKLYN DAILY EAGLE, Oct. 6, 1919, at 16.

[122] *Bail Too High for Alleged Anarchist; Jail*, N.Y. TRIB., Aug. 15, 1919, at 16.

[123] *Three Are Indicted on Sedition Charge*, N.Y. HERALD, Aug. 21, 1919, at 4.

[124] Thomas Hyder, *An American Journey: The "Activist" Lives of Gust Alonen and Carl Paivio*, MIGRATION-MUUTTOLIIKE, at https://siirtolaisuus-migration.journal.fi/article/view/90618/49767.

[125] *To Bring Finn Here on Anarchy Charge*, N.Y. TIMES, Aug. 14, 1919, at 7. In his opening statement at the trial, Rorke said both defendants, and three others, had been threatened with expulsion for advocating violence. *Finns' Words Read to Prove Anarchy*, N.Y. TIMES, Oct. 10, 1919, at 19.

[126] ELIZABETH GURLEY FLYNN, THE REBEL GIRL 261 (1955).

which claimed to represent "industrial unionism in its most revolutionary meaning.

> [The publication] defends the prisoners of the class war. It represents the full power of the people, freedom, equality and solidarity among producers as well in industry as in social life. It attacks the strongest fortresses of capitalism, such as patriotism, and as a consequence militarism, the state, nationality and religion, no matter in what form they appear. . . .[127]

In early September, Justice Robert F. Wagner granted the government's application for a special jury to try the two men. Wagner ordered that the extraordinary term of the Criminal Branch of the Supreme Court convene on Oct. 6. Assistant District Attorney Alexander I. Rorke had asked for the special jury "in order that an impartial jury of intelligent men might be obtained." Nelles had objected to the special venire on the ground that the people usually taken in special venires are typically unfavorable to radicals and radical opinions. Nelles said a fair trial was unlikely.[128] Indeed, the first group of prospective jurors consisted largely of business and professional men.[129]

Before the jury was selected, beginning on October 6, Nelles was joined by his old law partner, Swinburne Hale, who had just finished a stint with the Military Intelligence Division of the U.S. Army. Hale's and Rorke's *voir dire* examination of the prospective juror pool was so meticulous that Justice Weeks felt compelled to caution the lawyers. "We are not going into the question of Marxism, Socialism, Communism or any other ism," he said. "We are going to consider whether there has been a violation of a New York Statute. The defendants may have as radical ideas as they like about property. The logic of their reasoning or the reasoning of their logic is not in question. The question is whether or not they advocated force or violence to overthrow government."[130]

The actual trial began on Oct. 9 with Rorke's opening promise to prove that the defendants wrote and caused to be published an article advocating the overthrow of organized government by force and violence.[131] On October 25, both men were

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[127] *Anarchist Trial Begins, supra* note 121.

[128] *Object to Special Jury*, N.Y. TIMES, Sept. 12, 1919, at 11.

[129] *Anarchist Trial Begins, supra* note 121.

[130] *One Juror Chosen for Trial of Men on Anarchy Charge*, N.Y. TRIB., Oct. 7, 1919, at 10.

[131] *Finns' Words Read to Prove Anarchy*, N.Y. TIMES, Oct. 10, 1919, at 19.

convicted after only two hours of jury deliberations.[132] Both were sentenced on October 28 to four to eight years in Sing Sing. Weeks also called for the deportation of both men after their sentences were served.[133]

During the trial, Hale did most of the witness examination, but one prosecutor remarked that his heart was not in it. Hale protested, declaring that his heart was emphatically in his work and that he could not conceive of anarchy being a crime in a democracy. "I propose to test this law," he said, "wherever I can raise my voice.[134] But there was no appeal, probably for lack of funds;[135] both Paivio and Alonen were released in 1923, and neither was deported at the end of their sentences.[136] The real test of the New York criminal anarchy statute would come after the Finns' trial, in *New York v. Gitlow*.

VIII. THE GITLOW TRIAL

Gitlow's indictment consisted of three counts. The first count charged that, on July 5, 1919, Gitlow "feloniously advocated advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means by certain writings then and there procured, prepared, composed, circulated and distributed" by Gitlow, principally "The Left Wing Manifesto," published in *The Revolutionary Age*, a Communist weekly. The second count alleged essentially the same facts, but rather than target Gitlow's felonious "advocacy," focused on his felonious "publishing" of the Manifesto.

The third count charged that the defendants were "evil-disposed and pernicious persons and of most wicked and turbulent dispositions and unlawfully, wickedly and maliciously intending and contriving to disturb the public peace and to excite discontent and disaffection and to excite the good citizens of the United States to hatred and contempt of the government and the Constitution of this State, and to solicit, incite, encourage, persuade and procure divers persons to commit acts of violence upon the persons and property of divers of the good citizens aforesaid and to raise and make insurrections, riots, routs, unlawful assemblies and

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[132] *Id.*; *Alonen Convicted of Anarchy, Faces 10-Year Sentence*, N.Y. EVENING WORLD, Oct. 15, 1919, at 2.

[133] *Alonen Convicted, supra* note 132.

[134] *Jury Finds Finns Guilty of Anarchy*, N.Y. TRIB., Oct. 25, 1919, at 1

[135] LENDLER, *supra* note 3. at 67.

[136] Hyder, *supra* note 124. *See also* LENDLER, *supra* note 3, at 25–32.

breaches of the peace within the State, and to obstruct the laws and government thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition for the more effectual carrying into effect their said most wicked and unlawful intentions and contrivances."[137]

That prolix third count was ultimately withdrawn, although it fairly illustrated the "steamed up" mood of the country,[138] and Gitlow was tried separately from other Left Wing adherents on the first two counts, which alleged violations of Sections 160 and 161 of the New York penal code.[139]

The trial began on January 22, 1920, with New York Supreme Court Justice Bartow Weeks presiding. Although Recht had handled Gitlow's initial trial in magistrate's court, as well as jury selection in his New York Supreme Court trial, Gitlow's Communist Labor Party had brought in Clarence Darrow, perhaps the preeminent criminal defense lawyer of his time and long-time defender of such radicals as Big Bill Haywood of the I.W.W., at the last minute to handle the actual defense. Almost certainly against Darrow's advice, Gitlow insisted on taking responsibility for writing and publishing the Manifesto.[140] Gitlow refused to deny that he advocated the overthrow of the government by illegal means. As these were the only defenses appropriate for a trial court, Darrow presented no defense case at all.[141] "I want to say . . . so that it may save time, that my client was the business manager and on the board of this paper, and there will be no attempt on his part to deny legal responsibility for it," Darrow told the court.[142]

Darrow dissuaded Gitlow from taking the witness stand, where he would be subjected to cross-examination, but he had no success in persuading the court to truncate the prosecution's case on account of Gitlow's admission of the only salient facts at issue. Weeks allowed the prosecutor to call witnesses to Gitlow's actions, as well as the "violence inherent in his revolutionary doctrine." At the conclusion of

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[137] People v. Gitlow, 1921 N.Y. App. Div. LEXIS 4835, at *1–3 (Prior History).

[138] FARRELL, *supra* note 80, at 308.

[139] People v. Gitlow, 1921 N.Y. App. Div. LEXIS 4835, at *4 (Prior History).

[140] *Id.*

[141] LENDLER, *supra* note 3, at 36–43.

[142] FARRELL, *supra* note 80, at 309.

the prosecution's case, Darrow announced that there would be no defense witnesses, but that Gitlow himself would address the jury.[143] His "Red Ruby" speech was hardly calculated to obtain an acquittal: "Socialist philosophy has always been a revolutionary philosophy and people who adhered to the Socialist program and philosophy were always considered revolutionists, and I as one who maintain that, in the eyes of the present-day society, I am a revolutionist . . . I am not going to evade the issue. My whole life has been dedicated to the movement which I am in. No jails will change my opinion."[144]

In his closing argument, Darrow portrayed Gitlow as a harmless intellectual, within the tradition of revolutionaries like George Washington, John Brown, and Jesus Christ. "For a man to be afraid of revolution in America would be to be ashamed of your own mother," he said.[145] "This country, with its institutions, belongs to the people who inhabit it," Darrow said. "Whenever they shall grow weary of the existing government, they can exercise their constitutional right to amend it, or their revolutionary right to dismember or overthrow it." Quoting Lincoln's first inaugural address, Darrow declaimed, "If Lincoln would have been here today, Mr. Palmer . . . would send his night-riders to invade his office and the privacy of his home and send him to jail." [146]

In his lengthy charge to the jury, Weeks insisted that, "You are not sitting here to determine any question of the rights of free speech. That question, so far as this court is concerned, is fully disposed of by the opinions of the courts of this state. . . . While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution," Weeks continued, "and authority to provide for and publish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society, is essential to the security of freedom and the stability of the state."[147]

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[143] *Id.*

[144] Benjamin Gitlow, *The "Red Ruby": Address to the Jury,* Communist Labor Party pamphlet, at 4 (1920).

[145] *Id.* at 43–48.

[146] FARRELL, *supra* note 80, at 309–10.

[147] Transcript of Record at 145–46, Gitlow v. New York, 268 U.S. 652 (1925) (No. 770) (Charge to the Jury).

Weeks went through all of Darrow's written requests for instructions, granting some, denying more, then asked if there were any others. Darrow responded, "I would like to except to that portion of the court's charge where he instructs the jury that the question of free speech is not involved," but he did not pursue the point. Rather, he continued to request other changes in the instructions, leaving the constitutional question he raised unanswered.[148] Darrow did object to Weeks's definition of "advocate," but when Weeks offered to charge Darrow's definition, he admitted to not giving it much thought. The word "incite" did not appear in the colloquy, although it did appear in Darrow's proposed requests for instructions.[149] Weeks rejected any incitement requirement: "It makes no difference whether the language was calculated to incite, if the language did advise, advocate and teach the doctrine."[150]

It took the jury three hours to convict Gitlow, and it didn't take much longer for Darrow to go back to Chicago, where he continued to defend radicals caught up in the Palmer Raids.[151] Charles Recht handled Weeks's presentencing interrogation of Gitlow, and on February 11, 1920, he was sentenced to the maximum five to ten years at hard labor at Sing Sing.[152] A new defense team, including Recht and Nelles, would take the case up on appeal.[153]

IX. Gitlow Appeals Conviction

Following Gitlow's conviction, Recht's first step was to file a petition for a certificate of reasonable doubt seeking Gitlow's release on bond. Recht filed the petition on March 26, 1920, but the brief was written by Charles Whitman, a Republican and the respected former governor of New York. Whitman may have appeared to be the lawyer most likely to get Gitlow out of jail. Whitman's principal argument was that Gitlow had been prosecuted under a law designed for anarchists, not Communists, who wanted to replace an existing government with another, rather than destroy government altogether. Justice John McAvoy's opinion, which closely

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[148] *Id.* at 157.

[149] *Id.* at 164.

[150] *Id.* at 156.

[151] *Id.* at 310.

[152] LENDLER, *supra* note 3, at 46.

[153] The rest of the team included Swinburne Hale and Murray C. Bernays. People v. Gitlow, 1921 N.Y. App. Div. LEXIS 4835, at *10 (Counsel).

tracked the government's brief, held that the legislature had defined anarchism in the statute and that there was no reasonable doubt that the manifesto satisfied that definition. McAvoy denied the petition and Gitlow remained in jail.[154]

Gitlow returned to the cadre of leftist lawyers for his appeal to the Appellate Division of the New York Supreme Court. Swinburne Hale was lead counsel, with Nelles and Murray C. Bernays with him on the brief. Recht was also listed as attorney for Gitlow. Opposing were John Caldwell Myers, deputy assistant district attorney, of counsel, with Robert S. Johnstone and Alexander I. Rorke on the brief. District Attorney Edward Swann was also listed for the state. The judges who heard the case were Frank C. Laughlin, John P. Clarke (presiding), Walter C. Smith, Alfred R. Page and Edgar S.K. Merrell.[155]

Recht wrote the brief, while Hale presented the oral argument. Recht's brief tracked Walter Nelles's sense of the case articulated in November 1919. In a letter to the editor of the *New York Tribune*, shortly after Gitlow's arraignment, Nelles had written:

> Sir: You published this morning an editorial ridiculing my argument in the case of the so-called "Reds" arraigned before Magistrate McAdoo that the New York criminal anarchy statute is invalid. Will you have the fairness to print my argument?
>
> It was this: The [U.S.] Supreme Court has held that the expression of principles cannot be made criminal except when it creates a clear and present danger of overt criminal conduct.[156] The principle attributed to the so-called "Reds" creates no such danger. It is a wrong principle. It is not persuasive. So long as we have not, by oppression, created a wide prevalence of despondency as to the social justice order under our government, expression of the view that our government should be overthrown will not result in a formidable action directed toward that end.
>
> Walter Nelles,
>
> New York, Nov. 14, 1919[157]

Recht tried to sell that point by suggesting that the principle of "clear and present danger" was correct, but misapplied in the famous Espionage Act cases from which it had sprung. Since no such danger was presented by the manifesto, any law purporting to criminalize it would be unconstitutional. "The mere spreading of any

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[154] *Id.* at 79–81.

[155] People v. Gitlow, 195 A.D. 773 (1921).

[156] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[157] *Innocuous Anarchy*, N.Y. TRIB., Nov. 17, 1919, at 8.

doctrine as a doctrine cannot constitutionally be declared a crime," Recht wrote. "Speaking or writing can be dealt with as a crime only when in such close relation to substantive evil condemned as criminal as to constitute an active, immediate factor toward the prohibited end."[158]

Justice Frank C. Laughlin, who wrote the unanimous opinion filed April 1, 1921, would have none of it. "The Constitution . . . places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. *It does not deprive the State of the primary right of self-preservation*. . . . I am of the opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom . . . has no application here," he wrote, holding that the legislature could "forbid the advocacy . . . of a doctrine designed and intended to overthrow government" without waiting "until it can be shown that there is a present or immediate danger that it will be successful."[159]

Recht again sought to have the court construe the act as limited in application to its original purpose, that is, to punish anarchists who advocated the destruction of all government by assassination, notably of President McKinley, whose death precipitated the law, and other violent means. He reasoned that Gitlow could not be convicted under such an interpretation because he advocated creating a government, albeit a proletarian dictatorship.[160] Specifically, he tried to use canons of statutory construction to limit the meaning of "or by any unlawful means" to the use of force, which Gitlow did not necessarily advocate. "[If] a peaceable mass demonstration of all or a large part of the people of any country should prevail upon all the officers of government to cease functioning, and a new set of officials chosen under a new constitution thereafter functioned in fact, without opposition, there. . . would have been an overthrow, not affirmatively lawful perhaps, but not unlawful in its means.[161]

Justice Laughlin utterly rejected the appellant's statutory construction argument. "[The] verdict of the jury is an answer to this argument," he wrote, "in so far as it implies that the appellant and those associated with him did no more than to

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[158] LENDLER, *supra* note 3, at 82–84.

[159] People v. Gitlow, 195 A.D. 773, 788–90 (1921).

[160] *Id.* at 784.

[161] *Id.* at 794–95.

advocate that . . . through a peaceable mass demonstration of the proletariat, all the officers of our State and National governments may be prevailed upon to cease functioning and that a new set of officers may be chosen under a new Constitution without the use or exertion of force or violence. The defendant and his fellow-Socialists of the Left Wing knew perfectly well that such results could not be peaceably accomplished, and moreover they are not advocating a change in the Constitution or a new Constitution or government. They are plainly advocating the destruction of all existing government. The only practical difference between the doctrines advocated by them and the doctrine of anarchy pure and simple is, that they intend to utilize the existing government temporarily while organizing the proletariat for mass strike. . . ."[162]

Recht also argued that their client was prejudiced by testimony given by a Winnipeg attorney who testified to the effects of a mass strike on that city. In particular, he objected to Weeks's instruction to the jury: "You have heard the evidence of what did occur at Winnipeg. Was that a violation of law?" Laughlin ruled that "it was perfectly plain that the court meant and the jury must have understood, that they were to determine whether such a mass strike if it occurred here would have been lawful. . . . It is obvious," he said, "that it would be unlawful," finding the evidence competent and not prejudicial.[163]

A variety of additional exceptions were raised by Gitlow's team, but Laughlin shrugged each of them off as "trivialities," most of which were not preserved for appeal by the failure to object during the trial. None were found prejudicial to Gitlow, and the judgment below was affirmed on April 1, 1921.[164] All of the Communist defendants were ultimately convicted. Winitsky and Larkin, who defended himself with Nelles's assistance, also lost on appeal. Both were ultimately pardoned by Gov. Al Smith in 1923. Ferguson and Ruthenberg successfully argued on appeal that they were not legally responsible for publishing the manifesto; new trials were ordered, but never held.[165]

Only Gitlow's case reached the U.S. Supreme Court. According to Marc Lendler, it was the newly formed American Civil Liberties Union that persuaded

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[162] *Id.* at 795.

[163] *Id.* at 795–97.

[164] *Id.* at 797–805.

[165] LENDLER, *supra* note 3, at 68.

Gitlow to appeal his conviction in order to get a test case before the U.S. Supreme Court.[166] Lendler suggests that this persuasion may not have occurred until 1923, however, after Gitlow had exhausted his appeals in New York state courts.[167]

Walter Nelles led the team that took *Gitlow* to the New York Court of Appeals, with Joseph R. Brodsky and I.E. Ferguson supporting. The new District Attorney, Joab H. Banton, led the state's team, with Myers of counsel. Chief Judge Frank H. Hiscock and Associate Judges Frederick Crane, John W. Hogan, Chester B. McLaughlin, William S. Andrews, Cuthbert W. Pound and Benjamin N. Cardozo heard the appeal. The case was argued on June 6, 1922, and decided on July 12.

Crane's majority opinion was perfunctory with regard to the constitutional issue. "The Constitution, federal or state, does not authorize publications . . . advocating the destruction of the government by violence or unlawful means," he wrote. "The legislature of this state, therefore, was within its powers when it enacted [the Criminal Anarchy statute]."[168] Hiscock's concurrence offered no constitutional analysis at all, focusing instead on whether publishing the manifesto fell within the prohibitions of the statute.[169] Pound's dissent, joined by Cardozo, also avoided the constitutional issue, echoing Whitman's argument that Gitlow was convicted of advocating the dictatorship of the proletariat, not criminal anarchy.[170]

None of the decisions below offered the definitive constitutional test of the Criminal Anarchy law that the ACLU sought. Only a U.S. Supreme Court decision could resolve the issue. The ACLU would put Nelles and Walter Pollak in charge of steering the case through that process. Unlike Recht and Hale, they would have no ideological need to defend the manifesto, but could focus squarely on the constitutional issues. There were two: whether and, if so, how, the federal constitution protected free speech against infringement by state law and whether the New York statute under which Gitlow was convicted infringed that guarantee.

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[166] *Id.* at 76 (quoting Walter Pollak, who argued the case in the U.S. Supreme Court, writing in 1925, "We [the ACLU], who were anxious for a decision on these laws by the highest court, persuaded Gitlow to make the appeal.").

[167] *Id.* at 79. Lendler notes that the nature of the first appeal suggests that it was not originally designated a test case, but was rather designed to overturn the conviction by whatever approach seemed the most promising. *Id.*

[168] People v. Gitlow, 234 N.Y. 132, 138 (1922).

[169] *Id.* at 145 (Hiscock, J., concurring).

[170] *Id.* at 158.

Nelles was tapped to file the petition for a writ of error, the first step in getting the case before the High Court. Nelles submitted his application in *New York v. Gitlow* to Justice Louis D. Brandeis on July 22, 1922,[171] followed by a list of eleven purported errors dated August 10.[172] Nine days later, Brandeis referred the application to the full Court and ordered that the New York Attorney General be so notified.[173] Lindler notes that, in his original submission, Nelles tried to finesse the question of which constitutional clause was at issue. When Brandeis expressed doubt that the record was sufficient, Nelles amended his petition to specify that the issue was the due process clause of the Fourteenth Amendment,[174] specifically whether the amendment "incorporated" the First Amendment, thus making it applicable to the states.

Nelles's Assignment of Errors listed the constitutional issue first, i.e., that New York's "so-called Criminal Anarchy laws" violated the due process clause. A variation of that theme appears in the fifth numbered "error"; most of the others involved some form of the proposition that the operative standard was "incitement," not "advocacy."[175] There was no defense of the manifesto or its ideology.

The Supreme Court brief, filed April 4, 1923, was written for the ACLU by Walter Pollak, a partner in the firm of Engelhard, Pollak, Pitcher, Stern and Clarke, along with Nelles. Also named on the brief are Albert DeSilver, another important figure in the ACLU, and Charles S. Ascher. It got right to the point: "The case brings to this Court for the first time the question of the constitutionality of making advocacy *per se*, and without regard to circumstances, a crime."[176]

The first point in Pollak's argument asserted that the "'liberty' protected by the Fourteenth Amendment includes the liberty of speech and of the press."[177] Pollak

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[171] Transcript of Record at 137–38, Gitlow v. New York, 268 U.S. 652 (1925) (No. 770) (Petition for Writ of Error).

[172] *Id.* at 139–43 (Assignment of Errors).

[173] *Id.* at 139 (Order of Mr. Justice Brandeis Referring Application to the Full Court).

[174] LENDLER, *supra* note 3, at 107.

[175] Transcript of Record at 139–43, Gitlow v. New York, 268 U.S. 652 (1925) (No. 770) (Assignment of Errors).

[176] Brief for Plaintiff-in-Error at 1–2, Gitlow v. New York, 268 U.S. 652 (1925) (No. 19) (Statement of Facts).

[177] *Id.* at 9 (Outline of Argument).

cited three cases in which the Court had ruled in a manner consistent with that theory, although without explicitly deciding the point.[178] Pollak's second point argued that the New York statute under which Gitlow was convicted unduly restrained liberty of expression. Specifically, he asserted that such restraints could only be imposed where "its exercise bears a causal relation with some substantive evil, consummated, attempted, or likely," that is, "incitement to crime." Since the Criminal Anarchy law contained no such qualification, he argued, it was unconstitutional.

Pollak surveyed the recent Espionage Act decisions of the Court, distinguishing them from Gitlow's case on both the facts and the law. He pointed out that the Espionage Act decisions accounted for circumstances—especially the ongoing war—that could give rise to serious danger. And he asserted that the New York law punished, not incitement, but "the mere utterance—'advocacy'—of certain doctrines, whether or not such utterance was reasonably calculated to persuade persons to the acts condemned, or to any unlawful conduct whatever, and whether or not a causal connection between the utterance and a substantive evil can be deduced from surrounding circumstances."[179]

Most of the balance of Pollak's argument consisted of an erudite recounting of the history of sedition law in both England and the United States, comparing the New York law with those disfavored statutes. He concluded with the requested action from the Court: "Since the statute is unconstitutional, the conviction of the plaintiff-in-error should be reversed and the indictment dismissed."[180]

The state's principal brief, by Attorney General Carl Sherman and District Attorney Joab H. Banton, filed April 8, 1923, appeared to misconstrue the thrust of Pollak's argument. Pollak's brief contrasted "advocacy" and "incitement," arguing that New York's law punished the former, while only the latter was actionable. Sherman's brief contrasted "advocacy" with "heresy," that is, punishment for be-

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[178] Brief for Plaintiff-in-Error at 15–16, Gitlow v. New York, 268 U.S. 652 (1925) (No. 19) (Argument, Point I(b)) (citing Patterson v. Colorado, 205 U.S. 454 (1907); Fox v. Washington, 236 U.S. 273 (1915); and Gilbert v. Minnesota, 254 U.S. 325 (1920)).

[179] Brief for Plaintiff-in-Error at 19–24, Gitlow v. New York, 268 U.S. 652 (1925) (No. 19) (Argument, Point II).

[180] *Id.* at 105.

lieving in the doctrine of anarchy itself. In any event, it asserted that such advocacy—for example, advocating the overthrow of government—was a sufficient abuse of freedom of speech to be criminalized.[181]

Sherman's brief did address Pollak's argument that advocacy could only be restrained where "its exercise bears a causal relation to some substantive evil consummated, attempted or likely the "necessity of imminent danger," but dismissed the argument as false and absurd.[182] This brief did not address the question of incorporation, but a second brief—filed April 9, possibly requested by the Court—focused on that issue. It perfunctorily denied that, notwithstanding adoption of the Fourteenth Amendment, the First Amendment in any way curtailed the rights of the states to limit the freedom of speech and of the press.[183]

That issue proved to be the most important pronouncement to come out of this case. The U.S. Supreme Court declined to credit Sherman's conclusory argument, nor did it take issue with Pollak's claim. "For present purposes," wrote Justice Edward T. Sanford in the majority opinion, published June 8, 1925, "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[184] That principle would never be disputed again.[185]

Gitlow did not fare as well. "By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power," Sanford wrote.[186] "We cannot hold that the

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[181] Brief for Defendant-in-Error at 7, Gitlow v. New York, 268 U.S. 652 (1925) (No. 19) (The Real Question Involved).

[182] *Id.* at 18 (Argument, Point II, Necessity of Imminent Danger).

[183] Brief for Defendant-in-Error at 7, Gitlow v. New York, 268 U.S. 652 (1925) (No. 19) (Argument, Point III).

[184] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[185] *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

[186] 268 U.S. at 668.

present statute is an arbitrary or unreasonable exercise of police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality."[187] Gitlow's conviction would stand.

Justice Oliver Wendell Holmes, Jr., wrote the dissenting opinion for himself and Justice Louis D. Brandeis. Quoting his own "clear and present danger" test, Holmes said it was "manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."[188]

Reaction to the *Gitlow* decision was mixed. Roger Baldwin considered it a crushing defeat, concluding in the ACLU *Annual Report* that "the repressive measures passed during and since the war were strengthened by the U.S. Supreme Court in the *Gitlow* case." Pollak and Nelles saw it as a "near miss" and looked forward enthusiastically to the next case. Those with a longer view, primarily scholars like Charles Warren and Zechariah Chaffee, saw in the incorporation decision a "new liberty," and "victory out of defeat," respectively.[189]

X. NELLES'S LATER CAREER

As *Gitlow* was winding its way through the courts, the National Civil Liberties Bureau became the American Civil Liberties Union on January 19, 1920. Walter Nelles served as counsel on the ACLU's executive committee, which consisted of Roger N. Baldwin and Albert DeSilver, directors, and Helen Phelps Stokes, treasurer. Nelles also offered to edit a magazine publicizing free speech violations, agreeing with the others that the battle for civil liberties was in the arena of public opinion, not in the courts.[190] The new venture was supported by a private foundation,

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[187] *Id.* at 670.

[188] *Id.* at 673 (Holmes, J., dissenting).

[189] WALKER, *supra* note 56, at 79–80.

[190] *Id.* at 47.

the American Fund for Public Service, or the Garland Fund, for its benefactor Charles Garland of Boston. Nelles would be on the foundation's board, as would other ACLU leaders.[191]

About the same time, Nelles would join the defense team representing five duly elected Socialist Party members who faced expulsion from the New York State Assembly for no reason other than their affiliation. The defense was led by Morris Hillquit and also included Seymour Stedman, progressive civil liberties lawyer Gilbert E. Roe; S. John Block, counsel to the Socialist Party in New York City; and former assemblyman William Karlin. Also participating were two of the ousted assemblymen, Charles Solomon of Brooklyn and Samuel Orr of the Bronx.[192]

The Judiciary Committee hearings—often characterized as a "trial" in the press—began on January 20 and dragged on through the rest of January and all of February. Three of the five "defendants" had taken the stand on their own behalf.[193] Closing arguments took place in early March, and briefs were submitted later that month. After twenty-two hours of debate and maneuvering, the Assembly voted to expel all five socialists by margins of 70 percent to 80 percent.[194] Despite his initial determination that he lacked the authority to call a special election,[195] Gov. Alfred Smith found an exception in the law that provided for special elections whenever they were made necessary by the governor's calling a special session of the legislature. Smith did just that and called for elections to fill any vacancies on September 16.[196] All five Socialists were re-elected.[197] When the Assembly convened for the special session, however, it again voted to oust three of the socialists; the other two were seated but resigned in protest. The Assembly cheered their resignations.[198]

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[191] *Id.* at 70.

[192] *Sweet Blocks Move to Seat Socialists*, N.Y. TIMES, Jan. 20, 1920, at 3.

[193] *Socialists Close Defence Abruptly*, SUN & N.Y. HERALD, Feb. 28, 1920, at 4.

[194] *Assembly Expels All Five Socialists by Big Vote after a Thrilling Session*, BROOKLYN DAILY EAGLE, Apr. 1, 1920, at 1.

[195] *Special Elections Refused Socialists*, SUN & N.Y. HERALD, Apr. 13, 1920, at 1.

[196] *Fusion Completed against Socialism*, N.Y. TIMES, Aug. 13, 1920, at 3.

[197] *Five Socialists Assemblymen Are Reelected*, SUN & N.Y. HERALD, Sept. 17, 1920, at 22.

[198] *Assembly Again Expels Three Socialists*, N.Y. TIMES, Sept. 22, 1920, at 1.

That summer, Nelles would write that the Assembly's action in expelling the duly elected representatives of 61,021 citizens constituted "the most flagrant attempt to perpetuate in America the practice of thought-control and the prevalence of the cowed mind." In a pamphlet published by the ACLU in August, Nelles explained:

> There was an "investigation." It lasted for eight weeks. There were no charges of wrongful acts. The trial was not of acts, but of opinions. The finding was in substance that a certain political party working and acting in conformity with law, seeks to effect changes which the Assembly thinks would be harmful; the electorate in districts where approval of these changes prevails is therefore disfranchised. And it was proposed (but here the gubernatorial veto interposed) to make the right of all political parties to exist and elect members to public office depend upon opinion of certain judges in one of the four districts of the state as to whether their principles are "inimical" to the government.[199]

The pamphlet in which Nelles's comments appear was something of a primer on civil liberties. "Civil liberty means this," Nelles wrote, "that every one may think for himself upon every public question; that he may say what he thinks; and that he may do his utmost, and get his friends to do theirs, to bring what he thinks home to the minds and hearts of others. We do not now have civil liberty in the United States," he said. "It is splendidly guaranteed in our constitutions. But words are not facts."[200]

As an example, Nelles introduced the Espionage Act as a "dormant" agency of repression, arguing that its effect upon citizens generally—not just those who had gone to jail—had been devastating in its damage to social morale. Moreover, he said, it "furnished vicious precedents in the field of jurisprudence—precedents for vague and disingenuous statutes and for methods of administration more disingenuous and not so vague."[201]

Perhaps surprisingly, Nelles wrote that there was "never any serious question of the constitutional validity of the Espionage Law as originally enacted," i.e., excluding the amendments of 1918 or Sedition Act. "It forbade certain definite things

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[199] WALTER NELLES, SEEING RED: CIVIL LIBERTY AND THE LAW IN THE PERIOD FOLLOWING THE WAR 6 (1920). A version of this pamphlet was also published in THE NATION magazine; *see The Espionage Act,* CAPITAL TIMES (Madison), Dec. 15, 1920, at 8.

[200] NELLES, *supra* note 199, at 1.

[201] *Id.*

. . . [that] Congress clearly had a right to forbid." But Nelles said prosecutions under the act required, but typically lacked, the "actual infliction of definite and tangible injury" to the military, inflicted by the person indicted. Of the 877 convictions under the act between June 30, 1917, and June 30, 1919, "I have not been able to learn of a single instance in which it was proved, or even attempted to be proved, that the recruiting service . . . had sustained an injury of a character that can be seen, measured, or appraised." By upholding convictions based on speech, without proof of consequences, he said, the Supreme Court "reestablished a form of *constructive crime* of exactly the same species of seditious libel and constructive treason which the framers of the First Amendment had meant to make forever alien to the United States."[202]

Nelles also attacked state and local sedition laws, variously known as Anti-Sabotage, Red Flag, Criminal Syndicalism, and Criminal Anarchy laws. He called New York's Criminal Anarchy law the "parent of a great many of these statutes,"[203] although he made no mention of Benjamin Gitlow whose case was still pending. He also criticized police court prosecutions, censorship, mob violence, and injunctions, concluding:

> Civil liberty is more important today than it was in the stagnant period when we had it because no one troubled to abridge it. The world is rising upon one of the periodic waves which carry it onward towards civilized adjustment for human welfare. The propulsive force is the awakened working class. That class is organizing its power. It is formulating its purposes. It matters greatly to civilization that its purposes should be intelligent and its power sanely guided—that aspiration rather than resentment should be its motive—that its struggle should be towards a goal rather than against an enemy.[204]

Shortly after the expulsion vote in April, Nelles attended an organizing rally in Passaic, N.J., that was held jointly by the ACLU and the Amalgamated Textile Workers. Police officers stormed the meeting and turned off the lights. Nelles and other ACLU leaders—including Harry Ward, Albert DeSilver and Norman Thomas—nevertheless continued to read the opening sections of the New Jersey constitution aloud by candlelight to applause from the audience in the hall and

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[202] *Id.* at 1–2.

[203] *Id.* at 3.

[204] NELLES, *supra* note 199, at 4–6.

cheers from the "surging" crowd outside.[205] Samuel Walker would write that the confrontation was typical of the ACLU's initial fight for free speech in every respect except one: it succeeded. The mayor of Passaic relented and allowed the union to continue its organizing drive.[206]

During the early 1920s, Nelles would continue to represent unions[207] and deportees,[208] but his most important cases would immediately follow the Supreme Court's *Gitlow* decision in 1925. In the spring of 1925, ACLU secretary Lucy Milner noticed a newspaper clipping on a new Tennessee law forbidding the teaching of evolution. She pointed out to Baldwin, who offered ACLU's support to anyone willing to challenge the law. John Thomas Scopes, a science teacher, accepted the challenge, and the ensuing trial would pit William Jennings Bryan against Clarence Darrow in one of the most famous trials in American history: The Great Monkey Trial.[209]

Walter Nelles would serve as the ACLU's point man on the defense team. Walker reports that he was eager for a Supreme Court test of whether the Tennessee legislation represented an establishment clause violation. Neither he nor Baldwin was comfortable with the flamboyant Darrow in the lead and, along with Harvard's Felix Frankfurter, they tried unsuccessfully to persuade Scopes to reject him in favor of a more "respectable" lawyer.[210] The best they could do was create a defense strategy board that included Nelles, Frankfurter, civil liberties lawyer Arthur G. Hays, and local counsel, Judge John R. Neal. The defense team would also include Tennessee businessman George P. Rappleyea and Samuel Rosensohn, who would finance the effort, along with the ACLU; former secretary of state Bainbridge Colby; and Dudley Field Malone, Darrow's second chair.[211] The strategy that emerged would show that evolution and religion were not irreconcilable, rather than attempt

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[205] *Constitution by Candlelight*, N.Y. TRIB., April 3, 1920, at 8.

[206] WALKER, *supra* note 56, at 51.

[207] *See Test the Right of Injunction, Urge Shopmen to Fight*, KANSAS STATE NEWS (Topeka), Jan. 26, 1923, at 1.

[208] *See* U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923), U.S. *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924).

[209] WALKER, *supra* note 56, at 72–73.

[210] *Id.* at 73.

[211] *Scopes Will Boss His Own Defense,* EL PASO TIMES, June 9, 1925, at 2; *Defense Pumps Drama Into Evolution Trial,* MORNING POST (Camden, N.J.), June 11, 1925, at 2.

to prove a theory of evolution or attack religion in any way. Scopes would plead not guilty on the ground that teaching a scientific view of man's origin was not against the law in Tennessee.[212]

In the end, the strategy foundered on a ruling by Judge John Raulston to limit the case to the narrow question of the right of the legislature to control school curricula and to exclude any scientific or theological evidence. Darrow changed tactics and goaded Bryan into admitting his own skepticism regarding the biblical creation story. The trial ended the following day, and the jury took nine minutes to find Scopes guilty. The conviction was subsequently reversed by the state supreme court in 1927 because of an erroneous jury instruction. According to Walker, the ACLU's reputation was greatly enhanced by the trial and its aftermath, but Nelles never got the establishment clause test he sought.[213]

Not that Nelles was lacking in constitutional cases before the Supreme Court. As noted above, the *Gitlow* case was decided in 1925; the California case of Charlotte Anita Whitney, for which Nelles also helped prepare the brief, was initially argued the same year.[214] Whitney had been convicted of violating the California Criminal Syndicalism Act by virtue of her organization of and membership in the Communist Labor Party of America in 1919. On appeal, the statute was unsuccessfully challenged on due process grounds, but as in *Gitlow*, defeat was accompanied by an important consolation prize—here, a concurrence by Justice Brandeis[215] that built on Learned Hand's *Masses* opinion[216] and presaged *Brandenburg v. Ohio's* incitement standard.[217]

Nelles, meanwhile, had already begun teaching at Yale Law School—as early as 1926, according to Baldwin[218]—and was formally appointed to the faculty in

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[212] *Plan for Scopes' Defense Completed,* BALTIMORE SUN, June 13, 1925, at 2.

[213] WALKER, *supra* note 56, at 74–75.

[214] Whitney v. California, 274 U.S. 357 (1927).

[215] 274 U.S. at 372 (Brandeis, J., concurring).

[216] Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

[217] 395 U.S. 444 (1969).

[218] Roger N. Baldwin, *Introduction*, *in* WALTER NELLES, A LIBERAL IN WARTIME 15 (1940).

1929.[219] He became a research associate in 1930,[220] participating in efforts to amend the Espionage Act spearheaded by Sen. Thomas Walsh of Montana,[221] and was promoted to associate professor in 1932.[222] During his academic career, Nelles wrote numerous scholarly articles, principally on labor injunctions and contempt by publication,[223] and his biography of ACLU co-founder Albert DeSilver, *A Liberal in Wartime*, was published posthumously.

Nelles died of a sudden illness on April 1, 1937, in New Haven. He was survived by his mother, wife, son and daughter.[224] Baldwin, who had known Nelles since their Harvard days, described him as "a scholarly lawyer with an explosive sense of humor and a capacity for deep indignation . . . shy and retiring."[225] An unsigned editorial in the Boston Globe recalled Nelles's stand against the Palmer Raids: "It was a brave position for any man to adopt."[226] And his student, Norman Meyers, wrote a lengthy tribute for the *Yale Law Journal*:

> It must have been a great surprise to his radical clients that when Walter Nelles came to Yale he could put aside the partisanship of the advocate and special pleader. At Yale he renewed his fight on a higher plane where his blows had an even more telling effect. Both in his teaching and in his legal research his interest continued undiminished in the rights of man.[227]

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[219] *Dr. Walter Nelles, Professor at Yale Law School, Dies*, HARTFORD COURANT, Apr. 1, 1937, at 4.

[220] *Yale Announces Faculty Changes and Appointments*, HARTFORD COURANT, May 9, 1930, at 13.

[221] *Amendment to Wartime Spy Act is Urged*, KNOXVILLE NEWS-SENTINEL, Feb. 7, 1920, at 3.

[222] *Yale University Faculty Changes Are Announced*, HARTFORD COURANT, Apr. 29, 1932, at 10.

[223] A partial list of Nelles's scholarly articles includes: *Contempt by Publication in the United States*, *Part One*, 28 COLUM. L. REV. 401 (1928); *Part Two*, 28 COLUM. L. REV. 525 (1928) (with Carol Weiss King, reissued as a pamphlet by the ACLU); *A Strike and its Legal Consequences: An Examination of the Receivership Precedent for the Labor Injunction,* 40 YALE L.J. 507 (1931); *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956 (1931); *The First American Labor Case*, 41 YALE L.J. 165 (1931); *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128 (1932); *Towards Legal Understanding, Part One*, 34 COLUM. L. REV. 862 (1934); *Part Two*, 34 COLUM. L. REV. 1041 (1934).

[224] *Dr. Walter Nelles, Professor at Yale Law School, Dies*, HARTFORD COURANT, Apr. 1, 1937, at 4.

[225] Baldwin, *supra* note 218, at 14–15.

[226] *Conspicuous Bravery*, BOSTON GLOBE, Apr. 2, 1937, at 20.

[227] Norman L. Meyers, *Walter Nelles*, 46 YALE L.J. 1279, 1279 (1937).

XI. RECHT'S LATER CAREER

Gitlow was Charles Recht's last major civil liberties case. For the rest of his long and successful career, he continued to represent the Soviet Union in less politically fraught ways. In 1921, for example, he represented the Russian Soviet Federative Socialist Republic (RSFSR) in an effort to reclaim some $136,000 from an Italian national who had swindled the Cinematographic Committee of the Commissariat of Public Education on a contract for the purchase of film stock. The New York courts ruled against him on the ground that the still-unrecognized RSFSR had no standing to bring a lawsuit in U.S. courts.[228] But he successfully defended the RSFSR in a civil suit seeking more than $500,000 in damages for the unlawful confiscation of furs belonging to a New York City furrier.[229]

During the 1930s and 1940s, Soviet Russia was not only Recht's client for matters pertaining to that country, but was also a direct and indirect source of his substantial probate practice for private Russian and Eastern European clients, and for a growing caseload of international trade and shipping cases. Many of Recht's probate clients in Russia and the Baltic States were prevented from receiving distributions they were due on the ground that the money would be confiscated.[230] By 1945, however, the Surrogate's Courts were finding that legatees resident in Russia were receiving the full benefit of their legacies and allowed distributions to be made to them—often through Recht in his capacity as attorney to the Consul General of the USSR.[231]

Several of Recht's maritime cases involved seeking recovery of or compensation for shipping and other materiel requisitioned by the United States.[232] Others

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[228] RSFSR v. Cibrario, 235 N.Y. 255, 265 (1923).

[229] Wulfsohn v. RSFSR, 234 N.Y. 372, 375–76 (1923).

[230] *See, e.g., In re* Estate of Landau, 16 N.Y.S.2d 3 (Surr. Ct. Kings Cnty. 1939) (denying distributive share of estate to Soviet national); *In re* Estate of Bold, 18 N.Y.S.2d 291 (Surr. Ct. N.Y. Cnty. 1940).

[231] *See In re* Estate of Alexandroff, 61 N.Y.S.2d 866 (Surr. Ct. N.Y. Cnty. 1944) (allowing distributions to residents of Russia, modifying previous orders in *Landau* and *Bold* accordingly). *See also In re* Adzericha's Estate, 61 N.Y.S. 867 (Surr. Ct. N.Y. Cnty. 1945).

[232] *See, e.g.,* Denny, 127 F.2d 404 (3d Cir. 1942); The Florida, 133 F.2d 719 (5th Cir. 1943); The Kotkas, 135 F.2d 917 (5th Cir. 1943); Int'l Aircraft Trading Co. v. U.S., 109 Ct. Cl. 435 (1947); Estonian State Cargo & Passenger S.S. Line v. U.S., 115 Ct. Cl. 815 (1950); Latvian State Cargo & Passenger S.S. Line v. U.S., 342 U.S. 816 (1951).

involved breach of contract,[233] arbitration issues,[234] and other compensation claims.[235] His routine civil cases involved partnership fraud,[236] divorce,[237] immigration,[238] illegal picketing,[239] landlord-tenant,[240] insurance,[241] corporate governance,[242] elections,[243] and employment law.[244]

In 1948, Recht brought another high-profile lawsuit on behalf of Russian composers Dmitri Shostakovich, Sergei Prokofiev, Aram Khachaturian and Nicholai Miaskovsky against Twentieth Century-Fox Film Corp. seeking to enjoin the use of their music as background or incidental music in the defendant's film, *The Iron Curtain*, which credited the composers for the music. For purposes of the litigation, the composers conceded that all the music involved was in the public domain and not protected by copyright law.

The essence of Recht's complaint was that the use of his clients' music in a motion picture whose theme was objectionable to them implicated such legal issues as libel, false endorsement, and moral or authors' rights. The court held there was no libel, and, anyway, injunctions are not available for libel; there was no endorsement implied by use of the music; and the existence of moral rights at American law was at best questionable. The motion was denied in all respects.[245]

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[233] *See, e.g.,* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942); The Wildwood, 133 F.2d 765 (9th Cir. 1943); Ecco High Frequency Corp. v. Amtorg Trading Co., 81 N.Y.S.2d 610 (Sup. Ct. 1948).

[234] *See, e.g., In re* Amtorg Trading Corp., 100 N.Y.S.2d 747 (Sup. Ct. 1950); Amtorg Trading Co. v. Camden Fiber Mills, 103 N.E.2d 342 (N.Y. 1951).

[235] *See, e.g.,* Halpern v. Amtorg Trading Corp., 39 N.Y.S.2d 907 (App. Div. 1943); The Regent, 67 F. Supp. 149 (E.D.N.Y. 1946).

[236] *See, e.g.,* Troster v. Dann, 145 N.Y.S. 56 (App. Term 1913).

[237] *See, e.g.,* Radda v. Radda, 167 N.Y.S. 213 (App. Div. 1917).

[238] *See, e.g.,* Lopez v. How, 254 U.S. 613 (1920).

[239] *See, e.g.,* Benito Rovira v. Yampolsky, 187 N.Y.S. 894 (Sup. Ct. 1921).

[240] *See, e.g.,* Bozzuffi v. Darrieusecq, 210 N.Y.S. 455 (Sup. Ct. 1025).

[241] *See, e.g.,* Sliosberg v. N.Y. Life Ins. Co., 155 N.E. 749 (N.Y. 1927).

[242] *See, e.g.,* Herman v. Brooklyn Sav. Bank, 187 N.Y.S. 738 (App. Div. 1921); Lenc v. Zicha, 164 N.E. 600 (N.Y. 1928).

[243] *See, e.g., In re* Adler, 173 N.E. 265 (N.Y. 1930).

[244] *See, e.g.,* Gaetjens v. Gaetjens, Berger & Wirth, Inc., 151 F. Supp. 701 (S.D.N.Y. 1957).

[245] Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (Sup. Ct. 1948).

When Charles Recht died in 1965, the few obituaries published at the time were terse and without encomium. Typical was the paragraph in New York's *Daily News*: "Charles Recht, 78, an attorney in this country for the Soviet government since 1919, died yesterday in University Hospital after a heart attack. Recht, who lived at 77 Park Ave., was also a novelist, poet and translator. Services will be held at 1:30 P.M. tomorrow in the Universal Funeral Chapel, Lexington Ave. and 52d St."[246]

That the clipping emphasized Recht's literary output nearly as much as his legal accomplishment is, perhaps, understandable. Early in his career, Recht co-wrote, with Leigh Danen, *The Newest Freedom*, which his publisher, Irving Kaye Davis & Co., advertised as "A great book on the wreck of the Constitution."[247] Later, Recht wrote two novels, *Rue with a Difference*, in 1924, and *Babylon on Hudson* in 1932.

In between the novels, he published a book of poetry, *Manhattan Made*, in 1930, which literary critic Ludwig Lewisohn called "profoundly interesting." This poetry "cuts deep," Lewisohn said, "it stirs the mind; it is of us and our age."[248] He also translated poetry, such as *At the Chasm*, by Jaroslav Vrchlicky, in 1913, and a number of plays, including *The Clouds*, by Jaroslav Kvapil in 1910; *Countess Julie*, by August Strindberg in 1912; *Morals*, by Ludwig Thoma in 1925; and *Heckuba-Hackuba*, by Lajos N. Egri in 1927 (adaptation). Recht published an article entitled "The Modern Theatre" in *The Reflex* in August 1928[249] and another called "'Movied' to Reflection" in the September issue.[250] Recht's poetry and essays were widely published in *Soviet Russia Pictorial* in the 1920s[251] and such left-wing publications as *Liberator* in the 1910s and 1920s and *The Fight* and *The New Masses* in the 1930s. *The New Republic* received and often published letters from Recht throughout his career.

By the 1960s, new and different causes—civil rights, Vietnam—had captured the attention of the American left. Recht's early work with the Bureau of Legal Advice, his participation in such important cases as *Masses* and *Gitlow*, and his representation of soapbox orators, draft resisters, embattled teachers, Wobblies and

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[246] *Charles Recht,* N.Y. DAILY NEWS, July 17, 1965, at 20.

[247] Advertisement, THE NEW REPUBLIC, July 16, 1919, at 36.

[248] Advertisement, THE NEW REPUBLIC, Mar. 26, 1930, at 5.

[249] Advertisement, THE NEW REPUBLIC, Sept. 19, 1928, at 28.

[250] Advertisement, THE NEW REPUBLIC, Oct. 17, 1928, at 29.

[251] *See, e.g., The March "Pictorial,"* THE DAILY WORKER, Mar. 17, 1923, at 4.

other deportees was long forgotten in the United States. But when Elizabeth Gurley Flynn visited Moscow in 1960, she found old comrades who remembered him fondly. "They . . . inquired about attorney Charles Recht who handled many of their cases in the 20s and would be delighted to hear from him," she wrote.[252]

XII. POSTSCRIPT

This article has a modest purpose: to demonstrate that the legendary decisions of the World War I and postwar period that we revere today were not merely the product of brilliant judges—Learned Hand, Oliver Wendell Holmes, Jr., Louis Brandeis—but also the work of a cadre of lawyers who undertook to protect civil liberties in America at a time when those liberties were under serious assault. Charles Recht and Walter Nelles were but two of those lawyers; several others appear briefly in this text, and many more are not even mentioned here.

The tradition of American lawyers representing adherents of disfavored political ideas runs from Andrew Hamilton's defense of John Peter Zenger to William Kunstler's defense of the Chicago 7, and beyond, with many other such lawyers along the way. If this piece has added even slightly to our appreciation of that tradition, through its examination of Benjamin Gitlow's defenders, it will have accomplished its purpose.

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[252] Elizabeth Gurley Flynn, *I Meet Old Friends in Moscow*, THE WORKER, July 1, 1960, at 7.