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The Dilemma of a Civil Libertarian: Francis Biddle  
And the Smith Act

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ABSTRACT—Although society may have good reasons for protecting itself against both sedition and conspiracy, history demonstrates that statutes directed against these offenses are particularly prone to result in the abuse of power. A possibility of just such an abuse in the first application of the Smith Act—the Minneapolis Trotskyite trial of 1941—led to a consideration of a civil libertarian caught in the cross-pressure of enforcing a law anathema to his professed liberal beliefs. The study showed that, during time of threat, internal or external, our democratic society permits our government officials, in the name of survival, to limit those freedoms guaranteed by our Constitution.

During 1937 various individuals were expelled from the Socialist Party because of their revolutionary, left wing beliefs. These people held a convention in Chicago during the New Year's weekend at which the Socialist Worker Party was organized. This convention issued a Declaration of Principles and adopted a constitution. Thus a party organization was set up and party activities proceeded.

The Declaration set forth the program of action to effectuate the overthrow of the existing capitalist society and the government that supported it. The first step was to build up strength of the party so that it could have a majority of the exploited classes back of its leadership. The final step was to replace the existing government, by force if necessary.

The Party opposed Stalin and supported Trotsky and his program. After Trotsky arrived in Mexico, various leaders of the group conferred with him as to policies and actions, especially concerning the use of Defense Guards within labor unions. They were to be used for protection of the unions, later growing into a militia, and still later into a Red Army. Such a Defense Guard was organized in the Teamsters Local 544 at Minneapolis in July or August, 1938. It never realized the dreams of Trotsky, however. Its activities were limited to parking cars at the 544 annual picnic, target practice for those interested, and close order drill followed by a visit to a cheap strip show.

The Party also engaged in writing, publishing, and disseminating publications designed to convert others to their program. They also encouraged members of the armed forces to think of their officers as tools of the existing capitalist society and its imperialistic war-mongering government.

In December, 1940, the Party held a convention where, because of the Smith Act, the Declaration of Principles was suspended and withdrawn. This was obviuously an attempt to give evidence that the Party had broken and abandoned the desire to use force to overthrow the government and the advocacy of insubordination in the armed forces.

In 1941 agents of the FBI got jobs as truck drivers in Minneapolis and joined Local 544 to observe its leadership. In June U.S. marshals raided the headquarters of the Party, confiscated two bushels of paper, two red flags, and several pictures of Leon Trotsky. The arrest and trial under the Smith Act followed.

The role of Francis Biddle in the Trotskyite trial is quite enigmatic. Biddle was named to the Circuit Court of Appeals by Franklin Roosevelt in 1939; and when Robert Jackson became Attorney General in 1940, Biddle was appointed Solicitor General. On 11 June 1941 Jackson resigned as Attorney General to accept a Supreme Court position and Biddle became acting and later Attorney General. It was as acting Attorney General that Biddle authorized the criminal action against the Minneapolis Trotskyites.

In an earlier symposium on civil liberties (Biddle, April 1941) the then Solicitor General spoke on "Government and Propaganda" and said that the question of propaganda inevitably brings into question the "circumstances" of the time. Biddle's consideration of circumstances seems to be a reflection of the fears, insecurities, and conflicts produced by the threat of war and the threat of Bolshevik Revolution. These same fears, insecurities, and conflicts had brought about the passage of the Smith Act earlier in the year.

Before the raids of the Party headquarters, Biddle had remarked that sedition statutes invariably had been used to prevent and punish criticism of the government, particularly in time of war. He believed them to be unnecessary and harmful and doubted whether any speech or writing should be made criminal. However, this skepticism concerning sedition laws does not seem to square with public statements attributed to Biddle immediately following the raids. He is quoted as saying that the action was being taken against "persons who have engaged in criminal activities and have gained control of a legitimate labor union to use it for illegitimate purpose." (New York Times, 2 Dec. 1941) A local newspaper claimed

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that the Attorney General revealed the decision to make these prosecutions the start of a nationwide drive on those regarded as dangerous radicals and Communists. The paper saw action by the Justice Department as "grim determination" to push the case to a swift conclusion. (St. Paul Pioneer Press, 23 June 1941)

Biddle was attacked immediately by the American Civil Liberties Union as well as by his liberal friends. Three days after the raids, the ACLU telegraphed acting Attorney General Biddle, urging reconsideration of the move to prosecute the SWP members. The telegram declared that the government's action "is obviously dangerous to the preservation of democracy" (Minneapolis Star Journal, 1 July 1941). A month later the ACLU sent another protest to Biddle, calling upon the Department of Justice to dismiss the prosecution, claiming that the government injected itself into an inter-union controversy in order to promote the interests of the side which supported the Administration's foreign and domestic policy. Still later the ACLU challenged the constitutionality of the injunction because it felt that the case had been wrongly removed from one involving expression of opinion and that the threat of force did not constitute an overt act as claimed by Biddle (Minneapolis Star Journal, 20 October 1941).

Liberal I. F. Stone, in an article entitled "The G-String Conspiracy," belittled the entire action and concluded by saying;

"Without allegations as to overt acts or some clear and present danger," these prosecutions are prosecutions of opinion. Yet Mr. Biddle and Mr. Berge were willing to take responsibility for them without the full inquiry warranted by a step so out of accord with our free traditions. If I understand Mr. Biddle rightly he thinks that a government need not wait for an overt act but can punish men for the probable consequences which would result if they tried to put their ideas into action. This reasoning is no different from that on which Trotskyites are jailed in the Third Reich or the Soviet Union. On this basis, Thoreau could have been kept in jail for life. (The Nation, 26 July 1941)

Two days later the New Republic continued the attack on the Attorney General,

"That the Minneapolis case is important goes without saying. President Roosevelt and Acting Attorney General Biddle have repeatedly promised that there would be no such violations of civil liberties as stained the honor of America in the last war. For a country preparing to fight for the principle of democracy now to violate those principles either in hysterical fear of a little handful of theoretical Communists, or as a part of a sordid political maneuver to help the AF of L and hurt the CIO would be unforgivable; it would be worth ten divisions to Hitler." ("Civil Liberties in Minneapolis," 1941)

John Dos Passos, writing "To a Liberal in Office," in a letter designed to reach the sensitive ear of Roosevelt but applicable to Biddle as well said,

"What I want to ask you is this; what is more dangerous to that survival of the democratic process in this country for which I am sure you would gladly lay down your life—the uprising of a few fanatics who control a single local of a trade union or a situation in which the government undermines at home those four freedoms for which it is asking the nation to make every sacrifice abroad? (The Nation, 6 September 1941)

Biddle, apparently sensitive to the criticism of his liberal friends, attempted to clarify his position in the New York Times,

"It seems to me that the most important job an Attorney General can do in a time of emergency is to protect civil liberties.

In times such as these a strange psychology grips us . . . we are likely to vent our dammed up energy on a scapegoat . . . it may be a labor union which stands up for what it believes to be its rights . . . In so far as I can . . . I intend to see that civil liberties in this country are protected; that we do not again fall into the disgraceful hysteric of witch hunts, strike-breakings and minority persecutions which were such a dark chapter in our record of the last World War." (New York Times, 21 September 1941)

This attempt to soften the liberal critics was too much to swallow for George Novak, secretary of the Civil Rights Defense Committee. In a letter to the Times he pointed out that "the declaration directly conflicts with the prosecution initiated in Minneapolis. "Prosecutions speak louder than promises," he noted. (New York Times, 28 September 1941)

How then does one square Biddle's skepticism about sedition trials with his authorization of the action against the Minneapolis Trotskyites? Biddle himself may have given the answer some eleven years later. Writing in In Brief Authority he says that he may have been motivated by the instinct to display firmness on appropriate occasions. He believed that under the circumstances the case would be fairly tried and would not result in a spate of prosecutions for sedition as happened in the 1920s. He thought that the provisions might be declared unconstitutional; and thus he authorized a prosecution so that the law would be tested at that threshold and taken to the Supreme Court where it would, he hoped and believed, be knocked out. Biddle claimed that he sent Henry Scheinheit, formerly in charge of the Civil Liberties Unit of the Department of Justice, to Minneapolis to see that the U.S. Attorney "did not let his patriotism run away from him" and to say quietly to the trial judge that Biddle was anxious that the trial be as narrow as possible.

Biddle felt that the trial itself was fair and took some solace in the fact that there were a number of acquittals and that the sentences were comparatively light. In retrospect, he said that he regretted authorizing the prosecutions,

"I should not have tried to test the criminal provisions of the statute in this particular case. The two Dunne brothers and their twenty-seven associates were the leaders of the Trotskyite Socialist Workers Party, a little splinter group, which claimed 3,000
members, and by no conceivable stretch of a liberal imagination could have been said to constitute any ‘clear and present danger’ to our government, which it was alleged, they were conspiring to overthrow. There had been no substantial overt act outside of talk and threats, openly expressed in the time-honored Marxist lingo.” (Biddle 1962:152)

The refusal of the Supreme Court to review the case was a surprise to Biddle and he felt that the victory for the government became for him a personal defeat. He felt that the Court may have thought that the case did not present strong enough facts on which to test the law.

A draft on the Minneapolis Trotskyite trial, including this information on Biddle, was sent in November, 1964 to Milton Cantor, associate editor of Labor History. A month later Mr. Cantor wrote that he and his editorial board would like to publish the material. However, he suggested that I contact Mr. Biddle in an attempt to clear up some of the questions about his role in the proceedings. I wrote to Biddle and enclosed a copy of the draft in the hope that he would thus be able to answer for Mr. Cantor and myself the questions the paper rose about his role in the proceedings. His stinging reply came a few days later,

“I have just received your letter of December 15th. There is no basis for your statement that my role in the Dunne trial was ‘quite enigmatic.’ I was opposed to the sedition and other provisions of the Smith Act, and doubted their constitutionality. From this point of view it seemed to me wise to test them promptly. I therefore authorized the indictment. The case was tried fairly, and the sentences were moderate. The Circuit Court sustained the convictions, and the Supreme Court refused to review, and a few years later held the act constitutional.

What is there ‘enigmatic’ about my role? Are you of the opinion that I should have refused to authorize prosecution because I was opposed to sedition laws in general, and to this law in particular? Are these the questions that trouble you and Mr. Cantor?

On page 17 of your article you say: ‘While awaiting sentence Goldman still insisted that it remained a fact that the conspirators were Dan Tobin, President Roosevelt, and Attorney General Biddle, who had invented this frame-up for the purpose of violating the will of the truckdrivers . . . This language would seem to indicate that you believe there was such a conspiracy, and you rely on the opinion of one of the convicted defendants to prove it. Such a conclusion is of course absurd. President Roosevelt never communicated with me about the case directly or indirectly, nor did Dan Tobin or any other labor representative.

I suggest that in view of what I have said that you withdraw any suggestion that there was any ‘conspiracy’ or ‘frame-up’ in connection with the prosecution of this case, by any branch of government, or any individual connected with the government.’ (Letter to author, 28 Dec. 1964)

Mr. Biddle also wrote Mr. Cantor and closed with the comment, “I suggest that you consult your lawyer as to whether such a charge—conspiracy—is libelous before you print the article.” My first thought was to call my friend Frank Farrell, President of the Minnesota ACLU, and ask him to defend me against libel charges brought by the former President of the Americans for Democratic Action. The irony of that situation is quite evident!

Mr. Cantor reacted negatively to the inference of possible litigation and said that he had no intention of reneging on his promise to publish. He suggested, however, that speculation about Mr. Biddle’s motivation should be eliminated—unless it could be established that he was part of a conspiracy,

... As it now stands, the evidence suggesting collusion is inadequate. Biddle is quite right in this regard. The fact that the SWP made the claim can hardly be taken at face value without substantial evidence from other sources . . .

Biddle’s letter, to be sure, is fascinating—for he was wounded and obviously feels some guilt. And when he says, “Are you of the opinion that I should have refused to authorize prosecution because I was opposed to sedition laws in general and to this law in particular?”, the answer is clearly “Yes.” But he must be given his due regarding the collusion charge—in the absence of evidence to the contrary. And I am returning the enclosed to you in the hope that the above and my comments of January 18th will be seriously considered by you and result in some further revisions along the lines suggested . . .

(Letter to author, 22 February 1965)

Revisions were made qualifying the original, although unintended, abrasive and polemical tone of the paper. This was done without destroying the study of the behavior of public officials during time of pressure. Thus it was shown again that, during time of threat, internal or external, our democratic society permits our government officials, in the name of survival, to limit those freedoms guaranteed by our Constitution. What is shocking here is that an avowed liberal, such as Francis Biddle, dedicated to preserving these rights, authorized prosecution even though he was opposed to sedition laws in general and to the Smith Act in particular. I close with a question. If we cannot depend on a man with Biddle’s convictions in a circumstance such as this, where can we turn?

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Findings on Disarmament

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ABSTRACT — The author proposes a critical appraisal of current disarmament plans and their implications in present international affairs, especially, the 1964 draft treaties of the United States and the Soviet Union calling for a general and complete disarmament. By comparing and evaluating these two plans, the author hopes to prove his thesis that although disarmament is part of the overall peace effort, the attainment of disarmament will not necessarily establish peace. On the contrary, before any actual and feasible disarmament can be achieved, there must be established a peaceful international climate conducive to a general and complete disarmament.

Part One

"To disarm or not to disarm," is the question that might rightfully be asked by a latter day political scientist-, military expert-, statesman-, or just common man—turned Hamlet. Of course, the original question posed by the first Hamlet, "To be or not to be," is as relevant today as it was in the Shakespearean drama. Moreover, to many people the two questions comprise the real issue regarding the future of mankind: "If you do not disarm you simply will not be." Others would develop this idea to its logical conclusion by saying that mankind will not survive unless peace is established throughout the world and to establish peace the nations must disarm. Thus, the argument goes, disarmament is an absolute prerequisite to peace; there can be no peace without disarmament. Whether or not this line of thinking is correct is discussed in this paper.

The scope of disarmament can be divided into two distinct categories: first, general and complete or comprehensive disarmament; and second, limited arms reduction or control. The first category would include disarmament agreements involving all nations and all types of armaments; nations would be permitted only very limited arms for the maintenance of internal order by internal security forces. The other form of disarmament, limited in its scope, would consist of attempts at local agreements between two or more nations and would include only partial armaments limitations.

In a general and complete disarmament plan, which would be accomplished in various stages leading from less to more drastic and radical measures, all nations would adhere to a single treaty. General and complete disarmament is based on the assumption that there is an arms race which is general in its scope among the present international community of major and lesser nations. Thus, since nations do not live in isolation, a military build-up in one country stimulates similar measures among its neighbors, and even the neutral nations have no choice but constantly to improve their military posture, and, as a consequence, to be drawn involuntarily into the arms race. Since the neutral nations are not members of military alliances, national self-interest and survival is an individual concern. Most of the present neutral nations have forces well beyond the level sufficient for the maintenance of internal peace and security. It follows from this argument, therefore, that any disarmament agreement to which only a few states accede, such

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