

VICTOR BERGER'S DANGEROUS IDEAS: Censoring The Mail To Preserve National Security During World War I

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During World War I, the postmaster general conducted a vigorous campaign to stop the distribution of radical periodicals. Victor L. Berger, the socialist publisher of the Milwaukee Leader in Wisconsin, was among the first targets. Without any court review, Berger was found in violation of the Espionage Act and the Leader's second-class mailing privilege was revoked. As a result, mailing costs increased by a factor of seven, and circulation dropped by more than a third. Berger's personal papers from this episode in administrative censorship only recently have become available to researchers. They reveal a principled and defiant publisher who argued he could be a critic and a patriot, and a local press contemptuous of Berger and fearful of the federal government, local censors, advertisers, and readers.

In the early days of World War I, when spying and domestic subversion were feared as much as invasion and battlefield losses, Congress acted swiftly and decisively to protect the nation from enemies at home. The Espionage Act of 1917 prohibited making false statements to interfere with the military, obstructing the draft, or attempting to cause disloyalty among soldiers and sailors.¹ Soon, even criticizing the flag or the uniform of our armed forces was a punishable offense.² The Congress gave the postmaster general, Albert Burleson, the job of stopping the distribution of prohibited material in the mail. Burleson assumed the task with zealous dedication, withholding from the mail dozens of periodicals, books and other matter considered in violation of the Espionage Act.

Victor L. Berger, the publisher of the *Milwaukee Leader*, a small but widely distributed socialist daily newspaper in Wisconsin, was among Burleson's first targets and one of the most severely punished. Berger was an immigrant from Austria-Hungary who was active

in politics as a socialist and had served a term in Congress. He was informed that articles and editorials published in the *Leader* during the summer of 1917 violated the Espionage Act. Without the review of any court, Burleson withdrew the second-class mailing privilege for the *Leader*. The effect of postmaster general's action was dramatic. Mailing costs increased by a factor of seven, and circulation dropped by more than a third.³ Soon, Burleson stopped delivering first-class mail to the business. Critics argued that Burleson had overstepped his authority, but President Woodrow Wilson, while expressing doubt, supported the action.⁴ The courts also supported Burleson's interpretation of the Espionage Act, and the United States Supreme Court, with some dissent, upheld the denial of the mailing privilege.⁵ The ruling would stand for twenty-five years before a later court decided that the postmaster could not be given the power to determine what was good for the public to receive in the mail.⁶

The prosecution of Victor Berger is a reminder that the First Amendment often has been challenged when real or perceived threats face the nation.⁷ Numerous historians have examined the suppression of dissent during World War I, and Berger's fight to publish and distribute the *Leader* has been documented as part of that rich literature.⁸ However, his personal papers from this episode in administrative censorship only recently have become available.⁹ These papers offer a significant supplement to the historical record, providing new detail on his support and condemnation. They show a principled and defiant publisher who argued that he could be a critic and a patriot. His opposition to the war, he argued, was not driven by his heritage, but by concern that the American working class would be slaughtered and impoverished while capitalist elites profited from a European war. His correspondence shows a local press contemptuous of Berger and fearful of the federal government, local censors, advertisers, and readers. When Berger ran for the United States Senate in 1918, many local papers, such as the *Daily Leader* of Wood County, Wisconsin, argued that he wanted to "aid our enemies" and that publishing an advertisement for his campaign "would be pleasing to the German government."¹⁰ It was not just Berger and the radical press that paid a price in lost liberties. In effect, the restrictions on antiwar periodicals also abridged the freedom of the mainstream press, by creating a climate of fear of publishing prohibited material. Further, this denial of Berger's access to the Wisconsin press, for patriotic reasons or because of the threat of government reprisal, amounted to an erosion of the most fundamental of democratic privileges, that is, the right of citizens to run for office and the right of voters to select their representatives from those wishing to serve. As civil liberties questions have been ignited by terrorist threats in the twenty-first century, it is timely to recall the censorship of the *Milwaukee Leader* to be reminded of how the conflict between national security and civil liberties affected the radical press, the mainstream press, and democratic privileges in an earlier era.

Despite his radical views, Victor Berger believed in working within the American political system, and he built a "powerful political machine" in Milwaukee. He was elected in 1910 to the United States House of Representatives, serving one term at the same time as Burleson.¹¹ Born in Austria-Hungary in 1860, Berger emigrated when he was 18, eventually moving in 1881 to Milwaukee, a predominantly German community, and becoming a German teacher in the public schools. After about a decade, Berger resigned to become editor of *Wisconsin Vorwaerts*, a German-language newspaper. He began

working at a weekly English language paper, the *Social Democratic Herald*, and started the daily *Milwaukee Leader* in 1911.¹²

Berger was a moderate, pragmatic socialist who advocated an evolution from capitalism to socialism rather than a revolution. His support for labor unions and farmers, participation in the democratic electoral process, and efforts to give socialism a “cloak of responsibility” placed him in the conservative wing of American socialism.¹³ But like other socialists, he opposed the war in Europe. The day before Congress declared war with Germany, Berger advocated that the war be financed by corporate profits and not through public bonds. “The war will be an opportunity for profiting both from the necessities of the government and the needs of the people,” Berger wrote in the *Milwaukee Leader*. “Future generations of workers will be mortgaged to pay vast sums of interest to the heirs of our plutocrats.” The editorial called for nationalizing the means of interstate transportation and communication and appropriating the coal mines, oil fields, minerals, and industrial plants that would produce munitions.¹⁴ That same week, Berger helped prepare a hastily crafted Socialist party resolution opposing the war and objecting to the draft. By early 1918, Berger and four other socialists would be indicted for their opposition to the war.¹⁵

It would have been hard to mistake the socialist ideology of the *Milwaukee Leader*. Beside the weather forecast, at the top of the front page, was the *Leader's* motto: “Unawed by Influence and Unbribed by Gain.” Still, news stories contained more information than argument. On April 5, 1917, the lead headline was about the discussion in Congress in support of the war. The paper reported on the torpedo sinking of the *Missourian*, which carried twenty-two Americans on board. It noted that the United States government used its power to set a price and avoid war profiteering on a procurement contract, and that Treasury Secretary William McAdoo wanted Congress to appropriate \$3.4 billion to the pay for the war. But this issue also carried at the top of the front page a statement from the Chicago Federation of Labor to Wilson opposing the war. Elsewhere the *Leader* reported that the Federated Trades Council in Milwaukee had approved a resolution of support for war opponent Senator Robert La Follette. The paper contained some local news of traffic accidents and news of a business and local government dispute about a socialist proposal for a city-owned tailor shop to make police and fire department uniforms.

The editorial page of the *Leader* left no doubt about its antiwar position: “The duty that now rests upon those who can reason and think soberly is to promote policies which will strengthen the economic foundations of the masses of the people, weaken the hold of the dominant plutocracy upon the nation’s life, and insure a more lasting peace when war shall have run its course,” Berger wrote the day before war was declared.¹⁶ For Berger, there was no conflict between his opposition to the war and his loyalty to the country. “The truest of patriots is not he who pours forth an hysterical froth of jingo rhetoric,” Berger wrote on April 6, 1917. “The real lover of his country is the man who stands for her liberties in the hour when passion and frenzy and the interests that profit by them are ready to sweep freedom away.”¹⁷

Even before the indictment, Burleson’s staff informed Berger that the *Leader* was violating the Espionage Act. While the act was designed to stop specific materials, postal authorities interpreted the regulations to deny second-class mailing privileges for future

issues of the *Leader*. Despite a longstanding legal tradition to the contrary, the order amounted to prior restraint based on the presumption that the paper would violate the Espionage Act in the future. Legal scholar Zechariah Chafee Jr. later concluded that “no decision of the United States Supreme Court has gone so far in sustaining governmental powers over the press.”¹⁸

United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson was decided in March 1921, more than two years after World War I.¹⁹ The lower court had already found that Burleson had properly exercised his authority. “No one can read [the editorials] without becoming convinced that they were printed in a spirit of hostility to our own government and in a spirit of sympathy for the Central Powers,” Judge Charles H. Robb concluded.²⁰ Supreme Court Justice John H. Clarke found that Burleson had the authority to revoke the mailing privilege and that the articles cited by Burleson contained false reports and statements intended to promote the success of the enemy. Since the Milwaukee Leader had repeatedly violated the Espionage Act and produced material that could not be mailed, it was reasonable for the postmaster to assume continued violations and withhold the mailing privilege. “Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists,” Clarke wrote. In support of the prior restraint, the court that said the government cannot “maintain a reader in every newspaper office of the country to approve in advance each issue before it shall be allowed to enter the mails.”²¹ However, the postmaster general did in fact have a reader in every community during the war. He instructed his postal agents to examine all printed matter for objectionable content. Only three months after the Espionage Act was adopted, more than one hundred radical papers were under surveillance.²²

Justice Louis D. Brandeis, a leading advocate of a more permissive interpretation of the First Amendment, offered a lengthy dissent. Brandeis insisted that there was no statutory authority allowing the postmaster to revoke second-class mailing privileges. In addition, he argued, the Mail Classification Act of 1879 was improperly cited to deny mailing privileges to the *Milwaukee Leader* because it was never to be used for the punishment of crimes committed through publication. Brandeis argued that singling out one publication for higher postal rates “would prove an effective censorship and abridge seriously freedom of expression.”²³ Justice Oliver Wendell Holmes concurred, arguing that “the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.”²⁴

While the Berger mailing rights case was decided long after World War I, it was in the heat of hostilities that sanctions were leveled by the Post Office against the *Leader* and numerous other publications. In the years surrounding the war, press and speech were key battlefronts in a contest between civil liberties and the desire for domestic order and national security. That clash was the greatest during the European war, but the demands of labor and social activists at home and political upheaval abroad produced conflict that predated America’s entry into the war and lasted well after it was over.²⁵ Once war was declared with Germany in April 1917, the fight over political ideas and speech rights took on new passion throughout the country. Increasingly, faced with the threat of a foreign enemy, any act,

speech or even hint of hostility to the war effort was punished quickly and severely.²⁶

In addition to the Espionage Act, the Sedition Act made it a crime to utter, write, print or publish language that was disloyal or intended to cause contempt for the U.S. government, the Constitution, the flag or a military uniform during war time. Materials that violated the Espionage Act were prohibited from the mail, and under the Sedition Act, the postmaster general decided whether first-class mail should be delivered to those persons or institutions violating the Espionage Act. Violating either federal act was punishable by a \$10,000 fine and up to twenty years in prison.²⁷ In addition, Congress approved the Trading with the Enemy Act, which required foreign language newspapers carrying war news to submit an English translation in order to remain eligible for mailing privileges.²⁸

Berger's *Milwaukee Leader* was one of fifteen socialist and anarchist publications excluded from the mail almost immediately after passage of the Espionage Act.²⁹ Over a two-year period, Burleson denied permits to approximately seventy-five periodicals, including *The Masses* and *Appeal to Reason*, which had a prewar circulation of more than one-half million.³⁰ The Espionage Act prohibited mailing any material, including sealed first-class letters, which advocated or urged "treason, insurrection, or forcible resistance to any law."³¹ In practice, this applied mainly to the nation's periodicals, which were read by postal officials and used the subsidized second-class rate. In most cases, Burleson argued that the periodicals were ineligible for a second-class permit because they were not produced at regular intervals. This reasoning put any periodical at Burleson's mercy, since postal authorities had the power to withhold any single issue, thus breaking the publication cycle. For the *Milwaukee Leader*, Burleson denied second-class mailing privileges for future publications based on past editorials. Burleson cited more than fifty excerpts from the paper in the three months after the Espionage Act was approved, and he asserted Berger was part of an organized propaganda effort to "discredit and impede in every way the Government in the prosecution of this war."³²

Berger, who insisted the offending editorials were not pro-German and not intended to hurt the war effort, tried to argue his case before Wilson.³³ Biographer Edward Muzik suggested that Berger offered to submit to editorial limits to retain his second-class mailing privileges. However, Berger objected to a newspaper report characterizing his comments before postal authorities as a promise "to be good." He said he was only asking for a definition of legitimate criticism. For Berger, the war was a capitalist struggle between Great Britain and Germany. "If this be treason, let them make the most of it," Berger told the editor of the *New York Evening Journal*. He said he would not compromise principles for Wilson.³⁴ Although Wilson did not meet with Berger, he did review Berger's hearing before the Post Office. "I do not think that most of what is quoted ought to be regarded as unmailable," Wilson wrote Burleson.³⁵ The postmaster general was undeterred and Wilson did nothing more.

Berger's criticism of the war was simply too much for an administration intent on suppressing dissent. He was indicted for publishing five antiwar editorials during the summer of 1917, including one printed within a week of passage of the Espionage Act.³⁶ After his indictment, a Berger Defense Fund Committee, which included the mayor of Milwaukee, was set up to raise money to keep him out of prison. The fundraising letter asserted that the capitalist politicians and profiteers hated Berger because he "speaks for

an early and democratic peace, for free speech and a free press and against profiteering.”³⁷ Berger was convicted in December 1918, a month after the war formally ended. He was sentenced to twenty years in prison but released on appeal, with the condition that he have nothing to do with editorials or policy at the *Leader* while on bail.³⁸

Berger had just been elected to another term in the House of Representatives. His right to serve was challenged, and after a congressional hearing, he was denied a seat.³⁹ He won a special election in 1919, but again was prohibited from taking his seat.⁴⁰ Chafee argued in his 1920 book on free speech that Berger’s rights and those of his constituents were violated when Congress refused to seat him. While Chafee focused his criticism of Burluson on another mail case, he argued that the House of Representatives was wrong not to accept Berger even if his views were “detestable.”⁴¹ Berger thanked Chafee in a letter in January 1921.⁴² Ten days later, the Supreme Court threw out Berger’s conviction because he should have been given a new judge after pointing out prejudicial anti-German comments by the trial judge, Kenesaw Mountain Landis.⁴³ Elected again in 1922 and seated without controversy, Berger served until 1928.⁴⁴

The loss of second-class mailing privilege put extraordinary stress on the business, which depended on these special postal rates for circulation outside of Milwaukee.⁴⁵ Meta Berger, Victor Berger’s wife, recalled that after Victor telephoned her about the mailing decision she went to the *Milwaukee Leader* plant and could “feel the terror that permeated the whole force of workers.” As credit tightened and advertising dwindled, weekly payrolls became uncertain. Sometimes there was doubt about whether the paper might publish the next day.⁴⁶ The mailing rights decision cost the paper \$400,000 for the first six months because of higher mailing costs, lost subscriptions and lost advertising revenue, as national advertising accounts were withdrawn as a result of loss of wider circulation.⁴⁷ Berger noted that even before the mailing decision, it was hard to sell advertisements during the early days of the war “when we were practically boycotted by the Loyalty Legion, and other societies of that kind, and boycotted to such an extent that even some of the big department stores that had been with the paper since it first existed cut out their ads, told me they could not advertise in it until after the war.”⁴⁸ Berger’s legal troubles also created tension within the newspaper. In a letter to Berger, staff members noted that they had been informed that publishing the report from the St. Louis Socialist convention “constitutes a treasonable offense.” Whether an act of orchestrated self-protection or a statement of protest, the managing editor and several others said they felt “obliged to disclaim all responsibility” for the publication.⁴⁹ Even a trucking company refused to provide service to the *Leader*. Berger argued that he was not prohibited from the mail entirely but just denied second-class status, although he was notified that “it would be impossible for the Western Express Co. to handle your papers as outside mail or express.”⁵⁰ Berger also tried to publish a weekly periodical, *The Commonwealth*, to hold onto his subscribers who were no longer receiving the *Leader*. The Post Office, however, also refused to deliver *The Commonwealth*.⁵¹

In addition to his troubles with the Post Office and federal prosecutors, some of the state’s newspapers treated Berger as a pariah and would not even allow him to advertise in their publications. In March 1918, paper after paper rejected his United States Senate campaign advertisement as disloyal, pro-German, and apt to provoke community

response or government sanction.⁵² While one cannot be certain, it appears the objectionable ad touted Berger as the candidate who stands for an “early, general and lasting peace” and “against militarism and imperialism.” The advertisement said that Berger was “against race hatred” and “for freedom of speech, freedom of press and freedom of assemblage.” The advertisement, which contains about two hundred words of text within a thick border, attempted to confront the “foolish rumor” that Berger was disqualified by his indictment.⁵³

The most common explanation was that regardless of any business motivation, the papers would simply not accept an advertisement that appeared to challenge the war effort. *The Stevens Point Journal* regarded the ad as “pro-German, apt to obstruct the conduct of the war, and help the enemy.” In responding to an appeal from Berger’s campaign, the *Journal* noted that it did not want to turn away business, but “we cannot permit our paper to be made the agency for the circulation of pro-German propaganda.”⁵⁴ *The Antigo Daily Journal* said it would be “not only unpatriotic, but even border on the seditious to insert copy of that character.”⁵⁵ A.P. Andrews, the editor of the *Waupun Leader*, said he could not let his paper be used by Berger: “I am strongly convinced the war must be won for America,” he insisted.⁵⁶

The newspapers also expressed concern about adverse reader reaction. The editor in Waupaca said the ad “would not be tolerated” by his readers and sentiment against both Berger and La Follette, the state’s most visible war opponent, was strong. “We do not wish to court mob violence though we deplore such narrowness,” D.F. Burnham wrote.⁵⁷ Max Ninman, publisher of a German-language weekly, said that “under prevailing conditions” he could not print an advertisement “which contains statements referring to our government and which are apt to cause my German paper trouble.”⁵⁸ *The Daily Commonwealth* of Fond du Lac declared that “during these critical war times” Berger would need the approval of the Wisconsin Loyalty Legion or the Loyal Council of Defense before the ad would be accepted. “We are therefore submitting your copy for their censor and will be governed by their action,” A.L. Waffle informed the campaign’s advertising manager.⁵⁹ *The Appleton Evening Crescent* said it had been advised by the local defense council not to run Berger’s ad.⁶⁰

In some cases, editors and publishers were worried about government penalties if they chose to accept the ad. The president of the *Wausau Daily Record-Herald* was concerned the ad would violate a new state law prohibiting speech that might discourage enlistment.⁶¹ The *Berlin Evening Journal* noted that it would reject the ad for patriotic reasons and because “we have second class mail rights in the United States as well as in Canada and want to retain them.”⁶² *The Daily News* of Neenah said it had been warned by the Post Office that under the Espionage Act the ad could not be published.⁶³

Regardless of the reason, whether the threat of government punishment, fear of hostile reader response or well-meaning patriotism, the loss of access to Wisconsin’s press cost Berger and the state’s citizens a chance to fully participate in democratic governance. The newspapers that rejected his advertisement abridged Berger’s right to run for office. Voters were in some way denied a chance to hear from and learn about a candidate for the United States Senate. Despite the advertising blackout, Berger received more than 38,000 votes in the primary. The result is more impressive considering his indictment for violating the

Espionage Act was made public ten days earlier.⁶⁴ Berger received more than a quarter of the votes for three candidates in the April 1918 Senate election.⁶⁵

The professional journalism organizations to which Berger belonged were no more supportive than the Wisconsin press. During the war, the National Press Club expelled him: "Your course in the Wisconsin campaign, your speeches, and your attitude toward the cause of the nation have outraged the sense of loyalty of the members of the National Press Club."⁶⁶ A year later, after military hostilities had ended, the Milwaukee Press Club notified Berger he was to be removed because his membership was "injurious to the good order, reputation and welfare of the Club."⁶⁷ Ironically, as the press was condemning Berger, the Milwaukee County Council of Defense politely asked him to regularly publish a slogan encouraging thrift as part of the war effort.⁶⁸

While many in the Wisconsin press were quick to condemn or distance themselves from Berger, Burleson and Wilson were not free from criticism for heavy-handed censorship of radical publications. One critic described postal censorship efforts as a "thought control department."⁶⁹ Herbert Croly, editor of the *New Republic*, thought "censorship over public opinion" by the postmaster had the potential to further divide the nation into pacifists and socialists in one camp and "pro-war enthusiasts" in the other.⁷⁰ Wilson assured Croly that he thought Burleson "inclined to be most conservative in the exercise of these great and dangerous powers."⁷¹ Oswald Garrison Villard, editor of *The Nation*, urged that Burleson's staff be made to understand that socialism was a "perfectly legitimate" political philosophy that was especially strong in Europe.⁷² Reformer and lawyer Amos Pinchot told Berger that Burleson acted in a "silly and unpatriotic manner."⁷³ La Follette said he hoped the Wilson administration would broaden its attack on radical papers because it might prompt wider opposition in the Congress. "I realize the hardship and suffering to the publications already blacklisted," La Follette wrote to Berger. "It may be well nigh ruinous to them." La Follette hoped for a joint resolution "restraining such abuse of power."⁷⁴

Burleson argued that he had no intention of stifling criticism of the Wilson administration as long as it did not hamper the war effort.⁷⁵ Nevertheless, many publications fell under his harsh scrutiny. An issue of *Public* was withheld for urging that more money be raised by taxes rather than loans. The *Jeffersonian* was withheld from the mail for opposition to the draft. *Bull* was banned for attacks on Great Britain, and the *Irish World* was suppressed for suggesting the French had become materialists and Palestine would not become a free Jewish state but a British protectorate. The *Freeman's Journal and Catholic Register* was withheld for printing a statement by Thomas Jefferson that Ireland ought to be an independent state. The *World Tomorrow* was withheld for an article that criticized involvement in Russia.⁷⁶ The *Nation* was briefly withheld from the mail because of an article criticizing American Federation of Labor President Samuel Gompers, who supported the war.⁷⁷

Throughout the trial, hearings, and many elections, Berger insisted he would not change his views to please others. He proudly told his wife that his editorials "never sounded any better" than when he read them before a judge deciding whether to overturn the decision of the postmaster.⁷⁸ In a fundraising appeal, Berger argued that postal censorship suppressing the socialist press was a challenge to the core democratic values of

the nation. “Without a free, untrammled press, the capitalist class may then attempt to take away one by one all of the people’s rights – even the right of the ballot.”⁷⁹

Berger’s outspoken and matter-of-fact support for socialism drew bitter denunciation. One critic from Chicago urged Berger to continue speaking out “so you will be interned for the balance of the war.”⁸⁰ An official from the state of Washington, after reading about the decision to deny Berger his seat in the House for a second time, provided this warning: “WE are going to take care of all your class of ‘Hun loving dogs’ and you will wake up some fine morning, not in Little Germany (otherwise known as Milwaukee) but on board a good United States transport en route to the land of baby killers and all round cut throats.”⁸¹ Arthur Brisbane, editor of the *New York Evening Journal*, scolded Berger for taking up Burleson’s time “as the suit of course will not do you any good, and taking his time and attention will give him reasonable cause of annoyance.” Brisbane accused Berger of “splitting straws over Constitutional rights” and lectured him that “there never was a great war in which it was not necessary for ‘Constitutional’ or other rights to become temporarily submerged.”⁸²

Even after the war, despite an order from Wilson to stop censorship, Burleson withheld second-class mailing privileges from the *Leader* and other papers and magazines.⁸³ Speaking to postal officials in April 1919, Burleson acknowledged that he had been “denounced from one end of the country to the other as an autocrat, a tyrant, and a person who was constantly practicing arbitrary acts.” Still, he said, the law was enforced “with moderation, with justice, and with fairness.”⁸⁴ But Bernard Baruch, financier and former War Industries Board chairman, expressed dismay when he learned that the ban remained after the war: “Do you mean to say that they won’t let a man publish a newspaper or use the mails for the purpose of spreading a document that contains views that do not suggest violence or the overthrow of the present order of society?”⁸⁵

Burleson, who represented Texas in the House of Representatives for 12 years before becoming an influential insider in the Wilson administration in 1913, retired in 1921.⁸⁶ The new postmaster general, Will H. Hays, restored mailing privileges to the *Milwaukee Leader*, but by then the paper had lost thousands of subscribers. To add insult to his injury, the Internal Revenue Service audited Berger’s 1921 tax returns and refused to allow him to deduct \$2,000 in legal fees, insisting that they were a personal expense. Berger protested that the fees were a business expense resulting from the *Leader’s* persecution by the “autocratic Wilson government.”⁸⁷

Victor Berger’s *Milwaukee Leader* case was heard during a period widely regarded as the formative years for a modern interpretation of the First Amendment. A series of cases largely involving the production and distribution of socialist or anarchist literature, or antiwar statements, challenged the court to consider the definition of free speech rights in time of war.⁸⁸ However, the more libertarian First Amendment advocates on the high court remained a minority when Berger’s case was heard. It would be a full quarter century before the discretionary power of the postmaster general was curtailed.

In *Hannegan v. Esquire, Inc.*, Justice William O. Douglas ruled in 1946 that Postmaster General Frank Walker had no authority to deny a second-class mailing privilege to an *Esquire* magazine absent obscene materials.⁸⁹ The dissents by Brandeis and Holmes in the *Leader* case were cited by Douglas in his ruling that *Esquire* could not be denied a second-

class mailing privilege simply because the postmaster determined that some materials in the magazine did not contribute to the public good. Reversing the decision that penalized the *Milwaukee Leader* for expressing unpopular antiwar sentiment, Douglas decided the act did not give the postmaster the authority to deny mailing privileges based on content if it met other criteria for a permit. The act was only intended to address the format and nature of the contents, not their “quality, worth or value,” Douglas found. The mail subsidy received by the magazine was no justification for revoking its First Amendment protection: “To withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official,” he wrote.⁹⁰

As the nation enters the twenty-first century engaged in another military conflict abroad, it is possible to recognize how much the appreciation of First Amendment rights has evolved since World War I.⁹¹ Still, looking back at that time, it is also possible to see how precarious those rights are, especially when the nation is faced with conflict between dissent and conformity during a national crisis. During and immediately after World War I, censorship was mandated by Congress, enforced by the federal administration and sanctioned by the judiciary in the name of protecting the nation from its enemies abroad and within. State-sponsored repression of speech was practiced at all levels of government, and private citizens encouraged and participated in censorship on behalf of the war. While administrative and judicial efforts to contain antiwar sentiment were criticized by some civil libertarians even before Congress enacted the Espionage Act, government officials and a highly mobilized and worried public rushed to silence the most vulnerable skeptics.

Victor Berger paid a high price for dissent. He lost his right to free expression. Residents of his congressional district lost their right to a representative of their choosing. Whether to support the war effort or through fear of the reprisal from readers or the government, the state’s newspaper publishers restricted the participation of Berger and Wisconsin citizens in free elections. However, from the domestic battles fought by Berger and others who claimed the right to freely express unpopular ideas, the modern sense of the First Amendment emerged. The judiciary and popular opinion came to reject the limits of World War I and the Red Scare. Berger, an optimist as well as a pragmatist, assured his friend Eugene V. Debs, the socialist and presidential candidate, this would be so. In a note congratulating his associate when he was released from prison in 1921 after serving a sentence for antiwar statements, Berger told Debs he was sure his “suffering for the cause of human liberty was not in vain.”⁹²

NOTES

1. Espionage Act, 40 Stat. 217 (1917).
2. Sedition Act, 40 Stat. 553 (1918).
3. Berger testified that the *Milwaukee Leader* lost 17,600 customers “overnight.” At its peak, the paper had a circulation of 44,000. *Hearings Before the Special Committee*

- Appointed Under the Authority of House Resolution No. 6 Concerning the Right of Victor L. Berger to be Sworn in as a Member of the Sixty-Sixth Congress, vol. 1* (Washington: Government Printing Office, 1919), 538-540. Volume 1 hereafter referred to as *Berger Hearings 1*; Volume 2 hereafter referred to as *Berger Hearings 2*.
4. Donald Johnson, "Wilson, Burluson, and Censorship in the First World War," *Journal of Southern History* 28, no. 1 (February 1962): 46-58.
 5. *United States ex. rel. Milwaukee Social Democratic Publishing Co. v. Burluson*, 255 U.S. 407 (1921), and *Milwaukee Social Democratic Publishing Co. v. Burluson*, 49 App. D.C. 26, 258 F. 282 (1919).
 6. *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).
 7. See Jeffery A. Smith, *War and Press Freedom: The Problem of Prerogative Power* (New York: Oxford University Press, 1999), 128-142; and William H. Rehnquist, *All Laws But One: Civil Liberties in War Time* (New York: Alfred A. Knopf, 1998), 170-183.
 8. See, for example, H.C. Peterson and Gilbert C. Fite, *Opponents of War, 1917-1918* (Madison: University of Wisconsin Press, 1957); James Mock, *Censorship 1917* (Princeton, N.J.: Princeton University Press, 1941); Zechariah Chafee Jr., *Free Speech in the United States* (Cambridge, M.A.: Harvard University Press, 1941); Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, C.T.: Greenwood, 1972); Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992); and Paul L. Murphy, *The Constitution in Crisis: 1918-1969* (New York: Harper & Row, 1972).
 9. While Berger died more than 75 years ago, the Wisconsin Historical Society did not acquire his personal papers until 1989. Much of the scholarship on Berger predates the opening of these materials for research. Frederick I. Olson, "Victor Berger Papers," *Journal of American History* 82, no. 1 (June 1995): 381-382.
 10. J.F. Cooley, *Daily and Weekly Leader*, to G.A. Mixer, advertising manager for the *Milwaukee Leader*, 12 March 1918, Victor L. Berger Papers, Wisconsin Historical Society, Madison, Wis., box 13, folder 2. Hereafter referred to as the Berger papers.
 11. Edward J. Muzik, "Victor L. Berger: Congress and the Red Scare," *Wisconsin Magazine of History* 47, no. 4 (Summer 1964): 309-318. Quotation is from 309. Berger ran for re-election in 1912, 1914, 1916, losing each time to Republican William H. Stafford, but garnering more than one-third of the vote in a four-way contest in each election. *Wisconsin Blue Book* (Madison: Democrat Printing Co., 1913), 267; *Wisconsin Blue Book 1915* (Madison: Democrat Publishing Co., 1915), 230; *Wisconsin Blue Book 1917* (Madison: Democrat Publishing Co., 1917), 289.
 12. *Certified copy of the testimony of Victor L. Berger at the trial of the case of the United States vs. Berger et al. in the United States District Court for the Northern District of Illinois, Eastern Division* (Washington: Government Printing Office, 1919), 3-4, hereafter referred to as *Testimony of Victor L. Berger*; Sally Miller, *Victor Berger and the Promise of Constructive Socialism* (Westport, C.T.: Greenwood, 1973), 17.
 13. For more biographical information on Berger, see Edward J. Muzik, "Victor L. Berger: A Biography" (Ph.D. diss., Northwestern University, 1960). For an examination of his socialist views see Miller, and Roderick Nash, "Victor L. Berger: Making Marx Respectable," *Wisconsin Magazine of History* 47, no. 4 (Summer 1964): 301-308.

Quotation is from Nash, 307.

14. *Milwaukee Leader*, 5 April 1917.
15. Others were Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker, and William F. Kruse. Miller argued “Berger, more than any other party leader, experienced the full wrath of government prosecution.” Miller, 198.
16. *Milwaukee Leader*, 5 April 1917.
17. *Ibid.*, 6 April 1917.
18. Chafee, *Free Speech in the United States*, 298-299. See Thomas F. Carroll, “Freedom of Speech and of the Press in War Time: The Espionage Act,” *Michigan Law Review* 17, no. 8 (June 1919): 621-665, for a counterargument that use of the mail is a revocable privilege, and the Congress has authority to delegate the power to make a final determination on suitability for mailing. See also Henry M. Bates, “Freedom of Press and Use of the Mails,” *Michigan Law Review* 19, no. 7 (May 1921): 728-731; and “The Expanding Postal Power,” *Columbia Law Review* 38, no. 3 (March 1938): 474-492.
19. *Milwaukee Social Democratic Publishing Co.*, 255 U.S. 407 (1921).
20. *Milwaukee Social Democratic Publishing*, 258 F. at 284.
21. *Milwaukee Social Democratic Publishing*, 255 U.S. at 414. Quotation at 416.
22. Adrian N. Anderson, “Albert Sidney Burleson: A Southern Politician in the Progressive Era” (Ph.D. diss., Texas Technological College, 1967), 226. Also see Johnson, 48.
23. *Milwaukee Social Democratic Publishing*, 255 U.S. at 417-436 (Brandeis, J., dissenting). Quotation at 431.
24. *Milwaukee Social Democratic Publishing*, 255 U.S. at 437 (Holmes, J., dissenting).
25. See David M. Rabban, “The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I,” *Virginia Law Review* 80, no. 5 (August 1994): 1055-1158; Murphy, *The Meaning of Freedom of Speech*; Blanchard, 3-148; Murphy, *The Constitution in Crisis*, 1-40; Robert H. Wiebe, *The Search for Order: 1877-1920* (New York: Hill and Wang, 1967), 286-302; David M. Kennedy, *Over Here: The First World War and American Society* (Oxford: Oxford University Press, 1980), 3-92, 231-295; and Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge, M.A.: Belknap Press, 1991), 218-253.
26. Peterson and Fite; Mock, especially 2-38 and 190-212.
27. Espionage Act at 219, 230-231; Sedition Act at 553-554.
28. Trading with the Enemy Act, 40 Stat. 411 (1917).
29. Blanchard, 94; Anderson, 226. Postal regulations involving content originated with controls on mailing obscene materials and matter concerning lotteries. See Morris Cohn, “The Censorship of Radical Materials by the Post Office,” *St. Louis Law Review* 17, no. 2 (February 1932): 95-119; and Eberhard Deutsch, “Freedom of the Press and of the Mails,” *Michigan Law Review* 36, no. 5 (March 1938): 703-751.
30. *Masses Publishing Co. v. Patten*, 246 F. 24 (C.C.A. 2nd, 1917); Anderson, 229; Kennedy, 26-27. Blanchard placed the number of publications at more than one hundred. Blanchard, 75.
31. Espionage Act at 230.
32. Affidavit of Albert S. Burleson, 17 November 1917, supporting denial of the second-class mailing privilege. *Berger Hearings* 1, 510-530. Quotation at 512.

33. Former U.S. Rep. William Kent, a U.S. Tariff Commission member, to President Woodrow Wilson, July 16, 1917, seeking to arrange a meeting for Berger; Kent to Berger, 21 November 1917, defending Wilson while informing Berger he was not able to arrange an audience. Berger papers, box 13, folder 1.
34. Muzik, "A Biography," 281. Berger telegram to Editor, *Evening Journal*, October 1917, Berger papers, box 13, folder 1.
35. Wilson to Burlison, 18 October 1917, *The Papers of Woodrow Wilson*, ed. Arthur S. Link, vol. 44 (Princeton, N.J.: Princeton University Press, 1983), 396-397.
36. The editorials argued 1) The United States had to enter the war to prolong it, Wall Street financiers were becoming rich from the war, the country was free of labor troubles because of it, the United States government was using the war cause to create an autocracy, the war was justifying the establishment of a large standing army, and Germany was challenging United States imperial interests, 20 June 1917; 2) Some soldiers were being made insane by combat in Europe, 13 July 1917; 3) Despite newspaper reports to the contrary, many men do not wish to be conscripted, 2 August 1917; 4) War is big business, 6 August 1917; and 5) Warmongers would consider the peace-advocating words of the Bible to be treasonous, 24 August 1917. Indictment 2 February 1918, in the Northern District of Illinois, Charles F. Clyne, United States Attorney, found in *Berger Hearings* 2, 31-34.
37. Letter from Berger Defense Fund Committee, Daniel Hoan, Robert Buech, Meta Berger, F.W. Rehfeld, and E.H. Thomas, ca. 1918, Berger papers, box 22, folder 18.
38. Miller, 213.
39. Muzik, "Congress and the Red Scare;" Chafee, 247-269. Berger received 17,920 votes in the 1918 congressional election, compared to 12,450 for the Democrat Joseph Carney and 10,678 for Stafford. *Wisconsin Blue Book 1919* (Madison: Democrat Printing Co., 1919), 155.
40. In the special election of December 1919, Berger received 24,350 to 19,566 for H.H. Bodenstab, a candidate supported by both Republicans and Democrats. Muzik, "Congress and the Red Scare," 316.
41. Zechariah Chafee Jr., *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920), 315-332. *The Masses* decision is discussed at 46-56. Quotation is from 318.
42. Berger to Chafee, 21 January 1921, Berger papers, box 6, folder 6.
43. *Berger v. United States*, 255 U.S. 22 (1921).
44. Berger lost to Stafford, 40,777, to 34,004, in the 1920 election, but regained his seat in 1922, defeating Stafford, 30,045 to 26,274. *The Wisconsin Blue Book 1921* (Madison: State Printing Board, 1921), 223; *The Wisconsin Blue Book 1923* (Madison: State Printing Board, 1923), 573.
45. Most subscribers were located in Milwaukee and surrounding towns, but before the mailing ban, the paper also was sent to Minnesota, Oklahoma, Illinois, Ohio and Indiana. *Berger Hearings* 1, 540-541.
46. Meta Berger, *A Milwaukee Woman's Life on the Left: The Autobiography of Meta Berger*, ed. Kimberly Swanson (Madison: State Historical Society of Wisconsin, 2001), 70-71.
47. *Berger Hearings* 1, 538.
48. *Testimony of Victor L. Berger*, 59.

49. J.E. Harris, managing editor, et al. to Berger, 20 April 1917, Berger papers, box 13, folder 1.
50. A.B. Thoeny, general agent for Western Express Co., to the *Milwaukee Leader*, 26 December 1917; Berger to Thoeny, 27 December 1917, Berger papers, box 13, folder 1; Thoeny to Berger, 8 January 1918, Berger papers, box 13, folder 2. Quotation is from 8 January 1918.
51. *Berger Hearings* 1, 540.
52. More than three dozen rejection letters from March 1918 can be found in the Berger papers, box 13, folder 2. Berger, however, did not face a total news blackout during his campaign. For an example of newspaper coverage in Milwaukee at this time, see "Berger Makes Demand for Peace," a statement of his campaign platform, in the anti-La Follette, pro-Democrat *Milwaukee Journal*, 5 March 1918, page 2. The *Milwaukee Journal*, while clearly pro-Wilson and anti-socialist, reported that Berger was endorsed by Milwaukee Mayor Dan Hoan, 11 March 1918, on page 2. Berger's indictment for treason, not surprisingly, was reported on the front page March 10.
53. Berger papers, box 13, folder 2.
54. *The Stevens Point Journal* to Mixer, 9 March 1918; *The Stevens Point Journal* to Mixer, 12 March 1918, Berger papers, box 13, folder 2.
55. Fred L. Berner, *The Antigo Daily Journal*, to Mixer, 11 March 1918, Berger papers, box 13, folder 2.
56. A.P. Andrews, *The Waupun Leader*, to Mixer, 23 March 1918, Berger papers, box 13, folder 2.
57. D.F. Burnham, Waupaca Leader Co., to *Milwaukee Leader*, 22 March 1918, and 2 April 1918, Berger papers, box 13, folder 2. For a discussion of hostility toward Sen. Robert La Follette for his antiwar views, see Peterson and Fite, 67-72; and Robert C. Nesbit, *Wisconsin: A History*, 2nd ed. revised and updated by William F. Thompson, (Madison: University of Wisconsin Press, 1989), 440-453.
58. Max H. Ninman, *Sauk City Pioniere Presse*, to Louis A. Arnold, Milwaukee Social Democratic Publishing Co., 18 March 1918, Berger papers, box 13, folder 2.
59. A.L. Waffle, *The Daily Commonwealth* of Fond du Lac, to Mixer, 9 March 1918, Berger papers, box 13, folder 2.
60. *The Appleton Evening Crescent* to Arnold, 11 March 1918. The Post Publishing Co. of Appleton also rejected the ad for the same reason. B.A. Summers, Post Publishing Co., to Arnold, 12 March 1918. Berger papers, box 2, folder 13.
61. J.L. Sturtevant, *Wausau Daily Record-Herald*, to Mixer, 12 March 1918, Berger papers, box 2, folder 13. Wisconsin had adopted a law prohibiting any printed material, speech or assembly that would discourage men of military age from enlisting. 1918 Wis. Sess. Laws 22.
62. *Berlin Evening Journal* to Mixer, 25 March 1918, Berger papers, box 13, folder 2.
63. C.A. Bloom, The News Publishing Co., to Mixer, 14 March 1918. Berger papers, box 13, folder 2.
64. Nesbit, 460; Miller, 205.
65. *Wisconsin Blue Book 1919* (Madison: Democrat Printing Co., 1919), 46. The Republican Irvine Lenroot won.

66. Board of Governors, National Press Club, to Berger, 1 August 1918, notifying him that board had pulled his name from the membership rolls, Berger papers, box 13, folder 2.
67. Leonard E. Meyer, Milwaukee Press Club, to Berger, 20 December 1919, Berger papers, box 13, folder 4; Meyer to Berger, 14 February 1920, confirming expulsion, Berger papers, box 13, folder 5.
68. Willits Pollock, executive secretary, to Berger, 25 June 1918, Berger papers, box 13, folder 2.
69. Statement from Julian Pierce, chairman of the Socialist Committee on Legislative Information, n.d., ca. 1918, Berger papers, box 22, folder 17.
70. Herbert Croly to Wilson, 19 October 1917, *The Papers of Woodrow Wilson*, vol. 44, 408-410.
71. Wilson to Croly, 22 October 1917, *Ibid.*, 420.
72. Oswald Garrison Villard to Joseph Tumulty, personal secretary to Wilson, 27 September 1917, *Ibid.*, 272.
73. Amos Pinchot to Berger, 13 October 1917, Berger papers, box 13, folder 1.
74. Robert La Follette to Berger, 9 July 1917, Berger papers, box 13, folder 1.
75. Johnson, 51-53; Anderson, 227.
76. Chafee, 98-99; Peterson and Fite, 99-100; Anderson, 230; Johnson, 55-56.
77. Chafee, 99; Peterson and Fite, 100; Anderson, 231; Rehnquist, 178-179; Johnson, 54-55.
78. Victor Berger to Meta Berger, 28 November 1917, *The Family Letters of Victor and Meta Berger: 1894-1929*, eds. Michael E. Stevens and Ellen D. Goldlust Gingrich (Madison: State Historical Society of Wisconsin, 1995), 234-235.
79. *The Milwaukee Leader* Defense Fund letter from Berger, E.H. Thomas, and F.W. Rehfeld, ca. November 1917, Berger papers, box 13, folder 1.
80. Elmer R. Murphey, president of the James H. Rhodes Co. of Chicago, to Berger, 28 December 1917, Berger papers, box 13, folder 1.
81. J.F. Ledwidge, official reporter of the Superior Court of Pierce County, Washington, to Berger, 27 December 1919, Berger papers, box 13, folder 4.
82. Arthur Brisbane to Berger, 26 November 1917, Berger papers, box 13, folder 1.
83. Johnson, 57. Theodore H. Lunde of the American Industrial Co. asked Burleson to explain why the *Leader* did not have its second-class mailing permit restored, and why Berger and his staff were not allowed to begin receiving mail after the war ended. Burleson's solicitor general, W.H. Lamar, simply stated that Berger and the *Milwaukee Leader* had been found in violation of the Espionage Act and the order that the mail be returned to senders as undeliverable was still in effect. Theodore H. Lunde to Postmaster General Burleson, 30 September 1920; W.H. Lamar, solicitor, to Theodore H. Lunde, 6 October 1920, Berger papers, box 13, folder 5.
84. *Address of Hon. A.S. Burleson, Postmaster General* (Washington: Government Printing Office, 1919), 7.
85. Bernard Baruch to H.B. Brougham, the *Leader's* managing editor, 12 July 1920, Berger papers, box 13, folder 5. Brougham told Baruch that he believed the Congress never authorized the postmaster to exclude a paper from second-class mailings as long as it met the technical requirements. If it had been prohibited under the Espionage Act, it should not be allowed to use the more expensive first- or third-class mails.

- “Undoubtedly if it had been guilty of any of the things by which a newspaper becomes non-mailable that punishment would have been visited upon it,” Brougham wrote. Brougham to Baruch, 20 July 1920, Berger papers, box 13, folder 5.
86. In addition to Anderson’s dissertation, see Adrian Anderson, “President Wilson’s Politician: Albert Sidney Burleson of Texas,” *Southwestern Historical Quarterly* 77, no. 3 (January 1974): 339-354.
 87. E.H. Batson to Berger, 22 May 1922; Berger to Commissioner Internal Revenue Service, 16 June 1922, Berger papers, box 13, folder 7.
 88. In addition to Berger’s, among the cases to reach the U.S. Supreme Court were *Frohwerk v. United States*, 249 U.S. 204 (1918); *Debs v. United States*, 249 U.S. 211 (1918); *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1919); and *Pierce v. United States*, 252 U.S. 239 (1920).
 89. *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) at 153.
 90. *Ibid.*, at 153, 158.
 91. Shira Scheindlin and Matthew Schwartz argue that since 11 September 2001, the courts have been more protective of constitutional rights than in previous times of crisis, in part because citizens place a higher value on individual rights now than they have in the past, and because civil rights organizations are more powerful now than during other wars. Shira Scheindlin and Matthew Schwartz, “With All Due Deference: Judicial Responsibility in a Time of Crisis,” *Hofstra Law Review* 32, no.3 (Spring 2004): 795-852.
 92. Berger to Eugene V. Debs, 24 December 1921, in Berger papers, box 13, folder 6.