

PROPAGANDA IN THE MAILS: A POSTSCRIPT

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In the preceding issue of the *Law Review* we described the United States Government's program to control distribution through our domestic mails of Communist propaganda sent here in vast volume from behind the Iron Curtain.¹ Herein we report several very recent developments in this postal-customs operation and elaborate upon some opinions previously expressed.

To recapitulate briefly: since 1950 Communist controlled persons and organizations located abroad, mostly behind the Iron Curtain, have been sending quantities of publications of all sorts into this country. Some propaganda is shipped in volume to particular persons or groups. Some items are sent singly to a vast number of individual addressees. Dissemination of this propaganda—and "propaganda" is a term which is broadly and vaguely defined—is said, by our Government, to be a criminal violation of the Foreign Agents Registration Act:² the act of mailing abroad, where circulation is intended here, is said to make the person doing the mailing a foreign agent here, and failure of these "agents" to register and label their propaganda is a crime under the statute. Commission of this crime is said to render the materials disseminated "nonmailable"—a conclusion reached by recourse to provisions of the Espionage Act.³ This interpretation which interweaves two otherwise unrelated statutes—and which is the purported legal authorization for today's anti-Communist propaganda censorship—was set forth in 1940, in an opinion by Attorney General Robert H. Jackson.⁴ His ruling was probably prompted more by the necessities of war than the necessary inferences to be drawn from the statutes. The ruling is, in fact, of dubious validity. Enforcement lapsed after World War II. But since 1951 the ruling has been revived and enforced against Iron Curtain propaganda publications. In fact, all mail emanating from the Communist world is segregated on arrival in this country and sent to a special unit in one of three Post Offices. At these "segregation centers" all unsealed mail is screened and all publications deemed to contain "propaganda" are detained.

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1. Schwartz & Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621 (1959).

2. 52 Stat. 631 (1938), as amended, 22 U.S.C. §§ 611-21 (Supp. V, 1958).

3. Ch. 30, 40 Stat. 217 (1917) (codified in scattered sections of 18 U.S.C.).

4. 39 OPS. ATT'Y GEN. 535 (1940). For discussion of the opinion, see Schwartz & Paul, *supra* note 1, at 626-28, 649-54.

But over the years the officials enforcing this program developed policies and procedures permitting persons who have ordered propaganda publications to receive them—providing only small quantities (usually ten or less) are to be transmitted. While neither the Attorney General's ruling nor the statutes which the officials purport to enforce make any provision for this dispensation, it too exists by dint of necessity: many individuals and institutions—scholars, libraries, journalists, and other organizations and persons concerned with events and thinking behind the Iron Curtain—have need of current Communist publications. Moreover, wholly apart from professional need, it is doubtful that the Government may summarily deprive Americans of the right to receive foreign publications simply because these works are thought to contain noxious Communist propaganda; as previously set forth, such censorship would probably be illegal under the first and fifth amendments. So, for several years, by virtue of administrative fiat, any person who has wanted to receive publications (in limited quantity) has, in theory, been allowed to receive them. He need only make known his request for delivery.

But, until very recently, notice has seldom been furnished to those to whom the publications are addressed; thus, most addressees have received no direct word advising them that their publications were being detained and of their right to receive these materials if they so desired. Most addressees were obliged to take steps on their own—*e.g.*, a letter of inquiry as to why publications previously ordered were not arriving—to secure delivery of their mail. If such steps were taken, the materials were supposed to be released and future deliveries of the same or similar items permitted. Unless the addressee did take these steps, there was no assurance that the mail would be delivered; on the contrary, propaganda publications would be confiscated except where the enforcement officials somehow concluded, *ex parte*, that receipt was desired (*e.g.*, from inferences to be drawn by virtue of the addressee's apparent professional status as indicated by the face of the envelope).

The absence of notice evoked criticism and made the legality of the confiscation program suspect; indeed, it was our conclusion that notice is a minimal requirement of the first and fifth amendments if the confiscation program is to exist at all. Nevertheless, because of the assumed inconvenience and expense involved, postal and customs officials had previously made no concerted effort to notify addressees whose mail was detained.

Within the last few months this "no notice" policy has been reversed. On an experimental basis, without publishing any announcement or rules stating the new procedure, the Government has been

sending a form note to each addressee whose mail is detained for seizure. It tells him that the publication has been detained because it contains "nonmailable", "foreign political propaganda." However, the addressee is told he can receive the publication, and he is furnished a return postcard addressed to the Postmaster of the detaining Post Office.

The card lists the publication by title. It goes on to say:

"If you desire to receive these [publications], please indicate your intention by returning this card to the post office, personally or by mail. If this card is not received at the post office within 15 days from the date stamped hereon, the publications listed will be disposed of as nonmailable under the law.

POSTMASTER"

Beneath this is a statement for the addressee to sign:

"I have ordered, subscribed to, or desire the publications listed on this card and I request that they be delivered to me.

(Signature)"

Several observations on this new procedure seem appropriate. The policy of sending notices seems to be a much needed improvement, and one may ask: why has the Government been so long in making the innovation? The reform resulted from a change in postal personnel. A new General Counsel, in 1958, after a few months in office, ordered a study of ways to facilitate delivery of publications; the eventual upshot was today's operation. The assumption that supplying individual notices would require an exorbitant addition of personnel was shown unfounded. The fact is that a handful of clerks at each segregation Post Office can handle the job, and it may well be possible to cut even this work force in the future. If one believes that the Constitution requires notice, the cost of these new clerks surely is not too much to pay to secure a more scrupulous regard for the interests of freedom of information. Apparently here as elsewhere the lesson to be drawn is that claims of administrative expense and inconvenience must be viewed skeptically, particularly where the supporting details are lacking. Again, initiation of this basic change in policy underscores the breadth of administrative discretion which has attended the anti-propaganda program from its inception—an evolution from summary, total censorship to today's procedure, although there has been no change in basic statutory authority at any time.

Ironically, now that the Government has started sending notices, there has been increased criticism of its basic program. Persons receiv-

ing the "notice" have openly expressed irritation that the Government should interfere with their mail.⁵ Whereas criticism had abated several months ago, now many more people have become aware, for the first time, that the Government has been screening their mail. This is likely to arouse uncomfortable reactions. Precisely because such reactions may be expected, experience may also show that some persons receiving the notice may be deterred from requesting delivery. The return address postcard, if used, may clearly indicate to anyone else who sees it that the person signing the card "desires" to receive a Communist publication. In the preceding article we suggested that even if notices of this sort were sent many people would be reluctant to assert their right to receive even if they had some interest or curiosity in the publication. This remains, we believe, a definite possibility.

In any event, perhaps the new procedure of sending notices, coupled with recent pronouncements by the House of Delegates of the American Bar Association and the House Un-American Activities Committee,⁶ will stir more interest in the program; and this in turn may prompt congressional review. That, we reiterate, is needed—whether one favors strict measures to protect our security or uninhibited freedom of access to foreign publications. There has been too little disclosure and discussion of this program—particularly in view of its present, dubious pretensions to legality.

Basic is the question: what are the objectives of today's program? By recourse to the procedure of supplying notice to addressees with the promise to deliver all material "desired," the Government has partially undercut one of the rationales previously asserted, *i.e.*, that the United States should not undertake, at expense to itself, to deliver its cold war enemy's propaganda.⁷ The Government is now openly committed to carriage of the mail, and it will go to the added expense of communicating with every putative recipient.

There remains the argument that today's program is needed to protect our security. But has it yet been shown that it is really necessary to take all the steps now being taken to protect Americans from the possible subversive influence of the propaganda now being screened?

5. See, *e.g.*, Letter of Mr. Corliss Lamont in N.Y. Times, Feb. 23, 1959, p. 22, col. 6.

6. Subparagraph (e) of the third of a series of resolutions dealing with problems of internal security, adopted by the House of Delegates of the American Bar Association, recommends legislation to: "(e) insure the effectiveness of the Foreign Agents Registration Act of 1948 [*sic*] by a requirement that political propaganda by agents of foreign principals be labeled for what it is where such agents are situated outside the limits of the United States, but nevertheless directly or indirectly disseminate such propaganda within the United States." 27 U.S.L. WEEK 2437 (March 3, 1959). This suggestion appears similar to a proposal recently urged by the House Un-American Activities Committee as reported by N.Y. Times, March 8, 1959, p. 38, cols. 3-4.

7. See Schwartz & Paul, *supra* note 1, at 655-56.

At least in those cases where the item is sent singly in a package bearing a postmark indicative of its Communist origins, is not the foreign origin a sufficient warning to protect the recipient from the wiles of the propagandist? Obviously, if the Government concedes that it will deliver the material (except in bulk quantities) to *anyone* asking for it, the argument that we cannot trust people to evaluate the material for themselves loses much of its force.

Thorough, objective investigation of the problem presented by Iron Curtain exportation of propaganda materials might indicate that the most serious problem we face today relates to the persons who receive or try to receive these publications in quantity and then distribute them covertly without disclosure of their source. Ironically it would appear that the very groups in Congress (*e.g.*, the Un-American Activities Committee) most concerned about the danger of foreign Communist propaganda have so far failed to push through any legislation to deal effectively with this problem.

Many of the addressees of foreign Communist propaganda sent in bulk are registered agents. They are, therefore, by the Government's own interpretation of the Foreign Agents Registration Act, entitled to receive the propaganda without interference, and they do, and they apparently proceed to disseminate it. Frequently the publications sent in bulk shipments contain no clear indication showing where they were published and by whom. Unless the recipient labels them when he, himself, disseminates them, there may in fact be no notice, or inadequate notice, to the ultimate reader as to the origins of the document. And even though the disseminator may be a registered agent, there is no assurance that he will in fact label the publications, notwithstanding that the law may require it. The importer may conclude that the materials are not "propaganda"; he may believe he can disseminate without labeling and without detection of his failure to do so; he may believe that the Government would be unwilling, for one reason or another, to enforce the criminal sanctions of the Registration Act.⁸

In the case of bulk importers of Iron Curtain propaganda who are unregistered as agents, the Government, as seen, attempts to withhold delivery of all but a few copies of each publication. Whether this is in fact legal depends on whether the courts would construe the Registration and Espionage Acts as Attorney General Jackson did and whether, in any event, the Constitution permits such censorship. On both counts it is dubious that the courts would sustain the Government. All the more reason, then, for Congress to heed the problem. And, in

8. See *Hearings Before the House Committee on Un-American Activities*, 85th Cong., 1st Sess. 269, 1545-46 (1957). Cf. H.R. 9352, 85th Cong., 1st Sess. (1957).

any event, there is evidence that some persons in this country, most of them registered agents, are in fact receiving in quantity publications which do not readily reflect foreign Communist sponsorship, and these publications are, in turn, being redistributed within the United States—with no indication as to their origin.

If what is asserted above be a sound hypothesis—and that is peculiarly for Congress to decide—then one legislative approach may be suggested which will serve both the ends of protecting freedom of information and circulation, and national security.

A statute might be enacted which would require the addressee, or, alternatively, authorize the Bureau of Customs to fix a label to disclose the source of publications sent here in bulk from behind the Iron Curtain *whenever the publications themselves give no clear indication of the publisher and country of origin.*⁹ The purpose of the statute would be to disclose the fact that these publications originated behind the Iron Curtain; it would provide, not for confiscation or censorship, but simply for compulsory labeling.

There is an analogy for such a law in the tariff laws which require that foreign merchandise commercially imported be labeled.¹⁰ A labeling requirement of this sort would supply both a more efficient means of alerting the ultimate recipient to meet the threat of deception in the activities of the domestic propagandist, and a postal control more consistent with both the goals of the Registration Act and the first amendment. As Mr. Justice Black once wrote:

“Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the [Foreign Agents Registration Act] is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.”¹¹

9. Alternatively the law (after setting forth congressional findings and stating a congressional purpose to require full disclosure of the source and purposes of foreign Communist propaganda disseminated in quantity here) might go further with respect to the amount of information to be spelled out on the label, viz., the label might be required to say that the publications were prepared by a designated, foreign Communist agency or government for dissemination in other countries. When publications of this character were imported in bulk, the Bureau of Customs would be empowered to notify the recipient of the need to label but required to give him an opportunity to show cause why the label need not be affixed, in this particular case, and the statute might further provide for judicial review de novo (*cf.* 46 Stat. 688 (1930), 19 U.S.C. § 1305(a) (1952)) of the question whether the materials came within its purview.

10. 46 Stat. 687 (1930), as amended, 19 U.S.C. § 1304 (Supp. V, 1958).

11. *Viereck v. United States*, 318 U.S. 236, 251 (1943).