



0. FREE-SPEECH PROTECTIONS - Story Preface

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America was founded on the belief that freedom of speech is an essential civil right. It is guaranteed by the U.S. Constitution's First Amendment. Yet ... Congress sometimes passes laws giving the federal government power to curb free speech. Such laws can be tested in the Supreme Court where nine Justices have the power to declare them unconstitutional.

When the case of Jacob Abrams and his four compatriots came before the United States Supreme Court, Justice John H. Clarke wrote the majority opinion. Using the arguments Holmes had established in *Schenck*, seven of nine justices agreed the defendants had broken the Sedition law.

Analyzing excerpts from the leaflets, the court finds the defendants were trying to start a revolution in America:

*These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government sending troops into Russia...yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe.*

Seven justices evidently thought that a handful of disgruntled individuals, who were not American citizens, could also disrupt U.S. production of war materiel:

*...the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war...and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war...*

Two justices, Oliver Wendell Holmes and Louis Brandeis, disagreed. Writing the dissent, Holmes finds no evidence the defendants intended to start a revolt or to disrupt military production. Without such intent, he reasons, how could the Sedition law have been violated?

*But to make the conduct criminal that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." ... I do not see how anyone can find the intent required by the statute in any of the defendants' words.*

More significantly, argues Holmes, the defendants had a First Amendment right to express their opinions:

*In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.*

Instead of quashing someone's opinion, the dissent argues, why not let time prove (or disprove) its worth? A good idea is accepted over time; a bad idea is rejected. Or, as Holmes put it:

*...the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market ...*

People must be free, in other words, to voice their opinions unless those expressions are likely to cause immediate danger to the country:

*Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.*

Although Holmes and Brandeis did not carry the day in the *Abrams* case, their opinions ultimately held sway and, in later cases, became the law of the land. America had come close, however, to a much more restrictive

interpretation of the First Amendment.

The *Abrams* defendants, meanwhile, were sent back to Russia. While awaiting deportation, Mollie Steimer (whose father had died from the shock of her conviction) wrote a letter to her lawyer. In it, she quoted excerpts of a poem by Edmund V. Cooke:

***You cannot salt the eagle's tail,  
Nor limit thought's dominion;  
You cannot put ideas in jail,  
You can't deport opinion.***

Indeed.

In future cases, the Justices seemed to grasp the truth of the poem.

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