Schenck v. United States, 249 U.S. 47 (1919)

- Overview
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Argued: January 9, 1919
Argued: January 10, 1919
Decided: March 3, 1919
Annotation
Primary Holding

If speech is intended to result in a crime, and there is a clear and present danger that it actually will result in a crime, the First Amendment does not protect the speaker from government action.

Facts

During the First World War, the federal government imposed conscription into the armed services. Opposing the draft, the Executive Committee of the Socialist Party in Philadelphia authorized General Secretary Charles Schenck to print and distribute 15,000 leaflets to the public, in collaboration with Elizabeth Baer. The socialists declared that the Thirteenth Amendment prohibition against involuntary servitude meant that the draft was unconstitutional and should not be obeyed. Not long before, however, Congress had passed the Espionage Act of 1917 to forbid conduct undermining the war effort. Schenck and Baer were convicted of violating this law and appealed on the grounds that the statute violated the text of the First Amendment.

Opinions

Majority

- Oliver Wendell Holmes, Jr. (Author)
- Edward Douglass White
- Joseph McKenna
- William Rufus Day
- Willis Van Devanter
- Mahlon Pitney
- James Clark McReynolds
- Louis Dembitz Brandeis
- John Hessin Clarke

Articulating the clear and present danger test, Holmes voiced the opinion of a unanimous Court in sustaining the convictions. Holmes felt that courts owed greater deference to the government during wartime, even when constitutional rights were at stake. He held that the First Amendment does not protect speech that comes close to creating a clear and present danger of a significant evil that Congress has the power to prevent. There must be some degree of imminence to meet this test, but Holmes found that the widespread dissemination of the leaflets was sufficiently likely to disrupt the conscription process. He famously argued that the First Amendment does not allow people to shout "Fire!" in a crowded theater, which he saw as parallel to the leaflets.

Case Commentary

Although it is not widely applicable now, the decision is notable in the history of First Amendment jurisprudence for defining the clear and present danger test that governed the analysis of courts during this period. The Court interpreted this standard progressively more narrowly over the decades that followed, finding that a more nuanced evaluation was needed to address the complexities of a certain situation. Schenck and the Holmesian approach vanished for good with Brandenburg v. Ohio in 1969.

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Syllabus

U.S. Supreme Court

Schenck v. United States, 249 U.S. 47 (1919)

Schenck v. United States

Nos. 437, 438

Argued January 9, 10, 1919

Decided March 3, 1919

249 U.S. 47

Syllabus

Evidence *held* sufficient to connect the defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917. P 249 U. S. 49.

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Incriminating document seized under a search warrant directed against a Socialist headquarters, *held* admissible in evidence, consistently with the Fourth and Fifth Amendment, in a criminal prosecution against the general secretary of a Socialist party, who had charge of the office. P. 249 U. S. 50.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances a to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done. P. 249 U. S. 51.

A conspiracy to circulate among men called and accepted for military service under the Selective Service Act of May 18, 1917, a circular tending to influence them to obstruct the draft, with the intent to effect that result, and followed by the sending of such circulars, is within the power of Congress to punish, and is punishable under the Espionage Act, § 4, although unsuccessful. P. 249 U. S. 52.

The word "recruiting," as used in the Espionage Act, § 3, means the gaining of fresh supplies of men for the military forces, as well by draft a otherwise. P. 249 U. S. 52

The amendment of the Espionage Act by the Act of May 16, 1918, c. 75, 40 Stat. 553, did not affect the prosecution of offenses under the former. P. 249 U. S. 53.

Affirmed.

The case is stated in the opinion.

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Syllabus

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MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempting

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to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony, Schenck said he was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On

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August 20, the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer, there was evidence that she was a member of the Executive Board, and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585; *Weeks v. United States*, 232 U. S. 383, 232 U. S. 395, 232 U. S. 396. The search warrant did not issue against the defendant, but against the Socialist headquarters at 1326 Arch Street, and it would seem that the documents technically were not even in the defendants' possession. *See Johnson v. United States*, 228 U. S. 457. Notwithstanding some protest in argument, the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 218 U. S. 252, 218 U. S. 253.

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a

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convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on

"If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the

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main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462. We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 195 U. S. 205, 195 U. S. 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 221 U. S. 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in § 4, punishes conspiracies to obstruct, as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 245 U. S. 477. Indeed, that case might be said to dispose of the present contention if the precedent covers all *media concludendi.* But, as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The

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words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment, and would not even if the former act had been repealed. Rev.Stats., § 13.

Judgments affirmed.

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