

cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Case Title: *Abrams v. United States*

Alternate Case Title: The “Anti-American Circulars” Case

Legal Citations: 250 U.S. 616

Year of Decision: 1919



KEY ISSUE

Is the distribution of circulars, intended to provoke and encourage resistance to the United States in the war with Germany and inciting and advocating a general strike of workers in ammunition factories for the purpose of curtailing production, sufficient evidence to sustain a conviction of conspiracy to violate the Espionage Act?

HISTORY OF THE CASE

Five defendants were convicted of conspiring to violate provisions of the Espionage Act of Congress (Section 3, Title I, of act approved June 15, 1917, as amended May 16, 1918, 40 Stat. 553). The Espionage Act was a federal law that punished spying and transmitting national defense information with the intent to harm the United States or to benefit a foreign nation. The defendants printed and distributed circulars in the city of New York. Each of the defendants was born in Russia but at the time of arrest had lived in the United States for terms varying from five to 10 years. None of the defendants had applied for naturalization during that time.

The defendants met in New York City in rooms rented under an assumed name by the defendant Abrams. There, the defendants discussed printing and distributing the circulars about two weeks before they were arrested. They admitted at trial that they united for this

very purpose. Defendant Abrams then purchased a printing outfit with which the circulars were printed on July 27, 1918, and installed it in a basement room. On or about August 22, 1918, the defendants printed and distributed about 5,000 circulars by throwing some out of a window where one of the defendants worked and distributing the others secretly. The defendants pleaded not guilty to four counts charged against them. The conspiracy and the overt acts were largely admitted and fully established at trial.

SUMMARY OF ARGUMENTS

The defendants argued that the acts charged against them were lawful because they were within the protection of the freedom of speech and of the press guaranteed by the First Amendment to the Constitution of the United States. They alleged that the Espionage Act is unconstitutional because it is in conflict with that amendment. The defendants further argued that there was no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict was erroneously denied.

The government argued that the “judge-made” or common law regarding written communications advocating governmental change through the use of unlawful means, also known as seditious libel, remained in force despite the enactment of the First Amendment.

DECISION

Justice Clarke wrote the majority opinion for seven of the justices. Justice Brandeis concurred, and Justice Holmes wrote a dissenting opinion. Justice Clarke affirmed the judgment and convictions of the district court. He found that the language of the circulars was intended to provoke and encourage resistance to the United States in the war.

Justice Clarke looked at the plain language of the circulars to determine the intent of the defendants in writing them. Some of that language was as follows: “The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!” He noted that the defendants

also criticized the government of the United States as their “hypocritical,” “cowardly,” and “capitalistic” enemy. Based upon this language, Justice Clarke found that the purpose was to throw the United States into a state of revolution if possible and thereby to frustrate the military program of the government.

Justice Clarke also found that the defendants urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordinance and munitions necessary and essential to the prosecution of war as charged in the fourth count. He again drew this conclusion based upon the writing in the circulars themselves, which stated: “Workers, our reply to the barbaric intervention has to be a general strike! Any open challenge only will let the government know that not only the Russian worker fights for freedom, but also here in America lives the spirit of the revolution.” The plain language in the circulars led Justice Clarke to conclude that there was enough evidence tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment.

Justice Clarke dismissed the argument that the defendants only intended to prevent injury to the Russian cause. He stated that men have to be held to and accountable for the effects that their acts are likely to produce. Thus, Justice Clarke concluded that even if the defendants’ primary purpose was to aid the cause of the Russian Revolution, their plan of action could have had the effect of defeating the war program of the United States by persuading those addressed in the circulars not to aid government loans nor work in ammunition factories.

In his dissent, Justice Holmes also argued that the language in the circulars in no way attacked the form of government of the United States. Justice Holmes then conceded that the circulars advocated a general strike. He also conceded that they might have curtailed production of things necessary to the prosecution of war within the meaning of the act, in violation of the fourth charge. However, he insisted that there was no intent to cripple or hinder the United States in the prosecution of war, as required by

the act to make the conduct criminal. Justice Holmes believed that the only objective of the circulars was to help Russia and stop the American intervention there, not to impede the United States in the war it was waging. Justice Holmes argued that this was not the requisite intent needed to bring the circulars within the scope of the law and to be punishable.

He then turned to a free speech argument, stating that the theory of the Constitution is based on the belief that the best test of truth is the power of the thought to be accepted in the competition of the market. Therefore, he believed that we should not hinder the expression of ideas that we loathe, unless they imminently threaten immediate interference with the lawful and pressing purpose of the law, and the immediate suppression of those ideas is required to save the country.

Justice Holmes finally argued that the United States has shown its repentance for the Sedition Act of 1798, stressing that “Congress shall make no law . . . abridging the freedom of speech.” He did not believe that the common law as to seditious libel was still in force. Justice Holmes concluded that the defendants were denied their rights under the Constitution of the United States in their conviction.

AFTERMATH

Justice Holmes’s spirited dissent increased his reputation as a champion of First Amendment free speech rights. His visions of the First Amendment gained popularity and resulted in a First Amendment jurisprudence that places great weight on freedom from government regulation of speech. Today, the ideas of defending speech have been greatly expanded, and the “clear and present danger” test, used to determine when speech is unprotected by the First Amendment, has been limited to expression that is directed to and is likely to produce imminent lawless action.

SIGNIFICANCE

Justice Holmes was steadfast in his demand for fundamentality in the First Amendment at a time when the Supreme Court and dominant legal opinion were willing to justify virtually all legisla-

tive restrictions on unpopular speech. His dissent represents one of the finest expressions of pragmatism in free speech doctrine with his fear that the Sedition Act would inhibit free speech and the search for the truth. Few American judicial figures have aroused as much interest and controversy in both popular and legal circles as Justice Holmes. His theories continue to influence discourse decades after he first articulated them, and they still form the basis of many contemporary legal debates.

RELATED CASES

Lochner v. New York, 198 U.S. 45 (1905)
Debs v. United States, 249 U.S. 211 (1919)
Schenck v. United States, 249 U.S. 47 (1919)
Whitney v. California, 274 U.S. 357 (1927)
Dennis v. United States, 341 U.S. 494 (1951)
Brandenburg v. Ohio, 395 U.S. 444 (1969)

RECOMMENDED READING

Zechariah Chafee, *Freedom of Speech in War-time*, 32 Harvard Law Review 932 (1919).

Kalven, Harry, Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper, 1988.

Mill, J. "Essay on Liberty." In *On Liberty and Considerations on Representative Government*, 1859, edited by R. McCallum, 13–48. New York: Macmillan, 1946.

Polenberg, R. *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*. New York: Viking, 1987.

S. F. Pollock, *Abrams v. United States*, 36 Law Quarterly Review 334 (1920).



Case Title: *Charles T. Schenck v. United States*

Alternate Case Titles: Clear and Present Danger Case, Shouting Fire in a Crowded Theater Case

Legal Citation: 249 U.S. 47

Year of Decision: 1919



KEY ISSUE

May freedom of speech be restricted during wartime?

HISTORY OF THE CASE

Charles T. Schenck was the general secretary of the Socialist Party. When the United States entered World War I against Germany, Congress passed the Espionage Act of 1917, which made it illegal to cause insubordination in the military forces of the United States, to obstruct recruiting and enlistment into the armed services of the United States, or to convey false information that would interfere with U.S. military operations. The Socialist Party met in Philadelphia in August 1917 and voted to send 15,000 leaflets to men who had recently been drafted. Schenck had personally attended to the printing of the pamphlets and was involved in addressing envelopes. The pamphlet in question contained the idea that conscription was little better than forced servitude. It compared those conscripted to those convicted of crimes in violation of the Thirteenth Amendment to the U.S. Constitution, which outlawed slavery. It further urged that those conscripted assert their rights and refuse to be drafted. The pamphlet went on to state that the Socialist Party believed the draft interfered with the citizen's individual rights as well as his or her freedom of religion. It urged people to stop by the Socialist Party offices and sign a petition. Several people complained. The Philadelphia postal inspectors raided the Socialist Party offices on August 28, 1917, and seized records and files, all without a search warrant.

SUMMARY OF ARGUMENTS

The attorneys Henry John Nelson and Henry J. Gibbons argued for Schenck that unless citizens were able to have a full and free discussion about whether a war were just or unjust, they could not reach an informed decision. They argued that