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# The Case of Civil Liberties v. National Security

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## THE CASE OF CIVIL LIBERTIES V. NATIONAL SECURITY

Today the United States is engaged in a second World War, a war that has already surpassed the first World War in magnitude. More men are under arms and the people not actually bearing arms are made more instrumental in the winning of victory by the fact that this is also a war of production. Never before has so much depended on the ability of our factories to produce the essential materials and products with which our armies and navies fight. The importance of the steady flow of these materials to the war fronts is equally important to the success of the war effort as are the training of fighting men and transporting them to the battle-fronts.

In these ways the technique of fighting a war has changed. In a sense all these alterations are improvements in the methods of defeating the enemy. Men are employing knowledge that they have just recently gained; things that were innovations during World War I are now the main implements of battle.

When a nation is attacked by an enemy using new techniques he must either fight back with the same or improved methods or perish. Former methods are no longer effective. The standards by which we judge the former methods have changed or, rather, we now have new standards.

All the advances made in the methods of winning a war have not been technological. Hitler, in particular, has made extremely effective use of the so-called "fifth column" in reducing the resistance of those countries he has scheduled as victims. The undermining of unity in the countries he opposes is a powerful weapon which he has developed. Each voicing of dissent, each small act against the government may be part of the well planned program of our enemies. It is essential that America be prepared to battle these forces. We must expose them, resist them.

Especially is this true since, as pointed out above, more depends on each of the individuals at home, the vital cogs in our war industries, than ever before.

It is not the author's purpose to appraise or even deal with all the present law that relates to the problem of dealing effectively with these forces. We have many laws, some old and some new, which are our weapons. There are agencies to enforce these laws. Again, these are not within the scope of this note.

One single set of laws and, more precisely, the application of these by the courts, is the subject to be surveyed here. The laws to be considered are the Sedition Acts, both of the Federal Government and of Pennsylvania.

So far we have merely generalized about the war today. In continuing, facts rather than generalities will be dealt with, tracing the decisions under the above mentioned statutes, plus a few other related decisions, from the first World War to the second. The author will not attempt to draw conclusions as to which of the prominent legal theories are the best. The theories and the principal arguments pro and con will be considered and the decisions employing each will also be discussed. It will be left to the reader to make a choice between

the various philosophies and to answer the question of whether the courts in making their choice are properly facing the problem discussed above and whether they are at the same time preserving as much as possible the liberty of every person and resisting the ever-possible evil of war hysteria which it is claimed that we, the people, more than the Courts, sank into in 1918.

At the time of America's entry into World War I there were substantially no federal laws aimed at disloyalty. Shortly thereafter, on June 15, 1917, the so-called Espionage Law was enacted.[1] Section one thereof related to "unlawfully obtaining or permitting to be obtained information affecting national defense." This applied at all times. Section three, the other section which is important here, applied to seditions or disloyal acts or words in time of war. It provided: "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished. . . ."

Later, in May 1918, Congress amplified this statute by an amendment called the Sedition Law. This prescribed as criminal offenses, *inter alia,* the use of "profane, scurrilous or abusive language about the government, the Constitution, or the flag; as well as language intended to bring any of them into contempt, scorn, contumely or disrespect.[2]"

This latter amendment was repealed, however, on March 3, 1921 and the act as originally passed was restored.

It was inevitable that the question of whether or not this Espionage Act was in conflict with the First Amendment to the Constitution, should arise. This amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise 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."

The question arose and it was not until it did that the Supreme Court was called upon to interpret this amendment as it applied to oral utterances.[3] Five cases were argued at the same term of Court and the opinions were by Mr. Justice Holmes speaking for a unanimous court. In each case the statute was upheld as not violating any constitutional rights.

In the *Schenck* case[4] Justice Holmes created a standard that was to become famous as a test of constitutionality. He said: "We admit that in many places

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[1]Act of June 15, 1917, 40 Stat. 217, 219, 50 U.S.C.A. Sec. 31, 33.
[2]Act of May 16, 1918, c.75, sec. 1, 40 Stat. 553.
[3]*Restraints upon Individual Freedom in Times of National Emergency,* John Lord O'Brian, 26 Cornell Law Quarterly 523 (1941).
[4]249 U.S. 47, 39 Sup. Ct. 247 (1919).

and in ordinary times the defendants, in saying all that was said . . . , would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic . . . The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantial evils that Congress has a right to prevent . . . 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 a constitutional right."

Thus arose the "clear and present danger" test.

The four cases decided at the same term of court which produced the *Schenck* decision and which repeated the same theory are *Baer v. U. S.*,[5] *Debs v. U. S.*,[6] *Frohwerk v. U. S.*,[7] and *Sugarman v. U. S.*[8]

In a subsequent case involving the later-repealed amendment of 1918 known as the Sedition Act, Justices Holmes and Brandeis dissented from the majority opinion which upheld the conviction of the defendants. This was the famous *Abrams* case[9] in which the defendant was convicted of printing and distributing circulars containing, in part, these words: "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom . . . Workers, up to fight." The court said that this urged curtailment of products essential to the prosecution of the war "with *intent* . . . to cripple or injure United States in prosecution of war." The dissent of Holmes, while an eloquent and famous support of the liberal standard he favors, does not further clarify the question of just what that standard is. Holmes said: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by full 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 . . . " This dissent was based on fact, however, more than theory and urged that there was no evidence on which a jury of reasonable men could find against the defendants. Nor did the majority decision aid in defining the constitutional limitations of free speech.

In *Schaefer v. U. S.*[10] the Court affirmed the conviction of officers of a small Pennsylvania concern publishing a weak little German newspaper. Again in a dissent, Brandeis set forth the "clear and present danger" test.

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[5] *Ibid.*
[6] 249 U.S. 211, 39 Sup. Ct. 252 (1919).
[7] 249 U.S. 204, 39 Sup. Ct. 249 (1919).
[8] 249 U.S. 182, 39 Sup. Ct. 191 (1919).
[9] 250 U.S. 616, 40 Sup. Ct. 17 (1919).
[10] 251 U.S. 466, 40 Sup. Ct. 259 (1920).

In *Pierce v. U. S.*[11] the Court, by speaking of natural tendencies, apparently set forth what is variously known as the "indirect causation" or "reasonable tendency" test. This is a broader test, that is, more convictions can be sustained by its use then under the "clear and present danger" test. This doctrine is of long standing,[12] and along with it goes the doctrine of "constructive intent."

One writer[13] sums up the situation thusly: "Congress is not limited to forbiding words which are of a nature to create a clear and present danger' to national interests, but it may forbid words which are intended to endanger those interests if in the exercise of a fair legislative discretion it finds it necessary to do so; second, the intent of the accused in uttering the alleged forbidden words may be presumed from the reasonable consequences of these words . . . In short, the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which so far as there is evidence to show, is just where the framers of the Constitution intended it to be."

Professor Chafee in his discussion of these doctrines does not arrive at such a happy conclusion.[14] On the contrary, he states that these doctrines are the most powerful weapons in the hands of the opponents of free speech since the abolition of censorship, "under which words can be punished for a bad tendency long before there is any probability that they will break out into unlawful acts . . . When rulers are allowed to possess these weapons they can . . . create an 'ex post facto' censorship of the press. The transfer of that censorship from the judge to the jury is indeed important . . . the right to a jury trial is of much less value in times of war or threatened disorder when the herd instinct runs wrong."

Thus we see that shortly after the end of the last war we had two standards. There was a great split of opinion upon the question of which was the proper one and justices and writers alike found merit in both. In the former class, that is, the justices, the split was between the majority who favored the broader rule, judging by a somewhat equivocal decision, while a powerful minority favored the less stringent "clear and present danger" test.

The question is not clarified in the least by two further Federal Court decisions in 1920. In *Granzow v. U. S.*[15] the Court said the crime is "to intentionally obstruct. Where the utterance is calculated to result in obstruction and is uttered under conditions *which would naturally so result,* there is a presumption, that such result follows, but the presumption is rebuttable." This is the "indirect causation" test combined with the doctrine of "constructive intent."

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11252 U.S. 239, 40 Sup. Ct. 205 (1920).

12*See* Chafee, *Freedom of Speech in Wartime,* 32 Harvard Law Review 932.

13Edwin S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resume,* 30 Yale Law Review 48.

14Chafee, *op. cit.,* p. 948.

15261 F. 172.

In *Ham v. U. S.*[16] the clear and present danger test is definitely employed.

Since 1920, we have had two cases settled by the Supreme Court. Unfortunately a study of these does not reveal a tendency to employ uniformly either test. In *Herman v. Lowry*[17] the Court reviewed a conviction under a Georgia Sedition statute. Justice Roberts, speaking for the majority said that a clear and present danger must be present before a conviction may be had under the Federal law. Continuing he said that the need for such test is not present under the Georgia statute, the legislature having determined "that utterances advocating overthrow of organized government by force, violence and unlawful means are so inimical to the general welfare and involve such danger of substantial evil that they must be penalized in its exercise of police power."[18]

But, he said, the legislature is not unfettered; the "limitation upon liberty must have appropriate relation to the safety of the state." The state law in question was then said to be unconstitutional because of vagueness. "By force of it, (the statute), as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting *a clear and present danger* of forcible obstruction . . . " The test of the statute is that "forcible action must have been contemplated" but it is enough if the accused's intent was that insurrection "should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action." This is too vague; "if by exercise of a prophecy he can forecase that, as a result of a chain of causation, following his proposed action a group may arise at some future date that will resort to force, he is bound to make the prophecy and abstain . . . "

Thus, we see the Supreme Court not only applying the test of Justice Holmes but also requiring that a state statute employ it.

But, in 1941, in *Gorin v. U. S.*, and *Salich v. U. S.*,[19] the same court said that the question of "whether the acts done (in violation of a sedition statute) are *connected with national defense* is for the jury." Here they do not require that there be clear and present danger to national defense, only connected with it. Further, they cite the majority opinion in *Pierce v. U.S., supra* as to the test, that is, whether the printed words would in fact produce as a proximate result a material interference.

If so few cases can be said to outline a tendency on the part of the courts, it may be that the latter decision points to a new and more severe period of war-time strictness on the part of the courts and a departure from the application of the test of Justices Holmes and Brandeis.

There is another line of Supreme Court cases which might be said to support this view. In 1897 a case upheld an ordinance requiring a permit as a

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[16]261 F. 907.
[17]301 U.S. 242 (1936).
[18]*Cf.* with Gitlow v. N.Y., 268 U.S. 658.
[19]312 U.S. 19 (1941).

prerequisite to the public assembly. This case was *Davis v. Comm. of Mass.*[20] Many years later a contrary decision in *Hague v. C. I. O.*[21] came to the support of civil liberties and held a similar Jersey City ordinance invalid. In a case involving the Jehovah's Witnesses, *Schneider v. State,*[22] statutes prohibiting the distribution of hand bills, either requiring a permit or prohibiting the act absolutely, were held invalid. In *Thornhill v. Alabama,*[23] *Carlson v. California,*[24] (picketing) and *Cantwell v. Conn.*[25] (soliciting money without permit; involving Jehovah's Witnesses again) is seen the same result; that is, decisions against requiring permits and in favor of civil liberties.

The change appeared in the case of the *Minersville School District v. Gobitis.*[26] Here the Pennsylvania courts had refused to uphold a school regulation having the force of law requiring the students to salute the flag. In this case too, the Jehovah's Witnesses were the defendants. The children had been expelled under the above regulation. The U. S. Supreme Court reversed the decision of the Pennsylvania Courts and held the regulation to be valid.

This case, in a sense involving loyalty to the nation, considered with the decision in the above *Gorin* and *Salich* cases may indicate the tendency to strictness pointed out above and, if this conclusion is correct, the new view will probably continue throughout the war.

A more recent case than any of the above, *Bridges v. S. of California, Times Mirror Co. and L. D. Hotchkiss v. Superior Ct. of California*[27] discarded the "reasonable tendency" test and employed the "clear and present danger" rule. Justice Frankfurter in a dissent urged the use of the former test. This does not affect the above conclusion as it can be distinguished, being not a war or sedition case, but a case of freedom of speech as concerned with control of "contempt by publication."

The *Pennsylvania Sedition Act*[28] states that any act, utterance, etc., "the intent of which is: (a) to make or cause to be made any outbreak or demonstration of violence . . . (b) to encourage or take any measures or engage in any conduct with a view of overthrowing . . . by any force . . . the government . . . (c) to incite . . . any person to commit any overt act with a view to bringing the government . . . into hatred or contempt."

It does not require that there be any clear or present danger to the state. This was the fault of the Georgia statute declared unconstitutional in the *Herndon, supra,* case and is important in view of this case.

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[20] 167 U.S. 43 (1897).
[21] 307 U.S. 147 (1939).
[22] 308 U.S. 147 (1939).
[23] 310 U.S. 88 (1940).
[24] 310 U.S. 100 (1940).
[25] 310 U.S. 296 (1940).
[26] 310 U.S. 586 (1940).
[27] 62 Sup. Ct. (U.S.) 190 (1941).
[28] Act of June 26, 1919, P.L. 639 sec. 1; 1921, May 10, P.L. 435, sec. 1 as amended by the Penal Code of 1939, June 24, P.L. 872, sec. 207.

The statute has been held constitutional by the Penna. Supreme and Superior Courts in several cases. *Comm. v. Widovich*[29] and *Comm. v. Blankenstein.*[30]

The Pennsylvania decisions uniformly require no clear and present danger.

In *Comm. v. Blevesky*[31] it was said "the wilful distribution of documents which advocate the overthrow of government discloses a purpose to accomplish the result aimed at and one who organizes an assembly, a society or group for the accomplishment of any of the purposes prohibited by the statute would be held to intend the results advocated." Here, then, there is an application of the "indirect causation" test plus the doctrine of "constructive intent."

The *Widovich* and *Blankenstein* cases, *supra,* affirmed this view.

In *Comm. v. Smith*[32] the court said the question of "proximate cause" was for the jury. These words are very close to the words "natural tendency" as used by the majority in the *Pierce* case, *supra.* In this *Smith* case, the court also says that for this reason it does not need to consider whether the "clear and present danger" rule applies.

In *Comm. v. Lazar*[33] the court states the view decided in *Gitlow v. N. Y.* and urged in *Herndon v. Lowry* that, when the legislature has "previously determined the danger of substantial evils, arising from utterances of specific character" and made such utterances a crime, the courts need not consider the "clear and present danger" test. This view has been qualified by the latter, *Herndon,* case and must be given only an appropriate amount of weight.

Thus it would seem, although the question has not been clearly settled, that the later Federal cases and all of the Pennsylvania cases seem to apply the test of indirect causation. This may be, as stated above, wartime caution, a recognition of the new problems we face, and therefore a temporary view. The courts may be employing Justice Holmes' view that "When a nation is at war many things that might be said in times of peace . . . will not be endured so long as men fight" while rejecting his statement that "the question in every case is whether the words used . . . are of such a nature as to create a clear and present danger . . . "

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[29] 295 Pa. 311 (1929).
[30] 81 Pa. Super. 340 (1923).
[31] 79 Pa. Super. 12 (1922).
[32] 23 D. & C. 239 (1923).
[33] 103 Pa. Super. 417 (1931).