

# Abrams v. U.S.

250 U.S. 616

Supreme Court of the United States

November 10, 1919

5 ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF  
NEW YORK. Abrams v. United States. No. 316 Argued: October 21, 22, 1919..

**MR. JUSTICE HOLMES dissenting.**

10 This indictment is founded wholly upon the publication of two leaflets which  
I shall describe in a moment. The first count charges a conspiracy pending the  
war with Germany to publish abusive language about the form of government of  
the United States, laying the preparation and publishing of the first leaflet as  
overt acts. The second count charges a conspiracy pending the war to publish  
language intended to bring the form of government into contempt, laying the  
preparation and publishing of the two leaflets as overt acts. The third count  
15 alleges a conspiracy to encourage resistance to the United States in the same war,  
and to attempt to effectuate the purpose by publishing the same leaflets. The  
fourth count lays a conspiracy to incite curtailment of production of things  
necessary to the prosecution of the war and to attempt to accomplish it by  
publishing the second leaflet, to which I have referred.

20 The first of these leaflets says that the President's cowardly silence about the  
intervention in Russia reveals the hypocrisy of the plutocratic gang in  
Washington. It intimates that "German militarism combined with allied  
capitalism to crush the Russian evolution " -- goes on that the tyrants of the world  
fight each other until they see a common enemy -- working class enlightenment,  
25 when they combine to crush it, and that now militarism and capitalism combined,  
though not openly, to crush the Russian revolution. It says that there is only one  
enemy of the workers of the world, and that is capitalism; that it is a crime for  
workers of America, &c., to fight the workers' republic of Russia, and ends  
"Awake! Awake, you Workers of the World, Revolutionists!" A note adds

30 It is absurd to call us pro-German. We hate and despise German  
militarism more than do you hypocritical tyrants. We have more reasons  
for denouncing German militarism than has the coward of the White  
House.

35 The other leaflet, headed "Workers – Wake Up," with abusive language says  
that America together with the Allies will march for Russia to help the Czecko-  
Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites  
shall not fool the Russian emigrants and friends of Russia in America. It tells the  
Russian emigrants that they now must spit in the face of the false military  
propaganda by which their sympathy and help to the prosecution of the war have  
40 been called forth, and says that, with the money they have lent or are going to  
lend, "they will make bullets not only for the Germans, but also for the Workers  
Soviets of Russia," and further,

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.

5 It then appeals to the same Russian emigrants at some length not to consent to the "inquisitionary expedition to Russia," and says that the destruction of the Russian revolution is "the politics of the march to Russia." The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!" and, after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends, "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

10 No argument seems to me necessary to show that these pronouncements in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that, it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917. 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." It seems to me that no such intent is proved.

25 I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

35 It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech.

45 I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs*, 249 U.S. 47,

204, 211, were rightly decided. I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

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But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger, and, at any rate, would have the quality of an attempt. So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U.S. 375, 396. It is necessary where the success of the attempt depends upon others because, if that intent is not present, the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

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I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government -- not to impede the United States in the war that it was carrying on. To say that two phrases, taken literally, might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

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I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that, in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described, and, for the reasons that I have given, I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

5 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. Even if I am technically wrong, and enough can be  
10 squeezed from these poor and puny anonymities to turn the color of legal litmus  
paper, I will add, even if what I think the necessary intent were shown, the most  
nominal punishment seems to me all that possibly could be inflicted, unless the  
defendants are to be made to suffer not for what the indictment alleges, but for  
15 the creed that they avow -- a creed that I believe to be the creed of ignorance and  
immaturity when honestly held, as I see no reason to doubt that it was held here,  
but which, although made the subject of examination at the trial, no one has a  
right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If  
15 you have no doubt of your premises or your power, and want a certain result with  
all your heart, you naturally express your wishes in law, and sweep away all  
opposition. To allow opposition by speech seems to indicate that you think the  
speech impotent, as when a man says that he has squared the circle, or that you  
do not care wholeheartedly for the result, or that you doubt either your power or  
20 your premises. 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 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, and that truth is the only  
25 ground upon which their wishes safely can be carried out. That, at any rate, is the  
theory of our Constitution. It is an experiment, as all life is an experiment. Every  
year, if not every day, we have to wager our salvation upon some prophecy based  
upon imperfect knowledge. While that experiment is part of our system, I think  
that we should be eternally vigilant against attempts to check the expression of  
30 opinions that we loathe and believe to be fraught with death, unless they so  
imminently threaten immediate interference with the lawful and pressing  
purposes of the law that an immediate check is required to save the country. I  
wholly disagree with the argument of the Government that the First Amendment  
left the common law as to seditious libel in force. History seems to me against  
35 the notion. I had conceived that the United States, through many years, had  
shown its repentance for the Sedition Act of 1798, by repaying fines that it  
imposed. 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  
40 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.

45 MR. JUSTICE BRANDEIS concurs with the foregoing opinion.