SCHENCK v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
249 U.S. 47
March 3, 1919
[9 - 0]

FIRE! FIRE! EVERYBODY RUN!!!

OPINION: Justice Holmes...This is an indictment in three counts. The first charges a conspiracy to violate the **Espionage Act**...by causing and attempting to cause insubordination...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...The second count alleges a conspiracy to commit an offence against the United States [by planning to use] the mails for the transmission of [the document]...The third count charges an unlawful use of the mails for the transmission of the [document]. The defendants were found **guilty on all...counts.** They [defend based on] the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press...Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent...Without going into confirmatory details that were proved, **no reasonable man could doubt that...defendant Schenck was largely instrumental in sending the circulars...**

In other words, if the criminal statute is otherwise Constitutional, the evidence presented at the trial was sufficient to convict.

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 convict.

The first section of the Thirteenth Amendment states: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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 [and] winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course **the documents 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 argue that the documents are] protected by the First Amendment to the Constitution...**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. THE MOST STRINGENT PROTECTION OF FREE SPEECH WOULD NOT PROTECT A MAN IN FALSELY SHOUTING FIRE IN A THEATRE AND CAUSING A PANIC.**

You have heard that phrase — now, you have read it! The phrase most often repeated, falsely so, is “You can’t shout fire in a crowded theater” which is, of course, also false, for one can certainly shout “fire” in a theater, crowded or otherwise, if, indeed, there is a fire!

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.**

Is the Court saying that in times of war we must stretch certain principles?

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...**Judgments affirmed.

I believe subsequent cases will show us that a "clear and present danger" must now be much closer to the precipice of that danger before words of this nature can be punished. We shall see. The Court was in its early days of trying to frame the meaning of the 1st Amendment.