AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech

Hartzel v. United States, 322 U.S. 680 (1944)

Elmer Hartzel wrote several articles supporting a German victory in World War II and calling for "an internal war of race against race." "Who betrayed America to the empire of the British-Jewish yellow race?" one pamphlet asked. These articles were mailed to prominent civilian and military officials. His purpose in doing so, Hartzel declared, was "to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races." On the basis of these articles and statements, Hartzel was charged with and convicted of violating the Espionage Act of 1917. After that conviction was sustained by the Court of Appeals for the Seventh Circuit. , Hartzel appealed to the Supreme Court of the United States.

The Supreme Court by a 5-4 vote reversed the lower federal courts. Justice Murphy's majority opinion maintained that Hartzel lacked the specific intent necessary to violate the Espionage Act of 1917. Compare Hartzel *to* Abrams v. United States *(1919). Would the justices on the White Court also have reserved Hartzel's conviction? If not, what explains the difference between the two courts? Do you believe Hartzel violated the Espionage Act of 1917? Is that act, as construed by Justice Murphy, constitutional?*

JUSTICE MURPHY announced the conclusion and judgment of the court.

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. . . [P]etitioner was found guilty of violating the second and third clauses of Section 3 of the [Espionage] Act. These clauses are directed at those who, in time of war, "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States," or who, in time of war, "willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States." Thus, these clauses punish the making and dissemination of statements and writings which are intended to have the evil effects set forth by Congress. No question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder. But such legislation, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense." Justice Holmes, dissenting in *Abrams v. United States* (1919). . . .

The language of the second and third clauses of Section 3 makes clear that two major elements are necessary to constitute an offense under these clauses. The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service. This requirement of a specific intent springs from the statutory use of the word "willfully." That word, when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. . . . The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck v. United States* (1919). . . . Both elements must be proved by the Government beyond a reasonable doubt.

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There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny, or refusal of duty in the military

forces, or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect, and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories, and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But, while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot, by themselves, be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

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. . . Proof that he intended, in his words, to "create sentiment against war amongst the white races" and to "unite the white races against what I consider to be the more dangerous enemies, the yellow races" does not satisfy the burden which rests on the Government to prove beyond a reasonable doubt that petitioner had the purpose or intent to do what is outlawed by Section 3 of this Act. Thoughtlessness, carelessness, and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime.

We are not unmindful of the fact that the United States is now engaged in a total war for national survival, and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. For that reason, our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's three pamphlets. Crude appeals to overthrow the government or to discard our arms in open mutiny are seldom made. Emphasis is laid, rather, on such matters as the futility of our war aims, the vices of our allies, and the inadequacy of our leadership. But the mere fact that such ideas are enunciated by a citizen is not enough, by itself, to warrant a finding of a criminal intent to violate Section 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters, either by temperate reasoning or by immoderate and vicious invective, without running afoul of the Espionage Act of 1917. Such evidence was not present in this case.

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JUSTICE ROBERTS

[concurring opinion omitted]

JUSTICE REED, with whom JUSTICE FRANKFURTER, JUSTICE DOUGLAS and JUSTICE JACKSON concur, dissenting.

The First Amendment to the Constitution preserves freedom of speech and of the press in war, as well as in peace. The right to criticize the Government and the handling of the war is not questioned. Congress has not sought, directly or indirectly, to abridge the right of anyone to present his views on the conduct of the war or the making of the peace. The legislation under which Hartzel was tried and convicted was aimed at those who, in time of 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." It is only when the requisite intent to produce those results is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question. *Schenck v. United States* (1919). . . .

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Congress has made it an offense willfully to attempt to cause insubordination and likewise willfully to obstruct the recruiting and enlistment service of the Nation. It does not commend itself to us to hold that thereby Congress was merely concerned with crude attempts to undermine the war effort,

but gave free play to less obvious and more skillful ways of bringing about the same mischievous results. Papers or speeches may contain incitements for the military to be insubordinate or to mutiny without a specific call upon the armed forces so to act. If circulated for the purpose of undermining military discipline, scurrilous articles, attacking an ally, a minority of our citizens, and the President, may contain, without words of solicitation, indications of purpose sufficient, if accepted as true, from which to draw an intent to accomplish the unlawful results.

Hartzel himself, moreover, made a statement which was introduced at the trial. In it, he told of the preparation of the pamphlets, the selection of the mailing list from among prominent personages and associations, and his reason for his acts. His intent appears in these words:

> "Finally, the prime motive which impelled me in writing and distributing the articles discussed above was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races."

The jury might well infer from the quoted paragraph that Hartzel, by placing these pamphlets in military hands, was attempting to cause insubordination among the troops. He sought to develop sentiment "against war among the white races." Germans are a "white race."

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To adapt the language of Justice Holmes, speaking for a unanimous Court, in *Schenck v. United States*, . . . of course, the documents would not have been sent unless they had been intended to have some effect, and we do not see what effect they could be expected to have upon persons in the military service except to influence them to obstruct the carrying on of the war against Germany when petitioner deemed that a betrayal of our country.

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On these facts, we would intrude on the historic function of the jury in criminal trials to say that the requisite intent "to cause insubordination, disloyalty, or refusal of duty in the military or naval forces" was lacking. The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends.