

A First Amendment Salute
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Media Institute Friends & Benefactors Awards Banquet
Washington, D.C.
October 22, 2013

This week, we celebrate the First Amendment. It's always a good time to do so – it's also always easier to celebrate it than to live by it – but I think it's especially appropriate that we do so today, October 22nd. This is an anniversary, although one that I, as a practicing lawyer, may be more likely to notice than scholars or jurists. It was on October 22, 1919, that oral argument concluded in the great case of *Abrams v. United States* – no, I say quickly, not a family member.

The case is well described in two books, one by Professor Richard Polenberg called “Fighting Faiths: The Abrams Case, the Supreme Court and Free Speech,” and a more recent book by Thomas Healy entitled “The Great Dissent: How Oliver Wendell Holmes Changed His Mind – and Changed the History of Free Speech in America.”

The case came to the Supreme Court on appeal from criminal convictions under the Espionage Act of five Russian-born defendants who, during World War I, had published and thrown from the window of a building two sets of leaflets, one protesting the sending of American troops to Russia in the summer of 1918 to support enemies of the Russian Revolution, the other urging workers in munitions factories to engage in a general strike. Polenberg writes that when Harry Weinberger, counsel for the defendants, completed his argument, he sent a wire to his assistant saying, “The argument here looks good for a favorable decision.” He was not the first nor the last counsel to make so wrongheaded a prediction. The Supreme Court affirmed their conviction and Justice Oliver Wendell Holmes, joined by Justice Brandeis, wrote what is probably the greatest First American dissent, indeed greatest First Amendment opinion, in American history.

It was that opinion, the conclusion of which was well described by Professor Harry Kalven, as “durable gold,” which is worth recalling on this day of celebration. Here is the beginning of Justice Holmes's final paragraph in that dissent:

“Persecution for the expression of opinions seems to me perfectly logical. If 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 is 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 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 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 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.”

That Holmes-Brandeis dissent did not win the battle that was argued 94 years ago today. It did win the war, transforming the First Amendment and our nation.

Happy Anniversary to all and Happy First Amendment Week!