

Hess v. Indiana Revisited: A Panel Discussion with Case Participants

(Text of the display that accompanied the panel discussion. Display and panel discussion organized by Ralph Gaelber and Richard Vaughan of the Indiana University School of Law Library)

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HESS V. INDIANA: BACKGROUND

The Anti-War Protests at Indiana University **May 1970**

In the spring of 1970, university campuses around the country were subject to large-scale student protests against the war in Viet Nam. On April 29 of that year, President Nixon announced that the U.S. would support South Viet Nam's attack on communists in Cambodia, and the next day American bombers attacked the communist headquarters there. Many students around the country, already opposed to the war, were galvanized by what they perceived as a decision to widen the conflict.

Large-scale protests on the I.U. campus commenced on the evening of April 30th, as some 1500 students marched from Dunn Meadow to the courthouse square. The student-body president, Keith Parker, called for non-violence, and in fact students began to disperse when windows in the Monroe County State Bank were broken. At an even larger rally the next day in front of the Student Building, Parker condemned the "mad-dog adventurism" of the previous night's march, but produced a list of demands for the I.U. administration. A cordon of I.U.

Safety Division officers marched from the Chemistry Building across campus to protect Bryan Hall. As a large group of students raced the officers towards the administration building, Parker led another group of students in front of them to form a human chain and re-direct them back towards the rally. Scuffling took place around Bryan Hall, but the building was secured by officers, and Parker was permitted to enter to deliver the students demands to President Sutton. Sutton was out of town at the time, but announced that he would “not accept or consider demands of any kind.”

The demands presented by Parker on behalf of the student body included the following: that I.U. repudiate President Nixon’s policy in southeast Asia; that I.U. demand immediate withdrawal of U.S. troops from the region; and that I.U. open the books of the I.U. Foundation to supply information on government contracts held by the University.

On **May 3**, some 70 student body presidents issued a strike call through the Washington office of the National Student Association. On **May 4**, four students at Kent State were killed when National Guardsmen opened fire on a demonstration. Serious riots occurred at the University of Wisconsin, and many universities, including

the entire University of California system, shut down for the remainder of the week. Events at I.U. continued to be largely non-violent, as attention turned towards an attempt by many students to shut down the campus in protest.

More than 7,500 students marched on the I.U. campus on **May 6**. However, I.U. teaching assistants and Veterans for Peace acted as parade marshalls, easily identifiable in white shirts and green armbands, and the march remained peaceful. The rally endorsed a call for a two-day strike, and declared the next day a day of mourning for the students killed at Kent State.

During this period, there was disagreement between various students groups concerning the demands that had been given to the administration. The Inter-Residence Halls Association and Pahlhellenic rejected the student government demands, but agreed to plan teach-ins in I.U. residences to discuss the war.

On **May 7**, more than 2000 people gathered at the I.U. Auditorium to remember the students killed at Kent State. There was a class boycott, and student pickets, especially around Ballantine and Woodburn Halls. The National Guard was authorized to provide Guardsmen to serve as

watchmen during weekend anti-war activities, but without loaded weapons.

On **May 11**, students voted in a variety of referenda related to the war. 17,450 votes were cast. Of these, 9,872 supported the resolution calling for cancellation of classes for the remainder of the week; 12,342 voted against President Nixon's decision to send troops into Cambodia; 12,190 voted to support Congressional efforts to cut off further funding of the war; 9,857 agreed that I.U. should repudiate the invasion of Cambodia and demand immediate withdrawal of all American troops; 12,234 agreed that the I.U. Foundation should open its books to supply information on government contracts. However, only 7,361 agreed that I.U. should terminate the ROTC program on campus and all government-sponsored research. President Sutton declared that I.U. would not cancel classes regardless of the outcome of the referendum.

On **May 12**, relations between student government and the I.U. administration began to deteriorate. Parker responded on behalf of the student government that he and his office would no longer try to restrain student protest on the I.U. campus. He accused the

administration of “blindness” in its handling of student protest, and stated that the administration must be held responsible for their “actions and inactions, their lies and cowardice, their petty arrogance and dull tyranny.”

May 13, 1970 and the Arrest of Greg Hess

The events of **May 13**, leading up to the arrest of Greg Hess, began around **7:00 a.m.** Anti-war pickets blocked the entrance of Bryan Hall facing Indiana Ave. About **1:00 p.m.** Safety Division officers arrived at the rear of the building, and warned pickets that they would be arrested if they did not move. Students ignored the warning, and as Bloomington and Monroe County police moved in to clear the steps two students were arrested. By **1:15 p.m.**, students and onlookers numbered over 600, and were spilling into Indiana Ave. Monroe County police drove a car up the street to clear it, forcing students onto the sidewalks. Students then moved back into the street, and six more of them were then arrested. Among these was Greg Hess, who shouted to no one in particular, “We’ll take the fucking street later (or again).” He was later charged with disturbing the peace, and convicted in Bloomington City Court. He was convicted again in a *de novo* trial in Superior Court, and appealed from that

decision to the Indiana Supreme Court, which affirmed. From there, Hess appealed to the U.S. Supreme Court, which overturned his conviction in 1973.

Protests continued for the next several days. On the **14th** pickets returned to Bryan Hall. They locked the front and rear doors with bicycle locks. The locks were removed, and another student was arrested when he tried to replace them. More than 4,000 students attended an open forum at the Auditorium, where President Sutton and Chancellor Carter answered student questions. Sutton expressed regret that he had not met students earlier, but reiterated that he could not close the University. He said, “I feel that we have the obligation and responsibility to provide educational opportunities in the classroom for those students who wish the opportunity.”

Finally, on **May 18** a student-faculty delegation that had traveled to Washington, D.C. to meet with Indiana congressmen reported on their meetings. Senator Vance Hartke addressed the meeting, calling for an end to the war and praising campus political actions. Campus protests ended as the students settled down to exams, which began on **May 23rd**.

Protests at Other Universities

Anti-war demonstrations at I.U. during the spring of 1970 were noteworthy for the fact that they were conducted mostly in a non-violent manner. This was attributable to successful efforts made by both students and administrators to maintain dialogue, or at least communication as nerves frayed. Therefore, it is fitting that *Hess v. Indiana*, a case that tested the limits of free speech in the context of political protest, arose on this campus.

Many other universities were not as lucky as I.U. The most tragic, and best known, events occurred at **Kent State University** in Ohio. On May 4, four students were killed in a clash between protesters and National Guardsmen. Four others were seriously wounded, and an additional eight, including two Guardsmen, were taken to hospitals. On May 15, two more students were killed at **Jackson State College**.

On the night of August 24, 1970, after four years of sporadic and often violent protests, the **University of Wisconsin** campus was shattered by an explosion that almost destroyed Sterling Hall, home of the Army Mathematics Research Center, which conducted research

on behalf of the Department of Defense. The explosive device was composed of approximately 2000 lbs. of ammonium nitrate mixed with aviation fuel oil, detonated in a van parked next to Sterling Hall. The explosion damaged 26 buildings, could be heard for 30 miles, killed a graduate student who happened to be in the building late that night, and destroyed the life's research of several faculty members. Its severity as an act of domestic terrorism was not eclipsed until the Oklahoma City bombing of 1995.

Finally, there were many campuses where tear gas was used, and where confrontations led to large-scale police action. For example, on May 6 5,000 National Guardsmen were ordered onto the campus of the **University of Illinois**. In Texas, Governor Preston Smith ordered the evacuation of Austin because of attacks by **University of Texas** students.

Altogether, some 240 strikes occurred on campuses around the country in May, 1970.

The Hess Case Wends its Way Through the Courts

Bloomington City Court and Superior Court

Hess and his co-defendants were tried for disorderly conduct in Bloomington City Court. The defense was led by Law School professor Tom Schornhorst and local attorney David Colman. The defense filed a motion to quash the affidavit on the ground that it failed to charge an offense with sufficient certainty, and also on the ground that the disorderly conduct statute was unconstitutionally vague and overly broad because it forbade conduct protected under the 1st and 14th amendments of the U.S. Constitution. The defendants were convicted, and the case was tried *de novo* in the local Superior Court on stipulated facts. The defense did not move to quash the affidavit in the Superior Court, but did assert in its memorandum of appeal that the City Court's failure to do so was reversible error. The Superior Court entered judgment against the defendants on July 19, 1971, and assessed them a fine of \$1.00.

Indiana Supreme Court

Gregory Hess chose to appeal this decision, and the case

moved on to the Indiana Supreme Court. In a decision handed down on May 22, 1973, the Supreme Court affirmed the Superior Court ruling (297 N.E.2d 413). The Court rejected the defendant's constitutional argument that the disorderly conduct statute was vague and over broad. It also rejected the defendant's argument that the statute was unconstitutional as applied, stating that "[t]he trial court was justified in finding that the statement was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." Finally, the Court rejected the defendant's argument that the affidavit failed to charge an offense unambiguously, by citing the fact that the Superior Court had not addressed the issue. It had properly ignored this argument, in the Court's view, because the defense had not separately moved in the Superior Court to quash the affidavit.

Justice Hunter wrote a spirited dissent. He argued that the majority had ignored the standard recently established by the U.S. Supreme Court, in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827 (1969), forbidding states to proscribe speech that advocates violation of the law "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In his view, neither element of

the *Brandenburg* test was met. As a result, the disorderly conduct statute was in Hunter's view both overly vague and overly broad, as interpreted by the majority. Finally, Hunter also rejected the majority's conclusion that the defense had waived any question as to the sufficiency of the affidavit. As he put it, though the defense did not refile its motion to quash, "no one can doubt that appellant was continuing his objection to the affidavit."

United States Supreme Court

Hess' appeal to the U.S. Supreme Court was handled by Law School professor Pat Baude. The State of Indiana seized on the fact that the defense did not separately move to quash the affidavit in *de novo* proceedings in the Superior Court to argue that Hess had failed to preserve *any* of his claims, including his constitutional claims. However, in a *per curiam* decision of Nov. 19, 1973, 414 U.S. 105, 94 S.Ct. 326, the U.S. Supreme Court rejected this argument. It stated that "[s]ince the Supreme Court of Indiana considered and resolved each of Hess' constitutional contentions, it is apparent that it regarded Hess' actions in the state courts as sufficient under state law to preserve his constitutional arguments on appeal." The Court also rejected the Indiana Supreme Court's ruling that the disorderly conduct statute did not violate

Hess' constitutional rights as applied. Adopting the view of Justice Hunter, the U.S. Supreme Court held that Hess' speech "amounted to nothing more than advocacy of illegal action at some indefinite future time[,]” and therefore failed the *Brandenburg* test. Having thus held that the Indiana statute was unconstitutional as applied in the Hess case, the Supreme Court found no need to determine whether the Indiana statute was unconstitutional on its face.

Justice Rehnquist wrote a dissent, in which he was joined by Chief Justice Burger and Justice Blackmun. Noting that the record was "unusually colorless and devoid of life," since the Superior Court trial had been conducted on the basis of stipulated facts, Justice Rehnquist argued that the majority had improperly substituted its factual conclusions for those of the trial court. Moreover, he argued that the Supreme Court had violated the "traditional function of any appellate court" by failing to view the evidence in light most favorable to the appellee.