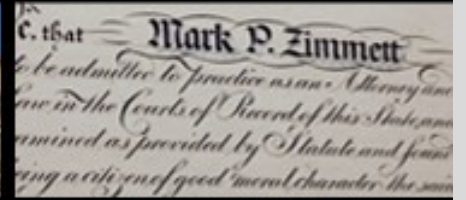


LAW OFFICES OF MARK P. ZIMMETT



Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Justice Holmes wrote that in 1904 when national passions and those of a trustbusting President ran deep against the efforts of James J. Hill and J. P. Morgan to monopolize the railroads.

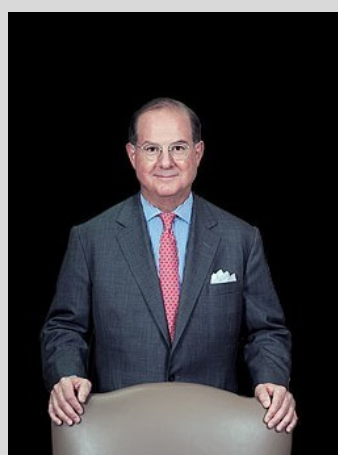
Passions run deep today. A member of Congress and a former member of the National Security Council staff ask whether the military would defy an “illegal” order of President Trump to deploy active-duty troops under the Insurrection Act in response to national protests and widespread looting and violence following the death of George Floyd. Hundreds of Facebook employees publicly protest their employer’s continued posting of President Trump’s comments that many see as false, divisive and encouraging violence. Journalists at *The New York Times* object to the paper’s publication of an op-ed opinion by U.S. Senator Tom Cotton to “Send In the Troops”. Initially, the publisher defended its publication “in the principle of openness to a range of opinions, even those we may disagree with,” Later in the day, however, the *Times* issued a statement that “the piece and the process leading up to its publication ... did not meet our standards,” without explaining how they fell short.

Soldiers called upon to disobey. Journalists opposing publication of an opinion. Well-settled principles bend to hydraulic pressure. Drawing lines of principled distinctions can be difficult, particularly at times of high anxiety. In 1917, the seismic year of the Russian revolution and America’s entry in the Great War, Congress enacted the Espionage Act. For the first time in nearly 120 years, criticism of government policies became a federal crime and could be banned from the mails. Two weeks after enactment of the law, the Government prohibited the publisher of *The Masses*, a monthly revolutionary journal, from mailing its forthcoming issue as “it tended to ... encourage the enemies of the United States, and to hamper the government in the conduct of the war.” *The Masses* went to court to enjoin the ban. The case came before U.S. District Court Judge Learned Hand. The judge agreed with the Government that Congress may pass laws such as the Espionage Act. He also agreed “that the cartoons and text of the magazine ... may interfere with the success of the military [mission] and encourage the success of the enemies of the United States” Nevertheless, the offensive material the Government sought to ban was opinion and, therefore, protected from Government interference. Hand’s judgment was reversed on appeal and it cost him: he was passed over for appointment to the Court of Appeals. But eventually he made it, and became known as “America’s greatest living jurist.” That is how Supreme Court Justice Benjamin Cardozo referred to him and how, nearly thirty years later, he was described in a page one obituary in *The New York Times*.

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