

# The Burger Court Opinion Writing Database

## *Hess v. Indiana*

414 U.S. 105 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Wm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 15, 1973

Re: 73-5290 - Hess v. State of Indiana

Dear Bill:

Please join me in your dissent.

Regards,

WJH

Mr. Justice Rehnquist

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Wm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

November 12, 1973

X  
f

Dear Potter:

Please join me in your per curiam in  
73-5290, Hess v. Indiana.

Cell  
William O. Douglas

Mr. Justice Stewart

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. November 12, 1973

RE: No. 73-5290 Hess v. Indiana

Dear Potter:

I agree with the Per Curiam you have  
prepared in the above.

Sincerely,

Mr. Justice Stewart

cc: The Conference

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To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES: Stewart, J.

GREGORY HESS v. STATE OF INDIANA

Circulated: NOV 12 1973

ON APPEAL FROM THE SUPREME COURT OF INDIANA

Recirculated:

No. 73-5290. Decided November —, 1973

PER CURIAM.

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute.<sup>1</sup> Appellant contends that his conviction should be reversed because the statute is unconstitutionally vague, *Connally v. General Construction Co.*, 269 U. S. 385 (1926), because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments, *Gooding v. Wilson*, 405 U. S. 518 (1972), and because the statute, as applied here, abridged his constitutionally protected freedom of speech. *Terminiello v. Chicago*, 337 U. S. 1 (1949). These contentions were rejected in the city court, where Hess was convicted, and in the superior court, which reviewed his conviction.<sup>2</sup> The Supreme Court of Indiana, with one

<sup>1</sup> "Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars (\$500) to which may be added imprisonment for not to exceed one hundred eighty (180) days." Ind. Code 1971 35-27-2-1, Burns' Ind. Stat. Ann., 1972 Supp., § 10-1510.

<sup>2</sup> The State contends that Hess failed to preserve his constitutional contentions in the state courts. But the record demonstrates that Hess moved to quash the affidavit for disorderly conduct in the city court on the constitutional grounds that he is asserting in this Court. The State points out that, on appeal to the superior court, appellant received a trial *de novo* and did not again move to quash the affi-

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 15, 1973

WTH  
H  
P

Re: No. 73-5290 - Hess v. Indiana

Dear Potter:

Boo

Please join me in the per curiam opinion  
you have circulated in this case.

Sincerely,

*[Signature]*

Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 15, 1973

*See memo  
11/15/73*

Re: No. 73-5290 -- Gregory Hess v. State of Indiana

Dear Potter:

I agree with your Per Curiam in this case.

Sincerely,

*T.M.*

T.M.

Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

7/2

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 15, 1973

Dear Bill:

Re: No. 73-5290 - Hess v. Indiana

Please join me in the dissent you have circulated for  
this case.

Sincerely,

H.A.B.

Mr. Justice Rehnquist

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all have voted

BS-PC  
Jbg  
WOT  
WJB  
GKW  
Tm  
LAP

WTR Decs  
J. by H.A.B.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 13, 1973

No. 73-5290 Hess v. Indiana

Dear Potter:

Please join me in your Per Curiam.

Sincerely,

*L. F. Powell*

Mr. Justice Stewart

lfp/ss

cc: The Conference

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File 11/13/73

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

GREGORY HESS v. STATE OF INDIANA

ON APPEAL FROM THE SUPREME COURT OF INDIANA

No. 73-5290. Decided November —, 1973

MR. JUSTICE REHNQUIST, dissenting.

The Court's *per curiam* opinion rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below. Since it is not clear to me that the Court has a sufficient basis for its action, I dissent.

It should be noted at the outset that the case was tried *de novo* in the Superior Court of Indiana upon a stipulated set of facts, and, therefore, the record is perhaps unusually colorless and devoid of life. Nevertheless, certain facts are clearly established. Petitioner was arrested during the course of an anti-war demonstration conducted at Indiana University in May 1970. The demonstration was of sufficient size and vigor to require the summoning of police, and both the Sheriff's Department and the Bloomington Police Department were asked to help University officials and police remove demonstrators blocking doorways to a campus building. At the time the Sheriff arrived, "approximately 200-300 persons" were assembled at that particular building.

The doorways eventually were cleared of demonstrators, but, in the process, two students were placed under arrest. This action did not go unnoticed by the demonstrators. As the stipulation notes, "[i]n apparent response to these arrests, about 100-150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed." Thus, by contrast to the

Mr. Justice Rehnquist  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Douglas  
Mr. Justice Powell

From Rehnquist, J.

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