

## Judicial Opinion Writing Activity—Answer Key

### *Schenck v. United States* (1919)

**What you need to know before you begin:** In a given term between October and April, the U.S. Supreme Court usually hears oral arguments in 70 to 80 cases. For one hour, the attorneys for the **petitioner** (who lost in the lower court and is now appealing the decision) and **respondent** (who won in the lower court) present arguments and answer the justices' questions. Later that week, the justices hold a private conference and discuss the case. The justices vote on the outcome of the case starting with the chief justice and then the associate justices in order of seniority with the most junior justice going last. The party in the majority with at least five votes wins. The chief justice or the most senior justice in the majority will assign a justice the job of writing a legal explanation, called an **opinion**. The justice will write a draft of the Court's **majority opinion** and circulate it to the other justices in the majority who will sign on to the opinion if they agree. The same procedure will happen to the justices in the minority who will write a **dissenting opinion**. Justices who agree with the outcome of the majority but for different legal reasons may write **concurring opinions** to explain their differences. There can also be more than one dissenting opinion.

**How it's done:** You have been given the background, facts, issue, constitutional provisions and federal statutes, and arguments of the case. Consider and apply the constitutional provisions and statutes to the case *Schenck v. United States*. Carefully consider all of the arguments. Decide if you will find for the **petitioner** (Schenck), and **reverse** the decision of the lower court or for the **respondent** (United States), and uphold or **affirm** the lower court's decision. Assume the majority of justices agree with you and write the Court's **majority opinion** explaining the reasons for the decision.

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**Case name:** *Schenck v. United States*. **Date decided:** \_\_\_\_\_ (today's date).

**Justice** \_\_\_\_\_ (your name) delivered the opinion of the Court.

**The question presented is:** Did Schenck's conviction under the Espionage Act for criticizing the draft violate his First Amendment free speech rights?

1. Brief summary of case and lower court decision(s):  
In 1917, after Schenck's conviction for violating the Espionage Act, Schenck asked the trial court for a new trial. This request was denied. He then appealed to the U.S. Supreme Court, which agreed to review his case in 1919.
2. Write a paragraph explaining how the constitutional provision(s) or statute(s) apply:  
Student answers will vary but should include: The First Amendment states, "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In this case the question is whether the government has a compelling interest in restricting Mr. Schenck's

free speech during wartime. Schenck argues that his speech should be protected because it is doing no direct harm, is expressing his political views, and while the government is free to punish those who evade the draft, it is not free to punish those who simply advocate it. The United States argues that Schenck's speech presents a clear and present danger and, therefore, is not protected by the First Amendment.

3. Write a paragraph explaining which arguments are most persuasive and why:

Student answers will vary.

4. Therefore, we find for the petitioner / respondent (circle one), \_\_\_\_\_ (name of party) and therefore reverse / affirm (circle one) the decision of the lower court.

Student answers will vary.

After students complete the Judicial Opinion Writing Activity, consider sharing the [complete case summary of \*Schenck v. United States\*](#) or the [decision summary and key excerpts from the unanimous opinion of the Court](#).

## Judicial Opinion Writing Activity:

### ***Schenck v. United States (1919)***

**Argued:** January 9–10, 1919

**Decided:** March 3, 1919

#### **Background**

The First Amendment to the U.S. Constitution protects the freedom of speech. However, like all rights protected by the Constitution, this right is not absolute. The government can place reasonable limits on protected rights in many instances. How much the government can limit free speech depends on the context including the time, manner, and place the speech occurs. Generally, the government cannot control the content of someone's speech. At various points in history, the government has argued that national security concerns or times of war permit the government to place additional restrictions on speech. Two months after the United States formally entered World War I, Congress passed the Espionage Act of 1917. Many elected officials were worried about the presence of foreign spies or American sympathizers with enemies of the United States. The Espionage Act stated, "Whoever, when the United States is at war, ... shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both." A number of Americans were arrested and convicted under this law during World War I.

In this case the Supreme Court had to decide whether the speech that was punished for violating the Espionage Act was protected by the First Amendment.

#### **Facts**

Charles T. Schenck was the general secretary for the Socialist Party chapter in Philadelphia. He was convicted of violating the Espionage Act after printing and mailing 15,000 fliers to draft-age men arguing that conscription (the draft) was unconstitutional and urging them to resist. Elizabeth Baer, a fellow executive committee member of the chapter, was also convicted.

On the side of the flier entitled "Long Live the Constitution of the United States," the Socialist Party argued that conscription was a form of "involuntary servitude" and thereby outlawed by the 13<sup>th</sup> Amendment. Schenck's flier also implored its recipients "to write to your Congressman and tell him you want the [conscription] law repealed. Do not submit to intimidation. You have the right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage, and petitioning the government for a redress of grievances."

On the reverse side entitled "Assert Your Rights!", Schenck adopted more fiery language. He implored his audience to "do your share to maintain, support and uphold the rights of the people of

this country” or else “you are helping condone a most infamous and insidious conspiracy” fueled by “cunning politicians and a mercenary capitalist press.”

In 1917, after Schenck’s conviction for violating the Espionage Act, he asked the trial court for a new trial. This request was denied. He then appealed to the U.S. Supreme Court, which agreed to review his case in 1919.

### **Issue**

Did Schenck’s conviction under the Espionage Act for criticizing the draft violate his First Amendment free speech rights?

### **Constitutional Provisions and Federal Statute**

#### **– First Amendment to the U.S. Constitution**

“Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

#### **– Espionage Act, Section 3**

“Whoever, when the United States is at war, ... shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.”

### **Arguments for Schenck (petitioner)**

- The First Amendment not only prevents Congress from prohibiting criticism of government action, it also protects the speaker from punishment after the expression.
- The First Amendment must protect the free discussion of public matters. This practice helps hold government officials accountable and promotes transparency. Schenck was simply sharing his opinions about important government actions and policies.
- There is an important difference between words and actions. While the government may punish those who refuse to serve in the military once drafted (action), the effort to persuade people not to serve is protected by the Constitution as speech (words).
- Schenck exercised his free speech rights to communicate his opinions on important public issues. He was not directly calling on readers to break the law, only to exercise their right to redress grievances by writing their Congressional representatives.

**Arguments for the United States (respondent)**

- Congress is empowered to declare war and ensure the functioning of the U.S. military. In a time of war, it may limit the expression of opinions if necessary to make sure the military and government can function—which includes the necessary recruitment and enlistment of soldiers.
- In distributing the flier, Schenck and Baer possessed a clear intent to persuade others to not enlist. That is a violation of the Espionage Act, which prohibits “willfully...obstruct[ing] the recruiting or enlistment service of the United States.”
- War time is different from peace time; during war the government should have extra power to ensure the safety and security of the American people, even if that means limiting certain kinds of speech.