

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-aged 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 13th 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Schenck's flier also implored its recipients "to write to your Congressman and tell him you want the [conscription] law repealed.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 Amendment 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 to 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.

Decision

Justice Oliver Wendell Holmes delivered the unanimous opinion (9-0) for the Court in favor of the United States, joined by Chief Justice White and Justices McKenna, Day, van Devanter, Pitney, McReynolds, Brandeis, and Clarke.

Justice Holmes accepted the possibility that the First Amendment did not only prevent Congress from exercising prior restraint (preemptively stopping speech). He said that the First Amendment could also be interpreted to prevent the punishment of speech after its expression.

Yet, according to Holmes, “the character of every act depends upon the circumstances in which it is done.” In the context of the U.S. effort to mobilize for entry into World War I, the Espionage Act’s criminalization of speech that caused or attempted to cause a disruption of the operation of the military was not a violation of the First Amendment. According to Holmes, “when a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”

Holmes held that some speech does not merit constitutional protection. He said that statements that “create a clear and present danger” of producing a harm that Congress is authorized to prevent, fall in that category of unprotected speech. Just as “free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,” the Constitution does not protect efforts to induce the criminal act of resisting the draft during a time of war.

Impact

Schenck fashioned a new and important rule. It allowed Congress to authorize the punishment of speech based on both its content and viewpoint. The “clear and present danger” test provided the framework for future cases brought against independent and spirited speakers under both the Espionage Act and similar state laws. Under the “clear and present danger” test, the government typically won, and the speakers almost always lost. In later cases Justice Holmes argued that the best way to counteract “bad”

speech was through more and better speech. He called this the “marketplace of ideas” rationale for freedom of speech, explaining that free debate was essential to a democratic society.

The Court moved away from the “clear and present danger” test in a 1969 case called *Brandenburg v. Ohio*, which involved a Ku Klux Klan member who gave a speech that was derogatory towards African Americans and Jewish people while burning a cross in an open field. In particular, *Brandenburg v. Ohio* fashioned the rule that now governs any action against a speaker for their speech, requiring that the statements in question be 1) “directed at inciting or producing imminent lawless action” and 2) “likely to incite or produce such action.” This and later rulings were more protective of free speech rights than the “clear and present danger” test established in *Schenck*.

Additional information about *Schenck v. United States*, including background at three reading levels, opinion quotes and summaries, teaching activities, and additional resources, can be found at <https://www.landmarkcases.org/>.