

## ***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. The First Amendment says, “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.” However, like all rights protected by the Constitution, the right to free speech is not absolute. The government can place reasonable limits on protected rights in many cases. 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 many points in history, the government has said that national security concerns allow government to place extra restrictions on speech. This includes times of war.

Two months after the United States formally entered World War I, Congress passed the **Espionage Act of 1917**. Many elected officials were worried about foreign spies and Americans who might cooperate with U.S. opponents in the war. The Espionage Act made it a crime to “cause insubordination, disloyalty, mutiny, refusal of duty, in the military” or to **obstruct**. 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. Schenck was opposed to the **draft**, which made it mandatory for all male citizens 18 years of age and older to register for the draft. Men randomly chosen were required to complete military service. Schenck printed and mailed 15,000 fliers to draft-age men. The fliers stated that the draft was **unconstitutional** and urged men to resist.

One side of the flier had the title “Long Live the Constitution of the United States” printed on it. Under the title, the Socialist Party argued that drafting was a form of “**involuntary servitude**” and violated the **13<sup>th</sup> Amendment**. Schenck’s flier also encouraged recipients to write to their Congressmen and tell them they wanted the draft **repealed**. He told them to not be intimidated by the government. The text also encouraged people to use their rights to free speech, protest, and petition.

On the reverse side entitled “Assert Your Rights!”, Schenck used more fiery language. He begged his audience to “maintain, support and uphold the rights of the people of this country.” Otherwise, Schenck

said that they were condoning “a most infamous and insidious conspiracy.” He said that this conspiracy was driven by a greedy and deceiving government and press.

In 1917, Schenck was arrested and convicted of 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?

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

- The First Amendment prevents Congress from banning criticism of government action. In addition to protecting the right to free speech, the First Amendment also protects the right to “petition the government for a redress of grievances.”
- The First Amendment must protect the free discussion of public issues. 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. The government may punish those who refuse to serve in the military once drafted. This is an action. However, the effort to persuade people not to serve is protected by the Constitution as speech. These are words. A person should not be punished for their words.
- Schenck used his free speech rights to share his opinions on important public issues. He was not directly telling readers to break the law. He only encouraged them to use their right to voice their complaints by writing their Congressional representatives.

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

- Congress has the power to declare war and ensure the functioning of the U.S. military. In a time of war, it may limit speech if it threatens national security. This is so that the military and government can function. This includes the required recruitment and enlistment of soldiers.
- In sending out the flier, Schenck showed a clear intent to persuade others not to enlist. That is a violation of the Espionage Act. The act bans “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. Sometimes that means limiting certain kinds of speech.

## Decision

Justice Oliver Wendell Holmes gave the unanimous opinion (9-0) for the Court in favor of the United States.

Justice Holmes accepted the possibility that the First Amendment did not only prevent Congress from stopping speech in advance. 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 prepare for entry into World War I, the Espionage Act 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.” He stated that “no Court could regard them as protected by any constitutional right.”

Holmes held that some speech does not earn constitutional protection. He said that some statements “create a clear and present danger” of producing harm. Congress has the power to prevent that harm. This speech would fall in that category of unprotected speech. For example, he said that “free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” As such, the Constitution does not protect efforts to encourage criminal acts. In this case, encouraging others to resist the draft during a time of war was a criminal act.

## Impact

*Schenck* fashioned a new and important rule about speech. It allowed Congress to authorize the punishment of speech based on both its content and viewpoint. This was different from punishing speech that had already caused harm. The “clear and present danger” test helped decide many future cases involving the Espionage Act. Under the “clear and present danger” test, the government typically won and the speakers almost always lost. The Court later abandoned this test to favor rulings that were more protective of free speech rights.

## Glossary

- **13<sup>th</sup> Amendment**: the amendment to the U.S. Constitution that abolished slavery.
- **Condoned**: to accept and allow immoral behavior to continue.
- **Draft**: required enlistment into the armed forces.
- **Espionage Act of 1917**: an act passed by Congress during World War I. This act made it a crime for any person to interfere with U.S. efforts in the war against Germany. Anyone who publicly protested the war or the military draft was subject to investigation.
- **Insidious**: gradually harmful.
- **Involuntary servitude**: a person being forced to work for another against their own will.

- **Obstruct**: to block or prevent from occurring.
- **Repeal**: reversed; invalidated; canceled.
- **Socialist Party**: A political party that believes people deserve equal rights and resources and that government regulation can be a force for good in people's lives and society.
- **Transparency**: the act of being open and honest.
- **Unconstitutional**: not allowed by or contained in the Constitution. If a law is unconstitutional, it will be struck down, meaning it is no longer a law.

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/>.