

Schenck v. United States
“Clear and Present Danger”

Essential Question:

How were civil liberties limited or suspended during World War I?

Lesson Objectives:

Students will be able to:

1. Analyze the restrictions placed on free speech and press during World War I.
2. Evaluate the impact of the case *Schenck v. United States* on an individual’s civil liberties and the First Amendment.
3. Compare and contrast the goals of Schenck’s pamphlet with those of the Espionage Act and the Patriot Act.
4. Analyze the content of a political cartoon and its relevance to *Schenck v. United States* as well as its underlying connotations.
5. Analyze the protest against the United States government conscription policies.
6. Explain Schenck’s position on conscription policies.
7. Identify parts of the Espionage Act that Schenck is convicted of violating.

Assessments

Visual – Create a political cartoon that either supports or opposes the Schenck case decision.

Written – Imagine you are a Socialist in the United States working under Charles Schenck. Write a second draft of the pamphlet that is worded so it does not violate the Espionage Act of 1917.

Verbal – Using either the Socratic Seminar approach or debate format, do one of the following:

- a. “argue” the position of each side in the case – Schenck or the Supreme Court.
- b. “argue” the position of pro or con on the limitations of civil liberties as addressed in the First Amendment during peacetime and war.

Schenck v. United States

Introduction

America entered World War I in 1917. Upon America's entry into World War I, the government and society experienced significant changes. The power of the United States government expanded in order to provide the support necessary for the war abroad. President Woodrow Wilson emphasized the importance of the American society's support of the War in Europe. In a speech given on April 15, 1917, Wilson stated, "The supreme test of the nation has come. We must all speak, act, or serve together."¹ In order to provide the manpower necessary for this support, the United States created a conscription system. Over the course of the American involvement in World War I, 24 million men between the ages of 18 and 45 years old registered for the draft. Of those 24 million, 2.5 million were drafted. In addition, the United States passed the Espionage Act in 1917 with the purpose of enforcing American support of the war on the home front. The law made it illegal to "obstruct the recruiting or enlistment service" in the United States.²

Many people in America protested the conscription system. Charles Schenck, the General Secretary of the American Socialist party, disagreed with the draft system. He helped create a pamphlet that was designed to be sent to men who had been drafted. Soon after the creation of the pamphlet, Charles Schenck was arrested for violating the Espionage Act of 1917. Schenck argued that his actions were allowed in the United States, due to the right of freedom of speech as guaranteed by the First Amendment. The Supreme Court upheld his conviction as the decision cited certain limitations of Americans' freedom of speech.

¹ FirstWorldWar.Com. "Do Your Bit For America, 15 April 1917." Primary Documents.
<http://www.firstworldwar.com/source/doyourbit.htm>.

² FirstWorldWar.Com. "U.S. Espionage Act, 15 June 1917." Primary Documents.
<http://www.firstworldwar.com/source/espionageact.htm>.

Document One

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

Source:

Cornell University Law School. "United States Constitution." Legal Information Institute.
<http://www.law.cornell.edu/constitution/constitution.billofrights.html>.

QUESTIONS

1. Identify the five freedoms in the First Amendment. In the Amendment, do you think one freedom stands out as the most important freedom? Defend your answer!
2. In the modern American society, which freedom do you think is the most valued?
3. What should the concept of freedom of speech include?
4. Should some speech be excluded from the protections in the First Amendment? Why? Why not? Explain!
5. Should the concept of freedom of speech change over time? Explain your answer.
6. Is the First Amendment violated when Congress makes a law that punishes dissent in wartime?

Document Two

The Espionage Act of June 15, 1917, c. 30 §3, 40 Stat. 217, 219

Section 3

Whoever, when the United States is at war, shall willfully make or convey false reports of false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and 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, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

Source:

FirstWorldWar.Com. "U.S. Espionage Act, 15 June 1917." Primary Documents.

<http://www.firstworldwar.com/source/espionageact.htm>.

QUESTIONS

1. In a court of law, which part of the Act might be the hardest to prove? Why?
2. What changes would you make to the Espionage Act? Why?
3. Currently, the United States is at war in Afghanistan. Do you believe a similar act is needed? Why or why not?
4. Explore the position of an anti-war organization in 2009. Would their actions, pamphlets, or statements be in violation of this section of the Espionage Act of 1917? Why or why not?
5. View a copy of the Patriot Act of 2001 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf). Identify one similarity and one difference.

Document 3

The World War One Draft – Reporting of the First Draft Lottery – 1917



The Secretary of War, Mr. Baker draws the first number in the World War I Draft

Original Source:

The Washington Post, Saturday, July 21, 1917, Pages 1-2.

The Gjønvik-Gjenvick Archives. "The World War One Draft - Reporting of the First Draft Lottery – 1917."

The Draft - Calling the First Number.

<http://www.gjenvick.com/WorldWarOne/1917-07-20-Draft-DrawingTheFirstNumber.html>.

QUESTIONS

1. Describe the draft process for World War One as it is depicted in this photograph.
2. Explain why the draft process elicited such a strong protest in the United States.
3. How does this depiction of the draft process compare to Schenck's opinion on the draft process (see document 5).
4. After looking at this photograph, do you believe Schenck is justified in his protest of the World War One draft? Why or why not?

Document 4



"Conscription"

Original Source:

"Conscription", cartoon, Glintenkamp, H.J., *The Masses*, Aug. 1917.

Linder, Doug. "The 'Clear and Present Danger Test.'" Exploring Constitutional Conflicts.

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/clear&pdanger.htm>.

QUESTIONS

1. Describe the images found within this political cartoon.
2. What image and connotations would make this cartoon so objectionable during the time of World War I?
3. Compare the depiction of the draft in this cartoon to the photograph in Doc. 3. Explain the differences.
4. Would this cartoon have the same impact today as it did during the time of *Schenck v. United States*? Why or why not?

ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the *supreme law of the Land.*"

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article I, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a 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. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.

Remember, "eternal vigilance is the price of liberty."

Down with autocracy!

Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

Document 5

Schenck Pamphlet

Source:

<http://1stam.umn.edu> was original source of the pamphlet; however, the organization no longer exists.

A PDF of the pamphlet can be found in a document collection by Bill of Rights Institute.

QUESTIONS

1. Identify by underlining the wording found in Schenck's pamphlet that was seen "to cause insubordinate, disloyalty, mutiny, refusal of duty" towards the United States.
2. Compare and contrast the goals of Schenck's pamphlet with those of the Espionage Act.
3. How do you think that the Supreme Court's decision was influenced by the fact that Charles Schenck was the secretary to the American Socialist party?
4. When, if ever, is it justified for the government to suspend an individual's civil liberties and safety for national safety purposes?
5. Would this pamphlet and its wording be seen in the same viewpoint today as it was seen in 1917?
6. Do you support or oppose reinstating the draft today? Why or why not?

Document 6

HOLMES, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

249 U.S. 47

Schenck v. United States

Argued: January 9, 10, 1919 --- Decided: March 3, 1919

MR. JUSTICE HOLMES delivered the opinion of the court

"...We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, [195 U.S. 194](#), 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, [221 U.S. 418](#), 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. 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. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in § 4, punishes conspiracies to obstruct, as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, [245 U.S. 474](#), 477. Indeed, that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But, as the right to free speech was not referred to specially, we have thought fit to add a few words."

Source:

Cornell University Law School. "Schenck v. United States Affirmed." Supreme Court collection.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0249_0047_ZO.html.

QUESTIONS

1. Explain in your own words, the meaning of "clear and present danger".
2. Identify additional phrases that are important to understanding the logic of Holmes' opinion. Why are they important?
3. According to Justice Holmes, would it matter if the United States was winning or losing the war? Explain.
4. Was there a better solution to preserve America's war making capabilities while maintaining absolute freedom of speech?
5. According to Justice Holmes, if the pamphlet had been printed and not distributed, would Schenck have been in violation of the Act?