

Restrictions on Speech During Wartime
Melanie Harden, Traviss Career Center
Grade 11 American History or Grade 12 American Government

Objective: Students will read four U.S. Supreme Court case abstracts dealing with restrictions on free speech during wartime and will answer the question posed after each in order to try to determine the conclusion of the case.

Curriculum Map: World War I Period (History) or Civil Rights and Liberties (Government)

Sunshine State Standards: SS.A.5.4.3 or SS.C.2.4.3

Materials: First Amendment (in textbook), Schenck v. United States abstract, Abrams v. United States abstract, Gitlow v. United States abstract, and Dennis v. United States abstract, and Response Sheets. A group copy of the Espionage Act of 1917 and the Smith Act of 1940 may also be provided, or students may look them up online. Copies of abstracts should be provided to each student.

Sources: Listed on each document.

Time: 2 45-minute class periods

Terms to Know:

Abridging – lessening, interfering with

Neutral – not allied with or supporting either side in a war or dispute

Draft – to select people for required military service

Sedition – the crime of attempting to overthrow the government by force or to disrupt its lawful activities by violent acts.

Seditious speech – is the advocating or urging of such conduct (sedition). It is not protected by the 1st Amendment.

Insubordination – unwillingness to accept orders from someone in authority

Affirm – to agree or support, as when a higher court agrees with the earlier decision of a lower court

Espionage – spying

Dissenting opinion – written explanation of the views of one or more judges who disagree (dissent from) a decision reached by the majority of the court

Lesson Plan:

1. Pre-teach terms to know.
2. In pairs, students will be given copies of each abstract to read and answer the question together. Note: Before distributing abstracts, cut off the conclusions so students will not see them when answering the questions. Students will use the Response Sheets while reading the abstracts.
3. After each pair has discussed the abstracts and completed the response sheets, distribute the conclusions so students may compare their answers to the court's decisions. Students will then restate the conclusions in their own words on the Response Sheet.
4. Final assessment will be the TAH DBQ titled, "Restrictions on Speech during Wartime."

Schenck v. United States

Docket: 437
Citation: 249 U.S. 47 (1919)
Petitioner: Schenck
Respondent: United States

Case Media

- No media files currently available
- [Written Opinion](#)

Abstract

Oral Argument: Thursday, January 9, 1919
Decision: Monday, March 3, 1919
Categories: first amendment, freedom of speech, freedom of the press, searches and seizures

Advocates

Not available

Facts of the Case

During World War I, Schenck mailed circulars to draftees. The circulars suggested that the draft was a monstrous wrong motivated by the capitalist system. The circulars urged "Do not submit to intimidation" but advised only peaceful action such as petitioning to repeal the Conscription Act. Schenck was charged with conspiracy to violate the Espionage Act by attempting to cause insubordination in the military and to obstruct recruitment.

Question

Are Schenck's actions (words, expression) protected by the free speech clause of the First Amendment?

Conclusion

Holmes, speaking for a unanimous Court, concluded that Schenck is not protected in this situation. The character of every act depends on the circumstances. "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." During wartime, utterances tolerable in peacetime can be punished.

Source: www.oyez.org

"I regret that I cannot put into more impressive words my belief that the defendants have been deprived rights under the Constitution of the United States."
--Justice Holmes, dissenting in *Abrams v United States*

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

Abrams v. United States

Docket: 316
Citation: 250 U.S. 616 (1919)
Petitioner: Abrams
Respondent: United States

Case Media

- No media files currently available
- [Written Opinion](#)

Abstract

Oral Argument: Tuesday, October 21, 1919
Decision: Monday, November 10, 1919
Categories: criminal, first amendment, freedom of speech, freedom of the press

Advocates

Not available

Facts of the Case

The defendants were convicted on the basis of two leaflets they printed and threw from windows of a building. One leaflet signed "revolutionists" denounced the sending of American troops to Russia. The second leaflet, written in Yiddish, denounced the war and US efforts to impede the Russian Revolution. The defendants were charged and convicted for inciting resistance to the war effort and for urging curtailment of production of essential war material. They were sentenced to 20 years in prison.

Question

Do the amendments to the Espionage Act or the application of those amendments in this case violate the free speech clause of the First Amendment?

Conclusion

No and no. The act's amendments are constitutional and the defendants' convictions are affirmed. In Clarke's majority opinion, the leaflets are an appeal to violent revolution, a call for a general strike, and an attempt to curtail production of munitions. The leaflets had a tendency to encourage war resistance and to curtail war production. Holmes and Brandeis dissented on narrow ground: the necessary intent had not been shown. These views were to become a classic libertarian pronouncement.

Source: www.oyez.com

Gitlow v. New York

Docket: 19
Citation: 268 U.S. 652 (1925)
Petitioner: Gitlow
Respondent: New York

Case Media

- No media files currently available
- [Written Opinion](#)

Abstract

Oral Argument: Thursday, April 12, 1923
Oral Reargument: Friday, November 23, 1923
Decision: Monday, June 8, 1925
Categories: criminal, federalism, first amendment, freedom of speech, freedom of the press, incorporation, national security, police power

Advocates

[John Caldwell Myers](#) (Assistant District Attorney of New York County argued the cause for New York)
[Walter H. Pollak](#) (Argued the cause for Gitlow)
[W. J. Weatherbee](#) (Argued the cause for New York)

Facts of the Case

Gitlow, a socialist, was arrested for distributing copies of a "left-wing manifesto" that called for the establishment of socialism through strikes and class action of any form. Gitlow was convicted under a state criminal anarchy law, which punished advocating the overthrow of the government by force. At his trial, Gitlow argued that since there was no resulting action flowing from the manifesto's publication, the statute penalized utterances without propensity to incitement of concrete action. The New York courts had decided that anyone who advocated the doctrine of violent revolution violated the law.

Question

Does the New York law punishing the advocacy of overthrowing the government an unconstitutional violation of the free speech clause of the First Amendment?

Conclusion

Threshold issue: Does the First Amendment apply to the states? Yes, by virtue of the liberty protected by due process that no state shall deny (14th Amendment). On the merits, a state may forbid both speech and publication if they have a tendency to result in action dangerous to public security, even though such utterances create no clear and present danger. The rationale of the majority has sometimes been called the "dangerous tendency" test. The legislature may decide that an entire class of speech is so dangerous that it should be prohibited. Those legislative decisions will be upheld if not unreasonable, and the defendant will be punished even if her speech created no danger at all.

Dennis v. United States

Docket: 336
Citation: 341 U.S. 494 (1951)
Petitioner: Dennis
Respondent: United States

Case Media

- No media files currently available
- [Written Opinion](#)

Abstract

Oral Argument: Friday, December 1, 1950
Decision: Monday, June 4, 1951
Categories: criminal, first amendment, freedom of speech, national security, sedition

Advocates

[George W. Crockett, Jr.](#) (Argued the cause for the petitioners)
[Abraham J. Isserman](#) (Argued the cause for the petitioners)
[Philip H. Perlman](#) (Argued the cause for the United States)
[Harry Sacher](#) (Argued the cause for the petitioners)
[Irving S. Shapiro](#) (Argued the cause for the United States)

Facts of the Case

In 1948, the leaders of the Communist Part of America were arrested and charged with violating provisions of the Smith Act. The Act made it unlawful to knowingly conspire to teach and advocate the overthrow or destruction of the United States government. Party leaders were found guilty and lower courts upheld the conviction.

Question

Did the Smith Act's restrictions on speech violate the First Amendment?

Conclusion

In a 6-to-2 decision, the Court upheld the convictions of the Communist Party leaders and found that the Smith Act did not "inherently" violate the First Amendment. In the plurality opinion, the Court held that there was a distinction between the mere teaching of communist philosophies and active advocacy of those ideas. Such advocacy created a "clear and present danger" that threatened the government. Given the gravity of the consequences of an attempted putsch, the Court held that success or probability of success was not necessary to justify restrictions on the freedom of speech.

Restriction on Speech during Wartime
Response Sheet

Directions: Fill in the blanks with the appropriate information from the abstracts and answer the questions where indicated. When you receive the conclusions, restate them in your own words in the spaces provided.

Case #1 – Schenck v. United States

Petitioner:

Oral Argument Date:

Respondent:

Decision Date:

Advocates (attorneys):

representing petitioner:

representing respondent:

Answer to Question:

Conclusion: (restated in your own words)

Response Sheet contd.

Case #2 - Abrams v. United States

Petitioner:

Oral Argument Date:

Respondent:

Decision Date:

Advocates (attorneys):

representing petitioner:

representing respondent:

Answer to Question:

Conclusion: (restated in your own words)

Response Sheet Contd.

Case #3 – Gitlow v. New York

Petitioner:

Oral Argument Date:

Respondent:

Decision Date:

Advocates (attorneys):

representing petitioner:

representing respondent:

Answer to Question:

Conclusion: (restated in your own words)

Response Sheet contd.

Case #4 – Dennis v. United States

Petitioner:

Oral Argument Date:

Respondent:

Decision Date:

Advocates (attorneys):

representing petitioner:

representing respondent:

Answer to Question:

Conclusion: (restated in your own words)