

Silenced on the Home Front: Espionage, Sedition, and a Clear-and-Present Danger during World War I

by David Riesenfeld

LESSON OVERVIEW

This unit is one of the Gilder Lehrman Institute’s Teaching Literacy through History™ resources, designed to align to the Common Core State Standards. These units were developed to enable students to understand, summarize, and evaluate original source materials of historical significance. Through a step-by-step process, students will acquire the skills to analyze, assess, and develop knowledgeable and well-reasoned viewpoints on primary sources.

This lesson will push students to read, write, and think deeply about the impact of the Espionage Act and landmark Supreme Court cases on the limitation of Americans’ constitutional rights in wartime. Students will take deep dives into the language of the First Amendment of the US Constitution, the Espionage Act, and judicial opinions from Supreme Court decisions in 1919 that established lasting legal precedents.

OBJECTIVES

Students will be able to (“SWBAT”)

- Read, paraphrase, and analyze primary source documents including the Espionage Act of 1918 and landmark Supreme Court cases tied to the clear and present danger doctrine
- Gather and organize evidence from complex text
- Write an evidence-based argument essay focused on the ability of government to limit civil liberties in a time of global conflict

ESSENTIAL QUESTION

How did the Espionage and Sedition Acts impact Americans’ ability to exercise their constitutional rights in wartime?

NUMBER OF CLASS PERIODS: 2 (for a total of about 90 minutes)

GRADE LEVELS: 11 and 12

COMMON CORE STATE STANDARDS

CCSS.ELA-Literacy.RH.11-12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2: Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.5: Analyze in detail how a complex primary source is structured, including how key sentences, paragraphs, and larger portions of the text contribute to the whole.

CCSS.ELA-Literacy.WHST.11-12.1.B: Develop claim(s) and counterclaims fairly and thoroughly, supplying the most relevant data and evidence for each while pointing out the strengths and limitations of both claim(s) and counterclaims in a discipline-appropriate form that anticipates the audience's knowledge level, concerns, values, and possible biases.

CCSS.ELA-Literacy.WHST.11-12.4: Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and structure.

CCSS.ELA-Literacy.WHST.11-12.8: Gather relevant information from multiple authoritative print and digital sources, using advanced searches effectively; assess the strengths and limitations of each source in terms of the specific task, purpose, and audience; integrate information into the text selectively to maintain the flow of ideas, avoiding plagiarism and overreliance on any one source and following a standard format for citation.

HISTORICAL BACKGROUND

During the period of neutrality (1914–1917), Americans could freely voice their opposition to fighting against Germany in World War I. Once the nation was officially at war, however, the government curbed dissent. The 1917 Espionage Act made it a crime to obstruct military recruitment, to encourage mutiny, or to aid the enemy by spreading lies. The 1918 Sedition Act prohibited uttering, writing, or publishing “any abusive or disloyal language” concerning the flag, Constitution, government, or armed forces. Upholding the constitutionality of the Espionage Act in *Schenck v. United States* (1919), the Supreme Court agreed that Congress could curtail speech that created a “clear and present danger.” Writing for the majority, Justice Oliver Wendell Holmes Jr. concluded that “when the nation is at war many things that might be said in time of peace . . . will not be endured so long as men fight.”

Source: Jennifer D. Keene, “World War I,” History Now, The Gilder Lehrman Institute of American History, gilderlehrman.org/history-now/progressive-era-new-era-1900-1929/world-war-i

MATERIALS

- Text #1: The First Amendment, US Constitution. Source: “The Bill of Rights: A Transcription,” *America’s Founding Documents*, National Archives, <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i>
- Text #2: Espionage Act of 1917 (with the Sedition Act provision from 1918). Source: National Archives Catalog, catalog.archives.gov/id/5721240

- Supreme Court Opinions: Text and Questions
 - *Schenck v. United States*, 1919 (Unanimous Majority, Justice Oliver W. Holmes, Jr.). Source: *Schenck v. United States*, Legal Information Institute, Cornell Law School, www.law.cornell.edu/supremecourt/text/249/47
 - *Abrams v. United States*, 1919 (Majority Opinion, Justice John H. Clarke) Source: *Abrams v. United States*, Legal Information Institute, Cornell Law School, www.law.cornell.edu/supremecourt/text/250/616
 - *Abrams v. United States*, 1919 (Dissenting Opinion, Justice Oliver W. Holmes Jr.) Source: *Abrams v. United States*, Legal Information Institute, Cornell Law School, www.law.cornell.edu/supremecourt/text/250/616
 - *Debs v. United States*, 1919 (Unanimous Majority, Justice Oliver W. Holmes Jr.). Source: *Debs v. United States*, Legal Information Institute, Cornell Law School, www.law.cornell.edu/supremecourt/text/249/211
- Case Summaries
 - *Schenck v. United States*. Source: *Oyez*, www.oyez.org/cases/1900-1940/249us47
 - *Abrams v. United States*. Source: *Oyez*, www.oyez.org/cases/1900-1940/250us616
 - *Debs v. United States* Source: *Oyez*, www.oyez.org/cases/1900-1940/249us211
- Exit Assignment

PROCEDURE

Step 1: Read, Respond, Discuss

The First Amendment and the Espionage Act

- Distribute Text #1: The First Amendment and have the students close read it.
- Prompt students to paraphrase the First Amendment in their own words. This paraphrasing can include language from the original document, but should be a rewrite that displays the larger themes embedded within this essential amendment to the US Constitution.
- Then have the students address the second activity. Ask them to list the rights expressed in the amendment. They should articulate the specific rights, not merely repeat the words in the amendment.
- Distribute Text #2: The Espionage Act, 1917. Depending on the abilities of your students, have them read the act independently or share read it. This is done by having the students follow along silently while you begin to read aloud, modeling prosody, inflection, and punctuation. Then ask the class to join in with the reading after a few sentences while you continue to read aloud, still serving as the model for the class. This technique will support struggling readers as well as English language learners (ELL).

Step 2: Jigsaw Activity

Wartime Supreme Court Decisions: Espionage, Sedition, and Clear and Present Danger

- Divide students into four groups. Distribute the reading packet for each group to all members of the group.
 - Group 1: *Schenck v. US* (1919)
 - Group 2: *Abrams v. US* (1919), Majority Opinion
 - Group 3: *Abrams v. US* (1919), Dissenting Opinion
 - Group 4: *Debs v. US* (1919)
- Each group will work together on the readings from their Supreme Court opinion and discuss the answers to the questions. All members will write the final group answer to each question on their own activity sheet.
- Once the groups have completed their readings and questions, create new groups in which each of the four opinions is represented by at least one student.
- Distribute the case summaries to every student.
- Within each group, the students will present the answers to the questions for the case they worked on. As each case is presented, the students will annotate the case summary provided, writing notes on the back of the sheet to inform the essay assignment that follows.

Step 3: Making the Argument

Using the language of the Espionage Act and gathered evidence from US Supreme Court opinions, students will write an essay to assess the justification for the Court’s articulation of the “clear and present danger” from the 1919 decisions, focusing on the question below. They will support their response with evidence from all the readings.

In wartime, does the US government have the unilateral right to abridge the constitutional rights of Americans?

Text #1: The First Amendment to the US Constitution

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: "The Bill of Rights: A Transcription," *America's Founding Documents*, National Archives, <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i>

Questions

Paraphrase the First Amendment in your own words.

What specific rights does the First Amendment articulate? List them here.

Text #2: The Espionage Act of 1917

Section 1: That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or

(b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any other person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or

(d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence

permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be list, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both. . . .

Section 3: Whoever, when the United States is at war, shall willfully make or convey false reports or 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, or 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.

Source: National Archives Catalog, <https://catalog.archives.gov/id/5721240>

Questions

Let the text be the guide for your answers. Address the following questions using solid references from the text selections. Be detailed in your discussions and choose to paraphrase over quoting large portions of text.

1. Paraphrase, in no more than three sentences, Section 1 of the Espionage Act of 1917.

2. What would happen to someone who was convicted of breaking the rules outlined in the Espionage Act?

3. Based on the document and your knowledge of World War I at home and abroad, make three or four educated assessments about why this act was written and authorized by Congress.

Group 1: *Schenck v. United States (1919)*, Unanimous Opinion of the Court

Opinion of the Court delivered by Justice Oliver W. Holmes, Jr.

Schenck Part 1: Text

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

Schenck Part 2: Text

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony, Schenck said he was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer, there was evidence that she was a member of the Executive Board, and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U.S. 585; *Weeks v. United States*, 232 U.S. 383, 395, 396. The search warrant did not issue against the defendant, but against the Socialist headquarters at 1326 Arch Street, and it would seem that the documents technically were not even in the defendants' possession. See *Johnson v. United States*, 228 U.S. 457. Notwithstanding some protest in argument, the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U.S. 245, 252, 253.

Schenck Part 3: Text

. . . in impassioned language, [the document in question] intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on

"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."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

Schenck Part 3: Questions

Let the text be the guide for your answers. Address the following questions using solid references from the text selections. Be detailed in your discussions and choose to paraphrase over quoting large portions of text.

1. Paraphrase the rhetoric of Schenck’s anti-war propaganda in no more than two sentences.
2. Holmes cites a specific influence of said rhetoric on citizens and soldiers during a time of war. What was this and why would it have such impact on a nation at war?
3. How could Schenck’s pamphlets be a “denial” of the nation’s ability to send its citizens overseas to war?
4. How does Justice Holmes address the issue of “intent” with regards to this case? Why would this be important in a discussion of the First Amendment?

Schenck Part 4: Text

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U.S. 454, 462. 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.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are “obstruct the recruiting or enlistment service,” and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment, and would not even if the former act had been repealed. Rev.Stats., § 13.

Schenck Part 4: Questions

Let the text be the guide for your answers. Address the following questions using solid references from the text selections. Be detailed in your discussions and choose to paraphrase over quoting large portions of text.

1. Justice Holmes establishes the clear and present danger doctrine in this portion of the opinion. How does he justify this stance on Schenck’s activity?

2. Upon reading the conclusion of this opinion, is there a difference between speech “during a time of war” and that “during a time of peace”? How does Justice Holmes establish this point?

3. How does Justice Holmes rely on the language of the 1917 Espionage Act to affirm the Court’s ruling?

Group 2: *Abrams v. United States (1919)*, Majority Opinion of the Court

Majority Opinion of the Court delivered by Justice John H. Clarke

Abrams Majority Opinion Part 1: Text

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress (§ 3, Title I, of Act approved June 15, 1917, as amended May 16, 1918, 40 Stat. 553).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: in the first count, “disloyal, scurrilous and abusive language about the form of Government of the United States;” in the second count, language “intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendants conspired, “when the United States was at war with the Imperial German Government, unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to-wit, ordnance and ammunition, necessary and essential to the prosecution of the war.”

The offenses were charged in the language of the act of Congress.

Abrams Majority Opinion Part 2: Text

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and, at the time they were arrested, they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and, of these, three frankly avowed that they were “rebels,” “revolutionists,” “anarchists,” that they did not believe in government in any form, and they declared that they had no interest whatever in the Government of the United States. The fourth defendant testified that he was a “socialist,” and believed in “a proper kind of government, not capitalistic,” but, in his classification, the Government of the United States was “capitalistic.”

It was admitted on the trial that the defendants had united to print and distribute the described circulars, and that five thousand of them had been printed and distributed about the 22nd day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded “not guilty,” and the case of the Government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled “Revolutionists Unite for Action,” written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus, the conspiracy and the doing of the overt acts charged were largely admitted, and were fully established.

Abrams Majority Opinion Part 3: Text

On the record thus described, it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment.

This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and *Baer v. United States*, 249 U.S. 47, and in *Frohwerk v. United States*, 249 U.S. 204.

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in this record to support the judgment upon the verdict of guilty, and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Troxell v. Delaware, Lackawanna & Western R.R. Co.*, 227 U.S. 434, 442; *Lancaster v. Collins*, 115 U.S. 222, 225; *Chicago & Northwestern Ry. Co. v. Ohle*, 117 U.S. 123, 129. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain anyone of the counts. *Evans v. United States*, 153 U.S. 608; *Claassen v. United States*, 142 U.S. 140; *Debs v. United States*, 249 U.S. 211, 216.

Abrams Majority Opinion Part 4: Text

. . . It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans, and not to work in ammunition factories where their work would produce “bullets, bayonets, cannon” and other munitions of war the use of which would cause the “murder” of Germans and Russians. . . .

. . . That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: “Revolutionists! Unite for Action!”

Abrams Majority Opinion Part 5: Text

After denouncing the President as “Our Kaiser” and the hypocrisy of the United States and her Allies, this article concludes:

“Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations, *Unite for action*, and let us save the Workers’ Republic of Russia,

“Know you lovers of freedom that, in order to save the Russian revolution, we must keep the armies of the allied countries busy at home.”

Thus was again avowed the purpose to throw the country into a state of revolution if possible, and to thereby frustrate the military program of the Government.

The remaining article, after denouncing the resident for what is characterized as hostility to the Russian revolution, continues:

“We, the toilers of America, who believe in real liberty, shall pledge ourselves, in case the United States will participate in that bloody conspiracy against Russia, to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.”

It concludes with this definite threat of armed rebellion:

“If they will use arms against the Russian people to enforce their standard of order, so will we use arms, and they shall never see the ruin of the Russian Revolution.”

These excerpts sufficiently show that, while the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government’s sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing, and, if possible, defeating the military plans of the Government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the

purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus, it is clear not only that some evidence, but that much persuasive evidence, was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment, and, under the long established rule of law hereinbefore stated, the judgment of the District Court must be *Affirmed*.

Group 3: *Abrams v. United States (1919), Dissenting Opinion of the Court (Excerpts)*

Dissenting Opinion of the Court delivered by Justice Oliver W. Holmes

Abrams Dissenting Opinion Part 1: Text

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war, and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet, to which I have referred.

The first of these leaflets says that the President’s cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that “German militarism combined with allied capitalism to crush the Russian evolution”—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it, and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world, and that is capitalism; that it is a crime for workers of America, &c., to fight the workers’ republic of Russia, and ends “Awake! Awake, you Workers of the World, Revolutionists!” . . .

No argument seems to me necessary to show that these pronouncements in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that, it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917. But to make the conduct criminal, that statute requires that it should be “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.” It seems to me that no such intent is proved.

Abrams Dissenting Opinion Part 2: Text

I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech.

Abrams Dissenting Opinion Part 2: Questions

Let the text be the guide for your answers. Address the following questions using solid references from the text selections. Be detailed in your discussions and choose to paraphrase over quoting large portions of text.

1. How does Justice Holmes address the issues of intent and liability?
2. What does Justice Holmes write about the notion of words versus deeds?
3. Is the First Amendment an appropriate reference at this point in his argument? Why/why not?

Abrams Dissenting Opinion Part 3: Text

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs*, 249 U.S. 47, 204, 211, were rightly decided. I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger, and, at any rate, would have the quality of an attempt. So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U.S. 375, 396. It is necessary where the success of the attempt depends upon others because, if that intent is not present, the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases, taken literally, might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that, in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described, and, for the reasons that I have given, I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase. . . .

Abrams Dissenting Opinion Part 4: Text

. . . Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.” Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

MR. JUSTICE BRANDEIS concurs with the foregoing opinion.

Group 4: *Debs v. United States (1919)*, Unanimous Opinion of the Court

Opinion of the Court delivered by Justice Oliver W. Holmes, Jr.

Debs Part 1: Text

This is an indictment under the Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, as amended by the Act of May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). It has been cut down to two counts, originally the third and fourth. The former of these alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech, set forth. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that intent delivered the same speech, again set forth. There was a demurrer to the indictment on the ground that the statute is unconstitutional as interfering with free speech, contrary to the First Amendment, and to the several counts as insufficiently stating the supposed offence. This was overruled, subject to exception. There were other exceptions to the admission of evidence with which we shall deal. The defendant was found guilty and was sentenced to ten years' imprisonment on each of the two counts, the punishment to run concurrently on both.

The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class—these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. *Ruthenberg v. United States*, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.

Debs Part 1: Questions

1. What were the specific counts of the indictments in the *Debs* case?
2. How did Justice Holmes address the power of the First Amendment in this case?
3. What was the content of Debs' speech? Why would this be an issue with regards to the Espionage Act?

Debs Part 2: Text

After considerable discourse that it is unnecessary to follow, he [Debs] took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to Socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court. We mention this passage simply for its connection with evidence put in at the trial. The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and never yet had a voice in declaring peace. "You have your lives to lose; you certainly ought to have the right to declare war if you consider a war necessary." The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

There followed personal experiences and illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that "you need to know that you are fit for something better than slavery and cannon fodder." The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, &c., with the implication running through it all that the working men are not concerned in the war, and a final exhortation, "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves." The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said, "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

Debs Part 2: Questions

1. Justice Holmes discusses Debs' speech to the court and cites a series of examples that could exonerate him. What are these examples and how do they apply to the issue at the center of this case?

2. How does Justice Holmes introduce the idea of intent?

Debs Part 3: Text

The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470. His counsel questioned the sufficiency of the indictment. It is sufficient in form. *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. The most important question that remains is raised by the admission in evidence of the record of the conviction of Ruthenberg, Wagenknecht and Baker, Rose Pastor Stokes, and Kate Richards O’Hare. The defendant purported to understand the grounds on which these persons were imprisoned and it was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address, so far as the present matter is concerned.

There was introduced also an “Anti-War Proclamation and Program” adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. The defendant referred to it in his address to the jury, seemingly with satisfaction and willingness that it should be considered in evidence. But his counsel objected and has argued against its admissibility at some length. This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it “was instigated by the predatory capitalists in the United States.” It alleged that the war of the United States against Germany could not “be justified even on the plea that it is a war in defence of American rights or American honor.” It said: “We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.”

Debs Part 3: Questions

1. Why does Justice Holmes reference the *Schenck* decision? What other precedent is deemed important to this ruling?
2. How does the court deal with the idea of something being “anti-war” in nature? Why would Debs’ counsel want to ensure that these kinds of statements remained inadmissible in court?
3. Specifically, how did Debs “speak out” against US involvement in World War I?

Debs Part 4: Text

Its [Debs's pamphlet] first recommendation was, "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.

Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained. Therefore it is less important to consider whether that upon the third count, for causing and attempting to cause insubordination, &c., in the military and naval forces, is equally impregnable. The jury were instructed that for the purposes of the statute the persons designated by the Act of May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a-2044k), registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States. The Government presents a strong argument from the history of the statutes that the instruction was correct and in accordance with established legislative usage. We see no sufficient reason for differing from the conclusion but think it unnecessary to discuss the question in detail.

Judgment affirmed.

Case Summary: *Schenck v. United States* (1919)

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

Decision: 9 votes for United States, 0 vote(s) against
Legal provision: 1917 Espionage Act; US Const Amend 1

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: Oyez, www.oyez.org/cases/1900-1940/249us47

Case Summary: *Abrams v. United States* (1919)

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: *Oyez*, www.oyez.org/cases/1900-1940/250us616

Case Summary: *Debs v. United States* (1919)

Facts of the Case

The Espionage Act of 1917 made it a crime to “convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.” This had the effect of constraining sedition and political speech. On June 16, 1918, Eugene V. Debs, a leader of the Socialist Party of America, gave a speech in Canton, Ohio protesting involvement in World War I. During the speech, he discussed the rise of socialism and specifically praised individuals who had refused to serve in the military and obstructed military recruiting. For his speech, Debs was arrested and charged with violating the Espionage Act. At trial, Debs argued the Espionage Act violated his right to free speech under the First Amendment. A federal district court rejected his claim and sentenced Debs to ten years in prison.

Question

Did Debs’ conviction under the Espionage Act of 1917 violate his First Amendment rights to freedom of speech?

Conclusion

No. In a unanimous opinion authored by Justice Oliver Wendell Holmes, the Court found that Debs’ case was clearly similar to *Schenck v. United States* (1919). In *Schenck*, the Court had concluded that the arrest of an individual for distributing leaflets encouraging readers to oppose the draft was constitutional. The Court found Debs’ sympathy for individuals convicted of opposing the draft and obstructing recruitment analogous to the situation in *Schenck*. Thus, Debs’ conviction was upheld.

Source: Oyez, www.oyez.org/cases/1900-1940/249us211

Exit Assignment

Using the texts read (the First Amendment, the Espionage Act, and the Supreme Court decisions), the evidence gathered, and what we know about the historical context of the time, develop and write a short essay of no more than 1 page. Use specific textual evidence gathered through your investigation of your specific text and the summaries provided of the other cases. Remember, citing evidence is not merely quoting text!

In wartime, does the US government have the unilateral right to abridge the constitutional rights of Americans?