

## Freedom of Speech in a Time of War Writing Exercise

In 1917, the US Congress passed the Espionage Act, which made much speech critical of the First World War illegal. Your assignment is to consider whether you would support such a law today or in the future.

The question: *Should our government, in times of war, be able to stop citizens from criticizing the government, the government's war policies, or the war itself?*

### Task I: Preparing to write.

1. Write a single sentence in which you give your answer to the question above.
  - ✓ Do not use the word "I."
  - ✓ Your sentence should be a statement, not a question.
  - ✓ Your sentence should give a clear answer, not rephrase the question or give "both sides."
2. List 2 Core Democratic Values that you could use to support the answer you gave for #1. In a single sentence for each CDV, explain how that CDV would support your answer.
  - ✓ CDVs are listed on the bulletin board in front of the room.
  - ✓ You may use other examples of CDVs not listed.
3. List two facts from the information we've discussed about the WWI time period that would support your answer (#1). In a single sentence for each fact, explain how that fact supports your answer.
  - ✓ Think about what we have discussed about WWI.
  - ✓ Use your book to find ideas.
4. List two facts from the present day that you could use to support your answer (#1). In a single sentence for each fact, explain how that fact supports your answer.
  - ✓ Think about what is happening in the world today.
5. In a single sentence, write what someone who disagrees with you might say in their answer to the question above. List one CDV, one fact from the WWI time period, and one fact from the present day that they could use to support their answer.
  - ✓ Write the sentence for this part as you think a person who disagrees with you would write it.

## Primary Source Reading 9-1 ★ ★ ★ ★ ★ ★

**Holmes on the Espionage Act****▣ About the Selection**

In 1918 five Russian immigrants were sentenced to 20 years in prison under the Espionage Act. They had distributed leaflets opposing the sending of American troops to Russia and calling for workers to strike rather than to make weapons that could be used against the Russian people. The five also argued that sending troops to Russia would not aid the war against Germany but would threaten the revolutionary struggle within Russia. The Supreme Court upheld their conviction by

**Reader's Dictionary****surreptitious:** secret

a vote of seven to two—Oliver Wendell Holmes and Louis Brandeis dissenting. This excerpt presents part of Holmes's dissent.

**GUIDED READING**

As you read, note under what conditions Justice Holmes says that free speech may be restricted by law. Then answer the questions that follow.

**T**he 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 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 causes of the government arms. . . .

I do not know how anyone can find the intent required by the statute in any of the defendants' words. . . . 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 is carrying on.

I return for the moment to the third count. That count charges an intent to provoke resistance to the United States in its war with Germany. . . . I think that resistance to the United States means some forcible act of opposition. . . .

Source: *An American Primer*. Chicago: The University of Chicago Press, 1966.

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Primary Source Reading **9-1** (continued) ★ ★ ★ ★ ★

**READER RESPONSE**

**Directions:** Answer the following questions on the lines below.

1. According to Holmes, under what conditions may the United States constitutionally restrict speech?

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2. Why does Holmes say that the power to restrict speech is greater during wartime?

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3. Does Holmes believe that the Congress legitimately has the power to restrict speech under wartime danger more than any other danger? Explain.

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4. **Critical Thinking** Why does Holmes believe that there was not sufficient intent to find the defendants guilty?

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# Supreme Court Case Study 19



## Wartime Freedom of Speech

### *Schenck v. United States, 1919*

#### \*\*\*\*\* Background of the Case \*\*\*\*\*

The freedom of speech guarantee of the First Amendment was not tested in the Supreme Court for more than 100 years after the adoption of the Constitution, despite the number of federal and state laws that placed limits on free speech during that period. When the United States entered World War I in 1917, the federal government felt that it had to protect itself against efforts to influence people to oppose the war. Therefore, it passed the Espionage Act, which made it a crime to cause or attempt to cause insubordination in the armed forces, obstruct recruitment or enlistment, and otherwise urge, incite, or advocate obstruction or resistance to the war effort.

Charles Schenck, who was general secretary of the Socialist Party in the United States, carried on a campaign encouraging young men to resist the wartime draft. He mailed thousands of circulars to men who had passed exemption boards and to men who had been drafted. In the circulars he declared that the draft was unconstitutional despotism and urged the men to assert their rights to resist the draft. Further, he claimed that the Thirteenth Amendment, which banned involuntary servitude except as punishment for committing a crime, was violated by the conscription act and that a conscript was little better than a convict. The circular declared, "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." He described arguments in favor of the draft as coming from cunning politicians and a mercenary capitalist press. For these actions Schenck was convicted of conspiracy to violate the Espionage Act by attempting to obstruct the recruitment of men into the United States's armed forces. Schenck challenged his conviction on the grounds that his First Amendment rights had been violated.

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#### *Constitutional Issue* \*\*\*\*\*

The Court had to decide whether Schenck had been properly convicted and whether the Espionage Act was constitutional in the light of the free speech guarantees of the First Amendment. Was such a broad limitation on the right of free speech as the Espionage Act allowed a violation of the First Amendment? Or was the fact that the Espionage Act was designed to protect the nation's war effort a sufficient enough reason for the Supreme Court to reject Schenck's First Amendment defense?

#### \*\*\*\*\* The Supreme Court's Decision \*\*\*\*\*

The Court ruled unanimously that the Espionage Act was constitutional and affirmed that Schenck was guilty of having violated the act. Justice Oliver Wendell Holmes, Jr., wrote the Court's opinion. The opinion was based on the idea that the First Amendment guarantees are not absolute and must be considered in the light of the setting in which supposed violations occur. Holmes wrote, "We admit that in many places and in ordinary times the defendants in

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## Supreme Court Case Study 19 (continued)

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. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” Holmes then enunciated a principle that he felt defined the true scope of the First Amendment as it applied to political expression. “The question in every case,” Holmes wrote, “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.”

The *Schenck* case clarified some limitations on free speech and supported the notion that the rights of the people are not absolute but must be balanced with national interests that are judged to be essential.



### Questions



**DIRECTIONS:** Answer the following questions on a separate sheet of paper.

1. Why was the Espionage Act passed?
2. Explain the clear and present danger principle that Justice Holmes enunciated in the *Schenck* decision.
3. According to Holmes, what factor made Schenck’s actions, which at other times would have been protected by the First Amendment, illegal at the time he performed them?
4. How far do you think the government should go in trying to protect itself against threats to its policies in times of war?
5. Eight months after the *Schenck* decision, the Court again applied the clear and present danger principle. Holmes dissented in that case, stating that unlike the *Schenck* case, actions of the convicted man in the second case had little or no effect on the nation’s war effort. What do you think this reveals about Holmes’s attitude toward free speech guarantees?