Schenck v. United States / Excerpts from Unanimous Opinion

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917 … by causing and attempting to cause insubordination 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. [The] defendant 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. The second count alleges a conspiracy to commit an offense against the United States, to use the mails for the transmission of matter declared to be non-mailable by title 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. The defendants were found guilty on all the counts.

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.

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 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

Questions to Consider

1. How does the Court explain the original charges against Schenck (the three "counts")?

2. The Court said that the Espionage Act allowed restricted speech in a time of war. What wartime concerns did Schenck's activities impact?

3. Why did the Court decide words that present a "clear and present danger" should be unprotected speech during wartime?

4. On the basis of this decision, what did people who were critical of the government and war have to consider before they shared their opinions?

5. Do you agree Schenck's mailing presented "a clear and present danger" to the country? Why or why not?

6. What types of speech if any do you believe should be restricted during wartime? Why?