

FREE SPEECH TRIAL ACTIVITY

- 1.) Each person should be judge, prosecutor, or defense lawyer once. (you should be each of these roles on different cases)
- 2.) Pick a case, pick roles, read the case, and begin writing down arguments based 1st Amendments issues from your notes and reading (chpt. 19 Sec. 3; Look at pgs. 546-549). Also fill out the case summary section on the Speech Case Matrix for the cases that you are Prosecution and Defense. Use the Free Speech Case Matrix
- 3.) Begin arguing case. Prosecution starts and gets 3 minutes to summarize case and argue points. Defense then gets 3minutes to summarize and make points.
- 4.) Judge take notes on the Free Speech Case Matrix while case is argued. Judge should then make a decision and write down why the decision was made based 1st Amendment issues.
- 5.) We're aiming to complete 3 cases; I will collect this at the end of the activity.

CASE:	
<u>Prosecution</u>	<u>Defense</u>
1	1
2	2
3	3
<u>Judge's Decision</u>	
1	
2	
3	

	Case Basics	Petitioner	Respndent	Verdict/ Why?
<i>Tinker v Des Moines</i>				
<i>Schenck v US</i>				
<i>Texas v Johnson</i>				

Schenck v. United States

Historical Background

A major effort to promote national unity accompanied America's involvement (1917-1919) in World War I. As a part of this effort, Congress enacted a number of laws severely restricting 1st Amendment freedoms to curb antiwar dissent. In 1917, Congress passed the Espionage Act, which set stiff penalties for uttering and circulating "false" statements intended to interfere with the war effort. Any efforts to cause unrest in the military forces or to interfere with the draft was forbidden. In 1918, the Congress passed a Sedition Act- the first such act in 120 years- which made it a crime to interfere with the sale of government securities (war bonds) and also prohibiting saying or publishing anything disrespectful to the government of the United States.

The Committee on Public Information, a collection of leading of leading writers and journalists, effectively functioned as a propaganda arm of the government, distributing some 75 million pieces of literature on behalf of the war effort from 1917 to 1919. But the strict conformity demanded by the government in wartime invited an element of hysteria. Dissenters were often forcibly silenced and jailed for their views. Among the best-organized organs of dissent against the war was the Socialist Party of America. Its leader, Eugene V. Debs, was sentenced to 10 years in prison for his statements that while the "master classes" caused the war, the "subject classes" would have to fight it. A Butte, Montana, mob dragged antiwar labor-organizer Frank Little thorough the streets before they hung him from a railroad trestle. In Washington, the House of Representatives refused to allow Milwaukee representative Victor Berger, a Socialist elected in 1918, to take his seat, despite his service in that chamber from 1911 to 1913. Berger, too, had been jailed for his antiwar views.

Charles Schenck was the general secretary of the Socialist Party of America. As noted, Socialists believed that the war had been caused by and would benefit only the rich, while causing suffering and death for the thousands of poor and working-class soldiers who would do the actual fighting in Europe. Party officials not only opposed the war, they urged American workers to oppose the war as well.

Schenck participated in many antiwar activities in violation of the Espionage Act, including the mailing of 15,000-20,000 leaflets urging draftees and soldiers to resist the draft. He was arrested and charged with "attempting to cause insubordination in the military and naval forces of the United States" and with disturbing the draft. He was arrested, tried, convicted, and sentenced to prison for violating the Espionage Act of 1917, and he appealed his case to the Supreme Court.

During World War I, Congress enacted carious measures to protest the United States against internal opposition that might endanger the war effort. One of these laws was teh Espionage Act of 1917:

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 with the operation or success of the military or naval forces of the United States. . . 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 . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years, or both.

Tinker v. Des Moines Independent Community School District 399 U.S. 503 (1969)

The Facts

In December, 1965, a group of adults and students decided to publicize their opposition to the Vietnam conflict by wearing black armbands during the holiday season and by fasting December 16 and New Year's Eve. Several of the students present had engaged in similar activities in the past, and they decided to participate in this activity. The principals of the Des Moines schools heard about the plan and, on December 14, adopted a policy that forbade the wearing of an armband to school. Students who refused to remove such armbands would be suspended until they complied.

On December 16, several students who knew about the regulation wore armbands to school: Paul Tinker, 8 years old and in the second grade, Hope Tinker, 11 years old and in the fifth grade, Mary Beth Tinker, 13 years old and in junior high school, and Christopher Eckhardt, a 15-year-old high school student. The following day, John Tinker, a 15-year-old high school student, wore his armband to school. The students were suspended and were told not to return to school unless they removed their armbands. They stayed away from school until after New Year's Day, when the planned period for wearing the armbands had expired.

Several incidents took place on the day the students wore the bands. There were comments and warnings by other students, some poking fun at them and an older football player warned other students they had better let the protestors alone. The suspended students, through their fathers, filed a complaint with the United States District Court, asking for an injunction ordering the school officials not to punish them. In addition, they sought nominal damages—a small or token sum of money, usually \$1.00, to show that legal injury has been suffered.

The Arguments

Plaintiff: In a criminal case, proof is necessary beyond a reasonable doubt, but since this was a civil proceeding, the attorneys for the Tinker children only had to prove by a fair preponderance of the evidence that their side was right.

The plaintiffs argued, in the first place, that the wearing of armbands was the equivalent of speech and was thus protected by the First and Fourteenth Amendments. The First Amendment prohibits Congress from abridging freedom of speech, and the Supreme Court has expanded this prohibition to states under the Due Process Clause of the Fourteenth Amendment ("No State shall ... deprive any person of life, liberty, or property, without due process of law..." by interpreting liberty' to encompass the fundamental rights guaranteed by the First Amendment.

The second line of argument was that the action of the school authorities was capricious, arbitrary, and unreasonable because it simply singled out one form of expression—the black armband—rather than prohibiting the wearing of all controversial insignia. Furthermore, the administrators had permitted the wearing of political campaign buttons, and even the Iron Cross, in the schools. The action of the school authorities would have been understandable if they could show that trouble might ensue in the school. However, the school system did not have a history of disruptions and, in any event, a few armbands in a school system of 18,000 students, the plaintiffs argued, did not warrant the action of the school administrators.

Defense: The defendants responded with equally effective arguments. Amendment X of the Constitution vests the states with power over the educational system. Acting in the name of the state and with the powers vested in them, school authorities have the responsibility to take measures to protect the health, welfare, and safety of the students under their supervision. The school regulation against black armbands was necessary to preserve discipline in the school. The Vietnam War was a divisive conflict marked by public protest meetings, draft card burnings, and a march on Washington. A former student of one of the high schools had been killed in Vietnam and some of his friends might have reacted strongly to the wearers of armbands. Students at one of the schools had been heard to say that if black armbands were permitted, they would wear armbands of another color. The situation seemed rife with rumors of trouble and the school administrators were best qualified to judge the situation. The regulation against the black armbands had been necessary to maintain discipline in the school and to prevent any interference with learning.

Texas V. Johnson (1989)

Gregory Lee Johnson participated in a political demonstration during the Republican National Convention in Dallas, Texas, in 1984. The purpose of the demonstration was to protest policies of the Reagan Administration and of certain corporations based in Dallas. Demonstrators marched through the streets, chanted slogans, and held protests outside the offices of several corporations. At one point, another demonstrator handed Johnson an American flag.

When the demonstrators reached Dallas City Hall, Johnson doused the flag with kerosene and set it on fire. During the burning of the flag, the demonstrators shouted, "America, the red, white, and blue, we spit on you." No one was hurt or threatened with injury, but some witnesses to the flag burning said they were seriously offended. One witness picked up the flag's charred remains and buried them in his backyard.

Johnson was charged with the desecration of a venerated object, in violation of the Texas Penal Code. He was convicted, sentenced to one year in prison, and fined \$2,000. He appealed his conviction to the Court of Appeals for the Fifth District of Texas, which let his conviction stand. He then appealed to the Texas Court of Criminal Appeals, which is the highest court in Texas that hears criminal cases. That court overturned his conviction, saying that the State could not punish Johnson for burning the flag because it was a form of protected symbolic speech under the First Amendment.

The State had asserted that its interests outweighed Johnson's symbolic speech rights, because it wanted to preserve the flag as a symbol of national unity, and because it wanted to prevent breaches of the peace. The appeals court held that neither of these State interests could be used to justify Johnson's conviction.

The court said, "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms . . . a government cannot mandate by fiat a feeling of unity in its citizens. Therefore that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol. . . ." The court also concluded that the flag burning in this case did not cause or threaten to cause a breach of the peace.

The State of Texas filed a petition for a *writ of certiorari* and, in 1988, the Supreme Court of the United States agreed to hear the case. In 1989, the Court handed down its decision.