**Schenck v. United States (249 U.S. 47, 1919)**   
Freedom of Speech  
  
  
**The Issue**  
Is the First Amendment violated when Congress makes a law that punishes dissent in wartime?

**Facts and Background**  
When America entered World War I in 1917, Congress passed a law called the Espionage Act. The law said that during wartime obstructing the draft and trying to make soldiers disloyal or disobedient were crimes. Almost 2,000 people were accused of violating this law and were put on trial.

Charles Schenck was against the war. He mailed thousands of pamphlets to men who had been drafted into the armed forces. These pamphlets said that the government had no right to send American citizens to other countries to kill people.

The government accused Schenck of violating the Espionage Act. It said that Schenck's pamphlets were intended to weaken the loyalty of soldiers and to obstruct military recruiting. Schenck answered by saying that the Espionage Act was unconstitutional. He said that it broke the First Amendment's promise the "Congress shall make no law…abridging the freedom of speech." After working its way through the federal courts, the case was judged by the Supreme Court in 1919.

**The Decision**  
Justice Oliver Wendell Holmes wrote the decision for the unanimous Supreme Court. It upheld (supported) Schenck's conviction, saying that it did not violate his First Amendment right to free speech.

Justice Holmes admitted that "in many places and in ordinary times" Schenck would have had a right to say everything that he said in his pamphlets. However, he said that how far a person's freedom of speech extends depends on the circumstances. "The most stringent protection of free speech," he said, "would not protect a man in falsely shouting fire in a theatre and causing a panic." Justice Holmes compared that circumstance to living in a nation at war. "When a nation is at war," he said, "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." During war, he thought, the government certainly has the power to prevent obstructions to recruitment. Therefore, it also has the power to punish someone who uses words that are proven to cause such obstructions. "The question in every case," said Holmes, "is whether the words 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."

**The Impact of the Decision**  
Justice Holmes's decision expresses what is called the "clear and present danger test." This test has been used in many other cases. A famous lower court judge named Learned Hand once said that whenever the government claims that someone's speech poses a danger, judges must consider both the seriousness of the danger and the likelihood of it actually happening. For instance, suppose someone makes a speech calling the government a dictatorship and hinting that revolution would be a good idea. Overthrow is the most serious evil that can happen to the government. But that person may not be punished for his words unless they really do make this danger likely.

A number of judges have disapproved of the clear and present danger test. Some complained that the test made the decision about when speech may be limited "a matter of degree." Each case could result in a contradictory decision!

The most well-known opponent of the clear and present danger test was the late Justice Hugo Black. He objected to the very idea that the First Amendment's promises of freedom could be "balanced" against other governmental goals (such as wanting to prevent obstructions to recruiting soldiers). He thought that this balancing view of free speech destroyed freedom. Instead he proposed another approach to the First Amendment, called the absolutist view of free speech. People who support this view believe that the promise of freedom means that speakers may never be punished for what they say. They may, however, be punished for the place, time, or way in which they say it. So someone might be charged with disturbing the peace for using a loudspeaker to broadcast a speech at 4:00 in the morning, but the speaker would face no charges for the substance [content] of the speech.

**Find Out**  
1. Explain the balancing view of the First Amendment and the absolutist view of the First Amendment in your own words.

2. If the Supreme Court had taken an absolutist view of the First Amendment, could it still have upheld Schenck's conviction? Explain your answer.

3. Choose between the balancing view and the absolutist view of the First Amendment. Use your imagination to defend the view you choose against the criticisms that would be made by those who choose the other view.