

Recitation 03 - Mission of the American Press

OBJECTIVE

Engage students in a debate over the First Amendment. We suggest one of two options:

1. SWIFT banking story: Was it Treasonous or was it Protected?
2. Is WikiLeaks Espionage or Watchdogery?

In recent semesters, some professors and instructors have begun to use the WikiLeaks/Bradley Manning/Julian Assange material. We caution that framing is important to keep the debate focused on First Amendment/National Security issues. Best way is probably to focus the debate on the decisions of newspapers that used WikiLeaks materials. Are THEY guilty of treason or espionage?

Organization

1. Take attendance
2. Blackboard problems?
3. Remind students that they are required to follow the news and participate in the online discussions.
4. News quiz

Recap Lecture

Emphasize the doctrine the No Prior Restraint and historic examples cited in lecture. A little provocation is in order: testing the boundaries of students' belief in free speech vs. government trustworthiness.

The recitation is an opportunity to drive home the lecture's intended outcomes, which are:

1. Identify the five freedoms in the First Amendment, and define the 4th Estate
2. Summarize major Supreme Court decisions on press freedom (esp. *Near v. Minnesota* and the Pentagon Papers case)
3. Apply the law's limits on press freedom in a series of hypothetical and real-world situations (requires clear understanding of no prior restraint)
4. Explain what remedies are available to someone who feels wronged by a publisher or a broadcaster
5. Describe specific situations in which freedom of the press conflicts with other constitutional rights

Class Discussion: Limits to the First Amendment

This is one of the livelier exercises, but it can be approached in a variety of ways:

1. Divide the class in half, have them deliberate with their groups and then debate each other.
2. Appoint a group of “jurors” that will reach a verdict after the prosecution and defense have their say. (Since the jurors might feel out of the loop, it’s a good idea with this option for the instructor to circulate among the jurors, talk to them about where their sympathies lie, challenge their assumptions, see if they’re open to changing their minds.)
3. Three-corners debate (see below)

(Or simply run a class-wide discussion of the issues at work in the story.)

It is up to each individual instructor to gauge the personality of his or her class and figure out which approach would be most suited to the group.

Option 1. The New York Times on Trial: Is the New York Times Guilty of Treason in Publishing the SWIFT Banking Story?

The Times on Trial:

- Frame the issues and the charge
- Discuss Espionage Act of 1917 (see Background Material, below)

The question to be debated: Was the New York Times justified and acting legally when they published information on the Bush administration's SWIFT banking operation?

Here are some basic points on both sides of the debate:

The New York Times was RIGHT

- A check on government
- Public has a right to know
- Freedom of the press is paramount
- Public awareness of issues permits oversight
- Revealed illegal activities by government
- People's privacy violated

The New York Times was WRONG

- Helped the enemy
- National security implications
- Exercised no restraint or poor judgment
- Overstepped authority
- Eroded support for the war and/or President
- Violated laws on espionage or treason

Option 2. WikiLeaks on Trial: Are American Newspapers Guilty of Espionage for Publishing Classified Documents Released by WikiLeaks?

If you choose the WikiLeaks debate, students need to come to class having prepared a list of several arguments in support of and against the New York Times and WikiLeaks. Students should bring four lists to class:

- **List 1:** Five arguments in support of the Times' decision and/or its right to publish the information.
- **List 2:** Five arguments against the Times' decision and/or against its right to

publish the information.

- **List 3:** Five arguments in support of Julian Assange and Wikileaks' decision to provide the information and classified documents to news media outlets.
- **List 4:** Five arguments against Assange and Wikileaks' decision to provide the information and classified documents to news media outlets.

A debate point is a simple statement of a point you wish to make, followed by supporting facts or information. Students must list their arguments and support them with evidence from the readings.

Option 3. Three-Corners Debate

If time permits, debate two or more questions to encourage participation.

1. Resolved: New York Times Publisher Arthur Sulzburger, Jr., Editor Bill Keller and reporters Eric Lichtblau, James Risen and Barclay Walsh are guilty of treason.
2. Resolved: President George W. Bush, CIA Director Gen. Michael Hayden, FBI Director Robert Mueller and Attorney General Alberto Gonzales are guilty of illegal wiretapping.
3. Resolved: WikiLeaks editor Julian Assange is guilty of espionage for releasing classified U.S. documents.

Procedure:

1. Students must come to class having prepared debate points.
2. At the start of class, **mark** each corner of the room with a label:
 - a) “Strongly agree”
 - b) “Still thinking / can't decide”
 - c) “Strongly disagree”
3. In class:
 - a) **Read** the resolution aloud (and the applicable law, if you like) and **write** it on the board or post where it is visible.
 - b) **Ask** students to take 5 minutes to think about whether they Agree, Disagree, or Can't Decide what they think about the resolution. **Move** students to the corresponding corner. (Each student should come prepared to contribute to both sides of the debate, so you can re-direct students to under-populated corners if necessary.)
 - c) **Start the clock:** Each group gets 10 minutes to discuss the reasons they chose the position they have taken. One student in each group assembles the conclusions of the group to present to the class.
 - d) **Stand and deliver:** each group's representative argues the case that the group put together.
 - e) **Encourage dialogue:** see if any of the arguments have motivated students to change their mind (and physically move to another corner).
 - f) **Demand answers:** if students move, ask what changed their minds. If they stay put, ask why they are not swayed by opposing arguments.
 - g) **Process** what students talked about and **encourage** them to discuss what they learned by preparing both sides fo the argument. Which were the hardest arguments to rebut?
 - h) **Wrap up** the discussion by returning to the central concepts from the lecture: No Prior Restraint, the Watchdog role of the American Press, and Freedom of the Press

Announcements

As usual, check with your Lecturer to see how they have modified assignments. This week's assignments typically require students to:

1. Print out the Blank “information taxonomy” chart and bring it to lecture.
2. Reading assignments.

Background Material for Discussion

Operation SWIFT - Useful context and factual details:

1. Times editors considered administration's arguments multiple times.
2. Similar information about this program, though not as detailed, was released by administration years before to show that it was doing something.
3. UN had issued report on this program, available on its web site.
4. Some in administration were troubled by this program.
5. Very politically charged, so objectivity in question:
 - a) NYT wrong to publish: Bush administration, GOP, conservatives
 - b) NYT right to publish: Democrats, civil libertarians
6. WSJ opposition:
 - a) An editorial, opinion of a conservative publication, generally pro-Bush.
 - b) It did not indicate how what news side feels or would have done, very possibly the opposite of the editorial board.
7. Other controversies around programs in the Bush administration's history:
 - a) Secret CIA prisons
 - b) Abu Ghraib and torture
 - c) Claims of weapons of mass destruction in Iraq
 - d) Guantanamo
 - e) Supreme Court rebuffs
 - f) Warrantless eavesdropping and wiretapping
 - g) PATRIOT Act**

The Espionage Act of 1917 was a United States federal law passed on June 15, 1917, shortly after the U.S. entry into World War I, during the First Red Scare. It prohibited any attempt to interfere with military operations, support America's enemies during wartime, to promote insubordination in the military, or interfere with military recruitment. In 1919, the U.S. Supreme Court unanimously ruled in *Schenck v. United States* that the act did not violate the free speech rights of those convicted under its provisions. It made it a crime:

1. 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 was punishable by death or by imprisonment for not more than 30 years.

2. To 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 when the United States is at war, to cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or to willfully obstruct the recruiting or enlistment service of the United States. This was punishable by a maximum fine of \$10,000 fine and up to 20 years in prison.

The Act also gave the Postmaster General authority to refuse to mail or to impound publications that he determined to be in violation of its prohibitions. The law was later extended on May 16, 1918 by the Sedition Act of 1918—actually a set of amendments to the Espionage Act—which prohibited many forms of speech, including "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States...or the flag of the United States, or the uniform of the Army or Navy."

The Espionage Act is not as forceful as it once was. In 1921, Congress repealed the collective amendments referred to as the Sedition Act of 1918, which had prohibited abusive language against the US government, flag, and military uniform. The Supreme Court has in the years since *Schenck v. United States* weakened the law, which may be relevant to a discussion of prosecuting the Times in the 21st century. *Brandenburg v. Ohio* (1969) found that speech would have to be responsible for "imminent lawless action," less restrictive than "clear and present danger." The Pentagon Papers case also gave whistleblowers, whose speech may be construed as harmful to the government and nation, more latitude.

Schenck v. United States (1919)

Circumstances of the Case

- Charles Schenck was the general secretary of the Socialist Party of America. 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 about 15,000 leaflets urging draftees and soldiers to resist the draft. He was arrested and charged with "causing and 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.

Arguments

- For the United States: A nation at war is justified in taking steps to insure the success of its effort to defend itself. The case involves congressional draft policy, not the 1st Amendment. Statements critical of the government cannot be tolerated in a crisis. The nation cannot allow an effort to deprive the armies of necessary soldiers. The actions and words of the Socialist party were a danger to the nation. The Espionage and Sedition acts, by contrast, were legitimate and appropriate in a time of war.

Decision and Rationale

- The Court's unanimous (9-0) decision was written by Justice Oliver Wendell Holmes. In it, the Court upheld Schenck's conviction, declaring the Espionage Act a reasonable and acceptable limitation on speech in time of war.
- In the operative passage of the decision, Holmes wrote, "The most stringent protection of

free speech would not protect a man in falsely shouting fire in a theatre and causing panic.” Holmes argued that “The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

- In short, the Court held that reasonable limits can be imposed on the 1st Amendment's guarantee of free speech. No person may use free speech to place others in danger. “Protected political speech” was diminished in time of war.
- The Schenck case stands as the first significant exploration of the limits of 1st Amendment free speech provisions by the Supreme Court. Its clarifications on the meaning of free speech have been modified, rewritten, and extended over the years. Flowing directly from this case, two schools of legal thought on the protections of the Bill of Rights emerged. One “absolutist” group felt that the Constitution meant to tolerate no interference by government with the people's freedoms, “absolutely none.” More widely held was the “balancing doctrine,” which suggested that the right of the people to be left alone by a government had to be “balanced” against “compelling public necessity.”