

## **CASE BRIEFING: HOW TO BRIEF A CASE**

### **I. INTRODUCTION**

One of the first things you need to learn in law school is how to brief a case. You should not confuse a case brief with the briefs -- written documents asserting a client's position on an issue of law -- that lawyers submit to a court. You will not be drafting such "legal briefs" until your second or third semester in Professional Skills II or Advocacy. Moreover, you will never submit a case brief to a court or even to a senior attorney in a law office. Rather, a case brief is a learning tool for your own benefit.

Why Case Briefing Is Important. The case brief is one of the most important learning tools you will acquire in your first semester of law school. The importance of learning to brief cases is three-fold: (1) it will enable you to recognize and understand how a court reasons and by so doing, to acquire the ability to reason in a logical and rational fashion; (2) it will help you prepare for substantive law classes; and (3) it will be an invaluable tool throughout your legal career when you do legal research; lawyers take notes on cases their research reveals and their notes usually follow the same general format of case briefing they learned in the first few weeks of law school.

Identifying the Components of Legal Reasoning. One of your goals in your first semester should be to begin to learn how to think like a lawyer. Case briefing is instrumental in achieving this goal. Lawyers solve problems for their clients. Nearly every legal problem you confront as a lawyer will require you to apply existing law to the particular facts of your situation. You *identify* what the *law* or rule is, determine *how* it *applies* to your set of *facts*, and then draw a *conclusion* as to whether your client will prevail or not. You then *explain* to the client, in writing, why you have reached the conclusion you have. In their opinions, judges do the same. Judges *identify* the *legal principles* or rules applicable to the case, determine *how* those rules *apply* to the particular *facts* of the case, and then draw a *conclusion (holding)* that will then serve as precedent, i.e., law, for others. Finally, judges *explain why* they reached the holding they did for a number of reasons: (1) so the parties to the lawsuit understand why they have prevailed or lost, and *second* (and more important); (2) so future judges can decide whether the decision is correct and should be followed; and (3) so lawyers can *understand* what the law is and *predict* the likely outcome of their clients' cases.

The Parties in Appellate Court Decisions: Appellant or Petitioner and Appellee or Respondent. The cases you read in law school are appellate court decisions. Appellate courts are so named because they hear appeals from trial courts (so named because they are the courts in which trials take place). That means that the trial court has already made a decision against one of the parties, plaintiff or defendant. The losing party (either plaintiff or defendant) has then appealed the trial court's decision or has petitioned the appellate court to determine whether the trial court made an error. The party (plaintiff or defendant) who lost in the trial court and appeals or petitions is then referred to as the appellant or the petitioner in the appellate court. The party

(plaintiff or defendant) who prevailed in the trial court is referred to as the appellee or the respondent, respectively.

How do you know whether to refer to the parties as appellant and appellee or as petitioner and respondent? Simple. Read the case. The appellate court opinion you brief usually notes that the losing party “appealed” the decision or “filed a petition” to review the trial court’s decision. The appellate court may also refer to the party who lost in the trial court as either appellant or petitioner (or the party who prevailed in trial court as either the appellee or respondent).

Having said all this, you should note that these terms are often not very helpful when you describe the facts that led to the lawsuit. Usually, you will want to use terms such as buyer, seller, driver, passenger, etc. *See discussion of “Facts,” below.* Nevertheless, it is important to know who is appealing or petitioning from the trial court’s decision. It is usually the appellant’s or petitioner’s burden to convince the appellate court that the trial judge committed an error in deciding the case. Appellate courts often defer to the trial judge. An appellate judge will often defer to the trial judge’s judgment and affirm the decision below, even if the appellate judge would have decided the case differently if he or she had been the trial judge. Because the decision on appeal often depends on who won below, you need to identify who is the appellant and who is the appellee in your case brief. *See discussion of “Name, Cite, Date,” below.*

## II. THE SEVEN PARTS OF A CASE BRIEF.

Each appellate opinion can be dissected and reorganized into parts. This makes it much easier to understand the court’s reasoning. Moreover, at this stage of your career, it enables you to understand how a court reasons in a logical and rational manner. In briefing a case, you will divide the opinion into seven different parts:

1. Name, cite, date;
2. Procedural setting (“P/S”);
3. Facts (“F”);
4. Issue (“I”);
5. Holding (“H”);
6. Rule; and
7. Court’s Reasoning (“R”).

Each of these sections is discussed below. Before proceeding, you need to read the edited opinion we are using as an example, Schenck v. United States, which appears **on pages A-1 and A-2** of this Handout. Also, when reading this hand, it will be helpful to refer to the Sample Case Briefs on **pages A-3 and A-4** of this handout.

- **NOTE:** Although other professors may prefer you to write a case brief in a different way, this is how I expect you to prepare case briefs for my class, *especially those I assign to be turned in for a grade.*

A. Name, Cite, Date

1. Case Name. The name of the case includes the last names of the parties (if they are natural persons) or the full name of an entity (i.e., a corporation, partnership or other entity). You also must identify the parties as plaintiff, defendant, appellant, petitioner, appellee and/or respondent. Note that in parentheses you identify what the party was in the trial court below (**P or “ = plaintiff; D or = defendant**) as well as what the party is on appeal (appellant or appellee, petitioner or respondent). In our example, Schenck v. United States, you can write the case name as:

**(D-Petitioner) Schenck v. (P-Respondent) United States,**

OR

**(Δ-Petitioner) Schenck v. (π-Respondent) United States,**

When you see “United States” or the name of a state or the word “People” in a case name, you can *usually* assume it is a criminal case.<sup>1</sup> Thus, merely by reading the case name here, you can be relatively sure that Schenck, the defendant in a criminal action, was convicted and then petitioned the court to review the decision of the court below. Similarly, you will know the United States government prosecuted him. You know all this from a single line in a case brief. If you were called on in class and asked how the case arose, you need only glance at the title and answer.

Finally, remember: No first names in the case name.

2. Citation (“Cite”). The citation refers to the numbers and letters that follow the case name. These numbers and letters have little meaning to you now. Once you begin to use the library, however, you will understand their significance. For now, you need only know that the numbers and letters tell you precisely where you can find the case -- the law upon which you may want to rely -- in the library or how to search for the case on a CD-ROM or on an on-line research service. For that reason alone, you need to include this information in your case brief. *See below for other reasons.*

In our example, you would write out the citation as follows:

(Δ-Petitioner) Schenck v. (π-Respondent) United States, 249 U.S. 47, 39 S. Ct. 47, 63 L. Ed. 470 (1919)

The first set of letters and numbers tells you that you can find the full case at page 47 of volume 249 of the United States Reports (i.e., “U.S.”). The United States Reports is one of the three multi-volume compilations of United States

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<sup>1</sup> I write usually because in Contracts, we will see some cases to which the United States is a named party. These are not criminal cases; they are civil cases involving an issue of contract law.

Supreme Court decisions. Each of these three compilations contains all of the decisions that the Supreme Court has ever decided. The other two compilations are the Supreme Court Reporter (“S.Ct.”) and United States Reports, Lawyer’s Edition (“L.Ed.”). By using the abbreviations set in parentheses, you can tell the reader exactly where she can find the full opinion in these compilations.<sup>2</sup>

Why put this information in a case brief you seldom give to anyone? *First*, you usually draft memos and other documents from your case brief. In other words, when you draft these documents, you take information from the case brief. Since you do give these memos and documents to other people, you want to make sure the information is accurate so they can find the case if they need to do so. *Second*, you may have to go back to the case to check your notes. The case compilations are not arranged alphabetically so if you do not know a case’s citation, you would have to spend time to look it up again in an index. If you have the citation, however, you can go directly to the book on the library shelf and turn to the page the case is on, or you can enter the citation on your computer so you can locate the case on a CD-ROM or an on-line research service. Therefore, it is important that you follow the correct format for the citation, i.e., the numbers and letter abbreviations that follow the case name. Get in the habit now; it will save you time in the future and help you throughout your career.

3. Date. Include the date: The date enables the reader to know how old the case is. The law changes over time and the reader may want to see if there is a more recent case on the same legal issue.

## B. Procedural Setting (“P/S”).

1. In this section, you explain (and thus remind yourself) what the court below (usually the trial court) did. For example, which party prevailed? Was defendant convicted? Which party (plaintiff, defendant) is appealing? If the court awarded damages, say so. Did the court do anything else? Sample Case Brief #2 states only the following:

“Petition by criminal defendant after conviction for illegal use of the mails.”

That is all the information you need to include here. It explains what happened in the trial court and how the case got to the Supreme Court. Because the criminal defendant is petitioning, we also know the defendant is seeking to reverse his or her conviction.

- **NOTE:** You also include procedural facts in the Facts section. *See below.*

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<sup>2</sup> The United States Reports (“U.S.”) is the “official” compilation of Supreme Court opinions. The other two compilations are unofficial, but for various reasons – primarily related to additional information and indexing the editors of the unofficial compilations provide – most lawyers prefer to work with the unofficial compilations, both of which have extensive cross-references to United States Reports. All the compilations, however, contain every word the Supreme Court actually wrote, so you can use them interchangeably.

2. This part of the brief can be placed after the facts if you have a professor who prefers it there. However, be sure to check with your professor to determine what he or she prefers. I want this section *before* the facts section.

### C. Facts

1. Legally Significant Facts. In the Facts section, you include only (1) the *legally significant* facts and (2) those *background* facts (e.g., procedural facts) that establish the context in which the case was decided. A *legally significant fact* attains that status by virtue of the court having considered that fact in its reasoning. *Therefore, you cannot determine whether a fact is legally significant until you have read the entire case and determined how the court reasoned.* Facts are significant because the analysis of the legal principles and their applications have made them *relevant* to the issue the court faced. Put another way, any fact the court considered in its legal analysis<sup>3</sup> is a legally significant fact and must appear in the fact section. At first, you probably will include facts that are not legally significant. Soon, however, you will be able to separate the wheat from the chaff. This will allow you to write shorter case briefs in less time.

**Remember:** The court legally analyzes a problem when it applies the law to the facts of the case. If the court has considered a fact in relation to the law, then it is a legally significant fact.

2. Example. Look at the Example of a court opinion (Schenck v. United States) on page A-1 and Sample Case Brief #2 on page A-4. Note that the court set out both the substantive facts and the procedural facts of the case in detail in the first two paragraphs of the opinion on p. A-1.
  - a. Procedural/Background Facts. In the first paragraph, Justice Holmes explains in great detail what the government charged Schenck and the other defendants with in the indictment and notes they were convicted on all charges (“counts.”) The fact section of Sample #2, however, sets out only the essence of what the indictment charged and that the jury convicted the defendants. In other words, Sample #2 sets out only those background facts that establish the *context* within which the court decided the case:

“A jury convicted defendant of using the mails for an illegal purpose (the sending of the circular to induce insubordination in the military), conspiring to use the mails for this purpose and causing and attempting to cause insubordination in the military.”

**Note** how Sample #2 includes “attempting,” which was central to the court’s reasoning in determining that a conspiracy to obstruct the military, even if not successful, warrants finding a crime has been committed.

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<sup>3</sup> The court’s legal analysis appears in the *Court’s Reasoning* section, discussed below.

- b. Substantive Facts. Similarly, Sample #2 does not give a detailed description of the information the documents contained. For example, it does not state what the documents contained on each page as the opinion does. Instead, Sample #2 merely sets out the following:

“During a war in which the United States was involved, defendants sent a circular that urged military draftees to assert their rights by opposing the draft. The defendants in their circular did not urge any specific activity, such as refusing to report for induction, but rather stated draftees had a right to assert their opposition to the draft, and urged them to state their opposition. The government did not offer evidence defendants were successful in their attempts to induce insubordination by draftees.”

The foregoing sets out the facts that the court considered legally significant, i.e., those facts to which the court applied the law in its reasoning.

To understand this, look at the “R” (Court’s Reasoning) section of Sample #2 and the Court’s actual words on A-2. The court was concerned with speech that would obstruct the war effort, speech or words that “are of such a nature as to create a clear and present danger that they will bring about the substantive evils [military insubordination] that Congress has a right to prevent,” and did so in the criminal statutes it enacted and which are the subject of this case. The facts state that circular was sent during a war. In its reasoning, the Court notes that “every act depends upon the circumstances in which it is done,” and then states, “[w]hen 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 fact that there is a war going on is central to the court’s holding, so you must include this fact in the facts section, as well as in the issue. Political propaganda (the circular) urging draftees to oppose the draft could obstruct the war effort. Moreover, the court noted that a person need not successfully obstruct; all that was necessary is that an *attempt* be made. The facts in Sample #2 reflect that defendants made such an attempt, even if they did not succeed.

3. Some further points. In addition to the foregoing, keep in mind the following:

- a. Statutes & Regulations. If the court has construed, i.e., interpreted a statute to reach its decision, and has included the statutory language in its opinion, you should quote the language of the statute in the facts. It is not usually necessary to quote the entire statute. At a minimum, however, you need to quote that language of the statute on which the court focused in its opinion. Finally, when you begin to write legal memoranda, you should note that the statute belongs in the discussion, not the statement of facts.
- b. Avoid Proper Names; Be Consistent. Avoid using proper names (e.g., “Schenck”) in the facts. Use proper names only if you have a large number of parties. In other words, refer to the parties as *buyer*, *seller*, *promissor*,

*promissee, driver, passenger, etc.* Although not usually helpful in understanding what events led to the lawsuit, you may also refer to the parties as plaintiff, defendant, appellant, appellee, etc. However, once you decide how you will refer to the party, be consistent, i.e., do not refer to the driver as “driver” on one line and “defendant” on another.

- c. **Be Specific.** You need to state particularly what the facts are. For example, do not merely refer to criminal charges. See Sample Case Brief #1, at A-3. State what the charges were. In Schenck, the fact that the defendants were “*attempting*” to cause insubordination in the military *by propaganda* (speech) was significant. The fact that the statute prohibits *attempts* means defendants need not actually succeed in inducing insubordination. Further, the fact they made their attempts *by speech* explains why Justice Holmes had to address their First Amendment arguments.

D. **Issue.** The issue statement is arguably the single most important part of your case brief. Done properly, you can summarize in a single sentence *what* the case is about, *how* the court held, and *why* the court so held. This ability is particularly useful when arguing before a court that has limited your time for argument, when trying to summarize a case for a busy partner, or trying to explain on an exam why the facts of your case are different from (or the same as) the case we covered in class. Time is money in the legal profession. You bill by the hour. You cannot afford to recount a case leisurely, whether in court, in a law firm, or during an exam.

1. **Single Question.** The issue is a *single* sentence *question*. If you properly frame the issue, the answer to it (i.e., the holding of the case) is a simple “yes” or “no.”
2. **Marriage of Law & Facts.** The issue is a *marriage of law and facts*. You must mention *legally relevant* facts in the issue. By so doing, the scope (broad or limited) of the holding (which becomes precedent) is apparent. See *the discussion of Holding, below*. In Sample #2, the issue was written as follows:

“Do the free speech provisions of the First Amendment protect a defendant from criminal liability under a federal statute that prohibits attempting to cause insubordination in the military, where in a circular sent to military draftees during a war, defendant has urged the draftees to oppose the draft but there is no evidence defendant’s efforts caused insubordination by the draftees?”

**Facts.** Note that as drafted, the issue includes *legally significant facts* such as defendants’ urging *military draftees* to oppose the draft and that there is no evidence defendants succeeded (recall that the court addressed this point in its reasoning and held that the government could impose criminal liability for *attempts* to obstruct the war effort.) Moreover, *as discussed in Facts, above*, that the country was at war was critical to the court’s reasoning and so is included in the issue. **Law.** In addition, the issue also notes that defendants sent a *circular* (i.e., *words*) and so defendant can assert he was protected from criminal liability under the free speech clause of the First Amendment.

*Question Court Addressed Must Be in Precise Terms.* By marrying the law and the facts in your issue, you summarize in one sentence what the case was all about. In other words, by setting out the facts and law, you state in precise terms the issue (i.e., the question of law) which the Court had to decide. Here, the Court was trying to determine whether First Amendment Free Speech guarantees *trumped* the federal statute that prohibited attempts to cause insubordination or obstruction in the military.

3. The Issue Must Be “Objective”. It is important that the issue be “objective,” i.e., it must not be slanted in favor of one party or the other. Note how the issue would have been slanted in favor of the government if the word “propaganda” had been inserted in place of the phrase “a circular.”
4. No Legal Conclusions. The issue must not include legal conclusions. For example, consider the following statement of the issue:

“Do the free speech provisions of the First Amendment protect a defendant from criminal liability where the defendant *has violated* a federal statute that prohibits attempting to cause insubordination in the military?”

The problem with the issue as framed is that by stating defendant has violated the statute, you remove from the issue statement one of the central questions the court had to resolve, i.e., whether attempting to cause obstruction or insubordination by speech subjects the speaker to criminal liability *under the statute*. The person to whom you recite the issue would be unaware that you have left out a central part of the court’s reasoning.

5. Use of “Whether”. You can begin your issue with “can,” “does,” “is” or “are,” etc. Just make sure that (i) it is a *single* sentence; and (ii) it is a question. If you decide to begin your issue with “Whether” (not preferred), do not write “Whether or not.” It is redundant.

## E. Holding

1. Yes or No. As noted in the preceding section on the issue, if the issue is properly framed, the holding can be a simple yes or no answer. Of course, if you are called on in one of your classes and are asked “what is the holding of this case,” and simply answer “yes” or “no,” you could suffer severe humiliation.
2. Recasting Issue as Declarative Sentence. Therefore, in addition to a “yes” or “no,” you could recast the issue as a declarative sentence. You can write the holding in Schenck as follows:
  - a. “The free speech provisions of the First Amendment do not protect a defendant from criminal liability under a federal statute that prohibits attempting to cause insubordination in the military, where in a circular sent to military draftees during a war , defendant has urged the draftees to oppose



the draft but there is no evidence defendant's efforts caused insubordination by the draftees."

Again, the foregoing is simply the issue rewritten as a declarative sentence. You have not added any facts or law. Of course, those of you who prefer to live on the edge in class can write the holding as follows and recast the issue as a declarative sentence in your head when you are called upon in class:

b. "No. Judgment affirmed."

Choose either a. or b., above. Do not include both in your holding. For briefs you submit to me, I prefer you use b. Be aware that some professors require that you recast the issue as a declarative sentence while others require that you state the holding as a "yes" or "no," indicating how it affects the ruling below (e.g., "judgment affirmed"). Check with your professor to determine which she prefers.

3. The Scope of the Holding. Finally, note that by including significant facts (i.e., those the court considered in its reasoning) in the holding, you state what the case was about and what future courts must follow as the law. For example, the court did not decide that:

- a. "The free speech provisions of the First Amendment do not protect a defendant from criminal liability."

Such a holding is *much broader* than what the court actually decided. If the foregoing were the actual holding of *Schenck*, then no person accused of violating a criminal statute could ever assert the First Amendment as a defense to criminal liability. In fact, we know this is not true. The free speech provisions of the First Amendment often do protect a defendant from statutes that impose criminal liability. See, for example, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (state law that prohibits the mere advocacy of violence as a means to effect political change violates the freedoms guaranteed under the free speech provisions of the First Amendment).<sup>4</sup> Here, however, the court held that the First Amendment does not afford protection in a situation "*where in a circular sent to military draftees during a war, defendant has urged the draftees to oppose the draft but there is no evidence defendant's efforts caused insubordination by the draftees.*" Similarly, the court did not decide:

- b. "The free speech provisions of the First Amendment do not protect a defendant from criminal liability where the defendant has urged military draftees to oppose the draft and has succeeded in convincing the draftees to refuse to enter the military."

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<sup>4</sup> Indeed, quite recently the United States Supreme Court held, in *Reno v. A.C.L.U.*, 117 S.Ct. 2329 (1997), that provisions of the Communications Decency Act, 47 U.S.C.A. § 223, which prohibits the transmission of obscene or indecent communications by means of telecommunications device to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, were content-based blanket restrictions on speech and thus violated the First Amendment's free speech guarantees.

Where the first example, a., was too broad, this second holding, b., is *narrower* than what the court actually decided. The court held that an attempt to obstruct the government's war effort was sufficient to prevent the First Amendment from protecting a defendant from criminal prosecution.

Thus, you can see that when you exclude from the holding or issue facts the court considered legally significant, or you include facts the court did not consider critical to its decision, you risk misrepresenting the court's holding. Since the holding is law, you misrepresent the law. This is an **ethical violation** for lawyers.

F. **Rule.** In this section, you set out the rules or standards the court has determined are applicable to the particular circumstances of the case. Here, the court attempts to create the legal *framework* within which it will analyze the facts of the case. Until a court has determined what laws (statutes, regulations, case precedent) apply under the circumstances, it cannot adequately decide how the case should be resolved.

1. Here, the Court was faced with the question whether, under the facts here (circular sent during war that encourages draftees to protest the military draft), the First Amendment Free Speech rights of a criminal defendant trumps a federal statute that prohibits attempting to cause insubordination in the military.
2. If the First Amendment is absolute, i.e., if Congress really can make "no law . . . abridging the freedom of speech," U.S. Const. Amend. 1, then defendants' First Amendment rights trump the federal statute and defendants' convictions must be overturned. In other words, this would be tantamount to the Court's holding all speech is protected by the First Amendment. That, however, is not the law.
3. The Court, through Justice Holmes' opinion, instead notes that "the most stringent protection of free speech would *not* protect a man in falsely shouting fire in a theater and causing a panic," (emphasis added), that is, not all speech is protected under the First Amendment. Sample #2 *paraphrases* the Court's statement of First Amendment law contained on page A-2, top ¶:

"Not all speech is protected by the First Amendment, e.g., falsely shouting fire in a crowded theater and causing a panic. Depending on the circumstances, some speech could be volatile that otherwise would not be, i.e., where it can "create a clear and present danger."

Sample #2 also *paraphrases* one of the "circumstances" on which the Court focuses:

"When a nation is *at war*, opposition from within could easily hinder the nation's success."

In two short sentences under the Rule section, Sample #2 establishes the legal framework under which the Court will consider the particular circumstances of the case before it.

4. Paraphrase the Rule Rather than Copying It. When writing your case briefs, it is better at this stage of your career to *paraphrase* the law, rather than copying it verbatim. Put the law in your own words so that you can convince yourself (and me) you really understand what the law is. Too often students just copy the words of the court without understanding what it means. One of the *principal goals* during your first semester of law school is to *learn how to teach yourself what the law is*. If you never learn how to read a case, you will never be able to teach yourself the present state of the law. Paraphrasing the rule or standard will get you to the point where you can teach yourself what the law is.
5. Always Include the Page and Paragraph on Which the Rule Appears. Note that in the Rules section, reference is made to the page and paragraph in which the Rule appears. Get into the habit of doing this early in your legal career.
  - a. During class, when I ask you what the rule is and you recite it from your written brief, I will usually ask on what page the court stated it. I expect you to be able to tell me immediately. Do not say, “*oh, I wrote the rule down but not the page.*” I will consider such a response -- or an inability to give me the page on which the rule appears -- evidence of lack of preparation and you will be penalized accordingly. See *Syllabus, IV. Classroom Participation*.
  - b. During your legal career, you will have to refer back to the “rule” as you draft memos or court briefs. You will find you do not usually have the time to search through the opinion for the page on which the rule appeared. Nevertheless, your partners and the judge expect you to give the page number for any statement of law you include in a memo or brief. You will save a lot of time by getting into the habit now of always writing down where in a case you have found a rule, or the court’s reasoning. See *below*.

G. **Court’s Reasoning (“R”).** This section sets out, in logical order, the court’s reasoning for its holding, which becomes law. This section is crucial, because you will find that although the plain words of a holding may appear to cover your client’s case, causing your client to lose, you still may be able to argue that given the court’s reasoning, the court never intended its holding to apply in your client’s situation. See *also, G.2., below*. This may be confusing to you now, but as the semester progresses, you will understand why the court’s reasoning is so important to analyzing and using cases to support your client’s position.

1. Number the reasons, i.e., if the court relied on more than one reason, then each should be a separate, numbered paragraph. Again, refer to Sample #2.
2. Include All the Court’s Reasons. You need to include all of the court’s reasons for making its decision. This is a very important section of a court opinion because the facts in future cases are seldom identical, but some of the reasons

may be broad and justify the holding's application to those cases. Consequently, the holding of the first case may be extended to those future cases even though the facts are not the same.

3. Policies and Reasons. Learn to distinguish between policies and reasons for a decision. You need to include both of these in the reasoning section. A lengthy discussion of what constitutes policy and what constitutes a reason is beyond the scope of this handout. Nevertheless, the following should provide some guidance:

- a. Policy. Look for some kind of social justification for how the court decided. For example, in recognition of the importance of railroads to the growth and development of the United States, courts and legislatures in the Nineteenth Century implemented laws that made it extremely difficult for a person to sue a railroad for a personal injury, even where the railroad was to blame.

- b. Reason. Reasons are narrower than policies. They are the logical steps the court takes to reach its decision. A court's analysis can involve the straightforward application of a rule to the particular facts of the case before it, or it can be slightly more complex, e.g., explaining why a rule in one area of law should be applied to a new area of law (reasoning by *analogy*). An example of the latter is taking the legal framework for determining whether a defendant has *contributed* to another defendant's infringement of a *patent*, and applying that framework to a situation involving a *copyright* rather than a patent. An example of the former, i.e., application of a rule to the particular set of facts, is Schenck. There, the Court stated the rule, i.e., First Amendment protections are not absolute and when speech can "create a clear and present danger," Congress can regulate it. It then explained why the facts here – a nation at war – created a situation where encouraging draft resistance creates "a clear and present danger" for the country's war effort.

4. Include References to Page Numbers and Paragraphs. See *F.5.*, above, for a discussion why you must include references to page numbers and paragraphs on which the court's reasoning appears.

H. A Final Note on the Case Briefs You Submit. Sample #2 is single-spaced. The case briefs which you submit to me, however, must be double-spaced, and comply with all of the other format requirements I have set out in the course syllabus. I will expect you to comply with all of these requirements for case briefs you submit.

## **APPENDIX “A” - EDITED CASE AND SAMPLE CASE BRIEFS**

### **1. SCHENCK v. UNITED STATES 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919)**

Mr. Justice Holmes delivered the opinion of the court.

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, etc., 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, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service [a document] alleged to be calculated to cause such insubordination and obstruction. [The] second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by [the 1917 Espionage Act], to-wit, the above mentioned document. [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. They set up the first Amendment to the Constitution, [and] bringing the case here on that ground have argued some other points also....

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitutions when he refused to recognize "your right to assert your opposition to the draft," and went on "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 maintain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of

laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado, 205 U.S. 454, 462 (1907). We admit that in many places and in ordinary times the defendants in 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. [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. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

## 2. **SAMPLE CASE BRIEF #1 (Unacceptable)**

Schenck v. United States, 249 U.S. 47

FACTS: Criminal charges against anti-war protestor.

PROCEDURAL SETTING: Appeal

ISSUE: Are the actions of anti-war protestors protected by the First Amendment?

HOLDING: No.

REASONING OF COURT: During time of war, political protests cause harm to the government. The government has the right to protect itself.

### 3. SAMPLE CASE BRIEF #2 (Acceptable)

(Δ-Petitioner) Schenck v. (π-Respondent) United States, 249 U.S. 47, 39 S. Ct. 47, 63 L. Ed. 470 (1919) [**J. Holmes**]

P/S: Petition by criminal defendant after conviction for illegal use of the mails.

F: During a war in which the United States was involved, defendants sent a circular that urged military draftees to assert their rights by opposing the draft. The defendants in their circular did not urge any specific activity, such as refusing to report for induction, but rather stated draftees had a right to assert their opposition to the draft, and urged them to state their opposition. The government did not offer evidence defendants were successful in their attempts to induce insubordination by draftees. The jury convicted defendant of using the mails for an illegal purpose (the sending of the circular to induce insubordination in the military), conspiring to use the mails for this purpose and causing and attempting to cause insubordination in the military.

I: Do the free speech provisions of the First Amendment protect a defendant from criminal liability under a federal statute that prohibits attempting to cause insubordination in the military, where in a circular sent to military draftees during a war, defendant has urged the draftees to oppose the draft but there is no evidence defendant's efforts caused insubordination by the draftees?

H: NO. Judgment affirmed.

Rule: 1. Not all speech is protected by the First Amendment, e.g., falsely shouting fire in a crowded theater and causing a panic. Depending on the circumstances, some speech could be volatile that otherwise would not be, i.e., where it can "create a clear and present danger." [**A-2,top ¶.**]

2. When a nation is at war, opposition from within could easily hinder the nation's success. [**A-2,top ¶.**]

R: 1. First Amendment protections are not absolute, and when speech can "create a clear and present danger," as is true here where the nation is at war and the speech can subvert the war effort, the government may regulate it. [**A-2,top ¶.**]

2. Congress has power to make actual obstruction a crime. Similarly, Congress also has the power to make *attempts* to obstruct a crime in order to prevent the obstruction which could more readily occur when a nation is at war. [**A-2,top¶.**]