Liberty and Security in Modern Times

The United States has always experienced tremendous tension in trying to balance the protection of liberty with the protection of national security. This tension became especially acute in times of war. On the one hand, wartime hysteria often unfortunately led to the violation of the constitutionally-protected rights of dissenters and of ethnic and racial minorities. But on the other hand, the U.S. during the twentieth century gradually expanded and breathed new life into the Bill of Rights, especially the First Amendment. Thus the pressures of wartime have brought out both the best and the worst in Americans grappling to achieve both liberty and security.

In 1940, after the outbreak of World War II in Europe, fear of domestic subversion led to the passage of the Alien Registration Act, better known as the Smith Act. This law made it a crime “to knowingly or willfully advocate, abet, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” In slightly modified form, this provision of the Smith Act still remains in effect today.

The Smith Act also required—for the first time ever in American history—that all resident aliens register with the federal government. In compliance with this law, five million aliens reported their status at local post offices. Once the U.S. entered World War II, all 900,000 German, Italian, and Japanese registrants became classified as “Enemy Aliens,” subject to possible deportation under the Alien Enemies Act. Nine thousand of these Enemy Aliens suffered arrest, only half of whom won release in legal hearings.

Many U.S. citizens were also tragically affected by the outbreak of World War II. In February 1942, President Franklin Roosevelt issued Executive Order 9066, leading to the three-year detention of 90,000 Japanese-Americans. Roosevelt did not act out of military necessity because the detainees posed no threat to national security. Instead, the president caved in to racism and political pressure from people demanding government action after the attack on Pearl Harbor. In 1944, in the case of *Korematsu v. United States*, the Supreme Court upheld the internment, falsely claiming that the Japanese posed a domestic threat. Not until 1988 did the U.S. formally apologize and provide reparations to the detainees and their descendants.

With the onset of the Cold War came renewed public anxiety over subversion, and a setback for free speech. Instead of standing up for First Amendment freedoms, most politicians, judges, lawyers, educators, and news people either acquiesced or joined in the repression of nonconformists.

Unwilling to appear soft on communism, President Harry Truman in 1947 issued Executive Order 9835 to root out disloyalty in the federal government. Every applicant or employee now faced an investigation to verify his or her allegiance to the U.S. The FBI gathered unsubstantiated accusations of disloyalty from anonymous witnesses. The accused faced inquisition-like hearings, in which past membership in supposedly subversive organizations or association with communists became grounds for dismissal. Under President Dwight Eisenhower, witnesses who pled the Fifth Amendment before a loyalty board lost their employment. From 1947 to 1956, 2,700 federal workers received pink slips, 12,000 resigned under a cloud of suspicion, and many more became intimidated. Yet none were convicted of conspiring against the government.

Congress went even further than the executive branch, investigating not only federal employees, but other Americans as well. In 1947, the House Un-American Activities Committee (HUAC) began a probe of communist influence in Hollywood’s motion picture industry. Despite bullying witnesses
and holding in contempt of Congress those who affirmed their constitutional rights, HUAC only achieved two convictions, both for perjury. One of those convicted—in a highly publicized case that made anti-communist Congressman Richard Nixon famous—was former State Department official Alger Hiss.

In 1950, Wisconsin Senator Joseph McCarthy claimed to have compiled a list of 205 communists in the Truman Administration. The list was utterly phony, but his accusations persuaded a nervous public, and won support from Republicans seeking partisan advantage over the Democrats. McCarthy secured the electoral defeat of senators who opposed his witch hunt, and intimidated the rest of his Congressional colleagues into silence. His targets ranged from State Department employees to members of the U.S. Army to President Eisenhower himself. Not before a four-year innuendo campaign had ruined countless lives did the Senate finally vote to condemn McCarthy’s behavior.

Even the Supreme Court gave in to the Red Scare hysteria. In 1951, in Dennis v. United States, the Court upheld the conviction of Eugene Dennis, general secretary of the Communist Party, for violating the Smith Act by advocating the overthrow of the government. The Court reasoned that merely to advocate the overthrow of the government poses a clear and present danger. Seven years later, however, in Yates v. United States, the Court reversed itself, ruling that one may legally support overturning the government as long as one does not take steps that could realistically achieve that goal. A big victory for freedom of speech, Yates finally put an end to prosecutions of communists under the Smith Act.

The Vietnam War, perhaps the most unpopular conflict in American history, aroused tremendous protest from a vocal minority of Americans. One extreme form of resistance was draft card burning, which Congress outlawed in 1965. The following year, David Paul O’Brien was convicted for publically burning his draft card. The Supreme Court in 1968 rejected O’Brien’s defense that his act of resistance was a form of free speech protected by the First Amendment. The Court reasoned that had Congress passed the law solely to halt a controversial method of antiwar protest (many thought it had), then the statute would indeed have been unconstitutional. But the Court instead gave Congress the benefit of the doubt, arguing that since draft cards are a reasonable means to implement conscription, the law was neither a restriction of free speech nor a violation of the First Amendment.

Prior to Vietnam, the federal government successfully punished wartime dissent though criminal prosecutions for sedition. By the 1960s, however, the Supreme Court had sufficiently expanded First Amendment freedoms to make it impossible for the government to convict opponents for practicing free speech. Instead, the government targeted antiwar activists by resorting to much the more dubious and less effective technique of government harassment. Presidents Lyndon B. Johnson and especially Richard M. Nixon employed the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), and the U.S. Army to engage in illegal searches, wiretaps, mail openings, and financial audits of dissenters. Not until after Nixon’s downfall in the Watergate scandal did the government stop harassing citizens for exercising their First Amendment freedoms.

The Pentagon Papers case marked a milestone in the liberty-security debate. In 1967, Defense Secretary Robert McNamara ordered a top secret report that detailed U.S. involvement in the Vietnam War. The report illustrated that the government had lied to the American people about the conflict. Daniel Ellsberg, a State Department official who turned against the war when he witnessed first-hand the tragic situation in Vietnam, illegally gave the report to the New York Times for publication. When the Nixon Administration claimed a breach...
of national security, a federal court—for the first time in U.S. history—issued a temporary restraining order against the Times. With the Times silenced, the Washington Post picked up publication. Both newspapers soon faced injunctions while the Supreme Court ruled on the matter. The Court ultimately sided with the newspapers, arguing that the federal government had not demonstrated that damage to national security caused by publication would outweigh the public’s need to know the truth about the war. Geoffrey Stone has shown that during the Vietnam War, the Court firmly established the principle that antiwar expression could only be punished criminally if it advocated immediate, express illegality that might actually take place.

Not only has the Supreme Court come a long way in defending First Amendment freedoms, the American public has also developed a tremendous appreciation for civil liberties. U.S. citizens have learned that free speech is especially crucial in wartime. Yet even in the twenty-first century, civil liberties may become jeopardized in a crisis. In the aftermath of the September 11, 2001 terror attacks, for example, Congress rushed the Patriot Act into law even though many legislators had not even read the bill. In the name of being tough on terrorism, this law increased the federal government’s power to engage in secret electronic surveillance. Subsequent government activity sparked a public debate over privacy rights, and even inspired Edward Snowden, a former National Security Agency official, to illegally publish secret government files in an effort to call attention to the situation.

A specific example of the tension between liberty and security is the question of whether terror suspects are entitled to jury trials under the Sixth Amendment. After the Civil War, in the 1866 case of Ex Parte Milligan, the Supreme Court ruled that civilians must be tried in civilian courts, not military courts. But constitutional scholar Mark Neeley has argued that the Milligan ruling is “irrelevant,” because the federal government will simply ignore it in the midst of a wartime crisis. In the War on Terror the three branches of the federal government have been at odds with each other over the Sixth Amendment. In a series of cases from 2004 to 2006, the Supreme Court reined in the George W. Bush administration’s treatment of 9/11 suspects held at the Guantanamo Bay, Cuba detention facility. The Court ruled that federal courts have habeas corpus jurisdiction over Guantanamo detainees, that U.S. citizens cannot be held indefinitely as enemy combatants without a hearing, and that military trials must not violate the 1949 Geneva Conventions.

The Obama administration has clashed with Congress over the treatment of terror suspects. Khalid Sheikh Mohammed (KSM), one of the Al Qaeda leaders charged with planning the 9/11 attacks, along with four alleged co-conspirators, originally faced trial before a military commission at Guantanamo. Constitutional scholars and human rights advocates criticized the decision to hold the trial in a military court, as well as the use of evidence obtained by torture. In 2009, U.S. Attorney General Eric Holder announced that the KSM case would be transferred to a federal district court in New York City, and that no evidence obtained by torture would be used. This decision, in turn, provoked condemnation by individuals including William Shawcross and from organizations like Keep America Safe, who advocate treating terror suspects as enemy combatants rather than as civilians protected by the Bill of Rights. Others, including Senator Diane Feinstein, warned that holding the trial in New York could be an invitation for further attacks. Responding to the outcry, Congress in 2011 passed the National Defense Authorization Act, denying federal funding either to transport terror suspects from Guantanamo to the U.S., or to build secure facilities in which to try them. The legislation forced a reluctant
Holder to transfer KSM and his co-suspects back to Guantanamo for a military trial. Protesting against Congress’s restrictions, Holder asserted that justice should be served in a civilian court, not a military court.

In our constitutional republic, Americans aspire to maintain both liberty and security. During wartime, all three branches of government, as well as the people themselves, have tended to prioritize security. With the return of peace, all three branches have restored previously threatened liberties. Trying to balance liberty and security poses a continuing challenge in modern America’s battle against terrorism.

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For Further Reading:


Answer Keys

Handout A: First Amendment, U.S. Constitution, 1791
1. Accept reasoned responses, which might include
   - Protecting these liberties promotes individual growth and human dignity.
   - These liberties are important for the advancement of knowledge.
   - These liberties are essential for maintaining representative government.
   - These liberties help bring about peaceful social change, serving a “safety valve" function.
   - These liberties are essential for protecting all other individual rights.
   - These liberties maintain freedom of conscience.
   - These liberties have been recognized as part of the common law for hundreds of years.
   - These liberties are necessary for exercising any political rights.

Handout B: Liberty and Security: Civil Liberties and McCarthyism
1. The effort to root out communism in America during the Cold War threatened American liberties because the Smith Act and the McCarran Act restricted the rights of Americans to speak their minds, join with other like-minded people in groups, and work in government jobs. The witch-hunt atmosphere created a chilling effect that made it dangerous for people to question, or appear to question, political orthodoxy. Thousands of people found their reputations, their jobs, and their liberties in jeopardy.
2. Accept reasoned responses, which should include the following: Specific constitutionally-protected rights violated by the federal loyalty programs, HUAC investigations, and McCarthy hearings included speech, press, association, and the right to challenge their accusers in court.
3. Some Americans trampled the rights of others during the Cold War for many different reasons, which may include a sense of desperation in understanding the reasons for communist victories in Europe and Asia, a hysterical witch-hunt mentality, a desire to capitalize on these fears for political gain, a desire to gossip and spread rumors, a desire to act on a grudge, a genuine desire to cooperate in finding dangerous enemies.

Handout C: House Un-American Activities Committee Mission Statement, 1948
1. Students are likely to say that HUAC did not carry out its work in an “undirected, uncensored, and unprejudiced” way. In the inquisition-like atmosphere of their investigations, anyone called to testify before HUAC was already presumed to be guilty of some dangerous activity or opinion.
2. The presumption of guilt and the lack of an opportunity to face one’s accusers suggest that HUAC violated its mission statement.
Handout D: The Alien Registration Act of 1940, also called the Smith Act (Excerpts)

1. Specific actions prohibited under the Smith Act included
   • Advocating, helping, or teaching the desirability of overthrowing the U.S., state, or local government by force or violence.
   • Organizing or joining a group aimed at overthrowing the government,
   • Printing, publishing or distributing literature that promotes the overthrow of the government.
   • Participating in a conspiracy to commit any of the actions listed.

2. Students may suggest that the Smith Act violated freedom of speech, press, assembly, and association.

Handout E: Internal Security Bill of 1950, also called the McCarran Act (Excerpts)

1. The McCarran Act, which required registration of communist organizations, prohibited the following actions
   • Conspiring or agreeing with another person to contribute to the establishment of a totalitarian dictatorship.
   • For members of communist organizations to work for the U.S. government or defense facilities, or to apply for or use a passport
   • For communist organizations to conduct their business secretly or to resist the required registration and yearly reports
   • For communist organizations to mail or broadcast anything without labeling it as sponsored or distributed by a communist organization

2. According to Section 1b, the McCarran Act was not intended to limit free speech and press; however, in its implementation it did limit free speech, press, and association.

3. If you were a communist or had been one in the past, the sections of the law that might ease your mind are Sections 1b, 4f, and 13.1.

4. A student who says he/she would veto the McCarran Act might list ways in which the law violated constitutional principles or guarantees. A student who would sign the law might refer to national security concerns during the Cold War when communism seemed to be gaining ground in Europe and Asia.

5. Accept reasoned responses.

Handout F: Truman’s Veto of the Internal Security Bill, September 22, 1950 (Excerpts)

1. Truman’s main objections to the McCarran Act were as listed below. Responses should express student opinion regarding Truman’s reasoning.
   • It was impractical; communist organizations were unlikely to register.
   • The registration requirements imposed a threat against speech, press, and assembly.
• The law suppressed opinion and belief.
• The result would be the stifling of views on controversial subjects. “The free expression of opinion, coupled with government by popular consent, leads to national strength and human advancement.”
• Section 22 amounted to thought control by requiring the deportation of any alien who distributes any written matter advocating totalitarianism.

2. Students may say that Congress overrode the president’s veto because of the level of anti-communist hysteria in the nation in 1950.

3. Truman saw the McCarran Act as “a step toward totalitarianism” because, as he wrote: “There is no more fundamental axiom of American freedom than the familiar statement: In a free country, we punish men for the crimes they commit, but never for the opinions they have...[W]e will destroy all that we seek to preserve, if we sacrifice the liberties of our citizens in a misguided attempt to achieve national security.”

4. The law would delight the communists, Truman wrote, because “it would make a mockery of the Bill of Rights and of our claims to stand for freedom in the world.”

Handout G: Excerpts from Chief Justice Vinson’s Majority Opinion, Dennis v. United States (1951); a 6 – 2 Decision

1. Students should paraphrase each of following quotes.
• Courts must weigh the degree of evil as well as considering the likelihood that the evil will be successful, in order to decide to what extent free speech must be limited in order to avoid the danger.
• Some may argue that a conspiracy is not a real danger because it is merely preparation. The majority decision maintains that it is the conspiracy itself which creates the danger because it works to bring all the necessary components into place in order to overthrow the government when the time is right.

2. Students should explain whether they agree with the Court’s majority that the Smith Act did not violate the constitutional rights of the Communist Party leaders.

Handout H: “McCarthy Cries Again,” Collier’s, August 2, 1952

1. The Collier’s editorial (Handout H) and the concluding statement issued by Edward R. Murrow (Handout I) both express contempt for Senator McCarthy and his methods. In the Collier’s editorial, he is described as “insecure,” “less than courageous,” carrying out “wild-swinging attacks,” “not only ridiculous but dangerous.” Edward R. Murrow said that McCarthy had “confused the public mind,” “caused alarm and dismay amongst our allies abroad, and given considerable comfort to our enemies.”

The two statements are about two years apart, and conclusions are somewhat different. While the Collier’s editorial points to the “real danger of communist infiltration,” Murrow stated that the fault for the fear that McCarthy exploited was not his own creation, but “The fault...is...in ourselves.”

Students should explain which statements or passages are most powerful.
2. According to McCarthy, speech should tell the truth as McCarthy understands it.

3. The *Collier’s* editorial implies that McCarthy’s action in alienating the *Times*’ chief sources of revenue was out of bounds.

**Handout J: Follow-up**

1. In *Yates v. United States*, the Court reversed the Smith Act convictions, reasoning that the law only prohibited express incitement to specific conduct. In several different decisions, the Court made the McCarran Act obsolete as each of its major provisions was overturned in favor of greater protection of civil liberties in the First and Fifth Amendments.