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 firsthand 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:


Kutler, Stanley I., American Inquisition: Justice and Injustice in the Cold War, 1983.


Handout A: Constitutional Provisions Related to Due Process and Fair Trials

1. *Habeas corpus* is Latin for “to have the body,” a centuries-old protection of the accused that guarantees a hearing before a judge who has the power to release a prisoner who is illegally detained. It is an important part of due process for people who are arrested because it helps prevent arbitrary, illegal, or mistaken detention.

2. According to Article III, Section 2, Clause 3, Congress designates the place where trial should be held if a crime is committed outside of any state.

3. Elements of a fair trial guaranteed by the Fifth Amendment include the following:
   - Right to indictment by grand jury unless the case arises in land or naval forces or the militia when in service during times of war or public danger
   - Protection against being tried more than once for given offenses (“double jeopardy”)
   - Protection against forced self-incrimination
   - Protection against being deprived of life, liberty, or property without due process
   - Protection against the taking of private property without just compensation

4. Elements of a fair trial guaranteed by the Sixth Amendment include the following:
   - Speedy and public trial by an impartial jury of the state or district where the alleged crime was committed. The district must have been previously ascertained by law.
   - The right to be informed of the charges
   - The right to be confronted by witnesses
   - Compulsory process for compelling testimony by witnesses in one’s favor
   - The right to have a defense attorney

5. Accept reasoned answers that demonstrate an understanding of both what is meant by due process and the complexity of the question.

Handout B: Background Essay—Due Process and Military Justice

1. All three cases arose during wartime; *Milligan* in the Civil War and *Quirin* and *Eisentrager* during WWII.

   The *Milligan* case involved a civilian who sought to overthrow the U.S. government, and who was tried, convicted, and sentenced to death by a military commission. The decision was unanimous that civilians must be tried in civil courts as long as they are open, even during wartime.

   In the *Quirin* case, German saboteurs were caught in the United States during WWII. They were tried, convicted, and sentenced to death by a military tribunal. The Supreme Court ruled unanimously that they had no right to a civilian trial because they were unlawful enemy combatants. President Roosevelt had not exceeded his authority in ordering them to be tried by military commission.
In the *Eisentrager* case, non-resident enemy aliens were tried by military tribunal outside the U.S. for war crimes against the U.S. In a 6-3 decision, the Supreme Court majority ruled that there is no *habeas corpus* protection for enemy aliens captured overseas.

2. The Roosevelt and Truman administrations tried enemy combatants during World War II according to Congress’s power under Article I, Section 8, Clauses 11 and 14 to govern the conduct of military forces. Congress had provided for the president to apply the rules of evidence used in federal criminal trials “in so far as he deems practicable.”

3. In decisions related to the detainment and military tribunals of enemy combatants by the Roosevelt and Truman administrations, the U.S. Supreme Court ruled that the president and Congress had acted within the Constitution.

4. Accept reasoned responses. As of January 2004, the Bush administration’s actions against enemy combatants during the war on terror seem to be largely consistent with precedents established by previous administrations in World War II.

5. Accept reasonable responses that do the following:
   - Accurately summarize the excerpts from decisions written by Justices Jackson and Black,
   - Support either opinion.


Accept reasoned answers that demonstrate an understanding of the following:

1. Constitutional passages and case precedents that would aid KSM’s defense.
2. Constitutional passages and case precedents that would aid KSM’s prosecution.
3. Major actions of each branch of the federal government in KSM’s case.
4. Decide which branch acted most powerfully in this context.

**Handout M: Timeline—Military Justice during the War on Terror**

Student responses should demonstrate understanding of the historical significance of each event on the timeline and reveal consistent reasoning regarding whether U.S. government actions were appropriate. Their graphic organizers or political cartoons should demonstrate an understanding of the complexities of applying constitutional principles during wartime.

Students should support their opinions regarding resolution of the remaining Guantanamo cases by citing constitutional principles and precedent.

**Handout N: Comparing Supreme Court Decisions**

Accept reasoned responses. Sample responses are shown below. Student choice of excerpt for each opinion should reveal a grasp of the comparison between each opinion and the opinions written in the Eisentrager case. To indicate the majority opinion in each case, students should highlight the opinions of Justices Jackson, O’Connor, Stevens, and Kennedy.
<table>
<thead>
<tr>
<th>What form of due process applies?</th>
<th>The privilege of the writ of habeas corpus does not apply in this situation; the policy determined by the president and Congress will be carried out.</th>
<th>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</th>
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<tbody>
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<td><strong>Johnson v. Eisentrager (1950)</strong></td>
<td><strong>Justice Jackson</strong>: “The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security...This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”</td>
<td><strong>Justice Black</strong>: “Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. ...I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”</td>
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<td><strong>Hamdi v. Rumsfeld (2004)</strong></td>
<td><strong>Justice Thomas</strong>: “[The Supreme Court lacks] the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches...Hamdi thereby received all the process to which he was due under the circumstances...”</td>
<td><strong>Justice O’Connor</strong>: “The Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions...Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process...”</td>
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<td>Rasul v. Bush (2004)</td>
<td><strong>Justice Scalia:</strong> “[T]he Court evades explaining why stare decisis can be disregarded, and why Eisentrager was wrong...Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction...”</td>
<td><strong>Justice Stevens:</strong> “Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under Section 2241. Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus...”</td>
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<td>Hamdan v. Rumsfeld (2006)</td>
<td><strong>Justice Scalia:</strong> “Here, apparently for the first time in history... a District Court enjoined [prohibited] ongoing military commission proceedings, which had been deemed “necessary” by the President “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.” Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to avoid such conflict. Instead, the Court rushes headlong to meet it...”</td>
<td><strong>Justice Stevens:</strong> “Neither of these congressional Acts [AUMF nor DTA 2005], however, expands the President’s authority to convene military commissions... But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”</td>
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*Boumediene v. Bush (2008)*

**Justice Scalia:** The writ of *habeas corpus* does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely ultra vires [beyond the powers of the Court]...

**Chief Justice Roberts:** The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants...

Hamdi concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have...

**Justice Kennedy:** “We hold that Article I, Section 9, Clause 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of *habeas corpus* is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. ...Petitioners, therefore, are entitled to the privilege of *habeas corpus* to challenge the legality of their detention... [if not] it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”

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Accept reasoned responses that

- Thoughtfully assess Hamilton’s warning
- Address to what extent the warning applies to twenty-first century America
- Evaluates to what extent the fair trial decisions have protected both liberty and security