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.

By Stuart Leibiger, La Salle University

For Further Reading:


