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. Although the committee's investigations were frequently flawed by innuendo and leaks, they nonetheless stirred fear and led to the persecution of film studio owners and employees. A few, such as the director Frank Capra, had their careers effectively ended.

Liberty and Security in Modern Times
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:


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


**Answer Keys**

**Handout A: Department of Justice Summary of the Patriot Act**

As they annotate their copies of this document, students may list constitutional principles and goals of government including republicanism, separation of powers, protection against unreasonable search and seizure, protection of free speech, justice, providing for the common defense, and promoting the general welfare.

**Handout B: Preamble and Fourth Amendment**

1. Answers will vary, but may include the following points:

   Protection against unreasonable searches and seizures was clearly one of the “blessings of liberty” that the Framers of the Constitution and Bill of Rights had in mind.

   The requirement of specific warrants issued by judges supports the goal of establishing justice.

   Complaint against the British crown’s use of writs of assistance and general warrants was a well-known colonial grievance, perhaps most famously highlighted by James Otis. Protection against such procedures was essential to form a more perfect union, insure domestic tranquility, and promote the general welfare of the people.

   Additional constitutional principles suggested by both documents are liberty, limited government, rule of law, natural rights, due process, and representative government.

2. It may seem easier to provide for the common defense if authorities are not bound by due process. However, can the government provide for the common defense if it alienates the very people whose support it needs?

**Handout C: Senator Rand Paul’s Letter of Opposition to the Patriot Act**

*February 15, 2011*

**Passage 1**

1. Writs of assistance were general warrants that were issued by British soldiers in colonial America without judicial review and that did not name the subject or items to be searched. Otis objected to these writs of assistance because they “placed the liberty of every man in the hands of every petty officer.”

2. “Fundamental principles” might include liberty, natural rights, limited government, due process (including freedom from unreasonable search and seizure), separation of powers, rule of law, justice, freedom of speech, and others.

**Passage 2**

1. National Security Letters, or NSLs, from FBI agents took the place of warrants issued by judges. The FBI might use them in order to save time in urgent situations, or they might represent a pretext for abuse of power in some other situations. NSLs are very similar to writs of assistance because they remove any check on the officer conducting the search. They allow “fishing expeditions” where
officers can make up their own rules for the search, and violate the principles of liberty, limited
government, separation of powers, rule of law and due process. It would seem that NSLs are simply
a modern version of general warrants.

2. The Court’s (7-2) decision in *Carroll v. United States* (1925) upholding the requirement of probable
cause for a search of a vehicle repudiates the reasoning behind modern NSLs. Principles of gov-
ernment include limited government, rule of law, due process, freedom from unreasonable search
and seizure, and others.

Passage 3

1. Under a sunset provision, the following provisions of the Patriot Act were to expire unless reau-
thorized by Congress and the President.

   - Section 215 allowing the government to obtain records, “any tangible thing,” from a person
     or entity by making only the minimal showing of “relevance” to an international terrorism or
     espionage investigation.

   - Section 206, the “roving wiretap” provision of the Patriot Act

   - Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, or the so-
called “Lone Wolf” provision (Note—this one is not mentioned in the passage, but this is the
third provision to which Senator Paul refers.)

2. Senator Paul suggested that the real reason behind the Patriot Act was to carry out a “long-standing
wish list of power grabs like warrantless searches and roving wiretaps.”

3. Constitutional principles that may be threatened by Section 215 are freedom from unreasonable
search and seizure, freedom of speech (gag rule), due process, and others.

Passage 4

1. Senator Paul explained that other provisions (National Security Letters and Suspicious Activity
Reports) allow the government to gather a great deal of sensitive personal information without
judicial oversight, leading to abuse. He described several reports documenting examples of abuse,
for example, situations in which the FBI did not follow its own rules.

2. NSL abuse involves violating the NSL statutes, Attorney General guidelines, or FBI internal policies,
as well as the collection of data on U.S. citizens or legal aliens. The Electronic Frontier Foundation
(“EFF”) estimates that, “based on the proportion of violations reported to the Intelligence Oversight
Board and the FBI’s own statements regarding NSL violations, the actual number of violations that
may have occurred [from 2001 – 2008] could approach 40,000 violations of law, executive order, and
other regulations.” Students should be able to explain which example of abuse they consider the
most troubling, and why. They may list constitutional principles such as freedom from unreasonable
search and seizure, rule of law, due process, limited government, liberty, free speech, and others.

3. Senator Paul noted that the Patriot Act makes abuses like NSLs and SARs permanent. Students
may note additional issues.
Passage 5

1. Senator Paul wrote that legislators are bound by their oath to the Constitution to re-evaluate the Patriot Act because he believes that many of its provisions, and the bureaucracy that developed to administer them, violate constitutional principles. Examples may include principles of liberty, limited government, separation of powers, rule of law, justice, due process, freedom of speech, and freedom from unreasonable search and seizure.

2. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.

Handout D: Remarks from President Barack Obama, August 9, 2013

Passage 1

1. Student responses will reflect their background knowledge, which may include the following examples. Specific incidents in which government use of surveillance has abused the rights of citizens might include writs of assistance in colonial America, the U.S. Sedition Acts of 1798 and 1918, use of Stasi informants in Nazi Germany; law enforcement use of informants in the former Soviet Union; U.S. use of illegal surveillance of Vietnam War protesters during the Johnson and Nixon administrations, and North Korea's web of political informants.

Passage 2

1. President Obama describes the following steps:

   First, Have Congress pursue appropriate reforms to Section 215 of the Patriot Act—the program that collects telephone records. Reforms might include greater oversight, greater transparency, and constraints on the use of this authority.

   Second, additional changes to the FISC taking steps to make sure civil liberties are protected by ensuring that the government’s position is challenged by an adversary.

   Third, we can, and must, be more transparent: The Department of Justice will make public the legal rationale for the government’s collection activities under Section 215 of the Patriot Act. The NSA is taking steps to put in place a full-time civil liberties and privacy officer. And finally, the intelligence community is creating a website that will serve as a hub for further transparency,

   Fourth, the federal government is forming a high-level group of outside experts to review our entire intelligence and communications technologies. This independent group will make sure that there is absolutely no abuse in the use of surveillance technologies. Finally, they will provide an interim report in 60 days and a final report by the end of the year (2013), so that we can move forward with a better understanding of how these programs impact security, privacy, and foreign policy.

2. President Obama agreed with Edward Snowden’s position in that safeguards must be imposed to prevent abuses of people's liberties and hold government to the rule of law even during wartime.

3. Student research would include a review of relevant steps since 2013 and should include current events.
Passage 3

1. Student responses will reflect their background knowledge. Specific examples of other governments throwing their own citizens in prison for what they say online might include the following:
   - In Iran, posting illegal content or accessing blocked Internet content is punishable by long terms in jail.
   - In China, nearly 100 journalists and citizens are in prison because of their Internet activity. For example, cyber dissident Hu Jia was imprisoned for 3 ½ years and continues under house arrest.
   - Also in China, new users of micro-blogging sites are required to register with their name and telephone number, thus increasing the government’s ability to track and potentially imprison them.
   - In Tibet, Buddhist monks are routinely under surveillance, and government authorities are prepared to raid monasteries at any given time. While no clear information exists regarding the arrest of any of the monks, computers, documents, photographs, and DVDs have been seized.
   - Additional likely countries to research: Turkmenistan, Saudi Arabia, Bahrain
   - Reporters Without Borders report, “Enemies of the Internet” suggests these additional countries and agencies as sources as potential abuse.
     - Belarus - the Operations and Analysis Centre conducts surveillance on its citizens.
     - India - the Centre for Development of Telematics
     - United Kingdom – the Government Communications Headquarters (GCHQ)
     - United States – the National Security Agency (NSA)

2. Specific constitutional principles might include liberty, limited government, separation of powers, rule of law, justice, due process (including freedom from unreasonable search and seizure), and freedom of speech. Virtues might include vigilance by citizens, justice, respect, responsibility, initiative, courage, honor, moderation, perseverance, resourcefulness, etc.

Extension Activities

Remarks from Senator Feingold on October 25th, 2001

1. Students should refer to any 3 of these:
   - with a warrant the FBI should be able to seize voice mail messages as well as tap a phone.
   - to update the federal criminal offense relating to possession and use of biological weapons.
   - to make sure that phone conversations carried over cables would not have more protection from surveillance than conversations carried over phone lines.
   - to stiffen penalties and lengthen or eliminate statutes of limitation for certain terrorist crimes.
   - to assist the victims of crime,
   - to streamline the application process for public safety officers benefits and increase those benefits,
Answer Keys: Page 5

- to provide more funds to strengthen immigration controls at our borders
- to expedite the hiring of translators at the FBI, and many other such provisions.

2. Note to teachers: This is a key question to understanding the debate over the Patriot Act. Extending the new criminal procedure regulations to any federal criminal prosecution will result in significant reductions in due process protections for anyone accused of a federal crime.

3. The longstanding practice under the Fourth Amendment of serving a warrant prior to executing a search could be easily avoided in virtually every case, because the government would simply have to show that it had "reasonable cause to believe" that providing notice "may" seriously jeopardize an investigation." Notice is a key element of Fourth Amendment protections. It allows a person to point out mistakes in a warrant and to make sure that a search is limited to the terms of a warrant.

4. Law enforcement agencies might support "sneak and peak" searches because they could make searches more efficient and safer for the officers conducting the searches.

5. Senator Feingold predicted an abuse of power that might result from making it easier for owners of computers, such as employers, to give police permission to monitor communications from those computers. For example, an employer might use procedures aimed at terrorist activity trying to catch an employee violating the workplace rules regarding personal use of the computer. Feingold writes, "With this one provision, fourth amendment protections are potentially eliminated for a broad spectrum of electronic communications."

6. Law enforcement powers would be expanded because officers could use powers originally intended to conduct surveillance in foreign intelligence investigations in almost any domestic investigation of federal crime. The government would not have to meet the rigorous probable cause standard under the Fourth Amendment—as long as the government shows that intelligence is a "significant purpose" of the investigation—not the primary purpose as under previous law. It seems obvious that with this lower standard, the FBI would try to use FISA as much as it can. (Note Section 215.)

7. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.

Remarks from Attorney General John Ashcroft, February 10, 2003

1. "Paradigm of prevention" refers to a new focus adopted by the U.S. and other freedom-loving countries. "We are working to bridge the gaps in our domestic law enforcement and security activities with greater cooperation and information sharing. We have broken down some of the artificial barriers separating needlessly our law enforcement and intelligence communities. Federal, state, and local law enforcement agencies have united in unprecedented cooperation, committed to a common goal." The goal is to stop terrorism before it happens, not just prosecute and punish the guilty after the fact.

2. The shared values include the following
   - rule of law
   - progress and pluralism
   - tolerance and freedom
• freedom of speech
• freedom of religion
• political democracy
• equality and justice

3. Answers will vary; accept reasoned responses.

4. Answers will vary, but may refer to Ashcroft’s desire to demonstrate that the U.S. is not alone in its opposition to terrorism. He emphasized the common ground shared by nations that value freedom and the international threat of terrorism.

5. Answers will vary, but Ashcroft explained that we have a better chance of preventing terrorism if we work with other countries to share information.

6. Answers will vary, but may refer to the international effort to stop the spread of communism during the Cold War as a historical example of successful cooperation among countries.

7. Ashcroft referred to “rule of law” at least 8 times in the document. Rule of law means that the laws of a country apply equally to everyone and are made by an open, fair, and predictable process. No one is above the law and the government must follow its own rules. Answers will vary regarding why Ashcroft emphasized the principle so much and how enhanced law enforcement powers might endanger the principle. Students might suggest that if law enforcement powers are enhanced, it becomes easier for officials to abuse the rights of the people. Accept well-reasoned responses.

8. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.