CRITICAL ENGAGEMENT QUESTION

Is it ever necessary to violate the Constitution in order to preserve the Constitution?

OVERVIEW

Since the Founding, American government has served two important purposes: protecting individual rights and protecting the safety of the people. In times of crisis, some debate whether and how government can adequately perform both of these roles simultaneously. Considering events in United States history that have provoked extraordinary security provisions, students will evaluate the constitutionality of such provisions from the early republic through the twentieth century.

The liberty of speaking and writing guards our other liberties.
–THOMAS JEFFERSON

It has long been a grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies
–ABRAHAM LINCOLN

MUSEUM CONNECTION

Help your students learn more about historical challenges of balancing liberty and security while maintaining freedom. Take your class to the What Are the Limits exhibit and learn about the “Wartime” case studies at the McCormick Tribune Freedom Museum (www.FreedomMuseum.us).
OBJECTIVES

Students will:
• understand constitutional provisions for times of crisis.
• understand historical periods when constitutional liberties have been suspended in times of crisis.
• analyze the Constitution and Bill of Rights as they apply to security issues.
• evaluate contradictory points of view concerning liberty and security.
• appreciate the complexity of preserving national security and freedom simultaneously.

STANDARDS

NCHS: Era 3, Standard 3; Era 9, Standard 4
CCE: IA1, IIA3, VB1, VB2, VB5
NCSS: Strands 2, 6, and 10

STUDENT MATERIALS

Handout A: Balancing Liberty and Security Background Essay
Handout B: Avoiding War with France
Handout C: President Lincoln and Habeas Corpus
Handout D: Sedition during World War I
Handout E: Japanese Internment Camps
Freedom's Touchstones: Daniel Ellsberg (optional)

TEACHER MATERIALS

Transparency Master A: Focus Questions
Answer Key

GRADE LEVEL/TIME

Two 45-minute high school classes or one 90-minute block

BACKGROUND/HOMEWORK

[10 minutes the day before]

Have students read Handout A: Balancing Liberty and Security Background Essay.

WARM-UP

[10-15 minutes]

A. Put up an overhead of Transparency Master A: Focus Questions and conduct a large group discussion. See the Answer Key for suggested responses.

B. Ask students to brainstorm instances in American history when the government has had to balance liberty and security. Make a list on the board of student responses. In addition to the answers students generate, you may wish to add: Avoiding war with France in 1798, the Civil War, World War I, World War II, the Iraq War, and the War on Terror.

ACTIVITY I

[20 minutes]

A. Divide students into groups of four and distribute Handout B: Avoiding War with France, Handout C: President Lincoln and Habeas Corpus, Handout D: Sedition during World War I, and Handout E: Japanese Internment Camps to students of each group. Have students read their document and answer the questions on the Handout.

B. Have students pair up within their groups for a mini-debate. One pair should take the position that the security law, instruction, or order described was a constitutional measure. The other pair should argue the side that the security law, instruction, or order described was an unconstitutional infringement of liberty.

C. Students should consider the questions:

• Why did the government act to limit rights under these circumstances?
• Does the government have the power to limit or even curtail the rights covered by the Bill of Rights?

ACTIVITY II

[30-40 minutes]

A. Arrange the classroom to feature a set of four desks facing each other at the front of the room.

B. Ask for volunteers from the 1798 Alien and Sedition Acts groups to come to the front of the class and debate the constitutionality of the Act. Have students debate for about five minutes, and then open the floor to questions from the class.

C. Proceed with the Civil War groups, the Sedition Act of 1918 groups, and finally the World War II groups.
D. After all groups have presented, ask students to share their impressions on the complexities of balancing liberty and security. Conduct a large group discussion to answer the questions:

- In what cases did the president initially limit rights? (The Civil War, World War II)
- In which cases did Congress limit rights? (1798, World War I)
- If the federal government should have extraordinary powers during a crisis, what type of governmental system should be put in place to protect against tyranny and despotism? Explain.
- Or, if the federal government does not have any extra powers, how can the government adequately provide security? Explain.
- Should the government ever violate the Constitution to preserve the Constitution?

HOMEWORK

A. Have students read Freedom’s Touchstones: Daniel Ellsberg and answer the critical thinking questions.

B. Have students write a new amendment to the Constitution, specifying what powers the government has (if any) to suspend freedom in wartime. Students should consider the War on Terror when drafting their amendments. Amendments should:

- explain what defines a national crisis: a declared war, any war, an invasion, a rebellion, a riot, a natural disaster, an environmental threat, an economic threat, etc.
- explain the procedure of how the federal government will take emergency power.
- specify who will make the decisions: the president, Congress, the Supreme Court, a combination of the three, etc.
EXTENSIONS

A. Have students research the cases below and summarize the way each decision defined the balance between free speech and national security. Students can begin their research at www.BilloRightsInstitute.org.

Schenck v. United States (1919)
Debs v. United States (1919)
Abrams v. United States (1919)
Gitlow v. People of New York (1925)

B. Have students research the Supreme Court case Hamdi v. Rumsfeld (2004). In a one- to two-page essay, have them summarize the facts of the case and the Court’s decision, and then present their opinion on the ruling.

C. Have students research individuals who were impacted by the measures and laws in this lesson. For example, students could research Matthew Lyon, John Merryman, Eugene V. Debs, and Mary Tsukamoto. Have them share what they learned with the class in a PowerPoint or other visual presentation.

REAL LIFE PORTAL

Have students research the USA-PATRIOT Act and write a one-page essay answering the following questions: What is the USA-PATRIOT Act? What are popular criticisms and defenses of it? Are the surveillance authorities granted to the government in sections 213, 214, 215, and 218 constitutional? Why or why not? The PATRIOT Act can be found at http://news.findlaw.com/cnn/docs/terrorism/hr3162.pdf.
There have been times in U.S. History when the federal government has limited or suspended constitutionally protected freedoms. In wartime in particular, the government has placed limits on liberty.

1798: Avoiding War with France

Sedition is speech that incites disloyalty or hatred of the government. The Sedition Act of 1798 was passed by the Federalist-controlled Congress in 1798 and signed into law by President John Adams. The law made it a crime to criticize the government.

The new nation seemed on the brink of war. An undeclared naval war (or “quasi-war,” as it was called,) was already in progress in 1797 as the French seized over 300 American ships. Federalists were calling for a formal declaration of war with France. Republicans, on the other hand, were urging support for France against the British and did not want the United States to be involved.

President John Adams, against the wishes of many within his Federalist party, wanted to avoid a formal declaration of war. The Sedition Act of 1798 was designed to silence Republican critics of his administration and to quiet support for the French in their war with England. Twenty-four journalists were arrested, and ten were convicted under the Sedition Act. The United States remained out of the war between France and England, which was one of Adams’s goals. The law was allowed to expire by the Republican-controlled Congress in 1801.

1861: The Civil War

President Lincoln, believing that the very existence of the United States was in jeopardy, suspended writs of habeas corpus during the Civil War. A writ of habeas corpus requires that the government bring the arrested person to court—literally, “you shall have the body to be subjected to examination.” (from the Latin habeas corpus ad subjiciendum)

John Merryman was arrested for opposing the United States government. He was also charged with communication with the Confederates and with treason. Merryman wanted to be removed from prison and charged in open civilian court, hoping to secure his freedom.

The case, Ex Parte Merryman (1861), came before the Supreme Court. Chief Justice Roger Taney’s strongly worded opinion asserted that by suspending writs of habeas corpus, Lincoln was wrongly assuming power that belonged to Congress. He believed that Lincoln was violating the Constitution’s provisions, guarantees, and checks and balances.

1918: World War I

As the United States entered World War I, President Wilson believed that the Central Powers and its sympathizers in the United States were spying on the United States. The Espionage Act of 1917 was passed two months after the U.S. went to war with Germany. The protections of First Amendment freedoms would be suspended due to the national emergency.
The Sedition Act of 1918 (which amended the Espionage Act) targeted those who interfered with the draft as well as those individuals who publicly criticized the government—including negative comments about the flag, military, or Constitution.

More than 2,000 people were prosecuted under the Sedition Act of 1918, though many were later pardoned or had their sentences commuted. The Espionage and Sedition Acts were repealed in 1921.

**1942: World War II**

On December 8, 1941, the day after Japan attacked Pearl Harbor, bringing the United States into World War II, the Treasury Department seized all Japanese banks and businesses in the United States. It gave the Federal Reserve authority over Japanese-Americans’ property.

More government restrictions followed, including Executive Orders 9066 and 9102. These orders authorized “military areas” and a “war relocation authority” to round up Japanese-Americans. These people—many of them U.S. citizens—would be sent to camps within the military areas for the rest of the war. Over 100,000 were moved to the camps by the time the war was over.

The 1948 Japanese-Americans Claims Act allowed camp detainees to receive compensation for their losses. The government received $131 million in claims, and paid $38 million to settle them. In 1988, President Reagan signed the Civil Liberties Act, which gave $20,000 in reparations to camp detainees, as well as an apology for their losses of liberty and property.
FOCUS QUESTIONS

1. Consider the word “security.” What definitions and what issues come to your mind?

2. Consider the word “liberty.” What definitions and what issues come to your mind?

3. What kinds of liberty are there? Do your parents or does your school ever restrict liberty in the name of security? How?

4. Describe the amount of security that a nation needs.

5. What liberties, if any, are you willing to give up in exchange for greater security?
AVOIDING WAR WITH FRANCE

Directions: Read the following documents carefully and then answer the questions below.

The First Amendment (1791)

Congress shall make no law…abridging the freedom of speech, or of the press.

The Sedition Act (1798)

SEC. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President…or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person…shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

1. When was The Sedition Act written?
2. What was the purpose of The Sedition Act?
3. Definitions of bolded vocabulary words:
4. What individuals or groups were most affected by the provisions of this document?
5. Do the Sedition Act’s provisions abridge any of the Constitution’s or Bill of Rights’s protections? If so, which ones?
6. How did the Sedition Act attempt to balance liberty and security? (Did it?)
PRESIDENT LINCOLN AND HABEAS CORPUS

Directions: Read the following documents carefully and then answer the questions below.

Sections of the United States Constitution (1787)

Article I, Section 8. The Congress shall have power to …provide for the common defense and general welfare of the United States…

Article I, Section 9. …The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

President Lincoln’s instructions to the Commanding General Army of the United States: (1861)

“You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line…you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally or through the officer in command at the point where resistance occurs are authorized to suspend that writ.”

1. When did Lincoln give these instructions?
2. What was the purpose of these instructions?
3. Definitions of bolded vocabulary words:
4. What individuals or groups were most affected by the provisions of these instructions?
5. Do the provisions of these instructions abridge any of the Constitution’s or Bill of Rights’s protections? If so, which ones?
6. How did this document attempt to balance liberty and security? (Did it?)
SEDITON DURING WORLD WAR I

Directions: Read the following documents carefully and then answer the questions below.

The First Amendment (1791)

Congress shall make no law...abridging the freedom of speech, or of the press...

The Sedition Act (1918)

SECTION 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports, or false statements, ...or incite insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct ...the recruiting or enlistment service of the United States, or ...shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States ...or shall willfully display the flag of any foreign enemy, or shall willfully ...urge, incite, or advocate any curtailment of production ...or advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both....

1. When was the Sedition Act written?
2. What was the purpose of the Sedition Act?
3. Definitions of bolded vocabulary words:
4. What individuals or groups were most affected by the provisions of this document?
5. Do the Sedition Act’s provisions abridge any of the Constitution’s or Bill of Rights’s protections? If so, which ones?
6. How did the Sedition Act attempt to balance liberty and security? (Did it?)
Directions: Read the following documents carefully and then answer the questions below.

The Fifth Amendment (1791)
No person shall be ...deprived of life, liberty, or property, without due process of law...

Executive Order No. 9066 – February 19, 1942
Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage...

...I hereby authorize and direct the Secretary of War...to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary...for the conduct and control of alien enemies...

Executive Order No. 9102 – March 18, 1942
...[I]n the interests of national security, it is ordered as follows...The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision....

1. When were these documents written?
2. What was the purpose of these documents?
3. Definitions of bolded vocabulary words:
4. What individuals or groups were most affected by the provisions of these documents?
5. Do the provisions of these documents abridge any of the Constitution’s or Bill of Rights’s protections? If so, which ones?
6. How do these documents attempt to balance liberty and security? (Did it?)
It was the middle of the night in Washington, D.C. The year was 1971. Not daring to turn lights on, the government analyst stood in the darkness, listening to the rhythmic hum of the photocopier. He fed pages and pages of classified documents into the machine. These 7,000 pages Daniel Ellsberg illegally copied revealed damaging information about the government’s actions in the Vietnam War. They would become known as the “Pentagon Papers” and their publication in newspapers around the country would spark a clash between the powers of government and the most respected newspapers in the country. At the center of this battle was the meaning of the First Amendment.

Daniel Ellsberg’s interests as a Ph.D. student at Harvard had been economics and decision-making. He served in the Marine Corps, and did consulting work for the federal government. In 1962, the State Department hired him to study government decision-making in times of crisis. As part of his work, Ellsberg had access to top-secret documents.

In 1964, Ellsberg began to focus on the Vietnam War. He began to “immerse himself” in the telegrams and cables that were being sent constantly. He began to see signs of government deception. He even observed the substantial fabrication of a battle, the Gulf of Tonkin incident. President Johnson then used that exaggerated battle to ask Congress for official support of the war.

Ellsberg continued in his position, all the while hearing the differences between what the President was telling the public, and the truth he read in the telegrams, cables, and other documents. He explained, “The public [was] being lied to every day by the president, by his spokespeople, by his officers.”

As part of a large team, Ellsberg worked on a study totaling more than 7,000 pages of top-secret documents related to the war. They were kept in safes at the Pentagon and became the Pentagon Papers.

When Richard Nixon was elected president in 1968, Ellsberg saw the same type of gap between the reality of the war and what the president was telling the public. Ellsberg had to decide what action, if any, to take. He could go public with what he knew, convince a member of Congress to go public for him, or do nothing.

Ellsberg knew that security procedures exist to keep the nation safe. Exposing government deception during a time of crisis might decrease citizens’ confidence in their leaders and make a difficult time even more unstable. Revealing past strategies might give Vietnam an advantage in the war. Further, revealing the classified information would mean breaking his oath to keep the information secret. On the other hand, the Papers revealed only the history of the war, and proved nothing about then-President Nixon’s intentions or future course.

Ellsberg decided that in this case, the balance between liberty and security must turn in the peoples’ favor. He gave the papers to the New York Times. Then he and his wife went into hiding.

The Times began printing excerpts from the Pentagon Papers on June 13, 1971. The federal government got a court order stopping the Times from printing any more of the documents. This was the first time in American history that the government had successfully ordered a prior restraint (the order that content be censored ahead of publication) on national security grounds. Historically, prior restraint has been considered the most serious and most questionable form of censorship.
Undaunted, Ellsberg released the Pentagon Papers to the Washington Post. The government then asked for another court order to stop the printing. Less than two weeks later, the two combined cases were before the Supreme Court.

The Court ruled in New York Times v. United States (1971) that the prior restraint was unconstitutional. New York Times v. United States is one of the most important freedom of the press cases in American history because it affirmed that prior restraint violates the First Amendment. On the day of the ruling, Ellsberg turned himself in, and was charged with theft, conspiracy, and espionage.

Ellsberg’s critics charged him with compromising national security. One official called him “the most dangerous man in America.” President Nixon criticized the Supreme Court decision: “[The] Supreme Court shouldn’t determine what is classified. They don’t know. The New York Times shouldn’t determine it. And Ellsberg shouldn’t determine it. They weren’t elected to do that—we are.”

In the months following Ellsberg’s surrender, an investigation revealed that the White House had gone to great lengths to discredit Ellsberg. Agents broke into Ellsberg’s psychiatrist’s office, hoping to find damaging information. In May of 1972, CIA agents were secretly flown to Washington with the orders to “totally incapacitate” Ellsberg. (The agents called off the plan.) Charges against Ellsberg were eventually dropped the next year in light of the gross government misconduct.

Ellsberg understands there was mixed reaction to his actions. He said in 1999 that he believes a majority of people “felt that they had had a right to that information, that it had been wrongfully withheld from them, …A great many people clearly approved of what I had done…On the other hand, many Americans felt I had acted wrongly, especially in view of my earlier promises to keep this information secret.”

He told CNN in 1999, “We live in a country, thank God, where telling the truth to Congress is not treason even though the president is determined to deceive Congress and the public. Of course, that’s that marvelous difference between our country and…most countries in the world.”

CRITICAL THINKING QUESTIONS

1. What were the Pentagon Papers?
2. How did Ellsberg’s actions attempt to balance liberty and security? Was he successful?
3. In order to make the Pentagon Papers public, Ellsberg had to break his promise to keep classified information secret. How does his affect the way you view his choice?
4. Does the fact that Ellsberg waited until Johnson was out of office to expose the Pentagon Papers make his crime less serious?
5. Ellsberg has said, “At that time, it was very hard to get the public to believe or to act on the possibility that a president was lying to them or deceiving them. That was not in the American consciousness, and it was a very unpopular notion even to put forward.” Do you think this is the case today? Why or why not?