

Free Expression in Wartime: A Controversial Constitutional Issue

Introduction:

This lesson involves students in a Structured Academic Controversy—a small group discussion focused on a controversial issue. In this lesson, that issue is whether free expression should be limited in wartime. Students review the meaning of the First Amendment and then consider whether First Amendment rights should be limited in wartime. In groups of four, they consider arguments on both sides of the issue and then try to reach some agreement in their groups. A debriefing discussion concludes the lesson.

Objectives: Students will be able to:

1. List and explain the rights protected in the First Amendment.
2. Present arguments and cite evidence supporting those arguments on both sides of the question: Should free expression be limited in wartime?
3. Take part in a Structured Academic Controversy.

Teaching Time: 2 class periods

Materials and Preparation: Make copies of the handout for all students and make a transparencies from the transparency masters. You will also need several newspaper articles or headlines about the War in Iraq and the War on Terrorism, as well as articles or headlines that feature people demonstrating or speaking out against the war. Display the articles or headlines prominently in the front of the room. During the lesson, the class will be divided into groups of four and each group will be divided into two pairs (A and B); to save class time, you may want to make a list of group and pair assignments beforehand.

Procedure

1. Display the articles about the War in Iraq and/or the War on Terrorism that you have collected from the newspaper. Ask students: What are these articles about? Why is it important to have information about these topics? (*Accept all answers.*) Why might someone think it was wrong to publish information about the war or to express opposition to the war? (*Accept all answers.*) What gives the press the right to publish information about the war? (*The First Amendment*) What gives people the right to express opposition to the war? (*The First Amendment*)
2. If necessary, use Transparency Master 1 to review the contents of the First Amendment. Be sure students understand that freedom of speech, freedom of the press, the right to petition, and the right to peacefully assemble are sometimes collectively referred to as freedom of expression.
3. Take a quick poll of students, asking for a Yes/No answer to the following question:

Do you think freedom of expression should be limited in wartime?

Tally student responses on the board and ask one or two students on each side to give a reason supporting their answer.

4. Tell students they are going to explore this question more fully through a Structured Academic Controversy (SAC), a discussion that will take place in groups of four. Go over the steps in the SAC on Transparency Master 2 and be sure students understand the process. Tell them how much time they will have for each step; you can make these allocations based on the time available; the following allocations are generally sufficient for the discussion phases. The time needed for preparation will vary depending on your students; you may want to go over the reading as a class or assign the reading as homework; in addition, time for preparation can be shortened by having students read only the arguments that support their assigned position.
 - Pair A presents its arguments (3 minutes).
 - Pair B asks clarifying questions (1 minute).
 - Pair B presents its arguments (3 minutes).
 - Pair A asks questions (1 minute)
 - Pairs talk among themselves to decide which argument presented by the other pair was the strongest (2 minutes).
 - Pair B explains which argument for limiting freedom of expression they thought was strongest (1 minute).
 - Pair A explains which argument for not limiting freedom of expression they thought was strongest (1 minute).
 - All four students discuss the issue from their own perspectives and try to reach consensus on something (10 minutes).
5. Organize students into groups of four and designate two students in each group as Pair A and two students as Pair B. Give each student a copy of the handout and tell them to begin their preparation for the SAC.
6. When students are ready to begin, run the SAC, keeping a fairly close eye on the time and telling students when to move to the next step.
7. At the end of the SAC, ask groups to report out *briefly* on whether they reached consensus and, if so, what they agreed on. Then conduct a debriefing using the following questions:
 - If you reached consensus, what characteristics of your group or processes used allowed you to reach consensus?
 - If you didn't reach consensus, what characteristics of your group or processes used prevented you from reaching consensus?
 - What were the strongest arguments on each side of the issue?
 - What values underlie the opposing positions on this issue?
 - What did you learn? How did you learn it? Why is this learning significant? Did it help you make up your mind on the issue?
 - What could you do now as a citizen regarding this issue?
 - What aspects of this issue did you not fully understand before doing the deliberation? Was it worth thinking about other aspects of the issue?
 - Did you change your mind? What helped you change your mind?
 - What did your group do well in the discussion? How could your group improve its discussion?

Teacher Background Information

The following is a timeline of cases relevant to limits on First Amendment rights in wartime. It is provided as background for the teacher, although it could also be shared with students.

1917

Congress passes the Espionage Act, making it a crime "to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States."

1918

Congress passes the Sedition Act, which forbids spoken or printed criticism of the U.S. government, the Constitution or the flag.

1919

In *Schenck v. U.S.*, Justice Holmes sets forth his clear-and-present-danger test: "whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has the right to prevent." Schenck and others had been accused of urging draftees to oppose the draft and "not submit to intimidation." Justice Holmes also writes that not all speech is protected by the First Amendment, citing the now-famous example of falsely crying "fire" in a crowded theater.

In *Debs v. U.S.*, the U.S. Supreme Court upholds the conviction of socialist and presidential candidate Eugene V. Debs under the Espionage Act for making speeches opposing World War I. Justice Holmes claims to apply the "clear and present danger" test; however, he phrases it as requiring that Debs' words have a "natural tendency and reasonably probable effect" of obstructing recruitment.

The U.S. Supreme Court upholds the convictions of five individuals charged with violating the Espionage Act in *Abrams v. United States*. The individuals had circulated pamphlets critical of the U.S. government and its involvement in World War I. In a dissenting opinion, Justice Oliver Wendell Holmes writes that "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market." This passage forms the foundation of the "marketplace of ideas" theory of the First Amendment.

1921

Congress repeals the Sedition Acts.

1925

In *Gitlow v. New York*, the U.S. Supreme Court upholds under the New York criminal anarchy statute Benjamin Gitlow's conviction for writing and distributing "The Left Wing Manifesto." The Court concludes, however, that the free-speech clause of the First Amendment applies to the states through the due-process clause of the Fourteenth Amendment.

1927

The U.S. Supreme Court upholds California's criminal-syndicalism law in *Whitney v. California*. The

case involves Charlotte Anita Whitney, a member of the Socialist Party and former member of the Communist Labor Party. Justice Louis Brandeis writes in his concurring opinion a passage that becomes a fundamental First Amendment principle: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

1931

In *Stromberg v. California*, the U.S. Supreme Court reverses the state court conviction of Yetta Stromberg, 19-year-old female member of the Young Communist League, who violated a state law prohibiting the display of a red flag as “an emblem of opposition to the United States government.” Legal commentators cite this case as the first in which the Court recognizes that protected speech may be nonverbal, or a form of symbolic expression.

In *Near v. Minnesota*, the U.S. Supreme Court rules that the Minnesota statute granting state judges the power to enjoin as a nuisance any “malicious, scandalous and defamatory newspaper, magazine or other periodical” is “the essence of censorship.” The Court concluded that the primary aim of the First Amendment was to prevent prior restraints of the press.

1933

President Franklin D. Roosevelt pardons those convicted under the Espionage and Sedition Acts.

California repeals its Red Flag Law, ruled unconstitutional in *Stromberg*.

1940

Congress passes the Smith Act, Title I of the Alien Registration Act of 1940, which makes it a crime to advocate the violent overthrow of the government.

1941

Congress authorizes President Franklin D. Roosevelt to create the Office of Censorship.

1942

The U.S. Supreme Court determines “fighting words” are not protected by the First Amendment. In *Chaplinsky v. New Hampshire*, the Court defines “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of peace.” The Court states that such words are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

1943

In *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court rules that a West Virginia requirement to salute the flag violates the free-speech clause of the First Amendment, overruling a case decided only three years previously (*Gobitis*).

1949

In *Terminiello v. Chicago*, the U.S. Supreme Court limits the scope of the “fighting words” doctrine. Writing for the majority, Justice William O. Douglas says that the “function of free speech ... is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

1951

In *Dennis v. United States*, the U.S. Supreme Court upholds the convictions of 12 Communist Party

members convicted under the Smith Act of 1940. The Court finds that the Smith Act, a measure banning speech which advocates the violent overthrow of the federal government, does not violate the First Amendment.

1959

The U.S. Supreme Court upholds the conviction of a college professor who refuses, on First Amendment grounds, to answer questions before the House Un-American Activities Committee. In *Barenblatt v. United States*, the Court states that “where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”

1968

In *United States v. O'Brien*, the U.S. Supreme Court upholds the conviction of David Paul O'Brien, an anti-war protester accused of violating a federal statute prohibiting the public destruction of draft cards. O'Brien claims that the burning of draft cards is “symbolic speech” protected by the First Amendment. The Court concludes that conduct combining “speech” and “non-speech” elements can be regulated if the following four requirements are met: (1) the regulation is within the constitutional power of the government; (2) it furthers an “important or substantial” government interest; (3) the interest is “unrelated to suppression of free expression”; and (4) “incidental restriction” on First Amendment freedoms is “no greater than is essential to the furtherance” of the government interest. The Court concludes that all requirements were satisfied in this case.

1969

The U.S. Supreme Court rules in *Tinker v. Des Moines* that Iowa public school officials violated the First Amendment rights of several students by suspending them for wearing black armbands to protest U.S. involvement in Vietnam. The Court determines that school officials may not censor student expression unless they can reasonably forecast that the expression will cause a substantial disruption of school activities.

In *Brandenburg v. Ohio*, a leader of a Ku Klux Klan group is convicted under Ohio law and sentenced to prison primarily on the basis of a speech he made at a Klan rally. The U.S. Supreme Court unanimously rules that speech advocating the use of force or crime is not protected if (1) the advocacy is “directed to inciting or producing imminent lawless action” and (2) the advocacy is also “likely to incite or produce such action.”

1971

In *New York Times v. United States*, the U.S. Supreme Court allows continued publication of the Pentagon Papers. The Court holds that the central purpose of the First Amendment is to “prohibit the widespread practice of governmental suppression of embarrassing information.” This case establishes that the press has almost absolute immunity from pre-publication restraints.

1979

Smith v. Daily Mail Publishing Co. establishes the principle that if the press “lawfully obtains truthful information about a matter of public significance then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”

Resources Used

Goodman, Amy, "Denver Man Sues Secret Service for Arrest After He Criticized Cheney on Iraq War," *Democracy Now* (October 5, 2006),

<http://www.democracynow.org/article.pl?sid=06/10/05/1429248>.

"Lawsuit by Three Tossed from Bush Event to Go Forward," 7 News (October 31, 2006),

<http://www.thedenverchannel.com/news/10197637/detail.html>.

Rehnquist, William H., *All the Laws But One: Civil Liberties in Wartime* (New York: Random House, 1998).

Stone, Geoffrey R., *Perilous Times: Free Speech in Wartime* (New York: Norton, 2004).

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

What does this mean? It means the people's rights are protected from infringement by the government. The rights protected are:

Freedom of religion

Freedom of speech

Freedom of the press

The right to get together in groups, as long as they are peaceful

The right to ask the government to right a wrong

Transparency Master 2

Steps in the Structured Academic Controversy

1. You will work in groups of four. Each group will be split into two pairs. One pair (Pair A) will read the background material looking for arguments and facts that support limits on freedom of expression in wartime. The other pair (Pair B) will look for arguments and facts that support full protection for freedom of expression in wartime. Each pair will prepare to present the arguments for their assigned position.
2. Pairs take turns presenting their arguments; Pair A will go first, followed by Pair B. While Pair A presents, Pair B makes notes and asks questions about information they don't understand. When Pair B presents, Pair A takes notes and asks questions. This is a time to gain insight into the arguments, NOT TO ARGUE.
3. Next, pairs put their heads together to decide which argument for the opposing side was the strongest. Pair B decides which argument for limiting free expression was strongest and Pair A decides which argument for not limiting expression was strongest. Your notes from the other pair's presentation will be important in the process of reaching a decision. When they have reached a decision, Pair B explains the strongest argument for limits and Pair A explains the strongest argument against limits.
4. You can now leave your assigned positions and discuss the issue in your foursome, presenting your real views on the issue. Try to find points of agreement and disagreement among group members. Try to reach consensus on something; if you cannot reach consensus on any substantive aspect of the issue, try to reach consensus on a process you could use to resolve disagreements.

Handout 1

Should Free Expression Be Limited in Wartime?

In June 2006, Steven Howards was walking his child to piano camp in Beaver Creek, when he saw Vice President Cheney walking across an outdoor mall, shaking hands and talking with members of the public. Howards waited his turn, then walked up to the Vice President and denounced the administration's policy on Iraq. He then continued on his way to the camp. When he returned about ten minutes later, he was confronted by a Secret Service agent, who asked Howards if he had assaulted the vice president. Howards replied, "No, I didn't. But I did tell him the way I felt about the war in Iraq, and if Mr. Cheney wanted to be shielded from public criticism, he should avoid public places. If freedom of the speech is against the law, you should arrest me." The Secret Service agent obliged. Howards was initially charged with assault; the charges were later reduced to harassment and then dismissed. Howards is now suing the Secret Service agent.

In March 2005, three Denver residents—Leslie Weise, Alex Young, and Karen Bauer—were forced to leave a taxpayer-funded meeting at which President Bush was explaining his plans for reforming Social Security. The three were purportedly asked to leave because they arrived in a car with a bumper sticker that read "No more blood for oil." The men who asked them to leave were dressed in dark suits, wore radio earpieces, and lapel pins that made them appear to be Secret Service agents. After denial of multiple Freedom of Information Act requests to learn more about the men who asked them to leave, two of the "Denver Three" filed a federal lawsuit.

Of course, such events are not confined to Colorado. In January 2005, filmmaker Jem Cohen was filming landscape from a train traveling from New York to Washington, DC. He was asked to stop filming; when the train stopped in Philadelphia, his film was confiscated; in Washington, he was questioned by authorities. After examination by the Joint Terrorism Task Force and the FBI, his film was returned—blank.

Sami Omar Al-Hussayen ran several Web sites for the Islamic Assembly of North America. The sites included what U.S. government officials described as "provocative content" that would encourage people to support or join terrorist groups. Al-Hussayen, a Saudi citizen studying at the University of Idaho, was arrested in 2003 and tried in 2004 on three terrorism charges and eight immigration charges. The jury acquitted him on all of the terrorism charges and three of the immigration charges; they deadlocked on the other immigration charges. He was deported.

Denials of Freedom of Information Act requests have increased, and more government documents are being classified; the FBI has been given the authority (by the Patriot Act) to infiltrate any public meeting, including religious services; media have been prevented from showing flag-draped caskets arriving at Dover Air Force Base from Iraq and Afghanistan; protestors at presidential appearances are confined to "free-speech zones" far from the location where the president will actually be; the press does not have access to deportation hearings of individuals suspected of having links to terrorism.

Newspapers that break stories based on leaks, such as *The New York Times'* coverage of domestic surveillance, have been threatened with prosecution under the 1917 Espionage Act. The Justice Department is using that act to prosecute two Americans, Steven Rosen and Keith Weissman,

who received leaked classified information from a Defense Department employee. They passed the information along to a journalist and an Israeli diplomat.

These actions are regarded by some Americans as necessary to wage the war on terrorism. Other Americans see these actions as unnecessary and even dangerous. But the question of free speech in wartime is not a new one.

Historical Background on Free Expression in Wartime

The proper limits on free expression in wartime have been hotly debated since the earliest years of the republic. John Adams's administration passed the Alien and Sedition Acts during the War of 1812. During the Civil War, Lincoln suspended habeas corpus in part to deal swiftly with anti-draft protestors. Congress passed the Espionage Act shortly after the United States entered World War I, the first federal law since the Alien and Sedition Act to restrict speech criticizing the government. In addition, 27 state governments passed anti-sedition laws during WWI, including Montana. The result? The imprisonment of many American citizens who spoke against the war.

At the outset of U.S. involvement in World War II, Congress authorized President Roosevelt to establish the Office of Censorship. This office, staffed by respected journalists, suggested topics that newspapers should avoid. Although compliance was voluntary, it was widespread. In addition, reporters were not allowed in theaters of war unless they agreed to submit all of their stories to military censorship. The media sat on many stories, including D-Day and the breaking of Japanese codes.

During World War II, the U.S. government enjoyed the support of a vast majority of the population, who believed that the war was necessary to save the world from Nazism/fascism. Such was not the case during the Vietnam War, about which the nation was sharply divided. Opponents of the war used many methods to protest the continuing U.S. involvement in Vietnam. One such method was burning draft cards, the registration documents from the Selective Service, the agency in charge of drafting young men into the military.

In 1966, David Paul O'Brien and three others burned their draft cards on the steps of the South Boston Courthouse. The crowd watching this event turned ugly, attacking the four men. An FBI agent who happened to be present led O'Brien to safety and then placed him under arrest for violating a federal law prohibiting mutilating, destroying, or burning Selective Service registration documents. O'Brien stated that he burned his draft card in an attempt to influence the views of other people—in other words, burning the draft card was symbolic speech to persuade others to his antiwar beliefs. He was convicted in district court; his conviction was overturned in the Court of Appeals, which held the law against burning draft cards to be an unconstitutional violation of First Amendment rights.

The government appealed and the Supreme Court ruled on the case in 1968. The Court concluded that conduct combining "speech" and "non-speech" elements can be regulated if the following four requirements are met: (1) the regulation is within the constitutional power of the government; (2) it furthers an "important or substantial" government interest; (3) the interest is "unrelated to suppression of free expression"; and (4) "incidental restriction" on First Amendment freedoms is "no greater than is essential to the furtherance" of the government interest. The Court concluded that all requirements were satisfied in this case.

Should First Amendment rights be limited in wartime? Consider the arguments on both sides before deciding.

Arguments Supporting Limits on First Amendment Rights in Wartime

Dissent is disloyal when the United States is at war. Dissent can discourage the troops who are fighting for our nation's freedoms. They are called upon to sacrifice on our behalf. Some even make the ultimate sacrifice, giving their lives for our country. Why shouldn't other citizens be called on to make sacrifices as well? A temporary restriction on our right to gripe about the government is a small sacrifice to make.

Criticism of the government's war policy may actually compromise our ability to wage war. People may be discouraged from joining the military or may even be motivated to undertake subversive acts. Dissent may persuade people to vote for politicians simply because they say they will end the war. That policy change may be disastrous. In addition, because these politicians ran on one issue, their views on other matters that concern Americans may be out of the mainstream, dangerous, or ill-advised.

Dissent is also disloyal because it can encourage the enemy while demoralizing American citizens. If the terrorists see that Americans are divided on the effort to thwart them, they will be more likely to keep up their efforts and less likely to negotiate a peace settlement. Newspapers may even disclose information that is useful to the enemy in waging war against us.

At other times in U.S. history, leaders have felt the need to limit rights during wartime. Opponents of limits on rights in wartime say that such limits put us on a slippery slope that will lead to more restricted rights when the war is over, but history does not support that argument. In all of the historical instances in which free expression rights have been restricted—from the near war with France in 1798 to the Vietnam War—those restrictions have had no long-term effect on our rights as citizens.

Furthermore, the government routinely regulates speech. The example of shouting "Fire!" in a crowded theater is only one example. The Supreme Court has developed a variety of tests for determining when speech can be limited, clearly indicating that some limits are constitutional.

As former Chief Justice Rehnquist wrote in 1998, in a time of war, the balance between freedom and order must shift "in favor of order." Dissent in wartime may be so unpopular or inflammatory that it incites violence among the people.

Arguments Opposing Limits on Free Expression in Wartime

Dissent is the highest form of patriotism. In a time of war, officials must make many critical decisions that should be debated and deliberated. By allowing their critics to speak and by listening to and even learning from what critics have to say, leaders show their commitment to making the best decisions possible. This can only benefit our democracy.

Dissent also helps Americans develop as citizens, to resist the mass psychology of fear and panic that war may breed. Citizens who have as much information as possible about a war, including dissenting views of wartime policy, will not be demoralized; instead, they will feel empowered as citizens to make the best choices possible.

It is true that the nation has restricted rights in wartime before, but we have come to regret those restrictions later. We should not repeat the mistakes of the past. It is also true that the government regulates speech. But only in wartime has it tried to regulate or restrict criticism of government policies or officials. Restricting speech on the basis of its content is a clear violation of the First Amendment and should not be tolerated.

It is especially chilling to consider limiting rights during a conflict like the War on Terror. The enemy is not well defined, and our leaders have suggested that this may be a war that never really ends. Never before have we considered the possibility that a war could be ongoing—if that is the case, we certainly should not allow rights to be restricted for an indefinite period of time.

Another aspect of the War on Terror that is troubling is that the enemy is defined, at least in part, by their religion. Following the September 11 attacks, then Attorney General John Ashcroft issued new guidelines allowing FBI agents to spy on religious groups. Muslim Americans who have never been involved with terrorism in any way might now be afraid to attend the mosque. Thus, limits have reached beyond speech to religious freedom.

The arguments of those supporting limits on rights are weak. For example, people who join the military know they will make sacrifices in a time of war. Certainly, other Americans should also make sacrifices—but not of their basic democratic rights. No one has proven that sacrificing Americans' right to free expression has helped to win any war.