

Recitation Guide: Following Lecture #3, a First Amendment Trial or Debate

Purpose: Engage Students in a Debate Over the First Amendment

We suggest one of two options:

A-SWIFT banking story: Was it Treasonous or was it Protected?

B-Is WikiLeaks Espionage or Watchdogger?

IN RECENT SEMESTERS: Some professors and instructors have begun to use the WikiLeaks/Bradley Manning/Julian Assange material. We caution that framing is important to keep the debate focused on First Amendment/National Security issues. Best way is probably to focus the debate on the decisions of newspapers that used WikiLeaks materials. Are THEY guilty of treason, etc.?

Wiki-debaters can use these same structures to engender one of the better recitation sessions of the semester

I. ORGANIZATION

- Attendance
- Quiz

II. MY LIFE AS

- If your recitation is after, you may want to set aside time to discuss the speaker.

III. RECAP LECTURE(S): MISSION OF THE PRESS

- Emphasize the doctrine the No Prior Restraint doctrine and historic examples cited in lecture. A little provocation is in order: testing the boundaries of students' belief in free speech vs. government trustworthiness.

IV. CASE STUDY A: IS THE NEW YORK TIMES GUILTY OF TREASON in publishing the Swift Banking Story?

THE TIMES ON TRIAL

- Frame the issues and the charge
- Discuss Espionage Act of 1917 (see background material emailed with this outline)
- Several organizational rubrics are included at the bottom of this document.

Point is to debate this question: Was The Times justified in printing the material on the Swift banking operation

Here are some points students should get around to

The Times was right:

A check on government
Public has right to know
Freedom of the press
Public needs awareness of issues
People's privacy violated

Showed illegal activities
No subpoenas, etc

The Times was wrong:

Helped the enemy
Exercised no restraint
National security paramount
Overstepped / not elected
Eroded support for war/President

Treason / espionage

USEFUL CONTEXT:

- o Times editors considered administration's arguments multiple times.
- o Similar information about this program, though not as detailed, was released by administration years before to show that it was doing something

- UN had issued report on this program, available on its Web site.
- Some in administration were troubled by this program.
- Very politically charged, so objectivity in question:
 - NYT wrong to publish: Administration, GOP, Conservatives
 - NYT right to publish: Democrats
- WSJ opposition:
 - An editorial, opinion of a conservative publication, generally pro-Bush.
- It did not indicate how what news side feels or would have done, very possibly the opposite of the editorial board.

The administration's history:

- | | |
|-------------------------------|-------------------------|
| ○ Secret CIA prisons | ○ Guantanamo |
| ○ Abu Ghraib | ○ Supreme Court rebuffs |
| ○ Torture | ○ Eavesdropping |
| ○ Weapons of mass destruction | ○ Patriot Act |

V. Or...CASE STUDY B: WIKILEAKS ON TRIAL

Students will prepare the following assignment (which is in YouSendIt documents folder as an assignment hand-out) to prepare for a debate or trial similar to the standard Times S.W.I.F.T. case.

What you're doing: In the Wikileaks folder, read the stories on The New York Times' decision to publish classified documents provided to Wikileaks. Based on the readings, make four lists of at least 5 talking points each that you could use in a debate or a courtroom:

List 1: Five arguments in support of the Times' decision and/or its right to publish the information.

List 2: Five arguments against the Times' decision and/or against its right to publish the information.

List 3: Five arguments in support of Julian Assange and Wikileaks' decision to provide the information and classified documents to news media outlets.

List 4: Five arguments against Assange and Wikileaks' decision to provide the information and classified documents to news media outlets.

A talking point is a simple statement of a point you wish to make, followed by the list of supporting facts or information. Here's an example of one of the talking points circulated to supporters of Elena Kagan's nomination to the U.S. Supreme Court. Each of yours won't be this comprehensive, perhaps, but you get the idea. List your arguments and support them with evidence from the reading.

"Critics who have attacked Kagan's record for hiring minorities at Harvard Law School have failed to include other appointments/hiring/promotion decisions that enhanced diversity while she was the Dean:

- Lani Guinier was the only woman of color on Harvard Law School's faculty – a source of great complaint until 2005, when Kagan hired Jeannie Suk, an Asian-American woman and up-and-coming young scholar.
- Guhan Subramanian, a South Asian law professor, was given tenure in 2004 – making him the only South Asian law professor on the faculty.
- Kenneth Mack, an African-American legal historian, was given tenure in 2006.
- Harvard Law School already has one of the largest group of black tenured law professors in the nation (Scott Brewer, Lani Guinier, Ken Mack, Randall Kennedy, Charles Ogletree, David Wilkins).
- Of the 12 Clinical Professors Kagan hired, three were minorities – 25%. This included Ron Sullivan – a highly sought-after African-American law professor Kagan poached from Yale University, Brian Price –

an African-American professor who teaches in the area of community economic development and Ashish Nanda – a South Asian professor who helps run the school's executive education program.

- Kagan dramatically expanded public interest clinics at Harvard – important vehicles for students to work with underserved communities in the Boston area.
- She created clinics in areas like Child Advocacy; Death Penalty; Environmental Law and Policy; Gender Violence; and War Crimes. The number of students participating in clinics increased 240%, from 360 to 866."

Why you're doing this: In recitation, your class will debate the merits and repercussions of the Times' decision to publish information provided to them by Assange and Wikileaks. You won't know until you get to class which side of the debate you'll be on, or how extensively you may be called to argue, so you must be prepared to argue from either side.

Background:

The Espionage Act of 1917 was a United States federal law passed on June 15, 1917, shortly after the U.S. entry into World War I, during the First Red Scare. It prohibited any attempt to interfere with military operations, support America's enemies during wartime, to promote insubordination in the military, or interfere with military recruitment. In 1919, the U.S. Supreme Court unanimously ruled in *Schenck v. United States* that the act did not violate the free speech rights of those convicted under its provisions. It made it a crime:

- To convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies. This was punishable by death or by imprisonment for not more than 30 years.
- To 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 when the United States is at war, to cause or attempt to cause insubordination, disloyalty, mutiny, 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. This was punishable by a maximum fine of \$10,000 fine and up to 20 years in prison.

The Act also gave the Postmaster General authority to refuse to mail or to impound publications that he determined to be in violation of its prohibitions. The law was later extended on May 16, 1918 by the Sedition Act of 1918—actually a set of amendments to the Espionage Act—which prohibited many forms of speech, including "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States...or the flag of the United States, or the uniform of the Army or Navy."

The Espionage Act is not as forceful as it once was. In 1921, Congress repealed the collective amendments referred to as the Sedition Act of 1918, which had prohibited abusive language against the US government, flag, and military uniform. The Supreme Court has in the years since *Schenck v. United States* weakened the law, which may be relevant to a discussion of prosecuting the Times in the 21st century. *Brandenburg v. Ohio* (1969) found that speech would have to be responsible for "imminent lawless action," less restrictive than "clear and present danger." The Pentagon Papers case also gave whistleblowers, whose speech may be construed as harmful to the government and nation, more latitude.

Debate/Trial options:

The debate is one of the livelier exercises, but it can be approached in a variety of ways.

Simply divide the class in half, have them deliberate with their groups and then debate each other.

Appoint a third group of “jurors” that will reach a verdict after the prosecution and defense have their say. Since the jurors might feel out of the loop, it’s a good idea with this option for the instructor to circulate among the jurors, talk to them about where their sympathies lie, challenge their assumptions, see if they’re open to changing their minds.

Some instructors have simply run a class-wide discussion of the issues at work in the story. It is up to each individual instructor to gauge the personality of his or her class and figure out which approach would be most suited to the group.

Three Corners Style

The Questions (If time, debate two questions, to encourage more participation)

#1 “Resolved: New York Times Publisher Arthur Sulzburger, Jr., Editor Bill Keller and reporters Eric Lichtblau, James Risen and Barclay Walsh are guilty of treason.”

#2 “Resolved: President George W. Bush, CIA Director Gen. Michael Hayden, FBI Director Robert Mueller and Attorney General Alberto Gonzales are guilty of illegal wiretapping.”

Before Class:

Mark each corner of the room with one label/poster (available below)

- Strongly Agree
- Still Thinking/Can’t Decide
- Strongly Disagree

Students will arrive having written five talking points on each side

In Class:

Read the Resolution/Debating Point aloud (and the applicable law, if you like) and post it where it’s visible.

Ask students to take about 5 minutes to decide if they Agree, Disagree or Can’t Decide. Then have them move to that corner. (Since they’ve written talking points, five on each side, you can direct students to re-populate if any position is under-staffed.)

Start the clock. Each group gets 10 minutes to discuss the reasons they strongly agree, agree, disagree, or strongly disagree. One student in each group assembles the talking points and will present to the class.

Stand and Deliver. Each group’s representative argues the case the group put together.

Encourage Desertion. See if any of the arguments have motivated a student to actually change their mind.

Demand Answers. Once they have moved, ask deserters what changed their minds.

Process. Ask students to talk about what they learned by preparing both sides of the argument and what they think were the hardest arguments to counter.

Tie it up with a bow. Move the conversation back to Prior Restraint, The Watchdog Role and Freedom of WHOSE Press?

Assignments: As usual, check with Lecturer to see how they have modified assignments. Typically:

- Print out the Blank “information taxonomy” chart and bring it to lecture.
- Also, prime them for the YouTube video viewing that will follow the next lecture
- There are readings (see Blackboard to be consistent with lecture)