



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

## **Wartime Attacks on Civil Liberties** **by George C. Leef**

*Perilous Times — Free Speech in Wartime* by Geoffrey R. Stone (Norton, 2004); 730 pages; \$35.

If it is true to say, as Randolph Bourne did, that war is the health of the state, it is equally true to say that war is the sickness of individual liberty. The state always menaces its people with an array of orders, prohibitions, and confiscations, but never so much as in times of war, when it can count on widespread support for all measures said to be necessary to ensure victory.

That is especially so when it comes to dissent. Many citizens and politicians are seized with the idea that any disagreement with the war policies is a threat to national survival and must be suppressed at all costs. Opposition to or even indifference toward the war is equated with disloyalty, and the deeply ingrained notion that the people have an overarching obligation of loyalty to the state rises to support the crackdown. Censorship and punishment are just what the traitors deserve!

In *Perilous Times*, University of Chicago Law School professor Geoffrey Stone chronicles the American experience with the attack on civil liberties during times of war. Stone, a noted First Amendment scholar, has written an elegant book that begins with the Sedition Act of 1798 and continues through the Vietnam War. He explains in his introduction,

Time and again, Americans have allowed fear and fury to get the better of them. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then — later — regretted their actions. This book is first and foremost about why this happens and how we can break this pattern as we look to the future.

As a history, *Perilous Times* is a complete triumph, meticulously researched and clearly told. When it comes to prediction and prescription, however, I am not sold on the author's optimism that the future will be better than the past.

Stone begins with a discussion of the importance of freedom of speech. The First Amendment says that Congress shall make no law abridging the freedom of speech or of the press. It is a blanket prohibition against efforts by the federal government to stifle free expression, a prohibition that the Supreme Court has extended to all units of government through the Fourteenth Amendment. Stone finds strong reason for that law:

For the government to censor public debate because it thinks a particular speaker unwise or ill informed would usurp the authority of citizens to make their own judgments about such matters and thus undermine the very essence of self-government.

Therefore, the First Amendment protects citizens (or should do so, at least) against the regrettable tendency of public officials to control information and discourse so as to preserve their authority.

But precisely what does it mean to “abridge” freedom of speech or the press? Only a few years after the nation’s founding, that issue was squarely raised with the passage of the Sedition Act of 1798. Annoyed over criticism from the Jeffersonians that President Adams’s bellicose policies risked drawing the United States into the war between England and France, the Federalist-controlled Congress passed into law a bill that criminalized any criticism of “a false, scandalous and malicious” nature against the government and its officials.

While it seems crystal clear today that such a law runs afoul of the First Amendment, at the time the Federalists defended it by arguing that what it means to “abridge” freedom of speech is to prevent people from speaking or writing, and the sedition law only punished people for their seditious expressions after they had made them. The Federalists maintained that their view, that the First Amendment prohibited only prior restraints on speech and publication, was well-grounded in English legal tradition.

Holding control of the presidency, Congress, and the judiciary, the Federalists proceeded to ardently enforce the Sedition Act. Probably the most famous prosecution was of Vermont Congressman Matthew Lyon, whose letter criticizing President Adams caused him to spend months in a jail cell and to be hit with the astounding fine of \$1,000. Lyon was actually reelected while in jail, and later his fine would be paid from a fund raised by voluntary contributions from such notables as Thomas Jefferson, James Madison, and James Monroe.

Stone recounts several other trials, including that of Thomas Cooper, a wealthy, well-educated man who practiced both law and medicine. For having written an essay attacking John Adams, he was accused of a “malicious attack on the character of the President,” done with the intention of arousing “contempt of the people of this country against the man of their choice.” Cooper ably represented himself, but the court was a stacked deck. The presiding judge, Samuel

Chase, was a Federalist zealot whose instruction to the jury was tantamount to an order to convict. It did, sentencing Cooper to six months in prison and levying a fine of \$400.

There was never any judicial review of the Sedition Act cases because the law expired at the end of John Adams's term of office. After assuming the presidency in 1801, Thomas Jefferson almost immediately pardoned all who had been convicted under the Sedition Act, so the Supreme Court had no occasion to decide whether the Federalist or the Republican view of the meaning of the First Amendment was correct.

In conclusion, Stone comments that the Sedition Act and subsequent events show that

those in power may exploit a threat to the nation's security to serve their partisan ends. A time-honored strategy for consolidating power is to inflate the public's fears, inflame its patriotism, and then condemn political opponents as "disloyal."

The nation would witness that strategy many more times.

### **Civil liberties in the Civil War**

The War of 1812 and the Mexican War did not lead to any efforts by the federal government to suppress opposition, although there was a good deal of opposition to both wars. With the Civil War, however, civil liberties and freedom of speech took a pummeling. At the outset of the conflict, President Lincoln suspended the writ of habeas corpus. In the case of *Ex parte Merryman*, Chief Justice Roger Taney ruled that only Congress had the power to suspend the writ of habeas corpus, but Lincoln refused to obey the Supreme Court's ruling.

Stone notes that Lincoln himself resisted demands for a new Sedition Act, but with his military commanders wielding extraordinary powers, dissent was to a substantial degree stifled. The most famous case is surely that of Congressman Clement Vallandigham of Ohio, an anti-war Democrat. The military governor of the region, Gen. Ambrose Burnside, had issued an order declaring that any expression of sympathy for the Confederacy would be subject to military punishment. Vallandigham challenged the legitimacy of the order and in a speech before a large crowd in Columbus, called the war "wicked, cruel, and unnecessary."

Upon hearing of the speech, Burnside ordered Vallandigham's arrest and trial before a military commission. His conviction was a foregone conclusion and he was ordered to be incarcerated for the remainder of the war. Burnside had not consulted with either his military or civilian superiors prior to taking his actions, and those superiors did nothing to reverse or rebuke them. So Burnside continued his assault on free speech, a month later ordering that troops shut down the *Chicago Times*, a newspaper that had criticized the war and Vallandigham's arrest. Although Lincoln (in Stone's view, rather feebly) defended the arrest, he did order that the *Chicago Times* be permitted to reopen.

About the best we can say about free speech and civil liberties during the Civil War is that the attack on them might have been far more stringent. Stone argues that the Lincoln administration for the most part was willing to leave dissenting voices undisturbed and usually countermanded the arrests and seizures of zealous military commanders. Nevertheless, free speech was only for the brave or reckless during the Civil War.

### **Wilson's assaults on civil liberties**

But compared with conditions during World War I, the Civil War was almost utopian. While Abraham Lincoln took a rather benign view of dissent, the dour Woodrow Wilson would not abide it. In his speech calling for a declaration of war in 1917, he said, "If there should be disloyalty, it will be dealt with, with a firm hand of stern repression." Indeed, it was.

Stone gives the reader a law professor's careful analysis of the crucial free-speech and press prosecutions during the war — cases that finally led to the nation's first Supreme Court decisions on the meaning and scope of the First Amendment.

Federal prosecutors repeatedly brought cases under the Espionage and Sedition Acts alleging that the defendants — ranging from the well-known socialist labor leader Eugene Debs to obscure pamphleteers — had attempted to impede the government's war efforts. A speech or a flyer criticizing the war or the draft was argued to be illegal because the speaker or writer should have anticipated that his action might lead others to violate the law — by draft evasion, for example.

When the cases reached the appellate courts, a number of jurists distinguished themselves by standing up for civil liberties, most famously Learned Hand. Their decisions, Stone makes clear, took some amount of personal bravery in a nation largely caught up in war hysteria. (One Illinois senator had introduced legislation that would lead to loss of citizenship and forfeiture of all property for any person found to be "disloyal.")

The Supreme Court, however, sided with the government when the first cases reached it in 1919. In *Schenck v. United States*, Justice Holmes wrote for a unanimous Court that the writer of a pamphlet advocating that people support the repeal of the draft had violated the law and was not protected by the First Amendment. It was in *Schenck* that Holmes resorted to his "false cry of fire in a theater" analogy and enunciated his test of the constitutionality of infringements on free speech — that is, whether it created a "clear and present danger" of harm to the nation.

*Schenck* was quickly followed by two more important cases, *Debs* and *Frohwerk*. Justice Holmes again delivered the Court's opinion and again the convictions were upheld. Those anti-civil-libertarian decisions ignited a fire-storm of controversy in the legal profession, with a number of the nation's most prestigious law professors attacking Holmes. University of Chicago professor Ernst Freund, for example, wrote that "the peril resulting to the national cause from toleration of adverse opinion is largely imaginary" and "slight compared with the permanent

danger of intolerance to free institutions.” The arguments of Freund and others caused Holmes to change his mind, and in the next case to come before the Court, *Abrams*, he dissented. Not that that did Abrams any good.

Stone’s assessment of Wilson and his dim view of the rights of individuals to dissent from his crusade to “make the world safe for democracy” is appropriately harsh. He laid the foundation for repression even before the onset of his war. He inflamed the public with his attack on critics as “disloyal.” He allowed his subordinates to support private groups that cracked down on war opponents. His administration marked a low point for respect for free speech and civil liberties.

Between World War I and World War II, the Supreme Court had to face the free-speech issue several times, and moved far away from the crabbed view of the First Amendment in the 1919 cases, with Justice Brandeis leading the way. As another war loomed in the late 1930s, leading intellectuals, such as historian Henry Steele Commager, wrote that in the event of war the nation ought to avoid the authoritarian measures that had characterized the “Great War.” And in 1938, Attorney General Frank Murphy established the new Civil Liberties Unit in the Department of Justice, designed to defend the rights of all citizens, no matter how unpopular, saying that it was necessary to protect against “misdirected patriotism which seeks to regiment thought.” The Court’s jurisprudence and the enlightened views of people like Commager and Murphy may have helped to cushion the blow to civil liberties that World War II would bring, but it was still a hard blow.

### **Roosevelt and civil liberties**

Franklin D. Roosevelt, alas, was little interested in protecting the civil liberties of American citizens. In 1936, he secretly authorized FBI chief J. Edgar Hoover to investigate suspected fascists and communists, a task that Hoover undertook with relish. In 1940, Roosevelt signed into law the Smith Act, which required resident aliens to register with the federal government; streamlined procedures for deportation of any deemed undesirable; and made it illegal for any person to “advocate, abet, teach the duty, necessity, desirability, or propriety of overthrowing any government in the United States by force.” Stone observes that the Smith Act was in effect the sedition law that Wilson’s infamous attorney general, A. Mitchell Palmer, had failed to convince Congress to enact in 1920.

Once the war began, Roosevelt pressured his civil-liberties-minded attorney general, Francis Biddle, to go after elements of the dissident press that were attacking him, asking, “When are you going to indict the seditionists?” Shortly thereafter, arrests of the “seditionists” began.

Of all the attacks on liberty during World War II, nothing compares with the massive internment of Americans of Japanese ancestry. Inflamed by unfounded charges that Japanese-Americans had helped the Pearl Harbor attack succeed and were facilitating Japanese plans for an invasion of the United States, as well as by crude racism, many politicians and citizens began

calling for internment. Biddle was adamantly opposed and tried to persuade Roosevelt that the proposed internment was cruel and needless. No matter. Roosevelt signed Executive Order 9066 on February 19, 1942. Stone quotes Justice Robert Jackson on Roosevelt's cavalier attitude toward the legality of his order:

Because he thought that his motives were always good for the things he wanted to do, he found difficulty in thinking that there could be legal limitations on them.

It might be expected that politicians would be indifferent to the rights of the Japanese-Americans, but it is surprising that the Supreme Court was no better. In *Korematsu v. United States*, Justice Black, writing for a 6-3 majority, held that the internment was legal on the grounds that military authorities had deemed it advisable. Mere speculation that a few people of Japanese descent might be collaborators was enough to send 120,000 of them into makeshift prisons for several years. Frank Murphy, now a Court justice, wrote a dissent that must have stung his liberal brethren, in which he noted,

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal.

But of course, in war, the rights of individuals must be dispensed with.

### **Civil liberties today**

In the interest of space, I'll pass over Stone's fine treatments of civil liberties during the Cold War and the Vietnam War to get to his concluding chapter, "The Secret of Liberty." After surveying our depressing history of allowing wartime passions to trump the Bill of Rights, he is cautiously optimistic that we have learned from the past and will do better at safeguarding civil liberties during future wars. He writes,

The aspiration of Americans to be fair, tolerant of others, and respectful of constitutional liberties may be more deeply embedded in American culture today than at any time in the nation's history.

I think some skepticism about that is in order. Our civil liberties aren't any more secure than in the past and perhaps less so. Freedom of speech? Our wonderful politicians breezily waived much of it away in the context of politics with their bipartisan Campaign Finance Reform Act, which the Supreme Court found quite acceptable. On our campuses, where you would think free expression would find universal favor, there is substantial sentiment in favor of restrictions on speech that certain interest groups don't want to hear. The old war-horse of an amendment to

prohibit flag burning is once again bestirring itself in Congress. Is the idea that people have a moral obligation to allow others to speak their minds even when they completely disagree with them really gaining ground in America? Much as I would like to think so, I'm not persuaded.

Stone argues that the "unthinkability" of prosecuting someone (say, Howard Dean) for his opposition to the war in Iraq today shows that the nation has advanced. Perhaps, but maybe the "unthinkability" is due only to the fact that in 2004 the opponents of the war were powerful persons whose prosecution would exact a heavy political cost upon the government. If there were a widespread consensus in favor of a future war and the only opponents were a few isolated bloggers, are we certain that the government wouldn't find some grounds for trying to silence them?

The value of *Perilous Times* has nothing to do, however, with the author's views on national progress toward tolerance for dissent. It is a beautifully written and produced book that reminds us that the Constitution is only a group of words on paper, easily ignored and evaded by government officials when they please, which is most often during times of war.

*George C. Leef is the director of the Pope Center for Higher Education Policy in Raleigh, North Carolina, and book review editor of [The Freeman](#).*

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