Free Speech and National Security

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The tension between free speech and national security arises in many different contexts. In this Article, I will explore the two facets of this tension that have generated particular difficulty in the United States, and I will offer some thoughts about how American courts have dealt with these issues.

The first issue involves speech that criticizes the government. No one likes to be criticized, and it is quite natural for government officials to want to suppress such speech. It is therefore rather striking that throughout American history there has been a broad consensus in support of the proposition that the government cannot constitutionally punish individuals for criticizing government officials or policies—except when their speech is thought to threaten national security. In the national security setting, however, the United States has a long and checkered history of allowing fear to trump constitutional values.

The second issue involves secrecy. The government has a legitimate need to keep certain matters secret. But in a self-governing society, secrecy prevents citizens from evaluating their government's actions and holding their representatives accountable. Once again, it has proved most difficult to strike the proper balance between free speech and national security.

I. SPEECH THAT CRITICIZES THE GOVERNMENT

The paradigm violation of the First Amendment is a law forbidding citizens to criticize public officials and policies. In the entire history of the United States, the national government has never attempted to punish criticism of government officials or policies, except in times of war. This makes clear that, in order to understand free speech, one must understand free speech in wartime.

War excites great passions. Thousands, perhaps millions, of lives may be at risk. The nation itself may be at peril. If ever there is a time to pull out all the stops, it is surely in wartime. In war, the government may conscript soldiers, commandeer property, control prices, ration food, raise taxes, and freeze wages. May it also limit the freedom of speech?

It is often said that dissent in wartime is disloyal. This claim puzzles civil libertarians, who see a clear distinction. In their view, dissent in wartime can be the highest form of patriotism. Whether, when, for how long, and on what terms to fight a war are among the most profound decisions a nation encounters. A democratic society

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must debate those issues. Dissent that questions the conduct and morality of a war is, on this view, the very essence of responsible and courageous citizenship.

At the same time, though, dissent can readily be cast as disloyalty. A critic who argues that troops are poorly trained or that the war is unjust may make a significant contribution to public discourse. But he also gives "aid and comfort" to the enemy. The enemy is more likely to fight fiercely if it is confident and believes its adversary is divided and uncertain. Public disagreement during a war can both strengthen the enemy's resolve and undermine the nation's commitment to the struggle.

Moreover, war generates a powerful mass psychology. Emotions run high. Spies, saboteurs, and terrorists are seen around every corner. War imperils our way of life. We fear and despise anything that increases the danger to our sons and daughters in uniform. We cannot tolerate the thought that a loved one or friend has put life and limb at risk for an unworthy cause. We are just; our enemy is cruel, immoral, and inhuman. Loyalty is the order of the day.

In such an atmosphere, the line between dissent and disloyalty is elusive, and often ignored. Indeed, the United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. 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.

In the discussion that follows, I will briefly explore these issues in seven episodes in American history: the "Half War" with France in 1798, the Civil War, World War I, World War II, the Cold War, the Vietnam War, and the War on Terrorism.

A. The "Half War" with France

The period from 1789 to 1801 was a critical era in American history. A climate of fear, suspicion, and intrigue put America's new Constitution to a test of its very survival.[1] Sharp internal conflicts buffeted the new nation, which also found itself embroiled in a fierce international struggle between Europe's two great powers: the French Republic and Imperial Britain. It was a time of bitter partisan warfare.[2]

Many of the ideas generated by the French Revolution aroused deep fear and hostility in some segments of the American population. In 1798, a rancorous political and philosophical debate raged between the Federalists, then in power, and the Republicans. The Federalists feared that the sympathy of the Republicans for the French Revolution indicated a willingness on their part to plunge the United States into a similar period of violent upheaval. The Republicans feared that the Federalists' sympathy for England denoted a desire to restore aristocratic forms and class distinctions in America.

As the war in Europe raged, the United States found it increasingly difficult to maintain its neutrality. President John Adams, in a special address to Congress, placed the United States into a virtual state of undeclared war against France. Responding to the President's demands, Congress ordered additional warships, expanded the army,

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1. *See* JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 5 (1993).

2. *See* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 195 (1975).

and authorized the navy to attack armed French ships. The United States was on a war footing.[3]

The Republicans fiercely criticized these measures. Vice President Thomas Jefferson feared that a war with France would drive the United States into the arms of England and deliver the nation over to the forces of anti-republicanism and monarchy.[4] Against the drumbeat of imminent war with the world's mightiest army, the Federalists enacted the Sedition Act of 1798. The Act prohibited the publication of "any false, scandalous, and malicious writing" against the government of the United States, the Congress, or the President, with intent to defame them or bring them into "contempt or disrepute."[5]

The Federalist Congressman Harrison Gray Otis defended the Act because, he believed, the very existence of the nation was endangered by a "crowd of spies and inflammatory agents" who had spread across the nation "fomenting hostilities" and "alienating the affections of our own citizens."[6] In response to Republican objections that the Act violated the First Amendment, Congressman Long John Allen insisted that the First Amendment "was never understood to give the right of . . . exciting sedition, insurrection, and slaughter, with impunity."[7]

The Federalist government vigorously enforced the Sedition Act, but only against supporters of the Republican Party. It prosecuted the leading Republican newspapers and the most vocal critics of the Adams administration. The Act proved a brutal weapon for the suppression of dissent. Consider, for example, the plight of Matthew Lyon, a Republican congressman from Vermont. During his reelection campaign, Lyon published an article in which he asserted that under President Adams "every consideration of the public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[8] Because this statement clearly brought the President into "disrepute," Lyon was convicted and sentenced to prison.[9] In all, the Federalists arrested twenty-five Republicans under the Act. At least fifteen of these arrests resulted in indictments. Ten cases went to trial, all resulting in convictions before openly hostile Federalist judges and juries.

The Supreme Court did not have occasion to rule on the constitutionality of the Sedition Act at the time, and the Act expired by its own terms on the last day of Adams's term of office. President Jefferson, who defeated Adams in the election of 1800, pardoned all those who had been convicted under the Act.[10] In 1840, Congress repaid all the fines, noting that the Act had been passed under a "mistaken exercise" of

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3. *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 8 (1956); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 21–23 (2004).

4. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 584 (1993).

5. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801).

6. *See* 2 ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856, at 257 (1857).

7. 5 ANNALS OF CONG. 2097 (1798).

8. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 333 (1849).

9. *Id.* at 333–37.

10. STONE, *supra* note 3, at 71–73.

power and was "null and void."[11] The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has never missed an opportunity in the years since to remind us that the Sedition Act of 1798 has been judged unconstitutional in the "court of history."[12]

B. The Civil War

During the Civil War, the United States faced perhaps its most severe challenge. Like most civil wars, the U.S. Civil War created sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. Moreover, the nation had to cope with the stresses of slavery, emancipation, conscription, and staggering casualty lists, all of which triggered deep division and even violent protest. Faced with these tensions, President Abraham Lincoln had to balance the conflicting interests of military security and individual liberty. At the core of this conflict was the writ of habeas corpus, which has historically guaranteed a detained individual the right to a prompt judicial determination of whether his detention by government is lawful.

During the course of the war, Lincoln suspended the writ of habeas corpus on eight separate occasions. His most extreme suspension order, in September 1862, was applicable nationwide and declared that "all persons . . . guilty of any disloyal practice . . . shall be subject to martial law."[13] It is unknown exactly how many civilians the military authorities arrested during the Civil War, but estimates range from 13,000 to 38,000.[14] Most of these arrests were for such offenses as draft evasion, desertion, sabotage, and trading with the enemy. Some individuals, however, were arrested for their political beliefs or expression.[15]

The most dramatic confrontation over free speech during the Civil War arose out of a speech in Mount Vernon, Ohio. Clement Vallandigham, a former Ohio congressman, was one of the national leaders and most forceful champions of the Copperheads, or Peace Democrats. He vigorously opposed the war, the draft, the military arrest of civilians, the suspensions of habeas corpus, and the Emancipation Proclamation. On May 1, 1863, Vallandigham gave a spirited two-hour address to an audience of more than 15,000 people. He characterized the war as "wicked, cruel, and unnecessary,"[16] asserted that the First Amendment protected the right to criticize the government, and urged citizens to use "'the ballot-box' to hurl 'King Lincoln' from his throne."[17] The speech brought rousing cheers from the crowd.

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11. CONG. GLOBE, 26th Cong., 1st Sess. 411 (1840).

12. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

13. 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 436–37 (Roy P. Basler ed., 1953).

14. *Compare* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 113 (1991) (concluding that the best estimate is near the upper end of this range), *with* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 49–50 (1998) (estimating 13,000).

15. *See* NEELY, *supra* note 14, at 26–28, 44, 131–38; Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1361 (1993).

16. STONE, *supra* note 3, at 101; THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM, BY A MILITARY COMMISSION 11–12 (Cincinnati, Rickey & Carroll 1863).

17. FRANK L. KLEMENT, THE LIMITS OF DISSENT 154 (1998).

Several days later, Union soldiers arrested Vallandigham. He faced a five-member military commission and was charged with "declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion."[18] The commission found Vallandigham guilty and recommended his imprisonment for the duration of the war.

Newspapers across the nation championed Vallandigham's cause. The *Albany Atlas and Argus* charged that his arrest was a "crime against the Constitution."[19] The *Detroit Free Press* declared sarcastically that if speakers may be jailed "because they are opposed to the war,"[20] then the polls may be closed, or voters excluded from them, for the same reason. If it is disloyal to make a speech against the war, "it is doubly disloyal to vote for men who are opposed to it."[21] Mass demonstrations protesting Vallandigham's confinement occurred in almost every major Northern city.[22]

Lincoln sought to defuse the situation. He ordered Vallandigham's sentence commuted from imprisonment to banishment. Lincoln defended this decision by arguing that the purpose of imprisoning Vallandigham was not to punish him but to prevent him from causing further injury to the military. Exile, he said, was a more humane and "less disagreeable" means of "securing the same prevention."[23]

Lincoln's "solution" did not satisfy his critics. The *Dubuque Herald* declared that "a crime has been committed" against the "right to think."[24] The *Detroit Free Press* protested that Vallandigham had been punished "for no crime known to law."[25] The Republican press chimed in as well. The *New York Independent* criticized the President's "great mistake," the *Anti-Slavery Standard* chastised his "blunder," and the *New York Sun* observed that "the Union can survive the assaults" of the South but "cannot long exist without free speech."[26]

Although the government also made efforts to limit the "secessionist" press during the Civil War, for the most part Lincoln gave the anti-administration press wide latitude. At one point, *Harper's Weekly* collected a list of the invectives that had been used in the press to castigate the President, including "despot," "liar," "usurper," "thief," "monster," "perjurer," "ignoramus," "swindler," "tyrant," "fiend," "butcher," and "pirate."[27] Lincoln was undoubtedly the most excoriated President in American history.

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18. *Ex parte* Vallandigham, 28 F. Cas. 874, 875 (C.C.S.D. Ohio 1863) (No. 16,816).

19. Frank J. Williams, *When Albany Challenged the President*, N.Y. ARCHIVES MAG., Winter 2009, at 31, 33 (quoting *The Arrest of Vallandigham*, ALBANY ATLAS & ARGUS, May 8, 1863), *available at* http://www.archives.nysed.gov/apt/magazine/documents/archivesmag_winter09_Williams.pdf.

20. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 320 (2000).

21. *The Military Discretion*, DETROIT FREE PRESS, June 10, 1863, at 2.

22. *See Ohio Democratic State Convention*, CINCINNATI DAILY COM., June 12, 1863, at 2.

23. Abraham Lincoln, Reply to the Ohio Democratic Convention (June 29, 1868), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 468 (Don E. Fehrenbacher ed., 1989).

24. STONE, *supra* note 3, at 109.

25. KLEMENT, *supra* note 17, at 178–79.

26. STONE, *supra* note 3, at 110 (citation omitted).

27. 3 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 389–90 (1939).

Lincoln did not enjoy these attacks. But he kept them in perspective. One anecdote is revealing. After he announced the Emancipation Proclamation, Lincoln endured a torrent of ugly calumny. According to the *Springfield Republican,* someone sent the President a stack of negative editorials. Lincoln later told a friend, "[H]aving an hour to spare on Sunday I read this batch of editorials, and when I was through reading I asked myself, 'Abraham Lincoln, are you a man *or a dog*?'"[28] Although the editorials were "bitter in their criticisms upon him," Lincoln "smiled very pleasantly as he spoke of them, though it was evident that they made a decided impression upon his mind."[29]

C. World War I

When the United States entered World War I in April 1917, there was strong opposition to both the war and the draft. Many citizens believed that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy. Many individuals were sharply critical of the Wilson administration.[30]

President Woodrow Wilson had little patience for such dissent. In calling for the first federal legislation against disloyal expression since the Sedition Act of 1798, he insisted that disloyalty "was not a subject on which there was room for . . . debate," for disloyal individuals "had sacrificed their right to civil liberties."[31] Wilson's own intolerance set the tone for what was to follow.

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917, which made it a crime for any person willfully to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States."[32]

Although Congress did not generally intend for the 1917 Act to suppress dissent, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a full-scale prohibition of seditious utterance.[33] A statement in November 1917 by Attorney General Charles Gregory revealed the administration's intent in this regard: "May God have mercy on [war dissenters], for they need expect none from an outraged people and an avenging government."[34]

The Department of Justice prosecuted more than 2000 individuals for allegedly disloyal or seditious expression in this era, and in an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed

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28. *The President and His Critics*, CINCINNATI GAZETTE, Nov. 29, 1862, at 1.

29. *Id.*

30. *See* EDWARD M. COFFMAN, THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I, at 25 (1968).

31. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

32. Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219.

33. *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 345–54 (2003).

34. *All Disloyal Men Warned by Gregory*, N.Y. TIMES, Nov. 21, 1917, at 3; *see also* ROBERT J. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 108 (1978).

disloyal. The decision of the Ninth Circuit in *Shaffer v. United States*[35] illustrates the prevailing approach in the lower federal courts. In *Shaffer*, the defendant was charged with possessing and mailing copies of a book, *The Finished Mystery*, in violation of the Espionage Act. The book contained the following passage:

> If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us. . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.[36]

Shaffer was convicted, and the court of appeals affirmed:

> It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here . . . is whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute.
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> . . . .
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> The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. . . . To teach that . . . the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.
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> It is argued that the evidence fails to show that [Shaffer] committed the act willfully and intentionally. But . . . [h]e must be presumed to have intended the natural and probable consequences of what he knowingly did.[37]

Almost every federal court that interpreted the Espionage Act during the course of World War I embraced this approach.[38] The result was to suppress virtually all criticism of the war; applying this standard, juries almost invariably returned a verdict of guilty.[39] Rose Pastor Stokes, the editor of the socialist *Jewish Daily News*, was

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35. 255 F. 886 (9th Cir. 1919).

36. *Id.* at 887.

37. *Id.* at 887–89.

38. *See*, *e.g.*, Goldstein v. United States, 258 F. 908 (9th Cir. 1919); Coldwell v. United States, 256 F. 805 (1st Cir. 1919); Kirchner v. United States, 255 F. 301 (4th Cir. 1918); Deason v. United States, 254 F. 259 (5th Cir. 1918); Doe v. United States, 253 F. 903 (8th Cir. 1918); O'Hare v. United States, 253 F. 538 (8th Cir. 1918); Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (reversing Judge Hand's opinion); United States v. Nagler, 252 F. 217 (W.D. Wis. 1918); United States v. Motion Picture Film "The Spirit of '76," 252 F. 946 (S.D. Cal. 1917). For additional citations, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 256–59 (1997).

39. *See* RABBAN, *supra* note 38, at 257.

sentenced to ten years in prison for saying "I am *for* the people, while the government is for the profiteers," during an antiwar statement to the Women's Dining Club of Kansas City.[40] D. T. Blodgett was sentenced to twenty years in prison for circulating a leaflet urging voters in Iowa not to reelect a congressman who had voted for conscription.[41] Harvard law professor Zechariah Chafee later concluded that, under the "bad tendency" interpretation of the Act, all "genuine discussion among civilians of the justice and wisdom of continuing a war . . . becomes perilous."[42]

And where was the Supreme Court in all this? In a series of decisions in 1919 and 1920,[43] the Court consistently upheld the convictions of individuals who had agitated against the war and the draft—individuals as obscure as Mollie Steimer, a Russian-Jewish émigré who had distributed anti-war leaflets in Yiddish on the lower East Side of New York,[44] and as prominent as Eugene V. Debs, who had received almost a million votes as the Socialist Party candidate for President in 1916.[45]

Justices Oliver Wendell Holmes and Louis Brandeis would eventually depart from their brethren and launch what became a critical underground tradition within the Court's First Amendment jurisprudence.[46] However, the Court as a whole showed no interest in the rights of dissenters. As the First Amendment scholar Harry Kalven later observed, these decisions left no doubt of the Court's position: "While the nation is at war, serious, abrasive criticism . . . is beyond constitutional protection."[47] These decisions, he added, "are dismal evidence of the degree to which the mood of society penetrates judicial chambers."[48]

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40. Stokes v. United States, 264 F. 18, 20 (8th Cir. 1920) (emphasis in original). For a brief background on the Stokes trial, see HORACE C. PETERSON & GILBERT C. FITE, OPPONENTS OF WAR: 1917–1918, at 185–86 (1957). On March 9, 1920, the Eighth Circuit Court of Appeals overturned Mrs. Stokes's conviction, ruling that that district judge had gone "too far in his charge to the jury" because of his inappropriate "partisan zeal." *Stokes*, 264 F. at 26. On November 15, 1921, the government finally dismissed the charges against Stokes. *Mrs. Stokes Freed; Debs May Soon Be*, N.Y. TIMES, Nov. 16, 1921, at 5.

41. *See* ESPIONAGE ACT CASES: WITH CERTAIN OTHERS ON RELATED POINTS 48 (Walter Nelles ed., 1918).

42. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 52 (1941).

43. Gilbert v. Minnesota, 254 U.S. 325 (1920); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

44. *Abrams*, 250 U.S. at 616; *see also* PETERSON & FITE, *supra* note 40, at 228–29 (containing background information on Molly Steimer, a co-defendant in *Abrams*).

45. *Debs*, 249 U.S. at 211; *see also* PETERSON & FITE, *supra* note 40, at 248–55 (containing background information on Eugene V. Debs).

46. *See, e.g.*, *Gilbert*, 254 U.S. at 335 (Brandeis, J., dissenting); *Pierce*, 252 U.S. at 253 (Brandeis, J., dissenting); *Schaefer*, 251 U.S. at 482 (Brandeis, J. dissenting); *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting).

47. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 147 (Jamie Kalven ed., 1988).

48. *Id.*

D. World War II

The outbreak of hostilities in Europe on September 30, 1939, created a mood of high anxiety in the United States. Having learned the lessons of World War I, Attorney General Frank Murphy promised that there would be no witch hunt for subversives and announced that it was the duty of the Department of Justice to "refrain from any action" that might violate "the fundamental rights and privileges of free assembly, free opinion, and free speech."[49]

In April 1940, Attorney General Robert Jackson, who had succeeded Murphy as Attorney General, addressed the nation's federal prosecutors. He warned that, "[i]n times of fear or hysteria," groups and individuals often "cry for the scalps" of other groups or individuals "because they do not like their views." Jackson exhorted his United States Attorneys to steel themselves to be "dispassionate and courageous in those cases which deal with so-called subversive activities." Such cases, he cautioned, posed a special threat to civil liberty because the prosecutor has "no definite standards to determine what constitutes a subversive activity."[50]

After Roosevelt appointed Jackson to the Supreme Court, he appointed Francis Biddle Attorney General. Like Murphy and Jackson, Biddle warned repeatedly against the dangers of public hysteria and excess. Shortly after Pearl Harbor, several men were arrested in Los Angeles for allegedly praising Hitler, stating that Japan had done a "good job" in the Pacific, asserting that "the Japanese had a right to Hawaii" because "[t]here are more of them there than there are Americans," and declaring that they would "rather be on the side of Germany than on the side of the British."[51] Another man was arrested for saying that "the President should be impeached for asking Congress to declare war."[52] All these men were charged with violating the Espionage Act of 1917, but Biddle dismissed the charges, stating that "free speech . . . ought not to be restricted"[53] unless "public safety was directly imperiled."[54] The United States had come a long way since World War I.

After Pearl Harbor, few individuals questioned our participation in the war. But those who did clearly grated on the nation's nerves. Public pressure mounted on Biddle to punish these dissenters, but he refrained, believing that the First Amendment protected critics of the war.[55] This led to severe criticism, including a direct rebuke from Franklin Roosevelt.[56] Indeed, according to Biddle, it was the President who exerted the most pressure on him to prosecute dissent.[57]

Roosevelt was particularly interested in William Dudley Pelley, an admirer of Adolph Hitler whose writing, Roosevelt observed, "comes pretty close to being seditious. Now that we are in the war," Roosevelt noted, "it looks like a good chance to clean up a number of these vile publications." In April 1942, Roosevelt directly

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49. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 117–18 (1984).
50. 86 CONG. REC. app. at 1840 (1940).
51. RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR 148 (1999).
52. FRANCIS BIDDLE, IN BRIEF AUTHORITY 235 (1962).
53. *Sedition Cases Dropped*, N.Y. TIMES, Dec. 21, 1941.
54. BIDDLE, *supra* note 52, at 234–35.
55. STEELE, *supra* note 51, at 143–44.
56. *Id.* at 144.
57. BIDDLE, *supra* note 52, at 237–38.

confronted Biddle, "demanding to know what was being done about . . . Pelley," and pointedly asking him, "[W]hen are you going to indict the seditionists?"[58] Biddle had his marching orders.

Pelley was an interesting character. On January 31, 1933, the day after Hitler was appointed Chancellor of Germany, Pelley founded the Silver Legion of America, an organization dedicated to bringing fascism to the United States. Pelley traveled across the nation recruiting members, speaking at rallies, and spreading his message that a cabal of Jews planned to take over the Christian nations of the world. In 1940, a congressional committee identified Pelley's Silver Shirts as "the largest, best financed, and certainly the best published" of the American fascist organizations.[59]

After the United States entered World War II, Pelley charged that Roosevelt had imposed an oil embargo on Japan in order to force it into war, maintained that Roosevelt's policies had led the nation to the "verge of bankruptcy,"[60] accused Roosevelt of instigating the war in order to save his faltering New Deal economy, and predicted a swift and glorious victory by the Axis.

At Roosevelt's insistence, Pelly was charged under the Espionage Act of 1917 with making "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."[61] The indictment included numerous counts based on statements such as: "[W]e (the United States) are bankrupt." "To rationalize that the United States got into the war because of an unprovoked attack on Pearl Harbor, is fiddle-faddle." And "[n]o realist in his senses would contend that there is unity in this country for the war's prosecution."[62]

The jury found Pelley guilty, and he was sentenced to fifteen years in prison.[63] In affirming his conviction, the Seventh Circuit rejected Pelley's contention that his utterances were mere statements of opinion that could not properly be "proved" false. The court explained that Pelley had not "candidly informed" his readers "of the true character and value of the statements," which he had stated as "definite or inevitable facts" rather than as opinions. The Supreme Court declined to review the case. Pelley spent ten years in prison.[64]

One final, but essential, observation is warranted. Under the standards used during World War I, Pelley could certainly have been convicted under the provisions of the Espionage Act prohibiting any person from attempting to obstruct the recruiting or enlistment service of the United States. What is striking about Pelley's prosecution is that he was indicted and convicted under the "false statement" provision of the Act. This implies a clear recognition as early as 1942 that criminal prosecutions for

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58. STEELE, *supra* note 51, at 151.

59. H.R. REP. NO. 76-1476, at 18–21 (1940).

60. *See* STONE, *supra* note 3, at 261–62; *see also* MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 203 (1992).

61 United States v. Pelley, 132 F.2d 170, 173 (7th Cir. 1942) (citation omitted) (emphasis added).

62. *Id.* at 175 n.2.

63. *See* LEO P. RIBUFFO, THE OLD CHRISTIAN RIGHT: THE PROTESTANT FAR RIGHT FROM THE GREAT DEPRESSION TO THE COLD WAR 78–79 (1983).

64. *See* STEELE, *supra* note 51, at 206–08. Pelley died on July 1, 1965, in Noblesville, Indiana. STONE, *supra* note 3, at 265–66.

expression of the sort that were commonplace during World War I were now of doubtful legitimacy. Although both the Department of Justice and the federal courts can be criticized for not working out the difficulties of prosecutions for false statements (Pelley's statements were clearly statements of opinion), there is no question that the insistence on this form of prosecution in itself marked an important, if imperfect, step forward from World War I.

E. The Cold War

As World War II drew to a close, the nation moved almost seamlessly into what came to be known as the Cold War. During this era, the nation demonized members of the Communist Party, "endowing them with extraordinary powers and malignity."[65] J. Edgar Hoover, the Catholic Church, the American Legion, and a host of political opportunists all fed—and fed upon—the image of the domestic Communist as less than a full citizen of the United States.[66]

When Harry Truman became president in 1945, the federal and state statute books already bristled with anti-Communist legislation. As the glow of our wartime alliance with the Soviet Union evaporated, Truman came under increasing attack from a coalition of Southern Democrats and anti-New Deal Republicans who sought to exploit fears of Communist aggression. As House Republican leader Joseph Martin declared on the eve of the 1946 election, "[t]he people will vote tomorrow" between chaos and communism, on the one hand, and "the preservation of our American life," on the other. In Wisconsin, Joseph McCarthy castigated his opponent as "Communistically inclined," and, in California, Richard Nixon charged that his opponent "consistently vot[ed]" the Moscow line.[67] The Democrats lost fifty-four seats in the House.

The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture. In hearings before HUAC, such prominent actors as George Murphy and Ronald Reagan testified that the media had been infected with sly, un-American propaganda and insisted on loyalty oaths for members of the Screen Actors Guild. Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, Lillian Hellman, James Thurber, and Arthur Miller. Fear of ideological contamination swept the nation like a pestilence of the national soul.

In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities.[68] Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the

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65. William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 428.

66. *See id.* at 429.

67. *See* DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 26–27 (1978).

68. Communist Control Act of 1954, ch. 886, 68 Stat. 775 (codified as amended in scattered sections of 50 U.S.C.).

public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States.[69]

The Supreme Court's response was mixed, and evolved over time. The key decision was *Dennis v. United States*,[70] which involved the prosecution under the Smith Act of the leaders of the American Communist Party.[71] The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a six-to-two decision, the Court held that this conviction did not violate the First Amendment.

Although the Court in *Dennis* overruled its World War I decisions upholding the convictions of socialists and anarchists under the Espionage Act of 1917, it could not bring itself to invalidate the convictions of these communists under the Smith Act of 1940.[72] Rather, the Court concluded that, because the violent overthrow of government is such a grave harm, the danger need neither be clear nor present to justify suppression. Chief Justice Vinson explained that the "formation by petitioners" of a "highly organized conspiracy, with rigidly disciplined members," combined with the "inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned," persuade "us that their convictions were justified."[73]

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld the Subversive Activities Control Act, sustained far-reaching legislative investigations of "subversive" organizations and individuals, and affirmed the exclusion of members of the Communist Party from the bar,[74] the ballot,[75] and public employment.[76] In so doing, the Court clearly put its stamp of approval on an array of actions we today look back on as models of McCarthyism.

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69. *See generally* RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958); CAUTE, *supra* note 67; FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM (1980); ATHAN G. THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN (1978).

70. 341 U.S. 494 (1951).

71. *See* Alien Registration (Smith) Act of 1940, ch. 439, §§ 2, 3, 5, 54 Stat. 670–71 (codified as amended at 18 U.S.C. § 2385 (2006)) (declaring it unlawful for any person to "teach[] the duty, necessity, desirability, or propriety of overthrowing or destroying [any] government [in] the United States . . . by force or violence").

72. *See* Geoffrey R. Stone, *Dialogue*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 7, 8 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("[O]ne might say that the Court learns just enough to correct the mistakes of the past, but never quite enough to avoid the mistakes of the present.").

73. *Dennis*, 341 U.S. at 510–11.

74. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961) (bar).

75. *See* Gerende v. Bd. of Supervisors of Elections, 341 U.S. 56 (1951) (ballot).

76. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (upholding the Subversive Activities Control Act's requirement that Communist and Communist-front organizations register with the government); Adler v. Bd. of Educ., 342 U.S 485 (1952) (upholding a New York law providing that no person who knowingly becomes a member of any organization that advocates the violent overthrow of government may be appointed to any position in a public school); Barenblatt v. United States, 360 U.S. 109 (1949) (upholding the power of the House Committee on Un-American Activities to require an instructor at Vassar College to answer questions about his past and present membership in the

Toward the end of the decade, however, with changes in its composition and perspective, the Court began to take a more critical look. Over the next decade, the Court constrained the power of legislative committees to investigate political beliefs,[77] invalidated restrictions on the mailing of communist political propaganda,[78] limited the circumstances in which an individual could constitutionally be denied public employment because of her political beliefs or associations,[79] and restricted the authority of a state to deny membership in the bar to individuals because of their past communist affiliations.[80] Although the Court proceeded in fits and starts during this decade, in the end it played an important role in helping bring this sorrowful era to a close.

F. The Vietnam War

In the Vietnam War, as in the Civil War and World War I, there was substantial, often bitter, opposition both to the war and the draft. Over the course of the war, the United States suffered through a period of intense and often violent struggle. After President Nixon announced the American "incursion" into Cambodia, student strikes closed a hundred campuses. Governor Ronald Reagan, when asked about campus militants, replied: "If it takes a bloodbath, let's get it over with."[81] On May 4, 1970, National Guardsmen at Kent State University responded to taunts and rocks by firing their M-1 rifles into a crowd of students, killing four and wounding nine others. Protests and strikes exploded at more than 1200 of the nation's colleges and universities. Thirty ROTC buildings were burned or bombed in the first week of May. The National Guard mobilized in sixteen states. As Henry Kissinger put it later, "[t]he very fabric of government was falling apart."[82]

Despite all this, there was no systematic effort during the Vietnam War to prosecute individuals for their opposition to the war. As the Columbia historian Todd Gitlin has rightly observed, in comparison to World War I, "the repression of the late Sixties and early Seventies was mild."[83] There are many reasons for this. For one, most of the dissenters in this era were the sons and daughters of the middle class. But the courts, and especially the Supreme Court, played a key role in this period. In 1969, the Court, in *Brandenburg v. Ohio*,[84] effectively overruled *Dennis* and held that states cannot punish even advocacy of unlawful conduct, unless it is intended to incite and is likely to incite "imminent lawless action." The Court had come a long way in the fifty years since World War I.[85]

Communist Party).

77. *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S 539 (1963).

78. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

79. *See* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).

80. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957).

81. TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE 414–15 (1987).

82. HENRY A. KISSINGER, WHITE HOUSE YEARS 513 (1979).

83. GITLIN, *supra* note 81, at 415.

84. 395 U.S. 444 (1969).

85. *See* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg*—And Beyond*, 1969 SUP. CT. REV. 41.

But the government found other ways to impede dissent. The most significant of these was the FBI's extensive effort to infiltrate and to "expose, disrupt and otherwise neutralize" allegedly "subversive" organizations, ranging from civil rights groups to the various factions of the anti-war movement. Beginning in the late 1950s, the FBI's Counter Intelligence Program (COINTELPRO) operations represented a systematic effort on the part of the American government to harass dissident organizations, sow dissension within their ranks, and inform public and private employers of the political beliefs and activities of dissenters. COINTELPRO was launched without any executive or legislative authorization, and its existence was a closely guarded secret, shielded from public view by a carefully crafted system of multiple filings.[86]

When these activities finally came to light they were sharply condemned by congressional committees. In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities made the following findings:

> The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts. . . . The Government, operating primarily through secret informants, . . . has swept in vast amounts of information about the personal lives, views, and associations of American citizens. Investigations of groups . . . have continued for decades, despite the fact that those groups did not engage in unlawful activity.
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> . . . FBI headquarters alone has developed over 500,000 domestic intelligence files. . . .
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> . . .The targets of intelligence activity have included political adherents of the right and the left, ranging from activist to casual supporters.[87]

In 1976, Attorney General Edward Levi declared that such practices were incompatible with our national values and instituted a series of guidelines designed to restrict FBI surveillance of political and religious organizations' activities.

G. The War on Terrorism

The terrorist attacks of September 11, 2001 shocked the American people. Images of the collapsing towers of the World Trade Center left the nation in a profound state of fear, fury, grief, and uncertainty. Anxious that September 11 may have been only the first wave of attacks, Americans expected and, indeed, demanded that their government take immediate and decisive steps to protect them.

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86. *See* DONNER, *supra* note 69, at 178–84; THEOHARIS, *supra* note 69, at 133–52.

87. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK II: FINAL REPORT, S. REP. No. 94-755, at 5–7 (1976), *available at* http://www.aarclibrary.org/publib/contents/church/contents_church_reports_book2.htm.

Nonetheless, as of this writing, there have been no direct federal criminal prosecutions of any individuals for antiwar dissent. This is a far cry from our past experience. It shows the progress we have made over the past two centuries. American values, politics, and law have reached a point where such prosecutions now seem almost unthinkable. A reasonable analogy to the prosecutions of Matthew Lyon in 1798, Clement Vallandigham in 1863, and Eugene Debs in 1918 would have been the prosecution of Howard Dean in 2004 for his opposition to the Iraq War. The very implausibility of this prospect testifies to our nation's advance.

On the other hand, like previous wartime leaders, members of the Bush administration went out of their way to tar their political opponents as "disloyal." Shortly after September 11, President Bush warned, in a phrase evoking Adams, Wilson, and Nixon: "You are either with us or with the terrorists." Attorney General John Ashcroft went even further, castigating those who challenged the necessity or constitutionality of the government's demand for restrictions of civil liberties: "To those . . . who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies. . . . "[88]

Moreover, as in several earlier episodes, the Bush administration often sought to excite rather than calm public fears. It led a frightened public too easily into understanding September 11 as the first stage of a "war." Declaring a "war" on terrorism was more than a rhetorical device to rally the public. It enabled the administration to seize the extraordinary powers reserved to the executive only in wartime.

Indeed, in the wake of September 11, President Bush, like Lincoln and Roosevelt before him, claimed far-reaching powers to address the crisis. In principle, this is sensible, even essential. The President can act more quickly and more effectively in an emergency than either Congress or the courts, and every President who has faced such a crisis has aggressively asserted executive authority. This is a necessary and proper response, but that authority must be exercised with due regard both for our civil liberties and our separation of powers, which rest at the very heart of the American government.

Immediately after September 11, Americans were more than willing to accept significant encroachments on their freedoms in order to forestall further attacks. To reinforce this willingness, the Bush administration repeatedly declared that the terrorists had taken "advantage of the vulnerability of an open society" and that the government therefore needed to restrict our freedoms.[89] Some of these restrictions were modest in scope and addressed serious deficiencies in the nation's intelligence apparatus. Others were more problematic.

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88. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 313 (2001) (statement of John D. Ashcroft, Att'y Gen. of the United States). *See generally* Richard C. Leone, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 1, 8 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra*, at 47, 50.

89. Leone, *supra* note 88, at 1, 5.

The most questionable measures included, among others, secret detentions of non-citizens with no access to judicial review; deportation proceedings that were closed to public scrutiny; secret detentions of American citizens based solely on executive branch determinations that they were "enemy combatants"; warrantless interceptions of telephone calls and e-mail communications; examinations of individuals' financial, medical, educational, and library records with no showing of probable cause or even reasonable suspicion; and denials of hearings and access to habeas corpus to "enemy combatants" detained at Guantanamo Bay.

Most of these measures do not directly involve freedom of speech. Some facets of government surveillance, however, implicate free speech concerns. To combat espionage, sabotage, and terrorism, a government needs to know who is planning what with whom. But in seeking this information, the government must respect constitutional rights. As we saw earlier, after the FBI's COINTELPRO came to light in the 1970s, Attorney General Edward Levi promulgated a series of guidelines restricting the FBI's authority to investigate political and religious activities. The Levi guidelines prohibited the Bureau from investigating any group or individual on the basis of protected First Amendment activity or investigating any organization engaged in protected First Amendment activity in the absence of "specific and articulable" evidence of criminal conduct.

On May 30, 2002, Attorney General John Ashcroft effectively dismantled the Levi guidelines and once again authorized FBI agents to monitor political and religious activities without *any* showing that unlawful conduct might be afoot.[90] The most immediate implication of this change was to authorize the Bureau for the first time in twenty-five years to spy on public political and religious activities.

At first glance, it may seem reasonable to permit federal agents to attend and monitor public events in the same manner as members of the public. After all, if you and I can attend public demonstrations and religious services, why shouldn't FBI agents do so as well? But it isn't so simple. Individuals planning to participate in an antiwar rally will be less likely to do so if they know FBI agents are taking names. Such surveillance, whether open or surreptitious, can have a deadly effect on First Amendment freedoms.

Speakers and protesters understand that their individual participation in public debate is unlikely to have any appreciable impact on national policy. Thus, if they fear that marching in a demonstration or signing a petition might land them in a government file, they may decide the better part of wisdom is *not* to express their views. And if many individuals independently make this decision, the *overall* effect might be to seriously distort the thought process of the community. Indeed, it is because of our concern with this "chilling" effect that we use secret ballots for voting. The same principle applies *whenever* government surveillance threatens the anonymity of free speech. By eviscerating the Levi Guidelines, the Bush administration acted in direct disregard of this principle.

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90. *See* JOHN ASHCROFT, U.S. ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATION, pt. VI(A)–(B), at 21–23 (2002), *available at* http://www.usdoj.gov/olp/generalcrimes2.pdf; Neil A. Lewis, *Traces of Terror: The Inquiry, Ashcroft Permits F.B.I. to Monitor Internet and Public Activities*, N.Y. TIMES, May 31, 2002, at A20.

But the more fundamental observation about the past eight years is that the government has made no effort to prosecute individuals for their criticism of the war in Iraq or of any other steps the government has taken in the war on terrorism. When compared to the Sedition Act of 1798, the prosecution of Clement Vallandigham, and the World War I era prosecutions under the Espionage and Sedition Acts, the change is profound.

What can we learn from this history? I would offer three observations. First, we have a long history of *overreacting* to the perceived dangers of wartime. Time after time, we have allowed our fears to get the better of us. Having discovered this tendency, we need to guard against such overreactions in the future.

Second, what this suggests is that in periods of relative calm the Court should self-consciously construct constitutional doctrines that will provide firm and unequivocal guidance for later periods of stress. Clear constitutional rules that are not easily circumvented or manipulated are essential if we are to preserve the right to dissent in the face of wartime fear and hysteria. Malleable principles, open-ended balances, and vague standards may serve us well in periods of tranquility, but they are likely to fail us when we need the Constitution the most.[91]

Third, the United States has made great progress over time in the protection of dissent in wartime. The restrictions we have historically imposed on dissent in wartime would be far less thinkable today than they were in the past. Indeed, although the current doctrine is certainly not settled beyond the possibility of erosion, the proposition that criticism of the government cannot constitutionally be prohibited unless it is intended to incite and is likely to incite imminent lawless action has thus far withstood the pressure of the war on terrorism. This is an important constitutional achievement.

II. SECRECY

This brings me to the second major issue involving free speech and national security—government secrecy. The history of the First Amendment in this setting is much less rich than in the context of controversies over the suppression of dissent. For the most part, the government has assumed that it is empowered to keep information secret in order to protect the national security, and relatively few constitutional controversies have arisen. One would expect such disputes to arise whenever the government thought that the press had harmed the national security by publishing classified information.

A. Publishing Classified Information

This issue arose during the debates over the Espionage Act of 1917. As initially presented to Congress, the bill drafted by the Wilson administration included a "press censorship" provision, which would have made it unlawful for any person in time of

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91. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

war to publish any information that the President had declared to be "of such character that it is or might be useful to the enemy."[92]

This provision triggered a firestorm of protest from the press, which objected that it would give the President the final authority to determine whether the press could publish information about the conduct of the war. The American Newspaper Publishers' Association objected that this provision "strikes at the fundamental rights of the people, not only assailing their freedom of speech but also seeking to deprive them of the means of forming intelligent opinion."[93] The Association added that "[i]n war, especially, the press should be free, vigilant, and unfettered."[94]

Many in Congress supported the proposed legislation. Representative Edwin Webb of North Carolina, for example, argued that "in time of war, while men are giving up their sons and while people are giving up their money,"[95] the press should be willing to give up its right to publish what the President "thinks would be hurtful to the United States and helpful to the enemy."[96] Webb added that, in time of war, the United States has to trust somebody, and just as we trust the President, as Commander in Chief, with the fate of our boys in uniform, so too must we trust him to prescribe what information would be "helpful to the enemy."[97]

Opposition to the legislation was fierce, however. Representative Simeon Fess of Ohio warned that "in time of war we are very apt to do things" we should not do.[98] Senator Hiram Johnson of California reminded his colleagues that "the preservation of free speech" is of "transcendent importance" and that in times of stress "we lose our judgment."[99] Describing the provision as "un-American," Representative Martin B. Madden of Illinois protested that "[w]hile we are fighting to establish the democracy of the world, we ought not to do the thing that will establish autocracy in America."[100]

When it began to appear that the press censorship provision would go down to defeat, President Wilson made a direct appeal to Congress, stating that the "authority to exercise censorship over the press . . . is absolutely necessary to the public safety."[101] Members of Congress were unmoved. The House defeated the provision by a vote of 184 to 144, and this effectively ended consideration of the "press censorship" provision for the duration of the war.

More recently, this issue emerged during the War on Terrorism after the *New York Times* disclosed President Bush's secret directive authorizing the National Security Agency (NSA) to engage in warrantless electronic surveillance of international communications. Several Republican members of Congress accused the *Times* of "treason," and 210 Republicans in the House of Representatives supported a resolution

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92. 55 CONG. REC. 1695 (1917) (discussing H.R. 291, 65th Cong. tit. I § 4 (1917)).
93. *Id.* at 1861 (reprinting letter from American Newspaper Publishers' Association).
94. *Id.*
95. *Id.* at 1590 (statement of Rep. Edwin Webb).
96. *Id.* at 1591.
97. *Id.* at 1590–91.
98. *Id.* at 1591 (statement of Rep. Simeon Fess).
99. *Id.* at 2097 (statement of Sen. Hiram Johnson).
100. *Id.* at 1773 (statement of Rep. Martin B. Madden).
101. *Wilson Demands Press Censorship*, N.Y. TIMES, May 23, 1917, at 1 (quoting letter from Woodrow Wilson to Rep. Webb).

condemning the *New York Times* for putting "the lives of Americans in danger."[102] Attorney General Alberto Gonzales went so far as to suggest that the *Times* might be prosecuted for violating a provision of federal law making it a crime to disclose "information relating to the national defense" with "reason to believe" that the information could be used "to the injury of the United States."[103]

What is the right approach to this issue? The government often has exclusive possession of information about its policies, programs, processes, and activities that would be of great value to informed public debate. In a self-governing society, citizens must know what their representatives are doing if they are intelligently to govern themselves. But government officials often insist that such information must be kept secret, even from those to whom they are accountable—the American people.

The reasons why government officials demand secrecy are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes, government officials rightly fear that the disclosure of secret information might undermine the national security (for example, by revealing military secrets). Sometimes, they are concerned that the revelation of secret information would betray the confidences of citizens of other nations who provided the information on the assurance that it would remain confidential. Sometimes, they want to keep information secret because disclosure would expose to public view their own incompetence or wrongdoing.

The value of such information to informed public discourse may also vary widely. Sometimes, the information is extremely important to public debate (for example, the disclosure of unwise or even unlawful government programs or activities). Sometimes, the information is of no real value to public debate (for example, the disclosure of the identities of non-newsworthy covert agents).

The most vexing problem arises when the public disclosure of a government secret is both harmful to the national security and valuable to self-governance. Suppose, for example, government officials conduct a study of the effectiveness of security measures at the nation's nuclear power plants. The study concludes that several nuclear power plants are vulnerable to terrorist attack. Should this study be kept secret or should it be disclosed to the public? On the one hand, publishing the report might endanger the nation by revealing our vulnerabilities to terrorists. On the other hand, publication would alert the public to the situation, enable citizens to press government officials to solve the problem, and empower the public to hold accountable those public officials who have failed to keep the nation safe. The public disclosure of such information could both harm and benefit the nation. Should the study be made public?

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102. H.R. Res. 895, 110th Cong. (2006), 152 CONG. REC. H4875, H4876 (daily ed. June 29, 2006). The article that precipitated the resolution was published in the *New York Times* on June 23, 2006. *See* Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1, *available at* http://www.nytimes.com/2006/06/23/washington/23intel.html?scp=3&sq=warrantless%20surveillance%20%22june%2023,%202006%22&st=cse.

103. 18 U.S.C. § 793(e) (2006); *see* Michael Barone, *Blowback on the Press*, U.S. NEWS & WORLD REP., May 8, 2006, at 39; Rick Klein, *House Votes to Condemn Media Over Terror Story*, BOSTON GLOBE, June 30, 2006, at A1; Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST, Feb. 17, 2006, at A04; David Remnick, *Nattering Nabobs*, NEW YORKER, July 10, 2006, at 33–34 (noting that the *New York Times* won the Pulitzer Prize for journalism for publishing these stories).

And who should decide? Public officials responsible for protecting national security? Public officials who might have an incentive to cover up their own mistakes? Lower-level public officials who believe their superiors are keeping information secret for inadequate reasons? Reporters, editors, and bloggers who have gained access to the information? Judges in the course of criminal prosecutions of leakers, journalists, and publishers? Ultimately, *someone* has to decide whether public officials can keep such information secret.

A simple answer would be that the same standard that the Court has developed to protect dissent in wartime should govern in this situation as well. That is, to preserve the value of free debate, to ensure an informed electorate, and to guard against government overreaching and the undue suppression of free speech, the press should be free to publish such information unless the government can demonstrate that the publication is likely to cause grave and imminent harm.

Perhaps surprisingly, in the entire history of the United States there has *never* been a criminal prosecution of the press for publishing confidential information relating to the national security. It may be that the press has exercised great restraint and has never published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or it may be that the government has exercised great restraint and has never prosecuted the press even though such prosecutions would have been constitutionally permissible. Whatever the explanation, because there has never been such a prosecution, the Supreme Court has never had occasion to rule on such a case.

The closest the Court has come to such a situation was *New York Times v. United States*,[104] the Pentagon Papers case. In 1967, Secretary of Defense Robert McNamara commissioned a top-secret study of the Vietnam War. That study, which filled forty-seven volumes, reviewed in great detail the formulation of United States policy toward Indochina, including military operations and secret diplomatic negotiations. In the spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the Pentagon Papers to the *New York Times*. After the *Times* began publishing excerpts from the papers, the United States filed a complaint for an injunction. The matter quickly worked its way to the Supreme Court, which denied the injunction. Having learned important lessons during the long history of controversies over government efforts to restrict dissent in wartime, the Court held that the publication of even classified information cannot constitutionally be restrained unless the government can prove that the disclosure would "surely result in direct, immediate, and irreparable damage to our Nation."[105]

Against this background, it is not surprising that, despite all the saber-rattling following the disclosure of the Bush administration's secret NSA surveillance program, the government has not prosecuted the *New York Times* for its disclosure of the NSA program. Clearly, the government could not prove that the disclosure caused "direct, immediate, and irreparable" harm to the national security.[106]

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104. 403 U.S. 713 (1971).

105. *Id.* at 730 (Stewart, J., concurring). Although the Pentagon Papers case involved a prior restraint, it seems reasonable to conclude that essentially the same standard would apply in a criminal prosecution of the *New York Times* for publishing the information. *See* GEOFFREY R. STONE, TOP SECRET: WHEN GOVERNMENT KEEPS US IN THE DARK 22–24 (2007).

106. The NSA surveillance program involved an additional twist, for there is good reason to

B. Leaking Classified Information

The result in the Pentagon Papers case gives rise to an interesting question: if the press has a First Amendment right to publish classified information unless publication will "surely result in direct, immediate, and irreparable damage" to the national security, does that mean that the public has a First Amendment *right* to such information? We protect the right of the press to publish confidential information because that publication serves the public interest. That being so, does it not logically follow that the ultimate right being protected is not the right of the press to publish, but the right of the public to know? And if that is so, then should not citizens logically have a First Amendment right to demand that the government disclose confidential information to the public, unless the disclosure would "surely result in direct, immediate, and irreparable damage to our Nation"?

At one level, this seems sensible. But the Supreme Court has never interpreted the First Amendment in this manner. Rather, the Court has construed the First Amendment as protecting a right to speak and to publish—but not a right of access to information, as such. Thus, individuals have no First Amendment right to insist that the government disclose information that the government would prefer to keep secret. For practical and historical reasons, the Court has drawn a sharp distinction between the right to communicate what one knows and the right to learn what one wants to know.[107]

There is, however, an intermediate case. Consider a public employee who discloses confidential information to the press. The Pentagon Papers situation illustrates the issue. In the Pentagon Papers case, two things were clear: First, the government could not constitutionally restrain or punish the *New York Times* for publishing the Pentagon Papers. Second, neither the *New York Times* nor any member of the public had any First Amendment right to demand that the government disclose the Pentagon Papers. What, then, of Daniel Ellsberg, who turned over the Pentagon Papers to the *New York Times*? Could the government constitutionally punish Daniel Ellsberg for leaking the Pentagon Papers to the press and the public?

The government filed criminal charges against Ellsberg, but the prosecution was dismissed because of government misconduct, so the issue was never resolved. But it seems clear under current law that a public employee who leaks classified information ordinarily can be discharged or criminally punished or both for his conduct, even if the press has a First Amendment right to publish the information he has unlawfully disclosed.

The doctrine that the government can constitutionally punish public employees for disclosing classified information is premised largely on the intersection of two considerations. First, constitutional rights can be waived. A criminal defendant can waive his right to a jury trial, a citizen can waive his right not to be searched, a litigant can waive his right to counsel. Similarly, public employees can waive their First

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believe that the program itself was unlawful. Although the issue has never arisen, it is difficult to believe that the Supreme Court would ever sustain a criminal prosecution for the public disclosure of *unlawful* government actions. *See* STONE, *supra* note 105, at 24–26; GEOFFREY R. STONE, WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT 143–63 (2007).

107. *See*, *e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that news media have no constitutional right of access to a county jail); Pell v. Procunier, 417 U.S. 817 (1974) (holding that there is no right of the press to interview prisoners); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

Amendment rights. But the government's authority to compel a waiver of constitutional rights as a condition of government employment is not unbounded. It would clearly be unconstitutional, for example, for the government to insist that public employees promise never to vote for Democrats, never to have an abortion, or never to practice the Muslim faith. Such waivers would be unconstitutional and unenforceable. Thus, waiver is relevant, but not in itself dispositive. We still need to decide when the government can constitutionally insist upon such waivers.

This brings us to the second consideration. Although the government cannot automatically require individuals to waive their constitutional rights as a condition of public employment, it can require them to waive those rights insofar as the waiver is reasonably necessary to enable the government to fulfill its responsibilities. As the Supreme Court explained in *Pickering v. Board of Education*:

> [The government] has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.[108]

Applying this reasoning, the Supreme Court held in *Snepp v. United States*[109] that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to his Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency."[110] The Court emphasized that a "former intelligence agent's publication of . . . material relating to intelligence activities can be detrimental to vital national [security] interests."[111]

In light of *Snepp* and *Pickering*, it seems clear that public employees can be required as a condition of employment to agree not to disclose classified information to the press or the public—in at least some circumstances. The critical question is to identify the circumstances in which such compelled waivers are valid. Under existing law, the prevailing presumption is that public employees can constitutionally be discharged or criminally punished or both for leaking classified information if the disclosure could *potentially harm the national security*.[112]

Now, there is a puzzle here. Except in rare circumstances, the press will not be in a position to publish classified information unless a public employee reveals it to them. Giving the press the protection guaranteed in the Pentagon Papers case is of limited value to the *public* if the press can almost never gain access to the information. If the Pentagon Papers decision states the proper standard for reconciling the interests of an informed public with the needs of national security, should not that same standard

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108. 391 U.S. 563, 568 (1968).
109. 444 U.S. 507 (1980).
110. *Id.* at 508.
111. *Id.* at 511–12.
112. *See* STONE, *supra* note 105, at 10–14.

logically protect the right of public employees to disclose such information to the press?

Professor Alexander Bickel offered the conventional answer to this puzzle, which he characterized as a "disorderly situation."[113] He argued that if we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; but if we give the government too little power to control confidentiality "at the source," we risk too great a sacrifice of secrecy.[114] The solution is thus to reconcile the irreconcilable values of secrecy and accountability by guaranteeing both a strong authority of the government to prohibit leaks and an expansive right of the press to publish them.

I recently wrote that this state of affairs "may seem awkward in theory and unruly in practice, but it has stood the test of time."[115] Upon further reflection, I have come to doubt the wisdom of this conclusion. The power we have given the government to control confidentiality "at the source" is simply too great. Even if one accepts both *Pickering* and *Snepp*, it does not necessarily follow that the government should have the authority to prohibit the disclosure of classified information whenever the disclosure might "potentially harm the national security," which was the standard for classification under the Bush Administration. A more appropriate constitutional standard might well be whether *the potential harm to the national security outweighs the value of the disclosure to public discourse*. Under this approach, the First Amendment would protect a public employee who reveals classified information if the value to public discourse outweighs the harm to national security.

Admittedly, this is a more difficult standard to administer than whether disclosure "might potentially harm the national security." "Value to public discourse" is hardly self-defining, and it is always vexing to balance incommensurable values. But such a standard better reflects the proper balance in a self-governing society between secrecy and transparency. Moreover, the Clinton Administration successfully administered this standard.[116]

The unprecedented secrecy of the Bush Administration brings this issue to the fore. Overbroad government assertions of secrecy cripple informed public debate. Citizens cannot responsibly consider the merits of public policy decisions if they are kept in the dark about the actions of their elected officials. As Senator Daniel Patrick Moynihan once observed, "secrecy is the ultimate form of regulation because the people don't even know they are being regulated."[117]

Excessive secrecy was a consistent and disturbing theme of the Bush Administration, which refused to disclose the names of those it detained after September 11; promoted a crabbed interpretation of the Freedom of Information Act;[118] closed deportation proceedings from public scrutiny; redacted a vast quantity of

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113. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 80 (1975).

114. *See id.* at 79–82.

115. STONE, *supra* note 105, at 22.

116. *See, e.g.*, Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (President Clinton Executive Order). This Executive Order was revised by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (President Bush Executive Order).

117. John Podesta, *Need to Know: Governing in Secret*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra* note 88, at 220, 227.

118. Enacted in 1966, the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250

"sensitive" information from tens of thousands of government documents and websites; implemented a secret NSA surveillance program; and created secret prisons in Eastern Europe for alleged terrorists.[119]

Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush Administration's obsessive secrecy effectively and intentionally constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. As the legal scholar Stephen Schulhofer has noted, one cannot escape the inference that the cloak of secrecy imposed by the Bush administration had "less to do with the war on terrorism" than with its desire "to insulate executive action from public scrutiny."[120] Such an approach to self-governance weakens our democratic institutions and renders "the country less secure in the long run."[121] This is an area in which serious reconsideration of First Amendment doctrine is necessary. The Obama Administration has already moved in this direction.

(1966) (codified as amended at 5 U.S.C. § 552 (2006)), establishes the public's right to obtain information from federal government agencies.

119. *See*, *e.g.*, Leone, *supra* note 88, at 1, 9; Podesta, *supra* note 117, at 220–25; John F. Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra* note 88, at 237, 237.

120. Stephen J. Schulhofer, *No Checks, No Balance: Discarding Bedrock Constitutional Principles*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra* note 88, at 74, 91. On the secrecy of deportation hearings, compare Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that a closed hearing was unconstitutional), with N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that a closed hearing was constitutional).

121. Podesta, *supra* note 117, at 220, 225.