White Papers

The Patriot Act in Historic Context

Craig R. Smith, Director
Center for First Amendment Studies, California State University, Long Beach

During the War of 1812, British troops landed near the nation's Capitol and proceeded to burn the Presidential Mansion, now known as White House. First Lady Dolly Madison barely escaped with a wagon load of public treasures and was not re-united with her husband for over 24 hours. By the end 1814 the war had stalemated, Andrew Jackson had scored his victory over the British at New Orleans, and a peace treaty was signed. The British were eventually forgiven for their unkind "act of war." On December 7th, 1941 the naval installation at Pearl Harbor on the island territory of Oahu was bombed in a sneak attack by the Japanese. Over twenty-five hundred Americans lost their lives. The United States declared war on Japan and eventually extracted revenge.

Neither of these events compared to the evil of the attack on the World Trade Towers in New York City on September 11, 2001 since this strike constituted a sneak attack on a civilian population by terrorists activists trained on foreign soil. Their Al Qaeda network, situated mainly in Afghanistan, was protected by the reigning Taliban government and headed by Osama Bin Laden, a known international outlaw of Saudi descent. Thus, the crisis that this bombing incited was one of the worst in the history of the United States. One of the questions the nation faced was what kinds of security measures would be necessary to deal with the crisis. A subsidiary questions was what impact would these measures have on the civil liberties of American citizens.

The chapter attempts to put the security measures passed by the Congress and implemented by President George W. Bush into historic context by comparing the legislation and the interpretation of it to other legislation passed in response to past American crises. The chapter reveals a pattern of events that not only place the current crisis in context, but demonstrate the role that each branch of the government has played in the past.[1] The chapter pays particular attention to the First Amendment since historically the freedoms contained therein tend to be the most affected; however, such other freedoms, as the right to consult with an attorney and to confront one's accusers, are also examined.

Inciting the Demos

A crisis is the result of a perceived threat, real or imagined. For example, by 1798, the year the Alien and Sedition Laws were passed, over 300 United States ships had been sunk or commandeered by the French. The nine-year-old French revolution had fallen into the hands of the radical Directory. Hundreds of nobles, including the King and Queen of France, had been sent to the guillotine. The Directory vowed to spread its ideology across Europe by force.

Vice President Jefferson and members of his party debated Federalists about the extent to which that threat was real for the United States. Jefferson had been Minister to France during its revolution. He had also been Secretary of State of the United States. As Vice President, he tried to dampen fears of a foreign invasion and openly opposed President Adams' call for a more stringent policy of immigration. The Federalists countered by arguing that the external threat of war with France was only one part of the story. The other was an internal threat from "Philosophes" and "Jacobins" who had infiltrated the country and, according to Congressman Otis, even served in Jefferson's State Department.[2]

The parallel to the McCarthy era is hard to miss. Again, America faced a foreign threat. Between 1945 and 1949, many eastern European countries and China were taken over by Communist regimes. In 1950 the United States led a United Nations' policing action against Communist North Korea. The Soviet Union aided that country with equipment and training. Eventually, the Communist regime on mainland China supported North Korea in the field with soldiers.

The internal threat of subversion had first appeared during hearings of the House UnAmerican Activities Committee (HUAC) in the Summer of 1948 when Whittaker Chambers, a former editor at *Time*, had accused Alger Hiss, a high ranking official in the State Department, of having been a member of a Communist cell in the 1930s. Hiss was eventually convicted of perjury for denying Chambers' charges. The embers of the HUAC charges had barely cooled when Senator Joseph McCarthy in a speech in Wheeling, West Virginia in 1950 claimed to have a list of over 200 subversive Communists employed by the State Department. Before his fall from power in 1954, McCarthy would exaggerate his claim to include the Army.

In between the Alien and Sedition crisis and the McCarthy era, the pattern of expanding an external threat into an internal threat was readily apparent in most crises. By the time Abraham Lincoln took the oath of office, seven states had seceded from the Union. When war came, Lincoln claimed that the internal threat of subversion justified his suspension of *habeas corpus* and the jailing of "Copperhead" newspaper editors and others who opposed his policies.

Following Lincoln's death, the external threat that the South might rise again was enhanced by the charge that President Andrew Johnson was in league with Southerners. Alabama and Florida had passed vagrancy laws that required the poor to work for the state. Their income was given to widows and orphans, thereby returning many Blacks to the status of state owned slaves. Other states passed laws denying the right of "negroes" to bear arms, denying business licenses to "negroes", and garnisheeing wages from "negroes" under various pretexts. On top of that, Alexander Stephens, in what must be seen as one the most arrogant acts in history, asked to be seated in the first post-war U.S. Senate. Stephens had been the Vice President of the Confederacy and had spent four years trying to destroy

the very Senate in which he asked to be seated. Southern editors infuriated Northerners by defending the reconstruction conventions. Moving quickly to "restore" the southern states to the Union, Johnson exacerbated his weak position, lost credibility, and increased suspicions that he was in league with the South.

Putting aside the unique threat to some by unionization and to others by turn of the century anarchists, the next major external crisis with internal ramifications came during America's entry into World War I. Woodrow Wilson's administration sent a force of U.S. troops to Archangel, Russia to join with other allies in support of the White Russian armies opposing Lenin and the Bolsheviks, who were perceived to be an external threat not only because of their ideology but because they negotiated peace with the Germans during World War I. Throughout the time of America's direct intervention into World War I and its attempt to prop up the White Russians, Wilson and his administration conducted an unremitting campaign of suppression of free speech at home.[3] Once war had been declared, Wilson was only too aware of ethnic opposition to his policies, particularly among Irish, German, and other central European immigrants. In fact, Wilson had sought to repress his critics as early as 1915, when Theodore Roosevelt had launched a withering attack on the President's conduct in the Lusitania affair. Like Alexander Hamilton during the quasi-war with France, Wilson claimed that foreign agents were subverting national will. During World War I and following the Russian Revolution, A. Mitchell Palmer, Woodrow Wilson's Attorney General, justified the suspension of civil liberties on the grounds that "Reds" were engaged in subversive activities.

America returned to "normalcy" during the '20s until its attention was drawn to the depression. Then, despite efforts to avoid involvement, America was drawn into World War II. The horror of Pearl Harbor was enhanced by the threat of alleged subversion on the part of Japanese Americans and Nazi infiltrators. The Attorney General of California, Earl Warren, was one of the first to call for the internment of the Japanese. Over 120,000 Japanese Americans were eventually placed in camps. Having endured years of vilification by Republican owned newspapers over such issues as trying to pack the Supreme Court, failing to end the depression, and plotting to get America into the war, Franklin Roosevelt was ready, as he wrote J. Edgar Hoover, to "clean up a number of ... vile publications" (Roosevelt 1942). The President proceeded to criticize and call for investigations of the *New York Daily News*, Henry Luce of *Time* and *Life*, Drew Pearson, and Robert S. Allen, among others. He also tried to keep newspapers from acquiring ownership of radio stations, the first instantiation of the cross-ownership rules of the Federal Communication Commission.

If such civil libertarians as Lincoln, Wilson and Roosevelt could trample basic rights, think how much more dangerous the situation would have been with a president less sympathetic to civil liberties. The pattern of taking an external threat and reinforcing it with an internal threat has been common in our history. Those who point it out are often attacked as giving sympathy to the enemy. It is to that pattern of suppression that this study now turns.

Condemnation of the Internal Opponent

While the Alien and Sedition Laws passed the Federalist-dominated Senate with ease, they faced tougher sledding in the House. In fact, fistfights broke out during the debates, and the margin of victory for the Federalists was very close, as little as three votes on the crucial bills. During the debates, members of Congress were not above questioning the patriotism of their opponents. One such attack was watched closely by members of the House and by citizens in a packed gallery. Federalist Jonathan Dayton rose to rebut a speech by Albert Gallatin, a Democratic-Republican leader who had originally come to the United States from Switzerland. Dayton himself was known to be a moderate Federalist, so his insinuations concerning Gallatin's foreign origin and his presumed friendliness to European radicalism were all the more striking. Said Dayton:

> *And why should that gentleman [Gallatin] be under no apprehension? Was it that secure in the perfect coincidence of the principles he avowed with those which actuated the furious hordes of democrats, which threatened the country with subjugation, he felt a confidence of his own safety, even if they should overrun ... the states? He might indeed contemplate an invasion without alarm ... he might see with calmness ... our dwellings burning.... (Levy and Peterson 199)*[4]

There were many more such attacks.

On Washington's birthday in 1866 in the midst of the reconstruction battle and while President Johnson was being feted at the White House by his friends, a crowd gathered outside and began to serenade him. Carried away by their adulation and his drinking, Johnson gave a long rambling speech that was interrupted by cries begging the President to name the "traitors" to whom he had alluded. "I have fought traitors and treason in the South," said the President. "I opposed Davis, Toombs, Slidell, and a long list of others whose names I need not repeat. And now, when I turn around at the other end of the line, I find men—I care not by what name you call them ..." Johnson was interrupted again with cries of "Call them traitors." He continued saying that it was those who opposed his plan of "restoration." The crowd demanded names and finally the President gave way:

> *I say Thaddeus Stevens of Pennsylvania. I say Charles Sumner. I say Wendell Phillips and others of the same stripe among them.... They may traduce me, they may slander me, they may vituperate, but let me say to you that it has no effect upon me; and let me say in addition that I do not intend to be bullied by my enemies.... If it is blood they want, let them have the courage enough to strike like men.*[5]

It would not be long before the Republicans in the Senate and the House began to question the President's loyalty to the Union. They spread stories about Johnson being found hung-over the morning he was sworn in, allowing the public to infer that he had celebrated Lincoln's assassination. They cited the fact that John Wilkes Booth had left his card at Johnson's boarding house, a charge that ignored the report that a co-conspirator happened to be staying there (Trefousse 195-96).

During the McCarthy era, professors, even those with tenure, were fired for exercising their right to request Fifth Amendment protection. Writers in Hollywood were blacklisted and held in contempt of Congress for invoking First Amendment protection and refusing to reveal associates who had been or were members of the Communist party.

During the Vietnam War, President Lyndon Johnson charged that news organizations undermined the chance to negotiate peace.[6] News reporters left the impression that the Communists were victorious during the Tet Offensive

(Small 82, 139). He called protesters cowardly, particularly given that U.S troops were spending holidays away from their families "in a lonely and dangerous land" (Johnson, 1965, 1125-26). Two years later, Johnson claimed that American fighting men resented the cheap talk of these protesters (Johnson, 1967, 1013). Ambassador Averill Harriman scolded the *New York Times* for promoting the view that the United States lacked dedication to the Vietnam cause.

President Nixon also questioned the patriotism of the news media and protesters. He claimed that resisters did not act on conscience; they deserted their country. Students "assault[ed] the processes of free inquiry which are the very life of learning" (Nixon, 1969, 236). Vice President Agnew claimed that the news media and protesters were not loyal to the United States.

Crafting Legislation

With crisis exaggerated through an internal threat, and the opposition demonized as disloyal, the leaders of the movement to secure the Union turn to legislation to achieve their goals. The Executive Branch has acted in two distinct ways regarding new laws and regulations during a crisis. In some cases the Chief Executive signs on to what the Congress initiates; in other cases, the Executive Branch itself moves the rules and regulations to the forefront.

When the Congress passed the Alien and Sedition Acts,[7] John Adams signed them. When newspaper editors, protesters, and even a Congressman were jailed under the Acts, Adams pardoned not a one of them. Ulysses S. Grant signed even the most draconian of the Reconstruction measures and kept the South divided into five military districts each governed by a different Union General for the whole of his presidency.[8]

In 1947, three years before Joseph McCarthy came to the fore, President Harry S. Truman supported congressional investigations of unions, including the Screen Actors Guild, then headed by Ronald Reagan. However, Truman's record on these issues was fogged by his partisan attacks on McCarthy and his veto of the McCarran-Walter Immigration Act. His record in the late forties matches that of many liberal groups clamoring to avoid the soft-on-communism label (Medhurst). In 1952, the McCarran-Walter Immigration Act was passed over President Truman's veto by a vote of 278 to 133 in the House and 57 to 26 in the Senate. It gave the State Department authority to prevent foreigners with alien political beliefs or affiliations from entering the country. This throwback to the Alien Act of 1798 remains in force.[9]

Despite the fact that McCarthy had slandered his good friend, George Marshall, Dwight Eisenhower appeared with the McCarthy during the 1952 elections. During Eisenhower's administration, many private meeting halls, including Madison Square Garden, refused to rent to groups that his Attorney General labeled as Communist (Rashin). Suspected Communists were denied low-income housing and could not obtain passports (Parmet 226-246). J. Edgar Hoover made uncovering Communist spies his top priority.[10]

Rather than being complicit, several presidents have initiated action on their own or urged the Congress to act. President Andrew Jackson asked the Congress to forbid the mailing of abolitionist tracks into the South on the grounds they incited violence. When Congress refused to do the President's bidding, he simply ordered his Postmaster General to carry out the order. President Lincoln suspended habeas corpus not only in war zones, but to prevent the Maryland legislature from meeting. He feared it would vote to secede.[11] Once war was declared in 1917, Woodrow Wilson encouraged the Congress to pass the Espionage Act, the Trading with the Enemy Act, and, a year later, the Sedition Act.[12]

In the meantime, the Espionage Act's censorship provisions allowed Postmaster General Albert Burleson to suppress journals, letters, or whatever he believed to be a threat to national security (Donald Johnson, Suter & Samosky). Wilson often defended Burleson's judgment (Wilson, vol. 43, 246; vol. 44, 420).[13] The Trading with the Enemy Act allowed the President to create the Committee on Public Information, known as the Creel Committee after its head George Creel, a former Muckraker who had supported Wilson in the elections of 1912 and 1916. The Committee was charged with coalescing a divided public behind the war effort by putting out "information" and "correcting" disinformation (Creel, Larson and Mock, Hollihan 240-246). Faced with the surprising growth of the motion picture industry, Creel initiated a policy of "benign censorship" that often crossed swords with Burleson's activism (Fishman and Lindmark).[14] With Wilson's support, Burleson overruled or circumvented Creel and also assumed more powers under the Sedition Act. Though Burleson came under continued attack from the nation's press and such strong voices as Norman Thomas and Upton Sinclair, Wilson continued to back Burleson. In fact, at one juncture, Wilson sought the indictment of a newspaper editor for seditious treason (Scheiber 38-39). Even after the war, from his death bed Wilson continued to support Burleson suppressive tactics (Wilson, vol. 55, 327). Throughout this period, Burleson found a soul mate in the Attorney General Wilson appointed in 1919 at the height of the internal crisis in the United States. The internal side of this crisis was supported by real events. On April 28, 1919 sulfuric acid poured out of a package mailed to the mayor of Seattle. In June the mayor of Cleveland was attacked; two bombs went off in Pittsburgh; a judge's home in New York City and a rectory in Philadelphia were attacked; worst of all, Palmer[15] had his own home in the Capitol blown apart. In August Palmer created the General Intelligence Division and named J. Edgar Hoover as its director. In November they coordinated a raid on the Union of Russian Workers in 12 cities and arrested 450 members. In December 249 aliens were arrested and so was "Red" Emma Goldman, whom the assassin of William McKinley had claimed inspired him. Palmer escalated his raids just as the new year began by arresting 5,000 persons in 33 cities. Just when things seem to be calming down, a bomb exploded on Wall Street in September of 1920. Of all the internal crises, the one Wilson faced was probably the most serious and the most to provide real evidence of violence.

There is a tendency to allow Franklin Roosevelt's internment of American citizens of Japanese descent to obscure other questionable policies initiated by Roosevelt during the war. Near the end of March, 1942, George Christians, the chief officer of the Fascist Crusader White Shirts, and Rudolph Fahl of Denver were arrested for disseminating material that could demoralize the army. In early April, five more seditionists were arrested. The President took pride in the operation during his "Fireside Chat" later in the month: "this great war effort ... must not be impeded by a few bogus patriots who use the sacred freedom of the press to echo the sentiments of the propagandists in Tokyo and Berlin." All of those from the March-April group were convicted by the end of the Summer of 1942 except Fahl. By the

end of the year, 150 persons had been arrested for seditious statements or publications (Washburn 722).

Whether provoked or not, the North Vietnamese attack on American naval ships in the Gulf of Tonkin in August, 1964 gave President Lyndon Johnson an excuse to ask Congress for broader military power. After that he felt more secure in attacking the news media. When Johnson discovered that the film used by CBS of a U.S. soldier setting a fire to a peasant shack in Southeast Asia was a re-enactment, Johnson called on J. Edgar Hoover to begin an FBI investigation of Morley Safer, the reporter responsible (Small 65). Draft card burners were prosecuted; Martin Luther King suffered from rumors circulated by the administration that Communists had infiltrated into the core of his organization (Small 100).

During the same war, President Nixon's monitoring and attempted intimidation of the press became legendary. For example, in 1972 the CIA initiated "Project Mudhen," to spy on columnist Jack Anderson and his staff (Spear 136). The Executive Branch also focused on such liberal reporters as Daniel Schorr and Cassie Mackin.

The Congress

The Congress, as we have seen in the current crisis, often follows the lead of the President. However, the Congress has also taken the lead in initiating restrictive legislation. That was certainly the case during the Alien and Sedition crisis, when Federalists under the direction of Hamilton produced an ambitious legislative package that resulted in the passage of the following laws: The Naturalization Act forbade aliens from being admitted to citizenship unless they had has resided in the United States for at least fourteen years. No native, citizen, subject, or resident of a country with which the United States was at war could be admitted to citizenship. The Alien Act allowed the president to order all aliens that he judged to be dangerous to the peace and safety of the United States to depart. The Alien Enemies Act held that when war is declared or invasion threatened, all natives, citizens, denizens, or subjects of the hostile nation, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.[16] The Sedition Act held that any persons combining or conspiring with intent to oppose any measure or measures of the government of the United States shall be liable to fines up to $5,000 and imprisonment up to five years. Any person writing, uttering, or publishing any false, scandalous and malicious writing or writings against the government, the Congress, or the president shall be liable to fine up to $2,000 and imprisonment up to two years.

The Congress would not be so active again until the end of the Civil War. Facing a hostile President and an intransigent South, Radical Republicans in the Congress passed legislation and amended the Constitution. While the Thirteen and Fourteenth Amendments hold high status in current jurisprudence, the method of getting them passed opened them to question for years after their passage. Because the Radicals could not obtain enough Union-supporting states to ratify the amendments, they conditioned re-entry into the Union upon ratification of the proposed Thirteenth and Fourteenth Amendments. President Johnson specifically objected to the treatment of Tennessee in this matter. However, when the 1866 election results came in, it was clear the nation did not stand with him.

Newly emboldened, the 40th Congress opened under the leadership of Senator Benjamin Wade and House Speaker Schuyler Colfax. The Second Reconstruction Act was soon passed. It gave specific orders to the Army on how to implement reconstruction. Yet another piece of legislation known as the Supplementary Act, giving even more power to the military, was passed on July 19th, 1867, despite even Sumner's feeling that military force should not be used to achieve reconstruction aims. However, it was the feeling of the vast majority of Congress that the Attorney General had watered down the previous Reconstruction Acts and that even more specific language was required. The Supplementary Act was passed and Johnson's veto was overridden. The new reinstatement process required: 1) registration of voters, including all adult Black males, 2) the swearing of a loyalty oath by each voter, 3) the election of a convention to prepare a new state constitution providing for Black suffrage, 4) the ratification of the new state constitution, 5) the election of all public office holders, 6) the ratification of the Fourteenth Amendment, and 7) once the Fourteenth Amendment was adopted by the mandated number of states, a state having fulfilled the other requirements would be readmitted to the Union.

Complicity of the Courts

The lower courts and the Supreme Court are in no position to initiate legislation, but they can rule on the constitutionality of legislation or of the actions of the Executive Branch. Since the Alien and Sedition Acts were set to expire the day before the Inauguration of 1801, they were never tested by the Supreme Court. However, they were widely upheld by Federalist judges in the lower courts.[17] When Jefferson became president on March 4, 1801, he pardoned all of thse incarcerated under the Sedition Act and returned fines to many of them.

During the Civil War, Chief Justice Roger Taney, who had written the infamous *Dred Scott* decision, challenged Lincoln's suspension of *habeas corpus*. On May 25, 1861, John Merryman, a secessionist from Maryland, was taken into military custody. He immediately appealed to the Supreme Court to be released under a writ of habeas corpus. In arguing for the President's power to suspend the writ, Attorney General Bates contended that the Chief Executive cannot rightly be subjected to the judiciary. The President, he maintained, is their preserver and protector as the defender of the Constitution (Randall 124). The President cannot be required to appear before a judge to answer for his official acts because the court would be usurping the authority of Executive Branch.[18] Bates contended that for any breach of trust, the President is answerable before the high court of impeachment and no other tribunal.

In ruling on *Ex parte Merryman*, Taney responded that the President had no lawful power to issue such an order. Taney claimed that only Congress could suspend the privilege of the writ and that the President, though sworn to "take care that the laws be faithfully executed," had broken the laws himself. Taney pointed out that the provision regarding *habeas corpus* appears in that portion of the Constitution that pertains to legislative powers; therefore, its suspension was a legislative, not executive prerogative. Taney argued further that the military authorities should reveal the day and cause of the capture of Merryman and explain the reasons for the detention of Merryman. Such requirements applied to civil courts but not to military tribunals. And so the military refused to comply.

As with the *Dred Scott* case, Taney stuck to the letter of the law and read the Constitution strictly. Lincoln sought

refuge in a higher law: the law of survival. Furthermore, according to Lincoln, the Constitution was "silent as to ... who, is to exercise the power" of suspension.[19] He would not release Merryman, even in the face of Taney's writ.

Horace Binney, a Philadelphia lawyer, came to the defense of the President through his widely circulated pamphlet, *The Privilege of the Writ of Habeas Corpus under the Constitution*. In the pamphlet Binney attacked Judge Taney's arguments. The controversy excited lawyers and politicians, resulting in a paper war consisting of more than 40 published answers to Binney's pamphlet. In the midst of this debate, Lincoln consistently argued that his paramount duty as chief executive was to preserve the integrity of the Government (Randall 123). In Lincoln's view, there had been no violation of the Constitution, since the Constitution permits suspension of *habeas corpus* in specific cases and does not specify which branch of the government is to exercise the suspending power. As the provision was plainly made for an emergency, he argued, the natural inference is that the President should use his discretion. Lincoln believed that the danger should not be permitted to run its course until Congress could be called together (Randall 123). The issue was never resolved.

Not so in the case of Lambdin P. Milligan, who was arrested on October 5, 1864, by order of General Hovey, in command at Indianapolis; he brought Milligan before a military commission on charges of 1) conspiring against the government of the United States; 2) affording aid and comfort to the Rebellion against the authorities of the United States; 3) inciting an insurrection; 4) disloyal practices; 5) violation of the laws of war. Milligan, along with others, was a suspected member of Clement Vallandigham's secret anti-war society, the Sons of Liberty.[20] The military commission sentenced Milligan to be hanged on May 19, 1865. Milligan petitioned the United States Circuit Court for a writ of *habeas corpus*. The controversy over Congressional versus Presidential power was re-ignited. Attorney General Stanbery and Benjamin F. Butler argued that:

> *The Commander-in-Chief has full power to make an effectual use of his forces. He must ... have the power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with the enemy; one who is an officer in an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines ... During the war his powers must be without limit, because if defending, the means of offense may be nearly illimitable (*Ex parte Milligan*).*

Milligan insisted, however, that the Military Commission had no jurisdiction to try him upon the charges proferred, or upon any charge whatever, because he was a citizen of the United States and the state of Indiana. Moreover, he contended that the right of trial by jury was guaranteed to him by the Constitution of the United States (*Ex parte Milligan*).

Justice David Davis, who had been a law partner of Lincoln's, announced the court's opinion in the Milligan case in April, 1866, a year after the war had ended:

> *During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgement ... [T]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances ... [O]ne of the plainest constitutional provisions was infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges ... [A]nother guarantee of freedom was broken when Milligan was denied a trial by jury ... Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real ... It is difficult to see how the safety of the country required martial law in Indiana ... Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.*

Chief Justice Chase concurred:

> *The power to make the necessary laws is in Congress; the power to execute in the President ... But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people ... nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature ... What we do maintain is that when the nation is involved in war ... it is within the power of Congress to determine to what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.*

Thus, the Court declared that the guarantees of such freedoms as safeguard against arbitrary arrest, fair trial and Fifth Amendment privilege are not to be set aside during war. Milligan's conviction by a military commission was overturned. Note, however, that the Supreme Court handed this ruling down after the Civil War had ended.

The Court tends to be more complicit with the president during wars. For example, during the Red scare of World War I, the Supreme Court handed down its ruling in *Schenck v. United States* (1919), which involved the secretary of the Socialist Party of Philadelphia. The Party leadership was accused of violating the Espionage Act of 1917 which made it a crime to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military." Writing for the majority, Justice Holmes argued that Schenck presented "a clear and present danger" to the United States during the war. Holmes refused to accept the argument that Schenck's circular opposing the draft was "speech" or "press," instead Holmes said it was action.[21] In the same year, the Supreme Court affirmed Burleson's suppressive tactics against Abrams and his four cohorts, who distributed literature critical of the U.S. intervention against the Bolsheviks. In *Abrams v. United States*, the conviction of those who circulated a leaflet condemning U.S. policy in Russia and calling for a general strike was upheld 7 to 2. Crucially, however, Holmes dissented, realizing that

these publications were in fact expression, not action. He argued that the "silly leaflets" could not really present a danger in a free "market" of ideas. Holmes, with Louis D. Brandeis, concurring, wrote:

> *[T]hese pronunciamentos in no way attack the form of government of the United States.... I do not see how anyone can find the intent required by the statute in any of the defendants' words.... In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution.... [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.... [T]he United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed (*Abrams v. U.S.*, 620).*

Using the majority opinion, however, the New York State Legislature, in January of 1920, did not allow five legally elected Socialists to take their seats in the assembly for fear they would spread Communist propaganda.

World War II presented the Supreme Court with a national emergency. As had other courts, the Supreme Court of 1941-45 was more willing than usual to permit restrictions on freedom of expression. They upheld the FCC's Mayflower ruling, which prohibited radio and television stations from editorializing. They upheld the incarceration of Americans of Japanese dissent. They upheld forcing school children to take an oath of allegiance (West Virginia State Board of Education v. Barnette). Not long after the close of World War II, the United States protested the Soviet Union's take over of various eastern European countries. The cold war was soon underway especially when the threat of internal subversion surfaced.

When the House Un-American Activities Committee began to investigate Communist influence in Hollywood, ten writers were summoned before the committee. When they refused to name associates who might be Communists, and refused to answer questions regarding their membership in the Communist Party, they were held in contempt of Congress. Among the parties involved, it was agreed to submit a test case to the Supreme Court based on the First Amendment arguments—right to associate, free speech—of Dalton Trumbo, one of the writers. To the shock of Trumbo and the ACLU, the Supreme Court upheld the contempt citation.

In July, 1948, the Federal Bureau of Investigation arrested six members of the Communist Party in their New York City offices. Eventually eleven members of the leadership of the Party were brought to trial for teaching and advocating "the overthrow and destruction of the Government of the United States by force and violence," a violation of the Smith Act of 1939 (18 U.S. Code, Section 2385, 1988). The eleven, including Eugene Dennis, Secretary of the Communist Party, were convicted despite protests from presidential candidate and former Vice President Henry Wallace and the American Civil Liberties Union. Dennis and his board were fined $10,000 each and sentenced to five years in jail. In 1951 the Supreme Court upheld the Dennis decision with Justices Hugo Black and William O. Douglas strongly dissenting (*Dennis v. United States*).

Chief Justice Vinson argued that the leader of a group who instructed about violent action is as guilty as the group who commits the action. Vinson relied on Judge Learned Hand's theory that the speech is transformed into action at the moment of incitement or instigation.[22] Had we not been at war with Communist China in Korea at the time of this decision, it might have been different. Or had the country not been in the grip of a paralyzing fear of Communism because it had spread over half of Europe and a large portion of Asia, the Supreme Court might have returned to its previous position of protecting membership in the Communist Party in America saying it was a movement no different from many others (*Schneiderman v. United States*). In his dissent in *Dennis v. U.S.*, Justice Douglas wrote:

> *Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country clearly is.... The First Amendment .... does not mean that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech.... The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy.... Unless and until extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be evoked only when the provocateurs among us move from speech to action (588-590).*

Douglas and Black sought to draw a definitive line between speech and conduct, and keep the Congress from crossing it.

Four years after the "police action" ended in Korea and three years after the fall of Senator McCarthy, the Supreme Court ruled in *Yates v. United States* (1957) that fourteen members of the Communist Party who had been arrested in California for calling for the violent overthrow of the government were not guilty of advocating specific illegal activity. They were instead engaged in advocacy of an ideology. Justice Harlan, who believed that there was a significant difference between speech (belief) and action, wrote the crucial decision in *Yates*. This ruling effectively gutted the Smith Act of 1939, though it remains on the books to this day.

The Vietnam war was the next crisis to put the Supreme Court on guard. Violating a federal law against destruction of draft cards, O'Brien burned his draft card on the steps of a Boston courthouse. He appealed his conviction on the grounds that his act was symbolic speech protected by the First Amendment. When the case reached the Supreme Court, it established a three-part test for determining whether expressive conduct could be punished. The federal government had the burden of proving that it was not suppressing the content of the expression, that it was advancing a compelling government interest, and that the law was no broader than essential to achieve the goal of advancing that interest. The Court found for the government by making a distinction between conduct, which could be regulated, and expression, which could not.[23] The conduct of burning the card violated a specific law that advanced a significant government interest: the Selective Service's ability to check the draft status of citizens.

However, the same Court did rule that students do not "shed" their First Amendment rights at the schoolhouse door

even though their protest is non-verbal and endangering. *Tinker v. Des Moines* involved three high school students who were suspended for wearing black armbands as a symbolic protest against the Vietnam war.[24] The Supreme Court held that the suspension violated the students' rights of free expression. The Court limited the scope of the decision, however, by stating that school officials could regulate student expression if it caused substantial disruption or material interference with school functions.

Thus, throughout American history, the Supreme Court has been far more likely to restrict First Amendment freedoms during times of crisis. With few exceptions, it has generally supported the Congress and the Executive Branch, sometimes reversing its restrictive rulings once the crisis has passed. Whether the current terrorist crisis is perceived to be enough of a threat to justify constitutionally suspect legislation will soon be clear. The Bush administration took the initiative in promoting a national security program and led a coalition of nations in a war on the Taliban government of Afghanistan. If the Supreme Court agrees that there is a threat tantamount to war, it is likely to uphold many of these restrictions.

The Current Crisis in Historical Context

As we watch the current crisis in America evolve, we have seen palpable evidence of an external threat to the country carried out by operatives of Al Qaeda. As of September, 2002, a year after the attack, Arab Americans are still being held in jail without charges being filed against them. Within weeks of the attack on Pearl Harbor, a congressional committee investigated the event not only in terms of the Japanese attack but in terms of the security breach on the part of the U.S. military. Within days of the assassination of John Kennedy, the Warren Commission was convened to investigate the crime. But no such public investigation was called together regarding the attacks of September 11th until evidence was discovered that the administration might have overlooked signals that an attack was coming.[25]

When formal congressional investigations were finally scheduled for September 24th and following in the fall of 2002, they were backed into impending congressional elections and had difficulty dealing with the evidence they were handed. The Congress then considered whether the whole issue should be turned over to an independent commission.[26]

In his indictment of these terrorists, President George W. Bush told the public that it was in a new kind of war in which terrorists were using American freedoms against Americans. Thus, the president took the initiative in forming a perception of the crisis, converting it into a "war" and then extending into an internal threat. In his address to a joint session of Congress on September 21st, the President described the new threat this way:

> *Tonight, we are a country awakening to danger.... [E]nemies of freedom committed an act of war against our country.... There are thousands of these terrorists in more than 60 countries.... Our enemy is a radical network of terrorists and every government that supports them.... These terrorists kill not merely to end lives but to disrupt and end a way of life.... They're the heirs of all the murderous ideologies of the 20th century.... Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security.... Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty....*

As this study indicates, the second step in inciting the public comes with the development of an internal threat. By November 10, 2001, nearly 1,200 persons were arrested on suspicion of helping the conspirators, of committing related crimes, or of being material witnesses to terrorist activities.[27] Soon stories of abuse of detainees began to emerge. A Pakistani student was beaten by cell mates in Mississippi (Serrano). The Israeli consulate complained that six of its citizens had been handcuffed and forced to take polygraph tests (Serrano). U.S. immigration officials prevented detainees in Wisconsin, Illinois, and Indiana from visiting with lawyers (Serrano, A4). The INS reported that 26 jails across the country had misapplied INS procedures; the Service began speeding up processing on October 26th (Serrano, A4).[28] At the end of the summer of 2002, the U.S. Court Appeals for the 6th Circuit ruled unanimously that closed hearings violated the First Amendment rights of the press and of detainees on U.S. soil. In order to hold a closed trial, the INS must demonstrate and judges must certify that information in the case would harm national security if an open trial was held. This decision was reinforced on September 17th, 2002 by U.S. District Judge Nancy Edmunds, who wrote "An open detention and removal hearing will assure the public that the government itself is honoring the very democratic principles that the terrorists who committed the atrocities of 9/11 sought to destroy" ("Detention hearing ...," A18). Several crucial cases finally reached the Supreme Court in 2004. In *Rasul v. Bush* and *Al Odah v. United States* the Supreme Court ruled that foreign nationals held at the U.S. Naval base in Guantanamo, Cuba may challenge their detentions in federal courts. The 6-3 majority held that the base was essential U.S. territory and therefore the Constitution applied. The Court rejected the administration's claim that the president alone could determine the legal status of these prisoners. The *Hamdi v. Rumsfeld* case was divided into two parts: In the first part decided 5 to 4, the Court held that the president had the right designate U.S. citizens as enemy combatants if they were apprehended on the battle field in Afghanistan. Such combatants could be held indefinitely. In the second part, decided by an 8 to 1 margin, the Court ruled that U.S. citizens held as enemy combatants had the right to know what they were being held for and had the right to challenge these charges before a federal judge.

Another measure of threats to civil liberties, as we have seen, is the nature of the legislation passed during the crisis. Congress quickly passed the legislation proposed by the administration to deal with the current crisis in the United States. It allows a single federal district court to authorize the "trapping" of phone numbers anywhere in the United States.[29] These "roving taps" allow interception of electronic evidence such as e-mail and a history of numbers called from or to tapped phones and e-mail. The legislation gives wider latitude to the special court that authorizes wiretaps on suspected agents of foreign powers.[30] The legislation allows information concerning foreign agents in the United States to be shared among government agencies.[31] The legislation allows the Immigration and Naturalization Service to detain aliens up to seven days.[32] It permits the Attorney General to detain "terrorist aliens" and expands the definition of terrorist activity. The district court of the District of Columbia has been given exclusive jurisdiction over such cases. The legislation ends the statute of limitation on the newly defined terrorist activities and increases the maximum sentence to life imprisonment.[33] Finally, the new law bans possession of biological agents that pose a threat to national security unless the possession would serve peaceful purposes.

The vote in the House on this proposal was 337-79; the Senate voted in favor 96 to one.[34] Amendments by Senator Russell Finegold (D-Wis.) to protect the rights of "innocent" people were defeated; he cast the lone dissenting vote to the legislation in the Senate. During the debate, Senator Orrin Hatch (R-Utah) argued that the government cannot guarantee total protection of the public "when you have people willing to commit suicide to do us harm.... [Those who argue for weakening this law should consider] "the loss of civil liberties of those who died" on September 11th (Jackson, A13).

After the President signed the legislation, Immigration and Naturalization Service Commissioner James Ziglar and Attorney General John Ashcroft held a joint press conference outlining the new rules that had been put in place. The federal government's ability to deny visas to and deport immigrants who "endorse" terrorism was stressed (Lichtblau). The Attorney General designated 46 "terrorist organizations" around the world. Any linkage to any of these organization can now be used as a justification to deny a visa or to deport an immigrant or visitor. The legislation's broadened definition of what constitutes a terrorist drew complaints from civil libertarians. Ashcroft attempted to allay these fears by stating that the linkage must establish evidence of "material" support to terrorists. The Attorney General also established a task force to track foreign terrorists.

The new rules give the Federal Bureau of Investigation broad latitude to conduct surveillance and information gathering. While these methods are not prohibited by the Constitution, any evidence obtained in violation of the Constitution may not be used in court. For example, the Fifth Amendment provides a right to avoid self-incrimination. However, there is no prohibition *per se* of the F.B.I. obtaining a confession, for example, to apprehend other terrorists; only the fruits of that confession would be unusable in court. The evidence could be used in a non-criminal case, such as a deportation hearing. Also it should be noted that if a witness were granted "use immunity," nothing confessed could be used against that witness; however, the witness could be compelled to answer questions pertaining to a crime and those linked to it. The due process clause of the Constitution only precludes coercion that shocks the conscience of the court. Thus, if the injection of truth serum could lead to the prevention of a terrorist act, it likely would be upheld, just as extracting blood from a drunk driver has been upheld. Torture, on the other hand, has tended to be of such a shocking nature, that it is prohibited.

Perhaps the most controversial interpretation of the new legislation came on November 9, 2001, when Attorney General Ashcroft announced that federal prison officials would be allowed to eavesdrop on conversations between inmates and their lawyers. According to Ashcroft, as long as officials had a "reasonable suspicion" that useful information was being passed on to an attorney, they could listen in (Savage). The American Civil Liberties Union's Washington, D.C. director claimed that the rule violated the right to "an effective and vigorous defense" (Savage). Senator Patrick Leahy (D-Vt.) sent a letter to the Attorney General demanding a rationale for the rule that appears to violate the Sixth Amendment right to "assistance of counsel" for one's defense.

he next reduction of civil liberties came on November 13, 2001, when President Bush agreed to allow military tribunals to try alleged terrorists. The order from the president said that those that he designates as terrorists will be "placed under the control of the secretary of Defense", who shall have "exclusive jurisdiction" in these matters (Meyer). These agents of terror may not appeal to "any court of the United States," nor "any court of any foreign nation or any international tribunal." Aside from the infringement on foreign sovereignty implied by this order, it is the starkest restriction of rights during war time since the Civil War. (See above). The Bush Administration claimed it had a precedent for taking such action with the *Quirin* case, wherein Nazi saboteurs were apprehended in the Mayflower Hotel in Washington, D.C. in June of 1942 when two of their members defected. Ten prosecutors tried the saboteurs in the Justice Department building before a military tribunal. Six of the saboteurs were executed on August 8, 1942, and the defectors were sent to prison.[35] If and when terrorists are apprehended, it will be interesting to determine if their circumstances are analogous to those of the Nazi saboteurs, who had been delivered by a German U-Boat to U.S. shores during a declared war. The *Milligan* case, examined above, would certainly protect American citizens from military tribunals, but foreign nationals might present a different set of circumstances. Under current law, the president must demonstrate that military tribunals are essential because the current system does not allow for the timely prosecution of terrorists. However, the Administration could claim that an open hearing might compromise national security. Secondly, the U.S. Constitution applies to "persons" not just citizens who inhabit the country. Almost anyone in the country, as illegal aliens have learned, can file a writ of *habeas corpus* unless they inhabit an area that has been declared under marshal law or unless they are "military combatants." Others, relying on Taney's ruling in the *Merryman* case, claim that Congress must legislate the procedure before the president can implement a suspension. In light of these and other arguments, President Bush eventually restricted his tribunals policy to areas of actual conflict overseas.

In the meantime, Attorney General Ashcroft proceeded to employ the Foreign Intelligence Surveillance Act to his advantage. The Act had originally been passed in 1978 to prevent the government from conducting surveillance of political enemies and establish a wall between surveillance of foreign and domestic criminals. The Act establishes a seven judge secret panel to rule on requests regarding national security matters. Any evidence gathered can be used in court but in cannot be passed on to local or state authorities because the secret court, which operates much like a grand jury, can approve search warrants on a lower threshold of suspicion that the "probable cause" standard imposed on the states and other federal agencies. Thus, if during a surveillance the FBI were discovered that someone was in possession of obscene material by the standards imposed by their state, that evidence could not be used in any state prosecution against the individual. The fruits of the surveillance could only be used to prove a national security threat. Furthermore, under the Patriot Act investigators may be granted a warrant even if there is no evidence of wrongdoing. In invoking this provision, Ashcroft overstepped his bounds according to the secret court. It rebuked Ashcroft in May of 2002 for letting his criminal investigations pursue too many secret searches. Ashcroft appealed this ruling in September of 2002 to a superior three-judge panel that reviews the use of this legislation. The panel, appointed by Chief Justice Rehnquist, was composed of three Reagan-appointed judges from different Federal Circuit Courts of Appeals. The panel had never been convened before. On November 18, 2002, the three judges, Ralph B. Guy of the 6th Circuit, Edward Leavy of the the 9th Circuit, and Laurence Silberman of the D.C. Circuit, upheld Ashcroft's appeal and overruled the Foreign Intelligence Surveillance Court. Ashcroft immediately claimed that the decision would revolutionize his ability to investigate and prosecute terrorists. Despite the fears of some civil libertarians, the three judge panel lowered the wall between intelligence agencies and the FBI, thereby strengthening the authority of the Patriot Act.

The Attorney General suffered another blow on August 22, 2002 when it was revealed that federal judges had grave misgivings about the way the Justice Department had handled some of its cases: "The FBI gave false information in more than 75 requests for top-secret warrants brought before the" secret surveillance panel (Lichtblau and Meyer). It was the first time in the 23 year history of the court that it released information about its proceedings.

The State Department kept the crisis alive by announcing in September of 2002 that over 70,000 names of terrorist operatives had been compiled by various international agencies. The claimed that Al Qaeda agents remained a threat in the United States (Meyer, 22 September, 2002).

In the historic crises examined in the first half of this chapter, we saw that citizens often took action on their own to deal with the crisis. The citizens of Boston, among other communities, tried to rid their libraries of certain books during the McCarthy era. French Jacobins were regularly beaten and run out of town during the Alien and Sedition crisis. But most common to a crisis is the citizen as informer. During the current crisis, the administration attempted to enhance a citizen's ability to inform on others with its Terrorism Information and Prevention Systems, known as TIPS. TIPS was part of the proposed Homeland Security Bill and would have recruited a million volunteers in ten test cities to check on deliveries, e-mail, Internet use, telephone conversation, etc. The volunteers would report what they found to a central data base in the Justice Department. The Attorney General would then make the information available to appropriate state and local agencies. When House Majority Leader Dick Armey (R-Texas) opposed the provision, it was dropped, then revived after the 2002 mid-term elections as the Total Information Awareness program to be conducted in the Pentagon under the guide of Admiral Poindexter. The system would have access to all computerized information including what you buy, what you watch, and who you talk to.

Finally, it might be useful to assess press restrictions during this crisis in terms of covering the "war" on terrorism. During World War II and the Korean conflict, reporters were allowed to accompany army combat units but had to submit their copy military censorship. During the Vietnam War, much less censorship was employed. However, with the invasion of Grenada during the Reagan Administration and the War in the Gulf during the Bush Administration, new restrictions were imposed that prevented reporters from traveling with American forces and forced the use of pool reporters where information was shared from a single source. The same policy was followed in the war in Afghanistan. American reporters were forced to rely on the Secretary of Defense or his spokespersons plus any foreign sources the reporters could contact. The administration justified this policy on a number of grounds. First, the use of Internet and satellite communications by reporters might jeopardize U.S. ground troops. Second, the precedent established in the Gulf War worked well and will be followed into the future.

It should also be noted that some members of the Bush Administration may have created an environment that has a chilling effect on criticism of the "war" on terrorism. Press Secretary Ari Fleisher was openly critical of commentator Bill Maher's remark that the army's use of missiles in war time was cowardly. Fleisher later had his remarks deleted from the official transcript. National Security Advisor Condoleeza Rice held a conference call with network news presidents and asked them not to re-broadcast Al Jazeera broadcasts of tapes made by terrorists. While crop dusters were allowed to return to the air, news aircraft were not, which is why when an American Airlines plane crashed in Queens, the news media was only able to show ground shots of the event. The Justice Department abruptly announced in mid-November, 2001 that it would no longer regularly update the number of people being held in association with the September 11th attacks. The Defense Department contracted with satellite operators to prevent them from making pictures available to the media.

In short once it had the legislation it requested in hand, the Bush Administration, and particularly the Department of Justice, began to issue orders, regulations, and the like that restricted civil liberties to a greater extent than anticipated. After the initial shock, however, the press began to protect its rights. The media was particularly effective, as we have seen, in bringing suits that forced the Justice Department to release the names of detainees, and forced judges to hold open hearings unless it could be approved that such hearings were a danger to national security. Members of the judiciary, particularly the 6th Circuit Court of Appeals and the review panel for FISA, were conscientious in holding the Justice Department constitutional standards. While these actions and proposals are debated, responsible voices on each side of the civil liberties divide need to keep America's history in mind. Hopefully, it will temper the debate and assure that, in the name of national security, laws are passed that do as little damage to civil liberties as possible.

As in most crises, the terrorist induced crisis in the United States was a real external threat that was shaped in the public's mind by the president's rhetoric. It was also extended into a internal threat to justify legislation pushed the constitutional envelope. As of this writing, the legislation does not appear as dangerous as past threats to the Constitution, such as the Alien and Sedition Acts. Nor does President Bush appear to be exercising the kind of media intimidation used by Lincoln, Wilson, Roosevelt, Lyndon Johnson, or Nixon. However, the interpretation put on the legislation by the Attorney General is more troubling and may have to be sorted out by the Supreme Court. If history is any indication, that sorting will be highly dependent on the state of the crisis at the time the Court considers the Attorney General's actions.

Notes

[1]. This examination extends my previous work on this subject (Smith, 1996).

[2]. All sorts of rumors were spread about the Jacobins including that they had evolved from secret societies such as the Knights Templar.

[3]. Many historians have examined this administration from different perspectives. Some of the more recent that highlight its suppressive nature include Ferrell (208ff), Gibbs, Heckscher, Murphy (particularly 26-32), and Rabin.

[4]. By 1807 Dayton would become so frustrated at the ascendence of the Democratic-Republicans that he would join Burr in an attempt to overthrow the government.

[5]. Hugh McCulloch (393) is one of the few historians who disputes the fact that Johnson was unable to hold his liquor. He argues that Johnson was simply a vituperative personality incapable of civil speech.

[6]. Lyndon B. Johnson, quoted in interview with Elspeth Rostow, 28 September 1970, in Turner (253).

[7]. The "Naturalization Act" extended from 5 to 14 the number of years of residence required before full U.S. citizenship could be granted. The "Act Concerning Alien Enemies" authorized President Adams to order the expulsion of "dangerous" aliens during peace time. The "Act Respecting Alien Enemies" authorized the president to apprehend, restrain, secure, and remove enemy aliens during time of war or undeclared hostilities. The "Sedition Act" prohibited conspiracy against the U.S. Government and also prohibited writing, printing, uttering, or publishing false, scandalous, and malicious writings against the U.S. Government.

[8]. Perhaps the most severe measure was the one introduced in the Joint Committee by the ailing Thaddeus Stevens on February 6, 1867. It called for dividing the ten states still outside the Union into five military districts and proposed that habeas corpus be suspended in the districts so that military tribunals could take control. Proponents of the bill claimed that whites loyal to the Union were being driven from the homes and killed, that new Black citizens needed to be protected, that the South had arrogantly rejected the Fourteenth Amendment, and that they had established illegal governments. Opponents of the bill said it was unconstitutional, unduly harsh, and imperialistic. In the Capitol, the *National Intelligencer*, a newspaper that supported the President, said it was "treason enveloped in the forms of law." With their new found, lop sided majority, Republicans were able to pass the bill 109 to 55 in the House. On February 14th, the Senate took up the bill and rehearsed the arguments of the House, making only slight changes in the bill. The law took effect soon after.

[9]. Under the law, current and former Communists, as well as homosexuals, anarchists, and those whom the State Department deems "prejudicial to the public interest", may be excluded. The McCarran-Walter Act, a comprehensive codification of the immigration and naturalization system, was amended by Congress in 1987 to say that aliens may no longer be denied entry into the United States on the basis of "past, current, or expected beliefs, statements, or associations."

[10]. In June of 1953 speaking at commencement at Dartmouth, Eisenhower did attack some of the excesses. He told his audience not to join the book burners, a response to McCarthy's call for the burning of certain books recommended by the Voice of America. After McCarthy attacked Eisenhower's beloved Army, the President went on national television to attack McCarthy.

[11]. Just after the fall of Fort Sumpter, Lincoln wrote to General Winfield Scott, "You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction, you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where the resistance occurs, are authorized to suspend that writ" (Fehrenbacher 237).

[12]. Eugene Debs, the Socialist, would be incarcerated under these acts, and Justice Oliver Wendell Holmes would speak for the majority of the Supreme Court in condemning Debs anti-war rhetoric. After the war, Wilson refused to pardon him; it took a Republican President, Warren G. Harding, to release Debs.

[13]. Donald Johnson (54-55) points out that Wilson did defend some papers that Burleson had attacked in 1918.

[14]. The Creel Committee's attempt to shut down a movie that contained a brutal scene involving the bayoneting of a baby by a British soldier resulted in *United States v. Motion Picture Film "The Spirit of '76"*, 1917. As Fishman reports, the government argued that the producer of the film had violated Sections 1 and 3 of the Espionage Act by attempting to "cause insubordination in the army. [H]e was sentenced to ten years in jail and fined five thousand dollars.... [T]wo years later [it was] upheld by the Ninth Circuit Court" in *Goldstein v. United States*, 1919. Imagine the chilling effect these decision must have had on the motion picture industry in its infancy.

[15]. The erosion of rights during this period is laid out by Murphy.

[16]. This act is in force with only one substantive change: states no longer have the jurisdiction to deal with enemy aliens.

[17]. These acts were directed primarily against anti-Federalist editors of French and English heritage, such as Thomas Cooper, Joseph Priestly, James Callender, Benjamin Bache, Count de Volney, and others. For further information on the Alien and Sedition Acts, see Anderson 113-126, Bowers chapters 16 & 17, and Commager 175-78.

[18]. President Nixon used the same argument during the Watergate crisis.

[19]. This position was used by Democrats to justify the charge that Lincoln was a tyrant. This charge seems unjust given Lincoln's reluctance to suspend the writ.

[20]. Vallandingham had been an Ohio Congressman who ran governor of his state. His inflammatory remarks in support of the South resulted in his arrest. The President eventually exiled him to the South. After the war, he became the famous "Man without a Country."

[21]. In *Frohwerk v. United States* Holmes condemned the anti-war rhetoric of a German newspaper publisher.

[22]. Hand wrote the Second Court of Appeals decision in *Dennis* in 1950 (*United States v. Dennis*, 208).

[23]. The Court revisited this issue in *Texas v. Johnson* in 1989. During the 1984 Republican Convention in Dallas, Gregory Johnson burned a U.S. Flag to protest the policies of the Reagan administration. His act violated a Texas law against burning the U.S. flag. In a five to four decision, the majority of the Court

overturned the Texas law as it would later overturn a U.S. law on the same subject. Writing the majority, Justice Brennan claimed that Johnson's case differed with that of O'Brien because Johnson's action was expressive and no compelling government interest would be advanced by suppressing it. "The state need not worry that our holding will disable it from preserving the peace." Furthermore, unlike the law under which O'Brien was prosecuted, the Texas law was not content neutral.

[24]. Justice Black, an absolutist on First Amendment issues, was also a literalist. He voted against *Tinker* on the grounds that the First Amendment was not meant cover symbolic speech. A year before the *Tinker* decision, Justice Warren had articulated a compromise position in U. S. v. O'Brien: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaged in conduct intends thereby to express an idea.... This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on the first amendment." (369).

[25]. These charges were not unlike those that plagued the Roosevelt administration during and after the Pujo Hearings into the attack on Pearl Harbor. After September 11, 2001, some congressional hearings on other matters, employees of the Justice Department and the F.B.I. have been questioned with regard to homeland security. However, their answers have been evasive. Floyd Abrams, a leading First Amendment attorney who, for example, defended the *New York Times* in the "Pentagon Papers" Case, claimed recently that the "American intelligence community" foiled an attempt to hijack 14 planes from Los Angeles Airport and crash them into the Pacific Ocean, but that they claimed to have been unprepared for what happened in New York and Washington, D.C. on September 11, 2001. President Clinton appearing on "The David Letterman Show" (September 11, 2002) confirmed that many attacks had been foiled by the United States, including the planned attack on Los Angeles Airport.

[26]. The issue was still pending in September of 2002.

[27]. By May 10th of 2002, 752 of the 1200 were still being held in the custody of the INS. By the end of June all but 81 of them had been deported. There were 129 accused of criminal wrong doing, of which 72 pleaded guilty, and eight more were convicted in trials. Six cases were dismissed. The remainder were pending. By August 10, 2002, at least two American citizens apprehended during the military action in Afghanistan were still being held in United States. See Richard A. Serrano, "A Swift, Secretive Dragnet after Attacks," *Los Angeles Times* (September 10, 2002): A16.

[28]. This report goes on to point out that "judges are denying bond, closing hearings, and sealing documents" (Serrano, A4).

[29]. A "pen register" allows determining who was called by cell or other phones, and deciphers the number of the person called by a suspect in a criminal investigation. Before the Congress acted, if the government sought to "trap" numbers, it needed to obtain court permission in the state of origin.

[30]. The former rules required the government to show that there was probable cause that the suspect was gathering foreign intelligence.

[31]. The supposed firewall between the CIA and FBI is regularly breached *de facto*. The new acts authorized the *practice de jure*.

[32]. The limit before the legislation was two days.

[33]. The Internal Security Act of 1950 allowed the Attorney General to detain aliens who were members of the Communist Party. They were not allowed bail.

[34]. A conference committee quickly worked out the minor difference between the two houses. The bill was stalled over a sunset provision inserted by the House; its negotiators agreed to a four year life span for the key provisions of the bill. The legislation on money laundering was also ironed out. Only 66 House members and one Senator voted against the bill. The President signed it on October 26th, 2001.

[35]. Attorney General Francis Biddle claimed that the Nazis could not use the precedent set in the *Milligan* case (see above) since he was an American citizen.

Works Cited

- *Abrams v. U.S.*, 250 U.S. 616.
- Abrams, Floyd. "Remarks for the Cornerstone Project." Washington, D.C.: The Media Institute. November 16, 2001.
- Agnew, Spiro T. *Frankly Speaking: A Collection of Extraordinary Speeches*. Washington, D.C.: Public Affairs, 1970.
- Anderson, Frank M. "The Enforcement of the Alien and Sedition Laws," *American Historical Association Reports: Annual Report for the Year 1912* (Washington, D.C.: American Historical Association, 1914):113-126.
- Binney, Horace. *The Privilege of the Writ of Habeas Corpus Under the Constitution*. Philadelphia: C. Sherman and Son, 1862.
- Bowers, Claude Gernade. *Jefferson and Hamilton*. St. Clair Shores, MI: Scholarly Press, 1925.
- Commager, Henry S. *Documents of American History*. Englewood Cliffs, NJ: Prentice-Hall, 1973.
- Creel, George. *How We Advertised America: The First Telling of the Amazing Story of the Committee on Public Information that Carried the Gospel of Americanism to Every Corner of the Globe*. New York: Harper and Brothers, 1920/New York: Arno Press, 1972.

- *Dennis v. United States*, 341 U.S. 494, 1951.
- "Detention Hearing Linked to Release," *Los Angeles Times* (18, September, 2002): A18.
- *Ex parte Merryman*, 17 Fed. Cas. 144 (1861).
- *Ex parte Milligan*, 4 Wall. 2 (1866).
- Fehrenbacher, Don E., ed., *Abraham Lincoln: Speeches and Writings, 1859-1865*. New York: Library of America, 1989.
- Ferrell, Robert H., *Woodrow Wilson and World War I, 1917-1921*. New York: Harper & Row, 1985.
- Fishman, Donald and Joyce Lindmark. "George Creel and the Strategy of Benign Censorship during World War I," paper presented at the annual meeting of the Western States Communication Association, 1994.
- *Frohwerk v. U.S.*, 249 U.S. 204 (1919).
- Gibbs, Christopher C. *The Great Silent Majority: Missouri's Resistance to World War I*. Columbia: University of Missouri Press, 1988.
- *Goldstein v. United States*, 258 Fed. 908, 9th Cir., 1919.
- Heckscher, August. *Woodrow Wilson*. New York: Charles Scribner's Sons, 1991.
- Hollihan, Thomas A. "Propagandizing in the Interest of War: A Rhetorical Study of the Committee on Public Information," *Southern Speech Communication Journal* 49 (Spring, 1984): 239-251.
- Jackson, Robert L. "Senate Oks Anti-Terrorism Program," *Los Angeles Times* (12 October, 2001): A13.
- *Johnson, Donald. "Wilson, Burleson, and Censorship in the First World War," Journal of Southern History 28 (1962): 46-58.*
- Johnson, Lyndon B. "The President's Thanksgiving Day message to members of the Armed Forces, 24 November 1965," *Public Papers of the Presidents* (Washington, D.C.: GPO, 1971) 1125-26.
- Johnson, Lyndon B. "Remarks at Doughboy Stadium, Fort Benning, Georgia, 10 November 1967," *Public Papers of the Presidents* (Washington, D.C.: GPO, 1971)1010-15.
- Larson, Cedric and James R. Mock. "The Lost Files of the Creel Committee of 1917-19," *Public Opinion Quarterly* 3 (1939): 5-29.
- Levy, Leonard Levy and Merrill D. Peterson, eds. *Major Crises in American History*. vol. 1 (New York: Harcourt, Brace & World, 1962.
- Lichtblau, Eric. "Justice Officials Introduce Tighter Immigrant Policy," *Los Angeles Times* (1 November, 2001): A3.
- Luchtblau, Eric and Josh Meyer, "Terror Probe Feuds Revealed by Secret Court," *Los Angeles Times* (23 August, 2002): A1.
- McCulloch, Hugh. *Men and Measures of Half a Century*. New York: Charles Scribner's Sons, 1889.
- Medhurst, Martin J., et. al. *Cold War Rhetoric: Strategy, Metaphor, and Ideology* (New York: Greenwood, 1990.
- Meyer, Josh, "70,000 Terrorist Suspects Worldwide on U.S. List," *Los Angeles Times* (22 September, 2002): A1.
- Meyer, Josh, David Savage, and Eric Lichtblau, "Bush to Allow Terror Trials by Military," *Los Angeles Times* (14 November, 2001): A1.
- Murphy, Paul. *World War I and the Origins of Civil Liberties in the United States*. New York: W.W . Norton, 1979.
- Nixon, Richard, M. "Statement on Campus Disorders, 22 March 1969" *Public Papers of the Presidents* (Washington, D.C.: GPO, 1971): 235-37.
- Parmet, Herbert S. *Eisenhower and the American Crusades*. New York: Macmillan, 1972.
- Rabin, David M. "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50 (1984): 1217-1219.
- Randall, James G. *Constitutional Problems Under Lincoln*. Urbana, IL: U. of Illinois Press, 1951.
- Rashin, A.H. "What Communists Can and Can't Do," *New York Times*. 26 April, 1953: E12.
- Roosevelt, Franklin. *Memo to J. Edgar Hoover*. President's Secretary's File. Justice Department—J. Edgar Hoover folder, Roosevelt Library, Hyde Park, N.Y. 21 January, 1942.
- Savage, David and Robert L. Jackson. "Ashcroft Eavesdropping Rule Assailed," *Los Angeles Times* (10 November, 2001): A5.
- *Schenck v. U.S.*, 249 U.S. 47 (1919).
- Scheiber, Harry N. *The Wilson Administration and Civil Liberties, 1917-1921*. Ithaca: Cornell University Press, 1960.
- *Schneiderman v. U.S.*, 320 U.S. 118 (1943).

- Scranton Commission, *Report of the President's Commission on Campus Unrest* (New York: Arno, 1970).
- Serrano, Richard A. "Some Held in Terror Probe Report Rights Being Abused," *Los Angeles Times* (15 October, 2001): A1, 4
- Small, Melville. *Johnson, Nixon and the Doves*. New Brunswick, NJ: Rutgers U. Press, 1988.
- Smith, Craig. *Silencing the Opposition: Government Strategies of Suppression of Freedom of Expression*. Albany: State University of New York Press, 1996.
- Spear, John C. *Presidents and the Press: The Nixon Legacy*. Cambridge,MA: MIT Press, 1984.
- Suter, Jon and Jack A. Samosky. "Uneasy Reading: Censorship in Woodrow Wilson's Wartime Administration," paper presented at the annual convention of the Western States Communication Association, 1994.
- *Texas v. Johnson*, 491 U.S. 397, 1989.
- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
- Trefousse, Hans L. *Andrew Johnson: A Biography*. New York: W.W. Norton, 1989.
- Turner, Kathleen. *Lyndon B. Johnson's Dual War: Vietnam and the Press*. Chicago: U. of Chicago Press, 1985.
- *United States v. Dennis*, 183 F. 2d 201, 2d Cir. 1950.
- *United States v. Motion Picture Film "The Spirit of '76"*, 252 F. Supp. 946, S.D., California, 1917.
- *United States v. O'Brien*, 391 U.S. 367 (1968).
- Washburn, Patrick. "FDR Versus His Own Attorney General: The Struggle Over Sedition, 1941-42," *Jounalism Quarterly* 62 (1985): 717-24.
- *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, (1943).
- Wilson, Woodrow. *The Papers of Woodrow Wilson*, ed. Arthur S. Link. Princeton: Princeton University Press, 1979-91.
- *Yates v. U.S*, 354 U.S. 298, 1957.
- Young, Oran R. *The Intermediaries: Third Parties in International Crisis*. Princeton: Princeton University Press, 1967).

The Center For First Amendment Studies
AS 304
California State University, Long Beach
1250 Bellflower Blvd.
Long Beach, CA 90840-2007