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Foreword: A Culture of Civil Liberties

Geoffrey R. Stone

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I am delighted to have this opportunity to introduce this remarkable collection of essays. They deserve to be read and re-read by those who care about preserving our freedoms in even the most perilous of times. They reflect clear-headed, insightful and rigorous thinking by some of our nation's most distinguished historians and constitutional scholars. To place the essays in context, I will offer a brief thought or two about each of the contributions. This will also give me a chance to preemptively shoot back.

To begin, though, it may be useful for me to set forth the central thesis of *Perilous Times*. It is, simply, this: The United States has a long and unfortunate history of overreacting to the stresses of wartime and unduly restricting civil liberties in general and free speech in particular in the name of national security. *Perilous Times* examines six episodes to substantiate this claim – the Alien and Sedition Acts of 1798, the Civil War, World War I, World War II, the Cold War, and the Vietnam War. It then concludes with a brief coda on the War on Terrorism. Sometimes, this overreaction is due to public fear and hysteria, sometimes to the manipulation of a crisis atmosphere by self-serving public officials, and sometimes to a combination of the two. I conclude that the only way to avoid such excesses in the future is to learn from our experience and to self-consciously create institutional mechanisms and a public culture of civil liberties that will enable us to better withstand the inevitable pressures of wartime. Of course, there is much more to it than this, but this should suffice to sketch the target of the essays.

In *What is War?*, Ronald Collins and David Skover begin with Justice Holmes's statement in *Schenck v. United States*[1] that "[w]hen a nation is at war" it may restrict civil liberties in ways that would not be constitutional "in time of peace."[2] Accepting this premise, they then point out that for such a principle to have meaning we must know when we are at "war." Although the concept of war may have seemed clear to Holmes in 1919, it no longer has such clarity, as the War on Terrorism demonstrates. In an era when

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1. 249 U.S. 47 (1919).
2. *Id.* at 52.

"war" can be metaphorical, how are courts to know when to adjust constitutional liberties?

This is a great point, but I would argue that, Holmes to the contrary notwithstanding, the existence of a formal, declared war has never been the touchstone for constitutional analysis. Indeed, in four of the six historical periods I examine in *Perilous Times*, there was no declaration of war. As a practical matter, the critical issue, for better or for worse, is not whether we are formally at war, but whether a genuine threat to the national security necessitates a restriction of civil liberties. Surely, it would be better to have a clean rule, but neither history nor the realities of our system of government supports such a rule. Thus, we will simply have to make the best of it. As Collins and Skover suggest, however, whenever the government invokes military necessity or national security as a justification for restricting civil liberties, courts should be particularly skeptical in the absence of a declaration of war.

Earl Maltz's essay, *The Exigencies of War*, criticizes *Perilous Times* for engaging in "Monday-morning quarterbacking." Maltz concedes that "government officials have at times wildly exaggerated the import of internal threats to national security and, consequently, imposed restrictions far greater than necessary to meet the danger." But hindsight, he argues, cannot provide the standard by which we judge government officials. Rather, we must evaluate their decisions "by reference to the exigencies of the situation as they appeared" at the time.

I agree that we should not judge past actions entirely by hindsight. In light of the situations confronting the nation in 1861, 1918, and 1942, perhaps it was reasonable for Lincoln, Wilson, and Roosevelt to conclude that protection of the nation's security required the suspension of habeas corpus, the Sedition Act of 1918, and the internment of Japanese-Americans. I am willing to assume arguendo that this was so. But even if this was their honest belief at the time, we can reasonably assess with the benefit of hindsight whether they really *needed* to act as they did. If we find that even well-intentioned public officials systematically err in a way that unduly restricts civil liberties, then we should try to avoid similar errors in the future. My point is not that we should (necessarily) condemn the judgments of our predecessors, but that we should recognize destructive patterns of behavior and try to break those patterns going forward. In that sense, hindsight can be quite helpful.

In *Libertarian Panics*, my Chicago colleague Adrian Vermeule takes Maltz's position one step further. In an elegant analysis, he observes that the mechanisms of panic, which I argue play a significant role in generating

excessive restrictions of civil liberties in wartime, can also create what he calls "libertarian panics." That is, there may be times when an exaggerated fear of government repression may lead the public unnecessarily and even dangerously to restrict the government's authority to protect the national security. Indeed, Vermeule argues that the "apocalyptic" responses of civil libertarians to the Patriot Act, responses he describes as often "ignorant," "irrational," and "hysterical," are a clear example of such a libertarian panic.

I agree that some criticisms of the Patriot Act and the Bush administration's other restrictions of civil liberties have been overdrawn. Those who assert that this is the most repressive period in American history know nothing of American history. Indeed, one goal of *Perilous Times* is to place different time periods, including the present, into a fuller historical context. On the other hand, there may be a sound strategy underlying the sometimes exaggerated claims of civil libertarians. It is much better, and much safer, to fight battles over the scope of civil liberties at the periphery rather than at the core of our rights. By characterizing significant, but not draconian, restrictions of civil liberties as serious infringements, civil libertarians shape the terms of the debate and attempt to ensure that the critical disputes are about sneak-and-peek searches rather than about laws punishing seditious libel. I suspect that what Vermeule describes as a "libertarian panic" is a conscious strategy that bears little relation to the periods of public hysteria that often accompany war fever.

Len Niehoff's *What We Believe* develops the intriguing thesis that what is really at stake in these episodes is the "freedom of conscience." Tracing this freedom back to Madison's original version of the First Amendment, Niehoff laments that after more than two hundred years we still have not developed "a 'jurisprudence of conscience' that offers adequate protection to the activity most of us prize above all others." I would add to Niehoff's lament a problem we may increasingly face in the future: The government's manipulation of public debate both by concealing information from the public and by secretly participating in public debate. The danger of government "propaganda" is one for which we currently have no First Amendment theories or principles. Niehoff's approach may be a first step towards developing such an analysis.

In *Freedom in Especially Perilous Times*, Floyd Abrams warns that we now face a "threat to our individual security" that "is unparalleled in American history." In his judgment, those who view 9/11 as an isolated event "are terribly, dangerously wrong." This is a critical observation. Many people, myself included, have slipped into the mindset that 9/11 was an aberration. Although attacks of similar magnitude may occur in the future,

they will be few and far between. Thus, the nation should be vigilant, but need not take any dramatic steps to restrict civil liberties. If Abrams is right, and we now face "a non-deterrable enemy that may acquire weapons of mass destruction," then we must talk more openly about what steps we should and should not take to protect ourselves. If we are talking about nuclear weapons, as Abrams warns, then what sacrifice of civil liberties that would help reduce this threat could sensibly be deemed excessive?

Abrams identifies what I regard as the key principle: "Any proposed limitation on recognized civil liberties . . . should still be the least intrusive . . . way of accomplishing the end. . . . " But I would take this one step further. The basic insight of the "least restrictive method" analysis is that government should restrict civil liberties as a last, rather than as a first, resort. As ordinarily applied, however, the inquiry usually focuses narrowly on whether there are "less restrictive" ways of constraining civil liberties, while achieving the same objective. The focus is on whether the restriction of civil liberties is unnecessarily broad.

We should ask a more rigorous question. Even if a limitation of civil liberties would make us safer, and even if it is narrowly framed, we should ask whether there are other steps the government could take to make us safer that do *not* involve the restriction of civil liberties. If so, we should demand that the government implement those measures *before* it limits civil liberties. This more robust form of less restrictive method analysis requires the government to exhaust all reasonable alternatives to enhance our safety that do *not* involve denying civil liberties before it may resort to the plea that rights must be abridged.[3] This approach gives "our recognized civil liberties" the weight they deserve, and would require the Bush administration, for example, to spend more resources to secure our borders before it can opt to search our libraries and monitor our emails.

David Strauss, my long-time colleague at Chicago, offers an intriguing insight about judicial review in his remarks made at the Free Speech in Wartime Conference. Professor Strauss argues that "there is no point in expecting judges to protect civil liberties in wartime" because they lack the necessary information and expertise to make the hard decisions required in such settings and because they lack the will to stand up to legislative, executive, and popular demands when the stakes are so high. He therefore suggests that judges should simply defer, except when it is clear from the

3. For an analogous understanding of the less restrictive method inquiry, see *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (upholding a preliminary injunction against the enforcement of the Child Online Protection Act).

circumstances that the challenged government action is the product of partisan rather than national interest.

It is certainly true that in many of the episodes examined in *Perilous Times* the courts collapsed in the face of real or perceived national crises. But there were exceptions. Beginning in 1957, for example, the Supreme Court took a strong stand against some of the excesses of the Cold War, and during the Vietnam War the Court often rejected national security claims, most obviously in the Pentagon Papers case.[4] Judges can learn from the mistakes of their predecessors. Current judges do not want their legacy to be the modern-day equivalent of *Schenck v. United States*,[5] *Korematsu v. United States*,[6] or *Dennis v. United States*.[7] They have learned that the government tends to exaggerate when it invokes military necessity and national security, and they will therefore be more skeptical about such claims in the future. We should not expect too little of our judges. They have an essential role to play in these circumstances, and we should not be too quick to invite them to abdicate their responsibilities.

In her remarks at the Conference, Nadine Strossen argues that since 9/11 the government "has thrown an unprecedented shroud of secrecy over every aspect of its 'War on Terror.'" I agree, and I find this secrecy deeply troubling. As we have progressed in our constitutional protection of free speech, the government has persistently sought new ways to manipulate public discourse and mute dissent. The Bush administration has used secrecy to evade accountability and defuse criticism. By denying the press and public access to critical information about its activities, the government has effectively squelched disagreement without directly censoring speech. Until this point in our history, the Supreme Court has drawn a sharp line between the right to publish and the right to know. The former is given capacious constitutional protection; the latter almost none.

This understanding of the First Amendment, which may have served us well in the past, now needs serious reconsideration. This will be difficult. There are sound reasons why a First Amendment right to demand information from the government is problematic. But in light of the lessons of the current situation, it is time for scholars and judges to venture into this

4. New York Times Co. v. United States, 403 U.S. 713 (1971).

5. 249 U.S. 47 (1919) (upholding convictions of World War I era dissenters).

6. 323 U.S. 214 (1944) (upholding exclusion orders for Japanese-Americans in World War II).

7. 341 U.S. 494 (1951) (upholding the convictions of the leaders of the Communist Party of the United States during the Cold War).

tricky and largely unexplored terrain. If the right to scrutinize government action is essential to self-governance, then the government cannot wield unlimited authority to deny citizens access to information about its actions.

Eric Foner's remarks at the Conference challenge the following tenet of *Perilous Times*:

> In the entire history of the United States, the national government has never attempted to punish opposition to government policies, *except* in time of war. . . . In peacetime, in times of relative tranquility, which (by my count) make up roughly 80 percent of our history, the United States does not punish individuals for challenging government policies. This . . . reveals a great deal about our constitutional traditions and makes clear that, in order to understand free speech, we must understand free speech in wartime.[8]

Foner argues that this conclusion is misleading and even dangerously complacent. Specifically, he notes that I ignore the many censorious actions of state and local governments and of private individuals and institutions, even in time of peace. Descriptively, of course, he is right. *Perilous Times* does, indeed, largely set aside the actions of state and local governments and of private individuals, as well as the actions of the national government that regulate speech for reasons other than its opposition to government policies.

But there are good reasons for these exclusions. *Perilous Times* focuses on the First Amendment (which does not govern private actors), on the federal government (which has the unique capacity to smother dissent nationally), and on the most problematic regulations of speech – those that prohibit criticism of government officials and policies. The instances of suppression I exclude, such as state restrictions on the distribution of abolitionist literature in the first half of the nineteenth century and state and local restrictions on labor and civil rights speech in the twentieth century, simply do not pose the kind of threat to *national* political debate that *Perilous Times* is about.

David Rabban's remarks at the Conference challenge my cautiously optimistic conclusion that, over time, we have made progress in our commitment to civil liberties. He tellingly observes that "there was more repression of free speech during World War I than during the Civil War, and more repression of free speech during the Cold War than during World War

8. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 5 (2004).

II." Alas, this is irrefutable. But it only confirms my argument that we progress in fits and starts, rather than on a smooth line. As times change, and wars change, we respond in different ways.

But I am convinced that over the past two hundred years we have gradually built an increasingly robust culture of civil liberties. It is a culture that must be reaffirmed and reexamined with each generation. Moreover, our commitment to this culture remains fragile. It could readily be overcome in the heat of a major national crisis. But we should not fail to acknowledge what we have achieved. Would we be as quick today to enact a Sedition Act as we were in 1798 or 1918, or as quick to suspend the writ of habeas corpus or intern 120,000 individuals based on their national ancestry as we were in 1861 or 1942, or as quick to prosecute and imprison national leaders like Clement Vallandigham and Eugene Debs because of their public opposition to the government's war policies as we were in 1863 or 1918? I think not. We do learn the lessons of the past, however painfully and haltingly.

In the end, this may be the most fundamental point. To preserve our freedoms in periods of national crisis, we must nurture a culture of civil liberties, a culture in which citizens understand and value their rights, and the rights of others. This is an ongoing challenge that calls for constant attention from the government, the media, the legal profession, foundations, civil liberties organizations, and higher education. This symposium, and this splendid collection of essays, represent an important contribution to this continuing responsibility of a free and self-governing society.