

A Lawyer's Responsibility: Protecting Civil Liberties in Wartime[†]

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“The first thing we do, let’s kill all the lawyers.”¹ That is, of course, from Shakespeare. Most people hear it as a lawyer joke, as commentary on how society regards lawyers. In fact, however, that statement was made in *Henry VI*² by one of the conspirators in Cade’s Rebellion. Those conspirators were plotting to overthrow the English government and to destroy the rights and liberties of the English people. “The first thing we do, let’s kill all the lawyers.”³ That says a lot about the role of lawyers in preserving liberty in a self-governing society.

I. HISTORICAL RESTRICTION ON CIVIL LIBERTIES

Throughout our history, the most intense pressure on the protection of civil liberties has come during wartime. Of course, that is only natural, for in times of war the security of the nation and the safety of the public are threatened. In such circumstances, it is inevitable that questions will arise about whether we can afford to preserve our freedoms in the face of danger. To some degree, it is not only inevitable but appropriate to consider whether some restrictions of our peacetime liberties may be justified in times of war. The difficult task is to decide the extent to which such restrictions are warranted.

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1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

2. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH.

3. *Id.* act 4, sc. 2.

One of the lessons of American history is that when episodes of military conflict arise we not only compromise our liberties, but we do so excessively and to a degree we often come later to regret. The challenge is to understand why that happens, to avoid repeating the same pattern of mistakes in the present and in the future, and to articulate the role of lawyers in addressing those questions.

To begin, I need to do a quick hop, step, and jump through our history to illustrate what tends to happen in wartime. In 1798 the United States was on the verge of a possible war with France. This was less than a decade after the ratification of the First Amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech or of the press.”⁴ On the plea that the nation needed to ensure its safety and to take all steps necessary to protect the national security, Congress enacted the Sedition Act of 1798,⁵ which effectively made it a crime for any person to criticize the President, Congress, or the government of the United States.

The rationale of this legislation, which on its face would appear to be the paradigmatic example of a law that “abridges the freedom of speech or of the press,”⁶ was that whatever may be true about free speech in peacetime, in wartime the nation must be united and citizens must have confidence in their leaders. The supporters of the law maintained that when the nation’s very survival may be at stake there can be no public disagreement over the morality, justice, or wisdom of the cause. The nation must rally around its elected leaders, rather than bring them into contempt and disrepute. Too much is at stake to allow for a division of opinion that might demoralize our soldiers, bolster the enemy’s resolve, and undermine the war effort.

During the Civil War, Abraham Lincoln suspended the writ of habeas corpus on eight separate occasions. The writ of habeas corpus is one of the bulwarks of Anglo-American freedom. If you are seized by executive authority and placed in a prison or in a military brig, the writ of habeas corpus enables you or your representative to go to a court and ask the court to determine whether your detention is lawful. As an independent branch of the government committed to the

4. U.S. CONST. amend. I.

5. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798).

6. U.S. CONST. amend. I.

protection of our constitutional liberties, courts are well-positioned to decide whether your detention is lawful. If the court finds that you have been unlawfully detained it will issue a writ of habeas corpus ordering your release from custody. This prevents an overreaching executive from simply locking up its enemies and throwing away the key. When the writ of habeas corpus is suspended the executive can seize and detain you for whatever reason and for as long as it wants, in whatever circumstances and conditions it wishes, and no court has authority to intervene on your behalf. When the writ is suspended the executive has essentially absolute power to imprison whomever it wants. Needless to say, this is an awesome power.

Under the Constitution it is clear that the power to suspend the writ is lodged in the Congress rather than in the President.⁷ But Lincoln suspended the writ unilaterally. He did this shortly after the attack on Fort Sumpter and in circumstances in which there was effectively no alternative: Congress was not in session, the crisis faced was immediate, and it was not possible to convene Congress quickly enough to deal with the impending crisis. So, even though Lincoln's actions early in the war were extra-constitutional they were arguably justified as essential to the security of the nation.

Thereafter, however, Lincoln repeatedly suspended the writ much more broadly—eventually throughout the entire United States—and he authorized military commanders in the North to seize and detain any individual who engaged in any “disloyal” act or practice. Often individuals were imprisoned for doing nothing more than criticizing the Lincoln administration for its conduct of the war, its suspensions of habeas corpus, and its issuance of the Emancipation Proclamation.⁸ Although Congress eventually approved Lincoln's actions retroactively there is little doubt that these later suspensions were unconstitutional, both because they were not authorized by Congress in a timely manner and because they exceeded the constitutionally permissible scope of the suspensions.

7. See U.S. CONST. art. I, § 9, cl. 2.

8. Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863) (transcript available in the National Archives of the United States), *available at* http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html.

During World War I the Wilson administration found itself in a difficult circumstance. Early in the war Americans had little interest in entering the conflict in Europe because it did not seem to implicate any vital interests of the United States. Indeed, Woodrow Wilson was re-elected President in 1916 on the platform that he had kept us out of war. By 1917, however, Wilson had decided that it was in the interest of the United States to enter the conflict, largely for reasons involving the freedom of the seas and Germany's violations of international law. Many Americans were unpersuaded that this justification was sufficient to risk American lives in a conflict that seemed both remote and frighteningly bloody. To many Americans this was not a war to make the world safe for democracy, as Wilson characterized it, but a war to make the world safe for munitions manufacturers who were making billions by selling their wares to the allies.

Thus, there was substantial opposition both to the decision to enter the war and to the decision to enact a conscription law (for the first time since the Civil War). Wilson's challenge was to rally public support for a war that was far from universally popular. He put in place a two-prong strategy. First, he created the Committee on Public Information (CPI), which was a propaganda agency operating directly out of the White House. CPI's function was to produce a flood of editorials, pamphlets, lectures, and even movies (such as *The Kaiser: Beast of Berlin*⁹), all of which were designed to whip up a hatred of anything German and a suspicion of anyone who did not enthusiastically support the war effort. Individuals were encouraged to report such persons to the Department of Justice, and thousands of such reports flowed into the Department daily.

But this still left the problem of dissenters who were "poisoning" others against the war and undermining the complete commitment to the cause that is necessary for people to make the many sacrifices war demands. Wilson needed to stifle his critics. To this end, he pushed through Congress the Espionage Act of 1917¹⁰ and the Sedition Act of 1918,¹¹ effectively making it a crime for any person to criticize the

9. THE KAISER, THE BEAST OF BERLIN (Renowned Pictures 1918).

10. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793-799 (2000)).

11. Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of 1921, ch. 136, 41 Stat.

government, Congress, the President, the flag, the Constitution, the military, or the uniforms of the military personnel of the United States. Some 2000 individuals were prosecuted under these laws and, unlike the Sedition Act of 1798 and the suspensions of habeas corpus during the Civil War (which usually resulted in jail terms of between one to six months), the sentences for violating the World War I statutes typically ranged from ten to twenty *years*.

Not surprisingly, this had a devastating effect on the willingness of dissenters to criticize the war, the draft, or the military. The effect was to stifle virtually all dissent. This is an important point about the nature of free speech. How eager would you be to sign a petition, hand out leaflets, or make a speech against the war if you knew that you could be prosecuted, convicted, and sentenced to ten to twenty years in prison for that act? A central feature of free speech is that each individual knows that his or her *own* contribution to public debate is unlikely to have impact upon national policy. Thus, the gain to the speaker from protesting is close to zero (other than the satisfaction of being a responsible citizen), and the cost of protesting may be a ten-, fifteen-, or twenty-year prison term. In such circumstances most sensible individuals will decide to remain silent, with the consequence being that public debate is completely distorted. That, indeed, is precisely what happened during World War I.

In World War II the primary civil liberties issue was the decision of the Roosevelt administration to intern almost 120,000 people of Japanese descent, two-thirds of whom were American citizens. This tragedy occurred not because of the needs of military security but to accommodate racism, address false rumors about Japanese espionage and sabotage on the West Coast, enable whites to gain a competitive advantage in businesses on the West Coast, and curry favor with the voters of California, Arizona, Oregon, and Washington in anticipation of the 1942 congressional elections.

During the Cold War, the United States entered a period of "McCarthyism" that was fed not only by a real and legitimate fear of Soviet espionage and Soviet bombs raining down upon American

cities, but also by exploitative politicians who manipulated this fear for partisan political advantage. This was accomplished by turning American against American through the generation of a wildly exaggerated fear that subversive individuals were secretly nesting within educational institutions, the labor movement, the government, the press, the entertainment industry, and the military. These “Red Baiters” created a frenzy of investigation, accusation, and prosecution designed to ferret out such “disloyal” individuals with little, if any, regard for whether their victims actually posed any credible danger to the nation.

Finally, in the Vietnam era, the United States government launched an extensive program of surveillance, infiltration, and disruption known most commonly under the Federal Bureau of Investigation’s code name “COINTELPRO.” The goal of this counterintelligence program was to neutralize the anti-war movement. This was achieved by directing undercover agents to infiltrate anti-war groups, fostering disagreement and hostility within those organizations; use anonymous accusations of disloyalty and drug abuse to get colleges, universities, landlords, and employers to harass anti-war leaders; and enlist the Internal Revenue Service and other government agencies to investigate individuals who supported the anti-war movement.

So, throughout our history we have a pattern of overreacting to the demands of wartime and unnecessarily restricting civil liberties. Indeed, after each of these episodes ended, the nation came to recognize the reality and magnitude of these excesses. How, though, can we learn from our past? Part of the problem is that once we are in the midst of a wartime atmosphere it is very difficult to strike the proper balance. Just as an individual experiencing a personal crisis finds it difficult to see clearly how to work through the crisis, a nation experiences the same dynamic—only worse because of the cascading effect of fear; each person’s anxiety reinforces and exacerbates the anxiety of those around him. Thus, even though we have consistently recognized, after the fact, that we have made grievous errors in our response to the danger, it is not clear that when the situation arises again, and the same fears overtake the nation, we will be any better at addressing the problem.

II. A LAWYER'S ROLE IN LEARNING FROM THESE HISTORICAL MISTAKES

A critical challenge, then, is to figure out how to learn from our own history and how to use that learning in a way that prevents, or at least makes less likely, the repetition of the same errors over and over again. This is where lawyers enter the picture. Lawyers play, and have played, a critical role in opposing, and sometimes, moderating some of these abuses. For instance, in World War I the Free Speech League, led by Gilbert Roe, courageously represented individuals who were prosecuted under the Espionage and Sedition Acts. Roe and his colleagues laid the foundation for the civil liberties movement in the United States, often at great personal sacrifice. Moreover, at least a few judges during World War I, most notably Learned Hand, George Bourquin, and Charles Anadon, boldly interpreted the First Amendment in the face of government efforts to crush dissent. Those judges paid a personal price for taking the positions they did, but, as time has proved, each of them was right to do so. After World War I, during the first Red Scare, a group of law professors and lawyers, led by Felix Frankfurter (then a young professor at Harvard) and Ernst Freund (then a professor at Chicago) put together a powerful critique of the legality of the Palmer Raids that helped bring that sorrowful era to a close.¹²

During World War II key members of the Roosevelt administration, who had learned the lessons of World War I, resisted government efforts to prosecute dissenters and to intern Japanese Americans. Men like Robert Jackson, Frank Murphy, and Francis Biddle, each of whom served as Attorney General, were critically important in attempting, sometimes unsuccessfully, to moderate the responses of the Roosevelt administration to the pressures of wartime. Interestingly, not only did Francis Biddle, then the Attorney General, emphatically oppose the internment decision, but so did another lawyer who is not usually thought of as a hero of this period: J. Edgar Hoover. Hoover argued strenuously that the internment of Japanese Americans was unnecessary and unjustified.

12. See R.G. Brown et al., *To the American People: Report Upon the Illegal Practices of the United States Department of Justice* (Nat'l Public Gov't League 1920).

During the Cold War it was extraordinarily risky for lawyers to stand up to the government's persecution of individuals because of their political beliefs and associations. At a time when fear was so pervasive and the dominant mindset was guilt by association, those lawyers who represented individuals in anti-Communist investigations and prosecutions jeopardized their own standing in the community. Nonetheless, there were lawyers, like Thomas Emerson, Joseph Rauh, and Abe Fortas, who risked all by representing those individuals before the House Un-American Activities Committee and other hostile venues.

III. THE SUPREME COURT'S ROLE IN THE WARTIME PROTECTION OF CONSTITUTIONAL LIBERTIES

The Supreme Court of the United States plays a central role in the protection of civil liberties. Because the justices have life tenure they are largely immunized from the temptation to try to please powerful constituencies or interest groups in order to gain personal advancement. Moreover, because the Court, as an institution, focuses more on long-term constitutional principles than on short-term political expediency we have come to view the Court as a critical last line of defense against the inevitable excesses and overreactions of the elected branches of government.

Through history the Court has a mixed record in meeting its responsibilities. In World War I the Court took a narrow view of the First Amendment and upheld the convictions of those who had been prosecuted under the Espionage and Sedition Acts. In World War II the Court gave unwarranted deference to the claims of the executive and upheld the internment of Japanese Americans. In the early years of the Cold War the Court itself fell victim to the paroxysms of the era and upheld the persecution and prosecution of individuals because of their political beliefs and affiliations. In all of these areas the Court's decisions at the time of the crisis have since been overruled or discredited.

At other moments, however, the Court has stood strong in defense of the Constitution. When President Truman seized control of the steel industry during the Korean War (to ensure the production of essential war materials), the Court held that he had exceeded his

constitutional authority as Commander-in-Chief of the armed forces. During the second half of the Cold War, the Court reasserted its authority and, in a series of decisions, held unconstitutional a broad range of federal, state, and local laws and programs that made up the heart of the government's attack on "disloyalty."

During the Vietnam War the Supreme Court rejected the claim of the Nixon administration that it had the constitutional authority to conduct warrantless electronic surveillance of American citizens in the name of national security, and rejected the executive's effort to suppress the publication of the Pentagon Papers. And, of course, in June 2004 the Court rejected the claims of the Bush administration that individuals detained at Guantanamo Bay had no access to habeas corpus and that the President has the inherent authority, as Commander-in-Chief, to detain indefinitely and hold incommunicado an American citizen allegedly captured on the battlefield in Afghanistan without any hearing on the question whether he was, in fact, an enemy combatant.

IV. CONCLUSION

As we move forward in the next several years we are going to see issues of this sort continue to percolate through the legal system, ultimately reaching the Supreme Court. The issues may range from the legality of torture to the constitutionality of electronic surveillance programs to the lawfulness of the government's detention of American citizens as "enemy combatants." Ultimately, it is lawyers who will frame and present these issues to the courts and to Congress, and it is lawyers who will educate the public about the nature and importance of our liberties.

The question "Will we learn from our mistakes?" will, in the end, be answered by lawyers. It is the legal profession that is most fundamentally responsible for helping the nation strike the right balance and for defending our freedoms. As you move on in your careers, I urge you to remember that the first step of those who would deny our civil liberties is to "kill all the lawyers."¹³

13. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.