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# The Restriction of Civil Liberties during Times of Crisis: The Evolution of America's Response to National Military Threats

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**THE RESTRICTION OF CIVIL LIBERTIES  
DURING TIMES OF CRISIS**

**THE EVOLUTION OF AMERICA'S RESPONSE TO NATIONAL MILITARY  
THREATS**

**An Honors Thesis  
Presented By  
Matthew David Fairman**

**To the Department of Government in Partial Fulfillment of the  
Requirements for Honors in the Major Field**

**CONNECTICUT COLLEGE  
NEW LONDON, CONNECTICUT  
MAY 1, 2009**

## ABSTRACT

*This treatise explores the nature and significance of the threat posed to civil liberties during times of major national military crisis and evaluates changes in the nature of wartime repression over the course of American history. It tests the thesis that the evolution in Americans' response to such crises has not been a simple progression toward increasing restraint on the part of federal, state, and local policymakers, as is sometimes assumed. Rather, major twentieth and twenty-first century developments related to the nature of threats to American national security and government capabilities to covertly repress dissent have interacted with evolutionary changes in the nature of wartime repression in reinforcing and conflicting ways. Because of those changes, modern crises will last longer, the restriction of civil liberties during wartime will increasingly be accomplished through covert forms of repression, and, therefore, the durability of wartime restrictions will be greater. In sum, during future crises, Americans' civil liberties will be restricted for longer periods, with the return to normalcy after those crises becoming increasingly difficult. To test this thesis, this treatise uses the past major national military crises in American history as case studies. They include the Quasi-War with France at the end of the 18<sup>th</sup> century, the Civil War, World War I, World War II, and the Cold War. The concluding chapter connects the "War on Terror" to these arguments. Overall, the case study analysis in Chapters I through V combined with the overarching assessment of historical changes in the nature of wartime repression and the durability of wartime restrictions in Chapter VI prove the validity of this thesis.*

To my parents, Mary and David,  
Whose support and encouragement helped me to finish this treatise,  
And to Julia, whose support, understanding, and reminders not to drive myself too hard  
Kept me sane these last few months.

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## INTRODUCTION

This treatise explores the nature and significance of the threat posed to civil liberties during times of major national military crisis and evaluates changes in the nature of wartime repression over the course of American history. During times of national crisis, the American public and its elected officials react fearfully to perceived national threats by placing restrictions on basic civil liberties, restrictions that they later come to regret and see as the byproduct of histrionic fears. In broad outline, this pattern has been evident in every past national military crisis, from the Quasi-War against France in the 1790's through the Civil War, World Wars I and II, and the Cold War. This pattern is further evident in today's "War on Terror."

Yet while this broad pattern has been reflected in every major crisis in American history, including the twenty-first century "War on Terror," important changes have occurred over time in the way in which policymakers and the public respond to crises. These changes can be grouped loosely into three broad categories: (1) evolutionary changes in Americans' response to crises, (2) twentieth and twenty-first century developments in the nature of threats to American national security, and (3) twentieth and twenty-first century developments in government capabilities to monitor and suppress dissent in a covert manner.

Changes falling under the first category have had conflicting effects on Americans' civil liberties. Four are particularly relevant. First, laws established during wartime often outlast the crises during which they were enacted, available to be implemented by policymakers in future crises. Second, the U.S. Supreme Court has gradually become more protective of individual civil liberties, which has mitigated against repression. Third, there has been growing public support for civil liberties, particularly as evidenced by the twentieth century emergence of groups advocating civil liberties. Fourth, evolving methods of repression have led to more sophisticated



methods of repression and greater reliance on covert forms of repression. That shift has been largely the result of increasing respect for civil liberties among the public and the Court, which makes overt forms of repression increasingly untenable politically and legally.

Changes falling under the second category—those altering the nature of threats to American national security—have had a largely negative impact by extending the length of crises and, thus, the length of time in which civil liberties are restricted. Three changes were particularly relevant in producing that effect. The first change was shifting distributions of power in the international system, which resulted in a shift from a multipolar to a bipolar world at the end of World War II and then to a unipolar world at the end of the Cold War. The second was the recent prevalence of ideological conflicts, as seen in the Cold War and the current “War on Terror.”<sup>1</sup> The third was the “democratization of violence,” as Fareed Zakaria terms the diffusion of technologies of mass destruction to non-state actors. This change began late in the twentieth century and has created angst among the public because of the uncertainty of when and where violence can occur. This fear has enabled longer and possibly broader repression of civil liberties. Collectively, these changes have produced a shift from state-based threats to American national security to non-state threats, as the only significant threat to security in a unipolar world can come from non-state actors.

Changes falling under the third category—the creation and expansion of federal intelligence agencies and the proliferation of surveillance technologies—have also had a largely negative impact by increasing the likelihood that civil liberties will be restricted in a covert manner. This in turn contributed, and continues to contribute, to greater durability of wartime

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<sup>1</sup> The term “ideological” is used in this treatise to characterize conflicts that strike deeply at the American way of life; the conflict between atheistic communism and Judeo-Christian capitalism seen in the Cold War or the current conflict involving radical Islam are perfect examples. While the other crises had ideological elements to them, they fundamentally were not driven by ideological differences of that degree.

restrictions because covert methods of repression tend to have greater durability than overt methods given their comparative invisibility to the American people.

In the twentieth century (and it appears the twenty-first as well), these three categories of change have affected the restriction of civil liberties during times of crisis in both positive and negative ways. The central thesis of this treatise is that the evolution in Americans' response to national military crises has not simply followed a natural, unobstructed progression toward increasing restraint (compelled or voluntary) on the part of federal, state, and local policymakers, as is sometimes assumed. Rather, major twentieth and twenty-first century developments have radically altered the nature of wartime repression such that modern crises will last longer, the restriction of civil liberties during wartime will increasingly be accomplished through covert forms of repression, and, therefore, the durability of wartime restrictions will be greater. In sum, during future crises, Americans' civil liberties will be restricted for longer periods, with the return to normalcy becoming more difficult.

To test this thesis, this treatise seeks the answers to three multifaceted research questions. First, to what degree were civil liberties restricted during the Quasi-War of the late eighteenth century, the Civil War, both World Wars, and the Cold War? In what way? What role did different governmental institutions play in the crisis? Second, for each of these crises, to what degree did wartime restrictions outlast the crises during which they were established? Third, to what degree has the nature of wartime repression changed over the course of American history, particularly during the twentieth century? In particular, how have the durability of wartime restrictions and the role of different governmental institutions changed over time?

### Review of Relevant Literature

The primary body of literature to which this treatise contributes—wartime repression of civil liberties in the United States—is quite voluminous. Much of this literature, however, is relatively narrow in focus, with most works centering on an individual crisis. Literature of this type, used in this treatise, includes *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* by James Morton Smith; *The Fate of Liberty: Abraham Lincoln and Civil Liberties* by Mark E. Neely, Jr.; and *World War I and the Origin of Civil Liberties in the United States* by Paul L. Murphy. Even more narrowly, a number of books focus on the effects of wartime repression on certain targeted groups. This is the case in Michal R. Belknap’s *Cold War Political Justice*, which examines McCarthy-era repression of the Communist Party. Although valuable in their contribution to the literature, these works do not, for the most part, reference or examine patterns in wartime repression over time. Hence, they provide an incomplete window into the lessons that can be learned from past crises.

A related weakness in this body of literature is that a very large proportion of recent crisis-specific works examine the restriction of civil liberties during the early years of the War on Terror, while relatively few focus on past crises.<sup>2</sup> For example, in a protracted search for texts examining wartime repression in the United States, I found over twenty-one books written about the War on Terror, but only a few written about the Civil War. Of these, only Mark E. Neely’s *The Fate of Liberty* approached Civil War political repression in a comprehensive and objective manner.

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<sup>2</sup> *Lost Liberties: Ashcroft and the Assault on Personal Freedom*, ed. Cynthia Brown; *More Secure, Less Free?: Antiterrorism Policy & Civil Liberties After September 11*, by Mark Sidel; *The War on our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr.; *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, by David Cole and Jack Dempsey; *Freedom Under Fire: U.S. Civil Liberties in Times of War*, by Michael Linfield. The list goes on.

Another difficulty in researching American wartime repression, is that a number of works in this body of literature, particularly those published in recent years, are somewhat polemical and at times alarmist. Bias is often evident even in the titles of books, such as *Bill of Wrongs: The Executive Branch's Assault on America's Fundamental Rights*; *Lincoln's Wrath: Fierce Mobs, Brilliant Scoundrels and a President's Mission to Destroy the Press*; and *Who Killed the Constitution?: The Fate of American Liberty from World War I to George W. Bush*.

In short, little scholarship comprehensively examines the restriction of civil liberties during multiple national military crises. The few works that do include *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History* edited by Daniel Farber; *Civil Liberty in War Time: The Civil War and the World War* by Elihu D. Ryden; *Political Repression in Modern America: From 1870 to 1976* by Robert Justin Goldstein; and *Perilous Times, Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* by Geoffrey Stone. Of these, only Geoffrey Stone's *Perilous Times* examines repression in every major national military crisis in American history. Although he provides an excellent assessment of evolutionary changes in wartime repression, he leaves unaddressed important developments in the twentieth century. In particular, the increasing use of covert forms of repression and the apparent shift in the nature of threats to American national security. This treatise contributes to the existing literature by addressing those developments, while also accounting for the evolutionary changes that Stone examines.

### **Methodology and Sources**

In order to establish, as this treatise asserts, that certain twentieth century developments in the nature of threats to American national security and in government capabilities to monitor and covertly repress dissent have militated against positive evolutionary changes in wartime

repression, this treatise relies largely on secondary source material. Where relevant, primary source material such as relevant legislation and presidential directives is used to supplement the secondary source material.

### **Overview of Chapters**

This treatise treats the first five national crises in American history as case studies. Each of the first five chapters analyzes one of these crises: the Quasi-War with France at the end of the 18<sup>th</sup> century, the Civil War, World War I, World War II, and the Cold War. For each crisis, the chapter examines relevant background information, explores wartime restrictions of Americans' civil liberties, and assesses the degree to which forms of wartime repression outlasted the crisis. Based on these case studies, Chapter VI analyzes changes in the nature of wartime repression and the durability of wartime restrictions over the course of American history.

## **I. QUASI-WAR WITH FRANCE (1798-1800)**

The first major national military crisis to test the United States' commitment to civil liberties was the Quasi-War, known alternatively as the Half-War or the Undeclared War with France. While often forgotten as a distinct major national crisis, the repressive laws that it produced, the Alien and Sedition Acts, are commonly remembered for spurring the first national debate over the appropriate boundaries of Americans' civil liberties during wartime.

### **Background of the Crisis**

The international events that led to the Quasi-War and the reaction of American policymakers and the public to those events provide the context for understanding the restriction of civil liberties during the crisis. To a large degree, the repression of dissent during wartime resulted from differing views on behalf of the two dominant political parties at the time with regard to the meaning of the French Revolution of 1789, the ultimate trigger of the crisis. In general, the public was unified in support of a stridently defensive response to French aggression. At the same time, however, views toward the Revolution, and by extension the French, broke solidly on partisan lines, with the supporters of each party identifying their opposition with that which they feared. As a result, the Democratic-Republican Party, whose supporters were more inclined than were the Federalists to view the French in a favorable light, was the major target of wartime repression.

### **Trigger of the crisis**

The French Revolution, a protracted period of intense "religious conflict, civil war, and economic chaos" gave rise to a war between France and surrounding pro-monarchist European countries that entangled the United States, despite the efforts of American policymakers to

maintain neutrality between two of the warring belligerents, France and Britain.<sup>3</sup> In combination with the political and social turmoil it produced, the French Revolution sent shockwaves throughout Europe, spreading fear of contagion even to the geographically isolated United States, because it led to the establishment of a government that “sought to suppress dissent, de-Christianize the nation, and impose a rigid system of economic egalitarianism.”<sup>4</sup>

Shortly after the beginning of the French Revolution, in April of 1792, the Legislative Assembly of France declared war on Austria in order to preempt threats of invasion by the monarchies of Europe. The Legislative Assembly also apparently assumed that war would cement the Revolution at home and that the subjects of the European monarchies would welcome them as liberators.<sup>5</sup> The decision to declare war on Austria led France into two protracted wars with different coalitions of pro-monarchist European countries. The First Coalition (1793-1797) included England, Spain, Austria, the Netherlands, and Prussia.<sup>6</sup> The French army suffered initial defeats, but by mid-1794, the tide of war had turned and France was secure from the threat of invasion.<sup>7</sup> By 1795, the war had become a war “of conquest,”<sup>8</sup> rather than a preemptive war of self-defense, as French armies under General Napoleon Bonaparte advanced throughout Europe, seizing “modern-day Belgium, the Rhineland, and the Italian peninsula” by 1797.<sup>9</sup>

In the midst of this European crisis, the United States government sought to maintain neutrality “between England and France, despite its economic dependence on the former and its

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<sup>3</sup> Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton & Company, 2004), p. 21.

<sup>4</sup> Stone, *Perilous Times*, p. 21.

<sup>5</sup> Alan Forrest, *The French Revolution* (Cambridge: Blackwell Publishers, 1995), pp. 110-115.

<sup>6</sup> Stone, *Perilous Times*, p. 21.

<sup>7</sup> Forrest, *The French Revolution*, p. 120.

<sup>8</sup> Forrest, *The French Revolution*, p. 132.

<sup>9</sup> Stone, *Perilous Times*, p. 21.

treaty obligations to the latter.”<sup>10</sup> In doing so, the U.S. “incurred the enmity of both,” leading to an aggressive British naval campaign to block American trade with France by seizing American ships and forcing American seamen into the British navy.<sup>11</sup> To prevent further British aggression and to avoid war, President George Washington sent a prominent Federalist, John Jay, to negotiate a peace treaty with Britain.<sup>12</sup> Although the treaty that arose from the negotiations, the Jay Treaty, secured peace with Britain, it provoked severe hostility from the French government because its strict requirements against American trade with France appeared “evidence of an American-British *entente*.”<sup>13</sup> As a result, shortly after the signing of the Jay Treaty, the French government began its own aggressive naval campaign against American trade, which quickly “eclipsed the British depredations of 1793.”<sup>14</sup> According to Geoffrey Stone, in *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, the French captured 316 American ships during the period from June 1796 to June 1797.<sup>15</sup>

Seeking to end French aggression, Federalist President John Adams (elected in 1796) sent a diplomatic mission consisting of John Marshall, Elbridge Gerry, and Charles Pinckney to negotiate with French Minister of Foreign Affairs Charles Talleyrand. At the same time, Congress authorized Adams to call upon 80,000 militiamen and ordered the strengthening of harbors and the completion of three warships.<sup>16</sup> When the American diplomatic mission arrived in Paris to negotiate with the French, three agents of Talleyrand’s Ministry of Foreign Affairs (in an incident that became known as the XYZ Affair) demanded a substantial cash bribe and

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<sup>10</sup> James M. Smith, *Freedom’s Fetters: the Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956), p. 5.

<sup>11</sup> Smith, *Freedom’s Fetters*, p. 5; Stone, *Perilous Times*, p. 21.

<sup>12</sup> Stone, *Perilous Times*, 21.

<sup>13</sup> Smith, *Freedom’s Fetters*, p. 5.

<sup>14</sup> Smith, *Freedom’s Fetters*, p. 5.

<sup>15</sup> Stone, *Perilous Times*, 21.

<sup>16</sup> Smith, *Freedom’s Fetters*, p. 6-7.



American loans to the French government as necessary conditions for negotiations. The American mission refused and returned home to an outraged citizenry in March 1798.<sup>17</sup>

In the months after the XYZ Affair, the U.S. entered a state of quasi-naval warfare with France. From April to June, the Adams administration and Congress outlawed the sale of arms, expanded the army and navy, reestablished the Marine Corps, put the navy on offensive against French attacks, authorized “armed merchantmen to repel French searches and depredations,” and recalled former President George Washington to command the army.<sup>18</sup> Further, Congress suspended trade with France and renounced all treaties with the French government.<sup>19</sup>

### **Reaction to the crisis**

Perhaps to a greater degree than in other major national military crises, the response of American policymakers and the public to the crisis and the international events that precipitated it dictated the nature of wartime repression. This was especially true of the different ways in which each of the dominant parties, the Federalists and the Republicans, viewed the French Revolution.<sup>20</sup> According to James Smith, in *Freedom’s Fetters: the Alien and Sedition Laws and American Civil Liberties*, the Federalists viewed the French Revolution in terms of polar labels such as “anarchy versus order, licentiousness versus authority, the masses versus the classes, and atheism versus religion.”<sup>21</sup> In contrast, the Republicans saw the French Revolution as “pitt[ing] liberty against oppression, republicanism against monarchy, and democracy against a decadent aristocracy.”<sup>22</sup>

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<sup>17</sup> Stone, *Perilous Times*, p. 21.

<sup>18</sup> Smith, *Freedom’s Fetters*, pp. 7-8.

<sup>19</sup> Smith, *Freedom’s Fetters*, pp. 7-8.

<sup>20</sup> At the time of the Quasi-War, the supporters of the Democratic-Republican Party referred to themselves as either Republicans or Democrats. For the sake of simplicity, the supporters of that party are referred to as Republicans throughout this treatise while the party itself is referred to as the Democratic-Republican party.

<sup>21</sup> Smith, *Freedom’s Fetters*, pp. 11-12.

<sup>22</sup> Smith, *Freedom’s Fetters*, pp. 11-12.

With the development of war in Europe during the early 1790s, the rift between the Federalists and the Republicans over the meaning of the French Revolution grew even wider, with both the Federalists and the Republicans increasingly coming to identify the opposition party with that which they feared. According to Stone:

Republicans feared that Federalists wanted to mimic British conventions and entrench formal class distinctions in the United States; Federalists feared that Republicans sought to plunge the nation into an American reign of terror in which the unthinking masses would seize political power, confiscate private property, and corrupt religion.<sup>23</sup>

Given the different perspectives of the two parties on the French Revolution and the growing tendency of the members of each party to see the worst in their political opponents, the Quasi-War was bound to dramatically exacerbate the division and tension between the Federalists and the Republicans.

As the Adams administration and Congress put the nation on a war footing after the XYZ Affair, this rift became a chasm. Increasingly, the Federalists began to exploit the crisis in an attempt to cement “their dominance in politics, economics, religion, and society.”<sup>24</sup> From the XYZ Affair on, the Federalists sought to link the Republicans with the French and “to equate opposition to the government’s policy with sedition and near treason.”<sup>25</sup> Republicans were forced to defend themselves against Federalist accusations of disloyalty that were both sweeping in nature and devastating in effect. At the same time, they accused the Federalists of “cynically inflating the threat to American interests in order to further their partisan ends.”<sup>26</sup>

To be sure, the battle raging between Federalists and Republicans to assert dominance and to define the appropriate response to French aggression was not just the realm of policymakers, but also of the public. The vicious attacks and counterattacks of Federalist and

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<sup>23</sup> Stone, *Perilous Times*, pp. 25-26.

<sup>24</sup> Smith, *Freedom’s Fetters*, p. 21.

<sup>25</sup> Smith, *Freedom’s Fetters*, p. 21.

<sup>26</sup> Stone, *Perilous Times*, p. 27.

Republican-leaning newspapers no doubt found fertile ground. Nevertheless, at least initially, the American public was unified in opposition to the French and in support of a stridently defensive response to French aggression. Indeed, upon learning of the XYZ Affair, the public was broadly swept up in a wave of patriotic fervor.<sup>27</sup> As during crises that followed, it was in that context that the “nation’s commitment to civil liberties was quickly rationalized out of existence.”<sup>28</sup>

### **Restriction of Civil Liberties**

During the Quasi-War, the restriction of Americans’ civil liberties was narrower in scope than during any other major national military crisis. In large part, the relatively narrow scope of repression was a function of the period. At the time of the Quasi-War, the Supreme Court had not yet established firmly its power of judicial review and the federal government was both smaller and weaker. Further, the technologies that would be a prerequisite to the monitoring and suppressing of dissent in the 20<sup>th</sup> century were not yet available. Indeed, even the telegraph was not yet in existence.

However, while narrow in scope, the restriction of civil liberties during the Quasi-War was more strongly related to partisan politics than the repression of dissent during any other national crisis in American history. As discussed in the previous section, the strongly partisan political nature of wartime repression was largely a product of the international events that triggered the crisis and the differing views of Federalist and Republicans with regard to those events. The partisan nature of repression, which especially targeted the Republicans, can be seen in four key aspects of the Quasi-War: restrictions enacted at the federal level, restrictions enacted at the state or local levels, the tone set by the executive branch toward civil liberties, and the deference of the Supreme Court to the executive and legislative branches.

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<sup>27</sup> Smith, *Freedom’s Fetters*, pp. 8-9; Stone, *Perilous Times*, p. 25.

<sup>28</sup> Stone, *Perilous Times*, p. 25.

## **Federal restrictions**

The restriction of Americans' civil liberties during the Quasi-War was relatively narrow in that it was accomplished primarily at the federal level, rather than at the state or local levels. Further, during the crisis, the federal government restricted civil liberties through only a few of the available avenues of repression. The narrow scope of federal repression was evident in four key components of the federal government's response to the Quasi-War: repressive legislation enacted by Congress, presidential directives relating to civil liberties, federal efforts to control political discourse, and efforts on behalf of the federal government to monitor and suppress political dissidents.

## **Legislation**

Today, the Quasi-War is best remembered for four pieces of repressive and overtly political legislation, each enacted shortly after the XYZ affair and known collectively as the Alien and Sedition Acts of 1798. These include the Naturalization Act, the Alien Friends Act, the Alien Enemies Act, and the Sedition Act.

The Naturalization Act, voted into law on June 18, 1798, was meant to strike at "domestic dissension and disaffection" and to rob the Democratic-Republican Party of one of its bases of support—foreign-born citizens, the majority of whom tended to vote Democratic-Republican.<sup>29</sup> To do so, it made it significantly harder for foreigners to become American citizens and expanded government control over immigrants. The law toughened the naturalization process by increasing the residence requirement for immigrants to obtain citizenship from five years to fourteen years, as well as by requiring foreigners to declare their intention to become naturalized citizens at least five years before applying.<sup>30</sup> Additionally, it

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<sup>29</sup> Smith, *Freedom's Fetters*, p. 22.

<sup>30</sup> Smith, *Freedom's Fetters*, pp. 22-23, pp. 33-34.

barred enemy aliens (residents born in countries with which the United States was at war, or otherwise in conflict) from applying for citizenship. To strengthen government control over aliens, the law required new immigrants to register with the “clerk of the district court, or with an authorized registrar of aliens, within forty-eight hours of their entry.”<sup>31</sup> Further, it required aliens already living in the United States to register within six months of the bills’ enactment and directed the State Department to develop a centralized record of all foreigners registered.<sup>32</sup>

The second major piece of legislation was the Alien Friends Act (known alternatively as An Act Concerning Aliens), enacted by Congress only seven days after the repressive Naturalization Act. Set to expire on the last day of President Adams’ term in office, it gave the President the unilateral authority to order the deportation of any foreign-born resident of the United States.<sup>33</sup> Under its provisions, the President could order the deportation of any alien who he deemed dangerous or believed was engaged in treason merely by setting a date at which that person would be required to leave the country.<sup>34</sup> Those who refused to leave were to be “forcibly deported or tried for violation of the president’s expulsion order.”<sup>35</sup> Sentences for conviction on that charge included three years imprisonment and a permanent ban from applying for citizenship.<sup>36</sup> Additionally, the Alien Friends Act specified that any alien ordered to leave the United States could not return without the explicit approval of the President.<sup>37</sup>

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<sup>31</sup> “Naturalization Act,” *Naturalization Act* Vol. 1 Iss. 1 (4 Jan. 2009): p. 1, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 27 Feb. 2009  
<<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=21213206&loginpage=Login.asp&site=ehost-live>>; Smith, *Freedom’s Fetters*, pp. 33-34. The law specifically levied restrictions on white aliens, presumably Congress did not wish the Naturalization Act to apply to black slaves who were considered property and not permitted full citizenship.

<sup>32</sup> Smith, *Freedom’s Fetters*, pp. 33-34.

<sup>33</sup> Stone, *Perilous Times*, p. 31.

<sup>34</sup> Smith, *Freedom’s Fetters*, p. 61.

<sup>35</sup> Smith, *Freedom’s Fetters*, p. 61.

<sup>36</sup> Smith, *Freedom’s Fetters*, p. 61.

<sup>37</sup> Smith, *Freedom’s Fetters*, p. 62.

Although foreigners whom the President chose to deport were allowed to appeal the expulsion order, they could not do so until after it had already been issued. Further, they were required to present their defense directly to the President. If a foreigner was successful in this regard, the Alien Friends Act directed the President to issue a license specifying where and for how long that person could stay. Violation of that license resulted in the same penalties as those described above for refusal to obey an order of expulsion.<sup>38</sup>

In addition to placing aliens at the mercy of presidential fiat and specifying an appeal process that lacked constitutional safeguards, the Alien Friends Act further tightened government control over foreigners by requiring shipmasters to file a record of the number of foreigners aboard their ships immediately upon docking. This record was used to verify compliance with the provisions of the Naturalization Act.<sup>39</sup> Ultimately, although no foreigner was ever deported under its provisions, the Alien Friends Act “had a corrosive effect,” helping to bring about the departure of “apprehensive French immigrants” and stemming “the flow of immigrants into the United States.”<sup>40</sup>

The third law affecting Americans’ civil liberties was the Alien Enemies Act. Passed on July 6, this law was the only piece of legislation enacted during the crisis that was contingent upon a declaration of war. When first drafted, it gave rather broad authority to the President to govern the treatment of enemy aliens during wartime. During congressional debate over the bill, however, the Alien Enemies Act was narrowed and made more moderate.<sup>41</sup> Thus, the bill emerged as relatively uncontroversial, largely because it significantly overlapped the previously

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<sup>38</sup> Smith, *Freedom’s Fetters*, pp. 61-62.

<sup>39</sup> Smith, *Freedom’s Fetters*, pp. 61-62.

<sup>40</sup> Stone, *Perilous Times*, p. 33; Smith, *Freedom’s Fetters*, p. 159.

<sup>41</sup> Smith, *Freedom’s Fetters*, pp. 35-49.

enacted, but temporary, Alien Friends Act.<sup>42</sup> In its final form, the Alien Enemies Act authorized the President, in the case of war, to manage American policy toward enemy aliens, “deciding whether they should be permitted to reside in the United States and on what security, and designating the method of removal of those not permitted to remain should they refuse or neglect to depart.”<sup>43</sup> In the event that the President ordered certain groups of enemy aliens to be deported, he was directed to specify a reasonable time by which they would be required to leave. In contrast to the Alien Friends Act, the Alien Enemies Act stipulated that enemy aliens whom the President chose to deport should receive a full hearing from the “state courts having criminal jurisdiction” to ascertain whether they posed a danger to the state.<sup>44</sup>

The final, and most notorious, piece of legislation enacted was the Sedition Act (known alternatively as An Act for the Punishment of Certain Crimes Against the United States). Passed on July 12, the law was applicable in peacetime and set to expire on the last day of President Adams’ term in office. Ostensibly, the act was intended to protect the U.S. against the threat of internal subversion by punishing those who sought “to impede the operation of federal laws” or to bring the American government into ill repute.<sup>45</sup> In reality, however, it was meant largely to shield the Adams administration and the Federalist Party from criticism and to enable the Federalists to gain political advantage by lashing out at prominent Republicans as treasonous and then prosecuting them on that basis.

Like the Alien Enemies Act, the Sedition Act of 1798 emerged from congressional debate a narrower and more moderate bill than when it was first drafted. Two alterations are particularly relevant to the nature of wartime sedition prosecutions and both demonstrate the patently

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<sup>42</sup> Smith, *Freedom’s Fetters*, p. 49. Despite being passed after the Alien Friends Act, the Alien Enemies Act was actually drafted earlier, which partially explains the reason why it was largely redundant upon its enactment.

<sup>43</sup> Smith, *Freedom’s Fetters*, pp. 47-48.

<sup>44</sup> Smith, *Freedom’s Fetters*, pp. 47-48.

<sup>45</sup> Smith, *Freedom’s Fetters*, pp. 94-95.

political motivations behind the bill's creation. First, from first draft to final form, the Sedition Act was made narrower in the way it defined seditious speech. Initially, the bill defined seditious speech as libelous or scandalous words. However, this definition was ultimately changed to “false, scandalous, and malicious” words “spoken or written with a ‘bad intent’” as a result of a revision drafted by leading Federalist Robert Harper.<sup>46</sup> This modification was important as it made “the tendency of the words and the intent of the speaker” the test of seditious speech, rather than the much broader definition established earlier of seditious speech as any words that were defamatory or shocking in nature.<sup>47</sup>

The second important modification made during congressional debate over the bill was the extension of its expiration date from one year to the last day of Adam's first term in office.<sup>48</sup> More than any other, this alteration demonstrated the patently political motivations behind the Federalists' creation of the sedition law by making plain the Federalists' intention to deny the Republicans the Sedition Act as a weapon for securing partisan political advantage in the event that President Adams was not elected to a second term.

In its final form, the Sedition Act of 1798 contained four sections. The first, according to Smith, “punished conspiracies and combinations to impede the operation of federal laws and set the penalty at not more than five years' imprisonment and a fine of not more than \$5,000.”<sup>49</sup> The second punished “any person, citizen as well as alien, for any ‘false, scandalous and malicious’ statements against the President, either house of Congress, or the government, made with intent to defame them, or to bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States” with a “maximum penalty [of] two years' imprisonment

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<sup>46</sup> Smith, *Freedom's Fetters*, p. 109, pp. 128-129, p. 119.

<sup>47</sup> Smith, *Freedom's Fetters*, pp. 128-129.

<sup>48</sup> Smith, *Freedom's Fetters*, p. 130.

<sup>49</sup> Smith, *Freedom's Fetters*, pp. 94-95.



and a \$2,000 fine.”<sup>50</sup> The third authorized truth as a defense against prosecution for sedition and directed that the defendant receive a trial by jury. Finally, the fourth section specified the expiration date of the legislation—March 3, 1801.<sup>51</sup>

Even today, due to the way in which it was applied and the fact that it was the first peacetime sedition law, the Sedition Act is still considered one of the worse examples of political repression in American history. During the Quasi-War, the net effect of this law was to dramatically intensify the witch-hunt against political dissidents by enabling the Federalists to prosecute Republican politicians and Republican newspapers for sedition.<sup>52</sup>

### **Presidential directives**

In contrast to every other national military crisis in American history, there were no major repressive presidential directives issued during the Quasi-War. Although this may have been a function of restraint on the part of the President Adams, it was more likely the product of other factors, particularly the period in which the crisis occurred and the Federalists’ success in passing the Alien and Sedition Acts, which could readily be used to advance the party’s interests.

### **Efforts to control political discourse**

Throughout the Quasi-War, there was no *systematic* effort by the federal government to control political discourse, at least not in the same manner as in the First and Second World Wars. In both of those crises, particularly World War I, the federal government sought to control political discourse by censoring the press and flooding the marketplace of ideas with pro-government propaganda.

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<sup>50</sup> Smith, *Freedom’s Fetters*, pp. 94-95.

<sup>51</sup> “An Act in Addition to the Act, Entitled ‘An Act for the Punishment of Certain Crimes Against the United States.’” Smith, *Freedom’s Fetters*, p. 442.

<sup>52</sup> Stone, *Perilous Times*, p. 71.

Although Federalists used the Sedition Act throughout the Quasi-War to lash out at political dissidents, most notably prominent Republican newspaper editors, the Adams administration did not attempt to censor the press directly. The reason for this was that the Federalists subscribed to a particular approach to the freedom of the press that reached back to English common law, as elucidated by the famous English legal theorist William Blackstone in his *Commentaries on the Laws of England*. The English common law approach to freedom of the press was that “no restraints could be laid upon writings prior to their publication,” but that “the most vital or the most harmless discussion of public policy could be punished if it was obnoxious to the authorities.”<sup>53</sup> For this reason, the Federalists chose to prosecute members of the press whose writings or speech they found to be seditious, rather than censoring their words directly.

#### **Efforts to monitor and suppress dissidents**

The last aspect of the Quasi-War that should be considered in assessing the degree to which the federal government restricted Americans’ civil liberties is whether there were any attempts, at the federal level, to monitor and suppress political dissidents, either through direct prosecution, surveillance, deportation and denaturalization campaigns, or loyalty laws. In contrast to other major national military crises, the Adams administration and the Federalists did not attempt to keep watch on, deport, denaturalize, or subject to loyalty laws those whom they considered subversive.

However, they did prosecute political dissidents quite heavily on an intensely partisan basis, largely using the Sedition Act of 1798. During the Quasi-War, “Federalist enforcement machinery ground out at least seventeen verifiable indictments,” with fourteen of these indictments applying the Sedition Act and the other three applying common law.<sup>54</sup> The overtly

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<sup>53</sup> Smith, *Freedom’s Fetters*, pp. 424-425.

<sup>54</sup> Smith, *Freedom’s Fetters*, pp. 185-186.

partisan political nature of these indictments was evident in two respects. First, wartime prosecutions for sedition were concentrated to a very large degree in “areas that were either thoroughly Federalist, as in New England, or in states where Federalist supremacy was threatened by the rising Republicans, as in New York and Pennsylvania.”<sup>55</sup> Second, these indictments were targeted entirely at vocal supporters of the Democratic-Republican Party. Victims of Federalist repression included prominent Republican newspapers, Republican politicians, and obscure political dissidents indicted for criticizing President Adams and the Federalists.

The largest, and in some ways most important, target of Federalist ire during the Quasi-War were Republican newspapers and newspapermen. The desire of Federalists to destroy the opposition party was so strong that two indictments were issued even before Congress passed the Sedition Act. These were directed against Benjamin Franklin Bache of the Philadelphia *Aurora*, “the most powerful of all the Republican editors,” and the New York *Time Piece*.<sup>56</sup> Once Congress passed the Sedition Act, the Adams administration and the Federalists began to campaign more actively against seditious speech. This campaign was particularly evident in the roughly six months leading up to the election of 1800, when Secretary of State Pickering “launched a campaign to prosecute every one of the leading Republican papers” not yet convicted for sedition. This campaign resulted in the indictment of four of the five major papers targeted.<sup>57</sup>

The editors of less well known Republican newspapers were also indicted for sedition, including Anthony Haswell of the *Vermont Gazette*, Charles Holt of the New London *Bee*, and

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<sup>55</sup> Smith, *Freedom's Fetters*, p. 187.

<sup>56</sup> Smith, *Freedom's Fetters*, p. 181.

<sup>57</sup> Smith, *Freedom's Fetters*, pp. 186-187.

William Durrell of the *Mount Pleasant Register*.<sup>58</sup> The prosecution of *Vermont Gazette* editor Anthony Haswell provides a flavor of the type of material on which indictments for sedition were returned. In part, Haswell was indicted for republishing a paragraph of an article originally published in the Philadelphia *Aurora* that attacked President Adams. Entitled “British Influence,” the article charged that Adams’ political appointments demonstrated affection for Tories (British loyalists).<sup>59</sup>

Although less prominent, the most egregious target of the Federalist campaign of repression was individual Republican (or Republican-leaning) politicians. The first, and most oft discussed, politician subjected to the wrath of the Federalists was Vermont Congressman Matthew Lyon. Lyon was indicted under the Sedition Act for attacking President Adams as a power-hungry despot and writing that Adams had “an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.”<sup>60</sup> Similarly, Jedidiah Peck, a heavily Republican-leaning Assemblyman from New York, was indicted for sedition after he circulated a petition against the Alien and Sedition Acts.<sup>61</sup>

More obscure political dissidents were also occasionally indicted as a result of the Federalist campaign to prosecute seditious speech. These included David Brown, Benjamin Fairbanks, Nathaniel Ames, and Luther Baldwin.<sup>62</sup> The first three of these men were all arrested subsequent to an incident in Dedham, Massachusetts in which local Republicans, galvanized by a speech delivered by “vagabond radical” David Brown, erected a liberty pole in protest of Federalist repression.<sup>63</sup> The prosecution of Luther Baldwin represented the most comedic

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<sup>58</sup> Smith, *Freedom’s Fetters*, p. 362, p. 377, p. 386.

<sup>59</sup> Smith, *Freedom’s Fetters*, p. 361.

<sup>60</sup> Aleine Austin, *Matthew Lyon: “New Man” of the Democratic Revolution, 1749-1822* (Pennsylvania State University Press, 1981), p. 108, qtd. in Stone, *Perilous Times*, p. 20.

<sup>61</sup> Smith, *Freedom’s Fetters*, p. 385, 390.

<sup>62</sup> Smith, *Freedom’s Fetters*, p. 257-270

<sup>63</sup> Stone, *Perilous Times*, p. 64; Smith, *Freedom’s Fetters*, p. 259-269.

incident of repression during the Quasi-War, while also demonstrating the extent to which the Federalists were willing to go to prosecute individuals for writing or speech they considered seditious. Luther Baldwin was “convicted for drunkenly observing that he didn’t care if the local cannon, which were giving President Adams a sixteen-gun salute, ‘fired thro’ his a—.’”<sup>64</sup>

### **State and local restrictions**

In direct contrast to the active efforts of the Adams administration and the Federalist Party to prosecute political dissidents for sedition, there were no major incidents of state or local repression during the Quasi-War. However, indicative of the tone of states toward dissent was the reaction of certain states to the Sedition Act. In the fall of 1798, the Kentucky and Virginia legislatures adopted resolutions that opposed the Sedition Act and argued the right of states to reject repressive federal legislation that infringed on states’ rights. No other states chose to adopt similar resolutions and, in response to an invitation to do so, ten expressly condemned the Kentucky and Virginia Resolutions.<sup>65</sup> This hostile response suggested a general lack of concern on behalf of state, and presumably local, governments for the civil liberties of political dissidents. Nevertheless, perhaps because the Adams administration was perceived to be effectively handling the threat posed by seditious speech, state and local governments did not enact sedition laws or other forms of repressive legislation.

### **Executive tone toward civil liberties**

In addition to the restriction of civil liberties by federal, state, and local governments, the tone set by the executive branch toward individual liberty is also relevant in assessing the degree to which civil liberties were restricted. The tone set during the crisis was important because it influenced the willingness of policymakers throughout the federal government to respect the

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<sup>64</sup> Stone, *Perilous Times*, p. 66.

<sup>65</sup> Stone, *Perilous Times*, pp. 44-45.

constitutional rights of dissidents. In general, the tone set by President Adams during the Quasi-War ranged from indifference to hostility and can be seen both in his actions and statements during wartime (partly reflected through his wife) as well as those of Secretary of State Timothy Pickering.

President Adams' approach to and treatment of two pieces of legislation—the Alien Friends Act and the Sedition Act—combined with his wife's stance toward Republicans, provide a flavor of the tone that he helped to set toward civil liberties. In general, although he had reservations about its use, Adams supported the repressive Alien Friends Act. Indeed, he set the tone for its creation through frequent anti-alien public addresses and he readily approved it upon its passage by Congress. To his credit, he resisted somewhat the efforts of the Federalists to bring the law to its full realization and never used it to deport foreigners living within the United States.<sup>66</sup> Nevertheless, while he may have attempted to restrain its use, the President generally agreed with the repressive intent embodied in the law. For example, though he did not use the Alien Friends Act to deport objectionable foreigners, he was enthusiastic about the voluntary departure of French-born aliens that the law's enactment brought about.<sup>67</sup> Further, he occasionally commented that certain people ought to be deported on its basis, including Philadelphia *Aurora* editor William Duane, and “gladly signed warrants for the seizure” of a few individuals pursuant to its provision.<sup>68</sup> Finally, after his term in office, he defended the Alien Friends Act with claims of military necessity, arguing that “French spies then swarmed in our cities and our country; some of them were intolerably imprudent, turbulent, and seditious.”<sup>69</sup>

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<sup>66</sup> Smith, *Freedom's Fetters*, pp. 92-93, p. 175, p. 161.

<sup>67</sup> Smith, *Freedom's Fetters*, pp. 92-93, p. 161.

<sup>68</sup> Smith, *Freedom's Fetters*, p. 284, pp. 159-175.

<sup>69</sup> Excerpted in Smith, *Freedom's Fetters*, pp. 92-93.

President Adams also wholeheartedly embraced the practice of using the Sedition Act to strike at opponents of his administration. Though not directly responsible for the law's creation, he approved of its use throughout the two years in which it was in force and often "specifically authorized its use against his critics."<sup>70</sup> Further, he refused to entertain any petitions for pardon that he received from persons convicted for sedition.<sup>71</sup>

Aside from his treatment of those two laws, Adams' tone toward civil liberties was also reflected in his wife Abigail's vehement attacks on the Republicans and on political dissent in general. Abigail Adams "rarely failed to act as her husband's eyes and ears."<sup>72</sup> She routinely attacked Republican-leaning newspapers as "the offspring of faction...nursed by sedition" and lashed out at Republicans throughout the crisis by referring to their party as the "French Party."<sup>73</sup> Further, she probably campaigned more actively for the strict enforcement of the Sedition Act than did anyone else.<sup>74</sup>

Secretary of State Pickering was less important in setting the tone for repression. However, his overt hostility toward dissent certainly encouraged wartime prosecutions. To a greater degree than Adams, Pickering sought to ensure the vigorous suppression of individuals whose speech and writing he deemed seditious. He "closely scrutinized Republican newspapers for any hint of sedition and vigorously encouraged a network of spies and informers to keep him personally apprised of their suspicions."<sup>75</sup>

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<sup>70</sup> Smith, *Freedom's Fetters*, p. 97, p. 152.

<sup>71</sup> Smith, *Freedom's Fetters*, p. 181.

<sup>72</sup> Stone, *Perilous Times*, p. 34.

<sup>73</sup> Abigail Adams, *Letters of Mrs. Adams, the Wife of John Adams*, 2nd ed. (Boston: C. C. Little and J. Brown, 1840), pp. 231-232, qtd. in Smith, *Freedom's Fetters*, p. 96.

<sup>74</sup> Smith, *Freedom's Fetters*, p. 96.

<sup>75</sup> Stone, *Perilous Times*, p. 46.

## Deference of the U.S. Supreme Court

The last aspect of the crisis that should be considered in assessing the degree to which civil liberties were restricted during the Quasi-War was the U.S. Supreme Court's deference to the executive and legislative branches. The Court did not rule on the constitutionality of the Alien and Sedition Acts during the Quasi-War. In large part, the reason for this was that the Court had not yet established firmly its authority to declare unconstitutional acts of the President and Congress, which it did explicitly in the 1803 cases of *Marbury v. Madison* and *Stuart v. Laird*.<sup>76</sup> Nevertheless, the Supreme Court had already begun to establish its power of judicial review during the preceding ten years. By the beginning of the Quasi-War, justices of the Supreme Court, acting in their responsibility as circuit court judges, had engaged in what could be characterized as judicial review, with the first known case occurring in *Hayburn's Case* of 1792. So too had the Supreme Court, acting as a whole, in the 1796 case of *Hylton v. United States*, in which the Court upheld the constitutionality of the Carriage Tax Act of 1794.<sup>77</sup> Consequently, at least in theory, the Supreme Court could have ruled unconstitutional the actions of President Adams and the Federalist-dominated Congress.

Given the tenuousness of its power of judicial review and the fact that the nation was at war, it is still debatable whether the Court could have checked the executive and legislative branches had it been willing. But even if its authority had been clear and well-established, three aspects of the crisis suggest that the Supreme Court would have ruled in favor of the federal

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<sup>76</sup> W. E. Nelson, "Marbury v. Madison and the Establishment of Judicial Autonomy," *Journal of Supreme Court History* Vol. 27 Iss. 3 (Nov. 2002): pp. 240-256, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 27 Feb. 2009  
<<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=7452656&loginpage=Login.asp&site=ehost-live>>.

<sup>77</sup> Robert Frankel, Jr., "Before Marbury: Hylton v. United States and the Origins of Judicial Review," *Journal of Supreme Court History* Vol. 28 Iss. 1 (Mar. 2003): pp. 1-13, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 27 Feb. 2009  
<<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=9442436&loginpage=Login.asp&site=ehost-live>>.



government had a case arisen relating to Americans' civil liberties. First, at the time of the Quasi-War, the justices of the Supreme Court were generally considered sympathetic to the Federalists.<sup>78</sup> Second, throughout the crisis, the Supreme Court justices, acting in their responsibility as circuit judges, regularly went out of their way "to charge grand juries with the duty of inquiring into all offenses against the Sedition Law."<sup>79</sup> Second, throughout the crisis, federal courts were more than willing to prosecute political dissidents and indeed, according to Stone, "were unanimous in upholding [the Sedition Act]."<sup>80</sup>

### **Return to "Normal"**

To a greater degree than in any other major national military crisis in American history, the restriction of civil liberties during the Quasi-War ended with the end of the crisis. This is evident both from the way in which the crisis ended and the degree to which wartime restrictions outlasted the end of the crisis.

### **End of the crisis**

The Quasi-War officially ended with the Mortefontaine Convention of September 1800 in which the U.S. and French governments agreed to cease hostilities. However, the crisis had begun to subside much earlier as popular fear of French invasion, along with the ability of the Federalists to exploit the crisis for political advantage, started to diminish in the latter half of 1798 (not long after Congress enacted the Alien and Sedition Acts).<sup>81</sup> Although fears of French

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<sup>78</sup> Richard L. Vining, "Ellsworth Court (1796-1800)," *Encyclopedia of American Civil Liberties*, Vol. 1, ed. Paul Finkelman (U.S.A.: Routledge, 2006), Google Book Search, 21 Apr. 2009, <<http://books.google.com/books?id=YoI14vYA8r0C&pg=PA491&dq=ellsworth+supreme+court+civil+liberties#PPA491,M1>>, pp. 491-492.

<sup>79</sup> Smith, *Freedom's Fetters*, p. 183.

<sup>80</sup> Stone, *Perilous Times*, p. 68.

<sup>81</sup> Gregory Fehlings, "America's First Limited War," *Naval War College Review*, Vol. 53 Iss. 3 (Summer, 2000), *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 26 Dec. 2008 <<http://web.ebscohost.com.peach.conncoll.edu:2048/ehost/detail?vid=2&hid=7&sid=1868b219-bb3b-413c-99e0-abd33722238d%40sessionmgr7&bdata=JnNpdGU9ZWhvc3QtG12ZQ%3d%3d#db=aph&AN=3544482>>; Stone, *Perilous Times*, p. 69.

invasion ran particularly rampant during the spring of 1798, the French government “did not want war with the United States.”<sup>82</sup> Rather, it sought to “reorient American foreign policy” through its aggressive naval campaign against American shipping.<sup>83</sup> In late 1799, after the French Directory experienced multiple *coups d’etat* and the French military suffered “setbacks in Europe, the Middle East, and the Caribbean,” the newly elected First Consul Napoleon Bonaparte (brought to power in a *coup* he staged on November 9, 1799) “anxiously sought peace with the United States.”<sup>84</sup> On November 3, 1799, President Adams accepted an offer by French Minister of Foreign Affairs Talleyrand to renew negotiations with the U.S. by sending an American diplomatic mission to Paris, even though this meant taking extremely heavy criticism from the more hawkish members of his own party.<sup>85</sup> These negotiations were ultimately successful and definitively ended the crisis months before the Alien Friends Act and the Sedition Act were set to expire.

With the onset of negotiations for peace between the United States and France, and later with President Adam’s decision in early May of 1800 to demobilize the army, the wartime hysteria truly subsided.<sup>86</sup> The Federalists, who were no longer able to use the threat of French invasion “as a rallying cry for military expenditures” and the suppression of Republicans, turned inward, attacking Adams as soft on national defense and generally unfit to be president.<sup>87</sup> From that point on, the Federalist Party deteriorated dramatically, leading to the election of Republican Thomas Jefferson and a large Republican majority in the House of Representatives in 1800.<sup>88</sup>

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<sup>82</sup> Stone, *Perilous Times*, p. 69

<sup>83</sup> Stone, *Perilous Times*, p. 69

<sup>84</sup> Fehlings, “America’s First Limited War.”

<sup>85</sup> John Ferling, *John Adams: A Life* (Knoxville: The University of Tennessee Press, 1992), p. 386; Stone, *Perilous Times*, p. 69.

<sup>86</sup> Ferling, *John Adams: A Life*, p. 395.

<sup>87</sup> Stone, *Perilous Times*, pp. 69-70.

<sup>88</sup> Stone, *Perilous Times*, pp. 69-70.

During his inaugural address, Jefferson sought to sow unity, declaring “Every difference of opinion is not a difference of principle...We are all Republicans—we are all Federalists.”<sup>89</sup>

### **Duration of restrictions**

In general, wartime restrictions on Americans’ civil liberties did not outlast the end of the Quasi-War, as evidenced by two aspects of wartime repression: the prosecution of political dissidents and the longevity of wartime legislation. The prosecution of political dissidents during the Quasi-War ended approximately with the end of the crisis. Indeed, the last indictment under the Sedition Act was issued to Thomas Callendar on May 24, 1800. Callendar was prosecuted for the seditious act of circulating a pamphlet entitled “The Prospect Before Us” that attacked President Adams’ handling of hostilities with the French and advocated the election of Republican Thomas Jefferson. It is noteworthy that this final indictment was issued months after the President decided to renew diplomatic negotiations with France and slightly after he decided to demobilize the army.

Although the last sedition prosecution was initiated roughly four months before the official end of the Quasi-War, the Alien and Sedition Acts themselves remained in force beyond the end of the crisis. The Naturalization Act, which made it more difficult for aliens to become naturalized citizens and expanded government control over aliens, was repealed on April 14, 1802, when Congress passed a naturalization law that restored the residency requirement to its pre-war level of five years.<sup>90</sup> In contrast, the Alien Friends Act, which authorized the President to deport aliens unilaterally and tightened government control over foreigners, expired on the last day of Adams’ term in office. The Alien Enemies Act, which gave the President authority to

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<sup>89</sup> Thomas Jefferson, “First Inaugural Address (1801),” *Documents of American Constitutional and Legal History*, Melvin Urofsky (Knopf 1989), pp. 171-174, qtd in Stone, *Perilous Times*, p. 72.

<sup>90</sup> United States, Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Legislation from 1790 to 1900*, 27 Dec. 2008 <<http://www.uscis.gov/files/nativedocuments/Legislation%20from%201790%20-%201900.pdf>>.

govern the treatment of enemy aliens during wartime, was the only piece of legislation to remain “a permanent part of American wartime policy.”<sup>91</sup> To this day, wartime presidents could act on its provisions. The final piece of legislation enacted during the Quasi-War, and the most violative of Americans’ civil liberties, was the Sedition Act. Like the Alien Friends Act, the Sedition Act expired on the last day of President Adam’s term in office. From that point, it quickly fell into deep disrepute, with successive generations of Congressmen disavowing its use. After the election of 1800, President Jefferson pardoned everyone convicted under the Sedition Act and discontinued the prosecution of all others awaiting trial.<sup>92</sup> Later, in 1804, the House of Representatives voted to impeach Justice Chase for his conduct in the trial of Thomas Callender. However, the bill did not receive the two-thirds majority necessary for impeachment.<sup>93</sup> Much later, on July 4, 1840, Congress officially renounced the Sedition Act and authorized reparations to cover the legal fees of all those indicted.<sup>94</sup>

### **Conclusion**

The Quasi-War was a crisis of limited duration involving a conventional, non-ideological threat to American national security. In comparison with the major national military crises that followed, the restriction of Americans’ civil liberties that it produced was narrow and limited. This was true in a number of respects. First, wartime repression was exclusively the province of the federal government, rather than also of state and local governments. Second, the repression of dissent was overt and accomplished chiefly through legislative means, i.e. the enactment of repressive legislation and the prosecution of dissidents. Third, the restriction of Americans’ civil liberties during wartime was of short duration, ending approximately with the end of the crisis.

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<sup>91</sup> Stone, *Perilous Times*, p. 30.

<sup>92</sup> Stone, *Perilous Times*, p. 73; Smith, *Freedom’s Fetters*, p. 305.

<sup>93</sup> Stone, *Perilous Times*, p. 69.

<sup>94</sup> Stone, *Perilous Times*, p. 73.

Yet while wartime repression was narrow and limited, the Adams administration and the Federalists targeted their opponents extensively using the repressive legislation that had been put in place. In large part because it had not yet firmly established its power of judicial review, the U.S. Supreme Court did not perform a role in checking the executive and legislative branch campaign against the Democratic-Republican Party and dissent in general.

In part, the narrow scope of wartime repression and the insignificant role of the Supreme Court was a function of the fact that the country was young. The federal government was small and weak at that time, leaving the Adams' administration with limited means to suppress dissent. Additionally, many of the avenues of repression open to policymakers during later crises were not yet available. Most importantly, before the crisis, there was no body of laws on which to build a campaign of repression before the enactment of the Alien and Sedition Acts. Those acts created precedents, which would be built on in later crises.

## II. CIVIL WAR (1861-1865)

The Civil War was a crisis like no other in American history. The second major national military crisis to test the United States' commitment to civil liberties, the Civil War presented a threat to the U.S. government that was internal, rather than the external threat presented by the Quasi-War or the national crises that followed the Civil War. Instead of defending the country against foreign aggression, Lincoln's challenge was to hold it together despite the efforts of the Southern States to secede. In the context of the incredible tensions unleashed by this conflict and given the difficult balance that Lincoln had to maintain in order to defeat the South without alienating the Border States, the restriction of civil liberties was inevitable.

### **Background of the Crisis**

To understand the context in which civil liberties were restricted during the Civil War, it is essential to understand both the issues and events that triggered the crisis and the reaction of the public to the outbreak of war. Although important in their own right for the context they provide, these aspects of the crisis are also important because they suggest or make obvious the conditions that fostered the heavy restriction of Americans' civil liberties during the crisis—the long-held tensions between the North and the South and the sharply divided loyalties between the people of each region.

### **Trigger of the crisis**

At its core, the Civil War resulted from election to the presidency in 1860 of a Northern Republican, Abraham Lincoln, who opposed the extension of slavery to new states and territories, and from the subsequent secession of Southern States from the Union. The roots of this crisis, however, were much deeper than this simple explanation suggests. The most important, and most widely known, cause of the Civil War was slavery itself. During the Civil

War, the cotton industry formed the backbone of the South. In the year of Lincoln's election the United States exported roughly 191 million dollars worth of cotton, which amounted to fifty-seven percent of the value of the entire nation's exports. Given that the cultivation of cotton, a heavily labor intensive crop, was made profitable at the time only through the exploitation of slave labor, slavery was of immense economic importance to the Southern economy. Beyond their importance in the cotton industry, slaves were of great economic importance in their own right, as is evident by the fact that the nation's slaves were "worth at least two billion dollars" in 1860.<sup>95</sup> It should not be surprising then, that most Southerners viewed slavery "not [as] an evil, but [as] the essential basis of peace and prosperity."<sup>96</sup> For this reason, they "resented the moral condemnation of slavery as an insult to Southern honor."<sup>97</sup>

In addition to slavery, the Civil War was the result of two other factors: regional social and economic differences between the North and the South and the resultant differences in perspective on the proper role of government. By the election of 1860, states in the North were industrializing, developing systems of transportation and finance, and were experiencing a tremendous influx of immigrants, whereas states in the South were more rural, received few immigrants, and, were significantly less industrial. In short, the North was more dynamic, while the South was more static. These regional social and economic differences also helped to produce another major difference that drove the Northern and Southern States to the point of war—differing views of government's appropriate role. Largely because of the differing structure of their economies, Northerners came "to clamor for all sorts of aid and protection from the federal government," while Southerners believed that "the national government must keep its

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<sup>95</sup> Bruce Catton, *The Civil War* (New York: American Heritage Press, 1971), pp. 3-5.

<sup>96</sup> Stone, *Perilous Times*, pp. 82.

<sup>97</sup> Stone, *Perilous Times*, pp. 82.

hands off as many things as possible.”<sup>98</sup> To provide an example, Northern entrepreneurs “who were developing new industries demanded protection from cheap European imports,” while Southerners, who exported their chief product (cotton), “wanted as many cheap European imports as [they] could get.”<sup>99</sup>

Beyond slavery, regional social and economic differences, and differing views with regard to the proper role of government, a number of events prior to the election of 1860 helped to serve as catalysts for the Civil War by exacerbating tensions between the North and the South. First, the passage of the Kansas-Nebraska Act in 1854 created the territories of Kansas and Nebraska and repealed the Missouri Compromise of 1820 (which admitted Missouri as a slave state, while establishing that no additional slave states could be created north of Missouri’s southern border). This led to great turmoil and violence in Kansas between Northern settlers determined to win Kansas as a free state and Southern settlers equally determined to make Kansas a slave state. Second, the Supreme Court’s 1857 decision in *Dred Scott v. Sandford*, in which Chief Justice Taney declared that Scott could not sue for his freedom because he was property rather than a citizen, further helped to galvanize Northerners against slavery. Third, John Brown’s 1859 attempt, to incite a widespread slave rebellion starting at Harper’s Ferry, West Virginia seemed to confirm the fear of many Southerners that Northerners wished to incite “a servile insurrection, with unlimited bloodshed and pillage.”<sup>100</sup>

With the 1860 election, tensions were high between the North and the South and, as a result, the slavery question was squarely before the American people. In the months before the election, the Republican Party nominated Abraham Lincoln for president. On the issue of slavery, Lincoln was a moderate who did not specifically advocate the abolition of slavery in

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<sup>98</sup> Catton, *The Civil War*, pp. 5-6.

<sup>99</sup> Catton, *The Civil War*, pp. 5-6.

<sup>100</sup> Catton, *The Civil War*, pp. 6-14.



states where it already existed. However, he still represented a threat to Southerners because the Republican Party platform “embodied the political and economic program of the North,” thereby endangering “Southern interests.”<sup>101</sup> Like the Republicans, the Democratic Party chose to nominate a relative moderate, Illinois Senator Stephen Douglas. Despite Douglas’ relative centrism, his selection caused a regional split in the Democratic Party, with most Southern Democrats voting for John Breckinridge, rather than for Senator Douglas, “whose support of popular sovereignty would have left their interests in doubt by allowing new states to reject slavery.”<sup>102</sup> A third party, the Constitutional Union Party, which expressly advocated the importance of restoring peace and maintaining the “union of the states,” also arose to challenge the Democratic and Republican presidential nominees.<sup>103</sup> Given these developments, Republican Abraham Lincoln won the election by a plurality of forty percent of the popular vote. His support was “limited almost entirely to the North and the West.”<sup>104</sup>

Even before his inauguration, Abraham Lincoln faced the threat that Southern States might secede, a threat which became evident when the two U.S. Senators from South Carolina resigned their seats on November 10, 1860 and was realized when the governor of South Carolina announced his state’s secession on December 24, 1860.<sup>105</sup> Soon after, other lower southern states followed South Carolina’s lead. In the midst of this growing movement on behalf of the Southern States to secede, lame duck President James Buchanan did little to stem the rapid

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<sup>101</sup> Catton, *The Civil War*, pp. 14-15.

<sup>102</sup> Stone, *Perilous Times*, pp. 82-83.

<sup>103</sup> Roy Basler, *A Short History of the American Civil War* (New York: Basic Books, 1967), p. 21; “Platform of the Constitutional Union Party,” *Platform of the Constitutional Union Party*, Vol. 1 Iss. 1 (07 Jan. 1997), *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 30 Dec. 2008 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=21212859&loginpage=Login.asp&site=ehost-live>>.

<sup>104</sup> Stone, *Perilous Times*, pp. 82-83.

<sup>105</sup> Stone, *Perilous Times*, p. 83; E. B. Long with Barbara Long, *The Civil War Day by Day: An Almanac* (Garden City: Da Capo Press, 1971), Google Book Search, 28 Dec. 2008 <[http://books.google.com/books?id=U0NStVX8Gq8C&pg=PA952&lpg=PA952&dq=june+1861+suspension+habeas+corpus&source=web&ots=m1p0HVLhcO&sig=7u\\_LCsYUNapESJaIJkevFjCTkrQ&hl=en&sa=X&oi=book\\_result&resnum=10&ct=result#PPA90,M1](http://books.google.com/books?id=U0NStVX8Gq8C&pg=PA952&lpg=PA952&dq=june+1861+suspension+habeas+corpus&source=web&ots=m1p0HVLhcO&sig=7u_LCsYUNapESJaIJkevFjCTkrQ&hl=en&sa=X&oi=book_result&resnum=10&ct=result#PPA90,M1)>, pp. 4-5, pp. 14-15.

escalation of the crisis. By February of 1861, a month before Lincoln's inauguration, "pro-secessionist forces [had] seized most of the federal forts in the South" and "South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana" had established the Confederate States of America.<sup>106</sup> On April 11, 1861, Confederate forces signaled the beginning of the Civil War by firing on Fort Sumter, a federal fort that stood at the entrance of the Charleston harbor in South Carolina.<sup>107</sup> For the next four years, "the twenty-three states of the Union and the eleven states of the Confederacy were locked in one of history's most brutal conflicts."<sup>108</sup>

### **Reaction to the crisis**

In addition to the issues and events that triggered the crisis, the reaction of the public to the outbreak of war reflected regional loyalties and the long-held tensions between the North and the South, conditions that would help to ensure the restriction of civil liberties during wartime. Similar in respects to the reaction of the public in other crises such as the Quasi-War, the American public was broadly in support of war between the North and the South, at least when the crisis first began. Upon learning of the Confederate attack on Fort Sumter, Americans, Northerners and Southerners alike, were swept up in a "hysterical wave of emotion" such that "war actually seemed to be welcomed, as if a tension which had grown completely unendurable had at last been broken."<sup>109</sup> According to Bruce Catton, "grim knowledge of the reality of war would come quickly enough, but right at first unsophisticated people surged out under waving flags with glad cries and with laughter, as if the thing that had happened called for rejoicing."<sup>110</sup>

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<sup>106</sup> Stone, *Perilous Times*, p. 83.

<sup>107</sup> E.B. Long, *The Civil War Day by Day*, pp. 55-57.

<sup>108</sup> Stone, *Perilous Times*, pp. 83-84.

<sup>109</sup> Catton, *The Civil War*, p. 22.

<sup>110</sup> Catton, *The Civil War*, p. 22.

## **Restriction of Civil Liberties**

As the events that triggered the crisis and the reaction of the public to those events suggest, Americans' civil liberties were severely restricted throughout the crisis. In contrast to the Quasi-War with France, and many crises that followed, wartime repression was less targeted at suppressing dissent than it was oriented toward advancing military goals. As in the previous chapter, the degree to which civil liberties were restricted can be seen by looking at federal repression, state and local repression, the tone set by the executive branch toward civil liberties, and the deference of the Supreme Court to the executive and legislative branches.

### **Federal restrictions**

The Civil War is often seen as one of the worst periods in the history of American civil liberties, although that is often excused because of the nature of the conflict. However, despite the fact that wartime repression occurred largely at the federal level, the restriction of civil liberties by the federal government was *relatively* narrow in scope, occurring through few of the potential avenues of repression and not typically involving questions of a partisan political nature. This is evident in four key aspects of the federal government's response to the crisis, which include repressive legislation enacted by Congress, presidential directives relating to civil liberties, federal efforts to control political discourse, and efforts on behalf of the federal government to monitor and suppress political dissidents.

### **Legislation**

Perhaps because of the legacy of political repression during the Quasi-War, though probably more importantly because of the Lincoln administration's intention not to exacerbate sharply divided loyalties or alienate the Border States, no federal laws against seditious speech or writings were enacted during the Civil War. Throughout the whole conflict, Congress passed

only one major piece of legislation seriously restricting Americans' civil liberties: the *Habeas Corpus* Act, which was passed by Congress on March 3, 1863. Though it did not clarify whether Lincoln had the authority to suspend the writ of *habeas corpus* prior to its passage, the Act effectively sanctioned Lincoln's earlier wartime suspensions of *habeas corpus* in that it authorized him, from that point on, to suspend the writ as he deemed necessary to guarantee the public safety.<sup>111</sup> Given that it was enacted after Lincoln had already issued numerous proclamations suspending the writ (with the first suspension, as discussed below, issued on April 27, 1861), the *Habeas Corpus* Act simply recognized a *fait accompli*.<sup>112</sup>

Ultimately, since President Lincoln had already suspended the writ of *habeas corpus* and would have continued to do so regardless of whether Congress chose to legitimize his actions, the practical effect of this law on Americans' civil liberties was relatively small. The law did not authorize the restriction of civil liberties any more than the President had already ordered. Although the *Habeas Corpus* Act was relatively unimportant in terms of its practical effect, the law was of greater importance for its symbolic value. It demonstrated the general tenor of the crisis, Congress' support for Lincoln's repressive policies, and the extent to which repressive policies of that type had come to be seen as legitimate.

### **Presidential directives**

Given that the only major federal legislation restricting civil liberties simply legitimized Lincoln's repressive policies, the more important facet of the federal government's response to the crisis came in the form of repressive presidential directives. During the Civil War, Lincoln

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<sup>111</sup> Mark Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: University Oxford Press, 1991), pp. 68-69; "Habeas Corpus Act of 1863," *Habeas Corpus Act of 1863*, Vol. 1. Iss. 1 (14 Jan. 1997), *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 28 Dec. 2008 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=21212276&site=ehost-live>>.

<sup>112</sup> Neely, *The Fate of Liberty*, pp. 68-69.

issued at least nine presidential proclamations and executive orders suspending the writ of *habeas corpus*, and, in some cases, also authorizing the imposition of martial law.<sup>113</sup>

The sequence and content of those directives demonstrate two central points with regard to the restriction of civil liberties by the federal government. First, Lincoln's directives were issued in an unsystematic manner. Rather than revealing a methodical effort by the President to extend the suspension of *habeas corpus* "by slow degrees or steady geographical expansion" across the country, the sequence in which the directives were issued demonstrate that "the [Lincoln] administration lurched from problem to problem drafting hasty proclamations and orders to meet the objective of the moment."<sup>114</sup> This was particularly evident in the somewhat redundant nature of a few of the directives issued, as well as the fact that three of President Lincoln's proclamations and executive orders simply formalized significant restrictions on Americans' civil liberties that had already been implemented by lower-ranking authorities. Second, the content of those directives demonstrated that, in issuing them, the Lincoln administration sought to advance military objectives rather than political goals: "the orders and

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<sup>113</sup> Neely, *The Fate of Liberty*, pp. 90-91. I use "at least" in describing the number of instances in which Lincoln suspended the writ of *habeas corpus* and/or authorized the imposition of martial law because of the difficulty in ascertaining the exact number of times in which these directives were issued. Although one of my sources, *Perilous Times* by Geoffrey Stone, cites eight presidential directives of this type, Mark Neely, Jr., in *The Fate of Liberty*, writes that Lincoln issued eight directives by the end of 1863 and that the last proclamation was issued on July 5, 1864, which suggests that the writ of *habeas corpus* was suspended in nine instances. Unfortunately, Neely's language is somewhat ambiguous and does not appear to account for the seven month period between the end of 1863 and the last proclamation of July 5, 1864. When I counted the number of these directives using E. B. Long's *The Civil War Day By Day* almanac, I found only seven instances in which Lincoln suspended the writ of *habeas corpus*, leaving out two instances that Neely cites— Lincoln's May 10, 1861 authorization for the suspension of *habeas corpus* in the Florida islands of Key West, the Tortugas, and Santa Rosa and his June 20, 1861 suspension of *habeas corpus* so far as necessary to arrest Major Chase of the U.S. Army Corps of Engineers. Thus, given the difficulty of ascertaining the *exact* number of such directives, I chose to defer to Neely's account as he fully documented each of the proclamations and executive orders cited; to account for the ambiguity in his language on pages ninety to ninety-one, I chose to use "at least" in my account of the number of directives issued. In the end, whether Lincoln issued eight directives or nine is mostly irrelevant. What matters in this analysis is the nature of these directives.

<sup>114</sup> Neely, *The Fate of Liberty*, p. 90.

proclamations were usually provoked by problems of military mobilization—first by obstructions of the routes to the underprotected capital and later by draft resistance.”<sup>115</sup>

The presidential proclamations and executive orders issued by President Lincoln during the Civil War fell into three basic categories: directives suspending the writ of *habeas corpus* along military lines to the capital, Washington D.C.; directives targeted at specific areas or, in the case of one directive, a specific individual; and directives suspending the writ of *habeas corpus* nationwide under certain circumstances.

The first category, directives suspending the writ of *habeas corpus* along military lines to Washington D.C., included three directives issued within a six-month period near the beginning of the war. The first directive of this type, and President Lincoln’s first suspension of *habeas corpus*, was issued on April 27, 1861, just two weeks into the war. It was meant to protect the nation’s capital by establishing a route to Washington D.C. along which Northern military troops could travel unimpeded. The directive was issued in response to rioting and bridge burning in Baltimore, Maryland that threatened to cut off the capital from Northern troop reinforcements. It authorized General-in-Chief Winfield Scott, the commander of the Union Army, to suspend the writ of *habeas corpus* as he deemed necessary “at any point on or in the vicinity of any military line, which is now or which shall be used between the City of Philadelphia and the City of Washington.”<sup>116</sup>

Less than two months later, on July 2, 1861, President Lincoln effectively extended the range of his first directive by authorizing Scott to suspend the writ of *habeas corpus* “at any point, on or in the vicinity of any military line which is now, or which shall be used, between the

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<sup>115</sup> Neely, *The Fate of Liberty*, pp. 90-92.

<sup>116</sup> Roy Basler, III, ed., *The Collected Works of Abraham Lincoln*, vol. 3 (New Brunswick: Rutgers University Press, 1953-1955), p. 347, qtd. in Neely, *The Fate of Liberty*, pp. 8-9.

City of New York and the City of Washington.”<sup>117</sup> Still later, on October 14, 1861, Lincoln amended his July 2 order by authorizing Scott to suspend the writ on military lines between Bangor, Maine and Washington D.C.<sup>118</sup>

Directives in the second category—those targeted at specific areas or individuals—were issued throughout the war, beginning with a directive issued in mid-1861 and ending with a directive issued in mid-1864. The first directive of this type was issued on May 10, 1861. It authorized the U.S. military commander responsible for the Florida coast to suspend the writ of *habeas corpus* as he saw necessary to enforce “the laws & constitution of the United States” on “the Islands of Key West, the Tortugas, and Santa Rosa.”<sup>119</sup> In doing so, the proclamation “simply recognized a *fait accompli*” in that Colonel Harvey Brown, the military commander of the Department of Florida, had already suspended the writ and “union officers on the Florida coast had for some time been acting as though the local citizens had abdicated their rights.”<sup>120</sup> The second directive of this type, issued little over a month later on June 20, authorized General-in-Chief Scott to suspend the writ of *habeas corpus* so far as necessary to arrest one particular individual, Major Chase of the U.S. Army Corps of Engineers, allegedly guilty of treason. Very ambiguous, the order did not specify the location in which Major Chase would be found, nor did it supply his first and middle names.<sup>121</sup>

The third and fourth directives of this type were targeted at specific states, rather than at a specific region or a specific person. The third, issued on December 2, 1861, authorized General Halleck, Commander of the Western Department, to suspend the writ of *habeas corpus* and to

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<sup>117</sup> E. B. Long, *The Civil War Day by Day*, p. 90; Neely, *The Fate of Liberty*, p. 11.

<sup>118</sup> Neely, *The Fate of Liberty*, p. 14.

<sup>119</sup> Basler, ed., *The Collected Works of Abraham Lincoln*, vol. 4, pp. 364-365, qtd. in Neely, *The Fate of Liberty*, pp. 9-10.

<sup>120</sup> Neely, *The Fate of Liberty*, pp. 9-10.

<sup>121</sup> Neely, *The Fate of Liberty*, p. 11.

impose martial law “within the limits of the military division under [his] command.”<sup>122</sup> This order was issued in response to a state of severe rebellion in Missouri, characterized as “the scene of widespread popular revolt, guerilla violence, and military campaigns” in which local commanders were heavily restricting civil liberties without official authorization.<sup>123</sup> Even before Lincoln’s directive was issued, military commanders responsible for Missouri had suspended the writ of *habeas corpus* and imposed martial law. Further, on at least one occasion, General Ulysses S. Grant had “authoriz[ed] the confiscation of a newspaper’s press and the arrest of its editor.”<sup>124</sup> Lincoln’s final directive, issued on July 5, 1864, focused on the state of Kentucky. It both urged enforcement in Kentucky of an earlier directive issued on September 15, 1863, which suspended *habeas corpus* nationwide to prevent interference with the mobilization of the military, and authorized the imposition of martial law in that state.

The third category, directives suspending the writ of *habeas corpus* nationwide in certain circumstances, represented the culmination of Lincoln’s practice of issuing presidential proclamations and executive orders during the Civil War. Like the other types of directives, these demonstrate that military objectives were foremost in his mind. The first such directive was issued on September 24, 1862 and was intended to enforce the Militia Act of July 17, 1862, which officially, though quite indirectly, authorized the first national military draft in American history in response to the Lincoln administration’s difficulty in maintaining and expanding the military. It authorized the suspension of the writ of *habeas corpus* and the military trial of individuals resisting, or advocating resistance to, the draft. However, like two of his earlier directives, this proclamation simply made official a significant wartime restriction on

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<sup>122</sup> Neely, *The Fate of Liberty*, pp. 32-38; Basler, ed., *The Collected Works of Abraham Lincoln*, vol. 5, p. 35, qtd. in Neely, *The Fate of Liberty*, p. 37.

<sup>123</sup> Neely, *The Fate of Liberty*, p. 32.

<sup>124</sup> Neely, *The Fate of Liberty*, pp. 32-34.



Americans' civil liberties already authorized by a lower-ranking authority. At Lincoln's request, Secretary of the War Department Edwin Stanton had issued a series of orders six weeks earlier on August 8 that suspended *habeas corpus* and directed the military trial of civilians for effectively the same reasons.<sup>125</sup> The second nationally applicable directive, issued on September 15, 1863, was slightly broader. It sought to prevent state court judges from issuing "writs of *habeas corpus* that interfered with the draft and the punishment of deserters" by suspending the writ of *habeas corpus* throughout the nation in any "cases where military or civilian authorities of the United States held persons under their command or in their custody."<sup>126</sup>

### **Efforts to control political discourse**

Although heavy-handed, particularly with regard to the wartime military arrest of civilians (discussed below), the restriction of Americans' civil liberties throughout the Civil War was *relatively* narrow in scope and generally did not involve questions of a partisan or otherwise political nature. While the Lincoln administration did work to control political discourse during the crisis, it did so unenthusiastically and in an unsystematic and largely ineffectual manner. As with presidential directives issued, the scattered efforts on behalf of the federal government to control political discourse demonstrated that military objectives, rather than political goals, were foremost in the mind of the Commander-in-Chief. Throughout the Civil War, there was a very real risk that the disclosure of sensitive information by members of the press might harm the military. This often happened as Confederate generals, including Robert E. Lee, frequently scanned Northern newspapers for information that gave away the intentions of Union Army generals. Nevertheless, press correspondents and newspapers were accorded wide latitude to

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<sup>125</sup> Neely, *The Fate of Liberty*, pp. 51-53; E. B. Long, *The Civil War Day by Day*, pp. 270-271.

<sup>126</sup> Neely, *The Fate of Liberty*, pp. 71-72; E. B. Long, *The Civil War Day by Day*, pp. 409-410.

publish as they saw fit. To the extent that the Lincoln administration did seek to restrict the press, however, its efforts were incomplete and largely ineffectual.<sup>127</sup>

During the Civil War, the Lincoln administration attempted to censor the press in two ways—by assuming control of the telegraph wires and by suppressing newspapers directly. Immediately after the war first began in April of 1861, the federal government assumed exclusive control of “the telegraph lines from Washington” and barred the transmission of “all telegraphic messages from Washington relating to ‘the civil or military operations of the government.’”<sup>128</sup> By August of 1861, after receiving criticism from newspapers and Congress over this program, the Lincoln administration attempted to establish a gentlemen’s agreement with the press whereby the federal government would lift censorship of the telegraph lines if press correspondents censored their own dispatches. However, the agreement broke down by February of 1862, at which point the Lincoln administration ordered the “military supervision of all telegraphic lines in the United States” by the War Department, rather than the State Department as was the case in the administration’s earlier attempt at censorship.<sup>129</sup> Under that program, which remained in effect until the end of the war, “all telegraphic communications touching military matters not authorized by the Secretary of War, or the commanding general of the district, were forbidden.”<sup>130</sup> Although restrictive, the program was largely ineffectual in censoring the press as correspondents were able to transmit information by telegraph and were also able to send dispatches freely by mail.<sup>131</sup>

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<sup>127</sup> James Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” *The American Historical Review*, XXIII (Oct. 1917-Jul. 1918), Google Book Search, 29 Dec. 2008 <<http://books.google.com/books?id=9rt52X2XR1oC&pg=PA303&dq=%22Civil+War%22+censorship&lr=&client=firefox-a#PPA304,M1>>, pp. 311-312.

<sup>128</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” pp. 303-304.

<sup>129</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Cold War,” p. 305.

<sup>130</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Cold War,” p. 305.

<sup>131</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” pp. 303-306.

In addition to censoring every telegraph line throughout the country, the Lincoln administration occasionally attempted to censor the press more directly by prosecuting editors, “excluding correspondents from the [military] lines, withholding facilities for news-gathering, denying the privilege of the mails, prohibiting the circulation of papers, seizing an edition, and, in extreme cases, suppressing the paper[s].”<sup>132</sup> Further, mob violence against Democratic newspapers on behalf of “Union soldiers and ‘loyal’ citizens” often went unpunished.<sup>133</sup> In the early months of the war, the Lincoln administration appears to have campaigned against the anti-war press by ordering the exclusion of certain newspapers from the mails, including two of the most prominent anti-war papers (the *Journal of Commerce* and the *New York Daily News*), and subjecting the editors of certain papers to military arrest for periods that usually lasted no longer than a month.<sup>134</sup> In general, however, the Lincoln administration was relatively lenient in its treatment of anti-administration newspapers, as evidenced by the unrestrained attacks of some of the most antagonistic newspapers, for which, at the time, the “suppression or the arrest of their editors seemed but mild forms of punishment.”<sup>135</sup> In the words of James Randall, the efforts of the Lincoln administration to censor the press during the Civil War had “but slight effect upon the whole problem of news control.”<sup>136</sup>

While the federal government did work to censor the press during the Civil War, there was no systematic effort to flood the marketplace of ideas with government propaganda, as was the case in World War I with the Committee on Public Information (CPI) and, to a significantly lesser extent, in World War II with the Office of War Information (OWI). Overall, then, the

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<sup>132</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” pp. 318-319.

<sup>133</sup> Stone, *Perilous Times*, p. 128.

<sup>134</sup> Dean Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin Company, 1965), pp. 144-155.

<sup>135</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” p. 316.

<sup>136</sup> Randall, “The Newspaper Problem in its Bearing upon Military Secrecy during the Civil War,” pp. 318-319.

Lincoln administration exercised relatively minimal, or at least relatively ineffectual, control over political discourse during the Civil War.

**Efforts to monitor and suppress dissidents**

The last aspect of the federal government's response to crisis that should be considered in assessing the degree to which Americans' civil liberties were restricted is whether there were any attempts, at the federal level, to monitor or suppress political dissidents. During the crisis, there were no significant attempts to surveil or deport and denaturalize those considered subversive, but there were a tremendous number of military arrests made. However, as those arrests were intended primarily to advance military objectives, rather than political goals, they should not be branded generally as political repression. Additionally, there was also an effort by Congress to screen alleged subversives from the federal government.

The government's program of military arrest represents the most egregious abuse of Americans' civil liberties during the Civil War. The nature of that program is evident both from its operation over the course of the conflict and its outcome (in terms of the number and type of individuals that it affected). Two aspects of the way in which it operated are particularly worth considering: the program's evolution and the repression of dissent by Union military authorities. There were two distinct periods in the evolution of the federal program. For the first ten months of the war, State Department Secretary William Seward was responsible for directing the program of military arrests and accounting for all arrests made. On February 15, 1862, the Lincoln administration transferred responsibility for the control of all military arrests from the Department of State to the Department of War, under Edwin Stanton, which subsequently maintained control until the end of the crisis.<sup>137</sup>

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<sup>137</sup> Neely, *The Fate of Liberty*, p. 19, pp. 21-22.

Two important points emerge from Seward's tenure as chief authority responsible for directing the government's program of military arrest. First, the Department of State did not administer an efficient or harsh program of repression against Lincoln's critics. Rather, it was extremely disorganized and lacked firm control over the execution of arrests. This was evident from the ignorance of Department authorities of the causes of most arrests, as well as their inability to execute arrests that they initiated. Exacerbating the effects of its disorganization, the State Department lacked solid control over military arrests because the Lincoln administration never made it publicly clear that responsibility for the handling of such arrests belonged to the Department of State. As a result, throughout this initial period, military generals, state officials, and the Departments of War and the Navy made arrests on their own authority. By February 1862, authorities outside the State Department had initiated at least 60 percent of all military arrests.<sup>138</sup>

The second point that emerges is that the military arrests made were, for the most part, not political in nature. This was evident from certain characteristics of arrest records from the period. In particular, the places of residence of those arrested and the reasons for their arrest strongly suggest that the various authorities who influenced the program sought primarily to advance military objectives. Of an estimated 864 people arrested during the period, nearly one-third were residents of Southern States, and another seven percent, roughly, were residents of other countries, leaving approximately forty-three percent from the Border States (not including the District of Columbia) and only fourteen percent from the Northern States, a relatively small percentage that amounted to less than one person each month. Although not conclusive in and of itself, the geographical distribution of those arrests provides some weight to the conclusion that

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<sup>138</sup> Neely, *The Fate of Liberty*, pp. 19-22.

the goal of the government's military arrest program was not, at least primarily, to suppress dissent.<sup>139</sup>

More telling, however, were the reasons for which individuals were subjected to military arrests during that early period. Of those who resided outside of the Union, a large percentage of those arrested were either Southern sailors who landed in the North after the start of the war, sailors who attempted to run the Northern naval blockade of the South (a majority of whom, Neely estimates, were British), or other foreigners not guilty of blockade-running whose lack of knowledge with regard to American laws made them especially susceptible to arrest. Of those who resided inside the Union, most do not appear to have been arrested for reasons related to political dissent, although there were instances in which individuals were subjected to military arrest for reasons that violated the freedoms of speech and of the press. For example, a Connecticut man was arrested after he raised a secession flag over his house. Additionally, at least fifteen owners, publishers, and editors of Democratic and Republican newspapers were imprisoned during Seward's control of military arrests.<sup>140</sup>

After February 15, 1862, the Department of War, under Secretary of War Edwin Stanton, assumed responsibility for the handling of all military arrests. Compared with the earlier period, the rate of arrests increased, as did the number of arrests that were, at least somewhat, more political in nature. Although that shift in the nature and number of arrests partially resulted from changing conditions on the ground, it resulted more largely from the evolution of War Department policy over the course of the conflict. Two different sets of orders, issued exactly one month apart, explain the change.

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<sup>139</sup> Neely, *The Fate of Liberty*, pp. 24-27.

<sup>140</sup> Neely, *The Fate of Liberty*, pp. 25-29.

On August 8, 1862, the Department of War issued a set of orders that suspended the writ of *habeas corpus* nationwide and ordered the military trial of civilians “who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.”<sup>141</sup> The orders were meant to enforce the Militia Act of July 17, 1862, which authorized the suspension of *habeas corpus* and the military trial of individuals resisting the draft; however, their effect was much broader. They produced a “period of sweeping and uncoordinated arrests” in which “petty functionaries [decided] without any legal guidelines one of the highest matters of state: precisely who in this civil war was loyal or disloyal.”<sup>142</sup> The weeks following the issuance of those orders represent one of the lower points in the history of American civil liberties. In the one-month period before they were rescinded, 354 civilians were arrested in the North, a far higher rate of arrests than in any earlier one-month period. Ultimately, although the August 8 orders were meant to aid military mobilization (which they indeed achieved), their vague language invited the arrest of anyone critical of the Lincoln administration or the federal government in general.<sup>143</sup>

Exactly one month later, on September 8, 1862, Judge Advocate Major Levi Turner, who assumed to a large degree and apparently on his own initiative the responsibility for overseeing the program of military arrests, disseminated an order stating that “the necessity for stringent enforcement of the orders of the War Department in respect to volunteering and drafting no longer exists.”<sup>144</sup> The order further directed that future arrests be made only on his authority or the authority of “the military commander or Governor of the State in which such arrests may be

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<sup>141</sup> *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, ser. 3, vol. 2 (Washington: Government Printing Office, 1880-1902), pp. 321-322, qtd. In Neely, *The Fate of Liberty*, pp. 52-53; E. B. Long, *The Civil War Day by Day*, p. 249.

<sup>142</sup> Neely, *The Fate of Liberty*, pp. 53-54.

<sup>143</sup> Neely, *The Fate of Liberty*, pp. 54-62.

<sup>144</sup> Neely, *The Fate of Liberty*, p. 54, p. 61.

made.”<sup>145</sup> From that point on, the most serious types of abuse produced by the War Department’s August 8 orders began to diminish “in frequency as higher authorities took control.”<sup>146</sup> With the orders of September 8, 1862, the evolution of the federal government’s program of military arrests was complete:

From the autumn of 1862 to the end of the war, persons who discouraged enlistments, impeded the draft, or afforded aid and comfort to the enemy were theoretically subject to martial law: arrest, trial, and punishment by the U.S. Army. Once imprisoned, these persons might have no recourse to civil courts, for the writ of *habeas corpus* was suspended for any such person. Trials by military commission were fully established. Moreover, martial law applied to all the cases mentioned in the proclamation and the categories of offenses were vague enough, in effect, to have placed the whole of the United States under martial law.<sup>147</sup>

In addition to its evolution, the nature of the government’s program of military arrest is also evident in the repression of dissent by Union military authorities. Throughout the Civil War, the residents of certain states found their civil liberties restricted by local military authorities to a greater degree than the Lincoln administration intended. The conditions in two states provide an idea of the occasional heavy-handedness of some Union commanders. In April 1863, General Ambrose Burnside, the Union Commander of the Department of Ohio, ordered the imposition of martial law and issued General Order no. 38, which criminalized treasonous speech. He subsequently and unilaterally directed Union soldiers to arrest Democratic Congressman Clement Vallandigham, an action (described later) that set off a bipartisan firestorm of protest. Later, and again on his own initiative, Burnside ordered Union soldiers to close the *Chicago Times* for publishing what he felt to be treasonous writing, an action for which he was subsequently rebuked by President Lincoln.<sup>148</sup>

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<sup>145</sup> Neely, *The Fate of Liberty*, p. 61.

<sup>146</sup> Neely, *The Fate of Liberty*, p. 64.

<sup>147</sup> Neely, *The Fate of Liberty*, pp. 63-65.

<sup>148</sup> Neely, *The Fate of Liberty*, pp. 96-118.



In Missouri during the early months of the war, without guidance from President Lincoln, Commander of the Western Department John Fremont declared martial law in St. Louis County and ordered the trial of civilians by courts-martial. As in other states, the abuse of civil liberties was not confined to the highest-ranking local military authorities. During his time in Missouri, General Ulysses S. Grant “authoriz[ed] the arrest of civilians and the taking of civilian hostages,” as well as “the confiscation of a newspaper’s press and the arrest of its editors.”<sup>149</sup>

The operation of the government’s program of military arrest described above demonstrates a number of important points about the degree to which the federal government sought to suppress political dissent during the Civil War, points that are also demonstrated in the assessment below of the outcome of the program. First, and perhaps most fundamentally, the evolution of the federal program throughout the crisis demonstrated that there was no *systematic* effort to repress opposition to the Lincoln administration and the federal government. Second, the preceding analysis clearly indicated that military objectives, rather than political goals, were foremost in the minds of those who directed and accounted for the program. Third, to the extent that the program gave rise to and made possible political repression, its evolution demonstrated that its excesses were largely the result of disorganization, lack of control, or incompetence by those responsible for its administration. For example, the vague language of the August 8 orders and their subsequent modification only one month later suggest that the War Department did not anticipate how broadly those orders would be applied and the degree to which they would be used to suppress dissent.

To a greater degree than the program’s operation over the course of the conflict, its outcome provides valuable insight into the nature of federal military arrests. It is perhaps impossible today to identify concretely the number of civilians subjected to military arrest during

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<sup>149</sup> Neely, *The Fate of Liberty*, pp. 34-44.

the Civil War. Nevertheless, the range of historical estimates is indicative of the scope of the program. Estimates of the number of civilians arrested vary tremendously, from a low of 13,535 to a high of 38,000, with most leaning toward the latter figure. Clearly, the program had a massive footprint on American society.

As estimates of the number of people affected range broadly, the reasons for which civilians were arrested provide more valuable insight. As mentioned above, most arrests did not involve political dissent. Some individuals were arrested for disloyal speech, but most were “men of obscurity, whose outbursts hardly threatened the war effort” and most of those individuals were released shortly after their arrest.<sup>150</sup> There were two particularly notable instances, however, in which prominent individuals were arrested on the basis of their political positions or affiliations—the arrest of Ohio Democratic Congressman Clement Vallandigham and the earlier, less well-known, sweeping arrest of alleged Maryland secessionists.

The arrest of Clement Vallandigham by General Ambrose Burnside, the Union Commander of the Department of Ohio, represented one of the most well known and one of the most overt instances of political repression during the Civil War. In 1863, acting on his own authority, General Burnside unilaterally ordered the arrest of Congressman Vallandigham for expressing “sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion.”<sup>151</sup> On this basis, Vallandigham was convicted by military commission and punished with imprisonment. Lincoln later commuted that sentence to banishment from the Union. The arrest and military trial of Vallandigham has rightly been cited as an egregious excess of the government’s program of

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<sup>150</sup> Stone, *Perilous Times*, p. 125.

<sup>151</sup> Stone, *Perilous Times*, pp. 96-98; *Ex Parte Vallandigham*, 28 F Cases 874, 875 (Cir Ct Ohio 1863), qtd. in Stone, *Perilous Times*, p. 101.

military arrest; however, this instance of abuse far from exemplified that program. In fact, the bipartisan backlash against Burnside's action, as well the backlash against Lincoln's cautious support of the arrest, proved as much, demonstrating that the event was indeed an outlier.<sup>152</sup>

Less well known than the arrest and eventual banishment of Vallandigham, the arrest of Maryland secessionists in early September of 1861 represented an equally, if not more, egregious instance of political repression. In mid-September, fearing that Maryland might secede from the Union in "a secret, extra, and illegal session of the legislature"—a devastating prospect for the Lincoln administration given that the District of Columbia partially lies within that state—Secretary of War Simon Cameron ordered a local Union General to prevent, by arrest if necessary, "the passage of any act of secession by the legislature of Maryland."<sup>153</sup> Subsequent to that and related orders, at least twenty-five alleged secessionists were arrested, including ten members-elect of the Maryland state legislature, one Congressman from Maryland, at least two newspaper editors, and the chief clerk of the Maryland state senate.<sup>154</sup>

In his memoirs, Union General George McClellan wrote that the arrests thoroughly upset "whatever plans the secessionists of Maryland might have entertained."<sup>155</sup> Even today, the origin of the administration's belief that members of the Maryland legislature were planning to secede

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<sup>152</sup> Stone, *Perilous Times*, pp. 101-103, pp. 107-110. On pages 108-117, Stone analyzed Lincoln's reaction to and defense of the arrest of Congressman Vallandigham. Although Lincoln was "surprised and embarrassed," to use Stone's words, at Burnside's action, he chose to defend him out of the belief that to do otherwise would harm the military and encourage the secessionist movement. In his response to the "Albany Resolves," a document penned by Democrats that condemned Vallandigham's arrest, Lincoln stressed cautiously that Burnside's arrest of Vallandigham was justifiable because, as he understood the circumstances, Vallandigham had "expressly advocated desertion and refusal of duty." This was not in fact the case, however, as Vallandigham "consistently counseled *against* unlawful resistance."

<sup>153</sup> George McClellan, *McClellan's Own Story: The War for the Union* (New York: Charles L. Webster & Company, 1887), Google Book Search, 7 Jan. 2009 <[http://books.google.com/books?id=EhMTAAAAYAAJ&pg=PA146&dq=arrest+maryland+legislators&as\\_brr=1](http://books.google.com/books?id=EhMTAAAAYAAJ&pg=PA146&dq=arrest+maryland+legislators&as_brr=1)>, pp. 146-147; United States, Department of War, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington: Government Printing Office, 1881), Google Book Search, 7 Jan. 2009 <[http://books.google.com/books?id=zO4UAAAAYAAJ&printsec=frontcover&dq=editions:0ebsEptOdtB-uWy6SHX8b9M&lr=&as\\_brr=1&rview=1#PPA195,M1](http://books.google.com/books?id=zO4UAAAAYAAJ&printsec=frontcover&dq=editions:0ebsEptOdtB-uWy6SHX8b9M&lr=&as_brr=1&rview=1#PPA195,M1)>, pp. 193-197.

<sup>154</sup> United States, *The War of the Rebellion*, pp. 193-197.

<sup>155</sup> McClellan, *McClellan's Own Story*, pp. 146-147.

remains unclear. The Lincoln administration never divulged its motivations and by late September, “the secessionist impulse seemed spent.”<sup>156</sup> It seems unlikely that the threat of secession was manufactured out of whole cloth or that the administration’s primary motivation was to strike at Maryland Democrats since the arrests received support from both Democrats and Republicans.<sup>157</sup> Regardless, the sweeping arrest of Maryland secessionists by the Lincoln administration certainly constituted a major instance of political repression.

While cited frequently, the examples above were outliers and, hence, did not exemplify the government’s wartime program of military arrest. The true nature of the program lay in the types of people arrested over the course of the conflict. Of those Southerners imprisoned in the North, the majority were not arrested for political reasons. The most common Southerners arrested appear to have been civilian refugees fleeing the Confederacy and petty contrabandists (individuals guilty of violating the blockade or otherwise being involved in contraband trade). Although less common, Southerners also ended up in Northern prisons for three other reasons. First, some individuals were arrested due to the erosion, at least in the eyes of Northern military authorities, in the distinction between combatants and non-combatants over the course of the war. Many Southern noncombatants were arrested merely because they were suspected of aiding Confederate forces. Second, Confederate deserters were often held as political prisoners in Northern prisons because of fears that they might be spies. Third, a number of Southerners were arrested simply because Union military authorities believed that they harmed the Union Army. For example, some Southerners were arrested for selling liquor to Union soldiers, which was not at the time illegal.<sup>158</sup>

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<sup>156</sup> Neely, *The Fate of Liberty*, p. 18.

<sup>157</sup> Neely, *The Fate of Liberty*, pp. 15-18.

<sup>158</sup> Neely, *The Fate of Liberty*, pp. 75-89.

As was the case with Southern occupants of Northern prisons, the most common types of Northerners imprisoned and held during wartime were businessmen, entrepreneurs, and peddlers arrested for fraud and corruption harmful to the Union. Such arrests were most often for charges such as:

forging discharge papers, selling passes, financial fraud committed while employed in an army or government bureau, buying or selling government property, posing as a government detective in order to accomplish fraud or theft, stealing wood from government piles or reserves, and taking bribes to exempt men from enrollment in conscription.<sup>159</sup>

Northerners were imprisoned less commonly for two other reasons. First, a number of arrests involved anti-Semitism on behalf of Northern military authorities. For the most part, those arrests were for charges of fraud and corruption. Although those arrested seem legitimately to have committed fraud and corruption against the Union, it appears that Jews were more susceptible to arrest than were Christians. Second, a number of Northerners were arrested on suspicion of desertion, some of whom were subsequently tortured.<sup>160</sup>

Aside from federal military arrests, the effort on behalf of Congress to root out disloyal employees should also be considered in assessing efforts to monitor and suppress dissent. In the early months of the war, the Potter Committee met to investigate charges of disloyalty against five hundred federal employees. At the time, “Washington... was a nest of Southern sympathizers and many of them were fired or forced to resign their jobs as the result of the Committee’s hearings.”<sup>161</sup> While such a program may have been necessary given the nature of the conflict, the Potter Committee’s loyalty investigations certainly constituted a violation of individual civil liberties. Even if the dismissal of federal employees for expressing disloyal sentiments is not seen as repressive, programs of that type inevitably harm some individuals wrongly.

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<sup>159</sup> Neely, *The Fate of Liberty*, p. 104.

<sup>160</sup> Neely, *The Fate of Liberty*, pp. 93-112.

<sup>161</sup> Dean Sprague, *Freedom Under Lincoln*, pp. 155-156.

### **State and local restrictions**

During the Civil War, there were no major laws enacted and few important prosecutions initiated directly by state or local authorities. Although the residents of some states found their civil liberties restricted particularly severely by heavy-handed Union commanders, it appears that state and local governments did little to suppress dissent.

### **Executive tone toward civil liberties**

The tone set by the executive branch during national crises dictates to a large degree the willingness of policymakers throughout the federal government, as well as state and local governments, to respect the constitutional rights of dissidents. This truth was particularly evident in the approach of President Lincoln and his Secretary of State, Edwin Seward, to Americans' civil liberties during the Civil War. President Lincoln's approach to civil liberties reflected a pragmatic approach to issues of national security rather than strict adherence to the principles of the Constitution. This point was evident in his approach to three separate issues: the suspension of the writ of *habeas corpus*, political dissent, and slavery. Throughout the crisis, Lincoln consistently defended suspension of the writ of *habeas corpus* as necessary to the mobilization of the military and, consequently, as necessary to holding together and restoring the Union. For example, in response to criticism of his proclamations suspending *habeas corpus*, Lincoln remarked, in the spring of 1862, "that a limb must sometimes be amputated to save a life, but that a life must never be given to save a limb."<sup>162</sup>

Lincoln was also consistent throughout the Civil War in his approach to the First Amendment freedoms of speech and of the press. Although he chose to support certain instances of political repression (such as the arrest of Congressman Vallandigham by General Burnside), Lincoln generally deferred to these rights. His general tolerance of dissent, however, was

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<sup>162</sup> Stone, *Perilous Times*, p. 88.

probably not so much motivated out of respect for the principles enshrined in the Constitution and the Bill of Rights as much as by his suspicion that the repression of newspapers and individuals “needlessly polarized opposition to the war.”<sup>163</sup>

Lincoln’s generally pragmatic approach to civil liberties was also demonstrated in his treatment of slavery. Although he wished to end slavery (as evidenced by his pre-war refusal to allow the extension of slavery to new states and territories despite the threat of succession), he passed up an early opportunity to begin to do so.<sup>164</sup> As mentioned earlier, Lincoln rebuked Western Department commander Fremont for issuing a little emancipation proclamation in Missouri in the early months of the war. At the time, the President feared that the proclamation might “scare slaveholding Kentucky out of the Union.”<sup>165</sup> Just a year later, when he judged the moment to be more opportune, Lincoln issued an emancipation proclamation of his own, one that was applicable nationwide.<sup>166</sup> While these three issues provide a window into the President’s approach to civil liberties, the more important point that they demonstrate was his pragmatism, even despite his personal beliefs. Lincoln sought to maintain the Union; all other objectives were secondary.

The other person who should be considered in assessing the tone set by the executive branch toward civil liberties was Secretary of State Edwin Seward. He was popularly demonized as having crushed dissent during the Civil War. However, this reputation seems to stem more from his rhetorically harsh approach to dissent before the crisis began than from his tenure as head of the Department of State or from his control of the government’s program of military arrest early in the war. With regard to his role as Secretary of State, Seward *did not* crush dissent

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<sup>163</sup> Neely, *The Fate of Liberty*, p. 28.

<sup>164</sup> Stone, *Perilous Times*, p. 83.

<sup>165</sup> Neely, *The Fate of Liberty*, p. 34.

<sup>166</sup> Stone, *Perilous Times*, pp. 87-9.

because of constraints on his time, as well as his inability to actually implement an effective program of repression. As stated earlier, Seward's State Department was extremely disorganized in handling military arrests and initiated probably less than forty percent of the arrests made. Thus, despite his reputation, Seward did not zealously suppress dissent nor enthusiastically restrict Americans' civil liberties, though this was less a function of willingness than ability.

Ultimately, the executive branch did not set a tone for the vigorous protection of civil liberties. However, while President Lincoln was willing to restrict civil liberties if beneficial to the cause of holding together and restoring the Union, he often kept in check the efforts of lower-ranking authorities to repress dissent.

### **Deference of the U.S. Supreme Court**

The last aspect of the crisis that should be considered in assessing the degree to which Americans' civil liberties were restricted during the Civil War was the degree to which the U.S. Supreme Court deferred to the executive and legislative branches. Although the Supreme Court as a whole did not technically rule on wartime restrictions implemented by the Lincoln administration or enacted by Congress, the role of the Supreme Court in the crisis was evident in the cases of *Ex parte Merryman* and *Ex parte Vallandigham*.

The case of *Ex parte Merryman* arose when John Merryman, a cavalryman arrested by the military for allegedly burning bridges and destroying telegraph wires during the April 1861 riots in Maryland, sued for a writ of *habeas corpus*.<sup>167</sup> Upon learning of Merryman's arrest, Supreme Court Chief Justice Roger Taney traveled to Baltimore specifically to issue that writ, which he did, acting directly in his capacity as Chief Justice.<sup>168</sup> On May 26, 1861, Taney ruled that the Lincoln administration's suspension of the writ of *habeas corpus* was unconstitutional

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<sup>167</sup> Stone, *Perilous Times*, pp. 85-87.

<sup>168</sup> Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca: Cornell University Press, 1951), pp. 20-21.



and therefore “commanded that General George Cadwalader, who was in charge of Fort McHenry and who had custody of Merryman” release him to be sentenced in the local district court.<sup>169</sup> However, Cadwalader, citing Lincoln’s April 27 order suspending the writ of *habeas corpus*, refused to do so.<sup>170</sup> Consequently, Taney was forced to reduce his opinion in the case, as well as of Cadwalader’s refusal to obey his authority, to writing. He then mailed this opinion to the President, which Lincoln subsequently ignored.<sup>171</sup>

The refusal on behalf of Cadwalader to release Merryman, which represented the refusal of the Lincoln administration to obey the authority of the Chief Justice, spurred no meaningful public backlash and had little long-term effect. Lincoln continued to suspend the writ of *habeas corpus* for the duration of the crisis, in direct disregard of Taney’s decision in the case.<sup>172</sup> Thus, though the first decision of the crisis involving the Supreme Court (or rather a member of that court) was not in favor of the Lincoln administration, it had no practical effect as the Lincoln administration chose simply to ignore it.

The second case involving the Supreme Court during the Civil War was *Ex parte Vallandigham*. Vallandigham, as discussed at various points in this chapter, was a Democratic Congressman from Ohio arrested by a local Union Army commander for allegedly making disloyal remarks. Subsequent to his arrest, Vallandigham was tried by military commission and sentenced to prison for the remainder of the crisis. Shortly after, President Lincoln commuted this sentence to banishment from the Union. After his trial, Vallandigham petitioned the Supreme Court to issue a writ of *certiorari*; however, the justices declined to review the case

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<sup>169</sup> Stone, *Perilous Times*, pp. 85-87.

<sup>170</sup> Rossiter, *The Supreme Court and the Commander in Chief*, p. 22.

<sup>171</sup> Stone, *Perilous Times*, 85-87.

<sup>172</sup> Stone, *Perilous Times*, pp. 85-87; Rossiter, *The Supreme Court and the Commander in Chief*, pp. 18-26.

because of a somewhat trivial technicality.<sup>173</sup> Thus, in the second major case related to Americans' civil liberties during the Civil War, the Supreme Court chose to defer to the President. Ultimately then, the Supreme Court exercised little, if any, restraint on the Lincoln administration and Congress during the Civil War.

### **Return to "Normal"**

The durability of wartime repression depends in part on the way in which a crisis ends. Unlike the Quasi-War, which ended rather neatly with the election of Thomas Jefferson as President in 1800, the Civil War ended in a more untidy manner and left open an enormous rift between the two belligerent nations, whose closing would ensure the continued restriction of Americans' civil liberties. Partly for this reason, the restriction of civil liberties introduced during wartime outlasted the end of the crisis.

### **End of the crisis**

The Civil War effectively ended on April 9, 1865 with the surrender of Confederate General-in-Chief Robert E. Lee to Union Army Commander Ulysses S. Grant at the town of Appomattox Court House in Virginia. The war had been winding down for months, as the Union Army gained increasing military advantage over Confederate forces, and Lee's surrender was all but a foregone conclusion. Following Lincoln's wish, Grant offered Lee liberal terms of surrender. He pledged that Confederate forces would not thereafter be "disturbed by Federal authority" if they laid down their arms and returned home.<sup>174</sup> The offer was intended to be the first step toward reuniting the two belligerent nations and securing a lasting peace. Five days after that first step toward peace, enraged actor John Wilkes Booth shot and killed President Lincoln at the Ford Theatre in Washington D.C. However, Lincoln's assassination did not

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<sup>173</sup> Rossiter, *The Supreme Court and the Commander in Chief*, pp. 28-30.

<sup>174</sup> Catton, *The Civil War*, p. 277.

change the war's outcome. Over the next month, other leading Confederate generals surrendered their troops and, on May 10, the Union Army finally captured and imprisoned Confederate President Jefferson Davis.<sup>175</sup> Although it was not officially declared until April 2, 1866, the Civil War was over:

The war had lasted for four years and it had consumed hundreds of thousands of lives and billions of dollars in treasure. It had destroyed one of the two American ways of life forever, and it had changed the other almost beyond recognition; and it ended as it had begun, in a mystery of darkness and passion.<sup>176</sup>

Before his assassination, Lincoln told his generals his post-war vision that “the broken halves of the Union could be fitted together without bitterness and in a spirit of mutual understanding and goodwill;” he wanted a peace that would be “broad enough and humane enough to mean some sort of gain for everyone in the land.”<sup>177</sup> Unfortunately, that vision largely died with him both because the events surrounding his assassination roused Northern demands for revenge against the South and because his death left the Radical Republicans, who rejected his conciliatory approach to reunification, in near complete control of the Federal Government.<sup>178</sup> After Lincoln's death, it fell to President Andrew Johnson and later to President Ulysses S. Grant, as well as the Republican-dominated Congress, to direct the reconstruction of the Union.

Reconstruction, which lasted roughly twelve years, was a period in which Radical Republicans, who dominated the former states of the Confederacy, sought to dramatically redesign the state governments of the South through legislative reform. In the early years of

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<sup>175</sup> Catton, *The Civil War*, pp. 267-279; George Milton, *Conflict: The American Civil War* (New York: Coward-McCann, 1941), p. 391.

<sup>176</sup> Albert Hart, *Cyclopedia of American Government* (New York: D. Appleton and Company, 1914), Google Book Search, 28 Dec. 2008 <[http://books.google.com/books?id=\\_-4UAAAAYAAJ&pg=PA165&dq=johnson+proclamation+war+1866&client=firefox-a#PPP7,M1](http://books.google.com/books?id=_-4UAAAAYAAJ&pg=PA165&dq=johnson+proclamation+war+1866&client=firefox-a#PPP7,M1)>, p. 165; Catton, *The Civil War*, p. 281.

<sup>177</sup> Catton, *The Civil War*, pp. 291-2, p. 283.

<sup>178</sup> Basler, *A Short History of the American Civil War*, p. 114; Catton, *The Civil War*, p. 287.

Reconstruction, President Johnson emulated Lincoln's approach to reunification somewhat by stressing the importance of Southern self-determination. In advocating this conciliatory approach, however, Johnson was in the minority of his own party. His fellow Republicans, particularly the Radical Republicans, sought to "remake the economic, social, and political framework, not merely of the South, but of the entire nation."<sup>179</sup> They almost immediately set about to accomplish this goal, even over the regular vetoes of President Johnson.<sup>180</sup>

Over the twelve years after the end of the Civil War, home rule gradually returned to the South as the dominance of the Radical Republicans over Southern state governments slowly faded, with South Carolina, Louisiana, and Florida the last states "delivered from this domination."<sup>181</sup> In the years that followed, the Southern states did away with the liberal reforms implemented by the Radical Republicans and established "an absolute fiction of 'natural' white supremacy, by means of state laws that circumvented the application of the Fourteenth and Fifteenth Amendments in particular and the entire Bill of Rights in general [as it applied] to Negroes."<sup>182</sup> The changes of this period were not wiped away entirely, however; by the end of Reconstruction, the Radical Republican-dominated Congress had managed to "entrench Northern commercial-industrial interests as the principal power in national politics as well as in the national economy."<sup>183</sup> By the end of Reconstruction, many of the issues that had initially spurred the development of war, except for slavery, remained unsolved; "questions of state versus federal sovereignty, Executive versus Legislative authority, industrial versus agrarian interests, [and] labor versus capital" continued to divide Americans in the North and in the South.<sup>184</sup>

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<sup>179</sup> Basler, *A Short History of the American Civil War*, p. 112.

<sup>180</sup> Basler, *A Short History of the American Civil War*, pp. 111-124.

<sup>181</sup> Walter Fleming, "The Sequel of Appomattox," *The Confederacy and Reconstruction* (New Haven: Yale University Press, 1919), pp. 282-304.

<sup>182</sup> Basler, *A Short History of the American Civil War*, p. 122.

<sup>183</sup> Basler, *A Short History of the American Civil War*, p. 122.

<sup>184</sup> Basler, *A Short History of the American Civil War*, p. 122, pp. 111-112.

### **Duration of restrictions**

To a greater degree than in the Quasi-War (though to a lesser degree than in future crises), the restriction of Americans' civil liberties outlasted the end of the Civil War. The durability of these wartime restrictions can be attributed particularly to three factors: the longevity and legacy of federal legislation, the deference of the U.S. Supreme Court after the end of the crisis, and the durability of the government's program of military arrest.

Throughout the entire Civil War, the only major piece of legislation enacted by Congress that related to American's civil liberties was the *Habeas Corpus* Act of 1863, which effectively sanctioned President Lincoln's practice of suspending the writ of *habeas corpus* by presidential directive. While it had no expiration date, this piece of legislation was written to be applicable only during the Civil War. As such, it did not outlast the end of the crisis. Nevertheless, this legislation had a lasting effect as it helped to make possible at least two pieces of repressive legislation enacted during Reconstruction: the Reconstruction Act and the Ku Klux Klan Act. The Reconstruction Act, voted into law by Congress on March 2, 1867, authorized Union military authorities operating in the South to prosecute civilians by military commission, despite the fact that the war was over and the civil courts were functioning.<sup>185</sup>

The Ku Klux Klan Act of 1871, also known as the Civil Rights Act, sought to prevent the Ku Klux Klan from "intimidating newly enfranchised blacks and those Southern citizens, black or white, who cooperated with northern 'carpetbag' leaders gone south" by authorizing the President to "suspend the privileges of the writ of *habeas corpus*" as necessary to overthrow conspiracies formed by "two or more persons within any State or Territory of the United States" to deprive "any person or any class of persons of the equal protection of the laws, or of equal

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<sup>185</sup> Neely, *The Fate of Liberty*, pp. 176-179.

privileges or immunities under the laws.”<sup>186</sup> Thus, although the *Habeas Corpus* Act did not outlast the end of the crisis, it legitimized the suspension of the writ and thereby helped to pave the way for Congress to authorize its suspension after the Civil War had ended.

In addition to the longevity and legacy of federal legislation, the limited check exercised by the U.S. Supreme Court after the end of the crisis should be considered in assessing the durability of wartime restrictions placed on Americans’ civil liberties. During the years after the end of the Civil War, the Court issued only one major decision relating to the restriction of civil liberties during wartime—*Ex parte Milligan*. The case of *Ex parte Milligan* arose when Lambdin Milligan was arrested on October 5, 1864 for “allegedly conspiring to engage in criminal acts to aid the Confederacy,” tried by military commission, and subsequently sentenced to death.<sup>187</sup> Shortly before he was to be hung, Milligan petitioned for a writ of *habeas corpus*. His petition eventually reached the Supreme Court, which agreed to hear the case. On April 3, 1866, well after the end of the Civil War, the Supreme Court ruled that President Lincoln “had acted unconstitutionally in instituting trial by military commission during the war in areas where the civil courts were open and functioning.”<sup>188</sup>

In no uncertain terms, the Supreme Court condemned Lincoln’s practice of subjecting civilians to trials by military commission. Nevertheless, the short- and long-term effects of this decision were minimal. In the short-term, as discussed below, trials by military commission continued for at least the next four years, despite *Ex parte Milligan*. Although often cited as a valuable moral guide to future presidents during times of war, the long-term effects of *Milligan*

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<sup>186</sup>Paul Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W. W. Norton & Company, 1979), pp. 33-35; “The Ku Klux Klan Act,” *The Ku Klux Klan Act*, Vol. 1. Iss. 1 (16 Jan. 1997), *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 28 Dec. 2008 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=21213309&loginpage=Login.asp&site=ehost-live>>.

<sup>187</sup>Stone, *Perilous Times*, p. 126.

<sup>188</sup>Rossiter, *The Supreme Court and the Commander in Chief*, pp. 30-31.

may be equally small given that no wartime President “seems to have given it the slightest thought in determining the scope and form of his martial powers.”<sup>189</sup>

The last aspect of the crisis to consider in assessing the degree to which the restriction of civil liberties outlasted the end of the Civil War was the government’s program of military arrest. Although the *Habeas Corpus* Act expired at the end of the crisis (April 2, 1866) and the Supreme Court condemned trials by military commission in 1866, such trials continued in the South during Reconstruction until 1870. From the end of the war until 1870, it is estimated that there were 1,435 trials by military commission.<sup>190</sup> The majority of these trials occurred between May 1, 1865 and the end of the year, while the last trials occurred in Texas and Missouri during 1869 and 1870. For the most part, these trials “did not involve any sharply defined political or racial issues;” they often served to “[restrain] an undisciplined soldiery occupying pacified territory” or to guarantee “better justice to freedmen than they would receive at the hands of Southern whites.”<sup>191</sup> Thus, trials by military commission occurred after the end of the Civil War, but their use declined gradually as the necessity for such trials also declined. While *Ex parte Milligan* may have helped to limit the use of trials by military commission, the decision did not end their use.<sup>192</sup>

### Conclusion

Like the Quasi-War, the Civil War was a conventional, non-ideological crisis of limited duration.<sup>193</sup> Unlike that crisis, however, the wartime restrictions that were established were meant to advance military objectives, rather than partisan political goals. During the Civil War,

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<sup>189</sup> Rossiter, *The Supreme Court and the Commander in Chief*, pp. 32-39.

<sup>190</sup> Neely, *The Fate of Liberty*, pp. 176-177.

<sup>191</sup> Neely, *The Fate of Liberty*, pp. 177-178.

<sup>192</sup> Neely, *The Fate of Liberty*, pp. 176-179.

<sup>193</sup> While some might argue that the Civil War was an ideological conflict, it was fundamentally about issues such as states’ rights, economic differences between the North and the South, and the basic rights of non-whites, rather than ideological differences like those seen during the Cold War.

the Lincoln administration restricted civil liberties in an overt manner, primarily by presidential directive and through the suspension of the writ of *habeas corpus*, the imposition of martial law, and the resultant arrest and trial of civilians by military commission. State and local governments did not play a major role in the restriction of civil liberties. That would change significantly during the First World War.

To a greater degree than the previous crisis, the restriction of Americans' civil liberties outlasted the end of the Civil War. Just as the Red Scare ensured the maintenance of wartime restrictions following the end of World War I, so too did Reconstruction provide new justifications for continued repression. Despite *Ex parte Milligan*, in which the U.S. Supreme Court condemned the Lincoln administration's use of trials by military commission where civilian courts were open and functioning, the military arrest and trial of civilians continued for years after the end of the Civil War. Additionally, the *Habeas Corpus* Act of 1863 and Lincoln's wartime suspensions of the writ served as precedents for the enactment of similarly repressive laws after the crisis had ended.

In some respects, the Civil War represents an anomaly to some of the broad evolutionary changes identified in the Introduction to this treatise. In particular, the laws established during the Quasi-War did not establish precedents or form the bases of Civil War-era legislation restricting civil liberties. Further, the Civil War left no precedents that were applied *after* Reconstruction. Although the Supreme Court was ineffectual in its efforts to check repression, at least with regard to *Ex parte Merryman* and *Ex parte Milligan*, it did begin to assert the power of judicial review that it had established in its 1803 decision in *Marbury v. Madison*.



### **III. WORLD WAR I (1917-1918)**

From a civil liberties perspective, the First World War is often seen as one of the worst national crisis in American history. President Wilson's challenge was to drum up and to maintain support for war. That was especially difficult as most Americans were strongly isolationist and rejected involvement in foreign conflicts that did not directly and clearly involve American interests. To a greater degree than in any other crisis, federal, state, and local governments actively campaigned against dissent, with the objective of achieving support for the war. It is for that reason that World War I has earned its reputation for restricting civil liberties.

#### **Background of the Crisis**

To understand the context in which civil liberties were restricted during World War I, it is important to understand the events that triggered the crisis and the reaction of American policymakers and the public to those events. In addition to providing context, to a significant degree these aspects of the crisis explain the types of individuals whose civil liberties would be violated most directly and seriously: those whose loyalty to the United States was most open to challenge.

#### **Trigger of the crisis**

The First World War was the result of a number of different factors, including the insecurities of and power rivalries between European nations; the lack of a defined process of international arbitration; and the striking intensification of the race to develop ever more powerful armaments and militaries over the sixty years preceding the war. However, the event that actually precipitated war was the assassination of Archduke Franz Ferdinand, heir to the throne of the Austro-Hungarian Empire, in June of 1914 by a small group of terrorists affiliated with a Serbian nationalist organization, the Black Hand. Enraged, the Austro-Hungarian Empire

almost immediately sought to punish Serbia for its involvement in the assassination. In doing so, it sought German support for forming an alliance with Bulgaria and Turkey to take action against the Serbs. Russia then pledged support to Serbia.<sup>194</sup> Within the next month and a half, thanks in large part to the “net of interlocking and opposed understandings and mutual assistance treaties” among the nations of Europe, the relatively narrow crisis surrounding the Archduke’s assassination had degenerated into a general European war that pitted the the Allies (Britain, France, and Russia) against the Central Powers (Germany and Austria-Hungary).<sup>195</sup>

During the early years of the war, the United States remained on the sidelines since most Americans were isolationists and wished to avoid any entanglement in the European war.<sup>196</sup> Isolationism was so strong in the U. S. at that time that the theme of President Woodrow Wilson’s 1916 reelection campaign was “He kept us out of war.”<sup>197</sup> Despite a strong preference for non-involvement, the United States eventually entered the war. The central issue that finally precipitated this entrance was the German submarine blockade against the Allies, which began in the early months of 1915 and resulted in the sinking of numerous American and foreign merchant ships, with significant loss of American lives. For example, on May 7, 1915, German submarines sank the *Lusitania*, which resulted in the death of 1200 passengers, including 128 Americans.

To a greater degree than other attacks, the sinking of the *Lusitania* enraged the American public, provoking such hostility toward Germany that the German government subsequently restricted the scope of its naval blockade against the Allied nations.<sup>198</sup> Nevertheless, President Wilson began to take steps toward preparing the country for war, although he publicly continued

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<sup>194</sup> John Keegan, *The First World War* (New York: Alfred A. Knopf, 1999), pp. 3-52.

<sup>195</sup> Keegan, *The First World War*, p. 52.

<sup>196</sup> Stone, *Perilous Times*, p. 136.

<sup>197</sup> H. W. Brands, *Woodrow Wilson* (New York: Times Books, 2003), pp. 68-72.

<sup>198</sup> Stone, *Perilous Times*, pp. 136-137.

to oppose American involvement. The German policy of restricting its submarine blockade lasted until January of 1917, at which point the German government announced that it would resume its blockade of England and France “in order to limit the continued shipment of munitions and supplies to the Allies.”<sup>199</sup> Shortly thereafter, despite campaign promises to the contrary and against the wishes of a great number of Americans, President Wilson sought a declaration of war against Germany, which Congress passed on April 6.<sup>200</sup> From that point on, the United States was locked in one of the deadliest and most horrific wars the world had yet seen.

### **Reaction to the crisis**

The international events that triggered the First World War and precipitated American involvement in that war provide the context for understanding the restriction of civil liberties during the crisis. To understand the targets of wartime repression, it is necessary to understand the reaction of American policymakers and the public to the war. Three aspects of that reaction were particularly important: the development of the preparedness movement, the shift leftward of the pacifism movement, and President Wilson’s reaction to the crisis. These three aspects make clear the types of individuals who continued to oppose involvement in the war even after it was declared. Further, they demonstrated, from the beginning, the way in which dissent would be treated. In general, as the United States grew closer to becoming involved in the war in Europe, opposition by well-established Americans seems slowly to have lessened, leaving opposition to the war in large part the domain of individuals or groups whose loyalty was potentially open to question. These included pacifists, Socialists, and members of the Industrial Workers of the World (IWW), a radical labor organization.

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<sup>199</sup> Stone, *Perilous Times*, p. 137.

<sup>200</sup> Robert Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Cambridge: Schenkman Publishing Company, 1978), p. 100, p. 105; Stone, *Perilous Times*, pp. 136-137.

As mentioned above, at the start of the war in Europe, most Americans were quite isolationist, believing that the war did not “implicate vital interests of the United States.”<sup>201</sup> Nevertheless, a movement to prepare the country for war began to develop immediately after its outbreak and gained traction after the sinking of the *Lusitania* by German U-Boats in 1915.<sup>202</sup> With strident rhetoric, the advocates of the preparedness movement, particularly those “drawn from the business community,” sought to portray the opponents of American involvement as disloyal.<sup>203</sup> At the time, the anti-war movement included “large numbers of Irish- and German-Americans, Socialists, and other political radicals, as well as pacifists and a number of progressives,” who “feared that shifting national priorities toward involvement in a foreign war would inevitably result in downgrading further” progressive social, political and economic reforms.<sup>204</sup> As the United States slowly moved closer to war, such inflammatory rhetoric by the preparedness movement increasingly began to take hold, setting the tone for the repression of dissent that followed U.S. entry into the war.<sup>205</sup>

Equally important, the pacifism movement shifted dramatically leftward during the years before the United States entered the European war. Upon the outbreak of the war, significant players in the traditional pacifist movement, including the American Peace Society and the Carnegie Endowment for International Peace, shifted 180 degrees from the position that all war was destructive to the position that American involvement in the European war would ultimately be beneficial. For these groups, “Prussianism was the enemy of peace and until it was destroyed by military might, hopes for a truly peaceful world were remote, if not nonexistent.”<sup>206</sup> That

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<sup>201</sup> Stone, *Perilous Times*, p. 137.

<sup>202</sup> Goldstein, *Political Repression in Modern America*, pp. 99-101.

<sup>203</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, p. 53.

<sup>204</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, p. 53.

<sup>205</sup> Goldstein, *Political Repression in Modern America*, pp. 99-101.

<sup>206</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, p. 59.

ideological shift fractured and effectively transformed the pacifism movement. Thereafter, the anti-war pacifist coalition was much more liberal. It consisted of “social workers, publicists, activist peace crusaders, feminists, social-gospel clergymen and church leaders, with a scattering, here and there, of antiwar Socialists.”<sup>207</sup> Thus, the new anti-war pacifism movement was made up of individuals and groups who could more easily be attacked as disloyal and, therefore, not truly American.<sup>208</sup>

In addition to the development of the preparedness movement and the shift leftward of the pacifism movement, President Wilson’s reaction to the crisis also shaped the form of the anti-war movement and the way in which its supporters would be treated. The President appears to have been legitimately opposed to war throughout the early years of the conflict in Europe. After the sinking of the *Lusitania*, however, his stance toward the war began to shift.<sup>209</sup> As early as mid-1915, Wilson began to support the preparedness movement. For example, in his State of the Union address in that year, he stressed the importance of rearmament and the need to suppress disloyalty. Further, he began to more broadly foster a “national defense mentality.”<sup>210</sup>

Although, at least publicly, President Wilson continued to oppose American involvement in the war in Europe, over the next two years, he seems to have sought to ensure that the United States would be prepared to enter the war and that his administration would be politically able to do so if such involvement became necessary. His administration appears to have managed political opposition in three ways throughout the period. First, the President worked to placate progressives, many of whom opposed involvement in the war, by tying his support for the preparedness movement and his openness to the possibility of war “to an avowed commitment to

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<sup>207</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, p. 59.

<sup>208</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, p. 59.

<sup>209</sup> Brands, *Woodrow Wilson*, pp. 73-82; Goldstein, *Political Repression in Modern America*, pp. 99-101.

<sup>210</sup> Goldstein, *Political Repression in Modern America*, p. 100.

ongoing liberal reform.”<sup>211</sup> Second, he undermined radical opponents of the war by savaging them as disloyal. For example, in his 1915 State of the Union address, Wilson told Congress:

The gravest threats against our national peace and safety have been uttered within our borders. There are citizens of the United States, I blush to admit, born under other flags, but welcomed by our generous nationalization laws...who had poured the poison of disloyalty into the very arteries of our national life.<sup>212</sup>

Finally, shortly before Wilson sought a declaration of war, his administration formed an informal compact with the American Federation of Labor (AFL) in which “the AFL agreed to support the government’s war policies, the government agreed to support pro-AFL labor policies, and both joined together ‘into an alliance to crush radical labor groups such as the IWW.’”<sup>213</sup> Thus, in its efforts to build support for the war, the Wilson administration set the tone for repression and helped to define the groups of individuals who would later become the targets of that repression.

### **Restriction of Civil Liberties**

During the First World War, Americans’ civil liberties were restricted severely throughout all levels of government and through every available avenue of repression discussed in this treatise. As the reaction of American policymakers and the public to the outbreak of war and the eventuality of American involvement suggests, the targets of wartime repression were primarily those individuals who, for reasons of ethnic identity or political or religious ideology, were not yet fully accepted into American society. These points were evident in four key aspects of the crisis: restrictions enacted at the federal level, restrictions enacted at the state and local levels, the tone set by the executive branch toward civil liberties, and the deference of the Court to the executive and legislative branches.

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<sup>211</sup> Murphy, *World War I and the Origin of Civil Liberties in the United States*, pp. 61-62.

<sup>212</sup> Stone, *Perilous Times*, p. 144; Harry Scheiber, *The Wilson Administration and Civil Liberties, 1917-1921* (Ithaca: Cornell University Press, 1960), p. 6, qtd. in Goldstein, *Political Repression in Modern America*, p. 100.

<sup>213</sup> Goldstein, *Political Repression in Modern America*, pp. 121-125.

## **Federal restrictions**

For a number of reasons, but especially because President Wilson needed to build and maintain support for American intervention in Europe and because he could tolerate little criticism of his policies, the First World War represented a particular low point in the history of this country in terms of the restriction of civil liberties by the federal government. The harsh repression of dissent by the Wilson administration was evident in four aspects of the federal government's response to the crisis—repressive legislation enacted by Congress, presidential directives relating to civil liberties, federal efforts to control political discourse, and efforts on behalf of the federal government to monitor and suppress political dissidents.

## **Legislation**

During the First World War, the federal government sought to suppress dissent on behalf of those deemed potentially subversive, as policymakers feared that such criticism would make it politically impossible to engage in the war. The enactment of repressive legislation was instrumental in making the suppression of dissent possible. In contrast to the Quasi-War and the Civil War, the enactment of repressive legislation at the federal level began even before Congress passed President Wilson's resolution for war, with the passing of two relevant pieces of legislation. The first was an immigration law passed by Congress on February 5, 1917. In addition to subjecting aliens entering the country to a literacy test, it made it easier to deport foreigners for obnoxious political beliefs and affiliations. To do so, the law eliminated "the time limit for the deportation of aliens for political reasons after their entry into the U.S" and criminalized "advocacy of 'unlawful destruction of property.'"<sup>214</sup> The latter provision was meant specifically to enable suppression of the IWW. The second, passed on February 14, 1917, made threats against the President illegal. Although seemingly quite innocuous, the law was used

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<sup>214</sup> Goldstein, *Political Repression in Modern America*, p. 101.

throughout the crisis to prosecute at least sixty individuals for reasons that were often “clearly ludicrous.”<sup>215</sup>

But the bulk of repressive legislation passed by Congress was enacted after President Wilson’s declaration of war against Germany. Four pieces of legislation were particularly important; the Espionage Act, the Trading with the Enemy Act, the Anarchist Exclusion Act, and the Sedition Act.

The first piece of legislation was the Espionage Act, which became law on June 15, 1917. Although primarily concerned with preventing espionage and protecting the military, the law made it illegal during wartime:

For any person (a) willfully to ‘make or convey false reports or false statements with intent to interfere’ with the military success of the United States or ‘to promote the success of its enemies’; (b) willfully to ‘cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States’; or (c) willfully to ‘obstruct the recruiting or enlistment service of the United States.’<sup>216</sup>

Punishable by up to twenty years imprisonment and a fine of 10,000 dollars, the law also directed the Postmaster General to exclude from the mails any publications that advocated “treason, insurrection, or forcible resistance to any law of the United States.”<sup>217</sup> In other words, the Espionage Act made possible the prosecution of individuals for speech or writings potentially injurious to the war effort and authorized the exclusion of subversive material from the mails. In some respects, the law was similar to the type of legislation that might have been drafted during the Civil War had not the Lincoln administration simply issued presidential directives to ensure mobilization of the military.

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<sup>215</sup> Goldstein, *Political Repression in Modern America*, p. 109.

<sup>216</sup> Stone, *Perilous Times*, pp. 151-152.

<sup>217</sup> Goldstein, *Political Repression in Modern America*, p. 108; “Espionage Act of 1917,” qtd. in Stone, *Perilous Times*, p. 152.



In comparison with legislation that would come later, the Espionage Act of 1917 was relatively narrowly tailored. During debate over the bill, Congress made certain emendations that mitigated or removed its more repressive provisions. For example, the House defeated a provision relating to press censorship that would have made it illegal to publish information the President had deemed potentially valuable to the enemy. In addition, Congress narrowed language in two other provisions that related to inciting disaffection with the military and the Postmaster General's authority to exclude publications from the mails. Given these emendations, it is clear that Congress originally intended the Espionage Act to have a more limited focus than its actual use during wartime would suggest.<sup>218</sup>

Enacted not long after the Espionage Act, the Trading with the Enemy Act was the second major piece of legislation passed by Congress once the United States became involved in the war in Europe. Among other things, that legislation, which became law on October 6, 1917, required all foreign language newspapers, except those exempted directly by the President, "to submit to the Post Office for approval, before mailing, translations of all material concerning the government and the war."<sup>219</sup>

The third piece of legislation enacted after Congress passed President Wilson's resolution for war against Germany was the Anarchist Exclusion Act (known alternatively as the Immigration Act or the Alien Act). The Anarchist Exclusion Act, which was passed by Congress on October 16, 1918, "extended the concept of guilt by association" by authorizing the deportation of "all persons who were *members* of organizations which advocated unlawful destruction of property, or the forceful or violent overthrow of the government—a provision

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<sup>218</sup> Stone, *Perilous Times*, pp. 146-150.

<sup>219</sup> Goldstein, *Political Repression in Modern America*, p. 109.

aimed squarely at the IWW.”<sup>220</sup> Further, the law made the deportation process “administrative in nature,” meaning that potential deportees no longer received a hearing to determine their guilt.<sup>221</sup> They also lost the right of appeal.<sup>222</sup>

The last, and most egregious, piece of legislation passed by Congress after the U.S. entered the First World War was the Sedition Act of 1918, which was actually an amendment to the Espionage Act of 1917. In legal and practical effect, the Sedition Act criminalized a wide range of dissent from the policies of the United States government. For example, the law made it illegal during wartime:

To willfully utter, print, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States.<sup>223</sup>

As a further example of the overtly repressive nature of the bill, the Espionage Act made it a crime for any person “by word or act to support or favor the cause of any country with which the United States is at war or by word or act to oppose the cause of the United States.”<sup>224</sup>

In criminalizing criticism of the government, the Sedition Act of 1918 mirrored closely the Sedition Act passed by Congress in 1798 during the Quasi-War, which was widely and roundly condemned after the end of that crisis. However, one major difference separates the two pieces of legislation. Whereas the Sedition Act of 1798 provided truth as a defense of one’s speech and required the government to prove the intent of the speaker to cause harm, the Sedition Act of 1918 contained neither of these tests.<sup>225</sup> Therefore, under its provisions, an individual could be arrested if his or her speech or writing could be construed as having done

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<sup>220</sup> Goldstein, *Political Repression in Modern America*, p. 110.

<sup>221</sup> Stone, *Perilous Times*, p. 181.

<sup>222</sup> Stone, *Perilous Times*, p. 181.

<sup>223</sup> Stone, *Perilous Times*, p. 186.

<sup>224</sup> Goldstein, *Political Repression in Modern America*, p. 108.

<sup>225</sup> Stone, *Perilous Times*, pp. 188-191.

some type of harm to the United States government, regardless of whether the criticism was true and regardless of whether he or she intended to cause harm.

### *Presidential directives*

Complementing the repressive legislation enacted at the federal level, President Wilson issued at least two major presidential proclamations and executive orders affecting Americans' civil liberties. First, on April 6, 1917, in the proclamation in which he declared war against Germany, President Wilson, acting pursuant to the authority granted to him during wartime by the Alien Enemies Act of 1798, established a number of regulations governing the treatment of enemy aliens for the duration of the conflict. The President's proclamation "made all aliens subject to summary arrest" for offenses ranging from owning a firearm or other "implement of war" to being within a half mile "of any Federal, or State fort, camp, arsenal, aircraft station, Government or naval vessel, navy yard, factory, or workshop for the manufacture of munitions of war or of any products for the use of the army or navy."<sup>226</sup> One of the more repressive regulations established forbid enemy aliens to "write, print, or publish any attack or threats" against the federal, state, and local governments of the United States."<sup>227</sup>

Later, in the fall of 1917, President Wilson issued another presidential proclamation that modified and supplemented the regulations established in April. Wilson's second proclamation, which, like the first, concerned "all natives, citizens, denizens, or subjects of Germany" above the age of fourteen and residing within the United States, tightened the travel restrictions already imposed on enemy aliens, empowered the Attorney General to tighten such restrictions further as

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<sup>226</sup> Wilson, *President Wilson's State Papers and Addresses* (New York: George H. Doran Company, 1918), Google Book Search, 12 Jan. 2009  
<[http://books.google.com/books?id=u2suAAAAIAAJ&printsec=titlepage&dq=%22April+6%22+Wilson+proclamation&client=firefox-a&source=gbs\\_summary\\_r&cad=0](http://books.google.com/books?id=u2suAAAAIAAJ&printsec=titlepage&dq=%22April+6%22+Wilson+proclamation&client=firefox-a&source=gbs_summary_r&cad=0)>, pp. 383-387.

<sup>227</sup> Wilson, *President Wilson's State Papers and Addresses*, pp. 383-387.

he deemed necessary, and required all enemy aliens to register with the government.<sup>228</sup> The proclamation stipulated that “an alien enemy shall not change his place of abode or occupation or otherwise travel or move from place to place without full compliance with any such regulations as the Attorney General of the United States” might authorize.<sup>229</sup> As an example of the repressive nature of the proclamation, the sixteenth regulation barred enemy aliens from “ascend[ing] into the air in any airplane, balloon, airship, or flying machine.”<sup>230</sup> While these proclamations may have been intended to protect and to ensure the success of the U.S. military, they were excessive and represented an unnecessary infringement on individual liberty (although they did not apply to American citizens).

### **Efforts to control political discourse**

In addition to repressive legislation and presidential directives regarding enemy aliens, the Wilson administrations’ attempted to control political discourse both by censoring the press and by flooding the marketplace of ideas with government propaganda. During World War I, the Wilson administration actively censored the press using the Espionage Act and the Trading with the Enemy Act, both of which were passed within the first six months of American involvement in the war in Europe. Throughout the crisis, Postmaster General Albert Burleson used the “nonmailability” provision of the Espionage Act of 1917, which authorized him to exclude publications from the mail that advocated “treason, insurrection, or forcible resistance to any law of the United States,” to censor a wide range of publications that he deemed subversive.<sup>231</sup>

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<sup>228</sup> United States, Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918* (Washington: Government Printing Office, 1918), Google Book Search, 12 Jan. 2009 <[http://books.google.com/books?id=Av0mAAAAMAAJ&printsec=titlepage&source=gbs\\_summary\\_r&cad=0](http://books.google.com/books?id=Av0mAAAAMAAJ&printsec=titlepage&source=gbs_summary_r&cad=0)>, pp. 679-682; Goldstein, *Political Repression in Modern America*, pp. 108-109.

<sup>229</sup> United States, Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918*, pp. 679-682.

<sup>230</sup> United States, Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918*, pp. 679-682.

<sup>231</sup> Goldstein, *Political Repression in Modern America*, p. 109.

Although the Congress that passed the Espionage Act did not intend it to be used to censor the press, or at least sought to limit the extent to which it could be used to do so (as evidenced by the significant emendations made to the bill), Burleson chose to narrowly define the range of acceptable speech.<sup>232</sup>

By the end of the war, he had applied the Espionage Act to at least 75 different newspapers. The most notable targets of Burleson's program of censorship were anarchist, communist, black, and Irish publications; however, the Postmaster General also applied the Espionage Act to a range of other publications. These included the *Jeffersonian* (whose editor intended to challenge the constitutionality of conscription), the *Rebel* ("which, coincidentally, had exposed the eviction of tenant farmers and their replacement by unpaid tenant labor in land Burleson owned")<sup>233</sup>, and pamphlets produced by the National Civil Liberties Bureau (NCLB) that "[deplored] mob violence and [explained] the beliefs of conscientious objectors."<sup>234</sup>

In contrast to the Espionage Act, which was used to censor a variety of publications, the Trading with the Enemy Act was directed more narrowly against German-language newspapers. It contained a provision stipulating that all foreign language newspapers, except those exempted by the President, must submit to the Post Office translations of material to be published before that material could be sent through the mails. That legislation, coupled with widespread public hostility by Americans to Germany, not only forced German-language newspapers to adopt a deferential tone toward the government but resulted in the closing, by the end of 1919, of roughly forty-seven percent of the German newspapers operating in the United States. The

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<sup>232</sup> Stone, *Perilous Times*, pp. 146-153, p. 180.

<sup>233</sup> Goldstein, *Political Repression in Modern America*, p. 114.

<sup>234</sup> Stone, *Perilous Times*, pp. 180-181.

ultimate damage was even more severe in that the circulation of the remaining publications dropped by roughly two-thirds.<sup>235</sup>

Complementing its efforts to censor the press, the Wilson administration sought to flood the marketplace of ideas with government propaganda through the creation of the Committee on Public Information (CPI) on April 14, 1917.<sup>236</sup> A unique invention in the history of wartime repression, the CPI worked to cultivate “public support and patriotic fervor” for involvement in the war in Europe by producing and widely disseminating “pamphlets, news releases, speeches, newspaper editorials, political cartoons, and even motion pictures.”<sup>237</sup> Throughout the crisis, the CPI, under the direction of publicist George Creel, “concentrated on two main themes: feeding hatred of the enemy and promoting loyalty to the nation.”<sup>238</sup> With these goals in mind, the Committee on Public Information attacked all things German, producing war movies that “depicted unspeakable German atrocities” and writings that “included vitriolic attacks on German culture, false charges that Germans and German Americans were orchestrating criticism of the Wilson administration and incendiary attacks on the loyalty of those who questioned the war.”<sup>239</sup> For the CPI, these vicious attacks were extremely successful as they fed into and spurred nativist sentiments on behalf of the American people and “unleashed new demands for conformity and blind allegiance.”<sup>240</sup>

The activities of the Committee on Public Information during the First World War were not unconstitutional and there are certainly those who would not consider its actions a violation

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<sup>235</sup> Goldstein, *Political Repression in Modern America*, pp. 109-110.

<sup>236</sup> George Creel, *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 & Brothers Publishers, 1920), Google Book Search, 13 Jan. 2009  
<[http://books.google.com/books?id=ItdmAAAAMAAJ&printsec=frontcover&dq=%22Committee+on+Public+Information%22+Creel&lr=&as\\_br=1&client=firefox-a#PPA158,M1](http://books.google.com/books?id=ItdmAAAAMAAJ&printsec=frontcover&dq=%22Committee+on+Public+Information%22+Creel&lr=&as_br=1&client=firefox-a#PPA158,M1)>, p. 158.

<sup>237</sup> Stone, *Perilous Times*, p. 153.

<sup>238</sup> Stone, *Perilous Times*, p. 154.

<sup>239</sup> Stone, *Perilous Times*, p. 154.

<sup>240</sup> Stone, *Perilous Times*, pp. 153-155.

of Americans' civil liberties. Nevertheless, as Geoffrey Stone points out, in *Perilous Times*, there is certainly some danger to free speech posed by excessive government propagandizing. The question of whether the Committee on Public Information crossed the "line between responsible advocacy and irresponsible manipulation of public opinion" is certainly arguable.<sup>241</sup>

Nevertheless, it is clear, at the very least, that the CPI was heavy-handed in its efforts to convey to the American people the position of the United States Government. For example, while Frank Barnette found that the CPI was effective, he wrote that "for modern tastes [it] was too zealous, too indifferent to the nuances of the first amendment, and too prone to overstate (even fabricate) the 'Atrocities of the Hun.'"<sup>242</sup>

### **Efforts to monitor and suppress dissidents**

Finally, the federal government attempted to monitor and suppress political dissent through direct prosecution, surveillance, deportation, denaturalization, and loyalty laws and by encouraging the formation of quasi-vigilante patriotic groups such as the American Protective League (APL).

As was the case during the Quasi-War, the prosecution of political dissidents by the Wilson administration was heavily political in nature, with most individuals arrested for voicing opposition to the war rather than for committing overt acts, such as demonstrations. By the end of the war, at least 2,100 people had been indicted under the Espionage and Sedition Acts, with over 1000 of those arrested subsequently convicted, and at least 100 of these eventually "sentenced to jail terms of ten years or more."<sup>243</sup>

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<sup>241</sup> Stone, *Perilous Times*, pp. 154-155.

<sup>242</sup> Frank Barnett, "Twelve Steps to Reviving American PSYOP," *Political Warfare and Psychological Operations: Rethinking the US Approach*, Ed. Frank Barnett and Carnes Lord (Washington, D.C.: National Defense University Press, 1989), Google Book Search, 13 Jan. 2009  
<[http://books.google.com/books?id=ygpJhCSUK14C&pg=PA210&dq=%22Committee+on+Public+Information%2+Creel&lr=&as\\_brr=1&client=firefox-a#PPA209,M1](http://books.google.com/books?id=ygpJhCSUK14C&pg=PA210&dq=%22Committee+on+Public+Information%2+Creel&lr=&as_brr=1&client=firefox-a#PPA209,M1)>, pp. 210-211.

<sup>243</sup> Goldstein, *Political Repression in Modern America*, p. 113.

Wartime prosecutions were directed chiefly at three groups—the Industrial Workers of the World (IWW), the Socialist Party of America (SPA), and, to a lesser degree, the People’s Council of America for Peace and Democracy. Throughout the crisis, the federal government sought “to smash” the radical IWW for its “unwilling[ness] to accept the progressives’ dream of class harmony” through an intensive campaign of repression.<sup>244</sup> Efforts to suppress the group included strike-breaking by federal troops, an investigation of the IWW by the Justice Department, and raids on the IWW’s Chicago headquarters and union halls throughout the country, as well as raids on the homes of members of the IWW (commonly known as “Wobblies”). The first major group of indictments against the IWW occurred in September of 1917, when over 166 Wobblies were indicted by a federal grand jury on the grounds that the organization’s strikes constituted “a criminal conspiracy to interfere with the war effort and that IWW members had conspired to obstruct the draft and violate the espionage act.”<sup>245</sup> Subsequent to that indictment, another 137 members of the IWW were arrested under the Espionage and Sedition Acts in Kansas, Oklahoma, California, and Nebraska, with arrests continuing throughout the war. By the time the First World War drew to a close, “virtually all persons who had played any important part in IWW affairs had been arrested.”<sup>246</sup>

In addition to the IWW, the Socialist Party of America (SPA) was also a major target of federal repression throughout the crisis. As was the case with the IWW, the war provided an excuse for the Wilson administration to lash out at the political ideology represented by the Socialist Party. In advance of the congressional election of 1918, federal agents raided the SPA’s Chicago headquarters and began to arrest leading Socialists, including an SPA candidate for Congress, an SPA gubernatorial candidate in New Jersey, an SPA mayoral candidate in

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<sup>244</sup> Goldstein, *Political Repression in Modern America*, p. 115.

<sup>245</sup> Goldstein, *Political Repression in Modern America*, p. 117.

<sup>246</sup> Goldstein, *Political Repression in Modern America*, pp. 115-119.



Cleveland, and three SPA leaders in Ohio. After “tremendous socialist gains” in the 1918 election, the federal campaign against the SPA became significantly more severe, with the federal government returning indictments for sedition “against virtually every major SPA leader,” including Eugene Debs.<sup>247</sup>

The last major group targeted by the federal government during the First World War was the People’s Council of America for Peace and Democracy, which, as its name suggests, opposed American involvement in the war in Europe. Although a major target of repression, the People’s Council was a lesser focus of the government’s campaign than either the IWW or the SPA. During the crisis, activities on behalf of the federal government to repress the People’s Council included an investigation of its activities by the Justice Department, a raid of its headquarters by federal agents, and the scattered prosecution of individuals who spoke at its meetings or distributed its propaganda.<sup>248</sup>

The government’s program of prosecuting dissent was marked, throughout the crisis, by the inability of “high-ranking federal officials” to control their subordinates. Thus, Attorney General Thomas Gregory occasionally discovered that agents in his own department had launched raids of dissident groups on their own initiative, as was the case in September of 1918, when “Justice Department agents acting without Gregory’s approval sacked the offices of the [National Civil Liberties Bureau].” The inability of federal authorities to control lower-ranking officials was perhaps best demonstrated by the treatment of conscientious objectors (CO’s). Despite the fact that Secretary of the Department of War, Newton Baker, wished to treat CO’s with leniency, CO’s, who were interned in military camps for the duration of the war, were subjected to extremely harsh treatment. CO’s were “severely beaten, placed in solitary

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<sup>247</sup> Goldstein, *Political Repression in Modern America*, pp. 119-120.

<sup>248</sup> Goldstein, *Political Repression in Modern America*, p. 121.

confinement, handcuffed for hours to cell bars, fed only bread and water, pricked with bayonets and/or immersed head first in the filth of camp latrines.”<sup>249</sup> The treatment of conscientious objectors was so harsh that by the end of the war only 3,989 of the 20,873 CO’s interned “refused to accept any kind of military duty.”<sup>250</sup>

Complementing its efforts to suppress dissent by prosecuting individuals under the Espionage and Sedition Acts, the Wilson administration also ordered the organized surveillance of enemy aliens and dissident political groups for the first time in the history of American national crises. In the months before President Wilson sought from Congress a declaration of war against Germany, the Justice Department ordered the creation of custodial detention lists, lists of aliens “to be arrested immediately in the event that war was declared,” and urged “local police chiefs and federal marshals” to keep tabs on enemy aliens residing within their jurisdiction.<sup>251</sup> Later, after war was declared, the Wilson administration massively expanded the strength and scope of the federal internal security agencies. For example, the military intelligence agencies expanded in size from two officers in 1917 to thirteen hundred officers and civilian employees over the course of the war. After their expansion and throughout the crisis, the military intelligence agencies engaged in the unprecedented surveillance of a wide range of groups considered to be subversive, such as the IWW, the SPA, and the NCLB.<sup>252</sup>

The Wilson administration also engaged in an extensive campaign to deport and denaturalize enemy aliens and political dissidents. In its campaign to deport subversive aliens, the Wilson administration applied two pieces of immigration legislation that resulted from

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<sup>249</sup> Goldstein, *Political Repression in Modern America*, p. 112.

<sup>250</sup> Goldstein, *Political Repression in Modern America*, pp. 112-113.

<sup>251</sup> Goldstein, *Political Repression in Modern America*, p. 101.

<sup>252</sup> Goldstein, *Political Repression in Modern America*, p. 110.

mounting nativist sentiment and the perceived need to suppress political ideologies advocating for (or even leaning toward) anarchism and communism, such as the IWW.

The first piece of legislation, entitled “Regulating Immigration of Aliens to, and Residence of Aliens in, the United States” (discussed earlier) was an immigration law passed months before the President’s declaration of war against Germany. It subjected aliens entering the United States to a literacy test and made it easier to deport foreigners for political reasons.<sup>253</sup> The second was the Anarchist Exclusion Act of 1918, which made it even easier to deport foreigners based on their political beliefs and affiliations by authorizing the deportation of aliens enrolled in groups that advocated the illegal destruction of property or the overthrow of government. Further, to achieve the same end, the law eliminated the judicial aspect of the deportation process, thereby removing the potential deportee’s right to a hearing and an appeal.<sup>254</sup> By the end of the war, 687 aliens had been arrested and 60 deported pursuant to these two laws. Of the 687 arrested, 162 aliens had their orders cancelled, while another 88 people awaited deportation by November of 1918.<sup>255</sup>

Although much less frequent, there were also instances during the war when the federal government attempted to denaturalize naturalized American citizens by arguing that these individuals had not been sincerely attached to the principles enshrined in the United States Constitution at the time of their naturalization. For example, a German immigrant had his citizenship revoked on the grounds that his refusal to contribute to the Red Cross and the YMCA

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<sup>253</sup> Goldstein, *Political Repression in Modern America*, p. 101; United States, Department of Labor, Bureau of Immigration, *Immigration Laws (Act of February 15, 1917)* (Washington: Government Printing Office, 2006), Google Book Search, 3 Mar. 2009  
[http://books.google.com/books?id=82UAAAAAYAAJ&dq=february+5+1917+immigration+law&printsec=frontcover&source=bl&ots=Go5fYRIgb3&sig=10n-cCHQeECZ7fAz5zd5ZZ\\_Rvwk&hl=en&ei=52ysSZSaBZDdnQeTkoS6Bg&sa=X&oi=book\\_result&resnum=1&ct=result#PPA3,M](http://books.google.com/books?id=82UAAAAAYAAJ&dq=february+5+1917+immigration+law&printsec=frontcover&source=bl&ots=Go5fYRIgb3&sig=10n-cCHQeECZ7fAz5zd5ZZ_Rvwk&hl=en&ei=52ysSZSaBZDdnQeTkoS6Bg&sa=X&oi=book_result&resnum=1&ct=result#PPA3,M) >, p. 3.

<sup>254</sup> Goldstein, *Political Repression in Modern America*, p. 110; Stone, *Perilous Times*, p. 181.

<sup>255</sup> Goldstein, *Political Repression in Modern America*, p. 110.

for political reasons (he believed that to do so would “harm his native land”) demonstrated that he had had “a mental reservation” about becoming an American when he renounced his German citizenship thirty-five years earlier.<sup>256</sup>

On top of efforts to monitor and suppress dissent by prosecuting, surveilling, and deporting or denaturalizing those deemed to be subversive, the Wilson administration was also responsible for instituting a loyalty program designed to filter out and block “disloyal” individuals from employment with the federal government. On April 7, 1917, the day after he declared war against Germany, President Wilson ordered the creation of a loyalty program to remove any federal employee deemed harmful to the public welfare because of their “conduct, sympathies or utterances, or because of other reasons growing out of the war.”<sup>257</sup> Further, he authorized the Civil Service Commission (CSC) to refuse employment applications from disloyal individuals. That loyalty program resulted in frequent dismissal of federal employees throughout the crisis and refusal by the CSC to accept the employment applications of nearly 900 people.<sup>258</sup>

One last aspect of the Wilson administration’s wartime efforts to monitor and suppress dissent, which was, at the time, unique in the history of American national crises, was its role in encouraging the creation and supporting the activities of civic organizations “dedicated to informing the authorities of possible disloyalty.”<sup>259</sup> Groups of that type that were formed during the war included the American Protective League, the “Knights of Liberty, the Boy Spies of America, the Sedition Slammers, and the Terrible Threateners.”<sup>260</sup> Although these organizations

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<sup>256</sup> Goldstein, *Political Repression in Modern America*, p. 110.

<sup>257</sup> Scheiber, *The Wilson Administration and Civil Liberties*, pp. 14-15, qtd. in Goldstein, *Political Repression in Modern America*, p. 109.

<sup>258</sup> Goldstein, *Political Repression in Modern America*, p. 109.

<sup>259</sup> Stone, *Perilous Times*, p. 156.

<sup>260</sup> Stone, *Perilous Times*, p. 156.

were created to inform the authorities of disloyalty, their activities often stretched far beyond that relatively limited mandate, verging on vigilantism.

The largest, most powerful, and most recognized of these civic groups was the American Protective League (APL), which was endorsed by the Department of Justice.

The official purpose of the APL...was to help the government with such matters as food rationing and putting the conscription machinery into operation, along with specific intelligence operations such as investigating the loyalty of soldiers and governmental personnel and...investigating the loyalty of Americans who wished to leave the country for any reason.<sup>261</sup>

Throughout the war, the APL met these objectives through a variety of illegal practices that the Justice Department tacitly condoned for much of the crisis. In differing degrees, APL agents made arrests, “instigated attacks on radicals and disrupted meetings of unionists and socialists,” “infiltrated radical organizations,” and even “burglarized, wiretapped, bugged, and opened the mail” of radical groups.<sup>262</sup>

Today, the American Protective League is perhaps best remembered for its participation in slacker raids, in which federal, state, and local authorities indiscriminately interrogated American males in an effort to catch draft dodgers. As an example of the excesses and the general inefficiency of these raids, Goldstein discusses a raid in Chicago that lasted three days and resulted in the interrogation of 150,000 people. Of these, 16,000 were arrested, with 1,465 found guilty of dodging the draft either by failing to register or by deserting the military. Thus, in an intensive three-day raid, less than one percent of the 150,000 people interrogated were found guilty of evading the draft. By the end of the war, 40,000 draft dodgers had been arrested in the course of slacker raids led or assisted by the APL. If a similar rate of arrests to interrogations held steady, roughly 400,000 people were interrogated for desertion during the war. Despite its

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<sup>261</sup> Goldstein, *Political Repression in Modern America*, p. 111.

<sup>262</sup> Goldstein, *Political Repression in Modern America*, p. 111.

excesses, Attorney General Gregory did not “impose even minimal controls on APL activity until late 1918.”<sup>263</sup>

### **State and local restrictions**

During the First World War, the restriction of civil liberties by the federal government was mirrored by state and local governments to a fairly large extent. State and local governments enacted and implemented legislation to repress dissent, created patriotic anti-radical organizations known as Councils of Defense, and, in some instances, tacitly condoned mob violence against individuals deemed subversive. The first major state or local law passed to suppress dissent was a criminal syndicalism law enacted in Idaho on March 14, 1917, less than a month before President Wilson declared war against Germany. The law followed strong IWW growth in the Idaho lumber industry. It made it illegal to advocate, or to be a member of a group advocating, “crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.”<sup>264</sup>

After the United States became involved in the war in Europe, more state and local governments began to pass repressive legislation. By the end of 1918, “seven states and territories” had enacted criminal syndicalism or sedition laws and eleven states had enacted laws barring displays of opposition to the war that “rang[ed] from speaking against the war to attempting to persuade people not to work in war-related industries and not to enlist in the army.”<sup>265</sup> At the local level, a number of cities passed legislation that outlawed sedition, banned the display of the red flag, made criminal syndicalism a punishable offense, and restricted, or in

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<sup>263</sup> Goldstein, *Political Repression in Modern America*, p. 112.

<sup>264</sup> Goldstein, *Political Repression in Modern America*, p. 101.

<sup>265</sup> Goldstein, *Political Repression in Modern America*, pp. 127-128.

some cases forbade, public assembly. These laws were particularly concentrated in the West, where the IWW was strongest.<sup>266</sup>

The number of people arrested during wartime pursuant to these laws is unclear. However, the arrest records of Montana and Idaho provide insight into the scope of their application. In Montana, laws enacted at the state and local level against criminal syndicalism and sedition resulted in the arrest of 134 people and 52 convictions. In Idaho, the criminal syndicalism law enacted in 1917 (discussed above) resulted in over 200 arrests and 31 convictions.<sup>267</sup> Although the records of Montana and Idaho may not be representative given the strength of the IWW in those states, they demonstrated the willingness of state and local governments to punish dissent.

While the enactment of legislation designed to repress dissent represented the most blatant form of repression committed by state and local governments, the Councils of Defense were the largest and most effective instruments of repression at that level. Authorized by the governor of each state, and in some cases given broad authority by state legislatures, the state and local Councils of Defense represented “a network of officially sponsored patriotic organizations” with wide-ranging activities, often bordering on repression.<sup>268</sup> For example, Councils of Defense in Minnesota, Iowa, and Wisconsin advocated the expulsion of Wisconsin Senator Robert La Follete from the U.S. Senate. In Fairview, Oklahoma, the local Council of Defense sold the car of a man who had not bought enough war bonds and then gave him “thirty days to either claim the bonds or see them given to the Red Cross.”<sup>269</sup> In many cases, state and local Councils of Defense specifically sought to suppress certain groups or political ideologies,

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<sup>266</sup> Goldstein, *Political Repression in Modern America*, pp. 127-128.

<sup>267</sup> Goldstein, *Political Repression in Modern America*, p. 128.

<sup>268</sup> Goldstein, *Political Repression in Modern America*, pp. 128-129.

<sup>269</sup> Goldstein, *Political Repression in Modern America*, pp. 129-130.

such as the Industrial Workers of the World (IWW) and the Non-Partisan League (NPL), a radical farmer's organization that leaned toward socialism. For example, the state Council of Defense in Minnesota "organized a private military force of fifty thousand men who led a vigilante campaign against Wobblies and other non-conformists," while the state council of North Dakota "virtually outlawed strikes and IWW organizational activity."<sup>270</sup>

Aside from passing and applying legislation meant to suppress dissent, and creating repressive Councils of Defense, state and local governments were also responsible, for tacitly supporting mob violence against subversives. According to records from the National Civil Liberties Bureau, there were 164 incidents of mob violence against political dissidents from April 1917 to April 1919. The most frequent targets of violent attacks were German-Americans, members of the IWW, the SPA, the People's Council, and the NPL. Although not all of these incidents of violence constituted state or local repression, there were many incidents in which local authorities "either participated or stood by while violence occurred."<sup>271</sup>

### **Executive tone toward civil liberties**

In addition to repression at the federal, state, and local levels, the third facet of the crisis that should be considered in assessing the degree to which Americans' civil liberties were restricted during the First World War, is the tone set by the executive branch with regard to the protection of civil liberties. While the restriction of civil liberties by federal, state, and local governments makes clear the nature of repression during the crisis, the tone set by the executive suggests more broadly the degree of deference accorded Americans' civil liberties. This tone determines to a large degree the willingness of policymakers throughout the federal government to respect the constitutional rights of dissidents. Most broadly, the Wilson administration set the

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<sup>270</sup> Goldstein, *Political Repression in Modern America*, pp. 128-131, pp. 98-99.

<sup>271</sup> Goldstein, *Political Repression in Modern America*, pp. 125-127.



tone for repression in that it built and maintained support for the war by attacking foreigners and political dissidents as disloyal and potentially injurious to the cause of the United States.

In general, President Wilson was none too concerned with the protection of Americans' civil liberties. Throughout the crisis, he sought to "squench disharmony that might impede his mission of making 'the world safe for democracy'" and consistently suppressed concern for civil liberties with "invocations of patriotism and accusations of disloyalty."<sup>272</sup> Although he might not have anticipated the effect of his words, his efforts to silence dissent "fed the natural fears of a nation under stress."<sup>273</sup> Wilson's general approach to dissent demonstrated his belief in the subservience of protecting civil liberties to advancing broad military goals. This was evident in a number of his actions and statements before and during the period of American involvement in the war in Europe.

Even before he declared war against Germany in early 1917, President Wilson actively decried dissent from the policies of his administration as injurious to the cause of the United States. In doing so, he laid the foundation for repression to come. As early as 1915, President Wilson stressed the need for legislation to suppress political dissidents. In his State of the Union address of that year, he declared, "there are citizens of the United States, I blush to admit, born under other flags, but welcomed by our generous naturalization laws...who have poured the poison of disloyalty into the very arteries of our national life."<sup>274</sup> Later, in September of 1916, he declared that "certain groups and combinations" of foreigners living within the United States had "injected the poison of disloyalty into our most critical affairs, laid violent hands upon many of

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<sup>272</sup> Stone, *Perilous Times*, p. 227.

<sup>273</sup> Stone, *Perilous Times*, pp. 226-227.

<sup>274</sup> Goldstein, *Political Repression in Modern America*, p. 110.

our industries and subjected us to the shame of divisions of sentiment and purpose in which America was condemned and forgotten.”<sup>275</sup>

The prospect of war became imminent in the early months of 1917 after Germany announced that it would renew its earlier unrestricted naval campaign against commercial shipping to the Allies. Although he seemed reluctant to enter the war (despite what his more inflammatory rhetoric might have suggested at the time), President Wilson sought a declaration of war against Germany. In his speech to Congress on April 2, 1917, he asserted that Germany had “filled our unsuspecting communities and even our offices of government with spies and set criminal intrigues everywhere afoot against our national unity of counsel, our peace within and without, our industries and our commerce.”<sup>276</sup> Disloyalty, he announced, would be crushed “with a firm hand of stern repression.”<sup>277</sup> With his speech to Congress, the President continued his practice of using strident and inflammatory rhetoric to mute critics of his administration.

After the President committed the country to war in Europe, his administration began to implement the laws and institutions of wartime repression, particularly the Committee on Public Information (CPI) and the Espionage Act of 1917. These provided insight into Wilson’s approach to civil liberties and dissent, demonstrating some concern for civil liberties, but an even greater concern for ensuring that his administration would be able to commit to the war unchecked by criticism. Shortly after declaring war against Germany, President Wilson authorized the creation of the CPI in hope that it would build “public support and patriotic fervor” for the war and “arouse Americans to enlist, contribute money, and make the many other

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<sup>275</sup> Scheiber, *The Wilson Administration and Civil Liberties*, pp. 8-9, qtd. in Goldstein, *Political Repression in Modern America*, p. 100.

<sup>276</sup> Scheiber, *The Wilson Administration and Civil Liberties*, p. 17, qtd. in Goldstein, *Political Repression in Modern America*, p. 100.

<sup>277</sup> Scheiber, *The Wilson Administration and Civil Liberties*, p. 17, qtd. in Goldstein, *Political Repression in Modern America*, p. 100.

sacrifices war demands.”<sup>278</sup> But, in doing so, he expressed to Attorney General Gregory unease about the effect that the organization might have in fanning hatred and intolerance.<sup>279</sup>

The president also went out of his way to advocate directly before Congress for the most repressive provisions of legislation. As originally presented to Congress by the Attorney General, the Espionage Act contained three provisions that were potentially injurious to Americans’ civil liberties. During debate over the bill, two of these provisions were modified to narrow the language used, while the third, which would have authorized the Wilson administration to censor the press, was removed entirely.<sup>280</sup> Before the third provision was defeated, however, President Wilson appeared before Congress to advocate its inclusion in the final bill, asserting that the “authority to exercise censorship over the press...is absolutely necessary to the public safety.”<sup>281</sup>

Although President Wilson was most responsible for laying the groundwork for repression during the First World War, Attorney General Gregory also played a major role in shaping the administration’s tone toward the protection of individual liberty. In general, Gregory, like Wilson was not overly concerned with defending the sanctity of Americans’ civil liberties. His approach to civil liberties and dissent was evident in a few actions taken and statements made during the period of American involvement in the war. Most prominent among these was his encouragement and use, throughout the crisis, of patriotic civic organizations dedicated to suppressing disloyalty. In the first month after Wilson’s declaration of war, Gregory encouraged Americans “to report their suspicions [of disloyalty] directly to the Department of Justice.”<sup>282</sup> In doing so, he undoubtedly helped to fan the patriotic fervor that gave rise to voluntary patriotic groups such as the American Protective League. Later in the crisis, he employed those groups to

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<sup>278</sup> Stone, *Perilous Times*, p. 154.

<sup>279</sup> Stone, *Perilous Times*, p. 156.

<sup>280</sup> Goldstein, *Political Repression in Modern America*, p. 108; Stone, *Perilous Times*, pp. 146-153.

<sup>281</sup> “Wilson Demands Press Censorship,” *New York Times* 23 May 1917, p. 1, qtd. in Stone, *Perilous Times*, p. 149.

<sup>282</sup> Stone, *Perilous Times*, p. 157.

round up draft-dodgers. Despite their obvious excesses, Attorney General Gregory neglected to even attempt to restrain their activities until late in the war.<sup>283</sup>

Gregory's encouragement and use of patriotic groups dedicated to suppressing dissent most blatantly represented his lack of deference to the constitutional rights of political dissidents. However, this lack of deference was also evident in other, more obscure actions and statements that he made over the course of the war. For example, when Wilson expressed discomfort with the mission of the Committee on Public Information, Gregory assured him that the Justice Department needed the services of organizations of that type.<sup>284</sup> Later, after the enactment of the Espionage Act, the Attorney General complained to the American Bar Association that "most of the teeth which we tried to put in it were taken out."<sup>285</sup> Further, in another statement reflecting his lack of concern for civil liberties, Gregory expressed admiration for a resolution adopted by the Bar Association of Illinois that "declar[ed] that it would be unpatriotic and unprofessional for a lawyer to defend an alleged draft evader."<sup>286</sup>

### **Deference of the U.S. Supreme Court**

The U.S. Supreme Court's deference to the executive and legislative branches also affected the degree to which Americans' civil liberties were restricted. The Court did not rule on the constitutionality of wartime repression until after the end of the First World War. However, the deference of the federal courts suggested that the U.S. Supreme Court would probably have ruled in favor of the Wilson administration had such a case arisen. During the crisis, the federal courts were largely "a product of the times," as most judges, with the notable exception of

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<sup>283</sup> Stone, *Perilous Times*, pp. 157-158.

<sup>284</sup> Stone, *Perilous Times*, p. 156.

<sup>285</sup> Thomas Gregory, "Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice," *American Bar Association Journal*, vol. 4, pp. 305-306, qtd. in Stone, *Perilous Times*, p. 152.

<sup>286</sup> Stone, *Perilous Times*, p. 159.

justices George Bourquin, Charles Amidon, and Learned Hand, succumbed to “the mounting pressure for [the] suppression” of dissent.<sup>287</sup> The deference of federal court judges was, at least in part, the result of two aspects of the wartime climate with regard to the protection of civil liberties. First, at the time of World War I, civil liberties were not seen as universal and basic, but, rather, solely as the province of “respectable, law-abiding citizens.” Second, at that time, a “deeply rooted commitment to civil liberties within the legal profession” had not yet evolved.<sup>288</sup>

### **Return to “Normal”**

The restriction of Americans’ civil liberties during the First World War should have ended roughly with the signing of the armistice on November 11, 1918, as the end of the crisis meant that the Wilson administration no longer needed to suppress dissent. At the same time, policymakers in federal, state, and local governments could no longer exploit the crisis to destroy objectionable political ideologies. This did not occur, however, because the Red Scare occurred shortly after the cessation of hostilities in Europe. Although the balance between civil liberties and national security had begun to shift back to a more normal state in the months after the signing of the armistice, the Red Scare fostered new pressures for repression. These pressures were realized in part because of the tone set during wartime toward civil liberties, as well as the laws and institutions of repression created during the war. Like the First World War, the new crisis, which lasted from early 1919 to mid-1920, left a swath of destruction across the social and political landscape of the United States. Only when it began to decline did Americans begin to see a return to “normal.” Thus, the Red Scare effectively extended by at least two years the duration of wartime restrictions on Americans’ civil liberties.

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<sup>287</sup> Stone, *Perilous Times*, p. 160, p. 170.

<sup>288</sup> Stone, *Perilous Times*, pp. 158-160.

### End of the crisis

The arrival of American soldiers on European fields in 1917 had little impact initially on the balance between the Allied and Central Powers. However, as the war progressed, the accretion of American troops (three million soldiers by 1918 and almost four million by war's end) eventually helped to shift momentum to the Allies.<sup>289</sup> The balance shifted in the middle to late 1918, not only as a result of the buildup of American troops, but also a result of the unsuccessful German spring offensive, a successful French counter-offensive, and a series of successful Allied offensives.<sup>290</sup> With the armistice in November, 1918, fighting on the western front between the Allied nations and Germany ended. Nevertheless, fighting continued in other areas of Europe, as "the defeat and collapse of three great empires created conditions of anarchy and revolution in their former territories."<sup>291</sup>

Although the First World War effectively ended when the armistice was signed, the war was not officially over until the Paris Peace Conference in June of 1919, which produced five separate peace treaties (with Germany, Austria, Hungary, Bulgaria, and the Ottoman Empire) and created President Wilson's League of Nations. Without a doubt, the most important of these agreements was the Treaty of Versailles, which was signed on June 28, 1919 (exactly five years after the assassination of Archduke Franz Ferdinand). Although it could have been more punitive, the treaty punished Germany by disarming its military, seizing portions of its territory, subjecting it to commercial and economic restrictions, and requiring the country to pay reparations to the Allies. In doing so, it helped to create the conditions that would later lead to the ascendance of Adolf Hitler and the outbreak of another devastating European war. Beyond

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<sup>289</sup> Keegan, *The First World War*, pp. 372-377.

<sup>290</sup> Tim Travers, "The Allied Victories, 1918," *World War I: A History*, Ed. Hew Strachan (New York: Oxford University Press, 1998), pp. 278-290.

<sup>291</sup> Zara Steiner, "The Peace Settlement," *World War I: A History*, p. 291.

the Treaty of Versailles, the Paris Peace Conference was generally unsuccessful, at least in the long term, in that it failed to address sources of tension that had originally led to the war's outbreak.<sup>292</sup> Nevertheless, with the signing of the armistice in November of 1918 and the Paris Peace Conference in June of 1919, the First World War came to its end. The war had:

Ended the lives of ten million human beings, tortured the emotional lives of millions more, destroyed the benevolent and optimistic culture of the European continent and left...a legacy of political rancor and racial hatred so intense that no explanation of the causes of the Second World War can stand without reference to those roots.<sup>293</sup>

### **Duration of restrictions**

To a greater degree than in either the Quasi-War or the Civil War, the restriction of Americans' civil liberties during the First World War outlasted the end of the crisis. It is difficult to discuss the duration of these restrictions, as the Red Scare followed so closely on the heels of the end of the war in Europe, with its roots stretching to the Bolshevik Revolution in Russia in 1917 and even earlier to preexisting popular suspicion of the labor movement. Repression during the Red Scare was partly the result of the tone set toward civil liberties during wartime and was made possible, to a large degree, by the laws and institutions of repression created during the war.

The Red Scare, which began in early 1919 and waned in mid-1920, was the result of a number of domestic and international factors, that included domestic turmoil, the mounting threat of communism abroad, and a tremendous upsurge in "radicalism and militant unionism" within the United States after the war. Sources of domestic turmoil in the year after the armistice was signed included race riots in the summer of 1919, rampant inflation (which reduced real income by over ten percent in 1919 alone), a large crime wave, the deadly Spanish flu epidemic, "a brief but sharp economic recession in late 1918," and a "tremendous wave of strikes"

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<sup>292</sup> Zara Steiner, "The Peace Settlement," *World War I: A History*, pp. 291-304.

<sup>293</sup> Keegan, *The First World War*, p. 3.

throughout the period.<sup>294</sup> Further frustrating popular “desire for a return to ‘normalcy’” after the war was popular fear that the Treaty of Versailles would “[keep] the U.S. embroiled in European affairs.”<sup>295</sup>

In addition to domestic turmoil, the Red Scare was the product of a dramatic resurgence of radicalism and a significant leftward shift by labor unions. After the end of the First World War, there was a general reemergence of radicalism; “talk of a major ‘reconstruction of American society was commonplace and support for major and fundamental reforms was widespread among progressives, labor, clergymen, social workers and intellectuals.”<sup>296</sup> In addition, spurred on by recent immigration and aided by the fact that wartime repression was beginning to diminish, the Socialist Party of America made strong gains between mid-1918 to mid-1919. Undoubtedly feeding into popular fear of the communist threat, two radical left-wing splits formed from the SPA in September of 1919—the Communist Party (CP) and the Communist Labor Party (CLP). At the same time, the labor movement was also becoming more radical. After the end of the war, when the “deal” between the American Federation of Labor and the United States government (mentioned in the background section of this chapter) broke down, the AFL, hoping to retain its gains during wartime, began to become more militant. During that period, the labor movement grew rapidly and became much more active in its efforts to better the welfare of workers, as evidenced by the fact that there were 3600 “strikes involving four million workers” in 1919 alone.<sup>297</sup>

The last, and most crucial, factor that helped to give rise to the Red Scare of 1919-1920 was the growing threat of communism abroad. The Bolshevik Revolution in Russia had already

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<sup>294</sup> Goldstein, *Political Repression in Modern America*, pp. 143-144.

<sup>295</sup> Goldstein, *Political Repression in Modern America*, pp. 143-144.

<sup>296</sup> Goldstein, *Political Repression in Modern America*, p. 141.

<sup>297</sup> Goldstein, *Political Repression in Modern America*, pp. 139-143, p. 63.



occurred in 1917; however, after the end of the war, “Bolshevism seemed to be sweeping Austria and Germany.”<sup>298</sup> At the same time, many European countries were in a state of turbulence and European socialist parties “were being driven to the extreme left.”<sup>299</sup>

What finally sparked the beginning of the Red Scare was a series of incidents occurring in the first half of 1919. These included the Seattle General Strike, which stirred popular fear of “a communist revolutionary plot;” the May Day Riots, in which “police and bystanders” attacked “radicals who were peacefully celebrating the traditional labor holiday” in major cities throughout the country; and the simultaneous bombing of “the homes of public officials and private businessmen” in eight cities on June 2, 1919, including the home of U.S. Attorney General A. Mitchell Palmer.<sup>300</sup> Before the June 2 bombings even occurred, state and local governments had already begun to heavy-handedly suppress radicals. During the months between the end of the war and these bombings, a number of state and local governments passed criminal syndicalism laws, red flag laws, and laws directed against anarchism and sedition. According to one estimate, cited by Goldstein, 1400 people were arrested and 300 convicted pursuant to these laws. In addition, the New York state legislature created the Lusk Committee to investigate “‘seditious activities’ in the state.”<sup>301</sup> The committee was similar in many respects to the House Un-American Activities Committee created later.

The federal government did not fully begin to repress radicals until the latter half of 1919. However, there were some scattered instances of repression before the June 2 bombings. For example, in the first half of the year, the Secretary of Labor announced a plan to deport aliens eligible for deportation under the 1918 immigration act. In addition, Congress reacted to fears of

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<sup>298</sup> Goldstein, *Political Repression in Modern America*, pp. 143-144.

<sup>299</sup> Goldstein, *Political Repression in Modern America*, pp. 143-144.

<sup>300</sup> Goldstein, *Political Repression in Modern America*, p. 145.

<sup>301</sup> Goldstein, *Political Repression in Modern America*, pp. 145-147.

the red menace by dismantling a great deal of progressive economic legislation enacted during the war. After June 2, members of the federal government, led by Attorney General Palmer, began to engage in an active campaign to suppress all forms of radicalism. Congress provided special appropriations to the Justice Department in July to prosecute radicals, and the Attorney General created the General Intelligence Division (GID) in August, under J. Edgar Hoover, to investigate radicalism in America. Immediately thereafter, Hoover and the GID began to collect and catalog information on radicals and infiltrate radical organizations. The GID “[fostered] the Red Scare through its practice of sending out sensationalized charges against radicals to major organs of the media.”<sup>302</sup> Around the same time, Military Intelligence began to resume its wartime efforts to collect information on radicals, which had been suspended entirely in January of 1919.<sup>303</sup>

Between September and November of 1919, a number of incidents further intensified the clamor for repression during the Red Scare: the Boston Police Strike, the Great Steel Strike, and the Coal Strike of November. They further reinforced the popular view of “all unions and strikes as revolutionary conspiracies.”<sup>304</sup> These incidents led to the climax of the Red Scare—the Palmer Raids. The first raids occurred on November 7, when “federal agents raided the offices of the Union of Russian Workers (URW) in twelve cities across the country” and arrested indiscriminately, and mostly without warrants, those associated with or even “in the vicinity of” the URW.<sup>305</sup> A week later, Attorney General Palmer asked the Senate for and was granted a sedition law applicable in peacetime. Still later, in December, 242 radical aliens, including prominent anarchists Alexander Berkman and Emma Goldman, were deported *en masse*. The

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<sup>302</sup> Goldstein, *Political Repression in Modern America*, p. 149.

<sup>303</sup> Goldstein, *Political Repression in Modern America*, p. 149.

<sup>304</sup> Goldstein, *Political Repression in Modern America*, p. 153.

<sup>305</sup> Goldstein, *Political Repression in Modern America*, p. 154.

surge in the repression of radicals by the federal government inspired additional repression at the state and local level. Preceded and followed by minor raids, the “climactic event of the Red Scare” was a series of raids that occurred on January 2, 1920 in thirty cities throughout the country.<sup>306</sup> These raids resulted in the indiscriminate arrest of five to ten thousand alleged Alien CLP and CP members. Thousands were freed immediately because the government lacked any evidence of wrongdoing, while many others were prosecuted under criminal syndicalism laws.<sup>307</sup>

After the raids on January 2, the Red Scare gradually began to wane. Four factors helped to bring about the end of the crisis. First was the growing opposition of the press, the business community, and the public to the government’s campaign of repression. Second, a variety of events occurred that proved embarrassing to the government, such as the expulsion of five socialist politicians from the New York Legislature. Third, perceptions of the threat of international communism diminished at the same time that there was greater economic and social tranquility at home. Fourth, most of the radical movement had been destroyed by repression at the federal, state, and local levels.<sup>308</sup>

To a significant extent, the repression of radicalism during the Red Scare was made possible by the restriction of Americans’ civil liberties during the First World War, resulting in part from the hostile tone set toward civil liberties by the Wilson administration and the laws and institutions of wartime repression. Although the Red Scare was a distinct crisis in its own right, it was also important in assessing the degree to which wartime restrictions outlasted the end of the First World War and resulted in additional political repression. Three aspects were of particular significance in assessing the durability of wartime restrictions: the longevity and legacy of

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<sup>306</sup> Goldstein, *Political Repression in Modern America*, p. 156.

<sup>307</sup> Goldstein, *Political Repression in Modern America*, pp. 156-157.

<sup>308</sup> Goldstein, *Political Repression in Modern America*, pp. 158-163.

federal legislation; the durability of the government's efforts to monitor and suppress political dissidents; and the deference of the U.S. Supreme Court after the end of the crisis.

**Longevity and legacy of federal legislation**

The two most important pieces of civil liberties-related wartime legislation were the Espionage and Sedition Acts of 1917 and 1918, respectively. In terms of their longevity, the Espionage Act continues to be in effect, while the Sedition Act was repealed by Congress on December 13, 1920, after the end of the Red Scare.<sup>309</sup> Both of these pieces of legislation, but particularly the Sedition Act, paved the way for other forms of repressive legislation. For example, January, 1920, the Senate passed a sedition law applicable in peacetime. Further, throughout 1919, a number of states passed laws against sedition.<sup>310</sup> Thus, it is clear that legislation enacted during the First World War restricting Americans' civil liberties significantly outlasted the end of the crisis and eased the way for later similarly repressive laws.

**Durability of efforts to monitor and suppress dissidents**

Four factors are particularly relevant to assessing the durability of efforts on behalf of the federal government to monitor and suppress dissidents: the prosecution of dissent; the surveillance of radical organizations; federal efforts to deport and denaturalize; and the state of loyalty tests after the war. A number of notable Espionage and Sedition Act prosecutions, initiated in wartime, continued after the end of the crisis. However, hundreds of prosecutions were abandoned in the six months after the end of the war and the federal government granted clemency to a number of individuals already imprisoned. Further, enemy aliens imprisoned in internment camps during the war were set free, as were a number of conscientious objectors

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<sup>309</sup> Stone, *Perilous Times*, p. 230.

<sup>310</sup> Goldstein, *Political Repression in Modern America*, p. 147.

imprisoned during wartime.<sup>311</sup> In March, 1919, as Attorney General Gregory left office, to be replaced by A. Mitchell Palmer, he recommended and Wilson approved “the release or reduction in sentence of two hundred prisoners then in jail” under the Espionage and Sedition Acts.<sup>312</sup> Years later, in 1921 (after the end of the Red Scare), President Warren G. Harding pardoned well-known socialist Eugene Debs (something President Wilson had refused to do before leaving office that same year) along with twenty-four others arrested during the war. After Harding’s death, President Calvin Coolidge authorized the discharge of all individuals, arrested during wartime, who remained in prison. Still later, in 1933, President Franklin Delano Roosevelt officially pardoned all those arrested and convicted for violation of the Espionage and Sedition Acts.<sup>313</sup>

By the end of the crisis, wartime prosecutions under the Espionage and Sedition Act, as well as the suppression of dissent through legislation and other avenues, had dealt a heavy blow to the principal targets of repression—the IWW, the People’s Council, the SPA, the NPL, and the Anarchist Movement. The Industrial Workers of the World, in particular, was “dead as an effective factor in American society;” its spirit had been “crushed, the ‘victim of the most systematic campaign of extermination in American history.’”<sup>314</sup> The SPA was not similarly crushed: it was “severely weakened and its geographical and national composition...severely distorted.”<sup>315</sup> Like the IWW, the organized anarchist movement, however, was effectively put to rest by wartime repression, as well as by the deportation, during the Red Scare, of prominent anarchists Alexander Berkman and Emma Goldman.<sup>316</sup>

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<sup>311</sup> Goldstein, *Political Repression in Modern America*, p. 140.

<sup>312</sup> Stone, *Perilous Times*, pp. 231-232.

<sup>313</sup> Stone, *Perilous Times*, pp. 231-232.

<sup>314</sup> Goldstein, *Political Repression in Modern America*, p. 132.

<sup>315</sup> Goldstein, *Political Repression in Modern America*, p. 132.

<sup>316</sup> Goldstein, *Political Repression in Modern America*, pp. 131-134.

To a greater degree than the prosecution of wartime violations of the Espionage and Sedition Acts, the surveillance of political dissidents diminished after the end of the First World War. In the months after the signing of the armistice in November 1918, Attorney General Gregory ordered the American Protective League, which had wreaked so much havoc during the war, to disband and directed the Bureau of Investigation (the predecessor of the Federal Bureau of Investigation) to reduce its activities to pre-war levels. Around the same time, Military Intelligence began to reduce its investigation of radicalism and, on January 24, its agents were ordered to end their investigations. As mentioned earlier, the reduction in the surveillance of radicalism after the end of the war lasted only a short time until fear of the communist menace restored the perceived need to monitor political dissidents. In 1924, well after the end of the First World War and the Red Scare, Attorney General Harlan Stone ordered the Bureau of Investigation to end its practice of surveilling radicals.<sup>317</sup>

As prosecutions initiated during the war were gradually being dropped and as government surveillance of radicalism was declining, the federal government began to release individuals, particularly members of the IWW, arrested and detained for possible deportation. By the end of 1919, most of these persons were released. With the end of the war, the efforts on behalf of the federal government to screen “disloyalty” from the federal government were mostly terminated, at least until the Red Scare inflamed popular fears of radicalism once more. For example, in November and December of 1918, a Senate committee dismissed charges of disloyalty leveled during wartime against Senate Robert La Follette.<sup>318</sup>

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<sup>317</sup> Goldstein, *Political Repression in Modern America*, p. 140; Stone, *Perilous Times*, p. 230.

<sup>318</sup> Goldstein, *Political Repression in Modern America*, p. 140.

*Deference of the U.S. Supreme Court after the war*

The last aspect of the crisis that should be considered in assessing the degree to which wartime restrictions on Americans' civil liberties outlasted the end of the crisis is the deference of the U.S. Supreme Court to the executive and legislative branches. In seven major decisions delivered over the two years following the First World War, the U.S. Supreme Court ruled in favor of the Wilson administration's wartime restrictions of civil liberties and against political dissidents. This was the result of two factors. First, in the years after the signing of the armistice, the Court was "in firmly conservative hands," such that most justices on the Court were not inclined to protect the liberties of "anarchists, socialists, and other 'radical' dissenters."<sup>319</sup> Second, the most important cases decided by the Court relating to the restriction of civil liberties during wartime were decided during the Red Scare. Thus, it should not be surprising that the Court ruled in favor of the Wilson administration in each major case that came before it.<sup>320</sup>

Of the seven major decisions, the most important came in March and November of 1919—*Schenck v. United States*, *Frohwerk v. United States*, *Debs v. United States*, and *Abrams v. United States*. In *Schenck*, decided in March, the Court upheld the conviction of a group of individuals indicted for conspiring to obstruct military recruitment by distributing a pamphlet that opposed the draft to newly drafted men. Shortly later, in *Frohwerk*, the Court upheld the conviction of a copy editor of the *Missouri Staats Zeitung* for "conspiring to cause disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States" through his role in developing material that advocated against the war and the draft.<sup>321</sup>

In the last major civil liberties-related decision of that month, the Court ruled in *Debs* that prominent socialist Eugene Debs was guilty of violating the Espionage Act because of a speech

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<sup>319</sup> Stone, *Perilous Times*, p. 192.

<sup>320</sup> Stone, *Perilous Times*, p. 192.

<sup>321</sup> Stone, *Perilous Times*, p. 195.

he gave in Canton, Ohio in which, among other things, he praised three local socialists arrested under the Espionage Act for voicing opposition to the war. The final important case relating to wartime repression decided by the Court in 1919 was *Abrams v. United States*. In *Abrams*, the Court upheld the conviction, under the Sedition Act, of a group of Jewish immigrants from Russia who were arrested for distributing pamphlets that called for a general strike. After *Abrams*, in 1920, the Court continued to uphold wartime convictions under the Espionage and Sedition Acts in the cases of *Schaefer v. United States*, *Pierce v. United States*, and *Gilbert v. Minnesota*.<sup>322</sup>

### **Conclusion**

The First World War was a conventional, non-ideological conflict of limited duration among the nations of Europe. When this war began, the United States was strongly isolationist. To build and maintain support for the war in a reluctant nation, Wilson himself set a tone for the restriction of civil liberties, even going before Congress to advocate the suppression of dissent. He also employed a range of repressive practices to squelch any dissent that might undermine support for his war policies and impede the war effort. The abuse of Americans' civil liberties was inevitable if he was to achieve his goals. Throughout the crisis, the Wilson administration and the federal government restricted civil liberties in both overt and covert ways, using nearly every available avenue of repression, with the exception of congressional investigations. State and local governments essentially mirrored that repression of dissent. The U.S. Supreme Court did not have a chance to rule on the constitutionality of wartime repression during the crisis. When it finally did, during the Red Scare, the Court ruled in favor of the President.

Following the war, both the range of methods of repression that continued to be in place and the length of time that they were in place was greater than during any previous crises. In

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<sup>322</sup> Stone, *Perilous Times*, pp. 194-211.



large part, the greater durability of wartime repression was the result of the Red Scare, which provided new justifications for the restriction of Americans' civil liberties. That durability was evident in the longevity of wartime legislation such as the Sedition Act and in the surveillance of dissent. Indeed, the surveillance of radicals by the Bureau of Intelligence, which had been formed in the early 1900s, did not end until 1924.

From an evolutionary perspective, the First World War drew on the precedents established during past crises and set numerous precedents used in the future. Indeed, in 1918, Congress reenacted the Sedition Act of 1798, making it more severe. Later, during World War II, Congress reenacted the Espionage Act of 1917, making it applicable in peacetime. As in the Civil War, the U.S. Supreme Court exercised its power of judicial review, although it upheld wartime convictions as late as 1920. Additionally, the First World War saw the emergence of new approaches to repression such as the surveillance of dissent, as well as the use of federal intelligence agencies as agents of wartime repression.

#### **IV. WORLD WAR II (1938-1945)**

The Second World War is often uniformly seen as a “good” war with the restriction of Americans’ civil liberties during the crisis forgotten, or papered over as an anomaly. In large part, this perception is certainly due to the unquestionable virtue of the Allied cause in going to war against Hitler and Hirohito. In comparison with the gross excesses of the First World War and with the major exception of the arrest and internment of 120,000 people of Japanese ancestry living within the United States, the Second World War had a relatively mild effect on Americans’ civil liberties. However, these are unacceptable points of reference as the First World War and the wartime internment of individuals of Japanese descent represent two of the lowest points in the history of American civil liberties. In truth, although the restriction of Americans’ civil liberties was more modest than in the earlier crisis, wartime repression, during and in the years before the Second World War, was substantial given the comparatively small amount of opposition to American involvement in the war in Europe.

##### **Background of the Crisis**

The degree to which civil liberties were restricted during the Second World War can be understood by examining the international events that triggered the crisis as well as the reaction of American policymakers and the public to those events and to other developments at home that fostered a climate for repression. Beyond providing context, they also help to explain variations in the extent of repression over the course of the crisis.

##### **Trigger of the crisis**

At its simplest, the Second World War was triggered by the German invasion of Poland on September 1, 1939, an act of aggression that convinced Britain and France that appeasement had failed and that it was necessary to go to war against Germany. Over the next year and a

half, Germany overran Norway, Denmark, France, and the Low Countries. Meanwhile, the Soviet Union, which had signed a non-aggression pact with Germany in August of 1939, began to move into Poland and the Baltic states. On the other side of the world, in 1937, Japan had invaded parts of China. Particularly in the years following the invasion of Poland, Japan began to extend its influence throughout Southeast Asia as the imperiled and distracted European colonial powers increasingly became unable to defend their holdings in the region.<sup>323</sup>

Central to the underlying causes of the Second World War was the fact that it was in many ways a continuation of the First World War. It grew out of the punitive treaties of the Paris Peace Conference in 1919 (especially the Treaty of Versailles). It also grew out of the failure of the disarmament movement in the years after the end of the war, the unwillingness (or inability) of the major powers to check the first instances of aggression by Germany, Italy, and Japan, and the related failure of President Wilson's brainchild, the League of Nations.

As the rumblings of war began to sound in Europe and Asia, the United States remained determinedly neutral. After 1938 and 1939, however, it became increasingly impossible for American policymakers and, perhaps more importantly, the American public, to ignore the emerging conflict.<sup>324</sup> In 1938, German hostility toward Czechoslovakia led to the Munich agreement, in which France and Britain appeased Hitler by giving Germany the Sudetenland (a region of Czechoslovakia inhabited mostly by ethnic Germans). The United States government began to increase spending on defense and to fortify holdings throughout the Caribbean, such as the Panama Canal, the Virgin Islands, and Puerto Rico. After the devastatingly quick defeat of Poland by Germany in 1939, Congress increased defense spending to an unprecedented level and enacted the first peacetime draft bill in American history. In 1941, Congress enacted the Lend-

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<sup>323</sup> James Stokesbury, *A Short History of World War II* (New York: William Morrow and Company, 1980), pp. 15-165.

<sup>324</sup> Stokesbury, *A Short History of World War II*, p. 116.

Lend-Lease Act to loan supplies to nations that were critical to American national security (such as Britain and, after the breakdown of the Nazi-Soviet Non-Aggression Pact in June of 1941, the Soviet Union). During that time, the United States and Germany increasingly began to clash; by mid- to late-1941, both countries were effectively in a state of undeclared war.<sup>325</sup> At the same time, the U.S. also began to clash with Japan as the Japanese government sought to maneuver into the position of controlling Southeast Asia. By mid-summer, the Japanese had begun to plan for war against the United States.<sup>326</sup>

Although the U.S. was already involved in the emerging global crisis by 1940 and 1941, strong domestic isolationist sentiment officially kept the country out of the war. The event that finally precipitated American involvement in the crisis and “transformed the wars in Europe and in Asia into one gigantic global struggle,” was the bombing of the U.S. Pacific Fleet’s naval headquarters at Pearl Harbor, Hawaii on December 7, 1941.<sup>327</sup> The bombing of Pearl Harbor effectively did for the Second World War what the sinking of the *Lusitania* had almost done for the First World War—instantly galvanize the American public into a state of fervent support for American involvement in the foreign conflict. Immediately after the bombing, President Roosevelt declared war against Japan. Shortly later, on December 11, Germany and Italy responded by declaring war against the United States. American involvement in the Second World War had officially begun.<sup>328</sup> In all, “the war lasted nearly six years, and by the time it was over, much of the civilized world lay in ruins, something more than thirty million people had

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<sup>325</sup> Stokesbury, *A Short History of World War II*, pp. 117-122.

<sup>326</sup> Stokesbury, *A Short History of World War II*, pp. 161-169.

<sup>327</sup> Stokesbury, *A Short History of World War II*, p. 161.

<sup>328</sup> Martin Kitchen, *A World in Flames: A Short History of the Second World War in Europe and Asia, 1939-1945* (New York: Longman, 1990), p. 165.

been killed, great empires destroyed, and weapons of new and hitherto unimagined potential had been unleashed upon the world.”<sup>329</sup>

### **Reaction to the crisis**

Despite restrictions on civil liberties during the First World War, “a more expansive view of free expression began to emerge” in its aftermath as “Americans confronted a broad range of divisive issues, including Prohibition, contraception, evolution, labor reform, the Sacco and Vanzetti prosecution, and the economic and social upheaval caused by the Great Depression.”<sup>330</sup> Nevertheless, despite this more expansive approach to individual liberty, a climate for repression began to emerge as early as 1937 and flowered in the years that followed, especially as opposition to the war fell away in the months before and after the bombing of Pearl Harbor. This climate made possible the restriction of Americans’ civil liberties and the repression of dissent even before the United States entered the war in December of 1941.

This general climate for repression, directed at the labor movement, liberals, and radicals, began to develop subsequent to three events in 1937, each unrelated to the emerging global crisis. These included President Roosevelt’s scheme to pack the U.S. Supreme Court, the labor strikes and violence accompanying the Little Steel Strike of 1937, and the economic recession of the same year (which “wiped out all of the economic gains made since 1933 and eroded FDR’s public image as an economic magician”).<sup>331</sup> In the years that followed, three other developments helped to cement the climate for repression and to provide the impetus for restricting Americans’ civil liberties. First, the escalation of the crisis in Europe, particularly after 1939, threatened to entangle the United States and stimulated severe hatred of the German-American Bund, an American Nazi organization, giving traction to efforts to repress the group. Second, the growth

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<sup>329</sup> Stokesbury, *A Short History of World War II*, p. 15.

<sup>330</sup> Stone, *Perilous Times*, p. 236.

<sup>331</sup> Goldstein, *Political Repression in Modern America*, p. 239.

of radicalism within the U.S. (particularly the Communist Party, various fascist groups, and the German-American Bund) combined with the simultaneous growth of anti-radical groups spurred the climate for repression to new heights. Third, the Dies Committee (also known as the House Un-American Activities Committee or HUAC), created in 1938, further “fostered a repressive climate” through “continual and irresponsible charges of widespread subversion in the country at large, and particularly within the federal government.”<sup>332</sup>

As a climate conducive to repression emerged, the range of groups opposed to American involvement in the emerging global war narrowed during the months before and after the bombing of Pearl Harbor. The first major event that diminished the amount of opposition to involvement in the Second World War was the breakdown of the Nazi-Soviet Non-Aggression Pact in June of 1941, which caused the American Communist Party to embrace President Roosevelt’s policies with regard to the war (because “Russia and the U.S. were now allies”).<sup>333</sup> The second major event, the bombing of Pearl Harbor, galvanized Americans in support of President Roosevelt and his administration’s war policies.<sup>334</sup> Third, upon the outbreak of war, the American Federation of Labor (AFL), the Congress on Industrial Organizations (CIO) and the federal government agreed “to refrain from striking” in exchange for government enforcement of “the ‘maintenance of membership’ principle,” which ensured the strength of the union movement by making it difficult for union members to leave their union.<sup>335</sup>

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<sup>332</sup> Goldstein, *Political Repression in Modern America*, pp. 239-240; Stone, *Perilous Times*, p. 244.

<sup>333</sup> Goldstein, *Political Repression in Modern America*, p. 165.

<sup>334</sup> Stone, *Perilous Times*, p. 256.

<sup>335</sup> Goldstein, *Political Repression in Modern America*, p. 276; Jack Metzgar, *Striking Steel: Solidarity Remembered* (Philadelphia: Temple University Press, 2000), Google Book Search, 2 Feb. 2009 <[http://books.google.com/books?id=h\\_DX5uhaFgUC&printsec=copyright&dq=World+War+II+CIO+AFL+no-strike+maintenance#PPA27,M1](http://books.google.com/books?id=h_DX5uhaFgUC&printsec=copyright&dq=World+War+II+CIO+AFL+no-strike+maintenance#PPA27,M1)>, p. 27.

### **Restriction of Civil Liberties**

During the Second World War, Americans' civil liberties were restricted by all levels of government and using every available means of repression. In comparison with World War I, the restriction of civil liberties was relatively modest. However, as Goldstein points out, in *Political Repression in Modern America*, "in relation to the amount of dissent voiced," the repression of dissent during the Second World War was probably worse than in any other major national military crisis, "with the possible exception of the 1950-54 period" during the Cold War.<sup>336</sup> That said, it should also be noted that the Second World War was the first major national military crisis in American history in which the U.S. Supreme Court, *during* wartime, ruled in favor of political dissidents and against the claims of the President and his administration.

The restriction of Americans' civil liberties fell into two distinct periods—from 1938-1941 and from 1941-1945. The first period spans the time from the creation of the Dies Committee in May of 1938 to the bombing of Pearl Harbor on December 7, 1941. The second period covers wartime, from December 7, 1941 to the official surrender of the Japanese on September 2, 1945.<sup>337</sup> These restrictions were achieved through four primary mechanisms: restrictions enacted by the federal government, restrictions enacted by state and local governments, the tone toward the protection of civil liberties set by the executive branch, and the deference of the U.S. Supreme Court to the executive and legislative branches.

#### **Federal restrictions**

In general, Americans' civil liberties were restricted less severely at the state and local level during World War II than during World War I. In part, that was the result of the Roosevelt administrations' post-1940 efforts to centralize the repression of dissent in the federal

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<sup>336</sup> Goldstein, *Political Repression in Modern America*, p. 284.

<sup>337</sup> Stokesbury, *A Short History of World War II*, p. 376.

government. Consequently, the degree and nature of the federal restrictions themselves largely determined the extent of repression during the war. Overall, civil liberties were both heavily and broadly restricted during the Second World War in relation to the amount of dissent voiced. This was evident in four key aspects of the federal government's response to the crisis—repressive legislation enacted by Congress; presidential directives that relate to civil liberties; efforts on behalf of the federal government to control political discourse; and federal efforts to monitor and suppress political dissidents.

### **Legislation**

The Second World War was unique in the history of American national military crises in that the enactment of repressive legislation by Congress occurred almost entirely before the United States entered the war. With only one exception, every major piece of legislation restricting civil liberties was enacted between 1938-1941, after the establishment of the Dies Committee and before the bombing of Pearl Harbor. During this period, Congress enacted six major pieces of repressive legislation, as well as many other laws that contained provisions variously banning subversives from federal employment or, in the case of one bill, placing new restrictions on the issuance of visas.

The first two major pieces of legislation related to Americans' civil liberties and the emerging global crisis—the Foreign Agents Registration Act and the Hatch Act—were enacted prior to the German invasion of Poland on September 1, 1939. Congress passed the first of these, the Foreign Agents Registration Act, in June of 1938, three months after the German annexation of Austria, one month after the creation of the Dies Committee, and three months before the signing of the Munich agreement. This law, which was meant to protect the American public from the potential impact of foreign propaganda, required all foreign agents to register with the



federal government and, in doing so, to provide “information regarding their relationship to the foreign principal involved.”<sup>338</sup> Although not repressive on its face, the Post Office twisted its provisions in late 1940 to exclude certain material from the mails.<sup>339</sup> Two months later, in August of 1939 and before the German invasion of Poland, Congress enacted the Hatch Act. The Hatch Act, which generalized a repressive provision included in the Relief Appropriations Act of June 1939 (discussed below), barred from federal employment any person belonging to a “political party or organization [that] advocated the overthrow of our constitutional form of government in the United States.”<sup>340</sup> In doing so, it sanctified “the principle of guilt by association” and made it legal to punish American citizens “for abstract advocacy of violence.”<sup>341</sup>

In 1940, as Hitler gained ever-increasing control over Europe and, more broadly, as the wars in Europe and Asia looked increasingly likely to entangle the United States, the pace of enactment of repressive legislation increased. In 1940 alone, Congress enacted four major pieces of repressive legislation. The first was a reenactment in March, 1940 of the Espionage Act of 1917, making it applicable in peacetime.<sup>342</sup> As discussed in Chapter Three, the Espionage Act, which sought primarily to prevent espionage and to protect the military, contained provisions that made possible the prosecution of persons for speech or writing that was potentially injurious to the war effort. It authorized the Postmaster General to exclude writings of this type from the mails.<sup>343</sup>

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<sup>338</sup> Goldstein, *Political Repression in Modern America*, p. 244.

<sup>339</sup> Goldstein, *Political Repression in Modern America*, pp. 250-251.

<sup>340</sup> D. R. Nissen, “Federal Anti-Communist Legislation From 1931-1941,” (Un-published M. A. Thesis, University of Illinois, 1959), pp. 36-38, qtd. in Goldstein, *Political Repression in Modern America*, p. 244.

<sup>341</sup> Goldstein, *Political Repression in Modern America*, p. 244.

<sup>342</sup> Stone, *Perilous Times*, p. 251.

<sup>343</sup> Stone, *Perilous Times*, pp. 146-147.

The second major law, passed in this year, was the Smith Act (also known as the Alien Registration Act), enacted by Congress on June 28, 1940, three months after the reenactment of the Espionage Act. The Smith Act was “the first peacetime sedition law in American history since 1798;” it effectively made it illegal to champion efforts to overthrow or destroy the United States government. Further, the Smith Act banned participation or membership in groups advocating the overthrow of government, made it a crime to incite disloyalty in the military, and stipulated that aliens could be deported on the basis of their past beliefs or affiliations. In addition, the Smith Act (as its alternate name suggests) required all aliens to register with the federal government.<sup>344</sup>

The third piece of repressive legislation enacted in 1940 was the Nationality Act, which was passed on October 14. Similar in certain respects to the Smith Act, the Nationality Act authorized the denaturalization of all individuals who had once belonged to the Communist Party. Further, it barred aliens from becoming naturalized citizens if they had, within the ten years before applying, championed efforts to overthrow violently the U.S. government by circulating petitions or belonging to an organization with such a purpose. More broadly, the law banned the naturalization of all aliens not sufficiently attached to the principles enshrined in the U.S. Constitution.

Three days later, on October 17, 1940, Congress enacted the fourth major law, the Voorhis Act. This law required all organizations dedicated to overthrowing any government (particularly the United States government) or “subject to foreign control and engaged in preparation for military action” to register with the federal government and, in doing so, to provide extensive information about their activities, membership, and organizational structure.<sup>345</sup>

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<sup>344</sup> Goldstein, *Political Repression in Modern America*, p. 245.

<sup>345</sup> Goldstein, *Political Repression in Modern America*, pp. 245-246.

In addition to these six major pieces of repressive legislation, after the creation of the Dies Committee and before the attack on Pearl Harbor by the Japanese, Congress enacted a range of other laws that contained provisions restrictive of Americans' civil liberties. For example, throughout this period, Congress passed a number of appropriations bills that forbid the payment of funds to individuals advocating the overthrow of government. Complementing those appropriations bills, the Selective Service Act, which was passed in September of 1940 and was "the first peacetime draft bill in American history," contained a provision stipulating that members of the Communist Party and the German-American Bund could not fill vacancies in employment created by the draft.<sup>346</sup>

After late 1941 and until the end of the war in 1945, Congress enacted only one other major piece of legislation that infringed on Americans' civil liberties—the Smith-Connally Act of June 1943. The lack of legislative activity during this period was due to two simple realities. First, for reasons discussed earlier, the amount of opposition to involvement in the war dropped precipitously after the Japanese attack on Pearl Harbor. Second, by the time President Roosevelt declared war against Japan, "Congress had exhausted most of the repressive possibilities available."<sup>347</sup> Less important for Americans' civil liberties than some of the laws enacted during the earlier period, the Smith-Connally Act gave President Roosevelt the power to seize factories essential to the war effort that were threatened with a stoppage in production. It also criminalized strike advocacy in seized factories. Further, the law discouraged stoppages in the production of materials necessary to the maintenance of the war effort by "requir[ing] union officials to

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<sup>346</sup> Goldstein, *Political Repression in Modern America*, pp. 245-247.

<sup>347</sup> Goldstein, *Political Repression in Modern America*, p. 246.

observe a thirty-day cooling off period and to obtain a majority vote from union members before striking in other plants.”<sup>348</sup>

### *Presidential directives*

During the period of American involvement in World War II, and in the years preceding it, President Roosevelt issued a number of presidential directives (in the form of executive orders and presidential proclamations) that heavily restricted Americans’ civil liberties. Today, we remember these directives as the worst abuses of individual liberty to arise out of the Second World War and, more broadly, as some of the most notable instances of abuse in the history of American national crises. The most violative presidential directives were issued in the months after the bombing of Pearl Harbor. However, the restriction of Americans’ civil liberties by presidential directive began earlier.

In contrast to the repressive laws enacted by Congress, the bulk of repressive presidential directives were issued after the bombing of Pearl Harbor and President Roosevelt’s subsequent declaration of war against the Japanese. Between 1938 and 1941, Roosevelt issued only one major presidential directive related to civil liberties and the emerging global war. Responding to a stoppage in production resulting from a labor dispute at the North American Aviation Company factory in Inglewood, California, Roosevelt issued an executive order on June 9, 1941 that authorized the Secretary of War to seize the plant and thereby ensure the continued production of goods necessary to the maintenance of the war effort. Once deployed to break the strike (which the president somewhat disingenuously portrayed as “a purely political strike rather

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<sup>348</sup> Goldstein, *Political Repression in Modern America*, pp. 276-277.

than a legitimate labor disagreement”), federal troops “forbid picketing within a mile of the plant and in effect established martial law within this area.”<sup>349</sup>

The worst of the presidential directives were a series of proclamations, issued on December 7 and 8, 1941 that established regulations to govern the control of enemy aliens during wartime and an executive order, 9066, that, among other applications, formed the basis for the wartime internment of individuals of Japanese descent. These three proclamations—each almost identical in content, but covering a different country (Japan, Germany, and Italy) called on enemy aliens to abide by the laws of the United States government. More importantly, however, Proclamations 2525, 2526, and 2527 established regulations governing the treatment of enemy aliens during wartime, as per the authority granted the president pursuant to the Alien Enemies Act of 1798. Similar to the proclamation issued by President Wilson in his 1917 declaration of war against Germany, these three directives levied travel restrictions on enemy aliens and made such aliens subject to summary arrest for offenses ranging from possessing firearms, cameras, short-wave radios, and “documents or books in which there may be invisible writing” to ascending into the air without the explicit authorization of the Attorney General or Secretary of War.<sup>350</sup> Even more damaging, these proclamations also directed the summary arrest and internment of enemy aliens “deemed dangerous to the public peace or safety of the United States” and authorized the Attorney General and Secretary of War to exclude enemy aliens from areas of military importance.<sup>351</sup>

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<sup>349</sup> Goldstein, *Political Repression in Modern America*, p. 252; Franklin Roosevelt, “Executive Order 8873 on the Seizure of the North American Aviation Company Plant at Inglewood, California,” 9 Jun. 1941, *The American Presidency Project*, 7 Feb. 2009 <<http://www.presidency.ucsb.edu/ws/?pid=16126>>.

<sup>350</sup> Franklin Roosevelt, “Proclamation 2525: Control of Japanese Aliens,” *U.S. Immigration and Naturalization Laws and Issues: A Documentary History*, ed. Michael LeMay & Elliot Barkan (Westport: Greenwood Press, 1999), pp. 184-187.

<sup>351</sup> Franklin Roosevelt, *U.S. Immigration and Naturalization Laws and Issues: A Documentary History*, pp. 184-187.

During the course of the war, these directives had two important effects. Most obviously, they subjected the roughly 890,000 enemy aliens of Japanese, German, and Italian descent living within the United States to a variety of controls. While the members of all three groups felt the effects of these restrictions to some degree, the Japanese fared far worse than the Germans, who, in turn, fared worse than the Italians.<sup>352</sup> This resulted from two factors. First, Japanese enemy aliens experienced the weight of these controls more heavily perhaps because of prejudice and perhaps because they were more easily targeted. Second, for reasons that are out of the scope of this treatise (such as prejudice against individuals of Japanese descent and the relatively greater economic and political importance of German- and Italian-Americans versus Japanese-Americans), President Roosevelt maintained restrictions placed on the Japanese until the end of the war, even though he thought it safe to lift the restrictions placed on Italian and German enemy aliens in 1942, in October and December, respectively.<sup>353</sup>

In addition to levying restrictions on some 890,000 people living within the United States, these three directives led to the summary arrest and internment of as many as 16,000 enemy aliens over the course of the war. Immediately after the bombing of Pearl Harbor, the FBI began to arrest and intern enemy aliens “solely under executive order,” arresting 5,100 Japanese, 3,250 Germans, and 650 Italians in the months after the attack.<sup>354</sup> Although not required under the Alien Enemies Act of 1798, which formed the basis for President Roosevelt’s proclamation and, as a result, the basis for the wartime arrest of enemy aliens, Attorney General Francis Biddle insisted upon the establishment of Enemy Alien Hearing Boards to determine whether to release

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<sup>352</sup> Stone, *Perilous Times*, p. 286.

<sup>353</sup> Goldstein, *Political Repression in Modern America*, p. 264; Stone, *Perilous Times*, p. 286.

<sup>354</sup> Goldstein, *Political Repression in Modern America*, p. 264; Stone, *Perilous Times*, pp. 285-286. Quote taken from Goldstein, though numbers of individuals arrested taken from Stone.

interned enemy aliens. By June 1944, these boards had released all but a couple of thousand, who, it appears, remained in jail for the duration of the war.<sup>355</sup>

Even more important for civil liberties in the United States than Roosevelt's December 7 and 8 proclamations directing the treatment of enemy aliens during wartime was Executive Order 9066, which authorized the internment of individuals of Japanese descent living on the west coast, as well as the exclusion from the same area of some 300 others. On February 19, 1942, under pressure from government officials in California and in the War Department, President Roosevelt authorized the Secretary of War to establish areas of military importance from which any person or persons could be excluded. In March, the War Department designated certain areas on the west coast as military areas and ordered the exclusion of all individuals of Japanese descent from those areas. Initially, those excluded were allowed to move freely throughout the rest of the country; however, public protest quickly led the Army to establish temporary prison camps to which all excluded Japanese would be transferred en route to one of ten permanent "relocation centers."<sup>356</sup>

In the eight months after Roosevelt signed Executive Order 9066, 120,000 individuals of Japanese descent living in California, Washington, Oregon, and Arizona were arrested and subsequently transferred to those internment camps for the duration of the war.<sup>357</sup>

Unsurprisingly, the conditions in those camps were extremely harsh; there was extreme overcrowding and no furniture. Further, internees were not allowed to possess reading materials or phonograph records and were subject to "arbitrary searches and harassment."<sup>358</sup> Even worse, internees had had to leave behind their homes and all of the possession that they could not carry

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<sup>355</sup> Stone, *Perilous Times*, pp. 285-286.

<sup>356</sup> Goldstein, *Political Repression in Modern America*, p. 267.

<sup>357</sup> Stone, *Perilous Times*, p. 287.

<sup>358</sup> Goldstein, *Political Repression in Modern America*, pp. 267-268.

with them to the camps; many ultimately lost everything.<sup>359</sup> Eventually, in 1943, the federal government created a loyalty program by which internees could be released if they swore allegiance to the United States and disavowed Japan. At least 7,000 internees refused to do so and were subsequently segregated in a maximum-security internment camp in Tule Lake, California.<sup>360</sup> The general release of those interned did not come until December 1944 (although the Secretary of War had recommended it would be safe to do so as early as May) in large part, because President Roosevelt believed that doing so might jeopardize his reelection that year.<sup>361</sup> Although far less important than the wartime internment of individuals of Japanese descent, it is also worth mentioning that Executive Order 9066 also served as the basis for the exclusion of some 300 other persons from the west coast over the course of the war. In all of those cases, the individuals who were excluded, arrested, or interned were denied fundamental due process rights.<sup>362</sup>

### **Efforts to control political discourse**

Compared to legislation enacted at the federal level and the restrictive, if not outright repressive, presidential directives issued by President Roosevelt, the efforts of the his administration to control political discourse, both by censoring the press and by flooding the marketplace of ideas with government propaganda, were far more modest than those of the Wilson administration during World War I. In large part, this was due to two factors. First, unlike his predecessor, President Roosevelt did not need to drum up support for war (at least not after the attack on Pearl Harbor). Second, the gross excesses of George Creel's World War I-era

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<sup>359</sup> Stone, *Perilous Times*, p. 287.

<sup>360</sup> Goldstein, *Political Repression in Modern America*, pp. 267-268.

<sup>361</sup> Stone, *Perilous Times*, pp. 302-303.

<sup>362</sup> Goldstein, *Political Repression in Modern America*, p. 268.



Committee on Public Information helped to ensure that its World War II equivalent, the Office of War Information, would not act in similarly repressive ways.

Although the bulk of wartime censorship began after the Japanese bombing of Pearl Harbor, censorship of the press began earlier. In late 1940, the U.S. Post Office interpreted the Foreign Agents Registration Act in such a way as to exclude from the mails foreign propaganda sent to persons in the U.S. who were not registered as foreign agents or similarly, from persons abroad who were not registered. In censoring these materials, however, the Post Office systematically destroyed only material that originated from countries unfriendly to the United States. Since this form of censorship appears to have been the only type of censorship to have occurred before the bombing of Pearl Harbor, the degree to which the federal government censored the press during the period from 1938 to 1941 can be said to have been modest.

However, after the bombing of Pearl Harbor, applying the reenacted Espionage Act of 1917, the Roosevelt administration began to restrict the freedom of the press more actively. Throughout the war, censorship of the press was accomplished by military intelligence, through the direct closure of certain foreign publications operating within the U.S., and by the U.S. Post Office. As is routine during periods of national crisis, upon the outbreak of war and for the duration, all communications sent to and from the United States were turned over to military intelligence for censorship.<sup>363</sup> In addition to the wartime censorship of international communications, the Roosevelt administration also seized the presses of certain Japanese- and German-American publications “allegedly financed in part by enemy capital.”<sup>364</sup> More important, however, was the degree to which the Post Office censored the press throughout the crisis. The bulk of wartime censorship by the Post Office occurred during the first year and a half

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<sup>363</sup> Goldstein, *Political Repression in Modern America*, p. 273.

<sup>364</sup> Goldstein, *Political Repression in Modern America*, p. 272.

of American involvement in the global war. After mid-1943, for a variety of reasons (which include the increasing success of the Allied nations in the war, the destruction of the already insignificant domestic opposition press, and the U.S. Supreme Court's increasingly protective stance for civil liberties), the Roosevelt administration censored few new publications.

Between late 1941 and mid-1943, however, at least seventy different publications were excluded from the mails temporarily, if not permanently. Publications were excluded if found to be sufficiently subversive, which Post Office employees decided using a classification system developed by political scientist Harold Lasswell.<sup>365</sup> Although many of the censored publications were somewhat obscure, two were particularly influential. The most important was *Social Justice*, produced by American fascist Father Charles Coughlin. It had a circulation of over one-million subscribers. After the Post Office revoked mailing privileges for *Social Justice*, Father Coughlin attempted to play the role of martyr by offering to defend the verity of the statements contained in the publication before a grand jury. Recognizing this maneuver, Attorney General Francis Biddle successfully appealed to the Catholic Church to silence their priest.<sup>366</sup> Aside from *Social Justice*, the other major publication that the Post Office censored during the war was the *Militant*, a weekly journal produced by the Socialist Workers Party.<sup>367</sup>

During the First World War, the Committee on Public Information (CPI) actively sought to cultivate support for war by whipping American citizens into a patriotic fervor. In doing so, the agency spurred nativist hatred of the Germans and intensified demands for the suppression of dissent. Although the Office of War Information (OWI), created by Roosevelt in 1942, resembled CPI, it appears to have played no such role in the Second World War. Its purpose was more narrowly defined to disseminate to the American people information about the progress of

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<sup>365</sup> Goldstein, *Political Repression in Modern America*, pp. 268-269.

<sup>366</sup> Stone, *Perilous Times*, pp. 276-277.

<sup>367</sup> Goldstein, *Political Repression in Modern America*, pp. 268-269.

the Allied nations in the war (a purpose the agency struggled to achieve given the unwillingness of the military to disclose discouraging information in the early years of the war). The OWI did occasionally act in ways akin to its predecessor, however. Regardless, the life of the Office of War Information was short, as Congress, concerned with the potential excesses of such an organization, slashed its budget in mid-1943.<sup>368</sup>

### **Efforts to monitor and suppress dissidents**

The last aspect of the crisis that should be considered in assessing the degree to which Americans' civil liberties were restricted by the federal government is whether there was any attempt, at the federal level, to monitor and suppress dissent, either through direct prosecution, surveillance, deportation and denaturalization campaigns, or loyalty laws. As in World War I, the Second World War gave rise to efforts to monitor and suppress dissent through each of these four avenues. In addition, very early on, the emerging crisis prompted the U.S. House of Representatives to convene the Dies Committee, a special committee established to investigate broadly un-American activities.

### ***Direct Prosecution***

The majority of prosecutions involving political dissidents were initiated after the bombing of Pearl Harbor. However, as was the case with regard to enacting federal legislation, issuing presidential directives, and censoring the press, the prosecution of dissent by the Roosevelt administration began before the official start of American involvement in the Second World War. Although relatively minimal when compared to the number of wartime prosecutions, the federal government initiated a number of prosecutions between 1938 and 1941 against radical groups, particularly the Communist Party. For example, in 1940, the federal government brought charges against the chairman of the Communist Party and the communist leaders of the Fur

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<sup>368</sup> Stone, *Perilous Times*, pp. 279-280.

Workers Union. Around the same time, in December of 1939 and March of 1940, three alleged Russian agents were indicted on charges of violating the Foreign Agents Registration Act.

One of the most notable cases during this period was the 1940 prosecution of seventeen members of the right-wing Christian Front Sports Club on charges of planning to overthrow the government. The case fell apart months after the indictment was issued when it was disclosed that a government informant had provided the Christian Front with the arms and ammunition for which the organization's members were being charged.<sup>369</sup> Equally if not more notable was the June 1941 prosecution of twenty-nine members of the Socialist Workers Party on charges of violating the Smith Act. The trial, known as the Minneapolis Sedition Trial, resulted in the conviction of eighteen of those charged, of whom twelve were imprisoned<sup>370</sup>

Two aspects of the crisis are relevant in assessing the extent of the Roosevelt administration's campaign to prosecute dissent—the wartime prosecution of individuals for sedition and for advocating resistance to the draft and the treatment of conscientious objectors (COs). During the period from 1941 to 1945, about 200 people were prosecuted for sedition or for advocating resistance to the draft. Some were prosecuted for offenses committed even before the attack on Pearl Harbor, while the majority of these indictments were issued in the first year and a half of American involvement in the global war, from late 1941 to mid-1943. After the summer of 1943, for reasons mentioned earlier (which include the growing strength of the Allied powers, the destruction of the opposition press, and the increasingly civil liberties-protective stance of the U.S. Supreme Court), the Roosevelt administration initiated relatively few new prosecutions.<sup>371</sup>

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<sup>369</sup> Goldstein, *Political Repression in Modern America*, pp. 248-249.

<sup>370</sup> Goldstein, *Political Repression in Modern America*, p. 253.

<sup>371</sup> Goldstein, *Political Repression in Modern America*, p. 268.

In general, the Roosevelt administration's wartime campaign against dissent resulted in the indictment of a wide range of obscure political dissidents. Targets of prosecution in that period included the members of black religious cults such as the Brotherhood of Liberty for the Black People of America, and pro-Nazi groups such as the Friends of Progress. Other individuals prosecuted were even more obscure, such as a Wisconsin farmer indicted for urging his brother to seek discharge from the military and twelve members of a pseudo-religious sect in California. The general obscurity of those prosecuted demonstrates the magnitude of suppression relative to the amount of dissent voiced.<sup>372</sup>

Though most wartime prosecutions involved obscure political dissidents, the Roosevelt administration's campaign against dissent produced a number of more significant prosecutions that involved prominent American fascists and the two most important sedition trials. During the war, the federal government levied a number of indictments against prominent native fascists, including William Kunze, the leader of the German-American Bund (an American Nazi organization), and William Pelley, the leader of a notable pro-Nazi organization known as the Silver Shirts. In addition, though not a prosecution *per se*, Attorney General Francis Biddle appealed to the Catholic Church to silence outspoken and vehement native fascist Father Charles Coughlin.<sup>373</sup> Conspicuously nonexistent during the period were prosecutions against prominent members of the Communist Party (CP). Although members of the CP had been targeted earlier in the crisis that changed when the party shifted to a position of support for American involvement in the war following the breakdown of the Nazi-Soviet Non-Aggression Pact in June of 1941, which led the Soviet Union to fight on the side of the Allied powers.

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<sup>372</sup> Goldstein, *Political Repression in Modern America*, p. 270.

<sup>373</sup> Goldstein, *Political Repression in Modern American*, pp. 270-271.

Even more significant than the prosecution of prominent native fascists, the Roosevelt administration's campaign against dissent led to two of the most important wartime sedition trials, neither of which produced convictions. The first, and most infamous, known as the Great Sedition Trial, involved an odd group of pro-fascist radicals (including German-American Bund leader William Kunze) charged in 1942 for conspiring to violate the Espionage Act of 1917 and the Smith Act of 1940. Without going into detail, the case can most accurately be summed up as a circus and as a fiasco. It ended in mistrial in 1945 and was dismissed completely upon retrial in November of 1946. The trial achieved its purpose, however, as it kept about thirty prominent radicals and critics of the Roosevelt administration locked in legal battles for the duration of the war. The other major sedition trial during the war involved twenty-four members of the German-American Bund who were indicted on charges of conspiracy to advocate resistance to the draft. The U.S. Supreme Court dismissed the case in 1945 because of insufficient evidence.<sup>374</sup>

In addition to the wartime prosecutions of individuals on charges of sedition and counseling draft resistance, the treatment of conscientious objectors (COs) is also relevant to assessing the extent of the Roosevelt administration's campaign to suppress dissent. During the war, 6,086 individuals, a great proportion of whom were Jehovah's Witnesses, were imprisoned after the Army refused to grant their petitions for conscientious objector status. As in World War I, those jailed were subject to extremely harsh treatment that often included beatings, regular harassment, and solitary confinement. Further, many objectors were fed only bread and water. Those conscientious objectors whose status the Army upheld were confined in Civilian Public Service camps for the duration of the war. A few were even detained in those camps until 1947. The camps were administered by the National Service Board for Religious Objectors (which was operated by a range of pacifist groups and churches) and effectively amounted to outdoor work

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<sup>374</sup> Goldstein, *Political Repression in Modern America*, pp. 269-270.

camps in which COs were forced to work fifty hours a week without pay. In general, the treatment of conscientious objectors during the Second World War was less harsh than in World War I. That said, the treatment of COs in the United States was still harsher than in Britain or Canada.<sup>375</sup>

### *Surveillance of dissident groups*

Complementing its efforts to suppress dissent by prosecution, the Roosevelt administration also oversaw a massive increase in surveillance. Between 1938 and 1941 and between 1941 and 1945, the Federal Bureau of Investigations expanded the size and scope of its operations dramatically. As early as 1936, J. Edgar Hoover, the first director of the FBI, instructed his agents to collect a broad range of information related to subversive activities.<sup>376</sup> In 1938, the FBI expanded its investigation of subversive activity still further following the explicit approval of President Roosevelt. In short, from 1936 on, the FBI expanded the scope of its investigations dramatically.<sup>377</sup>

By 1941, the Federal Bureau of Investigations was fully mobilized, to levels equivalent to the period from 1917 to 1920, during the First World War and the later Red Scare. During this crisis, the FBI's investigations ranged quite broadly, from collecting information on fascist, Communist, German, and Italian sympathizers to members of the isolationist American First organization and the NAACP. At Roosevelt's request, the bureau also investigated opponents of his policy of Lend-Lease (in which the United States lent military supplies to the Allied nations). Furthermore, by this time, the FBI had begun to engage in a variety of other programs of dubious constitutionality, if not outright illegality. Four such programs indicated the growing range of FBI activities.

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<sup>375</sup> Goldstein, *Political Repression in Modern America*, pp. 274-275.

<sup>376</sup> Stone, *Perilous Times*, p. 249.

<sup>377</sup> Goldstein, *Political Repression in Modern America*, p. 247.

First, beginning in 1939, and lasting until 1973 (if not later), the FBI began to build and maintain a custodial detention list of individuals to be arrested and imprisoned in the event of war; this list contained a wide range of Communist, Nazi, fascist, Japanese, and SWP sympathizers. Second, in 1940, the Bureau established an informer program that placed informants in factories important to the military to guard against espionage. The Bureau established a similar program that relied on members of the American Legion to assist with investigations into subversive activities and espionage. These programs lasted until 1969 and 1954, respectively. Third, beginning in 1940, the FBI began to engage in warrantless wiretapping of domestic subversives, a practice that continued at least until 1972. The Bureau placed twelve wiretaps and microphone bugs in 1940 and ninety-two in the next year alone. Fourth, also during 1940, the Bureau launched a program of monitoring (and occasionally opening) first class mail. The program continued at least until 1966. During those twenty-six years, the FBI opened approximately 130,000 pieces of mail.<sup>378</sup>

After the bombing of Pearl Harbor, the Bureau expanded still further in size and in the scope of its investigations, as did military intelligence. The FBI continued to monitor the mail and place wiretaps throughout the war. It also began to engage in “black bag jobs,” in which agents would break into the offices or residences of targeted subversives to collect information. During the war, the FBI planted over 600 bugs and 1,800 wiretaps. Further, from 1942 to 1968, the FBI agents engaged in approximately 240 black bag jobs. However, as it became increasingly apparent in 1944 and 1945 that the Allies would win the war, the FBI began to restrict the scope of its intelligence-gathering investigations, limiting its investigations to the leaders of prominent subversive organizations.<sup>379</sup>

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<sup>378</sup> Goldstein, *Political Repression in Modern America*, pp. 249-254.

<sup>379</sup> Goldstein, *Political Repression in Modern America*, pp. 272-273.



### ***Exclusion of foreigners and naturalized citizens***

The Roosevelt administration also sought to denaturalize alleged subversives. As early as March 1940, Attorney General Francis Biddle began to spearhead a denaturalization campaign that focused particularly on the German-American Bund and, to a lesser extent, the Communist Party. By the end of 1940, the Roosevelt administration had successfully denaturalized twenty-four people. At that time, 300 other cases were pending and 2,500 other people were the subject of investigation.<sup>380</sup>

The Roosevelt administration continued its campaign to denaturalize subversives after the bombing of Pearl Harbor. This campaign lasted until 1943, at which point the Justice Department was forced to drop pending cases following the U.S. Supreme Court's decisions in *Schneiderman v. U.S.* and *Baumgartner v. U.S.*, in which the Court ruled that it was unconstitutional to denaturalize citizens on the basis of subversive speech. Between March of 1940 and the Court's twin decisions in 1943, the Justice Department had successfully denaturalized approximately 180 citizens, including Fritz Kuhn, a former leader of the German-American Bund. After 1943, the Roosevelt administration continued its campaign against subversives by employing a provision of the Alien Enemy Act of 1798 that allowed a president to deport enemy aliens whom he deemed dangerous to the public safety.<sup>381</sup>

### ***Loyalty program***

Another major aspect of the government's response to crisis during the Second World War was the extent of efforts to screen subversives from federal employment. Although the bombing of Pearl Harbor brought greater attention to disloyalty, there had been scattered efforts between 1938 and 1941 to ensure that Americans' tax dollars did not pay the salaries of

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<sup>380</sup> Goldstein, *Political Repression in Modern America*, p. 251, 271; Stone, *Perilous Times*, p. 280.

<sup>381</sup> Goldstein, *Political Repression in Modern America*, pp. 270-272; Stone, *Perilous Times*, p. 272.

subversive individuals. For example, as discussed earlier, Congress enacted a variety of laws before December of 1941 that contained provisions banning subversives from employment with the federal government. Partly as a result of these laws, in June of 1939 the Civil Service Commission (CSC) declared that members of the Communist Party, German-American Bund, and other fascist or communist-leaning organizations could not be federal employees.<sup>382</sup> During the same period, in October of 1941, the Dies Committee, which sought to attack the Roosevelt administration by linking the New Deal with Communism, submitted a list of 1,121 allegedly disloyal federal employees to the Justice Department for further investigation.<sup>383</sup>

Efforts to screen subversives from roles in the federal government proceeded after the bombing of Pearl Harbor and throughout the war. Between 1941 and 1945, the Civil Service Commission, as well as the Justice Department, took additional action to ensure that subversives did not find employment with the federal government. For example, in March of 1942, the CSC declared that individuals could be excluded from federal employment if there was “reasonable doubt” of their loyalty. Around the same time, the Interdepartmental Committee on Investigations (ICI), an agency created by Attorney General Biddle in April of 1942 to manage the federal government’s loyalty program, reported that the Dies Committee’s October 1941 accusations of disloyalty in the federal government could not be confirmed. However, because many people regarded the report prepared by the ICI as a “whitewash,” President Roosevelt created the Interdepartmental Committee on Employer Investigations (ICEI) in February of 1943 to replace the ICI. The ICEI then established procedures for the removal of federal employees, as well as a hearing process by which employees could appeal unfavorable rulings. Overall, the Roosevelt administration appears to have been relatively restrained in its efforts to screen

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<sup>382</sup> Goldstein, *Political Repression in Modern America*, p. 250; Stone, *Perilous Times*, pp. 250-251.

<sup>383</sup> Goldstein, *Political Repression in Modern America*, p. 277.

subversives from the federal government. Throughout the war, 175 employees were dismissed, while another 1300 were prevented from applying.<sup>384</sup>

### *Congressional investigation*

Besides for suppression of dissent through means like prosecution, surveillance, and loyalty laws, Americans' civil liberties were also restricted by the Dies Committee and its irresponsible manipulation of public opinion through wide-ranging investigations of subversion. Formed on May 26, 1938, the Dies Committee (the World War II precursor to the Cold War House Un-American Activities Committee, or HUAC) was established to investigate the nature and extent of un-American activities in the United States. In general, although it investigated issues of legitimate concern, the Dies Committee acted in an irresponsible manner and "proved that in reckless hands legislative investigating committees can do untold damage to innocent persons and national values."<sup>385</sup>

During the period from 1938 to 1941, the Dies Committee focused its investigations on prominent pro-Nazi organizations, such as the German-American Bund and the Silver Shirts, and certain pillars of the left wing, most notably the Communist Party, the Congress on Industrial Organizations (CIO), and the Roosevelt administration. When formed, the Dies Committee originally intended to center its attention on the activities of the German-American Bund. The Bund was of particular concern at that time because the organization had grown substantially in membership during the two preceding years. By 1939, the organization had grown so much that it was able to attract as many as 32,000 supporters to a rally at Madison Square Garden in New York City.<sup>386</sup> This growth and the increasing instability in Europe in those years made the Bund

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<sup>384</sup> Goldstein, *Political Repression in Modern America*, pp. 277-279. Quotes in this paragraph taken from this source.

<sup>385</sup> Stone, *Perilous Times*, p. 245.

<sup>386</sup> Stone, *Perilous Times*, pp. 245-246.

a natural initial target of the Dies Committee. In describing the organization, Congressman Martin Dies, the committee chairman, condemned the Bund as a threat to the United States and demanded that the FBI investigate members of the Bund employed in the defense industry. Around the same time, partly motivated by pressure from Dies, the Justice Department launched an investigation into whether members of the Bund had violated any laws and whether they could be denaturalized.<sup>387</sup>

While the German-American Bund was in part the focus of the Dies Committee's investigations into un-American activities, in greater part, Martin Dies sought to destroy the left and "to portray the New Deal as part of a vast communist conspiracy."<sup>388</sup> Similar to the tactics of Senator McCarthy during the Cold War, Congressman Dies "used public disclosure as a political tactic," announcing in October of 1939 that he possessed a list of approximately 2,000 of the 4,700 Communists living and working in Chicago.<sup>389</sup> The list actually contained the names of government employees listed in the membership roles of the American League for Peace and Democracy, a left-wing anti-war group. As part of his continuing campaign to convince the American public of widespread subversion in the U.S. government, Dies also submitted a list of 1,121 allegedly subversive federal employees in 1941 to the Justice Department for investigation. Upon review, the FBI found no evidence to support Dies claim.<sup>390</sup> During the same period, the Dies Committee also condemned the Federal Theater Project and the Federal Writers Project as subversive, which, in the summer of 1939, led Congress to cut funding for the former and to eliminate funding entirely for the latter.<sup>391</sup>

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<sup>387</sup> Goldstein, *Political Repression in Modern America*, p. 241.

<sup>388</sup> Goldstein, *Political Repression in Modern America*, pp. 241-242.

<sup>389</sup> Stone, *Perilous Times*, p. 247.

<sup>390</sup> Stone, *Perilous Times*, pp. 247-248.

<sup>391</sup> Goldstein, *Political Repression in Modern America*, p. 243.

In many cases, the activities of the Dies Committee were even more blatantly related to partisan politics. For example, before the congressional elections of 1938, the Dies Committee heard allegations that Democratic candidates in California and Minnesota who supported the New Deal were affiliated with communists. Later, Dies demanded the resignation of numerous members of the Roosevelt administration, including the Secretary of the Interior, the Secretary of Labor, and the Works Progress Administrator. Even more telling of Congressman Dies' campaign to destroy Roosevelt was the title and content of a book Dies published in 1940, *The Trojan Horse in America*. In the book, Dies linked the Roosevelt administration with Communism and argued that "the greatest financial boon which ever came to the Communists in the United States" was the Works Progress Administration.<sup>392</sup>

When war came, the Dies Committee continued to investigate the nature and extent of un-American activities in much the same manner as it had during the preceding three years. It appears, however, that the German-American Bund became a lesser focus of the Dies Committee's investigations during wartime, perhaps because popular fears that this group represented a fifth column became less salient or potentially because Dies perceived the Roosevelt administration to be taking appropriate repressive action with regard to the Bund. Instead, the Dies Committee appears to have focused its campaign against un-Americanism almost exclusively on linking Roosevelt with Communism. On numerous occasions throughout the period from 1941 to 1945, Dies made sweeping accusations of subversion in the federal government. For example, in March of 1942, he accused 35 members of the Board of Economic

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<sup>392</sup> Richard Polenberg, "Franklin Roosevelt and Civil Liberties: the Case of the Dies Committee," *The Historian*, 30 (February, 1968), p. 166, qtd. in Goldstein, *Political Repression in Modern America*, p. 242.

Welfare of disloyalty, while, in September of 1942, he announced possession of a list of 1900 allegedly subversive federal employees.<sup>393</sup>

### **State and local restrictions**

In terms of targets of repression, the restriction of Americans' civil liberties by the federal government was mirrored to a significant extent by state and local governments. One notable difference, however, is the extent to which the program of repression shifted in focus after the bombing of Pearl Harbor. From 1938 to 1941, the primary targets of state or local repression were the German-American Bund, the Communist Party, organized labor, and the Jehovah's Witnesses. After 1941, however, the Jehovah's Witnesses were the only major targets of repression. That fact suggests a high degree of repression given how innocuous are Jehovah's Witnesses.

Prior to American involvement in the war, in the period between 1938 and 1941, demands for the repression of political dissidents grew, such that by December 7, 1941 (the day the Japanese bombed Pearl Harbor), this growing climate for repression had been institutionalized by a number of state and local governments. During that early period, pressure for repression gradually took hold of state and local governments. Instances of repression in a few states—New York, Washington, California, Oklahoma, Colorado, and Arkansas—are worth considering in brief as they demonstrate the growing climate for repression. In four of these states, legislative committees (which often resembled the Dies Committee, and therefore became known as “Little Dies Committees”) began to investigate the nature and extent of subversive activities. In New York, these committees focused largely on radicalism in the public school

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<sup>393</sup> Goldstein, *Political Repression in Modern America*, pp. 279-280.

system, while in California, the committees appear to have focused more broadly on un-American activities.<sup>394</sup>

Although sporadic, there were also instances in which academics employed by state institutions of higher education were fired for political reasons. For example, a teacher was fired in California for prior membership in the Communist Party, while the president of the Western Washington College of Education was fired by the governor of the state of Washington following allegations of tolerance for subversive activities. Even more repressive, in Arkansas, Commonwealth College was shut down after it could not pay fines levied by the state for refusing to display the American flag and for displaying a hammer and sickle. Complementing efforts to weed subversives from academia, there were also sporadic efforts to screen subversives from state governments. For example, in 1940, the Washington State Legislature voted, successfully, to exclude from the floor an elected representative who had once been a member of the Communist Party. In California, the governor successfully appealed to the state legislature to exclude from the ballot the Communist Party. Additionally, in New York, the state legislature passed a law banning from state employment all persons advocating the necessity of violent overthrow of the government.<sup>395</sup>

In 1941 alone, nine states enacted laws excluding political parties that advocated the violent overthrow of the government from the ballot, while two states enacted sedition laws and another five enacted laws banning subversives from employment with the state government. At the local level, a few cities and towns passed ordinances that struck at subversives. For example,

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<sup>394</sup> Goldstein, *Political Repression in Modern America*, pp. 255-258.

<sup>395</sup> Goldstein, *Political Repression in Modern America*, pp. 255-258.

one city in Florida made illegal all meetings of the Communist Party and the German-American Bund.<sup>396</sup>

In the period between 1938 and 1941, the targets of state and local repression—the German-American Bund, the Communist Party, labor, and the Jehovah’s Witnesses—suffered heavily. The Bund, which was strongest in New York and New Jersey, experienced the greatest amount of harassment. The organization was made the subject of numerous legislative inquiries and was repeatedly targeted for repression by state legislatures. Furthermore, a number of the organizations’ members were charged with a variety of obscure and disparate offenses. By the end of 1941, in large part because of the conviction of the organization’s leader, Fritz Kuhn, the German-American Bund had been virtually destroyed. Although apparently more concerned with the Bund, state and local governments also lashed out at the Communist Party. In 1940, the organization was excluded from the ballot in fifteen states. In addition, communists were arrested sporadically throughout the country for a variety of different crimes.<sup>397</sup>

While less patently political than the suppression of the Bund and the Communist Party, organized labor was also targeted for repression.<sup>398</sup> During the period, twenty-two states enacted anti-labor laws. At the same time, throughout this period, there were a few major incidents of violence against labor that were sanctioned by state and local governments—most notably the 1938 CIO International Workers of America lumber strike in Westwood, California, the 1939 Missouri Sharecroppers’ Strike, and the 1941 North American Aviation Strike (discussed earlier). The fourth major group targeted for repression by state and local governments during the period from 1938 to 1941 was the Jehovah’s Witnesses, who were sometimes arrested on

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<sup>396</sup> Goldstein, *Political Repression in Modern America*, pp. 259-261.

<sup>397</sup> Goldstein, *Political Repression in Modern America*, 258-259.

<sup>398</sup> The repression of labor would have occurred to some extent regardless of the emerging global war; however, the crisis helped to foment a certain climate for repression that undoubtedly helped to ensure that labor activism would be suppressed.



obscure charges and were subjected to severe mob violence in which local authorities occasionally stood by without trying to stop it. Mob violence against the Witnesses was so severe that the American Civil Liberties Union (ACLU) reported that nearly 1,500 Witnesses were victims of mob violence in one five-month period in 1940, from May to October. In addition, the children of many Jehovah's Witnesses were expelled from school for refusing to salute the American flag.<sup>399</sup>

However, after 1941, this began to change. Between 1941 and 1945, there was quantitatively less repression at the state and local level than during the preceding three years. This was due largely to two factors. First, after the Japanese bombing of Pearl Harbor in December of 1941, there was relatively little organized opposition to American involvement in the Allied war against Germany, Italy and Japan. This was partly a function pre-war repression, which had helped to bring about the downfall of the German-American Bund, though in larger part was the breakdown of the Nazi-Soviet Non-Aggression Pact and the attack on Pearl Harbor (which galvanized popular support for war).

The second factor was that the Roosevelt administration began to actively campaign against the repression of dissent at the state or local level beginning as early as 1940 and continuing throughout the war. Hoping to avoid the widespread vigilantism of the First World War and looking to concentrate the repression of dissent at the federal level, President Roosevelt, as well as Attorneys General Robert Jackson and Francis Biddle, met with state officials throughout the war to ensure that state sedition laws would go unenforced and that mob violence would be restrained.<sup>400</sup> Given the general lack of organized resistance to the war and the active efforts of the Roosevelt administration to concentrate the repression of dissent at the federal

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<sup>399</sup> Goldstein, *Political Repression in Modern America*, pp. 259-261.

<sup>400</sup> Goldstein, *Political Repression in Modern America*, pp. 263-4, p. 278.

level, it should not be surprising then that there were fewer instances of repression at the state or local level during the period from 1941 to 1945.

While repression at the state and local level was less after 1941, there was one major violation of Americans' civil liberties as well as a number of less notable incidents of repression. The most significant violation occurred when the governor of the territory of Hawaii authorized the imposition of martial law after the bombing of Pearl Harbor and transferred "all of the functions of government, territorial and county, including the functions of judicial officers" to Lieutenant General Walter Short, the Commander of the Department of Hawaii.<sup>401</sup> From December 7, 1941 to October of 1944, Hawaii remained under a state of martial law. During this period, the restriction of Americans' civil liberties was so harsh that ninety-nine percent of military trials conducted in 1942 resulted in convictions. Further, throughout the period, "martial law could not even be discussed in the mass media."<sup>402</sup>

Aside from the imposition of martial law in Hawaii, an action of which Roosevelt approved, there were a number of other, less noteworthy instances of repression at the state and local level. First, throughout the war, there were sporadic instances of repression against pacifists in states including California, Kentucky, Florida, and Washington. For example, in California, there were at least two cases in which teachers were dismissed for refusing "to sell defense stamps to elementary school children."<sup>403</sup> Second, throughout the war, the California Committee on Un-American Affairs continued to investigate all things un-American, such as the activities of right-wing anti-war groups and the alleged influence of Communism in the California school

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<sup>401</sup> Garner Anthony, "Martial Law in Hawaii," *California Law Review*, Vol. 30 Iss. 4 (May 1942): p. 371-396, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 17 Feb. 2009 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=10358076&loginpage=Login.asp&site=ehost-live>>.

<sup>402</sup> Goldstein, *Political Repression in Modern America*, pp. 264-265.

<sup>403</sup> Goldstein, *Political Repression in Modern America*, p. 281.

system. Third, in New Jersey, state and local authorities routinely targeted the German-American Bund for repression. For example, after the attack on Pearl Harbor, state officials shut down the Bund's Camp Nordlund. In general, however, relatively few new state or local laws against subversion were enacted during the war and those already on the books went largely unenforced.<sup>404</sup>

After 1941, the only major targets of state or local repression were the Jehovah's Witnesses. As in the period prior to U.S. involvement in the war, the Witnesses were the victims of deportation, arbitrary arrest, and severe mob violence. In the two-year period from December of 1941 to December of 1943, there were at least 300 incidents of mob violence against the Witnesses. During the same period, at least 200 Witnesses were arrested, often for their refusal to salute the flag. After May of 1942, the repression of Jehovah's Witnesses began to decline after the Justice Department threatened to prosecute state and local officials for violating the Witnesses' constitutional rights, a threat upon which the Department acted in June of 1942. Throughout the war, the children of Jehovah's Witnesses were also routinely expelled from school for refusing to salute the flag; however, this changed in June of 1943, when the U.S. Supreme Court ruled the practice unconstitutional in *West Virginia State Board of Education v. Barnette* 2000. From 1935 to June of 1943, 2000 children were so expelled, with most expelled after 1941.<sup>405</sup>

### **Executive tone toward civil liberties**

In assessing the degree to which Americans' civil liberties were restricted during the First World War, the third factor to consider was the tone set by the executive branch toward civil liberties. As was evident in the Quasi-War, the Civil War, and the First World War, to a large

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<sup>404</sup> Goldstein, *Political Repression in Modern America*, pp. 281-282.

<sup>405</sup> Goldstein, *Political Repression in Modern America*, p. 283.

degree the tone set by the executive during national crises dictates the willingness of policymakers throughout the federal government, as well as state and local governments, to respect the constitutional rights of dissidents. The actions and statements of President Franklin Roosevelt, as well as Attorneys General Murphy, Jackson, and Biddle reflect the administration's tone. Most broadly, the approach set by the Roosevelt administration can best be characterized as a blend of political expediency, on the part of the President, and cautious protection of civil liberties, on the part of the successive Attorneys General.

Though supportive of civil liberties in the abstract, President Roosevelt tended to follow the path of political expediency in making judgments that affected Americans' civil liberties. To put it more bluntly, "he supported them in the abstract, but not when they got in his way."<sup>406</sup> This view of President Roosevelt's approach to civil liberties and dissent reflected the fact that while he appeared to be concerned with avoiding the gross excesses of the First World War, he was directly responsible for some of the worst abuses of the Second.

That President Roosevelt was concerned with preventing the types of unrestrained abuse of Americans' civil liberties that occurred during the First World War, such as the American Protective League's slacker raids, seems evident in two major respects. First, Roosevelt was critical of the Dies Committee's broad and often irresponsible investigations of un-American activities.<sup>407</sup> Second, throughout the crisis, Roosevelt, and his administration, worked to restrain state and local authorities from committing the types of excesses that characterized the First World War. For example, at a conference of governors in 1940, the President warned those in attendance against tacitly accepting vigilantism.<sup>408</sup> Further, the efforts of his administration

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<sup>406</sup> Stone, *Perilous Times*, p. 252.

<sup>407</sup> Stone, *Perilous Times*, p. 248.

<sup>408</sup> Stone, *Perilous Times*, pp. 278-279.

“resulted in an almost completely unpublicized gentleman’s agreement in which state officials promised to restrain vigilantes and to let state sedition laws go unenforced.”<sup>409</sup>

Yet while President Roosevelt seems to have worked to prevent the abuses of the First World War, he was directly responsible for some of the most egregious abuses of World War II. This was evident in his approach to wartime internment and the surveillance and prosecution of dissent. In general, the President seems to have been quite unconcerned with the gross abuse of Americans’ civil liberties that a program of wartime internment would entail. This was evident in two respects. First, when Roosevelt signed the proclamations establishing regulations for the treatment of enemy aliens during wartime, which also authorized the Attorney General to intern such aliens as he deemed necessary, FDR “suggested that it might be wise to intern all German nationals” as, in his view, they posed a unique threat far and above Italian nationals.<sup>410</sup> Second, the President appears to have chosen to prolong the wartime internment of the Japanese until after the presidential election of 1944 because he believed that authorizing their release would jeopardize his prospects for reelection, even though the Secretary of War had told him in May that it would be safe to release those interned.<sup>411</sup>

In addition to his lack of concern for the harm caused by internment, President Roosevelt was also not overly concerned with the morality of violating the civil liberties of political dissidents. This was evident in two respects. First, in deciding not to veto the Smith Act, Roosevelt argued that its provisions criminalizing the advocacy of overthrowing the United States government did not constitute an abuse of Americans’ civil liberties, given the state of the world at that time.<sup>412</sup> Second, throughout the crisis, Roosevelt routinely requested the

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<sup>409</sup> Goldstein, *Political Repression in Modern America*, pp. 263-264.

<sup>410</sup> Stone, *Perilous Times*, p. 285.

<sup>411</sup> Stone, *Perilous Times*, pp. 302-303.

<sup>412</sup> Stone, *Perilous Times*, p. 252.

surveillance and prosecution of political dissidents. For example, in mid-1940, he began to encourage the FBI to investigate people “who had sent him messages indicating opposition to his foreign policy.”<sup>413</sup> In addition, on at least one occasion, Roosevelt directly reproached Attorney General Biddle for his inaction in prosecuting Nazi sympathizer William Dudley Pelley for sedition.<sup>414</sup>

In assessing the tone set by the executive during the crisis, it is also relevant to assess the roles played by the different Attorneys General—Murphy, Jackson, and Biddle. At a broad level, because “each had learned the lessons of World War I, each was a committed civil libertarian, and each came into office determined to avoid the mistakes of the past,” these three men exercised a liberalizing influence on the Roosevelt administration.<sup>415</sup> Throughout the crisis, each not only resisted popular pressure for the suppression of dissent, but also resisted demands for repression directly from the president.<sup>416</sup> Thus, each of these three men deserved credit for helping to prevent even worse abuses of Americans’ civil liberties than those which did occur during the crisis.

### **Deference of the U.S. Supreme Court**

The final relevant facet that reveals the degree to which Americans’ civil liberties were restricted is the deference of the U.S. Supreme Court to the executive and legislative branches during the crisis—seen in terms of two periods from 1938 to 1941 and from 1941 to 1945. In general, the Court acted as a counterbalance to pressures for repression from the executive and legislative branches. Although it deferred to the Roosevelt administration in a number of

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<sup>413</sup> Goldstein, *Political Repression in Modern America*, p. 250.

<sup>414</sup> Stone, *Perilous Times*, pp. 257-258.

<sup>415</sup> Stone, *Perilous Times*, p. 240.

<sup>416</sup> Stone, *Perilous Times*, pp. 252-258.

important respects, the Supreme Court upheld the constitutional rights of dissidents during a crisis for the first time ever.

Prior to American involvement in the war, the Supreme Court exercised a mostly liberalizing influence, upholding Americans' civil liberties in a variety of cases until 1940, at which point the Court shifted markedly away from its previous stance of protecting freedom of speech. From 1938 to mid-1940, the Court ruled consistently in favor of individual liberty in a series of decisions related to the rights of Jehovah's Witnesses to distribute literature and the rights of labor unions to organize and picket. In the latter half of 1940, however, the Court began to shift away from its previous positions. The change in the Court's stance toward civil liberties was first evident in *Minersville School District v. Goblitis* (decided in June of 1940), in which the Court upheld the expulsion of the children of Jehovah's Witnesses for refusing to salute the flag.<sup>417</sup> This shift away from the protection of civil liberties was further evident in the Court's 1941 decisions in *Cox v. New Hampshire* and *Milk Wagon Drivers Union v. Meadowmoor Dairies*, in which the Court ruled against the rights of Jehovah's Witnesses and labor, respectively.<sup>418</sup>

As during the period from 1938 to 1941, the U.S. Supreme Court's wartime record with regard to the protection of civil liberties was mixed, though generally supportive of the constitutional rights of dissidents. Broadly viewed, the Court's shift away from the protection of civil liberties continued until 1943; after that year, with the exception of decisions related to the wartime internment of the Japanese, the Court consistently upheld the rights of dissidents. In

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<sup>417</sup> Goldstein, *Political Repression in Modern America*, pp. 254-255; "Minersville School District v. Goblitis, 1940," *Minersville School District v. Goblitis, 1940*, Vol. 1 Iss. 1 (13 Jan. 1997), *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 16 Feb. 2009 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=21212812&loginpage=Login.asp&site=ehost-live>>.

<sup>418</sup> Goldstein, *Political Repression in Modern America*, pp. 254-255.

1942, the Supreme Court ruled against the claims of Jehovah's Witnesses in the cases of *Chaplinsky v. New Hampshire* and *Jones v. Opelika*. The next year, however, when the Allied position in the war had grown stronger, the Court reversed its opinion in *Jones v. Opelika*.<sup>419</sup> In part, the shift in the Supreme Court's stance was a result of the direct intention of several justices to move away from their earlier decision in *Gobitis*.<sup>420</sup> Later that year, in the case of *West Virginia State Board of Education v. Barnette*, the Court reversed its 1940 opinion in *Minersville School District v. Gobitis*, ruling that it was unconstitutional to expel schoolchildren for refusing to salute the flag.<sup>421</sup>

From 1943 on, leaving aside for the moment decisions involving the internment of the Japanese, the Supreme Court consistently ruled in favor of individual liberty in opinions related to the denaturalization of subversives, the prosecution of dissidents for sedition, and the rights of labor. In 1943 and 1944, respectively, the Court ruled against the claims of the Roosevelt administration in the cases of *Schneiderman v. United States* and *Baumgartner v. United States*. Both cases involved individuals whom the Roosevelt administration had attempted to denaturalize on the basis that they had not been sufficiently attached to the principles enshrined in the Constitution at the time of their naturalization.<sup>422</sup> During the same period, the Court also protected the right to free speech in the cases of *Taylor v. Mississippi*, *Hartzel v. United States*, and *Viereck v. United States*. *Taylor* and *Hartzel* both involved individuals indicted for statements or activities deemed to be seditious, while *Viereck*, which was similar in many respects, involved the prosecution of a man named George Viereck for violating the Foreign

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<sup>419</sup> Goldstein, *Political Repression in Modern America*, p. 280.

<sup>420</sup> Donald L. Smith, *Zechariah Chafee, Jr.: Defender of Liberty and Law* (U.S.A.: Harvard University Press, 1986), Google Book Search, 24 Apr. 2009, <<http://books.google.com/books?id=s35PvOnr0XYC&pg=PA208&dq=jones+v.+opelika#PPA208,M1>>, p. 208.

<sup>421</sup> Stone, *Perilous Times*, p. 282.

<sup>422</sup> Stone, *Perilous Times*, pp. 280-281.



Agents Registration Act (on the basis that he had failed to report certain activities undertaken as a foreign agent for the German government).<sup>423</sup> The last major decision related to American civil liberties issued by the Court during the Second World War, aside from those involving the internment of the Japanese, was *Thomas v. Collins*, in which the Court supported the right of labor unions to organize free from state regulation.<sup>424</sup>

The U.S. Supreme Court's position on the wartime internment of individuals of Japanese descent represents a major exception to its post-1943 protection of speech. In assessing the degree to which the Court acted as a check on the executive and legislative branches during, and in the years before the Second World War, this exception demonstrates continued acquiescence on behalf of the Court to the Roosevelt administration's claims of military necessity. In 1943 and 1944, the Court issued three decisions involving the internment of the Japanese—*Hirabayashi v. United States*, *Korematsu v. United States*, and *Ex Parte Endo*. In the first, *Hirabayashi*, decided in 1943, the Court upheld the constitutionality of wartime restrictions (specifically a curfew order) placed on enemy aliens and individuals of Japanese descent by the Roosevelt administration.<sup>425</sup> In the second, *Korematsu*, decided in 1944, the Court upheld the constitutionality of the Roosevelt administration's wartime exclusion of individuals of Japanese descent from the west coast.<sup>426</sup> The last decision, delivered on the same day as *Korematsu*, was the case of *Ex Parte Endo*, in which the U.S. Supreme Court ruled unconstitutional the Roosevelt administration's practice of interning individuals of Japanese descent deemed to be loyal. It should be noted that the Court's decision in *Endo* was issued the day after the Roosevelt administration had already decided to release those interned, which gives weight to the

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<sup>423</sup> Stone, *Perilous Times*, p. 282; Goldstein, *Political Repression in Modern America*, pp. 270-272.

<sup>424</sup> Goldstein, *Political Repression in Modern America*, p. 281.

<sup>425</sup> Stone, *Perilous Times*, p. 298.

<sup>426</sup> Goldstein, *Political Repression in Modern America*, p. 281.

conclusion that “the Court intentionally delayed its decision in *Endo* to allow the President rather than the Court to end the internment.”<sup>427</sup>

Clearly, the Court played a role that was cautious about protecting civil liberties during, and in the years before, the Second World War. At first glance, the Court’s role in the crisis seemed contradictory. On one hand, for the first time in the history of American national crises, the Court acted as a significant counterbalance to pressures for repression from the executive and legislative branches. On the other hand, the Court acted as a rubberstamp for the Roosevelt administration’s wartime internment of individuals of Japanese descent. The reason for the apparent contradiction was simply that while the Justices were willing to check the Roosevelt administration to an extent, they were still responsive to the perceived exigencies of wartime.

### **Return to “Normal”**

Although the most blatant violations of Americans’ civil liberties of the Second World War ended approximately with the end of the crisis, less noticeable restrictions produced during the period from 1938 to 1945, such as repressive laws and illegal surveillance practices, continued on into the next major national military crisis in American history—the Cold War. In large part, this was simply the result of timing—the beginning of the Cold War followed closely on the heels of the end of the Second World War. In other words, the new crisis occurred before the balance between civil liberties and national security could shift to a more appropriate post-war state. However, as will be considered in the next chapter and in the conclusion, the specific types of restrictions produced during the crisis also helped to extend the longevity of wartime restrictions.

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<sup>427</sup> Stone, *Perilous Times*, p. 302.

### End of the crisis

The Second World War officially ended on September 2, 1945, when the Japanese surrendered to the Allies on the sole condition that “the person of the Emperor and the imperial throne remain inviolate.”<sup>428</sup> By that time, however, the war had been over in Europe for at least four months, as the last remaining troops of fascist Italy had surrendered on May 2, with Germany, devastated and demoralized, surrendering unconditionally five days later.<sup>429</sup> Although the Allied nations had begun to gain some momentum against the Axis powers in mid- to late-1943, real momentum did not develop until mid-1944, when the Allies gained a foothold in Western Europe with the invasion of Normandy and subsequently liberated France. From there, the Allies took control of most of Italy; forced the Germans out of parts of Eastern Europe; and reduced the Japanese navy and air force to “mere shadows of what they had been.”<sup>430</sup> By the early part of 1945, the noose tightened as the Allies gained increasing military advantage over the Axis powers throughout Europe and Asia. On May 2, the Russian Army marched into and took control of Berlin.<sup>431</sup> At the same time, in Asia the Japanese empire was “coming apart at the seams.”<sup>432</sup> Nevertheless, in August, fearing the costs of invading the Japanese mainland, President Truman decided to drop atomic bombs on the cities of Hiroshima and Nagasaki in an effort to force Japan to surrender. The attacks achieved their purpose; the war was over.<sup>433</sup>

When the war finally ended, seventeen million soldiers and at least twenty million civilians lay dead. In Europe, “Northern France, the Low Countries, the great sweep of the North German Plain, and a wide swath running all the way to Moscow and Stalingrad lay devastated;”

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<sup>428</sup> Stokesbury, *A Short History of World War II*, pp. 375-376.

<sup>429</sup> Stokesbury, *A Short History of World War II*, pp. 359-363.

<sup>430</sup> Stokesbury, *A Short History of World War II*, pp. 217-363. Quote taken from p. 348.

<sup>431</sup> Stokesbury, *A Short History of World War II*, pp. 349-376.

<sup>432</sup> Stokesbury, *A Short History of World War II*, p. 372.

<sup>433</sup> Stokesbury, *A Short History of World War II*, pp. 364-376.

“cities were heaps of rubble, railways were lines of craters and twisted rails, bridges were down, canals and rivers blocked, dams blown, and electric power grids destroyed.”<sup>434</sup> In East Asia and the Pacific, “huge nations—China and Japan—and the great empires of the colonial powers were all brought low.”<sup>435</sup> Perhaps worse, “weapons of new and hitherto unimagined potential had been unleashed upon the world” and huge power vacuums in Europe and Asia had been created, which the two remaining superpowers—the United States and the Soviet Union—would spend the next fifty years attempting to fill.<sup>436</sup>

### **Duration of restrictions**

To a greater degree than in any earlier major national military crisis in American history, even World War I, the restriction of Americans’ civil liberties from the Second World War outlasted the end of the crisis. In general, the most blatant forms of repression ended approximately with the surrender of the Japanese in September of 1945, while less noticeable forms lasted into the Cold War.

That the most noticeable violations of Americans’ civil liberties produced by the Second World War did not continue after the end of the war was evident from three aspects of the crisis—the longevity of wartime prosecutions, the legacy of the government’s internment of the Japanese, and the change in U.S. Supreme Court decision-making after the end of the war. For the most part, the prosecution of dissent appears to have ended roughly with the end of the crisis. This was perhaps most evident from the fact that the federal government dropped its charges of thirty native fascists in the Great Sedition Trial—the most important sedition prosecution to arise out of the war—four months after the surrender of the Japanese.<sup>437</sup> It should not be surprising,

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<sup>434</sup> Stokesbury, *A Short History of World War II*, p. 377.

<sup>435</sup> Stokesbury, *A Short History of World War II*, pp. 377-378.

<sup>436</sup> Stokesbury, *A Short History of World War II*, p. 15, p. 387.

<sup>437</sup> Stone, *Perilous Times*, pp. 273-275.

however, that wartime prosecutions did not outlast significantly the end of the crisis given that the majority of prosecutions for sedition initiated during wartime involved a range of obscure political dissidents indicted for relatively harmless criticisms of the war. One important exception that belied the generally short duration of wartime prosecutions was the case of conscientious objectors (COs) whose status the Army agreed to uphold. Confined in unpaid work camps for the duration of the war, COs found that they were not allowed to leave immediately after the war ended. In protest of their continued confinement, many refused to work. This ultimately led to the arrest and conviction of twenty-two objectors, who were subsequently not released until 1947.<sup>438</sup>

Another aspect of the crisis that demonstrated that the most noticeable forms of repression ended with the surrender of the Japanese, was the wartime internment of individuals of Japanese descent. As discussed earlier, the Roosevelt administration authorized the release of all internees who remained in government camps in December of 1944. In the years that followed, policymakers in the federal government sought to make amends for the damage caused by internment. Most immediately, in 1948, Congress passed the Evacuation Claims Act, which compensation for the property losses of internees. Unfortunately, the program was incredibly inefficient and by 1958, less than 25 percent of those interned had received any money (which generally amounted to only 1,400 dollars per person).<sup>439</sup>

Much later, in 1976, President Ford offered an official apology to all those who had been interned during the war. Four years later, still seeking to make amends, Congress established the Commission on Wartime Relocation and Internment of Civilians to investigate the application of Executive Order 9066. In 1983, the Commission reported that the government's program of

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<sup>438</sup> Goldstein, *Political Repression in Modern America*, pp. 274-275.

<sup>439</sup> Goldstein, *Political Repression in Modern America*, p. 303.

internment was largely the result of prejudice, hysteria, and failed leadership and recommended that Congress pass a joint resolution condemning and apologizing for the program. Still later, in 1984 and 1987, respectively, a judge in the Ninth Circuit of the U.S. Court of Appeals issued writs of *coram nobis* to Fred Korematsu and Gordon Hirabayashi, which overturned their wartime convictions. The next year, Congress passed the Civil Liberties Act of 1988, which, following the earlier recommendations of the Commission on Wartime Relocation and Internment of Civilians, condemned the internment of the Japanese, submitted an official apology, and offered reparations.<sup>440</sup>

The last aspect of the crisis that demonstrates that the most blatant violations of Americans' civil liberties in the Second World War ended with the end of the crisis was the post-war change in U.S. Supreme Court decision-making. In general, after the surrender of the Japanese, the Supreme Court began to approach laws discriminating against aliens in a new way. In a series of decisions issued in the years after the war (*Takahashi v. Fish and Game Commission*, *Oyama v. California*, and *Duncan v. Kahanamoku*), the Supreme Court rejected a number of laws that discriminated against the Japanese. Of the three listed above, *Duncan v. Kahanamoku* was certainly the most important as it ruled unconstitutional the imposition of martial law in the territory of Hawaii during wartime. In doing so, the Court reaffirmed its decision in *Ex Parte Milligan* that military courts could not "supplant civil courts that were open and properly functioning."<sup>441</sup>

While the most noticeable violations of Americans' civil liberties ended approximately with the end of the crisis, less noticeable forms of repression continued into the Cold War, as was evident from two aspects of the crisis—the longevity and legacy of federal legislation and

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<sup>440</sup> Stone, *Perilous Times*, pp. 305-307.

<sup>441</sup> Stone, *Perilous Times*, p. 303. Both quotes from this paragraph are taken from p. 303.

the durability of the government's efforts to monitor political dissidents. Without any exceptions, every major piece of repressive legislation produced during the crisis remained on the books into the Cold War. These included the Foreign Agents Registration Act, the Hatch Act, the Espionage Act of 1917 (which, in 1940, was reenacted and made applicable in peacetime), the Smith Act, the Voorhis Act, and the Smith-Connally Act.<sup>442</sup> As was also true of legislation produced during the Quasi-War and the First World War, these pieces of legislation would come to be important instruments of repression in following national crises. Beyond their longevity, however, these pieces of legislation were important as they undoubtedly helped to set a precedent for the creation of similarly repressive laws during the Cold War.

In addition to the longevity and legacy of federal legislation, the durability of the government's efforts to monitor political dissidents also proved that the less noticeable forms of wartime repression significantly outlasted the end of the crisis. This was true of the surveillance efforts of both military intelligence and the FBI. During the war, copies of all international communications were provided to military intelligence for censorship. Although this program should have ended with the surrender of the Japanese, "representatives of the Army Signal Security Agency convinced the major international communications companies in the autumn of 1945 to continue to turn over copies of messages sent by private citizens to and from foreign countries."<sup>443</sup> The surveillance of international communications continued under the control of military intelligence until 1952, at which point the newly formed National Security Agency

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<sup>442</sup> "Allied Federal Laws Now in Effect," *Congressional Digest*, Vol. 28 Iss. 10 (Oct. 1949): p. 235, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 18 Feb. 2009 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=12174757&loginpage=Login.asp&site=ehost-live>>; "Antistrike Laws Miss the Point," *Saturday Evening Post*, Vol. 218 Iss. 35 (2 Mar. 1946): p. 100, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 18 Feb. 2009 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=19502370&loginpage=Login.asp&site=ehost-live>>.

<sup>443</sup> Goldstein, *Political Repression in Modern America*, p. 273.

(NSA) assumed control of the program and retained it until at least 1975 in a program known as Operation SHAMROCK.<sup>444</sup>

Perhaps an even greater impact resulted from the fact that the FBI continued to engage in a variety of questionably legal practices and programs long after the crisis had ended, even though the Bureau limited the focus of its investigations in the final years of the war. Five such practices and programs were of chief concern. First, the FBI continued its wartime practice of maintaining lists of individuals to be detained in the event of war until at least 1973. Second, the Bureau continued to place informants in defense plants until 1969, as well as employing members of the American Legion to report on subversion and espionage until 1954. Third, the FBI continued its wartime practice of warrantless wiretapping at least until 1972. Fourth, the Bureau continued its program of monitoring first class mail at least until 1966.<sup>445</sup> Finally, FBI agents continued to engage in “black bag jobs,” illegal break-ins with the purpose of stealing information from targeted subversive groups, at least until 1966.<sup>446</sup>

### **Conclusion**

Like the earlier crises in American history, the Second World War was a crisis of limited duration involving a conventional, non-ideological threat to American national security. Similar to the First World War, the restriction of civil liberties that it produced occurred through a range of different avenues of repression, both overt and covert, and was the province not only of the federal government, but of state and local governments as well. A major difference with the previous crisis, however, was that the Roosevelt administration, acknowledging the excesses of the previous crisis, actively sought to centralize the repression of dissent at the federal level.

While those efforts reflected concern for civil liberties, the Roosevelt administration nevertheless

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<sup>444</sup> Goldstein, *Political Repression in Modern America*, pp. 273-274.

<sup>445</sup> Goldstein, *Political Repression in Modern America*, p. 254.

<sup>446</sup> Goldstein, *Political Repression in Modern America*, pp. 272-273.



abused Americans' civil liberties in a number of important respects. The U.S. Supreme Court played a significant role in checking those excesses. Although it deferred to the President on the issue of internment, the Court upheld the constitutional rights of dissidents in a range of decisions related to the denaturalization of alleged subversives, the prosecution of dissidents for sedition, and the rights of organized labor.

Most of the overt forms of wartime repression, such as the prosecution of dissent and the internment of the Italians, Germans, and Japanese, ended approximately with the end of the crisis, if not earlier. In contrast, most of the covert forms of repression practiced during World War II continued well into the Cold War. That was particularly true of the monitoring of international communications by military intelligence and the FBI's use of questionably legal practices and programs established during wartime, including warrantless wiretapping, black bag jobs, and the maintenance of custodial detention lists.

The Second World War reflected a number of broad evolutionary changes in the nature of wartime repression. First, as during World War I, the crisis reflected a growing body of law on which to build a campaign of repression. Early in the crisis, Congress reenacted the Espionage Act of 1917, making it applicable in peacetime. Once World War II ended, the crisis left behind a number of major repressive laws, many of which were used to suppress dissent during the Cold War. That was particularly true of the Smith Act, which was used throughout the McCarthy era and during the years after to prosecute members of the Communist Party. Second, to a greater degree than in any previous national military crisis, the U.S. Supreme Court exercised a check on the executive and legislative branches, helping to limit a number of prominent forms of wartime repression. Third, although difficult to measure, the crisis demonstrated growing respect for civil liberties. That was evident in part from the Roosevelt administration's efforts to minimize the

repression of dissent by state and local governments. Fourth, the crisis also reflected growing sophistication in the federal response to crisis. As during World War II, Americans' civil liberties were restricted through nearly every available avenue of repression.

In addition to those evolutionary changes, the crisis also reflected growing reliance on covert forms of repression. During the crisis, both military intelligence and the FBI expanded in size and in the scope of their operations. Additionally, surveillance became an increasingly important method of repression, with the FBI engaging in black bag jobs and warrantless wiretapping throughout much of the crisis.

## V. COLD WAR (1946-1991)

The fifth, and final, past major national military crisis to test the United States' commitment to individual liberty was the Cold War. Although certain periods of repression during that crisis—the McCarthy era (which includes the Korean War) and the Vietnam War era—have received a tremendous amount of attention, no author has yet assessed the impact of the Cold War, in its entirety, on American civil liberties. This is unfortunate as the level of attention directed at these particularly intense periods of repression obscures the broader truth that popular fears of Soviet (communist) subversion, as well as the exploitation of those fears for partisan political advantage, led to the restriction of civil liberties in differing degrees throughout the roughly forty-five years of the crisis.

### **Background of the Crisis**

Coupled with the reaction of American policymakers and the public to developments throughout the crisis, the international and domestic events that led to the Cold War provide a critical context for understanding the restriction of civil liberties during wartime. In addition, these aspects of the crisis help to explain significant variations in the intensity of repression crucial to understanding the broad impact of the Cold War on American civil liberties.

### **Trigger of the crisis**

In contrast to earlier crises in American history, with the notable exception of the Quasi-War against France, the Cold War cannot easily be labeled the result of any single, prominent incident. The firing of Confederate guns on Fort Sumter, the assassination of Archduke Franz Ferdinand, and the Japanese bombing of the American fleet at Pearl Harbor all serve as clearly identifiable triggers for their respective crises. The Cold War, however, defies such simple explanations. Rather, after the end of the Second World War, the United States and the Soviet

Union rapidly slipped into an era of tensions and conflict—characterized by proxy wars at the edges of rival empires—that lasted nearly until the end of the twentieth century.<sup>447</sup>

At its core, the Cold War was the outgrowth of conflicting visions of the postwar landscape among the most powerful of the Allied nations—the United States, England, and the Soviet Union. During the war, American President Franklin Roosevelt and British Prime Minister Winston Churchill envisioned a postwar settlement in which a durable peace would be achieved through “cooperation among the great powers,” “a new United Nations collective security organization,” and the promotion of “self-determination and economic integration.”<sup>448</sup> In contrast, Soviet Union General Secretary Joseph Stalin sought a postwar settlement that would not only “secure his own and his country’s security,” but encourage “the rivalries among capitalists that he believed” would bring about their destruction and the “eventual Soviet domination of Europe.”<sup>449</sup> Given those starkly different hopes for the postwar landscape, it should not be surprising that tension and discord between the Soviet Union and the other Allied nations began to develop even before the end of the war.

When World War II ended, the wartime alliance began to break down as each country increasingly sought to ensure its own postwar security. Although the British had motives of their own, they tended to defer to the United States, accepting American leadership as the cost of long-term security.<sup>450</sup> A number of developments in the years after 1945 further eroded the relationship between the Soviet Union and the other Allied nations while, at the same time, giving form to the rivalry between the United States and the Soviet Union that lasted for the next half-century. One of the first major postwar developments that helped give rise to the Cold War

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<sup>447</sup> Stone, *Perilous Times*, p. 312.

<sup>448</sup> John Lewis Gaddis, *The Cold War: A New History* (New York: Penguin Press, 2005), pp. 26-27.

<sup>449</sup> Gaddis, *The Cold War*, p. 27.

<sup>450</sup> Gaddis, *The Cold War*, pp. 17-18.

was Stalin's effort in 1946 to secure territorial concessions in parts of Iran, Turkey, and the Mediterranean. Roosevelt and Churchill had acceded to Stalin's demands for territory during wartime out of fear that he "might again cut a deal with Nazi Germany" to establish a separate peace.<sup>451</sup> However, freed from that fear, the postwar leaders of the United States and Britain—President Harry S. Truman and Prime Minister Clement Attlee, respectively—refused to permit further Russian expansion.<sup>452</sup>

Stalin's aggressive efforts to acquire new territory during and after the Second World War caused American officials to search for some explanation of Soviet behavior. In February 1946, Foreign Service officer George Kennan provided an answer. In an 8,000-word telegram—the so-called "long-telegram"—Kennan argued that Russian "intransigence...reflected the internal necessities of the Stalinist regime."<sup>453</sup> The only way to counter Stalin's aggressive expansionistic tendencies, therefore, was to contain the Soviet Union, as "there would be no change in the [country's] strategy until it encountered a sufficiently long string of failures to convince some future Kremlin leader...that his nation's behavior was not advancing its interests."<sup>454</sup> Fleshed out in a later draft, Kennan's theory of containment became the basis of American policy toward the Soviet Union for the rest of the Cold War. Stalin responded to Kennan's "long telegram" by ordering the Russian ambassador to the United States to draft a similar assessment of American behavior and foreign policy. Unsurprisingly, it reached equally pessimistic conclusions.<sup>455</sup>

In the first six months of 1947, President Truman significantly escalated the developing Cold War through his efforts to implement Kennan's broad strategy of containment. In March of

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<sup>451</sup> Gaddis, *The Cold War*, p. 18.

<sup>452</sup> Gaddis, *The Cold War*, p. 28.

<sup>453</sup> Gaddis, *The Cold War*, p. 29.

<sup>454</sup> Gaddis, *The Cold War*, p. 29.

<sup>455</sup> Gaddis, *The Cold War*, p. 30.

that year, he offered military and economic assistance to Greece and Turkey in order to assist the governments of each country in resisting communist rebels. In doing so, he broadly declared that future American policy would be oriented toward supporting “free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.”<sup>456</sup> However, the Truman Doctrine was only part of the President’s plan to contain the Soviet Union. In June, Truman’s Secretary of State, George Marshall, announced a plan that committed the United States to the reconstruction of Europe. The Marshall Plan (as well as its later, less well-known equivalent in Japan, the Dodge Plan), was an integral part of the administration’s strategy of containment.<sup>457</sup> It sought to curry favor with Europeans, while, at the same time addressing the key factors that might lead them to vote communists into power—“hunger, poverty, and despair.”<sup>458</sup> Further, the Marshall Plan sought to drive a wedge between the Soviet Union and the nations of Europe. American policymakers rightly believed that Stalin would never accept American aid for either the Soviet Union or its satellites and that his refusal to do so would strain the Soviet Union’s relationship with its satellites, while simultaneously allowing the United States to seize “both the geopolitical and the moral initiative in the emerging Cold War.”<sup>459</sup>

As expected, Stalin reacted to the announcement of the Marshall Plan by “tightening his grip” on the nations of the United Soviet Socialist Republic.<sup>460</sup> In the year after the announcement of the Marshall Plan, Stalin directed the creation of the Cominform, an organization dedicated “to enforc[ing] orthodoxy in the international communist movement;” sanctioned a plan for communists to seize power in Czechoslovakia; unsuccessfully attempted to

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<sup>456</sup> *Public Papers of the Presidents of the United States: Harry S. Truman, 1947* (Washington: Government Printing Office, 1963), pp. 178-179, qtd. in Gaddis, *The Cold War*, p. 31.

<sup>457</sup> Thomas J. McCormick, *America’s Half-Century: United States Foreign Policy in the Cold War and After*, 2<sup>nd</sup> ed. (Baltimore: Johns Hopkins University Press, 1995), p. 89.

<sup>458</sup> Gaddis, *The Cold War*, pp. 31-32.

<sup>459</sup> Gaddis, *The Cold War*, pp. 31-32.

<sup>460</sup> Gaddis, *The Cold War*, p. 32.

subject Josip Broz Tito, the communist leader of Yugoslavia, to “Cominform orthodoxy”; and authorized the blockade of Berlin.<sup>461</sup> In the end, those measures failed to bring greater security to the Soviet Union as they persuaded policymakers in the United States and Europe that Stalin indeed posed a threat to their own security. Motivated by Stalin’s attempts to clamp down on Soviet satellites, Congress passed the Marshall Plan (which it had not yet done), while the nations of Europe requested the formation of a North Atlantic Treaty Organization (NATO). By the end of 1949, Stalin’s “strategy for gaining control of postwar Europe lay in ruins.”<sup>462</sup>

Despite the success of American foreign policy in preventing the Soviet Union from gaining additional influence in Europe, a series of developments in 1949 and 1950 widened and intensified the Cold War, appearing to outweigh “the European victories the West had won.”<sup>463</sup> First, on August 19, 1949, the Soviet Union tested its first atomic bomb. In doing so, it stripped the United States of the nuclear monopoly that American policymakers had expected to retain for at least a few more years. To regain the lead over the Soviet Union, President Truman increased the production of nuclear weapons, announced that the United States would develop a hydrogen bomb, and later authorized the reinforcement of American troops in Europe. Second, on October 1, Chinese communist leader Mao Zedong finally triumphed over nationalist leader Chiang Kai-shek and announced the formation of the People’s Republic of China. Shattering Western hopes, Mao did not follow in the footsteps of Yugoslavia’s communist leader, Tito (who resisted Soviet control and flirted with a place in the Western sphere of influence, despite his commitment to communism).<sup>464</sup> Rather, Mao wholeheartedly embraced cooperation with the Soviet Union. The fall of China to communism and the subsequent alliance between Stalin and Mao appeared to

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<sup>461</sup> Gaddis, *The Cold War*, pp. 32-34.

<sup>462</sup> Gaddis, *The Cold War*, p. 34.

<sup>463</sup> Gaddis, *The Cold War*, pp. 34-35.

<sup>464</sup> Gaddis, *The Cold War*, p. 33.

validate popular perceptions of communism as a monolithic threat to the American way of life.<sup>465</sup>

Third, in January 1950, two of the most prominent espionage cases of the entire Cold War came to light. On January 21, former State Department official Alger Hiss was convicted of perjury for denying under oath that he had been a spy for the Soviet Union during the late 1930s and early 1940s. Shortly later, on January 24, British physicist Klaus Fuchs confessed to having supplied atomic secrets to the Soviet Union for four years while he was working on the Manhattan Project.<sup>466</sup> In part, the information that he and other spies collected “had made it possible for the Soviet Union to succeed so quickly in building its own atomic bomb.”<sup>467</sup> Combined with the earlier Cold War developments of 1949, the Alger Hiss and Klaus Fuchs espionage cases further stoked popular fears of communist subversion in the United States, making red-baiting an even more profitable strategy for securing partisan political advantage. Indeed, Wisconsin Republican Senator Joseph McCarthy made his first broad accusations of communist infiltration in the federal government at a Republican Women’s Club meeting in Wheeling, West Virginia shortly after those espionage cases broke.<sup>468</sup>

Fourth, and perhaps most importantly, on June 25, 1950, the communist North Korean government invaded the Western-supported government of South Korea. President Truman immediately decided to meet the United Nations’ request for troops, authorizing General Douglas MacArthur to lead American forces in pushing North Korean troops back to the 38<sup>th</sup> parallel (which divided the two nations). Despite serious initial setbacks, UN forces soon seized the initiative and began pushing into North Korea, advancing all the way to the Yalu River

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<sup>465</sup> Gaddis, *The Cold War*, pp. 37-38.

<sup>466</sup> Gaddis, *The Cold War*, p. 40; Stone, *Perilous Times*, pp. 329-331.

<sup>467</sup> Gaddis, *The Cold War*, p. 40.

<sup>468</sup> Gaddis, *The Cold War*, p. 40; Stone, *Perilous Times*, pp. 331-2.



(which formed the border between North Korea and China) by November of 1950. That same month, fearing invasion, China sent 300,000 troops into North Korea, widening the Korean War and significantly intensifying the Cold War.<sup>469</sup> Ultimately, regardless of which point one choose to identify as the beginning of the Cold War, it is clear that by 1948, 1949, and 1950, the Cold War was well under way.

### **Reaction to the crisis**

In earlier crises, the reaction of American policymakers and the public to the immediate outbreak of war provided insight into the nature of wartime repression. However, in the case of the Cold War, it is necessary to discuss the reaction of policymakers and the public to the threat posed by the Soviet Union throughout the entire crisis. This reaction reveals significant variations in the intensity of wartime repression, variations that provide vital context for understanding the broad effects of the crisis on American civil liberties. These variations can be broken into four distinct periods: the McCarthy era, which lasted roughly from 1946 to 1954; a period of reduced tensions and hysteria from 1954 to 1964, referred to in this treatise as the Cold War Interlude; the Vietnam War era, from 1965 to 1981; and the Reagan era, which lasted until the collapse of the Soviet Union in 1991.

### **McCarthy era**

By the end of World War II, the prospects for civil liberties in the United States looked bright.<sup>470</sup> Unfortunately, hopes for the return to a pre-war “normal” were not realized. Over the next four years, a series of events—a few major espionage scares; the announcement of the Truman Doctrine in March, 1947; the Truman administration’s institution of a strict federal loyalty program later that month; the Soviet Union’s successful test of a nuclear weapon; and the

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<sup>469</sup> Gaddis, *The Cold War*, pp. 42-46; Stone, *Perilous Times*, p. 334.

<sup>470</sup> Stone, *Perilous Times*, p. 323.

fall of China to communism—brought Cold War tensions to new heights, transforming suspicion of the Soviet Union into popular fear and eventually widespread hysteria. During this period, Americans came increasingly to see communism as a monolithic, general threat to the American way of life.

At the same time, red-baiting became an increasingly profitable strategy for securing partisan political advantage throughout these years. The growing prevalence and intensity of this strategy both reflected and heightened fears of communist subversion. Republican candidates such as Richard Nixon and Joseph McCarthy first made successful use of the “red” issue in the congressional elections of 1946, in which each lambasted his opponent for alleged affiliations with “communistically-inclined” groups.<sup>471</sup> Although other issues no doubt featured prominently, smashing Republican success in the 1946 elections (they gained fifty-four seats in the House and eleven in the Senate) was at least partially a function of their exploitation of fears of communism.<sup>472</sup> Over the next few years, red-baiting became increasingly more common. By 1948, President Truman had adopted the strategy himself. In the presidential election of that year, he attacked the Progressive Party, whose candidate, Henry Wallace, represented a serious challenge to his reelection, as “controlled by Communists.”<sup>473</sup>

In 1950, the Cold War, as well as the contest between Democrats and Republicans for control of the “red” issue, significantly intensified due to a series of developments.<sup>474</sup> Discussed earlier, they include the Alger Hiss and Klaus Fuchs espionage cases; Truman’s announcement of his administration’s intention to develop a hydrogen bomb; Senator McCarthy’s first accusations of massive communist infiltration in the federal government; and the outbreak of war

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<sup>471</sup> Goldstein, *Political Repression in Modern America*, pp. 295-296.

<sup>472</sup> Stone, *Perilous Times*, p. 313.

<sup>473</sup> Stone, *Perilous Times*, pp. 328-329.

<sup>474</sup> Stone, *Perilous Times*, p. 313.

in Korea. Taken with the developments of 1949 (particularly the fall of China to communist leader Mao Zedong), those events further confirmed in the minds of many Americans the accuracy of Republican portrayals of communism as a monolithic, insidious enemy.<sup>475</sup> In doing so, they gave traction to the more vicious fear mongering of partisans like Joseph McCarthy. For this reason, red-baiting in the congressional elections of 1950 “reached unprecedented levels.”<sup>476</sup>

Intense red-baiting continued into the presidential election of 1952. Indeed, Republican presidential nominee General Dwight D. Eisenhower selected infamous red-baiter Richard Nixon as his running mate. The strategy continued to prove successful, yielding the Republican Party control not only of the House and Senate, but the White House as well.<sup>477</sup> Once in office, President Eisenhower “either passively supported or actively appeased McCarthy’s tactics,” while simultaneously “ratcheting up” the government’s program of repression.<sup>478</sup> Partly as a result, Senator McCarthy continued to grow in power, appearing nearly untouchable by the summer of 1953. After that point, however, a number of domestic and international events conspired to bring about his downfall. These included a devastating attack on McCarthy by influential broadcast journalist Edward R. Murrow; increasing opposition to the Senator’s tactics by the nation’s press<sup>479</sup>; the death of Joseph Stalin, which brought into power leaders who “appeared to be considerably more conciliatory”; and the signing of an armistice ending the Korean War.<sup>480</sup> Partly because of those events and partly because the Senator’s investigations in 1953 increasingly challenged the President, the Eisenhower administration finally began to denounce McCarthy in the first months of 1954. This led to the Army-McCarthy hearings and,

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<sup>475</sup> Gaddis, *The Cold War*, pp. 34-46.

<sup>476</sup> Stone, *Perilous Times*, p. 313.

<sup>477</sup> Stone, *Perilous Times*, pp. 338-339.

<sup>478</sup> Stone, *Perilous Times*, p. 340.

<sup>479</sup> Stone, *Perilous Times*, pp. 384-385.

<sup>480</sup> Goldstein, *Political Repression in Modern America*, p. 402.

ultimately, McCarthy's censure by the Senate in December.<sup>481</sup> In the congressional elections of that year, the Democratic Party "scored heavy gains," winning control of both houses of Congress.<sup>482</sup> From this point on, the level of overt repression declined significantly.

### *Cold War Interlude*

Following the McCarthy era, a period of reduced overt repression lasted roughly ten years, from 1954 to 1964. Robert Goldstein referred to that period simply as "An Interlude between the Wars," for the obvious reason that it was bracketed by the end of the Korean War and the escalation of the Vietnam War. In this treatise, however, that period is referred to even more simply as the Cold War Interlude. During the first year of that period, as hysteria over the threat of communist subversion began to ease, some of the most prominent institutions of McCarthy era repression began to come under increasing attack from Democrats, as well as some Republicans. On the international stage, the Soviet Union agreed to restore Austrian independence and the leaders of the United States, Russia, France, and Britain met at a conference in Geneva for the first time in ten years. Both of these events further reduced both the intensity of the Cold War and the intensity of wartime hysteria in the United States. As the intensity of hysteria began to diminish, so too did the level of overt repression on the federal, state, and local levels. This was particularly true of political deportations and the federal government's strict loyalty program.<sup>483</sup>

Nevertheless, while the level of overt repression diminished significantly following McCarthy's rapid fall from grace, federal policymakers continued to repress dissent. For example, congressional committees continued to hold hearings into the activities of left-wing organizations and pacifist groups, though certainly not with the same devotion and intensity

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<sup>481</sup> Geoffrey Perret, *Eisenhower* (New York: Random House, 1999), pp. 498-504.

<sup>482</sup> Goldstein, *Political Repression in Modern America*, p. 401.

<sup>483</sup> Goldstein, *Political Repression in Modern America*, p. 401-406.

characteristic of the McCarthy era.<sup>484</sup> Additionally, the FBI continued to grow throughout the Eisenhower years. Of particular importance, the Bureau established its first Counterintelligence Program (COINTELPRO) against the Communist Party (CP) in 1956. The program, which largely formalized preexisting harassment of the Communist Party, sought to monitor and disrupt CP activities through a broad range of questionably legal investigative techniques, such as break-ins, mail opening, and wiretapping. It ultimately became the model for the establishment of similar operations against other dissident groups throughout the 1960s.<sup>485</sup>

During the Kennedy years, from 1961 to 1963, the level of political activism in America increased significantly as the climate for civil liberties improved. In part, this was a function of the Kennedy administration's liberal approach to moderate dissent. Indicative of the Kennedy administration's tone, in February 1962, the President ordered coffee and hot cocoa sent to a group outside the White House protesting nuclear weapons and advocating disarmament.<sup>486</sup> The early 1960s saw the rise of a number of protest movements. In addition to the civil rights movement, college students (some of whom learned strategies of nonviolent resistance through their participation in the civil rights movement) began to organize around issues related to education, civil liberties, and peace. Students protested the House Un-American Activities Committee (HUAC) and university regulations preventing communists from speaking on campus, while a few organizations, most notably Students for a Democratic Society (SDS), worked broadly to advance social reform.<sup>487</sup> Further, the pacifism movement grew during those years, as groups such as the National Committee for a Sane Nuclear Policy (SANE) and the

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<sup>484</sup> Jeff Broadwater, *Eisenhower & the Anti-Communist Crusade* (Chapel Hill: University of North Carolina Press, 1992), pp. 190-191.

<sup>485</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 180-188.

<sup>486</sup> Goldstein, *Political Repression in Modern America*, pp. 412-415.

<sup>487</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 190-191; Goldstein, *Political Repression in Modern America*, pp. 412-415.

Student Peace Union (SPU) protested atmospheric testing of nuclear weapons and advocated disarmament.<sup>488</sup> The movement began to fade, however, after the Kennedy administration signed the Partial Test Ban Treaty with the Soviet Union in 1963.<sup>489</sup>

In general, tolerance of moderate dissent grew during the Kennedy years. Nevertheless, federal, state, and local governments continued to fight radicalism throughout the early 1960s, even though radical left-wing dissident groups such as the Communist Party, the Socialist Workers Party, and the Fair Play for Cuba Committee (a pro-Castro group) represented relatively insignificant forces in American society. They paled in influence, for example, to right-wing groups such as the John Birch Society, which grew rapidly during the early 1960s and experienced little repression. Thus, while greater tolerance of dissent began to develop during the Kennedy years, radical left-wing dissidents were still seen as not entitled to American civil liberties.<sup>490</sup>

### **Vietnam War era**

The Cold War Interlude was followed by the Vietnam War era, which lasted from approximately 1965 to 1981. When Lyndon Johnson assumed the presidency after the assassination of John F. Kennedy in November 1963, the level of overt repression of Americans' civil liberties was quite low, at least by the standards of the Cold War. In Johnson's first year as president, the number of HUAC hearings declined, the number of political deportations remained low, and there were few overt repressive acts. Even red-baiting had lost much of its usefulness by the election of 1964.<sup>491</sup>

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<sup>488</sup> Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (New York: Bantam Books, 1987), pp. 81-104.

<sup>489</sup> Stone, *Perilous Times*, pp. 433-434.

<sup>490</sup> Goldstein, *Political Repression in Modern America*, p. 425.

<sup>491</sup> Goldstein, *Political Repression in Modern America*, p. 433.

After 1965, however, a number of developments came together to usher in the second major period of intense repression during the Cold War. The most important of these was undoubtedly the war in Vietnam. Although Dwight D. Eisenhower first promised support to South Vietnamese leader Ngo Dinh Diem in 1954 and John F. Kennedy first committed American troops to support the South Vietnamese Army in 1961, President Johnson deserves credit for escalating the *relatively* limited American presence in Vietnam to the point of war.<sup>492</sup> In 1965, President Johnson first authorized the deployment of American combat troops to South Vietnam following congressional authorization the previous year to take all measures necessary to protect American forces and to prevent further North Vietnamese aggression (subsequent to an allegedly unprovoked attack by North Vietnamese ships on American naval vessels in the Gulf of Tonkin).<sup>493</sup> Over the next few years, the number of U.S. troops in Vietnam skyrocketed, from 184,000 troops by the end of 1965, to 385,000 by the end of 1966, and over 500,000 by the end of 1967.<sup>494</sup>

As the American presence in Vietnam grew, so too did public opposition to the war, which grew from SDS protest marches and teach-ins at a few universities in early 1965 to massive protests in 1967 and 1968.<sup>495</sup> One of the more notable protests of the period was a march on the Pentagon in October 1967, in which protesters sought “to turn the war itself into a ‘theater of the absurd’” by attempting to “levitate the Pentagon.”<sup>496</sup> Although President Johnson believed in the theoretical right of dissidents to protest, he also believed that that right should not be exercised when it came to foreign policy, as doing so undermined the President, making him and

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<sup>492</sup> Stone, *Perilous Times*, pp. 428-429.

<sup>493</sup> Stone, *Perilous Times*, p. 437.

<sup>494</sup> Stone, *Perilous Times*, p. 430.

<sup>495</sup> Stone, *Perilous Times*, pp. 437-448.

<sup>496</sup> Stone, *Perilous Times*, pp. 449-450.

the country weaker.<sup>497</sup> Nevertheless, he “refused to criticize—let alone *prosecute*—his detractors” out of fear of undermining support for his beloved Great Society program, a package of social reform policies meant to eradicate poverty and racial injustice.<sup>498</sup> Johnson’s fear that the war in Vietnam would undermine his domestic policies led his administration to put forth “half-truths” designed to avoid “alarming the public over the increasing likelihood that ‘a major war was in the offing.’”<sup>499</sup> In doing so, the President quickly developed what became known as a credibility gap.

The presidential election of 1968 represented a major turning point in the Vietnam War era. Earlier that year, the Vietcong and the North Vietnamese Army had launched the Tet Offensive, a massive assault throughout South Vietnam that, while militarily a defeat for the Communist forces, confirmed in the minds of most Americans that the war was not drawing to a close, as the Johnson administration had repeatedly promised.<sup>500</sup> Following the Tet Offensive, a nascent movement within the Democratic Party to unseat Johnson gained traction and the President subsequently announced that he would not run for re-election. Robert Kennedy ultimately scored the Democratic nomination for the presidency; however, his assassination left Vice President Hubert Humphrey to challenge the Republican nominee. By the time the election arrived, “increasing racial disorders, antiwar demonstrations, leaping crime rates, and the growth of a ‘counter-cultural’ movement among the young...had all become lumped together in the minds of many Americans as a general threat to peace and stability.”<sup>501</sup> Running on the campaign theme of “Law and Order,” McCarthy era red-baiter and former Vice President Richard M. Nixon secured the presidency that year by a very narrow margin. His election

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<sup>497</sup> Stone, *Perilous Times*, p. 441.

<sup>498</sup> Stone, *Perilous Times*, p. 438, footnote on p. 436.

<sup>499</sup> Stone, *Perilous Times*, pp. 438-439.

<sup>500</sup> Stone, *Perilous Times*, pp. 453-454.

<sup>501</sup> Goldstein, *Political Repression in Modern America*, p. 460.



brought about a major change in the treatment of political dissidents throughout the rest of the Vietnam War era.

Elected on the campaign theme of “Law and Order” and inheriting a massive surveillance apparatus built up during the Johnson administration, President Nixon immediately went to war against dissidents. Although the intense repression of the Nixon years was due in part to the growth of the civil rights and anti-war movements, it was more largely the result of the Nixon administrations’ hostile approach to dissent. During Nixon’s time as President, his administration massively expanded federal surveillance of dissent; carried out a major campaign of harassment directed at radicals, liberals and other opponents of the President’s policies; and formed a White-House intelligence unit known as the Plumbers, which was meant to plug leaks to the media.<sup>502</sup>

The radical movement began to wane after the summer of 1970 and was in definite decline by 1972. This was reflected in decreasing public anti-radical hysteria during the election of 1972 and the years afterward.<sup>503</sup> However, the larger reason for diminished repression in the early to mid-1970s was the disclosure of massive abuses of governmental power by the Nixon administration. During those years, the FBI’s Counter Intelligence Program (COINTELPRO) first came to light, and was subsequently shut down by Director J. Edgar Hoover. Additionally, the *New York Times* published excerpts of the Pentagon Papers, a highly classified study of U.S. decision-making in Vietnam commissioned by former Secretary of Defense Robert McNamara. Finally, and perhaps most importantly, the Watergate scandal broke, leading to Richard Nixon’s resignation in 1974.<sup>504</sup> As a result, by the mid-1970s, the repression of the Vietnam War era was in steep decline. Over the next few years, Presidents Gerald Ford and Jimmy Carter, as well as

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<sup>502</sup> Goldstein, *Political Repression in Modern America*, p. 463; Melvin Small, *Antiwarriors: The Vietnam War and the Battle for America’s Hearts and Minds* (U.S.A.: Scholarly Resources, 2002), pp. 113-114.

<sup>503</sup> Stone, *Perilous Times*, pp. 468-469; Goldstein, *Political Repression in Modern America*, p. 492.

<sup>504</sup> Stone, *Perilous Times*, pp. 495-495, pp. 500-514.

Congress, heavily restricted the extent and scope of surveillance in the United States. The Vietnam War era was over.

### **Reagan era**

The fourth and final period in the Cold War was the Reagan era, which lasted from Ronald Reagan's ascendance to the presidency in 1981 to the collapse of the Soviet Union ten years later. During that period, President Reagan significantly escalated the Cold War, portraying the Soviet Union "as an 'evil empire'—a godless, atheistic octopus extending its tentacles everywhere in remorseless efforts to destroy the 'free world.'"<sup>505</sup> At the same time, his administration worked to undo the checks on governmental power put in place in the mid- to late-1970s to prevent the widespread abuse of Americans' civil liberties that characterized the Vietnam War era. In addition, his administration attacked the Freedom of Information Act (which had been established in 1966 and strengthened in 1974 pursuant to "the Watergate revelations of the consequences of secret, unaccountable government")<sup>506</sup> and increased government secrecy.<sup>507</sup> Although the Reagan administration may have wished to expand surveillance and secrecy in government independent of the Cold War, these initiatives clearly "represent[ed] a continuation of the fears and 'national security' concerns of previous administrations."<sup>508</sup>

### **Restriction of Civil Liberties**

The four major periods of repression during the Cold War— the McCarthy era, from 1954 to 1964; the Cold War Interlude, from 1954 to 1964; the Vietnam War era, from 1965 to

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<sup>505</sup> Gaddis, *The Cold War*, pp. 215-218; Richard O. Curry, "Introduction," *Freedom at Risk: Secrecy, Censorship, and Repression in the 1980s*, ed. Richard O. Curry (Philadelphia: Temple University Press, 1988), p. 3.

<sup>506</sup> Diana M. T. K. Autin, "The Reagan Administration and the Freedom of Information Act," *Freedom at Risk*, p. 69.

<sup>507</sup> Curry, *Freedom at Risk*, pp. 3-29.

<sup>508</sup> Curry, *Freedom at Risk*, p. 10.

1981; and the Reagan era, from 1981 to 1991—were all linked by repressive actions motivated by widespread fears of Soviet or communist subversion. However, the focus of government repression evolved significantly throughout the crisis. In the beginning of the Cold War, during the McCarthy era, the overriding motivation of American policymakers was to provide broad protection against the threat of communist subversion and infiltration. Although the climax of the red scare occurred roughly in 1954, this fear continued to be reflected at a lower level of intensity in the actions of policymakers during the next major period, the Cold War Interlude. As the war in Vietnam escalated in the mid-to late-1960s, concern for the threat of communist subversion increasingly took a backseat to the perceived threat of the antiwar and civil rights movements. As the Vietnam War subsided, and the Reagan era began, the central focus of American policymakers' concerns for national security shifted once more to the threat of Soviet subversion, though communist ideology was by that point a less tangible threat to the American way of life than it was during the McCarthy era.

During those four periods, the evolution of wartime repression is evident in four areas: restrictions enacted by the federal government; restrictions enacted by state and local governments; the executive's tone toward the protection of civil liberties; and deference by the U.S. Supreme Court to the executive and legislative branches.

### **Federal restrictions**

As in previous crises in American history, though probably to a greater degree, the federal government set precedents for repressive action that state and local governments later emulated. For that reason, the restriction of civil liberties by policymakers in the federal government were more important than the reaction of state and local governments. Four key aspects of the federal government's response to the crisis are particularly relevant: repressive

legislation enacted by Congress; presidential directives related to civil liberties; efforts on behalf of the federal government to control political discourse; and federal efforts to monitor and suppress dissent.

### Legislation

For the most part, in its passage of repressive legislation, Congress reflected the broad evolution of repression described above. As the majority of, and the most important, civil liberties-related laws were enacted during the McCarthy and Vietnam War eras, these two periods receive the greatest level of attention.

During the McCarthy era, Congress passed three major laws directed at stemming the alleged spread of communism in American society. The first was the Taft-Hartley Act of 1947, which Congress passed over Truman's veto. Although its main purpose was to check the influence of labor by imposing a variety of restrictions on the scope of union activities, the Taft-Hartley Act contained a provision that sought to purge all communist and radical influence from labor unions. To do so, the law required all union officers to sign non-communist affidavits as a condition of retaining access to the benefits of the Wagner Act.<sup>509</sup>

The second major law, which Congress also passed over Truman's veto, was the Internal Security Act of 1950 (also known variously as the McCarran Act or the Subversive Activities Control Act). In addition to broadly criminalizing conspiracies to establish a totalitarian regime, the law required "communist-action organizations" and "communist front organizations" to register with the Attorney General, and in the process provide critical information about their operations (i.e. funding sources, membership lists, etc.). In doing so, it established a Subversive Activities Control Board (SACB) to ensure that groups registered, and it directed a range of

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<sup>509</sup> David McCullough, *Truman* (New York: Simon & Schuster, 1992), pp. 565-566.

penalties for groups (and their members) that neglected to do so.<sup>510</sup> For example, the Act made deportable all persons naturalized after January 1, 1951 who joined registered groups within the next five years. Finally, it authorized the President to declare an “internal security emergency,” at which point the Attorney General would be empowered to detain all persons whom he had “reasonable grounds” to believe might engage in, or conspire to engage in, espionage or sabotage.<sup>511</sup>

The third major repressive law passed during the McCarthy era was the McCarran-Walter Act of 1952 (also known as the U.S. Immigration and Nationality Act). Among other things, the Act specified “thirty-three reasons for excluding individuals from the United States, combining prostitutes, paupers, and the insane with ideological undesirables and homosexuals.”<sup>512</sup> Often ignored in analyses of political repression during the late 1940s and early 1950s, this law was used over the next forty years to prevent people from visiting the United States on the basis “of their political beliefs and associations.”<sup>513</sup>

The fourth major law was the Communist Control Act of 1954. In that law, Congress outlawed the Communist Party by stripping it of its legal rights. The Act was clearly largely symbolic, however, as it was never enforced. In the same bill, Congress also authorized the Attorney General to petition the Subversive Activities Control Board (SACB) to declare certain labor unions to be under communist domination. Unions so designated would thereby lose their standing before the National Labor Relations Board and, hence, their status as unions under law.

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<sup>510</sup> Stone, *Perilous Times*, pp. 334-335; Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 10-11.

<sup>511</sup> Goldstein, *Political Repression in Modern America*, pp. 322-323.

<sup>512</sup> Mark Schapiro, “The Excludables,” *Freedom at Risk*, p. 165.

<sup>513</sup> “McCarran-Walter Revisited,” *Bulletin of the Atomic Scientists*, Vol. 42 Iss. 4 (May 1987): p. 2, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 6 Apr. 2009 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=11019192&loginpage=Login.asp&site=ehost-live>>; “The Ghost of McCarran-Walter,” Editorial, *The New York Times* (9 Dec. 1991), *General OneFile*, Gale, Connecticut College, 6 Apr. 2009 <<http://find.galegroup.com/itx/start.do?prodId=ITOF>>; John W. Caughey, “McCarthyism Rampant,” *The Pulse of Freedom, American Liberties: 1920-1970s*, ed. Alan Reitman (New York: W.W. Norton & Company, 1975), pp. 201-203.

Further, their members would thereafter be subjected to a variety of restrictions in employment with the federal government and with other unions. The cumulative effect of that provision was to accelerate a pre-existing trend of labor unions purging any members that might cause the entire organization to be labeled as communist-infiltrated.<sup>514</sup>

Aside from these major pieces of legislation, Congress enacted a number of other, less important laws variously restricting and lashing out at members of the Communist Party and other groups deemed “communistically-inclined.” Four of these are particularly worth mentioning. The first, the Expatriation Act of 1954, revoked “the citizenship of persons convicted under the Smith Act.”<sup>515</sup> The second, an amendment to the Internal Security Act passed in 1954, required all Communist-action or front groups registered with the government to register any printing equipment they owned.<sup>516</sup> The third, also enacted in 1954, was the Espionage and Sabotage Act. Also referred to as the Rosenberg Law because it was passed shortly after the execution of Julius and Ethel Rosenberg in 1953 for passing nuclear secrets to the Soviet Union, the law made espionage during peacetime a capital offense.<sup>517</sup>

After the climax of the McCarthy era in 1954, the pace at which repressive laws were enacted slowed considerably. During the Cold War Interlude, Congress passed only one major piece of repressive legislation directed at preventing subversion. The law, a 1962 amendment to the Smith Act of 1940, criminalized ongoing organizational activities by groups advocating the

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<sup>514</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 173-175; Goldstein, *Political Repression in Modern America*, pp. 340-341.

<sup>515</sup> Goldstein, *Political Repression in Modern America*, p. 340; “The Expatriation Act of 1954,” *Yale Law Journal*, Vol. 64 Iss. 8 (Jul. 1955): pp. 1164-1200, *JSTOR*, 28 Mar. 2009 <<http://www.jstor.org/stable/794190>>.

<sup>516</sup> *Congress and the Nation, 1945-1964: A Review of Government and Politics in the Postwar Years*, Vol. 1 (Washington: Congressional Quarterly Service, 1965), p. 1658.

<sup>517</sup> *Congress and the Nation*, Vol. 1, p. 1658; Ronald Radosh and Joyce Milton, *The Rosenberg File*, 2<sup>nd</sup> ed. (U.S.A.: Yale University Press, 1997), Google Book Search, 9 Mar. 2009 <[http://books.google.com/books?id=QpKjGSHAcAYC&pg=PA448&lpg=PA448&dq=1954+peacetime+espionage&source=bl&ots=SFyYhY48k0&sig=FUFPToWVRSd3WP4NZ2cyuBVr3s&hl=en&ei=-yW1S2qHDtCCtwfU2bDqDA&sa=X&oi=book\\_result&resnum=1&ct=result](http://books.google.com/books?id=QpKjGSHAcAYC&pg=PA448&lpg=PA448&dq=1954+peacetime+espionage&source=bl&ots=SFyYhY48k0&sig=FUFPToWVRSd3WP4NZ2cyuBVr3s&hl=en&ei=-yW1S2qHDtCCtwfU2bDqDA&sa=X&oi=book_result&resnum=1&ct=result)>, pp. 448-449.

illegal overthrow of government—a bill directed specifically at the Communist Party.<sup>518</sup> In enacting the law, Congress was responding to the U.S. Supreme Court’s 1957 decision in *Yates v. United States*, in which the Court ruled that the “organize” provision of the Smith Act referred only to the original establishment of such a subversive group, and not to continuing organizational work.<sup>519</sup>

In addition to this bill, Congress enacted a slew of minor laws during this period that sought to limit the scope of activities in which communists could engage. In many cases, this goal was achieved by including loyalty oaths in major pieces of legislation. This was the case in both the National Defense Education Act of 1958 and the Anti-Poverty Bill of 1964. In other cases, however, it was clearly felt that loyalty oaths were not sufficient. In the Landrum-Griffin Act of 1959, Congress replaced the anti-communist loyalty oath established by the Taft-Hartley Act by making it a crime for past or present CP members to be in the employ of labor unions. Similarly, in 1962, Congress replaced the anti-communist loyalty oaths of the 1958 National Defense Education Act and the 1950 National Science Foundation Act by making it a crime for members of communist-action or front groups to apply for scholarships or grants.<sup>520</sup> In a piece of legislation particularly indicative of continuing concern about the threat of communist subversion, Congress overturned President Kennedy’s 1961 ban on the confiscation of foreign communist propaganda by the Post Office through the 1962 Postal Rate-Federal Pay Increase Bill (although the bill “watered-down” the previous mail-censorship program somewhat).<sup>521</sup>

With the escalation of the Vietnam War, the related growth of the anti-war movement, and the increasing strength and militancy of the civil rights movement in the mid-late 1960s, the

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<sup>518</sup> *Congress and the Nation*, Vol. 1, p. 1662.

<sup>519</sup> Goldstein, *Political Repression in Modern America*, p. 405.

<sup>520</sup> *Congress and the Nation*, Vol. 1, p. 1670; Goldstein, *Political Repression in Modern America*, p. 409.

<sup>521</sup> *Congress and the Nation*, Vol. 1, p. 1662.

focus of congressional repressive action shifted from a focus on communism to efforts to ban dissent. Many major pieces of legislation passed during the Vietnam War era represented efforts to prevent specific forms of dissent. For example, in 1965, Congress responded to the growing practice of burning draft cards as a form of public protest by banning the intentional destruction of draft cards in an amendment to the Universal Military Training and Service Act that year.<sup>522</sup> Later, in 1968, Congress responded to the increasing prevalence of flag burning as a form of public protest by criminalizing the destruction of the flag.<sup>523</sup>

Much more broadly, in the Civil Rights Act of 1968, Congress included a provision (often referred to as the Anti-Riot Act of 1968)<sup>524</sup> that made it illegal to travel across state lines or to use interstate facilities, such as a telephone, in order to incite a riot. The provision very broadly defined a riot to mean an act, or the threat, of violence by at least one person in a group of three or more people. Although enacted in the aftermath of serious race riots the previous year and intended primarily to stem increasing violence in the civil rights movement, the Act was applied in a number of instances to individuals protesting the Vietnam War.<sup>525</sup> Equally broadly, Congress passed a series of bills throughout the Vietnam War era that sought to deny federal education funds to students involved in dissident activities. Due to those laws, federal financial aid was denied to over one thousand college students in 1969 and 1970 alone.<sup>526</sup>

In addition to legislation directed at specific forms of dissent, one other major law was passed during the Vietnam War era. Reflecting continued concern with the threat of communist subversion and infiltration, Congress passed a law in 1967 that revived the SACB by authorizing

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<sup>522</sup> *Congress and the Nation, 1965-1968: A Review of Government and Politics*, Vol. 2 (Washington: Congressional Quarterly Service, 1969), p. 410.

<sup>523</sup> *Congress and the Nation*, Vol. 2, p. 417.

<sup>524</sup> Stone, *Perilous Times*, pp. 483-484.

<sup>525</sup> Howard Zinn, *A People's History of the United States: 1492-Present* (New York: HarperCollins Publishers, 2003), Google Book Search, 18 Mar. 2009 <<http://books.google.com/books?id=9-FtlblxbLgC&pg=PA461&dq=civil+rights+act+of+1968+riot>>, p. 461.

<sup>526</sup> Goldstein, *Political Repression in Modern America*, p. 442.



the Board simply to list organizations deemed communist, rather than requiring them to register. In doing so, Congress circumvented previous court decisions that had made the SACB virtually powerless.<sup>527</sup> It should be noted, however, that the legislation had little practical effect, as it merely formalized an executive order of similar content and purpose issued by President Nixon on July 2, 1971 (Executive Order 11605).<sup>528</sup>

In the 1970s, revelations of massive abuse of authority by the Nixon administration and the federal intelligence agencies led Congress to adopt a different approach to dissent and to stand against the restriction of Americans' civil liberties. In 1971, following the disclosure of the FBI's Counter Intelligence Program and the publication of the Pentagon Papers by the *New York Times*, Congress repealed the Emergency Detention Provision of the Internal Security Act of 1950.<sup>529</sup> The next year, Congress struck down an attempt to formalize an executive order issued by Nixon (11605) that sought to revive the SACB.<sup>530</sup> Following the Watergate scandal, Congress strengthened the Freedom of Information Act (FOIA) in 1974 to improve transparency in government.<sup>531</sup> Much later, in 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA) in order to prevent the excesses of the late 1960s and early 1970s. The bill prescribed "when and how the government could pursue foreign intelligence investigations."<sup>532</sup>

During the Reagan era (as during the Cold War Interlude), the pace at which repressive legislation was enacted slowed considerably. Only two laws passed during the period are worth noting. The first, enacted in 1982, was the Intelligence Identification Act. Proposed by the

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<sup>527</sup> Goldstein, *Political Repression in Modern America*, p. 441.

<sup>528</sup> *Congress and the Nation, 1969-1972: A Review of Government and Politics*, Vol. 3 (Washington: Congressional Quarterly Service, 1973), pp. 489-490.

<sup>529</sup> Stone, *Perilous Times*, pp. 494-495, pp. 514-515; *Congress and the Nation*, Vol. 3, p. 487-488.

<sup>530</sup> *Congress and the Nation*, Vol. 3, pp. 490-491.

<sup>531</sup> Autin, *Freedom at Risk*, p. 69.

<sup>532</sup> Geoffrey R. Stone, "The Vietnam War: Spying on Americans," *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History*, ed. Daniel Farber (New York: Russell Sage Foundation, 2008), p. 105.

Reagan administration, this law criminalized “the disclosure of information that *could* lead to the identification of an intelligence agent, regardless of the public nature of the source of the information or the illegal or unauthorized nature of the agent’s activities.”<sup>533</sup> The second, a provision included in the Anti-Drug Abuse Act of 1986, exempted certain law enforcement records from disclosure by normal FOIA regulations. Among those exempted were “FBI records pertaining to foreign intelligence, counterintelligence, and international terrorism.”<sup>534</sup>

### **Presidential directives**

The issuance of presidential directives throughout the Cold War also reflected the broad evolution in the focus of governmental repression, though to a lesser degree. No major executive orders or presidential proclamations stemming from fears of communism were issued during the Cold War Interlude. However, the directives issued during the other periods of the crisis confirm shifting perceptions of threats to American national security, from communist subversion and infiltration during the McCarthy era and dissent in general during the Vietnam War era to Soviet infiltration in the Reagan era.

Every major repressive presidential directive issued during the McCarthy era sought, in one way or another, to screen potentially subversive individuals from positions of importance in American society. Of the five issued, three related directly to a centralized effort to prevent disloyal or even questionably loyal citizens from securing employment with the federal government. President Truman first established the federal loyalty program through Executive Order 9835, which he issued on March 21, 1947. His order established a comprehensive federal loyalty program in which all federal employees and applicants for employment were required to undergo an extensive loyalty investigation that would draw on files from both the FBI and

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<sup>533</sup> Autin, *Freedom at Risk*, p. 73.

<sup>534</sup> Autin, *Freedom at Risk*, p. 79.

HUAC. Employees could be dismissed and individuals denied from applying for employment if there existed “reasonable grounds” to believe they were disloyal. Additionally, it directed the Attorney General to create and maintain a list of subversive organizations that was for all practical purposes to a government-run blacklist.<sup>535</sup> Although the President believed that the threat of communist infiltration was largely manufactured by Republicans seeking partisan advantage, he hoped that the establishment of the loyalty program would allow him to subvert further attacks and to allay popular fears.<sup>536</sup> In establishing the program, however, he invited the serious abuse of Americans’ civil liberties by making both employees’ beliefs and associations grounds for dismissal. This event, more than any other, helped to pave the way for the widespread hysteria of the early 1950s.<sup>537</sup>

Four years later, responding to growing hysteria over the “red menace” and undoubtedly seeking to head off Republican accusations that Democrats were “soft” on communism, President Truman sought to strengthen the federal loyalty program. To do so, he issued Executive Order 10241, which “changed the standard for loyalty firings from the existence of ‘reasonable grounds’ for the belief that the employee was disloyal to ‘reasonable doubt’ as to the loyalty of the individual.”<sup>538</sup> Because of this change, 565 cases previously decided in favor of federal employees were reopened to review whether the employees in question remained loyal under the new standard.<sup>539</sup> Two years later, and only a few months after he became President, Dwight D. Eisenhower authorized a significant overhaul of the federal loyalty program. In Executive Order 10450, Eisenhower established “a new and more stringent loyalty standard,”

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<sup>535</sup> Goldstein, *Political Repression in Modern America*, p. 310.

<sup>536</sup> McCullough, *Truman*, pp. 550-552.

<sup>537</sup> Stone, *Perilous Times*, pp. 326-327, pp. 342-345.

<sup>538</sup> Goldstein, *Political Repression in Modern America*, p. 330; Harry S. Truman, “Executive Order 10241 – Amending Executive Order No. 9835 Entitled ‘Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government,’” 28 Apr. 1951, *The American Presidency Project*, 29 Mar. 2009 <<http://www.presidency.ucsb.edu/ws/index.php?pid=78392>>.

<sup>539</sup> Goldstein, *Political Repression in Modern America*, p. 330.

ordered all federal agencies to check previously decided cases for compliance with the new standard, extended the power of summary dismissal to all federal agencies, and authorized all agencies to dismiss employees “on ‘security’ and ‘suitability’ grounds for such offenses as drunkenness, sexual perversion and mental disorders.”<sup>540</sup>

Aside from federal loyalty directives, two other, less far-reaching, repressive directives were issued during the McCarthy era. The first, Executive Order 10173 (issued by Truman on October 18, 1950), authorized the Commandant of the Coast Guard to exclude any person from maritime employment (government or private) that he deemed a threat and to restrict coastal areas as he felt necessary to protect American national security.<sup>541</sup> The second, issued by President Truman on January 9, 1953, was Executive Order 10422.<sup>542</sup> In EO 10422, Truman authorized the investigation of all American citizens employed with, or applying to work at, the United Nations (UN).<sup>543</sup>

During the Vietnam War era, the threat of communist subversion and infiltration no longer dominated the concerns of American policymakers to the extent it had previously. To some extent, this was reflected in the presidential directives issued during that period. But what was more obvious from the directives issued, was the broader shift from efforts to expand repression in the very early 1970s to efforts to prevent repression in the mid-late 1970s. In 1971, President Nixon issued an executive order, 11605, that sought to breathe life into the SACB by giving the Board “power formerly held by the attorney general to investigate and compile a list

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<sup>540</sup> Goldstein, *Political Repression in Modern America*, pp. 337-338.

<sup>541</sup> Goldstein, *Political Repression in Modern America*, p. 324; Harry S. Truman, “Executive Order 10173 – Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States,” 18 Oct. 1950, *The American Presidency Project*, 29 Mar. 2009 <<http://www.presidency.ucsb.edu/ws/index.php?pid=60775>>.

<sup>542</sup> Harry S. Truman, “Executive Order 10422 – Prescribing Procedures for Making Available to the Secretary General of the United Nations Certain Information Concerning United States Citizens Employed or Being Considered for Employment on the Secretariat of the United Nations,” 9 Jan. 1953, *The American Presidency Project*, 29 Mar. 2009 <<http://www.presidency.ucsb.edu/ws/index.php?pid=58850>>.

<sup>543</sup> Goldstein, *Political Repression in Modern America*, p. 333.

of groups which it considered” radical.<sup>544</sup> Nixon’s directive ultimately failed to revive the SACB, as Congress refused to appropriate funds for the Board in 1972. Consequently, Nixon later abolished the Board a year later.<sup>545</sup>

After the revelations about the extent of surveillance of domestic dissent and the disclosure of the Watergate scandal in the early to mid-1970s, Presidents Ford and Carter each issued directives limiting the degree to which certain intelligence agencies could investigate dissent. On February 18, 1976, Ford issued Executive Order 11905, which banned the Central Intelligence Agency (CIA) from launching domestic investigations and prohibited the National Security Agency (NSA) from monitoring the communications of persons within the United States (even if the communication in question originated from or was directed to someone outside the country).<sup>546</sup> Two years later, on January 25, 1978, President Carter issued an executive order, 12036, that limited FBI “investigations of ‘terrorist’ and ‘potentially subversive’ organizations” and more broadly restricted the permissible scope of activities in which the federal intelligence agencies might engage.<sup>547</sup> While the three directives discussed above were in large part a reflection of the issuing president, they also reflected broader trends in American society.

As in the McCarthy and Vietnam War eras, the presidential directives issued during the Reagan era reflected shifting perceptions of threats to American national security. In particular, the various repressive directives issued demonstrated increased concern during the Reagan years with the threat of Soviet espionage, which was evident from the fact that the most important

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<sup>544</sup> *Congress and the Nation*, Vol. 3, pp. 489-491.

<sup>545</sup> Goldstein, *Political Repression in Modern America*, pp. 499-500.

<sup>546</sup> Stone, *Security v. Liberty*, p. 105; Gerald R. Ford, “Executive Order 11905 – United States Foreign Intelligence Activities,” 18 Feb. 1976, *The American Presidency Project*, 29 Mar. 2009 <<http://www.presidency.ucsb.edu/ws/index.php?pid=59348>>.

<sup>547</sup> Athan Theoharis, “Conservative Politics and Surveillance: The Cold War, the Reagan Administration, and the FBI,” *Freedom at Risk*, p. 266.

directives expanded surveillance and increased secrecy in government. Without a doubt, the most important directive issued by President Reagan was Executive Order 12333. Issued on December 4, 1981, the order reversed many of the reforms of the late 1970s by significantly expanding the scope of activities in which the federal intelligence agencies could engage.<sup>548</sup> For example, the order empowered the CIA to launch domestic intelligence operations, authorized the “infiltration of domestic groups,” and appeared to open the door to warrantless wiretapping.<sup>549</sup> Following this order, FBI intelligence operations involving wiretaps, infiltration, and other previously illegal techniques increased significantly. Further, reports surfaced in the early 1980s that the Bureau was interviewing groups opposed to President Reagan’s policies in Central America.<sup>550</sup>

Aside from his efforts to free the federal intelligence agencies from the constraints imposed during the mid-to-late 1970s, Reagan issued a series of directives throughout the 1980s that sought to expand secrecy in government. The first, Executive Order 12356, established a new security classification system that reversed a long-term trend toward growing transparency in government. Under that order, the “threshold standard for classification” was lowered, the automatic declassification of classified materials was eliminated, “the presumption in favor of openness [was] reversed,” and federal officials were no longer required to balance “the public’s need to know against the need for classification.”<sup>551</sup>

Over the next few years, the President issued a number of National Security Decision Directives (NSDD) that variously increased secrecy in government. For example, on March 11, 1983, Reagan issued NSDD 84. Among other things, this directive authorized the use of

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<sup>548</sup> Ronald Reagan, “Executive Order 12333 – United States Intelligence Activities,” 4 Dec. 1981, *The American Presidency Project*, 29 Mar. 2009 <<http://www.presidency.ucsb.edu/ws/index.php?pid=43324>>.

<sup>549</sup> Autin, *Freedom at Risk*, p. 74.

<sup>550</sup> Theoharis, *Freedom at Risk*, p. 270; Autin, *Freedom at Risk*, pp. 75-76.

<sup>551</sup> John Shattuck, “Federal Restrictions on the Free Flow of Academic Information and Ideas,” *Freedom at Risk*, pp. 51-53.

polygraph tests in loyalty investigations and required all Executive Branch employees with access to highly classified material “to sign nondisclosure agreements containing prepublication review clauses,”<sup>552</sup> whereby employees were “required to submit their public writing, speech texts, and publication drafts for prior review by security officials.”<sup>553</sup> However, the most controversial features of this directive, including the prepublication review clause and the polygraph provision, were subsequently dropped after massive opposition from Congress.<sup>554</sup> The next year, in NSDD 145, issued on September 17, 1984, the Reagan administration introduced “a new category of controllable data: ‘sensitive but unclassified government or government-derived information, the loss of which could adversely affect the national security interest.’”<sup>555</sup> Later, in November 1985, the Reagan administration tried once more to authorize the use of polygraph examinations for federal employees with access to highly classified material through NSDD 196. This effort was also unsuccessful, however, and was rescinded a year later. Although these directives represent only a few of the most prominent executive orders issued during the Reagan years, they demonstrate an extremely high level of concern that sensitive information might fall into the wrong hands, a concern that continued into the presidency of George H. W. Bush.<sup>556</sup>

### **Efforts to control political discourse**

During the Cold War, there was no centralized federal effort to control political discourse by flooding the marketplace of ideas with government propaganda, at least not domestically. The idea of an official government propaganda agency had fallen very much out of favor after the

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<sup>552</sup> Shattuck, *Freedom at Risk*, pp. 48-49.

<sup>553</sup> Peter Herson and Harold C. Relyea, “Information Policy,” *Encyclopedia of Library and Information Science*, Vol. 48 (New York: Marcel Dekker, 1991), Google Book Search, 30 Mar. 2009 <<http://books.google.com/books?id=gVuX8DkkkJIC&pg=PA184&dq=nsdd+84#PPA184,M1>>, p. 184.

<sup>554</sup> Myriam Dunn Cavelty, *Cyber-Security and Threat Politics: US Efforts to Secure the Information Age* (New York: Routledge, 2008), Google Book Search, 30 Mar. 2009 <[http://books.google.com/books?id=QEjX-pv0\\_PcC&pg=PA49&dq=nsdd+84](http://books.google.com/books?id=QEjX-pv0_PcC&pg=PA49&dq=nsdd+84)>, p. 49.

<sup>555</sup> Janet Raloff, “Coming: The Big Chill?,” *Freedom at Risk*, p. 89.

<sup>556</sup> Sandra N. Milevski, “Federal Policy-Making and National Security Controls on Information,” *Library Trends* Vol. 39 (1990), p. 140-144.

excesses of George Creel's Committee on Public Information (CPI). Even so, other factors also prevented a similar agency from being established. For example, during the McCarthy era, there was simply no need to establish a new CPI as federal policymakers were already able to manipulate the public by exploiting popular fears of the "red menace." Later, during the mid-1960s, President Johnson sought to downplay the war in Vietnam in order to maintain support for his Great Society domestic reforms. Had he even been friendly to the idea, the establishment of a government propaganda agency would have undermined this central goal by focusing attention on the war.

There was also relatively little direct censorship of the press, at least by the federal government. Nevertheless, despite minimal direct censorship, members of the press were not entirely free from constraints. Press freedom was restricted in two ways throughout the Cold War. First, during conflicts such as the Korean War, the Vietnam War and Grenada, journalists were frequently denied access to the critical information needed to inform the public. Second, at various points throughout the crisis (particularly during the Nixon years), influential journalists were investigated and harassed by intelligence agents attempting to intimidate them into self-censorship.

Upon the outbreak of war in Korea, President Truman, acting through the United Nations, committed American troops to the defense of the Republic of South Korea. As in any war, military officials were confronted with the difficult task of balancing the public's need to be informed about the progress of the war with the military's need to protect vital information such as troop movements and "the strength of forces."<sup>557</sup> Initially, General Douglas MacArthur, the commander of UN forces in the Korean War, resisted efforts to censor the press, advocating

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<sup>557</sup> Jeffrey A. Smith, *War & Press Freedom: The Problem of Prerogative Power* (New York: Oxford University Press, 1999), p. 169.



instead press self-censorship. Under pressure from Washington, however, MacArthur eventually consented and the Eighth Army established a set of rules governing censorship. Unsurprisingly, while intended to prevent the dissemination of critical information, military censorship led to the suppression of a range of information embarrassing to military and governmental authorities.<sup>558</sup> Later, during the Vietnam War, the American military did not establish a similar program of censorship. Throughout the war, despite strategies of “official dishonesty” and “news management” on the part of the Kennedy and Johnson administrations, members of the press were accorded wide leeway to publish as they so chose.<sup>559</sup> That said, the South Vietnamese government not only maintained its own censorship program, but subjected reporters to investigation and harassment.<sup>560</sup>

Although the press faced some restrictions in covering the wars in Korea and Vietnam, press censorship in those conflicts paled in comparison to the Reagan administration’s strategic denial of access to the news media during the 1983 invasion of Grenada, in which American troops invaded the island nation to overthrow a recently installed communist government.<sup>561</sup> During that conflict, the Reagan administration not only refused to admit that an invasion was planned until after American troops had landed, but also refused to allow members of the press any access until the conflict had almost concluded. In doing so, the President was able to win over the majority of Americans, despite outrage in Congress and from abroad.<sup>562</sup> Outrage over the Reagan administration’s conduct led to the creation of a “Department of Defense Media

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<sup>558</sup> Smith, *War & Press Freedom*, pp. 169-171.

<sup>559</sup> Smith, *War & Press Freedom*, p. 181.

<sup>560</sup> Smith, *War & Press Freedom*, pp. 181-184.

<sup>561</sup> Russell Crandall, *Gunboat Democracy: U.S. Interventions in the Dominican Republic, Grenada, and Panama* (U.S.A.: Rowman & Littlefield Publishers, 2006), Google Book Search, 31 Mar. 2009 <<http://books.google.com/books?id=iWqI3G2VZLYC&pg=PA105&dq=invasion+grenada#PPA105,M1>>, pp. 105-108.

<sup>562</sup> Smith, *War & Press Freedom*, pp. 188-190.

Pool.”<sup>563</sup> Unfortunately, during the invasion of Panama six years later, this program failed to guarantee press access to developments on the ground, as President Bush’s Secretary of State, Richard Cheney, “delayed the activation of the pool and obstructed Army efforts to create a pool of reporters who were already in Panama.”<sup>564</sup>

Beyond the denial of access during wartime, members of the press were also subjected to investigation and harassment throughout the Cold War. Press censorship was broadly unnecessary during the McCarthy era as the press was swept up in widespread public hysteria over the threat of communist subversion. During this period, editors and publishers worked with government officials to expose alleged communists “to public opprobrium,” while the movie, radio, and television industries avoided unpopular content, dismissed questionably loyal employees, and operated a blacklist.<sup>565</sup> The press began to assume a more independent stance, however, after the climax of the McCarthy era in 1953 and 1954.<sup>566</sup>

When Kennedy came into office in 1961, he found it necessary to devise strategies of news management and to order “government agencies to spy on and sometimes harass journalists who managed to uncover sensitive or embarrassing information.”<sup>567</sup> These strategies of information control and repression continued throughout the Johnson administration. However, President Nixon embraced their use more fully than did any other Cold War era president. During his administration, Nixon used the FBI and the Internal Revenue Service (IRS), as well as a number of other agencies, to investigate and intimidate the press.<sup>568</sup> Additionally, the White House “began a massive program of subpoenaing the files and unused films and photographs of

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<sup>563</sup> Smith, *War & Press Freedom*, p. 191.

<sup>564</sup> Smith, *War & Press Freedom*, p. 191.

<sup>565</sup> Alan Reitman, “Past, Present, and Future,” *The Pulse of Freedom, American Liberties: 1920-1970s*, ed. Alan Reitman (New York: W. W. Norton and Company, 1975), p. 312.

<sup>566</sup> Reitman, *The Pulse of Freedom*, p. 312, p. 315.

<sup>567</sup> Smith, *War & Press Freedom*, p. 180.

<sup>568</sup> Smith, *War & Press Freedom*, p. 187.

reporters” in an effort to stifle press contact with radical groups.<sup>569</sup> Later, after the *New York Times* began publishing the Pentagon Papers—which the Nixon administration challenged unsuccessfully before the U.S. Supreme Court in one of the only major attempts at prepublication press censorship during the Cold War—the White House “set up its own secret ‘Plumbers’ unit to investigate leaks to the news media.<sup>570</sup> The group’s illegal actions eventually led to Nixon’s resignation in 1974. After his resignation and the reforms of the mid-late 1970s, the investigation and harassment of the press declined significantly, if not entirely.<sup>571</sup>

### **Efforts to monitor and suppress dissidents**

The surveillance and repression of dissent was clearly not uniform throughout the Cold War. As circumstances changed and as different avenues of repression became more or less attractive, policymakers chose to monitor and suppress dissent in different ways and in differing degrees. During the McCarthy era, the repression of dissent was accomplished most prominently through the federal loyalty program and by congressional investigation. Less prominent, but still impactful, were prosecutions, surveillance, and efforts to exclude foreigners and naturalized citizens. As popular fears of communist subversion diminished throughout the Cold War Interlude, the loyalty program improved and congressional investigations of communism declined. Efforts to exclude radicals also became less frequent, while the prosecution of Communist Party leaders under the Smith Act ended for a time following the U.S. Supreme Court’s 1957 decision in *Yates v. United States*. Nevertheless, despite a general decline in overt repression, the surveillance of political dissidents expanded, motivated in large part, no doubt, by the growing strength of the civil rights movement.

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<sup>569</sup> Goldstein, *Political Repression in Modern America*, p. 495.

<sup>570</sup> Smith, *War & Press Freedom*, p. 187.

<sup>571</sup> Smith, *War & Press Freedom*, pp. 184-194.

As the antiwar and civil rights movements grew stronger and more militant throughout the mid-late 1960s and early 1970s, prosecutions and surveillance became the most prominent methods of repression, though congressional committees also investigated and reported on communist infiltration in the antiwar movement. Meanwhile, efforts to exclude foreigners and naturalized citizens remained low and the federal loyalty program effectively dropped off the radar. After the decline of the antiwar and civil rights movements in the early 1970s and the concurrent revelations of massive governmental abuse of power, the repression of dissent diminished significantly as Congress and Presidents Ford and Carter dismantled, or imposed new restrictions on, many instruments and institutions of wartime repression. Once President Reagan came into office in 1981, however, his administration began to actively undo some of those reforms. As a result, during the Reagan era, the surveillance of political dissidents rose somewhat, along with the exclusion of foreigners for political reasons. During that period, opponents of Reagan's Cold War foreign policies in Central America were a major target of exclusion.

The Cold War presidents used five specific avenues of repression to monitor and suppress dissent. They include direct prosecution; surveillance; the exclusion of foreigners and naturalized citizens; loyalty programs; and congressional investigations.

### ***Direct prosecution***

Although the McCarthy era and the Cold War Interlude represent distinct periods of differing intensity, from the perspective of the prosecution of dissent, it was a continuum. During both periods, the majority of repressive prosecutions focused on removing communist influence from important positions in American society. Unsurprisingly, the Communist Party was of the greatest concern. The first major prosecution occurred in July 1948, when twelve top CP leaders

were indicted, and subsequently convicted, for “*conspiring to advocate* the overthrow of government.”<sup>572</sup> The U.S. Supreme Court eventually upheld their convictions in the 1951 decision *Dennis v. United States*. Following the Court’s decision, the Truman administration began to indict second-string leaders of the Communist Party. This practice continued throughout the Eisenhower administration until the U.S. Supreme Court’s 1957 decision in *Yates v. United States*, in which the Court overturned the conviction of twelve California CP leaders in what “seemed a routine rerun of *Dennis*.”<sup>573</sup> In doing so, the Court effectively outlawed further use of the “Smith Act as a weapon in the campaign against American Communists.”<sup>574</sup> In the six years between the Court’s decision in *Dennis* and its decision in *Yates*, 145 first- and second-string leaders of the Communist Party were indicted under the Smith Act, most for conspiring to advocate the overthrow of government (though some solely for membership in the Party).<sup>575</sup> The cumulative effect of these prosecutions, combined with other forms of repression and intense public anti-communism, was to cause the Communist Party to collapse.<sup>576</sup>

Aside from prosecuting prominent CP leaders, the federal government also sought to exorcise allegedly communist influences in the labor movement. The Taft-Hartley Act of 1947 went a long way toward advancing that goal as it forced labor unions to purge individuals from positions of power who were even remotely sympathetic to communist ideology.<sup>577</sup>

Nevertheless, the Eisenhower administration sought further to destroy communist influence in

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<sup>572</sup> Stone, *Perilous Times*, p. 396.

<sup>573</sup> Stone, *Perilous Times*, p. 413.

<sup>574</sup> Stone, *Perilous Times*, p. 415; Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport: Greenwood Press, 1977), pp. 252-272.

<sup>575</sup> Stone, *Perilous Times*, pp. 412-413; Goldstein, *Political Repression in Modern America*, p. 313, p. 332, p. 369, p. 406.

<sup>576</sup> Belknap, *Cold War Political Justice*, pp. 185-206.

<sup>577</sup> R. Alton Lee, *Truman and Taft-Hartley: A Question of Mandate* (Lexington: University of Kentucky Press, 1966), pp. 232-233; Harry A. Millis & Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950), pp. 553-558, pp. 643-644.

the labor movement by leveling a series of perjury indictments against the officers of the few remaining radical unions who signed non-communist loyalty oaths. This campaign resulted in twenty convictions by 1956, as well as the destruction of “six of the ten expelled CIO unions by 1955.”<sup>578</sup>

During the Vietnam War era, the focus of federal repression shifted from communists primarily to political dissidents involved in the civil rights and anti-war movements. In general, there was relatively little direct and overt prosecution of dissent during the Johnson administration. As already mentioned, the President feared that suppressing criticism of his administration’s foreign policies with regard to Vietnam would alienate the very people that supported his Great Society social reforms. However, two repressive actions on behalf of the Johnson administration are worth mentioning. The first, while not a prosecution, *per se*, had a similar effect. Following a major demonstration at the Pentagon in October 1967, the Director of the Selective Service System, Lewis Hershey, recommended that all local draft boards reclassify and induct antiwar demonstrators.<sup>579</sup> Although Director Hershey and Attorney General Ramsey Clark publicly backed off from that order in December, at least 537 students lost their student deferments over the next year for protesting the war by turning in their draft cards.<sup>580</sup>

The other major repressive action initiated by the Johnson administration was the January 1968 prosecution of five leading members of the anti-war movement, which included Yale University chaplain William Sloane Coffin and renowned pediatrician Dr. Benjamin Spock. The Boston Five, as they were called, were charged with conspiring to violate the Selective Service Act on the basis of speeches given at anti-war rallies, as well as their role in helping others to

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<sup>578</sup> Goldstein, *Political Repression in Modern America*, p. 366.

<sup>579</sup> Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* (New York: Harper & Row, 1972), p. 424.

<sup>580</sup> Goldstein, *Political Repression in Modern America*, pp. 439-440.

violate the law. Four of the defendants were convicted; however, their convictions were later overturned.<sup>581</sup>

During the Nixon administration, the prosecution of political dissidents increased dramatically. Elected on a platform of “Law and Order,” Nixon was far from shy in his efforts to prosecute political dissent, which his administration did primarily in three ways—by initiating sweeping conspiracy trials, by using the grand jury system as a method of repression, and by arresting and prosecuting antiwar demonstrators. From 1969 to 1973, the Nixon administration initiated four major conspiracy trials, as well as a string of lesser-publicized trials. Perhaps the most prominent among these was the prosecution of eight anti-war leaders for allegedly fomenting a riot outside the 1968 Democratic National Convention in Chicago, as well as the prosecution of Daniel Ellsberg and Anthony Russo for their role in stealing the Pentagon Papers. Despite their prominence, nearly every conspiracy prosecution that was initiated during that time ultimately failed to produce convictions because of insufficient evidence, illegal government actions, or the government’s refusal to produce records of illegal wiretapping. Nevertheless, these conspiracy prosecutions achieved their purpose, as they were extremely costly, in both time and money, to the anti-war and radical movements.<sup>582</sup>

As early as 1970, the Nixon administration also began to actively prosecute dissent by convening federal grand juries for what amounted to broad “fishing expeditions” into the extent of radical activities in the United States. While grand juries are intended to investigate specific crimes, the grand jury proceedings held during the Nixon years were often more closely akin to a “general political intelligence operation” and came to represent a convenient method by which

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<sup>581</sup> Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), pp. 282-295; Alan M. Dershowitz, *America on Trial: Inside the Legal Battles that Transformed Our Nation* (New York: Warner Books, 2004), pp. 382-389.

<sup>582</sup> Stone, *Perilous Times*, pp. 482-487; Goldstein, *Political Repression in Modern America*, pp. 487-493.

the administration could punish dissidents without resorting to direct prosecution.<sup>583</sup> From 1970 to 1973, over one-hundred grand juries, operating in thirty-six states and eighty-four cities, subpoenaed one thousand witnesses and issued roughly four hundred indictments. Further, during this time, roughly thirty witnesses were imprisoned for contempt after they refused to testify.<sup>584</sup>

Meanwhile, throughout the late 1960s and early 1970s, the Nixon administration actively prosecuted individuals who demonstrated against the war in the nation's capitol. For example, during the November 1969 Moratorium to End the War in Vietnam, which was held in Washington, D.C., police arrested 186 people who were praying peacefully on the steps of the Pentagon.<sup>585</sup> Later, during the May Day protests of 1971, Washington police, along with the military, responded to an attempt by protestors to shut down the capitol by blocking major streets and bridges with a massive program of indiscriminate arrests.<sup>586</sup> In the few days of the protest, roughly 13,400 people were arrested, of which 625 pled guilty or no contest, while only 122 were subsequently convicted. Years later, finding "massive civil rights violations and unnecessary police violence during every major demonstration" between 1969 and 1975, a federal court judge ordered the destruction of all related arrest records.<sup>587</sup>

After the end of the Vietnam War era, there were no major prosecutions of political dissent. This was partly a function of reduced opposition to American foreign and domestic policy. However, increased awareness of the dangers of repression also played an important role, particularly in shaping the political constraints on policymakers' ability to repress dissent. That there was little direct prosecution of dissent was evident from the Reagan administration's

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<sup>583</sup> Goldstein, *Political Repression in Modern America*, p. 493.

<sup>584</sup> Goldstein, *Political Repression in Modern America*, pp. 493-494.

<sup>585</sup> Small, *Antiwarriors*, pp. 113-114.

<sup>586</sup> Small, *Antiwarriors*, pp. 144-147.

<sup>587</sup> Goldstein, *Political Repression in Modern America*, pp. 498-499.



treatment of the Sanctuary movement, which emerged in the early to mid-1980s (as a part of the broader Central America peace movement) and sought to smuggle refugees from war-torn Central American countries into the United States. In general, despite being subjected to government surveillance, members of the Sanctuary movement were not prosecuted for voicing their dissent. A number of activists were indicted between early 1984 and 1985 for transporting undocumented refugees; however, it would be difficult to argue that those prosecutions violated their civil liberties.<sup>588</sup>

### *Surveillance of dissidents*

In addition to direct prosecution, the surveillance of dissident groups and individuals was a major element of federal repression during the Cold War. Although this was particularly true during the Vietnam War era, the scope and extent of federal surveillance increased throughout the years preceding President Johnson's first major escalation of the war in Vietnam in 1965. Indeed, the first two FBI COINTELPRO operations were established in 1956 and 1961, respectively.

In contrast to other, more overt, forms of repression, federal surveillance largely continued after the end of the Second World War, as discussed in Chapter 4. Although the FBI limited its investigations of dissent toward the end of World War II, the Bureau continued to monitor and open first class mail and continued to engage in a variety of questionably legal practices and programs, originally begun during the war, such as warrantless wiretapping and surreptitious entries, as noted in Chapter 4. Further, military intelligence continued to monitor international communications. It is interesting to question whether the Truman administration would have maintained these forms of surveillance after 1945 had a new threat to American

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<sup>588</sup> Christian Smith, *Resisting Reagan: The U.S. Central America Peace Movement* (Chicago: University of Chicago Press, 1996), pp. 280-324; J. Bruce Nichols, *The Uneasy Alliance: Religion, Refugee Work, and U.S. Foreign Policy* (New York: Oxford University Press, 1988), pp. 246-250.

national security not emerged; regardless, the Cold War provided new justifications for the expansion of surveillance.

In the years immediately after the war, the FBI stepped up its political intelligence operations significantly, focusing primarily on the threat of communist espionage. Bureau agents conceived of this threat rather broadly. For example, they investigated a childcare center in New York that was allegedly run by communists. Additionally, in advance of the presidential election of 1948, the Bureau investigated individuals only loosely associated with Henry Wallace's Progressive Party.<sup>589</sup> Throughout the period, FBI agents not only employed the questionably legal surveillance techniques established during World War II,<sup>590</sup> but also relied heavily on paid informants, only some of whom were agents of the Bureau. Infiltration of the Communist Party was so extensive during the late 1940s and early 1950s that FBI Director J. Edgar Hoover, along with Attorney General McGrath, claimed to know the identity of every communist in the country. Unfortunately, a number of these informants were of questionable trustworthiness and reliability. Many gave inconsistent statements, while one paid informant, Matthew Civet, had "a long history of mental illness."<sup>591</sup> Additionally, throughout the McCarthy era, the FBI continued to maintain its Security Index of individuals to be arrested in the event of invasion, which the Justice Department incorporated into a formal emergency detention plan in 1948.<sup>592</sup>

Although the McCarthy era ended in 1954, the FBI continued to expand its investigations of dissent throughout the Cold War Interlude. In 1956, during the Eisenhower administration, the Bureau established its first Counter Intelligence Program (COINTELPRO). Directed against the Communist Party, the purpose of COINTELPRO-CP was to disrupt and ultimately neutralize the

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<sup>589</sup> Goldstein, *Political Repression in Modern America*, p. 294.

<sup>590</sup> Goldstein, *Political Repression in Modern America*, p. 340.

<sup>591</sup> Goldstein, *Political Repression in Modern America*, pp. 346-348.

<sup>592</sup> Goldstein, *Political Repression in Modern America*, p. 312.

CP by utilizing a wide variety of non-traditional and highly abusive methods. For example, FBI informants worked to create dissent within the Party, while other Bureau agents mailed anti-communist propaganda to CP members believed to have doubts about the Party's leadership.<sup>593</sup> While it is difficult to gauge concretely the effectiveness of the operation, the surviving remnants of the CP collapsed in factional infighting between 1957 and 1959.<sup>594</sup> Even so, the FBI continued to expand the scope and extent of its political intelligence investigations throughout the Kennedy administration. During the early 1960s, the FBI focused increasingly on pro-Castro Cuban groups (particularly following the 1961 Bay of Pigs and the 1962 Cuban missile crisis), the civil rights movement, and white-hate groups, as well as extreme left-wing groups.<sup>595</sup> Indeed, the FBI initiated a second COINTELPRO against the Socialist Workers Party (SWP) in 1961, and a third against the Ku Klux Klan in 1964 (during the Johnson administration).<sup>596</sup>

Although less impactful, two other agencies also monitored dissent during the McCarthy era and the Cold War Interlude. The most important was probably the CIA. In 1952, the agency began to examine the covers of letters mailed between the United States and the Soviet Union. The program was primarily based out of New York. However, the CIA also examined mail travelling to and from New Orleans, San Francisco, and Hawaii. Over the course of the program, the CIA handled over four million letters, opening approximately 8,700.<sup>597</sup> Later, in 1958, the agency began to collaborate with the FBI by providing the Bureau with information that they had obtained that was relevant to the maintenance of internal security.<sup>598</sup> The other agency was the IRS, which was used at various points to monitor (and punish) dissent by selectively auditing

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<sup>593</sup> Goldstein, *Political Repression in Modern America*, p. 408.

<sup>594</sup> Belknap, *Cold War Political Justice*, pp. 185-206.

<sup>595</sup> Goldstein, *Political Repression in Modern America*, p. 407, pp. 418-425.

<sup>596</sup> Rhodri Jeffreys-Jones, *The FBI: A History* (New Haven: Yale University Press, 2007), pp. 169-173,

<sup>597</sup> Scott D. Breckinridge, *CIA and the Cold War: A Memoir* (Westport: Praeger, 1993), pp. 212-213.

<sup>598</sup> Goldstein, *Political Repression in Modern America*, pp. 339-340.

radical organizations.<sup>599</sup> In 1956, for example, IRS agents raided the *Daily Worker*, a publication produced by the Communist Party; seized vital equipment and records; and claimed that the Party owed hundreds of thousands of dollars in back taxes. Later, during the Kennedy administration, the IRS began to investigate extreme right- and left-wing groups, ultimately revoking the tax-exempt status of at least six organizations.<sup>600</sup>

Building on earlier federal efforts to monitor dissent, the most extensive surveillance of dissident groups and individuals occurred during the Vietnam War era, with the greatest excesses occurring because of the Nixon administration's determination to suppress dissent. In contrast to what one might think, during the early years of the Johnson administration, the President, along with FBI Director Hoover, worked to restrict the scope of federal surveillance. In 1965, Johnson severely restricted the placement of wiretaps, which he allowed only when essential to the national security and only with the explicit approval of the Attorney General. Additionally, from roughly 1964 to 1966, Hoover not only restricted the FBI's use of wiretaps and bugs, but also banned surreptitious entries to collect information (so-called "black bag jobs"); ended the Bureau's mail-opening program; and forbid the practice of examining mail and trash for sensitive information (known as mail and trash covers, respectively). Unfortunately, those efforts only amounted to minor reform. FBI agents continued to engage in many questionably legal surveillance practices, such as surreptitious entries and the placement of wiretaps.<sup>601</sup>

After 1966, as the racial and anti-war movements grew in intensity, federal efforts to monitor political dissent grew to unprecedented levels. Over the next two years, the FBI

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<sup>599</sup> Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (U.S.A.: University of Pennsylvania Press, 1999), Google Book Search, 21 Apr. 2009, <[http://books.google.com/books?id=6ZDDSiCwXSsC&pg=PA60&dq=IRS+Communist+Party&as\\_brr=3#PPA60,M1](http://books.google.com/books?id=6ZDDSiCwXSsC&pg=PA60&dq=IRS+Communist+Party&as_brr=3#PPA60,M1)>, p. 60.

<sup>600</sup> Goldstein, *Political Repression in Modern America*, p. 406, p. 422.

<sup>601</sup> Goldstein, *Political Repression in Modern America*, pp. 443-444; Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI* (New York: Free Press, 2004), pp. 271-272.

established two new massive COINTELPROs against black nationalist hate groups and the New Left, while continuing its broad, and intensely irresponsible, efforts to disrupt and destroy the CP, the SWP, and white hate groups.<sup>602</sup> Indicative of the reckless and abusive nature of the FBI's counterintelligence efforts in those years was Operation Hoodwink, in which Bureau agents sought to create conflict between the CP and organized crime by sending each group highly critical letters purporting to come from the other group. For example, one letter attacked the labor policies of a major mob figure.<sup>603</sup> In addition to the expansion of its counterintelligence efforts, the FBI continued to maintain its Security Index, while also creating new lists of individuals to be detained in a time of crisis. These included a "Rabble Rouser Index," an "Agitator Index," a "Key Activists Index," and a "Key Activist photo album."<sup>604</sup>

Complementing the active efforts of the Bureau to monitor political dissidents, the CIA, the NSA and military intelligence expanded their political intelligence operations in ways only loosely related to their intended functions. While continuing its mail-opening program, the CIA also established three massive domestic surveillance programs—codenamed Project MERRIMAC, Project RESISTANCE, and Operation CHAOS—that, while ostensibly intended to protect CIA assets and vet future employees, investigated a wide range of political dissent. Around the same time, the NSA supplemented its general monitoring of international communications (Project SHAMROCK) with Project MINARET, which sought to uncover communist influence in the civil rights and anti-war movements. Finally, in 1967, Army intelligence instituted its own domestic surveillance program meant to help the Army respond more effectively in the event of serious domestic disorders.<sup>605</sup>

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<sup>602</sup> Goldstein, *Political Repression in Modern America*, pp. 445-452; Powers, *Broken*, pp. 266-280.

<sup>603</sup> Goldstein, *Political Repression in Modern America*, p. 448.

<sup>604</sup> Powers, *Broken*, p. 280.

<sup>605</sup> Stone, *Perilous Times*, pp. 491-492; Goldstein, *Political Repression in Modern America*, pp. 454-460.

The surveillance of political dissidents by the federal government reached its peak during the Nixon years, particularly between 1969 and 1971. Federal surveillance was so intense during those years that nearly a quarter million people were kept under active surveillance, while thousands of organizations were investigated and files were developed on hundreds of thousands of people.<sup>606</sup> Throughout the period, the FBI, CIA, NSA, and military intelligence continued to expand the scope and extent of their political intelligence operations.<sup>607</sup> Meanwhile, the IRS, at the behest of the Nixon administration, investigated a wide range of radical groups, such as SDS, with the goal of removing their tax-exempt status.<sup>608</sup> Additionally, during the early 1970s, the White House began to maintain an “enemies list” and, after the release of the Pentagon Papers in 1971, established its own investigations unit, the “Plumbers” (discussed earlier).<sup>609</sup>

From the early to mid-1970s, revelations of massive governmental abuse of power on behalf of both the Nixon administration and previous administrations, led to the termination of every major surveillance program and the placement of restrictions meant to prevent the excesses of the Nixon years from reoccurring. Most importantly, the FBI’s COINTELPRO was terminated in 1971 following public disclosure of the Bureau’s activities, though some FBI agents continued to engage in actions characteristic of the program for the next few years.<sup>610</sup> Also in 1971, the FBI was forced to rename its Security Index the Administrative Index (ADEX) in order to avoid scrutiny after Congress repealed the Emergency Detention provisions of the 1950 Internal Security Act. In the following years, the ADEX was reduced substantially, and ultimately terminated in October 1975.<sup>611</sup> The trend toward decreased FBI surveillance culminated in the

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<sup>606</sup> Goldstein, *Political Repression in Modern America*, p. 463.

<sup>607</sup> Stone, *Perilous Times*, p. 492-493; Goldstein, *Political Repression in Modern America*, pp. 464-481.

<sup>608</sup> Stone, *Perilous Times*, p. 493; Goldstein, *Political Repression in Modern America*, pp. 481-483.

<sup>609</sup> Stone, *Perilous Times*, p. 493; Goldstein, *Political Repression in Modern America*, pp. 501-503.

<sup>610</sup> Stone, *Perilous Times*, p. 494-495; Goldstein, *Political Repression in Modern America*, p. 472.

<sup>611</sup> Goldstein, *Political Repression in Modern America*, pp. 469-470.

mid-1970s, when Attorney General Levi issued a set of surveillance guidelines and President Carter issued an executive order (12036, discussed earlier) that, in different ways and to different degrees, “imposed stringent limitations on the investigative authority and activities of the FBI.”<sup>612</sup> Meanwhile, during the early 1970s, the political intelligence operations of the CIA, the NSA, and military intelligence were wound down and eventually terminated.<sup>613</sup> This trend concluded in 1976, when President Ford issued an executive order (11905, also discussed earlier) prohibiting the CIA from investigating domestic dissent and forbidding the NSA from monitoring communications to, from, or within the United States.<sup>614</sup>

The reforms implemented during the mid- to late-1970s remained in effect until the Reagan administration. Shortly after entering office, President Reagan issued an executive order (12333) that, among other things, authorized the CIA to investigate and infiltrate domestic groups.<sup>615</sup> Later, in 1983, Attorney General Smith reversed the Levi guidelines, issued in 1976, by expanding significantly the FBI’s authority to investigate and infiltrate dissident groups.<sup>616</sup> Under those less restrictive guidelines, the federal intelligence agencies increased their political intelligence operations throughout the 1980s. The FBI continued to employ some of the practices established during the Second World War and the Cold War, such as surreptitious entries and the infiltration of dissident groups. Further, as part of its Library Awareness Program, Bureau agents approached libraries to inquire about their users, for example, foreigners who request scientific books.<sup>617</sup> Targets of Reagan era surveillance included the Central America peace movement

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<sup>612</sup> Stone, *Perilous Times*, pp. 496-497; Theoharis, *Freedom at Risk*, p. 266.

<sup>613</sup> Goldstein, *Political Repression in Modern America*, pp. 478-481; Stone, *Perilous Times*, p. 496.

<sup>614</sup> Stone, *Perilous Times*, p. 496.

<sup>615</sup> Autin, *Freedom at Risk*, p. 74.

<sup>616</sup> Stone, *Freedom at Risk*, pp. 278-283.

<sup>617</sup> Jeffreys-Jones, *The FBI*, pp. 208-211.

primarily, as well as the antinuclear movement, both of which the Reagan administration alleged were “national security threats and heavily influenced by foreign elements.”<sup>618</sup>

### *Exclusion of foreigners and naturalized citizens*

Complementing the prosecution and surveillance of dissent, there were also efforts, over the course of the Cold War, to exclude from the country those foreigners and naturalized citizens deemed injurious to the national interest. This was done by deporting or denaturalizing dissidents, as well as by restricting the issuance of visas and passports, practices that reached their height during the McCarthy era. As early as 1948, the Truman administration banned foreign communists from visiting the country and started to deny passports to American citizens deemed harmful to the national interest. During the same year, the Truman administration also launched a highly publicized campaign to deport individuals deemed subversive, which focused most heavily on radical union leaders and critics of Truman’s Cold War foreign policies, particularly supporters of Henry Wallace’s Progressive Party. Though the campaign brought about few deportations, it resulted in the arrest of over one hundred alleged communists between February and May 1948 alone. As public hysteria and the President’s need to fend off Republican attacks on the Democratic Party as “soft” on communism grew throughout the late 1940s and early 1950s, the Truman administration stepped up its efforts to exclude alleged subversives.<sup>619</sup>

Once President Eisenhower came into office, federal efforts to exclude foreigners and naturalized citizens intensified even further. In March 1953, Eisenhower’s Attorney General, Herbert Brownell, announced that 10,000 people were being investigated for potential denaturalization, along with another 12,000 for potential deportation. Political deportations

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<sup>618</sup> Autin, *Freedom at Risk*, pp. 74-75; Smith, *Resisting Reagan*, pp. 281-307;

<sup>619</sup> Goldstein, *Political Repression in Modern America*, pp. 311-312, pp. 330-331.



reached their peak in 1954, having grown more than threefold in only three years (from eighteen in 1951 to sixty-one in 1954). After that point, however, efforts to exclude began to diminish as the threat of communist subversion and infiltration became less tangible. Deportations rapidly dropped to just six in 1958, with a small spike occurring between 1959 and 1960. From 1962 onward, the number of political deportations hovered between two and four throughout the 1960s and 1970s.<sup>620</sup> Efforts to exclude foreigners and naturalized citizens undoubtedly continued to occur, but at reduced levels, during the Cold War Interlude and the Vietnam War era.

During the Reagan era, there appeared to have been few instances in which political dissidents were deported or denaturalized; however, the Reagan administration did employ some of the strategies of exclusion prominent during the McCarthy era. In particular, throughout the 1980s, the State Department (acting under the McCarran-Walter Act of 1952), routinely denied visas to foreign speakers critical of Reagan's Cold War foreign policies, particularly with regard to Central America.<sup>621</sup> When visas were issued to such individuals, they were often "limited to particular cities or special public appearances."<sup>622</sup>

### ***Loyalty program***

Another important aspect of the federal campaign to monitor and suppress dissent during the Cold War was the federal loyalty program, a major instrument of repression during the McCarthy era. As early as 1946, policymakers began to grow very concerned with protecting the federal government from communist infiltration. Those fears, and the associated political pressures, led Truman to establish a Temporary Commission on Employee Loyalty in November

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<sup>620</sup> Goldstein, *Political Repression in Modern America*, p. 337, pp. 402-403, p. 433; Kevin R. Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press, 2004), pp. 65-69.

<sup>621</sup> Shattuck, *Freedom at Risk*, pp. 58-59; Schapiro, *Freedom at Risk*, pp. 163-165.

<sup>622</sup> Schapiro, *Freedom at Risk*, p. 163.

1946.<sup>623</sup> After reviewing the federal loyalty program, the Commission “recommended the vigorous and effective punishment of disloyal individuals in the government.”<sup>624</sup> Following those recommendations, President Truman issued an executive order (9835, discussed earlier) that established a strict, centralized loyalty program in which all federal employees were to undergo an investigation and be dismissed if “reasonable grounds” existed to believe they were disloyal.<sup>625</sup> In large part, Truman’s decision was motivated by political calculations. Although relatively unconcerned with the treat of communist infiltration himself, he hoped the establishment of the federal loyalty program would allow him to head off increasingly vicious Republican red-baiting.<sup>626</sup> One major outgrowth of that directive was the Attorney General’s List of Subversive Organizations, a published, government-run blacklist that effectively dictated to the public the groups that they could or could not join. Though most important for its broad chilling effect on the freedom of speech, the Attorney General’s List also had an overwhelmingly negative effect on group membership and contributions. Further, the groups on the list were vulnerable to other forms of repressive action. For example, Congress passed legislation in 1952 banning “members of listed organizations from eligibility for public housing.”<sup>627</sup>

After 1947, the federal loyalty program was made successively more stringent as Presidents Truman and Eisenhower revised the standards for dismissal (through executive orders 10241 and 10450, respectively). Additionally, the program was effectively broadened in 1949 when the Department of Defense (DoD) announced that it would hold private employees of DoD contractors to similar loyalty standards.<sup>628</sup> By mid-1953, the federal loyalty program had reached

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<sup>623</sup> Murphy, *The Constitution in Crisis Times*, p. 256.

<sup>624</sup> Goldstein, *Political Repression in Modern America*, p. 295.

<sup>625</sup> Murphy, *The Constitution in Crisis Times*, p. 256.

<sup>626</sup> McCullough, *Truman*, pp. 550-553.

<sup>627</sup> Murphy, *The Constitution in Crisis Times*, p. 256; Goldstein, *Political Repression in Modern America*, p. 310.

<sup>628</sup> Goldstein, *Political Repression in Modern America*, pp. 318-319, p. 330, pp. 337-338.

its peak in terms of breadth and severity. Only a year later, in June 1954, the Atomic Energy Commission (AEC) announced that J. Robert Oppenheimer, the father of the atomic bomb, would no longer have access to classified AEC material. This incident, more than any other symbolized and made evident the gross excesses of the federal loyalty program.<sup>629</sup> After Oppenheimer's dismissal, the program began to show signs of improvement, in large part because of greater awareness of the need for caution in determining the loyalty of employees. By the Vietnam War era, it was no longer a major method of repression (though the Attorney General's List was not abolished until 1974).<sup>630</sup>

Ultimately, throughout the McCarthy era, 13.5 million people, or roughly twenty percent of the American work force, were subjected to the federal loyalty program, with approximately 20,000 subjected to formal hearings. During this time, 3,900 federal employees, in addition to 5,400 private-sector employees working for government contractors, were dismissed as disloyal. Those numbers are likely conservative estimates, however, as they discount the number of employees fired due to similar loyalty programs and blacklists established voluntarily by private companies. In the end, at a cost of 350 million dollars and countless lives ruined or reputations tarnished, the federal loyalty program failed "to uncover a single spy."<sup>631</sup>

### ***Congressional investigation***

The last major avenue of repression prominent during the Cold War was the surveillance and suppression of political dissidents by congressional investigation. In contrast to the intended purpose of their investigatory power, congressional committees conducted investigations into dissent in order to define the acceptable standards of thought and to enforce those standards by exposing subversives to public opprobrium. In this way, the types of investigations conducted

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<sup>629</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 96-105.

<sup>630</sup> Goldstein, *Political Repression in Modern America*, p. 394, p. 400, p. 403.

<sup>631</sup> Goldstein, *Political Repression in Modern America*, pp. 374-376.

throughout the Cold War were broadly similar to the federal loyalty program, as each sought to punish dissent without according dissidents the normal due process guarantees of the courtroom. Though particularly powerful and vicious during the McCarthy era, congressional committees investigated subversion from 1945 until the last remaining internal security subcommittees were abolished in mid- to late 1970s.

During the McCarthy era, congressional investigations of dissent were so extensive that their impact was felt in “virtually all aspects of American life”:

[They] spread a chill of fear...throughout the whole of American society – fear not only of advocating communism, but of advocating virtually *any* dissenting or unpopular opinion, fear of joining radical or liberal organizations, fear of reading dissenting periodicals, and ultimately fear of thinking ‘bad’ thoughts.<sup>632</sup>

Although the House Un-American Activities Committee (HUAC), the Senate Internal Security Subcommittee (SISS), and Senator McCarthy’s Subcommittee on Investigations were most responsible for fostering that repressive climate, numerous other House and Senate subcommittees also investigated political dissent in different ways and to different degrees throughout the period.<sup>633</sup>

Of the three listed above, HUAC was the most well-known and most vicious red-hunting congressional committee. In the first two years after the end of World War II, before it became fully apparent that the United States and the Soviet Union had descended into a Cold War, HUAC received little attention, as well as limited appropriations. In 1947, however, following Truman’s establishment of the federal loyalty program, HUAC began to investigate, in a highly publicized and extremely irresponsible manner, the extent of communist activities in the United States.<sup>634</sup> In doing so, the committee compiled and published its own massive lists of subversive

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<sup>632</sup> Goldstein, *Political Repression in Modern America*, p. 344.

<sup>633</sup> Stone, *Perilous Times*, p. 353.

<sup>634</sup> Goldstein, *Political Repression in Modern America*, p. 292, p. 296, pp. 306-308.

organizations and individuals. For example, in 1948, HUAC announced that it had “compiled lists of signers of CP election petitions ‘for various years in twenty states, showing 363,119 signatures.’”<sup>635</sup> Over the next seven years, targets of HUAC investigation ran far and wide, from government officials and the movie industry to left-wing unions, alleged CP “front groups,” and the Progressive Party.<sup>636</sup> Indicative of the committee’s reckless behavior were its attacks on the arts. HUAC not only sought and achieved the blacklist of prominent, allegedly subversive, writers (such as playwright and author of *The Crucible* Arthur Miller), but also investigated communist subversion in the movie industry. The committee’s investigations led to the imprisonment of numerous prominent Hollywood figures for contempt and led the movie industry to blacklist any person who refused to deny membership in the Communist Party.<sup>637</sup>

By 1957, HUAC had heard testimony from 3,000 people and, in the process, ruined the careers and reputations of countless individuals. Of those who appeared before the committee, 135 were cited for contempt (though the majority of contempt citations were ultimately dismissed). Beyond the direct consequences of non-cooperation, many “unfriendly” witnesses were subsequently dismissed from their jobs, and in some cases became the targets of mob violence.<sup>638</sup>

After the climax of the red scare in 1954, congressional investigations into communist subversion and infiltration declined sharply. In part, the decrease in activity was the product of diminishing hysteria; however, it also reflected the simple fact that there were few “subversives” left to investigate. Despite the decline, congressional committees continued to investigate throughout the Cold War Interlude, but at a reduced rate. Targets of investigation during those

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<sup>635</sup> Goldstein, *Political Repression in Modern America*, p. 346.

<sup>636</sup> Goldstein, *Political Repression in Modern America*, pp. 306-308, pp. 315-316, p. 319.

<sup>637</sup> Stone, *Perilous Times*, pp. 352-374.

<sup>638</sup> Goldstein, *Political Repression in Modern America*, pp. 344-345; Stone, *Perilous Times*, p. 313.

years included a disparate collection of left-wing individuals, groups, and institutions (such as unions, summer camps, teachers, and businesspersons), as well as the nuclear test ban movement (and the pacifism movement more broadly). Indicative of a changing climate, however, was the fact that college students began to protest HUAC as early as 1960 (though, unsurprisingly, their efforts were portrayed as part of the broader communist conspiracy against the so-called “American way of life”).<sup>639</sup>

The investigation of dissent by congressional committees continued to decline into the early 1960s. But congressional activity increased once more after President Johnson began to escalate the American presence in Vietnam. Over the following years, HUAC and SISS held investigations into the anti-war movement, dissent on college and university campuses, and Black Nationalist groups, as well as the KKK. As during the McCarthy era, throughout the late 1960s and early 1970s, both committees routinely issued reports charging communist control of the anti-war movement.<sup>640</sup> For example, in 1968:

[HUAC] urged the use of the Internal Security Act’s concentration camps for the ‘temporary imprisonment of warring guerillas’ and claimed that radical and black groups were ‘seriously considering the possibility of instituting armed insurrection in this country.’<sup>641</sup>

By the mid-1970s, revelations of extensive governmental spying and disruption of dissident groups during the Nixon years, along with the collapse of the anti-war and civil rights movements, made further congressional investigations into dissent both increasing unnecessary and increasingly untenable. Subsequently, the House abolished HUAC (which had been renamed the House Internal Security Committee, or HISC) in January 1975, while SISS continued to hold

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<sup>639</sup> Goldstein, *Political Repression in Modern America*, pp. 408-409; pp. 414-415, p. 422; Broadwater, *Eisenhower & the Anti-Communist Crusade*, p. 253, note 4.

<sup>640</sup> Stone, *Perilous Times*, p. 445, p. 442, p. 469; Goldstein, *Political Repression in Modern America*, p. 433, pp. 436-437, p. 446; Small, *Antiwarriors*, p. 61.

<sup>641</sup> Goldstein, *Political Repression in Modern America*, p. 441.

hearings into dissident activities until it too was abolished by the Senate in early 1977.<sup>642</sup> After that point, congressional investigation was no longer a major instrument of repression throughout the rest of the Cold War.

### **State and local restrictions**

In general, throughout the Cold War, the repression of dissent at the state and local levels closely mirrored repressive actions taken by the federal government. During the McCarthy era, state and local policymakers responded to growing fears of the “red menace” (and the exploitation of those fears by federal policymakers seeking partisan advantage) by enacting a wide range of laws targeting “subversives” and by conducting legislative investigations into dissent. It is noteworthy that state and local repression began after the establishment of the federal loyalty program in 1947, though growing hysteria would almost certainly have produced such a result regardless.

Though only a few states instituted full-fledged loyalty programs, nearly thirty states enacted laws banning subversives from state employment (nine of which specifically barred communists), while around a thousand state and local governmental districts or institutions across the country required employees to sign loyalty oaths. Reflecting a similar purpose, twenty states also enacted legislation preventing members of the Communist Party and other subversive organizations from running for public office. In addition to those efforts, nine states passed legislation modeled after the Internal Security Act of 1950, which required “communist-action” and “communist-front” groups to register with the federal government. Additionally, many states

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<sup>642</sup> Goldstein, *Political Repression in Modern America*, p. 537; “Phasing Out Security,” *National Review*, Vol. 29 Iss. 14 (15 Apr. 1977): p. 427, *Academic Search Premier*, EBSCO, Connecticut College, New London, CT, 8 Apr. 2009  
<<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=6070772&loginpage=Login.asp&site=ehost-live>>.

criminalized membership in subversive groups. A few even outlawed the Communist Party entirely.<sup>643</sup>

Although less common, a number of states (at least twelve) also investigated dissent through legislative committees. Their focus and activities were broadly similar to the congressional committees, particularly HUAC, as they sought to expose subversives to public condemnation and to develop as much information on dissident individuals and groups as possible. In general, they cast an equally wide net with a particular focus on subversion in the public school system. State investigations into radicalism in academia not only resulted in the dismissal of a number of teachers and professors, but also led a few institutions to institute loyalty standards of their own.<sup>644</sup>

After the end of the McCarthy era, diminishing public hysteria was reflected in the actions of state and local governments. Over the next five years, from 1955 to 1960, very few repressive state or local laws were enacted. During the same period, the prosecution of subversives fell significantly after the U.S. Supreme Court declared in *Pennsylvania v. Nelson* (1956) that federal laws directed against sedition superceded all state and local laws of the same purpose.<sup>645</sup> Although the Kennedy years saw the enactment of additional repressive state legislation in response to the Cuban Revolution and growing right- and left-wing activity, the prosecution of political dissidents remained relatively rare.<sup>646</sup> It should be noted that, throughout the period, southern state and local governments exploited fear of communist subversion and infiltration to suppress the growing civil rights movement. For example, some southern state legislatures held investigations into civil rights organizations such as the NAACP, while laws

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<sup>643</sup> Goldstein, *Political Repression in Modern America*, pp. 349-351.

<sup>644</sup> Goldstein, *Political Repression in Modern America*, pp. 353-358.

<sup>645</sup> Goldstein, *Political Repression in Modern America*, p. 402, p. 404, pp. 409-410.

<sup>646</sup> Goldstein, *Political Repression in Modern America*, p. 402, p. 409, p. 424.



originally intended to stem the alleged spread of communism were frequently used to prosecute prominent civil rights activists. Some states even attempted to force the NAACP to disclose its membership lists under communist registration laws.<sup>647</sup>

During the Vietnam War era, the suppression of dissent at the state and local level increased dramatically. As state and local policymakers took cues from the federal government, they generally mirrored federal repression. However, some actions taken by state and local governments during the period (particularly in the late 1960s and early 1970s) demonstrated a willingness to suppress dissent that exceeded even that of federal policymakers. Four major forms of state and local repression were evident throughout the period. These include legislation, surveillance, prosecutions, and the occasional excessive use of force by local police and state National Guard troops.

In general, significantly fewer repressive laws were enacted during the Vietnam War era. One major exception, however, were laws enacted that sought to quell political protests on campus. In 1969 and 1970 alone, almost eighty laws were passed in thirty-two states that variously prevented students from becoming active in the anti-war and civil rights movements. Some directed the expulsion of students who engaged in protests against campus regulations, while others made it possible to eliminate financial aid for dissident students. Although many of those laws were undoubtedly directed at legitimate incidents of violence on campus, they made it easier for state authorities to suppress dissenting opinions. Significantly more important was the expansion of surveillance throughout the late 1960s and early 1970s. During that period, local police in hundreds of municipalities developed their own intelligence divisions (often referred to as “Red Squads”), while a number of states established full-scale surveillance operations. In many cases, state and local intelligence units committed many of the same excesses

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<sup>647</sup> Goldstein, *Political Repression in Modern America*, pp. 409-410.

characteristic of the FBI's Counterintelligence Program, such as infiltration protest groups and developing extensive files on alleged subversives.<sup>648</sup>

The prosecution of dissent by state and local governments was another major form of repression during the Vietnam War era. Throughout the period, a large number of individuals were arrested and prosecuted under flag desecration and red flag laws. There were also numerous criminal syndicalism prosecutions, the majority of which appear to have been quite baseless. Finally, there were numerous instances in which political dissidents were arrested under disorderly conduct laws for using offensive language and under loitering laws. Certainly some of these prosecutions were legitimate; however, there can be no doubt that at least some were part of the broader effort to suppress dissident speech.<sup>649</sup>

The last major form of repression was the excessive use of force by state and local authorities. Although certainly not the intent of policymakers, there were a number of major instances throughout the late 1960s and early 1970s in which local police and state National Guard troops responded to protesters in a harsh and violent manner. There were undoubtedly many protesters who were antagonistic, if not downright hostile, to those authorities. For example, at the October 1967 Moratorium to End the War in Vietnam, some protesters "urinated on the Pentagon, threw rocks at first-floor windows, and taunted, insulted, and spat upon [federal troops there to protect the Pentagon], who stood fixed at attention."<sup>650</sup> However, the level of antagonism does not excuse the level of violence that protesters occasionally received. The most well-known incident was at Kent State University in 1969, in which Ohio National Guard troops "responded to taunts and rock throwing by firing their M-1 rifles into a crowd of students, killing

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<sup>648</sup> Goldstein, *Political Repression in Modern America*, pp. 504-509, p. 519.

<sup>649</sup> Goldstein, *Political Repression in Modern America*, pp. 513-516.

<sup>650</sup> Stone, *Perilous Times*, p. 450.

four, wounding thirteen.”<sup>651</sup> A few days later, 1.5 million college and university students responded to the tragedy by walking out of their classes.<sup>652</sup>

The repression of dissent by state and local governments appears to have declined during the mid-1970s concurrent with the decline of federal efforts to monitor and suppress political dissidents. Thus, by the end of the Vietnam War era, there was undoubtedly relatively little repression on the state and local levels. Once President Reagan came into office, his administration escalated the Cold War, increasing government secrecy and federal surveillance in the process. Fortunately, as the Reagan era was not a particularly intense period of the Cold War, those efforts do not appear to have resulted in any appreciable increase in state and local repression.<sup>653</sup>

### **Executive tone toward civil liberties**

The third major facet that should be considered in assessing the degree to which Americans’ civil liberties were restricted during the Cold War is the tone set by different presidents toward civil liberties and dissent. Although there were nine different presidents during the crisis, attention is given only to Truman, Eisenhower, Johnson, and Nixon, as those four presidents had the greatest affect on the course of the Cold War. Reagan is extremely important to Cold War developments as well, however, the amount of radical dissent in American society during the 1980s was so low, relatively, that it is difficult to assess Reagan’s approach to dissent without relying heavily on clearly polemical material.

Throughout his time as president, members of the Republican Party attacked Harry S. Truman viciously as “soft” on communism. Feeding on, and cultivating, popular fears of massive communist subversion and infiltration in the U.S. government, Republicans scored huge gains in

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<sup>651</sup> Stone, *Perilous Times*, p. 465.

<sup>652</sup> Stone, *Perilous Times*, p. 466.

<sup>653</sup> Curry, *Freedom at Risk*, pp. 3-29; Stone, *Freedom at Risk*, pp. 272-287; Smith, *Resisting Reagan*, pp. 281-324.

the election of 1946.<sup>654</sup> Thereafter, many policies advanced by the Truman administration reflected the President's need to head off Republican attacks and to take control of the "red" issue. A perfect case in point was the federal loyalty program. As discussed earlier, Truman established a comprehensive loyalty program in 1947 (through Executive Order 9835) that subjected millions of Americans to investigation and made possible their dismissal for affiliation with individuals or groups deemed subversive. The program ultimately helped to lay "the foundation of the anti-Communist hysteria that gripped the nation over the next decade."<sup>655</sup> However, it was created not because Truman was particularly concerned with the threat of communist infiltration—indeed, he felt that the communist threat was being overblown—but because he had come to believe that "acting first on the loyalty issue" would allow him to subvert Republican attacks and to allay popular fears.<sup>656</sup>

Yet despite establishing a strict federal loyalty program and authorizing other forms of repression (such as the prosecution of prominent CP leaders and the deportation of radicals),<sup>657</sup> Truman was unable to head off Republican attacks on himself and the Democratic Party. Nothing anyone in his administration did or said seemed to diminish the Republican onslaught or the fear that many prominent Republicans "spread in the government and the nation."<sup>658</sup> Truman's legacy, then, is this: though he felt fears of communist subversion and infiltration overblown, disapproved of HUAC,<sup>659</sup> and distrusted the FBI,<sup>660</sup> he instituted a number of repressive policies that not only failed to shield the Democratic Party from Republican red-baiting in the long run, but paved the way for McCarthyism and the hysteria of the early 1950s.

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<sup>654</sup> Stone, *Perilous Times*, pp. 312-313.

<sup>655</sup> Stone, *Perilous Times*, pp. 326-327.

<sup>656</sup> McCullough, *Truman*, pp. 550-552.

<sup>657</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 7-11.

<sup>658</sup> McCullough, *Truman*, pp. 769-770.

<sup>659</sup> McCullough, *Truman*, pp. 651-652.

<sup>660</sup> McCullough, *Truman*, p. 550, p. 553.

To an extent, President Eisenhower was faced with some of the same challenges that beset Truman. Although a dedicated anti-communist, he “deplored McCarthy’s tactics and regretted the damage they were doing to the country.”<sup>661</sup> Nevertheless, throughout the first years of his administration, he tolerated, even appeased, McCarthy out of the belief that the Senator was too powerful to be taken down. In part, he also feared, rightly, that challenging McCarthy would divide his own party and make it difficult for him to lead.<sup>662</sup> The President finally stood firm against McCarthy’s abusive and irresponsible tactics in mid-1954 after the Senator overstepped his bounds by attacking a decorated Army commander, Brigadier General Zwicker, during the Army-McCarthy hearings. After that attack, the President invoked a twisted interpretation of executive privilege to deny McCarthy the power to subpoena executive branch employees. This effectively ended the Senator’s efforts to intimidate the Eisenhower administration and went a long ways toward bringing down McCarthy.<sup>663</sup>

Yet while Eisenhower opposed McCarthy’s tactics, he was nevertheless a vigilant anti-communist. Immediately upon taking office, he revised Truman’s loyalty program by loosening the requirements for the dismissal of employees. Throughout the period, his administration continued to prosecute Communist Party leaders under the Smith Act, even after the Senate voted to censure McCarthy. Additionally, although he was not initially aware of the FBI’s Counterintelligence Program, Eisenhower presided over a significant increase in political surveillance and was given “[ample] warnings that [FBI Director] Hoover’s campaign against American Communists might broaden into a general war against political dissent.”<sup>664</sup> In sum, although President Eisenhower opposed the worst excesses of the McCarthy era and helped to

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<sup>661</sup> Geoffrey Perret, *Eisenhower* (New York: Random House, 1999), pp. 498-499.

<sup>662</sup> Perret, *Eisenhower*, pp. 498-499.

<sup>663</sup> Perret, *Eisenhower*, pp. 500-504.

<sup>664</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 180-181.

destroy the career of its namesake, his administration clearly believed that it was necessary to monitor and suppress radical dissent.

When Lyndon Johnson became president in 1963, communism was no longer the issue it had been during the McCarthy era. By that point, the hysteria of the late 1940s and early 1950s had died down to such a point that, unlike Truman, Johnson did not need to defend himself constantly against Republican charges of being “soft” on communism. That said, many prominent federal policymakers, including the President, continued to believe that communism lay behind much of radical, even moderate, dissent in America. That belief was particularly true of the growing civil rights and anti-war movements, extending even to the press and left wing congressmen.<sup>665</sup>

Yet while inclined to believe that criticism of his policies reflected communist subversion, Johnson sought to avoid prosecuting political dissidents. Although he believed that “the president needed to be virtually ‘unassailable’” on matters of foreign policy, he feared that suppressing dissent would undermine support for his Great Society domestic reforms.<sup>666</sup> The President’s tolerance of, or rather refusal to suppress, dissent began to diminish, however, as the anti-war and civil rights movements intensified. Increasingly, Johnson ordered the FBI and the CIA to intensify their surveillance and disruption of dissident groups and individuals. By the time he left office, his administration had mobilized a significant internal security apparatus, which the Nixon administration later exploited in a broad effort to destroy all manner of dissent.<sup>667</sup> Ultimately, although Johnson largely refused to prosecute political dissidents, his

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<sup>665</sup> Robert Dallek, *Flawed Giant: Lyndon Johnson and his Times, 1961-1973* (New York: Oxford University Press, 1998), pp. 281-284, pp. 352-353, pp. 366-367, pp. 487-490.

<sup>666</sup> Stone, *Perilous Times*, p. 441.

<sup>667</sup> Stone, *Perilous Times*, pp. 436-451, pp. 488-490, p. 492.

belief that criticism of his policies reflected communist subversion and his efforts to expand federal surveillance of dissent helped to make possible the abuses of the Nixon years.

Of the nine Cold War presidents, Richard M. Nixon was undoubtedly the least tolerant of dissent and the least respectful of Americans' civil liberties. Throughout his administration, he labeled protesters bums, thugs, and hoodlums, frequently implying that dissident college students were ingrates because of their protest activities on campus.<sup>668</sup> Additionally, his administration routinely attacked the news media on the basis of its alleged liberal bias.<sup>669</sup> More broadly, as the antiwar movement grew particularly intense in early to mid-1970, the President came to believe that it would be necessary to vilify critics of his administration in order to rally his supporters. His efforts to do so undoubtedly helped to spur the anti-antiwar demonstrations that arose around that time, many of which turned violent against peace protesters.<sup>670</sup>

Unsurprisingly, the President's general intolerance of dissent extended beyond the rhetoric put forth by his administration. To a greater degree than Lyndon Johnson, Nixon was convinced that there was a link between foreign communists and the United States' "domestic troubles," particularly with regard to the anti-war movement.<sup>671</sup> Operating on that belief, the President further expanded the already massive internal security apparatus that he had inherited from Johnson. As early as 1970, his administration also began to compile a White House "enemies list," which contained the names of at least two hundred individuals and eighteen organizations.<sup>672</sup> Later, after the release of the Pentagon Papers in 1971, the Nixon administration established a secret White House investigations unit—the Plumbers—dedicated to

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<sup>668</sup> Richard Reeves, *President Nixon: Alone in the White House* (New York: Simon & Schuster, 2001), p. 209, p. 218; Goldstein, *Political Repression in Modern America*, p. 462.

<sup>669</sup> Stone, *Perilous Times*, pp. 503-504.

<sup>670</sup> Stone, *Perilous Times*, pp. 466-471.

<sup>671</sup> Reeves, *President Nixon*, p. 230.

<sup>672</sup> Stone, *Perilous Times*, pp. 492-494; Goldstein, *Political Repression in Modern America*, p. 461.

plugging leaks to the news media and disseminating information damaging to the Democratic Party.<sup>673</sup> Additionally, throughout the Nixon years, the Justice Department actively sought to tie up prominent leaders of the antiwar movement by charging them with violating federal laws against conspiracy.<sup>674</sup> In sum, during his time as president, Richard M. Nixon struck a hostile tone toward civil liberties by savaging political dissidents in public addresses and by expanding and utilizing the government's weaponry against dissent.

### **Deference of the U.S. Supreme Court**

The last aspect of the crisis that is relevant in assessing the restriction of Americans' civil liberties during the Cold War is the deference of the U.S. Supreme Court to the executive and legislative branches. The Court's record on issues of civil liberties and dissent varied throughout the crisis, with the McCarthy era representing a particular low point. Overall, however, the Court exercised a significant liberalizing influence on federal, state, and local policymakers.

### **McCarthy era**

Toward the end of World War II, the Supreme Court began to shift to a stance more protective of Americans' civil liberties. This more tolerant approach continued after the end of the war. However, by 1948, as the Cold War between the United States and the Soviet Union escalated, the Court increasingly began to favor the side of the government in cases involving individual liberty.<sup>675</sup> This shift grew more pronounced throughout the late 1940s such that by the early 1950s the Court was routinely upholding instances of wartime repression. In part, the growing conservatism of the Court during those years was also the result of the appointment of

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<sup>673</sup> Reeves, *President Nixon*, pp. 348-349; Stone, *Perilous Times*, pp. 514-515.

<sup>674</sup> Stone, *Perilous Times*, pp. 482-483; Goldstein, *Political Repression in Modern America*, p. 487.

<sup>675</sup> Goldstein, *Political Repression in Modern America*, p. 268.



two conservatives to the U.S. Supreme Court—Frederick M. Vinson (who was appointed Chief Justice in 1946) and Sherman Minton.<sup>676</sup>

During the McCarthy era, the Court endorsed the restriction of civil liberties by federal, state, and local governments in a variety of cases. Most notable was the Court's June 1951 decision in *Dennis v. United States*. In *Dennis*, the Court upheld the 1948 conviction of twelve national CP leaders for “conspiring to advocate the overthrow of government.”<sup>677</sup> In doing so, it opened the door to additional Smith Act prosecutions. Immediately following the Court's decision, nineteen second-string CP leaders were arrested in New York, as well as numerous other leads in states and municipalities including California, Baltimore, Pittsburgh, and Cleveland. Efforts to prosecute prominent leaders of the Communist Party continued until 1957, at which point the Supreme Court overruled parts of the Smith Act through its decision in *Yates v. United States*.<sup>678</sup>

In addition to its subversive advocacy decision in *Dennis*, the Supreme Court routinely upheld federal, state, and local efforts to screen alleged subversives from positions of influence. This was the case in a number of decisions in which loyalty or non-communist oaths were an issue, such as *Bailey v. Richardson* (1950); *American Communications v. Douds* (1950); *Garner v. Board of Public Works* (1951); *Gerende v. Board of Supervisors of Elections of Baltimore* (1951); and *Adler v. Board of Education* (1952).<sup>679</sup> *Garner* and *Adler* both illustrate the types of

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<sup>676</sup> Michal R. Belknap, *The Vinson Court: Justices, Rulings, and Legacy* (U.S.A.: ABC-CLIO, 2004), Google Book Search, 18 Apr. 2009 <[http://books.google.com/books?id=oeFRJj8dVAUC&printsec=copyright&dq=civil+liberties+and+the+vinson+court&as\\_br=3#PPA36,M1](http://books.google.com/books?id=oeFRJj8dVAUC&printsec=copyright&dq=civil+liberties+and+the+vinson+court&as_br=3#PPA36,M1)>, pp. 36-43, pp. 82-86; Elizabeth Blanks Hindman, *Rights vs. Responsibilities: The Supreme Court and the Media* (U.S.A.: Greenwood Press, 1997), Google Book Search, 18 Apr. 2009, <[http://books.google.com/books?id=6vqu9Awfr3EC&pg=PA72&dq=civil+liberties+and+the+vinson+court&as\\_br=3#PPA72,M1](http://books.google.com/books?id=6vqu9Awfr3EC&pg=PA72&dq=civil+liberties+and+the+vinson+court&as_br=3#PPA72,M1)>, pp. 72-73.

<sup>677</sup> Stone, *Perilous Times*, pp. 396-403.

<sup>678</sup> Ted Morgan, *Reds: McCarthyism in Twentieth-Century America* (New York: Random House, 2003), pp. 317-319.

<sup>679</sup> Goldstein, *Political Repression in Modern America*, pp. 268-269.

repressive actions the Court chose to uphold. In *Garner*, which was decided on the same day as *Dennis*, the Court upheld a Los Angeles law requiring all municipal employees to pledge that they had not joined any subversive organizations after 1943. Similarly, in *Adler*, the Court upheld a New York law banning subversives—i.e. those who advocated the overthrow of government—from employment in the public school system.<sup>680</sup>

During the same period, the Supreme Court also proved unwilling to check federal efforts to deport or exclude allegedly subversive aliens. As with loyalty oaths, the Court routinely upheld Smith Act deportations of CP members, along with the exclusion of foreigners from the United States on ideological grounds.<sup>681</sup> Perhaps the most important, or at least the most well known, case of this type was *Harisiades v. Shaughnessy*. Decided in 1952, the Court ruled that it was constitutional to deport three aliens for past membership in the Communist Party, even though they had each lived within the United States for at least thirty-two years and had not belonged to the CP for over twelve years.<sup>682</sup>

### *Cold War Interlude*

Although the Senate voted to censure McCarthy in late 1954, cracks in the U. S. Supreme Court's support for government repression did not begin to show until a few years later. In 1955 and 1956, the Court issued a few important decisions—*Peters v. Hobby* in 1955 and *Slochower v. Board of Higher Education*, *Cole v. Young*, *Pennsylvania v. Nelson*, and *Communist Party v. Subversive Activities Control Board* in 1956—that began to limit specific forms of repression. In those decisions, the Court restricted the federal loyalty program, struck down state sedition laws, reversed the dismissal of a New York college professor for pleading the Fifth Amendment before

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<sup>680</sup> Stone, *Perilous Times*, p. 412.

<sup>681</sup> Goldstein, *Political Repression in Modern America*, p. 369.

<sup>682</sup> Stone, *Perilous Times*, p. 412. For an interesting, if at times polemical, description of the deportation of defendant Peter Harisiades, see Abner Green, "The Deportation Terror," *Immigrant Rights in the Shadow of Citizenship*, ed. Rachel Ida Buff (New York: New York University Press, 2008), pp. 364-382.

SISS, and reversed an SACB order requiring the CP to register with the federal government.<sup>683</sup>

The “climax of the Court’s assault on McCarthyism” occurred the next year.<sup>684</sup> On June 17, 1957, which later became known as “Red Monday,” the Court “handed down four decisions that reversed the course of constitutional history.”<sup>685</sup> Of those issued, *Watkins v. United States* and *Yates v. United States* were undoubtedly the most important. In *Watkins*, the Supreme Court ruled that HUAC’s investigations of dissent were unconstitutionally broad in scope. More importantly, the Court ruled in *Yates* that convictions under the Smith Act required more than mere theoretical advocacy of violence and that the Act’s “organize” provision referred only to the original establishment of a subversive group, and not to continuing organizational work. As a result, *Yates* significantly undermined the extent to which the federal government could use the Smith Act to prosecute members of the Communist Party.<sup>686</sup>

Although the growing willingness of the Supreme Court in those years to challenge government repression was partly the result of diminishing anti-communist hysteria, it was more largely a function of changes in the composition of the Court. In 1953, President Eisenhower appointed as Chief Justice moderate Republican Earl Warren. Later, in 1956, he appointed William J. Brennan. To his dismay, both men adopted liberal approaches to issues of dissent and transformed the Supreme Court “from a national security court into a civil liberties court.”<sup>687</sup> The Court’s strong support for civil liberties in cases involving alleged communists did not last, however. Following significant criticism of its 1956 and 1957 decisions, the Warren Court

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<sup>683</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, p. 195, p. 260n.

<sup>684</sup> Goldstein, *Political Repression in Modern America*, p. 404.

<sup>685</sup> Stone, *Perilous Times*, p. 413.

<sup>686</sup> Broadwater, *Eisenhower & the Anti-Communist Crusade*, pp. 195-197; Morgan, *Reds*, pp. 544-546; Goldstein, *Political Repression in Modern America*, p. 405.

<sup>687</sup> Morgan, *Reds*, pp. 540-541; Perret, *Eisenhower*, pp. 552-554.

appeared to adopt a more cautious approach to such cases.<sup>688</sup> This was evident in part from the fact that the number of cases involving civil liberties that the Court refused to review rose dramatically in the years after 1957.<sup>689</sup>

Nevertheless, by the early 1960s, it had brought to an end the prosecution of Communists under the Smith Act.<sup>690</sup> One particularly important decision in that regard, aside from *Yates*, was *Scales v. United States*, in which the Court limited significantly the circumstances in which individuals could be prosecuted under the Smith Act for mere membership in the Communist Party.<sup>691</sup> The Court's record in cases involving congressional and state legislative committees was slightly more uneven. However, it did issue a few decisions that declared it unacceptable for congressional and state legislative committees to investigate alleged subversives merely to expose them to public opprobrium.<sup>692</sup>

### **Vietnam War era**

During the Vietnam War era, the Supreme Court's record in cases related to political dissent was much more positive. Throughout the period, the Court demonstrated support for Americans' civil liberties in a range of cases involving acts of dissent, many involving symbolic nonverbal speech (such as burning an American flag to protest the war). Three different types of cases particularly demonstrate the Court's increasingly broad interpretation of First Amendment rights. First, the Supreme Court routinely ruled unconstitutional state and local laws criminalizing flag desecration. For example, in its 1974 decision in *Smith v. Goguen*, the Court

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<sup>688</sup> Goldstein, *Political Repression in Modern America*, p. 406; Morgan, *Reds*, p. 546. Changes in the composition of the Court do not seem to have been a major factor in producing this shift, as two conservative justices (Charles Evans Whittaker and Potter Stewart) replaced two equivalently conservative justices (Stanley Forman Reed and Harold Hitz Burton) during the late 1950s. For more information, see *The Supreme Court Justices: A Biographical Dictionary*, ed. Melvin I. Urofsky (U.S.A.: Taylor & Francis, 1994).

<sup>689</sup> Sabin, *In Calmer Times*, pp. 197-202.

<sup>690</sup> Belknap, *Cold War Political Justice*, pp. 252-272.

<sup>691</sup> Stone, *Perilous Times*, p. 415; Belknap, *Cold War Political Justice*, p. 271.

<sup>692</sup> Stone, *Perilous Times*, pp. 417-419.

overturned the conviction of a Massachusetts man prosecuted for sewing a replica of the American flag to the seat of his pants.<sup>693</sup> Second, in a number of major cases, the Supreme Court ruled against university and public school restrictions on radicalism. For example, in *Tinker v. Des Moines Independent Community School District*, it ruled unconstitutional the expulsion of three students for refusing to remove black armbands intended as a form of protest against the war in Vietnam.<sup>694</sup> Third, the Court also overturned a number of cases in which individuals were prosecuted under disorderly conduct statutes for symbolic speech deemed to be offensive by local authorities.<sup>695</sup>

In addition, the U.S. Supreme Court also demonstrated support for Americans' civil liberties in two major subversive advocacy cases. The first was *Bond v. Floyd*, which was decided in 1966. In *Bond*, the Court ruled unconstitutional the efforts of the Georgia House of Representatives to deny elected representative Julian Bond a seat in the legislature. Bond had endorsed a statement issued by the Student Nonviolent Coordinating Committee (SNCC, of which he was the director of communications) that expressed opposition to the war in Vietnam and "sympathy" for those who violated the draft.<sup>696</sup> The second, and more important, case was *Brandenburg v. Ohio*, which was decided on June 9, 1969. In *Brandenburg*, the Court overturned the conviction of a Ku Klux Klan leader who was prosecuted under a 1919 Ohio criminal syndicalism law (which was passed during the Red Scare) for broadly suggesting that violence

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<sup>693</sup> Stone, *Perilous Times*, p. 521.

<sup>694</sup> Goldstein, *Political Repression in Modern America*, pp. 521-522; Howard Ball, *Hugo L. Black: Cold Steel Warrior* (New York: Oxford University Press, 1996), Google Book Search, 21 Apr. 2009, <[http://books.google.com/books?id=OurB10COyVcC&pg=PA205&dq=vietnam+war+supreme+court+disorderly+conduct&lr=&as\\_brr=3#PPA205,M1](http://books.google.com/books?id=OurB10COyVcC&pg=PA205&dq=vietnam+war+supreme+court+disorderly+conduct&lr=&as_brr=3#PPA205,M1)>, pp. 205-208.

<sup>695</sup> Goldstein, *Political Repression in Modern America*, p. 516; *Freedom of Expression in the Supreme Court: The Defining Cases*, ed. Terry Eastland (U.S.A.: Roman & Littlefield Publishers, 2000), Google Book Search, 21 Apr. 2009, <<http://books.google.com/books?id=zVoYUSOP6SkC&pg=PA192&dq=brandenburg+v.+ohio#PPA192,M1>>, p. 196-197.

<sup>696</sup> Robert N. Strassfeld, "Bond v. Floyd," *Encyclopedia of American Civil Liberties*, Vol. 1, ed. Paul Finkelman (U.S.A.: Routledge, 1996), Google Book Search, 21 Apr. 2009, <<http://books.google.com/books?id=YoI14vYA8r0C&pg=PA161&dq=bond+v.+floyd#PPA161,M1>>, pp. 161-162.

might be necessary if the suppression of the white race continued. To a greater degree even than most other Vietnam War era cases, the Supreme Court's decision in *Brandenburg* expressed strong support for free speech, as the Court used the opportunity provided by the case "to revisit all of its prior decisions about subversive advocacy."<sup>697</sup>

The U.S. Supreme Court's strong support for American civil liberties during the Vietnam War era was further evident in two major cases involving broad claims of executive power by the Nixon administration. The first was *United States v. U.S. District Court*, decided in June 1969. In that case, the Court rejected unanimously the Nixon administration's claim that the President could authorize electronic surveillance without first obtaining a court order.<sup>698</sup> In the second, *United States v. New York Times Co.* (1971), the Court ruled that the Nixon administration could not prevent the *New York Times* and the *Washington Post* from publishing excerpts of the Pentagon Papers as it had not provided sufficient evidence to justify laying prior restraint on the press. In demonstrating the supremacy of the rule of law, the Court's decision in the case was one of its most important during the entire Vietnam War era. As the editors of the *New York Times* wrote the day after it was decided, the case represented "a ringing victory for freedom under law" and "strongly reaffirmed the guarantee of the people's right to know, implicit in the First Amendment to the Constitution of the United States."<sup>699</sup>

Although the U.S. Supreme Court was a strong defender of civil liberties throughout the Vietnam War era, the Court issued a few major decisions that went against that record. Two are particularly relevant: *United States v. O'Brien* (1968) and *Brandenburg v. Hayes* (1972). In *O'Brien*, the Supreme Court upheld the 1966 conviction of a man who burned his draft card as a

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<sup>697</sup> Stone, *Perilous Times*, p. 522; *Freedom of Expression in the Supreme Court*, ed. Terry Eastland, p. 192.

<sup>698</sup> Stone, *Security v. Liberty*, p. 107; Goldstein, *Political Repression in Modern America*, p. 468.

<sup>699</sup> Stone, *Perilous Times*, pp. 509-512; *Freedom of Expression in the Supreme Court*, ed. Terry Eastland, pp. 198-208. Quote taken from "An Enlightened People," *New York Times*, 1 Jul. 1971, which is republished on pp. 206-207 of *Freedom of Expression in the Supreme Court*.

form of public protest in violation of a law passed by Congress the previous year. The law in question should have been held unconstitutional as it was clearly passed in an effort to suppress dissent; however, the Supreme Court decided in favor of the government because it did not think it wise to attempt to evaluate Congressional motives in enacting the bill.<sup>700</sup> In *Branzburg*, the Court upheld the contempt citations of three journalists who had refused to provide information about their sources to federal and state grand juries, leaving journalists open to similar citations in the future. As the *New York Times* noted, “the Court’s majority seemed oblivious of the chilling effect of its decision on the press’s freedom to investigate, to expose, without fear of governmental sanctions.”<sup>701</sup>

### **Reagan era**

By the end of the Vietnam War era, the restriction of Americans’ civil liberties had declined dramatically. During the Reagan era, there were no major U.S. Supreme Court cases involving civil liberties that stemmed from the Cold War.

### **Return to “Normal”**

By the time the Cold War ended, most overt forms of wartime repression had long been discontinued. That was also partially true of covert forms of repression. However, though continuing at a significantly lower level than during previous periods of the crisis, the size and scope of the federal intelligence agencies, which was a product of the crises of the twentieth century, continued.

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<sup>700</sup> Stone, *Perilous Times*, pp. 472-477. The draft law was clearly unconstitutional as it was enacted shortly after draft card destruction became a common form of protest. Further, it was clear from the debate over the bill that numerous congressmen supported it precisely because it would ban protests of that sort.

<sup>701</sup> *Freedom of Expression in the Supreme Court*, ed. Terry Eastland, pp. 209-217. Quote taken from “...Loss for the Public,” *New York Times*, 15 Jul. 1972, which is republished on p. 217 of *Freedom of Expression in the Supreme Court*.

### End of the crisis

The Cold War ended on December 25, 1991, when Russian General Secretary Mikhail Gorbachev signed an edict ordering the dissolution of the Soviet Union. Gorbachev had sought to reform the Soviet Union during his time as head of state, but he never intended to dissolve it. However, the seeds of the U.S.S.R.'s destruction were long in the making and by December 1991, he had no choice but to recognize a *fait accompli*. Putting the best spin possible on the event, he declared, "An end has been put to the 'Cold War,' the arms race, and the insane militarization of our country, which crippled our economy, distorted our thinking and undermined our morals. The threat of a world war is no more."<sup>702</sup>

By the 1970s, the United States and the Soviet Union had settled into *détente*, a period of comparatively relaxed tensions in the Cold War in which "the stability of the Soviet-American relationship" was prized over its fairness because the risks of continuing conflict—all out nuclear war—were "too frightening to contemplate."<sup>703</sup> During that period, both countries effectively agreed to refrain from taking actions that would escalate the Cold War, such as intruding on the other's sphere of influence or accelerating the production and development of nuclear arms. In doing so, both countries accepted the maintenance of the *status quo*. Implicit in that acceptance was the belief that the Cold War was going to be a permanent part of the geopolitical landscape and that it fell to policymakers to negotiate the rules by which the conflict would be waged.<sup>704</sup>

However, *détente* began to break down relatively quickly during the mid-to-late 1970s for a variety of complex reasons that are beyond the scope of this treatise. One of the significant reasons it ended was that many people saw it as perpetuating injustice. This was true in two respects. First, *détente* proposed that Mutually Assured Destruction (MAD)—the idea that the

<sup>702</sup> Mikhail Gorbachev, *Memoirs* (New York: Doubleday, 1995), p. xxxviii, qtd. in Gaddis, *The Cold War*, p. 257.

<sup>703</sup> Gaddis, *The Cold War*, p. 180.

<sup>704</sup> Gaddis, *The Cold War*, pp. 179-211.



United States and the Soviet Union could not attack each other directly because the resultant nuclear war would destroy both countries—was an acceptable, even necessary, arrangement that ensured stability. Second, it also accepted the denial of self-determination and human rights to those living under communist control as a necessary cost for stability. Another major factor in the collapse of *détente*, beyond the debate about its morality, was Soviet aggression during the late 1970s, particularly the Soviet Union’s invasion of Afghanistan.<sup>705</sup>

During the 1980s, Ronald Reagan and Mikhail Gorbachev became heads of state of the United States and the Soviet Union. To a greater degree than the previous leaders of their respective countries, both sought fundamental change in Soviet-American relations. President Reagan refused to believe that the Cold War was a permanent part of the geopolitical landscape. He accelerated military spending; repudiated the concept of MAD by announcing a plan to build an intercontinental ballistic missile shield, his Strategic Defense Initiative (SDI); and proposed Strategic Arms Reduction Talks (START). Further, he portrayed the Soviet Union in stark terms reminiscent of the McCarthy era, referring to it as the “evil empire.”<sup>706</sup>

At the same time, General Secretary Gorbachev was extremely honest about the past failures of the Soviet Union and sought fundamental reforms both within the U.S.S.R. and in Soviet-American relations. He sought arms reductions and limited capitalist economic reforms. More importantly, he also refused to suppress growing dissent in the Warsaw Pact countries, a trend that had begun under previous Soviet leaders during the early 1980s.<sup>707</sup> Rather quickly, that led to political liberalization in numerous Warsaw Pact countries and ultimately their secession, a trend that accelerated after the fall of the Berlin wall in late 1989. By the end of that year, the

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<sup>705</sup> Gaddis, *The Cold War*, pp. 179-211.

<sup>706</sup> Gaddis, *The Cold War*, pp. 214-228.

<sup>707</sup> The Warsaw Pact was a military alliance of communist countries in central and eastern Europe created by the Soviet Union in response to the formation of NATO. For more information, see Gaddis, *The Cold War*, pp. 108-109.

Soviet sphere of influence in Eastern Europe was in tatters and pressures within the Soviet Union for autonomy and independence were growing rapidly.<sup>708</sup>

In June 1991, Boris Yeltsin was elected president of Russia. While Gorbachev sought reform, he sought to dissolve the Soviet Union. He quickly abolished the Communist Party of the Soviet Union and disbanded the Congress of People's Deputies (the governing body of the Russian federation), establishing in its place a Commonwealth of Independent States. By December 1991, all that remained was for Russian Secretary Gorbachev to officially declare the dissolution of the Soviet Union and to resign.<sup>709</sup>

### **Duration of restrictions**

In general, the overt restriction of Americans' civil liberties during the Cold War ended in the 1970s, long before the crisis itself ended. That was also broadly true of covert forms of repression, particularly with respect to the activities of the different federal intelligence agencies. Recall that the political intelligence operations of the FBI, the CIA, the NSA, and military intelligence were reduced and eventually terminated during those years. However, once Ronald Reagan became president, his administration weakened many of the strong reforms put in place during the 1970s, believing they were too restrictive. In spite of those changes, the core of the 1970s reforms remained until the end of the Cold War, throughout the 1990s, and until the "War on Terror" provided new justifications for the restriction of civil liberties.<sup>710</sup>

While there was something of a return to "normal" after the end of the Cold War, the restriction of Americans' civil liberties during the crisis clearly legitimized the institutions and established the practices of wartime repression. To be sure, there was a strong backlash against

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<sup>708</sup> Gaddis, *The Cold War*, pp. 229-252.

<sup>709</sup> Gaddis, *The Cold War*, pp. 252-257.

<sup>710</sup> Jeffreys-Jones, *The FBI*, pp. 191-252; Geoffrey Stone, "The Vietnam War: Spying on Americans," *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History*, ed. Daniel Farber (New York: Russell Sage Foundation, 2008), pp. 108-112.

the excesses of the late 1960s and the early 1970s; however, that alone was insufficient to dissolve the foundations of repression created during the war. The “War on Terror” would later build on those institutions and practices.

### **Conclusion**

Unlike the previous crises in American history, the Cold War was an unconventional, ideological crisis of potentially unlimited duration. Like the other crises of the twentieth century, however, the restriction of civil liberties that it produced was a product not only of the federal government, but of state and local governments as well. Further, the wartime restrictions put in place occurred through a range of different avenues of repression, utilizing both overt and covert methods. As the crisis developed, the forms of repression employed were increasingly covert. That shift was in large part caused by increasing civil liberties-protectiveness on the part of the U.S. Supreme Court and growing support for civil liberties among the public, which reached its culmination in the reaction of policymakers and the public to the abuses of the Nixon years. Changing methods of repression over the course of the crisis were certainly correlated with shifting perceptions of threats to American national security, from communism broadly during the McCarthy era and the Cold War Interlude to dissent generally during the Vietnam War era and Soviet infiltration more narrowly during the Reagan era. However, increasing respect for civil liberties by the Court and the public was a more powerful causal factor in the shift toward increasing use of covert forms of repression.

In general, the overt forms of repression established during the Cold War ended during the 1970s. That was also mostly true of covert forms, which were restricted or eliminated through a series of intelligence reforms during those years. Those reforms were weakened somewhat during the Reagan era; however, their core remained essentially intact. Ultimately,

although the covert methods of repression established were not employed after the end of the Cold War, they served as significant precedents enabling the restriction of civil liberties during the “War on Terror.” Similarly, the creation and expansion of the federal agencies during the Cold War served as a ready foundation on which to build a campaign of repression during the current crisis.

Different Cold War presidents set very different tones toward civil liberties throughout the Cold War. During the first period of the crisis, the McCarthy era, Truman reluctantly restricted civil liberties in response to immense external pressures for the elimination of communist influences in American society. To an extent, that was also true of Eisenhower. However, in contrast to Truman, Eisenhower was a dedicated anti-communist who continued to take repressive actions directed at members of the Communist Party even after the censure of McCarthy. Later, during the Vietnam War era, Johnson expanded covert forms of repression, but refrained for the most part from restricting civil liberties in an overt manner because he feared that doing so would undermine support for his Great Society domestic reforms. Nixon inherited the internal security apparatus established during the Johnson years and immediately began to use it to suppress dissent. After the excesses of the Nixon years and the reforms of the 1970s, Reagan set an intolerant tone toward civil liberties through his efforts to weaken previous federal intelligence reforms and to expand secrecy in government, thereby denying access to the American people. The U.S. Supreme Court played a strong role in checking the executive and legislative branches throughout the crisis. Although it limped into the McCarthy era, it began to assert itself in the mid-to-late 1950s. That was particularly true of the Court’s decision in *Yates v. United States*, which limited the extent to which the Smith Act could be used to prosecute members of the Communist Party. The Court played a stronger role during the Vietnam War era,

which was especially evident through its decisions in *United States v. U.S. District Court* and *United States v. New York Times Co.*

To a greater degree than previous crises, the Cold War reflected significant evolutionary changes in the nature of wartime repression. Four were particularly relevant. First, the crisis reflected and contributed to a growing body of laws on which to build a campaign of repression. For example, early on in the crisis, the Truman and Eisenhower administrations prosecuted members of the Communist Party under the Smith Act, a law passed before the bombing of Pearl Harbor during the Second World War. Additionally, the laws enacted during the crisis established precedents that would help to enable the restriction of Americans' civil liberties during future crises. Second, throughout the crisis, the U.S. Supreme Court was increasingly protective of civil liberties, particularly the freedom of speech. Overall, the Court played a stronger role in checking executive and legislative branch excesses than during any previous crisis. Third, the crisis demonstrated growing public support for civil liberties, as particularly evidenced in the 1970s backlash against the excesses of the Nixon years. Fourth, with regard to evolving methods of repression, the increasing protection of civil liberties by the U.S. Supreme Court and growing public support for civil liberties helped to make the repression of dissent less politically and legally tenable. That change, in turn, caused a shift toward increasing use of covert repression, as the disincentives for employing overt forms of repression were increasingly significant.

In addition to those evolutionary changes, the crisis also reflected change in the nature of threats to American national security. Change occurred in both the distribution of power in the international system and in the nature of the conflict. The power balance shifted from pre-war multipolarity to post World War II bipolarity. The two dominant powers (the United States and

the Soviet Union) were locked in an ideological battle between their most deeply held values: atheistic communism and Judeo-Christian capitalism. Those two changes created a vastly longer crisis, not simply because it was an ideological conflict, but also because the nation that embodied the ideological threat to the American way of life was the other global hegemon in a bipolar world. That meant that it would be much more costly to destroy, particularly in an age of nuclear weapons.

When the Soviet Union collapsed, the United States became the sole global hegemon. The international system was suddenly unipolar. Around the same time and in following years, there was a growing diffusion of technologies of mass destruction to non-state actors, a “democratization of violence.” That shift decreased, and continues to decrease, the asymmetries between state and non-state actors, leaving modern states vulnerable not only to attack by other states but to attack by terrorist groups such as Al-Qaeda. Thus, after the Cold War, the redistribution of power in the international system was such that the major credible threats to American national security were non-state actors, which were, and are, increasingly becoming capable of inflicting significant damage to states.

The Cold War also reflected growing government capabilities to monitor and suppress dissent in a covert manner. During the Cold War, new federal intelligence agencies were established and expanded. Further, those already in existence, the FBI in particular, grew vastly stronger than they had been during previous crises. Although the creation and expansion of those agencies would have occurred regardless of the Cold War, the degree to which they expanded was undoubtedly greater than if the crisis had never occurred. That is relevant because it means that the footprint of the federal intelligence agencies after the Cold War was greater than if the

crisis had not occurred. Additionally, the crisis reflected growing reliance on forms of electronic surveillance, such as wiretapping, bugging, and the monitoring of international communications. In the latter years of the Cold War and in the years after, the growth of technologies of mass surveillance was extraordinary. As a result, their significance was most clearly reflected in the current “War on Terror.”

## VI. CONCLUSION

This treatise was designed to test the thesis that the evolution in Americans' response to national military crises has not been a simple progression toward increasing restraint on the part of federal, state, and local policymakers, as is sometimes assumed. Rather, major twentieth and twenty-first century developments relating to the nature of threats to American national security and government capabilities to covertly repress dissent have interacted with evolutionary changes in the nature of wartime repression in reinforcing and conflicting ways. Because of those changes, modern crises will last longer, the restriction of civil liberties during wartime will increasingly be accomplished through covert forms of repression, and, therefore, the durability of wartime restrictions will be greater. In sum, during future crises, Americans' civil liberties will be restricted for longer periods, with the return to normalcy after those crises becoming increasingly difficult.

To test that thesis, this treatise sought to answer three central research questions. First, to what degree were civil liberties restricted during the past crises of American history? Second, for each of those crises, to what degree did wartime restrictions outlast the crises during which they were established? Third, how did the nature of wartime repression change over the course of American history? The first two questions were answered in great depth in Chapters I through V. This chapter focuses specifically on the third question, examining the evolution of Americans' response to national military crises in terms of the three broad sets of changes identified in the Introduction and referenced above. To restate, those changes include 1) evolutionary changes in the nature of wartime repression, 2) twentieth and twenty-first century changes in the nature of threats to American national security; and 3) twentieth and twenty-first century changes in



government capabilities to monitor and suppress dissent. In the final section, this chapter reviews areas for future study.

### **Findings**

In general, the central thesis of this treatise proved valid. The evolution of wartime repression in America has clearly been driven by the reinforcing and conflicting interactions of the three sets of changes listed above. Yet while those changes account for the *evolution* in the restriction of civil liberties over the course of American history, they do not fully explain Americans' response to crisis. Other factors are also relevant. Therefore, before examining those changes, this treatise reviews two major constants in Americans' reaction to national military crises revealed in the case study analysis in Chapters I through V, as well as four aspects of crises that are not directly a product of the broad changes identified in this treatise.

### **Constants**

The first major constant evident in Americans' response to crisis relates to the broad pattern established in the Introduction, whereby Americans restrict civil liberties in times of crisis in ways that they later come to regret. In every crisis in American history, including the "War on Terror," policymakers and the public demonstrated a similar fear-based response to threats to American national security. In each, those fears led people to accept restrictions on their civil liberties that usually exceeded any limitations justifiable by the threat posed. Afterwards, they came to regret those restrictions. The Civil War may represent an exception to this pattern, as Lincoln's suspension of the writ of *habeas corpus* may very well have ultimately ensured survival of the union. There is simply no way to know for sure. However, the pattern is clear overall. In this treatise, it was perhaps most evident from the Roosevelt administration's active efforts to avoid the excesses of the First World War.

The second major constant evident in the crises on which this treatise focuses, which was also evident in the early years of the “War on Terror,” is the willingness of Americans to define the enemy as “other” and to link domestic dissidents with that enemy. Viewing dissidents and the enemy on the same plain, Americans become particularly willing during intense times of crisis to deny the civil liberties of those who voice any fundamental opposition. This link has frequently been exploited for partisan political purposes. For example, during the Quasi-War, the Federalists attacked the Democratic-Republicans as Jacobins (i.e. Frenchmen who supported the Revolution). Later, during the Cold War, the Republicans attacked Democrats as “parlor pinks” (communist sympathizers). Similarly, during the “War on Terror,” the Republicans attacked the Democrats as “soft on terrorism.” However, Americans’ tendency to identify dissidents with the enemy during wartime exists independent of political battles between the two major parties. During World War I, German-Americans were a major target of mob violence, along with members of left-leaning radical groups such as the IWW and the Socialist Party of America. Later, after the bombing of Pearl Harbor during World War II, the Jehovah’s Witnesses were a major target of mob violence. Further, Americans imprisoned for refusing to go to war were subjected to extremely harsh treatment while in prison. In short, the charge of “un-Americanism” has been, and will continue to be, leveled in national military crises.

### **Independent variables**

Beyond these constants, three major independent variables—that is, aspects of the crisis that vary and are not directly correlated with the three sets of changes identified in this treatise—are evident in Americans’ response to crises. First, and perhaps most important, is the willingness of different presidents to manipulate public fears and to suppress dissent. To be sure, that willingness is also the result of other factors, such as the nature of the crisis, the motivations

of policymakers and the context in which civil liberties are restricted. For example, even if Lincoln had been intolerant of dissent, his larger goal of reuniting the South and the North meant that he could not actively repress dissidents because doing so would have risked alienating the Border States. Regardless, the tone set toward civil liberties and dissent is clearly in large part a function of the President, and that tone powerfully affects the nature of wartime repression.

The second, and most obvious, independent variable evident in the case studies is that the specific types of repression employed are a reflection of the nature of the crisis. For example, during World War I, the repressive actions taken by the Wilson administration, such as the prosecution of dissidents for sedition and the establishment of the Committee on Public Information, reflected the President's need to build support for involvement in the war in Europe. Similarly, during the McCarthy era, the repressive actions taken by Presidents Truman and Eisenhower, as well as Congress (the establishment of the federal loyalty program and congressional investigations into alleged communist influences in American society are the most suitable examples) reflected the perceived need to shield the United States government from communist infiltration. This variable is further reflected in the "War on Terror." During the early years of the current crisis, the Bush administration sought to increase government surveillance and expand secrecy in government in order to detect terrorist cells and to deny them access to critical information.

Third, overt forms of wartime repression are always discontinued at the end of a crisis unless new situations or crises emerge shortly thereafter that provide strong justification for the continuance of wartime restrictions. This was the case in three of the crises analyzed in this treatise: the Civil War, World War I, and World War II. After the end of the Civil War, Reconstruction provided justifications for the continued restriction of civil liberties. In that

context, the suspension of the writ of *habeas corpus* and the trial of civilians (in the South) by military commission continued for years after Confederate General Robert E. Lee surrendered to Union General Ulysses S. Grant at Appomattox Court House. Later, after the end of the First World War, the Red Scare ensured the maintenance of wartime restrictions until early 1920. Similarly after the end of the Second World War, the rapid development of the Cold War ensured that there would be no return to “normal.” As a result, wartime restrictions, like the Smith Act, continued well into the new crisis.

### **Evolutionary changes**

At a broad level, the four evolutionary changes in Americans’ response to national military crises identified in the Introduction of this treatise were reflected in the case studies in Chapters I through V. To restate, they include the growing body of repressive laws, increasing civil liberties-protectiveness on the part of the U.S. Supreme Court, growing public support for civil liberties, and evolving methods of repression. Another change was evident, however, that was not addressed in the Introduction—the restriction of civil liberties by state and local governments. Taken together—that is, seen as interacting fluidly in both reinforcing and conflicting ways—these five changes have produced a gradual shift from narrow, limited, and overt repression to broad-based, sophisticated, and increasingly covert repression. In parallel, there has been increasing support for civil liberties by the U.S. Supreme Court and the public at large. This has interacted with the other evolutionary changes, helping to produce the shift toward increasingly covert methods of repression, while simultaneously helping to militate against repression.

The first change that helped to produce this shift has been the growing body of repressive laws on which to build a campaign of repression. It is clearly too extreme to assert that repressive

laws established during times of crisis continually accumulate and, hence, pose an ever-growing and ever-more significant threat to American civil liberties. Indeed, some major repressive laws have expired or been repealed after the end of crises, though their mere enactment establish important precedents. For example, both the Alien and Sedition Acts of 1798 expired at the end of President Adams' term in office. Additionally, the Sedition Act of 1918 was repealed only two years later, after the end of the Red Scare. However, it is not extreme to assert that laws established during wartime often outlast the crises during which they were enacted, leaving them as ready weapons for the restriction of civil liberties during the future. Indeed, this has occurred in most of the crises on which this treatise focuses. Perfect examples are World Wars I and II and the Cold War. During World War I, Congress enacted an amendment to the Espionage Act of 1917 that effectively reenacted the Sedition Act of 1798. Later, during World War II, Congress reenacted the Espionage Act of 1917 and made it applicable in peacetime. Only a few years after the end of that crisis, the Truman and Eisenhower administrations began to prosecute members of the Communist Party for violation of the Smith Act of 1940. Clearly, even when laws expire or are repealed, their enactment and use establishes important precedents that helps to make possible repression in future crises.

The second relevant change has been the increasing protectiveness of speech and civil liberties by the U.S. Supreme Court, which has militated against repression. It is difficult to identify specific points at which Supreme Court decision-making changed relative to previous wartime decisions without examining in-depth the specific legal reasoning used in key cases. Nevertheless, it is quite clear that the Court has become gradually more protective of Americans' civil liberties over time. The broad role played by the Supreme Court in both past crises and the current "War on Terror" demonstrates the point. During the first crisis, the Quasi-War, the Court

played no role because it had not yet firmly established the power of judicial review. The Supreme Court began to assert itself more strongly during the Civil War. However, its efforts were ineffectual. The Court did not have a chance to rule on the constitutionality of wartime repression during World War I. However, after the crisis, during the Red Scare, it upheld numerous wartime sedition prosecutions. Although it deferred to the Roosevelt administration on the issue of internment, the Supreme Court protected the rights of dissidents in a range of cases during the Second World War. The Court played an even stronger role throughout the Cold War. The trend toward increasing protection of civil liberties has also been evident in the “War on Terror,” particularly through the Court’s decisions in cases such as *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008).<sup>711</sup>

The third relevant change has been growing public support for civil liberties. This shift is particularly evident from the emergence in the twentieth century of groups advocating civil liberties, such as the American Civil Liberties Union and the Center for Constitutional Rights. Although clear and undeniable, the shift is only indirectly reflected, in this treatise, through changes in wartime repression. The increasing willingness of the U.S. Supreme Court to uphold the rights of dissidents during times of crisis partly reflects that shift. Perhaps more indicative is the evolution of press censorship. The contrast between the Quasi-War and the current crisis illustrates the point. During the Quasi-War, journalists were prosecuted for sedition. Today, a similar occurrence is virtually unthinkable, even in the early years of the “War on Terror.” To be sure, people are still willing to restrict the rights of dissidents. For example, in the early years of

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<sup>711</sup> Stacy Sullivan, “The Guantánamo Question,” *Liberty Under Attack: Reclaiming Our Freedoms in an Age of Terror*, ed. Richard C. Leone & Greg Anrig, Jr. (New York: The Century Foundation, 2007), pp. 189-214; Joseph Lelyveld, “What Now for Detainees?” *Liberty Under Attack*, pp. 215-233; Scott M. Matheson, Jr., *Presidential Constitutionalism in Perilous Times* (U.S.A.: Harvard University Press, 2009), Google Book Search, 28 Apr. 2009 <[http://books.google.com/books?id=-RWdsYHEzAsC&pg=PA151&dq=supreme+court+\"war+on+terror\"+boumediene+hamdan+hamdi+rasul#PPA151,M1](http://books.google.com/books?id=-RWdsYHEzAsC&pg=PA151&dq=supreme+court+\)>, p. 151.

the “War on Terror,” many people defended increased government surveillance with statements such as, “if you have nothing to hide, you have nothing to fear.” However, it is a question of degree. Although this may not be true in the most intense moments of a crisis and may only extend to the freedoms of speech and of the press, Americans appear to be more willing today than during the Quasi-War and other past crises to support the civil liberties of dissidents during wartime.

The fourth change that helped to produce the shift toward more broad-based, sophisticated, and increasingly covert restrictions on Americans’ civil liberties has been the evolving methods of repression employed during crises. This change has two parts. First, there has been a gradual progression from simple to complex methods of repression. For example, during the Quasi-War, the repression of dissent was accomplished strictly through simple legislative means, i.e. the enactment of legislation and the prosecution of dissidents. Later, during the Cold War, a significantly broader variety of methods was used to suppress dissent. They included direct prosecution, surveillance, loyalty programs, congressional investigations, and the exclusion of aliens. Second, after each crisis, the forms of repression previously employed become increasingly untenable politically and legally because of the growing support for civil liberties by the public and the U.S. Supreme Court. The trend to reject these discredited methods has resulted in an increasing premium on covert methods of repression. This, in its own right (even barring the twentieth and twenty-first century changes in government capabilities to covertly repress dissent discussed later), has ensured the increasing use of covert methods of repression.

The final relevant evolutionary change in Americans’ response to crises has been the restriction of civil liberties by state and local governments. At first glance, state and local

repression appeared to be an independent variable affected primarily by a range of factors other than time, such as the tone set by the executive and the nature and intensity of the crisis.

However, the case study analysis in Chapters I through V provide evidence to support a different conclusion. It appears that state and local repression has been dependent on the willingness and ability of state and local governments to repress dissent. This is evident from an apparent shift at the beginning of the twentieth century toward the repression of dissent by state and local governments. During the first two crises of American history, the Quasi-War and the Civil War, there was no significant state or local repression. However, during every crisis of the twentieth century, state and local governments joined the federal government in restricting Americans' civil liberties. Further research is needed to ascertain to what extent that shift is reflected in the current "War on Terror." Regardless, while not yet conclusive, the evidence suggests that state and local repression has evolved over time.

### **Changes in threats to national security**

In addition to the evolutionary changes discussed above, major twentieth and twenty-first century developments in the nature of threats to American national security have also driven the evolution of wartime repression in America. These developments—the shifting distributions of power in the international system, the recent prevalence of ideological conflicts, and the “democratization of violence” (the diffusion of technologies of mass destruction to non-state actors)—have produced a shift from conventional, non-ideological crises of limited duration to unconventional, ideological crises of potentially unlimited duration. The broad effect of these developments has been to extend the length of crises and, thus, the length of time in which civil liberties are restricted. These changes were partially seen in the Cold War and have been more fully reflected in the current “War on Terror.”



In length and in nature, the Cold War was a radically different crisis from the other national military crises on which this treatise focuses. That was primarily the result of two factors. First, after the end of the Second World War, the distribution of power in the international system shifted from multipolarity to bipolarity, as the United States and the Soviet Union emerged from the crisis the only global hegemonic powers. Second, in contrast to earlier crises, the Cold War involved an ideological threat to the American way of life. At heart, it was a conflict between atheistic communism and Judeo-Christian capitalism. To be sure, previous crises had ideological elements to them. The Civil War and World War II are perfect examples. However, neither of those conflicts was driven by ideology to the same degree as the Cold War and the “War on Terror,” at least in its early years. On their own, the redistribution of power in the international system and the ideological nature of the Cold War would not have produced a longer crisis. Yet together, they created a crisis that lasted nearly half a century and only ended after one of the two belligerent nations collapsed, along with its ideology. There were very few other ways in which the Cold War could have ended, given that it was an ideological struggle between two global hegemonic powers. This explains why the crisis lasted so long; the two countries could not resolve ideological differences and were simply unable to destroy each other for a variety of reasons.

The major twentieth and twenty-first century developments in the nature of threats to American national security became even more important in the current “War on Terror.” This has been true in three respects. First, after the end of the Cold War, the collapse of the Soviet Union left the United States the sole global hegemonic power. The world had become unipolar and as a result, the United States no longer faced a credible threat from other states. This meant that the only credible threat to American national security could come from non-state actors.

Second, the “War on Terror,” at least in its early years, was strictly framed as an ideological conflict between the American way of life and radical Islam, which was often posited broadly by the Bush administration as seeking to advance the antithesis of American values. The ideological nature of the conflict appears to have become less important in recent months and years, particularly with the election of President Barack Obama in 2008, who has refrained from even referring to the conflict as a “War on Terror.” Nevertheless, there is no way of knowing whether the crisis will again intensify and thereby resume its previous intense ideological overtones. Another terrorist attack on a scale similar to the attacks of September 11<sup>th</sup> could easily produce such a result.

Third, the growing “democratization of violence” has decreased the asymmetries between states and non-state actors. Although this shift began in the final years of the Cold War, it was only truly a major factor in the current “War on Terror.” The horrific attacks on the World Trade Center and the Pentagon proved in an utterly destabilizing way—by making Americans suddenly aware of their vulnerability—the damage that small groups of determined people could cause in the modern era. A major effect of this “democratization of violence” has been to expose Americans to attack at any time and in any location, making some more willing to accept what were once seen as wartime restrictions, restrictions tolerated only for the duration. Additionally, this shift combined with the shift from bipolarity to unipolarity has made the United States especially vulnerable to attack by terrorist groups because, as the sole global hegemon, its hard and soft power extends across the world.

### **Changes in covert repression capabilities**

The last major change driving the evolution of Americans’ response to national military crises has been twentieth and twenty-first century developments in government capabilities to

monitor and suppress dissent in a covert manner. In general, these developments, which include the creation and expansion of federal intelligence agencies and the proliferation of surveillance technologies, have produced a shift toward increasing reliance on covert methods of repression. In doing so, they have extended the durability of wartime restrictions on Americans' civil liberties, as the covert methods of repression increasingly employed tend to have greater durability after the end of crises because of their comparative invisibility to the American people.

In broad outline, the establishment and expansion of the federal intelligence agencies throughout the twentieth and twenty-first centuries has been a progression toward increasing strength and breadth in the scope of their activities. The progression is clear from World War I and World War II to the Cold War. In each of these crises, federal capabilities to covertly monitor and suppress dissent grew, with the balance between overt and covert methods shifting inexorably toward the latter. During the 1970s, the excesses of the Nixon years led policymakers to implement strong controls on the different intelligence agencies. Although weakened by the Reagan administration, the core of those controls remained essentially intact throughout the 1980s and 1990s. However, during the early years of the "War on Terror," the Bush administration all but dismantled those reforms, at least for the FBI.<sup>712</sup>

Along with the establishment and expansion of the federal intelligence agencies, the proliferation of surveillance technologies was also important in producing the shift toward more covert forms of wartime repression. In general, the effect of these technologies was *relatively* limited in the crises on which this treatise focused. Electronic forms of surveillance first became important methods of repression during World War II. Their use expanded significantly during the Cold War. However, it has only been during the "War on Terror" that these technologies

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<sup>712</sup> Rhodri Jeffreys-Jones, *The FBI: A History*, (New Haven: Yale University Press, p. 2007), p. 235; Stone, *Security v. Liberty*, p. 109; Aziz Huq, "The New Counterterrorism: Investigating Terror, Investigating Muslims," *Liberty Under Attack*, pp. 167-185.

have begun to have significant impacts on Americans' civil liberties. Although a large number of individual dissidents were subjected to surveillance during past crises, it seems quite clear that surveillance technologies have played a vastly more important role during the "War on Terror."<sup>713</sup>

Of all the changes examined in this treatise, the creation and expansion of the federal intelligence agencies and the proliferation of surveillance technologies have been the most significant causes of the increased durability of wartime repression. After every major crisis in the twentieth century, these changes have ensured the post-war maintenance of wartime restrictions. For example, during World War I, the Bureau of Intelligence did not end its investigation of radicals until 1924. Later, many questionably legal practices and programs established by the FBI during the World War II continued well into the Cold War. Although most covert methods of repression established during that crisis were discontinued during the 1970s, their use served as major precedents that later helped to make possible the restriction of civil liberties during the "War on Terror."

### **Summation**

Each of these three broad sets of changes has driven different shifts in the evolution of wartime repression in America. First, the evolutionary changes in Americans' response to crises have not only driven a shift toward increasing support for civil liberties by the U.S. Supreme Court and the public, but have also driven a shift from narrow, limited, and overt methods of repression to more broad-based, sophisticated, and increasingly covert methods of repression.

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<sup>713</sup> Stephen J. Schulhofer, "The Patriot Act and the Surveillance Society," *Liberty Under Attack*, pp. 123-146; Patrick Radden Keefe, "The Espionage Industrial Complex," *Liberty Under Attack*, pp. 147-166; Stephen J. Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles," *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone & Greg Anrig, Jr. (New York: The Century Foundation, 2003), pp. 74-99; James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (New York: Free Press, 2006), pp. 39-60; Morgan, *Reds*, pp. 598-600.

Second, the twentieth and twenty-first century developments in the nature of threats to American national security have produced a shift from conventional, non-ideological crises of limited duration to unconventional, ideological crises of potentially unlimited duration. Third, the twentieth and twenty-first century changes in government capabilities to repress dissent covertly have fed into the evolutionary changes described above by producing a shift toward increasing reliance on covert methods of repression, methods that tend to have greater post-war durability because of their relative invisibility to the American people.

Ultimately, these three sets of changes have not acted independently. It is the complex interplay among them that has driven change in the nature of wartime repression. In the first two crises of American history, the evolutionary changes alone drove the shift in the nature of wartime repression. However, over the course of the twentieth century, growing government capabilities to covertly repress dissent increasingly became the method of choice as overt forms of repression were increasingly discredited. This increased the durability of wartime repression. Similarly, after World War II, the changing nature of threats to American national security has created longer, more diffuse crises, which has meant that Americans' civil liberties are restricted for longer periods. One can only anticipate how these changes will be reflected in the future.

#### **Areas for Future Study**

This treatise raises a few additional research questions. First, to what degree have civil liberties been restricted in the current "War on Terror," in what way, and to what degree have the changes identified herein been reflected? Second, how has the ideological nature of recent crises changed the nature of wartime repression, beyond helping to extend crises? Third, to what extent is the crisis mentality demonstrated in this treatise reflected in other types of crises, such as economic crises? These questions pose a rich mine for future research.

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