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TWO COMMANDERS-IN-CHIEF: FREE EXPRESSION'S MOST SEVERE TESTS

by

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Research Paper R-7
August 1992

The Joan Shorenstein Barone Center

PRESS • POLITICS

• PUBLIC POLICY •

Harvard University
John F. Kennedy School of Government

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"War and preparation for war impose serious strains on a system of freedom of expression. Emotions run high, lowering the degree of rationality which is required to make [a democratic] system viable. . . .Here the constitutional guarantee of free and open discussion is put to its most severe test."

Thomas I. Emerson, *The System of Freedom of Expression*[1]

War puts the constitutional guarantee of free expression to its most severe test. For a president, war heightens immeasurably the classic First Amendment conflict between confidentiality and openness in a democracy. War exacerbates the usual free expression tensions between access and governing, frankness and caution, the people's right to know and the need to operate a crisis government. In other words, war and war crisis conditions chill free expression in a democracy. With war, values are traded between individual freedom and group survival. The self-protection of the group becomes so important that the government interferes with individual liberties. When the country as a whole is committed to a war, there will be few defenders of individual free expression, especially that expression opposed to the military conflict. In the United States, such free expression confrontations are but part of an old story of clashes involving the president as the commander-in-chief.[2]

War itself is not an aberration in American social and political history. With over 200 incidents of using military force outside the United States in the past 200 years, military actions are part of the presidency. In fact, less than one-third of all presidents have avoided major military conflicts and their commander-in-chief roles. While there have been only five formal Declarations of War, Congress, for the most part, supports the President's military ventures, especially after the fact. Such was the case when James Polk told Congress that a state of war existed with Mexico in 1846; such was the case in 1861 when Abraham Lincoln responded to the firing on Fort Sumter.[3]

Post-World War II presidents have successfully asked Congress to approve resolutions for war, just as George Bush did for Operation Desert Storm, just as Lyndon Johnson did for the Vietnam War, and just as Harry Truman did for the Korean War. The use of military force has become an accepted presidential action, part of the very governing and leadership fabric of this country.[4]

During a war, a democratic president is bound to change. He becomes part of an authoritative, military government whose major administrative focus is war. To be successful, military actions must be autocratic and secret, as well as supported by the public. With additional authoritative controls, the president's concerns over public opinion become extremely important. A wartime presidency greatly conflicts with a democratic society's demand of public actions and the president's necessary military conduct. The president, under close public scrutiny, has to find the balance between waging the war in an effective manner and then convincing the public and Congress that the human and economic costs are justified. "Public opinion wins the war," General Eisenhower once told newspaper editors during World War II. There must be public support, as Lyndon Baines Johnson so painfully learned during the Vietnam War.[5]

Even with the American martial spirit and initial military agreement, presidents quickly notice that the American mass media's accurate accounts and critical coverage are potential hindrances for that all-important public support at home and the completion of military tactics on the battlefield. The mainstream press's usual news processes and story types become dangerous as reporters attempt to garner multi-news sources, give accurate spot news accounts and supply analytical, interpretive and contextual news stories. Despite the fact that war produces the greatest public interest in news, under war conditions the people's right to information, to openness, and even to accountability, all become lost in the latest technological avalanche of

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exaggerated military successes, operation boosterism, appeals for patriotism, and presidential claims of good versus evil. When the war is relatively short and appears to go well, the military and presidential actions are but one acceptable means to an end, even to the point of curbing civil liberties.[6]

This paper will examine the presidency as defined by the men in office, and free speech and a free press under the most stressful leadership crisis conditions of all — war. Presidents in their leadership roles set the pace for the climate of free expression about governmental actions. If wartime governments are more autocratic, then it is assumed that presidents as Commanders-in-Chief will take a more authoritative stance concerning free expression. As part of the author's current work on free expression and the presidency, the major emphasis here will be an examination of two wartime presidencies, presidencies with the most extreme infringements on civil liberties. These presidencies were some 56 years apart with different national security dilemmas: Abraham Lincoln's internal insurrection of a Civil War with a possible breakup of the Union and hostilities close to the seat of government and Woodrow Wilson's external security problem in the Great War with Germany some 3,000 miles away during tremendous American nationalism. These two eras provide the basis for contrasting presidential roles during other major conflicts: the quasi-war of 1798, the War of 1812, and the Mexican, Korean and Vietnam wars. The 1991 press outcry against the Persian Gulf censorship only points to 130 years of precedents and a legacy of abridging freedom of expression during war conditions.

Two presidents—Lincoln and Wilson—attempted to contain and control information more aggressively than had any of their predecessors, or successors. They alone greatly suppressed expression in every legal means possible. They stand in sharp contrast to the reluctant wartime commander-in-chiefs of the most unpopular nineteenth century wars, who did little to censor expression. For example, James Madison did nothing to suppress expression during the War of 1812. James Polk, who boldly acted in 1846 before he requested a declaration of war with Mexico, learned of American victories from the publishers first. William McKinley not only had the backing but the urging of Congress and the largest American newspapers for the 1898 Spanish American war. His postmaster's attempts to stop anti-imperialist pamphlets from going to the Philippines stands out as his major censorship attempt. Even the latter twentieth-century presidents pale by comparison to Lincoln and Wilson's initiatives and autocratic actions. Among all forty-one American presidents, Lincoln and Wilson stretched the legal parameters in every possible way to suppress and control information. The question is how?[7]

General Background

Once war begins, the president not only has a constitutional mandate to react, but indeed is expected to act as a commander-in-chief quickly. While discussing the emergency powers in Article I, Section 9 of the Constitution, James Madison wrote Thomas Jefferson, "Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp [sic] be dictated by the alarm, no written prohibition on earth would prevent the measure."[8]

Information then becomes but one part of a president's arsenal of defense. When war comes, the power of information is both immediate and symbolic. When Marlin Fitzwater announced on January 16, 1991, "the liberation of Kuwait has begun," he gave the transforming signal for a lack of access, truth and flow of information. It was similar to what Franklin D. Roosevelt said as he watched the correspondents rush into the first press meeting after Pearl Harbor: "They will get damn little."[9]

The first such American crisis occurred just seven years after the inclusion of the Constitution's Bill of Rights. The President and his supporters feared an invasion after the French raids on American ships and what seemed to be internal vocal support by the anti-Federalist editors, mostly French born. The possibility of a war with France appeared too great. John Adams and the Federalists would stop all critical expression and pushed a Sedition Act through Congress. Passed along with the 1798 Alien Acts, the Sedition Act made it illegal to conspire to oppose various governmental measures, by "uttering or publishing any false, scandalous and malicious writing or writings against the Government of the United States or the President of the United States,". . ."or to excite against them or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States. . . ."[10]

Quite controversial, these acts had public criticism from founding fathers James Madison and Thomas Jefferson in the Kentucky and

Virginia Resolutions, both of which were reprinted in the early newspapers. After the Federalists created an uproar with the prosecution of a congressman among 25 others, thousands of citizens signed petitions for the release of U.S. Congressman Matthew Lyon (VT). The Federalist role in the acts became a campaign issue in 1800 and incumbent John Adams failed to get a majority of the electoral college. At the same time, Congress refused to renew the laws, which ran out the day before Thomas Jefferson's inauguration.

The Sedition Act left several legacies. Congress could *indeed* pass a law abridging free expression. A president in his leadership role could also suppress expression. John Adams supported, signed and enforced such measures. Adams later wrote,

> I knew there was need enough of both, and therefore I consented to them. But as they were then considered as war measures, and intended altogether against the advocates of the French and peace with France, I was apprehensive that a hurricane of clamor would be raised against them, as in truth there was, even more fierce and violent than I had anticipated.[11]

The Sedition Act also had historical legal significance. For the first time, criminal intent had to be shown. The jury could decide whether the accused statements were libelous as a matter of law as well as a matter of fact. Truth for the first time could legally be a defense. Yet, these statutes left such a negative legacy that presidents did not request similar legislation for almost 120 years. During the War of 1812, the Mexican War in 1846, the Civil War of 1861 and the Spanish American War in 1898, presidents James Polk, Abraham Lincoln and William McKinley avoided a national sedition statute. Only by World War I did Woodrow Wilson request similar legislation.[12]

The jingoism of the Alien and Sedition acts can also be found in the twentieth century wartime legislation. Adams and the federalists feared the French during that 1798 quasi-war; Woodrow Wilson and Congress feared the Germans during World War I. Wilson initiated World War I measures to suppress immigrants as well as the foreign language press. Preceding World War II, Congress passed without the president's signature the 1940 Smith Alien Act, the first peacetime sedition act since 1798. The act, mostly used during the Cold War, went after the communists. Instead of new legislation, President Franklin D. Roosevelt relied upon executive orders, such as E.O. 9066 to remove the Japanese Americans from their west coast homes.[13]

Rather than initiate specific legislation against free speech or free press, presidents in the latter twentieth century have brandished wartime legal swords left over from their predecessors. By the time of World War II, Franklin D. Roosevelt had World War I and Civil War statutes to cover disloyalty, treason, draft interference, aliens and espionage. He also had the previous presidential policy examples, most particularly those of Abraham Lincoln and Woodrow Wilson.

Abraham Lincoln

With Congress in recess when South Carolina fired on Fort Sumter, April 12, 1861, Abraham Lincoln immediately responded to the rebellion without a formal declaration of war. He acted under his emergency powers and as Commander-in-Chief. The President called for 74,000 volunteer troops three days later and declared a blockade of southern ports by April 19. For the first time ever, this president gave a military commander the ability to suspend civil liberties of American citizens. Without authorization of Congress and sanction of the courts, Lincoln directed General Winfield Scott on April 27, 1861:

> If at any point on or in the vicinity of any military line between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally or through the officer in command at the point where resistance occurs, are authorized to suspend this writ.

Lincoln's initiation and his assumption of emergency powers to control resistance remained a basis for his wartime policy throughout his administration.[14]

The region around the nation's capital was in chaos, an all-out emergency. The generals suspended the writ of habeas corpus in those areas exposed to Confederate invaders and arrested and imprisoned thousands, despite Chief Justice Taney's opinion denying that the President had such power and stating that such power rested with Congress alone. By September, Lincoln suspended the writ by proclamation and the action was subsequently used against the

large scale resistance to emancipation, conscription or the employment of what were then called Negro troops. Lincoln later explained to Congress, "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a popular necessity; trusting then, as now that Congress would readily ratify them." Later, in March 1863 Congress enacted a habeas corpus statute, approving Lincoln's measure retroactivity.[15]

On July 10, as an amendment to a 1861 military bill, Congress gave Lincoln an overwhelming affirmation: "all acts, proclamations, and orders of the President after March 4, 1861, respecting the army and navy, should stand approved and legalized as if they had the previous express authority of Congress." The Department of Justice did not have the organization nor the personnel to handle so many arrests. Thus, the military arrested an estimated 14,000 citizens for disloyalty and sedition. The War Department, military and naval offices, federal marshals, district attorney, state sheriffs, constables and city police imposed both martial law and suspended habeas corpus interchangeably without defining the finer legal points. Citizens were tried in military courts, without civilian juries and their usual rights. By February 1862 Lincoln ordered all political prisoners to be released upon their subscribing to a parole requirement to render no aid or comfort to the enemy.[16]

Lincoln justified these martial law actions by pointing to the difference between times of war and peace. He explained, "I can no more be persuaded that the government can constitutionally not take strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace. . . ." To concerns over losses of civil liberties and suppression of expression, Lincoln responded:

> Nor am I able to appreciate the danger..., that the American people will by means of military arrests during the rebellion lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and habeas corpus throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life."[17]

Similar to presidents who refer to recent wars to justify their actions, Lincoln's reference was the War of 1812 when General Andrew Jackson had imposed martial law on New Orleans and the suspension of the writ. Lincoln ignored the fact that President James Madison rebuked such actions, as did the federal judge who sanctioned the General with a $1,000 fine and a suspended sentence. Rather, he remembered as a congressman that Congress had repaid Jackson's fine with interest some 30 years later. He compared Jackson's initiative to his own: "we had the same Constitution then as now; secondly, that we then had a case of invasion, and now we have a case of rebellion; and, thirdly, that the permanent right of the people to public discussion, the liberty of speech and of the press, the trial by jury, the law of evidence, and the habeas corpus, suffered no detriment whatever that conduct of General Jackson, of its subsequent approval by the American Congress."[18]

Lincoln scholar Mark E. Neely, Jr. wrote that the ability to balance short-term practicality and long-term ideals is perhaps the essence of statesmanship. The short term practicality was the survival of the Union. Congress and the Yankee press did not appear initially to care that the administration abused civil rights and freedom of expression or made arbitrary arrests. Nor was there a great public outcry as there had been when the Adams administration enforced the 1798 Sedition Act. The danger to the country's national security appeared too great: the United States was dissolving. Lincoln never had the historical reputation as a dictator. Moreover, when the military commanders went too far, the president usually stopped them. Too, Lincoln's tragic death may been softened his legacy. His crisis leadership contrasted sharply with Andrew Johnson's direction and the subsequent nineteenth century presidents.[19]

The Civil War heightened the legal and extralegal presidential actions against uninhibited expression at an unprecedented level, still unmatched. Congress too added its own efforts. The 1862 Treason Act resulted in the arrests of thousands at the end of the war, but few indictments. A loyalty oath statute required all court officials, including attorneys, to swear to their past as well as future loyalty before entering practice. The Conspiracies Act required proof of conspiracy which made it almost inoperable for conviction. The 1864 Draft Law punished anti-draft resistance and counseling. Yet, despite these laws, the federal jurisdiction into criminal matters in 1861 was very limited. There was no executive machinery for dealing systematically with criminal cases on a large scale. Thus, the military took

over even the civilian cases, and tried to enforce the acts.[20]

Unlike other American wars with a foreign enemy, the Civil War confronted an enemy at its own gates, an enemy who spoke the same language, had the same culture and could read the same newspapers. Rather than John Adams' or Woodrow Wilson's sedition acts, Lincoln, his generals and his postmaster attempted to control the Civil War press in the field. Unlike subsequent wars, the field was not just the battlefield, but the entire countryside. Such Civil War measures left a legacy for future wars. The generals attempted to stop all negative and disloyal communication by limiting battlefield access and thus restraining the reporters; by controlling the technology of the era, in this case, the telegraph; by censoring the mails; and by closing the newspapers and arresting editors.[21]

While Abraham Lincoln rarely directed any of the arrests, he permitted them and then selectively responded to the most extreme cases. In 1861 his Secretary of War ordered the arrests of those Maryland legislators and citizens who urged secession. The military sent nineteen legislators, the mayor of Baltimore, two editors and a congressman to Fort Warren in Boston. In addition, the federal marshals and the Army officers became the greatest direct censors, even of oral speech. When military tribunals went after preachers in Missouri and Norfolk, Virginia, Lincoln changed the military courts' sentences of hard labor to exclusion from the Union lines.[22]

Lincoln also commuted the military commission's 1863 imprisonment of Representative Clement Vallandigham of Ohio to banishment. Vallandigham encouraged desertion and charged Lincoln's government with tyranny in the conduct of the war. Vallandigham was seized at night, tried before a military commission and eventually sent beyond the Union lines into the Confederacy. When the Ohio representative returned via Canada, he continued to speak critically, unmolested. While Lincoln insisted that his commanders in the field were the best judges of such actions, the President took the responsibility of their actions. In the case of the Ohio congressman, the president said that he was "warring upon the military; and this gave the military constitutional jurisdiction to lay hands upon him" and while he might not have ordered the Vallandigham arrest, he would not attempt to shift responsibility from himself as to how to respond. Lincoln's response chilled any further military harassments of the congressman.[23]

Lincoln explained that armies cannot be maintained unless desertion could be punished severely. Vallandigham had urged desertion and tried to prevent the raising of troops. Lincoln raised poignantly the basic free expression conflict: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feelings, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he shall desert." He then answered, "I think that, in such a case, to silence the agitator and save the boy is not only constitutional, but withal a great mercy." Nevertheless, Lincoln, like so many other presidents, remained troubled by the wily agitators.[24]

During the first two years, the war did not go well and the agitators told of the problems. The president kept changing generals in hope of success. The commanders, in their zeal and worry about morale, tried to censor criticism. They even went after a popular song, "Give Us Back Our Old Commander: Little Mac, the People's Pride." The tune called for the return of the banished General George McClellan after the rebels soundly thrashed General Ambrose Burnside's Army at the Battle of Fredericksburg. People bought more than 80,000 copies of the song within a few days of issue. Soldiers of the Army of the Potomac sang "Give Us Back" during their day's work and at the campfires in the evening. The Secretary of War, Edwin Stanton, called the song treasonous and said that any soldier caught singing it faced arrest. He had the author, Septimus Winner, detained and ordered him to destroy all existing song copies or face imprisonment.[25]

Lincoln knew about and approved these extreme actions, while at the same time urging caution. With the crisis too much was happening too fast; the union was at stake. The President approved the notorious General Order No. 11 to evacuate four counties in western Missouri. The soldiers arrested some 20,000 homeless refugees and tried them in military commissions. Lincoln warned General John M. Schofield, Commander of the Department of Missouri, on October 1,1963: "Under your recent order, which I have approved, you will only arrest individuals, and suppress assemblies, or newspapers, when they may be working *palpable* injury to the

Military in your charge; and, in no other case will you interfere with the expression of opinion in any form, or allow it to be interfered with violently by others. In this, you have a discretion to exercise with great caution, calmness, and forbearance." The military did not exercise calmness and caution. Lincoln scholar Mark Neely, Jr. recently wrote that destruction of life and property remained "rampant everywhere" in Missouri.[26]

Edwin Stanton, as Secretary of War, devoted more attention to the press than did any other official. The press, still partisan, had Stanton worried. The Democrats controlled the Associated Press (AP). He thought that the Republican administration would not get a fair, accurate presentation in Northern newspapers and along with his generals monitored the AP results and the newspapers. Stanton began favoring those smaller, country papers not serviced by the AP wires with War Department printing contracts. He also made sure that the influential papers had selected official dispatches in return for favorable coverage.[27]

Overall, Lincoln's generals stopped as many as 300 Northern newspapers for varying periods from 1861 to 1865. They arrested those editors who publicly opposed the administration's policies or urged an end to the war, or published too detailed accounts of military movements or actions. Most of the arrests concerned newspapers in the border states. The military issued a statement justifying the suppression of the *Missouri State Journal* for attempting to overthrow the United States "by fraud, by deception, by the fabrication of false intelligence ... and by its skillfully contrived and inflammatory appeals to passion and prejudice, to secure the entire subversion of the federal authority in the State of Missouri."[28]

The President revoked the most extreme military actions, such as General Burnside's 1863 suppression of the *Chicago Times* and the Ohio distribution of the *New York World* because of disloyal articles and editorials. A year later Lincoln wrote that he "was embarrassed with the question between what was due to the military service on one hand, and the liberty of the press on the other."[29]

Lincoln rebuked his generals for their zeal. The President still held a strong view about property rights and he revoked General John Fremont's emancipation proclamation in Missouri in 1861. As a free state, Missouri was not enemy territory and Lincoln asked, "can it be pretended that it is no longer the government of the United States—any government of Constitution and laws,—wherein a General, or a president, may make permanent rules of property by proclamation?" [30]

Lincoln's reprimands went beyond property and concerned war correspondents. When General William Sherman arrested the *New York Herald* correspondent Thomas E. Knox and held him as a spy, Lincoln interceded and Knox was released. The President never settled the right of military suppression. There was no national policy of sedition, suppression or espionage as an institutional mechanism as was to happen during World War I. Rather, during the Civil War there continued to be military arrests and presidential reactions in support or as a rescinding order.[31]

Many powerful newspapers were so vicious in their criticism and so pernicious in disclosing the army's plans, that the military's arrests of editors seemed inevitable. *The New York World*, the *New York Daily News*, the *New York Journal of Commerce*, the *Chicago Times*, the *Louisville Courier*, the *Baltimore Gazette*, the *Daily Baltimore Republican*, the *Baltimore Exchange*, the *Maryland Daily News*, and the *Columbus* (Ohio) *Crisis* were among those newspapers. The Fifty-Seventh Article of War contained a clear provision for doing so, "for holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly."[32]

The most outrageous case concerned the *New York World* and the *New York Journal of Commerce*. On May 18, 1864, they published a presidential proclamation, a fabrication which recalled the recent military disasters and set a day for prayer and then requested an additional 400,000 recruits. The authors who telegraphed this sensational, fabricated story had hoped to make a financial killing in the stock market. Secretary of War Stanton commanded General Dix to arrest and imprison the offending journalists, the unsuspecting telegraph operators, the incredulous editors, newspaper proprietors and publishers of these newspapers and to bring them before a military commission. Moreover, the Army stated that they would take possession of the newspapers' printing establishments unless there was a public confession of the falsehood. Days later after a public statement and their tribunal, Lincoln ordered their release.[33]

This incident points to a major war informational concern, the latest communication technology—the telegraph. With the telegraph's

ability to send news faster than ever before, even before the President might learn information, certain New York newspapers would have a potential monopoly on battle news. By July 1861, Lincoln suspended the use of the telegraph for all war or battle news. Newspapers such as the *New York Times* agreed with the action and told its readers, "We acknowledge the perfect propriety of a Government suspension of telegraphic dispatches concerning Army movements, for the purpose of preventing the disclosure of information that might be useful to the enemy."[34]

After the engagements of the summer of 1861, press representatives held a series of meetings with field commanders. General George McClellan attempted to find a working relationship in light of the use of the telegraph, the need to cover the war, and the need to set rules for access. As a trade for war news, the journalists promised to abstain from printing anything which could give aid or comfort to the enemy. The military would in turn guarantee access for obtaining and transmitting suitable intelligence, especially concerning military engagements. The arrangement, albeit a form of censorship, was still too ideal and broke down almost immediately. Editors differed from the military about what would aid the enemy and what was proper to be printed. They refused to follow the pledge. Moreover, the intense rivalry of newspapers proved to be a far more powerful concern than the restraints of any voluntary agreement.[35]

By January 1862, Lincoln had obtained congressional authority to establish military supervision of all telegraph material having to do with the war. War correspondents had to submit their news copy to the provost marshals for approval before telegraph transmission. Otherwise, journalists had to deliver their war stories to the newspapers in person or use a messenger or the mails. The news about planned troop movements continued to trickle out through mysterious leaks. Enterprising journalists devised ingenious ways of getting battle news around the military censors. By February 1862, Secretary of War Stanton clarified the previous voluntary restrictions to rules.[36]

The generals also introduced newsgathering restrictions, controls still in place today. The rules covered military sources and battlefield access. With as many as 500 reporters in the field at one time, the military was overwhelmed. General William T. Sherman requested that all correspondents be *accredited*, or recognized. Lincoln approved the concept that the journalists had to be *acceptable* to the commanders in the field. This meant that the generals could choose which reporters could follow the troops and which journalists could be ejected. Such a military precedent has been followed ever since.[37]

Similar to the 1991 Gulf War "Censored Pooled Reports," editors warned the newspaper readers about the military interference and fraudulent news accounts. Editors told their readers about military interference and false news stories. As an example, the *New York Times* published stories about possible government fabrication after the July 1861 Union losses at Manassas Junction: "It was passed over to the Government Censor, who, without a word of explanation, and even indicating his purpose, suppressed it entirely — and allowed the false impression, that we had achieved a victory, to go to the great body of the American people."[38]

Despite the generals' efforts to control the reporters and their news access and use of damaging sources, war correspondents published campaign plans, the troop movements, military location and unit strength, Grant's march of the cavalry divisions and the locations of Grant's guns placements against Vicksburg. Readers could check the newspapers for Sherman's objectives in his Georgia march and the details about the land and sea expedition against Wilmington. Southern generals could easily obtain copies of the various journals and detect valuable military information, much to the chagrin of Yankee officers.[39]

Thus, the military had to fight a press enemy, too. For example, General William Sherman had tried to conceal his plans for a southern flank until Confederate General Hardee found a most obliging editorial in the *New York Tribune*. Horace Greeley's editorial informed readers that "Sherman would next be heard from about Goldsboro because his supply vessels from Savannah were known to be rendezvousing at Morehead City." Sherman blamed Greeley's disclosure for the heavy losses in the 1865 Carolina campaign, a fight which the General had hoped to avoid. When Greeley later wanted to meet the General, Sherman refused.[40]

As another war precedent, Lincoln's Postmaster General, Montgomery Blair, censored the postal service. He excluded from the mails those newspapers which he thought were disloyal and which might hinder the union's success. When members of Congress asked under what authority of the Constitution and the law did the Postmaster General decide what newspapers could and could not be transmitted through the

mails, Blair referred to a 25-year precedent. These were materials "decided by postal officers to be insurrectionary, or treasonable, or in any degree inciting to treason or insurrection, have been excluded from the mails." Blair argued that the government could deny the use of its postal facilities for the circulation of matter deemed injurious to the public safety. Blair also cooperated with the military in preventing mail correspondence between the seceded states and the North. At various times, the State and War departments detained and opened letters in search of vital battlefield information. Later, in fact, under *Ex parte Jackson*, the Court upheld the constitutionality of a federal statute that prohibited the mailing of particular materials. Such military controls continued and military officers censored the outgoing mail during World Wars I and II, Korea and the recent Gulf War. Lincoln's actions only raised the question about whether they were necessary.[41]

A striking contrast can be made between the two Civil War presidents and their wartime suppressions. Lincoln and Confederate President Jefferson Davis both fought a war at the same time for their country's survival and national security. In contrast to Lincoln, Davis did not institute martial law until he received permission from the Confederate Congress, even though the Southern states were invaded and Richmond was endangered. Then, he suspended the writ of habeas corpus only on three specific occasions: when General McClellan was close to Richmond, during the Fredericksburg-Chancellorsville threat, and when General Grant was pushing through the Wilderness. Davis had limited suspensions, applicable to specific smaller areas than Lincoln's 1861 directive. Disloyal Southerners had almost unrestricted freedom, including their newspapers, however criticizing, however demoralizing. When the Confederate Congress passed a law forbidding the publication of unauthorized news of troop movements in January 1861, the Southern press bitterly protested and flagrantly ignored the law.[42]

In reference to free expression in the South, Harvard historian David Donald wrote that on the tombstone of the Confederacy should be written "Died of Democracy." Donald argues that the real weakness of the Confederacy was that Southerners stuck to their democratic, individualistic rights, which affected the administration of the Southern army, and the management of Southern civilian affairs. Subsequent precedents, especially those of the twentieth century, have more likely followed Lincoln's strong controls.[43]

Lincoln's statements on the various suppressions and arrests concerned the most sensational abridgements of free expression. With such startlingly unprecedented actions, Lincoln presided over a great constitutional conflict. It was *a* Civil War, a revolution, according to scholar Mark Neely, Jr. The constitutional authority shifted from the states to the nation. The Confederate states had fought against centralized power and lost. Lincoln's challenge to this shift of gravity was not just from the succession of the states, but also with free expression. His problems with dissent and opposition were part of an authentic threat to the national existence. Up to that time, no democratic nation had determined the permissible limits of opposition and dissent even in non-crisis times. For the most part, Lincoln and his generals acted against those persons who did something *other* than just criticize the war. Yet even the President argued that punishment for silence was permissible. He said, "The man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy. Much more, if he talks ambiguously, talks for his country with 'buts' and 'ifs' and 'ands'."[44]

Lincoln's legacy became a legacy of all-out war censorship: battlefield access, stipulations of accreditation and general suspension of civil liberties. The Civil War had the most extreme measures taken against free expression since the country began. In 1866, in *Ex parte Milligan*, the Supreme Court declared unconstitutional any military trials of civilians where civil courts were still able to function. At the same time, the court did not question the suspension of the writ of habeas corpus during war or the arrests of civilians without charge. Yet, none of the wartime presidents who followed Lincoln except one—Woodrow Wilson—made general arbitrary arrests: not William McKinley during the Spanish American War, not Franklin D. Roosevelt during World War II, not Harry Truman in the height of the Cold War with the Korean War, not Lyndon Baines Johnson during the Vietnam War, and not even Richard Nixon during the last phases of the Southeast Asian conflict.[45]

Woodrow Wilson

Woodrow Wilson, a political scientist, had urged an independent presidency in his book *Constitutional Government in the United States*. During a period of a strong Congress and weak presidents, Wilson had written that only one national officer should speak with a national mandate. Wilson attempted to become that lone voice in both words and actions during his presidency. He initiated more legal suppression than the country had ever witnessed.[46]

As early as 1915, Wilson asked for legislation to suppress disloyal activity. The President expelled the German military and naval attachés as labor saboteurs. He said in his third annual message to Congress that the grave menace to American security was "uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed by our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life."[47]

Wilson's focus on a single national voice was emphasized by his dissatisfaction with how journalists chose what they thought to be newsworthy for news. In fact, Wilson proposed a national publicity bureau as early as 1914, "which would handle the real facts, so far as the government was aware of them, for all the departments.... Since I came here I have wondered how it ever happened that the public got a right impression regarding public affairs, particularly foreign affairs."[48]

Wilson pushed for a singular voice of "Americanism" as a major campaign theme and platform plank on loyalty in 1916. Wilson's Attorney General recommended legislation that would curtail freedom of speech and press that year but Congress adjourned without acting upon the measures.[49]

In 1917, the President initiated a series of laws and executive orders. In February, Congress passed, at the Attorney General's request, the "Threats Against the President Act." The law would punish persons with up to five years' imprisonment for any willful "threat to take the life of the President or inflict bodily harm on him." While 60 cases were prosecuted under this act *before* June 1918, 35 resulted in convictions for being actually threatening to the president.[50]

Wilson issued both a proclamation and two executive orders to coincide with Congress's Declaration of War, April 6, 1917. This proclamation established regulations for the conduct and control of enemy aliens to restrict their movements and to punish their publication of any attack upon the government, armed forces or policies of the United States. Except for one 1921 case, all prosecutions were in 1917 and 1918. One conviction was when a man said, "I wish Wilson was in hell and if I had the power, I would put him there." The judge used a broad interpretation of the law when words constituted a threat and asked how else would the President be in hell unless he was dead.[51]

With an executive order to execute this proclamation, the Justice Department arrested 6,300 people and interned 2,300 more as dangerous to the national security. The day after the War Declaration, a confidential executive order provided for an organized loyalty program affecting every federal employee. Some 868 persons were affected and prevented from taking government service examinations. This order was later enacted as a provision of the 1918 Sedition Act in a revised form. As Wilson told the nation on Flag Day, June 14, 1917, "Woe be to the man or group of men that seeks to stand in our way in this day of high resolution when every principle we hold dearest is to be vindicated and made secure for the salvation of the nation." [52]

Seven days later, under his emergency powers, Wilson created the Committee on Public Information (CPI). This agency, the nation's first national censorship and propaganda institution, mobilized the country's artists, writers, advertisers, journalists and professors to promote war and national solidarity. As part of its duties, the CPI published an official daily newspaper, the *Official Bulletin*, to be what director George Creel called a "national newspaper," a singular voice of the commander-in-chief about the war and the civilian efforts. As large as 40 pages by 1918, the bulletin went to public officials and all federal agencies, including the post offices and military camps. The public could subscribe for $5 a year.[53]

The committee not only released and controlled the war news, but the agency particularly focused on the commander-in-chief. In an unprecedented manner, the CPI printed and distributed the President's speeches in both the *Bulletin* and pamphlets. With their distribution of Woodrow Wilson's words, the CPI built what later became known as the imperial presidency, according to scholar Steven Vaughn. The CPI legacy became propaganda, censorship and presidential boosterism. Coinciding with the rise

in American public relations, the CPI institutionalized the executive branch information mechanisms. During the New Deal era, FDR would refine, widen and incorporate the public information functions. When the United States became involved in World War II, Franklin D. Roosevelt refused George Creel's offer for service and separated the propaganda and censorship functions into two competing and overlapping agencies, without the excesses of the CPI.[54]

As a major piece of World War I legislation, Wilson asked for an Espionage Act. In his war message, Wilson emphasized that because spies were everywhere, even in government offices, disloyalty should be punished immediately. Wilson argued that censorship was "absolutely necessary to the public safety." On June 15, 1917, Congress passed Wilson's Espionage Act. Although the measure dealt primarily with espionage problems, some parts were aimed expressly at interference, dissent and opposition to the war. In particular, it was made a crime to convey willfully a false report with the intent to interfere with the war effort, or to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces, or willfully to obstruct the recruiting or enlistment service of the United States. Similar to the 1864 draft law, the act and its 1918 Sedition Amendment were aimed at even broader anti-draft resistance. The offenses included any language intended to incite resistance to the United States or promote the cause of its enemies, or urging of any curtailment of production of things necessary to the prosecution of the war with intent to hinder its prosecution, or to advocate, teach, defend the words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein.[55]

Federal agents used the Espionage Act, in particular, to prosecute some 2,000 cases and convict at least 1,055 citizens. The agents even went after such war critics as former congressman Victor Berger (Democrat from Wisconsin) and former presidential candidate Eugene V. Debs, the choice of 900,000 in 1912. Scholar Harry N. Scheiber wrote that the Department of Justice was not able to convict any bona fide spies or saboteurs during the war. Broad-reaching in its interpretation, the Espionage Act remains on the books.[56]

The Post Office used not just the Espionage Act but other acts to ban the mailing of anti-war materials. In October, Congress passed a Trading-with-the Enemy Act, which enlarged the censorship powers of the Postmaster General by requiring that the Post Office approve all literal translations of the foreign language media news and editorials before mailing. This regulation almost killed the American foreign language press, with an estimated 75 papers, mostly German, stopped at one time or another. This latter statute is still on the books today.[57]

Wilson's Postmaster General Sidney Burleson used both acts to declare as unmailable critical opinion. Burleson went far beyond the intention of the legislation when he denied the second class privileges to hundreds of publications, mostly the socialist press, such as the *Masses*, and newspapers, such as the *Milwaukee Leader*.[58]

Aware of Burleson's excesses, Wilson asked the official to exercise the "utmost caution and liberality in all of censorship." Burleson ignored the President's request. Yet, rather than rescind his cabinet member's overall efforts, as Lincoln had done with his zealous generals, Wilson selectively tried to convince Burleson to reverse a particular decision. For example, Wilson did persuade Burleson to refrain from barring the *Nation* again, as he had once done, and the *World Tomorrow*, where Wilson's son-in-law was part of the *World's* management. When in October 1917, Wilson informed Burleson that he did not approve of the suppression of the *Milwaukee Leader*, the Postmaster still denied the *Leader* a second-class mailing permit until 1921. Moreover, the Justice Department made sure that courts convicted the prominent Socialist editor, former U.S. Representative, Victor Berger, under the Espionage Act. Although the Attorney General's office scanned anti-war William Randolph Hearst's newspapers for sedition, and even put him under surveillance and had a secret federal agent in his home, the administration openly ignored the powerful publisher's criticisms. The Hearst newspapers were alone among the major press which vigorously denounced the charges against the Socialist and German-language newspapers.[59]

Wilson kept pushing for even more regulations throughout the fall and into the war's second year. The President asked for and got a Sedition Amendment by May 1918. This law sought to rid the country of "dangerous utterances," by making it a crime to write or publish "any disloyal, profane, scurrilous or abusive language about the form of government of the United States or the Constitution, military or naval forces, flag, or the uniform" or to use language intended to bring these ideas and institutions "into contempt, scorn, contumely,

or disrepute." The Postmaster General was careful not to go after the Republican party, no matter how much they used abusive language to criticize the administration or the military efforts. Rather, in their fear of the anti-war speakers, Wilson and Burleson went after the weaker, smaller and unpopular anti-war, radical and pro-German minorities. Legal scholar Zechariah Chafee, Jr. documented the damage from the Espionage and Sedition Acts and concluded that the prosecutors, judges and juries went far beyond the words of acts, often because of public pressure. The record was indeed grim: the courts prosecuted some 2,000 people and convicted some 900.[60]

The President initiated other legal measures in 1918. Wilson signed the Sabotage Act to protect the country from an imagined network of saboteurs and spies. In Wilson's executive order that fall, a Board of Censorship began examining private letters and gathering information concerning "the Bolsheviki, Industrial Workers of the World, Socialists, and other organizations whose aims are antagonistic to this government." The Alien Act, passed on October 16, 1918, reaffirmed a 1917 bill, passed over the President's veto, to protect the country from anarchists and to require a literacy test. Yet in this bill, which the President did sign, any alien who was found to have been at the time of entry or to have become thereafter a member of any anarchist organization would be deported.[61]

Wilson censored the communications' technology, too, with Executive Order 2604. Similar to Lincoln's fears during the Civil War, Wilson was concerned that the telegraph, the cable and radio with such instantaneous information could be potentially dangerous. His actions also had the precedents of the Spanish American war. The Western Union Telegraph Company cooperated in 1898 with military censors sent to Tampa, Miami and Jacksonville. Wilson directed the Navy Department to take over all American wireless stations and the War Department to censor information from Mexico. With such efforts, the American government knew about practically every individual and firm doing business with the German people before April 6, 1917. After the war began, Wilson's executive order placed all submarine cables under the control of the Secretary of the Navy and all telegraph and telephone lines leading outside the country with the Secretary of War. The British had severed the cables to Germany early in the war. Wilson extended the cable censorship even seven months after armistice, in spite of objections of American merchants and commercial interests.[62]

The Navy Department also took over the embryonic radio stations and issued the order that "all sending and receiving radio stations not operated by the government, with the exception of stations that were needed for experimental purposes, had been closed in order to efficiently prosecute the present war."[63]

Such censorship affected the newspapers' incoming and outgoing international messages, excerpts and quotations. According to James Mock, as the censors became acquainted with different foreign correspondents and their newspapers' attitudes, they selectively applied "cease filing" orders for outgoing as well as incoming messages such as those messages to the New York correspondents of the Mexican papers, *La Defensa* and *de El Democrata*, because of German sympathies.[64]

World War I field censorship followed the initiatives of the Civil War for accreditation and approval of press dispatches. Within three weeks after the declaration of war, the War College organized a Military Intelligence Section, which grew to 200 officers and 700 clerks by the end of the war. Each military camp had an officer to perform as censor. The military classified all correspondents as either accredited or visiting. The military rules demanded accuracy and forbade revealing military movements or other vital military information that might be valued by the enemy, or injure military morale at home or abroad, and embarrass the United States or her allies. Unlike the military rules of the Civil War, World War I rules required that all accredited correspondents wear officers' uniforms without insignia and live with the military. Visiting correspondents, not in uniform, toured the Army with accompanying officers. Wilson did not care about the details of field censorship and access decisions, unlike Lincoln and later Franklin D. Roosevelt.[65]

Even after the Armistice, the administration extended suppression of civil liberties. A gigantic "Red Scare" began a public panic, stimulated by the Russian Revolution and the reaction to the radical labor movement and Socialist party efforts. Attorney General Mitchell Palmer led the enforcement: agents tore down crimson flags in New York City; they hustled groups of "Reds" to Ellis Island for deportation; they raided and wrecked offices of the Socialist daily, the *New York Call*; and they encouraged legislative initiatives to oust Socialists from state offices and from universities and colleges. Many states

passed criminal syndicalism laws. The 1920 election was a plea for a return to normalcy and the country responded. Warren G. Harding swept aside the Democrats and pardoned many of those convicted by the Wilson administration, including Eugene Debs. [66]

Wilson's efforts had historical roots of a public reaction. During the War of 1812, a person could safely object to the war if he lived in the New England states, which supported Great Britain. Yet, the Baltimore Federalist editors and staffs saw the mobs wreck their newspapers and witnessed former Revolutionary War hero James Lingan, then an anti-war editor, lose his life to an oppressing mob. During the Mexican War and the Civil War, citizens openly told of their views, depending upon their geographical region. Mobs attacked disloyal Civil War newspapers and made threats, banishments and personal outrages against numerous editors. In fact, popular pressure had a great effect in keeping anti-war material out of Union newspapers. The community pressure became what Madison had once warned, "This essential branch of liberty [free press] is, perhaps, in more danger of being interrupted by local tumults, or the silent awe of a predominant party, than by any direct attacks of power." The World War I public reaction only followed Madison's historical warning. By 1917, people not only sought pro-war opinion and advocation even in the language itself, but allowed Congress and the President to create an enormous propaganda apparatus to nurture the desired state of mind.[67]

World War I resulted in the greatest xenophobic excesses that this country has ever experienced. The President himself spread such fear in a country in which the 1910 census had shown that at least one of every three Americans was either foreign born or had one parent born abroad. Wilson launched a broad attack against hyphenated Americans. He told Congress in his third annual message in reference to disloyal citizens, "Such creatures of passion, disloyalty, and anarchy must be crushed out. . . . The hand of our power should close over them at once."[68]

While the President and other leaders condemned vigilantism, none would admit their own contribution to the flames of hysteria. The general spirit of the American people was for conformity: they eliminated German language from the public school curriculum; they had "assessors" coerce citizens and aliens alike to meet Liberty Loan quotas; and they used violence against labor leaders and strikers in the name of patriotism. The American Protective League volunteers, soldiers and sailors, and Justice Department agents summarily arrested as many as 20,000 men in the Southern District of New York alone. The Justice Department agents sacked the offices of the National Civil Liberties Bureau, the predecessor of the ACLU. When Wilson told the Attorney General of his disapproval of the American Protective League, the cabinet member insisted that he needed such an auxiliary force and the President yielded. When local Councils of National Defense and mobs condemned and attacked pacifists, German-Americans, Socialists and others in a wave of terror, Wilson waited to respond. Even when some 500 citizens in Collinsville, Illinois, decided that fellow townsman Robert Prager was a German spy, dragged him into the street, wrapped him in the flag and then murdered him in April 1918, the President said nothing until July 26.[69]

Wilson's legacy became the ensuing 1919 Red Scare. He made an abortive attempt to have Congress pass a peacetime sedition act, because of Bolshevism. The Attorney General testified before a Congressional Committee that he had been advised of the date of an impending revolution. Until the day before he left the White House, Woodrow Wilson refused to surrender wartime powers or to pardon those sentenced, such as Eugene Debs. Even Congress turned against the President and refused to pass his peace proposals.[70]

The courts found Wilson's World War I legal initiatives neither unconstitutional nor unusable. The era was not an ordinary time. Wilson's legal legacy left extreme executive actions against free expression. When World War II came, Franklin Roosevelt and other officials were determined not to repeat what they considered were Wilson's mistakes. Yet, forty plus years later, the Reagan administration used the Espionage Act even in peacetime in 1988.[71]

Despite the fact that during World War II the nation was attacked and its own shores were threatened by bombs and invasion and that the war lasted two years longer than World War I, there was only one Espionage Act prosecution. Aside from the most virulent Fascist publications, the mails were not closed to the critics of the war. The most tragic domestic blunder of World War II was the incarceration of Japanese Americans, almost six months after the bombing of Pearl Harbor.[72]

World War II, albeit a more popular war, had no hysteria, no mob violence, no pressure for

suppressing dissent, no secret political police, no organizations for ferreting out other viewpoints, no hostility toward those of German and Italian heritage. Rather the loss of civil liberties concentrated on two specific areas. The governor of Hawaii declared martial law and suspended the writ of habeas corpus for everyone. Along the continental Pacific coast, the public directed its hostility to those of Japanese ancestry living in California, Oregon and Washington. Roosevelt's Executive Order 9066 coupled with Congress's support resolution created an overwhelming exception of serious repression. The administration confined almost 100,000 Americans of Japanese ancestry in concentration camps. Not a single Japanese American citizen or non-citizen was convicted of any act of sabotage or espionage during the course of the war.[73]

The American Civil Liberties Union 1943 "Review of the Year" of 41 states showed a surprising amount of freedom of debate and criticism of war measures, unlike World War I. With an attack on Pearl Harbor, the country became overwhelmingly united. In his ACLU study, Robert E. Cushing explained that more tolerance existed during World War II because the American people had become more "civil liberty conscious" and because of the various court rulings from World War I. Moreover, the states wisely refrained from dealing with subversion talk or publication since the centralized federal court rulings about civil liberties problems. Lastly, and most important, Franklin D. Roosevelt and his administration had not only a different temperament and view toward free expression, but also steadily declared that they would not repeat the government excesses of the previous world war.[74]

Conclusions

During a war, the president is commander-in-chief, not just for the armed forces during wartime, but also for the entire nation. The president's focus during war becomes different, and less tolerant. As these two presidents illustrate, the president's commander-in-chief role means that he must define the war and peace goals, attempt to garner support, use his previous precedents, and keep factions down between key national political figures. In his effort to win a military conflict, the president becomes primarily a military commander-in-chief, more autocratic and authoritarian. The military by its mere nature emphasizes group conformity, obedience and discipline. All of these characteristics are opposed to traditional libertarian values of free expression which depend upon individual judgment and challenge.

Even in a democracy, during war the individual is not very important, as both the Civil War and World War I demonstrate. Opposite to democracy's individual convictions, the military emphasizes national patriotism and loyalty. Just how much the public gives up individuality depends upon how great the crisis is and how clearly the president has defined the situation. There must be public support for such extremes as Lincoln's suspension of the writ of habeas corpus and Wilson's push for an Espionage Act and a loyalty program. As a whole, during a war crisis the First Amendment does not seem to matter, especially initially. Thus, in general, the country has been more than willing to support initially those presidential infringements on free expression.

In both the Lincoln and Wilson administrations, the presidents exerted very different commander-in-chief styles. As shown by these two extreme examples, Lincoln agonized over the infringements of free expression and even rescinded his generals' orders to punish well-known individuals, such as Representative Vallandigham and correspondent Thomas Knox, and to stop the publication of the *Chicago Times*. Lincoln said that he was embarrassed about what was due to the military on one hand and the press on the other. During this all-out internal insurrection, Lincoln used a broad interpretation of his constitutional emergency powers and asked for caution, calmness and forbearance from the military, who meted out the Civil War punishments.

Woodrow Wilson's civilian cabinet members, the civilian courts, prosecutors and juries took on a military, autocratic role and meted out the wartime punishments, more extreme than those of the Civil War. While Wilson also urged caution and liberality, unlike Lincoln's generals, Wilson's cabinet generally ignored the president's requests. Such administrative actions set into motion the waves of xenophobic reactions. Rather than suspend the writ of habeas corpus and declare martial law, Wilson's administration worked with Congress to pass the greatest legal infringements on free expression; many of those laws are still on the books. As for individual free expression, for a multitude of diverse voices, Wilson himself had wanted in every way possible a singular national voice even before the war.

For the most part, the country both in and out of war does not speak in unison. While presidents may want a single voice speaking for the nation, that has not been the historical case, no matter how stringent the military reactions and legal requirements. Early in the country's development, Adams could not tolerate other voices, anti-federalism views and criticism during the quasi-war atmosphere of 1798. The public reacted by electing Thomas Jefferson and supporting the new President's pardon of those sentenced. During the War of 1812, James Madison tolerated other voices, even as close as Baltimore and as powerful as those New England secessionists. He almost lost the war and the confidence of the public as a leader. During the Civil War, Abraham Lincoln broadly interpreted and used the emergency powers of the Constitution to stop the insurrection near the capital, regardless of the opinion of Congress or of the courts. Even with the fragility of the union, an enemy within, Lincoln used his authority as commander-in-chief sparingly and in a more tolerant manner than did Woodrow Wilson almost sixty years later. Wilson exceeded Civil War leaders in his almost unrestricted attempts to control public expression down to commerce and industry. Wilson not only had Lincoln's precedent of the constitutional functions of the commander-in-chief, but also acts of Congress.[75]

A wartime president's first goal is national survival, national security. With a great crisis, the commander-in-chief's role overrides all domestic considerations. Everything else becomes secondary, including free expression. One strong voice makes but another weapon to an outside enemy. If the president becomes too heavy-handed in garnering that single voice and if the public is not convinced of a crisis, he loses public support. A quasi-war is not enough. Adams went too strongly after his own internal opposition and lost the next election. Wilson, 120 years later, pushed his wartime goals too far and lost not only further legislation and approval for his beloved League of Nations, but later his party's hold on the presidency. The Republican party's successful 1920 presidential election win was based upon a rejection of Wilson's policies.

Presidents use every possible means of communication in their attempts to garner that much-needed public support during a war. The legal means as shown by Woodrow Wilson's efforts were a stark contrast to Abraham Lincoln's measures. Some efforts were similar: the 1864 Draft Law and the 1917 Espionage Act both dealt with obstruction of recruiting; both wars had military field censors who tried to contain publicity about military movements. Prohibitions against such crucial wartime information later became part of Justice Charles Evans Hughes' 1931 exceptions to the prohibition on prior restraint in the case of *Near v. Minnesota:* obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. Yet, Lincoln and Wilson had very different enforcement policies. In the ensuing conflict between the military wanting to tell as little as possible and the press wanting to tell as much as possible, Lincoln, by paying closer attention to the war details, was more willing to rescind the suppression zeal of his generals than Wilson, who saw the big picture and ignored the repressive efforts of his cabinet.[76]

In all wars of the past 131 years, commanders-in-chief have attempted to contain, control and monopolize the most advanced communications technology. Instantaneous information so vital to military survival makes communication but another crucial weapon. The telegraph and then the cable cut the information lag of months during the War of 1812 to minutes in 1861. Before the telegraph, Andrew Jackson fought the Battle of New Orleans after the peace treaty at Ghent had been signed. With the new technology, James Polk relied on the telegraph to tell him what happened during the Mexican War, as did Abraham Lincoln during the Civil War, as did William McKinley during the Spanish American Wars, and so did Woodrow Wilson during World War I. For over seventy-five years, the telegraph was the strategic communications weapon. Only the news sent by telegraph came under direct government scrutiny during the Civil War. By the time of World War I, the President with congressional authority took over the telegraph, the cable and radio. When the Japanese attacked Pearl Harbor, the Navy immediately cut the United Press radio-telephone message alert. At that very moment, radio too went under voluntary codes of censorship.[77]

Without the public's access to technological speed and visual images, the executive branch could more easily suppress war horrors and blunders for long periods of time. Today's technology makes war images and impressions not only immediate but vivid, more believable. Satellite broadcasts report within minutes live global information from the scene in living color. The communications mechanisms in the late twentieth century are both quick and powerful: satellite communications, television, fax, radio

and electronic systems. While the ultimate military objective is to win, the ultimate information question had been and will continue to be: would the message contribute to or hinder the war effort?

The goal remains the same: the president wants to contain certain military and national security information. The American mass media want to report what is happening, even if the news is negative. The president needs public opinion to support the war. Military official communiqués usually exaggerate bravery, fortitude, and determination, while limiting the coverage of losses. The twentieth century military secrets have not just concerned the weapons and movements, but the civilian casualties. The official communications of World War II, Korea and until Vietnam have insinuated that American planes bombed only military objectives, pinpointing with accuracy. The public only learned after World War II that one Allied Tokyo raid killed 140,000. After the Gulf War, the public learned that the famous "smart bombs" only made up 7 percent of the explosives dropped and that 70 percent of the bombs dropped in Iraq and Kuwait missed their targets.[78]

One subtle wartime control has been the president's mode of operating in secrecy. Like all previous wartime presidents, Franklin D. Roosevelt did not want journalists to give aid and comfort to the enemy with vital information. Roosevelt told the White House correspondents that their war information would be "determined by the higher officers — the Army and Navy." For wars in general, secrecy aids in the practice of withholding gloomy news and making good news sound better than it was. The military gatekeepers will be more cautious than not. The crucial question centers around what indeed does breach national security, what does indeed give aid and comfort to the enemy? [79]

A second subtle aspect exists: deception. A high value of truth has been part of the American presidential campaign myth, beginning with George Washington, culminating with Jimmy Carter's campaign promise "not to lie," and continuing through the 1992 election campaign on character questions. Just as one author entitled his book, *The First Casualty*, the first casualty when war comes is truth. In other words, the president in general is more likely to lie when there is a military crisis. During the Civil War, the *New York Times* expressed the change: "we cannot conceive of any state of things which can justify the Government in deliberately suppressing what it knows to be true, and thus promulgating what it knows to be false. . . .it seems to us unfair and unjust that, in spite of all these efforts, the Government should compel us, against our will, but without power of resistance or redress, to publish falsehoods instead of facts."[80]

In the twentieth century, lying was but another weapon, and not a secret one either. Woodrow Wilson perfected the art of presidential deception, even before he had a war. Wilson told his advisor Colonel House that he thought lying was justified in matters of public policy. House described Wilson's lying as "grazing the truth" and what correspondent Ames Brown called "adroit fencing." Charles Willis Thompson wrote of Wilson's refined technique, "I do not mean that he lied, I mean that he took such intellectual pleasure in stating a thing so as to give an opposite impression to the fact, though he kept strictly to the truth that one had to be constantly on the alert to keep from being misled."[81]

Each Vietnam War era president used deception as war policy. The lying began with John Kennedy's Vietnam soldiers being called "advisers," became institutionalized with the Gulf of Tonkin resolution, an erroneous attack on American ships, and continued with the escalation of the war through the first six months of 1965. Then there were Lyndon Johnson's announcements about the troop strength and the promise to limit 50,000 men to Vietnam and Richard Nixon's secret bombing of Cambodia and efforts into Laos. Presidents during the Vietnam War seemed overly optimistic about troops wins and enemy losses. Former White House aide Richard Goodwin said that the lies were necessary to contain communism in South Vietnam and then the President and his aides began "to lie to each other. . .and finally they lied to themselves." Even when they knew better, the mass media became carriers of the deception. They "felt compelled to print and broadcast official public reports simply because they were official and public," Goodwin wrote.[82]

The usually positive aspects of free expression become especially detrimental for a wartime president. During a crisis, popular decision-making is too time-consuming to defer to individual autonomy in decision making. An immediate consensus becomes extremely urgent when the president and the country are contending with an outside enemy. Survival of the group is the nation's priority. Individual expression and the potentiality of multiple viewpoints

may actually hinder public support for the war and affect the military morale. A multitude of voices is harder for a president to tolerate when he and his administration alone are attempting to speak for a united nation against an outside enemy.

At the same time, the consequences for a democratic government are great. During the ultimate national stress with war, the public has less ability to check the most extreme abuses of the president and the government. In order for the public to exert any power at all, they must have information. With the seemingly inevitable wartime controls, there will be either less credible information because the public as a whole wants to win the war or in general fewer national debates and divergent opinions because the country faces an outside enemy. The American people lose a part of their democratic sovereignty without having pervasive popular deliberation over the national sacrifice for an all-out war. Minority opinions about the war and military actions are seen as harmful, as was shown historically in this paper. Dissent may appear to some to give aid to the enemy. Societal intolerance emerges in full force. During stressful times, the community itself may find divergent voices repugnant and tyrannize a minority, whose voices disagree with the nation's war policies. As was demonstrated recently during the Persian Gulf War and historically with the Lincoln and Wilson wars, when the president pushes the country into war, the majority of the public may cease to see that free expression is something to care about. War, as Thomas Emerson put it, puts the constitutional guarantees of a free and open discussion to its most severe test. [83]

Endnotes

Professor Winfield gratefully acknowledges the critical historical and legal insights of Robert E. Burke, Professor of History at the University of Washington, and Frederick Schauer, Frank Stanton Professor of the First Amendment, at the John F. Kennedy School of Government and the research assistance of Heather Howard, M.J. student in Journalism at the University of Missouri, and Michael D. Shear, M.A. student in Public Policy at the John F. Kennedy School of Government.

1. Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), pp. 55–56.

2. See John Stuart Mill, *On Liberty* (New York: Appleton-Century-Crofts, Inc., 1947), p. 9. Mark E. Neely, *The Fate of Liberty, Abraham Lincoln and Civil Liberties* (New York and London: Oxford University Press, 1991), p. 220, cites S.S. Nicholas, "Martial Law" (A pamphlet), 1861, to quote former President John Quincy Adams for publicly supporting his former nemesis, Andrew Jackson, for a refund of his fine for imposing a suspension of a writ of habeas corpus and martial law in New Orleans during the War of 1812. Adams said, "Because General Jackson was acting under the laws of war, and because the moment you place a military commander in a district that is in the theater of war, the laws of war apply to that district."

3. Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law* (New York: St. Martin's Press, 1978), p. 226.

4. Ibid., p. 226.

5. Ibid., pp. 219, 226.

6. See Noam Chomsky, *The Manufacture of Consent* (Minneapolis: Silha Center for the Study of Media Ethics and Law, 1986), pp. 13, 15, for the myth of a watchdog press.

7. Samuel Eliot Morison, "Dissent in the War of 1812," pp. 3–31; Frederick Merk, "Dissent in the Mexican War," pp. 35, 38, 45; Frank Freidel, "Dissent in the Spanish-American War and the Philippine Insurrection," pp. 68, 72, 74, 84–85, as found in *Dissent in Three Wars* by Samuel Eliot Morison, Frederick Merk and Frank Freidel (Cambridge: Harvard University Press, 1970). See too John H. Schroeder, *Mr. Polk's War, American Opposition and Dissent, 1846–1848* (Madison: University of Wisconsin Press, 1973), pp. 10–15; Edwin Emery and Michael Emery, *The Press and America, An Interpretative History of the Mass Media*, 6th ed. (Englewood Cliffs, New Jersey: Prentice-Hall, 1988), p. 139.

8. James Madison to Thomas Jefferson, October 17, 1788, *The Papers of James Madison*, Vol XI, Robert A. Rutland, ed. (Charlottesville: University Press of Virginia, 1977), p. 299.

9. Ibid., pp. 215–216; *New York Times*, January 17, 1991, and Franklin D. Roosevelt, "Press Conference, December 9, 1941," *Complete Press Conferences of Franklin D. Roosevelt*, Vol. 18 (New York: Da Capo Press, 1972), p. 343.

10. Statutes at Large, I (U.S.Congress, July 14, 1798 approved), pp. 596–97. For more discussion, see Leonard W. Levy, *Emergence of a Free Press* (New York and Oxford: Oxford University Press, 1985), p. 298. Levy argues that the First Amendment only prohibits prior restraint; unlike other scholars who separate "public" from "private" concerns and argue that the First Amendment provides greater safeguards of public affairs. See David Rabban, "The First Amendment in Its Forgotten Years," *Yale Law Journal* 90:3 (January 1981): 563.

11. Letter to the Boston Patriot, *John Adams' Works*, IX, pp. 290–292, See too James Morton Smith, *Freedom's Fetters, The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956), pp. 98, 99, 152, 159; See too John D. Stevens, "Congressional History of the 1798 Sedition Law," *Journalism Quarterly* 43:2(1966): 249 and Leonard Levy, *Emergence of a Free Press*, p. 202.

12. Prior to the Sedition Act, judges refused to allow the defendant to plead truth as a defense. The greater the truth, the greater the libel. The famous John Peter Zenger case of 1735 did not set a legal precedent, only a popular one. Fox Libel Act of 1792 in England secured the power of the juries in libel cases.

13. E.O. 9066, 7 Federal Register 1407 (1942).

14. Abraham Lincoln to The Commanding General of the Army of the United States, April 27, 1861, *A Compilation of the Messages and Papers of the Presidents, 1789–1897*, James D. Richardson, ed., Vol. VI, (Published by Authority of Congress, 1900), p. 18; Thomas F. Carroll, "Freedom of Speech and of the Press During the Civil War" *Virginia Law Review* 9:7 (May 1923): 529–530; See too Article I, Section 9, Part 2 of the United States Constitution for reference to suspension of the writ. See also *The Prize Cases*, 67 US 635 (1862) for Lincoln's authority to institute a blockade and justification of an existing state of war without a formal declaration.

15. Carroll, "Freedom of Speech and the Press During the Civil War," pp. 529–530; Sydney G. Fisher, "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly* III:3 (September 1888): 456.

16. Such bold presidential actions can be found in the twentieth century with Franklin D. Roosevelt's New Deal responses to the depression and John F. Kennedy's Bay of Pigs invasion.

The Commander of the Army, the Secretary of War, the Secretary of Navy, even the Secretary of State shared among themselves the responsibility for the prisons. The prisoners consisted not just of soldiers and sailors charged with military offenses, but civilians charged with criminal offenses, Southerners claiming to be enemy aliens but charged with treason, and Northerners charged with hindering the war effort. The Army had custody of them all. See William Archibald Dunning, "Disloyalty in Two Wars," *American Historical Review* XXIV: 4 (July 1919): 626.

Military guards refused to recognize judicial writs even when they came from the Chief Justice of the Supreme Court. Carroll, "Freedom of Speech and Press During the Civil War," pp. 538–39; David Donald, "Died for Democracy," *Why the North Won the Civil War*, David Donald, ed. (Baton Rouge: Louisiana State University Press, 1960), p. 87; See Neely, *The Fate of Liberty* on the confusion of the numbers of civilian arrests, pp. 233–34. Neely points out that in many cases it was difficult to tell whether a person was a civilian or not and whether the person was actually arrested or not.

17. Lincoln to Corning, June 12, 1863, in *Abraham Lincoln:His Speeches and Writings*, Roy Basler, ed. (New York: A Da Capo Paperback, a 1946 reprint), p. 706.

18. Ibid., p. 707.

During the War of 1812, such contradictions were found when Andrew Jackson totally disregarded judicial authority and individual constitutional rights. In New Orleans as military commander, Jackson ruthlessly seized and exercised absolute political power until he had officially received word that the peace treaty had been ratified. With no authority but his own, Jackson not only arrested the writer of a critical editorial, a member of the state legislature and a staunch supporter of the war, but he also jailed the Federal District Judge who requested a writ of habeas corpus. Jackson acted "to silence opposition," and to make the example effectual, and to obtain, through fear, "that security which could not be had through love of country." Robert V. Remini, *Andrew Jackson and the Course of American Empire, 1767–1821* (New York: Harper & Row, 1977), pp. 311–312, 315. Remini quotes John Reid and John Henry Easton, *The Life of*

Andrew Jackson, (University: Alabama, 1974 reprint), p. 381.

When Jackson was summoned to explain why he should not to be held in contempt for refusing to recognize the writ of habeas corpus, Judge Hall raised the question as to whether "the law should bend to the General or the General to the Law." Remini *Andrew Jackson*, p. 314. See also *The Life of Andrew Jackson*, p. 387.

19. Neely, *The Fate of Liberty*, p. 222.

20. The 1864 draft law severely punished anyone who resisted the draft or counseled resistance, although there were few indictments. The 1862 Treason Act caused the greatest number of arrests and said that any traitor "shall suffer death. . .or, at the discretion of the court, shall be imprisoned for not less than five years, and fined not less than ten thousand dollars." While the military sparingly enforced this law during the early part of the Civil War struggle, it became a weapon after the devastating Battle of the Wilderness. By 1865, more than 1,900 indictments for treason were on the dockets of Eastern Tennessee alone. The names of more than 4,000 Maryland residents who had joined the Confederate Armies were also submitted to a grand jury for indictment. They were not brought to trial stage nor were the several million former rebels who were technically traitors. In the meantime, Lincoln died. Even though President Andrew Johnson had said, "treason must be made odious . . . traitors must be punished," the cases were dropped.

See Dunning, "Disloyalty in Two Wars," pp. 629–30; James G. Randall, *Constitutional Problems Under Lincoln*, rev. edition (Urbana: University of Illinois Press, 1951), pp 96–7; Nathaniel Weyl, *Treason: The Story of Disloyalty and Betrayal in American History* (Washington, D.C.: Public Affairs Press, 1950), pp. 268–69; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York: Harper and Row, Publishers, 1982), p. 373.

21. Randall, *Constitutional Problems Under Lincoln*, p. 480.

22. James R. Mock, *Censorship, 1917* (Princeton: Princeton University Press, 1941), p. 11

23. Abraham Lincoln to Erastus Corning and others, June 12, 1863, as found in *Lincoln: His Speeches and Writings*, pp. 705, 707.

24. Lincoln to Corning, June 12, 1863, p. 705.

25. Mock, *Censorship*, 1917, pp. 14–15. Ulysses Grant supporters for a third term sang the song, "Give Us Back Our Old Commander," albeit written about McClellan, but later applied to Grant.

26. Neely, *The Fate of Liberty*, pp. 48–49; Neely cites *The Collected Words of Abraham Lincoln*, Roy P. Basler, Marion D. Pratt, Lloyd A. Dunlap, eds., Vol. VI (New Brunswick: Rutgers University Press, 1953–1955), p. 492 and Vol. VIII, p. 308.

27. Benjamin P. Thomas and Harold M. Hyman, *Stanton: The Life and Times of Lincoln's Secretary of War* (New York: Alfred A. Knopf, 1962), p. 370 and T. Harry Williams, "Civil War Papers Spilled Secrets," *The Quill* 32:1 (January-February 1944): 5, 12. Before the concept of objectivity, the news-gathering cooperatives reflected their membership. During the Civil War, different geographical regions had their associated press cooperatives for telegraphic news reporting and newsgathering. The New York Associated Press, with at least seven newspaper members, was large and influential. The Confederate Press Association was but another group as was the Illinois Press Association. A good study on these groups is Victor Rosewater, *History of Cooperative Newsgathering in the United States* (New York: Appleton-Century-Crofts, 1930).

28. "By Fraud, by Deception," Missouri *Democrat*, 13 July 1961 as cited by Dean Sprage, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1965), p. 94.

29. Lincoln to Arnold, May 25, 1864, *The Collected Works of Abraham Lincoln*, Roy P. Basler, ed., Vol. VII, p. 361. Lincoln discovered that General Burnside suppressed the newspapers by visiting the War Department Telegraph Office and reading a copy of Burnside's suppression order, No. 84. Two days later, the President revoked the order in time to dampen Republican enthusiasm for the order at a rally.

30. Lincoln to Rep. Orville Hickman Browning, September 22, 1861, *The Collected Works of Abraham Lincoln*, Vol. IV, pp. 531–32. See too Neely, *The Fate of Liberty*, p. 219.

31. Emery and Emery, *Press and America*, pp. 161–62.

32. Randall, *Constitutional Problems Under Lincoln*, p. 317, re: fn: 42, "An Act for Establishing Rules and Articles for the Government of the Armies of the United States, approved April 10, 1806, Statutes at

Large, II. 359. Occupied area newspapers were also vicious, such as the *New Orleans Crescent*, the *New Orleans Advocate*, the *Memphis News* and the *South*.

33. Randall, *Constitutional Problems Under Linclon*, pp. 497–99; Thomas and Hyman, *Stanton*, pp. 301-302; Louis M. Starr, *Bohemian Brigade* (New York, 1954), pp. 315–320.

34. *New York Times*, 25 July 1861, p. 4.

35. Emery and Emery, p. 162. The American Telegraph Company cooperated with the executive branch and required oaths of loyalty and secrecy from its employees.

36. Jean Folkerts and Dwight Teeter, *Voices of a Nation, A History of the Media of the United States* (New York: Macmillan and Co., 1989), p. 214.

37. Philip Knightley, *The First Casualty: From the Crimea to Vietnam: The War Correspondent As Hero, Propagandist, and Myth Maker* (New York: A Harvest Book, Harcourt Brace Jovanovich), p. 20; Emery and Emery, *The Press and America*, p. 162; Neely, *The Fate of Liberty*, pp. 234–35. Neely points out that a legal code to govern the armies was passed in the midst of the war. By 1864, the Army declared itself ineligible to try civilians in military courts, although it was still unsettled as to what exactly was a civilian.

38. *New York Times*, 24 July 1861, p. 4.

39. Randall, *Constitutional Problems Under Lincoln*, pp. 486–487, 490. When Sherman tried to initiate a case against a reporter who wrote accounts of the Union operations at Vicksburg, the court ruled that the military must prove that identical information went to the enemy and the evidence was not at hand.

40. Randall, *Constitutional Problems Under Lincoln*, pp. 486–87, 311. The *New York Times* gave detailed accounts in December 1864, of the land and sea plans for attack at Wilmington, North Carolina and told where the fleet had been sighted and a full list of the vessels. By the time of the first Wilmington attack, the enemy had been amply warned, so that there was no element of surprise, according to Randall, pp. 312–313.

41. See *Ex parte* Jackson, 96 U.S. 727; Randall, *Constitutional Problems Under Lincoln*, p. 500. See *The Journal of The House of Representatives*, U.S. Document 445, 37th Congress, 3rd Session, 1862–1863, p. 7.

42. Donald, "Died of Democracy," pp. 82–84.

43. Ibid., pp. 84–85, 96.

44. Neely, *The Fate of Liberty*, p. 223, which cites *Collected Works of Lincoln*, Vol. VI, pp. 264–65.

45. In *ex parte* Milligan, 71 US 139 (1866), after the Civil War ended, the court held that Milligan ought to be discharged from custody as that his trial had taken place outside the theater of active military operations, in a region where the civil courts were open and beyond the power of the Commander-in-Chief to have ordered. See p. 110. A military court was used erroneously to hang Mary E. Surratt for assistance in the assassination of the president. See David Miller Dewitt, *The Judicial Murder of Mary E. Surratt* (Baltimore: John Murphy and Co., 1895).

46. Woodrow Wilson, *Congressional Government: A Study in American Politics* (1884, reprint edition Gloucester, Mass.: Peter Smith, 1973), preface to the 15th printing, pp. 22–23. It must be noted that Wilson shifted his views from *Congressional Government* 24 years later in his account, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), where he became the proponent of a revitalized presidency, less inhibited by Congress for forceful action.

47. Harry N. Scheiber, *The Wilson Administration and Civil Liberties, 1917–1921* (Ithaca: Cornell University Press, 1960), p. 6.

48. Woodrow Wilson to Charles W. Eliot, President of Harvard, June 1, 1914, *Life and Letters of Woodrow Wilson*, Vol. IV, Ray Stannard Baker, ed. (New York: Doubleday and Co., 1927), p. 234.

49. Scheiber, *The Wilson Administration*, p. 13.

50. 39 U.S. Statutes 919; Scheiber, *The Wilson Administration*, pp. 13, 14.

51. Zechariah Chafee, Jr., *Free Speech in the United States* (New York: Atheneum, 1969), p. 184. Chafee cites U.S. v. Clark, Bill 101, affd., 250 Fed. 499 (CCA 1918).

52. "Woodrow Wilson Flag Day Address," June 14, 1917, Papers of Woodrow Wilson (PWW), Vol 42, p. 504; Chafee, *Free Speech*, pp. 14, 15.

53. Chafee, *Free Speech*, pp. 16.

54. Stephen Vaughn, *Holding Fast the Inner Lines, Democracy, Nationalism, and the Committee on Public Information* (Chapel Hill: University of North Carolina Press, pp. 43, 197, 235. See Betty Houchin Winfield, *FDR and the News Media* (Urbana: University of Illinois Press, 1990), chapters 5 and 8. There was no *Official Bulletin* during World War II and when the Office of War Information would release FDR's Four Freedoms speech or other words, Congress would react and even cut the OWI budget. See Winfield, *FDR and the News Media*, pp. 164–65.

55. Act of June 15, 1917, v. 30, Title I, 3, changed to 50 U.S.C.A. (1926), 33; Sedition Amendment, May 16, 1918, 40 Stat. 553 (1918). Repealed in 1921, 41 Stat. 1359–1360; 60 *Congressional Record*, 293–94, 4207–8 as cited by Zechariah Chafee, Jr., *Free Speech in the United States* (New York: Atheneum, 1969), pp . 39–40. The Sedition Act also prohibited saying or doing anything to obstruct the sale of United States bonds, uttering, printing, writing or publishing any disloyal, profane, scurrilous, or abusive language to cause contempt, scorn, contumely or disrepute as regard the form of American government, the Constitution, the flag, or the uniform of the military.

56. Chafee, *Free Speech*, pp. 18, 19. Until 1925, the majority of the Supreme Court did not fully comprehend the role of individual rights. For pre-World War I cases, see Alexis J. Anderson, "The Formative Period of First Amendment Theory, 1870–1915," *American Journal of Legal History* XXIV (January 1980): 56-75; see too David M. Rabban, "The First Amendment in Its Forgotten Years," *Yale Law Journal* 90:3 (January 1981): 514–595. For a particular change in the Supreme Court attitude, see references to Justice Oliver Wendell Holmes and his dissent in Abrams v. U.S. 250 US 616, 624 (1919). Holmes emphasized the "free trade in ideas" as "the theory of our Constitution." Note too Gerald Gunther, "Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27:3 (February 1975): 718–772.

57. Chafee, *Free Speech*, pp. 20–21; Folkerts and Teeter, *Voices of a Nation*, pp. 346–47. Wilson's early public protest against calling any newspaper or magazine "foreign," such as a foreign language newspaper, was during his 1912 campaign in a New York speech to the editors of the foreign language newspapers, September 4, 1912, Papers of Woodrow Wilson, Vol. XXV, pp. 94–97.

58. Wilson forwarded Burleson's justification for barring the *Masses* to Amos Pinchot in 1917. *Milwaukee Leader* and Berger, see Baker, *Life and Letters*, VII, p. 3301 as found in Scheiber, p. 38.

59. Re: the *Nation*, the exclusive of both the *Nation* and the *World Tomorrow* were short-lived. Only one issue of the *Nation* was barred, the September 14, 1918 issue, for criticism of the great slacker round-up in New York City and attacks against Samuel Gompers. See Chafee, *Free Speech*, p. 99. For more on the *World Tomorrow*, see Scheiber, p. 36, which quotes Ray Stannard Baker, *Life and Letters of Woodrow Wilson*, VII, p. 165. W.A. Swanberg, *Citizen Hearst, A Biography of William Randolph Hearst* (New York: Charles Scribner's Sons, 1961), pp. 312–13; Emery and Emery, *The Press and America*, p. 359. John Blum argues that "the President turned his back on civil liberties not because he loved them less but because he loved his vision of eventual peace much more." John Morton Blum, *Woodrow Wilson and the Politics of Morality* (Boston: Little, Brown and Co., 1956), p. 144.

Note that Chafee is not without criticism, despite his almost single-handed efforts to create free speech as a law topic. See Harry Kalven, Jr., *A Worthy Tradition*, p. 137; Floyd Abrams, "Worthy Tradition, the Scholars and the First Amendment," *Harvard Law Review* 103:5 (March 1990): 1164-5.

60. Scheiber, *The Wilson Administration*, pp. 21, 40 U.S. Statutes 553–554; Chafee, *Free Speech*, pp. 60–79; James R. Mock, *Censorship, 1917* (Princeton: Princeton University Press, 1941), p. 148.

61. 40 U.S. Statutes 1012.

62. Mock, *Censorship, 1917*, pp. 55, 93. Executive Order 2011, August 5, 1914, took precautions to ensure the enforcement of neutrality, for the use of radio communication. By the time of American entry into the war, some 250,000 messages had been transmitted between Tuckerton or Sayville and central Europe. Mock, p. 73. Executive Order 2604 related to all cable and land telegraph lines out of the United States. See Mock, p. 48.

By June 1916, censorship extended to merchant ships of belligerents entering harbors. Before the U.S. entry into the war, Henry Goldman of Goldman, Sachs and Co. informed the Secretary of State that on July 14, 1916 he had tried to send a message to a bank in Berlin, which mentioned the newly arrived German submarineliner in the New York harbor. After the censor had Goldman delete that section of his message, he complained to the Secretary of State, "this procedure appears to me a curtailment of my rights as a native-born American citizen." See Mock, p. 76.

63. Mock quotes Secretary of the Navy Josephus Daniels, p. 79.

By April 30, 1917 there was a Chief Cable Censor with others in the Caribbean, Panama, San Francisco, Galveston. The military instruction stated that this

activity was to prevent the spread of false reports or reports likely to cause, directly or indirectly, dissatisfaction with the success of the American cause. Mock, p. 80.

64. Mock, *Censorship*, pp. 81–82, 91. In addition, the administration closely watched outgoing dispatches. In fact, the censorship included specific references to strikes, riots, or activities attributed to an anti-war sentiment, such as activities of the I.W.W. that were suppressed. The censorship even extended to an interpretation of the New York mayoralty race. See Mock, p. 84.

65. Cedric Larson, "Censorship of Army News During the World War, 1917–1918," *Journalism Quarterly* 17:4 (December 1940): 313–323; Winfield, *FDR and the News Media*, p. 177. Ernest R. May explains that Wilson evaded a commander-in-chief role in the field. See "Wilson (1917–1918)" in *The Ultimate Decision, The President As Commander in Chief* (New York: George Braziller, 1960), pp. 130–31.

66. Emery and Emery, *Press and America*, pp. 302, 305, 307.

67. Donald L. Shaw and Stephen W. Brauer, "Press Freedom and War Constraints: Case Testing Siebert's Proposition II," *Journalism Quarterly* 46 (Summer 1969): 243–254; John D. Stevens, "Press and Community Toleration: Wisconsin in World War I," *Journalism Quarterly* 46 (Summer 1969): 255–259; David Kennedy, *Over Here, The First World War and American Society* (New York: Oxford University Press, 1980), p. 62; I *Writings of James Madison*, 195; John Tebbel and Sarah Miles Watts, *The Press and the Presidency, From George Washington to Ronald Reagan* (New York: Oxford University Press, 1985), pp. 48–49.

68. Kennedy, *Over Here*, cites *Messages and Papers of Woodrow Wilson*, I, p. 151.

69. Kennedy, *Over Here*, p. 74. The areas with the highest incidents of prosecutions were those areas in which the I.W.W. was active. Federal officers charged the union with disloyalty and used violence against "Wobbly" workers and leaders. See Scheiber, pp. 49, 51.

70. Scheiber, *The Wilson Administration*, p. 57.

71. The Supreme Court had not ruled on the First Amendment until Schenck v. U.S., 249 U.S. 47 (1919). Justice Oliver Wendell Holmes wrote then, "In ordinary times, such pamphlets might have been harmless and protected by the First Amendment. . . .The question in every case is whether the words used, are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

See too Rabban, *The First Amendment in Its Forgotten Years*, pp. 591–95.

Morison v. U.S., 844 F.2d 1057, 1988 App. Lexis 4066.

John D. Stevens, *Shaping the First Amendment, The Development of Free Expression* (Beverly Hill, Calif.: Sage Publications, 1982), 54–55.

72. See, in particular, Korematsu v. United States, 323 U.S. 214, 1944. The Court in this case ruled only on the first of two charges, violation of the west coast commander's curfew order, which it construed as a measure to prevent espionage and sabotage. The Court took advantage of the fact that the sentence had run concurrently with a second lower court conviction of an order to report by a certain date to a so-called civilian center. See too *ex parte* Endo 323 U.S. 283 (1944) as another case in which a Japanese American was released, albeit two years and a half years after she filed a petition. See Edward S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947), pp. 98–99.

73. See " 'Review of the Year' to June, 1943" as found *Freedom of the Press from Hamilton to the Warren Court*, Herald Nelson,ed. (Indianapolis, New York: The Bobbs-Merrill Co., Inc., 1967), pp. 265–66; Executive Order 9066, 7 Fed. Reg. 1407.

74. Ibid. See for example, the Jehovah's Witnesses, whose anti-war propaganda and public activities usually provoke patriotic opposition are a prime comparison between the two world wars. In World War I, their leaders were jailed and their publications were curbed; in World War II, they were accorded by the courts and by public opinion even greater liberties than in time of peace. For Franklin D. Roosevelt's views toward expression, in particular the mass media, see Betty Houchin Winfield, *FDR and the News Media* (Urbana: University of Illinois Press, 1990), chapters 8, 9, 10. See Robert E. Cushing, "Wartime Prosecutions for Speech and Publication," ACLU Report (April 1944), *American Political Science Review* 37 (1943) as found in Corwin, *Total War and the Constitution*, pp.106–107.

75. Dunning, "Disloyalty in Two Wars," p. 628.

76. See Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625 (1931).

77. Carroll, "Freedom of Speech and of the Press During the Civil War," 519, 520.

78. The *Washington Post*, 16 March 1991, p. 1; Tom Wicker's *In the Nation* column, 21 March 1991, *New York Times*. The Reporters Committee for Freedom of the Press has cited 135 Bush administration actions since their 1990 report where information has been restricted by access or intrusion on editorial freedom. See "Committee Tracks Bush Record on Press, Public Access," *Broadcasting* (March 18, 1991): 44.

79. Press Conference 790, December 9, 1941, *Complete Press Conferences*, Vol. 18: 356.

80. Knightley, *The First Casualty*, preface; *New York Times*, 24 July 1861, p. 4.

81. L. Ames Brown, "President Wilson and Publicity," *Harper's Weekly* 59 (November 1, 1913): 20; Charles Willis Thompson, *Presidents I've Known and Two Near Presidents* (Indianapolis: Bobbs-Merrill Co, 1929), pp. 295–297; James Pollard, *The Presidents and the Press*, p. 649. For Wilson's lying about sending the Marines to Mexico in 1914 see Elmer E. Cornwell, Jr., "The Press Conferences of Woodrow Wilson," *Journalism Quarterly* 39 (Summer 1962): 267.

82. Johnson even told the correspondents at a press conference the day after his announcement about troop amount and strength, that this did "not imply any change in policy or objective." Yet, it did, as Richard Goodwin, a White House aide, pointed out, p. 383. Goodwin points out that the troop limits were an understatement that amounted to a major deception of Congress, the country and most of the government, pp. 386–87. Richard Goodwin, *Remembering America: A Voice from the Sixties* (Boston: Little, Brown and Co., 1988), pp. 381–82, 413.

83. See footnote 1; Vincent Blasi, "The Checking Value in First Amendment Theory, 1977 American Bar Foundation, *Research* I, p. 521; see Frederick Schauer, "The Role of the People in First Amendment Theory," *California Law Review* (1986) 74:760–788.