

# *Taking Liberties with Liberty*

## U.S. Civil Liberties and National Security in Times of War and Crisis



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Master Thesis

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## **U.S. Civil Liberties and National Security in Times of War and Crisis**

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*“Lord love you, sir,” he added, “they’re so fond of Liberty in this part of the globe, that they buy her and sell her and carry her to market with ‘em. They’ve such a passion for Liberty, that they can’t help taking liberties with her.”*

Charles Dickens, *Life and Adventures of Martin Chuzzlewit*

*“Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk...”*

Justice Hugo Lafayette Black, *Dennis v. United States* (1951)

## Table of Contents

Table of Figures.....	5
Introduction.....	6
Chapter 1 – Civil Liberties during the Great War and the Great Red Scare.....	16
The Great War .....	16
The Great Red Scare .....	29
Conclusion: Civil Liberties 1917-1920.....	47
Chapter 2 - Civil Liberties during World War II.....	50
World War II and the Bill of Rights .....	50
The Japanese-American Internment.....	59
Conclusion: World War II and the Limits of Executive Power.....	68
Chapter 3 –Civil Liberties during the Early Cold War (1947-1953).....	72
Cold War Anticommunism.....	73
Cold War Repression.....	82
Conclusion: Cold War National Security and Civil Liberties.....	95
Chapter 4 - Civil Liberties and the War on Terror .....	99
American Society post-9/11 .....	99
Civil Liberties in the War on Terrorism.....	103
Conclusion: Concept Wars, Liberty and Security.....	122
Conclusion.....	126
Bibliography.....	133
Appendix A: The Bill of Rights.....	140
Appendix B: The Fourteenth Amendment.....	142

## Table of Figures

Chapter 1 – Civil Liberties during the Great War and the Great Red Scare.....	48-49
President Woodrow Wilson, Library of Congress, <a href="http://www.americaslibrary.gov">www.americaslibrary.gov</a>	
Attorney General A. Mitchell Palmer, Federal Bureau of Investigation, <a href="http://www.fbi.gov">www.fbi.gov</a>	
Government propaganda poster, <a href="http://www.learn-ict.org.uk">www.learn-ict.org.uk</a>	
New York Globe cartoon, History Matters, the U.S. Survey Course on the Web, <a href="http://historymatters.gmu.edu/">http://historymatters.gmu.edu/</a>	
IWW headquarters, New York City, after the raid of November 15, 1919. Special Collections Library, Labadie Collection, University of Michigan, <a href="http://sunsite.berkeley.edu/">http://sunsite.berkeley.edu/</a>	
Burial of Wesley Everest, <a href="http://freepages.genealogy.rootsweb.ancestry.com">http://freepages.genealogy.rootsweb.ancestry.com</a>	
Chapter 2 - Civil Liberties during World War II.....	70-71
President Franklin D. Roosevelt, The National Archives, <a href="http://www.archives.gov">www.archives.gov</a>	
Lt.-General John DeWitt, <a href="http://www.owensvalleyhistory.com">www.owensvalleyhistory.com</a>	
Evacuation Order, <a href="http://sunsite.berkeley.edu/">http://sunsite.berkeley.edu/</a>	
Evacuation Sale, Franklin D. Roosevelt Library, Public Domain, <a href="http://www.ourdocuments.gov">www.ourdocuments.gov</a>	
Family Portrait, JARDA: Japanese American Relocation Archives, <a href="http://www.calisphere.universityofcalifornia.edu/jarda/">http://www.calisphere.universityofcalifornia.edu/jarda/</a> ; contributing institution: the Bancroft Library. University of California, Berkeley.	
Amache Relocation Center, JARDA; contributing institution: the Bancroft Library, University of California, Berkeley.	
Painting by Henry Sugimoto, JARDA; contributing institution: Japanese American National Museum, Los Angeles, California.	
Chapter 3 –Civil Liberties during the Early Cold War (1947-1953).....	97-98
President Harry S. Truman, Truman Presidential Library, <a href="http://trumanlibrary.org">http://trumanlibrary.org</a>	
Senator Joseph R. McCarthy, TIME Magazine, <a href="http://www.time.com">www.time.com</a>	
J. Edgar Hoover, Federal Bureau of Investigation, <a href="http://www.fbi.gov">www.fbi.gov</a>	
Eugene Dennis and co-defendants, <a href="http://www.spartacus.schoolnet.co.uk">www.spartacus.schoolnet.co.uk</a>	
Alger Hiss before HUAC, University of Kansas-Missouri City School of Law, <a href="http://www.law.umkc.edu">www.law.umkc.edu</a>	
Washington Post cartoon, Library of Congress, <a href="http://www.loc.gov">www.loc.gov</a>	
Chapter 4 - Civil Liberties and the War on Terror .....	124-125
President George W. Bush at Ground Zero, <a href="http://www.americanrhetoric.com">www.americanrhetoric.com</a>	
Total Awareness Project logo, <a href="http://www.sourcewatch.org">www.sourcewatch.org</a>	
Cartoon by Don Wright, <a href="http://www.liberty-news.com">www.liberty-news.com</a>	
Guantanamo Bay Camp, <a href="http://stjohnsdemocrats.files.wordpress.com">http://stjohnsdemocrats.files.wordpress.com</a>	

## Introduction

*"In May (2004), Brandon Mayfield, a 37-year-old Oregon lawyer, was arrested and thrown in jail when federal agents incorrectly matched his fingerprint with one found on a bag of detonators in a station near Madrid after the March train bombings. Earlier, FBI agents had sneaked into his home and taken "Spanish documents" (namely his son's Spanish homework), along with copies of the Koran (Mr. Mayfield is a convert to Islam). Two weeks later, most of it spent in solitary confinement, all charges were dropped and he was released with an apology from the FBI."*<sup>1</sup>

The War on Terror instigated by the Bush administration had profound effects on the domestic American scene as well as the foreign realm it was aimed at. It caused an undeniable shift in the balance between national security and civil liberties through several new security measures, including the introduction of the Department of Homeland Security and the USA PATRIOT Act that allowed the FBI and other governmental agencies greater powers of surveillance and investigation. The appointment of the right-wing evangelical John Ashcroft as Attorney General further hinted at the administration's conviction to defend national security at all costs, even if this meant a restriction of personal liberties.<sup>2</sup> It is important to stress, though, that the debate between the promotion of security and maintaining essential civil liberties is as old as American society itself. Although ideas of individual freedom form a steady current throughout American history, American society has, at times of war, been preoccupied with its national security. The government has, time and again, implemented policies of national security, even when these violate essential individual liberties. Astoundingly, these measures have often enjoyed wide public backing.

To a certain extent, it has been both logical and necessary for the American government to take measures of national security at times of emergency. Increased intelligence gathering, surveillance of enemy aliens, and prosecution of spies and saboteurs, while possibly limiting certain individual liberties, can be justified if they improve the security of the American people and their institutions. However, an increased state of emergency can also lead to abuses of executive power, such as the prosecution of dissenting or critical voices, or the suspension of rights of due process. Moreover, measures might be taken, justified by the increased need for national security, which, in fact, fulfill completely unrelated interests.

This study will investigate the causes and effects of America's preoccupation with national security over civil liberties at times of war and perceived external threats. Despite the continuing importance of democratic values in American society, crises of national security have witnessed the implementation of security measures that infringe upon basic individual rights. During the twentieth century, a trend has developed to regard civil liberties secondary to the security of the nation. Central to this study is the question why and how such a tradition has been able to develop, a question which has fuelled considerable debate among scholars. Was it primarily *instigated* by the federal government (top-down), or was it mainly orchestrated as a *reaction* to public demands for greater security and conformity (bottom-up)? In the following chapters it will become clear that, during the past one hundred years, American leaders have consistently abused their enhanced wartime powers to advance interests and implement policies not directly related to the national security of the United States. However, executive policies of repression were almost always based on wide public support as well.

This study will, in addition, touch upon subjects related to the executive's policy of restricting civil liberties. What interests did the executive government pursue throughout periods of crisis? How did the legislative and judicial branches function to limit the power of the executive in times of war? What was the role of the federal bureaucracy in the implementation of

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<sup>1</sup> "Enemy Within", *Economist* 372 (2004), Special Section, 24.

<sup>2</sup> Neil Campbell and Alasdair Kean, *American Cultural Studies: An Introduction to American Culture*, (London/New York: Routledge, 2006), 279.

security policies? Why was the promotion of security at the cost of liberty welcomed by large segments of the population? These various questions will be tested through a comparative approach. Four historical cases are presented. In each of these periods the United States seemed to be threatened by a foreign power, and in each of these periods the administration took farfetched measures to promote the national security. The choice for the specific periods will be accounted for next.

### *The Cases*

The first period discussed in this thesis is the First World War and its aftermath, from American entry in 1917 until the end of the so called "Red Scare" in 1920. For many reasons, World War I has become an important period in the history of American civil liberties. The Great War was the first occasion of American military involvement into a conflict overseas, breaking its long-lasting tradition of isolationism. The sudden war mobilization, material as well as ideological, had a lasting effect on the American people and allowed for an unprecedented restriction of personal liberty. In fact, the government set a very clear standard in handling the conflict between civil liberties and national security, to which other periods can be compared. Moreover, the war saw an immense expansion of federal executive power, already initiated during the progressive era, which constitutes an important requirement for increased government control and repression. The war also witnessed the birth of important federal bureaucratic agencies, most notably the predecessor to the Federal Bureau of Investigation (FBI), cardinal to any increased control of the government over its citizenry. Finally, during WW I, the government made its first attempts at creating legislation to persecute American citizens and resident aliens for their political beliefs. Such attempts, as will be demonstrated throughout this thesis, have formed an integral part of the U.S. government's measures of national security during times of war and crisis.<sup>3</sup>

For all these reasons, any historical discussion of American civil liberties in wartime should include WW I. Likewise; the immediate aftermath of the Great War is of major importance to the relation between liberty and security in American history. The years 1919-1920 witnessed the ascendancy of the antiradical forces that had begun to crystallize during the war. Although the *unr* ended in 1918, a sense of *crisis* prevailed in American society. An alarming series of events that included bomb plots, major strikes and social upheaval made many people as eager as they had been during the war to allow limits on constitutional freedoms in order to regain their sense of security. This short period thus saw an unprecedented outburst of antiradicalism, including the infamous "Palmer raids", demonstrating how a national crisis could be exploited for clear political opportunism. Together the years 1917-1920, which will be discussed in chapter one, both provide a measuring rod for the relation between security and liberty in other periods and demonstrate the inception of increased government control, powerful bureaucracies, and political exploitation of an emergency situation.<sup>4</sup>

The second period chosen for comparison is the Second World War, discussed in chapter two. For several reasons, World War II is especially interesting to this discussion of American civil liberties. First of all, the image of WW II as a "good" war has often diverted attention from the American domestic scene during the war. On closer inspection, many facets of the domestic war hardly constitute anything that might be called a "good" war. Secondly, the interment of Japanese Americans during the war was one of the clearest and most infamous cases of repression in American history. The internment decision is of utmost importance to this thesis, as it was so clearly formulated as a measure of national security, while in fact it was a policy decided

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<sup>3</sup> David M. Kennedy, *Over Here: The First World War and American Society* (New York/Oxford: Oxford University Press, 1980), 244-257; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York/London: W.W. Norton, 2004), 135-219; Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Cambridge, MA: Schenkman Publishing, 1978), 103-136.

<sup>4</sup> Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States* (Copenhagen: Museum Tusulanum Press, 2000), 167-299; Stone, *Perilous Times*, 220-234; Goldstein, *Political Repression*, 137-164.

upon racial grounds, to accommodate interests quite divergent from the security of the nation. Finally, during the Second World War the limitations on individual liberties were implemented by an administration considered to be one of the most liberal in American history. President Franklin D. Roosevelt, and the liberals surrounding him, not only subduced to the wartime demands for conformity and increased security, but often initiated measures of political repression. Therefore, this case attributes to the notion of consistent government policy to regard civil liberties secondary to the national security, by highlighting the broad political spectrum that supported such measures in times of war.<sup>5</sup>

The third chapter of this thesis covers the early Cold War, from the beginning of Soviet Containment in 1947, up until the end of the Korean War in 1953. One of the most turbulent periods in American history, the early Cold War witnessed several important events, highly relevant to this thesis. The Cold War itself formed as a perpetual state of anxiety, a continuing crisis that included periods of actual war in the "Third World", allowing for the political exploitation of public fears on a more permanent scale. Probably the clearest example of such political opportunism was the rise of Senator Joe McCarthy, who gained national fame on the issue of Communist subversion. "McCarthyism" became a phenomenon in the early 1950s highly reminiscent of the Red Scare of 1919-1920. It constituted a broadly based witch hunt for Communists and other leftwing agitators presented to bolster national security and coherence in order to counter Soviet aggression. McCarthyism, however, only constituted part of the political repression during the early Cold War. In order to defend his international policies, the Truman administration implemented both anti-Communist rhetoric and extensive loyalty testing. In doing so, Truman allowed for, and contributed to, the wide scale repression of people on the basis of *beliefs* and *associations* during the late 1940s and early 1950s. This period is therefore illustrative in showing how international crises have been used to manipulate domestic politics, and how a stern foreign policy is often replicated with farfetched security measures at home.<sup>6</sup>

The same trends are visible in the fourth chapter of this thesis, concerning the "War on Terrorism" of the George W. Bush administration, especially the early aftermath of the terrorist attacks of September 11, 2001. Reminiscent of the red-baiting McCarthyists, the administration used public fears and a sense of crisis to take comprehensive measures of national security. Reminiscent of the Truman administration, it exploited the issue of the day, "terrorism" rather than "communism", to justify its foreign policies, especially the war in Iraq. However, the "War on Terrorism" is included in this thesis for other reasons than the comparison with the anti-communism of the early Cold War as well. First of all, by declaring this latest struggle a "war", the administration was allowed executive powers unthinkable of in peace time. It remains questionable whether a nation can in fact be engaged in a war with an idea, and when or if such a war could end, hinting at the administration's exploitation of the war theme in order to establish permanent changes to the American democracy. Secondly, the contemporary nature of the "War on Terrorism" points to continuities regarding the state of civil liberties in times of national emergency. For example, it reveals much about the persistent expansion of executive power in times of crisis, the constant use of national security concerns to further distinct interests and the repetitive patterns of legislative and judicial resistance to executive expansionism.<sup>7</sup>

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<sup>5</sup> Richard Polenberg, "World War II and the Bill of Rights" in: Kenneth Paul O'Brien and Lynn Hudson Parsons eds., *The Home-Front War: World War II and American Society* (Westport, CT/London: Greenwood Press, 1995), 11-24; Goldstein, *Political Repression*, 237-284; Stone, *Perilous Times*, 235-310; Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Carbondale/Edwardsville: Southern Illinois University Press, 1999), 135-169.

<sup>6</sup> Ellen Schrecker, *Many are the Crimes: McCarthyism in America* (Boston/New York/Toronto/London: Little, Brown and Company, 1998); Walker, *In Defense of American Liberties*, 173-216; Cedric Belfrage, *The American Inquisition 1945-1960* (Indianapolis/New York: Bobbs Merrill, 1973); Richard M. Fried, *Nightmare in Red, the McCarthy Era in Perspective*, (New York/Oxford: Oxford University Press, 1990).

<sup>7</sup> Scott M. Matheson, Jr., *Presidential Constitutionalism in Perilous Times* (London/Cambridge, MA: Harvard University Press, 2009), 85-148; Ivan Eland, "Bush's Wars and the State of Civil Liberties", *Mediterranean Quarterly* 14:4 (2003): 158-175; Richard C. Leone, "The Quiet Republic: the Missing Debate About Civil Liberties After 9/11," in Richard

Thus, as has been argued, together these four cases constitute a thorough historical overview of the relationship between civil liberties and national security in the United States in times of war. Two other probable cases are consciously omitted: the Civil War, including the official suspension of habeas corpus by President Lincoln; and the Vietnam War period that witnessed the repression of war protestors. These periods have been left out for several reasons, apart from limits on available time and space.

The Civil War has been excluded, first of all, to limit the scope of research to the twentieth and early twenty-first century. This thesis deals with the American political system as it has evolved since the Progressive Era. The enhanced powers of the federal government and presidency, in times of both war and peace, have changed the face of American politics in such a way that comparing the government's policies during the Civil War to its policies during twentieth century wars feels like comparing apples to oranges. If a line has to be drawn, the tradition to regard individual liberty as secondary to national security was most clearly established during the First World War. A discussion of earlier trends in this direction would possibly form a welcome preface, but would also arguably overextend the comparative method used here to demonstrate the connection between the periods chosen.

Likewise, the Vietnam War is omitted from this thesis on at least two grounds. First of all, the Vietnam War is part of the Cold War, which is already assessed in chapter three. Secondly, the conflict between individual liberties and national security during the Vietnam era represented many cultural developments characteristic of the sixties and seventies, including rising anti-intellectualism, sexual and racial emancipation and anti-authoritarianism. Although extremely interesting, these developments make the Vietnam War more of a separate case, so to speak, regarding civil liberties and security concerns. Therefore it was deemed less useful, than the other periods chosen, to include in the comparison.

#### *Liberty, War and Security: the Academic Discussion*

Ever since its founding, the United States has witnessed a vivid discussion on the issue of liberty and security, especially among scholars of history, law and political science. These scholars generally agree that democratic values remain important to American society, but also point out that, in times of war or crisis, concerns of national security have prevailed over essential individual rights. Political scientist John Wells thus recently maintained that "John Locke's principles undergird American democracy." To these principles he includes natural rights, the inviolability of individual property and an emphasis on rational consent of the governed.<sup>8</sup> Although Lockean values have been persistent throughout the history of American society, many scholars point out that they have existed on a subtle balance with the nation's security. Thus, as political scientist Jerel Rosati argues, "under conditions of war, American civil liberties and political participation are often curtailed and violated in a systematic way by the government, usually with the active support of groups and people throughout society."<sup>9</sup> Law scholar Otis H. Stephens Jr., points out that "throughout American history, threats to national security have been accompanied by demands for expanded governmental power and the curtailment of civil liberties."<sup>10</sup> In times of national emergency, Lockean values were thus suspended or limited in

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C. Leone and Greg Anrig Jr. eds., *The War on Our Freedoms* (New York: Public Affairs, 2003), 1-22; Stone, *Perilous Times*, 550-559.

<sup>8</sup> John H. Wells, "The Way Forward: Locke or Hobbes?" in David B. Cohen and John W. Wells eds., *American Security and Civil Liberties in an Era of Terrorism* (New York: Palgrave Macmillan, 2004), 232.

<sup>9</sup> Jerel A. Rosati, "At Odds with One Another: The Tension between Civil Liberties and National Security in Twentieth-Century America," in Cohen and Wells eds., *American Security...*, 11.

<sup>10</sup> Otis H. Stephens, Jr., "Presidential Power, Judicial Deference and the Status of Detainees," in Cohen and Wells eds., *American Security...*, 84.

favor of the perception associated with Thomas Hobbes that “the people give consent to a state that provides safety while they in return reduce their overtly expressive exercises of freedom.”<sup>11</sup>

In explaining this tendency, scholars have generally emphasized either one of two schools of thought. The first follows what historian Richard Hofstadter has called “the paranoid style in American politics.”<sup>12</sup> This approach stresses the importance of public *consensus* to accept or even demand restriction of personal freedom to enhance public security. Wartime lack of concern for civil liberty is attributed to social pressure, including a tradition of popular hatred of foreign ideas and ethnic minorities. Thus, historian Robert K. Murray attributed the Red Scare of 1919 to the public “surrender to a tremendous fear complex.”<sup>13</sup> Likewise, historian John Higham maintained that during WWI “steady, uniform subordination of other interests to one national endeavor imposed a heavy psychic strain on a loose-knit, individualistic society.”<sup>14</sup> Similarly, Hofstadter attributes the excesses of Senator Joseph McCarthy to a recurrent thread of a society in which freedom of speech is featured prominently. This paranoid mentality has been a permanent psychological phenomenon, but can, especially through historical catastrophes, such as war, take the form of mass movements.<sup>15</sup> Thus, as Murray holds, wartime “abridgment of civil liberties ... can only be explained on the basis that the public mind was under the influence of a tremendous social delirium.”<sup>16</sup> The same logic is applied to the nonexistence of radical groups outside the mainstream body of American political thought. Sociologist Daniel Bell thus points to a “set of ideological blinders,” which “prevented the American Socialist Party from understanding the society.”<sup>17</sup>

These explanations of wartime repression that stress public anxiety or general consensus, however, as later historians and political scientists have pointed out, downplay the importance of group differences and conflicts in American history. In doing so, they assume government policies as mere *expressions* of public consensus or popular resentment.<sup>18</sup> Social historian William A. Muraskin designates a central problem to works of this “social-control theory”: the tendency to “posit as their subject an imaginary, homogenous group labeled ‘the Americans.’”<sup>19</sup> In doing so, these scholars have neglected the tension between; on the one hand, labor movements and movements of social equality; and on the other, forces that benefit from maintaining the status quo. Thus, Robert J. Goldstein argues that the consensus approach has “significantly downplayed the importance of political repression” in explaining the lack of dissenting voices in American society.<sup>20</sup>

Thus, a second school of thought has developed, which emphasizes *intent* regarding wartime suspensions of civil liberties. These scholars clearly point to conflicting interests in American society, which in times of national emergency leads the American government and other elite groups to pursue and initiate a policy towards the repression of personal liberty. Historian Michael P. Rogin thus argues that McCarthy’s success was based on the attitude of influential elites, while his mass support was mostly the result of Cold War tensions.<sup>21</sup> Likewise, Reginald Schmidt blames the Red Scare of 1919 on the federal government’s concern “to put an effective end to the anarchist’s agitation and to prevent the infant Communist movement in

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<sup>11</sup> Wells, “The Way Forward,” 234.

<sup>12</sup> Richard Hofstadter, “The Paranoid Style in American Politics”, *Harper’s Magazine*, 229:1374 (1964): 77–78.

<sup>13</sup> Murray, *Red Scare*, 32.

<sup>14</sup> Higham, *Strangers in the Land*, 205.

<sup>15</sup> Hofstadter, “The Paranoid Style,” 85–86.

<sup>16</sup> Murray, *Red Scare*, 217.

<sup>17</sup> Daniel Bell, *Marxian Socialism in the United States*, (Princeton: Princeton University Press, 1967), viii–x.

<sup>18</sup> Schmidt, *FBI and the Origins of Anticommunism*, 32.

<sup>19</sup> William A. Muraskin, “The Social-Control Theory in American History: A Critique,” *Journal of Social History* 9:4 (1976): 559.

<sup>20</sup> Goldstein, *Political Repression*, xv.

<sup>21</sup> Michael P. Rogin, *The Intellectuals and McCarthy: The Radical Specter* (Cambridge MA/London: Massachusetts Institute of Technology, 1967), 30–31.

gaining adherents."<sup>22</sup> Goldstein concurrently maintains how wartime political repression has, throughout history, been orchestrated by the government and various elites, as a conscious attempt to destroy organized labor and radical political movements. The amount of repression *depends* on the choice of the government: "the most important and the *only* variable which *must* change for levels of political repression to change, is the attitude of policy-making authorities with regard to political dissidents."<sup>23</sup> Likewise, Law Professor Geoffrey Stone argues that the intensity of the suppression of dissent differed between periods of conflict, mainly because in several of these periods "political leaders *intentionally* inflamed public fear." The experiences of World War I and the Cold War illustrate that "public officials not only *respond* to the demands of a fearful public but sometimes deliberately *manipulate* the public in order to create national hysteria."<sup>24</sup>

In addition to its interests in maintaining the social and economic status quo, many scholars also point to the attempts of the executive government to extend its powers vis-à-vis the other branches of government and the people themselves. For example, historian Alan Brinkley writes: "the history of civil liberties in times of emergency suggests that the government seldom reacts to crises carefully or judiciously ... they pursue preexisting agendas in the name of national security."<sup>25</sup> In this regard law scholar Scott Matheson Jr. recently wrote that each wartime president "pushed executive power in ways that burdened individual rights and crossed the constitutional line."<sup>26</sup>

This study will examine the two theories regarding the wartime restriction of civil liberties during the four periods discussed above. Ultimately it will be argued that executive policies aimed at curbing civil liberties were initiated by the government, but welcomed or encouraged by wide public support.

### Civil Liberties in the United States

In discussing the relation between civil liberties and national security, it is important to define civil liberties. A short account of the main constitutional freedoms of United States citizens is appropriate. The main legislative body establishing basic rights to protect the individual from government oppression is, of course, the *Bill of Rights*. This first series of ten amendments to the U.S. constitution was enacted in 1791 to balance the scales between individual freedom and government power. To the content of this thesis, several of these first ten amendments are of vital importance, primarily those dealing with *Freedom of Speech and Assembly* and *Due Process of Law*.

#### *Freedom of Speech*

The First Amendment to the U.S. Constitution safeguards free expression and assembly to U.S. citizens. It reads as follows:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.*<sup>27</sup>

Often considered the most essential of personal freedoms, the freedom of expression has, in fact, been an ambivalent concept throughout American history. As legal scholars Abraham and Perry

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<sup>22</sup> Schmidt, *FBI and the Origins of Anticommunism*, 299.

<sup>23</sup> Goldstein, *Political Repression*, 558.

<sup>24</sup> Stone, *Perilous Times*, 533-535.

<sup>25</sup> Alan Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 45.

<sup>26</sup> Matheson Jr., *Presidential Constitutionalism*, 153.

<sup>27</sup> Geoffrey R. Stone et al. eds., *Constitutional Law* (New York: Aspen Publishers, 2005), li.

point out, Americans “have been quite willing to curb the ‘dangerous,’ the ‘seditious,’ the ‘subversive,’ the ‘purient,’ the ‘obscene,’ the ‘libelous,’ and a host of other presumably undesirable modes and manners of expression.”<sup>28</sup> Some, such as Supreme Court Justice Hugo Black, have held an absolutist stand on freedom of expression. Justice Black argued that “the phrase ‘Congress shall make no law,’ is composed of plain words, easily understood”, in other words, “the language is absolute.”<sup>29</sup> The Supreme Court, however, as the highest body of law in the United States, has never accepted this absolutist stance and held that interpretation is required to understand the concepts of “abridging” and “freedom of speech.”<sup>30</sup> As shall be discussed in chapters one and two, the Court has for a long time used the “clear and present danger” standard to determine whether the government could outlaw “dangerous” or “seditious”. This standard involved a difficult value judgment of interpretation to determine what speech constituted a danger both clear and present. Even though this approach was augmented and changed by the Court throughout the twentieth century, it remained imperfect.<sup>31</sup> Given the difficulties in interpreting the framers of the constitution’s real intent and the changes history brought to the media and politics since the first amendment was adopted, the exact meaning of freedom of speech has thus continuously changed over time.<sup>32</sup>

Several ideas explain the constitutional protection of free expression. First of all, freedom of speech is necessary to a self-governing society to allow the citizens the authority to make their own judgments about matters of government. Similarly, free expression might be considered indispensable to maintain a political and intellectual climate that includes tolerance, skepticism, personal responsibility, and independence of mind. Moreover, the First Amendment guards against manipulation of public discourse by public officials or the enactment of laws to suppress criticism of government policies. Free expression also preserves the balance between stability and change and fosters the search for the truth in everyday decisions. Finally, the First Amendment preserves the human need for self-fulfillment, to speak one’s mind, express emotions and desires, or to create art, music and fiction.<sup>33</sup> For these reasons, freedom of expression might thus not be absolute, but evidently needs as much Constitutional protection as possible.

Central to this thesis is the state of free speech in wartime. As Law Professor Geoffrey Stone points out, the government of the United States “has never attempted to punish opposition to government policies, *except* in times of war.”<sup>34</sup> Writing in 1964, First Amendment scholar Zechariah Chafee, Jr., argued that freedom of speech is *especially* important during a national emergency. His argument is twofold: first, only through free speech and open discussion is truth discovered and spread, which is of increased importance in wartime; second, suppression causes effects far beyond those agitators targeted, by forcing more moderate forces into silence.<sup>35</sup> More recently, Supreme Court Chief Justice William H. Rehnquist quoted Judge Learned Hand to nuance this contention: “A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few.”<sup>36</sup> Thus, Rehnquist argues “in any civilized society the most important task is achieving a proper balance between freedom and order,” in wartime “*reason and history* both suggest that this balance shifts to some degree in favor of order.”<sup>37</sup> Stone argues that three leading principles frame the central questions

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<sup>28</sup> Henry J. Abraham and Barbara A. Perry, *Freedom & the Court: Civil Rights & Liberties in the United States* (New York/Oxford: Oxford University Press, 1994), 154.

<sup>29</sup> Stone ed., *Constitutional Law*, 1049.

<sup>30</sup> Idem, 1049.

<sup>31</sup> Abraham & Perry, *Freedom & the Court*, 216.

<sup>32</sup> Stone et al. eds., *Constitutional Law*, 1053.

<sup>33</sup> Stone, *Perilous Times*, 7-9.

<sup>34</sup> Idem, 5.

<sup>35</sup> Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1964), 559-562.

<sup>36</sup> Quoted in William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 2000), 222.

<sup>37</sup> Rehnquist, *All the Laws But One*, 222.

regarding limits of free speech in wartime. First, there should be no government paternalism in the realm of political discourse. Second, the government should attempt to punish *actors*, not *speakers*. Third, “low-value speech” needs less protection than other forms of expression. The government thus should not suppress dissent because it thinks it holds wrong values, or censor dissent because it might “cause” other citizens to question or oppose the war. A certain category of expression, however, decided by the Supreme Court to be of only “low” First Amendment value, including obscenity, false statements of fact, commercial advertising, and threats, warrant government regulation.<sup>38</sup>

### *Due Process of Law*

The other main category of individual liberties recurrently violated in times of conflict is comprised of guarantees of “due process of law.” Several chapters of the Bill of Rights established such guarantees, mainly the Fourth, Fifth, Sixth and Eighth Amendments.<sup>39</sup> The Fourteenth Amendment to the U.S. Constitution, adopted in 1868, established the Equal Protection clause to increase the scope of due process guarantees and apply the Bill of Rights to the states.<sup>40</sup> Abraham and Perry deduce eleven concepts from the Bill of Rights, which have generally been viewed basic to American society. In an attempt to provide a full array of due process rights in the United States, required to discuss their fate in times of national emergency, these have been reproduced here:

1. the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures (Fourth Amendment)
2. the issue of a search or arrest warrant only upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized (Fourth)
3. indictment by grand jury for capital or otherwise infamous crime (Fifth)
4. protection from “double jeopardy”, i.e. being prosecuted for the same crime twice (Fifth)
5. immunity from compulsory self-incrimination (Fifth)
6. the right to a speedy and public trial, by an impartial jury, in the state and district wherein the crime was committed (Sixth)
7. the right to be informed of the nature and cause of the accusation (Sixth)
8. the right of the accused to be confronted with adverse and favorable witnesses (Sixth)
9. the right to a compulsory process obtaining witnesses in the accused’s favor (Sixth)
10. the right to counsel in criminal cases (Sixth)
11. protection from excessive bail, excessive fines, and cruel and unusual punishment (Eighth)<sup>41</sup>

Even though these concepts have, in times of peace, been widely supported by the authorities and courts alike, they have not been without criticism. As the due process clauses of the Bill of Rights became increasingly applicable to state law through the Fourteenth Amendment in the 1960s and 1970s, the federal judiciary was increasingly criticized by law enforcement officials for making it too difficult to combat accused violators of the law in their communities.<sup>42</sup> Congress also voiced clear criticism of the Supreme Court’s increased favoring of due process rights in criminal investigations and attempted to limit the jurisdiction of the Court regarding criminal justice, especially through the Omnibus Crime statutes of 1968 and 1970.<sup>43</sup> Other voices

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<sup>38</sup> Stone, *Perilous Times*, 10-11.

<sup>39</sup> See Appendix A: The Bill of Rights.

<sup>40</sup> See Appendix B: The Fourteenth Amendment.

<sup>41</sup> Abraham & Perry, *Freedom & the Court*, 113.

<sup>42</sup> *Idem*, 112, 114.

<sup>43</sup> *Idem*, 115.

supported the notion that the Court had made to many decisions “in favor of criminals”. In an influential 1964 article in *The New York Times Magazine*, for example, it was argued that measures should be taken to amend this trend by constitutional means. These included legislation to permit wiretapping following a court order, rephrasing the requirements for search and seizure, limited extensions of government rights to detain and interrogate, and relaxations of rules regarding the exclusion of improperly obtained evidence.<sup>44</sup> Still, as Abraham and Perry point out, it is not the Court’s duty to “win cases”, but to assure justice is done. Therefore, “in insisting upon strict standards of decency and fairness in governmental lawmaking, law enforcing, and prosecuting, the courts simply perform the historic function of protecting the rights of the individual against the alleged unlawful acts of government.”<sup>45</sup>

Nevertheless, certain aspects of the constitutional rights to due process warrant a continuous assessment of the balance between society’s rights to protect its citizens from criminals and the individual’s rights to fair, decent and objective treatment. Thus far the Supreme Court has, in the main, strictly condemned government abuse. As Justice Brandeis argued in a dissenting opinion of 1928, “to declare that in the administration of the criminal law the end justifies the means – to declare the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution.”<sup>46</sup> Still, U.S. courts also warned not to blindly reach out and grant constitutional claims when they are not due, as not to “convert the constitutional Bill of Rights into a suicide pact.”<sup>47</sup>

Another difficulty regarding rights to due process of law concerns the question whether resident aliens in the United States are entitled to the same rights as U.S. citizens. This question is especially relevant to this thesis, because the increased measures of security regarding enemy and other aliens are often taken at times of war or crisis. Some, such as immigration expert Mark Krikorian, have argued that the presence of resident aliens is “a privilege”, not a “right” they have exercised.<sup>48</sup> The courts, however, have applied the equal protection clause of the Fourteenth Amendment to extend many due process rights to resident aliens. In *Sugarmann v. Dougall* (1973), Supreme Court Justice Blackmun reflected this tendency in his majority opinion, arguing that “it is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause.” Quoting from an earlier case, Blackmun added: “aliens as a class ‘are a prime example of a discrete and insular minority’ ... classifications based on alienage are ‘subject to close judicial scrutiny.’”<sup>49</sup> Based on the Court’s holdings that aliens should not be treated different from citizens and that legislative classifications based on “alienage” are inherently suspect, this thesis regards resident aliens within the United States as entitled to “basic” rights of due process. Therefore, government policy that represses the rights of resident aliens in the United States at times of national emergency will be as critically examined as those measures affecting the rights of U.S. citizens. Together, rights to free speech and due process form the most important safeguards against abuse of government power at times of war or crisis. Accordingly, major attention will be given to the fate of these rights during the periods examined in this thesis.

### *Inter Arma Silent Leges*

Is law silent in times of war?<sup>50</sup> Throughout history, the people of this world have experienced abuse and repression at the hands of their governments during periods of war or crisis.

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<sup>44</sup> Daniel Gutman, “The Criminal Gets the Breaks,” *The New York Times Magazine*, November 29, 1964, 36.

<sup>45</sup> Abraham & Perry, *Freedom & the Court*, 134.

<sup>46</sup> *Idem*, 153.

<sup>47</sup> *Idem*.

<sup>48</sup> Mark Krikorian, “A Privilege or a Right?,” in Amitai Etzioni and Jason H. Marsh eds., *Rights vs. Public Safety after 9/11: America in the Age of Terrorism* (Lanham/Boulder/New York/Oxford: Rowman and Littlefield, 2003), 34.

<sup>49</sup> Stone et al. eds., *Constitutional Law*, 691.

<sup>50</sup> The Latin phrase “inter arma enim silent leges” was originally used by Cicero in 52 B.C., but also frequently used in the above way by Supreme Court Justices to comment on wartime suspensions of the rule of law, for example by

Democracy's rule of law and rule of the people has created a vast bulwark against such abuse, but has not prevented it completely. This thesis strikes at the heart of this persistent issue and contributes to the discussion of liberty and security in democratic society. The importance of debate on this topic can hardly be overstated. Only through meaningful and continuous evaluation can a fitting balance be struck to keep democratic citizens as safe as possible, without damaging their rights to free expression and fair, equal and objective treatment.

Still, some reservations are in place. First of all, it is not this thesis's aim to point out that American society is not "free". Even though, as Robert Justin Goldstein concludes, political repression has "frequently interfered with the free market of ideas in modern American history,"<sup>51</sup> it is not to argue that America is not a democratic state, or that Americans do not adhere to the principle of democracy. To the contrary, what makes this topic so interesting is the constant discussion and debate about the *content* and *meaning* of freedom, which has been lively throughout American history. Additionally, it is way beyond the scope and intent of this thesis to "prove" any standard relation between liberty and security in American history. Instead, it simply suggests, through evaluation of scholarly work and four case studies that certain trends and tendencies have developed. Given the limited scale of this thesis, the lack of access to U.S. government and bureaucracy files in the Netherlands, and the immense scale of this topic, this discussion remains a limited one. Still, by demonstrating historical trends on a small scale, this thesis hopefully contributes to the debate on security vs. liberty, which not only concerns American life, but that of all people living in a "free" society today.

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Chief Justice Rehnquist in *All the Laws but One*, 221; most recently Justice Antonin Scalia used it in his dissenting opinion in *Hamdi v. Rumsfeld* (2004), see Stone et al eds., *Constitutional Law*, 390-392.

<sup>51</sup> Goldstein, *Political Repression*, ix.

## Chapter 1 □ Civil Liberties during the Great War and the Great Red Scare

*“No man has a right to citizenship in a democracy, if ... he is unwilling to fight, or is morally or mentally incapable of fighting, for the defense of that democracy against a powerful alien aggressor.”<sup>52</sup>*

Theodore Roosevelt, 1917

*“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.”<sup>53</sup>*

Justice Oliver Wendell Holmes, Jr., 1919

During the First World War and its aftermath, the United States went through a period of tremendous tumult and social uprising. Part of the institutional and social upheaval was an unprecedented restriction of civil liberties in the name of national security. In this chapter, it will be investigated how such a broad suspension of individual liberty could occur. Two main explanations of wartime and postwar suspension of civil liberties will be examined. The first theory attributes the phenomenon to a bottom-up, grassroots crusade against unwanted elements in American society. This theory has shared both the wartime and postwar waves of repression into a movement called “nativism.” Such nativism had been apparent throughout American history, as a reaction to the great waves of immigration, but resurfaced in its most blatantly hostile form during the Great War. A second theory proposes that, instead, the movement was initiated, enforced, and empowered by a growing federal government. The executive branch and the newly erected federal bureaucracies had their own interests in pursuing an antiradical campaign and were aided by the coinciding interests of the industrial and business establishment.

This chapter will explore both theories and test their respective value at explaining the restriction of civil liberties during the First World War and the anticommunist aftermath. The first part of the chapter focuses on the forms of repression that occurred during the war. The postwar period of repression known as the “Red Scare” is discussed in the second part. Finally, a short conclusion will be provided regarding the fate of civil liberties in the years 1917-1920.

### The Great War

America’s sudden entry into the war in Europe and the breach with the long-standing tradition of isolationism had profound effects on American society. The war increased public demands for conformity and conditioned rising feelings of xenophobia. At the same time, the federal government and bureaucracy expanded rapidly and began to exert greater social control over its citizens. Both developments had severe consequences for the freedom of expression and rights of due process of aliens and American citizens alike, especially those who dissented from the common line. Rising nativism among the American public and outbursts of vigilantism will be discussed here first, followed by a discussion of official repression at the hands of the federal government.

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<sup>52</sup> Theodore Roosevelt, “Letter to Stanwood Menken,” January 10, 1917, in *The Days of Armageddon: 1914-1919*, ed. Eltin E. Morison, vol. VIII of *The Letters of Theodore Roosevelt*, ed. Elting E. Morison et al, (Cambridge MA: Harvard University Press, 1954), 1146.

<sup>53</sup> *Schenck v. United States*, 249 U.S. 47 (1919)

### *Coherence, Anti-Hyphenism and German-Americans*

The war sharply increased demands for loyalty, which eventually crystallized into an Americanization campaign based around the assumption that the United States had a Protestant and Anglo-American core culture. The concept of "Hyphenism" suggested a dual loyalty, making hyphenates a clear target of repression. President Wilson himself cast doubt on the loyalty of hyphenates by declaring that "you cannot become Americans if you think yourselves as groups."<sup>54</sup> Because of their ties to the main enemy in the war, German-Americans became the main target of such anti-hyphenism.<sup>55</sup> Although most German-Americans had perfectly assimilated into American society during the late nineteenth and early twentieth centuries, the war completely changed the average Anglo-American's attitude towards their compatriots of German descent.<sup>56</sup> Wartime nationalistic fears that America was gravely divided on the loyalty issue caused a dramatic shift in public perception of German Americans. The anxiety towards German-Americans hence took the blurred form of an assault on the "hyphenated American," the immigrant with divided loyalties, which legitimized their political repression as a group.<sup>57</sup> Former President Theodore Roosevelt, for example, called the hyphenated Americans "those evil enemies of America," and exclaimed that German-Americans in specific "have shown that they are not Americans at all."<sup>58</sup>

The war sharply increased the importance of the Americanization campaign and gave rise to a number of organizations bent to forge the American people into an utterly loyal and prepared nation. Among them were the National Security League (NSL), the American Defense Society (ADS), and the American Protective League (APL). Such organizations hammered away at the need for "preparedness" for national defense, during the period between the onset of the war in Europe and American entrance into it. Their efforts included denunciations of organizations stressing so-called foreign influences, which included labor unions as well.<sup>59</sup> Next to these patriotic organizations the two most distinguished figures in American public life offered their influence to the Americanization movement. Theodore Roosevelt became a leader of the movement and believed that "unless our people are good Americans first, America can accomplish little or nothing worth accomplishing."<sup>60</sup> President Woodrow Wilson submitted to the movement when the war and the loyalty issue became an important part of his presidential campaign in 1915.<sup>61</sup>

With America's entry into the war in April 1917, German-Americans came to be regarded as agents of an enemy state and *nativist rhetoric* turned into *repressive action*.<sup>62</sup> According to John Higham, the declaration of war led to the formation of a new nativist ideology. Out of the preparedness, Americanization and anti-hyphenate movements emerged the expression "100 per cent Americanism". "100-percenters" demanded total loyalty, neatly combining the wartime need for conformity with the spirit of nationalism. To 100-percenters, the war was all-important and only a total, one directional dedication to the singular national objective of winning the war could prevent disharmony and inner conflict. To achieve such unity, the 100-percenters used the crusading rhetoric of imperialism and Progressivism that had been so dominant in the prewar

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<sup>54</sup> Dale T. Knobel, *America for the Americans: The Nativist Movement in the United States* (New York: Twayne Publishers, 1996), 244.

<sup>55</sup> John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick/London: Rutgers University Press, 1988), 195-196.

<sup>56</sup> David H. Bennett, *The Party of Fear: From Nativist Movements to the New Right in American History* (Chapel Hill/London: University of North Carolina Press), 183.

<sup>57</sup> Higham, *Strangers in the Land*, 197-198.

<sup>58</sup> Theodore Roosevelt, *Fear God and Take Your Own Part* (London/New York/Toronto: Hodder and Stoughton, 1916), 138-139.

<sup>59</sup> Knobel, *America for the Americans*, 245-246.

<sup>60</sup> Roosevelt, *Fear God*, 344-345.

<sup>61</sup> Higham, *Strangers in the Land*, 198-199.

<sup>62</sup> Bennett, *The Party of Fear*, 184.

decade.<sup>63</sup> Theodore Roosevelt, who had been the personification of both movements, thus exclaimed: “there can be no citizenship on the 50-50 basis; there can be no loyalty half to America and half to Germany”, American citizens “must be Americans, and nothing else.”<sup>64</sup>

100 per cent Americanism especially struck at the German minority. Although sabotage ceased with the flight of official German agents days after American entry into the war, and although German-language newspapers embraced a blatant patriotic stance, the 100 per centers were hardly satisfied.<sup>65</sup> According to Bennett, new nativist fears arose, including that German-Americans would poison food, spoil medical supplies and undermine support for the war effort. As a result, some bizarre events occurred, including the disappearance and renaming of German dishes from restaurants – sauerkraut became liberty cabbage – and the refusal on account of musical organizations to play Wagner, Schubert or Beethoven.<sup>66</sup> 100 per centers assured that America would never be safe as long as German culture could be expressed, and called for the suppression of German-language newspapers.<sup>67</sup> More seriously, German-Americans were assaulted across the country. Perhaps the perpetrators had followed Theodore Roosevelt’s advice to “treat every American of German origin as a good American, if he so acts; and if he shows himself disloyal, treat him as you would any other disloyal man, shooting him or hanging him, if that is possible.”<sup>68</sup>

As the conflict evolved the violence came to include organized repression at the hands of vigilante groups such as the earlier mentioned patriotic societies.<sup>69</sup> Especially the American Protective League gained notoriety as a quasi-official ally of the federal government’s Justice Department.<sup>70</sup> The 100-percenters’ zeal to obliterate disloyalty culminated into the lynching of a German alien in southern Illinois by a mob of miners in April 1917.<sup>71</sup> A year later, near St. Louis, Missouri, a mob seized Robert Prager, German by birth, bound him with an American flag, dragged him barefoot through the streets and eventually lynched him to the cheers of five hundred so-called patriots. Prager could hardly be considered disloyal, as he had attempted to enlist into the American Navy but had been rejected for medical reasons. In the subsequent trial, the mob leaders were acquitted of all charges.<sup>72</sup> The *Washington Post* commented that although lynching was an unwanted excess, the affair proved to be a “healthful and wholesome awakening” in the country.<sup>73</sup> Generally, the anti-German drive, however, tended to exaggerate in its emotional, messianic emphasis on imminent acts of sabotage and aggression.<sup>74</sup> In reality, according to Knobel, German-American “disloyalty – let alone sabotage – turned to be a nonissue.”<sup>75</sup> Sadly, acts of anti-German violence were only the first incidence of the authorities’ refusal to act against vigilantism and protect the constitutional rights to life and due process of American citizens during the war.

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<sup>63</sup> Higham, *Strangers in the Land*, 204-207.

<sup>64</sup> Roosevelt, “Letter to Stanwood Menken,” 1144.

<sup>65</sup> Higham, *Strangers in the Land*, 207.

<sup>66</sup> Bennett, *The Party of Fear*, 184.

<sup>67</sup> Higham, *Strangers in the Land*, 208.

<sup>68</sup> Roosevelt, “Letter to Ralph Montgomery Easley,” in *The Days...*, ed. Morison, vol. VIII of *The Letters of Theodore Roosevelt*, ed. Morison et al, 1207.

<sup>69</sup> Bennett, *The Party of Fear*, 184.

<sup>70</sup> Bennett, *The Party of Fear*, 184; Knobel, *America for the Americans*, 245.

<sup>71</sup> Higham, *Strangers in the Land*, 209.

<sup>72</sup> David M. Kennedy, *Over Here: The First World War and American Society* (New York/Oxford: Oxford University Press, 1980), 68.

<sup>73</sup> “Stamping Out Treason,” *The Washington Post*, April 12, 1918.

<sup>74</sup> Higham, *Strangers in the Land*, 199.

<sup>75</sup> Knobel, *America for the Americans*, 246.

### *Foreign Ideologies*

Suspicion of German-Americans thus waned, but the 100 per cent Americanism movement managed to keep its momentum by transferring its targets from those German-Americans who were "against us", to others who were not "for us". Wartime demands for cultural conformity led to a vigorous effort to Americanize Italians and Slavs and any other groups considered "foreign".<sup>76</sup> Moreover, suspicion, intolerance and vigilantism could be aimed at anyone who deviated from the norm, including anyone who opposed or questioned the war.<sup>77</sup> In August 1917, vigilantes seized minister and future Congressman Herbert S. Bigelow, who was about to address a peace gathering near Cincinnati. The "patriots" took him to the woods and stripped him to his waist. A man in white robes then lashed his back with a whip "in the name of the poor women and children of Belgium."<sup>78</sup> The opinion to oppose war, guaranteed by the First Amendment, was thus hardly respected in American society during World War I, nor was it actively protected by state or federal powers.

Among these opponents of the war, the radical voices were most outspoken and would eventually become the most important target of nativist action when the war ended.<sup>79</sup> The seeds for such a development were already sown during the war, despite the lack of success of radical movements. Even after America became involved in the war in Europe they could not seriously infer with the democratic system. The Socialist Party had no more than 100,000 members out of a population of over 90 million people. The American nation provided an extremely unlikely case scenario for revolutionary socialism to develop. Most people were far too individualistic and optimistic to follow a dogmatic doctrinaire model of historical development.<sup>80</sup> Nonetheless, radical and revolutionary utterances undermined demands for complete loyalty and the solidarity on which the preparedness movement was based. Furthermore, the most outspoken voices against American preparedness came from the left-wing camp.<sup>81</sup>

When the United States declared war, all ethnic and religious groups joined the war effort, but radicals opposed it. As a consequence, a national attack on radicals, supplementing the anti-German hysteria, formed during 1917 and 1918. All radicals were heaped into the same category: the public mind lost its ability to distinguish and the general press, courts and patriotic societies now viewed *all* radicals as traitors. Robert Murray regards this development as a nationwide surrender to a suffocating fear complex: the wider public lost its faith in the ability of the American democratic system to sustain itself without having to use force against minor elements of opposition.<sup>82</sup> According to Higham, the war reversed conditions which had prevented fear of revolution during the Progressive period. Enthusiasm for social reform had confined anti-radicalism, but the war put such an emphasis on stability that any sort of dissent was severely condemned. Liberals who had proposed reform before the war suspended their qualms and supported the war effort to preserve harmony and coherence. Only the most radical voices remained to oppose the war and thus became an easy target for those demanding full national coherence.<sup>83</sup>

Moreover, a "bizarre effort" took place to connect the Socialist Party with pro-German sentiments.<sup>84</sup> Higham points out that "the attack on radicalism was thoroughly interwoven with

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<sup>76</sup> Idem., 246-247.

<sup>77</sup> Kennedy, *Over Here*, 68.

<sup>78</sup> Idem., 68, 73.

<sup>79</sup> Bennett, *The Party of Fear*, 184-185.

<sup>80</sup> Robert K. Murray, *Red Scare: A Study of National Hysteria 1919-1920* (New York/Toronto/London: McGraw-Hill Book Company, 1964), 31.

<sup>81</sup> Higham, *Strangers in the Land*, 202.

<sup>82</sup> Murray, *Red Scare*, 32.

<sup>83</sup> Higham, *Strangers in the Land*, 218-219.

<sup>84</sup> Bennett, *The Party of Fear*, 185.

the anti-German hysteria.<sup>85</sup> This equation lay in the line of anti-radical thought that assumed class warfare as a foreign import and was further established by the tendency to see the hand of the demonic Kaiser in any disruption of American unity.<sup>86</sup> Public figures reinforced the connection. Theodore Roosevelt, for example, wrote that America should be “warring against the Huns within our gates,” including “the Socialists.”<sup>87</sup> As communism entered the world scene as a political force *during* WWI, American thinking on bolshevism was largely shaped by the emotional responses to the conflict. The Bolsheviki were immediately regarded as agents of the Kaiser and their insistence upon the world-wide overthrow of capitalism and the abolition of private property proved especially horrifying to the average American. Americans were thus from the onset extremely hostile towards Bolshevism. Conversely, anyone who opposed or hampered the war effort was suddenly labeled a “Bolshevik.”<sup>88</sup> The anxieties of war and the tales of revolution turned foreign “oddities” like Bolshevism and Socialism into frightful, real ideologies. The links between “foreign”, “socialism”, “Bolsheviki” and “anti-war” were then seemingly confirmed by the new Russian government’s decision to pull out of the war, leading to a widespread condemnation of “hyphemism” as damaging the American war effort.<sup>89</sup> Hence communists, from the start, were hardly regarded as entitled to the same rights and privileges as other Americans, and neither were any other leftwing “radicals”.

#### *The Fate of the I.W.W.*

The Americanization campaign was thus logically extended to the Industrial Workers of the World (IWW), also referred to as “Wobblies”, an organization of anarcho-syndicalists who advocated class warfare in their public expressions.<sup>90</sup> The IWW had been a popular target of harassment and persecution throughout the early twentieth century, despite its limited support and influence, not only because of its revolutionary nature, but mainly because it insisted that the American way of life was a hoax.<sup>91</sup> Such repression intensified, when, in the Western states, militant Wobblies took a strong anti-war stand and enforced it with calls for sabotage and a condemnation of what they claimed was an anti-union conspiracy among the capitalists and the U.S. government.<sup>92</sup>

During the war, the IWW produced almost all of the limited anti-war propaganda in the United States, especially after the Socialist Party had been pressured into silence by the Americanizers. The IWW claimed that class loyalty transcended any national loyalty and called for strikes in the copper mines and northwestern lumber camps in the summer of 1917. In doing so, they presented the clearest challenge to the spirit of nationalistic conformity. Out of the conviction that the Wobblies were acting on behalf of the German Kaiser, the middle-class public reacted extremely violently. Local sheriff’s posses and armed citizen’s committees expelled 1300 miners who were believed to be Wobblies from Arizona. At the California state border an armed mob threatened to shoot another group of expelled miners.<sup>93</sup> On August 1, 1917, a group of vigilantes in Butte, Montana seized Frank Little, an IWW official involved in the local Copper mines. After he was pummeled into the streets, Little was dragged by an automobile until his

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<sup>85</sup> Higham, *Strangers in the Land*, 219.

<sup>86</sup> *Idem*, 219.

<sup>87</sup> Roosevelt, “Letter to Theodore Roosevelt, Junior,” in *The Days...*, ed. Morrison, vol. VIII of *The Letters of Theodore Roosevelt*, ed. Morison et al, 1245.

<sup>88</sup> Murray, *Red Scare*, 34.

<sup>89</sup> Knobel, *America for the Americans*, 249.

<sup>90</sup> Bennett, *The Party of Fear*, 185.

<sup>91</sup> Murray, *Red Scare*, 31; Bennett, *The Party of Fear*, 185.

<sup>92</sup> Kennedy, *Over Here*, 70.

<sup>93</sup> Higham, *Strangers in the Land*, 219.

kneecaps were scraped off and subsequently hanged from a railroad bridge.<sup>94</sup> Throughout the Western states vigilante groups formed, urging for more “necktie parties”.<sup>95</sup>

As the war progressed, a mixture of vigilantes, sheriffs’ posses and federal agents intensified the assault on the IWW. Wobblies were routinely beaten, tarred and feathered, or deported by freight cars into the desert.<sup>96</sup> Western State legislation severely reduced the scope of freedom of assembly by passing “criminal syndicalism” laws that punished membership of any organization that might advocate violence, aimed primarily at the IWW. Attorney General Thomas W. Gregory responded with the order to intern all German aliens found to be IWW members. Still, the public call for harsher action continued and on September 5, 1917, Gregory started a massive campaign of repression. Justice Department agents raided every IWW hall in the country, confiscated all revolutionary literature they could find and arrested over three hundred Wobbly and other radical leaders under the Espionage Act.<sup>97</sup> These men were denied their rights to due process of law, in addition to being persecuted for their associations and opinions, even though they had committed no overt act of disloyalty or any other federal crime.

Attorney General Gregory kept insisting that Germany funded the IWW, which was echoed in newspapers such as the *New York Times* that called the lynching of Frank Little in Montana “a deplorable and detestable crime,” but also claimed that “the IWW agitators are in effect, and perhaps in fact, agents of Germany.”<sup>98</sup> What Bennett attributes to wartime hysteria, turned the unfounded connection between “German” and “radical” into nationwide persecution, resting on prewar nativist feelings.<sup>99</sup> At the same time, the Justice Department increasingly detained German aliens at internment camps on the basis of the executive powers of the President. By 1918, 6300 enemy aliens had been arrested and the Justice Department by then also stripped “disloyal” German-Americans of their citizenship. Moreover, as its own staff was quite limited in numbers, the department encouraged secret societies of volunteer detectives, including the American Protective League, to engage in loyalty testing. APL “operatives” spied on people’s opinions, reporting seditious and disloyal expressions comprised of gossip and misinformation. League departments became quite a menace to their own communities and could not always be kept in check. In New York, for example, they formed a major part of a mass roundup of draft evaders. Joining the League meant participating in an exciting, secret, oath-bound society, which more or less operated according to the law and applied the authority of the national government. Thus, according to Higham, “any red-blooded patriot could become a policeman.”<sup>100</sup>

Such utter disregard for the Wobbly form of freedom of expression was publicly condoned by local and federal authorities, mostly because the IWW’s ideology so contrasted mainstream American thought. According to Bennett, Wobblies “had been guilty of the unpardonable sin of questioning the American dream; now they could be persecuted for un-American activities in wartime.”<sup>101</sup> The federal government thus gave its approval to such wide scale repression of the freedom to express oneself or even think, in any way which deviated from the norm. Together, Knobel argues, the anti-radical and anti-hyphen wartime efforts closely approached the classic nativist campaign to turn what it meant to be an American into a fixed, Anglo-American, protestant meaning.<sup>102</sup>

To a large extent, the climate of national hysteria, which proved so dismal to the state of civil liberties during the war, was produced by the sudden and rigid imposition of war upon American society. Woodrow Wilson had secured his second term as president by campaigning on

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<sup>94</sup> Kennedy, *Over Here*, 73.

<sup>95</sup> Higham, *Strangers in the Land*, 219.

<sup>96</sup> Bennett, *The Party of Fear*, 186.

<sup>97</sup> Higham, *Strangers in the Land*, 220.

<sup>98</sup> “The I.W.W.,” *New York Times*, Editorial, August 4, 1917.

<sup>99</sup> Bennett, *The Party of Fear*, 186.

<sup>100</sup> Higham, *Strangers in the Land*, 210-211.

<sup>101</sup> Bennett, *The Party of Fear*, 185.

<sup>102</sup> Knobel, *America for the Americans*, 247.

the anti-war ticket, proposing that America should be neutral “in thought as well as action.”<sup>103</sup> Then, after Wilson was reelected, public support had to be mobilized for a total war effort unprecedented in American history. To many Americans the sudden need to justify American involvement changed the enemy into a dehumanized caricature of evil, against whom repression was easily justified.<sup>104</sup> The steady subordination of all personal and group interests to the national endeavor imposed heavy psychic strains on American society. The strict demand for conformity obligated all citizens into serving the nation, scolding the public for thinking too much about their individual rights and privileges in the past. Logically civil liberties were thus not held in high esteem during the war, especially regarding unpopular minority groups.<sup>105</sup>

### The Government as Forerunner

Despite the public demands for anti-German and anti-radical action and the incidences of vigilantism, the federal government played an at least as important role in the wartime suspension of free speech and due process of law. Through legislation aimed to repress dissent, nativism became the *official policy* of the American government during the First World War.<sup>106</sup> In fact, it may be argued that government initiated a policy of repression, independent of any public cries for loyalty and national coherence. David Kennedy thus argues that the Woodrow Wilson was much less concerned about civil liberties than his progressive image would suggest.<sup>107</sup> Scott Matheson even concludes that “the Wilson administration aggressively punished dissent.”<sup>108</sup> In addition, as Robert Goldstein points out, “the severe governmental repression which developed did not constitute an irrational response.”<sup>109</sup> The role of the government, not as a reaction to public pressure, but as a harbinger to the wide scale suspension of civil liberties during the war, shall be discussed next.

### *The Creation of Favorable Public Opinion*

The Wilson administration had been instrumental in kindling the flames of patriotism, nationalism and xenophobia. President Wilson had waited a long time to declare war on Germany, as he was convinced that America would first need to be led to “a single way of thinking.”<sup>110</sup> By attempting to rally Americans around the national principles of liberty, democracy and self-determination, he could give the American people a reason to go to war and to achieve political coherence.<sup>111</sup> Therefore, the administration deliberately mobilized emotions and ideas to forge a favorable public opinion. After the war broke out in Europe, Wilson increasingly sought to awaken public emotions and rally mass support for the Great War.<sup>112</sup> The President argued that the struggle against authoritarianism abroad would inspire a movement for justice at home. Walter Lippmann, the famous American author, voiced the faith that many

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<sup>103</sup> Woodrow Wilson, *The Papers of Woodrow Wilson*, eds. Arthur S. Link et al, vol. 30 (Princeton: Princeton University Press, 1966), 394.

<sup>104</sup> Bennett, *The Party of Fear*, 186.

<sup>105</sup> Higham, *Strangers in the Land*, 205-207.

<sup>106</sup> *Idem.*, 221-222.

<sup>107</sup> Kennedy, *Over Here*, 88-98.

<sup>108</sup> Scott M. Matheson, Jr., *Presidential Constitutionalism in Perilous Times* (London/Cambridge, MA: Harvard University Press, 2009), 53.

<sup>109</sup> Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Cambridge, MA: Schenkman Publishing, 1978), 107.

<sup>110</sup> Wilson, *The Papers of Woodrow Wilson*, ed. Link, vol. 41, 593.

<sup>111</sup> Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (Princeton/Oxford: Princeton University Press, 2001), 89.

<sup>112</sup> Kennedy, *Over Here*, 46-48

people had in Wilsonian idealism, as “we who have gone to war to insure democracy in the world will have raised an aspiration here.”<sup>113</sup>

Wilson, however, also believed that civil liberties needed to be limited in wartime.<sup>114</sup> This conviction was implemented by two disparate strategies: pro-war propaganda and repression of dissent. The most important propaganda instrument to form a coherent public opinion was the Committee on Public Information (CPI), which became America’s “ministry of propaganda” during the war. It was designated to promote and sustain the radical change in public opinion from an anti-militaristic democracy to a nation organized for war.<sup>115</sup> The official philosophy of the CPI was “faith in democracy... faith in the fact,”<sup>116</sup> and its director, George Creel, saw the war as a “product” that he was determined to sell to the public.<sup>117</sup> The CPI’s *Official Bulletin* showed Creel’s commitment to information in order to win the fight over the hearts and minds of his fellow Americans. The idea for the “Four-Minute Men”, who made speeches across the country to incite passion for the war, was born out of similar convictions. In the course of the war, the CPI also distributed about 75 million copies of pamphlets in which it explained America’s role in the war. It used 6000 press releases to “help” the newspapers cover the war events and it sponsored expositions about the war in over twenty cities.<sup>118</sup> At its peak the committee employed 150,000 people spread across many divisions, including a Film Division, a Labor Publications Division, a Pictorial Publicity Division and a Syndicate Features Division, which employed novelists to write articles in support of the war<sup>119</sup>.

The CPI thus became deeply involved in American society and its work affected almost every American. It became the main instrument to popularize the greatly extended engagement of the federal government into the lives of individual Americans.<sup>120</sup> Creel may have never engaged himself in coercion, but his organization moved far away from the original informational mission and became a true propaganda machine. It encouraged people to report compatriots who spread negative stories about the war or called for peace. The committee also promoted movies such as *The Prussian Cur* and *The Kaiser, the Beast of Berlin* and exhorted “Four-Minute Singing” in order to bring patriotism to a level of “white heat.”<sup>121</sup>

The Committee also enlisted journalists and writers to spread government policy, presented as intellectuals’ opinions. An article by journalist and novelist Booth Tarkington called “Why Americans are Pro-Ally”, for example, explained how “history” was pro-ally and how the war was caused by the Germans.<sup>122</sup> Gertrude Atherton, another famous novelist, was asked to write propaganda articles to stimulate enlistment into the army. Her writings proved merciless to the Germans: “Better to extirpate the whole breed, root and branch.”<sup>123</sup> Logically, few Americans could discern between the German enemy overseas and the German people, including the model immigrants at home. An editorial in *North American Review* of February 1918 hence asserted that “our duty is to kill Germans,” no matter what, while calls for remorse by “easy going, complacent Americans” failed to realize that war meant “that it is the lives of their men against the lives of Germans.”<sup>124</sup> Such hatred and simplification was an inevitable product of the propaganda

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<sup>113</sup> Walter Lippmann, “The World Conflict in its Relation to American Democracy,” in Ross F. Collins ed., *World War I: Primary Documents on Events from 1914 to 1918*, (Westport, CT: Greenwood Press, 2007), 240-241.

<sup>114</sup> Matheson, Jr., *Presidential Constitutionalism*, 53.

<sup>115</sup> Peter Buitenhuis, *The Great War of Words: British, American and Canadian Propaganda and Fiction, 1914-1933* (Vancouver: University of British Columbia Press, 1987), 68.

<sup>116</sup> Kennedy, *Over Here*, 59-60.

<sup>117</sup> Buitenhuis, *The Great War of Words*, 69.

<sup>118</sup> Kennedy, *Over Here*, 61.

<sup>119</sup> Buitenhuis, *The Great War of Words*, 71.

<sup>120</sup> Idem, 68.

<sup>121</sup> Kennedy, *Over Here*, 61-62; Stone, *Perilous Times*, 153-155.

<sup>122</sup> Buitenhuis, *The Great War of Words*, 76.

<sup>123</sup> Idem., 76-77.

<sup>124</sup> “We Must Kill to Save,” *North American Review*, February 1918, in Collins ed., *World War I*, 242-243.

produced by the Committee on Public Information.<sup>125</sup> During the war, the government came to represent an imperious concern for the “correct” opinion and created a gigantic propaganda machinery to shape the mind of the people. In doing so it condemned anyone who thought differently and justified the repression of incommpliant opinions.<sup>126</sup>

Pushed to embrace a pervasive kind of patriotism, vigilante action and communal violence was but a small step for a people influenced by a generation of progressive calls to fight decay and corruption through direct political engagement. Wilson repeatedly condemned vigilantism, but never realized his own role in creating a climate in which hysteria could ignite. The crisis of national security allowed persuasion to reign supreme over law and permit pervasive kinds of repression in the name of the common cause, some of it conspired by officials of the law.<sup>127</sup> As a result, concepts of individual liberties, especially regarding due process of law and free speech, collapsed among *all* Americans except those directly hurt by the repression.<sup>128</sup>

### *Framing Dissent*

The government’s propaganda efforts to create a uniform public opinion were hindered by radical anti-war sentiments. Although radical voices hardly constituted any threat of revolution, they might have spread animosity that encumbered the war effort. The Wilson administration therefore began a comprehensive program of repression.<sup>129</sup> Especially unwanted groups on the fringes of American society were easy targets of repression, such as foreign immigrants and the labor movement. As the effort to create absolute unity seemed most clearly obstructed by the millions of unassimilated immigrants in the United States, the government yielded to the use of repression to “Americanize” such newcomers.<sup>130</sup> In his 1915 state of the union speech, President Wilson asserted that those “creatures of passion, disloyalty and anarchy must be crushed out.”<sup>131</sup> On the same day as the speech, a man in Wyoming who called out “Hoch der Kaiser” was hanged and cut down while still alive to kneel and kiss the American flag. 100 per-centers pressed the state to help them repress and exclude immigrants, and in 1917 Congress sustained over the President’s veto to demand a literacy test for future immigrants.<sup>132</sup>

American labor met a similar fate. Lippmann had still voiced hope in 1917 that American engagement in the world war would “turn with fresh interests to our own tyrannies – to our Colorado mines, our autocratic steel industries, our sweatshops and our alums.”<sup>133</sup> Lippmann could hardly have been more mistaken: the war years saw big business and the federal government bundle their powers to jointly deliver a savage blow to the little labor resistance they faced. Labor organizations in America had never been as well organized or ideologically rigid as their European counterparts, but could still make erratic disturbances to the market before the war. Many businessmen thought these stirrings to be menacing and tried to enlist the government in their efforts to destroy organized labor. The government, in turn, worried that workers would be naturally inclined towards the Socialist Party and its idea that the war was a “capitalist’s quarrel”. Such exclamations struck at the administration’s efforts to picture the war as a popular, democratic struggle against autocracy and seemed a threat to the mobilization of industry to the war effort. To the business elites, however, the socialists’ pacifism provided a golden opportunity to brand *all* labor agitation as anti-American, disloyal and traitorous.<sup>134</sup>

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<sup>125</sup> Buitenhuis, *The Great War of Words*, 77.

<sup>126</sup> Kennedy, *Over Here*, 62-63.

<sup>127</sup> *Idem.*, 74-75.

<sup>128</sup> Goldstein, *Political Repression*, 134.

<sup>129</sup> *Idem.*, 107.

<sup>130</sup> Kennedy, *Over Here*, 66-67.

<sup>131</sup> Woodrow Wilson, “Third Annual Message: State of the Union Message,” December 7, 1915, <http://www.presidency.ucsb.edu/ws/index.php?pid=29556>, retrieved 7-12-2009.

<sup>132</sup> Kennedy, *Over Here*, 68-69.

<sup>133</sup> Lippmann, “The World Conflict”, 241.

<sup>134</sup> Kennedy, *Over Here*, 70.

The employers were aided in their efforts by the conservative American Federation of Labor. In 1916, its president, Samuel Gompers, had already declared labor's support for the war and sought a solid cooperation pact between the government, capital and labor. He believed that the socialists' anti-war issues would divide the working class, force capital into a stiffer stance and pit the government against the workingmen.<sup>135</sup> His AFL and the government thus made a wartime deal, by which the AFL supported the war aims, while the government supported labor policies that would benefit the AFL. Together they joined into an alliance to destroy radical labor groups such as the Socialist Party and the IWW.<sup>136</sup> Together the forces of government, big business and Gompers' moderate form of labor representation sealed the fate of labor during the war. As a result, the disparate issues of welfare and loyalty could not be kept separately and conservative capitalists were able to crush legitimate labor demands through claims of disloyalty.<sup>137</sup>

### *The Espionage and Sedition Acts*

The general climate of repression was set up among the highest levels of federal government. President Wilson held little tolerance for criticism, as he assured in his speech to Congress requesting the declaration of war: "if there should be disloyalty it will be dealt with a firm hand of stern repression."<sup>138</sup> Already in 1915, the president had urged Congress to enact "adequate federal laws" to deal with those alien radicals "who have poured the poison of disloyalty into the very arteries of our national life."<sup>139</sup> Shortly after the declaration of war, the administration presented its Espionage Act to Congress. As proposed, it would have declared it unlawful for any person in time of war to publish information declared by the President as "useful to the enemy", to convey false reports, to interfere with the war operation, or to cause "disaffection in the military" and would have granted the postmaster general power to exclude any treasonable or "anarchistic" content from the mails.<sup>140</sup> Despite Wilson's appeal that censorship over the press was "absolutely necessary to the public safety,"<sup>141</sup> Congress protested vehemently against such limitations on the freedom of the press and the possibility to criticize the government. Eventually, the Espionage Act of 1917 was therefore enacted with various amendments and with the press censorship provision eliminated.<sup>142</sup> As it was signed into law, it nevertheless made it a crime to "willfully obstruct the recruiting or enlistment service of the United States."<sup>143</sup>

The Espionage act was construed strictly by federal judges to imprison anyone who condemned the war from a religious or socialist point of view, despite Congressional concerns about free speech.<sup>144</sup> The Justice Department, however, still believed it to be a compromise, and in early 1918, Attorney General Gregory asked Congress to amend the act as to prohibit any person to interfere with the war effort and to more clearly outlaw any attempts to obstruct recruitment and enlistment.<sup>145</sup> His proposals disallowed any disloyal, profane or abusive language about the form of government of the United States, the flag, the uniforms of the Army or Navy.<sup>146</sup> The Senate Judiciary Committee, however, increasingly criticized among the rising war fevers, gave the Attorney General more than he had bargained for: the draconian Sedition Act.

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<sup>135</sup> Kennedy, *Over Here*, 71-73.

<sup>136</sup> Goldstein, *Political Repression*, 121.

<sup>137</sup> Kennedy, *Over Here*, 71-73.

<sup>138</sup> Stone, *Perilous Times*, 137.

<sup>139</sup> Wilson, "Third Annual Message."

<sup>140</sup> *Idem*, 146-147.

<sup>141</sup> "Wilson Demands Press Censorship," *New York Times*, May 23, 1917.

<sup>142</sup> Stone, *Perilous Times*, 151.

<sup>143</sup> Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Carbondale/Edwardsville: Southern Illinois University Press, 1999), 14.

<sup>144</sup> Higham, *Strangers in the Land*, 210; Bennett, *The Party of Fear*, 186.

<sup>145</sup> Stone, *Perilous Times*, 184.

<sup>146</sup> Kennedy, *Over Here*, 78-80.

This statute introduced a twenty year prison sentence for disloyal opinions or undignified references to the government or the American flag.<sup>147</sup> The Sedition Act answered to the growing feelings of suspicion towards political organizations outside the mainstream political spectrum by criminalizing public criticism of the American government system.<sup>148</sup> In doing so, it strictly reduced the scope of the First Amendment towards a form of freedom of expression limited to those within the body of mainstream political thought. According to law professor Stone, the Sedition Act therefore accounted for "the most repressive legislation in American history."<sup>149</sup>

A third piece of wartime legislation, the Immigration Act of February 1917, allowed for the exclusion of people who belonged to revolutionary organizations and the deportation of alien individuals who expressed revolutionary views at any time after their entry in the United States. The immigration law revealed how ancient feelings of xenophobia interacted with new anxieties of hyphenated loyalties and a fear of radicalism in wartime.<sup>150</sup> During the war, deportation gained a new significance as a means to rid the nation of people with divided loyalties and thus came to fit the ideals of the 100 per cent Americanism. The new immigration law, however, proved to be much harder to put into action than originally believed. Therefore the Justice and Labor Departments together asked Congress for a new law to deport any alien on the simple grounds of belonging to an organization that advocated revolt. Congress passed the bill in October with hardly any opposition, setting the stage for the infamous "guilt by association" clause as a test for exclusion, deportation or imprisonment.<sup>151</sup>

### *The Administration's Official Repression*

Several of Wilson's cabinet members stretched the new legislation to its limits. The Department of Justice and the Postmaster General went far beyond what Congress had wished for in their enforcement of the Espionage Act.<sup>152</sup> Postmaster General Albert S. Burleson was authorized by the Espionage Act to bar any material from the mails that would advocate treason, insurrection or resistance to the law. Burleson used his new powers with zeal and together with Attorney General Gregory started to take mailing privileges away from numerous journals that encouraged insubordination by doubting the motives of the government. Congress extended the Postmaster General's powers with the Trading-with-the-Enemy Act in 1917, despite Burleson's already strict application of censorship laws. The Act obliged foreign-language newspapers to present any articles referring to the government or any belligerent power to the Post Office Department before publishing. Thanks to Burleson's diligent use of his new powers many of the publications either moved to full support of the government or shut their doors altogether. Together the Post Office and Congress thus institutionalized the repression of free press in wartime. The President made a weak attempt to constrict his secretary, but to little avail.<sup>153</sup> Burleson continued to suppress the constitutionally protected the free press: he announced that newspapers "cannot say that this Government is the tool of Wall Street or of munitions makers", excluded anything from the mail that might interfere with enlistment and banned publications ranging from Thorstein Veblen's *Imperial Germany and the Industrial Revolution*, to Lenin's *Soviets at Work* to magazines such as *the Nation* and the *Gaelic American*.<sup>154</sup>

Attorney General Thomas W. Gregory showed little more respect for civil liberties. He called for a rigorous application of the Espionage Act on numerous occasions. He reprimanded a judge who assessed that a man who had called the President a "tool" should be acquitted and

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<sup>147</sup> Higham, *Strangers in the Land*, 210; Bennett, *The Party of Fear*, 186.

<sup>148</sup> Knobel, *America for the Americans*, 247.

<sup>149</sup> Stone, *Perilous Times*, 185.

<sup>150</sup> Higham, *Strangers in the Land*, 202.

<sup>151</sup> *Idem*, 220-221.

<sup>152</sup> Matheson, Jr., *Presidential Constitutionalism*, 63.

<sup>153</sup> Kennedy, *Over Here*, 75-78.

<sup>154</sup> Stone, *Perilous Times*, 180.

expressed admiration for the Illinois State Bar Association for condemning an attorney who refused a draft resister as client.<sup>155</sup> Before the Sedition Act was enacted, Gregory complained that Congress had taken the “teeth” out of the administration’s legislation proposals.<sup>156</sup> Gregory personified the drive for legislation to prosecute *expressions* of disloyalty. The Attorney General pushed for the Sedition Act as a way to beat the vigilantes to their torch and ropes in dealing with disloyal minorities; not “to prosecute the mobs but to pre-empt them, to replace crude vigilantes with trained government agents armed with the new sedition stature.”<sup>157</sup> The Justice Department thus chose to tolerate vigilantism as a communitarian reaction to amend the absence of laws to deal with disloyalty. The failure to publicly condemn vigilantism proved a clear invasion of the right to life and freedom of assembly of those Americans with “radical” opinions. As Gregory had already stated in November 1917, regarding war opponents, “may God have mercy on them, for they need expect none from an outraged people and an avenging government.”<sup>158</sup>

Gregory’s attempts to restrain the violence by making the American Protective League official auxiliaries to his department, shows the extent to which he favored appeasement over punishment concerning vigilantism. The Justice Department’s Bureau of Investigation, the future Federal Bureau of Investigation (FBI), short on funds and manpower, and anxious of the national security, allowed the APL to form a citizen’s branch to their organization.<sup>159</sup> The League’s “agents” went far beyond reports of disloyal utterances and used the official blessing of the Justice Department to engage in wiretaps, to “bug” offices, and to break into homes unwarranted. APL-led vigilantes raided homes of German Americans and tarred, feathered, beat or even murdered “subversives”.<sup>160</sup> In doing so, the APL allowed the government to take drastic measures without taking full responsibility itself, leading to “a kind of officially blessed vigilantism.”<sup>161</sup> Such disregard for the public assault on “unwelcome” opinions and use of illegal methods further shows the administrations low regard for the constitutional rights to both the freedom of expression and assembly, as well as to due process in wartime. Together, Wilson, Gregory and Creel *created* an “outraged public” and a “divided, fearful, and intolerant nation.”<sup>162</sup>

### *The Centralization and Extension of Government*

The wartime drive for conformity among the various departments was shaped by a broad centralization of executive powers into the federal government. Therefore, the wartime suppression of civil liberties was not a temporary aberration, brought on by public hysteria, but part of the origination of the national security state.<sup>163</sup> Regin Schmidt argues that new federal bureaucracies, such as the Bureau of Investigation, were established during this period and soon exerted great political power, while many of its ambitious, assertive and ideologically motivated officials shaped public policy to their interests.<sup>164</sup> In tandem with this increasing power among ambitious bureaucrats emerged the desire by the political elite to use the new central powers for nationwide social control, of which Creel’s Committee was only one example. Because the authorities were unwilling to either solve economic or racial inequality, or to impose authoritarian rule, they were forced to actively pursue social control over the American population.<sup>165</sup>

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<sup>155</sup> Kennedy, *Over Here*, 78.

<sup>156</sup> Stone, *Perilous Times*, 184.

<sup>157</sup> Kennedy, *Over Here*, 81.

<sup>158</sup> Goldstein, *Political Repression*, 108.

<sup>159</sup> Kennedy, *Over Here*, 80-82.

<sup>160</sup> Stone, *Perilous Times*, 157.

<sup>161</sup> Kennedy, *Over Here*, 82-83.

<sup>162</sup> Stone, *Perilous Times*, 158.

<sup>163</sup> Walker, *In Defense of American Liberties*, 16.

<sup>164</sup> Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States* (Copenhagen: Museum Tusulanum Press, 2000), 50.

<sup>165</sup> Schmidt, *FBI and the Origins of Anticommunism*, 50-52.

Especially after war broke out, the government's desire to create a coherent and disciplined people required disciplinary instruments.<sup>166</sup> A true surveillance state was hence created, a comprehensive effort to systematically spy on the political activities of American citizens. In this surveillance state, the Bureau of Investigation became the national agency charged with watching radical leaders and suppressing radical movements and grew dramatically during the war, assembling files on 80,000 radical subjects.<sup>167</sup> These files were based on associations alone, including those with pacifists, socialists, labor radicals or black activists, and used to harass or intimidate dissenters.<sup>168</sup> Federalization of political surveillance neatly overlapped with corporate interests to prevent labor stirrings and warrant a steady flow of capital. The growth of the federal government thus resulted in an influential bloc of political and economic elites determined to use the powerful bureaucracies against any threat to their interests, especially regarding movements that challenged the racial or economic status quo.<sup>169</sup>

Wilson's wartime rhetorical emphasis on democratic ideals, symbolized by the CPI, led laborers, women and African Americans to increasingly challenge social, economic or racial inequalities. The administration, however, believed such militancy to be threatening the unity of the American people and, thus, the American war effort and increasingly turned to the repression of defiant minorities.<sup>170</sup> The authorities used the Bureau of Investigation to control calls for racial equality, following the Great Migration, the movement of about 400,000 African-Americans from the South to the Northern cities from 1915 to 1919. Although the social forces behind the migration, such as increased discrimination in the south and demands for labor in the north, were obvious and well-known, the Wilson administration emphasized the existence of a black conspiracy. Wartime fevers added to the suspicion with wild tales of German agents trying to recruit black Americans against the white population as a fifth column, which prompted the Bureau of Investigation to investigate black disloyalty. It recommended that the black newspaper *Crisis* should be banned, because it campaigned against lynching and thus challenged the racial hierarchy in the south. The *Chicago Defender* was investigated because of its encouragement of the Great Migration. The *San Antonio Inquirer* had its editor sent to prison because it criticized the executions of black soldiers and the *Messenger*, a socialist black paper, was denied mailing permits and had its editors arrested. The federal government's neglect for the individual rights of African-Americans was painfully exposed when a major race riot erupted in East St. Louis, Illinois in 1917. Despite the fact that most of the violence was carried out by armed gangs of whites, the federal authorities used the Bureau to search for radical subversive influences among blacks involved and to investigate critics of its attitudes towards the riot.<sup>171</sup>

The federal government's increased involvement into American society found its most infamous expression in the decision to get rid of the troublesome IWW. Corporate interests and the politicians who represented such interests had for a long time called upon the administration to suppress the radical union. After America became engaged in the war however, the government gained an independent own interest to suppress the IWW: to secure the production of war materials. Despite the fact that federal agents hardly knew what the IWW actually stood for, they were anxious that the organization might sabotage the war effort and called for mandatory detention of Wobblies. Attorney General Gregory authorized a nationwide investigation by the Bureau of Investigation to find out whether the IWW was financed by Germans and whether its members committed any wartime crimes. During the subsequent raids of September 5, 1917, Bureau agents raided IWW offices and private homes across the country and confiscated many of their publications and literature. Over 150 organizers, offices and

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<sup>166</sup> Gerstle, *American Crucible*, 91-92.

<sup>167</sup> Idem, 92.

<sup>168</sup> Walker, *In Defense of American Liberties*, 16.

<sup>169</sup> Schmidt, *FBI and the Origins of Anticommunism*, 52-54.

<sup>170</sup> Gerstle, *American Crucible*, 91.

<sup>171</sup> Schmidt, *FBI and the Origins of Anticommunism*, 59-68.

secretaries of the IWW were charged for conspiracy against the war effort by strikes and sabotage, for aiding others to evade the draft and for causing insubordination in the military. In August 1918, 99 defendants were found guilty on all accounts in a mass trial and sentenced to prison terms ranging up to 20 years.<sup>172</sup>

The prosecution of the IWW accounted for the greatest direct repression at the hands of the federal government during WW I. Individual members were arrested for their association with the IWW, based solely on the organizations' revolutionary statements. Moreover, the prosecution massively infringed upon due process rights of the accused and brought little evidence of individual *acts* of disloyalty. The combined force of federal government, local authorities and vigilantes accounted for the most systematic campaign of political repression in the history of the United States, which disrupted the IWW's leadership, destroyed its locals and scattered its membership.<sup>173</sup> Concurrently, the government supported attacks on German-Americans and immigrants from Eastern Europe, leading to a severe and racialized system of immigration restriction.<sup>174</sup> During the war, free speech became severely limited: to defend immigrants or the rights of the workingman, or to criticize the course of war, was to risk accusations of disloyalty if not persecution for treason.<sup>175</sup>

## The Great Red Scare

When the Great War ended, the disturbances in American society did not. The immediate postwar years even witnessed a wave of repression surpassing the wartime mix of vigilantism, anti-German violence and anti-radical legislation. By early 1919, the attention of many "patriots" seemed to have shifted categorically towards Communism as the main enemy of the United States.<sup>176</sup> At the same time, labor discontent was spreading and the labor force reacted to raging inflation with a series of large scale strikes that appeared extremely threatening to many Americans.<sup>177</sup> Nativistic responses were further enhanced by the high representation of ethnic minorities among the strikers. Ultimately, a clear case of political opportunism provoked the infamous "Red Scare" of 1919-1920. The main character of this tragic chapter in American history was the new Attorney General, Alexander Mitchell Palmer. After his own home became one of the targets of a series of anarchist bombings, he and the Justice Department's Bureau of Investigation under the leadership of the ambitious J. Edgar Hoover, set out on a crusade to destroy the radical element in American society. Their initiative to stop any radical uprising from happening came to be known as the "Palmer raids", a series of mass arrests of enormous proportions and subsequent deportations of arrested aliens claimed to be "radicals".<sup>178</sup>

Similar to the Americanization campaign of the war, the Red Scare was fed by a public frenzy, a wave of fear for a possible communist revolution. Vigilantes redirected their violent anger and nativist passions towards "radical subversives." Scholars such as Knobel, Higham and Murray therefore blame the Red Scare on "a fusion of Americanization and nativism, in which 'foreign' and 'un-American' became interchangeable."<sup>179</sup> Higham points to "the survival of 100 per cent Americanism under peacetime conditions" as one of the main explanations for "the storm of xenophobia that followed in the wake of battle."<sup>180</sup>

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<sup>172</sup> Idem., 69-72.

<sup>173</sup> Goldstein, *Political Repression*, 132.

<sup>174</sup> Gerstle, *American Crucible*, 91.

<sup>175</sup> Kennedy, *Over Here*, 87-89.

<sup>176</sup> Knobel, *America for the Americans*, 249.

<sup>177</sup> Bennett, *The Party of Fear*, 188-189.

<sup>178</sup> Knobel, *America for the Americans*, 255-256.

<sup>179</sup> Idem., 256-257.

<sup>180</sup> Higham, *Strangers in the Land*, 222.

However, as during the war, public fury and long lasting feelings of xenophobia only tell part of the story. Recently several scholars have steered away from the explanation of the Red Scare as a movement of public hysteria. Historian Regin Schmidt concludes from early Bureau of Investigation and FBI files that the bottom-up explanation wrongly emphasizes the role of public pressure, assigning too little attention to the interests of the government itself in promoting the Red Scare and hence treating its policies as mere expressions of the public will.<sup>181</sup> Schmidt instead points to the growing power of the executive and to various conflicts in American society, which have been ignored in assuming that government policies were supported by a consensus of Americans. Schmidt argues that, instead of viewing the Red Scare as a short-term “aberration” from the normal course of American history, it should be regarded as another chapter in the conflict between organized conservative groups, the expansive federal government and the progressive labor movement.<sup>182</sup> Goldstein concurs that the red scare was a very rational response of the government and business elites aimed to dismantle perceived revolutionary threats to the status quo. The government and big business had a mutual interest in pursuing anti-radical policies and used the national emergency situation to advance their position in American society.<sup>183</sup>

From the analysis of relevant literature on the Red Scare a picture emerges that both theories hold some value: an increasingly hysterical public was accompanied by a federal government that used newly formed bureaucracies to expand upon its wartime powers. It was in the government’s interest to initiate antiradical policies and exploit public support of extensive security measures. The reasons for increasing public demands for antiradical action are discussed here first, followed by an examination of the government’s initiative to turn the public hysteria into repressive action.

### *Troublesome Times*

American society certainly had trouble to adjust to peacetime. The year 1919 witnessed almost daily protests, great social upheaval and clashes between political forces. There were many complex reasons for these disturbances. The economy reversed almost instantaneously from government-controlled wartime production to the big firm capitalism of the prewar years.<sup>184</sup> Changing social relations, however, meant that prewar society could not be easily restored. Powerful federal wartime agencies dismantled and could no longer control production, wages and prices, leading to an escalated inflation.<sup>185</sup> The inflation reduced the savings and salaries of the middle classes, while rapid demobilization added thousands of veterans to the job market.<sup>186</sup> Logically, social unrest and labor strife were among the consequences and created fertile soil for increased nativism.<sup>187</sup> Wartime calls for absolute conformity could easily be transplanted into peacetime, especially among a climate that suggested the war had not ended at all, but that the enemy had simply changed form. Thus, a “martial spirit” remained and adapted itself to the new circumstances. Exemplary of this continued sphere of national emergency was the erection of the American Legion, launched in 1919 by several U.S. Army officials, who swore to protect America from revolution. The Legion kept war hatreds alive, demanded an ever stricter dedication to the national cause and used intimidation and violence against radical dissent to retain the status quo. During 1919 it helped break up strikes, attacked leftwing meeting places and raided leftwing newspapers.<sup>188</sup>

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<sup>181</sup> Schmidt, *FBI and the Origins of Anticommunism*, 28-29.

<sup>182</sup> Idem, 31-32.

<sup>183</sup> Goldstein, *Political Repression*, 139.

<sup>184</sup> Schmidt, *FBI and the Origins of Anticommunism*, 24.

<sup>185</sup> Bennett, *The Party of Fear*, 187.

<sup>186</sup> Schmidt, *FBI and the Origins of Anticommunism*, 24.

<sup>187</sup> Bennett, *The Party of Fear*, 188.

<sup>188</sup> Higham, *Strangers in the Land*, 223-224.

As demands for conformity remained strongly present in American society, actual homogeneity eroded. Groups that had subdued their own interests to wartime conformity now eagerly jumped to the occasion to claim the rewards of their obedience. Organized labor arose from its wartime slumber and demanded the right to collective bargaining, while employers saw in the consistent call for homogeneity a means to break unions and retake their control over the economy. Moreover, blacks had migrated to the North and started to demand equal rights, while whites in the northern cities grew increasingly alarmed about these waves of immigration. Race based attacks hence increased in number and fortitude.<sup>189</sup> Higham argues that during the war, a sense of community had kept nativism fairly limited in its expression and given status to all who took part in the war effort. When the war ended this communitarian spirit ceased to exist: "the 100 per cent impulse survived, but the principal barrier which had held it in check disappeared."<sup>190</sup> Public opinion became more and more inclined against radical and foreign elements in American society. The far-reaching program of the Communist Third International greatly bolstered the fear that Russian communism constituted a clear and present threat to peace and to American capitalism.<sup>191</sup>

Despite the increased tendency to heap all leftwing groups into the Bolshevik category, the left in reality became more fragmented than ever. Two new political groups formed: the Communist Party, who claimed fifty-eight thousand members, but was likely much smaller, and the American Communist Labor Party, an even smaller group of ten thousand devotees. The former party claimed to advance militant revolution, but was in reality made up of foreign-language federations, whose members did not speak English and thus hardly understood the party's revolutionary statements. The latter party advocated a more pragmatic, opportunistic program that better fitted American reality. Still, no matter the actual character of these movements and their limited numbers, all "reds", including Wobblies, socialists and foreigners in general, became "fair game" to the Americanizers.<sup>192</sup> Such generalizations were possible, because the fear of radicalism was fed by more than mere imagination. In fact, a series of groundbreaking events shook the nation in the years after the war.<sup>193</sup>

### *Strikes and Bombs*

Postwar America seemed on the verge of an all out class conflict: the radical voice was on the rise. The Communists were very outspoken in their agitation and optimistically predicted that the revolution of the proletariat was imminent.<sup>194</sup> Many radical groups became increasingly vocal, as, for example, almost fifty radical newspapers were erected within a year of the end of the war. More dangerously, several small anarchist groups executed a series of bombing attempts at the lives of public officials in the winter of 1918-1919.<sup>195</sup> This chain of very suspicious and extravagant events greatly focused media and public attention on the issue of radicalism. Together they formed a monolith of public panic and paranoia that allowed for the Great Red Scare. Even though these events contained elements of radicalism and thereby helped to bolster public fears, it was especially the way radical activity was reported that generated so much alarm. Every ambitious politician, overzealous veteran, antiunion employer, super-patriotic organizer, defender of white supremacy, and sensational journalist jumped into the fray, using the issue of radicalism for their own specific interests. This led to an assault on public reason, unseen before in American history and with unprecedented success.<sup>196</sup>

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<sup>189</sup> Schmidt, *FBI and the Origins of Anticommunism*, 24-25.

<sup>190</sup> Higham, *Strangers in the Land*, 224.

<sup>191</sup> Murray, *Red Scare*, 44.

<sup>192</sup> Bennett, *The Party of Fear*, 189.

<sup>193</sup> Murray, *Red Scare*, 56.

<sup>194</sup> Schmidt, *FBI and the Origins of Anticommunism*, 25-26.

<sup>195</sup> Higham, *Strangers in the Land*, 224-226.

<sup>196</sup> Murray, *Red Scare*, 57-58.

The first of the great incidents was the Seattle general strike of February 1919. Although the strike was peaceful and the strikers made quite legitimate labor demands, it was nevertheless branded as a revolutionary uprising by employers and local conservative politicians. Immediately following the strike, the Senate Overman Committee, tasked with investigating German interests among the liquor industry, shifted its focus to Bolshevik activities. As the committee drowned its public in colorful, irrelevant accounts of Bolshevik atrocities in Russia, public attention was aimed at the domestic Red menace.<sup>197</sup> In its final report, the Committee disclosed that the strike contained "certain well-defined abuses prejudicial to the best interests of the nation and calculated to undermine and destroy our form of government."<sup>198</sup> The committee's general accusations against "that class of American citizens," who, "promulgate the doctrine that the form of Government established by the Constitution should be overthrown," smeared labor movements with the taint of radicalism.<sup>199</sup> Labor became subject to public suspicion and politicians discovered that they could use radicalism as a political issue for free publicity and electoral support. The press, in turn, discovered that the issue of radicalism made a fine substitute for its wartime sensationalism.<sup>200</sup>

The Seattle strike was followed by a number of bomb plots and other outbreaks of political violence. On April 28, a homemade bomb arrived at the office of Mayor Ole Hanson of Seattle, who had fiercely condemned the strike. More bombing attempts followed: the postal service intercepted a total of 36 mail bombs addressed to prominent politicians, judges and other state officials during the spring of 1919. Furthermore, on May Day, 1919, radical demonstrations in several cities provoked antiradical mobs of soldiers into violence, resulting in numerous riots.<sup>201</sup> Many editorials of newspapers then claimed that these riots had in fact been "dress rehearsals" for an imminent revolution. As May Day seemed to reveal the danger that radicalism brought to America, newspapers stated that America should not longer be so tolerant towards such revolutionaries.<sup>202</sup> The *Salt Lake Tribune* even went as far as to claim that free speech itself "has been carried to the point where it is an unrestrained menace."<sup>203</sup> Public stability was strained further when, on June 2, the violence culminated into the explosions of bombs in eight cities, killing two people. Among the intended victims was Attorney General Palmer, triggering his all-out crusade against radicalism. The responsibility for these bombings, as well as the earlier events, was put squarely on the radical movement.<sup>204</sup>

### *The Establishment of Public Hysteria*

The police forces, in the meantime, failed to find any of the perpetrators of the bombings, further strengthening claims that the cunning world bolshevism movement had planned the explosions. The theoretical possibility of radical revolution was shaped into a horrible reality in the minds of many Americans through exaggeration, misinterpretation and misreporting. Exaggeration on part of both the press and several prominent public officials, kept the momentum of the Red Scare afloat. Mayor Ole Hanson, for example, emphasized that "if we compromise, we will lose every last mother's son and daughter of us in this great land of ours."<sup>205</sup>

The greatest overstatements and downright lies were produced by groups who consciously used the existence of radicals to gain support for their own interests. Patriotic

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<sup>197</sup> Schmidt, *FBI and the Origins of Anticommunism*, 26.

<sup>198</sup> "Radicalism and Sedition Among the Negroes, as Reflected in Their Publications," *The New York Times*, November 23, 1919.

<sup>199</sup> *Idem*.

<sup>200</sup> Murray, *Red Scare*, 67.

<sup>201</sup> Goldstein, *Political Repression*, 145.

<sup>202</sup> Murray, *Red Scare*, 76-77.

<sup>203</sup> *Salt Lake Tribune*, June 3, 1919.

<sup>204</sup> Murray, *Red Scare*, 77-80.

<sup>205</sup> Ole Hanson, *Americanism versus Bolshevism* (Garden City/New York/London: Doubleday, Page & Company, 1920), 293, <http://www.archive.org/stream/americanismvers00hansgoog>

societies, supported by conservative groups eager to expand the power of capital, such as the National Security League and the American Defense Society, were bent to uphold the wartime drive for 100 per cent Americanism and intensified public fear of radicalism to achieve it.<sup>206</sup> The nativistic calls of these groups stressed the fact that almost all of the American communists were foreign-born or had a recent immigrant background and that most of the major strikes took place in industries primarily equipped by immigrants. Conservative employers in turn used these facts to counter labor initiatives by pointing to the historic link between class conflict and immigrant radicalism.<sup>207</sup> Such sentiments gained more and more support among the general press and wider public: every strike seemingly confirmed that labor was a radical and un-American force and greatly influenced the public perception of the postwar labor unrest and justified oppressive measures against those involved.<sup>208</sup>

The average American's ideas concerning the position of organized labor became one of the main factors that moved public hysteria into repressive action. Organized labor undertook actions itself that seemed to confirm these public contentions. The decision to continue to push for higher wages, shorter hours and the right to collective bargaining, despite falling public support, worked against labor's chances.<sup>209</sup> At the same time, strong signs of radical growth appeared everywhere. Communists supported the major strikes as if they were their own making and made the public even less discriminate of the various movements behind the strikes.<sup>210</sup> Therefore, by the fall of 1919, when new strikes erupted, all were regarded to be crimes against society and plots to overthrow the government. Four major incidents unfolded among these dire conditions that greatly aided the development of the Red Scare. Each solidified the public equation between labor and radicalism, sanctioning repressive action against *all* dissenters.<sup>211</sup>

First, during the summer of 1919, several violent race riots erupted in both Southern and Northern cities. The influence of the Red Scare was evident in the assertions of Southern politicians that blacks had organized the riots because of radical influences.<sup>212</sup> In the fall of 1919, the Boston Police Strike followed. Although the policemen desired only affiliation with the AFL, they blundered severely in letting their whole city devoid of police protection. Conservative elements in Boston and the city press were convinced of revolutionary intent behind the strikes and the general public thus believed that revolutionary radicalism had produced the strike. In reality, the Boston police force had only been "radical" in its abandonment of the community, which was certainly very foolish, but had nothing to do with bolshevism whatsoever. Riots that occurred had nothing to do with the striking policemen themselves, but by their absence on the scene.<sup>213</sup>

The second major fall strike, the nationwide Steel Strike, lasted from September 1919 until January 1920. Two investigations were made to find the purposes behind the conflict, one by the Senate Committee on Education and Labor and one by a special inquiry commission of the Interchurch World Movement. The Senate report concluded that the strike had involved a considerable amount of IWW's, anarchists, revolutionists and Russian Soviets.<sup>214</sup> The Interchurch commission came to a completely different conclusion: it minimized the extent of radical influence behind the strike and blamed its long duration on steel interests. The commission concluded that "the causes of the strike lay in the hours, wages and control of jobs and in the

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<sup>206</sup> Murray, *Red Scare*, 81, 83, 85.

<sup>207</sup> Higham, *Strangers in the Land*, 226.

<sup>208</sup> Murray, *Red Scare*, 91-94.

<sup>209</sup> *Idem*, 119-120.

<sup>210</sup> Goldstein, *Political Repression*, 140-142.

<sup>211</sup> Murray, *Red Scare*, 122.

<sup>212</sup> Schmidt, *FBI and the Origins of Anticommunism*, 26-27.

<sup>213</sup> Murray, *Red Scare*, 126, 134.

<sup>214</sup> *Idem*, 152.

manner in which all these were fixed.”<sup>215</sup> It further stated that “no interpretation of the movement as a plot or conspiracy fits the facts,” and that “charges of Bolshevism or of industrial radicalism in the conduct of the strike were without foundation.”<sup>216</sup> Both inquiries agreed, however, that the association with revolution and bolshevism had destroyed any chance of success on account of the strikers. By January 8, the strike leaders voted to end the struggle, without gaining a single concession. Twenty people had died and about \$112 million had been lost in wages.<sup>217</sup>

Finally, a nationwide Coal Strike erupted, which proved to be a little more successful to the strikers involved. Fears of radicalism among the strikers and the need for coal in the cold winter forced the government into action. President Wilson allowed the Fuel Administration to offer the strikers a 14 per cent wage increase and an investigation of their other demands, but also tried eighty-four United Mine Workers for violating an injunction to strike. The President’s plan was accepted on December 10, 1919, in the face of the proceedings against the UMW officials and amidst hostile public sentiment, ending the strike. The effects of the major fall strikes were comprehensive. Conservative forces had pushed organized labor into the radical corner and their open-shop policies triumphed over labor’s demands. Newspapers reprinted many of the employers’ arguments and declared any form of unionism “un-American.” Naturally, public opinion was affected. Exaggerations of the radical elements in the police, steel and coal strikes, led many average Americans to believe that all union men were opposed to the American way of life and advanced a revolutionary cause.<sup>218</sup>

### *The Red Scare: Vigilantism*

According to the scholars who regard the wartime and postwar repression as an essentially popular movement produced by national hysteria, the federal government was pressed, or even forced, to take action against radical activities. Higham, for example, holds that “public opinion was growing daily more impatient for action.”<sup>219</sup> These demands were exemplified by renewed waves of vigilantism. The year 1919 witnessed a growing insensitivity towards injustice and public indifference towards civil liberties. As during the Great War, unprotected citizens that held unpopular beliefs were denied their rights to due process of law in the cruelest of fashions, paying for their adverse opinions with their lives, dignity or freedom.

One example of mob violence, the Centralia Massacre, surpassed all other incidents in brutality. Once again, the Wobblies were the designated victims, this time in the state of Washington. On Armistice Day, 1919, violence erupted when a local chapter of the American Legion marched upon the newly reopened IWW hall of Centralia. Three Legion members were felled by gunfire as they broke through the doors of the hall. The Wobblies responsible for the shooting were quickly seized and put into a jail, but one member, Wesley Everest, escaped and shot another Legionnaire before he was apprehended by a posse. He was seized, beaten, kicked and his teeth were knocked out before he was thrown into jail with the others. At night, a mob broke into the jail, dragged Everest out and hung him from a railroad bridge.<sup>220</sup>

The Centralia Massacre ushered into a wave of police action and mob violence across the Western states to rid the area of “Bolshevism”. Authorities unanimously condoned the lynching of Everest and the subsequent raids. Testimony in the subsequent trial against eleven of the

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<sup>215</sup> The Commission of Inquiry, the Interchurch World Movement, *Report on the Steel Strike of 1919* (New York: Harcourt, Brace and Howe, 1920), 11,

<http://www.archive.org/stream/reportonsteelst00resegooq#page/n5/mode/1up>

<sup>216</sup> Interchurch World Movement, *Report on the Steel Strike*, 15.

<sup>217</sup> Murray, *Red Scare*, 152.

<sup>218</sup> *Idem*, 162-165.

<sup>219</sup> Higham, *Strangers in the Land*, 229.

<sup>220</sup> “Essay: The Centralia Massacre”, University of Washington, <http://content.lib.washington.edu/iwwweb/read.html>

captured Wobblies was utterly mixed, especially concerning the question whether they had merely exercised their rights of self-defense. Still, the jury found seven Wobblies guilty of second-degree murder and sentenced them to twenty-five to forty years in prison. The branding of the Wobblies as radicals had influenced the jury's decision in this case, severely damaging their rights of a fair trial. The Centralia Massacre showed how the climate of public hysteria and intolerance that plagued the nation in late 1919 caused a severe indifference towards civil liberties, especially concerning those of groups believed to be anti-American. Moreover, local authorities once again showed little respect for the law and failed to protect its citizens' rights to life and liberty, while the vigilantes faced little prosecution.<sup>221</sup>

### *The Red Scare: Top-down Initiative*

The chain of events following the end of the Great War created a public opinion quite receptive of antiradical measures. Outbursts of vigilantism stress the anxious state of public opinion and the lack of tolerance for presumed radicals. Nevertheless, the government and various influential elites had at least equally important part in creating the Red Scare. In fact, to pursue its own interests, the federal government and its powerful bureaucracies often initiated anti-radical policies, independent of the public will, as will discussed next.

The government's impulse to turn antiradical policy into repressive action was supported by conservative interests. Employers used anti-union propaganda to discredit labor movements as subversive and anti-American and helped spread suspicions of radical movements in general.<sup>222</sup> The various patriotic societies aided the open shop campaign by functioning as unofficial mouthpieces to the leaders of small reactionary cliques. Many of these organizations were subsidized and directed by corporations and businessmen as part of their anti-labor propaganda. The National Security League, for example, was financed by leading corporations and businessmen such as Carnegie Steel Company, U.S. Steel, J.P. Morgan, J.D. Rockefeller and W.K. Vanderbilt. The American Legion operated on its own, but 55% of its members were officers, while only 6% were unskilled workers or farmers. The shared interests and sentiments between conservative businessmen and the private organizations, point to the important part conservative interests played in the promotion of the Red Scare.<sup>223</sup>

The role of the press in the Red Scare, although often regarded as proof of the mass hysteria explanation, was in fact determined by certain economic and ideological considerations. Economically, the sensationalism with which incidents of violence were presented to exaggerate the radical threat was a means to ensure lots of paper sales. Ideologically, many powerful newspapers such as the *New York Times* and the *Washington Post* reflected the pro-business interests of their owners. Quite a few newspapers were owned by "press barons" who did not use these papers to report objective news, but to advance reactionary political interests.<sup>224</sup> Conservative forces in the press and industry constantly warned about communism and revolution, especially regarding the major strikes.<sup>225</sup> The Red Scare was not caused by a mass uprising to postwar social upheaval, labor unrest and fear of radicalism alone, but such feelings did make it possible for the elites to pursue their goals so vigorously. *Outside* of the government, the anti-radical push was "an integrated part of a reactionary political campaign".<sup>226</sup>

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<sup>221</sup> Murray, *Red Scare*, 185, 188-189.

<sup>222</sup> Schmidt, *FBI and the Origins of Anticommunism*, 33-34.

<sup>223</sup> Idem, 35-36.

<sup>224</sup> Idem, 36-37.

<sup>225</sup> Goldstein, *Political Repression*, 143.

<sup>226</sup> Schmidt, *FBI and the Origins of Anticommunism*, 40.

### *The Government's Interests*

The government also had its interests to engage in an anti-radical campaign, starting with the president himself. In his State of the Union message of December 1919, President Wilson exclaimed that "towards passion and malevolence tending to incite crime and insurrection under guise of political evolution there should be no leniency."<sup>227</sup> Wilson greatly contributed to the fear of radicalism and subversion during his campaign to ratify the Versailles treaty. Next to the general arguments in favor of the treaty, he often indicated that his opponents were disloyal and claimed that pro-German interests made up the opposition to the treaty.<sup>228</sup> The New York Times dutifully reported that a mysterious petition asking Congress to impeach Wilson would comfort "Bolsheviki", "pro-Germans," and "other elements that oppose the ratification of the treaty of peace with the League of Nations."<sup>229</sup> Wilson himself declared that "any man who carries a hyphen about him carries a dagger that he is ready to plunge into the vitals of this republic."<sup>230</sup> Moreover, the president assured that the U.S. was being infiltrated by radicals and only ratification of the treaty could stop political disorder and unrest. The President thus willfully exaggerated the state of emergency, to pursue policies unrelated to the security of American society. In doing so, he allowed for and intensified calls for the repression of "subversives".<sup>231</sup>

Although the president thus publicly condoned and supported the antiradical campaign, the federal bureaucratic organs executed the antiradical policies. Especially the Bureau of Investigation, the predecessor of the FBI, played an important part during the events of 1919 and 1920. Its extensive role was the product of long-term institutional changes. The increased role of the state to accommodate the emerging corporate order led to the centralization of power into the federal bureaucracy as well as the establishment of the idea to use such power for social control on a national scale. Together these developments resulted in the federalization of political surveillance by the Bureau of Investigation. Surveillance and harassment of radical activities was gradually transferred from private patriotic groups to police agencies at the local and federal level. The Bureau's wartime involvement in immigration regulation, organized labor and race riots that has been discussed before, indicates that the Bureau of Investigation's activities, which it continued and intensified were the logical consequence of growing federal social and political interference.<sup>232</sup>

### *Antiradicalism in State and Nation*

With the Bureau as its bureaucratic arm, an antiradical campaign developed at many levels of government. State legislations became infested with a number of criminal syndicalism laws that prosecutors used to defile the First Amendment by punishing organizational membership and expressions of radical opinions.<sup>233</sup> The many local incidents of antiradical repression, including the outbursts of vigilantism, seem to confirm the characterization of the Red Scare as an expression of grass-roots hysteria. Nevertheless, the federal government often played a major role in such events, as the Bureau actively cooperated with or even initiated such outbursts. It assisted state legislators to create their criminal syndicalism and sedition bills, investigated opponents of such laws and offered information about radical activities to local authorities as well as legal advice to state prosecutors.<sup>234</sup> In doing so, the Bureau developed as an organ by which the executive and legislative governments could manipulate court proceedings and limit due process

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<sup>227</sup> Woodrow Wilson, "Seventh Annual Message, State of the Union Message", December 2, 1919, <http://www.presidency.ucsb.edu/ws/index.php?pid=29560>, retrieved 9-2-2009.

<sup>228</sup> Schmidt, *FBI and the Origins of Anticommunism*, 74-75.

<sup>229</sup> "Seek Men Who Want Wilson Impeached," *The New York Times*, July 19, 1919.

<sup>230</sup> Wilson, *The Papers of Woodrow Wilson*, ed. Link, Vol. 63, 501.

<sup>231</sup> Schmidt, *FBI and the Origins of Anticommunism*, 74-75.

<sup>232</sup> Idem, 40-43, 52-54.

<sup>233</sup> Murray, *Red Scare*, 80-81.

<sup>234</sup> Schmidt, *FBI and the Origins of Anticommunism*, 125.

guarantees of presumed radicals. Moreover, local elites, such as Ole Hanson, the conservative major of Seattle, were sharply inclined against radicalism ideologically. Hanson called Bolshevism “the autocratic rule of the lowest, least intelligent, least able class.”<sup>235</sup>

The federal government, however, had no antiradical legislation to act on. The Espionage and Sedition Acts had lapsed at the end of the war and the government could only act upon the antiradical climate by deporting radical immigrants without citizenship.<sup>236</sup> Nevertheless, efforts were made to change this. Senator Thomas J. Walsh offered a new peacetime sedition bill. Other members of Congress offered similar legislation after Attorney General Palmer told a judiciary subcommittee that the wartime Espionage and Sedition acts could not be used to prevent radicalism in peacetime.<sup>237</sup> Two governmental investigations were held to determine the need for anti-radical legislation. The Overman Judiciary Subcommittee in the Senate and the New York State Lusk Committee both represented increased antiunion and antiradical sentiments and were both ideologically inclined against radicalism, which was reflected in their findings.<sup>238</sup> The final Overman report presented another sensational charge of Bolshevik infiltration, concluding that “the American people have been victimized and deceived by the activities of special interests and the subtle practices of designing individuals, some of them the agents and representatives of foreign governments.”<sup>239</sup>

The Lusk Committee began its investigation by examining a mass of Russian propaganda collected as “evidence” in several raids by the Justice Department and local police against the Russian Soviet Bureau in New York. Senator Lusk announced that the materials proved that over fifty radical publications circled in New York City and concluded that a Bolshevik revolution was being planned. These wild contentions gave the Lusk committee prominence and enough support to strike against a second target. On June 21 it ordered a raid against the Rand School, a socialist and labor college. The Committee revealed that documents were found during this undertaking that showed that radicals controlled over one hundred trade unions and that the school was involved in a conspiracy with the Soviet Bureau to “bolshevize” American labor. Although these charges lacked any foundation, it frightened the public enough to take steps to permanently close the “radical” school.<sup>240</sup> The Lusk Committee, organizing raids, arrests and confiscations, in fact functioned as the Bureau’s arm of operation at New York State level. As such, the Bureau and the Committee took the initiative in anti-radical repression at the state level, instead of reacting to local demands.<sup>241</sup>

### *Upholding the Status Quo*

The main drive behind the Red Scare, however, was produced at the federal level. The Wilson administration used the Bureau of Investigation to contain and weaken social unrest and movements that might endanger the existing political and economic order. Therefore the Bureau was called on to respond to the race riots, strikes and anarchist bombings of 1919.<sup>242</sup> Hoover systematized existing files and added new ones of anyone who had ever criticized the government.<sup>243</sup> In addition to surveillance, the Bureau became engaged in direct suppression of radical activities by denying passport applications, by confiscating radical publications and through unwarranted raids. Although the Bureau was without legal means after the Espionage Act expired, it illegally suppressed the radical press across the country. Agents stopped the movie

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<sup>235</sup> Hanson, *Americanism versus Bolshevism*, viii.

<sup>236</sup> Higham, *Strangers in the Land*, 227.

<sup>237</sup> Murray, *Red Scare*, 80-81.

<sup>238</sup> *Idem*, 95.

<sup>239</sup> “Senators Tell What Bolshevism in American Means”, *New York Times*, June 15, 1919.

<sup>240</sup> Murray, *Red Scare*, 99-103.

<sup>241</sup> Schmidt, *FBI and the Origins of Anticommunism*, 125.

<sup>242</sup> *Idem*, 167.

<sup>243</sup> Walker, *In Defense of American Liberties*, 42.

*The Contrast* from showing, confiscated shipments of radical literature and cooperated with local police to enforce state criminal syndicalism laws. In addition, the Bureau initiated raids to disrupt radical organizations by arresting their leaders and by confiscating their records and pamphlets.<sup>244</sup>

Most of the major events that took place during the year and a half after the war ended reveal how the federal government encouraged the creation of an antiradical public opinion, rather than merely acting upon it. During the first of these events, the race riots that erupted in about 25 major cities across the country during the summer of 1919, the Lusk Committee, Secretary of War Newton D. Baker, and Bureau head Hoover, all suggested that the riots were connected to radical agitation among blacks.<sup>245</sup> The Bureau's approach to the riots was characterized by the wish to maintain the racial order and their officials and agents instinctively characterized the black discontent as instigated by radicals. Despite the lack of evidence of radical involvement and the obvious social, economic and racial reasons underlying the conflicts, the Bureau nevertheless concluded that radical propaganda had played a major role in the riots.<sup>246</sup> The *New York Times* hence reported that "at this time there can no longer be any question of a well-connected movement among a certain class of negro leaders of thought and action to constitute themselves a determined and persistent source of a radical opposition to the Government."<sup>247</sup> During 1919, the federal government recurrently used the threat of radicalism to maintain the racial status quo and managed to smear any black calls for equality with the taint of radicalism.<sup>248</sup>

The government's response to the great strikes of the fall of 1919 reveals similar interests. The "red menace" was used consciously by big business to crush unions and by politicians to foster their own political position.<sup>249</sup> The Wilson administration reacted to the strikes out of concern that they might destabilize the economic system, not because it feared a radical threat to the national security. The administration condemned the Boston police strike action publicly, and pressured the unions during the nationwide steel strike into submission. It was also determined to end the Coal Strike quickly, for an interruption of the fuel supply would cause hardship during the winter and halt the economy. Wilson thus employed a wartime law that forbade any intervention with the production of necessary goods. The Justice Department received a far reaching temporary restraining order and disallowed any of the strike leaders to issue strike orders, to take part in the strike, or to support it publicly. Concerning either strike, the administration's actions were motivated by a concern to keep industrial production running and protect the economic status quo.<sup>250</sup>

The Bureau of Investigation was used to investigate radical activities and to keep the government informed during the strikes. Bureau agents actively tried to undermine the steel strike by branding it as criminal and subversive. One of the strike leaders, William Foster, had made several extreme statements in the past, and was used to discredit the entire venture as a revolutionary conspiracy. The Bureau reported to Congress that the labor conflict had been engineered by Foster and the IWW. Such a stance allowed employers to stand firm and reject any demands made by "revolutionaries." During the coal strike the Bureau played a similar role, portraying it as an attempt by radicals to win over the union and the miners. The evidence for these claims was minimal, but functioned to justify the government's intervention in the strike.<sup>251</sup> The Bureau thus intensified the Red Scare by aggressively spreading sensational, exaggerated and

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<sup>244</sup> Schmidt, *FBI and the Origins of Anticommunism*, 175-178.

<sup>245</sup> Goldstein, *Political Repression*, 150.

<sup>246</sup> Schmidt, *FBI and the Origins of Anticommunism*, 194-195.

<sup>247</sup> "Radicalism and Seditious Among the Negroes, as Reflected in Their Publications," *The New York Times*, November 23, 1919.

<sup>248</sup> Schmidt, *FBI and the Origins of Anticommunism*, 194-195.

<sup>249</sup> Goldstein, *Political Repression*, 143.

<sup>250</sup> Schmidt, *FBI and the Origins of Anticommunism*, 212-216.

<sup>251</sup> Schmidt, *FBI and the Origins of Anticommunism*, 216, 223-227, 233.

often untrue charges that radicals had instigated the strikes and race riots.<sup>252</sup> Clearly, by exploiting fear of radicalism among the major fall strikes, the anti-radical climate was *used* and *promoted* by the Bureau as part of the federal government's campaign to ensure that vital industries kept running.<sup>253</sup>

### *The Alien Element*

The overriding concern of the federal government to uphold the economic and social status quo, also led it to engage in more direct repression of elements of dissent. Without a peacetime sedition law, however, it was without a legal weapon to persecute American citizens for their "seditious" opinions. Instead it went after the alien population of the United States. After the Overman Committee had concluded that "the alien element in this country is the most susceptible and is the first to adopt violence as an effective weapon for supremacy,"<sup>254</sup> the federal government steered towards the repression of foreign immigrants, as, conveniently, they could most easily be prosecuted.<sup>255</sup> Deportation proceedings had become more common ever since America's entry into the World War, as a means to deal with labor disturbances. Judges and city authorities used deportation as a threat against alien workers on strike. Eventually, deportation proceedings regarding groups and organizations deemed revolutionary came to constitute an important part of the Red Scare.<sup>256</sup>

The first incident of deportation was the transport of fifty-four aliens, who had been apprehended by the Justice Department in connection with the Seattle general strike of February 1919, in a train dubbed the "Red Special" to the port of New York. Of these people, thirty-nine had been arrested as part of a campaign against the IWW in Washington, while the remaining fifteen had no connection to a radical movement whatsoever.<sup>257</sup> The tales of the men involved show the general disregard for the liberties of aliens during the Red Scare period. After many months in prison and a journey across the continent, the department of justice reversed its decision in two-thirds of the cases, releasing them in New York City, thousands of miles from home, with no money or job. Kate Claghorn concluded in 1922 already that "this is certainly not the speedy and sure process of justice to which the client is entitled according to the spirit of our law, even when he is guilty."<sup>258</sup> The aliens were bereft of most legal services; their benefit of counsel was restricted because of a wartime rule that aliens could only have counsel after proceedings began and because it was difficult to find an attorney willing to take on a case against the unpopular IWW.<sup>259</sup> The experiences of the men during their confinement were much worse than what criminals generally went through. One of the men described the detention quarters as a 45 by 40 foot room on the water front, in which 125 men were held around the clock. The bunks were shut of ventilation, the place was infested with vermin and the group shared their quarters with other deportees that suffered from contagious diseases.<sup>260</sup>

Because deportation was connected to the regulation of immigration, responsibility of the cases fell into the hands of the Labor Department. The Secretary of Labor, William B. Wilson, proved unwilling to go along with the wave of repression. Wilson had to sign a warrant before any individual could be deported and had to certify the organization to which the individual belonged as being "subversive". He did not believe membership of the I.W.W. guaranteed a

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<sup>252</sup> Stone, *Perilous Times*, 223.

<sup>253</sup> Schmidt, *FBI and the Origins of Anticommunism*, 216, 223-227, 233.

<sup>254</sup> "Senators Tell What Bolshevism in American Means", *New York Times*, June 15, 1919.

<sup>255</sup> Higham, *Strangers in the Land*, 227.

<sup>256</sup> Kate Holladay Claghorn, *The Immigrant's Day in Court*, vol. 9 of William S. Bernard ed., *Americanization Studies: The Acculturation of Immigrant Groups into American Society* (Montclair, NJ: Patterson Smith, 1971), 335-336.

<sup>257</sup> *Idem*, 335-336.

<sup>258</sup> *Idem*, 338.

<sup>259</sup> *Idem*, 354-355.

<sup>260</sup> *Idem*, 356-357.

hostile attitude towards the nation, and thus refused to certify it as warranting deportation. Therefore, the federal government's deportation campaign initially made little progress.<sup>261</sup>

### *The Palmer Raids*

Not surprisingly, many thus demanded more sweeping legislation and a more austere federal policy. The Justice Department answered to the call. In the rising fever of anti-radicalism, Attorney General A. Mitchell Palmer became the main instigator of official repression. The May Day bombings and riots of 1919 caused him to drop any regard for civil liberties. The ensuing bombing of his own house led him to announce rigid plans to destroy any breeding ground for terrorist activities.<sup>262</sup> Higham and Bennett argue that Palmer, exasperated by the failure of his agents to find the terrorists, went with the anti-radical "current"<sup>263</sup>. Congress pressured the Attorney General, as, in the summer of 1919, Senator Miles Poindexter offered a resolution to demand further government action against the radical menace.<sup>264</sup> Poindexter requested Palmer to "take legal proceedings for the arrest, punishment, and deportation of the various persons within the United States," who "have attempted to bring about the forcible overthrow of the Government of the United States."<sup>265</sup>

Does the "Poindexter resolution" indicate that a reluctant federal government was "pressured" into acting against people with radical opinions? If it is regarded as an *expression of public opinion* it gives some acclaim to this contention. As such, however, the *political context* of the resolution is ignored. Schmidt points out that the resolution was part of a Republican offensive against the administration during the midterm elections of 1918. Senator Poindexter himself was a possible candidate for the presidency and was backed by business elites. He used Wilson's "soft" attitude towards Bolshevism as one of his main campaign themes. The resolution's criticism of the Justice Department should therefore be regarded as part of a campaign strategy aimed at discredit the Democrat administration, rather than an expression of public hysteria.<sup>266</sup> The resolution perhaps influenced Palmer, who had his eyes on the presidency himself, to defend himself and intensify his department's antiradical policy. On the bureaucratic level, however, Bureau of Investigation files show that the deportation campaign was already well under way before the resolution passed the Senate and that federal authorities acted quite independently from public demands.<sup>267</sup>

Palmer first created the General Intelligence Division of the Justice Department, in order to collect information about radicals and to organize percussions against the threat of radicalism and made Bureau director Hoover its leader. Labeled the "antiradical division", it began to review newspapers and pamphlets published by organizations accused of being radical. The Attorney General then persuaded Congress for a special allocation to deal with "the enemy within".<sup>268</sup> Utilizing this financial backing and his new division, he organized the infamous Palmer Raids. The Union of Russian Workers was chosen as the main target. On 7 November 1919, agents of the Justice Department raided meeting places of Russian workers in a dozen cities across the country. In New York agents invaded the Russian People's House, beat many men and violently escorted about people to the Justice Department headquarters for questioning. Following inquiries only thirty-three were found aware enough of the revolutionary aims of the URW to be

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<sup>261</sup> Higham, *Strangers in the Land*, 228-229.

<sup>262</sup> Bennett, *The Party of Fear*, 190.

<sup>263</sup> Higham, *Strangers in the Land*, 229-230; Bennett, *The Party of Fear*, 190.

<sup>264</sup> Murray, *Red Saare*, 196.

<sup>265</sup> "Text of Senator Poindexter's Resolution Questioning Inaction Against Red Agitators," *The New York Times*, October 14, 1919.

<sup>266</sup> Schmidt, *FBI and the Origins of Anticommunism*, 236-240.

<sup>267</sup> *Idem*, 244-246.

<sup>268</sup> Bennett, *The Party of Fear*, 190, Higham, *Strangers in the Land*, 229-230.

kept in custody. Others, who also knew little about their organization's goals, were held for excessively long periods before being released.<sup>269</sup>

The main principles of the Union of Russian Workers were contained within the "Little Red Book," upon which the Department of Justice framed its charges. This declaration contains several violent expressions, but the movement's general behavior concentrates on supporting the liberation movement in Russia and carrying on class struggle to improve the position of the working class. In practice, Claghorn argues, the union was a "loosely knit group of locally self-determining bodies, of varying policies and beliefs," not a rigid revolutionary organization. Moreover, the Union had never been involved in any disorder or crimes. Their members were simply foreign workingman, at times outraged at a government who permitted their exploitation, "their sin", has "consisted of talk only."<sup>270</sup> Based on association alone, across New York City homes were searched without warrants and arrests were made without stated cause. In total 650 people were detained, some of them radicals, while others were clearly not engaged in any sort of radical activities.<sup>271</sup> Meanwhile, state and local officials saw Palmer's initiative as a signal for them to act as well. Throughout the country local raids were executed on what officials believed were nests of radical aliens. The Labor Department gave in and proclaimed membership of the Union to be a deportable offense.<sup>272</sup> A month later, 249 aliens, most of them arrested in the November raids, leaving behind their women and children, were deported on *The Buford*, a special transport to Finland, labeled the "Russian Ark" in the newspapers.<sup>273</sup>

The constitutional problems brought on by the Palmer Raids were numerous. The majority of the deportees had never participated in any subversive action, nor did they have a criminal record. They were deported solely for their belief in radical theories, in clear violation with the First Amendment. Moreover, only an extremely small number of the deportation cases involved men who understood the doctrine and even less were leaders or agitators. The statements of several victims underscore the injustices done in the name of so called national security. Mike Elick, arrested in Akron, Ohio, December 1917 and released after two years, stated:

*"In view of the fact that it is free to organize in this country, we were under the impression that the literature that was found on us and other evidences that were against us were not forbidden by the law. Should we have found out that such is the case ... we would never have engaged ourselves in organizing or distributing or propagating or advocating such."*<sup>274</sup>

Elick thus points directly to the freedom of assembly guaranteed by the First Amendment. Naum Stepanuk, arrested at the same time and place, was eventually deported on the *Buford*, despite his attempts to convince his inquirers of his loyalty:

*"If I had anything against the American government I would not have bought Liberty Bonds."*<sup>275</sup>

Stepanuk and his peers were denied any individual review of their loyalty, according to due process of law. Instead, they were *assumed* disloyal, solely on the basis of their nationality and associations. Leo Haskevich was also deported, although he had testified that:

*"We never had any intention of killing or destroying, but only to speak and advocate by mere words, as it was permitted until the United States went into war."*<sup>276</sup>

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<sup>269</sup> Murray, *Red Sare*, 196-197.

<sup>270</sup> Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 368, 370-371, 373.

<sup>271</sup> Bennett, *The Party of Fear*, 190-191.

<sup>272</sup> Murray, *Red Sare*, 197, 206-207.

<sup>273</sup> Higham, *Strangers in the Land*, 230.

<sup>274</sup> Mike Elick, Immigration Bureau number 54325/160, quoted in: Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 375.

<sup>275</sup> Naum Stepanuk, Immigration Bureau number 54248/20, quoted in: Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 375.

The inquirers themselves recommended deportation on the grounds that “in subscribing to the principles” of a radical organization they were “clearly guilty of advocating and teaching anarchy and the unlawful destruction of property.”<sup>277</sup> The Palmer Raids thus represent a classic example of the doctrine of “guilt by association”, so contrary to First Amendment values. Moreover, throughout the raids and their detainment, the Workers’ were denied their rights to counsel, fair trial, individual indictments, court review, and other due process rights.

### *The January Raids*

The raids against the Russian workers nevertheless proved popular to the anti-radical sentiment in American society, despite the small number of actual revolutionaries caught. The majority of U.S. citizens regarded the *Biford* deportations as proof that Palmer had finally led the nation to deal with the menace.<sup>278</sup> Basking in glory, Palmer prepared for more drastic steps. On January 2, 1920, his Justice Department, aided by local police chapters, executed a vast roundup of alien members of the two communist parties in thirty-three cities. Officers randomly burst into homes, at multiple occasions seizing everyone in sight, loaded the arrestees into trucks, or forced them to march through the streets handcuffed or chained.<sup>279</sup> Law enforcement became mixed up with looting, as a Russian alien reported to the Russian-language newspaper *Golos Truzhenika*:

“On January 31<sup>st</sup> (...) nine men broke into our house. They were apparently detectives armed with clubs and revolvers. (...) they threatened us and handcuffed us, then searched our pockets. In one of my pockets they found a copy of *Golos Truzhenika*, and in the other \$62 in cash. The paper they threw to the floor and the money they pocketed. Then I realized that they were not looking for Bolsheviks, but for money.”<sup>280</sup>

Some of the alleged communists were released after a few hours; others were stuffed into crowded cells for weeks without any hearing. The conditions in a jail in Detroit, where eight hundred Russian Workers and Communists were held, became especially notorious. The jail was overcrowded and there was hardly any ventilation; many cells were overheated because of their close vicinity to steam pipes.<sup>281</sup> The men slept on stone floors, were bullied by police officers and shared one single drinking fountain and a single toilet. The “crime” they had committed was that they had attended a dance, been to a class or had eaten at the Communist party headquarters of Detroit. In Seattle, arrests were arbitrarily made at pool halls and other random places where foreigners might come together, to be loaded into trucks and taken away. Altogether these January raids proved even more comprehensive than the November raids. Over three thousand people had been arrested and over a thousand taken into custody.<sup>282</sup>

In addition to the fact that the raids punished associations and ideas, instead of actual crimes, and that people were arrested arbitrarily, without any individual court order, the “crime” of revolutionary ideas or associations was not even well founded. In the end, the January raids were little more than a token move against a defenseless immigrant group to win popular acclaim. Many of the arrestees recommended for deportation were later found out to have joined the Communist party without knowing what it implied, or without even knowing they had been members. The immigration officials also ran into difficulties proving advocacy or membership of

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<sup>276</sup> Leo Haskevich, Immigration Bureau number 54235/159, quoted in: Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 375.

<sup>277</sup> Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 376.

<sup>278</sup> Murray, *Red Saare*, 198, 209.

<sup>279</sup> Higham, *Strangers in the Land*, 230-231; Bennett, *The Party of Fear*, 192-193.

<sup>280</sup> P. Karol, *Golos Truzhenika*, February 28, 1920, quoted in: Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 463-464.

<sup>281</sup> Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 448-449.

<sup>282</sup> Higham, *Strangers in the Land*, 230-231; Bennett, *The Party of Fear*, 192-193.

subversive organizations. When the accused person denied the charges, the department was forced to arbitrarily decide to release or deport the immigrant.<sup>283</sup>

A study, undertaken in 1920, to provide a representative cross section of the deportation cases found that of the 200 cases examined, in sixty percent of the cases the arrest was made prior to the issue of the warrant. The study also revealed that many interpreters, who was required because the accused spoke no English, had been employees of the prosecuting department. In 3 of 27 studied cases he was also the witness against the alien. In many cases lawyers refused to serve "anarchists" and in other cases lawyers were only appointed after the trial had started. Evidence was also minimal: out of 124 cases, 8 involved no evidence whatsoever, 14 cases were based on the sworn statement of an agent of the Justice Department and in 36 cases membership cards were submitted as evidence, but 10 of those were cards of the Socialist or Communist Labor parties, neither of which was an organization proscribed for deportation.<sup>284</sup> This study thus reveals the wide disregard for due process rights of the immigrants in addition to the grounds for deportation, which were based on their associations and opinions, clearly violating the First Amendment.

The federal anticommunist crusade was copied by the legislative bodies in the states. By 1921, thirty-five states had passed criminal syndicalism, criminal anarchy or sedition laws. Over fifteen hundred suspected radicals were arrested under these new laws.<sup>285</sup> In general, such laws made radical opinions objectionable and punishable without any regard for the chance such ideas would lead to actual crimes. Severe penalties were applied for the advocacy of small offences, while the press was censored across the country.<sup>286</sup> In New York, the presence of the Lusk Committee led to the repression of all nonconformist ideas. Seeking publicity, it smeared a wide range of organizations and individuals with the taint of "bolshevism", including the Universities of Chicago, Yale and Barnard; the National League of Women Voters and several Senators that questioned the legitimacy of its inquiries.<sup>287</sup> The New York Socialists were the clearest victim. Being equated with violent bolshevism, Socialists were barred from the Legislature. A resolution, passed by a vote of 140 to 6, denied five duly elected Socialist members their seats in the New York assembly. In doing so, the legislators of New York not only outlawed socialist opinions from politics, but also denied about 60,000 voters representation in the state government, striking a double blow to free expression.<sup>288</sup>

### *The Red Scare Ends*

Meanwhile, the attorney general planned to deport the approximately 3500 radical aliens caught in the January raids.<sup>289</sup> Although Secretary of Labor Wilson had yielded to pressure from Palmer by authorizing warrants for the arrests *after* the raids had taken place, he had not declared membership of either communist party a deportable offense. While the issue of deportation was still pending, Assistant Secretary Louis F. Post became acting secretary and proved harder to persuade. At the time somewhat of a lone defender of civil liberties, Post cautiously examined all the cases brought to him and canceled the deportation orders when evidence or party membership seemed faulty or when the government could not prove the men had joined the party knowing exactly what it stood for. In the end, the Labor department released 2202 deportees. Although 556 were endorsed to deport, Palmer's efforts to purge the nation of all alien radicals had been delivered a serious blow. Several antiradical Congressmen tried to impeach the

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<sup>283</sup> Claghorn, *The Immigrant's Day*, vol. 9 of Bernard ed., *Americanization Studies*, 450-451

<sup>284</sup> Constantine M. Panunzio, *The Deportation Cases of 1919-1920*, (New York: Commission on the Church and Social Service, 1921), p. 27, 40, 52-65, <http://www.archive.org/stream/deportationcase00panuooog#page/n3/mode/1up>

<sup>285</sup> Walker, *In Defense of American Liberties*, 43.

<sup>286</sup> Murray, *Red Scare*, 231-233.

<sup>287</sup> Stone, *Perilous Times*, 222.

<sup>288</sup> Murray, *Red Scare*, 236-237.

<sup>289</sup> Bennett, *The Party of Fear*, 194.

Assistant Secretary, but their public backing was diminishing.<sup>290</sup> Post's attorney effectively defended him by stating that "the only criticism that could be directed against his administration was that he exercised humanity," in the face of a Justice Department that "used worse than Russian methods."<sup>291</sup>

The Great Red Scare had by then lost its momentum. Palmer attempted to overcome the lag caused by the Labor Department by intensifying the Justice Department's propaganda campaign and by forcibly trying to secure a peacetime law against sedition and subordination. After the January raids Palmer appealed to Congress for such legislation and ensured the population he would rid the nation of all radicals.<sup>292</sup> Post's refusal to ride the waves of antiradicalism, however, was accompanied by broader developments that brought the Attorney General's crusade to a halt. Most importantly, the labor unrest of the fall and winter died out.<sup>293</sup> Immigrant workers seemed submissive again and thus economically valuable to their employers. Several profound businessmen erected the so-called Inter-racial Council to defend their own foreign-born laborers, denying links to violent radicalism.<sup>294</sup> Twelve prominent legal figures published a document titled *To the American People: Report Upon the Illegal Practices of the U.S. Department of Justice*, in which they attacked the government for its "continued violation of the Constitution and the breaking of laws by the Department of Justice," for example by pointing to the Eight Amendment's prohibition of cruel and unusual punishments and the Fourth Amendment's bar on arrests without warrants.<sup>295</sup>

Moreover, the Red baiters had overextended their hand. The antiradical measures were appealing, because they were aimed at minority groups in American society. Palmer, however, tried to milk the antiradical sentiment for all it was worth and pushed relentlessly for a peacetime sedition law that would allow him to punish American *citizens* for their associations and opinions as well. Such legislation was too drastic a measure for many Americans. The Attorney General, however, could not recognize the writings on the wall and forcibly tried to keep the Red Scare alive. In April, 1920, he predicted that a massive bomb plot and general strike would take place on May Day as part of a Communist conspiracy to overthrow the United States Government. When nothing happened on Labor Day, Palmer lost his remaining credibility and his peacetime sedition bill never became political reality.<sup>296</sup> Palmer was done for and became almost a comical figure. Praised as "the Fighting Quaker" during the fall, he now became known as "the Faking Fighter" and lost all hope of winning the presidential nomination of the Democratic Party in 1920.<sup>297</sup>

### *The Red Scare and the Supreme Court*

Fortunately, the Great Red Scare thus subsided soon after its high tide in January 1920. Still, a dear price had been paid: the Red Scare had a profound effect on the state of civil liberties, especially regarding limits on the freedom of expression. During the 1920s, state legislation was passed across the country to implement teacher loyalty oaths and a movement crystallized to purge textbooks of "un-American" content.<sup>298</sup> Such narrow visions of freedom of speech also ruled the courts in the years following the war, including several cases reaching the Supreme Court. The Court did not review any Espionage Act cases until after the Armistice and by then

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<sup>290</sup> Higham, *Strangers in the Land*, 231.

<sup>291</sup> "Assail Louis Post for Releasing Reds," *The New York Times*, May 1 1920.

<sup>292</sup> Murray, *Red Scare*, 220-221.

<sup>293</sup> Bennett, *The Party of Fear*, 194-195.

<sup>294</sup> Higham, *Strangers in the Land*, 232-233, Bennett, *The Party of Fear*, 195.

<sup>295</sup> E.G. Brown, Zachariah Chafee, Jr., et al, "To the American People: Report Upon the Illegal Practices of the United States Department of Justice", May 1920, [http://www.archive.org/stream/toamericanpeople00natiuoft/toamericanpeople00natiuoft\\_djvu.txt](http://www.archive.org/stream/toamericanpeople00natiuoft/toamericanpeople00natiuoft_djvu.txt)

<sup>296</sup> Higham, *Strangers in the Land*, 232-233.

<sup>297</sup> Bennett, *The Party of Fear*, 195-196.

<sup>298</sup> Murray, *Red Scare*, 269.

the damage had often already been done. Due to lack of judicial interpretation in this area for about a hundred years, it was required to create the law of the land concerning freedom of speech during a few tumultuous months in 1919.<sup>299</sup> During the war, approximately 2,000 people had been convicted for antiwar criticism under the Espionage and Sedition acts.<sup>300</sup> Of these, three cases reached the Supreme Court in 1919, and in all of them the convictions reached by the lower courts were unanimously affirmed. According to Law Professor Geoffrey Stone, “the Court fretted over fired in a crowded theater,” and “established dismal precedents that took the nation half a century to overcome.”<sup>301</sup>

In *Schenck v. United States*, the Court upheld a conviction for mailing pamphlets that urged young men to resist conscription. In his famous opinion, Justice Oliver Wendell Holmes, Jr., declared that the question was whether Schenck’s words constituted “a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>302</sup> The “clear and present danger” test, although an attempt to discriminate between legitimate agitation and illegitimate incitement, greatly reduced the scope of free speech. Moreover, as Holmes added the criterion of *circumstances*, under which the words were expressed, he created a wide space for judicial interpretation and guesswork concerning the intention of the speaker, the possible consequences of the expressions and the mindset of the audience.<sup>303</sup>

Despite the vagueness and the lack of thought regarding civil liberties, the Supreme Court justices even violated the “clear and present danger” test in subsequent decisions. In *Frohwerk v. United States*, Holmes upheld the conviction of a German-American who questioned the constitutionality of the draft and the need to go to war. Holmes ignored his “clear and present danger” standard by pointing out that it was impossible to *disprove* that Frohwerk’s anti-war articles threatened the nation: “on the record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame.”<sup>304</sup> In the third Supreme Court case of March, 1919, *Debs v. United States*, the Court found socialist leader Eugene V. Debs guilty of giving an anti-war speech at a socialist convention in Ohio. Although Debs had not spoken to potential drafters per se, nor overtly urged violation of the draft law, it ruled that part of the speech encouraged the audience to obstruct the draft and therefore “the immunity of the general theme may not be enough to protect the speech.”<sup>305</sup>

A similar pattern continued after the Red Scare passed. In *Pierce et al. v. U.S.*, *Schaefer v. U.S.*, *Gilbert v. Minnesota*, and *Milwaukee Social Democratic Publishing Co. v. Bursleson* the decision followed the principle of *Schenck* to regard nonconformist ideas as dangerous, no matter whether any criminal act followed the advocacy of such ideas. The sedition laws involved were never held unconstitutional, despite the clear abridgements of freedom of speech, based on the “clear and present danger” principle.<sup>306</sup> Subsequently, in 1925 several cases involving actual Red Scare action appeared before the Supreme Court, most famously *Gitlow v. New York*. The defendant, Benjamin Gitlow, who was arrested and convicted under New York criminal anarchy law, claimed that such a statute was unconstitutional because it infringed on individual liberties guaranteed by the equal protection due process clause of the Fourteenth Amendment.<sup>307</sup> Although the majority opinion of the Court upheld the state law, it also, for the first time, seriously considered the First

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<sup>299</sup> Kennedy, *Over Here*, 84.

<sup>300</sup> Schmidt, *FBI and the Origins of Anticommunism*, 312.

<sup>301</sup> Stone, *Perilous Times*, 138.

<sup>302</sup> Kennedy, *Over Here*, 84-85.

<sup>303</sup> *Idem*, 85-86.

<sup>304</sup> Stone, *Perilous Times*, 196.

<sup>305</sup> Kennedy, *Over Here*, 86.

<sup>306</sup> Murray, *Red Scare*, 270-271.

<sup>307</sup> *Idem*, 271.

Amendment: advocacy of changes in the form of government were not penalized, but the explicit advocacy of “the overthrow of organized government by *unlawful* means.”<sup>308</sup>

For many years, the Supreme Court held onto the concept that ideological dissent, even if no criminal act was involved, constituted a clear and imminent danger to the national security or general welfare.<sup>309</sup> The conviction that the minority should follow the opinions of the majority determined judicial thinking, including Supreme Court decisions. The immense scope of repression during the war and the Scare, however, pointed to the dangers of a centralized state and the protection free speech required against it. Slowly, the Supreme Court began to reflect this awareness and began federal protection of free speech. Eventually, in *Fiske v. Kansas* (1927), the Court overturned a conviction under Kansas state criminal syndicalism law, because there was lack of evidence that the defendant was willing to use force or violence to recruit people into the IWW.<sup>310</sup>

### *The Red Scare: Public Pressure and Government Initiative*

In summary, many arguments support a dual reinforcement of anti-radicalism by both public resentment and active government encouragement that caused the Red Scare. On the one hand, the American public had “surrendered” to a complex of fear and hysteria, losing their faith in the strength of the American democratic system vis-à-vis radical individuals and organizations.<sup>311</sup> Bennett thus claims that alien un-American ideas generated a pandemic of fear that made the Palmer Raids possible.<sup>312</sup> To Murray, the deportations on the *Buford* indicated that the ability of the government to withstand the public pressure was severely weakened, and amidst the public hysteria, the Justice Department stepped in and took control of the deportation machinery.<sup>313</sup> Higham and Bennett concur that Palmer acted in a power vacuum. During President Wilson’s struggle to get the Versailles treaty rectified he suffered a stroke and could not lead the country in its battle with domestic radicalism.<sup>314</sup> Hence Palmer could grasp the moment and emerged as the nation’s apparent leader.<sup>315</sup> According to these scholars, Palmer might have milked the Red Scare for all it was worth to further his own personal ambitions, but only began his attack on radicalism to satisfy the public call for harsher action.<sup>316</sup>

On the other hand, the Bureau’s extensive role in the Palmer raids reveals other mechanics at work than just public pressure. The raids, including the widespread use of illegal methods, were hardly a spontaneous aberration of normal proceedings, brought about by public hysteria. In fact, they only differed in scale from practices developed by immigration authorities since the 1890s. As the Supreme Court had held in *Fong Yue Ting v. United States*, in 1893 that deportation was not an act of punishment but an administrative process, the federal government hardly *needed* public pressure to legitimize taking strong action against aliens.<sup>317</sup> The Bureau nevertheless took a far reaching initiative outside its own jurisdiction. The main concern of the officials involved was to end radical agitation and prevent Communism from growing into a political force. They also sought to increase support for peacetime sedition legislation that would institutionalize the Bureau’s political surveillance and increase the power of the Justice Department and the executive as a whole, as after the Espionage Act had expired, the Bureau was left without a legal weapon to continue its surveillance.<sup>318</sup>

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<sup>308</sup> Stone, *Perilous Times*, 237.

<sup>309</sup> Murray, *Red Scare*, 272-273.

<sup>310</sup> Schmidt, *FBI and the Origins of Anticommunism*, 312-313.

<sup>311</sup> Murray, *Red Scare*, 32.

<sup>312</sup> Bennett, *The Party of Fear*, 194.

<sup>313</sup> Murray, *Red Scare*, 205, 207.

<sup>314</sup> Bennett, *The Party of Fear*, 192.

<sup>315</sup> Higham, *Strangers in the Land*, 230.

<sup>316</sup> Murray, *Red Scare*, 192.

<sup>317</sup> Schmidt, *FBI and the Origins of Anticommunism*, 55-59; Murray, *Red Scare*, 196.

<sup>318</sup> Schmidt, *FBI and the Origins of Anticommunism*, 276-278, 299.

Other government forces also called for peacetime legislation to more easily persecute American citizens who held “seditious” opinions and reduce court interference. First, the Overman Committee proposed a new sedition law after “exposing” the Bolshevik menace, as the government was “without laws adequate even to protect its own sovereignty.”<sup>319</sup> After the Committee’s proposals stranded in Congress, on November 15, just after the Palmer raids, the Attorney General submitted his own version of a sedition law to Congress. His proposal would turn membership, advocacy or commitment to any organization advocating sedition into a federal crime for citizens and aliens alike. It would provide twenty years prison sentences to citizens and denaturalization and deportation measures for naturalized citizens as well as quick deportation proceedings regarding aliens.<sup>320</sup> Wilson urged Congress to pass Palmer’s bill in his annual State of the Union Message “to arm the Federal Government with power to deal in its criminal courts with those persons who by violent methods would abrogate our time-tested institutions.”<sup>321</sup>

The administration’s initiatives to create a statute that would allow it to effectively combat seditious *opinions*, without judicial oversight, thus severely limiting the scope of both freedom of speech and due process, indicate that its involvement in the Red Scare constituted a conscious effort to expand the power of the executive branch and legitimize its instruments of surveillance. In this light, the raids have to be regarded as a carefully and rationally managed operation, not a spontaneous response to a public hysteria.<sup>322</sup> As a whole, the Red Scare of 1919 was a deliberate response of the government and business elites to vanquish the developing forces of radicalism and mainstream labor. As such it was not brought on by public hysteria, even though public support was essential to its success.<sup>323</sup>

## Conclusion: Civil Liberties 1917-1920

America’s breach with its isolationism policy during the Great War, and its first encounter with Communist doctrines after the war ended, had a malignant affect on essential rights of free speech and due process. During this period of war and crisis, the federal government deliberately attempted to alleviate the prosecution of resident aliens and American citizens for their political views, when they criticized the war conduct, the peace treaty or the American form of government. Concurringly, the American public proved extremely receptive of measures aimed at repressing radical organizations, especially those of the immigrant population. Old nativistic hatreds were fed by the emergency demands for national coherence and led to a public assault on radical expressions of free speech. The expanding federal government and its newly established organs of surveillance used such public fervor to maintain the racial and economic status quo and extend the power of the executive. To defeat the rising labor movement, as well as any movements toward racial and social equality, the federal government repressed voices of dissent, facilitated deportation proceedings and attempted to limit court interference. In doing so, the Wilson administration and the ambitious Bureau of Investigation exploited the sense of national emergency to the fullest for interests quite unrelated to the national security of the United States.

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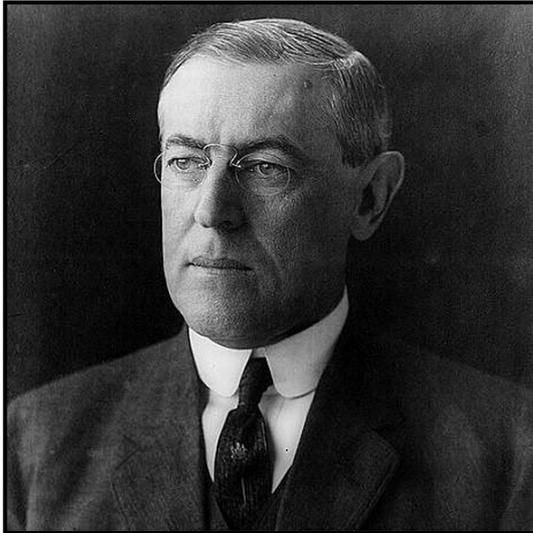
<sup>319</sup> “Radicalism and Sedition Among the Negroes, as Reflected in Their Publications,” *The New York Times*, November 23, 1919.

<sup>320</sup> Schmidt, *FBI and the Origins of Anticommunism*, 276-278.

<sup>321</sup> Wilson, “Seventh Annual Message.”

<sup>322</sup> Schmidt, *FBI and the Origins of Anticommunism*, 299.

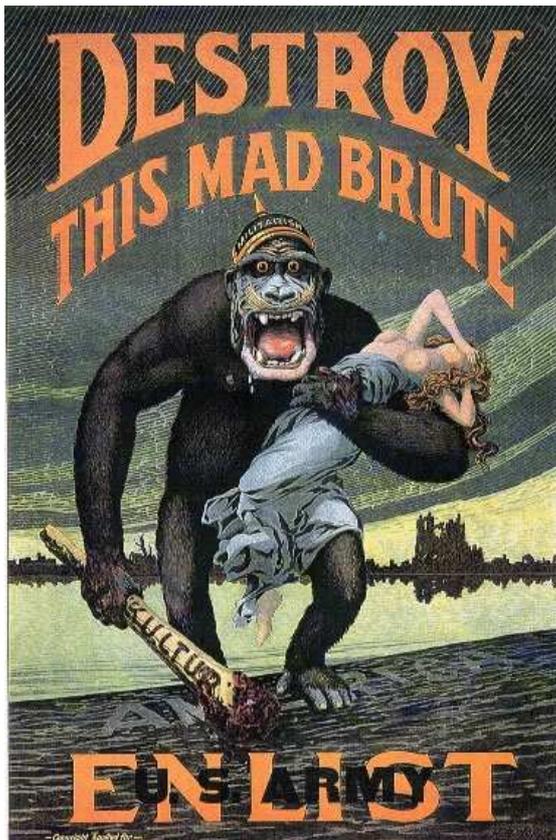
<sup>323</sup> Goldstein, *Political Repression*, 139.



*President Woodrow Wilson*



*Attorney General A. Mitchell Palmer*



*Official Poster by the U.S. Government depicting the German enemy as an ape-like monstrosity, 1917.*



*Cartoon from the New York Globe portraying the IWW as agents of the German Kaiser, 1917.*



*Government Repression: IWW headquarters, New York City, after the raid of November 15, 1919.*



*Vigilantism: The burial of Wesley Everett, who was lynched during the Centralia Massacre, October 1919.*

## Chapter 2 - Civil Liberties during World War II

*"The President ... was not much interested in the theory of sedition, or in the constitutional right to criticize the government in wartime. He wanted this anti-war talk stopped..."*<sup>324</sup>

Attorney General Francis Biddle, 1962

*"This crisis, again revived all of the prejudices and other handicaps of the second generation Japanese in this country, and we are again faced with all of the problems that were are being faced by our parents. It will probably take generations, and generations before this will be smooth and ironed out."*<sup>325</sup>

Noji Toru, high school student, 1943

World War II has gained the reputation of being the "Good War" for many Americans. America's entry into the conflict allowed for the liberation of Europe and Eastern Asia from the horrors of German fascism and Japanese imperialism. In accordance to this perception, the lion's share of attention has gone to America's role overseas, while domestic developments during the war have received little attention. Considering the ideological warfare that followed it and the economic and political earthquakes that preceded it, American society seemed at its most tranquil exactly during the war period. This chapter centers on the question whether American society during the war really was that quiet. More specifically, the state of civil liberties will be discussed during the war that threatened the national security of the United States and changed its position in world politics as never before.

As we have seen in chapter one, America's rigid transformation from isolationism to total war during the First World War led to far reaching demands for loyalty and kindled feelings of nativism, which allowed for a full scale assault on unwanted elements in American society. Moreover, the expansion of the federal government and the centralization of powers into the executive led the government to pursue a broad agenda of repression to accommodate its wartime and postwar interests. The consequence of both developments turned out to be a serious blow to constitutional liberties. Did a similar wave of repression occur during the Second World War, or did civil liberties meet a better fate during the "Good War"? The first part of this chapter is dedicated to a general overview of civil liberties during the war, while the second part focuses on the infamous decision to evacuate and intern all people of Japanese origin living at the West Coast of the United States.

### World War II and the Bill of Rights

The week of December 12<sup>th</sup> to December 18<sup>th</sup>, 1943 was designated "Bill of Rights Week", which prompted Eleanor Roosevelt to urge her fellow Americans to celebrate and "re-read the Bill of Rights at frequent intervals, especially during wartime," as "all wars curtail the rights of the individual." Americans, however, "give up these rights voluntarily because we see the need for doing so while a war is on," for the continuing right to vote "insures the return of these rights at the end of the war."<sup>326</sup> Her incentive to momentarily "forget" about civil liberties in the name of the national interest deviated quite a bit from her husband's statement two years earlier. At the

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<sup>324</sup> Quoted in: Stone, *Perilous Times*, 256-257.

<sup>325</sup> Noji Toru, "The Japanese Problem," Sociology Assignment, (4-27-1943), JARDA: Japanese American Relocation Digital Archives, <http://www.calisphere.universityofcalifornia.edu/jarda/>, retrieved February 18, 2009.

<sup>326</sup> Eleanor Roosevelt, "My Day: Every American Should Review the Bill of Rights in Wartime", *St. Petersburg Times*, October 31, 1943.

Bill of Rights' 150<sup>th</sup> anniversary in December 1941, just after the attack on Pearl Harbor, President Franklin D. Roosevelt assured Americans that "we will not, under any threat, or in the face of any danger, surrender the guarantees of liberty our forefathers framed for us in our Bill of Rights."<sup>327</sup> Clearly he played the game of politics, as Roosevelt had a few days earlier declared that "some degree of censorship is essential in war time."<sup>328</sup> Still, in a certain way, the contrast between these Presidential comments followed a similar contrast between the government's efforts to protect the civil liberties of certain groups on the one hand, while, on the other hand, repressing those of other groups.

According to historian Richard Polenberg, the fate of civil liberties during the war was to a large part shaped by "the nature of the conflict and the absence of opposition to it."<sup>329</sup> After the attack on Pearl Harbor an overwhelming majority of Americans thought the war was both necessary and justified. After all, it was fought in the name of freedom and democracy against tyranny and evil. Moreover, those who dissented weren't committed to peace per se, as the socialists and pacifists had been during the First War, but came from a miniscule minority of rightwing extremists. Therefore, Polenberg argues, there was hardly any public fear of internal threats to the nation's coherence.<sup>330</sup> The Second World War was a war that united Americans, ended the depression, set off an almost forty-years-long economic boom and made the United States the single most powerful nation in the world. David Bennett writes in this regard that "the nation became unified in a gigantic national effort to smash the Axis."<sup>331</sup> Still, Geoffrey Stone points out that although Americans were generally united in common cause, this could lead the government either to "comfortably tolerate dissent, which could readily be dismissed as misguided, but not dangerous," or to "bluntly crush dissent because war opponents were so marginal that their suppression would hardly be noticed."<sup>332</sup>

In one aspect, compared to the violations of civil liberties during World War I, the Second World War left a much improved record. Violence at the hands of vigilante groups hardly occurred during World War II.<sup>333</sup> German-American citizens were to a large extent left to themselves and President Roosevelt explicitly praised their contributions to American society to avoid violence.<sup>334</sup> In fact, several members of the Roosevelt administration seemed determined to prevent repression at the hand of local and state forces, as it had occurred during WWI and took a number of actions to prevent repression of dissent. In 1940, for example, FDR and other administration officials urged law enforcement officials throughout the country to leave matters of internal security to the federal authorities. Roosevelt warned against the stupidities and cruelty of vigilantism which led to an unwritten "gentleman's agreement" between state and federal powers to restrain vigilantes and allow the federal government to combat disloyalty on its own.<sup>335</sup>

### *The Supreme Court*

The persistent view of the war as a "good" war went all the way up to the Supreme Court, as became clear in the case of Elmer Hartzel. Hartzel wrote three pamphlets in which he claimed that England was a parasitic nation, that Jews had misled the United States into getting involved in the war and that the polio suffered by President "Rosenfeld" made him a degenerate. He was arrested under the Espionage Act of 1917, tried in federal district court and found guilty. The

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<sup>327</sup> "The U.S. at War: Doctrine and Covenants," *TIME Magazine*, December 22, 1941.

<sup>328</sup> "Censorship Plan," *The Evening Independent*, December 17, 1941.

<sup>329</sup> Richard Polenberg, "World War II and the Bill of Rights," in Kenneth Paul O'Brien and Lynn Hudson Parsons eds., *The Home-Front War: World War II and American Society* (Westport, CT/London: Greenwood Press, 1995), 11.

<sup>330</sup> Polenberg, "World War II...", 11.

<sup>331</sup> Bennett, *The Party of Fear*, 271.

<sup>332</sup> Stone, *Perilous Times*, 239-240.

<sup>333</sup> Roger Daniels, "Bad News from the Good War: Democracy at Home During World War II," in O'Brien and Parsons eds., *The Home-Front War*, 158-159.

<sup>334</sup> Bennett, *The Party of Fear*, 266.

<sup>335</sup> Goldstein, *Political Repression*, 263.

conviction was upheld by the Circuit Court of Appeals because Hartzel's expressions were regarded as an attack on the President, which could affect the morale of the nation. The Supreme Court, however, afforded Hartzel protection of First Amendment freedoms in wartime by overturning his conviction by a close five to four margin.<sup>336</sup> The court reversed the decision of the lower courts on the grounds that there was no proof that Hartzel had attempted to cause insubordination or disloyalty among the army.<sup>337</sup> Justice Frank Murphy became crucial to the verdict, as he first sided with a majority of five to affirm the conviction, but changed his mind when he was assigned to write the majority opinion. In accordance with the idea that the war America was fighting was a "Good War", Murphy believed that because Hartzel promoted Nazism, he should be punished. Murphy's high regard for free speech, however, could not allow him to uphold the conviction. Thus the bizarre situation arose that Murphy wanted to change his own vote, but preferred it if Hartzel went to prison. Therefore he attempted to talk one of his fellow justices into switching sides as well, so that the conviction would be upheld. In doing so, Murphy would be able to defend free speech personally as a dissenting opinion to the majority ruling. No one was willing to change his opinion though, leaving Murphy forced to turn his opinion into the Court's opinion and overturn the conviction of Elmer Hartzel.<sup>338</sup> Through its ruling that "an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective," the Court seriously hindered the government's efforts to repress antiwar dissent.<sup>339</sup>

Throughout the war years such uncertainty and divisions ruled the Supreme Court. Several cases regarding freedoms of religion and speech illustrate the point. By 1940, 18 states and many school districts had introduced compulsory flag salutes as a patriotic exercise to children attending public school. In *Minersville School District v. Gobitis*, a case in which two children of Jehovah's Witnesses were expelled from their school, because they refused to salute the flag out of religious convictions, the Supreme Court voted eight to one to uphold the mandatory flag salute. Justice Felix Frankfurter argued, writing for the majority, that "national unity is the basis of national security."<sup>340</sup> In doing so, he contended that religious liberty does not allow for disobedience to general laws. Symbols, petty as they seem, were actually very important, Frankfurter explained, and the flag is "the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."<sup>341</sup> After hundreds of attacks occurred on Jehovah's Witnesses following the Court's decision, three justices changed their mind, believing that *Gobitis* had been "wrongly decided." Moreover, two new justices were appointed to the court. Ultimately, when a similar case was brought before the Supreme Court in 1943, at the height of the war, overruled *Gobitis*, although the facts of *West Virginia State Board of Education v. Barnette* were almost the same.<sup>342</sup> This time, the Court held, in a six to three vote, that children could not be expelled from school for refusing to salute the flag.<sup>343</sup> Newly appointed Justice Robert Jackson wrote the majority opinion in which he stated that "the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials."<sup>344</sup> Public officials, such as those on the school board, could employ a symbolic public ceremony to foster national unity, according to

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<sup>336</sup> Polenberg, "World War II...", 14-15.

<sup>337</sup> Goldstein, *Political Repression in Modern America*, 270.

<sup>338</sup> Polenberg, "World War II...", 14-15.

<sup>339</sup> Stone, *Perilous Times*, 282.

<sup>340</sup> Polenberg, "World War II...", 12.

<sup>341</sup> Henry J. Abraham and Barbara A. Perry, *Freedom and the Court: Civil Rights & Liberties in the United States* (New York/Oxford: Oxford University Press, 1994), 238.

<sup>342</sup> Stone, *Perilous Times*, 282.

<sup>343</sup> Goldstein, *Political Repression in Modern America*, 280.

<sup>344</sup> Polenberg, "World War II...", 13.

Jackson, but “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>345</sup>

In two other cases, *Schneiderman v. United States* and *Baumgartner v. United States*, the Court overruled the government’s attempts to denaturalize citizens who expressed extreme and subversive views. William Schneiderman was a naturalized Russian émigré and a member of the Communist Party. The United States began denaturalization proceedings against him in 1939, based on the premise that, being a Communist, he could not have been dedicated to the principles of the U.S. Constitution when he became an American citizen.<sup>346</sup> In July 1943, the Supreme Court ruled five to three that without an overt act of insubordination, mere membership in the CP could not establish fraud upon taking the oath. Moreover, the Court found nothing in the party program which was necessarily incompatible with the Constitution.<sup>347</sup> The majority ruling also emphasized that the status of all naturalized citizens would become jeopardized when citizenship could be annulled because of an individual’s *ideas*. In writing for the majority, Justice Murphy argued that the only basis for denaturalization should be the perpetration of overt acts, not the expression of ideas or membership of a revolutionary organization. Dissenting, Chief Justice Harlan Fiske Stone argued that aliens who advocate the violent overthrow of the government were ineligible for citizenship. A communist regime would abolish “the freedoms guaranteed by the Bill of Rights,” according to Stone. Hence, a member of the Communist Party should not be entitled to these rights.<sup>348</sup>

The second case involved Carl Wilhelm Baumgartner, who was born in Germany and became an American citizen in 1932. When he later embraced Hitler and the Nazi doctrines, the government canceled his naturalization by arguing that he had not been loyal to the United States when he took the naturalization oath. The Supreme Court, however, expanding on *Schneiderman* held that individuals could not be denaturalized for speaking “foolishly and without moderation,” or for making “sinister-sounding” statement.<sup>349</sup> Even Justice Frankfurter, who had dissented in the cases of Schneiderman and Barnette, wrote that Baumgartner had expressed his views, although controversial, only *after* he was naturalized. Thus there could be no “clear, unequivocal and convincing” proof of his supposed “fraud”. Murphy, in his concurring opinion, argued that a naturalized citizen “is not required to imprison himself in an intellectual or spiritual straitjacket.”<sup>350</sup>

### *Executive Political Repression*

The court’s respect for freedom of speech during wartime thus eventually prevailed over its concern with national security, although only barely. In two of the above discussed cases such an outcome was the result of a change in mind of one or several justices. In *Hartzel* the outcome could as easily have been decided otherwise, considering Justice Murphy’s dual commitment to the just cause of the war and freedom of speech. Still, the Court proved to be much more austere in its defense of the constitution against wartime quirks than it had been during the nineteen twenties. To the extent that World War II was a “good” war for civil liberties, the Supreme Court was responsible.<sup>351</sup> The executive powers, however, despite the fact that most of the cabinet members considered themselves to be liberals, played a much more nefarious role. Roger Daniels speaks of a “paradox” between the administration’s elevated *goals* abroad and at home, such as the four freedoms and the economic bill of rights – and the *means* to achieve these goals, which were mostly undemocratic. Such a paradox was conditioned by the immense expansion of the federal

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<sup>345</sup> Abraham and Perry, *Freedom and the Court*, 241-242.

<sup>346</sup> Stone, *Perilous Times*, 281.

<sup>347</sup> Goldstein, *Political Repression in Modern America*, 271.

<sup>348</sup> Polenberg, “World War II...”, 14.

<sup>349</sup> Stone, *Perilous Times*, 281.

<sup>350</sup> Polenberg, “World War II...”, 14.

<sup>351</sup> Goldstein, *Political Repression in Modern America*, 280-281.

government, particularly the executive branch, and its increasing involvement in the lives of ordinary Americans during WWII.<sup>352</sup>

When Hitler invaded Poland on September 1, 1939, anxieties rose in the United States. Immediately conservatives stepped up their criticism of the Roosevelt administration, especially through the House Un-American Activities Committee (HUAC), in its early years often called Dies committee, after its chairman, representative, Martin Dies. HUAC, formed in 1938, was charged with investigating “the extent, character and objects un-American propaganda activities in the United States,” but soon became an instrument to attack the Roosevelt administration through wild, spectacular and often unfounded charges of subversive infiltration in the administration.<sup>353</sup> Roosevelt subsequently proclaimed a limited state of national emergency in September 1939, and placed the Federal Bureau of Investigation in charge of investigating matters of espionage, counterespionage and sabotage.<sup>354</sup> The surveillance activities of the FBI consequently expanded greatly under the wartime pressures. The FBI engaged in illegal break-ins against various groups connected to foreign intelligence and espionage. These “surreptitious entries” took the form of either “black bag jobs” in which FBI agents stole confidential material, or heists made to install microphone “bugs.”<sup>355</sup> The initiative came to a large extent from the administration. President Roosevelt had already in August 1936, secretly authorized J. Edgar Hoover, director of the FBI, to investigate suspected Fascists and Communists in the United States.<sup>356</sup> Included in the mandate were any “subversive activities,” which allowed for the surveillance of various political groups. Hoover in turn stretched the presidential directives as far as possible by reinstating many of the Bureau’s tactics, as they had been used during the Red Scare. He ordered FBI field offices to investigate thirty-three political groups, which included the American Student Union, the American Committee for the Protection of the Foreign Born, and the National Negro Congress. Agents went out and obtained membership lists, publications and sponsor lists of these organizations.<sup>357</sup>

Hoover’s drive against dissent was framed by the federal government’s official loyalty program. The program included the Hatch Act, which prohibited employment at the federal government to any member of an organization that advocated the violent overthrow of the government and the U.S. Civil Service Commission’s approval to dismiss any suspected subversive individuals.<sup>358</sup> As the war developed in Europe, both the administration and Congress became increasingly concerned about a so-called fifth column and undertook a new series of repressive measures. The most important of these was the Alien Registration Act passed by Congress in 1940, which required all resident aliens to register with the government, eased deportation proceedings and forbade any individual to “willfully advocate, abet, advise, or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence.” The statute, popularly known as the Smith Act, was in effect equal to what Attorney General Palmer had proposed as his sedition act in 1920.<sup>359</sup> President Roosevelt did not mention any of the anti-sedition provisions in the law when he introduced it to the public, but instead emphasized the registration of aliens as a design to protect them. The real purposes of the law, however, were to provide an element of control over aliens and to make sure that such control was entirely in the hands of the federal government. In the end, the Smith Act was used only twice during World War II, but it institutionalized federal control over the

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<sup>352</sup> Daniels, “Bad News...”, 157.

<sup>353</sup> Stone, *Perilous Times*, 245-248, 252.

<sup>354</sup> Daniels, “Bad News...”, 159.

<sup>355</sup> Goldstein, *Political Repression in Modern America*, 272.

<sup>356</sup> Stone, *Perilous Times*, 248.

<sup>357</sup> Walker, *In Defense of American Liberties*, 126-127.

<sup>358</sup> *Idem*, 127.

<sup>359</sup> Stone, *Perilous Times*, 251.

“seditious” foreign-born. During the Cold War, the act was used effectively to convict many leaders of the Communist Party, as will be discussed in the following chapter.<sup>360</sup>

When the United States got actively involved in the world war in late 1941, new forms of political repression arose. Under the terms of the Alien Enemies Act of 1798, which authorized arrests on presidential warrant, almost four thousand allegedly dangerous enemy aliens were arrested by the FBI. Interment of these individuals was based solely on executive order.<sup>361</sup> A more drastic measure was applied at the Territory of Hawaii. A few hours after the attack on Pearl Harbor, the governor of Hawaii issued a proclamation that placed the territory under martial law and suspended the writ of habeas corpus. FDR approved the governor’s action on December 9. The commanding general of the military in Hawaii then established a military regime for administering criminal law throughout the territory.<sup>362</sup> For three years fundamental rights of due process were suspended, despite the lack of evidence of subversive activities occurring in Hawaii.<sup>363</sup>

On the mainland, sedition prosecutions against the tiny war opposition, mostly rightwing extremists, began in 1942. Under pressure by the president and the wider public, Attorney General Francis Biddle indicted twenty-eight American fascists for violating the Espionage Act of 1917 and the Smith Act of 1940. The defendants had little in common, despite their hatred for Jews, communism and Roosevelt and, despite their disturbing political views, by no means threatened the security of the United States.<sup>364</sup> Nevertheless, the Department of Justice charged that their criticism of the government was part of a conspiracy to undermine the morale of the troops.<sup>365</sup> The “Great Sedition Trial” of World War II, which did not start until 1944, was the first overt political prosecution in the United States since the IWW trials of the World War I. It, however, did not lead to a conviction. The essence of the government’s rationale was that the defendants acted sympathetic to the enemy line, but could not find any real evidence to support such claims.<sup>366</sup> Insecure, the government changed the charges twice, before finally settling on “conspiracy on behalf of the German government to undermine the morale of the military”. The case subsequently resulted in a mistrial.<sup>367</sup> Still, the lingering prosecution restricted fascist propaganda during the war, forced the defendants to defend themselves in court for four years and set an important precedent for subsequent Smith Act prosecutions of the Communist Party in the Cold War.<sup>368</sup>

In addition to the sedition prosecutions of “native fascists”, the administration began to denaturalize members of the German-American Bund and other supposedly disloyal naturalized citizens. The government took legal action against those who had not been “attached to the principles of the Constitution” at the time of naturalization. By the end of 1943, the government had issued 146 cancellation orders, most involving naturalized German immigrants who had made statements in favor of the Nazi’s, while in the United States. The effect of such a cancellation order was to reinstate original nationality and allow for internment or deportation as an enemy alien.<sup>369</sup> Although the Supreme Court, through *Schneiderman* and *Baumgartner* effectively ended this initiative, the government intentions show the little regard it held for the rights of naturalized citizens. The “liberal” Roosevelt Administration, in its attempts to combat dissent,

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<sup>360</sup> Daniels, “Bad News...”, 160.

<sup>361</sup> Goldstein, *Political Repression in Modern America*, 264-265.

<sup>362</sup> Rehnquist, *All the Laws but One*, 213.

<sup>363</sup> Goldstein, *Political Repression in Modern America*, 265.

<sup>364</sup> Stone, *Perilous Times*, 272-273.

<sup>365</sup> Richard D. Polenberg, *The Era of Franklin D. Roosevelt 1933-1945: A Brief History with Documents*, (New York: Palgrave Macmillan, 2000),

[http://books.google.nl/books?id=zEGj1moYJ\\_OC&printsec=frontcover&source=gbs\\_v2\\_summary\\_r&cad=0#v=onepage&q=&f=false](http://books.google.nl/books?id=zEGj1moYJ_OC&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q=&f=false), retrieved September 11, 2009.

<sup>366</sup> Stone, *Perilous Times*, 274.

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

<sup>368</sup> Stone, *Perilous Times*, 275.

<sup>369</sup> *Idem*, 280-281.

thus deprived its citizens of their rights of assembly and free speech on multiple accounts.<sup>370</sup> The President's contention that the Smith Act's prohibition of "advocacy", which criminalized seditious expressions, hardly constituted "an improper encroachment on civil liberties in the light of present world conditions," reveals Roosevelt's view of civil liberties: he supported them in the abstract, but not when they interfered with his policies.<sup>371</sup>

### *Freedom of the Press*

FDR had been very successful in promoting his New Deal legislation partly due to his skillful use of the communications media. He bound newspapers to his cause by bringing reporters into the Oval Office for press conferences and demonstrated his ability to transmit his sense of concern and his aptitude to transform his policies into understandable language across the airwaves of the radio.<sup>372</sup> Usually able to win journalists for his cause, Roosevelt regarded press material critical of him or his policies as "untrue news."<sup>373</sup> As Polenberg argues, Roosevelt especially held a "highly restrictive" view of freedom of the press at time of war. Already in 1942, Roosevelt informed Biddle that the editorials of the *Chicago Tribune* and *New York Daily News*, which had been critical of the allies, warranted persecution under the 1918 Sedition Act.<sup>374</sup> The President also urged Attorney General Francis Biddle to act against seditious far-right agitators and critics, asking him at multiple cabinet meetings when he was going to indict such "seditionists". Roosevelt also questioned the American Civil Liberties Union (ACLU) "whether freedom of the press is not essentially freedom to print correct news and freedom to criticize the news on the basis of factual truth."<sup>375</sup>

An important episode of the administrations restrictions of free press concerned Father Charles Coughlin. Coughlin used his enigmatic radio voice to become a powerful religious leader and a serious political voice. After the President declared his New Deal legislation plans, he began to characterize Roosevelt as the "Great Betrayer" and started a publication called *Social Justice*. By the end of the 1930s, Coughlin had moved to the far right and become a fierce anti-Semite, while his journal reached a circulation of over five million members.<sup>376</sup> FDR, who had written to Hoover that the war "looks like a good chance to clean up a number of these vile publications", urged Biddle to act against Father Coughlin. In April, 1942, Biddle requested the postmaster general to suspend the mailing privileges of *Social Justice* as it echoed the enemy line that war was unnecessary. Eventually the administration, to prevent the need for a public trial against the popular priest, convinced the Catholic Church to censor Coughlin.<sup>377</sup>

Biddle also, under constant pressure of the president, barred seventy newspapers and publications from the mails under the Espionage Act during the first year of the war.<sup>378</sup> Still, the Attorney General's war record proved above average in the long run, compared to his predecessors and successors in wartime. He resisted pressure from FDR and the wider public to push for more repressive measures. Biddle also advised Roosevelt against attacks on the press and had dismissed three Espionage Act indictments in December 1941. Only after the other cabinet members unanimously supported the president's demand to act against seditious speech did he authorize the indictments of the domestic fascists.<sup>379</sup> According to Biddle, the President

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<sup>370</sup> Goldstein, *Political Repression in Modern America*, 271-272.

<sup>371</sup> Stone, *Perilous Times*, 252.

<sup>372</sup> Alonzo L. Hamby, *Liberalism and Its Challengers: From F.D.R. to Bush* (New York/Oxford: Oxford University Press, 1992), 32-33.

<sup>373</sup> Goldstein, *Political Repression in Modern America*, 266.

<sup>374</sup> Polenberg, "World War II...", 16.

<sup>375</sup> Goldstein, *Political Repression in Modern America*, 266.

<sup>376</sup> Stone, *Perilous Times*, 277.

<sup>377</sup> Polenberg, *The Era of Franklin D. Roosevelt*, 27.

<sup>378</sup> Goldstein, *Political Repression in Modern America*, 268.

<sup>379</sup> Walker, *In Defense of American Liberties*, 153-154.

himself formed the greatest source of pressure to take on repressive action, later commenting that he had explained to the President "the unwisdom of bringing indictments for sedition except where there was evidence that recruitment was substantially being interfered with." FDR, however, according to Biddle, was not very interested "in the constitutional right to criticize the government in wartime."<sup>380</sup>

Equally dangerous as these attempts at overt censorship by the administration were the media's willing concessions to government requests of voluntary censorship. The broad consent with the war aims and conduct of war led to a form of self-censorship among moderate media, which rendered governmental censorship unnecessary. The film industry, for example, collaborated with the government intensively. Hollywood studios produced numerous films that romanticized combat and promoted the war effort and the cause of war. Roosevelt's wish to leave the film industry uncensored thus was easily promised. The Code of Wartime Practices was almost universally adhered to, even concerning silly rules that forbade musical request shows and lost and found notices out of a fear of coded messages. The Code was used more seriously, however, by the government to suppress news of racial disturbances and to censor news from the battlefronts.<sup>381</sup> In addition, the president established the Office of War Information (OWI), which was used to provide misleading reports about American losses in Asia and to play down the significance of early setbacks. As the war went on, the OWI, imitating the CPI of World War I, secured the media's allegiance to the government propaganda, for example by pressuring Hollywood into presenting an image of the wartime experience as "happy, brave, trustworthy, and loyal."<sup>382</sup>

In addition to the inherent dangers of government propaganda, the OWI censored any movie that depicted existing race relations in a bad light. On the other hand, as a bulwark of liberals dedicated to racial equality, it aimed to include blacks in its celebration of American society. Therefore, the OWI was often inclined to remove black characters from movie scripts altogether and, by doing so, helped to uphold the color line in Hollywood movies.<sup>383</sup> In addition, President Roosevelt actively pushed for action against African-American newspapers. These newspapers propagated a "Double V" campaign: victory over fascism abroad was to be accompanied by victory at home over racial discrimination.<sup>384</sup> The government's attitudes toward racial injustice, however, proved quite different: it fought international racism by using a military establishment produced by strict segregation.<sup>385</sup> The "Double V" campaign, therefore involved some criticism, especially of black experiences in the segregated military, including recurrent patterns of exclusion, subordination and harassment.<sup>386</sup>

The president, however, again was unwilling to tolerate criticism at wartime and urged Biddle to talk to black editors and prevent their "subversive" language. Although Biddle proved unwilling to indict black newspapers for sedition, the government subtly managed to silence their criticism either way. FBI agents regularly visited black editors to threaten or complain to them concerning reports about discrimination and segregation. As a result of veiled threats and government pleas the black press generally became less outspoken during the war and abandoned its Double V campaign.<sup>387</sup> The administration also charged over eighty members of black religious organizations with sedition, because they had indicated sympathy for the Japanese as a fellow "colored" race.<sup>388</sup> At the same time, the military, even though it abdicated its efforts to

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<sup>380</sup> Goldstein, *Political Repression*, 266.

<sup>381</sup> Daniels, "Bad News..." , 163; Walker, *In Defense of American Liberties*, 159.

<sup>382</sup> Stone, *Perilous Times*, 279-280.

<sup>383</sup> Gerstle, *American Crucible*, 206-210.

<sup>384</sup> Polenberg, "World War II..." in O'Brien and Parsons eds., *The Home-Front War*, 19-20.

<sup>385</sup> Daniels, "Bad News..." in O'Brien and Parsons eds., *The Home-Front War*, 157.

<sup>386</sup> Gerstle, *American Crucible*, 210-211.

<sup>387</sup> Polenberg, "World War II..." in O'Brien and Parsons eds., *The Home-Front War*, 19-20.

<sup>388</sup> Goldstein, *Political Repression in Modern America*, 270.

limit black subscription into the armed forces, held on to Jim Crow practices and racial stereotyping throughout the war.<sup>389</sup>

In addition to the violations of First Amendment rights regarding the press and its limited views of the Fourteenth Amendment's Equal Protection Clause, the administration also confiscated property of war opponents who were allegedly financed by the enemy. It seized Japanese-language newspapers published by American citizens, as well as publications of the German-American Bund. Despite the lack of evidence of financial links between the German government and the Bund it stood out as the best known opposition group and thus suffered from all the tactics used by the administration to suppress its opposition. Its properties were confiscated, it suffered draft resistance and sedition prosecutions and its members were subject to be denaturalized and deported.<sup>390</sup>

### *The Liberal Consensus*

Many liberals who surrounded Roosevelt in or outside the administration shared the president's perception of liberties in wartime. Roosevelt's aide Aubrey Williams for example, told the president in 1942 that "the right of free speech carries with it the obligation not to use it to aid the enemy." Embarrassingly, he added that in this regard "the Russians have set a damn good example."<sup>391</sup> Many liberals at the time not only feared subversion and accepted how the war established a need of control; they also wished to support their friends in the administration. Those who held such positions in turn wanted to make sure they would not be accused of being "soft" in wartime.<sup>392</sup> Dissent was also limited, because Russia and the U.S. fought side by side. American Communists therefore vanished as antiwar protestors and the only remaining war opposition was produced by several extremist right-wing groups. Left-wing groups and liberals, who used to form the core of organizations advocating the protection of civil liberties, now began to demand repression of the tiny fascist opposition. Liberal organizations, such as *The Nation*, *the New York Post*, *Life* magazine and the New York branch of the American Labor Party called for the suppression of the anti-war press and the prosecution of anti-war agitators on the account of sedition.<sup>393</sup>

The idea that freedom of speech did not apply to Nazi's became persistent as well. Even the ACLU, self-proclaimed defendant of civil liberties, became permeated by such voices. Staff counsel A.L. Wirgin urged the temporary House Un-American Activities Committee in 1934, for example, to investigate Fascist groups. ACLU front man Roger Baldwin even proposed a measure to outlaw military drills to political groups, possibly restricting the freedom of assembly guaranteed by the First Amendment.<sup>394</sup> Although the ACLU over the years began to defend the rights of fascists as a cornerstone of their defense of free speech to anyone, an anti-fascist sentiment regarding the freedom of expression remained dominant in society at large. According to ACLU scholar Samuel Walker, 'most of the pressure on the ACLU to support suppression of domestic Fascists came from the left.'<sup>395</sup> *The Nation*, for example, called to "curb the Fascist press."<sup>396</sup> Many Americans, liberals included, feared that foreign totalitarianism seriously threatened American society. They thought that the American democracy needed protection against Communists and Fascists through the restriction of their political activities.<sup>397</sup>

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<sup>389</sup> Gerstle, *American Crucible*, 213-214.

<sup>390</sup> Goldstein, *Political Repression in Modern America*, 272.

<sup>391</sup> Polenberg, "World War II...", 17.; Daniels, "Bad News...", 160.

<sup>392</sup> Polenberg, "World War II...", 17-18.

<sup>393</sup> Goldstein, *Political Repression in Modern America*, 264-265.

<sup>394</sup> Walker, *In Defense of American Liberties*, 117.

<sup>395</sup> Idem.

<sup>396</sup> Freda Kirchwey, "Curb the Fascist Press!," *The Nation*, March 28, 1942, 357-358.

<sup>397</sup> Walker, *In Defense of American Liberties*, 134.

## The Japanese-American Internment

The broad general support for the war and the placement of fascist opinions outside of the realm of accepted freedom of speech considerably limited the possibilities for a discussion of civil liberties during the war and gave the administration an almost carte blanche in dealing with issues of subversion. This became painfully apparent when FDR issued an executive order, which should have provided plenty debate on civil liberties, but hardly caused any public reaction. Executive Order 9066 was issued on February 19, 1942, to send Japanese Americans to internment camps, which according to Goldstein shattered “whatever hopes there might have been of a “good” civil liberties record’ during the war.<sup>398</sup> The order itself was rather vague and did not single out Japanese Americans:

Whereas, The successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national defense utilities (...) by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War (...) to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion.<sup>399</sup>

The order provided the Secretary of War with the authority to exclude both citizens and aliens from certain areas to prevent sabotage and espionage. The army implemented it by relocating all 110,000 Japanese Americans from the Western states of the United States to concentration camps at desolated areas across the country. Over two-thirds of those interned were American citizens. The decision had been authorized solely by the executive order, no formal charges were filed against any of the Japanese Americans, nor was there any possibility for an individual review of loyalty.<sup>400</sup>

### *The False Premises*

The order itself presented the relocation as a measure of national security, a response to an acute threat of sabotage and subversion. The idea easily held with the broader public as many Americans had grown increasingly worried by Japanese advances in the Pacific and rumors of ethnic Japanese in Hawaii who had aided in the attack on Pearl Harbor.<sup>401</sup> Still, the weeks following the surprise attack saw a remarkably restrained public reaction devoid of any serious outbursts of vigilantism. The local and federal governments arrested 736 Japanese nationals on December 7, 1941, and an additional 600 over the next three days. The president also imposed a curfew for Japanese, German and Italian aliens and the situation seemed to be under control.<sup>402</sup> Still the growing atmosphere of paranoia and panic slowly developed into a plan to remove all Japanese Americans from the West Coast. The fear for the security of the United States that underlay the campaign was nevertheless hardly based on facts. Reports from the FBI concluded that mass relocation and incarceration was not a military necessity. Instead, the public acceptance

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<sup>398</sup> Goldstein, *Political Repression in Modern America*, 266.

<sup>399</sup> Executive Order 9066, February 19, 1942,

<http://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript>

<sup>400</sup> Donna K. Nagata, *Legacy of Injustice: Exploring the Cross-Generational Impact of the Japanese American Internment* (New York/London: Plenum Press, 1993), 1-2.

<sup>401</sup> Nagata, *Legacy of Injustice*, 2.

<sup>402</sup> Walker, *In Defense of American Liberties*, 136.

of the measure was founded in racial prejudice, as was the military's eagerness to implement such a drastic measure.<sup>403</sup>

Lieutenant General John L. DeWitt, who recommended the relocation, informed Secretary of War Stimson that ethnic Japanese were possibly organized and committed to jointly act against the United States. He saw no distinction between the Japanese enemy and Japanese Americans. Loyalty was determined solely by ethnic heritage, hence the recommendation to evacuate on the criterion of ethnicity.<sup>404</sup> DeWitt's thoughts were entirely based on assumptions of racial traits, as he stated to Secretary Stimson that "the Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."<sup>405</sup> Stimson commented that "the second generation Japanese can only be evacuated either as part of a total evacuation," or by "trying to put them out on the ground that their racial characteristics are such that we cannot understand or trust even the citizen Japanese." Stimson admitted he was afraid that the latter reasoning "will make a tremendous hole in our constitutional system to apply it."<sup>406</sup> Polenberg argues that Stimson, Roosevelt and others eventually dug that hole in the constitution, because "most Americans accepted odious racial stereotypes of the Japanese, and, by extension, of Japanese Americans."<sup>407</sup> Moreover, DeWitt had suppressed the military's own evidence, complementing that of the FBI and naval intelligence, that the evacuation was not a military necessity.<sup>408</sup>

To a large extent, the measure was a preliminary one, as was concluded in the Commission on Wartime Relocation and Internment of Civilians (CWRIC), established by Congress in 1980 to review the internment decision and practices. The Commission stated that the decision was made "despite the fact that not a single documented act of espionage, sabotage or fifth column activity was committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast."<sup>409</sup> DeWitt reversed all logic in saying that the fact that no sabotage had taken place up until the evacuation was "a disturbing and confirming indication that such action will be taken."<sup>410</sup> Moreover, U.S. intelligence had already been monitoring Japanese immigrants before the United States became involved in the war. Army Intelligence already inquired about the possibility to detain civilians who were American citizens in 1941. Both the Justice Department and the FBI suggested that limited actions were preferable to mass evacuation. Supposedly even J. Edgar Hoover declared that "this evacuation isn't necessary; I've already got all the bad boys."<sup>411</sup> Their opinions never came to represent more than token resistance and never formed a clear and unified opposition to DeWitt's recommendations.<sup>412</sup>

The clearest case of token resistance was made by Attorney General Biddle, who completely disagreed with the Army's plans, but hardly protested them. At a lunch meeting with the president on February 7, 1942, less than two weeks before the executive order, he told the

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<sup>403</sup> Nagata, *Legacy of Injustice*, 2.

<sup>404</sup> Nagata, *Legacy of Injustice*, 2.

<sup>405</sup> Commission on Wartime Relocation and Internment of Civilians (CWRIC), *Personal Justice Denied: Report on the Commission on Wartime Relocation and Internment of Civilians* (Washington DC, 1982), chapter 2, [http://www.nps.gov/history/history/online\\_books/personal\\_justice\\_denied/chap2.htm](http://www.nps.gov/history/history/online_books/personal_justice_denied/chap2.htm), retrieved September 21, 2009.

<sup>406</sup> CWRIC, *Personal Justice Denied*, chapter 2.

<sup>407</sup> Polenberg, "World War II..." in O'Brien and Parsons eds., *The Home-Front War*, 20.

<sup>408</sup> Walker, *In Defense of American Liberties*, 136.

<sup>409</sup> CWRIC, *Personal Justice Denied*, summary,

[http://www.nps.gov/history/history/online\\_books/personal\\_justice\\_denied/summary.htm](http://www.nps.gov/history/history/online_books/personal_justice_denied/summary.htm).

<sup>410</sup> CWRIC, *Personal Justice Denied*, chapter 2.

<sup>411</sup> "Interview with James H. Rowe, March 1 1971," *Japanese-American Relocation Reviewed: Volume I, Decision and Exodus*, <http://content.cdlib.org/view?docId=ft667nb2x8&doc.view=frames&chunk.id=d0e642&toc.depth=1&toc.id=d0e642&brand=calisphere&query=Japanese%20American%20Oral%20History%20Project>, retrieved September 22, 2009.

<sup>412</sup> Nagata, *Legacy of Injustice*, 3.

president that “there were no reasons for mass evacuation” and emphasized “the danger of hysteria.”<sup>413</sup> Still the Attorney General failed to tell the president that the evacuation, as it included suspension of the writ of habeas corpus, would be unconstitutional, just that it was unnecessary.<sup>414</sup> It turned out that it was just not Biddle’s decision to make. His assistant at the time, James H. Rowe, stated in an interview in 1971 about the internment decision: “FDR told Biddle to move the Japanese”. In fact, “[Assistant Secretary of War] McCoy and Stimson had talked to Roosevelt, and we weren’t in on it.”<sup>415</sup> The Justice Department had not considered the military’s extended powers over domestic issues during wartime and believed that the internment option was impossible, constitutionally, as well as practically. Rowe explained that “we kept saying that we won’t do it and haven’t got the authority to do it,” although “there are enough precedents, you know with Lincoln suspending the writ of habeas corpus, that if the military wanted to do it, they could do it.”<sup>416</sup> Edward J. Ennis, chief of the Justice Department’s Alien Enemy Control Unit, states: “the President determined that if the civilian authorities would not deal with American citizens of Japanese ancestry as something beyond our authority, that he would authorize the military authorities to do it as a war measure.”<sup>417</sup>

The conclusion that the decision to evacuate all people of Japanese origin from the West Coast could not be justified by military necessity becomes even more evident when it is contrasted to the policies implemented in Hawaii. In Hawaii, significantly closer to Japan’s military reach, only approximately 1% of the Japanese people were interned, compared to 90% of those living on the mainland. The difference in policy stems from the fact that Japanese Americans composed over one-third of the islands’ population. Internment would therefore seriously hamper the local economy and day-to-day life.<sup>418</sup> In fact General Delos Emmons argued that Japanese labor on Hawaii was “absolutely essential” to rebuild the defense infrastructure destroyed at Pearl Harbor. Charges of Japanese-American disloyalty and subversion were dismissed as there had been no acts of sabotage committed in Hawaii.<sup>419</sup> Moreover, Hawaii’s population was much more pluralistic: anti-Asian feelings were therefore much less common than they were among the inhabitants of the Western states of the mainland.<sup>420</sup>

### *The Underlying Reasons*

In the Western states racism underlay the internment policy. Decades of anti-Asian prejudice created the context and public support for the decision. Japanese immigrants had been increasingly recruited as agricultural laborers and brought to the West Coast since the 1800s. With the increasing numbers of Japanese immigrants, prejudice and hostility against them intensified. The government responded by restricting immigration. The so-called *Gentleman’s Agreement* between President Theodore Roosevelt and the Emperor of Japan of 1908 already limited it severely. In 1924, the Immigration Act basically stopped all Japanese immigration. Specific anti-Japanese legislation accompanied the immigration bill, such as laws prohibiting intermarriages between whites and Japanese Americans. Moreover, Japanese were often considered “ineligible for citizenship” on the basis of race and were banned from buying land or owning property by the Californian Alien Land Law of 1913. Ennis reflects that “it may be that

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<sup>413</sup> CWRIC, *Personal Justice Denied*, chapter 2.

<sup>414</sup> *Idem*.

<sup>415</sup> “Interview with James H. Rowe,” *Japanese-American Relocation Reviewed*.

<sup>416</sup> *Idem*.

<sup>417</sup> “Interview with Edward J. Ennis, December 12, 1972,” *Japanese-American Relocation Reviewed*,

<http://content.cdlib.org/view?docId=ft667nb2x8&doc.view=frames&chunk.id=d0e7916&toc.depth=1&toc.id=d0e7916&brand=calisphere&query=Japanese%20American%20Oral%20History%20Project>, retrieved September 22, 2009.

<sup>418</sup> Nagata, *Legacy of Injustice*, 3-4.

<sup>419</sup> Ronald Takaki, *A Different Mirror: A History of Multicultural America* (New York/Boston/London: Little, Brown and Company, 1993), 378-379.

<sup>420</sup> Nagata, *Legacy of Injustice*, 3-4.

racist bar in the naturalization laws which was part of the reason that the Japanese and Japanese-Americans were so roughly treated."<sup>421</sup>

Much of the prewar anti-Japanese sentiment had been caused by economic competition. The majority of Japanese men worked in agriculture, forestry and fishing, and their success in these professions threatened white American agricultural workers.<sup>422</sup> An organization of farming interests named the Grower-Shipper Vegetable Association stated that it came down to question whether the "white man" or the "brown man" lived and prospered on the Pacific Coast.<sup>423</sup> The age-old fear that foreigners were driving whites out of their jobs combined with the awry perception that the Japanese population grew exponentially, into a widespread anxiety of a "yellow peril".<sup>424</sup> It seems that DeWitt's decision was directly influenced by these considerations. According to Ennis, DeWitt was "honestly, though mistakenly" concerned about a Japanese attack on the West Coast, but in December 1941 hardly considered anything as large and drastic as the removal of the Japanese-American population. The idea came to him "when he learned from elements in California, principally the farmer-growers, who had an avaricious eye on Japanese farming land, and from the congressmen from California, who felt the pressure from these elements."<sup>425</sup> President Roosevelt was severely pressured as well by California officials and representatives of the War Department in the West.<sup>426</sup> Walker argues that California politicians were especially vocal in their demands of evacuation. Even liberal hero-to-be Earl Warren, California's Attorney General at the time, argued that alien Japanese should all be considered potential fifth columnists. He mobilized sheriffs and police chiefs and testified at hearings to promote mass evacuation of American citizens of Japanese descent. Any action against German or Italian ethnics, however, would disrupt the national unity, revealing the persistent racial bias against the "Japanese race."<sup>427</sup>

Historical anti-Japanese sentiments created the emotionally and economically based support for the government's plan to remove Japanese Americans. The Japanese attack on the United States inflamed deep-seated prejudice against Japanese among white Americans.<sup>428</sup> The press played up the agitation for removal. The *Los Angeles Times* questioned the loyalty of American-born Japanese and suggested that they would always be loyal to Japan because of racial traits.<sup>429</sup> Patriotic societies joined the assault against Japanese Americans. The Californian American Legion urged that all Japanese with dual citizenship be placed into "concentration camps." The shock of the attack on Pearl Harbor propelled such sentiments into a panic. The Native Sons and Daughters of the Golden West asserted that if the federal and state authorities had enacted legislation to deny citizenship to the offspring of Japanese aliens, the "treacherous Japs" would not have attacked Pearl Harbor.<sup>430</sup> The National Opinion Research Center thus found a vast majority of the public supporting internment in 1942. Ninety-three percent approved of the relocation of Japanese aliens and sixty percent was in favor of evacuating American citizens of Japanese descent as well.<sup>431</sup> In turn, public hysteria put pressure on the governmental agencies involved. Rowe remembers that "there was an awful lot of hysterics about this thing."<sup>432</sup>

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<sup>421</sup> "Interview with Edward J. Ennis," *Japanese-American Relocation Reviewed*.

<sup>422</sup> Nagata, *Legacy of Injustice*, 4-5.

<sup>423</sup> Takaki, *A Different Mirror*, 381.

<sup>424</sup> Nagata, *Legacy of Injustice*, 4-5.

<sup>425</sup> "Interview with Edward J. Ennis," *Japanese-American Relocation Reviewed*.

<sup>426</sup> Goldstein, *Political Repression in Modern America*, 267.

<sup>427</sup> Walker, *In Defense of American Liberties*, 136-137.

<sup>428</sup> Gerstle, *American Crucible*, 201.

<sup>429</sup> Takaki, *A Different Mirror*, 380.

<sup>430</sup> Idem, 380-381.

<sup>431</sup> Nagata, *Legacy of Injustice*, 5.

<sup>432</sup> "Interview with James H. Rowe," *Japanese-American Relocation Reviewed*.

Moreover, as we have seen before, liberals and civil rights advocates remained silent so as not to obstruct the course of the “good war”. Conservative members of the ACLU yielded to the idea of increased presidential authority in wartime, while more liberal members were bound by political loyalty to Roosevelt. Both groups did not want to question the judgment of the commander in chief, as not to obstruct the prosecution of the war.<sup>433</sup> Others even endorsed the internment of innocent American civilians, sometimes because of racist attitudes. Earl Warren, for example, later cherished by for his landmark rulings against segregation as Supreme Court Chief Justice, supported the action against the Japanese because “when we are dealing with the Caucasian race we have methods that will test the loyalty of them,” but when dealing with Japanese “we cannot form any opinion that we believe to be sound.”<sup>434</sup> According to psychologist Donna K. Nagata, Japanese Americans were excluded from the “moral community” to which most other Americans belonged, meaning that they were perceived to exist outside of the realm to which moral values, rules and considerations of fairness applied.<sup>435</sup> Japanese Americans were believed to be treacherous, racially inferior and inassimilable. Polenberg states that “Americans regarded Japanese as subhuman and inherently inferior” and they were often depicted as “a reptile or an insect” during the war.<sup>436</sup> The Japanese in California were a small population, isolated into their own communities and lacking any political support. They were extremely vulnerable to the context of racism and war fever, allowing for the recommendation as well as the unopposed execution of mass evacuation.<sup>437</sup>

The decision to intern all people of Japanese heritage living on the West Coast thus was not established by military necessity. In 1982, the CWRIC established nine conditions which permitted the decision to intern all inhabitants of Japanese origin living near the West Coast. First, General DeWitt believed that ethnicity determined loyalty and that Japanese were so alien to American ideas that it was impossible to distinguish between the loyal and the disloyal. Second, relevant intelligent agencies such as the FBI and Naval Intelligence were ignored when they recommended not going beyond individual reviews of loyalty and the surveillance of suspicious individuals. Third, DeWitt relied on civilian politicians who repeated anti-Japanese themes to gain support of factions and interest groups on the West Coast, not on military expertise. Fourth, President Roosevelt took no effective measure to calm the public or refute rumors of sabotage and fifth column involvement in the Pearl Harbor attack. Fifth, General Dewitt was “temperamentally disposed to exaggerate” the required security measures and regarded national security as much more important than citizens’ liberties. Sixth, Secretary of War Stimson and his assistant McCoy did not insist on a clear military justification of the measures DeWitt wanted. Seventh, Attorney General Biddle did not argue to the president that the lack of military necessity rendered the internment unconstitutional, nor that exclusion based on ethnicity was prohibited by the Constitution. Eight, the voices who normally represented civil liberties in Congress and among the press, now remained silent or supported the exclusion. Finally, President Roosevelt agreed to the measure without discussing it with his Cabinet or thoroughly reviewing the situation and despite Biddle’s arguments against it.<sup>438</sup>

### *The American Concentration Camps*

What, however, were the consequences of the decision for the Japanese American population? Immediately following the attack on Pearl Harbor, the FBI took action against Japanese

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<sup>433</sup> Walker, *In Defense of American Liberties*, 139.

<sup>434</sup> Quoted in Goldstein, *Political Repression in Modern America*, 267.

<sup>435</sup> Nagata, *Legacy of Injustice*, 6.

<sup>436</sup> Polenberg, “World War II...” in O’Brien and Parsons eds., *The Home-Front War*, 20.

<sup>437</sup> Takaki, *A Different Mirror*, 381.

<sup>438</sup> CWRIC, *Personal Justice Denied*, summary.

Americans. It arrested approximately 1,500 *Issei*<sup>439</sup> aliens who were suspected of being disloyal. Most of the leaders of Japanese American communities were incarcerated, often without explanation, evidence or stated cause of arrest. The Japanese Americans had no grounds to challenge the injustice inflicted upon them, being isolated from American society, feared and hated after Pearl Harbor and without the support of any political group willing to resist the internment orders. Therefore they were obliged to passively wait and see what the government had planned for them. When the government implemented the compulsory removal of Japanese Americans they were first transported to provisory assembly centers.<sup>440</sup> They were first moved to temporary assembly centers, without any charges, time to prepare for the move, and without even knowing any details about the move. As they were told to bring what they could carry, the forced evacuation caused tremendous economic losses. Many families lost everything they possessed.<sup>441</sup> The unconstitutionality of the order can be quoted almost literally from the Fifth Amendment: no person shall be deprived of life, *liberty*, or *property*, without *due process of law*. The *Issei* were hit especially hard and most never regained their economic status after the war ended.<sup>442</sup>

During the evacuation deported families wore numbered tags, they were transported by buses and trains with blinded windows of which some lacked food supplies, and guarded by armed soldiers. Logically rumors arose among the Japanese Americans that they were transported to the desert to be shot. Many of the assembly were in fact converted race tracks or fairgrounds where the internees lived in horse stalls smelling of manure. The government thus did not only drive Japanese Americans from their houses and rounded them up like cattle, but actually forced them to live in facilities meant for animals.<sup>443</sup> Large families were cramped into small spaces, received inadequate food, sanitation and medical supplies while military police patrolled the perimeter with machine guns.<sup>444</sup> Internal police issued curfews, roll calls and random searches within the camps. The internees stayed for approximately 3 months on average at these "temporary" assembly centers, until in May 1942 trains took them to more permanent, desolately situated "concentration camps," as President Roosevelt clumsily coined them.<sup>445</sup>

Although officially called "relocation centers" or "resettlement communities" by the military, the permanent camps again featured barbed wire and armed guards. Families again were cramped together in overcrowded rooms with no furniture.<sup>446</sup> There was no running water and the barracks the internees stayed in hardly protected them from the extreme temperatures of the deserts where many of the camps were situated.<sup>447</sup> Responsibility for the camps was given to a new civilian agency called the War Relocation Authority (WRA). It proceeded on the basis that most of the evacuees were law-abiding and loyal citizens or aliens and once removed from the West Coast should endure normal living conditions.<sup>448</sup> Although the WRA thus set out to treat the Japanese Americans equally to other American citizens, the final CWRIC report concluded that the actual experience of the internees turned out to be much worse. The Commission's hearing record was "full of poignant, searing testimony that recounts the economic and personal losses and injury caused by the exclusion and the deprivations of detention."<sup>449</sup> The report concluded that camp living conditions were "Spartan", as people were housed in very small tarpapered barrack rooms, regardless of family size. Because the internees were not allowed outside

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<sup>439</sup> *Issei* is the term to describe first generational Japanese Immigrants in the United States, *Nissei* are the second generation, *Sansei* the third.

<sup>440</sup> Nagata, *Legacy of Injustice*, 6-7.

<sup>441</sup> Stone, *Perilous Times*, 287.

<sup>442</sup> Nagata, *Legacy of Injustice*, 20.

<sup>443</sup> Polenberg, "World War II...", 20-21.

<sup>444</sup> Stone, *Perilous Times*, 287.

<sup>445</sup> Nagata, *Legacy of Injustice*, 9.

<sup>446</sup> Stone, *Perilous Times*, 287.

<sup>447</sup> Nagata, *Legacy of Injustice*, 9-10.

<sup>448</sup> CWRIC, *Personal Justice Denied*, summary.

<sup>449</sup> *Idem*.

the perimeters, they were forced to work at the camp for wages kept low willfully “under continuing pressure from those who blindly held to the belief that evacuees harbored disloyal intentions.”<sup>450</sup> Facilities for the sick and elderly were quite poor and the shortage of medical care persistent. As a consequence epidemics of dysentery, typhoid and tuberculosis spread in several camps.<sup>451</sup> Moreover, some state medical authorities refused to permit doctors to issue birth certificates for children born in the camps as to deny them legal existence.<sup>452</sup>

Among the internees were about 30,000 Japanese American children who attended public school when the internment was ordered. Within weeks of internment kindergarten and English classes were set up by Japanese Americans themselves at the assembly centers, although education was severely limited by a lack of textbooks, equipment and teachers. The WRA, however, made little effort to further the initiative at the permanent camps and instead created a shamefully paternalistic education program aimed to “Americanize” the children.<sup>453</sup> The CWRIC concluded from the hearings that such efforts proved bitterly ironic: “an oft-repeated ritual in relocation camp schools . . . was the salute to the flag followed by the singing of ‘My country, ‘tis of thee, sweet land of liberty’ – a ceremony Caucasian teachers found embarrassingly awkward if not cruelly poignant in the austere prison-camp setting.”<sup>454</sup> The WRA also censored reading material, confiscated phonograph records and undertook arbitrary searches.<sup>455</sup>

In early 1943 all Japanese Americans in the camps over age 16 were obliged to answer questions concerning their loyalty. These questions were used to help the camp authorities determine whether internees who requested leave of absence or resettlement were loyal enough. Moreover, as the government had opened enlistment into the armed forces to Japanese Americans in 1944, loyal Japanese had to be distinguished from disloyal Japanese. Thus the internees were asked whether they were willing to serve in the armed forces of the United States and whether they swore “unqualified allegiance” to the United States, defend it from any attack by foreign forces and forswore any obedience to the Japanese emperor. These questions caused painful conflicts among the *Issei* and *Nisei*. If an *Issei* said he would be willing to serve in the army, he would have to give up his Japanese nationality, but as Japanese aliens were prohibited from becoming American citizens, it would leave them without any citizenship at all. Answering no to the question, however, would brand them disloyal. *Nisei*, on the other hand, wondered whether the question regarding their alliance to the Emperor might be a trick question. Forswearing allegiance after all might mean they had once been loyal to a foreign government. Eventually 87% of the internees answered “yes” to both questions of loyalty. The 8,000 or so who had not answered yes unqualified, or had answered no, or had refused to answer at all, were labeled “disloyals” and shipped to a high-security camp in California.<sup>456</sup> Following a disturbance at that camp at Tule Lake, the Army moved in, threw two hundred people into pens and issued martial law for two months.<sup>457</sup>

From 1943 onwards, *Nisei* who answered yes to the loyalty questions but did not enlist in the army started to be allowed to leave the camps and move to areas outside the forbidden parts of the West Coast. They were given transportation costs and a further \$25 to start their new lives. Many were reluctant to do so, as they experienced emotional stress of imprisonment, were fearful to leave the camps and hardly trusted the resettlement offers. Although the loyalty review had provided evidence that the incarceration was not a military necessity, the President decided against sudden action and waited until May 1944 to open up the West Coast for resettlement,

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<sup>450</sup> *Idem*.

<sup>451</sup> Nagata, *Legacy of Injustice*, 10-11.

<sup>452</sup> Polenberg, “World War II . . .”, 21.

<sup>453</sup> Nagata, *Legacy of Injustice*, 11.

<sup>454</sup> CWRIC, *Personal Justice Denied*, summary.

<sup>455</sup> Goldstein, *Political Repression in Modern America*, 267-268.

<sup>456</sup> Nagata, *Legacy of Injustice*, 12.

<sup>457</sup> Goldstein, *Political Repression in Modern America*, 268.

allowing Japanese Americans to return home.<sup>458</sup> The CWRIC found that a simple reason existed for this delay: “the President was unwilling to act to end the exclusion until the first Cabinet meeting following the Presidential election of November 1944.” Thus “the inescapable conclusion from this factual pattern is that the delay was motivated by political considerations.”<sup>459</sup>

### *The Supreme Court and the Internment*

Although protests to the interment were minimal among the Japanese American community, several individuals did protest against the suspension of their rights of due process and the writ of habeas corpus during the evacuation. Of these cases a few reached the Supreme Court, of which three rulings will be discussed here.

In 1943, in *Hirabayashi v. United States* the Court upheld the right of the military to exercise control over citizens through a curfew and to discriminate against individuals for their ancestry.<sup>460</sup> Gordon Hirabayashi was a student at the University of Washington and challenged the military orders of 1942. He refused to register for the evacuation and listed his reasons on a four page statement. He argued that the order denied all individuals of Japanese heritage the right to live and felt compelled to refuse it to stand up for his democratic principles. After being convicted for violating curfew orders, Hirabayashi appealed, arguing that the military orders were the result of unconstitutional delegation of congressional legislative power and that the orders violated the Fifth Amendment as it discriminated between citizens on the basis of ethnicity.<sup>461</sup> When the case reached the Supreme Court, Chief Justice Stone, however, simply argued that war brought “the power to wage war successfully.”<sup>462</sup> Although Stone had found it “jarring” that U.S. citizens were subjected to the measure, he added that it was constitutional as long as a reasonable basis for it existed.<sup>463</sup> The Chief Justice upheld the constitutionality of the curfew, because the executive branch had ground to believe that “in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken against it.”<sup>464</sup> Inevitably the conduct of war involved “some infringement on individual liberty.”<sup>465</sup>

The Court acknowledged how “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,” but explained that there were “facts and circumstances with respect to the American citizens of Japanese ancestry residing on the Pacific Coast which support the judgment ... of the government.”<sup>466</sup> Through such reasoning, the government attributed certain racial attachments Japanese Americans that made them prone to disloyalty.<sup>467</sup> The use of race as basis for exclusion was justified because “residents having ethnic affiliation with an invading enemy may be a greater source of danger than those of different ancestry.”<sup>468</sup> Usual defendants of civil liberties at the Court concurred with Stone’s opinion. Justice William O. Douglas naively defended military authorities by writing that “we must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties.”<sup>469</sup> Justice Murphy’s opinion sounded as dissent: “it does not follow ... that the broad guaranties of the Bill of Rights and other provisions of the

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<sup>458</sup> Nagata, *Legacy of Injustice*, 14-15.

<sup>459</sup> CWRIC, *Personal Justice Denied*, summary.

<sup>460</sup> Osmond K. Fraenkel, *The Supreme Court and Civil Liberties: How the Court Has Protected the Bill of Rights* (New York: Oceana Publishing, 1960), 17-18.

<sup>461</sup> Nagata, *Legacy of Injustice*, 24.

<sup>462</sup> Fraenkel, *The Supreme Court and Civil Liberties*, 18.

<sup>463</sup> Polenberg, “World War II...”, 21.

<sup>464</sup> Stone, *Perilous Times*, 298.

<sup>465</sup> Walker, *In Defense of American Liberties*, 145.

<sup>466</sup> Rehnquist, *All the Laws but One*, 200.

<sup>467</sup> Polenberg, “World War II...”, 21.

<sup>468</sup> Fraenkel, *The Supreme Court and Civil Liberties*, 18.

<sup>469</sup> Walker, *In Defense of American Liberties*, 146.

Constitution protecting essential liberties are suspended by the mere existence of a state of war."<sup>470</sup> However, despite further comments that the curfew "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany", he did not dissent and the Court proved unanimous in upholding the verdict.<sup>471</sup>

In the case of *Korematsu v. United States* the Court applied the same principles to sustain a conviction for violating the evacuation order. Fred Korematsu, a welder from California, came before the Court in 1944 as only the first issue of exclusion. Korematsu planned to move to the Midwest with his white girlfriend and thereby violated the internment orders. As Japanese Americans were prohibited to live with whites, he underwent plastic surgery and changed his name to hide his Asian heritage. It did not make him unrecognizable, however, as he was arrested by the police in California and found guilty of remaining in a prohibited area.<sup>472</sup> The Court upheld the conviction and the government's policy with a six-to-three vote. Justice Murphy was one of the dissenters, commenting that the exclusion order fell into "the ugly abyss of racism." He further named the order "obvious racial discrimination" and the "legalization of racism."<sup>473</sup> Contrastingly, Hugo Black's majority opinion contented simply that "Korematsu was not excluded from the Military Area because of hostility to him or his race", but because the military authorities decided that the urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the area.<sup>474</sup> Black argued that Korematsu was treated as such, because "it was impossible to bring about an immediate segregation of the disloyal from the loyal", while the link to racial prejudice "merely confuses the issue."<sup>475</sup> Black acknowledged that "legal restrictions which curtail the civil rights of a single group are immediately suspect," but "this is not to say that all such restrictions are unconstitutional." According to Black "pressing public necessity may sometimes justify the existence of such restrictions", although "racial antagonism never can."<sup>476</sup>

These two cases raised basic questions regarding constitutional government in wartime. What were the limits of executive war powers in the Constitution and how far could the president go in suspending civil rights to prosecute the war? Abraham Lincoln had suspended habeas corpus during the Civil War, but was rebuked by the Supreme Court afterwards in *Ex Parte Milligan*. The Court had held, back then, that a claim of military necessity did not justify the suspension in itself, and was subject to being reviewed by the courts. Martial law could not be established from a *threatened* invasion, the invasion had to be real and present. *Ex Parte Milligan* still stood in 1942 and ruled against the government's evacuation order, as no serious threat of invasion existed, let alone a real and present attack.<sup>477</sup> Still, under war pressure, the court ruled in favor of the government. In *Hirabayashi*, the Court went with the government's contention that the threat of invasion justified the suspension of due process: "that reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted."<sup>478</sup> Because of the crisis situation questions regarding the constitutionality of the evacuation were left unanswered. Stone's opinion flatly stated that "we need not now attempt to define the ultimate boundaries of the war power."<sup>479</sup> Clearly, "now" had been the perfect time to do so. In *Korematsu*, the evacuation was justified by the court because it could not "reject as unfounded the judgment of the military

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<sup>470</sup> Stone, *Perilous Times*, 298.

<sup>471</sup> Walker, *In Defense of American Liberties*, 146.

<sup>472</sup> Nagata, *Legacy of Injustice*, 24.

<sup>473</sup> Polenberg, "World War II...", 21.

<sup>474</sup> Stone, *Perilous Times*, 300.

<sup>475</sup> Walker, *In Defense of American Liberties*, 147-148.

<sup>476</sup> Abraham and Perry, *Freedom and the Court*, 16n.

<sup>477</sup> Walker, *In Defense of American Liberties*, 145.

<sup>478</sup> Rehnquist, *All the Laws but One*, 205-206.

<sup>479</sup> Walker, *In Defense of American Liberties*, 146.

authorities" that there existed disloyalty among the Japanese Americans.<sup>480</sup> Justice Black ignored the links between evacuation and incarceration and dismissed the charge that the relocation camps were in fact concentration camps as he deemed it "unjustifiable to call them concentration camps with all the ugly connotations that term implies."<sup>481</sup>

Ultimately, in the case of *Ex Parte Endo*, the Court unanimously renounced the detention of a Japanese-American citizen who had been considered "loyal."<sup>482</sup> Mitsuye Endo was a 22 year old clerk at the Department of Motor Vehicles and petitioned habeas corpus with the federal district court in San Francisco as she questioned the legality of her detention at an assembly center. The Supreme Court did not announce its opinion in the Endo case until 1944 but then held that an admittedly *loyal* citizen could not be legally detained in a camp against his or her will.<sup>483</sup> The Court nevertheless did not elucidate on what procedure was used to determine such loyalty, or whether citizens could be still be detained if their loyalty was questionable.<sup>484</sup> According to William Rehnquist, Supreme Court Chief Justice in the 1980s, "there was no reason to think that Gordon Hirabayashi and Fred Korematsu were any less loyal than was Mitsuye Endo."<sup>485</sup> Perhaps the case of Hirabayashi, decided when the outcome of the war was still quite uncertain, led the Court to favor the government's security reasoning. *Endo* and *Korematsu*, however, producing such different rulings, were decided on the same day.<sup>486</sup>

Polenberg concludes that "in weighing the constitutionality of the relocation and internment program the Supreme Court fell victim to the prevailing racist mood."<sup>487</sup> Nagata points to the importance of the judicial process which underlay the outcome of the *Hirabayashi* and *Korematsu* cases. Chief Justice Stone had forged a unanimous decision in *Hirabayashi*, suppressing evidence which indicated the falsity of General DeWitt's claims that Japanese Americans were dangerous and disloyal.<sup>488</sup> Moreover, Justice Frankfurter had persuaded Murphy not to dissent as to "maintain and enhance the corporate reputation of the Court."<sup>489</sup> These dynamics also affected the decision in *Korematsu*, in which Stone attempted to win over Justice Wiley Rutledge by telling him that "if you can do it for curfew, you can do it for exclusion."<sup>490</sup> Clearly, "it" was the creation of the "tremendous hole" in the constitutional system, using the words of Secretary Stimson. At the very least it was the refusal by the Court to believe any such hole had been dug. Finally, the case of *Endo* was announced one day after the administration announced its release of the internees in December 1944. According to Geoffrey Stone "there is good reason to believe that the Court intentionally delayed its decision in *Endo* to allow the president rather than the Court to end the internment."<sup>491</sup>

## Conclusion: World War II and the Limits of Executive Power

The Court thus willfully succumbed to the "racial antagonism" of which Justice Black had said it could never legally restrict the civil rights of a group. Officially, the Court went with the disproved rationale of military necessity to legalize the operation, despite the evidence to the contrary. The rulings of the Court in the cases concerning the internment order substantially

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<sup>480</sup> Stone, *Perilous Times*, 300.

<sup>481</sup> Walker, *In Defense of American Liberties*, 147-148.

<sup>482</sup> Fraenkel, *The Supreme Court and Civil Liberties*, 18.

<sup>483</sup> Nagata, *Legacy of Injustice*, 24-25.

<sup>484</sup> Fraenkel, *The Supreme Court and Civil Liberties*, 18.

<sup>485</sup> Rehnquist, *All the Laws but One*, 202.

<sup>486</sup> Walker, *In Defense of American Liberties*, 146.

<sup>487</sup> Polenberg, "World War II...", 21.

<sup>488</sup> Nagata, *Legacy of Injustice*, 25.

<sup>489</sup> Stone, *Perilous Times*, 298.

<sup>490</sup> Polenberg, "World War II...", 21.

<sup>491</sup> Stone, *Perilous Times*, 302.

differentiated from its wartime rulings considering the constitutional freedoms of Caucasian Americans, such as the freedom of religion, freedom of assembly and freedom of expression. The likely cause is the racial prejudice against Japanese Americans, which prevailed all across American society. Eventually, in the case of *Endo*, the Court condemned the forced evacuation and internment of an innocent American citizen on the sole basis of race. However, by that time the victims of Executive Order 9066 had already endured severe restrictions of their constitutional rights. They had been violated in their First Amendment right of petition. They were deprived of liberty and property without a due process of law, contrary to the Fifth and Fourteenth Amendments. They did not receive the rights of council, or the right of a civil trial by jury, which the Sixth and Seventh Amendment proscribe. At the concentration camps, they suffered cruel and unusual punishments, prohibited by the Eight Amendment and were unreasonably searched, contrary to the Fourth Amendment. As Geoffrey Stone notes, all this was done, without "a *single* documented act of espionage, sabotage, or treasonable activity committed by an American citizen of Japanese descent or by a Japanese national residing on the West Coast."<sup>492</sup>

The fact that the deportation and incarceration was wholly justified by an Executive Order adds another layer to the unconstitutionality of the act. In doing so, FDR misused his wartime powers to surpass Congress and violate Article 1 of the Constitution. Altogether the Roosevelt Administration's wartime record concerning civil liberties was dismal. The government charged citizens with sedition, censored newspapers and attempted to stifle any form of criticism of the war conduct. The administration further enhanced the institutional power of the FBI and allowed them to impose a strict form of political surveillance. The introduction of the Smith Act allowed for the prosecution of foreign born dissenters, even after the war ended. Sadly, the president himself was the driving force behind many elements of political repression and held a very restrictive view of civil liberties in wartime. In the end the administration's record was only an improvement over the horrors of WW I because of the lack of any real opposition and the widespread approval of the war aims and its conduct. Government officials were hardly more inclined to defend civil liberties, despite their liberal outlook. In fact, as Robert Goldstein contends, "there was probably more repression during World War II in *relation* to the amount of dissent voiced, than in any period in American history."<sup>493</sup>

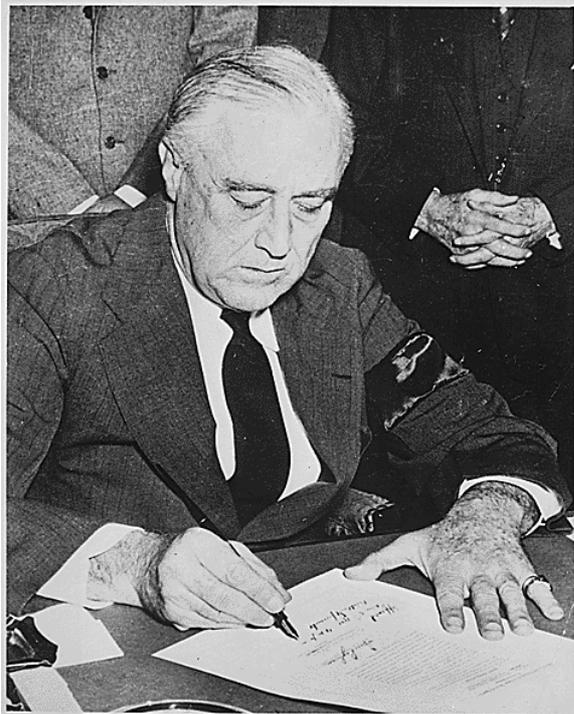
Still, the government was not alone in its low regard for civil liberties. As during WWI, public hysteria and demands for conformity permitted the restriction of civil liberties. The internment of the Japanese Americans was a popular measure, forged from, and supported by, a persistent racism among west coast citizens, politicians and interest groups. White farmers and laborers and whoever represented them wanted to get rid of the Japanese competition and hardly anyone believed that constitutional rights applied to non-white citizens. In the end, American society as a whole carried the burden of the so-called "good war", which, according to Goldstein, was "pretty much of a disaster for civil liberties."<sup>494</sup>

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<sup>492</sup> Stone, *Perilous Times*, 287.

<sup>493</sup> Goldstein, *Political Repression in Modern America*, 284.

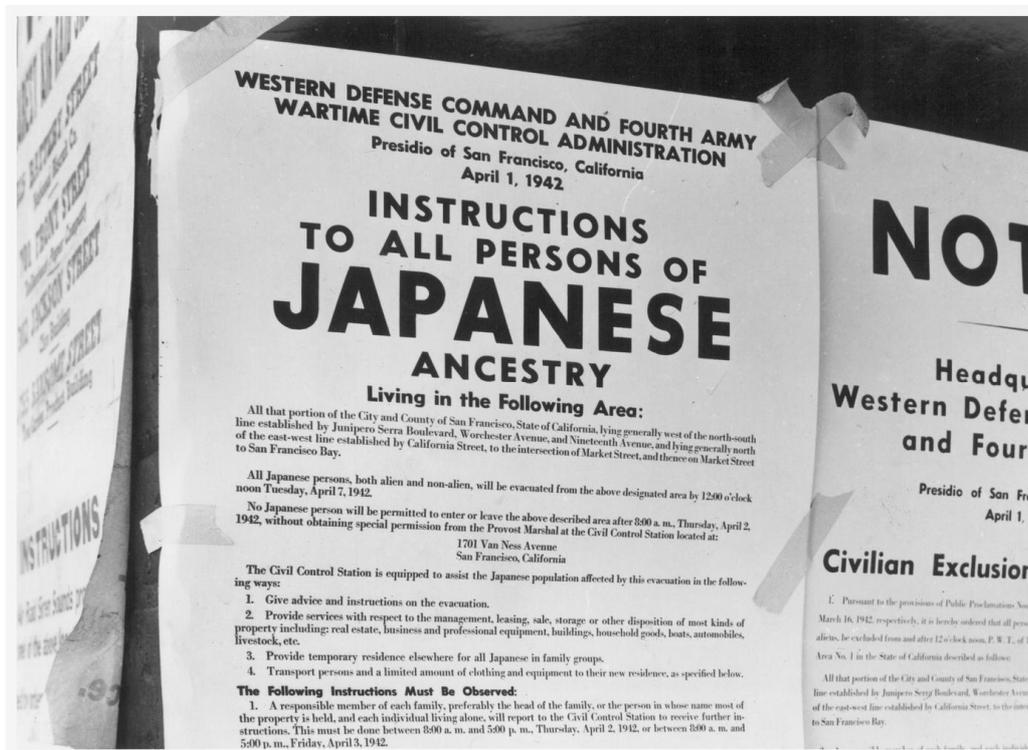
<sup>494</sup> Idem, 284.



*President Franklin D. Roosevelt signs the declaration of war against Japan, December 8, 1941.*



*Lt.-General John DeWitt, who recommended the relocation of all persons of Japanese origin from the West Coast*



*Exclusion Order with instructions to all persons of Japanese ancestry, San Francisco, California, April 11, 1942.*



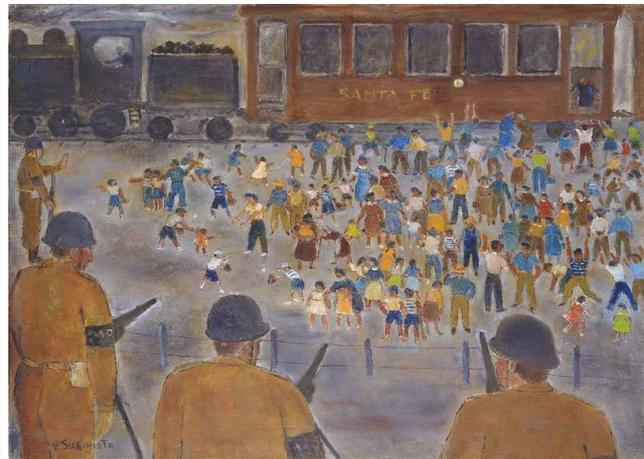
*Evacuation sale; people of Japanese origin were forced to sell their possessions, or leave them behind.*



*Entire families of Japanese origin were labeled as cattle and relocated, such as this family from Hayward, California.*



*Amache Relocation Center, near Granada, Colorado. Official photographs released by the War Relocation Authority left out barbed wire and armed guards.*



*Painting by Henry Sugimoto, named "Take Fresh Air?" depicting a break on the trip to a relocation center, painted in 1957.*

## Chapter 3 –Civil Liberties during the Early Cold War (1947-1953)

*“You are using the old technique, which was used in Hitler Germany in order to create a scare here - ... The Bill of Rights was established precisely to prevent the operation of any committee which could invade the basic rights of Americans.”*<sup>495</sup>

John Howard Lawson, screenwriter, 1948

*“The actions of the junior Senator from Wisconsin...have caused alarm and dismay amongst our allies abroad... ..and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear... ..he merely exploited it, and rather successfully. Cassius was right. ‘The fault, dear Brutus, is not in our stars, but in ourselves.’”*<sup>496</sup>

Edward R. Murrow, journalist, 1954

On April 29, 1953, Senator Joseph R. McCarthy, in his role as chairman of the Senate Permanent Subcommittee on Investigations interrogated Theodore Kagan, the head of a governmental intelligence program. Kagan had, during his college days, written several plays, which would come to haunt him in the hearing:

*THE CHAIRMAN. You wrote a number of plays. Is that right?*

*Mr. KAGHAN. Yes I Did.*

*THE CHAIRMAN. Would you say they followed the communist line?*

*Mr. KAGHAN. I would not say they followed the communist line.*

*THE CHAIRMAN. Would you say they were acceptable to the Communists?*

*Mr. KAGHAN. I think they were, by and large, not necessarily in detail.*

*THE CHAIRMAN. (...) I find that they seem to follow largely the same pattern, that you have someone representing the Communist Party, arguing the Communist line. You have someone very weakly arguing against it. In the end, you find the man against the Communist cause had been converted, in practically all the plays. (...)*

*THE CHAIRMAN. (...) this consists largely of a running argument, the father trying to convince the son he should not be a Communist, the son trying to convince the father he should be a Communist. Let us take the finale of the play. The son says: Well, that's a fine how-do-you-do. It isn't enough that my father has to be a capitalist, but he's got to come out openly and betray his employees, just like all the other dirty capitalists. Do I have to come here and tell my own father he is a slave driver, an exploiter of labor, an enemy to civilization?*

*And the father, finally, in the close, has this to say. He says:*

*Peter, peter, for God's sake listen to me, Peter. You were right, do you hear, you were right! I have been all wrong, Peter.*

*Would you say that would make good anti-Communist propaganda? (...)*

*THE CHAIRMAN. (...) I think this is what we will have you do. We will be going over your plays. (...) I believe you should review these plays of yours and come back here tomorrow morning, and tell us which ones you consider are Communist-line plays and which ones are not; (...) now let me ask you a question. If you today felt the same as you felt in 1939, would you think that you were a proper man to head this information program?*

*Mr. KAGHAN. No, sir....*<sup>497</sup>

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<sup>495</sup> Quoted in: Stone, *Perilous Times*, 364.

<sup>496</sup> Edward R. Murrow, CBS *See it Now*, 9-3-1954, <http://www.lib.berkeley.edu/MRC/murrowmccarthy.html>

<sup>497</sup> United States Congress, 83d Congress, 1st Session, Permanent Subcommittee on Investigations of the Committee on Government Operations, *Hearings*, 176-180, 199-200, in: Albert Fried ed., *McCarthyism, the Great American Red Scare, A Documentary History*, (New York/Oxford: Oxford University Press, 1997), 93-98.

As a consequence of these hearings Kagan lost his job with the federal government.<sup>498</sup> His case is only one of many examples of people who became victim of the anticommunist witch hunt that swept across the United States in the early nineteen fifties. Kagan was violated in his constitutional right to express one's opinion through an art form, such as play. However, during this period of American history, a climate developed in which the First Amendment could no longer protect unwanted political convictions. A phenomenon had arisen to which the aforementioned Senator gave his name: the age of *McCarthyism*.

According to ACLU scholar Samuel Walker, the Cold War "developed into the greatest assault on the freedom to think, to speak and to join political groups in American history."<sup>499</sup> During the Cold War's anticommunist climate of suspicion, the lives of thousands of people were ruined, on the basis of guilt by association. People were placed on lists because they had attended political meetings decades earlier, or for subscribing to a magazine deemed subversive years later. Ideas concerning civil rights of African-Americans, disarmament, or peace became suspect and were associated with communism. Eventually, even the Bill of Rights became suspicious, as is evidenced by Attorney General Tom Clark who announced in 1957 to "ferret out those who cloak themselves under the Bill of Rights and who would undermine our form of government."<sup>500</sup>

What caused such a climate of suspicion to emerge? First of all, international politics framed the domestic scene. The cold war "officially" started in 1947 when President Harry S. Truman promised military aid against Communist rebels in the Greek Civil War and started the policy of "containment" developed, by which the United States would battle Communism anywhere on the globe. A domestic attack followed nine days after his containment speech when Truman created a federal loyalty program against subversives in the federal government.<sup>501</sup> Fear of domestic communism quickly became a means for different groups in American society to further their interests. Starting in the early 1940s, an anti-communist consensus developed, a bipartisan effort which would eventually also enlist the general public in its assault on civil liberties. During the early 1950s, when international politics took a turn for the worse, this consensus transformed into the second big red scare, culminating in the rise and fall of Senator McCarthy. Once again, as during the first and second world war, the government used the state of national emergency for political profit, to smother dissenting voices and limit court interference. The people again proved quite receptive of policies that limited essential individual freedoms, as long as they were aimed at "un-American" minorities.

The first half of this chapter is dedicated to the rise of an anticommunist consensus, providing an explanation for the success of anti-communism in the early Cold War and of the emergence of "McCarthyism". The second half of this chapter discusses the fate of several important constitutional freedoms during this era, most notably the freedom of speech and assembly guaranteed by the First and due process guarantees of the Fifth Amendment. Finally, some concluding remarks will be offered concerning the effect of national security implications on the state of civil liberties during the early Cold War.

## Cold War Anticommunism

Many different groups and individuals already opposed the American Communist Party wherever possible during the nineteen thirties. The predominance of leftwing Liberals in the highest ranks of government during the Roosevelt era, however, had kept the voices of anticommunism in

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<sup>498</sup> Fried ed., *McCarthyism*, 93.

<sup>499</sup> Walker, *In Defense of American Liberties*, 174.

<sup>500</sup> *Idem*, 173-174.

<sup>501</sup> *Idem*, 174.

check.<sup>502</sup> During the decade that followed, especially after the war had ended, conservative voices increasingly labeled these Liberals, together with Labor Unions, the Communist Party and other supporters of Roosevelt's "Popular Front", as un-American enemies of the United States, especially through the Dies Committee.<sup>503</sup> During the long period of the liberal Roosevelt and Truman administrations a fierce political rivalry developed. Conflict and arguments became central to American politics. The war kept criticism of the government at bay, but afterwards, internal peace became immensely pressured.<sup>504</sup> The development of the Cold War provided new opportunities to investigate un-American activities and the loyalty issue, which had run rampant during WWI and the years following it, became an important domestic issue once more.<sup>505</sup> The 1946 congressional elections saw a first major experimentation by Republican candidates with charges of communist infiltration in Washington. As the issue of communism was mixed with other topics of popular frustration, such as strikes and inflation, it allowed obscure candidates such as Richard Nixon and Joseph McCarthy to defeat their established democratic opponents.<sup>506</sup>

### *The Bureaucracy*

The communist issue could be exploited for maximal political profit, because a bureaucratic "heart" was construed to investigate radicalism. The FBI had established itself during World War I and its powers had expanded exponentially during World War II. In 1938 Congress had also gained its own organ to investigate radical tendencies, independent of the executive power. This House Un-American Activities Committee (HUAC), at first often called Dies Committee, was established as a conservative reaction to the liberal dominance in the Senate and the House and became an important means of conservative politicians to influence federal politics.<sup>507</sup>

HUAC became a frontrunner in the anticommunist crusade. Most famously, in 1947 it used FBI files and testimonies to assault Hollywood studios, who had been suspect of spreading "un-American" ideas for a long time. A group of producers, writers and directors, who came to be known as the "Hollywood Ten" were sentenced to prison, because they refused to answer whether they were communists and refused to "name names" of presumed Communists in Hollywood.<sup>508</sup> The Hollywood Ten refused to answer questions to avoid legitimizing the investigation into political beliefs on account of the First Amendment, which forbade Congressional inquiries into political beliefs and associations. During the hearings, however, they were one by one removed and cited for contempt, often before they could read their statements in which they denounced the committee. As a consequence, their public support vanished, which caused the film industry into a panic, firing all of the Ten.<sup>509</sup>

HUAC's crusade against Hollywood pushed at least ten other writers and directors to commit suicide. Movie studios fired hundreds of actors, scenarists, directors and other employees who had been added to "blacklists". Without a shred of evidence their careers were destroyed, solely because of *alleged* "un-American" opinions. By 1950, the fear of being branded communist led several studios to absurd decisions, as is evidenced by the following dispatch to the *New York Times*:

*"Fear that a motion picture dealing with the life and exploits of Hiawatha might be regarded as Communist propaganda has caused Monogram Studio to shelve such a project. It was Hiawatha's efforts as a peacemaker among the warring Indian tribes of his day, which brought about the*

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<sup>502</sup> Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston/New York/Toronto/London: Little, Brown and Company, 1998), 81.

<sup>503</sup> Michael J. Heale, *American Anticommunism: Combating the Enemy Within, 1830-1970* (Baltimore/London: John Hopkins University Press, 1990), 122.

<sup>504</sup> Heale, *American Anticommunism*, 122-123.

<sup>505</sup> Bennett, *The Party of Fear*, 278.

<sup>506</sup> Goldstein, *Political Repression*, 295.

<sup>507</sup> Heale, *American Anticommunism*, 123-129.

<sup>508</sup> Cedric Belfrage, *The American Inquisition 1945-1960* (Indianapolis/New York: Bobbs Merrill, 1973), 66-68.

<sup>509</sup> Walker, *In Defense of American Liberties*, 180-181.

federation of five nations, that gave Monogram particular concern, according to a studio spokesman. These, it was decided, might cause the picture to be regarded as a message for peace and therefore helpful to present Communist designs”<sup>510</sup>

### *Political Conjunction*

Another factor that helped create the anti-communist climate was the strong political conjunction on the issue of communism between different ideological groups in the 1940s. The foremost impulse came from conservatives in both parties who were repulsed by the New Deal and everything associated with it. Liberals, however, had also accepted the possible threat of a “fifth column” during the World War II, as evidenced by the government’s attempts to strip “cancel” the citizenship of naturalized citizens that expressed fascist or communist sympathies.<sup>511</sup> Democrats helped the Republicans in creating a climate in which anticommunism prospered. The Roosevelt administration had enacted the *Smith Act* of 1940, a peacetime sedition statute, had started loyalty and security programs during the war and censored the radical press. These measures made the idea that communists ought to be fired, deported, convicted and jailed logical, even after hostilities ended.<sup>512</sup>

President Truman himself, a liberal in name, became a central figure in the establishment of the new Red Scare. At least two developments led him to this position. First, the administration was increasingly criticized for being too “soft” on Communism, despite its belligerent rhetoric regarding the USSR. Second, the administration’s programs for economic reconstruction of Europe, which it regarded vital to American interests, proved only sellable to Congress and the American public on the basis of ideological anti-Communism.<sup>513</sup> By March 1947, the Truman administration thus reached a policy that could meet these two challenges: a fiercely anti-communist foreign policy – the Truman Doctrine –, entwined with a policy of strict repression at home to picture all opposition to the foreign policy plans as subversive.<sup>514</sup> Domestic anticommunist policies allowed Truman to regain some of the initiative from conservative forces such as HUAC and to gain support for his international Cold War policies. He issued *Executive Order 9835*, by which the Employee Loyalty Program in the Executive Branch of Government was launched, to investigate the loyalty of government employees. The commission that executed these investigations would destroy the careers of thousands of people over the next decade.<sup>515</sup> The political scene thus significantly moved to the right, despite Truman’s surprise victory over Thomas E. Dewey in the presidential elections of 1948. The Republicans’ defeat even further kindled their feelings of revenge and strengthened the political competition that fueled the “Red Scare tactics.”<sup>516</sup>

Anticommunism was also construed by groups and elites outside the bureaucracy and government. Just as during World War I, the anticommunist impulse coincided with the interests of business groups, who wanted to limit governmental and especially union control over the free market. Red-baiting strategies also provided a great opportunity to cause dissension among the ranks of laborers and break union strikes.<sup>517</sup>

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<sup>510</sup> Belfrage, *The American Inquisition*, 130.

<sup>511</sup> Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* (New York/ Oxford: Oxford University Press, 1990), 58.

<sup>512</sup> Fried, *Nightmare in Red*, 84.

<sup>513</sup> Goldstein, *Political Repression*, 296.

<sup>514</sup> *Idem*, 298-299.

<sup>515</sup> Bennett, *The Party of Fear*, 286-287.

<sup>516</sup> Jeff Broadwater, *Eisenhower & the Anti-Communist Crusade* (Chapel Hill/London: University of North Carolina Press, 1992), 15.

<sup>517</sup> Fried, *Nightmare in Red*, 85-86.

## *Public Support*

Eventually anticommunist politics also gained the support of the mainstream public. Criminal prosecutions proved crucial to this process, especially HUAC's investigations into onetime Communists among the Roosevelt administration, who they accused of espionage and treason. Several spectacular spy cases and political trials transformed the vague, ideological Communist threat into the clear menace of a Moscow based conspiracy. The public and political discourse about postwar anti-communism was dominated by iconic figures such as former communist Alger Hiss and atomic spy Klaus Fuchs. Their cases and the threat associated with nuclear espionage helped to support the anticommunist scenarios. It also helped to establish an image of the general communist villain: a monolithic stereotype which portrayed only cruel traits abhorred by normal, peaceful, God-fearing Americans.<sup>518</sup> The Cold War era witnessed headlines, novels and movies being mingled with spies, disinformation, secret wars, double agents and fifth columns. Mystification of the "enemy" enflamed the political atmosphere and distorted many Americans' perceptions of what was right for the national security.<sup>519</sup> Many Americans began to fear communism, because they were worried for a new world war between the United States and Soviet Union.<sup>520</sup>

Communists themselves added to the image because they continued to support the Soviet-Union publicly, as they lied about their ideological affections and thus heavily contributed to the conspiracy theories. The inherent dishonesty of Communists was seemingly approved by their behavior.<sup>521</sup> As with the interment of Japanese Americans during WW II, the image of the enemy as an Un-American outsider, inherently treacherous, justified repression in the eyes of many Americans. The assumption that all communists were alike, all were dishonest, and that all were controlled by the Bolsheviks in Moscow was crucial to the progress of anticommunism in the United States. The image of communists as brainless automatons changed them into odd, inhuman creatures. Communism threatened American society like "space-invaders" did in contemporary science-fiction movies.<sup>522</sup> An article in *Life* magazine devoted to American Comintern agent Gerhard Eisler described him as the "prototype of the professional, Moscow-schooled revolutionary," and "as such he is almost a separate species of mankind."<sup>523</sup> Political repression of Communists was further accepted, because the Soviet Union did not respect its own citizens' civil rights. Therefore, anyone who adhered to the Marxist ideology should not be entitled to such rights in America either. Such argumentation was used to annul the academic freedom of professors by the taint of disloyalty and socialist ideas.<sup>524</sup>

Meanwhile, many political leaders echoed the conspiracy theories with an unusually apocalyptic tone. Time and time again, political figures used charged language to describe the Red Menace. Communism formed a threat, not only to the American government and public institutions, but also to Christianity, the sacred values of marriage and family and existing ideas about the role of women, sexuality and abortion.<sup>525</sup> Among the moral crimes *Life* magazine attributed to Gerhard Eisler were his inability to earn a decent living for his family, his "hatred" for religion, his abandonment of his wife and daughter, and his wife's remarks that she had "dominated him too much".<sup>526</sup> Many politicians and civil servants were easily prepared to evoke

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<sup>518</sup> Schrecker, *Many Are the Crimes*, 119-120.

<sup>519</sup> Victor Navasky, "Weinstein, Hiss, and the Transformation of Historical Ambiguity into Cold War Verity," in Athan Theoharis ed., *Beyond the Hiss Case: The FBI, Congress and the Cold War* (Philadelphia: Temple University Press, 1982), 234.

<sup>520</sup> Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party and American Civil Liberties* (Westport CT, London: Greenwood Press, 1977), 174.

<sup>521</sup> Schrecker, *Many Are the Crimes*, 139.

<sup>522</sup> Idem, *Many Are the Crimes*, 131, 135.

<sup>523</sup> Hubert Kay, "The Career of Gerhard Eisler as a Comintern Agent", *Life*, February 17, 1947, 99.

<sup>524</sup> Schrecker, *Many Are the Crimes*, 139.

<sup>525</sup> Idem, *Many Are the Crimes*, 145-149.

<sup>526</sup> Kay, "The Career of Gerhard Eisler...", 99-100.

the security of the nation whenever the word communism surfaced. Although these expressions were clearly overstatements, they proved plausible enough to convince many Americans of the necessity to initiate a far reaching program of political repression.<sup>527</sup>

### *The Anticommunist Consensus*

By 1949 all pieces of a nationwide anticommunist consensus had come together. The federal executive powers had been greatly expanded during World War II, including those of powerful bureaucracies such as the FBI. President Truman made the containment of communism the primary goal in his foreign policy, infused by ideological assumptions. The competitive state of American party politics caused, as a reaction to the Cold War developments, to align the center and the right against the leftwing liberals. Therefore the anticommunist cause gained an unprecedented authority and consistency.<sup>528</sup>

The second big Red Scare became so attractive because all facets of government joined in.<sup>529</sup> Conservatives of both parties in Congress became obsessed with the loyalty issue and were ready to attack the government for being too soft on communism for electoral profits. In turn, the administration and the federal bureaucracies pursued their own anticommunist policies, while developments in the states echoed national patterns, spawning multiple local loyalty reviewing committees to HUAC's example.<sup>530</sup> The FBI provided its allies in politics and the media with information and created a network of red-baiters that comprised reporters, columnists, publishers, congressmen, religious leaders, business elites and anticommunist labor leaders.<sup>531</sup>

The resurgence of anticommunism in the years following World War II indicated the completion of a political reaction to the New Deal and the Popular Front, which had started in the 1930s. Long-lasting tendencies in American society resurfaced in the anticommunist campaign. The broad framework of the established class, race and religion was mobilized against socialist ideas to persuade millions of Americans of the communist threat. Although actual class conflict had waned since the first Red Scare, the opposition between communist values and "American" values could be seized for optimal political gain by politicians and bureaucrats alike.<sup>532</sup>

### *The International Scene*

Although all ingredients for an anticommunist fever were apparent in 1949, public support remained lukewarm due to the lack of a clear sense of imminent crisis. International events in the context of the Cold War during the following two years, however, created such a persistent feeling of threat to the national security.<sup>533</sup> A threatening series of events regarding America's foreign policy made the threat of a worldwide Communist revolution seem much more plausible than before and, as the series of strikes and bombings had fueled the Red Scare of 1919, kindled the anti-communist fire. On September 23, 1949, Truman announced that the Soviet-Union had exploded its own nuclear bomb and the American nuclear monopoly had hence been ended.<sup>534</sup> Only a week later, Mao Zedong established the People's Republic of China by which the Chinese Communists had triumphed over the Nationalist Kuomintang whom the Americans had supported. Truman and his Secretary of State, Dean Acheson, gave up renewed support to the nationalists because they regarded the Chinese of inferior importance to the developments in

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<sup>527</sup> Schrecker, *Many Are the Crimes*, 190.

<sup>528</sup> Heale, *American Anticommunism*, 143-144.

<sup>529</sup> *Idem*, 165-166.

<sup>530</sup> Fried, *Nightmare in Red*, 85.

<sup>531</sup> Kenneth O'Reilly and Athan Theoharis, "The FBI, the Congress and McCarthyism", in: Theoharis ed., *Beyond the Hiss Case*, 372.

<sup>532</sup> Heale, *American Anticommunism*, 165-166.

<sup>533</sup> *Idem*, 122-123.

<sup>534</sup> John L. Gaddis, *The Cold War* (London: Penguin Books, 2005), 35.

Europe.<sup>535</sup> In doing so, they made a crucial mistake. The “fall” of China was characterized by Republic Congressmen as betrayal of the government to Chiang Kai-shek. Acheson was accused of sympathizing with the Chinese Communists and the government was blamed for the loss of China to the Communist camp.<sup>536</sup>

At the same time two spectacular spy cases entered the public eye. In Great Britain, an immigrated German scientist named Klaus Fuchs confessed to have spied for the Russians during the Manhattan Project. In the United States, former government official Alger Hiss was convicted of perjury. Hiss had denied under oath to be an agent of the Soviet-Union while he was employed by the Roosevelt administration. The new chairman of HUAC, the young Richard Nixon, however, had found new evidence proving that Hiss had been working for the Russians after all.<sup>537</sup> Time Magazine editor and former communist Whittaker Chambers testified that Hiss had belonged to the Communist Party. Chambers was sued by Hiss for slander, but retaliated by providing state documents and microfilms which Hiss had given to him, while a member of the Roosevelt administration, to be transmitted to the Russians.<sup>538</sup>

The case against Hiss was of utmost importance to the anticommunist cause. The settled image of the obligatory Cold War enemy permeated popular culture, destroying any possibility of intellectual debate on the case.<sup>539</sup> His conviction seemingly proved that all American Communists were Soviet spies, legitimizing their persecution for disloyalty.<sup>540</sup> Moreover, what Republicans had been claiming for years appeared to be the truth: Roosevelt and his New Deal had been “Red” and responsible for the “twenty years of treason” culminating in the Soviet bomb and the “fall” of China. Nixon summed it up later: “it was the Hiss case that completely changed the public’s perception of domestic communism.”<sup>541</sup> Few liberals protested the conviction, reflecting the emergence of the anti-Communist consensus between liberals and conservatives.<sup>542</sup>

The events of the Cold War, especially the case against Hiss, further removed the “red” issue from the Truman administration’s control. The case gained an overarching symbolic importance, mainly because outcome of the case seemingly proved Republican charges of communist dominance over the New Deal.<sup>543</sup> The public contempt for Alger Hiss which followed also revealed how the postwar antiradicalism deviated from earlier forms. Hiss was, after all, not an illiterate foreigner, but a perfect example of the American establishment: a WASP with an unblemished reputation, a Harvard alma mater, tall, handsome and “upper-class.”<sup>544</sup>

The Cold War legitimized and fueled the new Red Scare. The President’s warnings against the monolithic advance of the Soviet Union divided the world into spheres of good versus evil. The United States’ need to protect the free world from the evil Communist empire was logically accompanied by anti-communist policies at home.<sup>545</sup> Although the Cold War was, in reality, spawned by complex events, many Americans regarded it to be caused solely by Soviet expansionism. The double development of American anticommunist policy abroad and at home seemed inevitable.<sup>546</sup>

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<sup>535</sup> Warren I. Cohen, *America in the Age of Soviet Power: 1945-1991*, Volume IV of *The Cambridge History of American Foreign Relations*, edited by Warren I. Cohen (Cambridge: Cambridge University Press, 1993), 51.

<sup>536</sup> Cohen, *America in The Age of Soviet Power*, 51.

<sup>537</sup> Gaddis, *The Cold War*, 39.

<sup>538</sup> Ellen Schrecker, *The Age of McCarthyism: A Brief History with Documents* (Boston/New York: St. Martin’s Press, 1994), 121.

<sup>539</sup> Navasky, “Weinstein, Hiss...”, 233.

<sup>540</sup> Schrecker, *The Age of McCarthyism*, 121.

<sup>541</sup> Broadwater, *Eisenhower*, 12.

<sup>542</sup> Kenneth O’Reilly, “Liberal Values, the Cold War, and American Intellectuals: the Trauma of the Alger Hiss Case, 1950-1978,” in Theoharis ed., *Beyond the Hiss Case*, 309.

<sup>543</sup> Goldstein, *Political Repression*, 316-317.

<sup>544</sup> Bennett, *The Party of Fear*, 290.

<sup>545</sup> Idem, *The Party of Fear*, 288.

<sup>546</sup> Fried, *Nightmare in Red*, 8.

Eventually a “hot” war in Korea gave the anticommunist movement durability and the feeling of urgency related to the possibility of catastrophic world war. The period 1949-1954, which became the low point for American civil liberties during the Cold War, overlapped almost perfectly with the Korean War.<sup>547</sup> From the moment America faced casualties in Korea the fears created by the Hiss case, the Soviet bomb and the realization that spies might be active in America, culminated into an anticommunist madness. Truman had exaggerated the communist threat himself to sell the Marshall plan and to get reelected, hence, in 1950; he could no longer prevent the anticommunist movement from growing beyond his control.<sup>548</sup> The ideological tension created by the anticommunist rhetoric in both domestic and foreign policy made action against the communist aggressor more important than the results of the war. The Korean War thus continued even after it bogged down into a standstill, resulting in an enormous loss of men and exercising an enormous psychological pressure on the American people. The attempts to both act against evil and prevent a total war inevitably led to an outbreak of frustration and a search for scapegoats, which expanded to the domestic scene.<sup>549</sup>

The anticommunist crusade in America was unmistakably connected to crises in foreign affairs, from the “fall” of China, through the leaking of nuclear secrets, to the standstill in Korea. The burden of political leadership in the world, the worries of the atom age and the fears of Soviet expansionism determined Truman’s foreign policy. The issue of domestic communism struck so many people because it overlapped with a question, both confusing and urgent, which seemed to be on the minds of every American: how could America, at the height of its powers, find itself on the defensive in every important international issue?<sup>550</sup>

### *McCarthy*

In a climate determined by political strife, international failures and a public opinion hostile to radicalism and dissent, on February 9, 1950, Senator Joseph R. McCarthy held a speech in Wheeling, West Virginia for a local women’s club of the Republican Party. In this infamous “Wheeling Speech” McCarthy assured he had a list of 205 people employed by the State Department, who were also members of, or loyal to, the Communist Party. In reality, he had no such list, but the doctrine of guilt by association had by then become an established feature of the anticommunist cause. Any form of dissent was easily confused with disloyalty and public Cold War fears were already exploited frequently for political ends. To this, McCarthy added wild, spectacular and unfounded attacks.<sup>551</sup> Combined, a movement carrying the Wisconsin Senator’s name entered the scene and led to the low point in Cold War political repression.

In his campaign for the Senate, Joe McCarthy had already used the by then established tactic of accusing his democratic opponent of communist activities.<sup>552</sup> After he achieved national fame with his Wheeling Speech, he became chairman of the Senate’s Permanent Subcommittee on Investigations. Using this bureaucratic force, he continued his crusade against communist subversion. After the Truman administration dismissed the popular war hero Douglas McArthur for insubordination, McCarthy let go of his final restraint in his accusations of the government, especially concerning Secretary of State Dean Acheson:

“He (a crippled Korea veteran named Bob Smith) should say, ‘Mr. Acheson, if you want to at long last perform one service for the American People you should (...) remove yourself from this country and go to the nation for which you have been struggling and fighting so long.’”<sup>553</sup>

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<sup>547</sup> Fried, *Nightmare in Red*, 118-119.

<sup>548</sup> Cohen, *America in The Age of Soviet Power*, 75-78.

<sup>549</sup> Henry Kissinger, *Diplomacy* (New York/London/Toronto/Sydney: Simon Schuster, 1994), 490-491.

<sup>550</sup> Bennett, *The Party of Fear*, 313-314.

<sup>551</sup> Fried ed., *McCarthyism*, 72; Broadwater, *Eisenhower*, 12-14.

<sup>552</sup> Fried ed., *McCarthyism*, 72.

<sup>553</sup> Joseph R. McCarthy at United States Congress, 82nd Congress, 1st Session, May 24, 1951, *Congressional Record*, 1287, in: Fried ed., *McCarthyism*, 89.

Two years later, McCarthy attacked a war hero himself: General George C. Marshall, responsible for the “socialist” Marshall Plan. McCarthy implied that Marshall had always been a traitor:

“General Marshall looked off into space for perhaps 30 seconds. Then he began. For nearly 40 minutes he spoke. His talk was a smooth, connected, brilliantly clear narrative that encompassed the war. (...)All agreed on one thing: ‘That’s the most brilliant interview I have ever attended in my life’. The above (...) becomes extremely interesting when compared to Marshall’s inability to recall what he was doing on the morning of Pearl Harbor. Originally Marshall testified that he was out horseback riding and for that reason could not be contacted. Later, he testified his memory had been refreshed and that he actually had not been horseback riding but was at home with his wife. The third version (...) is contained in Arthur Upton Pope’s book *Litvinoff* in which the diary account of [Soviet Diplomat] Litvinoff’s trip from Russia to the United States shows that Marshall was meeting Litvinoff at the airport on Pearl Harbour morning. While the question (...) seems unimportant today, it does form a very interesting comparison of Marshall’s memory on those two occasions...”<sup>554</sup>

McCarthy could make such far-fetched allegations to a celebrated war hero unhindered. It is remarkable that “tail gunner Joe”, as a senator hardly noticeable before the Wheeling Speech, carrying a reputation of being dishonest, and known to be an alcoholic, obtained such a prominent place in American politics.<sup>555</sup> How could a speech of a young, unknown Senator, based on sheer imagination, lead to a movement of nationwide mass hysterics that carried his name?

#### *McCarthy’s Popular Support*

McCarthy’s success follows the general pattern of support for political repression in times of war: a dual reinforcement by elites that used the dynamics of repression to further their own causes and by the wider public that welcomed the repression of unpopular groups. McCarthy gained won quite some support with the public at large. He had emphasized the loyalty issue and the “twenty years of treason” the Democrats had allegedly brought about, as had become common among Republicans. McCarthy managed to become a political force by exploiting these issues, although he never proved any of his claims and followed earlier accusations with even more ridiculous ones. He had, however, chosen the perfect moment to garner public support, as the events that precluded his claims had created a climate of hysterical anticommunism.<sup>556</sup> As long as the Korean War persisted, the politics of disloyalty had a continuity on which McCarthy could foster.<sup>557</sup> As the United States seemed on the verge of “losing” another nation to Communism in Asia, the senator’s accusations of treason among the highest officials of the government seemed less ridiculous.<sup>558</sup> Besides the international Cold War and long-term traditions of antiradicalism, however, other factors help explain the phenomenon which “McCarthyism” became.

McCarthy’s success with the people is partly explained by the framework of American party politics. McCarthyism originated to some extent as part of Republican envy at the twenty year long Democratic domination of federal politics. The fact that anticommunism only survived on the extreme right of the Republican Party after Eisenhower’s 1952 victory strengthens this claim.<sup>559</sup> Still, such reasoning only explains the motives of the anticommunists, not their public success. The mass reception of the antiradical crusade was based on three other factors.

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<sup>554</sup> Joseph R. McCarthy, *Ameria’s Retreat from Victory, the Story of George Catlett Marshall*, 1-2, 12-13, in: Fried ed., *McCarthyism*, 90-92.

<sup>555</sup> Fried ed., *McCarthyism*, 75.

<sup>556</sup> Hamby, *Liberalism*, 111-112.

<sup>557</sup> Fried, *Nightmare in Red*, 129.

<sup>558</sup> Schrecker, *Many are the Crimes*, 249.

<sup>559</sup> Broadwater, *Eisenhower*, 14.

First of all, domestic communism offered an almost perfect political issue: it brought together two of the greatest fears of the American people: *taxes* and *Communism*.<sup>560</sup> Millions worth of tax money had been wasted to support the Chinese nationalists by a government that had lost its nuclear monopoly, because it had been infiltrated by spies. Taxes combined with communism, which had always been considered very dangerous, being godless, foreign and opposed to private property.<sup>561</sup> Secondly, McCarthyists could profit from the long isolationist tradition that had only been broken in 1917 and 1942, which, as it appeared in 1950, had only caused trouble.<sup>562</sup> McCarthy's attacks on the interventionist Democrats constituted a form of neo-isolationism that allowed populous groups in America, such as German- and Irish-Americans to refute a generation of interventionist, anti-German and pro-British foreign policy.<sup>563</sup> Finally, the press played a large part in the promotion of the "Red Scare" and its reception by the public at large. The wish to sell as much papers as possible combined with a naïve objectivity that allowed McCarthy a lot of press attention.<sup>564</sup> McCarthy managed to dominate the mass media through the continuous, excessive and hyperbolic nature of the charges. He continued to be front-page news by repeating unfounded claims and surpassing them with even wilder accusations. Accusations bounced back when they were denied, qualified or countercharged, creating a chain of publicity for the Senator. Rectifications and critiques that refuted his claims ended up in the back pages of newspapers.<sup>565</sup> As a result, a large segment of the public was hardly aware that McCarthy's claims were based on lies and exaggerations.

#### *McCarthy's Support among the Elites*

McCarthy also became such a success because various elites encouraged him and because other elites allowed him to prosper. Political and psychological reasons caused political elites to be apprehensive about attacking McCarthy. Many thought they could use him for their own political gain, others saw little reason to treat him different from other senators and some feared to become the next target of the anticommunist wrath if they opposed him.<sup>566</sup>

The strongest support for McCarthy came from the establishment of the GOP. Conservative Republicans encouraged the attacks because they damaged the vulnerable Democratic government. McCarthy became a champion of the conservative leadership of the party, centered on Robert Taft. Taft was a senator with presidential ambitions and became a key figure in the portrayal of McCarthy as a crusader for freedom.<sup>567</sup> In addition, many conservative publicists, businessmen and veteran officers supported McCarthy because of their dissatisfaction with the New Deal, the expanding bureaucracy and the military disaster that was Korea. McCarthy's role as champion to their cause gave the movement its emotional intensity, summoned by the incensement and desperation of the political situation.<sup>568</sup>

Furthermore, the moderate majority in Congress supported McCarthy, albeit less passionately. McCarthy exploited the competition between Congress and the Executive to the fullest. The expansion of the federal executive powers aroused fear among Congressmen about losing privileges and power. Most Southern Democrats in the Senate, who had become the embodiment of the institutional traditions of the Senate, thus supported McCarthy and were unwilling to harm the privileges of an individual senator as not to incriminate the entire

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<sup>560</sup> Idem, 15-16.

<sup>561</sup> Heale, *American Anticommunism*, 18.

<sup>562</sup> Broadwater, *Eisenhower*, 15-16.

<sup>563</sup> Fried, *Nightmare in Red*, 8.

<sup>564</sup> Broadwater, *Eisenhower*, 15-16.

<sup>565</sup> Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate* (Lexington: University Press of Kentucky, 1970), 139-140.

<sup>566</sup> Michael P. Rogin, *The Intellectuals and McCarthy: The Radical Specter* (Cambridge MA/London: Massachusetts Institute of Technology, 1967), 249.

<sup>567</sup> Hamby, *Liberalism*, 112-113.

<sup>568</sup> Rogin, *The Intellectuals and McCarthy*, 250.

institution. Moreover, these democrats, although not anticommunist by heart, were hardly displeased by the damage McCarthy dealt to their northern, liberal colleagues.<sup>569</sup>

Many newspapers, especially those outside the major metropolitan areas along the coasts, actively encouraged McCarthy. The more respectable, moderate dailies opposed McCarthy vigorously, but still dramatized any news concerning communism, allowing McCarthy to profit. Moreover, as they attempted to expose his past and denounce his actions, they merely generated more publicity for his cause.<sup>570</sup>

The Liberals themselves, finally, who were still in power when McCarthy ascended to the spotlight, failed to combat him effectively. Progressive politicians and officials were not ready to accept that the New Deal, the Popular Front and the alliance with the Soviet Union had been replaced by Cold War attitudes. Guilt, insecurity and fear further weakened the will of the Liberal elites to stand up against McCarthy.<sup>571</sup> Other liberal democrats meant to refute McCarthy's claims, but their attempts to set him as an example of the unfounded accusations against the Democratic Party simply kept his momentum going.<sup>572</sup>

## Cold War Repression

The fact that various elite groups and the public at large supported McCarthy reveals a widespread lack of concern for civil liberties in American society at the time. Such an atmosphere caused very few politicians to risk the wrath of McCarthyists by defending the freedom of speech or assembly of alleged Communists. McCarthy's influence in Washington was hardly the consequence of a fanatical public, but the result of a widespread indifference for the consequences of the Cold War on civil liberties in the United States.<sup>573</sup> Eisenhower, strikingly, even after he had secured the end of democratic control over the federal government, allowed McCarthy to continue his crusade. Although Ike despised of the Senator's ways, especially his sensational form of demagoguery, he fully supported the need to stand firm against communism, even at the cost of civil liberties: "it was silly to think that the liberties of the United States were being endangered merely because we were trying to squash communism."<sup>574</sup>

The climate of fear which arose from the international Cold War developments, the spy cases, the red-baiting on account of both Republicans and the administration itself and eventually McCarthy's hysterical accusations allowed for a serious restriction of civil liberties, especially freedom of speech. In dealing with the Communist party, the courts upheld the "clear and present danger" test to determine the limits of freedom of speech protected by the constitution. In doing so, First Amendment rights became highly dependent on the identity of whoever asserted such rights.<sup>575</sup> According to Robert Goldstein, the treatment of the Communist Party in the years following World War II was therefore "the real measuring rod for the climate of civil liberties".<sup>576</sup>

The idea that Communists existed beyond the normal sphere of constitutional protection allowed for a massive attack on their civil liberties during the early Cold War, as had been the case with Japanese Americans during World War II and radical aliens during the first Red Scare. The devices for the prosecution of communists had already been put in place during World War II, including HUAC, the Smith Act, loyalty oaths at schools and FBI surveillance. Fundamental

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<sup>569</sup> Idem, 254-255.

<sup>570</sup> Griffith, *The Politics of Fear*, 142.

<sup>571</sup> Rogin, *The Intellectuals and McCarthy*, 256.

<sup>572</sup> Fried, *Nightmare in Red*, 123.

<sup>573</sup> Broadwater, *Eisenhower*, 16-17.

<sup>574</sup> Herbert S. Parmet, *Eisenhower and the American Crusades* (New York/London: Macmillan, 1972), 267.

<sup>575</sup> Belknap, *Cold War Political Justice*, 122.

<sup>576</sup> Goldstein, *Political Repression*, 287.

questions concerning the reach of civil liberties during international conflict surrounded the treatment of the Communist Party. It could either be regarded a legitimate political opposition group or a criminal cabal planning conspiracy. In doing so, many people, including civil liberties champions such as the ACLU, as well as the Supreme Court itself, distinguished between Communists and others on many civil liberties issues. At the same time that the Court forged essential new law on civil rights, freedom from censorship, separation of church and state and due process of law, it dealt a heavy blow to the Marxist-Leninist expression of freedom of speech.<sup>577</sup>

### *The Smith Act Prosecutions*

In July 1948, the U.S. government indicted twelve top party leaders of the Communist Party (CPUSA) under the Smith Act in order to destroy the party once and for all. As the leaders were charged with advocating the overthrow of the government, the case embodied a serious test about the scope of the First Amendment during the Cold War. The problem centered on the question whether the Communist doctrine was just a theory or a direct call for criminal action.<sup>578</sup>

The ensuing trial had important immediate consequences for American civil liberties during the early Cold War, first of all for equal rights of due process and counsel. New York Court Judge Harold Medina, who was, according to many, biased against the defendants, cited the defense attorneys for contempt, eventually sending them to prison. As a consequence, few lawyers were willing to step up and take on the defense of the Communist leaders. Thus, "the problem of legal representation for unpopular clients became a national crisis as the organized bar abandoned its obligation to provide counsel for all defendants."<sup>579</sup> As constitutional rights of due process were seriously impeded, so was the freedom of assembly. When Communists organized massive demonstrations outside the courthouse, a bill was quickly introduced in Congress to prohibit protesting against federal courts.<sup>580</sup> Eventually Eugene Dennis and ten other leaders of the CPUSA were found guilty of *conspiring* to teach and advocate the overthrow of the U.S. government by force and violence. The defendants then appealed to the U.S. Court of Appeals for the Second Circuit. Chief Justice Learned Hand upheld the convictions of the leaders, although he had earlier written that a nation is in danger "where orthodoxy chokes off freedom of dissent."<sup>581</sup> Dennis' further appeal then led to one of the most important Supreme Court cases about the constitutional rights of communists and about the freedom of expression during the Cold War in general.

In *Dennis v. United States*, decided in 1951, the Court upheld the conviction with a 6 to 2 majority, thus affirming the constitutionality of the Smith Act.<sup>582</sup> Dennis had contended that the Smith Act infringed on First Amendment guarantees of freedom of expression and violated due process guarantees of the Fifth Amendment. The majority in the Court, however, retreated from the "clear and present danger" test by repeating the circuit court's opinion that "we must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger."<sup>583</sup> In the context of the Cold War, *intent* and *conspiracy to advocate* constituted a clear and present danger, since the accused were Communists.<sup>584</sup> Based on this standard Chief Justice Fred M. Vinson ruled that the activities of the CPUSA transgressed the line between the individual's rights to advocate change and the right of society to confirm

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<sup>577</sup> Walker, *In Defense of American Liberties*, 176.

<sup>578</sup> *Idem*, 185.

<sup>579</sup> *Idem*, 186.

<sup>580</sup> *Idem*, 186.

<sup>581</sup> Stone, *Perilous Times*, 398-399.

<sup>582</sup> Justice Clark did not participate as he had brought the indictments to the case as President Truman's Attorney General.

<sup>583</sup> Walker, *In Defense of American Liberties*, 187.

<sup>584</sup> Belknap, *Cold War Political Justice*, 131-132

national security through the Smith Act.<sup>585</sup> The community's evocation, through the Smith Act, of such national security policy was justified by the Chief Justice, because the formation "of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom the petitioners were in the very least attuned, convince us that their convictions were justified on this score."<sup>586</sup> Thus, international events of the day sanctioned the conviction. Furthermore, Vinson pointed out, the clear and present danger test should not mean that, before the "Government may act, it must wait until the *putsch* is about to be executed."<sup>587</sup>

As has been said, the Court was not unanimous in its defense of the Smith Act; in fact only three associate justices joined Vinson. Justices Black and Douglas dissented passionately. They both denied the existence of either clear or present danger that would justify such invasion of the rights of freedom of expression and argued for free discussion, even of hated ideas. Vinson's establishment of clear and present danger by notice of the Cold War drew a venomous response from Douglas, who remarked that the Court could likewise claim that the defendants' speech was illegal because the USSR comprised a threat to world peace.<sup>588</sup> He also pointed to the impotency of the American Communist Party:

*"Communism in the world scene is no bogeyman; but Communism as a political faction or party in the country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it... How it can be said that there is a clear and present danger that this advocacy will succeed, is, therefore, a mystery... (...) The fact that their ideas are abhorrent does not make them powerful."*<sup>589</sup>

Black, in turn, recognized the effects of public opinion and the effect of the Cold War on the conviction:

*"Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society"*<sup>590</sup>

As it happened, the majority decision in *Dennis* sanctioned prosecution of all Communist party members. The foreign-born among them could be deported immediately and teachers could be fired. The Justice Department went on to indict the second tier in party leadership. Only a few solicitors proved brave enough to represent the defendants. Consequently, by 1956, 108 of the 145 party leaders had been convicted under the Smith Act and only 10 had been acquitted.<sup>591</sup> Finally, in 1957, a six-member majority of the Supreme Court severely reduced the application of the statute by adding a series of rectifying interpretations in *Yates v. United States*, although not officially overruling *Dennis*.<sup>592</sup> The rulings of the Warren Court during the 1960s further neutralized the Smith Act, but not after it had already accomplished the objectives it was created for: to destroy any attempts at creating an American communist movement.<sup>593</sup>

During the early 1950s judges across the country unanimously followed the Supreme Court's conviction that the American Communists constituted a "clear and present danger." Most judges decided for themselves that such a danger existed based on their assessment of the

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<sup>585</sup> Abraham and Perry, *Freedom and the Court*, 194.

<sup>586</sup> Abraham and Perry, *Freedom and the Court*, 194.

<sup>587</sup> Stone, *Perilous Times*, 404.

<sup>588</sup> Belknap, *Cold War Political Justice*, 140.

<sup>589</sup> Stone, *Perilous Times*, 407.

<sup>590</sup> Abraham and Perry, *Freedom and the Court*, 196.

<sup>591</sup> Walker, *In Defense of American Liberties*, 187-188.

<sup>592</sup> Abraham and Perry, *Freedom and the Court*, 196.

<sup>593</sup> Belknap, *Cold War Political Justice*, 280.

international situation, and as the international state of affairs worsened over the years, so did the fate of the Communists' rights of freedom of expression. Judge John Marshall Harlan reasoned that "if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war."<sup>594</sup> Any claims, by defendants in Communist cases, that Cold War attitudes made it impossible for them to receive a fair trial, were dismissed, even when they pointed to specific actions by governmental agencies which had prejudiced the rights of the accused. For example, when the defense criticized the appearance of a witness in a trial in Pittsburgh before Senator McCarthy's Permanent Investigations Subcommittee, while the trial was in recess, the court refused to grant relief.<sup>595</sup>

Public support was fully behind the ruling in *Dennis*. Nationwide only a handful of major newspapers expressed opposition.<sup>596</sup> The *Washington Post* proclaimed the decision "the most important reconciliation of liberty and security in our time."<sup>597</sup> The *Chicago Tribune* insisted that "the Communist Party in the United States is as much an instrument of Russian policy as is the Red army," warranting "rigorous measures repressing it."<sup>598</sup>

The Smith Act prosecutions also affected many Americans outside the tiny communist movement. The *Dennis* decision and subsequent assault by the Justice Department on the Communist Party damaged the First Amendment rights of all Americans and added to the atmosphere of repression of the McCarthy era. By sending communists to jail for their beliefs, the Supreme Court gave additional status to the crusade for conformity and legitimized repression of voices of dissent outside the radical leftwing camp. The consequences were long-lived: during the 1960s and 1970s the FBI and the Internal Security Division led a campaign against any critics of American society, including peaceful dissenters such as Martin Luther King. Individuals as well as organizations that were far less outspoken or radical than the Communist Party faced investigation, harassment and prosecutions for their attempts to change the status quo.<sup>599</sup>

### *The Federal Loyalty Program*

In addition to the Smith Act, the federal government launched an extensive federal loyalty program. Executive Order 9835, issued by President Truman on March 21, 1947, enormously enlarged the earlier wartime programs, allowing the government to deny employment to people who were believed disloyal to the United States. Such disloyalty was affirmed by membership, affiliation or sympathy to any foreign, communist or subversive organization that advocated or approved acts of force or violence against other people's rights. A list of subversive organizations was subsequently created by Attorney General Tom Clark.<sup>600</sup> According to historian Justin Goldstein, Truman's executive order on government loyalty marked the real beginning of "McCarthyism" as a phenomenon, three years before the Wheeling Speech: "it was this program, more than any other single action, which set the tone and paved the way for the anti-communist hysteria which gripped the country from 1947 onwards."<sup>601</sup>

The program legitimized judgments of individuals on the basis of their political beliefs rather than actual criminal acts. The undefined inclusion of vague terms such as "subversive" and "sympathetic association" in the Executive Order allowed for a wide range of abuse. Subsequently, any contact to an organization on the list, no matter how long ago, constituted

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<sup>594</sup> *Idem*, 170.

<sup>595</sup> *Idem*, 170-171.

<sup>596</sup> *Idem*, 142.

<sup>597</sup> "Freedom with Security," *Washington Post*, June 6, 1951.

<sup>598</sup> *Chicago Tribune*, June 6, 1951.

<sup>599</sup> Belknap, *Cold War Political Justice*, 280-281.

<sup>600</sup> Walker, *In Defense of American Liberties*, 176.

<sup>601</sup> Goldstein, *Political Repression*, 299-300.

“proof” of disloyalty.<sup>602</sup> All present or prospective employees within the government had to endure investigation of their loyalty, including a review of any information about them held by the FBI, HUAC or local law enforcement. A finding of “adverse” loyalty was based on the standard that “reasonable grounds” existed to believe the person involved was disloyal, although “disloyalty” had never been defined. Among the criteria for making such a determination listed in the Executive order was “membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, Fascist, Communist or subversive.”<sup>603</sup> This criterion focused on *beliefs* and *associations* rather than acts of disloyalty, and made clear, together with Truman’s statement that the program was designed against “potential subversive”, that the purpose of the program was to determine whether “disloyal” *ideas* were *thought of* by the employees.<sup>604</sup> Perhaps most importantly, the program gave the executive government the power to define what thoughts and ideas were “permissible,” severely undermining free thought, essential to a self-governing society such as the United States.<sup>605</sup>

Aside from such clear abridgment of freedom of thought *precedent* to any freedom of expression, the program consisted of other grave defects. Specific charges could be omitted for security reasons, allowing the charges to be filed with only vague allegations of general disloyalty. Moreover, as the order included that “the investigating agency may refuse to disclose the names of confidential informants” employees and applicants were unable to determine who accused them and denied the right to confront their accusers.<sup>606</sup> Moreover, there was no time limit established on any of the activities deemed subversive, meaning that persons could be charged for sympathizing with an organization forty years earlier. As the loyalty reviews spread across many agencies and each organization had its own procedures, employees were often cleared by one organization, to face renewed questioning by another agency, enduring a clear form of double jeopardy. In contrast to court proceedings, the loyalty hearings were not public or open: the agency boards often studied confidential papers before the accused person was called in, denying him rebuttal and creating bias against the accused before the actual hearing. In reversal of the court treatment of defendants as “innocent unless proven guilty”, the accused were also considered guilty until they were determined to be loyal. Moreover, word of accusations often leaked out, causing the accused to be convicted by the public if not by the boards themselves and causing severe problems for the accused to find future employment. Most shockingly though, was the earlier discussed focus on *potential*, rather than actual disloyalty, which required an exploration of the accused person’s entire life reminiscent of a medieval inquisition. As the cold war developed and demands for conformity increased, the emphasis transferred towards unorthodox ideas in general, rather than just disloyal ideas.<sup>607</sup>

Many liberals at the time shared in Truman’s ignorance of the consequences of the program, especially because of the focus on the dangers of Communism, rather on the dangers of restricting free thought. Voices within the ACLU argued that “secret advocacy by its very nature precludes public discussion, it does not come within the First Amendment.”<sup>608</sup> Marxist philosophy professor Sidney Hook, who had repudiated Communism in the 1930s, argued that liberalism needed to be defended “against those agents and apologists of Communist totalitarianism who, instead of honestly defending their heresies, resort to conspiratorial methods of anonymity and other techniques of fifth columnists.”<sup>609</sup> Committed New Deal liberal James Wechsler also defended the loyalty program, accusing liberals of being naïve about communists

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<sup>602</sup> Walker, *In Defense of American Liberties*, 177.

<sup>603</sup> Goldstein, *Political Repression*, 300.

<sup>604</sup> *Idem*, 300-301.

<sup>605</sup> Stone, *Perilous Times*, 352.

<sup>606</sup> “Executive Order 9835, *Federal Register*, vol. 12, 1935-1936, in: Fried, *McCarthyism*, 30.

<sup>607</sup> Goldstein, *Political Repression*, 301-303; Stone, *Perilous Times*, 345-351.

<sup>608</sup> Walker, *In Defense of American Liberties*, 177.

<sup>609</sup> Sidney Hook, *Heresy Yes, Conspiracy No* (New York: John Day and Co., 1953), 35, in: Fried ed., *McCarthyism*, 64-66.

as well as conservatives: “if liberals cannot face the reality of Communist intrigue as they once recognized the scope of the fascist fifth column, the Congressional cops will run the show.”<sup>610</sup> Although liberal organizations disputed the *acts* carried out on the basis of the federal loyalty program and the *methods* used by the FBI, their basic support of the *ideas* behind the program blotted any serious debate on the effects of the anticommunist fever on civil liberties during the Cold War.

The official list issued by Attorney General Clark listed eighty-two groups, among them the Communist Party and a myriad of Popular Front organizations, such as the American Committee for the Protection of the Foreign Born, the International Labor Defense and the National Negro Congress. No standards were set to explain why these groups made the list, nor was there any opportunity to challenge the listing. The venture then immediately became an official blacklist adopted by state and local governments across the nation.<sup>611</sup> Serious problems arose from the creation of the blacklist. Many investigators could or would not separate communists from other unconventional left-wing inclined persons, largely based on their own political bias. As a result, many innocent people lost their jobs, because they were associated with groups on the list. Some had bought insurance policies from the International Workers Order, while others had sent money to Loyalists during the Spanish Civil War. Food inspector Kendrick Cole lost his job, because he had befriended members of the Nature Friends of America and had used their campsite.<sup>612</sup>

#### *The House Un-American Activities Committee*

As Goldstein points out, “the context of these repressive actions must be kept in mind: the Truman administration was initiating a *major* shift in American foreign policy, one that committed the nation to fight communism all around the world.”<sup>613</sup> When opposition to this new direction increased throughout 1947 and 1948, the administration increasingly attempted to cooperate with the anticommunist forces in the Republican-controlled Congress. One organization that clearly profited from this development was the House Un-American Activities Committee. After it had been given a de facto sign of approval by the initiation of the loyalty program it conducted a series of highly publicized investigations into communist activities and started questioning individuals suspected of Communist activities. It boldly stated that it would “expose and ferret out” Communists in the federal government, the labor movement and Hollywood, for which it over the next few years compiled “more than one million names, records, dossiers, and data pertaining to subversion.”<sup>614</sup> Although it clearly targeted the Democratic administration, the Justice Department helped the committee by providing confidential files and documents. The collaboration between HUAC and the FBI went even further, as HUAC Chairman J. Parnell Thomas proudly stated in 1948: “the closest relationship exists between this committee and the FBI.”<sup>615</sup>

Even HUAC’s shameless assault on the “Hollywood Ten”, which moved it further into the public spotlight, caused little protests from the Truman administration. After the ten witnesses refused to answer questions about their political affiliations, they were publicly charged with being members of the Communist Party based on confidential FBI information and sent to jail for contempt of Congress.<sup>616</sup> HUAC’s assault on Hollywood established a blacklist among Hollywood studios populated with actors, scenarists and directors. In 1953, character actor

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<sup>610</sup> James Wechsler, “How to Rid the Government of Communists,” *Harper’s Magazine*, November 1947, 438-440, in: Fried ed., *McCarthyism*, 54-55.

<sup>611</sup> Walker, *In Defense of American Liberties*, 179.

<sup>612</sup> Schrecker, *Many are the Crimes*, 276-277.

<sup>613</sup> Goldstein, *Political Repression*, 305.

<sup>614</sup> Stone, *Perilous Times*, 355-356.

<sup>615</sup> Goldstein, *Political Repression*, 306-307.

<sup>616</sup> *Idem*, 307.

Lionel Stander hilariously defended himself before HUAC by stating that he knew “of a group of fanatics who are desperately trying to undermine the Constitution of the United States by depriving artists and others of life, liberty, and pursuit of happiness without due process of law,” by which he obviously meant the Committee itself. Nevertheless, despite Stander’s refusal to answer the question whether he had ever been a Communist on the grounds of First and Fifth Amendment rights, he did not find work in America again until the late 1970s.<sup>617</sup>

In fact, the concept of the blacklist summarized HUAC’s thinking that not only was communism a dangerous and subversive doctrine, but that the presence of every individual communist, former communist or lefty “fellow traveler” was intolerable, never mind whether they actually threatened the nation. Its case against Alger Hiss established the public belief that Communists had in fact infiltrated the government. Teachers, union leaders, writers and musicians were subpoenaed to appear before the Committee, usually preceded by testimonies of ex-Communist witnesses. Guilt by association took on its most macabre form, as merely being called forward meant being labeled a Communist. “Taking the fifth” led to being called a “Fifth Amendment Communist”.<sup>618</sup> HUAC succeeded in its goal to expose Communists and “fellow travelers”, but, its hearings only resulted in *two* convictions of federal employees, both only for perjury, one of whom was Alger Hiss.<sup>619</sup> Therefore, although it exploited the Cold War state of emergency, it contributed strikingly little to the national security of the United States. In addition to its severe infringements upon constitutional rights of free expression, association and due process, without significantly aiding public security, perhaps the worst excess of HUAC was the requirement of witnesses to name names. The willingness to do so formed the Committee’s ultimate test of credibility and loyalty. Witnesses, after being pressured to rat out their former comrades, often paid the price, losing both their careers and self-respect.<sup>620</sup> The Committee’s focus on repentance, confessions and betrayal gave official government blessing to the doctrine of “guilt by association”. In doing so, HUAC’s ways threatened the very line between a democratic government’s focus on criminal conduct through law enforcement and the suppression of open debate and exploitation of fear characteristic of a police state.<sup>621</sup>

### *The FBI*

As during earlier episodes of national emergency, the power of the FBI escalated during the Cold War. With it, its illegal activities increased. Already in 1946 did the FBI report to Truman on alleged Soviet espionage based on statements by Whittaker Chambers and others. The FBI reported that it was necessary to intensify the investigation of Communist Party activities and to take steps to create a list of all members of the Communist Party and any other people who would prove “dangerous” in the event of a clash with the Soviet Union.<sup>622</sup> FDR had authorized the use of wiretaps by the FBI during the war, but only for reasons of “national defense.” In 1946, however, one year before the Cold War officially began, FBI director J. Edgar Hoover asked Attorney General Tom Clark to approve wiretapping without mentioning the national defense. President Truman signed Clark’s letter in which the Attorney General argued that “in the present troubled period in international affairs, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt’s memorandum.”<sup>623</sup>

The early spy cases, the emergence of the Cold War and the authorization by Truman to wiretap in cases concerning subversion, sharply increased FBI political intelligence activity. The

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<sup>617</sup> United States House of Representatives, 83d Congress, 1st Session, Committee on Un-American Activities, *Hearings*, May 6, 1953, in: Fried ed., *McCarthyism*, 143-147.

<sup>618</sup> Walker, *In Defense of American Liberties*, 181.

<sup>619</sup> Stone, *Perilous Times*, 372.

<sup>620</sup> Walker, *In Defense of American Liberties*, 181-182.

<sup>621</sup> Stone, *Perilous Times*, 374.

<sup>622</sup> Goldstein, *Political Repression*, 293.

<sup>623</sup> Athan Theoharis, *Spying on Americans* (Philadelphia: Temple University Press, 1978), 99-100.

FBI's surveillance went far beyond espionage, as its investigation of a New York City child care center, found to be "dominated" by members of the Communist Party, illustrates.<sup>624</sup> Neither was only Communist activity targeted. The Bureau harassed the National Lawyers Guild throughout the 1940s and 1950s to prevent them from representing alleged Communists. Their extensive and illegal surveillance contributed to the loss of over eighty percent of the Guild's membership. As the FBI found no evidence to indicate that the Guild's members violated any law, its campaign was instead based completely on the reactionary political philosophy of Hoover and other high ranking officials. The lawyers' "crime" had been their broad application of individual rights of due process of law that damaged essential government policies such as the Smith Act prosecutions and the Loyalty Program.<sup>625</sup> Likewise the Bureau investigated the American Labor Party (ALP), which it continued to spy upon despite the lack of any evidence that the ALP violated the law. Moreover, the FBI almost certainly selectively released information to conservative journalists and HUAC. In doing so, it shrewdly stepped over the lines separating intelligence from political activism, revealing the ambiguous role of government-aligned bureaucracies during periods of national emergency.<sup>626</sup>

Just as during the first Red Scare, the FBI had its reasons for engaging itself in the postwar anticommunist campaign. In addition to its own interests of bureaucratic expansion and legitimization, it was genuinely convinced that Soviet espionage threatened the American nation. In 1955 it revealed 2,900 coded Soviet intelligence messages, known as the Venona documents that showed that the Soviet Union had mounted an extensive espionage operation. To the conservative minds in the organization, this justified its attempts to destroy the Communist Party, no matter the costs. The FBI went on to dominate the federal loyalty program, conducting over two million name checks and leading 20,000 full investigations.<sup>627</sup> Although the Bureau's methods, structure and role did not deviate from its involvement in the first Red Scare, the scale on which it was involved and the independence of its operations greatly increased. The Cold War focus on espionage and subversion, and the extended powers of the executive allowed it to operate almost autonomously.<sup>628</sup>

By the late 1940s, J. Edgar Hoover had become a political force of its own, partly because he had information on every possible critic. He, for example, played an important role in driving HUAC towards its assault on Communists.<sup>629</sup> To a large extent, the executive had handed him such power. Successive presidents had willfully given the FBI authority by asking it to spy on political opponents.<sup>630</sup> The lion's share of the political surveillance carried out by the FBI was known by Hoover's superiors: he was given so much freedom because American leaders genuinely believed it was in the interests of the nation.<sup>631</sup> In the end, FBI engagement proved massive. The Freedom of Information Act of 1966 revealed the magnitude of spying on writers, lawyers and even Supreme Court justices by the FBI during the early Cold War.<sup>632</sup> Between 1940 and 1970, the FBI employed 37,000 informants, used 13,500 illegal buggings and made 7,500 illegal break-ins.<sup>633</sup>

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<sup>624</sup> Goldstein, *Political Repression*, 294.

<sup>625</sup> Percival R. Baily, "The Case of the National Lawyers Guild, 1939-1958," in Theocharis ed., *Beyond the Hiss Case*, 162-163.

<sup>626</sup> Kenneth Waltzer, "The FBI, Vito Marcantonio, and the American Labor Party," in Theocharis ed., *Beyond the Hiss Case*, 200-201.

<sup>627</sup> Schmidt, *FBI and the Origins of Anticommunism*, 365-366.

<sup>628</sup> *Idem*, 367.

<sup>629</sup> Stone, *Perilous Times*, 235n.

<sup>630</sup> Walker, *In Defense of American Liberties*, 191.

<sup>631</sup> Schmidt, *FBI and the Origins of Anticommunism*, 367.

<sup>632</sup> Walker, *In Defense of American Liberties*, 191.

<sup>633</sup> Schmidt, *FBI and the Origins of Anticommunism*, 367.

## *Loyalty Oath Mania*

Eventually the Federal Loyalty Program and the Bureaucratic impulse of the FBI and HUAC led to a nationwide call for loyalty oaths. In 1949 fifteen states enacted loyalty oaths for public employees, by 1953 thirty-nine states had such oaths in place. The judiciary, all the way up to the Supreme Court, consistently upheld compulsory loyalty oaths. First the Court established the Taft-Hartley Act, denying protection to any union whose leaders failed to produce a written legal declaration, destroying many unions in the process. In this case, *Douglas v. American Communications Association*, the Court rejected First Amendment regards as "Congress might reasonably find that Communists, unlike members of other political parties... represent a continuing danger of disruptive political strikes when they hold positions of union leadership."<sup>634</sup> In *Douglas* membership of a Communist organization presumed advocacy acts, including political strikes, which were deemed illegitimate. Afterwards, the Court upheld the Los Angeles loyalty oath in *Garner v. Board of Public Works*, as past loyalty was a viable qualification for employment, because it "may have a reasonable relationship to present and future trust."<sup>635</sup> The institutionalization of loyalty oaths crippled the important due process clause of "innocent until proven guilty", as Justice Douglas, who dissented in *Garner* pointed out: "the vice is in the presumption of guilt which can only be removed by the expurgatory oath."<sup>636</sup>

The loyalty programs imposed serious penalties, as Supreme Court justice Tom Clark noted: "in the view of the community, the stain is a deep one; indeed it has become a badge of infamy."<sup>637</sup> As the loyalty mania extended beyond the federal government by HUAC, the FBI and local review boards, repression was less and less limited to Communists only. Many past experiences or present possessions could lead to a mark of heresy, such as support for the New Deal, or Republican Spain, union support, or possession of Marxist literature. Any attempt to defend Communists' free speech rights or advance racial equality certainly marked one as "un-American".<sup>638</sup> In June 1950, three ex-FBI agents, with financial backing from right-wing groups, published *Red Channels*, a book containing an extensive list of people in the entertainment industry whom it claimed were or had been "red". It used numerous sources from Communist publications, and HUAC, FBI and Justice Department files. Composer Leonard Bernstein was labeled "red" because he had sponsored "People's Songs, Inc.," was affiliated with the "American-Soviet Music Society" and had signed a defense of Communist cases by the "Progressive Citizens of America." Likewise, dancer Paul Draper was identified as a fellow traveler, because he had sponsored the "Scientific and Cultural Conference for World Peace" and had entertained at a benefit of the "National Council of American-Soviet Friendship."<sup>639</sup>

The sanctions imposed on such dissenters proved highly effective, especially because the host of official and unofficial blacklists applied their lists so rigorously. To get off or to avoid getting on a blacklist proved arduous, while the political tests for employment extended to almost every sector of employment. There came to exist loyalty oaths for lawyers, entertainers, public and private employees, and especially teachers.<sup>640</sup> Educators of various degrees were hit hardest by the loyalty oath mania. The University of California obliged all of its personnel to swear not to be members of a Communist Party or commit itself to anything in conflict with loyalty to the United States. Although the faculty senate at Berkeley voted against the oath, it underscored that Communists were not acceptable as members of the faculty, affirming the anti-Communist restrictions of academic freedom. After the Korean War started, only 30 faculty members of the

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<sup>634</sup> Walker, *In Defense of American Liberties*, 189.

<sup>635</sup> *Idem*, 189.

<sup>636</sup> 341 U.S., 720, 731, in: Fried, *McCarthyism*, 109.

<sup>637</sup> Schrecker, *Many are the Crimes*, 271.

<sup>638</sup> Belfrage, *The American Inquisition*, 131.

<sup>639</sup> *Red Channels* (New York: American Business Consultants Inc., 1950), 49-50, 59-60, in: Fried ed., *McCarthyism*, 119-121.

<sup>640</sup> Schrecker, *Many are the Crimes*, 271.

University of California dared to refuse to participate with the loyalty oath, of which 26 were subsequently fired.<sup>641</sup>

Professional associations representing teachers and professors fully surrendered to the anti-Communist pressure. The nation's university presidents, through the platform of the Association of American Universities, declared that "'Academic Freedom' is not a shield for those who break the law."<sup>642</sup> The National Education Association, representing public school teachers, voted that Communist party membership rendered individuals unqualified to carry out the responsibility of a teacher.<sup>643</sup> University of South Florida president Elwood C. Nance spoke in praise of teachers' loyalty oath in 1950, suggesting that "Americans learn all there is to know about how to kill, based on the law of the jungle, because it is the only law by which Russia and her satellites know how to live."<sup>644</sup> In fact, instead of creating an intellectual bulwark to the anticommunist excesses, American universities collaborated extensively with the FBI. Their cooperation rested on symbiotic interests: the FBI gained information about suspected individuals, while the universities gained protection from Congressional inquiries.<sup>645</sup> The idea that educational freedom was a constitutionally protected liberty was rejected across American society. Even Norman Thomas, socialist and founding ACLU member argued that "the right to teach in public schools is not a necessary or logical deduction from the Bill of Rights or the right to free speech."<sup>646</sup> Most dangerously, the nation's educational system was damaged far beyond the firing of teachers for disloyalty. The fear to deviate from the national norm smothered any research into social and political subjects, including debate about the course and goals of American foreign policy or persistent issues of racism and poverty.<sup>647</sup>

The mania for loyalty became utterly entangled with issues of racial and economic inequality. Once again, as during WW I and WW II did a crisis of national security allow various forces to uphold the status quo by exploiting the loyalty issue. A candidate in Washington already declared during the 1946 Congressional elections that "if someone insists there is discrimination against Negroes in this country, or that there is inequality of wealth, there is every reason to believe that person is a communist."<sup>648</sup> Many loyalty boards reinforced this connection, regarding objection to segregation a "party line tactic" and including racially discriminatory tests to their loyalty reviews. Government agencies with larger numbers of African-American employees, such as the Post Office, proved strongly biased against civil rights activists. The chairman of a board within that department argued that although it remained "fact" that "racial equality is part of the Communist line."<sup>649</sup> HUAC emphasized in 1954 in its report on African-Americans within the Communist movement that "one of the principal goals of the Communist Party in the United States is the infiltration and control of the Negro population in this country."<sup>650</sup> In addition to the assumptions about race, many loyalty boards used questions about domestic politics such as health care and public ownership, or about personal preferences regarding art, literature and religion to establish "loyalty". Clearly, such questions infringed upon basic personal and political freedom of expression.<sup>651</sup>

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<sup>641</sup> Walker, *In Defense of American Liberties*, 189-190.

<sup>642</sup> *The Rights and Responsibilities of Universities and Their Faculties* (Princeton: Association of American University Professors, 1953), in: Fried ed., *McCarthyism*, 140-142; Walker, *In Defense of American Liberties*, 190.

<sup>643</sup> Walker, *In Defense of American Liberties*, 190.

<sup>644</sup> Belfrage, *The American Inquisition*, 129-130.

<sup>645</sup> Sigmund Diamond, "The Arrangement; The FBI and Harvard University in the McCarthy Period," in Theoharis ed., *Beyond the Hiss Case*, 364-365.

<sup>646</sup> Walker, *In Defense of American Liberties*, 190.

<sup>647</sup> *Idem*, 191.

<sup>648</sup> Goldstein, *Political Repression*, 295-296.

<sup>649</sup> Schrecker, *Many are the Crimes*, 282.

<sup>650</sup> Committee on Un-American Activities, U.S. House of Representatives, *The American Negro in the Communist Party*, December 22, 1954, 1, <http://www.archive.org/stream/americannegroinc00unit#page/n3/mode/2up>, accessed 10-14-2009.

<sup>651</sup> Schrecker, *Many are the Crimes*, 283.

## *The McCarran Act*

The Cold War restriction of civil liberties reached a new peak in 1950, when America became involved in Korea and McCarthy started his anticommunist rampage. Congress responded to the rising fears of world war, atomic espionage and communist infiltration by the enactment of the McCarran Act to basically outlaw any Communist-like party.<sup>652</sup> Truman's veto, who had realized he was no longer in control of the anticommunist issue, was overridden.<sup>653</sup> Officially known as the Internal Security Act, the law obliged Communists to register with the newly instated Subversive Activities Control Board (SACB) and to reveal their leaders, finances and membership files. Their mail had to be labeled *Communist organization* and their members were ineligible for passports, ineligible to work for the government and required to register with the SACB. Such registration exposed these individuals to certain penalties under the McCarran Act and other laws, creating clear Fifth Amendment issues and denying the Equal Protection clause of the Fourteenth Amendment.<sup>654</sup>

Finally, and most shockingly, the McCarran Act authorized concentration camps, empowering the president to declare an internal security emergency in case of invasion, insurrection or declaration of war. When such an "Internal Security Emergence" arose, "the President, acting through the Attorney General, is hereby authorized to apprehend and by order detain, pursuant to the provisions of this title, each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage."<sup>655</sup> This emergency detention provision allowed mass roundups of citizens without trial, based solely on the Attorney General's estimations. The stature also set unprecedented penalties for aliens based on their affiliations. It allowed for easy deportations should the alien in question engage in activities "prejudicial" to the national interest, basically meaning any political activities of a controversial nature.<sup>656</sup>

Although several liberal and moderate dailies recognized how cumbersome and ineffective the bill was, and that it would seriously endanger civil liberties guaranteed by the First and Fifth Amendment, the bill easily passed the Senate. The fact that the law was backed by a large number of liberal senators shows the extent of anti-communist beliefs among the legislators and the dedication of all congressmen to prove their endorsement of anti-Communist measures.<sup>657</sup> Altogether the McCarran Act was a massive assault on freedom of speech and association. Much like the criminal syndicalism laws passed during and after World War I made repression of the IWW possible without showing any specific crime, the Internal Security Act was enacted to make it impossible for any Communist organizations to function, solely by government designation as such.<sup>658</sup>

The McCarran Act failed to achieve its goals when the Communist party did not voluntarily register. Attorney General Howard McGrath thus directed the Subversive Activities Control Board to compel it to do so, which proved a complex affair only to be settled by the Supreme Court in 1961. Congress, in the meantime, frustrated by the failure, passed two new repressive laws: the Communist Control Act and the McCarran-Walter Immigration Act. The Communist Control Act stated that the Communist party was an "instrumentality" of a conspiracy to overthrow the U.S. Government. Once again, liberals sponsored the law to prove their anti-Communist stance, and once again it proved highly ineffective. The Immigration law struck at the root of the "problem", strengthening discretionary powers to the government to

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<sup>652</sup> Walker, *In Defense of American Liberties*, 198.

<sup>653</sup> Goldstein, *Political Repression*, 322.

<sup>654</sup> Walker, *In Defense of American Liberties*, 198.

<sup>655</sup> 81<sup>st</sup> Congress, 2<sup>nd</sup> Session, Public Law 831, in: Fried ed., *McCarthyism*, 85-88.

<sup>656</sup> Goldstein, *Political Repression*, 323.

<sup>657</sup> Griffith, *The Politics of Fear*, 119-121.

<sup>658</sup> Goldstein, *Political Repression*, 323.

exclude foreign visitors for ideological reasons and to deport aliens suspected of subversion.<sup>659</sup> The combined legislation, although initiated by Congress, strengthened the power of the Executive and limited Judicial oversight, allowing for easy government abuse by removing essential checks and balances.

### *The Fifth under Attack*

In the mid fifties, this shift in power between people, government and courts, was painfully exposed by a comprehensive assault on the Fifth Amendment. The duty of citizens to cooperate with investigations carried out in the name of national security overruled the individuals' protection against the abuse of governmental power in legal procedures. As First Amendment rights were not granted by the prosecutors, witnesses "took the Fifth", refusing to answer even the most trivial questions. Anti-communists furiously labeled them "Fifth Amendment Communists", victimizing people for exercising a fundamental constitutional right against the power of government.<sup>660</sup> People who had been identified as Communists and refused to talk about their politics were considered guilty, as the invocation of the Fifth Amendment was, in Joe McCarthy's words, "the most positive proof obtainable that the witness is a communist."<sup>661</sup>

Debate within the American Bar Association (ABA) over Fifth Amendment rights revealed the extent of the anticommunist mania. The ABA voted in 1950 to refuse any new members who did not sign an anti-communist oath. Considering real communists would lie, voices within the association called for legislative investigations to identify them as such. When witnesses in these investigations invoked the Fifth Amendment, anti-communists argued for their disqualification.<sup>662</sup> The bar's timidity throughout the anticommunist witch hunts made it next to impossible for alleged Communists to find counsel. Many lawyers feared a loss of business and respect if they represented the "pariahs" that alleged communists had become.<sup>663</sup> The simple fact that an association of lawyers doubted the essentiality of Fifth Amendment rights shows both the strength of the anti-Communist crusade, the immense concern for national security as well as the quick surrender of the legal profession to the mood of the day.<sup>664</sup>

The Fifth Amendment's scope was officially reduced to shatters when the Supreme Court decided in *Rogers v. United States* in 1951 that "the privilege against self-incrimination "is solely for the benefit of the witness," therefore, "a refusal to answer cannot be justified by a desire to protect others from punishment." Moreover, because the witness had voluntarily testified about her leading position in the Communist Party of Denver, the Court's majority ruled that "petitioner had already 'waived' her privilege of silence when she freely answered crminating questions relating to her connection with the Communist Party."<sup>665</sup> At least Justice Black, again, dissented, arguing the witnesses "on the one hand ... risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question", which "relegates the Fifth Amendment's privilege to second-rate position."<sup>666</sup> This relegation of Fifth Amendment rights eventually led to the 1954 Immunity Act, allowing federal prosecutors and congressional investigators to enforce testimony from witnesses by awarding them immunity from prosecution.<sup>667</sup>

The crisis over "Fifth Amendment Communists" ultimately also aided the reaction against the excesses of the red-hunters. In 1955, Dean Griswold of Harvard Law School argued

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<sup>659</sup> Walker, *In Defense of American Liberties*, 199.

<sup>660</sup> Walker, *In Defense of American Liberties*, 201.

<sup>661</sup> Schrecker, *Many are the Crimes*, 251.

<sup>662</sup> Walker, *In Defense of American Liberties*, 201-202.

<sup>663</sup> Schrecker, *Many are the Crimes*, 303-305.

<sup>664</sup> Walker, *In Defense of American Liberties*, 201-202.

<sup>665</sup> 340 U.S. 368-371, in: Fried, *McCarthyism*, 106-107.

<sup>666</sup> 339 U.S. 378-381, in: Fried, *McCarthyism*, 107.

<sup>667</sup> Walker, *In Defense of American Liberties*, 202-203.

how the Fifth's real meaning eclipsed far more than its application to specific cases: it forms a reminder of the need to remain vigilant against police abuse of individual rights, sensational press coverage of criminal cases endangering fair trials, and the right of the accused to an attorney.<sup>668</sup> In 1956, the Supreme Court directly pointed to Griswold's publication in *Slodower v. Board of Education*, to define the privilege against self-incrimination. The Court vindicated the Fifth Amendment by overruling the dismissal of Professor Harry Slochower from Brooklyn College for refusing to discuss past membership in the Communist Party before McCarthy's committee in 1953. Chief Justice Earl Warren wrote: "since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support."<sup>669</sup>

### *Repression Wanes*

The period 1947-1955 saw a renewed outburst of concern for subversive activity. As during World War I and the Great Red Scare, the government adopted legislative and administrative measures to answer for its concern with the national security. The resulting laws, executive orders and legislative investigations all eventually led to fierce judicial discussion, especially regarding of the conflict between freedom of association and national security. In 1956, through *Ullmann v. United States* the Supreme Court clipped HUAC's wings by asserting the limits to the range and extent of the power of Congress to investigate, stating the right of the witness to invoke the Fifth Amendment.<sup>670</sup> The same year, in the earlier mentioned case of *Slodower*, it emphasized how "protection of the individual against arbitrary action," was "at the very essence of due process."<sup>671</sup> When international tensions eased the federal employee loyalty oath also became increasingly confined through a series of Supreme Court cases. In 1967, the Court, through the majority opinion of Chief Justice Warren in *United States v. Robel*, also declared the provision of the McCarran Act that made it a crime for members of the Communist Party to work at defense plants, unconstitutional, as it violated First Amendment rights of freedom of association. Finally, in 1969, the by then twenty years old loyalty oath requirement for federal employees was deemed "unconstitutionally vague" by a special federal court, because it violated Fifth Amendment due process of law. Moreover, the U.S. Court of Appeals ruled that it violated the provision against "odious test oaths" inherent to Article 6 of the Constitution.<sup>672</sup> The government's cold war policy of refusing employment to individuals *merely* because of their beliefs and associations thus ended.

Senator Joe McCarthy did not live to see the anticommunist statutes revoked. His downfall began soon after his rise to fame. Although he had been a master at manipulating the written press, he had little affinity for the growing power of television. Moreover, opposition of his ways grew in Congress. A majority report of the Senate concluded that his Wheeling Speech accusations were based on fraud.<sup>673</sup> At the end of the Korean War McCarthy lost his prestige by accusing the American Army of harboring Communists among their rank and file, live on national television. He embarrassingly appeared as a drunken brute, cruelly intimidating witnesses. Finally on April 29, 1954, he was humiliated by Joseph Welsh, the Army Secretary's lawyer, who famously sneered: "Have you no sense of decency, sir, at long last?"<sup>674</sup> Afterwards McCarthy found himself in a downwards spiral. He was censured by the Senate, after which illness and alcoholism determined his fate. In 1957, Joseph R. McCarthy died at the age of forty-nine.<sup>675</sup>

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<sup>668</sup> Idem, 203.

<sup>669</sup> 350 U.S., 557-559, in: Fried ed., *McCarthyism*, 203-204.

<sup>670</sup> Abraham and Perry, *Freedom and the Court*, 190-191.

<sup>671</sup> 350 U.S., 557-559, in: Fried ed., *McCarthyism*, 204.

<sup>672</sup> Abraham and Perry, *Freedom and the Court*, 191-192.

<sup>673</sup> Broadwater, *Eisenhower*, 14.

<sup>674</sup> United States Senate, 83d Congress, 2<sup>nd</sup> Session, Permanent Subcommittee on Investigations of Committee on Government Operations, *Special Investigations, Hearings*, 2428, in Fried ed., *McCarthyism*, 185-187.

<sup>675</sup> Fried ed., *McCarthyism*, 180.

## Conclusion: Cold War National Security and Civil Liberties

Ultimately it was the Cold War and the grim series of international events that had, in a mere five years, transformed America from victor and sole superpower into a nation seemingly on the losing side that had condition the second Red Scare. According to Walker, repression was accepted because “the Cold War was an irrational outburst, one of the many episodes of popular hysteria.”<sup>676</sup> It was the international warlike situation, rather than any fear of domestic radicalism that fueled the anti-communist fire. Most Americans, including politicians of all kinds, judges and even pronounced libertarians, found communism far more threatening than the implications of the measures devised against it.<sup>677</sup> The clear violations of the Bill of Rights, concerning all Americans, rather than just communists, have to be viewed in the light of international events taking place at the same time and the effects of these events on the American public mind. When *Dennis* was decided, American soldiers were dying on the battlefields of Korea. Therefore, whatever the abridgment of free speech involved in the Smith Act, the Communist leaders were not regarded as bona fide politicians, but fifth-column agents of a foreign power.<sup>678</sup> Their relation to the Soviet Union, not their political philosophy, made them dangerous. The Korean War thus, as it happens, justified the ruling against Dennis and his colleagues.<sup>679</sup> The Supreme Court retreated from protecting all unpopular political expressions, upholding almost all cold war measures during the years 1947-1954. Only Justices Black and Douglas seemed aware of the Court’s duty to resist the societal mood of the day.<sup>680</sup> Later, when the international scene had “cooled off” again, the Court reversed its opinions regarding the Internal Security Act, the federal loyalty program and the Smith Act prosecutions.

The relative strictness of loyalty oaths followed a similar pattern. Several Cold War-related events framed the wide support of anti-communist repression, most notably the Hiss case and the Korean War. The Hiss case blurred the lines between radical activism and involvement in espionage to mandate the persecution for a wide array of opinions.<sup>681</sup> The Korean War intensified the sense of crisis and with it the demand for absolute conformity. As a result, loyalty testing became more and more severe: cases against suspected communists were reopened, ex-communists were less likely to retain their positions, and people who had been dismissed from public service were less likely to prove their loyalty to a review board.<sup>682</sup> Many people were so possessed by Cold War anxieties to hardly realize the damage dealt to their own civil liberties. Many of the people on the loyalty review boards thought their inquiries and techniques were necessary to determine loyalty and help prevent treats to the national security.<sup>683</sup> During the early Cold War, the state of civil liberties surmounted for little more than their theoretical presence and only when international tensions lessened did the United States again attempt to treat its dissenters according to the ideals of the Bill of Rights.<sup>684</sup>

The Cold War threat to the national security thus greatly fueled and framed the measures of repression. In addition, the equation between the Soviet Union’s threat to America abroad and the threat of radical dissent to American society was central to the development of the Second Red Scare. Since the Soviet Union presented a “clear and present danger,” so did their agents

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<sup>676</sup> Walker, *In Defense of American Liberties*, 174.

<sup>677</sup> Belknap, *Cold War Political Justice*, 123.

<sup>678</sup> *Idem*, 126.

<sup>679</sup> *Idem*, 131-132.

<sup>680</sup> Walker, *In Defense of American Liberties*, 194-195.

<sup>681</sup> Navasky, “Hiss, Weinstein and...”, 216.

<sup>682</sup> Schrecker, *Many are the Crimes*, 286.

<sup>683</sup> *Idem*, 283.

<sup>684</sup> Belknap, *Cold War Political Justice*, 280.

within America. To many Americans the Soviet domination of Eastern Europe, the coup in Prague, the Berlin brocade, the fall of China and the Korean War fell into the same category as the case against Alger Hiss and McCarthy's allegations of Communist subversion. All seemed like ominous signs of Soviet expansionism.<sup>685</sup> The Cold War revived the old grassroots tradition of intolerance towards unpopular views. During the time of national emergency, habits of "nativism", seeking a scapegoat among "foreign" and "un-American" ideas, resurfaced.<sup>686</sup> Thus, repression was publicly accepted, as it dealt with what was aimed against people who had never been held in high regard.

Still, no matter the popular support of the anticommunist repression, it was *not* a movement of popular passion breaking onto the political scene. McCarthy himself; important as a symbol of his age and because his success accounts for the strength of political repression in the name of Cold War national security; was sustained by the actions and failures of various elites.<sup>687</sup> Liberal intellectuals did not focus on the repression of free speech, but on the danger and naivety of those few who defended the liberties of American Communists.<sup>688</sup> Most importantly, the anticommunist inquisition was conditioned by the Cold War, but initiated, pursued and encouraged by Congressmen hungry for power and the executive government determined to repress any criticism of its foreign and domestic policy. As Wilson had done during and after WW I, and as Roosevelt had attempted during WW II, a crisis of national security allowed the Truman Administration to repress critics almost unquestioned and expand the powers of the executive branch of government. As political scientist Jerel Rosati points out, throughout the Cold War "the government was engaged in a campaign to limit and stifle the exercise of civil rights and liberties."<sup>689</sup>

Finally, bureaucratic institutions, such as, but not limited to, HUAC and the FBI, had their own, independent interests in developing an anticommunist crusade. These organizations willfully manipulated fears of communism to repress dissent, because of, *one*, their hatred of Communism as an ideology, and, *two*, the need to exaggerate domestic subversion to legitimize their existence, power and government allowances. The Hiss case emphasizes the point: both the FBI and HUAC were committed to secure Alger Hiss's conviction and destroy his dangerous liberal values. In February 1946 the FBI began to leak "dirt" about Hiss to the committee and, at the same time, launched an extensive campaign against Communist support among "liberal elements" to establish an "informed public opinion" about the American Communist Party.<sup>690</sup> The FBI's collaboration with Congress continued throughout the McCarthy years, indicating the Bureau's promotion of and involvement into anti-communist politics and Congress's reluctance to investigate the constitutionality of the Bureau's activities and, more generally, the wide range of anticommunist policies.<sup>691</sup>

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<sup>685</sup> Schmidt, *FBI and the Origins of Anticommunism*, 365.

<sup>686</sup> Walker, *In Defense of American Liberties*, 194.

<sup>687</sup> Rogin, *The Intellectuals and McCarthy*, 248.

<sup>688</sup> O'Reilly, "Liberal Values..." in Theoharis ed., *Beyond the Hiss Case*, 309.

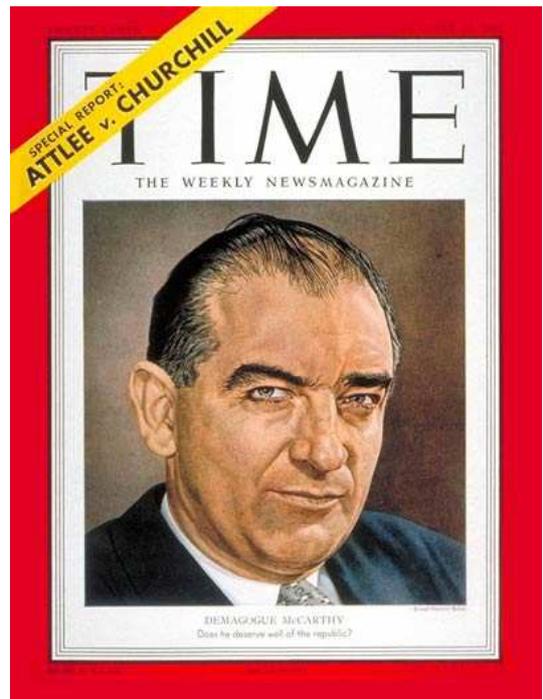
<sup>689</sup> Jerel A. Rosati, "At Odds with One Another: The Tension between Civil Liberties and National Security in Twentieth-Century America," in David B. Cohen and John W. Wells eds., *American Security and Civil Liberties in an Era of Terrorism* (New York: Palgrave Macmillan, 2004), 20.

<sup>690</sup> O'Reilly, "Liberal Values..." 328-239.

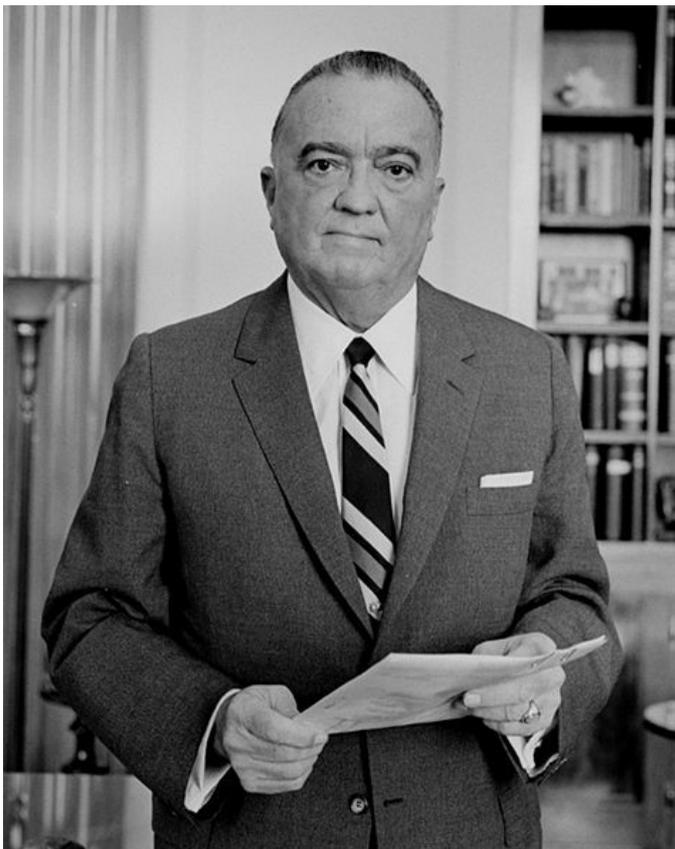
<sup>691</sup> O'Reilly and Theoharis, "The FBI, Congress and McCarthyism," 395.



*President Harry S. Truman, delivering his "Truman Doctrine" speech, March 12, 1947.*



*Senator Joseph R. McCarthy on the cover of TIME Magazine, October 22, 1951.*



*Federal Bureau of Investigation Director J. Edgar Hoover, still in charge in at the time of this photograph, 1961.*



*Defendants in Dennis v. United States leaving the courthouse in New York City, Eugene Dennis is third from the left, July 21, 1948.*



*Alger Hiss (front) at his first hearing before the House Un-American Activities Committee, August 5, 1948.*



*Cartoon in the Washington Post, depicting the extent of the anti-communist witch hunt; Senator McCarthy is depicted with his characteristic shade holding a paintbrush and a bucket of "smear". August 13, 1951.*

## Chapter 4 - Civil Liberties and the War on Terror

*“To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve.”<sup>692</sup>*

Attorney General John Ashcroft, 2001

*“At stake is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers ... is the character of the constraints imposed on the Executive by the rule of law.”<sup>693</sup>*

Justice John Paul Stevens, 2004

On September 11, 2001, for the first time in the history of the United States, the American people witnessed an attack on their mainland. The harsh realization that, in the 21<sup>st</sup> century, neither the two oceans which it borders, nor its nuclear arsenal could protect the nation from outside threats led to drastic homeland security measures. The initial shock of the terrorist attacks stifled any concerns for the consequences of these measures on the freedom of individual Americans. Once again, as during the two world wars and the Cold War, national security concerns took precedence over essential individual liberties.

In this chapter the effects of the so-called “War on Terror”, or alternatively called “War on Terrorism”, on civil liberties, will be discussed. Although in popular media such discussions often focus on the detention camp at Guantanamo Bay, the discussion here focuses in the first place on the constitutional rights of American citizens and thus only refers to Guantanamo concerning due process rights petitioned at American courts. The question whether the American government or army violated international human rights, albeit a very interesting one, does not directly concern the topic of this thesis and is thus largely omitted. The first part of this chapter focuses on the climate after “9/11”, which allowed for a renewed restriction of essential civil liberties. In the second part the policy measures taken by the Bush administration to promote national security are discussed, concentrating on the PATRIOT Act enacted by Congress, as well as the effect of these policies on civil liberties, especially on freedom of speech and the due process of law. Finally, some concluding remarks will be provided regarding the relation between the War on Terror, liberty and security.

### American Society post-9/11

The terrorist attacks of September 11, 2001, had a profound effect on American society. In the few years following the attacks, Americans experienced daily events such as military troops patrolling public places, concrete barriers protecting public sites, drastic security measures concerning air travel, highway signs urging travelers to report suspicious behavior, the introduction of color-coded threat levels of terrorism transmitted over television and a multitude of television “experts” explaining the developments of international terrorist movements.<sup>694</sup> A wave of nationalism swept across the United States, exerting great pressure on Americans to accept commonly held values and restrain from criticizing the nation or the government. Numerous incidents prove the point; the cartoon *Boondocks* was pulled from newspapers because

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<sup>692</sup> “Ashcroft: Critics of new terror measures undermine effort,” CNN, December 7, 2001, <http://edition.cnn.com/2001/US/12/06/inv.ashcroft.hearing/>

<sup>693</sup> *Rumsfeld v. Padilla*, 125 S. Ct. 2711 (2004)

<sup>694</sup> Stefan Halper and Jonathan Clarke, *America Alone: The Neo-Conservatives and the Global Order* (Cambridge: Cambridge University Press, 2004)

it was deemed “un-American” as newspapers became afraid to offend their community and lose readers; Bill Maher’s television show *Politically Incorrect* was dropped by fifteen stations for similar reasons.<sup>695</sup>

Altogether a dual development took place within American society. On the one hand, the public climate changed as people became terribly afraid of terrorists, suspicious of their countrymen and willing to accept restrictions of due process, unwarranted searches, government spying and violations of freedom of assembly. On the other hand, the Bush administration, and especially the neo-conservative voices within it, willfully used the politics of fear to pursue their own interests and policy goals, damaging civil liberties in the process. Once again, American society thus witnessed mutual reinforcement of repression by top-down interest groups and bottom-up public demands.

Lack of public discussion determined public opinion, conditioned by the government’s failure to provide a voice of reason to a society controlled by fear. The aftermath of September 11 led to a climate in which few criticized a militant government determined to prevent another terrorist attack. The images of the collapsing towers in New York left many Americans in a state of shock, uncertainty and anger. As a result, Americans not only expected that the government take decisive measures against any future threat: they demanded rigorous action.<sup>696</sup> Such public uproar contributed to an initial lack of debate or information about the effects of anti-terrorist and security measures on basic civil liberties. In the year following the terrorist attacks no one, ranging from Democrats in Congress, to the media, to civil liberties advocates, was eager to be perceived as obstructing the administration’s efforts against future attacks. As a result, there was hardly any debate in American society about the War on Terrorism and its aims, or about the dramatic increase in government surveillance through the new USA Patriot Act.<sup>697</sup> According to Political Scientist William Crotty the consequence of the lack of debate was ‘that the Bush administration defined the problem, set the policy agenda, established the options, and directed attention to the responses it believed most appropriate.’<sup>698</sup>

Several factors attributed to the lack of public debate. Part of it was caused by the actual shock of the attack: Americans, including those among the press, were fear-struck by what modern terrorists might be able to accomplish, should they get their hands on weapons of mass destruction.<sup>699</sup> A second reason was the government’s aggressive strategy following the terrorist attack. Symbolized by Bush’s famous claim “you are either with us or with the terrorists,” its rhetoric seemingly equated any criticism to treason.<sup>700</sup> Resembling Truman’s warnings of Communism, the Bush administration used such language to mine public fear for political advantage and smear any opponents with the taint of being “disloyal”. Attorney General John Ashcroft surpassed his president’s remarks by calling critics of the government’s policies effect on civil liberties “those who scare peace-loving people with phantoms of lost liberty”.<sup>701</sup> Another factor that contributed to the lack of debate was the fact that, as Representative John Conyers stated in 2003, Congress “legislated in hysteria in October of 2001.”<sup>702</sup> Most fundamentally, however, was the fact that Americans had been largely disinterested and uninformed about foreign affairs since the end of the Cold War. Therefore, their initial reactions to the terrorist

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<sup>695</sup> Valerie L. Demmer, “Civil Liberties and Homeland Security”, *The Humanist* 1 (2002): 7-8.

<sup>696</sup> Stone, *Perilous Times*, 550.

<sup>697</sup> Richard C. Leone, “The Quiet Republic: the Missing Debate about Civil Liberties after 9/11,” in Leone and Anrig Jr. eds., *The War on Our Freedoms*, 1-3.

<sup>698</sup> William Crotty, “Conclusion: Terrorism, Security and the American State,” in William Crotty ed., *The Politics of Terror: the U.S. Response to 9/11* (Boston: Northeastern University Press, 2004), 282.

<sup>699</sup> Leone, “The Quiet Republic”, 4.

<sup>700</sup> *Ibid*, 8.

<sup>701</sup> Stone, *Perilous Times*, 551.

<sup>702</sup> Christopher P. Banks, “Protecting (or Destroying) Freedom through Law: The USA PATRIOT Act’s Constitutional Implications,” in: David B. Cohen and John W. Wells eds., *American National Security and Civil Liberties in an Era of Terrorism* (New York: Palgrave Macmillan, 2004), 30.

attacks were defined by irrational fears, which rendered many extremely susceptible to fear-mongering.<sup>703</sup>

The invocation of the term “War” also helped many Americans to set aside their historical privileges, for example to regard freedom of the press as less important than the government’s ability to keep secrets. The administration’s actions were based on a broad public support for “emergency measures,” as many Americans regained their trust in the government as the ultimate patron of their safety.<sup>704</sup> Americans were very willing, in the immediate aftermath of September 11, to accept limitations to their freedoms to prevent further attacks.<sup>705</sup> Thus polls have consistently shown Americans’ belief that investigating threats is more important than the right to privacy.<sup>706</sup> As during the strikes and bombings of 1919 and the series of Cold War setbacks of 1949, demands for stern government action were fed by fears produced by a series of highly profiled events, including anthrax mailings, the war in Afghanistan and the Beltway sniper attacks. Therefore, opposition and critique was limited to minority organizations that concentrated on issues of civil liberty. The majority of the political opposition to the Bush administration remained loyal and shared the government’s immense concern for security. Many Democrats, as during the Cold War, temporarily lost their belief in the important need for criticism in times of war.<sup>707</sup> The Center of American politics, as a whole, underperformed, allowing radical voices within the government to dominate the debate on the right security policies unquestioned. Public support for the government and roaring patriotism made Democratic opponents highly susceptible to accusations of being unpatriotic or soft on terrorism.<sup>708</sup>

#### *The Neo-Conservative World War IV*

Once initial fears had subsided, both Congress and the wider public, however, settled on more rational considerations regarding the expansion of government power. At the core of this expansion was a conscious effort on part of the government to shift the balance between government authority and individual liberties towards the former. According to law professor Geoffrey Stone, “the Bush administration went out of its way after September 11 to excite rather than calm public fears.”<sup>709</sup> The security measures of the War on Terror were part of a long-term neoconservative agenda upheld by several members of the Bush administration, amongst them Attorney General Ashcroft and Assistant Secretary of Defense Paul Wolfowitz. In support of these measures, neoconservative legal scholar Robert H. Bork argued that “security inevitably means restrictions,” while those “who recklessly exaggerate the threat to our liberties in the fight against terrorism do give ammunition, moral and otherwise, to our enemies.”<sup>710</sup> Through this logic the Bush administration committed itself to the necessity to restrict individual liberties, as the terrorists had “take advantage of the vulnerability of an open society.”<sup>711</sup> The tradeoff between security and liberty is self-evident to the neo-conservatives, who favor “twenty-first-century surveillance” over “suicidal” civil liberties.<sup>712</sup>

To advance this proposition, neocons among the Bush administration have embraced the concept of an ongoing, all encompassing “World War IV” to which the war against the Taliban in Afghanistan belongs, but which also justified the invasion of Iraq, as well as a domestic war on

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<sup>703</sup> Halper and Clarke, *America Alone*, 303.

<sup>704</sup> Leone, “The Quiet Republic,” 10-11.

<sup>705</sup> Stone, *Perilous Times*, 552.

<sup>706</sup> Halper and Clarke, *America Alone*, 273-274.

<sup>707</sup> Leone, “The Quiet Republic,” 15-18.

<sup>708</sup> Halper and Clarke, *America Alone*, 304.

<sup>709</sup> Stone, *Perilous Times*, 554.

<sup>710</sup> Robert H. Bork, “Civil Liberties after 9/11,” *Commentary* 116:1 (2003), 29.

<sup>711</sup> Stone, *Perilous Times*, 552.

<sup>712</sup> Halper and Clarke, *America Alone*, 273.

terror.<sup>713</sup> The events of 9/11 were immediately characterized by the administration as the initiation of a “war”. The declaration of “war” on terrorism both rallied the public to the government’s cause and allowed the administration powers usually limited to the executive in times of war.<sup>714</sup> The concept of the war on terrorism stems from the neo-conservative and evangelical line of black-and-white thinking, their focus on military power as the fundamental determinant between states and on the Middle East and global Islam in foreign policy.<sup>715</sup> Immediately after Bush won the presidency and awarded several cabinet positions to neo-conservatives, the neocons pointed to the threat of Saddam Hussein’s Iraq. Deputy Secretary of State Wolfowitz had, for example, in January 2001, when warned about the threat of Al Qaeda, attempted to shift attention to “Iraqi terrorism” instead.<sup>716</sup> The terrorist attacks of 9/11 gave the neo-conservatives the opportunity to pursue their goal of a unilateral foreign policy focused on Iraq and global Islam, according to the President’s pledge that “we will make no distinction between the terrorists who committed these acts and those who harbor them.”<sup>717</sup> In doing so, the Bush administration consciously misled the U.S. public in order to build support for escalating the war against terrorism by exaggerating the evidence of Iraqi weapons of mass destruction.<sup>718</sup> U.S. policy thus transferred from the logical focus on Al-Qaeda, to invade Iraq, a state claimed to harbor and sponsor terrorism.<sup>719</sup> According to law professor Stephen Schulhofer, in doing so “the administration of George W. Bush has swept aside urgent security needs while it continues to win public acclaim for toughness by targeting and scapegoating civil liberties.”<sup>720</sup>

Accompanying this change in foreign policy were changes to American society itself. For approximately eighteen months following September 11, 2001, Americans lived on the edge of crisis, fed by continuous discourse of daily terrorist alerts that allowed no rational discussion of the government’s war aims. Advances in surveillance technology enabled the authorities to assemble all electronic information about an individual at one spot. The removal of checks and balances in this system in the light of the terrorist attacks assumes perfect behavior from the police and prosecutors, which in practice is highly doubtful. As a result, a highly intrusive surveillance network has developed, which is very easy to abuse. Such invasion of individual privacy was made possible by the administration’s declaration to be a government at war and its claims of wartime powers to surpass issues of civil liberty.<sup>721</sup> Moreover, as Bush claimed that “the war against terrorism will never end,” America became dangerously entangled in a seemingly endless struggle against an idea. Through this concept, the War on Terror’s implications regarding dissent, surveillance and civil liberties differed from earlier wars.<sup>722</sup> The claim of perpetual war intensified the damage that could be done to civil liberties in the name of the war on terror. Its stated indefinite duration provided rationale to get rid of “unnecessary” liberties, and left the question when or *if* civil liberties were to be restored, unanswered.<sup>723</sup>

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<sup>713</sup> Idem, 274.

<sup>714</sup> Stone, *Perilous Times*, 554.

<sup>715</sup> Halper and Clarke, *America Alone*, 14.

<sup>716</sup> Richard A. Clarke, *Against all Enemies: Inside America’s War on Terror* (New York/London/Toronto/Sydney: Free Press, 2004), 231.

<sup>717</sup> Halper and Clarke, *America Alone*, 31-32.

<sup>718</sup> Stone, *Perilous Times*, 555.

<sup>719</sup> Halper and Clarke, *America Alone*, 32.

<sup>720</sup> Stephen J. Schulhofer, “No Checks, No Balances: Discarding Bedrock Constitutional Principles,” in Leone and Anrig Jr. eds., *The War on Our Freedoms*, 75.

<sup>721</sup> Halper and Clarke, *America Alone*, 299-300.

<sup>722</sup> Jerome M. Mileur and Ronald Story, “America’s Wartime Presidents: Politics, National Security and Civil Liberties”, in Crotty ed., *The Politics of Terror*, 127.

<sup>723</sup> Stone, *Perilous Times*, 554.

## Civil Liberties in the War on Terrorism

### *The USA PATRIOT Act*

The Bush administration thus consciously expanded its powers to fight the war against terrorism and took several security measures that greatly infringed upon individual liberties. The most important of these measures was the USA PATRIOT Act, which will be discussed here in some depth.<sup>724</sup> The act was signed into law within six weeks of the attacks on America, on October 26, 2001. Congress had been pressured into such a hasty procedure by the administration and especially by Attorney General John Ashcroft, who had made a proposal of the act *eight days* after the terrorist attacks. Upon reflection, members of Congress criticized the congressional procedure, as Representative John Conyers retold a House Constitution subcommittee in 2003: "Members had to vote on a multi-hundred page bill with no one having had a chance to read the bill", while "the bill was available an hour in advance," thus "people had to vote based on summaries."<sup>725</sup> The swift passing of the administration's proposals testifies to the mounting public demands for quick retaliation against the terrorist threat and Congress' surrender to such pressure.<sup>726</sup>

The PATRIOT Act was designed as a proactive law to attempt and prevent acts of aggressive terrorists before they happen. As such, it aimed to mend a number of "problems" which had prevented the government to act against the 9/11 perpetrators. It sought to increase sharing of information between law enforcement and intelligence agencies, create more flexible warrant requirements, expand wiretap authorities and deport or imprison aliens suspected of having links to terrorist organizations. The main elements of the PATRIOT Act, as it was signed into law, fell into three legal categories: information sharing and expanded surveillance capability; new immigration restrictions; and antiterrorist money laundering provisions.<sup>727</sup>

The "Enhanced Surveillance Procedures" of the PATRIOT Act were designed to centralize power into the executive branch by enhancing its potential to monitor, track or capture messages between hostile forces within the United States or abroad. The PATRIOT Act allowed the sharing and revelation of intelligence derived from grand jury investigations to "any federal law enforcement, intelligence, protective, immigration, national defense, or national security official."<sup>728</sup> Furthermore, the act allowed for judicial authorization of government access to voicemail, allowed victims of hacking to invite the police to monitor attacks on their computer networks without a court order, and allowed for devices to obtain "dialing, routing, addressing and signaling information" to be used on computer transmissions.<sup>729</sup> Subpoena power was expanded to overcome the delay of a court order to seize data transmitted by the Internet or telephone, such as credit card numbers, Internet protocol addresses and Internet session times.<sup>730</sup> Another section of the act permits federal officials to obtain nationwide search warrants for terrorism investigations, including electronic surveillance.<sup>731</sup> Even more controversially, Section 213's "sneak and peak" provision permits law enforcement to delay notification of a search and seizure until after it has happened, applying not just to terrorism prevention, but to all criminal

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<sup>724</sup> The oddly chosen name is actually an acronym for *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*.

<sup>725</sup> Banks, "Protecting...", 29-30.

<sup>726</sup> Ibid, 30.

<sup>727</sup> Ibid, 30-32.

<sup>728</sup> Ibid, 35.

<sup>729</sup> "Antiterrorism Tools: A Summary of the USA PATRIOT Act and the Order on Military Tribunals," in Amitai Etzioni and Jason H. Marsh eds., *Rights vs. Public Safety after 9/11: America in the Age of Terrorism* (Lanham/Boulder/New York/Oxford: Rowman and Littlefield Publishers, 2003), 19.

<sup>730</sup> Banks, "Protecting...", 35-36.

<sup>731</sup> "Antiterrorism Tools," 20.

investigations. Seizure of personal records and electronic information is equally allowed delayed notice when the court finds it “reasonably” necessary.<sup>732</sup>

The PATRIOT Act also diminished regulations regarding foreign intelligence investigations. The law enhanced the government’s power to carry out extended surveillance and physical searches, and allowed the interception of Internet and telephone communications when the order is not aimed *exclusively* at protected First Amendment activities of American persons. The act also enabled law enforcement officials to obtain authority for “roving wiretaps” on a person suspected of involvement in terrorism to monitor *any* telephone used by that person, instead of the traditional requirement of separate authorizations for each phone used by the suspect. The most profound change, however, was a change in obtaining Foreign Intelligence Surveillance Act (FISA) warrants. Before 9/11, a FISA warrant could only be given if “the purpose” of the investigation was to collect foreign intelligence, in order to maintain separation between domestic and international security. The PATRIOT Act, however, changed this condition to “a significant purpose” of the investigation, thus allowing federal law enforcement to obtain a FISA warrant for domestic criminal matters, as long as foreign intelligence is also included in the request.<sup>733</sup>

Among the “Enhanced Immigration Provisions” of the PATRIOT Act expanded the grounds to regard an alien inadmissible to the United States for terrorism activities, including public endorsement of a terrorist activity, material support to terrorist organizations, family relation to a barred alien, or association with a terrorist organization. The attorney general was granted legal authority to detain suspected alien terrorists for seven days without court interference if the alien was inadmissible on terrorism-related grounds, or if “reasonable grounds” existed to believe he or she was engaged in any activity that might endanger the United States. Detained aliens who are not likely to be removed soon could be held for additional six months periods. In doing so, the PATRIOT Act gave the attorney general almost unlimited discretion to take the liberty of an individual whom he *reasonably believed* to be a terrorist.<sup>734</sup>

The PATRIOT Act’s third main category, the “International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001,” expanded government control over money flows distributed in domestic and international commerce. The Act proscribed government control over banks’ record keeping, disclosure and information sharing to connect financial institutions to the government in a secure bureaucratic network.<sup>735</sup> The Treasury Department gained the authority to require banks to determine sources of overseas private banking accounts and to impose sanctions on nations that withheld information about clients.<sup>736</sup> The act also punished several offenses relating to money laundering, smuggling and economic terrorism to evade preexisting laws concerning fines and confiscations. For example, false reporting of large sums of money at the border is made into a smuggling offense, to avoid the courts’ deciding it to be an unconstitutional “excessive fine” under the Eight Amendment. More troublesome, the act permits the confiscation of property of any individual, or organization, fostering domestic or international terrorism. The expansive definitions of what terrorism constitutes gave this provision an enormous reach, while the suspected terrorist did not need to be convicted for the confiscation to be ordered.<sup>737</sup> Criminal penalties for unauthorized possession of biological agents, toxins or delivery systems were also extended, penalties for hiding terrorists strengthened, and the penalties for parties to a terrorist conspiracy were made equal to those for perpetrators.<sup>738</sup>

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<sup>732</sup> Banks, “Protecting...,” 37.

<sup>733</sup> Banks, “Protecting...,” 37-39; “Antiterrorism Tools,” 20.

<sup>734</sup> Banks, “Protecting...,” 39-40; “Antiterrorism Tools,” 21.

<sup>735</sup> Banks, “Protecting...,” 41-43.

<sup>736</sup> “Antiterrorism Tools,” 21.

<sup>737</sup> Banks, “Protecting...,” 41-45.

<sup>738</sup> “Antiterrorism Tools,” 21-22.

The USA PATRIOT Act, as it was signed into law by Congress, held important ramifications for civil liberties post 9/11. According to law professor Geoffrey Stone, the act “smuggled into law several investigative practices that have nothing to do with fighting terrorism, but that law enforcement officials had for years tried unsuccessfully to persuade Congress to authorize.”<sup>739</sup> Political scientist Christopher Banks argues that, both in application and as a hasty political reaction to terror, the law “implicates core issues of liberty, including rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment.”<sup>740</sup> Richard Leone considers the stature “arguably the most far-reaching and invasive legislation passed since the Espionage Act of 1917 and the Sedition Act of 1918.”<sup>741</sup> Law professor David Cole adds that “the overbreadth of the Patriot Act reflects the overreaction that we have often indulged in when threatened and raises serious constitutional concerns even if it were shown that such measures would make us more secure.”<sup>742</sup>

### *Government Surveillance and Privacy*

Some of the clearest constitutional issues raised by the Patriot Act concern the balance between government surveillance and personal privacy. Fourth Amendment prohibition against unreasonable search and seizure and inherent respect for personal privacy were seriously tested by the enhanced government powers of surveillance. Although the expanded surveillance powers of the government reduced essential privacy rights, many Americans hardly worried about the impact of the PATRIOT Act. Seeing that law-abiding citizens have nothing to hide, many Americans welcomed the enhancement of surveillance powers. It is true that the Act corrected several legal oversights such as the authority of judges to allow surveillance of mobile phones in foreign intelligence investigations and the ability to issue nationwide search warrants.<sup>743</sup> In at least three areas, however, the enhanced surveillance raises concern: general searches were approached through the use of technology; government requirements to establish individualized suspicion were lowered; and, requirements were established to make private data more accessible to government.<sup>744</sup>

Although the PATRIOT Act expands the use of “pen registers”, devices used to record all numbers dialed from a telephone line to capture Internet transmissions on a nationwide basis, it also raises a legal barrier to capture the “content” of internet messages. However, it does not define whether “content” constitutes subject lines on e-mail addressing. Moreover, new devices easily allow switching between revealing entire messages and showing only addressing data during operations. Therefore all faith is put in the competence and integrity of the government operators.<sup>745</sup> To the administration, the PATRIOT Act was only the first step in using technology to impose greater control over its citizens, followed by the ominously sounding Total Information Awareness (TIA) initiative. Through the TIA initiative the government aimed to aggregate enormous amounts of data on citizens and aliens from numerous sources such as federal and local records, credit card transactions, airline reservations, Internet service provider records and live camera feeds. The TIA’s proposed combination of both comprehensive data aggregation and automated extraction techniques by the government closely approaches Orwellian control over individuals’ lives. The project, however, partly because it was lead by John

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<sup>739</sup> Stone, *Perilous Times*, 553.

<sup>740</sup> Banks, “Protecting...” 31.

<sup>741</sup> Leone, “The Quiet Republic,” 7.

<sup>742</sup> David Cole, “Let’s Fight Terrorism, Not the Constitution,” in Etzioni and Marsh eds., *Rights vs. Public Safety*, 42.

<sup>743</sup> Schulhofer, “No Checks, No Balances,” 76-77.

<sup>744</sup> Kathleen M. Sullivan, “Under a Watchful Eye: Incursions on Personal Privacy,” in Leone and Anrig Jr. eds., *The War on Our Freedoms*, 129.

<sup>745</sup> Banks, “Protecting...” 50-51.

M. Poindexter<sup>746</sup>, because of its shadowy origins, its scary title and its logo of an eye in a pyramid spying on the world, led to public outcry and the project's funding was withdrawn by Congress in 2003.<sup>747</sup>

The government also set out to lower the threshold of justification for surveillance. The PATRIOT Act altered the legal structure with provisions to expand the use of "sneak-and-peek" warrants, to authorize "roving wiretaps" and to provide the Foreign Intelligence Surveillance Act (FISA) with greater authority.<sup>748</sup> The "sneak-and-peek" provisions in the PATRIOT Act sanctioned the use of delayed notice on entering a person's property to seize evidence. Therefore, judicial supervision is nominal and the surveillance target cannot challenge the warrant's legality until after it had already been used against him or her. Sneak and peak, in awarding the government such discretion, construes Fourth Amendment protections as easily erasable or malleable, depending on the crisis of the moment.<sup>749</sup> Difficulties also exist with the Act's approval of "roving wiretaps", to allow a single wiretap order to apply to each device used by the individual under surveillance. This change seems a logical effect of terrorists' customs to switch phones and the impracticalities of restricting government access to a fixed line in an age of mobile phones.<sup>750</sup> The ability to "tap" all phones and computers under suspicion, however, violates the particularity requirement of warrants provided by the Fourth Amendment. Moreover, roving wiretaps inherently capture all communications of innocent third parties who use the targeted device, denying them their constitutional guarantees of privacy.<sup>751</sup>

More dangerous are the PATRIOT Act's endorsements to use FISA powers to spy on U.S. citizens. Foreign intelligence surveillance, to which the FISA belongs, has traditionally been permitted more flexibility in its procedures by the judiciary, because of its preventive purposes. Under the PATRIOT Act, however, if there is significant purpose in gathering foreign intelligence as a preventive measure, the government has the power to find and use evidence of criminal acts unrelated to the original warrant.<sup>752</sup> FISA powers can thus be used to gather evidence for criminal prosecutions *within* the United States. In addition, FISA does not require the targeted person to be a foreign spy or international terrorist. Thus, both aliens and U.S. citizens qualify as "foreign agents", subject to covert searches and surveillance when they are suspected of having relations with foreign organizations or governments, even *legitimate* organizations.<sup>753</sup> FBI agents are allowed to acquire business or educational records of such suspects, without certification of them being a foreign agent; to access records of any organization; and to inspect formerly confidential records concerning any American citizen.<sup>754</sup> Altogether, the Patriot Act severely lowered the barrier between criminal investigations and foreign counterintelligence to reduce the government's difficulties in establishing individual suspicion.<sup>755</sup>

The third major infraction upon Fourth Amendment rights contained in the PATRIOT Act concerns the requirement to hand over data to the government. The Treasury Department gained the authority to require private citizens and businesses to report "suspicious activities", essentially to eavesdrop for the government, without any judicial supervision.<sup>756</sup> In addition, the Treasury regulations that impose obligations to report to the government can be used for

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<sup>746</sup> Poindexter, as National Security Advisor for the Reagan administration, infamously lied about the Iran-Contra affair.

<sup>747</sup> Sullivan, "Under a Watchful Eye," 130-133.

<sup>748</sup> *Idem*, 136.

<sup>749</sup> Banks, "Protecting..." 51.

<sup>750</sup> Sullivan, "Under a Watchful Eye," 138.

<sup>751</sup> Banks, "Protecting..." 51-52.

<sup>752</sup> *Idem*, 52.

<sup>753</sup> Schulhofer, "No Checks, No Balances," 79-80.

<sup>754</sup> *Idem*, 77-78.

<sup>755</sup> Sullivan, "Under a Watchful Eye," 136-137.

<sup>756</sup> Schulhofer, "No Checks, No Balances," 76-77.

investigations outside the realm of national security, for example for allegations of prostitution, gambling and insider trading.<sup>757</sup>

The effect of 9/11 and the ensuing declared state of war have had a profound effect on Fourth Amendment protections of privacy. Before the PATRIOT Act two major laws existed to govern electronic surveillance by the government, known as Title III and FISA. Title III of the Omnibus Crime Control Act was enacted by Congress in 1968 to require judicial warrants, approved by a court, for electronic surveillance. However, Title III applies only to law enforcement; it does not regulate national security surveillance. FISA was Congress' 1975 attempt to balance civil liberties with the government purpose of acquiring foreign intelligence to protect the national security. Congress specifically pointed out that both Title III and FISA were the "exclusive means by which electronic surveillance may be conducted."<sup>758</sup> However, in 2005, the *New York Times* reported that the National Security Agency (NSA) had engaged itself in warrantless electronic surveillance to intercept international telephone calls and e-mails to and from the United States, bypassing the framework of FISA.<sup>759</sup> Afterwards, the program was labeled the President's Program of the Terrorist Surveillance Program (TSP). The NSA surveillance had already begun shortly after 9/11 and Bush had officially implemented TSP with a secret executive order in 2002. Consequently, the NSA spied on thousands of individuals in America without a court order until the press found out about the program.<sup>760</sup>

### *Surveillance and Security*

The Bush administration's secret circumvention of the law strictly conflicts with the President's obligation to "take Care that the Laws be faithfully executed." Moreover, the administration's public pose to be working in harmony with Congress to increase national security without infringing upon individual liberties further erodes its position. Instead, President Bush should have asked Congress for electronic surveillance beyond FISA, as he did with the PATRIOT Act. The administration's argument that presidential authority in times of crisis allowed for the NSA spying program reveals its disregard for executive constitutionalism. Although heavy internal branch debate forced Bush to modify the program, executive supremacy prevailed. Despite the ample possibilities to conduct surveillance of the enemy under FISA and the additional authority received by Congress post September 11, the Bush administration defied Congress and the American public. In doing so, regarding electronic surveillance it neglected its duty to balance security and liberty concerns.<sup>761</sup>

Considering the obvious tension between civil liberties and domestic security, the administration completely mismanaged the perception of the war on terror at home, appearing to attack rather than protect civil liberties. As former chairman of the Counterterrorism Security Group Richard Clarke points out "al Qaeda and similar groups" use "our system against us, applying for refugee status or political asylum, hiding in religious and charitable institutions, communicating on the Internet." However, the propositions of Attorney General Ashcroft to amend the Patriot Act to allow for actions without judicial review, fundamentally affected "the confidence of many Americans in the government's ability to safeguard our rights."<sup>762</sup> Moreover, it is unknown whether the enhanced surveillance measures actually helped in the battle against future terrorist attacks. Bush insisted that the secret TSP had been effective in disrupting terrorist activity, but the program's cloak and dagger operations and its illegality limited the possibility of proving such claims.<sup>763</sup>

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<sup>757</sup> *Idem*, 85.

<sup>758</sup> Matheson, *Presidential Constitutionalism*, 108-110.

<sup>759</sup> "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005.

<sup>760</sup> Matheson, *Presidential Constitutionalism*, 110-111.

<sup>761</sup> *Idem*, 126-128.

<sup>762</sup> Clarke, *Against All Enemies*, 256-257.

<sup>763</sup> Matheson, *Presidential Constitutionalism*, 111.

The increased abilities to combine foreign intelligence and domestic law enforcement were intended to prevent new acts of terrorism, but also contained serious flaws. First of all, concern with terrorism has little relation to many areas of law enforcement. New opportunities of surveillance have, however, led to “inexcusable opportunism on the part of the law enforcement establishment, which has exploited the momentum of 9/11 to expand government power to intrude on privacy in pursuit of wholly unrelated goals.”<sup>764</sup> Moreover, the drive to make surveillance more efficient led to a neglect of internal supervision and control procedures essential to effective management of government agencies. Newfound data is useless unless the surveillance agencies are able to decipher what piece of information is essential. Before 9/11, the FBI and the CIA had important information about the plot, but did not know that it held such clues.<sup>765</sup> Moreover, intelligence agencies easily succumb to political pressure on account of the government, as the case of Iraq exemplifies, in which American and British intelligence services held hard evidence proving that Saddam possessed no Weapons of Mass Destruction but were pressured to report otherwise.<sup>766</sup>

The rush to appear tough has led to serious disregard of accountability principles at the center of effective management. In addition, the government has taken many steps that are clearly irrelevant to the threat of Al-Qaeda, exemplified in the extreme by the Iraq war. Many of the actions that encroach on liberty hardly enhance security.<sup>767</sup> In doing so, the administration ignored underlying issues concerning the nature of Al-Qaeda and America’s image in the world.<sup>768</sup> Clarke assesses that “rather than seriously and systematically addressing the real security vulnerabilities in this country, the Administration succumbed to political pressure to reorganize agencies amid the ‘war on terrorism’ and created an unwieldy bureaucracy.”<sup>769</sup> Former government officials Stefan Halper and Jonathan Clarke therefore conclude that the removal of checks regarding surveillance and government intentions that accompanied the Patriot Act makes it “quite possible that America will end up with the worst of both worlds: a highly intrusive surveillance infrastructure that contributes little to public safety.”<sup>770</sup>

### *Surveillance, Secrecy and The First Amendment*

The enhanced surveillance provisions of the PATRIOT Act also influenced the freedom of speech and assembly of many Americans. Business records and computer hard drives are allowed to be searched in a terrorism investigation and people are forbidden to report such surveillance to anyone. Thus, Halper and Clarke argue “the effect of this provision is that government officials have much easier access to monitoring the legal, First Amendment-protected activities of American citizens.”<sup>771</sup> On May, 2002, Attorney General Ashcroft authorized the FBI to enter any place or event open to the public to gather information *possibly* relevant to criminal activity. In doing so, he allowed the FBI, once again, to monitor political and religious activities without proof or suspicion of unlawful conduct.<sup>772</sup> The FBI had, as we have seen, made a massive contribution to the establishment of the “guilt by association” doctrine regarding American communists during the Red Scare and the early Cold War. Agents intimidated dissenters, randomly damaged reputations and produced thousands of thick files on public figures. After the FBI’s COINTELPRO’s were revealed during the 1970s strict guidelines were introduced to prevent such abuse and inefficiency.<sup>773</sup> These guidelines barred the bureau from investigating

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<sup>764</sup> Schulhofer, “No Checks, No Balances,” 85.

<sup>765</sup> *Idem*, 85-86.

<sup>766</sup> Halper and Clarke, *America Alone*, 318-320.

<sup>767</sup> Schulhofer, “No Checks, No Balances,” 99.

<sup>768</sup> Halper and Clarke, *America Alone*, 311-313; Crotty, “Conclusion,” 284-292.

<sup>769</sup> Clarke, *Against All Enemies*, 286.

<sup>770</sup> Halper and Clarke, *America Alone*, 301.

<sup>771</sup> *Idem*, 288-289.

<sup>772</sup> Stone, *Perilous Times*, 555.

<sup>773</sup> Schulhofer, “No Checks, No Balances,” 86-87.

people for their beliefs or associations and from monitoring any activities protected by the First Amendment, except among narrowly defined circumstances helpful to criminal law enforcement.<sup>774</sup> Despite the logic behind these guidelines and the fact that all American presidents had supported them since Gerald Ford introduced them in 1976, Ashcroft considered the guidelines “bureaucratic restrictions” that prevented FBI agents from doing their jobs.<sup>775</sup> Since Ashcroft threw these guidelines aside, the FBI has collected extensive information on anti-war demonstrators, to identify “anarchists” and “extremists”, eerily reminiscent of its Cold War activities.<sup>776</sup>

According to Geoffrey Stone, the surveillance of public events “can have a significant chilling effect on First Amendment freedoms.”<sup>777</sup> Moreover, as Ashcroft “launched the largest, most comprehensive criminal investigation in history to identify the perpetrators of the September 11<sup>th</sup> attacks,”<sup>778</sup> the FBI was authorized to use techniques to investigate political and religious organizations, as if they were to investigate a terrorist cell. Therefore, religious and political associations were subjected to extensive FBI surveillance, without any grounds for suspicion.<sup>779</sup> Ashcroft also allowed FBI agents in charge of field offices “to approve and renew terrorism enterprise investigations, rather than having to seek and wait for approval from headquarters.”<sup>780</sup> Strangely enough, however, contrary to the changes in investigations of “general crimes” and domestic terrorist groups, the rules regarding international terrorism cases, Al-Qaeda included, were not changed at all. In doing so, civil liberties were needlessly repressed *without* enhancing immediate national security concerns. According to Stephen Schulhofer, “fear of terrorism offered an occasion for the bait-and-switch: the guideline revisions are irrelevant to the concerns about Al-Qaeda that preoccupy the American public, yet they leave us with a large risk to civil liberties and large losses to effective management of the FBI.”<sup>781</sup>

Freedom of speech was also affected in a more subtle but equally dangerous way in the War on Terrorism through the administration’s embrace of secrecy. Stone points out that it becomes impossible for citizens “to engage in responsible political debate if they are denied access to critical information about the actions of elected officials.”<sup>782</sup> The post 9/11 public climate gave the administration an easy opportunity to conceal its effort “in the nation’s best interest”. Reminiscent of the early Cold War, President Bush promoted policies to expand government secrecy at almost every level, limiting public access to health and safety issues. Although Al-Qaeda’s tactics justified government needs to undertake certain actions in secret, the administration used the desire for security to implement sweeping policies to deny public access to information and public understanding of policymaking. New legislation that created the Department of Homeland Security, an effort to concentrate intelligence and security into a single, super-department, contained new secrecy provisions that effectively dismantled much of the Freedom of Information Act (FOIA) of 1966.<sup>783</sup>

Attorney General Ashcroft also issued a memorandum, reducing the availability of his department’s documents to protect “sensitive institutional, commercial and personal interests

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<sup>774</sup> Stone, *Perilous Times*, 555.

<sup>775</sup> Schulhofer, “No Checks, No Balances,” 87.

<sup>776</sup> Eric Lichtblau, “F.B.I. Scrutinizes Antiwar Rallies,” *New York Times*, November 23, 2003.

<sup>777</sup> Stone, *Perilous Times*, 556.

<sup>778</sup> Department of Justice, “Message from the Attorney General”, *Fiscal Year 2001 Performance Report & Fiscal Year 2002 Revised Final Performance Plan, Fiscal Year 2003 Performance Plan*, <http://www.justice.gov/archive/ag/annualreports/pr2001/AGMessage.htm>

<sup>779</sup> Stone, *Perilous Times*, 556.

<sup>780</sup> Department of Justice, “Remarks of Attorney General John Ashcroft, Attorney General Guidelines,” *Fact Sheet*, <http://www.justice.gov/archive/ag/speeches/2002/53002agpreparedremarks.htm>.

<sup>781</sup> Schulhofer, “No Checks, No Balances,” 87-88.

<sup>782</sup> Stone, *Perilous Times*, 556.

<sup>783</sup> John Podesta, “Need to Know: Governing in Secret,” in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 225-227.

that be implicated in government order".<sup>784</sup> This "Ashcroft Memorandum" contained two issues impeding free access to government information. First, it allowed individuals within the agency to determine who will receive what information, rather than using a strictly objective standard. Second, the standards that were intended to protect information from assisting terrorists also made environmentalists, educators, researchers and journalists unable to access documents essential to their work.<sup>785</sup> In fact, reflecting the concerns of business lobbyists, the government gained immense discreteness regarding health, safety and environmental information submitted by businesses to the federal government. In doing so, the public lost the right to know about possible hazards, while the government is *obliged* to keep information secret, if it has been labeled "sensitive" by *private* industries.<sup>786</sup>

Excessive secrecy on part of the administration, ranging from the refusal to reveal the names of those detained after September 11, to the TSP program and alterations of "sensitive" government documents and Web sites, has severely restricted the First Amendment right to be informed about the government's conduct.<sup>787</sup> The wide tendency to engage in secrecy has constituted an effort to remove executive action from public criticism, to lessen constitutional rights to counsel, judicial review and the ability of the press to report upon government conduct. The U.S. Court of Appeals for the Sixth Circuit ruled unanimously that the government's secrecy policy regarding deportation proceedings violated the First Amendment. Judge Damon Keith wrote that "the first amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully and accurately."<sup>788</sup> Moreover, as Law Professor Daniel P. Tokaji points out, "a healthy democracy requires the availability of channels for dissent, so that issues of social importance can be debated and 'antagonistic' voices disseminated."<sup>789</sup> The government's tendency towards secrecy stifled the few voices of criticism present in the post 9/11 climate of national coherence. Stone points out that the administrations "obsessive secrecy" in effect "directly undermines the vitality of democratic governance," with leaves "the country less secure in the long run."<sup>790</sup> In fact, the government should encourage alternative points of view, including opinions adverse to the actions of the national government. According to Tokaji, such promotion of free speech would further "both the individual's interest in self-expression and society's interest in a robust public discourse that includes antagonistic viewpoints."<sup>791</sup>

### *Freedom of the Press and Freedom of Association*

The Bush administration's measures of secrecy thus undermined First Amendment rights to be informed and free public discourse, but also infringed upon the freedom of the press. Media access to the government's handling of the September 11 aftermath was limited from the onset. Several photographers disregarded the prohibitions to enter the ground or air space surrounding the disaster areas and were sent to jail for trespassing. After the scenes had been opened to the press, the government frequently interfered with the coverage of the aftermath. Through Ashcroft's adaptation to the FOIA, press access to information was limited, while the Department of Defense created the Office of Strategic Influence to influence public relations for the War on Terror.<sup>792</sup> An article in the *New York Times* consequently reported that the Office "envisions a broad mission ranging from 'black' campaigns that use disinformation and other

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<sup>784</sup> Kendra B. Stewart and L. Christian Marlin, "Terrorism, War, and Freedom of the Press: Suppression and Manipulation in Times of Crisis," in Cohen and Wells eds., *American National Security...*, 168-169.

<sup>785</sup> *Idem*, 169.

<sup>786</sup> Podesta, "Need to Know," 227.

<sup>787</sup> Stone, *Perilous Times*, 557.

<sup>788</sup> Schulhofer, "No Checks, No Balances," 90-91.

<sup>789</sup> Daniel P. Tokaji, "The Possibility of Dissent in the Age of Terrorism," 219.

<sup>790</sup> Stone, *Perilous Times*, 557.

<sup>791</sup> Tokaji, "The Possibility of Dissent," 222.

<sup>792</sup> Stewart and Marlin, "Terrorism, War, and Freedom of the Press," 168-170.

covert activities to 'white' public affairs that rely on truthful news releases, Pentagon officials said."<sup>793</sup> Such a clear attempt at propaganda through misinformation, however, led to a storm of bad press, forcing the Defense to close the Office down one week later. Still, in more subtle ways, government agencies withheld information from the press during the War on Terror, especially through the new Department of Homeland Security's authority to decline the release of information under the FOIA.<sup>794</sup>

The unconventional nature of the war allowed for a considerable lack of openness. The Reporters Committee for Freedom of the Press, an organization dedicated to provide legal assistance to journalists, has deemed "covering the war" and "access to terrorism-related proceedings" at high risk to a free press. "The reporter's privilege" and "freedom of information" have even been exposed to a "severe" risk in the war on terror.<sup>795</sup> During the first four years of the war on terror the government kept the imprisonment of over 1,100 aliens for immigration violations secret from the press, aggressively investigated information leaking to the press, resulting in subpoenas of reporters and citations for contempt, secretly arrested "perhaps dozens" of terrorism suspects and created new security layers preventing public supervision of government operations.<sup>796</sup>

Broadly speaking, the freedom of the press has been compromised in the War on Terrorism in two distinct ways, in addition to the increased tendency to govern in secret. First of all, the Bush administration has employed a number of techniques to keep the watchdogs of the press quiet. These include the refusal on account of the government to talk to the press, a permanent flood of sound bites repeating the government's own message, and threats to severely punish "leakers".<sup>797</sup> Second, it has limited and controlled coverage of the war in Afghanistan and of the course of the War on Terrorism in general. As Operation Enduring Freedom developed, correspondents were kept far from the fighting, while journalists designated to the Department of Defense National Media Pool to cover the initial phases of the conflict were kept waiting although the conflict had already started. When the Pentagon finally allowed reporters to enter Afghanistan, serious coverage problems developed, mainly regarding civilian and friendly fire casualties.<sup>798</sup> Secretary of Defense Donald Rumsfeld and other top military spokespersons controlled the information journalists received about the conduct of U.S. forces in Afghanistan and left out important facts.<sup>799</sup> Journalists were reduced to "covering Rumsfeld's briefings". Actual coverage of the war was mostly limited to reporters "embedded" with military units. Issues of censorship and security reviews were left to the individual unit commanders and embedded journalists themselves.<sup>800</sup> Naturally this policy, while often protecting individual journalists from harm, severely diminished open and objective coverage of the war, denying the American public vital information on the conduct of the war.

First Amendment rights to public access of information and national security have often conflicted in times of war. Nevertheless, defense officials have historically attempted to keep information from the press to control "editorial slant" in their reporting, rather than to protect

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<sup>793</sup> James Dao and Eric Schmitt, "Pentagon Readies Efforts to Sway Sentiment Abroad", *New York Times*, February 19, 2002.

<sup>794</sup> Stewart and Marlin, "Terrorism, War, and Freedom of the Press," 170-171.

<sup>795</sup> The Reporters Committee for Freedom of the Press, *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know*, 6d ed., September 2005, table of contents, <http://www.rcfp.org/homefrontconfidential/>, accessed 11-9-2009.

<sup>796</sup> Reporters Committee, *Homefront Confidential*, foreword, <http://www.rcfp.org/homefrontconfidential/foreword.html>

<sup>797</sup> John F. Stacks, "Watchdogs on a Leash: Closing Doors on the Media," in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 237-240.

<sup>798</sup> Stanley Cloud, "The Fog of War: Covering the War on Terrorism," in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 263-270.

<sup>799</sup> Stacks, "Watchdogs on a Leash," 242.

<sup>800</sup> Cloud, "The Fog of War," 270-275.

the national security from unauthorized publications of sensitive material.<sup>801</sup> In fact, in times of crisis, the government is often dependent on information provided by the mainstream press.<sup>802</sup> Again, through its restrictions of media access, the Bush administration thus restricted civil liberties without clearly demonstrating how these measures have aided the national security of the United States.

A final First Amendment issue that has developed since 9/11, has been the renewed vindication of the doctrine of “guilt by association” regarding cases of terrorism. Law Professor David Cole calls the adoption of this philosophy “the single most problematic feature of the PATRIOT Act.”<sup>803</sup> Even though the Supreme Court has condemned the doctrine as “alien to the traditions of a free society and the First Amendment”, the PATRIOT Act allowed for the deportation of aliens for *associations* with a “terrorist organization.” Moreover, as the bill defined both “terrorist activity” and terrorist organizations very broadly, prosecution for political association extends to any organization that was ever involved in civil war, crime or violence. Considering the lack of requirements that the alien’s association connects to terrorist activity, deportations are justified solely on the basis of associations and beliefs, reminiscent of the anti-communist legislation of the McCarthy era.<sup>804</sup>

Still, it is important to note that the Bush administration was not acting completely on its own. As during earlier wars, restrictions of the freedom of expression received wide public support, when they were *believed* to contribute to the national security at the expense of unpopular groups and ideas. Thus, a majority of the national public proved in support of silencing anyone linked to terrorism. When asked whether someone who expressed support of terrorists should be allowed to teach at public schools, 85% of those questioned answered negatively. Lynn Kuzma, who conducted a public survey in Portland, Maine six months after the terrorist attacks of 9/11, concludes that “the overall mood is one of intolerance for any type of expression that may legitimate terrorist activities or increase Americans’ vulnerability to a terrorist attack.”<sup>805</sup> Perhaps then, with this in mind, it has not been the administrations greatest fault that it has restricted civil liberties, but that it has misled the public by incorporating restrictive policies, claimed to enhance the national security, to further other interests, stifle criticism and expand the power of the executive.

### *Due Process: Enemy Combatants*

September 11 dramatically changed the emphasis in criminal prosecutions of terrorists. The expansion of presidential power led to a basic shift from a law enforcement model to a military justice model as rules of criminal trials gave in to claims of military conditions. In response to the public demand for retaliation and prevention of future attacks, President Bush proclaimed a “Declaration of National Emergency by Reason of Certain Terrorist Attacks” three days after the terrorist attacks. Congress responded by authorizing the president to use all necessary force against the 9/11 terrorists and those who harbored them. Two months later, on November 13, 2001, Bush issued a comprehensive military order to authorize the detention of non-U.S. citizens suspected of being involved in acts of international terrorism against the United States, its citizens or the national security.<sup>806</sup> Bush’s order applied to an unknown number of non-citizen enemy combatants and bypassed Congress as well as an interagency task force assembled to

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<sup>801</sup> C. Robert Zelnick, “Military Secrets and the First Amendment,” in Etzioni and Marsh eds., *Rights vs. Public Safety*, 73-74.

<sup>802</sup> Clarke, *Against All Enemies*, 1-34; Zelnick, “Military Secrets...”, 63-65.

<sup>803</sup> Cole, *Let’s Fight Terrorism*, in Etzioni and Marsh eds., *Rights vs. Public Safety*, 38.

<sup>804</sup> *Idem*, 38-39.

<sup>805</sup> Lynn M. Kuzma, “Security versus Liberty: 9/11 and the American Public,” in: Crotty ed., *The Politics of Terror*, 174-175.

<sup>806</sup> Otis H. Stephens, Jr., “Presidential Power, Judicial Deference, and the Status of Detainees in an Age of Terrorism,” in Cohen and Wells eds., *American National Security...*, 71.

address this matter. Although it did not expressly suspend the writ to Habeas Corpus, it denied any enemy combatants access to a federal court.<sup>807</sup> Trials were to be held before military commissions, convictions required a two-third majority among the members of the commission.<sup>808</sup> Proof was not based necessarily on traditional rules of evidence, but on determination by “a reasonable person” that the conviction had “probative value.”<sup>809</sup> Moreover, the accused “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf,” in “any court in the United States.”<sup>810</sup>

The order was immense in scope and strictness, in theory surpassing even the Executive Order by which FDR allowed for the deportation of Japanese Americans in World War II, although not in effect. The order authorized the president to command states to turn over suspects, command civilian federal authorities to turn over suspects to the military and to remove judicial oversight regarding the rights of suspects and the conduct of trials. The order made no distinction between illegal and legal aliens, or between civilians and combatants, nor whether the suspect was apprehended in the United States or on a foreign battlefield. Moreover, Congress had no say in this suspension of the writ to habeas corpus, despite the fact that such power is reserved to Congress by the Constitution. Naturally, the Bush administration recognized the unconstitutionality of the order in the areas of due process, federalism and separation of powers and the ease by which the Supreme Court would strike it down on Fifth and Sixth Amendment grounds. Therefore, the administration did not use the order against resident aliens.<sup>811</sup> Still, President Bush claimed and used unchecked executive power to detain citizens and aliens alike, whom he considered “unlawful enemy combatants”. Hundreds of detainees captured in Afghanistan and elsewhere were moved to the prison at the Naval Base in Guantanamo Bay, Cuba; an American citizen named Jose Padilla was apprehended in the United States; another American citizen named Yaser Hamdi was captured in Afghanistan; and thousands of resident aliens were locked up in the context of the War on Terrorism.<sup>812</sup>

The two arrests of American citizens led to two important court cases regarding the legal rights of “enemy combatants” and whether the executive had the authority to detain them in wartime. In *Hamdi v. Rumsfeld*, the Fourth Circuit Court of Appeals adhered to the military justice model as proposed by the government, but the Supreme Court reversed the decision. Yaser Esam Hamdi was captured by American forces in Afghanistan while fighting for the Taliban. He was removed from Guantanamo Bay when authorities learned Hamdi was a U.S. citizen and detained at Norfolk, Virginia in May 2002. His father, as well as a federal public defender, filed for habeas corpus. The District Court held that Hamdi was entitled to due process of law, but in January 2003, the Fourth Circuit Court remanded the case and dismissed Hamdi’s habeas corpus petition. Chief Judge Wilkinson held that there existed sufficient basis “upon which to conclude that the Commander in Chief constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution.”<sup>813</sup> The court, moreover, cautioned against “obstructing war efforts authorized by Congress and undertaken by the executive branch.”<sup>814</sup>

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<sup>807</sup> Matheson, *Presidential Constitutionalism*, 130.

<sup>808</sup> Daniel Krislov, “Civil Liberties and the Judiciary in the Aftermath of 9/11,” in Crotty ed., *The Politics of Terror*, 150.

<sup>809</sup> Philip B. Heymann, *Terrorism, Freedom, and Security: Winning without War* (Cambridge, MA/London: MIT Press, 2003), 93.

<sup>810</sup> “Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” *Federal Register: Presidential Documents* 66:222 (November 16, 2001), <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>, retrieved 11-11-2009.

<sup>811</sup> Krislov, “Civil Liberties and the Judiciary,” 151-152.

<sup>812</sup> Matheson, *Presidential Constitutionalism*, 129.

<sup>813</sup> Stephens, Jr., “Presidential Power...,” 78-79.

<sup>814</sup> *Idem*, 79.

The Supreme Court, however, found in 2004 that U.S. citizens held as “enemy combatants” in military custody are entitled to constitutional rights of due process of law.<sup>815</sup> Speaking for a narrow five to four majority, Justice Sandra Day O’Connor asserted that although “Congress has in fact authorized Hamdi’s detention,” any “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>816</sup> Through this ruling the Court rejected “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances,” as it has “long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>817</sup>

In the case of *Padilla v. Rumsfeld*, New York District Court Judge Mukasey had also complied to the president’s war powers in general, but similarly declined to fully remove judicial duty to investigate government action when it infringed upon individual liberty.<sup>818</sup> Jose Padilla, U.S. citizen by birth, had been arrested in May 2002, when he flew into Chicago from abroad. At first he was detained as a material witness to the investigation of the September 11 attacks. However, in June, the President Bush designated Padilla an enemy combatant and withdrew the subpoena to testify before grand jury. Padilla was consequently flown to a Navy brig, kept in solitary confinement and forbidden to see a lawyer or his family. Shockingly enough, Attorney General Ashcroft made a statement that was shown on American television that the government had captured a known terrorist who had trained with the enemy and that his detainment had prevented a terrorist plot to explode a radioactive bomb in the United States.<sup>819</sup>

Ashcroft’s statements in effect convicted Padilla of grave crimes without trial or indictments. The Attorney General claimed to have acted on “clear Supreme Court precedent,” referring to the case of *Ex Parte Quirin* in which the Court had upheld the military trial of German saboteurs, including one American citizen, during World War II. Nevertheless, the Nazi saboteurs had been given trial and they had full access to counsel.<sup>820</sup> After Padilla’s appointed lawyer filed a writ of habeas corpus, the court hence allowed them to consult for the limited purpose of preparing to present the court with any facts that challenged his status as an unlawful enemy combatant.<sup>821</sup> The case came before the Supreme Court in 2004, which in a five-to-four decision held that Padilla had filed the petition in the wrong venue and dismissed the case, allowing him to refill the petition. Justice Stevens wrote a passionate dissent, joined by Justices Souter, Ginsburg and Breyer:

*“Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. Executive detention of subversive citizens (...) may sometimes be justified to prevent persons from launching or becoming missiles of mass destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.”*<sup>822</sup>

Perhaps to avoid a Supreme Court showdown over the case, the government in November 2005 indicted Padilla on charges of conspiring to murder, kidnap and maim people overseas.<sup>823</sup> On

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<sup>815</sup> Matheson, *Presidential Constitutionalism*, 88.

<sup>816</sup> Geoffrey R. Stone et al. eds., *Constitutional Law* (New York: Aspen Publishers, 2005), 385, 388.

<sup>817</sup> Stone et al. eds., *Constitutional Law*, 388-389.

<sup>818</sup> Anthony Lewis, “Security and Liberty: Preserving the Values of Freedom,” in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 55.

<sup>819</sup> *Idem*, 52-53.

<sup>820</sup> Lewis, “Security and Liberty,” 54.

<sup>821</sup> Stephens, Jr., “Presidential Power...,” 81.

<sup>822</sup> Stone et al. eds., *Constitutional Law*, 395.

<sup>823</sup> Kelli Arena, Terry Frieden and Phil Hirschkom, “Terror Suspect Padilla Charged,” CNN, <http://edition.cnn.com/2005/LAW/11/22/padilla.case/index.html>, retrieved 11-10-2009; Fred Barbash, “Padilla’s Lawyers Suggest Indictment Helps Government Avoid Court Fight,” *The Washington Post*, November 22, 2005.

August 15, 2007, after less than two days of deliberations, and despite the judge's comment that there was "no evidence" that the defendant "personally maimed, kidnapped or killed anyone in the United States or elsewhere," a jury found Padilla guilty on all counts. He was subsequently sentenced to 17 years in federal prison.<sup>824</sup>

Regarding the development of the case, it becomes difficult to imply that Padilla had been entitled to due process of law. Even though the Mukasey decision was applauded in the press, its affirmation of Padilla's rights of due process as an American citizen was minimal. Normally, detention without a hearing is deemed unconstitutional after forty-eight hours; detention incommunicado has never been permitted for any time, even in military courts. Moreover, Padilla only received counsel because he was "lucky" to be originally treated as a witness.<sup>825</sup> Richard Clarke argues that "the Bush administration crossed a very important line that was created by the Founding Fathers to protect Americans from the possibility of some future government in this country violating their basic rights."<sup>826</sup> Law Professors Terry Gill and Elies van Sliedregt argue that by rejecting the writ of habeas corpus on technical grounds, the court avoided dealing with a case in which the U.S. government exercised far-reaching powers. If the government's actions were upheld "it could capture U.S. citizens on American soil – far from the battlefield, unconnected to any traditional armed conflict – and detain them indefinitely without charge."<sup>827</sup> Earlier displacements of civilian for military courts during the Civil War and during World War II in Hawaii were explicitly rejected by the Supreme Court In *Ex Parte Milligan* it had ruled in 1866 that "martial law" "cannot arise from a threatened invasion." Government by the rule of law cannot be allowed unchecked power to imprison citizens.<sup>828</sup>

#### *Due Process: Detention of Aliens*

Apart from the use of martial law to deny American citizens their legal rights, the government also arrested approximately 1,200 foreign nationals in the months following September 11. Hundreds of them were released after months of detainment, while others remain in detention, presumably awaiting deportation.<sup>829</sup> The administration was supported in its detainment proceedings of foreign nationals by Congress through the PATRIOT Act. The Act expanded the grounds for determining an alien deportable for terrorist activity and provided mandatory detention of aliens based on the estimation of the Attorney General.<sup>830</sup> After the Act was enacted, detentions were implemented aggressively on many fronts. The executive branch carried out a broad counter-terrorism manhunt locking up 5,000 foreign nationals in the two years following the 9/11 attacks.<sup>831</sup> This process included an unprecedented use of a statute allowing the detention of witnesses to force them to testify in order to effectively apprehend terrorism suspects. Immigration procedures have been enforced to delay the filing of charges, adjourn hearings, and hold deportation orders.<sup>832</sup> Most problematic to these proceedings was the executive's unilateral decision regarding who was to be detained, bypassing any independent or individual review of relevant evidence.<sup>833</sup> Despite the PATRIOT Act provisions, the administration acted on military commission policies, rather than on authority granted by

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<sup>824</sup> Associated Press, "Jose Padilla Sentenced on Terrorism Charges", MSNBC, <http://www.msnbc.msn.com/id/22784470//>, accessed 11-10-2009.

<sup>825</sup> Schulhofer, "No Checks, No Balances," 93-94.

<sup>826</sup> Clarke, *Against All Enemies*, 257.

<sup>827</sup> Terry D. Gill and Elies van Sliedregt, "Guantanamo Bay: a Reflection on the Legal Status and Rights of 'Unlawful Enemy Combatants,'" in Antoine M. Hol and John A.E. Vervaele eds., *Security and Civil Liberties: the Case of Terrorism* (Antwerp/Oxford: Intersentia, 2005), 23.

<sup>828</sup> Schulhofer, "No Checks, No Balances," 98.

<sup>829</sup> *Idem*, 88-89.

<sup>830</sup> "Antiterrorism Tools," 21.

<sup>831</sup> Matheson, *Presidential Constitutionalism*, 128-129.

<sup>832</sup> Heymann, *Terrorism, Freedom, and Security*, 91-92.

<sup>833</sup> Schulhofer, "No Checks, No Balances," 89.

Congress.<sup>834</sup> The Immigration and Naturalization Service (INS) held arrestees for months without allowing them hearing and without indictments to any violations of the law. The administration authorized the INS to detain any alien certified by the Attorney General as a “suspected terrorist”. This label was, conveniently, defined in such a broad manner to include any migrant who had ever been involved in a brawl or domestic dispute. Even aliens who had never committed any crime, but had provided humanitarian aid to an organization deemed adverse to the national interest could be designated as such.<sup>835</sup>

In addition to the impersonal grounds for detainment, the detention allowed by the PATRIOT Act raised constitutional issues regarding the preventive nature of the detention and the indefinite period of detainment. The Supreme Court upheld preventive detention in the past, but only when the government was able to establish a specific need for doing so, demonstrating the individual’s threat to the nation or threat of flight.<sup>836</sup> The purpose of the detentions in the War on Terror, however, was to apprehend exactly those people who were *suspected* of terrorist activities, but of whom it might not be *proven*.<sup>837</sup> Allowing the INS to detain aliens indefinitely, even if the alien has been granted relief from removal, is akin to detaining a pardoned prisoner. Clearly this permission conflicts with the Fifth Amendment’s protection from “double jeopardy.”<sup>838</sup> Preventive, impersonal and indefinite detention was framed by a clear absence of judicial establishment of the grounds for detention. As with the incommunicado detention of Padilla and Hamdi, these roundups revealed how executive powers were pushed beyond their constitutional limits in a crisis situation. Schulhofer thus argues that “apart from the relocation of Japanese Americans during World War II”, these detentions were “unprecedented in terms of the unilateral, unreviewable executive powers on which they rest.”<sup>839</sup>

To further remove the detention process from usual procedures, the arrests have been surrounded by exceptional secrecy: the government refused to release the names of the detainees, and when hearings were ultimately allowed, these were closed to the press and even to the arrestees’ families. Bizarrely, Attorney General Ashcroft stated that the secrecy was necessary to protect the privacy of the detainees, while his Department later acceded that the names had not been released to prevent their terrorist cohorts from gathering information on the investigations. The limitations of these arguments led the U.S. Court of Appeals for the Sixth Circuit, as has been noted before, to rule in August 2002 that the use of secrecy violated the First Amendment, stating that such discretion was only warranted if an independent check on the necessity was provided and not as a means to provide a mantle for government abuse of power.<sup>840</sup> Two months later, the Court of Appeals of Third Circuit reversed the decision, conceding to the government’s assertion that openness in the detainment cases would damage national security. By doing so, it granted the administration, instead of the judiciary, power to determine the necessity of secrecy, removing government policy from judicial and public oversight.<sup>841</sup>

### *Due Process: Guantanamo Bay*

The Bush administration’s “extraordinary rendition” program perhaps became its most controversial practice of detention. Through this program prisoners were transferred to other nations, with more relaxed restrictions on torture and detention, outside of the realm of American constitutional protection. The CIA kept prisoners at various undisclosed “black sites” to implement this program and the administration eventually moved fourteen detainees from the

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<sup>834</sup> Matheson, *Presidential Constitutionalism*, 129.

<sup>835</sup> Cole, “Let’s Fight Terrorism,” 39-40.

<sup>836</sup> *Idem*, 40.

<sup>837</sup> Heymann, *Terrorism, Freedom, and Security*, 92.

<sup>838</sup> Cole, “Let’s Fight Terrorism,” 40.

<sup>839</sup> Schulhofer, “No Checks, No Balances,” 89.

<sup>840</sup> *Idem*, 89-90.

<sup>841</sup> *Idem*, 90-91.

U.S. to the prison at the Guantanamo Bay Naval Base in Cuba.<sup>842</sup> Under the president's November 13 order, several hundred non-U.S. citizens were detained and imprisoned at Guantanamo.<sup>843</sup>

The grounds for detainment and treatment of detainees at Guantanamo Bay were quite at odds with international conventions on the treatment of prisoners of war. The camp itself was called "a legal blackhole" beyond the reach of any court in the world, by a panel of British judges.<sup>844</sup> Nevertheless, international human rights do not form the subject of this thesis. Hence, the discussion here will be limited to the relation between detention at Guantanamo Bay and American law. The government claimed that the prisoners were not "prisoners of war" but instead "enemy combatants," raising the issue whether the detainees were entitled to the protections outlined by the Supreme Court in *Hamdi*, who had been, after all, granted the right to a writ of habeas corpus despite his status as enemy combatant.<sup>845</sup> Although this question has, as of writing, not been answered fully, several cases developed in which detainees at Guantanamo attempted to be heard before a U.S. Court. The initial efforts were unsuccessful. For example, in *Coalition of Clergy v. Bush*, the Court of Appeals affirmed an order to dismiss a habeas corpus petition on the ground that the clergy, lawyers and law professors who undertook the action were not proper "best friends" of the detainees.<sup>846</sup>

In *Al Odah v. U.S.*, three separate actions of nationals from Kuwait, Australia and Great Britain challenged the legality and conditions of the confinement. The individuals sought legal review in the Court of Appeals of the District of Columbia. The petitioners maintained that, because of the lease agreement between United States and Cuba, Guantanamo Bay was in effect a territory of the United States. Judge Randolph, however, writing for a three-judge panel, held that the privilege of trial did not extend to aliens outside the territory of the United States. Through the court's denial of jurisdiction, it avoided dealing with the question whether the president had constitutional authority to detain foreign nationals it considered enemy combatants without indictments or trial. According to law scholar and political scientist Otis Stephens, Jr., the Court of Appeals decision in *Al Odah* illustrates "the lengths to which American courts will go to avoid constitutional questions that relate to the president's exercise of war powers."<sup>847</sup>

The case of *Rasul v. Bush* centered on the question whether enemy combatants at Guantanamo Bay could petition federal courts in the United States for habeas corpus. The petitioners, two Australians and twelve Kuwaitis, challenged the legality of their detention at the District Court of Columbia, arguing that they had never fought against the United States or engaged themselves in any terrorist acts. They pointed to the fact that they had never been charged for any crime, permitted counsel, or been granted access to a court or tribunal. The Supreme Court dismissed the Court of Appeals decision that aliens detained outside the United States may not invoke habeas corpus at American federal courts. Justice Stevens delivered the six-to-three majority opinion, in which he argued that a prisoner's presence within the geographical jurisdiction of the court is not "an invariable prerequisite." Moreover, he pointed out that the scope of the writ of habeas corpus had been broadened throughout legal history. Justice Scalia, dissenting, had little difficulty in pointing out the weak points in this justification, as it was up to Congress to change the jurisdiction of district courts, not up to the courts. More noteworthy, however, was Scalia's comment that the majority ruling "has a potentially harmful effect upon the Nation's conduct of war." Scalia undermined the authority of the very organ he represented, by arguing that the executive had reason to *expect* that "the internment of combatants at

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<sup>842</sup> Matheson, *Presidential Constitutionalism*, 128-129.

<sup>843</sup> Stephens, Jr., "Presidential Power...", 76.

<sup>844</sup> Joseph Lelyveld, "The Least Worst Place: Life in Guantánamo", in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 126.

<sup>845</sup> Stone et al. eds., *Constitutional Law*, 395.

<sup>846</sup> Stephens, Jr., "Presidential Power...", 76.

<sup>847</sup> *Idem*, 77-78.

Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.”<sup>848</sup>

*Rasul* was revolutionary in the sense that the habeas corpus statute of the United States Code gained *extraterritorial value* and, hence, petitions of habeas corpus could be submitted by non-citizens outside of the United States.<sup>849</sup> In response to *Rasul*, Congress adopted the Detainee Treatment Act of 2005 (DTA), to eliminate habeas corpus review for Guantanamo detainees and to strip jurisdiction from any court to consider applications of a writ of habeas corpus on behalf of an alien detained at Guantanamo. However, in 2006, the Supreme Court decided in *Hamdam v. Rumsfeld* that the DTA did not apply retroactively to the habeas corpus petition of Guantanamo prisoner Salim Ahmed Hamdam. Moreover, it concluded that the administration’s military commissions did not comply with the Uniform Code of Military Justice (UCMJ) and that the government could not proceed in its detention politics without Congressional authorization. Afterwards, the administration was forced to seek help from Congress, which passed the Military Commissions Act of 2006 (MCA) to allow the administration a legislatively approved program similar to what the Department of Defense had already been doing.<sup>850</sup>

The MCA not only authorized military commission trials, but also eliminated habeas corpus rights in all detainee cases. The U.S. Court of Appeals for the District of Columbia held that the MCA overturned the jurisdictional basis for *Hamdam* and held that the legislation did not constitute a suspension of the writ of habeas corpus. However, in the case of *Boumediene v. Bush*, decided in June 2008, an again sharply divided Supreme Court rebuked the government detention program once more. The court held in a five-to-four decision that Guantanamo Bay detainees possessed a constitutional right to habeas corpus and that the MCA’s ban was an unconstitutional suspension of the great writ. In doing so, it ruled that both the executive and legislative branches had violated the Constitution.<sup>851</sup>

Nevertheless, the Supreme Court cases of *Hamdi*, *Padilla*, *Rasul* and *Hamdam* did not constitute a clear victory for the protection of the rights of Guantanamo prisoners under national law. The decisions did not decide any clear process of detention concurrent to the Geneva Conventions on human rights. The Court adopted a cautious approach in reviewing executive detention, in an attempt to accommodate the benefits and dangers of executive power in wartime, rather than strictly condemning the administration’s custom to bypass judicial review.<sup>852</sup> The *Boumediene* decision represented an unusual objection to bilateral political branch agreement and a strong affirmation of the purpose of promoting individual liberty inherent to the separation of powers. The Court’s narrow majority maintained that the administration had severely manipulated the separation of powers to bypass judicial review. In doing so, the Supreme Court blocked the strategy of the Bush administration to place Guantanamo Bay outside of the realm of U.S. Court jurisdiction.<sup>853</sup>

The entire chain of events that developed from the Military Order of November 13, 2001, reveals much about the intent of the Bush administration after 9/11. President Bush authorized military tribunals for trials, conducted them in secret, sanctioned the detention of suspected terrorists for indefinite periods, denied terrorism suspects access to lawyers and reduced the rules concerning interrogations.<sup>854</sup> In cases regarding both citizens and aliens the government explicitly sought to deny judicial review over the grounds by which individuals were detained indefinitely.<sup>855</sup> The executive operated without legislative or constitutional basis, until its detention powers were restrained by the Supreme Court in 2004. Bush was reluctant even to follow a bilateral executive-

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<sup>848</sup> Gill and van Sliedregt, “Guantanamo Bay,” 23.

<sup>849</sup> *Idem.*, 27

<sup>850</sup> Matheson, *Presidential Constitutionalism*, 131-132.

<sup>851</sup> *Idem.*, 141-142.

<sup>852</sup> Gill and van Sliedregt, “Guantanamo Bay,” 36.

<sup>853</sup> Matheson, *Presidential Constitutionalism*, 144-145.

<sup>854</sup> Crotty, “Conclusion,” 212.

<sup>855</sup> Heymann, *Terrorism, Freedom, and Security*, 91.

legislative course in its counter-terrorism detention policies, despite Congress' agreeable position towards anti-terrorism measures in the wake of the terrorist attacks, as evidenced by the quick passing of the PATRIOT Act. Such handling reveals that the pursuit of executive sovereignty in dealing with terrorist suspects was the primary goal of the administration. Until the Supreme Court dismissed his claims "extralegal, unilateral action was again the President's modus operandi – not executive constitutionalism."<sup>856</sup>

### *Due Process: Torture*

Related to the suspension of due process rights regarding enemy combatants was the increasing use of harsh interrogation techniques by the administration in order to collect intelligence from terrorist suspects. In doing so, the administration stepped over boundaries set by the Eighth Amendment of the Constitution inhibiting "cruel or unusual punishment" and Fifth Amendment guarantees of due process. Furthermore, the Uniform Code of Military Justice made "cruelty toward, or oppression or maltreatment of any person subject to this orders" a court-martial offense. The administration's most extreme defense of torture was put forward by the "Torture Memo" of the Office of Legal Counsel (OLC) of the Department of Justice to White House Counsel Alberto Gonzales. This memo provided the legal basis for a comprehensive interrogation program of the Central Intelligence Agency (CIA). The memo concluded that the President was allowed to order torture and cruel, inhuman or degrading treatment of human beings in violation of statutes that prohibited such actions.<sup>857</sup>

Even though President Bush restrained from officially using the authority to allow for torture, many incidents of torture and abuse in Afghanistan, Iraq and Guantanamo occurred during the first years War on Terrorism. The prevalence of torture can be attributed to the administration's broad view of executive power, the failure of military leadership to investigate abuses and of course the memo to remove restrictions on harsh interrogation techniques. Moreover, the Bush administration went out of its way to shield the CIA interrogation program from investigations.<sup>858</sup> In late 2007, it was revealed that the CIA had destroyed hundreds of hours of video of harsh interrogation techniques applied in 2002.<sup>859</sup> The prohibition on torturing terrorism suspects was vindicated in 2005, when Senator John McCain, himself a victim of torture at the hands of the Vietcong, despite administration objections, put forward an amendment to the DTA. The McCain Amendment required Department of Defense personnel to comply with the U.S. Army Field Manual in their interrogations and prohibited the government from using cruel, inhuman, or degrading treatment against any person in the custody of the United States. The new Attorney General, Michael Mukasey, disapproved of the Torture Memo, but declined to say whether waterboarding constituted torture, to protect CIA officers who had used the technique. In May 2008, the Justice Department released a review of FBI involvement in detainee interrogations in Guantanamo, Afghanistan and Iraq. In their reports, FBI agents stated that they had witnessed and reported abusive CIA and military interrogation techniques.<sup>860</sup>

The Bush administration had again acted unilaterally, covertly and extra-constitutionally to apply the Torture Memo. Until the memo was publicly disclosed in 2004, the administration ignored earlier Supreme Court rulings against the abuse of presidential power and was indifferent to the rule of law by disregarding anti-torture statutes. The administration afterwards retreated from the aggressive posture of the Torture Memo to scaled-back position on the use of torture techniques. Still, the administration maintained that legal bans on "cruel, inhuman or degrading treatment" did not apply to the CIA as they did to the military. Not until 2008, when CIA

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<sup>856</sup> Matheson, *Presidential Constitutionalism*, 148.

<sup>857</sup> *Idem*, 90-91.

<sup>858</sup> *Idem*, 95-96.

<sup>859</sup> Mark Mazzetti, "CIA Destroyed 2 Tapes Showing Interrogations," *New York Times*, December 7, 2007.

<sup>860</sup> Matheson, *Presidential Constitutionalism*, 94, 97-98.

director Michael Hayden's testified in Congress, did the administration acknowledge that the CIA, with executive approval, had used waterboarding on at least three al-Qaeda detainees.<sup>861</sup>

### *Racial Profiling*

A final civil liberties consideration that surfaced in a new form after September 11, concerns the use of racial profiling and the Fourteenth Amendment's equal protection clause. After the terrorist attacks, backlash against Arab Americans raised concerns of racism and anti-Muslim violence.<sup>862</sup> President Bush did, to his credit, break with history by warning against public outbursts against Muslim Americans, as opposed to Wilson's rhetoric about German-Americans or Roosevelt's treatment of Japanese-Americans.<sup>863</sup> Six days after the tragedy, the President visited the Islamic Center of Washington D.C., declaring that "the face of terror is not the true face of Islam," and that "Islam is peace."<sup>864</sup>

Nevertheless, suspicion of Arab Americans was incorporated into the justice system and gave the issue of racial profiling a new face as a "necessary evil" to prevent future terrorist attacks.<sup>865</sup> Several developments show the increased role of racial and ethnic targeting post 9/11. The Immigration and Naturalization Service adopted a special program to require male nationals of about twenty-five countries to be photographed, fingerprinted, and interviewed under oath. Every designated country was Arab or Muslim, except North Korea. Also, visa and border patrol practices were revised to allow for extensive interviewing and fingerprinting of applicants from suspect countries. First Amendment rights of Muslim Americans were also violated by a number of government actions. The months following 9/11 witnessed a program by which thousands of Arab and Muslim Americans were interviewed or interrogated based on their nationality or religion. In addition, the Treasury Department has investigated charities in the Muslim community, based on undisclosed evidence. The FBI was directed to investigate mosques across the country to help assess areas of vulnerability.<sup>866</sup>

Racial profiling has developed as a form of "rational discrimination": racial discrimination with a nonracist rationale. For many Americans, the lack of racial profiling in, for example, airport security, removes the one identifiable fact counter terrorist efforts have.<sup>867</sup> Racial profiling, however, is a measure that generalizes danger on the basis of nationality, religion or ethnic classifications and thus leads to a form of officially condoned inequality. Every member of the profiled class will be made to feel less than equal, and as that message transfers to other American citizens, encourages private forms of discrimination.<sup>868</sup> Civil Rights scholar Christopher Edley, Jr. identifies several reasons why the use of racial profiling is misguided. He, for example, points out that the factual premises are sometimes incorrect and that racial profiling is ineffective. Edley also mentions that racial profiling has systemic consequences, such as the backlash described above, and that law enforcement officers may adopt the stereotypes influencing their judgment in other areas. Finally, even if the systemic effects are negligible and when it is effective, the imposition of injustice will often prove unacceptable.<sup>869</sup>

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<sup>861</sup> Idem, 105-108.

<sup>862</sup> Susan J. Tabrizi, "At What Price? Security, Civil Liberties, and Public Opinion in the Age of Terrorism," in Cohen and Wells eds., *American National Security...*, 76.

<sup>863</sup> Stone, *Perilous Times*, 551.

<sup>864</sup> Patrick Allitt, *Religion in America Since 1945: A History*, (New York/Chichester: Columbia University Press, 2003), 257.

<sup>865</sup> Tabrizi, "At What Price?", 76.

<sup>866</sup> Christopher Edley, Jr., "The New American Dilemma: Racial Profiling Post -9/11," in Leone and Anrig, Jr. eds., *The War on Our Freedoms*, 126.

<sup>867</sup> Michael Kinsley, "Discrimination We're Afraid to Be Against," in Etzioni and Marsh eds., *Rights vs. Public Society*, 53-55.

<sup>868</sup> Heymann, *Terrorism, Freedom and Security*, 98-100.

<sup>869</sup> Edley, Jr., "The New American Dilemma," 176-178.

Despite these considerations, many Americans, at times of national emergency, seem to hold that racial profiling is required to combat terrorism. Although large majorities did not approve of racial profiling in the past, over two-thirds of those questioned in a survey executed directly after 9/11 supported apprehending people that fit the racial profile of a suspected terrorist. A year later, over sixty percent of Americans still felt the same way. Other polls showed that a majority of Americans favored stricter security checks for Arabs, while half approved of obligatory identification cards for Arabs.<sup>870</sup> Sixty-seven percent of those questioned supported the government plan to question thousands of Middle-Eastern immigrants. Nevertheless, other elements of racial profiling appeared to go too far for many Americans. A majority said that to routinely question Middle Eastern men, who legally reside in the United States and were not suspected of any crime, violated their rights. Three in four Americans, in the same survey, answered that investigating religious groups without evidence violated their freedom of religion. Thus, in the aftermath of September 11, many Americans felt that security was enough reason to warrant racial profiling, but that this should not be interpreted as a “blank check” for investigating innocent people.<sup>871</sup> Moreover, racial profiling in counter-terrorism may have reflected national security concerns of many Americans, but also led to antiterrorism strategies that imposed prejudiced and irrational burdens on American society. At the same time, disregarding injustice done to ethnically and culturally different people, who are deemed beyond the realm of civil liberty, may inspire future terrorist attacks.<sup>872</sup>

### *Popular Support*

The main emphasis of this chapter has been on the role of the Bush administration in the restriction of civil liberties in the War on Terrorism. However, as during other periods of national crisis, public support of racial profiling was accompanied by support for many other measures to limit constitutionally protected liberties. Political Scientist Lynn Kuzma shows that, in the initial stages of the War on Terror, large majorities supported the restrictions on freedom of expression, privacy and rights to due process.<sup>873</sup> Such public support for repression was, again, greatly conditioned by the state of anxiety. Gallup Polls reveal that, by mid-2003, about two-thirds of all Americans felt that measures needed to prevent new acts of terrorism should not violate civil liberties. In early 2002, however, almost half had indicated that the government should take all steps necessary, even if civil liberties were violated. On specific topics, Americans more persistently supported violations of civil liberties: throughout 2006 about half of those questioned thought the Bush administration was right in wiretapping conversations between U.S. citizens without warrant. As late as 2006, 48% of all Americans believed that defendants in terrorism cases should be convicted on evidence never shown to them, while 43% approved of a federal government program to create a database of billions of telephone numbers by confiscating telephone company records.<sup>874</sup>

Reflecting earlier tendencies to support anti-Communist or anti-alien repression, one of the main reasons for such public support is the fact that many of the measures taken by the administration only influenced the liberty of a small, often isolated, portion of the population. Heymann argues that the detention policy changes were “tolerable to Americans only because it is implicitly and seemingly reliably limited to discrete groups to which most do not belong.”<sup>875</sup> Likewise, Kuzma concludes that “Americans are highly supportive of democratic principles in the abstract, but they become very intolerant when asked to make judgments concerning policies

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<sup>870</sup> Kuzma, “Security versus Liberty,” 179-180.

<sup>871</sup> Tabrizi, “At What Price?”, in Cohen and Wells eds., *American National Security...*, 76-77.

<sup>872</sup> Edley, Jr., “The New American Dilemma,” 191.

<sup>873</sup> Kuzma, “Security versus Liberty,” 172-183.

<sup>874</sup> “Civil Liberties”, GALLUP, <http://www.gallup.com/poll/5263/Civil-Liberties.aspx>, accessed 11-11-2009.

<sup>875</sup> Heymann, *Terrorism, Freedom and Security*, 98-100.

about threatening situations or noxious groups.<sup>876</sup> Still, even though, in the aftermath of 9/11, public opinion was favorable to the prevalence of security measures over civil liberty concerns, this was in part due to the fact that public opinion was deliberately manipulated by the administration through policies of fear in order to create political support for their policies.

## Conclusion: Concept Wars, Liberty and Security

In summary, American society after 9/11 witnessed a conscious effort of the government to promote executive power and to restrict individual and constitutional hindrances to that expansion. To a large extent, especially in the immediate aftermath of the terrorist attacks, this effort received much public backing. As the War on Terrorism developed, however, the measures undertaken by the Bush administration went far beyond the promotion of national security and formed a serious challenge to essential freedoms, such as First Amendment rights of free press, association and expression, Fourth Amendment rights of privacy and Fifth Amendment Rights of Due Process. Moreover, the administration attempted to change the separation of powers into the executive, legislative and judicial branch, as proscribed by the Constitution. In many ways, the events resembled earlier restrictions of freedom in times of war, but there also existed important differences. To a large extent, these differences stem from the invocation of a perpetual “war” to further the administration’s goals.

Anthony Lewis points out that “the war on terrorism is being waged against a hidden enemy who is not going to surrender in a ceremony aboard the U.S.S. *Missouri*.” As there is no way to predict when this war will end, the fear of terrorism may continue to confound constitutional values, without “breathing space to understand regret punitive excesses.”<sup>877</sup> In many ways, the terminology of the “war on terrorism” proved useful to the administration. First of all, as we have seen, it allowed the president to claim warlike powers in matters of surveillance, detention, suspension of habeas corpus, and even torture. The government also used the “novelty” of the War on Terrorism to legitimize its suspension of due process. Assistant attorney general for legal policy, Viet Dinh, for example, uses it to legitimize Bush’s interpretation of the two functions of the president as chief law enforcement officer and military commander in chief:

*“In traditional wars (...) the division between the two functions was clear. This time you have a confluence, by al-Qaeda’s choosing, where both hats come into play. An enemy activity may be both a violation of the laws of war and of domestic law. The president may choose to deal with it as law enforcement officer or commander in chief. The decision is his, and the commander in chief has a significant function even in the United States, because al-Qaeda has made the U.S. a target.”*<sup>878</sup>

According to the administration, the president can thus, at his choosing switch “hats”, to detain American citizens without trial as the commander in chief, or to designate foreign nationals captured abroad as “enemy combatants” with his law enforcement “hat”, thus bypassing international conventions on the human rights of prisoners of war. Likewise, neoconservative lawyer Bork claims that although “America has, in the past, overreacted to perceived security threats,” the War on Terror, “like no other we have ever faced, may last for decades rather than years,” while “the enemy blends into our population,” capable of murdering “hundreds of thousands of Americans in a single attack”. These factors, according to Bork, justify “what the administration has already done, and urgently require more.”<sup>879</sup>

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<sup>876</sup> Kuzma, “Security versus Liberty,” in: Crotty ed., *The Politics of Terror*, 181.

<sup>877</sup> Lewis, “Security and Liberty,” 52-53.

<sup>878</sup> Quoted in Lewis, “Security and Liberty,” 65

<sup>879</sup> Bork, “Civil Liberties after 9/11,” 35.

President Bush wasted little time in declaring a war on terrorism and persuaded congress to support him. His declaration, however, was everything but a formal declaration of war, as "Terrorism is a tactic, not a state against which war may be declared. In that sense, the war on terrorism is the same as the war on drugs or poverty – a metaphor rather than a legal process or description of the relationship between nations."<sup>880</sup> Following the same logic, humanities scholar David Bewley-Taylor points out that "the nature of a concept war ... generates broader repercussions that pose a long-term threat to civil liberties." The lack of closure of a concept war, like the war on drugs, leads to "escalation in the quest for an unobtainable total victory," and "the same is true for a policy on terrorism."<sup>881</sup> Former Deputy Attorney General Philip Heymann argues that in the long term, "war on terrorism is the wrong theme" and "reliance on the military is the wrong set of priority activities."<sup>882</sup> The empowerment of the executive at the expense of the legislature and the judiciary and the disregard for civil liberties in a perpetual conflict would change American democracy fundamentally.<sup>883</sup> A more quiet campaign against al Qaeda based on a model regarding terrorism as a crime, would almost certainly have been more successful and less damaging.<sup>884</sup> Heymann further contends that the definition of fighting terrorism as "war" makes it harder to reflect the complexity of the terrorist threat in the goals and strategy of the United States.<sup>885</sup> The escalation of the War on Terrorism into a worldwide "World War IV," including the unrelated invasion of Iraq ultimately *reduces* the security of the nation may, instead of enhancing it. The Bush administration's mismanaged "War on Terrorism" may thus indeed have brought the worst of both worlds. On the one hand, it featured immense executive abuse and severe restrictions of civil liberties, on the other, American security vis-à-vis terrorism diminished as a consequence of increased anti-Americanism abroad, a less informed public society at home and the failure to eliminate the threat of al-Qaeda.<sup>886</sup>

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<sup>880</sup> Cloud, "The Fog of War," 263.

<sup>881</sup> David R. Bewley-Taylor, "Watch This Space: Civil Liberties, Concept Wars and the Future of the Urban Fortress," *Journal of American Studies*, 40 (2006), 254.

<sup>882</sup> Heymann, *Terrorism, Freedom and Security*, 17.

<sup>883</sup> *Idem*, 18.

<sup>884</sup> Ivan Eland, "Bush's Wars and the State of Civil Liberties," *Mediterranean Quarterly* 14:4 (2003), 170.

<sup>885</sup> Heymann, *Terrorism, Freedom and Security*, 23-28.

<sup>886</sup> Halper and Clarke, *America Alone*, 273-294; Clarke, *Against All Enemies*, 247-287.

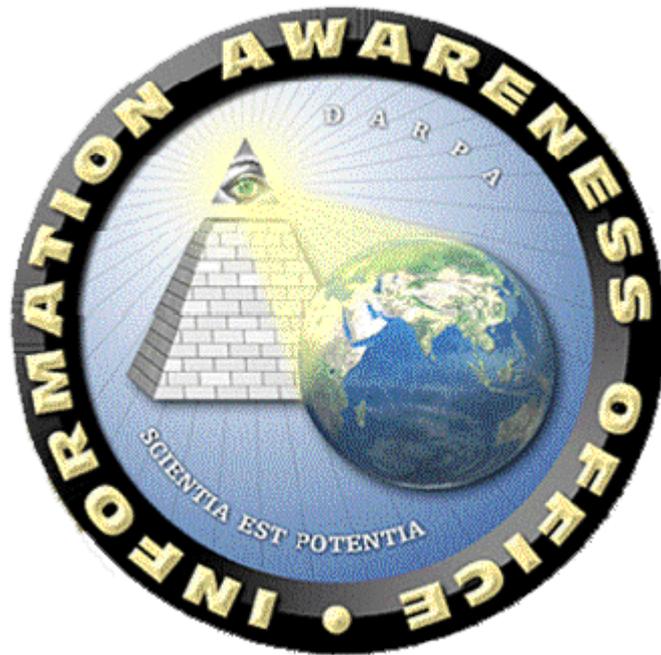


*President George W. Bush (center, holding bullhorn) rallies the nation at Ground Zero, New York City, September 14, 2001.*

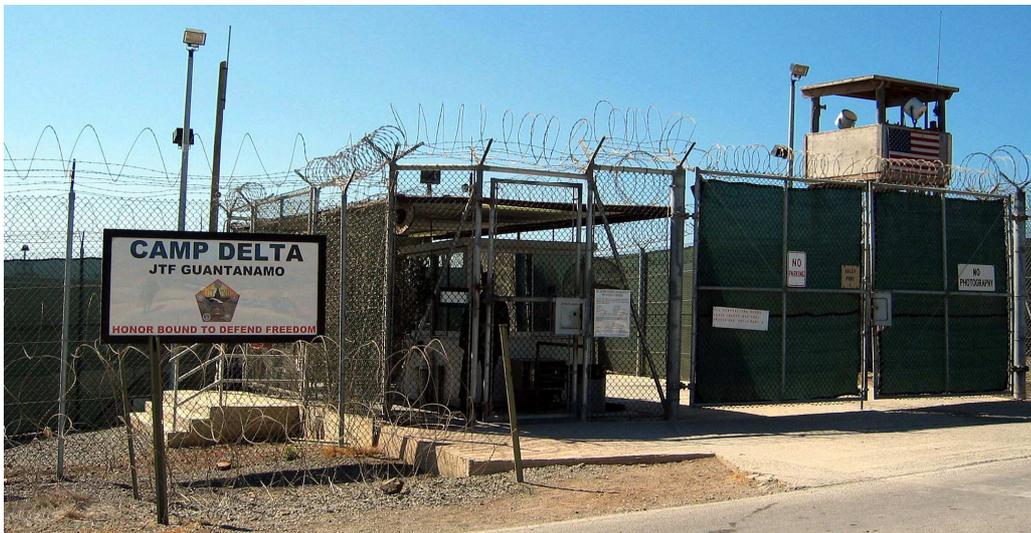


JOHN ASHCROFT'S WAR ON TERRORISTS

*Although the immediate aftermath of 9/11 saw little discussion regarding civil liberties and the “War on Terrorism”, many critics eventually began to question the increased surveillance powers of the government, as through this cartoon by Don Wright.*



*The most comprehensive government program of surveillance, the Total Information Awareness Office, drew an immense amount of criticism from citizens and politicians alike. The ominously looking official logo may have fueled such criticism.*



*The controversial prison camp at Guantanamo Bay, Cuba was used by the Bush administration to hold alien suspects designated as “enemy combatants” to deny them many rights of due process of law.*

## Conclusion

The four periods discussed in this thesis together form a thorough account of the fate of civil liberties in America at times of national emergency throughout the twentieth century. From the many instances of personal injustice, government abuse and public demands for repression emerges a general trend to accept or even encourage restrictions on personal freedoms at times of national emergency. The examples put forward in this study support the contention that the federal government initiated the repression of dissent in wartime. Throughout the four periods discussed in this study, the executive attempted to stifle criticism and ease criminal proceedings, often framing such attempts as measures of national security. At times it exploited public fears and a sense of crisis to stimulate calls for repression. As such, its measures often enjoyed wide public backing, especially when they were aimed at unpopular, foreign or minority groups and ideas. Therefore, as argued by scholars such as Geoffrey Stone, government policies that infringed upon civil liberties were accompanied by public fears. However, what Richard Hofstadter called the “paranoid style” in American politics, was not a reaction to public pressure, but instead a conscious effort orchestrated from above. The various similarities between the four periods that demonstrate these contentions will be discussed in this concluding chapter. First, however, the most important differences between the four periods will be examined.

### Differences

#### *Free Speech*

The differences are, in fact, few. One of the main differences in the relationship between civil liberties and national security during the four periods is the *why* by which freedom of expression was restricted and *who* was targeted by the repression of speech. During both the Great Red Scare and the McCarthy era communists and other leftwing radicals became the main victim of repression. However, during the Red Scare the main burden fell onto a relatively small group of immigrants from Eastern Europe, while the Cold War loyalty oath mania affected the lives of many everyday Americans. During both periods, dangerous groups were persecuted for their beliefs through legislation created specifically for that purpose, being the Espionage Act and Sedition Act during World War I, and the Smith Act enacted at the dawn of World War II. In contrast, during the War on Terror, the government largely refrained from officially repressing freedom of association or speech. The increased surveillance regulations of the PATRIOT Act damaged First Amendment rights by reducing the sphere of private and public discussion, but the administration never set out to *specifically* restrict freedom of speech. In this aspect, the latest period of national crisis witnessed a much greater respect for First Amendment rights, at least by the government. The Bush administration did not overtly persecute Americans for their ideas, even though it vigorously sought for new ways to detain suspects accused of being “terrorists”. In contrast, the Palmer Raids, the prosecution of fascists during World War II, and the loyalty review programs of the Cold War, were based on suspicions of “adverse” political beliefs alone. In a sense, the doctrine of guilt by association reached its height during the McCarthy era, when it was used to incriminate suspect Americans of every rank and file, but clearly diminished afterwards.

#### *Vigilantism*

Another discontinuity in the history of American civil liberties at times of crisis concerns vigilantism and outbursts of popular fury. During World War I and its aftermath, vigilantism ran

rampart throughout the states and was publicly condoned by local and federal authorities. The victims of this violence were denied their rights of due process in the cruelest way imaginable, while the perpetrators faced little to no prosecution. Observing later periods of national emergency, the American government apparently learned from the dangers of such lawlessness. During both World War II and the War on Terror, when the people who were suddenly considered to be the “enemy” were easily identifiable among the American people, outbursts of vigilantism were kept to a minimum. The government in both cases strictly condemned vigilante action or public violence aimed at perceived enemies of the United States. Thus WW II witnessed limited anti-Asian vigilantism, while the War on Terror saw little public violence against Muslim or Arab Americans.

## Similarities

### *Dual Reinforcement*

The similarities between the four periods nonetheless far outweigh the differences. One of the clearest continuities regarding the fate of civil liberties in wartime has been the dual reinforcement of “top-down” government repression and “bottom-up” public support. On the one hand, wartime administrations have taken measures to repress dissent and to make prosecution of radical agitators and subversives easier, while, on the other hand, the American public, at large, has welcomed such measures when they were framed as to increase the security of the society as a whole. This study thus strengthens the argument of scholars such as Geoffrey Stone, who point to *both* public demands for repression of dissent, and government initiatives to enhance security at the cost of civil liberties. Government programs and public fury together produced repressive policies. For example, during the Cold War, “national leaders cynically exploited public fears for partisan political gain.” During WW I, the Wilson administration “fomented public hysteria in an effort to unite the nation in common cause,” while during World War II Attorney General Francis Biddle caved in to public and presidential “demands for the repression of ‘disloyal’ individuals.”<sup>887</sup> Thus, in the words of political scientist Jerel Rosati, “under conditions of war, American civil liberties and political participation are often curtailed and violated in a systematic way by the government, usually with the active support of groups and people throughout society.”<sup>888</sup>

Public support of political repression was especially high when it seemed to concern only “terrorists”, “socialists”, “communists”, or “fascists”; that is, those groups that maintained views or associations outside of the realm of what was “acceptable”. When Congressional or government forces pushed for broader measures, which would affect mainstream Americans, backlash followed, as is evidenced by the outcome of the Army-McCarthy hearings and the short duration of the Total Information Awareness project. Still, as long as the repression was justified to only affect “criminals”, many Americans were quite willing to give in to sweeping restrictions of their privacy, freedom of expression and rights of due process.

In effect, the compliance on account of the people to the policies of repression was in the first place framed by the emergency status and sense of crisis that accompanied it and waned when the threat to the national security lessened. Many examples from the periods discussed in this thesis stress the recurrence of this effect. When the strikes and anarchist bombings ended in the spring of 1920, Attorney General Palmer’s support eroded; people became increasingly concerned about the rights of Japanese American citizens when the memory of Pearl Harbor blurred; the anti-communist witch-hunt was bolstered by the Korean War; and the immediate aftermath of “9/11” saw a climate of virtual no discussion on the topic of civil liberties.

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<sup>887</sup> Stone, *Perilous Times*, 13.

<sup>888</sup> Jerel A. Rosati, “At Odds with One Another,” 11.

Repressive policies were thus either accepted or rejected by the American public based on who was targeted and on the emergency status. However, whether the public opposed or welcomed government policies, in the first place it *reacted* to government initiatives. Through this conclusion, earlier theories to explain repression by mass paranoia or hysteria are thus refuted. The approach in American historical writing that emphasizes mass psychic strains and popular feelings of resent still holds some value in explaining public support for measures of repression, but fails to account for the interests of the government and other parties in pursuing such a policy.

The executive government, when it was, at times of crisis, presented with such a “window of opportunity”, consciously utilized the situation for maximum profit. The examples brought forward in this study endorse the contention of historian Justin Goldstein that “severe political repression will not occur without the clear tolerance or active encouragement of the president.”<sup>889</sup> Time and again, wartime administrations used public fears and popular resent to implement comprehensive policies of repression. Furthermore, in most cases it did not *react* to public demands of conformity and increased security measures, but effectively outpaced such demands in its efforts to enhance the powers of the executive. During the First World War, the Wilson administration went out of its way to form wartime coherence and strictly repressed voices of dissent, often allowing for, rather than overcoming, acts of vigilantism. During the Second World War, President Roosevelt took the initiative against any voices of dissent by prosecuting “American fascists”, by declaring martial law in Hawaii, and by forcing the press into submission. Several years later, his successor, President Truman, firmly established domestic communism as a political issue by implementing the Federal Loyalty Program and later used the Smith Act to prosecute the American Communist Party. Subsequently Senator McCarthy enjoyed wide popular backing, but the issue he exploited was, in the first place, created by the government and the House Un-American Activities Committee, who had legitimized political repression at the hands of red-hunters. Finally, in the context of the War on Terrorism, the Bush administration took unprecedented steps to increase government powers of surveillance and detention, and to limit judicial interference in the few months following the terrorist attacks. These measures were not proposed or demanded by an assertive Congress acting on behalf of the people. Instead they constituted a conscious and autonomous executive effort to repress criticism, shift the balance of powers between the branches of government and create support for measures unrelated to the immediate national security of the United States.

### *Secondary Interests*

The promotion of interests not directly related to the national security accounts for another continuity throughout the four periods of national emergency. During each of these periods, the government took measures that were framed as augmenting the national security or war effort, which, in fact, fulfilled completely disparate interests and policy goals. In the words of Alan Brinkley, wartime governments “pursue preexisting agendas in the name of national security.”<sup>890</sup> Wilson set the example on the grandest of scenes: he first emphasized the loyalty issue to win support for joining the war and then used inflated anti-radical and anti-alien sentiments to sell his Versailles Treaty and League of Nations proposals. Similarly, Attorney General Palmer’s harsh actions against radical and socialist immigrants were part of his opportunistic attempts to secure the presidential nomination of his party and ascend as the nation’s leader while his president lay ill. The decision by President Roosevelt and Secretary of War Stimson to relocate all Japanese Americans in 1942, probably represents the clearest case of wartime measures, designed as measures of national security, that represent wholly different interests and goals. The decision

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<sup>889</sup> Goldstein, *Political Repression*, 562.

<sup>890</sup> Alan Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” in Leone and Anrig Jr. eds., *The War on Our Freedoms*, 45.

accounted, in the first place, for the economic interests of white American farmers in California and was based on racial conceptions of loyalty. There existed little to no grounds to believe that Japan either was planning to invade the American mainland, using Americans of Japanese origin as spies, or that Japanese Americans, as a group, were in any way inclined to commit any acts of subversion or espionage.

As during World War I, the early Cold War witnessed a thorough entanglement of foreign and domestic policy. As Truman used ideological language and pointed to the dangers of Soviet aggression, in order to sell his foreign policy, he fed congressional anti-communist forces at home. To regain political initiative, the administration reproduced its anti-communist foreign policy at home with the Federal Loyalty Program. Political strife, which had little to do with the national security, eventually resulted in the repression of many Americans for their beliefs and associations. Similarly, in the War on Terror, foreign and domestic policy goals were mixed up and security concerns were emphasized to pursue quite disparate goals. The war on Iraq forms the prime example of how the issue of terrorism was manipulated to engage America into a wholly different international conflict. Likewise, the increased surveillance and government secrecy brought on by the PATRIOT Act and several executive programs, hardly helped to combat Al-Qaeda. Instead, it allowed the government to avoid criticism of its policies and to limit judicial control over all criminal prosecutions.

### *The Bureaucratic Heart*

Another constant throughout America's history of crises involves the means by which the government enforced its policies of surveillance and political repression. To increase surveillance and accumulate intelligence it depended on powerful federal bureaucracies, whose capacities it enhanced to meet these ends. Most notably, it used the Federal Bureau of Investigation (FBI) to spy on American citizens and resident aliens, to incriminate certain groups, which it *believed* to be dangerous to the national security, and to suppress critical members of the press. The FBI, established as the Bureau of Investigation during the First World War, became an indispensable instrument of repression during the Red Scare, the Second World War and the Cold War. Although its wings were clipped in the nineteen-seventies, the Bush administration sought to enhance its powers once again to combat terrorism post 9/11. Most controversially, organizations of political surveillance, such as the FBI, developed into a serious threat to the system of checks and balances, essential to a democratic political system. Throughout the twentieth century, such organizations repressed the rights of American civilians to further their bureaucratic and ideological interests. The FBI was established as an auxiliary to the Justice Department, as a neutral and impartial organ to help the government in conducting its policies. However, from the onset, its agents were ideologically opposed to radical ideas and feared ideological subversion. Accordingly, the FBI often harassed legitimate and peaceful critics of the government. Moreover, its actions were characterized by the drive to prove its essentiality in times of war and peace alike. It has thus had a major interest to exaggerate "threats" to the national security and to uphold a sense of imminent crisis, as to confirm its "raison d'être". In doing so, the FBI and its zealous bureaucrats aided executive tactics to use fear and a sense of crisis so as to implement comprehensive policies of repression.

### *Bipartisan Support*

A final continuity in the government impulse towards restrictions of civil liberties is the bipartisan support for such efforts. Both Republicans and Democrats have emphasized national security over individual freedom at times of national emergency. Conservatives and liberals alike have taken measures to repress dissent, stifle criticism and weaken due process guarantees at times of crisis. Especially during World War II and the early Cold War it became painfully clear how liberals in the government, as well as among the press, surrendered their high regard for

individual liberty when the security of the nation seemed threatened. Likewise, “liberal” presidents like Wilson, Roosevelt and Truman all proved quite willing to violate essential liberties of American citizens to consolidate their political power. Republicans, who were, during the nineteen-forties, quite jealous of the Democrats’ dominance over the executive branch, turned the accusation of Democratic treason and softness into their main campaign issue. In doing so they ruthlessly mined the harassment of Americans for their thoughts and associations to gain political profit. Following 9/11, a renewed bipartisan effort secured the enactment of the PATRIOT Act and democrats and republicans alike called for a harsh stance on terrorism and mined surging patriotism for public support. The democrats in congress forfeited their duty to challenge an administration eager to override any civil liberties concerns in its desire to appear strong on terrorism.

### *The Legislative and Judiciary Branches*

These insights lead to questions regarding the role of the other two branches of government. What was the role of Congress and the Supreme Court during these periods of crisis? Did the balance of powers between the three branches of government function to limit government abuse at times of emergency? Not quite. To a large extent, Congress followed a general pattern of submission to the executive government at times of crisis, occasionally demanding *more*, but hardly ever *less* repression. Such demands, often the product of political strife between the legislative and executive branches, crystallized, for example, in the creation of the Sedition Act in 1919 and HUAC’s loyalty oath mania during the early Cold War. In general, though, Congress has been characterized by remaining aloof to the dangers of unchecked executive power in times of war. Many Congressmen proved too fearful to alienate their patriotic, anxious or angry electorate. Therefore they chose not to criticize the administration at times of war, as not to appear un-American, gutless or even as not to appear to be aiding the enemy. Thus Congress passed the PATRIOT Act without studying it thoroughly, approved the executive order to evacuate the Japanese Americans during World War II, and, following the Palmer raids, assailed Louis F. Post, instead of A. Mitchell Palmer.

The third branch of government, the Supreme Court, was less constant in its reaction to executive abuses at times of war and crisis. On the whole, it proved the most consistent barrier to government repression and the greatest safeguard of constitutional rights. It limited the wartime powers of President Roosevelt, protected free speech of fascists and eventually condemned the interment decision on the basis of race; it also ultimately struck down the Smith Act and allowed Guantanamo Bay prisoners to petition for habeas corpus. That being said, it was hardly the most effective organ to prevent violation of civil liberties. First of all, it often dealt with wartime repression long after the crisis situation was over, and often after the accused had been violated in his or her First or Fifth Amendment rights. It also proved less resistant to current events and contemporary crises than its role as supreme arbiter of the constitution would proscribe. Exemplary of such political engagement are its rulings “in times of crisis” in *Schenck v. United States* (1919), upholding the conviction of an antiwar agitator; *Hiyabayashi* (1943), legitimizing the Japanese incarceration; and *Dennis v. United States* (1951) condemning the American Communist Party. After the crisis situation had abided, the Court often reversed its wartime decisions, for example in *Fiske v. Kansas* (1927), and *Yates v. United States* (1957). One of the clearest examples of how wartime pressure and the will to support the war effort affected the Justices of the Supreme Court was Justice Murphy’s side-switching move in *Hartzel* (1944) in which he believed a promoter of Hitler’s cause should be sent to jail, despite his own First Amendment objections to the conviction.

Finally, the justices’ own ideological preferences recurrently influenced the Court’s role as safeguard of the Constitution throughout the Twentieth Century. The recurrence of conflicting voices among the Court itself becomes apparent from the contrasting opinions in the major rulings during the four periods discussed in this thesis. In *Korematsu v. United States* (1944), the

government's internment policy was upheld, but Justice Murphy wrote in his dissenting opinion that the order fell into "the ugly abyss of racism."<sup>891</sup> In *Dennis*, Justices Black and Douglas dissented from the majority opinion that upheld the conviction of the Communist Party leadership by denying the existence of either clear or present danger that would justify such invasion of the rights of free speech. Vice versa, in *Rasul v. Bush* (2004), while the Court decided that the executive abused its wartime powers by detaining what it called "enemy combatants" at Guantanamo Bay, Justice Scalia dissented, commenting that the majority ruling had "a potentially harmful effect upon the Nation's conduct of war."<sup>892</sup>

### *The Executive Battle with Due Process*

Throughout the four periods, many elements of the American political system thus played their roles in a highly similar fashion. Wartime administrations took the initiative to follow preexisting agendas, framed as measures of national security. The people generally applauded such policies. Congress stood by silent, while the Supreme Court restrained the executive's trust, but often proved too ineffective to prevent harm from being done. In addition to these patterns of political operation at times of crisis, the actual repression also generally followed continuities and similarities. The examples put forward in this study strengthen the contention of several modern scholars that all wartime administrations attempted to expand the power of the executive government; "all followed the path to executive supremacy."<sup>893</sup>

The executive's tendency of political repression generally took the form of a struggle against a broad application of due process rights. Due process concerns especially surfaced when the government sought to persecute people for their political beliefs. The administrations' goals to overcome criticism of its security policies and suppress dissent at wartime meant it continuously sought to make political prosecutions easier and to limit judicial oversight. Throughout the four periods, American Presidents and their administrations have attempted to deny counsel, limit court review, violate privacy rights and even neglected to officially charge those whom *they* accused of threatening the nation. The basis for accusation was solely decided by the executive, often allowing the President or Attorney General in question to determine who was to be denied its constitutional rights in the face of danger. During WWI and the Great Red Scare the administration decided what speech formed a "clear and present" danger and decided the organizations of which membership became a deportable offense. During the Second World War, the administration decided that people of Japanese ancestry formed a threat to the national security and had to be put into concentration camps. During the Cold War, the government decided what opinions were deemed acceptable for admission into public service and what kind of speech was considered "disloyal". Finally, during the War on Terror, the administration got to decide which organizations were "terrorist" ones and what people thus had to be detained or spied upon.

Perhaps one of the saddest implications of the wartime preference of national security over civil liberties, inherent to the removal of checks and balances upon government conduct, has been the tradition to aim repression at minority groups at the fringes of American society. As Alan Brinkley contends: wartime administrations "target unpopular or vulnerable groups in the population less because there is clear evidence of danger than because there is little political cost."<sup>894</sup> In this manner, the Wilson administration and the vigilante possess in the Western states repressed and effectively destroyed the unpopular IWW. Attorney General Palmer fueled his career by using the weapon of deportation to arbitrarily throw poor, defenseless and often illiterate immigrants out of the country. Roosevelt ordered the detainment of 110,000 Japanese Americans, many of whom had already suffered a lifetime of racial abuse and resentment. The

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<sup>891</sup> Polenberg, "World War II...", 21.

<sup>892</sup> Gill and van Sliedregt, "Guantanamo Bay," 23.

<sup>893</sup> Matheson Jr., *Presidential Constitutionalism*, 149.

<sup>894</sup> Brinkley, "A Familiar Story," 45-46.

measure was politically safe, despite its clear unconstitutionality, because the people targeted were regarded as being both treacherous and inferior on account of their race. During the Cold War, the government set out to destroy the unpopular American Communist Party, aided by the public perception that Communists were all dishonest, treacherous and bent to destroy American life. Finally, during the War on Terror, the Bush administration incorporated techniques of racial profiling, aimed at a miniscule minority, in many security measures, and implemented the use of torture against suspects designated to be terrorists.

### A Sad Legacy

Many similarities thus exist in the relation between national security and civil liberties during the four periods discussed in this thesis. These four periods together form a comprehensive overview of America's wartime experiences since the beginning of the twentieth century. The tradition to regard civil liberties as secondary to the national security that emerges from the many examples put forward in this study is primarily caused by the assertive executive government. The federal government, aided by its powerful bureaucracies, instigated the repression of dissent and attempted to limit rights of due process of law and judicial oversight. In doing so, the executive power has time and time again abused its increased wartime authorities to pursue policies related or unrelated to the immediate security of the United States. However, it was hardly alone in its preference of coherence and security over individual liberty. Its actions often enjoyed wide public support as long as they seemingly enforced the security of mainstream American society, and especially when they dealt with unpopular ideas or people. Nevertheless, public demands for the repression of alien ideas, although important to the *success* of repressive policies, did not *cause* the prevalence of security concerns over civil liberties.

Finally, as measures of political repression helped to uphold the status quo, many voices of reaction among Congress, the bureaucracy and the media supported them. Moreover, the climate of political repression stifled harmless criticism and forced legitimate forms of dissent into hiding. In doing so, American society has been damaged severely in two different ways. In the first place, people have been repressed for their political ideas and have been denied democratic legal proceedings in a fashion eerily remindful of the oppressive regimes America battled in its many wars. Secondly, the exaggerated concern to overcome dissent and stand united in the face of danger, *no matter what*, has seriously hampered many initiatives of social and economic change. It has helped delay the process towards racial equality and thus far helped to prevent any serious attempt to overcome the immense social and economic disparities of American society. That, perhaps, remains the saddest legacy of the historical preference of national security over civil liberty.

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## Appendix A: The Bill of Rights

### *Amendment I:*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### *Amendment II:*

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### *Amendment III:*

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### *Amendment IV:*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

### *Amendment V:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### *Amendment VI:*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### *Amendment VII:*

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### *Amendment VIII:*

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*Amendment IX:*

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*Amendment X:*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## Appendix B: The Fourteenth Amendment

### *Section 1.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### *Section 2.*

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

### *Section 3.*

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

### *Section 4.*

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

### *Section 5.*

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.