

## BOOK REVIEW

### Of Speech, Politics, and Circular History

PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM. By Geoffrey R. Stone. New York: W.W. Norton & Co., 2004. Pp. xx, 730. \$35.00.

Reviewed by Michael J. Kelly\*

Geoffrey Stone's most recent contribution to our understanding of the First Amendment is at once important, current, and fatalistic. It is important in that it meticulously chronicles the ways in which wartime American governments have trampled free speech rights. For instance, when dealing with the Sedition Act of 1798, Stone deftly introduces the complicated politics and personalities of the time, explaining the developing system of political parties, the expanding feud between John Adams (leading the Federalists) and Thomas Jefferson (leading the Republicans), and the myriad influences on the young United States generated by the French Revolution and the associated war between England and France.<sup>1</sup>

Overreaction ensued, and President Adams and the Federalist Congress outlawed public dissent against them. Section 2 of the Sedition Act declared:

That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the

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1. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 16-44 (2004).

constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.<sup>2</sup>

Stone reminds us how, with this act, the Federalist government “declared war on dissent.”<sup>3</sup> Enforcement of the Sedition Act was energetically pursued against Republicans and Republican-leaning publications. It was a strategy “aimed directly at the presidential election of 1800.”<sup>4</sup> About twenty-five Republicans were arrested, and all ten who went to trial were convicted.<sup>5</sup> The Federalist prosecutions aimed at hostile newspapers resulted in the closure of two Republican journals and the suspension of several others because their editors were in jail.<sup>6</sup> Secretary of State Timothy Pickering was the Administration’s principal instrument in what Jefferson termed “the reign of the witches.”<sup>7</sup>

Although its historical materials are rich, Stone’s book is also current. It draws lessons that are particularly applicable to the present plight of America’s journalists and political dissenters under the aggressive policies pursued by the Bush administration in the War on Terrorism. With passage of the USA PATRIOT Act six weeks after the catastrophic and harrowing September 11 terrorist attacks on the United States, Attorney General John Ashcroft began sweeping reforms of the FBI’s internal intelligence gathering and sharing powers, increasing the risk of intimidation. Although Ashcroft, as the federal government’s enforcement chief after 9/11, did not use the USA PATRIOT Act to mount politically motivated criminal prosecutions the way Pickering did under the 1798 Sedition Act, he was willing to paint political dissenters as disloyal and traitorous.<sup>8</sup>

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2. An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States,” ch. 74, 1 Stat. 596, 596-597 (1798). By its own terms, the statute expired on March 3, 1801, the final day of the Federalist administration. *Id.* §4; *see* Stone, *supra* note 1, at 71.

3. STONE, *supra* note 1, at 36.

4. *Id.* at 48.

5. *Id.* at 63.

6. *Id.* at 48.

7. *Id.* at 46.

8. *See id.* at 44-64 (Sedition Act), 550-557 (War on Terror). In hearings before the Senate Judiciary Committee on the proposed USA PATRIOT Act, Ashcroft admonished: “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. They give

Finally, *Perilous Times* is fatalistic in that Stone gives himself up to the cyclical nature of history – this even after much eloquent recitation of the evolutionary nature of free speech. Stone recognizes that reaction (dissent) has always been met with overreaction (government restrictions) in times of war, only to see the balance restored after the crisis ebbs. In that, Stone agrees with Chief Justice Rehnquist, who made the same claim in his 1998 book *All the Laws But One*.<sup>9</sup> There, Rehnquist persistently argued that in times of war, such civil liberties as free speech must temporarily give way to public order, but that the pendulum always rebalances itself.

While Stone is of the view that most post-war returns to normalcy and free speech protection are hard-fought and not predetermined, Chief Justice Rehnquist's view places an inordinate amount of trust in the government to set things right on its own. The Stone and Rehnquist approaches are also entirely different in tone. Stone is more pessimistic and alarmed, Rehnquist more optimistic and assured. The debate has not been resolved definitively, and may never be, but Stone may be closer to the truth of the current situation. The War on Terror shows no sign of ending soon, and policymakers concede that it could go on for decades. Consequently, Rehnquist's faith in post-crisis restoration may be significantly misplaced, although the same could be said of Stone's hope that we will learn from our past experiences of wartime restrictions on free speech.<sup>10</sup>

As to the architecture of Stone's book, six war periods are covered in six chapters. Stone guides the reader through what he calls the "half war with France" (concentrating on the Sedition Act of 1798), the Civil War, World War I, World War II, the Cold War, and the Vietnam War. Through each period of conflict, Stone effectively describes the players in motion, both on the restrictionist side and the counter-restrictionist side of America's free speech tradition, giving the reader a sense of knowing the combatants and understanding their motivations.

Although Stone is impatient with, and unsympathetic to, those in government – from Presidents and members of Congress to bureaucrats and

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ammunition to America's enemies." *Id.* at 551-552.

9. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998).

10. STONE, *supra* note 1, at 530, 557. At a symposium held at Rutgers Law School-Camden in 2005, Stone said:

Sometimes, this overreaction is due to public fear and hysteria, sometimes to the manipulation of a crisis atmosphere by self-serving public officials, and sometimes to a combination of the two. I conclude that the only way to avoid such excesses in the future is to learn from our experience and to self-consciously create institutional mechanisms and a public culture of civil liberties that will enable us to better withstand the inevitable pressures of wartime.

Geoffrey R. Stone, *Free Speech in Wartime Symposium – Foreword: A Culture of Civil Liberties*, 36 RUTGERS L.J. 825, 825 (2005).

generals – who sought to restrict free speech in wartime, the reader nevertheless comes away with a sense of the urgency that motivated them to act. That impetus could stem from many sources, including preservation of their own power, as in the case of General Burnside’s restriction on “treasonable expressions” after he declared martial law in Ohio in 1863;<sup>11</sup> fear of infiltration, as in the case of Senator McCarthy’s hearings on Communist penetration of the Army;<sup>12</sup> or containment of leaks, as in the case of Nixon administration functionaries (William Mitchell and William Rehnquist among them) attempting to bully *The New York Times* and *The Washington Post* not to publish the state secrets that became known collectively as the “Pentagon Papers.”<sup>13</sup>

All these situations, however, share a common explanatory characteristic – the backdrop of a nation at war, providing the government restrictionists with a handy and popular excuse to undermine the First Amendment. Stone explains:

In each of these episodes, the nation faced extraordinary pressures – and temptations – to suppress dissent. In some of these eras, national leaders cynically exploited public fears for partisan political gain; in some, they fomented public hysteria in an effort to unite the nation in common cause; and in others, they simply caved in to public demands for the repression of “disloyal” individuals. Although each of these episodes presented a unique challenge, in each the United States went too far in sacrificing civil liberties – particularly the freedom of speech.<sup>14</sup>

Given this straightforward chronological structure, *Perilous Times* in less capable hands could easily have slipped into a pedantic recitation of historical events laden with somber invocations of the sanctity of the Bill of Rights. But Stone understands the power of narrative. Short vignettes pepper the pages of *Perilous Times*, and the reader is eager to digest these nuggets of compelling drama while also appreciating the complexity of the arguments made. Consequently, the reading is brisk and accessible. For example, one four-page vignette tells the story of a “little-known state senator from Mt. Vernon, Illinois” named Broyles who introduced legislation in the state assembly in 1949 to prohibit those associated with the Communist Party from holding public office or teaching in colleges or universities.<sup>15</sup> More than 100

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11. STONE, *supra* note 1, at 96-97.

12. *Id.* at 384.

13. *Id.* at 500-516.

14. *Id.* at 13.

15. *Id.* at 423-426.

University of Chicago students traveled to Springfield, the state capital, and protested in the streets, prompting Senator Broyles to hold hearings on the matter. The first witness to appear was the university's president, Robert Maynard Hutchins, who made short work of the suggestion that students who were sympathetic to Communism should be excluded from higher education. If the students were denied instruction, "how would they ever learn better?"<sup>16</sup>

These small storylines effectively convey the vitality of the First Amendment as well as the continuous assault it has come under during the course of the nation's history. And, perhaps amazingly, the accompanying theoretical development does not suffer because of this device. Stone is careful to set the stage for each vignette by discussing new wrinkles in free speech jurisprudence emerging from the courts or legislatures in response to building political or societal pressures. To his credit, he avoids getting bogged down in excessive discussion of Supreme Court cases. Many of the challenges to free speech during wartime that Stone explores arose in non-courtroom settings, such as the Illinois confrontation described above. This brings great flavor to *Perilous Times*, and it sidesteps the trap of courtroom confinement that bedevils many legal histories.

That said, Stone has been criticized for concentrating too much on minor participants in the public debate – speakers who did not have the stature necessary to shape public policy. Harvard's Frederick Schauer says, "Many of the speakers on which Stone focuses were simply inconsequential, existing and speaking at best on the margins of mainstream public debate."<sup>17</sup> Schauer misses the point. It is that very group of speakers – those who do not have the relative protection of a strong public image – who are most at risk and, therefore, most in need of protection from government intrusion on their free speech rights. It is those more vulnerable practitioners of free speech who bring Stone's book to life and make it breathe.

*Perilous Times* ends with an unfortunately cryptic discussion of the fate of civil liberties in the War on Terror.<sup>18</sup> Stone skims over both successful government initiatives, such as the PATRIOT Act, and failed ones, such as the TIPS (Terrorism Information and Prevention System) program to encourage citizens to monitor and report on one another and the TIA (Total Information Awareness) program to create a broad database gleaned from personal and commercial information. What is missing here is the carefully crafted storytelling that makes the rest of the book so enjoyable.

By early 2004, when *Perilous Times* was going to press, numerous examples of government overreaching in the War on Terror were emerging.

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16. *Id.* at 423-424.

17. Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157, 2162 (2005) (reviewing *Perilous Times*).

18. STONE, *supra* note 1, at 550-557.

For example, in the spring of 2002 *USA Today* told of three individuals who attempted to gain access to otherwise public records in the course of normal daily inquiries:

When United Nations analyst Ian Thomas contacted the National Archives in March to get some 30-year-old maps of Africa to plan a relief mission, he was told the government no longer makes them public.

When John Coequyt, an environmentalist, tried to connect to an online database where the Environmental Protection Agency lists chemical plants that violate pollution laws, he was denied access.

And when civil rights lawyer Kate Martin asked for a copy of a court order that has kept secret the names of some of the hundreds of foreigners jailed since Sept. 11, the Justice Department told her the order itself was secret.

“They say, ‘there’s a secrecy order barring us from telling you this. But the language of the secrecy order is secret, so you’ll just have to take our word for it,’” she says.<sup>19</sup>

Without access to basic information, the public, the press, and civil society itself cannot assess the motives, actions, and statements of our public officials, and it then becomes very difficult to challenge decisions that may be illegal or otherwise unacceptable. Public debate is at risk of being reduced to charges and countercharges based on hearsay and speculation, harming free speech both directly and indirectly. When public discourse is reduced to such a level, paranoia flourishes and takes democracy as its primary hostage. I was left wanting more from Stone in this vein.

Thus, while *Perilous Times* should be a must-read on every constitutional scholar’s list and is deftly organized and delivered by a true master, perhaps it should have stopped after the Vietnam War. The summing-up that precedes the discussion of current issues would have sufficed nicely as a thought-provoking endnote to this remarkable tome.<sup>20</sup> But the War on Terror discussion (perhaps forced on him by his publisher?) functions only as a teaser and simply does not measure up to the artistry of the rest of the book. Nonetheless, no one should be discouraged from delving into Stone’s book. Those who do will be richly rewarded.

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19. Laura Parker, Kevin Johnson & Toni Locy, *Secure Often Means Secret*, USA TODAY, May 16, 2002, at 1A.

20. STONE, *supra* note 1, at 527-550.