



© Corbis

In recent months, Academy meetings in Cambridge, Palo Alto, and Washington, D.C., have considered the concept of justice from an historical, contemporary, and international perspective. The remarks from these meetings are reprinted below.

Civil Liberties in Times of Crisis

Alan Brinkley

This presentation was given at the 224th Annual Meeting and 1891st Stated Meeting, held at the House of the Academy on May 11, 2005. At this meeting Denis Donoghue, University Professor and Henry James Professor of English and American Letters at New York University, also spoke. His remarks on “The American Classics” were published in the Summer 2005 issue of the *Bulletin*.



Alan Brinkley

Alan Brinkley is Allan Nevins Professor of History and University Provost at Columbia University. He has been a Fellow of the American Academy since 1999.

The history of civil liberties in America, like the history of civil rights, is a story of struggle. Even in peacetime, Americans constantly negotiate between the demands of liberty and the demands of order and security. But in times of national emergency, the conflict between these demands becomes particularly intense and the relative claims of order and security naturally become

stronger. We are now in a period of apparently open-ended crisis, and the lessons of these past experiences with war and emergency are clear: We cannot reasonably expect the highly robust view of civil liberties that we have embraced in recent decades to survive entirely unaltered. Every major crisis in our history has led to abridgments of personal liberty, some of them inevitable and justified. But in most such crises, governments have also used the seriousness of their mission to seize powers far in excess of what the emergency requires.

Those living through such times should remember that civil liberties are not a gift

from the state that the state can withdraw when they become inconvenient. They are the product of continuous effort, which has extended over two centuries and must continue into a third – in dangerous times as well as in tranquil ones – if personal freedom is to remain a vital part of our national life.

It is part of our national mythology that the framers of the Constitution guaranteed civil liberties to all Americans through the Bill of Rights, and that we are the beneficiaries of their wisdom. But during the first century and more of the history of the United States, the Bill of Rights had relatively little impact on the lives of most American citizens. Widespread violations of civil liberties that

by modern standards would seem exceptionally oppressive inspired one scholar, remarking on the early history of the Bill of Rights, to describe it as “140 Years of Silence.” Even ignoring the egregious violations of rights and liberties inflicted on both enslaved and free African Americans, Native Americans, Mexicans, Chinese, and many other groups of immigrants, and the routine limitations of the rights of women, the abridgments of civil liberties were severe and routine. Local governments routinely banned books, censored newspapers, and otherwise policed “heretical” or “blasphemous” speech. Communities enforced rigid standards of public decorum and behavior and often criminalized unconventional conduct. The legal rights of the accused in criminal trials had few effective protections, and obedience to the Fourth, Fifth, and Sixth Amendments was often token or nonexistent. Freedom of religion did not always extend to Catholics, Jews, free thinkers, agnostics, or atheists; and such people had no protection against discrimination in education, jobs, and even place of residence.

It would be too much to say the Bill of Rights was an empty shell during the nineteenth century. Things would surely have been worse without it. But to a significant degree it remained contentless in the absence of popular, legislative, and judicial support – all of which were intermittent and often grudging for over a hundred years.

Our modern notion of civil liberties was, in fact, not born with the creation of the Bill of Rights. A more important turning point may have been American involvement in World War I, which fostered some of the most egregious violations of civil liberties in our history – and, indirectly, some of the first vigorous defenses of them.

When the United States entered the war in April 1917, the Wilson administration was acutely aware of how much of the public remained hostile to the nation’s intervention. It responded with an aggressive campaign of intimidation and coercion designed to silence critics and root out opposition.

At the center of this effort were two pieces of wartime legislation: the Espionage Act of 1917 and the Sedition Act of 1918, which empowered the government to suppress and punish “disloyalty and subversion.” The Espionage Act, among other things, permitted the Postmaster General, Albert Sidney Burleson, to ban all “seditious” materials from the mail. He announced that “sedi-

The history of civil liberties in America, like the history of civil rights, is a story of struggle. Even in peacetime, Americans constantly negotiate between the demands of liberty and the demands of order and security.

tious” materials included anything that might “impugn the motives of the government and thus encourage insubordination,” or anything that suggested “the government is controlled by Wall Street or munitions manufacturers, or any other special interests.” All publications of the Socialist Party were banned by definition.

The Sedition Act, passed the next year to strengthen the provisions of the Espionage Act, made it a criminal offense to use “any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the flag of the United States, or the uniform of the Army or Navy,” or any language that might bring those institutions “into contempt, scorn, . . . or disrepute.” This second law was a particularly useful instrument for suppressing radicals and labor unionists. Hiram Johnson, progressive senator from California, caustically described the provisions of the law: “You shall not criticize anything or anybody in the Government any longer or you shall go to jail.”

This state-sponsored repression did not occur in a vacuum. It both encouraged and reflected a widespread popular intolerance of dissent that at times became highly coercive. In 1917, private volunteers formed the American Protective League (APL) to assist the government in the task of maintaining loyalty. The APL received the open endorsement of the Attorney General, who called it a “patriotic organization . . . assisting the heavily overworked federal authorities in keeping an eye on disloyal individuals and making reports on disloyal utterances.” By the end of the war, the organization had two hundred and fifty thousand members – men

and women who defined their mission as spying on their neighbors, eavesdropping on suspicious conversations in bars and restaurants, intercepting and opening the mail and telegrams of people suspected of disloyalty, and reporting to the authorities any evidence of disenchantment with the war effort. They made extralegal arrests. They organized “slacker raids” against perceived draft resisters. And they constituted only the largest of a number of such organizations. There was also the National Security League, the American Defense Society, even one modeled on the Boy Scouts – the Boy Spies of America.

Much of this repression was directed at labor leaders, radicals, and other dissidents. But it fell hardest on immigrants, and above all on German Americans. The California Board of Education, for example, banned the teaching of German in the public schools, calling it “a language that disseminates the ideals of autocracy, brutality, and hatred.” Libraries removed German books from their shelves. Merchants and others dropped German words from the language. (“Sauerkraut” became “liberty cabbage”; “hamburgers” became “liberty sausage.”) German faculty members were fired from universities. German musicians were fired from orchestras. Because of widespread rumors of plots by German Americans to put ground glass in bandages sent to the front, the Red Cross barred people with German names from working with the organization. In Minnesota, a minister was tarred and feathered because he was overheard praying with a dying woman in German. In Southern Illinois, a man was lynched in 1918 for no apparent reason except that he happened to be of German descent; the organizers of the lynch mob were acquitted by a jury, which insisted that what they had done was a patriotic act.

The end of the war in 1918 did not bring this period of intolerance to a close. If anything, it intensified it by ushering in what has become known as the great Red Scare. The Red Scare was, in part, a response to the Bolshevik Revolution in Russia and the tremendous fear that event created throughout the capitalist world. It was also a product of the great instability of postwar America, which many middle-class people believed to be orchestrated by revolutionaries. There was widespread labor unrest, racial conflicts in cities, economic turbulence, and a small but frightening wave of terrorist acts by radi-

The federal government's assault on civil liberties during and after World War I may have been the most egregious in its history. But in acting so aggressively to abridge civil liberties, the government inadvertently gave birth to an important new movement to protect them.

icals. But the Red Scare was, above all, a result of the deliberate strategies of ambitious politicians, who saw a campaign against "Bolshevism" in America as a useful spur to their careers.

The Justice Department, under Attorney General A. Mitchell Palmer (who had presidential hopes for 1920), was the leading actor in inflaming the Red Scare. A series of mail bombings, including an attempted bombing of Palmer's own house, helped legitimize the major campaign against radicals that he was already planning and that he launched on New Year's Day, 1920. Orchestrated by the young J. Edgar Hoover, the "Palmer Raids" produced six thousand arrests, amid enormous publicity. Most of the people detained were not radicals at all, and even the relatively few genuine radicals rounded up could not be shown to have violated any laws. Most were eventually released, although many remained in custody for weeks and even months without facing formal charges, without access to attorneys or even to their own families.

The federal government's assault on civil liberties during and after World War I may have been the most egregious in its history. But in acting so aggressively to abridge civil liberties, the government inadvertently gave birth to an important new movement to protect them. Indeed, it is not too much to say that World War I was the birthplace of our modern notion of civil liberties; that in its aftermath, the Bill of Rights slowly began to have an expansive meaning in American life for the first time. The backlash against

the wartime excesses helped create three new forces committed to defending civil liberties: popular support, formidable institutions, and the first serious evidence of judicial backing.

Popular support for civil liberties prior to World War I had been almost entirely theoretical. People of wealth and standing assumed, generally correctly, that they faced little danger of repression, censorship, and arbitrary arrest. People without property, on the other hand, could not realistically expect the civil liberties promised by the Constitution. As Zechariah Chafee, a great champion of free speech in the 1920s and 1930s, later wrote of this period: "The First Amendment had no hold on people's minds, because no live facts or concrete images were then attached to it. Consequently, like an empty box with beautiful words on it, the Amendment collapsed under the impact of Prussian battalions, and terror of Bolshevik mobs."

The heavy-handed actions of the federal government during and after World War I, however, created popular alarm where other abuses had not, largely because of the great suspicion with which Americans viewed federal power. State and local governments might act repressively without inspiring popular fears; Washington could not. The Palmer Raids, in particular, produced widespread denunciations in the press; destroyed A. Mitchell Palmer's political career; nearly crushed J. Edgar Hoover's budding prospects for bureaucratic advancement; and badly damaged the Wilson administration and the Democratic Party. Republicans, sensing a political opportunity, took up the cause of civil liberties as a way of attacking the Democrats and helped give the issue popular credibility. One of Warren G. Harding's early acts as president was to pardon Eugene V. Debs, the Socialist Party leader, who had been imprisoned for opposing American intervention in the war. In the absence of public opinion polls, it is impossible to measure the extent of this shift in public opinion. But not since the Alien and Sedition Acts of 1798 had violations of civil liberties aroused so much popular and political condemnation.

The war and its aftermath also energized the small and once largely powerless community of civil liberties activists, who suddenly saw an opportunity to establish their cause in the public mind. Among them was Roger Baldwin, a settlement house worker in St. Louis, who, inspired by a speech of Emma Goldman, became deeply committed to re-

sisting state efforts to limit individual freedoms. He became a civil liberties activist during World War I, and he spent the rest of his long and active life building institutional support for protections of this relatively new concept.

In 1917, he and a few other critics of government policies created the National Civil Liberties Bureau, whose original purpose was to criticize state repression and garner support for protecting personal freedoms. Baldwin's approach to this task was deliberately controversial. He rejected the suggestions of some of his allies that he target only the most indefensible violations (such as the government's brutal treatment of conscientious objectors). He insisted, rather, that the best way to establish the principle of robust civil liberties would be to defend the most unpopular people and causes. He was especially outspoken on behalf of the radical anarchists of the Industrial Workers of the World, arguing that by standing up for the Wobblies he was casting light not just on the role of government but also on the role of industrial capital in repressing the rights of individuals.

The Civil Liberties Bureau attracted relatively little attention during the war itself. But the reaction to the 1919 Palmer Raids sud-

The history of civil liberties in times of emergency suggests that governments seldom react to crises carefully or judiciously. They acquiesce to the most alarmist proponents of repression.

denly thrust it into prominence. In January 1920, it was reorganized and renamed the American Civil Liberties Union (ACLU). Baldwin attracted a host of prominent supporters, among them Clarence Darrow, Jane Addams, Felix Frankfurter, Helen Keller, Norman Thomas, and John Dewey, and he began to envision a larger role for the ACLU. It would no longer simply denounce assaults on liberty. It would use its influence to attack them through the legal system.

It is the government's role to see beyond the understandably passionate feelings of the public and frame a reasoned response to the dangers we face.

The third great contribution to the founding of the modern regime of civil liberties was the slow but growing support for the idea within the judiciary. Not until the Warren Court decisions of the 1950s and 1960s did protecting civil liberties become a major item on the Supreme Court's agenda, and even then the courts at lower levels were slow to embrace the cause. But the gradual shift of judicial thinking on the issue became visible within months after the end of the war, less in the actual decisions of the courts than in several notable dissents that formed the intellectual foundation for an expanded legal notion of free speech.

The most important figure in this process was Justice Oliver Wendell Holmes. During and immediately after the war, Holmes showed little more inclination than any other member of the Supreme Court to challenge the government's aggressive use of the Espionage and Sedition Acts. Early in 1919, for example, the Court accepted an appeal on behalf of Charles Schenk, a Socialist convicted of violating the Espionage Act for passing out leaflets that denounced the war and encouraged young men to resist the draft. Holmes wrote the majority opinion, which affirmed both Schenk's conviction and the constitutionality of the law. "The question in every case," he wrote in this controversial decision, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenk's "words," he insisted, were designed to undermine the draft and were therefore unprotected speech. "When a nation is at war," he added, "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."

Holmes's decision evoked a storm of protest from eminent legal scholars whose opinion the justice evidently respected; by November 1919, he had clearly revised his views about protected speech. In *Abrams v. U.S.*, the Court reviewed the case of Jacob Abrams, a Russian immigrant convicted under the Sedition Act for distributing leaflets that criticized President Wilson's decision to dispatch American troops to Russia in 1918, during the civil war that followed the Bolshevik Revolution. As in the *Schenk* case, there was no evidence that Abrams's actions had in any way impeded the course of the war. But a lower court had claimed that it was enough that his actions *might* have jeopardized American policy to justify a conviction; and the Supreme Court agreed, upholding both the conviction and the law. But this time, Holmes (joined by Justice Louis Brandeis) vigorously and famously dissented, in language that many consider the classic initial argument for a robust view of the First Amendment. Defenders of the Sedition Act, Holmes said, had rested their case on the overwhelming importance of sustaining support for the war and the dangers dissenters posed to that effort. But no one should be so confident that the passions of the moment are irrefutable, Holmes suggested, for

... when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death. . . . I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798.

In this and other dissents, Holmes, along with Brandeis and a slowly expanding group of other judges and justices, began laying out much of what became the legal and moral basis for our modern conception of civil liberties.

No one can doubt that the United States faces grave dangers in today's perilous world, and we cannot dismiss the aggressive efforts by the government to seize new powers and to curb some traditional liberties as entirely cynical or frivolous. Some alteration in our understanding of rights is inevitable and perhaps necessary in dangerous times, as even the most ardent civil libertarians tend to admit. But the history of civil liberties in times of emergency suggests that governments seldom react to crises carefully or judiciously. They acquiesce to the most alarmist proponents of repression. They pursue preexisting agendas in the name of national security. They target unpopular or vulnerable groups in the population less because there is clear evidence of danger than because they can do so at little political cost. During and after World War I, the victims of government repression were labor leaders, anarchists, and Socialists, none of whom posed any danger to the war effort but all of whom were widely disliked. In World War II, the victims were Japanese Americans, who were stripped of all the rights of citizenship not because there was any evidence that they were disloyal but because they were feared on largely racial grounds. In the present emergency, the victims are mostly Arab Americans and foreign nationals.

Citizens naturally react to great crises viscerally, and they sometimes vent their fears by demanding unconscionable actions. It is the government's role to see beyond the understandably passionate feelings of the public and frame a reasoned response to the dangers we face; not to defend all civil liberties reflexively, certainly, but to give them considerable weight in choosing how to balance the competing demands of freedom and order. And it is up to those organizations and individuals who care about civil liberties, and who are committed to continuing the more than two-century-long struggle to legitimize and strengthen their place in American life, to insist that our leaders do just that. ■

© 2005 by Alan Brinkley