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Wages of Silence:
The Dangers of Wartime Suppresion of Rights

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The Historical Society of the Courts of the State of New York annually sponsors the David A. Garfinkel Essay Competition. The Society launched this essay competition in 2008 with the generous funding of Gloria and Barry Garfinkel. SUNY and CUNY Community College students from around the State are invited to write an original essay on a specified topic of legal history.

This year, the topic is THE BLUE AND THE GRAY: NEW YORK DURING THE CIVIL WAR. In 1867, Court of Appeals Judge Francis M. Finch wrote a poem entitled "The Blue and the Gray" and it immediately struck a chord with the American public. For many years after the war, the poem was read at the grave-side of Civil War soldiers during Memorial Day ceremonies.

The Society was launched in 2003 by its Founder, former Chief Judge Judith S. Kaye, with the mission of preserving the legal and judicial history of New York. It seeks to foster public appreciation and a better understanding of the rich legacy of the New York courts, the legal profession, and their contributions to the State and the nation.

Wages of Silence: The Dangers of Wartime Suppression of Rights

The phrase "in time of war, the laws are silent" proved accurate not only in the American Civil War, but has a long history of being true, and continues to be true even in modern times. President Lincoln's restriction of civil rights and liberties during the Civil War was not the first instance in which people's freedoms were limited during wartime, but Lincoln's actions set the precedent for these types of restrictions in the United States. Restriction of liberties has become more palatable to the populace of the United States because it has been the general practice of the government to engage in such restrictions during times of war. However, wartime is the most dangerous time to restrict freedoms.

Arguably, President Lincoln's most restrictive acts were the declaration of martial law and the suspension of habeas corpus. Habeas corpus requires that the accused be brought before a civil court and that the arrest and detention of the accused must be justified (Rehnquist). Habeas corpus is the private citizen's "most powerful protection against unlawful imprisonment," and has been recognized in England since the fourteenth century (Rehnquist). This writ has become a staple of living in what is considered a free society, and should not be infringed upon without a compelling reason, if at all.

Lincoln used the restriction of habeas corpus explicitly to prevent southern sympathizers in Maryland from attempting secession from the Union (Dueholm 48). Lincoln was especially concerned with the possible secession of Maryland, because the only overland supply line for troops and information to Washington, D.C. was through Maryland (Dueholm 48). Lincoln's view was that the Constitution warranted this action under Article I, Section 9: "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion the public safety may require it." Chief Justice Roger Brooke Taney was petitioned by the lawyer

of one of the accused Maryland dissenters, and Taney argued that only Congress could suspend the writ of habeas corpus, because the suspension clause is in Article I of the Constitution (Dueholm 49). Taney's implication was that because Article I dealt with the legislative branch, suspension of habeas corpus was in the hands of Congress, and was not a presidential power (Dueholm 49). Further bolstering Taney's ruling that suspension was a Congressional power were his citations of Chief Justice John Marshall and Thomas Jefferson's acknowledgment that suspension was a Congressional power, and not in the hands of the executive branch (Dueholm 49). Even if Lincoln had been correct in asserting the power to suspend habeas corpus, his reasoning behind the suspension is still questionable.

The suspension clause mentions times of "rebellion" and "public safety." The Union, of course, saw the Confederate Army as rebels, but to the Confederacy their actions began as a peaceful attempt to secede from the Union. The states of the Confederacy saw the Union forces as trying to prevent those states from leaving a republic of individual states, which they thought they had every right to leave. The Union was attempting to prevent this by force of arms. Maryland had not taken up arms against the Union, and the Confederacy would have had no reason to take up arms if it had been allowed to separate from the Union without conflict. Therefore, it is arguable whether revoking the right of habeas corpus from citizens who were not technically in an open state of rebellion is constitutionally appropriate, regardless even of who gives the order.

Approximately one year after Lincoln's first instance of suspension of habeas corpus, it was suspended a second time due to unrest over implementation of the draft (Harper). Congress finally authorized the suspension of habeas corpus, but nearly a full two years after Lincoln's first usage of it (Dueholm 53). Possibly, this is the best example of "laws being silent" during the Civil War; Congress obviously felt it necessary to confirm the suspension, which implies that

Congress felt that it was a legislative power despite Lincoln's arguments. Seemingly, if Congress had felt that suspension of habeas corpus was an executive power, there would be no need for them to confirm it. In May of 2000, William Rehnquist stated: "It [habeas corpus] has been rightly regarded as a safeguard against executive tyranny." If this assertion is held to be true by modern authorities, then Lincoln's actions must also be deemed unconstitutional by modern historians; if habeas corpus is a safeguard against executive tyranny, then it is a contradictory practice that the executive branch would be able to revoke habeas corpus at will. Once again, evidently the law remained silent on this infraction during that time of war: Congress kept silent on the validity of Lincoln's actions in this matter, and eventually confirmed the writ, presumably to keep the appearance of a united front during a crisis time in the country.

Lincoln's defense of his suspension of habeas corpus was based on the premise that if he had not been willing to take this radical step, the Union would crumble, and the question of constitutionality would be moot. His thoughts are evidenced in this quote in defense of his reasoning, which was directed at Congress in a special session in 1861: "To state the question more directly, are all the laws but one to go unexecuted, and the government itself go to pieces lest that one [right to writ of habeas corpus] be violated?" (qtd. in Kleinfeld). The problem with Lincoln's reasoning is that he is approaching the problem with a consequentialist approach; he is stating that the freedoms of these few must be sacrificed so that the greater good (in this case, the Union itself) can be served. The problem with the consequentialist approach in this case is that the Constitution is written in a categoricalist vein. That is, that the freedoms of every person are at an absolute value; one person's freedom cannot be sacrificed for the common good. By curtailing the civil liberties of Maryland residents to "save the Union," Lincoln was in effect defying the ideas that the Union was based on, and destroying it in a slower and more indirect

way than the advances of Confederate soldiers.

More recently, former President George W. Bush followed in Lincoln's footsteps by proving that laws are silent in time of war even now: he also suspended habeas corpus. On October 17, 2006, Bush suspended habeas corpus to anyone "determined by the United States to be an enemy combatant in the Global War on Terror" (Longley). Though Bush's suspension was approved by Congress through the Military Commissions Act of 2006, the constitutionality is still highly questionable (Longley). The Military Commissions Act states that habeas corpus suspension applies only to enemy combatants, but the Act fails to identify what exactly an enemy combatant is (Longley). Both situations show a parallel, because as Union supporters were terrified of secessionists, Americans were terrified of terrorists after the 9/11 attacks. Undoubtedly, fear of the evil enemy was and is used to silence potential protests of presidential abuse of the suspension clause. It may be argued that the suspension of habeas corpus was necessary in this case, but the problem arises in the vagueness of the wording of the Act. The Act never specifies that it cannot be applied to American citizens; that is, "enemy combatant" could potentially be a citizen of the United States, because the definition of "enemy combatant" does not exempt American citizens from this label (S.3930). The hysteria of the populace at the time allowed this Act to be passed with its dangerous wording intact. Again, the law is silent in time of war.

George W. Bush made a famous statement in his November 2001 speech, saying that there was no room for neutrality in the War on Terror, and "you're either with us, or against us" ("You Are Either with Us or Against Us"). This sort of black and white wording is used to polarize the nation; when a seemingly clear "us" and "them" is in the minds of citizens, it is easier to pass a constitutionally questionable act so long as it only affects "them." Americans were similarly polarized during the Civil War by Lincoln's Emancipation Proclamation, which seemed to imply

that anyone supporting the Confederate Army authorized slavery. One of the chief reasons for the Emancipation Proclamation was to prevent Europe from intervening on behalf of the Confederate Army. After the Emancipation Proclamation went into effect, the clear implication was that the North was "anti-slavery" while the South was "pro-slavery." It further separated the North from the South, presumably to bolster the Northern troops' lackluster zeal for the war by enlarging the moral issue of slavery.

Chief Justice Taney spoke of the climate in America at the time, which echoes the feelings of Americans during the early years of the War on Terror, when he stated:

The paroxism [sic] of passion into which the country has suddenly been thrown -- appears to me to amount almost to delirium. I hope that it is too violent to last long -- and that calmer and more sober thoughts will soon take its place -- and that the north as well as the south will see that a peaceful separation with free institutions in each section -- is far better -- than the union of all the present states under a military government & a reign of terror -- preceded too by a civil war with all its horror & which[,] end as it may[,] will prove ruinous to the victors as well as the vanquished (qtd. in Harper).

The result of the panic and fear felt by most American citizens at this time resulted in unconstitutional practices going unchecked. The infamous Hermann Goering explains how whipping the population into a delirium benefits a leader's agenda: "Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is to tell them they are being attacked, and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country" (qtd. in Hornberger). The formula seems simple: encourage the people's fear, polarize them by any means available, be it emancipation of slaves or treatment of terrorists, and then use the fear of the enemy to keep the laws of the land

silent during the war. This quote from Lincoln evidences his justification of the revocation of civil liberties to combat the evil enemy: "…under cover of 'liberty of speech,' 'liberty of the press,' and 'habeas corpus,' they hoped to keep on foot among us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways" (qtd. in Raymond 356). Lincoln's message in this quote seems to be "they are everywhere!" which follows Goering's vocalization of the theory of using the fear of the people to promote the war, and thereby keep the people silent on the restriction of their rights when in a time of war.

In his address to Congress, Lincoln mentions limiting not only habeas corpus, but also limiting freedom of the press. Though freedom of the press is an expressly implied freedom in the First Amendment of the Constitution, it was limited during the Civil War. President Lincoln sponsored policies to "suppress 'treacherous' behavior, believing that 'the nation must be able to protect itself against utterances which actually cause insubordination" (qtd. in Lee and Epstein 194). One of the most notable instances of this was Brigadier General Milo Smith Hascall's vigorous enforcement of Order Number Nine in Indiana, which quieted several Indiana newspapers that attempted to express unfavorable opinions of the draft (Bulla and Sempruch 186-187). Many years later, in 1917, a fearful nation approved the passing of the Espionage Act, which authorized the prosecution of anyone who would attempt to hinder the recruitment of soldiers, amongst other things (Epstein and Walker 194). The climate of delirious patriotism and fear of communism and socialism led to this act, under which Schenk v. United States was prosecuted. When looking at these trends, a person begins to see why suppression of laws is most dangerous during wartime.

Charles Schenk, the general secretary of the Socialist Party of Philadelphia, spread pamphlets to prospective draftees which urged them to resist the forced conscription (Epstein and Walker

196). Schenk appealed to the Supreme Court on the basis that the distribution of his pamphlets was protected under the First Amendment (Epstein and Walker 196). The Supreme Court's opinion, written by Oliver Wendell Holmes, gave rise to the "clear and present danger" test (Epstein and Walker 197). This test was implemented to judge whether or not actions should be protected under the First Amendment, or whether they were legitimate violations of the Espionage Act (Epstein and Walker 197). Schenk's conviction was affirmed; it was written that his Socialist leanings and teachings were too much of a clear and present danger to the United States government to go unpunished (Epstein and Walker 197). Both Lincoln's silencing orders during the American Civil War, and congressionally approved Acts following World War I were effective in restricting Americans' rights to freedom of the press in these times of war. It becomes apparent that a fearful nation is far more tolerant of limited rights than a peacetime nation.

The classic defense to these types of limitations on freedoms is that the government is in a crisis point at this time of war, and cannot afford such luxuries as freedom of the press. The rebuttal to this defense is that in a time of war, it is perhaps even more important than in times of peace that these freedoms not be abridged. For it is in the most perilous of times that a government needs to be criticized. Ideally, a war is waged by fully informed and educated citizen soldiers who have gone to war knowing the full reasons and ramifications of the act of war. If there is a legitimate concern as to the validity of the war, then ought this not be the time when freedom of the press is most precious? Some would argue that wartime restrictions are for the common good, but the logical fallacy in this is that for the health of the nation as a whole, opinions cannot be repressed, especially in a time of war. Criticism is what keeps the nation "honest," and prevents politicians from entering into unwanted or little-understood wars. It is undoubtedly true that laws are silent

in times of war, but this is when a nation's people must be most vigilant in protecting their rights.

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