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Who Goes There?

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For this paper I chose to explore issues concerning dissent in wartime.

The strong differences in public opinion, in Congress and in the media, about the military invasion of Iraq, accompanied by strong beliefs about how patriotic citizens "ought" to behave and speak about our government's policy and actions, invite comparison with other episodes in U.S. history.

In parts of the paper I will focus on just a very few of the episodes presented in the book, Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism, by Geoffrey R. Stone. The author is Distinquished Professor of Law at the University of Chicago and former Dean and Provost of the University. He has lectured at leading universities and societies nationwide, including the University of Virginia. Stone's rubric for his book is the examination of our country's response to dissent in time of war, mainly in relation to First Amendment rights. This 730 page book includes over 2000 source references. The following are among the episodes studied in the book: the Alien and Sedition Acts of 1798; actions by Lincoln and others during the Civil War; WWI and the Espionage Act of 1917 and the Sedition Act of 1918; WWII internments of Japanese-Americans under FDR's Executive Order 9066; the cold war, with Joseph McCarthy and HUAC; the Korean "police action" and the use of loyalty oaths; the Vietnam antiwar movement, including the shootings at Kent State and the Pentagon

papers; and the current anti-terrorism and Iraq invasion period, accompanied by the Patriot Act. I will present selected examples from the first three of these wartime episodes. They occurred when speech issues were less settled and thus suggest some of the dangers of yielding rights today.

By the way, I found that I knew least about the WWI episodes. In thinking about why that was so, I realized that of the eras before my birth, the founding and Civil War periods had been emphasized in history courses and in my personal reading, and that the incidents from WWII on were within my life experience, but that I had missed out on the WWI matters on both scores.

Alien Enemies, Alien Friends, Sedition and Immigration Acts of 1798

Leading up to the apparent war to come soon, most members of the president's party thought reasons for war ample and that national safety and honor were at stake. A congressional member of the majority party (Allen) questioned whether the minority party members loved their country. Another (Harper) accused opponents of seeking to preserve a peace of "vile submission." Still another (Edmund) demanded a more "manly course of conduct." The hawks blurred the line between dissent and treason, accusing opponents of disloyalty.

A minority party member of Congress (Nicholas) charged that whenever anyone disagreed with the majority he was "branded with treason." Another (Williams) complained that the majority strategy of character assassination was intended to destroy the "freedom of debate." A third (Gallatin) accused the majority of attempting to intimidate their opponents into silence. Yet another claimed that members of the

majority party were exaggerating the dangers and would precipitate, rather than avoid, war.

The nation was preparing for war and the president, who had been won a disputed election by the barest of margins (three electoral votes), now received rousing cheers whenever he appeared in public.

One could easily think all this occurred during the build up to the invasion of Iraq. Instead, the remarks and circumstances cited occurred in 1798, when the U. S. appeared ready to go to war with France. (France, offended by the Jay treaty with England, had launched a campaign against U. S. shipping, capturing more than 300 ships flying U. S. colors.) (Stone)

Using machinations that can make current events seem echoes of things past, partisan strategists in 1798 sought to use the war talk to political advantage. "By discrediting Thomas Jefferson and his colleagues as disloyal and treasonable, they attempted to entrench themselves as the nation's dominant party." (Stone, p. 29) For example, with a strategy that seems to have foreshadowed those of Karl Rove, Alexander Hamilton, in a letter to Rufus King, stated that "the spirit of patriotism" that now prevailed could be used to destroy the [Democratic] Republicans so "that there will shortly be national unanimity." (Stone, p. 29)

With intent to cement this goal, legislation was passed to almost triple (from five to fourteen years) the waiting period for voting rights for immigrants. Presumably this was done partly because of security concerns and partly because a higher proportion of

immigrants voted Democratic-Republican, not Federalist, when they became eligible to vote.

Also passed was our first alien act, the Alien Enemies Act, with bipartisan support. That Act provided that in time of declared war citizens or subjects of an enemy nation residing in the U.S. could be detained, confined, or deported at the direction of the president. This Act still stands.

The Federalist controlled congress also enacted the much more controversial Alien Friends Act as an emergency measure that would expire on the final day of President Adams' term of office. The expiration date assured that the Act could not later be used by Democratic –Republicans if the Federalists lost the next election (which they did, ironically partly because of public reaction against the Act.) The Act empowered the president to seize, detain and deport any non-citizen he deemed dangerous to the U.S., without regard to whether the U.S. was at war with the individual's native land. "Moreover, the non-citizen had no right to present evidence on his behalf. The Act vested the final decision exclusively with the president." (Stone, pp.30-31)

The following remarks, which mirror debate in our own time about similar situations, are characteristic of opposing positions at that time. "Albert Gallatin warned that if such a law was appropriate for alien friends, it might later be directed at citizens."

"Congressman Otis replied that the act was necessary because 'the times are full of danger and it would be the height of madness not to take every precaution in our power."

Democratic –Republican Nicholas' challenged '…the threat of punishment 'for false and

malicious' statements can easily be manipulated to chill the willingness of printers an others to criticize the government."

From July 1798 to March 1801, when the sun set on the Alien Friends Act, twenty-five well known Democratic–Republicans were arrested, of which fifteen were indicted. Ten cases went to trial, all resulting in convictions. (Stone, p. 63)

Continuing the partisan action of the Alien Friends Act, in February 1801, after Adams had lost the election to Jefferson, but before Jefferson took office, the Federalist congress took another highly partisan step. Anticipating a vacancy soon in the seat of Supreme Court Justice William Cushing, and to block Jefferson from an opportunity to appoint a replacement, the Federalist Congress voted to reduce the number of seats on the Court from six to five when the next vacancy occurred. (Even if this act had not been reversed, Cushing would have muddied the waters because he defied expectations and served until 1810.) Additionally, twenty six new judges were appointed to lower federal courts, not because needed to meet case loads but in a further effort to lock in Federalist influence in the judiciary for years to come. Just for good measure, they also threw in forty-five justice of the peace appointments in D. C. to reward loyal Federalist supporters and to preempt future non-Federalist appointments. Thomas Jefferson is reported to have said that the Federalists have retreated into the judiciary, where it will be difficult to dislodge them because of lifetime tenure.

An Aside – Supreme Court Justice Selection

Having mentioned the Supreme Court, before moving on with my topic, I will comment in passing on a current hot topic: the selection of justices for the Supreme Court. In 1987, the bicentennial year of the writing of the U. S. Constitution, I wrote a series of articles about the Constitutional Convention for the Lynchburg News and Advance. One of those articles (August 10, 1987) concerned the establishment of a national judiciary system and the selection of judges. At the time Justice Lewis Powell recently had resigned and Robert Bork had been nominated to replace him. In the short article, I focused on the debates in the Convention about the appointment of justices. Though some citizens appear to think the Senate is overstepping its bounds when it strongly asserts itself and carefully examines a president's nominees, scrutiny of James Madison's notes from the Convention and other sources provides ample evidence that the "advise and consent of the Senate" clause in the Constitution is there precisely because the framers intended that the legislature have a strong role in appointments. One evidence of this is that several times during the course of the Convention, drafts even placed the responsibility for appointment of justices "of the Supreme Court" with the Senate, rather than with the president.

That is a topic that I might have chosen this time, but I will return now to the one I did choose.

Lincoln's Suspension of the Writ of Habeas Corpus During the Civil War

After the election of 1800 the next attempt to silence criticism of national policies or leaders occurred during the Civil War, when Abraham Lincoln suspended the writ of habeas corpus and declared martial law in certain areas. Article I, Section 9 of the

Constitution states, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." As you know, habeas corpus is the provision that enables an individual who has been detained by government officials to seek a judicial determination of the legality of his detention.

One example of how Lincoln's action played out occurred when Union soldiers seized John Merryman, a suspected secessionist and participant in the Baltimore riots of April, 1861. U.S. Supreme Court Chief Justice Roger Taney, in this case leading the U.S. Circuit Court in Maryland, considered Merryman's petition. Taney, who had earlier taken a position publicly that it would be better to let the South go peacefully than to try to hold the Union together by force, ruled that only Congress was authorized to suspend the writ of habeas corpus and that Lincoln's executive order was unconstitutional. As you may recall the section allowing suspension of the writ of habeas corpus appears as section 9 of Article I of the Constitution, – the article about congress. Further, Taney ruled that because Merryman was not in the U.S. military, and because the regular Maryland courts were open and functioning, ordinary judicial process, rather than the military, had jurisdiction in this matter. The military commander at Ft. McHenry refused to release Merryman to the Court. Taney acknowledged that the military commander had more force available than the marshal could possibly muster and issued a written report instead, calling on Lincoln to determine how to preserve the law. (Stone, pp. 84-85) He closed his written statement this way: "It will remain for that high officer [Lincoln] in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the

United States to be respected and enforced." (ex parte Merryman) (It seems to me that Taney, though now infamous for his earlier awful 1857 ruling in the Dred Scott case and his obvious personal biases concerning the insurrection in the South, performed effectively in the Merryman case.) Lincoln did not issue a response to Taney's report but eventually released Merryman from military custody. As far as I know there has been no other constitutional ruling issued concerning which can suspend the writ of habeas corpus, the president or Congress.

Also, Taney's ruling that when the regular courts are open and functioning, they rather than the military, have legal jurisdiction was later vindicated in a different case. Lambdin P. Milligan, a resident of Indiana, had been sentenced to death by a military tribunal, but the implementation of the sentence had been delayed. After the war Milligan petitioned to be released from prison. In 1866, with the Civil War ended, the U.S. Supreme Court, in a carefully explained decision, ruled in ex parte Milligan as Taney had in Merriman, that the open and functioning civil courts, not military tribunals had jurisdiction.

These same issues, among others, have been in the spotlight in our own time concerning prisoners taken into custody after 9-11 and held without charges, hearings or trials, and with habeas corpus petitions at issue.

The effects of war on freedom of speech were evident in other ways, also. From its founding in 1854, the new Republican Party had strongly advocated free speech and had stood against laws limiting it. In 1856, the party's campaign slogan was "Free speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont." As late as 1860, Republican senators had supported resolutions saying, "freedom of speech and of the press, on … every … subject of domestic and national policy, should be maintained

inviolable." But, while some remained steadfast to the party's position during the Civil War, other Republicans demanded that the government suppress disloyal dissent and seize treasonable newspapers. (Stone, pp. 95)

Another Civil War case, one perhaps even better known, is that of Clement Vallandigham, a Copperhead. In the middle of the Civil War (April, 1863) General Ambrose Burnside, commanding the Department of Ohio, without Lincoln's knowledge or approval invoked martial law and issued General Order No. 38, declaring, among other things that "the habit of declaring sympathies for the enemy will not be allowed in this department." The following month (May 1, 1863), in Mt Vernon, Ohio, Vallandigham challenged General Order No. 38. He claimed that his "... right to speak and criticize was based upon General Order No. 1 – the Constitution of the United States." He called the war wicked, cruel, and unnecessary. He called the Order "a base usurpation of arbitrary authority" and said "the sooner the people inform minions of usurped power that they will not submit to such restrictions upon their liberties, the better." (Stone, 101) Burnside had Vallandigham arrested and brought before a five member military commission, charged with "publicly expressing, in violation of General Order No. 38 ... sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object of weakening the power of the government...."

Vallandigham defended: The speech "was an appeal to the people to change that policy, not by force but by free elections and the ballot-box. It is not pretended that I counseled disobedience to the Constitution or resistance to lawful authority. I never have."
In other statements Vallandigham always had "maintained that he was loyal to the Constitution and that the effort of Republicans to equate loyalty to the United States with loyalty to the Lincoln administration and its policies was itself a concept disloyal to the Constitution. He denied that radical Republicans had the right to 'impose their definition of loyalty upon the country.' " (Stone, p. 99)

Vallandigham was found guilty as charged and sentenced to imprisonment in close confinement for the duration of the war. He filed a petition for a writ of habeas corpus in federal district court. "Although no suspension of habeas corpus was in effect in the area at the time, the judge (Humphrey H. Leavitt) denied the petition, reasoning that " 'the court cannot shut its eyes to the grave fact that a war exists, involving the most imminent public danger, and threatening the subversion and destruction of the Constitution itself.' " (Stone pp. 101-103)

From time-to-time we will hear someone express the sentiment "My country, love it or leave it." Lincoln made it so when he ordered General Burnside to commute Vallandigham's sentence to banishment to the Confederacy. Lincoln explained to the general that this would lessen sympathy for the firebrand and still prevent further injury to the military. Newspapers and Democrats protested. For example, the New York Sun

asserted that "although 'the Union can survive the assaults' of the South, it cannot long exist without free speech.'" Even the Anti Slavery Standard referred to the exile as a blunder. Democrats held meetings in most Northern cities to denounce the president's tactics. (Stone, p. 110)

The signal such meeting was the one held in Albany, N.Y. in May, 1863, resulting in ten resolutions. "The 'Albany Resolves' insisted that Lincoln honor the liberties of citizens, assailed the military's 'arbitrary' arrests and use of military commissions to try civilians, and charged that Vallandigham had been unconstitutionally convicted and exiled for criticizing the government." (Stone, p. 110)

In response, Lincoln issued a carefully prepared statement for dissemination to the public. He conceded that if it were the truth, and the whole truth, that Vallandigham's arrest was for no other reason than criticizing the government, it was wrong. The president continued, "But the arrest, as I understand, was made for a very different reason. ...[H]is arrest was made because he was laboring , with some effect, to prevent the raising of troops; to encourage desertions from the army; and leave the rebellion without an adequate military force to suppress it. He was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the Commanding General, but because he was damaging the Army, upon the existence and vigor of which the life of the Nation depends." As to the possibility of limiting action, but not speech, Lincoln asked, in a simile that has become famous, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" He closed by addressing differences in Constitutional rights in times of peace and times of war. "[T]he Constitution is not, in its application, in all respects the

same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security." And Lincoln rejected the claim that rights, if allowed to be curtailed in time of war, would not be recovered in time of peace. To support his reasoning the president used an analogy about taking medicine when ill, but not continuing it when well. (Stone, p. 111-112)

On the nature and Nature and Quality of Debate on War and War Strategy

I find it interesting and disappointing to contrast the quality of the exchange between the Albany meeting and Lincoln with that recently between John Murtha and George W. Bush and the Republican controlled congress. As I understand it Mr. Murtha, after concluding that the continuing U.S. occupation is part of the problem, asked consideration of resolutions to change U.S. involvement in Iraq by reducing our troop levels and redeploying those who would remain. Specifically Murtha's proposed resolution declared, "The deployment of United States forces in Iraq, by direction of Congress, is hereby terminated and the forces involved are to be redeployed at the earliest practicable date." "A quick-reaction U.S. force and an over-the-horizon presence of U.S. Marines shall be deployed in the region." and "The United States of America shall pursue peace and stability in Iraq through diplomacy." [He thought redeployment might be accomplished in six months.] This might have been taken as an opportunity for a carefully reasoned Lincoln-like colloquy with Mr. Murtha and the American public about our policy and strategies. But, again as I understand it, this is what happened instead. First the White House accused Mr. Murtha of advocating surrender, but when that didn't play well, his right to criticize was acknowledged, with the caveat that of course he was

wrong. Rather than allowing real consideration of the overall change of strategy proposed by Murtha, the Republican majority insisted on a straight up or down vote on immediate withdrawal of troops, which of course was voted down after a histrionic "debate."

Did you notice that John Murtha's conclusion was foreshadowed by Dennis Kucinich? In October, 2003, some 2000 American troop deaths ago, he said, "The assertion by the president that daily attacks on U.S. troops and innocent civilians is 'progress' is ridiculous and just as false and misleading as his prewar statements about the threat to the United States by Iraq. Mr. President, 353 dead American troops is not progress." And he said in February, 2005, Iraq is on the verge of civil war, and the administration still refuses to admit any mistakes. Congress should not serve as a rubber stamp of this Administration's failed policies."

It is just as disappointing that, with the exception of a very few individuals, there have been no cohesive proposals from the Democrats to engage the public in thoughtful consideration of alternatives.

Outside the domain of party politics it *is* possible to find proposals concerning the nature and quality of our debates about our involvement in wars. An example is an article titled "Declare War," by foreign policy experts Leslie H. Gelb and Anne-Marie Slaughter, in the November 2005 issue of The Atlantic Monthly. The authors contend that "Iraq is only the latest in a long line of ill-considered and ill-planned American military adventures." They claim that "Today a transportation bill gets more deliberation than a decision to send American troops to war." They continue, "Declarations of war may seem to be relics of a bygone era .... Yet a declaration of war has a great deal to

recommend it today: it forces a deliberate, public conversation about the reasons for going to war, the costs, the risks, the likely gains, the strategies for achieving them – all followed by a formal vote." The authors propose to "restore the Framers' intent by requiring a declaration of war in advance of any commitment of troops that promises sustained combat." They add, "Because the declaration process would address problems beforehand, it would help us win wars once they start." "In the case of a sudden attack on the United States or on Americans abroad, the president would retain his power to repel that attack and to strike back without a congressional declaration." The authors conclude that this approach "may be the only way to give the decision to go war the care it deserves." (The Atlantic Monthly, November 2005)

I will now return briefly to the Merryman and Vallandigham cases. I think they provide examples of important issues of loyalty/disloyalty in time of war. Some, even many, argue that any criticism of the president or of government policies in time of war shows disloyalty and should be suppressed. But others argue that civil rights are most important during time of war and that the courts, while carefully considering military judgments during war, especially then still must interpret and enforce the Constitution concerning rights of dissenters. (Stone, p. 105)

The Espionage Act of 1917 and the Sedition Act of 1918

Another significant episode concerning loyalty and dissent came to the fore as U.S. involvement in World War I approached. In 1917 Woodrow Wilson sought a declaration of war and proposed "the Espionage Act of 1917, the first federal legislation against

disloyal expression since the sedition Act of 1798." Wilson declared that disloyal individuals 'had sacrificed their right to civil liberties.' "(Stone, p. 150) After nine weeks of intense debate, Congress, after eliminating the proposed press censorship and narrowing provisions on disaffection and mailings passed the Act. What passed made it a crime, when the nation is at war, for any person willfully to 'make or convey false reports or statements with intent to interfere with the military success of the United States or to promote the success of its enemies; willfully to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States; or willfully to obstruct the recruiting or enlistment service of the United States. Violations were punishable by prison sentences of up to twenty years. The Act also authorized the postmaster general to exclude from the mails any publication in violation of the Act.

Later, an amendment known as the Sedition Act of 1918 was passed. The Sedition Act forbade any person, when the United States is at war, to willfully utter, print, write or publish 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 military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States or to use any language to bring the above into contempt, scorn, contumely or disrepute, or to willfully display the flag of any foreign enemy, or to willfully incite or advocate any curtailment of production in this country of things necessary for prosecution of the war … or to support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States. (Stone, p. 186) The vote on the Sedition Act was 48 to 26 in the Senate

and 293 to 1 in the House. I think of the House vote as a barometer that tells what public sentiment was at the time. Then, as now, many were willing to give up a degree or a lot of freedom to purchase a greater sense of security. We get an idea of the effect of the loss of political courage from the outcome of an amendment offered during congressional consideration of this Sedition Act. It was proposed that "Nothing in this Act shall be construed as limiting the liberty … of any individual to publish or speak what is true, with good motives and for justifiable ends." This proposal was first rejected in the Senate by a 31 yea to 33 nay vote, later was adopted by unanimous vote, but finally eliminated by a conference committee on advice of the assistant attorney general. The severe restrictions of the act and the defeat of the amendment caused Senator Johnson of California to exclaim, "Yes … [this] is war … but good God when did it become war upon the American people?" (Stone, p. 190) Senator Lewis of Illinois offered an amendment that the disloyal suffer loss of citizenship and all property. Senator McKellar of Tennessee said dissenters ought not to be in this country. Some Senators thought the Act necessary to forestall mob violence by citizens who would be outraged by congress not doing enough to punish dissenters. On the other side, one observer wryly said, " 'doubtless some governmental action was required to protect [dissenters] from mob violence but [sentencing the dissenters] to twenty years incarceration [to protect them from mobs] seems a very odd kind of protection.' "(Stone, p. 185)

The efforts of Woodrow Wilson to enlist public support for U.S. entry into the war invited many examples of public over-reaction and even vigilantism in response to perceived dangers. The Sedition Act provided the vehicle for vigorous government efforts to suppress dissent.

Geoffrey Stone's Overview Concerning Dissenter's Rights During Wartime

I will turn now to a summary of some thoughts from the author of Perilous Times, Geoffrey Stone.

Overall, Stone's collection of first amendment cases in wartime from our founding to the present presents the following picture. It is a history that if put on a graph might look like a Dow-Jones stock market chart: showing significant gains over many years but with losses -- sometimes severe losses -- from time-to-time. The author introduces his concluding chapter with a quote from Justice Robert H. Jackson that could have been written today: "It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security." Stone adds, "When citizens become fearful they demand that their leaders protect them, and public officials quickly respond." (Stone, p. 528)

Stone argues that if freedom of speech is essential to self-governance in ordinary times, it is even more critical … [in wartime]." He continues, "Insofar as government silences dissent, in wartime or otherwise, it warps the thinking process of the community and undermines the very essence of self-government. Free and open debate can help save the nation from tragic blunders." (Stone, pp. 531-32)

Opinions in newspapers about the Iraq war

If it is true, as Stone thinks, that citizens have gained in protected freedom of speech, how are we doing in using it?

To gauge this we can move from examples from our history about dissent and loyalty to current examples of expressions seen in the media.

Two writers of letters to the editor, published in the Lynchburg News and Advance last fall, typify the state of much public opinion. Emmett G. Reynolds' (9-11-05) letter read "Has America forgotten the unprovoked cowardly attack of September 11, 2001? We now seem to advocate the liberals' and the Democrats' cowardly advice to abandon a war we must continue until every Muslim terrorist jihadist is killed. .... There can be no result in this war but either total victory for or defeat of the U.S. Our great president realizes this. The liberal cowards and Democrats either do not or else are engaging in the most imbecilic and dangerous type of treason and politics to the detriment and destruction of themselves and our country. We must choose either victory or death; our enemy will give no other choice in this war."

Deborah Wagner responded (9-26-05) "...of course America has not forgotten the attacks of 9-11, however, Emmett G. Reynolds seems to have forgotten that Osama bin Laden, *not* Saddam Hussein was responsible for the attacks. This war our country is in was forced upon us by a president who chose to pursue a vendetta against Saddam Hussein instead of pursuing bin Laden. Because of that choice, our country is now a bigger target than it was before the Sept. 11 attacks.

As long as the president continues to follow his destructive, dangerous path, our enemies will multiply and we certainly will fall victim to more attacks on our soil. Unfortunately, this nation's most dangerous enemy is its president."

A more recent exchange reveals continuing sharp differences of opinion and the appropriateness of public expression of dissent about the Iraq war. Antony Young wrote

(2-13-06), "Cindy Sheehan crossed the line again by wearing a T-shirt announcing '2240 dead. When will it end' in the halls of Congress, for which she was arrested. Now she is complaining that her right to free speech and expressing her opinion, has been abridged. …. It is tantamount to psychotic behavior, encouraged and supported by fringe elements and perhaps with financial support from the far left. …."

Wendell D. Wyland's view (2-15-06) differed, "the removal of Cindy Sheehan … was a disgraceful act and a violation of her First Amendment rights to freedom of speech and freedom of assembly. …. The fact that an American citizen can have her constitutional rights violated in the 'sanctuary of democracy' is an outrage. Cindy Sheehan's son gave his life defending our rights and freedoms.

The brave men and women of our Armed Forces have witnessed a complete and utter failure of their leaders to uphold the very ideals that they willingly lay down their lives to defend. [The Bush] regime has contaminated our government with the same privileged air that sparked the American Revolution."

Retired marine colonel Ralph Dilullo, whose son had been called to active duty to be deployed to Iraq wrote, (News and Advance, 11-16-05) "If you say, 'bring them home' you are … giving aid and comfort to the terrorists who want to kill us."

Of course many op-ed columnists have weighed in on matters related to the Iraq war. One – Frank Rich – writing in the Sunday New York Times week-after-week excoriated both Mr. Bush and company for what he claims was misleading us into the war and mismanaging the effort to win the peace and disrespected the Democrats for not standing up to Mr. Bush and vigorously opposing the war.

Following yet another 'stay the course' speech by Mr. Bush to a carefully selected audience, Ellen Goodman wrote (News and Advance 7-8-05), "This is not the first time a 'war president' has conflated war and disloyalty." She continued, "I fly my flag … for the men and women in harm's way. But I fly it as well for [those who] protest. The silenced majority of Americans who believe we were misled into war have no reason to be tongue-tied by a yellow ribbon."

Grey Hesson wrote (News and Advance, 2-3-06?), "For some reason I had in mind that giving aid and comfort to the enemy was a treasonable offense in wartime." Brian Humphrey wrote (News and Advance, 7-11-05) about a proposed flag burning amendment. After acknowledging that "Flag burning is offensive to anyone, … including me.," he continued, "This has nothing to do with patriotism …." "If this amendment passes, our constitution and that flag will no longer stand for freedom. Our country is not based on protecting a piece of cloth. It is about protecting your right to complain."

Local Initiatives to Influence National Policy

Throughout Vermont and in a number of communities and cities in other states, resolutions against the war in Iraq have been passed. In town meetings in Vermont in early 2003, citizens considered resolutions urging Mr. Bush and Congress to take steps to withdraw American troops and calling on the state legislature to investigate the use and abuse of the Vermont National Guard in the Iraq war. Forty-nine (of 251) towns voted for the resolutions, three voted no, and one produced a tie vote.

Some concluding thoughts

I think that all of us expect that certain issues will continue to present many opportunities for public debates. Some of the easily obvious ones that will continue during and after the taking and occupation of Iraq will include the following: the Constitutional war powers of the president and the Congress, the use of military tribunals, and personal liberty and national security issues concerning spying, wiretapping and the rights of citizens and others.

Because of the cumulative assurances over the last fifty years, it is easy for us to assume that freedom of speech for dissent about war policy has always been respected and protected. But Geoffrey Stone's selection of cases illustrates that this has not always been true. Even the courts often have been reluctant to rule against the government in times of war.

Nonetheless, it seems to me that our concern is not so much about freedom of speech for dissent – thank God that we live in a country where we have freedom of speech and freedom after speech- but is more about the *quality* of discourse between dissenters and non-dissenters. As citizens we need to get beyond headlines, sound bites and talk show hosts and to be willing to learn in depth about policies and options. And politicians need to have the courage to thoroughly examine issues and options, even when that is not politically expedient.

I will close by endorsing a recent statement by Pulitzer Prize winning cartoonist Doug Marlette and then posing a question. The quote follows: "… [Our] ability to engage in vigorous debate and to tolerate robust intellectual discord and all the attendant

controversies is a measure of the health of society." Now I ask your consideration of the question: When a person dissents during time of war – "Who goes there, friend or foe?"

Addendum

After I completed this paper I received the April 2006 issue of the Atlantic Monthly, with an article titled "The Man Who Be King" by a conservative pundit, Stuart Taylor. Because the article is directly pertinent to this paper I am adding a synopsis of it. The opening sentences read, "Many of us mistook the steady expansion of civil liberties during the fifty-five years after World War II as a natural, inevitable, and essentially irreversible evolution [until 2/11 came]." "[Then] the battle was joined over whether and how to recalibrate the balance between liberty and security." Taylor goes on to say that he Patriot Act that followed was passed by Congress after public debate, and in full view – just the sort of rebalancing that should occur in a democracy struggling to reconcile competing fundamental values. But, he continues, another development has been going forward– "the succession of claims by the Bush administration … of near dictatorial powers to wage war at home as well as abroad – often in secret and certainly without public consent." Taylor laments that whereas former presidents who tested the limits of executive power "worked with Congress when feasible, … George W. Bush prefers to act unilaterally – so much so, in fact that avoidance of oversight seems at times to be his principal goal." The author catalogues the claimed new unilateral power to: launch preemptive invasions without congressional approval, order indefinite detentions, authorize indiscriminate torture, prosecute in military commissions, and order

eavesdropping on Americans. Taylor concludes that the Supreme Court can help this executive grab for extensive new powers but that Congress will have to exercise its constitutional war powers if efforts are to be successful.

MAIN SOURCES:

Perilous Times, by Geoffrey R. Stone, W.W. Norton and Company, New York, 2004.

Ex parte Merryman, 17 cas. 144 (Cir. Ct. Md. 1861)

Ex parte Vallandigham, 28 Cas. 874-77 (Cir. Ct. Ohio 1863)

Ex parte Milligan, 71 U.S. 2

Lynchburg News and Daily Advance

The Constitution of the United States

The Atlantic Monthly, "Declare War," November, 2005

The Atlantic Monthly, "The Man Who Would Be King," April, 2006

Notes of Debates in the Federal Convention of 1787, compiled by James Madison.

The New York Times