nineteenth century conceptions evolved for more than half a century before the American Legal Realists began their assault on the Victorian citadel, an assault which began to have an impact on this side of the Atlantic in the second half of the twentieth century. But the law of restitution is travelling a similar path in a considerably shorter period of time. Whether the beginning of the process is dated from the first edition of Goff and Jones in 1966 or from Birks's *Introduction* in 1985, we have very quickly reached the stage where Dagan can write a sympathetic realist critique of the subject and Birks can provide a neo-classical defence and interpretation. Long may the subject continue to generate this kind of intellectual ferment and excitement!

EOIN O'DELL
Fellow, Trinity College Dublin

PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM
By Geoffrey R. Stone (W.W. Norton & Co., New York and London, 2004) (ISBN 0-393-05880-8) (xx and 730 pages, hardback, US$35)

To many observers, the administration of President George W. Bush seemed adrift in late summer 2001. To be sure, the new administration had sometimes made its presence felt, as with the President's early repudiation of the United States's assent to the Kyoto Protocol on global warming.[1] In the main, however, the administration had not conspicuously seized control of the machinery of government or articulated a new agenda for the United States, either domestically or internationally. In this respect, of course, the new administration was no different from many of its predecessors. All that changed with the devastating terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. In the aftermath of those attacks, the administration found its purpose.[2]

1. See Julian Borger, "Bush Kills Global Warming Treaty," *The Guardian*, March 29, 2001, available at http://www.guardian.co.uk/globalwarming/story/0,7369,464920,00.html. The repudiation of the Kyoto Protocol marked an early defeat for Environmental Protection Administrator Christine Todd Whitman and Treasury Secretary Paul O'Neill, both of whom later left the cabinet. One knowledgeable (if partial) observer reportedly noted that, "It looks like amateur hour at the White House as regards foreign policy." Id.
2. The appearance of inactivity may have been misleading. According to Secretary O'Neill, the White House began planning the attack on Iraq within days of assuming office in January 2001. See Bryan Bender, "Bush Began Iraq Plan Pre-9/11, O'Neill Says," *Boston Globe*, January 11, 2004, available at http://www.boston.com/news/nation/articles/2004/01/11/bush_began_iraq_plan_pre_911_oneill_says/.

The administration acted swiftly. On September 18, 2001, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons."[3] On October 7, the United States officially commenced hostilities against Afghanistan, initially through the use of air strikes, and shortly thereafter with the deployment of ground forces. Soon after the ground war commenced, the United States found itself with hundreds of prisoners in Afghanistan. By January 2002, the government had determined that these prisoners were not persons entitled to the full protection of the law of war or the Geneva Conventions.[4] At about the same time, the government also decided that prisoners from Afghanistan should be held at the United States Naval Base at Guantanamo Bay, Cuba, a facility that was leased by the United States, and thus was not technically subject to United States sovereignty or (as it was thought by some in the administration) to the jurisdiction of the federal courts.[5]

Within six weeks after the September 11, 2001, terrorist attacks, the Bush administration also had drafted and caused to be enacted the so-called USA PATRIOT Act,[6] a complex statute that expanded the government's investigative

3. See Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001).

4. See Neil A. Lewis, "Geneva Conventions: Justice Memos Explained How To Skip Prisoner Rights," *New York Times*, May 21, 2004, available at http://nytimes.com/2004/05/21/ politics/21MEMO.html ("A series of Justice Department memorandums written in late 2001 and the first few months of 2002 were crucial in building a legal framework for United States officials to avoid complying with international laws and treaties on handling prisoners, lawyers and former officials say."). In March 2005, the Pentagon reported to Congress that "[a]t least 26 prisoners ... died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspect were acts of criminal homicide." Douglas Jehl and Eric Schmitt, "U.S. Military Says 26 Inmate Deaths May Be Homicide," *New York Times*, March 16, 2005, available at http://www.nytimes.com/2005/03/16/politics/16abuse.html. See also Thomas L. Friedman, "George W. to George W.," *New York Times*, March 24, 2005, available at http://www.nytimes.com/2005/03/24/opinion/24friedman.html; Bob Herbert, "Is No One Accountable?," *New York Times*, March 28, 2005, available at http:// www.nytimes.com/2005/03/28/opinion28herbert.html?hp.

5. See *Rasul v Bush*, U.S. 124 S. Ct. 2686, 2710-11 (2004) (Scalia, J., dissenting) ("The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.").

6. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

powers. The legislation passed both Houses with little dissent, and those who questioned the constitutionality, wisdom or necessity of any of its provisions were quickly branded as "soft on terrorism". Throughout this period, the American people expressed strong support for the administration's policies, and most members of Congress suspended whatever doubts they might have had.

During substantially the same period of time, the government arrested and detained approximately 1200 people, largely of Arab ethnic background or Muslim religious faith, within the United States.[7] The government released the names of some of these persons. In some cases, the government also gave detailed accounts of their alleged links with international terrorism. However, when the Center for National Security Studies and several other non-governmental organizations sued under the Freedom of Information Act[8] for access to government information concerning the identities of all the detainees, the dates on which they were arrested and released (if applicable), the locations of their arrests and detentions, the reasons for their detentions, and the names of their lawyers, the government refused to comply with the request on the ground that the information was exempt from disclosure. The government asserted that disclosure would not only compromise national security, it would invade the privacy interests of those being held. The trial court held that some, but not all, of the requested information had to be turned over.

In June 2003, the United States Court of Appeals for the District of Columbia Circuit decided cross-appeals in the *Center for National Security Studies* case, holding, by divided vote, that the government was not required to disclose any of the requested information. Judge Tatel, the dissenting judge, observed: "While the government's reasons for withholding some of the information may well be legitimate, the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both [the Act] itself and the principles of openness in government that [the Act] embodies."[9] Judge Tatel specifically acknowledged that the case involved two "uniquely compelling governmental interests", that is, "the government's need to respond to ... unquestionably the worst ever acts of terrorism on American soil ... and its ability to defend the nation against future acts of terrorism."[10] But Judge Tatel thought that the case also involved another compelling interest

7. See Dan Eggen & Susan Schmidt, "Count of Released Detainees Is Hard to Pin Down", *Washington Post*, November 6, 2001, at A10.
8. See 5 U.S.C. § 552(b) (2002).
9. *Center for National Security Studies v U.S. Department of Justice*, 331 F..3d. 918, 937 (D.C. Cir. 2003) (Tatel J., dissenting) (emphasis in original).
10. *Id.*

that the majority failed to consider: "the public's interest in knowing whether the government ... is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation — by ... detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge or preventing them from seeking or communicating with legal counsel."[11] The Supreme Court denied certiorari.[12]

The Supreme Court was not eager to step into the war on terrorism, but eventually granted review in three cases that became the "Enemy Combatant Trilogy of 2004." On April 20, 2004, the Court decided *Rasul v Bush*,[13] in which 16 citizens of friendly nations, who maintained that they had never been combatants against the United States or engaged in terrorist acts, had challenged their continued confinement at Guantanamo on the grounds that they had not been charged with wrongdoing, permitted to consult counsel, or allowed access to courts or other tribunals to test the reasons for their confinement. Trial and appellate courts both held that they lacked jurisdiction to hear claims brought by aliens captured and held abroad, but the Supreme Court reversed by a 6 to 3 vote, holding that the courts did not lack jurisdiction to hear the claims of aliens held at Guantanamo because the Unites States effectively exercised sovereignty over the territory.

Approximately one week later, the Court decided the other two cases. In *Hamdi v Rumsfeld*,[14] the Court held, in a somewhat bewildering array of opinions, that Yaser Esam Hamdi, a person who was possibly a dual citizen of Saudi Arabia and the United States (having been born in Louisiana), and who had been captured by the Northern Alliance in Afghanistan, transferred to U.S. custody, and eventually held as an enemy combatant in a military prison in South Carolina, was entitled as a matter of due process to contest the factual basis for his detention before a neutral decision maker. The government had maintained that Hamdi was not entitled to any such review. In her plurality opinion, Justice O'Connor rejected the government's position, but also suggested that the circumstances might require a modification of customary constitutional and evidentiary rights in a number of ways. Leaving open the details, Justice O'Connor nonetheless suggested that the burden of proof might be shifted to the detainee, that the government might be able to introduce hearsay evidence, and that the neutral decision maker might not need to be a federal judge. On the same day, the Court decided *Rumsfeld v Padilla*,[15] in which a United States citizen had been arrested as a material witness in Chicago,

11. *Id.* at 937–938.
12. *Center for National Security Studies v Department of Justice*, 540 U.S. 1104 (2004).
13. See *supra*, n.5.
14. See U.S. 124 S. Ct. 2633 (2004).
15. See U.S. 124 S. Ct. 2711 (2004).

transported to New York, reclassified as an "enemy combatant," and transferred to a military prison in South Carolina. In a 5 to 4 decision, in which the majority opinion was written by the Chief Justice, the Court held that the case had been improperly filed in a New York federal district court because Padilla had been removed from New York by the government (albeit without his lawyer's knowledge) shortly before the petition for habeas corpus relief had been filed there. Thus, both courts below lacked jurisdiction, and the proceedings would have to begin anew in South Carolina.[16]

Many Americans have opted not to try and make sense of the significant changes they have experienced in their public and private lives, both as a result of the events of September 11, 2001, and as a result of public and governmental responses to those events. Others have experienced a profound loss of innocence, coming to appreciate not only the genuine existence of serious external threats to their way of life, but also the extent to which domestic political capital sometimes may be gained through a combination of government secrecy and fear-mongering. Many Americans are doubtless more interested in the widespread loss of faith in capital markets and the generally unhealthy state of the economy than in the challenges to ordered liberty represented by the prospect of a war against terrorism that has no apparent, discernable end. But some have sought to understand the causes of this present outbreak of terrorism and its possible genesis in factors within or beyond our control. Others are intensely curious about how the efforts of our governmental leaders, our courts, and our civil society compare to other instances in which the customary balance between liberty and security has been challenged by real or perceived dangers.

For those interested in the long view, it is fortunate that the latter question also has occurred to Geoffrey R. Stone, a leading scholar of the First Amendment and a former dean and provost of the University of Chicago. Earlier in his career, Dean Stone was a student of Harry Kalven, the legendary University of Chicago professor[17] who championed an expansive understanding of First Amendment freedoms, which he thought central to a free society.[18] Dean Stone also was a law clerk for Justice William J. Brennan, a Supreme

16. *Id.* at 2724–2727.

17. See Vincent Blasi, "Harry Kalven, 1914–1974" in *Remembering the University of Chicago: Teachers, Scientists, and Scholars* (Edward Shils, ed. 1991), pp.221–227.

18. See, e.g., Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven, ed. 1988). As with Professor Kalven, Dean Stone's work has been influenced by the scholarship of Zechariah Chafee and Alexander Meiklejohn, as well as the judicial work of Learned Hand, Oliver Wendell Holmes, Jr., Louis D. Brandeis, and William J. Brennan, Jr. — four of the great judicial theorists of the First Amendment. See Zechariah Chafee, Jr., *Free Speech in the United States* (1941); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960).

Court justice with similar views. These roots are never far from the surface in Perilous Times.

The architecture of Dean Stone's book is straightforward. The aim of the book is to consider the present state of civil liberties in the United States against the background of six previous periods in which threats to national security, whether real or imagined, exaggerated or soberly considered, were thought sufficient to justify significant adjustments of the existing balance between liberty and security. After a brief introduction, Dean Stone provides a necessarily truncated account of the salient issues and circumstances affecting the protection of civil liberties in each of the six relevant historical periods: the French Threat and the Alien and Sedition Acts of 1798, the Civil War of 1861–1865, World War I and the Red Scare, World War II, the Cold War, and the Vietnam War. The final chapter provides a summing up of the historical evidence and an attempt to place current events in historical context. In many ways, this is an optimistic book: things could be worse, and they have been. Whether that is serendipitous, or the result of permanent progress and evolving standards in law and society, remains to be seen.

For those who look to the understanding of the founding generation as the touchstone of constitutional interpretation, the Alien and Sedition Acts warrant particular attention. After all, the Bill of Rights became effective in December 1791, and the Alien and Sedition Acts were enacted less than seven years later.

In 1796, John Adams, a member of the Federalist Party, defeated Thomas Jefferson, a Republican, in the first contested election for president, by three electoral votes. In broad terms, the Federalists feared what they deemed excesses of democracy, and particularly the potential spill-over effects of the French Revolution. Similarly, the Republicans believed in popular sovereignty, were suspicious of government, tended to value liberty more than security, and feared tyranny more than anarchy. During Adams's administration, the French adopted an antagonistic position to the United States, and Adams proposed strong defense measures to Congress in the spring of 1798. The Republicans recognized the danger posed by French provocations, but, "[f]earing that a large military buildup would make war with France inevitable, increase the authority of the president, and deepen the national debt, they opposed every significant measure put forth by the Federalists" (p.26). The Federalists responded by accusing the Republicans of disloyalty. As noted by Albert Gallatin, the Republican leader of the House, it became impossible for a Republican to prove that he was not a French agent except by supporting the Federalists' proposals (p.28). Fiercely attacking the patriotism of their opponents, the Federalists experienced the frisson that politicians often feel when they sense the possible confluence of high patriotism and substantial partisan political advantage.

The Federalists sought to protect the nation from both external and internal

subversion. They passed legislation extending to 14 years the period of residence required before immigrants could obtain citizenship, which the first Congress had set at two years.[19] They also passed the Alien Enemies Act, which permitted citizens of alien nations to be detained, confined, or deported at the discretion of the president in the event of a declared war,[20] as well as the Alien Friends Act, which authorized the president to seize, detain, and deport any non-citizen he deemed dangerous to the United States, without regard to the existence of any state of hostilities.[21] Under the Alien Friends Act, the non-citizen had no right to any notice of the charges against him, no right to a hearing, and no right to present evidence on his own behalf. In addition, the president's determination was deemed conclusive. Finally, Congress passed the Sedition Act, which authorized imprisonment for not more than two years, and the levying of a fine of not more than $2,000, in the event that someone should be convicted of the offense of "writ[ing], print[ing],utter[ing] or publish[ing] ... 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 the intent to defame [them], or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States."[22] The Sedition Act had a "sunset provision", and was due to expire on March 3, 1801, the last day of the president's term.

The first prosecution under the Sedition Act was brought against Matthew Lyon, an Irish immigrant and former indentured servant who settled in Vermont and was elected to Congress as a Republican in 1796. Lyon was a candidate for re-election when was indicted in October 1798. He was charged with maliciously intending "to bring the President and government of the United States into contempt" by accusing the Adams administration of fostering "ridiculous pomp, foolish adulation, and selfish avarice," and by repeating the statement of another that Congress should have sent Adams to a "mad house" (p.50). Supreme Court Justice William Paterson presided at the trial. Lyon argued that the Act was unconstitutional, that he had not spoken with malice, and that his statements were true. After deliberating for an hour, the jury returned a guilty verdict. Justice Paterson sentenced Lyon to four months in jail, fined him $1,000, and assessed costs of $60.96. Lyon was confined in harsh conditions. He also was re-elected. He subsequently completed his sentence, a collection was taken up to pay his fine, and he took his seat in the House.

---

19. See Act of March 26, 1790, ch. 3, 1 Stat. 103 (Peters, ed. 1845) (2 years): Act of June 18, 1798, ch. 54, 1 Stat. 566 (Peters, ed. 1845) (14 years).
20. See Act of July 6, 1798, ch. 66, 1 Stat. 577 (Peters, ed. 1845). The Alien Enemies Act was enacted with bipartisan support and remains part of United States law.
21. See Act of June 25, 1798, ch. 58, 1 Stat. 570 (Peters, ed. 1845).
22. See Act of July 14, 1798, ch. 74, 1 Stat. 596 (Peters, ed. 1845).

Jefferson eventually defeated Adams in the contested election of 1800, and the Republicans took control of both Houses of Congress. Between July 1798 and March 1801, when Jefferson took office, however, the Federalists had arrested approximately 25 well-known Republicans under the Sedition Act. Of these, 15 were indicted. Ten of those were tried, and all those tried were convicted. Among those convicted were the three most influential Republican editors of the time. By contrast, not a single Federalist was indicted under the Act.[23] As Dean Stone notes, the "Sedition Act alienated a substantial majority of the American people, gave those who supported the Republican cause a powerful issue of principle around which to rally, and hastened the downfall of the Federalist Party" (p.71). Although the Federalists remained in control of the judicial branch, they would never again control either of the popular branches of government.

The Supreme Court never ruled on the constitutionality of the Sedition Act.[24] However, some of the Justices (who were required to ride circuit when the Court was not in session) presided over the trials of some of these cases, and they do not seem to have had any serious misgivings about the constitutionality of the law. Nor was there any evidence of jury nullification in the cases that were tried. On the other hand, Jefferson, in one of his first official acts as president, pardoned those who had been convicted, and freed those still being held under the Act, which he considered "to be nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[25]

In the sixty-year period between the Sedition Act and the onset of the American Civil War, the Sedition Act acquired iconic status, as an experiment not to be repeated. As the Court noted in New York Times Co. v Sullivan, "the attack upon [the] validity [of the Sedition Act] has carried the day in the court

23. That was true even though the Federalists were not shrinking violets themselves, but also spoke and wrote intemperately, both about the Republicans and about each other, particularly after Adams alienated many of them by reopening negotiations with the French in November 1799 (pp. 69–70).

24. At that time, the Republicans took the position that the federal courts were authorized to pass on the constitutionality of legislation. They subsequently abandoned that position when they came to power. See *Marbury v Madison*, 5 U.S. (1 Cranch.) 137 (1803).

25. "Letter of Thomas Jefferson to Abigail Adams," July 22, 1804, reprinted in 1 *The Adams-Jefferson Letters. The Compete Correspondence Between Thomas Jefferson and Abigail and John Adams*, at 275 (Lester J. Cappon ed., 1959) ("I discharged every person under punishment or prosecution under the Sedition law, because I considered and now consider that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image"). Moreover, Congress repaid the fines exacted under the Sedition Act forty years later, on July 4, 1840.

of history."[26] According to Dean Stone, there were "no significant federal restrictions of political dissent" during the period between 1798 and the Civil War, and, thus, there was no occasion to establish benchmarks to distinguish between appropriate and unjustifiable restrictions on civil liberties (p.133).[27] That statement is undoubtedly correct in one sense, but it certainly understates the significance of such events as the "Petition Crisis," when Congress prohibited the introduction of anti-slavery petitions over a long period of time, and John Quincy Adams, the only former president to sit in the House following his term as president, undertook to read the petitions aloud in the House to protest against what he took to be a violation of the First Amendment's guarantee of the right to petition the government.[28]

At all events, Lincoln was required to write on a relatively clean slate during the Civil War, and Dean Stone gives him high marks, not only for resisting the temptation to enact a new Sedition Act (which doubtless would have seemed an appealing option in view of the peculiar circumstances of a civil war), but for interfering relatively little with freedom of speech during the war (p.80). Dean Stone is obviously partial to Lincoln as an individual, and he is particularly impressed with Lincoln's willingness and ability to give cogent reasons for his actions, even where the factual predicate for those reasons may have been lacking (p.117). But Lincoln also let his military commanders get ahead of him on several occasions, and Lincoln did little in such instances to repair the damage once it was done. That was certainly true in the case of Clement Vallandigham, a former congressman who was tried and convicted by a military tribunal for having spoken against the imposition of martial law in Ohio (pp.94–108). Of course, Lincoln also unilaterally suspended habeas corpus, an action that Chief Justice Taney found unconstitutional in *Ex parte Merryman*,[29] and he did so on eight separate occasions. He also allowed civilians to be tried by military tribunals in places where the civil courts were open and functioning, which the Supreme Court found unconstitutional in 1866 in *Ex parte Milligan*.[30] In that case, Justice David Davis, a friend and supporter of the late president, wrote with great eloquence: "The Constitution ... is a law for rulers and people, equally in war and in peace, even in time of war or insurrection, if the civil courts are open and functioning. No doctrine, involving more pernicious

26. 376 U.S. 254, 276 (1964).

27. From its founding in 1854, the Republican Party championed freedom of speech, particularly with respect to laws in the Southern states which equated the advocacy of abolition with incitement to revolt (p.95).

28. See Leonard L. Richards, *The Life and Times of Congressman John Quincy Adams* (1986); William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* (1998).

29. 17 F. Cas. 144 (C.D. Md. 1861), Lincoln refused to comply with the court's ruling. (p.87).

30. 71 U.S. (4 Wall.) 2 (1866).

consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[31] Dean Stone nonetheless admires the moderation of Lincoln's position: that the Constitution does not cease to apply in time of war, but "the application of the Constitution may be different in time of war than in time of peace" (p.113).[32]

The final four case studies are well executed, touch on events more familiar to the contemporary reader, and are perhaps better known to current students of American constitutional law. President Woodrow Wilson entered the First World War without a strong domestic consensus and immediately set about building support and enhancing morale by attempting to curb dissent. Congress began debating what was to become the Espionage Act of 1917 only three weeks after the United States declared war. While Congress rejected some of the more extreme provisions proposed by the Administration, the Administration and the federal courts found ways, as the war progressed, to give the Espionage Act the edge that Congress had left off (p.146). As Dean Stone points out, the government went to great lengths to stir up suspicion of Germans and other ethnic groups, encouraged groups that were dedicated to spying on their neighbors, and encouraged individuals to report instances of disloyalty to the government (pp.156–57). A few federal judges acted courageously in rejecting extravagant readings of the Espionage Act, but most did not. The result was an expansive interpretation of the laws and unconscionably harsh sentences of ten, fifteen or twenty years. As Professor Chafee observed later, "the First Amendment had no hold on people's minds" (p.182). In the spring of 1918, Congress also passed the Sedition Act of 1918, which, with its sweeping terms, was "the perfect instrument to suppress dissent" (p.191). Shortly before the armistice, Congress also passed the Alien Act, which gave the government broad powers to deport aliens who were deemed members of anarchist organizations (p.181). In March 1919, the Supreme Court decided *Schenck v United States*,[33] in which Justice Holmes, writing for a unanimous court, upheld a conviction for conspiring to obstruct the recruiting and enlistment service by circulating a pamphlet to men who had been called and accepted for military service. In *Schenck*, Justice Holmes not only used his memorable simile of "falsely shouting fire in a theatre," but wrote that,

31. *Id.* at 120–121.

32. According to Dean Stone, "[w]e can infer that Lincoln would have upheld a restriction of speech if two conditions were satisfied: (1) the speaker specifically intended to cause unlawful conduct, and (2) the speech was likely seriously to interfere with the war effort" (p.117). As a theoretical matter, that may be true, but, as Dean Stone also properly points out, those were not the facts of the *Vallandigham* case, and Vallandigham was exiled by Lincoln's administration.

33. 249 U.S. 47 (1919).

"[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and ... no Court could regard them as protected by any constitutional right. ..."[34] Eventually, Justice Holmes and his colleagues would be required to work through a series of cases in which the Court would sketch out the shape of modern First Amendment law. In addition, the First Amendment would begin to get a "hold on people's minds."

In most respects, the government's actions during the Second World War were more modest. In 1940, Congress enacted the Smith Act, which required aliens to register, made it easier for them to be deported, and forbade any person "knowingly or willfully" to "advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence" (p.251). Only two sedition prosecutions were mounted under this Act during World War II, however. Thus, as Dean Stone notes, the nation's free speech record in World War II was mixed. In addition to the sedition trials, the war years were marked by the Dies Committee's investigation of alleged Nazi and Communist sympathizers, the FBI's wide-ranging investigations into political beliefs, and the government's aggressive use of denaturalization proceedings (p.282). The situation had been much worse, of course, during World War I, and it might well have been worse during World War II, but for the interventions of Roosevelt's last three Attorneys General—Frank Murphy, Robert Jackson, and Francis Biddle. At the same time, there had been significant developments since World War I, in the Supreme Court's willingness to protect freedom of speech, and the principle of freedom of speech had developed a new following within elements of the bar and the public. Indeed, one might reasonably conclude that the record of the war years was blemished, not principally by the government's treatment of free speech, but by its treatment of Japanese Americans (pp.283–307).

Dean Stone introduces the Cold War period by noting that, "During this era, the United States demonized current and former members of the Communist Party and their 'fellow travelers', and a host of political opportunists fed—and fed upon—the image of the Communist as insidious, malignant, and dangerous to American values. It was a period marked by the bare-knuckled exploitation of anticommunism. Fearful of domestic subversion and nuclear annihilation, Americans turned against one another in what would prove to be one of the most repressive periods in American history" (p.312). It was a time when Republican candidates went so far as to charge that Democrats were directed by Moscow, and the Democrats responded by trying to prove that they were as tough on loyalty issues as the Republicans. The executive branch produced "blacklists" of allegedly subversive organizations, congressional committees used their subpoena powers to harass Americans from every walk

34. *Id.* at 52.

of life, and "government at all levels hunted down 'disloyal' individuals and denounced them for past or present beliefs or associations," with little regard for considerations of due process (p.313). Senators and congressmen who questioned the tactics of individuals such as Senator Joseph McCarthy or the House Un-American Activities Committee were targeted for extinction (pp.336–337). In June 1954, Senator McCarthy was finally brought down by Joseph Welch, a courageous Boston lawyer who got up and left Senator McCarthy's hearing room, to loud applause, after stating, "You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?" (p.387). Like the other branches of government, the courts had a mixed record during this period. In the course of a decade, however, the Supreme Court decided some 60 cases involving the First Amendment. Dean Stone sums up the case law in this way: "At the outset, the Court strongly endorsed efforts to combat domestic subversion. Later, it played a critical role in helping bring this era to a close. This shift was due to several factors, including a change in the makeup of the Court, a deepening understanding of the issues, and a greater appreciation of the Court's responsibility to protect civil liberties—even in wartime" (pp.395–396).

In the Vietnam War period, President Johnson believed that domestic opponents of the war were weakening national security, but he was restrained in his response, in part because some of his most virulent foreign policy critics in Congress were among his staunchest allies in domestic affairs. In addition, however, Dean Stone believes that President Johnson's "guarded response to [his] critics also reflected a fundamental change in America's constitutional culture." He states: "It is impossible ... to imagine the president of the United States in 1963 initiating—or even *contemplating*—a criminal prosecution of George McGovern or Frank Church for his opposition to the war in Vietnam. Gradually, over 165 years and several wars, America's understanding of free speech and its commitment to open public debate, even in wartime, has changed profoundly." On the other hand, as Dean Stone also points out, the Johnson Administration found that "secrecy, deceit, and half-truths still remained effective weapons in the government's propaganda arsenal" (p.438). Moreover, government spying, congressional investigations into the anti-war movement, interference with political demonstrations, the criminal prosecution of political activists, and even "dirty tricks" eventually all played critical roles in the government's response to growing opposition to the war. As Dean Stone notes, divergent attitudes about the war both reflected and exacerbated other deep divisions within American society, which the Nixon Administration seemed particularly intent upon exploiting for partisan advantage (pp.461–462). In the end, the Vietnam War brought down two presidents, as well as President Johnson's "Great Society," which aimed at finishing the work of the New Deal. The Vietnam War also provided the occasion for some of the Supreme Court's most significant judgments of the modern era: *New York Times Co. v*

United States,[35] in which the Court declined to enjoin publication of the so-called "Pentagon Papers," and *United States v Nixon*,[36] which rejected President Nixon's claim of executive privilege with respect to the Watergate burglary, as well as several other landmark cases dealing with free speech and "subversive activities," including *Brandenburg v Ohio*,[37] which finally adopted the Holmes-Brandeis view that "advocacy of the use of force or of law violation [cannot be proscribed] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[38]

Dean Stone concludes the book by summing up some lessons to be learned from the six episodes and by reflecting on developments since September 11, 2001. From the Alien and Sedition Acts to the present, Dean Stone discerns the outlines of two distinct trends. On the one hand, each episode evidences a similar pattern: substantial restrictions are placed on liberty (with attendant harm to the political process and substantial sacrifices often being exacted from hapless individuals), only to be recognized later as an excessive reaction to whatever real or perceived danger might have existed. "Again and again, Americans have allowed fear to get the better of them" in reacting "to the dangers of wartime" (p.528). In each case, what was deemed wise policy by many at the time was later seen to be a mistake. Dean Stone writes:

> "[W]e know that in every one of these episodes the nation came after the fact to regret its actions and to understand them, in part, as excessive responses to war fever and/or government manipulation. The Sedition Act ... has been condemned in the "court of history, Lincoln's suspensions of habeas corpus were declared unconstitutional by the Supreme Court in *Ex parte Milligan*,[39] the Court's own decisions upholding the World War I prosecutions of dissenters were all effectively overruled, and the internment of Japanese Americans during World War II has been the subject of repeated government apologies and reparations. Likewise, the Court's decision in *Dennis*[40] upholding the convictions of the leaders of the Communist Party has been discredited, the loyalty programs and legislative investigations of that era have all been condemned, and the efforts of the U.S. government to "expose, disrupt and otherwise neutralize" antiwar activities during the Vietnam War have been denounced by Congress and the Department of Justice" (p.529).

The second trend that Dean Stone discerns is an overall pattern of progress,

35. 403 U.S. 713 (1971).
36. 418 U.S. 683 (1974).
37. 395 U.S. 444 (1969).
38. *Id.* at 447.
39. See *supra*, n.30.
40. See *Dennis v United States* 341 U.S. 494 (1951).

albeit one that is sometimes halting and uncertain. For example, the Civil War period was probably not as repressive as the period of the Alien and Sedition Acts, while the periods of the First World War and the Cold War were more repressive than those of the Civil War, World War II, or Vietnam. But American presidents no longer subject their political opponents to criminal prosecution or harsh conditions of imprisonment, and the American people, in Dean Stone's view, "have come increasingly to celebrate and take pride in the nation's commitment to civil liberties" (p.537). Neither of these developments should be underestimated. According to Dean Stone, "the aspiration of Americans to be fair, tolerant of others, and respectful of constitutional liberties may be more deeply embedded in American culture today than at any time in the nation's history" (p.537). On the other hand, Dean Stone also wisely recognizes that no one could predict with assurance "that the United States will never reenact the Sedition Act of 1798 or undergo another era of McCarthyism" (p.533). Finally, Dean Stone sees much occasion for optimism in the fact that our constitutional tradition has not recognized the option of shutting down the Constitution in time of war: "the Constitution is [not] irrelevant in wartime, and ... wartime is [not] irrelevant to the application of the Constitution." (p.543). In other words, Lincoln's view has prevailed.

Dean Stone's book is a big book in every respect, and it would seem churlish to suggest that something more might have been said. If one were to ask for more, however, it would be for a fuller examination of the two trends he identifies, their interplay, and their possible future course. In other words, there is much wisdom to be gained from the six historical studies that make up the bulk of Perilous Times, but it is impossible to take away from them a firm opinion about the extent to which they demonstrate progress, or how durable that progress will prove to be when threatened in varying degrees.

Much of the progress that Dean Stone sees is the apparent result, not only of changes in public opinion, but of changes in judge-made law, that is, in the development of formal constitutional doctrine, which moved during the twentieth century largely in a direction that Dean Stone would deem to be properly progressive. That may or may not continue in the future, depending on the personnel of the courts and the circumstances in which these issues arise. Indeed, to say that "the Constitution is [not] irrelevant in wartime, and ... wartime is [not] irrelevant to the application of the Constitution" is to state a very broad and capacious principle that is subject to a myriad of uncertain interpretations and applications. It would be far less satisfactory, of course, to say either that the Constitution is not relevant in wartime or that no account ought to be given to a state of war. But the idea that both should be considered obviously gives rise to the possibility that the courts will be guided by the felt need to express respect for constitutional values, while applying them in a way that may or may not give effect to them in any meaningful sense. For example, it comports with constitutional tradition to say that a citizen labeled

as an "enemy combatant" is entitled to the protection of the due process clause, but what consequence does such a statement have if the courts also define the citizen's entitlement not to include protections commonly understood as central to the meaning of due process, as Justice O'Connor suggested might be the case in *Hamdi*? At some point, does this balancing test simply allow the courts to pretend that they are paying attention to the Constitution when that is not the case?

Dean Stone wisely raises an equally important subject—the degree of traction that constitutional values may or may not have in the current situation—with a simple, but chilling example: "[I]f the United States had been struck within a single month with six terrorist attacks on the scale of those of September 11, who knows what measures the nation would have adopted?" (p.533). That is indeed the question to be asked and considered, even if it is not one that is susceptible to any firm or easy answer. Given the reactions of the government and the public to the events that did occur on September 11, it is difficult to be sanguine about what those reactions would have been if the actual events had approached the horror of the scenario posited by Dean Stone. Devastation of that magnitude, together with the government's confident assertions that the nation might have to face the threat of similar attacks for the foreseeable future, could pose a serious challenge to the progress that Dean Stone sees in the felicitous development of formal legal doctrine and a similar evolution of public attitudes. After all, as Dean Stone notes, "no cultural or legal change is irrevocable" (p.551). Additional consideration of these points would have made an impressive book even more so.

There is a final point that warrants mention. The possibility of meaningful political debate and deliberation in a free society does not depend simply on the absence of coercive government action, or threats of such action, directed against those with different backgrounds and perspectives or unorthodox views. It also depends on the quality of information available to the great body of citizens, and on the willingness and ability of those citizens and their leaders to process and evaluate that information. In 1966, Donald Rumsfeld, then a young congressman from Illinois, made this point with great eloquence during the congressional debate on the bill that became the Freedom of Information Act. Quoting James Madison, Mr Rumsfeld observed: "Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."[41] So the state of free speech in America

41. 112 Cong. Rec. 13,654 (June 20, 1966), quoting "Letter of James Madison to W.T. Barry," August 4, 1822, reprinted in *The Founders' Constitution* (Philip B. Kurland and Ralph Lerner, eds. 1987), available at http://press-pubs.uchicago.edu/founders/print_documents/v1ch18s35.html.

cannot be evaluated simply by the degree to which we forbear sanctioning speech. Nor can Americans simply congratulate themselves on their increased gentility in this area, that is, on their increasing adherence to those "evolving standards of decency that mark the progress of a maturing society."[42]

Any overall appraisal of the current state of free speech in the United States necessarily would require consideration of the degree to which accurate information is available and the degree to which the people are interested in it. One important technique in the war on terror has been for the government to limit access to accurate information about its activities, while also sometimes disseminating false or unsubstantiated information, such as Vice-President Cheney's repeated assurances that Saddam Hussein was responsible for the attacks on the Pentagon and the World Trade Center.[43] At the same time, access to hard news has become more limited as the news media have become increasingly centralized, increasingly profit-driven, and increasingly partisan. The mainstream television news bureaus have greatly reduced the size of their operations. Opinion is regularly delivered as news, and many viewers fail to notice because they tend to patronize only those outlets that share their own points of view. At the same time, there is some evidence that many Americans are not particularly interested in having access to hard news or facts. As the social commentator Gary Wills noted shortly after the last election, the American form of government "was a product of Enlightenment values—critical intelligence, respect for evidence, a regard for the secular sciences."[44] "Though the founders differed on many things, they shared these values of what was then modernity. They addressed 'a candid world', as they wrote in the Declaration of Independence, out of 'a decent respect for the opinions of mankind'. Respect for evidence seems not to pertain anymore, when a poll

42. See *Trop v Dulles*, 356 U.S. 86, 101 (1958). Moreover, technological advances have made spying on people easier than ever before. It is something that can be done very effectively, notwithstanding high standards of gentility. See *Kyllo v United States*, 533 U.S. 27, 35–40 (2001). In addition, it would be interesting (but obviously beyond the scope of Dean Stone's book) to compare the "progress" Dean Stone perceives in the United States's experience with trends in the other western democracies.

43. See James Gersten, "Cheney presses Hussein-Qaeda link. Despite questions, his claims persist," *Los Angeles Times*, October 3, 2004, available at http://www.boston.com/news/nation/articles/2004/10/03/cheney_presses_hussein_qaeda_link?mode=PF; Michael Kranish and Bryn Bender, "Bush backs Cheney on assertion linking Hussein, Al Qaeda," *Boston Globe*, June 16, 2004, available at http://www.boston.com/news/nation/washington/articles/2004/06/16/bush_backs_cheney_on_assertion_linking_hussein_al_qaeda?mode=PF.

44. See Garry Wills, "The Day The Enlightenment Went Out," *New York Times*, November 4, 2004, available at http://www.commondreams.org/views04/1104-25.htm.

taken just before the elections showed that 75 percent of Mr Bush's supporters believe Iraq either worked closely with Al Qaeda or was directly involved in the attacks of 9/11."[45]

In sum, there is more to free speech than the absence of coercion, and there is more to the safeguarding of political freedom than can be learned simply through the tracing of doctrinal evolution—even when that tracing is thoughtful and well-grounded in historical context. Dean Stone has performed an invaluable service by making this subject accessible to a wide readership in an intellectually rigorous way and at an opportune time. It does not in any way lessen his achievement to suggest that there is further work yet to be done in these fields.

BARRY SULLIVAN
Partner, Jenner & Block LLP, Chicago

THE WINDING UP OF THE DÁIL COURTS 1922–1925: AN OBVIOUS DUTY By Mary Kotsonouris (Four Courts Press, Dublin 2004) (ISBN 1-85182-767-6) (269 pages, hardback, €45)

Mary Kotsonouris' *The Winding Up of the Dáil Courts* is a complete and well-documented chronicle of the Irish courts during the fateful Civil War and the residual judicial chaos following partition. The American reader—especially a Southerner—is inescapably reminded of what must have been a similar difficulty for the eleven Confederate states of the defeated South during Reconstruction after the American Civil War (1861–1865). Both the Confederate courts and the *Dáil* courts served a government that was short-lived, and both were left dangling when that sovereign was unsuccessful in its cause.

The author, a former District Judge in Limerick, has written with a palpable passion for the legal history of Ireland. Her research is impressive, and her writing, almost impeccably prose-like.

The book's byline "an obvious duty" were the words of legislator Kevin O'Higgins when he introduced to his fellow lawmakers on February 11, 1925, the Act that officially terminated the commission that had served as the body constituting the interim judiciary.[1] O'Higgins was referring to the unavoidable task of the legislature to "wind up" this body when its work was completed.

As every American school child (particularly in the South) learns the history

---

45. *Id.*

1. Mary Kotsonouris, *The Winding up of The Dáil Courts 1922–1925: An Obvious Duty* (Four Courts Press, Dublin, 2004) 193, hereinafter "Kotsonouris."