

Our national crises, overreaction and regret

By Susan Bandes

A clever spoof recently posted on a legal history blog was headlined "In disturbing new study, economists find that history is inefficient." The study purported to test the old bromide that those who forget history are doomed to repeat it, proving through sophisticated methodological techniques that "those who remember history are as likely to repeat it as those who do not." The conclusion: resources currently devoted to the study of history should be redirected.

"War and Liberty," the indispensable new book by Geoffrey R. Stone, Harry Kalven Jr. Distinguished Service Professor of Law at the University of Chicago, handily refutes this conclusion.

"War and Liberty" is a powerful and thoroughly engaging study of how our nation has historically dealt with the challenge of balancing national security against fundamental liberties in wartime. The book (adapted from Stone's award-winning, more encyclopedic book "Perilous Times: Free Speech in Wartime") distills the lessons of seven national crises and their effects on civil liberties: the formative period of the 1790s, the Civil War, the two World Wars, the Cold War, the Vietnam War and the current war on terror (the last chapter is original to this book).

While each national crisis poses unique challenges, the narrative yields a disturbing pattern of overreaction to dissent, partisan exploitation and manipulation of fear and patriotism, and discriminatory imposition of the hardships of wartime.

"War and Liberty" is a terrific read, filled with humanizing anecdotes about the often larger-than-life characters populating its historical narrative. The book's lucid, direct style makes it appropriate for the lay reader. At the same time, even those familiar with the constitutional and historical terrain the book covers should find it both engrossing and illuminating.

The narrative begins at the end of the 18th century, when "the United States first faced the challenge of reconciling the Constitution with the perceived necessities of wartime." At this nascent stage, when the long-term survival of the United States was in question, a bitterly divided Congress passed the Sedition Act of 1798, criminalizing, inter alia, scandalous or malicious speech made with intent to bring federal governmental officials into contempt or disrepute.

The rise and fall of the Sedition Act introduces many of the book's themes. The act was the government's first attempt to address the issue of how much criticism is compatible with its

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WAR AND LIBERTY. An American Dilemma: 1790 to the Present. By Geoffrey R. Stone. W.W. Norton and Co. 224 pp. \$14.95.

ability to protect and sustain its own well-being.

The debate split cleanly along partisan lines, and the Federalists had the votes to pass the act. They also controlled the executive branch, which enforced the law, and every one of the ensuing indictments targeted a Republican. In short, it became apparent early on that it is difficult and perilous to distinguish speech dangerous to the national interest from speech dangerous to partisan interests, and that this problem is exacerbated when power is concentrated in one party.

The Sedition Act expired in 1801, and Jefferson, the newly elected Republican president, immediately pardoned and freed his Republican compatriots. But it was not until 40 years later that Congress decisively declared the act a mistake and made restitution to those fined.

This pattern of regret and correction in the wake of wartime overreaction was repeated many times: for example after President Lincoln's use of military tribunals to try civilians, the internment of Japanese Americans, the McCarthy era blacklists, and the widespread domestic surveillance of the Vietnam era.

Unfortunately, regret too often gave way to repetition of past mistakes once war returned. The lessons of the Sedition Act were forgotten by the time of the Espionage Act of 1917. The abuses born of the Espionage Act, such as the attorney general's exhortation that "loyal" Americans report suspicious people to the Justice Department, leading to 200,000 overzealous citizens ferreting out "disloyalty wherever they could find it," sometimes violently, were insufficiently heeded during the McCarthy era.

Whether we will continue to heed the lessons of the Watergate era — for example the need for oversight of government surveillance, and the recognition of the dangers of government secrecy — or for that matter the lessons of the McCarthy era on the dangers of stifling dissent, is an open question.

One fascinating aspect of this book is its analysis of judges and judging in wartime. In the conventional wisdom, judges stand apart from political actors swept up in war fever, and courts provide a bulwark against overreaction.

Yet wartime precedent (most obviously, *Korematsu* and the Cold War First Amendment cases, but examples abound) suggests a more complex story. As Stone observes, judges are not exempt from the assumptions or the

pressures of wartime, and they tend to defer to claims of military necessity. Throughout he singles out courageous judges (as well as politicians) who withstand enormous pressure, but in the main, wartime judges interpret the Constitution through a wartime lens.

His conclusion: "The Constitution applies in time of war, but the special demands of war may affect the application of the Constitution."

The extent to which the "wartime Constitution" is either a necessary evil or an appropriate reaction should be a matter of ongoing national debate, especially now. Two additional themes of the book help elucidate the issue.

First, in considering whether the time-limited nature of civil liberties restrictions ameliorates their harm, Stone eloquently argues that free speech in wartime is especially important, not merely for the individuals whose liberties are restricted, but for the "operation of democracy itself."

Second, he raises the question of how the hardships of wartime curtailment of civil liberties are allocated. The *Korematsu* court observed that "hardships are a part of war, and war is an aggregation of hardships." Stone's informative description of how Japanese-Americans, and not those of German or Italian ancestry, came to bear the overwhelming burden of the wartime sacrifice of liberties makes clear that racial prejudice was the primary cause of this aggregation of hardships.

The book's narrative shows this shameful period to be anything but aberrant: questions about how we treat aliens in particular, and the despised and dispossessed in general, are always with us but never more salient than in wartime.

The central question posed by "War and Liberty," one which is particularly salient in light of our current engagement in a war on terror that has no clearly defined endpoint, is this: Are we capable of utilizing the lessons of history in the long term, and even in the heat of wartime, or only in a post-war period of reflection and regret?

Stone's conclusion is measured but ultimately optimistic: we make many of the same mistakes over and over, and yet we do learn and progress.

The takeaway message of the book is that we cannot count on our leaders — from any branch of government — to protect our liberties in times of crisis: "the protection of freedom rests ultimately with the people themselves." This is not one of those books that leave its readers feeling angry, but powerless. It provides information we need, and a host of good reasons to make use of it.

"War and Liberty" makes a convincing case that if we pay attention to the recurring cycles of wartime overreaction and eventual correction, although we may never avoid them entirely, we can certainly do better.