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Free Speech in Wartime: Sedition Acts during the Presidencies of John Adams and Woodrow Wilson

From the moment the United States Constitution was ratified in 1788, conflicting ideas about our country's governing document have always been present. A critical part of the United States' constitutional history is the fact that the Constitution's creators, our country's founders, purposefully made it broad enough to be shaped as time went on. They knew change was inevitable, so they wanted a governing document that could last for a long time. This unique approach led to our country having one document that has been its way of governing for more than 200 years. Nevertheless, this broadly and generally written document left ample room for interpretation and disagreement. Such conflict was seen in the early days of our nation under the Constitution, and has definitely carried on into present times. Approaches to interpretations differed (strict versus loose), as did ideologies (liberal versus conservative), and various political factions throughout history also disagreed. This last point can be seen very early on, when the Democratic Republicans rose as the opposition to a Federalist-dominated government in the late 1790s, mainly because of a difference in opinion about how to interpret the Constitution. It was this conflict of ideas that became crucial in the early history of the Bill of Rights.

Specifically, the First Amendment has always been a topic of interest when examining these differing opinions. This amendment states that

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Freedom of speech has certainly had a large impact on how we have shaped our country from its beginning, and how we continue to shape it. An example of conflicting ideas about this particular freedom can be seen during times of war in our country. In examining those trying times, it is important to observe how the government dealt with such situations, how its actions related to the Constitution, and why the government decided to act as it did. Likewise, we must examine how citizens reacted to such government actions, and what the overall impact on American history and constitutionalism was. These issues can be pursued in two case studies: the wartime acts against free speech put forth by John Adams and the Federalists with the passing of the *Alien and Sedition Acts* in 1798, and by Woodrow Wilson with the passing of the *Sedition Act* in 1918, along with various reactions and effects of both wartime acts. After fully examining the two wartime sedition acts through these several subtopics, the conclusions made will show how each controversy contributed to American Constitutional history and specifically, to the development of American constitutionalism.

First it is necessary to examine the actual laws themselves, including the punishments for specific seditious actions, and to understand the political atmosphere of these specific points in time. Who was identified as the "enemy," and why did both President Adams and President Wilson feel it was necessary to support these wartime sedition acts?[1] Both Adams and Wilson signed these acts in order to protect their country and its citizens. However, when men were prosecuted and argued that their rights under the Constitution were being violated, deeper-rooted issues arose everywhere.

Analysis of a sedition trial from each era will show the law in action. These cases and their legacies have deeply affected American constitutional history. By examining them in depth, and understanding the judicial atmosphere in both time periods, we are able to understand how the laws were carried out, how seriously they were regarded in the eyes of the judicial branch, and how the public reacted to each.[2] During the two time periods examined, both of the Presidents'

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[1] It is the enemy during wartime that can really influence the President, a powerful leader in foreign affairs, to make decisions based on how he sees the government best protecting its citizens from foreign danger.

[2] Judicial opinions in this area have varied because this branch has changed many times since its beginning, mainly due to how the majority of justices at a specific time interpret the Constitution. It is important to remember that all justices are bound to be replaced at some point in time, and they can either be replaced by a justice with similar views as them, or opposite views - which is how court opinions can change over time on cases that are similar to each other.

relationships with the courts really depended on the political stance of the justices.

The final outcome of each trial validated the Presidents' acts, but behind the supportive opinions were different arguments that the justices of each era used to reach their conclusions. The acts had profound effects on state governments, state representatives, and the American people, because they were seen as direct attacks on a core principle of the Constitution: freedom of speech. Widespread and significant action was almost inevitable.

After analyzing the two court cases involving the sedition acts of 1798 and 1917, my examination will move to the documents that illustrate the friction between the national government and state governments. These include writings of the common citizens themselves and stories covered in newspapers while the acts were in force. Along with general public reaction, I will also examine the government reactions to these laws, such as actions of state governments in opposition to the decisions of the national government. In both eras the sedition acts raised fundamental issues about individual rights and American constitutionalism.

The latter half of this paper will discuss in detail how the two sedition acts affected American constitutional history. When we go beyond specific conflicts and look at the political atmosphere after the acts expired, we gain a fuller understanding of how both of the acts' legacies took shape. The immediate outcomes were significant, but so too were the long term effects, including how

the First Amendment protection of freedom of speech was interpreted and how these decisions shifted constitutional development in both eras.

John Adams and the 1798 Sedition Act

In 1798, our country was very young - it had been 23 years since the Revolutionary War started, and only ten years since the Constitution was ratified. As an independent country, America was figuring out who its allies and enemies were. The French had played a key role in the United States' victory in the Revolutionary War, giving a significant amount of help with resources throughout the years spent fighting against Great Britain. But by 1798 the relationship between our two countries was not as strong as it had been twenty years prior. With relations going bad fairly quickly, there was soon an undeclared naval war with France. This produced worry within the government, and specifically within the Federalist majority of Congress, along with President John Adams, who was a Federalist himself. It was this weakening relationship with France that led the government's Federalist majority to pass the Sedition Act of 1798. Regarding opposition to the government as harmful to the country, this act was created to punish any published words in opposition to the government, specifically the

President and his Federalist allies. As France was the enemy at this time, they targeted the French, and especially any Americans who supported France.[3]

Before getting to the language of the law itself, it is important to note how the history of government action against seditious libel, particularly within the practice of common law, influenced the Federalists to want a Sedition Act of 1798 in the first place. Before the United States was an independent country, it was a colony under the British Empire which operated under English law. When the Declaration of Independence was created and the Revolutionary war ensued, Americans did not necessarily want to get rid of every single practice inherited from the British. Upon gaining independence,
British influence through court rulings and traditional procedures was still prevalent. Specifically, early American law was similar to English seditious libel law in the fact that both were defined by common law, the supposed ancient, natural law of England. This practice was made known to Americans during colonial times though the English legal intellectual Sir William Blackstone, in his work *Commentaries on the English Law*, written between 1765 and 1769. This "Blackstonian view" quickly became a favorite on the account of the common law

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[3] Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* (New York, London: W.W. Norton & Co, 1991), 130-31.

authority, and even despite the struggles of colonialism brought on by the British, the American people claimed common law as their inheritance.[4]

When separation from the British occurred, Americans kept but modified the common law, as many did not want to keep American courts the same as British courts. Due to truth being prohibited as a defense, as well as the extremely unequal power between the judge and jury,[5] the people were expecting things to change from British rule. And they did. By allowing the jury to have more authority within a case, as well as allowing truth as a defense in order to demonstrate whether the statement was of malicious intent or not, significant modifications were affirmed in state law and practice.[6] According to historian James R. Stoner, the fact that the Americans wanted to keep the general practice of common law shows that "even as they introduced the written constitution to the

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[4] James Reist Stoner, *Common Law Liberty: Rethinking American Constitutionalism* (Lawrence, Kansas: University Press of Kansas 2003), 13.

[5] In English law the jury was only allowed to decide whether or not the defendant actually published the words he was charged with. The judge, on the other hand, was the one who actually decided if the words said or written constituted a seditious act, and would then decide how the defendant would be punished. As for truth as a defense being prohibited, it was because British judges figured that if something was truthful, it would actually constitute an even larger possibility of acting against the government. On this topic, see Leonard W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (New York: Harper & Row, 1963), 12-13.

[6] Levy, *Legacy of Suppression*, 3-13.

world, they had no intention of replacing the unwritten law on which their properties were founded and by which their moral and social lives were ordered."[7]

One particular area within common law described by Blackstone through his work *Commentaries on the English Law* would soon become a focal point of the Sedition Act of 1798. Blackstone wrote that "The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[8] This notion of punishment being acceptable as long as there is no prior restraint is a strong indicator of why the Federalists were in favor of the Sedition Act of 1798. But it also led to the opposition by the Democratic-Republicans, as will be discussed below. Along with Blackstone's views, the modifications of the common law practice within American courts also encouraged the Federalists to create the Sedition Act.[9]

Within the actual law, there were four sections. The first section included details of what would be seen as a high misdemeanor, and the punishment for that crime. If someone were to conspire against the National Government, then

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[7] Stoner, *Common Law Liberty*, 15.

[8] Levy, *Legacy of Suppression*, 14.

[9] "The Sedition Act Trials — Historical Background and Documents," History of the Federal Judiciary, accessed November 30, 2016, http://www.fjc.gov/history/home.n sf/page /Tu_sedition _narrative.html.

they were to “be deemed guilty of a high misdemeanor, and on conviction...be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years…”[10]

The next section made just speaking against the government as a lower level of crime, and stated the punishment as well. If someone were to write, print, publish, etc., words that were against the National Government, then they were to “be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.”[11]

The third section delineated how the trial of the accused would be handled. The person accused of such actions would be allowed to defend themselves through evidence in front of a jury, which would “have a right to determine the law and the fact,” meaning they would be deciding whether what was printed/published was in fact truthful, or libel.[12]

The final section of the law stated that the act was to expire after March 3, 1801, which is when the Adams administration would leave the White House. This is an interesting part of the law, mainly because it shows that the Adams administration intended to have this law available to Adams exclusively, and not the next president. If the presidency were to go to someone who did not like

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[10] “The Sedition Act Limits Criticism of the National Government, 1798,” reprinted in *Major Problems in American Constitutional History,* 87.

[11] Ibid., 88.

[12] Ibid.

Adams or was against Adams in some way, and this act did not expire, that next president might use it to his own advantage. Adams and the Federalist did not want that to happen.[13]

This Sedition Act was similar to the common law used in the British Government. The political actors who supported the Sedition Act did not deny this, even saying that the act's intention was to bring seditious libel, a common law crime, into American government via a congressional statute.[14]

Section three of the Sedition Act stated that in regard to the trial of the accused, it was up to the jury to decide whether or not the accused party had a truthful defense, or if what they were saying was false information. This wartime act passed by Federalists essentially "softened the traditional law of seditious libel, for it permitted truth as a defense and allowed the jury to decide whether an utterance was libelous." Both permitting truth as a defense and allowing a jury to decide whether or not it was true were issues that free speech advocates had argued for a long time.[15]

During this time there were many aspects of the political atmosphere that made the situation surrounding the Sedition Act unique. First of all, since the country was still in its early years, the power of the Supreme Court was not yet

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[13] "The Sedition Act Limits Criticism of the National Government, 1798," reprinted in *Major Problems in American Constitutional History*, 88.

[14] Kelly, Harbison, and Belz, *The American Constitution*, 131.

[15] Ibid.

developed. The Constitution's founders purposefully created the Judicial branch as the weakest of the three branches, with the Legislative branch being the most detailed with rules, then the Executive Branch. Obviously coming out of the rule of a monarch, the founders saw a presiding Executive officer as something important to have, but they did not want another king. So they created checks and balances for that purpose, but these were within and between the Legislative and Executive branches, rather than within the Judicial branch. The role of the judiciary in this scheme was not entirely clear, so the early Supreme Court did not have the power we see in more modern times, when it has assumed the power of determining what the Constitution means when hearing cases that have constitutional questions. In these early years of the country, “the federal judiciary played no such role. Either the separate branches of the government presumed to exercise this power.”[16] John Marshall’s contribution to the Supreme Court with his defense of judicial review did not happen until 1803. Accordingly, the justices during the years of the Sedition Act did not attempt to resolve the issues involved. This part of political atmosphere doubtlessly affected the outcome of the Sedition trials.

Another component of the political atmosphere was the tension between the two major parties at the time, the Federalist and the Democratic

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[16] Kelly, Harbison, and Belz, *The American Constitution*, 134.

Republicans.[17] The main concern from this newly formed party opposed to the Federalists was that “the reforms that the federalists had put into the Sedition Act were inconsequential: The very idea that freedom of the press existed so long as there was no prior restraint of publication suddenly appeared inadequate. Punishment after publication, Republicans argued, was every bit as inhibiting as prior censorship.”[18] It was clear that the Democratic Republicans did not agree with the Federalists on how the government of this newly founded country should work.

When the Sedition Act was passed in 1798, the first person to be convicted was in fact a member of Congress himself. Matthew Lyon, a United States Representative from the state of Vermont at the time, was accused of seditious libel on three counts. They revolved around Lyon’s harsh criticism of the government of the United States, and specifically President John Adams, by publishing a letter received from a French diplomat in a newspaper article and speaking ill about the President on numerous occasions. In his own words,

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[17] In the United States’ earlier years, a group called the Anti-Federalists mainly consisted of small states that liked the system of sovereign states under the Articles of Confederation. This group opposed the Constitution until the Bill of Rights was proposed as a compromise by James Madison. Madison, who was in fact a Federalist, became displeased with his party and split from them, ultimately helping create the Democratic Republican party in the early 1790s. This party supported strong sovereign states and can be seen as a backstory to why they supported states’ rights rather than an overbearing federal power.

[18] Kelly, Harbison, and Belz, *The American Constitution*, 136.

Matthew Lyon was accused of seditious libel against the government due to this published quote:

> "As to the executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness, and accommodation of the people, that executive shall have my zealous and uniform support; but whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power...when
> I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.'"[19]

As well as those remarks, the letter published by Lyon, which was written by a French diplomat and was also antagonistic of the Adams' administration, stated the following:

> "'The misunderstanding between the two governments [France and the United States], has become extremely alarming; confidence is completely destroyed, mistrusts, jealousy...are so

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[19] *Spooner's Vermont Journal*, vol. 16, n. 784, July 31, 1798, reprinted on *Federal Judicial Center*, http://www.fjc.gov/history/home.nsf/page/tu_sedition_hd_statements.html.

> apparent, as to require the utmost caution in every word and action that are to come from your executive, I mean, if your object is to avoid hostilities...had it guided the pens that wrote the bullying speech of your president, and stupid answer of your senate...I should probably had no occasion to address you this letter.'"[20]

Based on these two excerpts, the government accused Matthew Lyon of three seditious libel charges. First, he was charged with intent "To stir up sedition, and to bring the president and government of the United States into contempt." Secondly, he was charged with "Having maliciously...and with intent...published a letter, said to be a letter from a diplomatic character in France." Lastly, he was charged with "Assisting, counselling, aiding, and abetting the publication of the same."[21]

Interestingly, Lyon did not hire a lawyer. After pleading not guilty, his main defense point was that the sedition law was unconstitutional. Besides this, he defended himself in two other ways: that he meant no harm from it, and that

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[20] James Lyon, *A Republican Magazine: or, Repository of Political Truths* (Fairhaven, Vt.: 1798), 79–80, reprinted on *Federal Judicial Center*, http://www.fjc.gov/history/home.nsf/page/tu_sedition_hd_ statements.html.

[21] "Lyon's Case, 1798," reprinted in *Major Problems in American Constitutional History*, 91-92.

whatever he was saying in his news source was truthful and not a made up story. Lyon was unfortunately without testimony for the first two points, but did call on two judges to testify for him on the third point. Judge Smith, said that "the defendant addressed the jury at great length, insisting on the unconstitutionality of the law, and the insufficiency of the evidence to show anything more than a legitimate opposition."[22]

Unfortunately, "guilty until proven innocent" was the main way these Sedition Act trials worked. Since the jury was unable to prove Lyon's outright innocence, they returned with a verdict of guilty and a punishment of being "imprisoned four months, pay the costs of prosecution, and a fine of one thousand dollars, and stand committed until this sentence be complied with."[23] Lyon decided to peacefully serve his sentence, and even ran for the House of Representatives for Vermont while serving his time in jail. He ended up winning the election and beating his Federalist opponent by a landslide, despite the fact that his home state was majority Federalist. After serving his full sentence, Lyon became a very well-known elite who advocated strongly for free speech, and was hailed for his bravery despite suffering through an unjust sentence.[24]

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[22] "Lyon's Case, 1798," reprinted in *Major Problems in American Constitutional History*, 92-93.

[23] Ibid., 93.

[24] Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Co, 2004), 52-53.

At face value, the Lyon case can be seen as a success for Federalists because they tried and punished a citizen who violated the Sedition Act of 1798. When looking at a deeper level though, this case ended up harming the Federalists. Instead of gaining dominance over the Democratic Republicans after successful punishment of citizens for seditious libel against the government, the Republicans and their supporters ended up coming back stronger than ever expected by the Federalists. It was this growing support for their opponents that cost the Federalists the election of 1800, a significant turning point not only because it was the turn of the century, but because of the turn of power from the Federalists to the Democratic Republicans. With ideals that were more state-centered than based on federal power, this radical change can be seen as the point that started paving the way for how the 1800s would look in America.

The states also fought back against the federal government prior to the election of 1800.The primary action was the Virginia Resolution and the Kentucky Resolution, which were both created in the same year as the Sedition Act and a few months after the Matthew Lyon case. These resolutions, which were secretly written by Madison and Jefferson, are the key documents that showed what the Democratic Republicans and many of their supporters wanted - the destruction of the Sedition Act that they saw as unconstitutional.

The Virginia Resolution, the first of the two, protested the Sedition Act for many reasons. For one, the power delegated to the federal government within the Act was actually a power that is not delegated to the executive through the Constitution. Giving the Executive branch the power of either of the other

branches undermined the process of free government, as well as positive provisions of the Constitution itself. And within the Constitution, the Resolution emphasized, the First Amendment meant that “the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified by any authority of the United States.” By passing this Act, the federal government violated the written words of the Constitution and actively undermined the governing document.[25]

As for the Kentucky Resolution, it said that if the federal government was allowed to infringe upon the limits set by and for it within the Constitution, and did not recognize the separate institutions that have specific powers given to them through this compact that is favorable to the “liberty and happiness of the several states...[then] an annihilation of the state governments, and the creation upon their ruins of a general consolidated government, will be the inevitable consequence.”[26] This Compact Theory of the union created by Jefferson was the strict-constitution-states’-rights view that sought to limit the federal government to enumerated constitutional powers.[27] The theory expressed a concern with problems of constitutionalism in regards to “the relationship between the citizens

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[25] “The Virginia and Kentucky Resolutions Decry the Abuse of National Power, 1798-1799,” reprinted in *Major Problems in American Constitutional History*, 88-90.

[26] Ibid., 90.

[27] Michael Kent Curtis, *Free Speech, “the People’s Darling Privilege”: Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), 73.

and the government, the distribution of powers among the parts of the government, [and] the proper limits on governmental power in the interest of individual liberty."[28] The interesting part about the Resolutions and this theory is that, even when they did not gain overall support from many states, only *one* state rejected the Compact Theory. This shows that its support was widespread, despite the large differences in opinion between the two opposing political parties.[29]

Both of the Resolutions showed that the Republicans did not agree with the federal common law of crime, which gave the federal government the power to regulate what was intended to be left to individual state governments. "Congress could punish as crimes only those matters enumerated as such in the Constitution; seditious libel not having been so enumerated, Congress lacked the power to enact a sedition law." The Democratic Republicans used the Virginia and Kentucky Resolutions to argue that the Sedition Act was a clear case of constitutional corruption and decay, and that the Federalists were to blame.[30]

It is clear that there were fundamental differences in viewpoints on the matter, and the Democratic Republican viewpoint was best summed up by Madison. He said that "it made no sense to construe the First Amendment as embodying the English law of seditious libel...fundamental differences between

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[28] Kelly, Harbison, and Belz, *The American Constitution*, 140.

[29] Ibid.

[30] Kelly, Harbison, and Belz, *The American Constitution,* 133.

the English and American political systems rendered the limited English conception of Free speech inappropriate for the United States."[31] Unfortunately for Madison and his party, the Sedition Act of 1798 was ultimately passed by a very narrow margin of 44-41. The Federalists "celebrated not only the enactment of this legislation, but also the "liberalization of the common law," proclaiming when it was passed that the Sedition Act was "'a wholesome and ameliorating interpreter of the common law.'"[32] Their support of the modified traditions brought from English law was abiding.

With both of these powerful Resolutions, as well as other similar protest writings at the time, the Democratic Republicans brought attention to four essential constitutional issues: "the scope of federal legislative power; the settlement of constitutional disputes and the role of the states therein; the nature of the Union; and the meaning of freedom of speech and of the press and its bearing on the question of legitimate political opposition." [33] All four of these key issues were ones that stayed with our country for many decades, building more tension and contributing to the secession of the Southern states and the arrival of the Civil War.

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[31] Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W. W. Norton, 2007), 11-12.

[32] Stone, *Perilous Times*, 43-44.

[33] Kelly, Harbison, and Belz, *The American Constitution*, 133.

Opposing views on this Sedition Act not only spread through Congress, but newspapers as well. Obviously Democratic Republican newspapers were the targets of this government action against freedom of speech, but that did not stop editors from publishing works that were blatantly opposed to the Adams administration. For example, one Boston-based Republican newspaper, the *Independent Chronicle*, asked its readers in one article about the intrusive act, saying "'But can a law...founded on a violated Constitution, repress a sacred right vested in every freeman by the immutable law of nature?'"[34] And on the day before the Sedition Act was approved by President Adams, *The New York Times* published an article stating that the Federalists were a "'harmonizer of parties...They must all sing the same tune!'"[35]

As previously mentioned, an interesting facet of these resolutions was their authorship. At the time, authorship was a secret, but we would later find out that it was in fact James Madison and Thomas Jefferson who wrote them, respectively. It is easy to recognize the distinctive thoughts and opinions of both of the founding Democratic Republican politicians in the Resolutions. For instance, Madison did not see the Sedition act as a violation of the First Amendment, but rather saw regulation of the press as something that was within the state's power, thus limiting federal power. This is the guiding principle of the

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[34] Curtis, *Free Speech, "The People's Darling Privilege"*, 73.

[35] John Lofton, *The Press as a Guardian of the First Amendment* (Columbia, SC: University of South Carolina Press, 1980), 33.

Virginia Resolution, of which he was the author. As for the Kentucky Resolution, which Jefferson wrote, the ideas presented are those of the Compact Theory of the Union, which was a large part of republican conservatism put forth by the Democratic Republican party. These ideas became increasingly salient as the constitutional system wrestled with the problem of state versus federal power in the years before the Civil War.

It became clear to Adams that the Democratic Republicans had gained tremendous support for their ideas when he lost the election to Jefferson and thus to the Democratic Republicans. He decided to undertake some last minute presidential actions before leaving office so that even when Jefferson and the Democratic Republicans held the majority in government, his Federalist administration would still have lasting influence. One obvious and immediate effect of Adams signing the Judiciary Act of 1801 was the reorganization of the federal court system and his appointing of the "midnight judges."[36] By appointing a large number of Federalist judges across all levels of federal courts, the Federalist party had one last stronghold in the government they were leaving to the Democratic-Republicans.

Even though the judicial branch was not seen as very powerful during that time, things began to shift with *Marbury v. Madison* (1803), and later, *McCulloch*

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[36] "Midnight Judges" occurred when President John Adams spent the last weeks in office, all the way up to midnight of his last day, signing appointments for a large range of federal judge positions.

v. Maryland (1819) - two of the most important Supreme Court rulings in American history. Chief Justice John Marshall, a Federalist Supreme Court judge who was appointed as one of Adams' "midnight judges", implemented *judicial review* in the court's opinion in *Marbury v. Madison*, which gave the judiciary a significant amount of power over the legislature. Sixteen years later in the case of *McCulloch v. Maryland*, Chief Justice Marshall highlighted the idea of *implied powers*. Through the "necessary and proper" clause of the legislative powers outlines in the Constitution, this broad interpretation of the Constitution clearly favored federal power over state power,[37] furthering the impact of the Federalist judges appointed by Adams in 1801.

This favoring of federal power over state power was always a key part of Federalist views, and in looking at the long lasting impacts of John Adams and the Federalists, this increased federal power can be seen as a factor that helped

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[37] *Judicial review*, which is not found within the Constitution, is the notion that the Supreme Court can mark a law unconstitutional if it is not in accordance with the Constitution, giving the Supreme Court an added check on the Legislature. On the other hand, *implied powers* and the "necessary and proper" clause, also known as the Elastic Clause, can be seen in the Constitution, under Article I Section 8, which outlines all powers of the legislative branch. At the end of the clause, it is stated that "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," meaning that in order to carry out the powers given to the Legislature, they are to use whatever mean is necessary, which broadened the scope of federal power against state power.

bring on the Civil War. When Federalists were losing their support more and more to the Democratic Republicans, one large issue was interpretation of the Constitution and the tension of federal versus state power. As seen in the Virginia and Kentucky Resolutions, states were not afraid to stand up to the Federalist administration to express their reasons for opposing the Sedition Act of 1798. It was this desire for more state power that advanced the Compact Theory of the Union during the Jefferson Administration. John C. Calhoun of South Carolina, in fact, used the arguments of these resolutions when he wrote a proposal for nullification of new federal tariff laws in 1828, which were anonymous since he was actually the current Vice President under the Jackson administration. To Calhoun, the tariffs were only beneficial to the North, not to the South, and more specifically, not to the state of South Carolina. He called on the exact ideology of state sovereignty and the Compact Theory set forth in the Kentucky Resolution by Jefferson, but in a much more systematic way than Jefferson imagined when he created the resolution. Calhoun presented the argument that the power of the nation lies within the sovereign states, the states had the right to decide on whether they think their rights have been imposed on by specific federal laws, and they should be able to apply a remedy for any such infraction. After it was understood that Calhoun wrote the nullification proposal, tensions were high between him and President Jackson, who then decided to select a different Vice President for his second term in 1832. That same year, South Carolina held a nullification convention in which the state voted to nullify the tariff that Calhoun wrote on in 1828, and issued an “Ordinance for Nullification” which would then be

immediately rejected by President Jackson. It is through those events that Calhoun took the Compact Theory down an unprecedented road, ultimately creating the path to South Carolina's secession from the Union in 1860.[38]

When Thomas Jefferson won the election of 1800, the Democratic Republicans were grateful that the Federalist no longer dominated the government. By winning, they "saw their victory as signaling a return to an earlier condition of liberty and civic virtue," and aimed for restoration of the principles that lead the country during the Revolution. With the turn of the century and the power being turned over to a new political party, the Republicans wanted to make sure their government did not do the same as the Federalists had done before them. With this Republican constitutionalism, the main notions were all things that were not present with Adams' administration. The ideas that this new Constitutionalism was based on included "the separation of powers and legislative independence, resistance to executive influence, strict construction of federal powers, and states' rights and the compact theory of the Union."[39] These principles are what ultimately contributed to our country having the one of the most divided eras we have ever seen in our country's short history. In this way the legacy of the Sedition Act, and the resistance to it, were long lived and influential.

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[38] "South Carolinian John C. Calhoun Proposes Nullification, 1828," reprinted in *Major Problems in American Constitutional History,* 59-161.

[39] Kelly, Harbison, and Belz, *The American Constitution*, 138.

Woodrow Wilson, the 1917 Espionage Act, and the 1918 Sedition Act

As the United States was moving into the 20th century, a little more than 100 years had passed since the Sedition Act of 1798. Woodrow Wilson had won a second term as president in 1916 based on a platform of American neutrality, which had grown out of his first term and had gained a lot of public support. Americans wanted to continue to stay out of Europe's war, and the votes to reelect Wilson showed that. But as Germany became more of a threat, eventually attacking the supply boats that the United States used to send to aid to the Allies, America declared war on Germany. The War in Europe had officially spread to America, and a real world war had begun. That war declaration soon provoked a familiar pattern of freedom of speech restrictions similar to the Sedition Act of 1798, with the passing of the Espionage Act of 1917 and the Sedition Act of 1918.

Leading up to the passing of the Espionage Act and Sedition Act, many things were occurring that contributed to the Democratic Party's support for them. For one, the new century brought new technologies of entertainment. Throughout history, whenever there is a new technology, there is uncertainty among elites regarding how far the citizens will go when it comes to using it. New technologies always tended to lead those in power to regulate them somehow. This was true of the printing press in America when it arrived in the mid-1600s. In the early 1900s the new technology was film, and it too was seen as threatening - so much

so that the Supreme Court ruled in a 1915 case that film was subject to prior restraint. The Court did not think movies were protected by the First Amendment. In modern times this would be shocking, but this case was not overruled for over 30 years, paving the way for federal censorship during World War I through the Wilson administration's application of the Espionage and Sedition Acts.[40] Another occurrence that contributed to the passing of these acts against freedom of speech was the success of the Russian Revolution in 1917. This success saw the rise of Communism as well as the rise of American fear towards Communism, formally known as the first "Red Scare" that took place in 1919-1920. As communism is the opposite of capitalism, the basis of American economy, the possible threat of Communist Russia spreading to America and stripping the country of the free market was a large part of the Scare. All the while, WWI was going on (1914-18), and Wilson had sent US troops to aid the Allies in the fight on the eastern front. Before Communist Revolutionary leader Vladimir Lenin and the Bolsheviks took over, Russia was actually a part of the Allied countries.[41]

Just when the American Government saw the Russian Revolution and Lenin as a growing overseas enemy of the United States, Wilson was facing something even more prevalent at home. There was political division regarding

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[40] Craig R. Smith, ed., *Silencing the Opposition: Government Strategies of Suppression* (Albany: State University of New York Press, 1996), 151. This case's citation was not found in Smith's book, but it is *Mutual Film Corp. v. Industrial Commission of Ohio* (1915).

[41] Smith, *Silencing the Opposition*, 151.

the ideas that were being shared by supporters of German-born philosopher Karl Marx, the father of political and economic communism. This divisiveness, which was building up alongside the Progressive Movement of the late 1800s as well as with the rise of the Socialist Party and American Nationalism, was a major contributor to the creation of the Espionage and Sedition Acts of 1917 and 1918.

In the later half of the 1800s, America was seeing its own Industrial Revolution, with important industries accumulating size and wealth, such as oil, steel, and railroads. More factories were created, and more people were moving to and working in urban areas rather than rural areas. Big businesses and monopoly companies were on the rise, quickly acquiring more wealth than anyone had seen before that day and age in America. Big business owners began to have more power, whereas the poor were getting poorer. There was an extreme wealth gap, and the big business elites even had political ties - essentially affecting the conduct of government. By the end of the 1800s the working class had seen enough of their own being treated unfairly, and enough of the big business elites corrupting the marketplace as well as the government. It was with this belief that the Progressive movement was born, with key ideals from Karl Marx's "Communist Manifesto" that included aspects of scientific socialism, which claims that there is a natural economic transition from capitalism to socialism. The workers were attracted to the ideas of reform across all areas - economic, social, political, and moral - and strived to create a better society with better working conditions, higher wages, regulated businesses, and more direct elections.

Another reason for the passage of the Espionage and Sedition Acts was that the Socialist party of the United States contained a large number of German immigrants, due to socialism being a large part of German political society. This key factor added to the fear of Communism spreading on a global scale and into America.[42] By this point in time, President Woodrow Wilson realized the imminent threat Germany presented to the United States through its societal ideals. Yet there had been no direct attack on the United States or its national security, so support for entering the war against Germany remained very low.

Moreover, Wilson was running for his second term on the promise that he would not include America in the war that was taking place in Europe, so he needed to find a reason to change the opinions of the Americans to be in support of entering the war. If he were to create an "outraged public," they would then find it acceptable for him to abandon the isolationist standpoint that he had been elected with. It would even make them want to enlist when it came time to be fully invested in the war. Accordingly, he "resorted to rhetoric that directly echoed the cries of the Federalists in 1798. He decried the 'sinister intrigue' that was being 'actively conducted in this country' by 'dupes of the Imperial German government,' and warned that the German government had agents in the United

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[42] This fear was one factor which led the American government to declare war on Germany in 1917 after the Germans used submarine warfare to sink American merchant ships as they were on their way to aid the Allies.

States ‘in places high and low.’”[43] Wilson might as well have had a big arrow pointing to the Socialist party, and more specifically, the German Marxist immigrants, because that was exactly whom he wanted to make the national enemy on the homefront.

As President Wilson was presenting his war message to Congress, he made it clear that extreme American Nationalism was going to be the most important political stance for the next four years. He warned Congress that “the war would require a redefinition of national loyalty. There were ‘millions of men and women of German birth and native sympathy who live amongst us,’ he said. ‘If there should be disloyalty, it will be dealt with a firm hand of repression.’”[44] By claiming that German agents were “subverting the national will,” Wilson showed strong similarities to the message that the Federalist party, specifically Alexander Hamilton, offered during the quasi-war with France to justify the Sedition Act of 1798.[45]

When reading the actual text of the Espionage Act of 1917 and the Sedition Act of 1918, similarities can definitely be drawn between them and the Sedition Act of 1798. The Espionage Act of 1917 “targeted those who interfered

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[43] Stone, *Perilous Times*, 153.

[44] S. Mintz and S. McNeil, “The Espionage Act of 1917,” Digital History, last modified 2016, accessed February, 1 2017, http://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid= 3&psid=3904.

[45] Smith, *Silencing the Opposition*, 152.

with the drafted, as well as openly criticized the government. It gives the postal service the authority to ban printed items for mail service, as well as threatens any person convicted of obstructing the draft with $10,000 fines and 20 year jail sentence."[46] The Sedition Act of 1918 contained a provision that was originally a part of the Espionage Act and "made it a federal offense to use 'disloyal, profane, scurrilous, or abusive language' about the Constitution, the government, the American uniform, or the flag,'"[47] but it was ultimately rejected. As the war went on, and the need for it became more prevalent to the American government, the provision was brought back to a vote and was then approved as an amendment to the Espionage Act about a year later.[48] This Act was very similar on paper to that of 1798.

In 1798, the Federalist party had majority control over all aspects of the government. It was easy for them to pass the Sedition Act and have President Adams sign it into action, despite the opposition of the Democratic-Republicans. In the context of the Wilson administration, being that it was more than 100 years since the passing of the 1798 act, the political atmosphere within Congress was

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[46] Digital History, "The Espionage Act of 1917."

[47] S. Mintz and S. McNeil, "The Sedition Act of 1918," Digital History, last modified 2016, accessed February 1, 2017, http://www.digitalhistory. uh.edu/disp_ textbook_ print. cfm?Smtid=3 &psid=3903.

[48] David M. Rabban, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997), 176.

hesitant to pass a law that was so closely related to that horrendous Sedition Act of 1798. When drafting the
Espionage Act there were clear supporters, but there were also “strong voices in the House of Representatives and in the Senate that opposed censorship and the suppression of dissenting views...those opposing the repression of dissent won the day, and the press censorship provision was rejected by a clear vote in the House in 1917.
However, the Sedition Act was approved some twelve months later.”[49]

Even though there were similarities between the 1798 and the 1917 acts, the supporters of the Espionage and Sedition Acts did not use the 1798 act as a model for the sedition act of 1918, which shows that there were still negative connotations surrounding the earlier legislation. Instead, “proponents of suppression argued in 1917 that the censorship provision was needed because America was at war...because ‘every government at war’ has censorship, as Representative Venable put it...In 1918 the argument was that the Sedition Act was needed because otherwise there would be mob rule and lynch justice...they were the driving force behind the effort to tighten the Espionage Act,”[50] On the other hand, opponents of the 1917 act “referred back to the Sedition Act of 1798

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[49] Martti Juhani Rudanko, *Discourses of Freedom of Speech: from the Enactment of the Bill of Rights to the Sedition Act of 1918* (New York: Cambridge University Press, 1997), 176.

[50] Rudanko, *Discourses of Freedom of Speech*, 176.

as a dangerous precedent. A more general theme for them was to emphasize that freedom of speech, understood in a broad sense, had been and was...[a] basic right of Americans. This theme reflected the continuing salience of the tradition of toleration that President Madison established during the War of 1812."[51] The fundamental difference in viewpoints, Democrats and Federalists versus the Republicans in both eras, still generally reflect the same opinions towards the First Amendment: intense government action during time of war versus freedom of speech as a basic right for Americans.

During the World War I era, the legal profession as a whole was highly conservative, both politically and jurisprudentially. "Bar associations tended to embrace the fierce patriotism of the war effort, and lawyers who criticized the war - or even defended war critics - were subjected to ostracism and occasionally even formal discipline. Judges who bucked the dominant attitudes of their profession could expect to be treated no less harshly."[52] Since the atmosphere was highly conservative, the commitment to civil liberties was basically nonexistent.

Up to this point in American history, never had there been a civil liberties case to reach the Supreme Court that concerned freedom of speech. There was little experience with this type of civil liberty law. In fact, most judges just

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[51] Rudanko, *Discourse of Freedom of Speech*, 177.

[52] Stone, *Perilous Times*, 159.

assumed that the First Amendment implicitly incorporated the common law practice of England, staying with the Blackstonian viewpoint seen from America's oldest days. This acceptance of the Blackstonian stance in the legal arena, as well as the growing nationalism within the setting of the first World War against Germany, fostered the general acceptance of the Espionage and Sedition Acts of 1917 and 1918 within the legal community.

The patriotic fervor of American judges during World War I encouraged the judges to act through emotion, rather than through careful judicial reflection. This lead the legal system into a very dangerous state. Judges would impose "severe sentences on those charged with disloyalty, and no details of legislative interpretation or appeals to the First Amendment would stand in the way."[53] The danger of not having any sort of firm precedent to protect the freedom of speech meant that "few federal judges had neither the inclination nor the fortitude to withstand the mounting pressure for suppression. They, and the First Amendment, were swept away in a tide of patriotic fervor."[54]

Two of the most important cases from this crucial time of American constitutional history were the Supreme Court decisions of *Schenck v. United States* (1919), and *Abrams v. United States* (1919). In *Schenck v. United States*, Charles Schenck, the Philadelphia Socialist Party's general secretary, was accused of violating the Espionage Act of 1917. He, along with other members,

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[53] Stone, *Perilous Times*, 170.

[54] Ibid., 160.

"published 16,000 antiwar leaflets, some of which were distributed at the Party's bookshop and others of which were mailed to enlisted soldiers. The circulars declared the draft to be unconstitutional and urged the recipients to assert their rights." Because of these actions, Schenck was indicted for "conspiring and attempting to cause insubordination in armed forces, and for obstruction of military recruitment."[55] According to law professor George Anastaplo, this Supreme Court case "may be the most important case interpreting and applying the speech and press provisions of the First Amendment" and "dealt with what may have been the first significant legislation bearing directly on these provisions since the Sedition Act of 1798."[56]

When the court opinion was released, Justice Oliver Holmes Jr., its author, introduced an idea that would change how first amendment law would be carried out in the courts: his "clear and present danger" test. In the unanimous court decision, the justices decided that Schenck was not protected under the first amendment to undertake the actions that he had been indicted for. In the words of Justice Holmes:

> "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a *clear and present*

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[55] Collins, *We Must not be Afraid to be Free*, 107.

[56] George Anastaplo, *Reflections on Freedom of Speech and the First Amendment* (Lexington, KY: University Press of Kentucky, 2007), 101.

> *danger* that they will bring about the substantive evils that Congress has a right to prevent...The Statue of 1917 punishes conspiracies to obstruct as well as actual obstruction. If the act, its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime..."[57]

In the creation of the "clear and present danger" test Holmes stated that utterances which are normally allowed to be spoken or published during peacetime cannot be punished if it is during wartime - which in turn created a plausible reason for federal judges, and even state judges, to continue using the patriotic fervor of the war to suppress Americans even further. At this point, this standard was in line with the notion of the "bad tendency" test, which allowed the government to restrict speech if its purpose was to encourage illegal activity.

It did not take Justice Holmes long to have a distinct change in opinion about the "clear and present danger" test. In *Abrams v. United States*, which happened within the same year as *Schenck*, Holmes was a changed judge on the topic of freedom of speech in wartime. A major influence was a Harvard Law Professor by the name of Zechariah Chafee, who criticized the "clear and present danger" test. Chafee wrote a scholarly piece in the *Harvard Law Review* titled "Freedom of Speech in War Time" in which he expressed that during time of war,

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[57] "Schenck v, United States, 1919," reprinted in *Major Problems* in American Constitutional History, 316.

“speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.”[58] Chafee argued that defining where the line ran between protected and unprotected oversight of speech by the government was the nature of the challenge presented in *Schenck*. Unfortunately, he said, Holmes had completely missed the opportunity to clarify that defining line so that it might be used in other First Amendment cases. Instead, it was offered in *Schenck* as an ambiguous rule that could flow either way depending on the situation, and that was not what was needed in Chafee’s opinion. Even with this criticism, Chafee did admire Holmes’ “clear and present danger” standard, to the extent that he saw potential in it. To Chafee, Holmes “laid the foundation for a powerful legal principle: speech can be punished only at ‘the point where words will give rise to unlawful acts...’”[59] It is clear that Chafee recognized the test’s potential in future First Amendment law, but was obviously frustrated with the lack of expansion of the test by Holmes in the *Schenck* decision.

In *Abrams v. United States* later that same year, the defendant was indicted under the Sedition Act of 1918 for printing two leaflets and then throwing them out a window. One of the leaflets, signed “revolutionists,” was anti-war and criticized American troops being sent to Russia. The second leaflet also criticized

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[58] “Legal Scholar Zechariah Chafee, Jr., Advocates Freedom of Speech, 1919,” reprinted in *Major Problems in American Constitutional History*, 320.

[59] Stone, *Perilous Times*, 202.

the war effort, as well as the American effort to obstruct the Revolution occurring in Russia. It was written in Yiddish - which at the time was a German dialect. Abrams and the other participants were "charged and convicted for inciting resistance to the war effort and for urging curtailment of production of essential war material. They were sentenced to 20 years in prison." When brought to the Supreme Court, there was a 7-2 ruling in favor of the defendant's convictions. By using the "clear and present danger" standard established in *Schenck*, the Court saw it as a danger, with its call for an uprising and conspiring against the war effort.[60]

What came as a surprise was that one of the two dissenters was in fact Justice Holmes. His dissenting opinion showed the influence of Chafee's criticism. Holmes wrote that:

> "as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the *present danger of immediate evil* or intent to bring it about that warrants Congress in setting a limit to the expression of opinion...where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country....the ultimate good desired is better reached by free trade

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[60] "Abrams v. United States," Oyez, accessed February 6, 2017, https://www.oyez.org/cases/1900-1940/250us616.

of ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market...That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[61]

It is clear that his opinion changed heavily because of Chafee's article. Holmes recognized the strategic possibilities of Chafee's position for future jurisprudence.[62] Even though Holmes' *Abrams* dissent did not spark an immediate change in legal precedent, it did mark the beginning of one of the most significant changes in constitutional history. By making this "clear and present danger" standard into something that had constitutional significance,

Holmes "clung to it as the doctrinal peg for the protective interpretation of the First Amendment [that] it did not express when Holmes first used the phrase in *Schenck*."[63]

The public's reaction to the implementation of these acts in 1917 and 1918 also changed with the times. In the beginning, many people were in support of the act and the mass arrests of Communists and any other group that was determined to empower the thoughts and ideals of the Communists.[64] This mood was certainly heightened by the attempts of President Wilson to create an

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[61] Collins, *We Must not be Afraid to be Free*, 111.

[62] Rabban, *Free Speech in its Forgotten Years*, 342.

[63] Ibid., 343.

[64] Collins, *We Must not be Afraid to be Free*, 25.

"outraged public" against the Germans or any Communist thinkers. Moreover, at the time of the *Schenck* opinion the conservative motives of the judiciary and the conservative lives of most of the American public were aligned with each other, both encapsulated by the patriotism and American Nationalism of the time. In fact, throughout most of American history, the Supreme Court is usually aligned with majority public opinion. Usually it reflects those opinions in the cases that come it. Because the public was just as feverish as the government with this heightened patriotism during World War I, most of the public supported the prosecutions. Just because the majority of Americans were in agreement with the government at that point in time, though, does not negate the efforts of the opposition. It was during this time that the "blatant restrictions on speech prompted the formation of opposition groups such as the Civil Liberties Bureau of the American Union Against Militarism, which later evolved into the American Civil Liberties Union."[65] Groups such as the ACLU reflected the views of the Progressive Movement that had been taking place, which enhanced legal reform throughout many aspects of American life.

While the American people seemed to move more towards opposing the Espionage and Sedition Acts as time went on, American newspapers for the most part did not do the same. During the time period that the majority of all Americans

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[65] Kermit L. Hall and Timothy S. Huebner, ed., *Major Problems in American Constitutional History* (Boston: Wadsworth, Cengage Learning, 2010), 312.

were expressed this nationalist mentality and the passionate hatred of Communism, newspapers echoed these views. Many newspapers were in favor of the Espionage and Sedition Acts, such as "when the Sedition Amendment to the Espionage Act was making its way through Congress, *The New York Times* again manifested its lack of sympathy for freedom of expression."[66] The split between the citizens and the newspapers occurred around the time that the people started to become disillusioned by the war and Wilson's efforts at home. It was at this point that the people started to go against the government, but the newspapers kept publishing the same as they had before - a continued lack of sympathy for the First Amendment.[67] In fact, after the famous Holmes dissent in *Abrams*, many large newspapers had no editorials on the decision whatsoever. Some did have reports on them, but they were very brief and not seen as one of the important parts of the newspaper, such as with the *San Francisco Chronicle* and the *Atlanta Constitution*.[68] Even though it was clear which side the majority of newspapers supported, there were still a few papers with socialist support that outright opposed the government's actions. For example, the *New York Evening Call* reminded readers of the events that took place in 1798 with the Alien and

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[66] Lofton, *The Press as a Guardian of the First Amendment*, 185-186.

[67] This was odd, considering the newspapers are *the* outlet of freedom of speech, most people would think that they would in fact be sympathetic, but the greater majority of them were not.

[68] Lofton, *The Press as a Guardian of the First Amendment*, 198-99.

Sedition Acts by recalling Jefferson, and stated that "no such power should be put in the hands of any official in a democracy."[69]

When the war ended in November of 1918, the 1917 and 1918 acts had quite an immediate effect on both the public and the government itself. For example, when debates over the Treaty of Versailles took place in the summer of 1919, the American people who agreed with the extreme effort against Communism during the war became disillusioned, resulting in the realization that "the war had failed to achieve the idealistic goals that justified their initial support of American intervention." This disillusionment, plus the attempts by President Wilson to instill postwar repression of radical speech even after the war had ended, "horrified many people previously uninterested in free speech issues." It was through these actions that a transformation of these progressives into civil libertarians occurred, as exemplified the ACLU.[70] This post-war repression of radical speech continued all the way through 1921, when the Sedition Act was finally repealed. The election of the Republican Warren Harding as President in 1920 helped bring this change. Then, over 15 years after the Espionage Act was enacted, President Franklin D. Roosevelt, a Democrat, "restored civil rights of all those who had been convicted under the Espionage and Sedition Acts."[71] Even

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[69] Lofton, *The Press as a Guardian of the First Amendment*, 184-85.

[70] Rabban, *Free Speech in its Forgotten Years*, 342.

[71] Rudanko, *Discourses of Freedom of Speech*, 178.

though it was not repealed until well into peacetime, there were certainly opponents of the act within the government after the war. For example, John Lord O'Brian, who was a key member of the Department of Justice as the head of the War Emergency Division, observed shortly after the war that "'immense pressure' had been brought to bear on the department 'for indiscriminate prosecution' and for 'wholesale repression and restraint of public opinion'. It was, he added, in this atmosphere of excessive passion, patriotism, and clamor that the laws affecting free speech received the 'severest test thus far placed upon them in our history.'" Under these acts, over 2,000 people were prosecuted.[72]

As for the long term effects of the Espionage and Sedition Acts of 1917 and 1918, the influence of Holmes' opinion in *Abrams* was by far the largest impact. With postwar civil libertarianism on the rise, especially with the concrete decision to move away from using the "bad tendency" test and toward a legitimate legal principle that defined the "clear and present danger" standard set out by Holmes in his *Abrams* dissent, there was a clear change in constitutional thought. Also, the precedent that it created for modern First Amendment law would go on to become very important for Civil Rights. In fact, by the late 1960s, when Earl Warren was Chief Justice, the dissenting opinion of Holmes had actually become the dominant perspective within the Supreme Court.[73] On the

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[72] Stone, *Perilous Times*, 170.

[73] Rabban, David M., *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997), reprinted in *Major Problems in American Constitutional History*, 332.

Warren court was Justice Hugo Black, a well-known defender of free speech. In a 1941 opinion about the significance of the "clear and present danger" standard, he wrote:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious, and the degree of imminence extremely high, before utterances can be punished...For the First Amendment...must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow"[74]

In our modern times, we are thankful not to have experienced a restriction on our freedom of speech as seen in 1798, 1917, and 1918, and we need to give credit to Supreme Court Justices such as Holmes and Black, who understood the importance of tolerating dissent, and likewise to James Madison for starting the notion of toleration of dissent. Those men enabled this principal to be carried into modern constitutionalism, and helped make First Amendment rights such as freedom of speech so significant to our American society of today.

Conclusion

Analysis of the two presidential eras of John Adams and Woodrow Wilson revealed uniqueness, as well as similarities, about their respective sedition laws,

[74] Rudanko, *Discourses of Freedom of Speech*, 178.

as well as the experiences that ensued thereafter. Both time periods had enemies in mind when creating these laws, whose threats they rated as more significant than the protections of the First Amendment. Each era had a political and legal atmosphere that affected the acts themselves and their execution, and each generated significant court cases that helped define public opinion on the issues.

The one overarching similarity between the two is that the Sedition Act of 1798 and the Espionage and Sedition Acts of 1917 and 1918 had significant influence on later developments in government and American constitutional history. The acts that restricted freedom of speech in two very different time periods are similar in that both were seeds that grew into something never imagined. The difference between the two though, is the type of effect they had.

For the Sedition Act of 1798, Jefferson's explanation of the Compact Theory sought to protect the states in a time of a Federalist government, when federal power was weighed more heavily than state power. He established the Compact Theory to support the Democratic Republican position on how the power should be divided between the two entities. It was nothing extreme in its creation - but it prompted something that would tremendously affect American history.

That seed grew slowly until the nullification crisis in South Carolina, when in 1828 Vice President John C. Calhoun, who also represented South Carolina, anonymously wrote a proposal for nullifying the new tariff law of 1828. He leaned on Jefferson's Compact Theory as justification for why nullification by sovereign

states under the Constitution should be allowed. In 1832 the seed grew even more when South Carolina's legislature officially attempted to nullify the tariff by calling for a nullification convention, which was rejected by President Jackson and then led to even more tension between states' rights activists and the federal government. Ultimately, the way that Calhoun referenced the Compact Theory as a basis for nullification was much more threatening to the unity of the country than Jefferson intended it to be, and the final years of growth of that original seed Jefferson planted during the Sedition Act of 1798 would grow until the explosion of tension between states' rights and federal rights - the Civil War in the 1860s.

As for the Espionage and Sedition Acts of 1917 and 1918, they too planted a seed in American history that grew into something that significantly changes country. Unlike that of the Compact Theory that emerged in opposition to the Sedition Act of 1798, the change was positive. The long delayed effect of President Wilson's acts, or more accurately, the opposition to those acts, planted a seed that created modern First Amendment law as we know it today. Through Holmes's famous dissent in *Abrams*, a new precedent was created for the First Amendment. Nothing like it had previously existed because no cases regarding the First Amendment had made it to the Supreme Court level. After the acts signed by President Wilson, cases such as *Schenck* and *Abrams* arrived at the Supreme Court, ultimately changing American constitutional history for the better.

This seed was fallow for a while, but it resurfaced and continued to grow as World War II was on the rise in the late 1930s, and then the Cold War of the 1950s. First Amendment law was once again in the headlines, and Holmes's

dissent was called on by Justice Black during the Warren Court through the use of the "clear and present danger" standard. Before Holmes's dissent, civil liberties were rarely ever on the minds of Americans, but through his powerful words, and later Justice Black's comments on this standard, civil liberties were better protected in the United States.

Overall, these two eras were very important in the grand scheme of American constitutional history. In order to truly understand major development such as the Nullification Crisis and the emergence of modern First Amendment law, you must have a complete understanding of their timelines, even when it means tracing them back to the specific events that started it all.

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