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978-1-107-01660-6 - Presidents and Civil Liberties from Wilson to Obama: A Story of Poor Custodians

Samuel Walker

Excerpt

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# 1 Introduction

## Presidents and Civil Liberties

### SCENES FROM THE WHITE HOUSE

#### February 19, 1942

For his signature, Attorney General Francis Biddle presented President Franklin D. Roosevelt with Executive Order 9066, authorizing the military to evacuate people from the West Coast of the United States. Roosevelt promptly signed it. Within months the government removed 117,116 Japanese Americans and interned them in Relocation Centers, which have been properly called concentration camps. At least seventy thousand of the internees were bona fide American citizens. Many lost their homes and businesses. Historians generally regard the treatment of the Japanese Americans as the greatest single violation of civil liberties in American history.

President Roosevelt had no qualms about signing Executive Order 9066. He expressed no concerns about its legality and ignored information on his desk that the overwhelming majority of Japanese Americans were loyal to this country.

Nor did he ever express regrets about his decision. Nearly three thousand Americans had died in the Japanese attack on Pearl Harbor just two and a half months earlier, and many feared that the Japanese might attack the continental United States itself. Military officials argued that security required evacuating all people of Japanese origin from the West Coast to prevent espionage and sabotage. Several Justice Department lawyers objected, arguing that it would be wrong and unnecessary. Both the Federal Bureau of Investigation (FBI) director, J. Edgar Hoover, and the Office of Naval Intelligence reported that there were only a few potential spies or saboteurs among the Japanese Americans. Roosevelt sided with the military, however, and signed the order, setting in motion a terrible tragedy.

#### November 26, 1963

Four days after being sworn in as president after the assassination of John F. Kennedy, Lyndon Johnson consulted White House advisers about his forthcoming speech to Congress and the nation the evening of November 27. He wanted the speech to heal the nation and define the goals of his presidency. The group was a mixture of his own staff and Kennedy advisers. Musing out loud, he said he was thinking about making the pending civil rights bill his top legislative priority. Although it eventually became the historic 1964 Civil Rights Act, the bill at that point faced a very uncertain prospect in Congress, with strong opposition from southern segregationists and Republican conservatives.

Abe Fortas, the future Supreme Court justice, who was at the meeting, recalled that “one of the wise, fine, practical people around the table” advised against making the bill his top priority. Others agreed, arguing that a president has only so much “coinage to expend,” and that he should not risk it all on a bill that might not pass. Silence fell over the room, as Johnson pondered this advice. Finally rousing himself, he said, “Well, what the hell’s the presidency for?”

Johnson understood power, and the special power of the presidency. Since his first days as a public official in 1936 he had been deeply committed to ending racial segregation in America. The day after consulting his advisers, he told the nation that the civil rights bill was his top priority and that he wanted it to be a memorial to the slain former president. Congress passed it the following year, and the 1964 Civil Rights Act is today regarded as one of the most important laws in American history, defining racial equality as national policy. A year later Johnson again used his special influence as president to secure passage of the 1965 Voting Rights Act, an equally important law in the cause of racial justice.

## POOR CUSTODIANS OF AMERICAN LIBERTIES

These two episodes dramatize the role regarding civil liberties presidents have played in American democracy. In the first, a president authorized the violation of fundamental liberties with little regard for the rights of the 117,116 victims. In his view, national security trumped all other considerations. Over the last one hundred years, other presidents have violated constitutional rights. Rarely have presidents taken strong stands to defend individual rights, on national security questions, free speech controversies, church and state questions, or other freedoms guaranteed by the Bill of Rights.

In the second episode, a president understood that the country faced a historic moment involving the rights of Americans and chose to use his power to secure legislation ending an ancient wrong. It would have been easy for President Johnson to heed counsels of caution and hope for a more promising political moment in the future, but he rejected that advice and did what he knew was right. Regrettably, American presidents have been poor custodians of the Bill of Rights. Too often, they have knowingly authorized violations of individual rights or looked away and failed to speak out or prevent abuses that were occurring. Few have been willing to use the enormous power of the White House to defend or advance the protections of individual liberties enshrined in the Bill of Rights.

There is exactly one instance when a president risked his political future in defense of civil rights. Harry Truman was the first to appoint a presidential civil rights commission and to send Congress a comprehensive legislative program. In summer 1948 he issued an executive order ending racial segregation in the Armed Services. He was far ahead of white American opinion on racial justice at that time, and his actions jeopardized his reelection chances in November 1948. Yet, he not only did what was right, but won a stunning upset reelection victory.

## PRESIDENTS AND AMERICA’S CORE VALUES

The failure of most presidents to defend or advance civil liberties is a matter of great importance in assessing presidential performance. The principles in the Bill of Rights represent the core values of American democracy. The freedoms of speech and press,

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religious liberty, due process of law even for the most heinous suspect, equal protection for all people, and privacy are at the core of our constitutional law. The United States is unique in the world for its commitment to expanding and protecting those liberties. No other country extends such protection to free speech, no matter how offensive it might be, or to guarding against government sponsorship of religion.

The president in America is more than just the person who won the last election; he or she is the national leader and spokesperson for the country in world affairs. When historians attempt to rank presidential performance, they consider how they led the country through times of crisis, including wars, economic difficulties, and other critical moments. Given the centrality of the Bill of Rights in American democracy, it is important to assess how presidents have done in protecting the rights it enshrines. Curiously, no historian has undertaken such an assessment. Indeed, civil liberties tend to vanish in the traditional efforts to rank presidential importance. This book seeks to fill that void.

**From Wilson to Obama**

This book examines in detail the records of American presidents on civil liberties from Woodrow Wilson through Barack Obama. Wilson is the proper starting point because the suppression of free speech and other rights during World War I put civil liberties on the American political and legal agenda on a permanent basis. Over the previous century and a half, there had been only episodic civil liberties crises: over the Alien and Sedition Acts between 1798 and 1800, the suppression of anti-slavery activity prior to the Civil War, and Abraham Lincoln's suspension of habeas corpus during the Civil War. In each case, however, the crisis passed and the country returned to its normal course of business without undertaking an ongoing debate over the constitutional questions about individual liberties that had arisen.

All that changed in the crucible of World War I, when thoughtful Americans suddenly discovered the awesome power of the federal government to suppress freedom and the capacity of the American people to be stampeded by patriotic hysteria into accepting such actions. Two events mark the emergence of civil liberties as an ongoing national issue: First, the Supreme Court's wartime free speech cases set in motion a debate over the First Amendment and the entire Bill of Rights that continues today. That debate focuses on the scope of the First Amendment, whether there is a right to criticize the government during wartime, the meaning of due process, equal protection and other rights enumerated in the Bill of Rights, and the role of the Court in defining those rights.

The second watershed event was the founding of the American Civil Liberties Union (ACLU) in January 1920. The ACLU became the first permanent national organization devoted to civil liberties and over the years aggressively fought for an expanded protection of individual rights. The aggressive pursuit of rights by public interest groups – the ACLU, the National Association for the Advancement of Colored People (NAACP), and in time a host of other rights groups – shaped the social and political context of America over the next eighty-plus years. The role of advocacy groups is crucial to understanding presidents and civil liberties. As this book makes clear, presidents have generally not played a leading role in defending the principles of freedom of speech and press, the right to due process, equal protection, and individual privacy. In several tragic episodes, in fact, presidents have authorized gross violations of those rights.

### Presidential performance: The major themes

Why has presidential performance been so poor in this area? Several themes emerge from this examination of the records of the seventeen presidents from Woodrow Wilson to Barack Obama. The first is that in a democratic society, presidents inevitably shy away from unpopular issues that are likely to cost them votes. This melancholy fact is inherent in the very nature of democracy itself and is why the generation that fashioned the Constitution added a Bill of Rights to remove certain issues from the passions of conventional politics.

Examples of presidential leadership in defense of civil liberties have been extremely rare. As indicated, President Harry Truman's initiative on civil rights in 1946 and 1948 is the only example of a president's risking his political future in defense of the rights of Americans; no other president has demonstrated a similar kind of courage. Beginning in the 1970s, presidents – almost always Democrats – supported civil rights, women's rights, and reproductive rights but largely because by then these issues had powerful political constituencies.

A second theme is that the failure to defend American liberties has been decidedly bipartisan. Democratic presidents have as poor a record as do Republicans. It is particularly important to emphasize this point in the wake of the presidency of George W. Bush, whose record on civil liberties was truly appalling. Many people – liberal Democrats and others – have framed his presidency in a narrative that incorporates Richard Nixon and Ronald Reagan and views Republicans as hostile to civil liberties and Democratic presidents as sympathetic to and protective of individual rights. The record does not support that narrative. Most glaringly, Woodrow Wilson and Franklin D. Roosevelt, two of the most famous and celebrated liberal Democratic presidents of the twentieth century, were responsible for two of the worst violations of civil liberties in American history: Wilson's suppression of free speech during World War I and Roosevelt's evacuation and internment of the Japanese Americans in the Second World War.

A third theme is that the record of many presidents on civil liberties is filled with contradictions, with a good or even outstanding record on one issue but a terrible one on another. Roosevelt ordered the evacuation of the Japanese Americans, but his Supreme Court appointments established the first significant body of civil liberties case law in American history in the late 1930s and 1940s, laying the groundwork for the more famous Warren Court of the 1960s. Truman deserves great credit for his leadership on civil rights, but he also launched the 1947 Federal Loyalty Program, which embodied the principle of guilt by association, was a terrible assault on freedom of belief and association, and in the view of many historians helped set the stage for Senator Joe McCarthy's reckless anti-communist demagoguery beginning in 1950. President Eisenhower has been deservedly criticized for failing to endorse the Supreme Court's historic school desegregation decision, *Brown v. Board of Education*, in 1954. And yet, his administration moved aggressively to desegregate the nation's capital, Washington, D.C. On that issue, he had a far superior civil rights record to Truman, who had ignored the racial segregation in the nation's seat of government.

As we shall see, contradictions mark the records of many if not most of the presidents under consideration. Among other things, they create a serious problem for making any final assessment of individual presidents on civil liberties and then comparing different

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presidents. To be sure, some presidents have been clearly better than others. Woodrow Wilson, for example, has perhaps the worst record on freedom of speech and press and on racial justice, with only a few positive actions on the other side of the ledger. Lyndon Johnson, meanwhile, was clearly the greatest civil libertarian, with a strong record on civil rights, reproductive rights, the rights of criminal suspects, and other issues. But he too perpetrated serious violations of the Constitution, wiretapping civil rights activists and lying to secure congressional authorization to escalate American involvement in Vietnam.

A fourth theme involves national security. Beginning with Franklin D. Roosevelt in the late 1930s, as the world headed for another global conflict, national security considerations repeatedly trumped constitutional considerations. From FDR to the present, national security has been a rationale for military adventures overseas, excessive government secrecy, illegal spying on Americans, and violations of law and human rights overseas. Democratic and Republican presidents alike have been guilty of these abuses.

## Surprises

The history of presidents and civil liberties is filled with surprises. Woodrow Wilson, the most accomplished scholar ever to serve as president, was a prominent authority on American democracy. His 1908 book, *Constitutional Government*, however, contains not a word about the Bill of Rights, free speech, or other civil liberties, and his other writings indicate he was oblivious to hard questions about the scope of the Bill of Rights.

Warren G. Harding is generally regarded as one of the most incompetent presidents, who presided over a terribly corrupt administration. Yet, in 1921 he gave a speech in Birmingham, Alabama, that was the strongest call for racial justice by any president between Abraham Lincoln and Harry Truman. Calvin Coolidge, meanwhile, is generally remembered for doing almost nothing as president, but in 1924 he cleaned up the FBI and ended the practice of political spying that had begun under Wilson during World War I. Franklin D. Roosevelt in 1936 gave J. Edgar Hoover the green light for political spying by the FBI, sweeping away the reforms established by President Coolidge. Hoover's campaign of massive illegal spying on Americans dates from FDR's presidency.

Richard Nixon has a reputation for hostility to civil rights, but through the first twenty-two years of his public life he had one of the best records on the issue among all leading Republicans. In 1960 the Reverend Martin Luther King initially preferred him to John F. Kennedy for president. Nixon was also a staunch supporter of the Equal Rights Amendment, which would guarantee equality to women, from the beginning of his political career to the day he left office on August 9, 1974. Jimmy Carter is generally regarded as a failure as president, but he was the first president to invite lesbian and gay rights activists to the White House and had by far the strongest record on women's rights of any previous president.

## A dialogue about America

Exploring the history of presidents and civil liberties is more than a matter of simply reviewing and grading presidential performance. When we ask how well a president has done with regard to freedom of speech, religious liberty, or racial justice, we are asking

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some basic questions about what is important to us as a country, about what we expect of our leaders. We are asking how important, in the larger scheme of things, is protecting freedom of speech for dissenters in wartime. How we answer that question reflects the value we place on the First Amendment, and it will determine how we evaluate certain presidents. How important is it to preserve civil liberties vis-à-vis considerations of national security? Our answer to that question has implications for every president from Franklin D. Roosevelt to Barack Obama.

American presidents have had such a weak record on defending civil liberties because of the very nature of those rights in a democratic society. Civil liberties inherently involve unpopular issues: free speech for the radical critic of the free enterprise system or the dissenter in time of war; the due process rights of the mass murderer; equal protection for an unpopular minority group; the privacy right to engage in a sexual activity that many people find abhorrent. These are not the issues a candidate for political office is likely to champion. And they are precisely the kind of issues that are likely to get an officeholder soundly rejected at the next election.

In the end, while this book examines in detail the performance of seventeen presidents with regard to civil liberties, it ultimately becomes a dialogue about American democracy. Although presidents have not been strong defenders of the Bill of Rights, in fact the rights of Americans have expanded enormously in the century covered here. Americans today enjoy freedoms of speech, press, and assembly, of equality and due process, that in most cases were unimaginable the day Woodrow Wilson entered the White House in 1913. This book examines the generally poor performance of the sixteen presidents during this period, but this story is only a part of the larger drama of civil liberties in America.

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**PART I**

# The Early Years

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Feminist pickets the White House in support of women's suffrage, summer of 1917. The United States had entered World War I in April, and calling the president "Kaiser Wilson" was highly inflammatory.

Source: National Archives.

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## 2 Woodrow Wilson and the Suppression of Civil Liberties in World War I

### “SUCH CREATURES ... MUST BE CRUSHED OUT”

“Such creatures of passion, disloyalty, and anarchy must be crushed out.” Speaking to a joint session of Congress, President Woodrow Wilson warned of a grave internal threat to the nation. “There are citizens of the United States ... born under other flags ... who have poured forth the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt.” To solve the problem of dangerous immigrants Wilson urged Congress to enact laws “by which we may be purged of their corrupt distempers.”<sup>1</sup>

Wilson’s inflammatory attack on the “poison of disloyalty” occurred on December 7, 1915, sixteen months before the United States entered World War I. The massive suppression of freedom of speech and press, along with other violations of individual rights by his administration during the war, is one of the major attacks on civil liberties in American history. Historians have generally portrayed it as an unfortunate aberration, a sudden eruption of excessive wartime patriotic hysteria that was unrelated to Wilson’s attitudes and policies as president. As we shall see, however, intolerance of dissent was an integral part of Wilson’s view of American society and progressive reform. The wartime suppression of free speech was no aberration, and he bears direct responsibility for it.<sup>2</sup>

### WILSON, PROGRESSIVISM, AND CIVIL LIBERTIES

A stark paradox lies at the heart of Woodrow Wilson’s presidency, one that few historians have confronted. Wilson consistently ranks among the few “near-great” presidents. That ranking rests on the important domestic reforms he secured before the war. Only Presidents Franklin D. Roosevelt and Lyndon B. Johnson exceed his achievements in that regard. And yet, he also perpetrated terrible violations of individual rights

<sup>1</sup> Woodrow Wilson, 3rd Annual Message to Congress, December 7, 1915, APP.

<sup>2</sup> The literature on Woodrow Wilson is unbalanced, with much on foreign affairs, less on domestic policy, and little on the suppression of free speech. The latter is addressed largely by civil liberties specialists, and few historians have seriously addressed the relationship between the wartime civil liberties issues and the rest of Wilson’s public and private career. Arthur Link’s five-volume biography (Princeton, NJ: Princeton University Press, 1947–65) ends with U.S. entry into the war. A short but insightful biography is John Morton Blum, *Woodrow Wilson and the Politics of Morality* (Boston: Little, Brown, 1956); see also Blum’s comparative analysis, *The Progressive Presidents* (New York: W. W. Norton, 1980). Daniel D. Stid, *The President as Statesman: Woodrow Wilson and the Constitution* (Lawrence: University of Kansas, 1998) contains almost no mention of freedom of speech or other civil liberties issues. John M. Mulder, *Woodrow Wilson: The Years of Preparation* (Princeton, NJ: Princeton University Press, 1978) is valuable.

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during the war. Wilson's legislative accomplishments were extraordinary. They included creation of the Federal Reserve System, the Department of Labor, and the Federal Trade Commission; major tariff reform; and the Clayton Anti-Trust Act. Progressive social legislation included the 1915 LaFollette Seaman's Act, which ended dreadful and unsafe working conditions; the first workmen's compensation law; a ban on children working in coal mines; and the 1916 Adamson Act establishing the eight-hour workday in the railroad industry.<sup>3</sup>

Wilson's record on civil liberties, however, is among the worst of all modern presidents. In addition to wartime violations of free speech and press, which included the notorious postwar Palmer Raids in 1919–20, he instituted racial segregation among federal employees and opposed women's suffrage until political expediency forced him to switch and support it. The appointment of Louis Brandeis to the Supreme Court is his lone contribution to the protection of individual rights.

The crisis of Wilson's suppression of civil liberties during World War I was a watershed in American history, transforming the issue of individual rights into a permanent controversy in American law and politics. Previous civil liberties crises – the 1798 Alien and Sedition Acts, the suppression of antislavery speech prior to the Civil War, Lincoln's suspension of habeas corpus during that war – had been temporary affairs that soon disappeared. The World War I crisis, by contrast, launched the modern civil liberties era. As the First Amendment scholar Zechariah Chafee put it in 1920, "Never in the history of our country, since the Alien and Sedition Acts of 1798, has the meaning of free speech been the subject of such sharp controversy as today."<sup>4</sup> The controversy continued after the war, and the debate over the scope of the First Amendment and the entire Bill of Rights remains a central part of American law and politics. For this reason, Wilson's presidency is the proper starting point for examining presidents and civil liberties.

## WAR AND REPRESSION BEGIN, 1917

Just three months into the war, Max Eastman, Amos Pinchot, and John Reed of the Civil Liberties Bureau wrote to President Wilson to protest the Post Office ban on antiwar publications, including the radical magazine *Masses*. Congress had declared war on April 6, and already the administration was cracking down on dissent. Wilson asked Postmaster General Albert S. Bursleson, one of his closest political advisers, for response to their objections. Bursleson disingenuously told him that neither the *Masses* nor any other publications had been "suppressed nor suspended," although conceding that "particular issues of them which were unlawful" had been banned. In fact, he had excluded virtually the entire antiwar press from the mail. Wilson was satisfied with his assurances and did

<sup>3</sup> James Lindgren and Steven G. Calabresi, "Rating the Presidents of the United States, 1789–2000: A Survey of Scholars in Political Science, History, and Law," *Constitutional Commentary* 18 (Winter 2001): 583–605. Arthur S. Link, *Woodrow Wilson and the Progressive Era, 1910–1917* (New York: Harper, 1954). Wilson's 1912 campaign views: Woodrow Wilson, *The New Freedom* (Englewood Cliffs, NJ: Prentice-Hall, 1961). James Chace, *1912: Wilson, Roosevelt, Taft and Debs – The Election That Changed the Country* (New York: Simon & Schuster, 2004).

<sup>4</sup> Zechariah Chafee, *Freedom of Speech* (New York: Harcourt, Brace, and Howe, 1920), p. 1. Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (New York: W. W. Norton, 2004). Samuel Walker, *In Defense of American Liberties* (New York: Oxford University Press, 1990). See also Paul Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W. W. Norton, 1979).