

OUTLINE FOR TV SHOW ON "PERILOUS TIMES"

1. What were you trying to accomplish in writing *Perilous Times*? That is, what lessons did you seek to teach? What perceptions do you want people to get from the book?
 - A. In this regard, explain the existence and relevant role of patterns in history.
2. The book melds history and law, perhaps uniquely so. Are you either trained in history or an autodidactical reader of it? Did you, on the other hand, more or less have to start from scratch in reading the pertinent history for purposes of your book?
- 3(a). *Perilous Times* revolves around six periods in American history: 1798-1800, the Civil War, 1917-1920, World War II, the early Cold War, and Viet Nam. Why did you pick these particular periods for study?
 - (b). There was great opposition to the War of 1812 -- when New England even considered secession; to the Mexican War -- which many people, including Lincoln and U.S. Grant, thought a war of American aggression; and to the Spanish-American War and the succeeding war over the Filipino insurgency -- a period when the anti-imperialists thought (correctly, as it turned out) that the country had launched itself on the imperialistic road. What prompted you to leave these periods out of your analysis?
- 4(a). What is the reason to allow maximum possible free speech in wartime -- to allow the maximum possible exercise of this freedom at a time when soldiers are losing their freedom and their lives, and when speech antagonistic to the war can weaken the war effort?
 - A. Discuss this as a general matter.
 - B. Discuss it with specific reference to the reasons given by government for:
 - i. The Spanish-American War.
 - ii. WWI.
 - iii. WWII.
 - iv. Viet Nam.
 - v. Gulf War I and the subsequent ten years or so of air war.
- 5(a). What role has each of the following governmental entities played in causing, whipping up or preventing repression in each of the six periods you discuss and in the

current Gulf War II period?

- A. The President.
- B. The Congress. (Briefly describe, in this regard, major repressive acts enacted by Congress during these periods, Congressional investigations, and other forms of Congressional repression (e.g., by McCarthy).
- C. The bureaucracy, including the DOJ.

(b). What role has been played in each period by the media?

(c). What role has been played in each period by everyday or prominent citizens?

(d). What role has been played by the courts in each period?

(e). What role has been played by the legal profession in each period?

- A. Wouldn't it be desirable for law schools to teach more history in the hope that more future lawyers will be defenders instead of opponents of civil liberties?.

6(a). Discuss each of the following legal doctrines (or partial doctrines) relating to free speech, their practical meanings, and the role they've played in our history:

- A. The doctrine of prior restraint.
- B. The bad tendency test.
- C. The requirement of specific intent.
- D. The express advocacy requirement.
- E. The clear and present danger doctrine.
- F. The balancing test.
- G. The need for imminent harm of a grave nature.

(b). Isn't it basically true that, whatever doctrines they may have used, during each of the periods you've discussed, and in the current Gulf War, the courts have largely -- not necessarily exclusively, but largely -- abdicated to the military and the Executive (and sometimes were the willing instruments of same)? In this regard go through some of the more salient events of:

- A. 1798-1800.
- B. WWI.
- C. WWII.
- D. The Cold War.
- E. Viet Nam (when, incidentally, the courts, whatever else they might have

protected, refused to decide the most fundamental constitutional question of all -- whether that war was lawful -- and did this, as is now known with regard to the Supreme Court, for reasons that in significant part were nefarious.)

7. Discuss what happened with regard to civil liberties in the north during the Civil War. Include, among other things, discussions of the Merriman and Vallandigham situations, the various suspensions of habeas corpus, throwing copperheads in jail, and Lincoln's fundamental tolerance dissenting speech and the reasons for his tolerance.
 - A. Doesn't Lincoln's tolerance reflect, at least in part, the fact that governments are tolerant when there are so many opponents that the governments cannot be *intolerant* or they would have to put a fifth or third or a half of their populations in jail? Isn't this, in effect, the reason why Japanese Americans in Hawaii were not interned while those in California were, why German Americans and Italian Americans were not interned, why the Communist Party remained legal in France and Italy after the war?
8. Although FDR is generally regarded as a great president, and Truman often is regarded these days as at least a near great president, I gather that you think very poorly of Roosevelt on the matter of civil liberties and think Truman was at best a mixed bag. Is my impression correct and, if so, what are the reasons underlying your view?
 - A. Do you feel strongly enough about this so that it affects your *overall* view of the extent to which Roosevelt was a great and Truman perhaps a near great President?
9. What is your opinion of Woodrow Wilson as a civil libertarian (and, more broadly, as a President)?
10. I gather you feel that, as a general matter, we have made great progress over the centuries with regard to freedom of speech and other civil liberties, since today we wouldn't have wholesale round-ups, wouldn't throw political opponents (like Debs or Berger) in jail, etc. How does your view of progress square with what some consider to be, for example, the Bush Administration's wholesale roundups of Muslims, citizens and non-citizens alike, its intent and actions to put people in jail and throw away the key, and its renditions to countries like Syria for torture?
11. One theme that arises in the book is that, when courts or the Congress close off the possibility of certain federal criminal prosecutions for speech, the Government finds new ways to stop people from speaking (e.g., harassment of one type or another).

Explain how this was done in the period 1917-20, during the Cold War, during Viet Nam, in the last two to three years.

- A. How was this done with specific regard to the media?
12. Don't the possibilities of subsequent criminal punishment, or libel suits for large damages (at least before *N.Y. Times v. Sullivan*), operate as effectively as prior restraints in choking off speech?
 13. Explain how and why secrecy is effective -- perhaps as effective as prior restraints or subsequent punishments -- in defeating both freedom of speech and the *reasons* for freedom of speech.
 - 14(a). Before Gulf War II, to take one example of a not infrequent phenomenon, many of us felt that, much as we did not want to see America fight a new war in the Mideast, there appeared to be no choice because we were assured that Saddam had WMDs. This is symptomatic of the problem that one cannot say in advance that we are *not* in danger, or that a war will *not* lead to good things while *not* fighting a war *will* lead to *bad* things. In short, the average guy, or the average legislator (just like the Executive) cannot foresee the future. So how can freedom of speech protect us against unnecessary wars -- that is, what lessons are there to be learned from the past, what ways of thinking could arise from study of the past, that would enable freedom of speech to protect us against unneeded wars?
 - (b). Isn't it true in this connection that governments always claim they are faced with new and unprecedented types of crises? In this connection, by the way, haven't we had terrorism and bombings before?
 - (c). Wouldn't the Civil War and World War II represent crises *far* more serious than anything we face today?
 15. Looking at the repression of 1798-1800, the Civil War, the Cold War, (with McCarthyism, etc.), the Nixon years, and Gulf War II, can one make a historical case that it is more often the Republicans than the Democrats who engage in repression? (There was, of course, repression under Wilson, and some under FDR, Truman and Johnson, but I am asking a "by and large" type of question.) If the answer is affirmative, what do you think the underlying reasons are?
 16. Explain why the McCarthy era is said to be responsible for the so-called "silent generation."
 - 17(a). Describe the following persons, and their contributions to or against freedom of

speech.

- A. John Lord O'Brian.
- B. Alfred Bettman.
- C. Robert Jackson.
- D. Frank Murphy.
- E. Francis Biddle.
- F. Emma Goldman
- G. Alexander Berkman
- H. Eugene V. Debs.
- I. Roger Baldwin.
- J. David Dellinger.
- K. Tom Hayden.
- L. John Wigmore.
- M. Robert M. Hufihins

- (b). Explain who or what the Silver Shirts and the Bund were.
18. Fear of aliens among us seems to have been a constant reason for suppression of speech. Describe this with regard to 1798-1800, the Civil War, World War I, World War II, and the current Gulf War.
 19. In which of the six episodes you discuss, plus the current Gulf War, could it be said that the Government's position was that free speech be damned, you are either with us or against us?
 20. Explain the workings of the "heckler's veto" in WWI and WWII.
 21. What has been the role of the idea that, unless government acts against "disloyal" or "defeatist" speech, people will take the law into their own hands.
 22. Have juries stopped governmental repression in war?
 23. Explain what the Dies Committee and HUAC were.
 24. Discuss the trial in Abrams, the Great Sedition Trial of World War II, the Dennis trial, and trials during the Viet Nam war such as the Chicago 7, the Catonsville 9, the Boston 5.
 25. What were the teach-ins of the Viet Nam period, and how did they begin? Why haven't there been any with regard to Gulf War II?

26. Describe the Pentagon papers, McNamara's statement that people could be hung for what was in them, and the no collateral attack (*Walker v. Birmingham*) rule under which, unlike violations of a statute, one can be punished for violating an injunction even if the injunction is unconstitutional.
27. Explain your view as to why a variety of voices are needed because decisionmakers go too far when they all are like-minded.
28. Discuss the way in which the Patriot Act was enacted.

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