Justifying Wartime Limits on Civil Rights and Liberties

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Many law professors and commentators condemned the Bush Administration's "War on Terrorism" as involving unprecedented assertions of Article II power that sacrificed constitutional rights and liberties for no purpose, as America actually became less safe.[1] This Symposium provides a valuable opportunity to test such claims against history, with a special focus on Abraham Lincoln's actions during the Civil War. This historical perspective casts doubt upon the conventional wisdom that the War on Terrorism has caused unique harm to the Constitution's structure and the individual rights it guarantees.

More specifically, our panel has been asked to address three questions concerning the Constitution's delicate balance between protecting national security and preserving fundamental rights. First, are wartime limitations on civil liberties necessary to avoid military defeat? Second, do such restrictions influence the subsequent creation and enhancement of civil rights? Third, if these later legal gains occur, do they ultimately justify the wartime measures? I am afraid that I cannot answer any of these questions with much confidence.

Initially, it is impossible to say with any certainty whether or not Presidents like Abraham Lincoln and Franklin Roosevelt had to infringe constitutional liberties the way they did in order to win their wars.[2] Perhaps they could have achieved the same results with fewer intrusions. But maybe greater solicitude for personal freedoms would have led to defeat, or to a victory that exacted a far greater cost in blood and money. Speculating about such matters is an academic exercise. All we know for sure is that these Presidents took the actions they deemed necessary to

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1 *See generally* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007); *see also* Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1006–07 (2007) [hereinafter Pushaw, *Enemy Combatant*] (citing other prominent critics such as Bruce Ackerman, Neal Katyal, and Harold Koh).

2 *See infra* Parts I.B & C (summarizing the actions of Lincoln and Roosevelt).

prevail, and they did.[3] For better or worse, the Constitution commits to the President almost unbridled discretion to determine what must be done to meet a military emergency.[4] These decisions must be made quickly and with imperfect information, and they are then judged by Congress, voters, and posterity. All of these groups tend to be quite forgiving of the President if he triumphs.

Turning to the second issue, the orthodox view is that Americans, out of some blend of fear and patriotism, blindly support Presidents during military crises when they trample civil liberties,[5] but later feel remorseful, vow that such excesses will never happen again, and bestow civil rights generously.[6] I do not believe we can isolate a collective sense of guilt over wartime sins and attempted redemption as the single "cause" of civil rights laws, which reflect multiple political, legal, social, ideological, economic, moral, and religious factors.[7]

Finally, even if there were such a direct causal connection, determining whether wartime curtailments of civil liberties are justified by subsequent efforts to secure civil rights requires an entirely subjective judgment.[8] Most obviously, the immediate victims of government heavy-handedness, such as those denied habeas corpus during the Civil War or Japanese Americans interned during World War II, would find cold comfort in the later extension of civil rights (particularly to some other group). On the other hand, African Americans would conclude that (1) the Thirteenth, Fourteenth, and Fifteenth Amendments were well worth the price of Lincoln's impairments of individual liberties, and (2) the Civil and Voting Rights Acts expiated any of FDR's excesses during World War II. Instead of trying to figure out whether later gains excuse wartime pains, I prefer to concentrate on the dispositive issue: whether the limits on constitutional rights were necessary to achieve the greater good of winning the war. A President can never rationalize a gratuitous abridgment of personal liberties based on the mere possibility of future improvements in civil rights.

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3 *See infra* Parts I.B & C.

4 *See infra* notes 23–25 and accompanying text (discussing executive war powers).

5 *See, e.g.*, GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 903 (2004).

6 *See, e.g.*, Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 262 (2002); *but see* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 610, 622–25, 643–44 (2003) (describing the idea of a "libertarian ratchet"—that wars have produced ever-increasing respect for civil rights and liberties—but dismissing it as empirically unfounded).

7 *See infra* Part II.

8 The arguments in this paragraph will be developed *infra* Part III.

The foregoing analysis, which incorporates the lessons of history, has several implications for the War on Terrorism.[9] Most importantly, although President Bush asserted aggressive unilateral executive powers, his response to al Qaeda's September 11, 2001 attacks was fairly mild in comparison with the actions of Lincoln, Roosevelt, and other Presidents.[10] Furthermore, like his predecessors, Bush can defend his infringements on civil liberties as necessary to achieve his avowed objective: preventing another terrorist assault.[11] In the past, such success has usually been sufficient for a President to deflect charges that he went overboard.

Indeed, the majority of Americans have always solidly supported antiterrorism efforts.[12] Although the legal and media intelligentsia have been outraged by conditions at Guantanamo Bay, average people do not appear to feel widespread regret that will result in a compensatory increase in civil rights.[13] Rather, any such expansion would be primarily attributable to the election of Barack Obama, who ardently supports this cause.

In this Essay, I will devote most of my analysis to the threshold issue of whether wartime restrictions on civil liberties are necessary to avoid a military loss. I will then explore whether such constraints eventually result in an overall enlargement of civil rights. Finally, I will consider whether those improvements excuse the infringement of rights during the military crisis.

I. LIMITING CIVIL LIBERTIES TO HELP WIN WARS

Professors have typically argued that Presidents like Lincoln, Wilson, Roosevelt, Truman, and Bush have lost their heads in the heat of war and curbed civil liberties to a far greater extent than was needed to ensure victory.[14] They might be right. But they might be wrong. For example, perhaps if Lincoln had been more sensitive to individual constitutional rights, he would have lost the Civil War and the United States would have fractured along North-South lines, and then probably further fragmented into regional nations (or possibly autonomous states). It is intellectually interesting, but pointless, to try to ascertain what might have happened if Presidents had taken different

9 *See infra* Part I.D.

10 *See infra* notes 94–97 and accompanying text.

11 *See infra* Part I.D.

12 *See infra* note 100 and accompanying text.

13 *See infra* note 166 and accompanying text.

14 *See* Posner & Vermeule, *supra* note 6, at 608–10, 612–22 (summarizing and criticizing this prevalent view).

courses of action. Put simply, it is impossible to test the libertarian academics' arguments empirically.

More significantly, these critics tend to make two fundamental errors. First, they incorrectly assume that the Constitution supplies fixed legal rules for determining when the President went "too far" in exercising war powers and clearly violated individual rights.[15] Second, they judge federal government officials based on hindsight, rather than on the facts and circumstances that existed at the time those leaders had to make decisions.[16]

A study of the Constitution as written and as actually implemented in wars reveals that the political branches have enormous leeway in exercising military powers to respond to the unique conditions of each armed conflict. Given the complexities of decision-making during a military crisis, it is usually quite difficult to conclude definitively that Congress or the President abused their discretion.

A. The Constitutional Design

The Constitution entrusts the power to make, execute, and evaluate military and foreign policy exclusively to the political departments, which have the democratic legitimacy, institutional competence, and political incentives to defend the nation.[17] In supporting this conferral of plenary authority, Alexander Hamilton declared:

> [War] powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason *no constitutional shackles can wisely be imposed on the power to which the care of it is committed*. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence [sic].[18]

Specifically, Article I authorizes Congress to provide for the

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15 *See* Pushaw, *Enemy Combatant, supra* note 1, at 1005–47 (demonstrating that the Constitution does not set forth such clear legal principles and that, consequently, the Court has always struggled in attempting to identify limits on executive military authority).

16 Posner & Vermeule, *supra* note 6, at 608–10, 620, 623–26.

17 For an extensive analysis of the relevant textual and historical sources, see Pushaw, *Enemy Combatant*, *supra* note 1, at 1017–23.

18 *See* THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (original emphasis omitted, new emphasis added); *see also* THE FEDERALIST NO. 41, at 270 (James Madison) (Jacob E. Cooke ed., 1961) (to similar effect).

national defense;[19] declare war or otherwise approve it;[20] create, finance, and regulate the armed forces;[21] and suspend the privilege of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[22] Article II confers on the President federal "executive power"[23] and enables him to direct the army and navy as "Commander in Chief."[24] Furthermore, the structure of Article II suggests that the President can unilaterally address emergencies because only he, as the sole repository of all executive power and the lone federal official always on duty, can act swiftly and resolutely based on the recommendations of experts who have access to secret military intelligence.[25] By contrast, the other two departments labor in fixed sessions: Congress legislates through a time-consuming process of debate and compromise, while federal courts render judgments only after parties have properly invoked their jurisdiction and lengthy litigation has been completed.[26]

In short, the Constitution grants Congress and the President all conceivable war powers, and gives each branch weapons to check the other.[27] For instance, Congress can investigate the executive branch's conduct of war,[28] halt any armed conflict by cutting off funding,[29] and impeach executive officials for

19 *See* U.S. CONST. art. I, § 8, cl. 1.

20 *See* U.S. CONST. art. I, § 8, cl. 11.

21 *See* U.S. CONST. art. I, § 8, cls. 12–16.

22 *See* U.S. CONST. art. I, § 9, cl. 2. This clause does not explicitly state that only "Congress" can suspend the writ. Nonetheless, this conclusion seems obvious because of the provision's location in Article I (which governs Congress alone) and longstanding English and American practice confiding this drastic power to multi-member legislatures. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 91–92, 101 (1807).

23 *See* U.S. CONST. art. II, § 1, cl. 1.

24 *See* U.S. CONST. art. II, § 2, cl. 1.

25 *See, e.g.,* THE FEDERALIST NO. 70, at 471–73, 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 132-33 (2005).

26 For exhaustive consideration of how the Constitution's separation-of-powers framework nicely accounted for these institutional differences, see AMAR, *supra* note 25, at 131–204, 351–63; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400–35 (1996) [hereinafter Pushaw, *Justiciability*]; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (examining the meaning of Article III "judicial power" and the inherent authority of federal judges in light of constitutional history, theory, and structure).

27 *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 173–77 (1996) (making this point and contending that the Constitution does not create any particular process for initiating war, but rather allows the political branches to work out these details).

28 Article I's broad grant of "legislative power" has always been understood to include oversight of all executive branch actions. *See* Pushaw, *Justiciability*, *supra* note 26, at 404–05.

29 *See* Yoo, *supra* note 27, at 174, 196–97, 218, 241–90, 295–96, 300, 305 (discussing the power of the purse and impeachment as the key legislative checks).

egregious misconduct.[30] Conversely, the President can veto legislation[31] that he believes hampers the military and can exploit the institutional advantages of the unitary executive to maintain a singular focus that often overwhelms the multi-member Congress, especially when it is sharply divided along party lines.

Not surprisingly, Article III gives the judiciary no role in warfare.[32] Thus, claims that a military action violated Articles I or II are political, not judicial, questions.[33] The only time judicial review might be proper would be when the exercise of war powers *allegedly violated individual legal rights*. Unfortunately, the historical record is silent as to whether such cases should be dismissed as nonjusticiable, treated the same as decisions made in ordinary contexts, or addressed through a compromise approach of asserting jurisdiction but demonstrating extraordinary deference to the political branches. The Court adopted the latter position, which seems to be the best way to balance the Constitution's institution of judicial review with its provisions entrusting national security primarily to Congress and the President.[34]

In implementing the Constitution, all three branches have determined that sometimes individual rights and liberties must yield to the national imperative of winning a war. The primary actor has been the President, who has had to make swift decisions based on a constantly shifting military situation and

30 *See* U.S. CONST. art. I, § 2, cl. 5 (providing for impeachment by the House of Representatives); *id.* at art. I, § 3, cl. 6 (authorizing the Senate to conduct impeachment trials).

31 *See* U.S. CONST. art. I, § 7, cl. 2.

32 Recognizing this point, the Justices in 1793 declined President Washington's request for legal advice on questions related to military and foreign affairs, and they instead suggested that he seek such counsel from his Cabinet officers. *See* Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1998) (describing this incident and explaining how it became the foundation of the judiciary's practice of refusing to give legal advice).

33 *See* THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Court has always confirmed this principle. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–71 (1803); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28–33 (1827); Luther v. Borden, 48 U.S. (7 How.) 1, 38–45 (1849); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251–54 (1863); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 71–77 (1867); Johnson v. Eisentrager, 339 U.S. 763, 770, 774–87 (1950); Gilligan v. Morgan, 413 U.S. 1, 5–12 (1973). For an attempt to clarify the political question doctrine by placing it on a firm historical footing, *see generally* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165 (2002).

34 Scholars of divergent political stripes have endorsed the Court's approach of exercising judicial review to safeguard individual rights but showing great respect for the military judgments of the political departments. *See, e.g.*, Yoo, *supra* note 27, at 182–86; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 66.

imperfect intelligence.[35] As long as they acted reasonably under the circumstances, strong Presidents who have forcefully and successfully responded to military crises have always enjoyed the support of Congress, the courts, and the American people. Thus, modern laments that these Presidents have gone "too far" often smack of Monday-morning quarterbacking. The examples of Lincoln and Roosevelt are especially illuminating.

B. Lincoln's Constitutionalism

Depending on your ideology, Abraham Lincoln is either the patron saint–or sinner–of muscular executive leadership during war. When Fort Sumter was attacked on April 12, 1861, Congress was not in session.[36] Lincoln determined that waiting for Congress to reassemble would create intolerable military problems, and so he immediately took decisive and unprecedented actions.[37]

For example, the President increased the size of the military, called for volunteers, and appropriated huge sums of money for the war effort despite the Constitution's grant of such powers to Congress.[38] With similar gumption, he blockaded Confederate ports and ordered the seizure of all ships in the forbidden zone even though doing so raised serious Fifth Amendment problems of taking property without due process.[39] Likewise, Lincoln banned disloyal speech and press in seeming disregard of the First Amendment, and he created military tribunals that did not provide ordinary due process protections.[40]

Perhaps most famously, Lincoln suspended the writ of habeas corpus and jailed thousands of civilians without affording them any judicial process.[41] Initially, Lincoln's main fear was that Maryland would secede, which would hinder and perhaps destroy the war effort by cutting off Washington from the rest of the Union.[42] Accordingly, Lincoln ordered the Army to place Confederate sympathizers in Maryland in military prisons.[43] Merryman, one such detainee, filed a habeas petition to the

35 *See supra* notes 23–25 and accompanying text.

36 *See* AMAR, *supra* note 25, at 132–33, 354–55 (stressing this fact as a key justification for Lincoln's unilateral assertion of Article II powers until Congress could reconvene).

37 *See id*. at 122.

38 *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 17–18, 117–18, 136–38, 192, 196–97 (2003).

39 *See* The Prize Cases, 67 U.S. (2 Black) 635, 665–71 (1862) (upholding Lincoln's actions as a valid exercise of his Article II power as Commander-in-Chief).

40 *See* FARBER, *supra* note 38, at 8, 17, 19–20, 118, 144–45, 163–75.

41 *See id*. at 16–17, 19, 117, 144, 157–63, 192–95.

42 *See id*. at 16, 18, 117, 157–63, 192–95; AMAR, *supra* note 25, at 122, 355.

43 *See* FARBER, *supra* note 38, at 17–20, 157–163.

Circuit Court manned by Chief Justice Taney.[44] He ordered the release of Merryman after concluding that Lincoln had broken his oath to faithfully execute the law by usurping (1) Congress's Article I power to suspend habeas corpus, and (2) the judiciary's Article III function of deciding whether citizens had been unconstitutionally detained.[45]

Lincoln refused to comply. Soon thereafter, when Congress had reassembled, Lincoln justified his conduct in a special address.[46] He contended that the President's oath to "preserve, protect and defend the Constitution" as a whole justified taking any actions he deemed necessary to save the Union, even those that temporarily disregarded individual constitutional provisions.[47] In Lincoln's own words: "[M]easures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation."[48] As for habeas specifically, Lincoln rhetorically asked: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[49]

Yet Lincoln was not the tyrant that some have made him out to be.[50] On the contrary, he had a profound reverence for constitutional democracy.[51] Accordingly, Lincoln recognized that he needed the approval of Congress, especially because it was the only branch that could constitutionally continue to fund the war.[52] Congress ratified Lincoln's actions (including his suspension of habeas) and supported him for the remainder of the war.[53]

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44 *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

45 *See id.* at 147–53; RONALD C. WHITE, JR., A. LINCOLN: A BIOGRAPHY 416–17 (2009).

46 *See* 6 ABRAHAM LINCOLN, *Message to Congress in Special Session*, July 4, 1861, *in* COMPLETE WORKS OF ABRAHAM LINCOLN 297 (John A. Nicolay & John Hay eds., 1905).

47 *Id.* at 309.

48 *See* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 721 (2004) (book review) (quoting Lincoln and defending his theory of the Constitution during wartime).

49 *Id.* at 723.

50 *See* WHITE, *supra* note 45, at 3–6, 417, 443, 519, 553–57, 563–69, 584 (acknowledging the charge that Lincoln acted like a dictator, but demonstrating its falsity).

51 *See* AMAR, *supra* note 25, at 21, 38–39, 51–52, 118–19, 132, 146–47, 188, 196, 275, 368–73, 471–472. Most tellingly, Lincoln always insisted that the Presidential elections would be held in 1864 based on the timetable set forth in the Constitution, even when the North was faring badly and there was a very real possibility he would lose. *Id.* at 146–47.

52 *See* FARBER, *supra* note 38, at 18, 24, 118, 137–48, 192–97.

53 *See* Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326 (approving Lincoln's earlier actions); Act of March 3, 1863, ch. 81, 12 Stat. 755 (authorizing suspension of writ of habeas corpus); *see also* AMAR, *supra* note 25, at 132–33 (emphasizing that Lincoln sought, and received, Congress's blessing during the Civil War). For a detailed discussion of Lincoln's respect for Congress's role in warmaking, see David J. Barron & Martin S.

A chastened Court also fell into line. In *The Prize Cases*,[54] a majority of Justices upheld the validity of Lincoln's blockade against a challenge by owners of seized vessels who claimed that their property had been taken without due process.[55] The Court concluded that it could not review the President's exercise of political discretion, which Article II confided in him as Commander-in-Chief, to "determine what degree of force the crisis demands" (such as the blockade).[56]

Likewise, *Ex parte Vallandigham*[57] rejected a due process challenge to an Army tribunal created under Lincoln's orders.[58] The Court disavowed any power to "review or pronounce any opinion upon the proceedings of a military commission"[59] or similar executive wartime decisions.[60]

Finally, Lincoln fulfilled his preelection promise to decline to adhere to the Court's constitutional holding in *Dred Scott v. Sandford*[61] that the federal government could not intrude upon state power over slavery.[62] Invoking his authority as Commander-in-Chief, Lincoln emancipated millions of slaves in rebellious Southern areas, even though such a hugely consequential policy determination seemed to fall squarely within the legislative domain.[63]

The Civil War teaches that a strong President can sweep aside significant constitutional provisions—including both clauses that confer powers on Congress or the courts and those that protect individual rights and liberties—if he determines that this course must be taken to address a military emergency.[64] Modern libertarians who assert that Lincoln went "too far" cannot easily explain the contemporaneous consensus that he did not. The President himself, among the most profound

Lederman, *The Commander in Chief at the Lowest Ebb–A Constitutional History*, 121 HARV. L. REV. 941, 993–1021 (2008).

54 67 U.S. (2 Black) 635 (1862).

55 *Id.* at 665–82.

56 *Id.* at 670.

57 68 U.S. (1 Wall.) 243 (1863).

58 *Id.* at 243, 248.

59 *Id.* at 252.

60 *Id.* at 254 (referring to *Martin v. Mott* and *Dynes v. Hoover*).

61 60 U.S. (19 How.) 393 (1856).

62 *Id.* at 446–52. *See* Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1022 (1987) (describing Lincoln's view that Congress and the President, in carrying out their duties under Articles I and II, could rely on their independent interpretation of the Constitution and therefore did not have to conform their actions to the Court's *Dred Scott* decision).

63 *See* FARBER, *supra* note 38, at 19, 21, 144–45, 152–57; AMAR, *supra* note 25, at 281, 356–58, 373, 380.

64 *See* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 25 (1976).

constitutional thinkers America has ever produced, did not consider his actions excessive under the circumstances.[65] Neither did Congress, which approved his conduct.[66] Neither did the Court as an institution (as distinguished from individual Justices like Taney), which concluded either that the Constitution left wartime decisions entirely to the President's discretion or upheld them on the merits.[67] Last, but not least, posterity has lionized Lincoln, who is equaled only by George Washington in the presidential pantheon.

Modern Presidents absorbed the lesson of the Civil War. For example, Woodrow Wilson had no qualms about sacrificing individual liberties if doing so, in his judgment, would help achieve victory in World War I.[68] Indeed, even after the war had ended, Wilson continued to suppress freedom of expression.[69] Wilson, however, was merely a warmup for Roosevelt, who emulated Lincoln in the sheer audacity and scope of his assertions of war powers.

C. Roosevelt: Lincoln Redux

Even before Congress declared war in December 1941, Roosevelt had independently engaged in negotiations over military and foreign affairs with Great Britain, sent troops to the North Atlantic, ordered Nazi U-boats shot on sight, and declared a state of "unlimited national emergency."[70] After America entered World War II, Roosevelt did whatever he deemed necessary to win it, which included suppressing constitutional liberties.[71]

Roosevelt followed Lincoln in two specific ways. First, FDR successfully seized private property, including over sixty plants where labor disputes and other problems had impeded the war effort.[72] Second, he created military commissions to try enemies charged with war crimes.[73] In *Ex parte Quirin*,[74] the Court

65 *See* AMAR, *supra* note 25, at 132.

66 *Id.* at 132–33.

67 *See supra* notes 54–60 and accompanying text.

68 *See* Pushaw, *Enemy Combatant*, *supra* note 1, at 1034–35 (citing numerous instances and sources).

69 *See* CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 1–2, 13–16, 191–253 (1989).

70 *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 110–13 (1973).

71 *Id.*

72 The Court waited until the end of hostilities to consider legal challenges to these seizures, then dismissed the cases as moot. *See* Montgomery Ward & Co. v. United States, 326 U.S. 690 (1945); *see also* ROSSITER, *supra* note 64, at 59–63 (describing such commandeering and the Court's timid response).

73 In *Ex Parte* Quirin, 317 U.S. 1 (1942), the Court interpreted an unclear federal statute as empowering the President to establish such tribunals, thereby avoiding having

sustained a commission's imposition of the death penalty against Nazi spies (including an American citizen) who had stealthily entered the United States, and rejected their claim that the Constitution guaranteed their right to a trial in civilian court with ordinary procedural protections.[75] Roosevelt had used intermediaries to inform the Justices that he intended to execute the saboteurs whatever the Court decided, and he had marshaled massive popular support in this matter.[76]

FDR's most novel, and notorious, decision was his executive order (issued on the advice of his generals, and reinforced by an Act of Congress) removing Americans of Japanese descent from the West Coast to prison camps to prevent espionage and sabotage on behalf of Japan.[77] Even though it eventually became apparent that there was no credible evidence of such disloyal activities, the Court in *Korematsu* concluded that it could not use hindsight to condemn the actions taken in the emergency that followed Pearl Harbor.[78] Therefore, the Court held that military necessity justified the severe infringement of the detainees' rights to liberty and equality.[79]

In his dissent, Justice Jackson sagely noted that the "chief restraint" on the President and his military subordinates was "their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[80] Roosevelt's "contemporaries" obviously approved his conduct. He was the only President elected more than twice, and his convincing reelection to a fourth term in 1944 indicated broad popular support for his handling of World War II.[81] Congress also backed FDR's military decisions. Similarly, the Court

to reach Roosevelt's claim that he had power to do so independently under Article II. *See id.* at 21–30, 38–39, 45–48; *see also* Pushaw, *Enemy Combatant, supra* note 1, at 1036 n.136 and accompanying text (disputing the Court's statutory construction).

74 317 U.S. 1 (1942).

75 *Id.* at 22–48.

76 *See, e.g.*, A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 319–32; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1291 (2002).

77 *See* Korematsu v. United States, 323 U.S. 214, 215–17 (1944) (setting forth these laws and their stated rationales).

78 *See id.* at 218–19, 223–24.

79 *See id.* at 215–24.

80 *Id.* at 248. He further argued that the case should have been dismissed because he and his colleagues lacked adequate information to meaningfully review the President's assertion of military necessity but that the Court, having taken jurisdiction, should have struck down the exclusion order because it plainly violated the constitutional rights of Japanese Americans. *See id.* at 242–48 (Jackson, J., dissenting).

81 *See* Pushaw, *Enemy Combatant*, *supra* note 1, at 1039 & n.149.

rejected every constitutional challenge to his exercise of war powers.[82]

The "moral judgments of history" are mixed. On the one hand, Roosevelt is considered the greatest twentieth-century President, in large part because he led America to victory in a war that mortally threatened not only the United States but all democracies. On the other hand, FDR's internment of Japanese Americans is a stain on his legacy, an overreaction to Pearl Harbor that reflected racism more than military exigencies.[83]

The overall picture, however, is best captured by America's decision to build a monument honoring Roosevelt, as it did for Lincoln.[84] These marble symbols send the clear message that, in a high-stakes war, Presidents should err on the side of using too much force (including intrusions on constitutional liberties) to win, rather than risk defeat by showing greater sensitivity for individual rights.

D. Bush and the War on Terrorism

Since September 11, 2001, America has been engaged in a unique conflict. Unlike past wars, America is not fighting a nation-state for a finite time period in a series of battles. Rather, we are confronting shadowy worldwide private terrorist groups like al Qaeda, which strike indiscriminately in a struggle that will probably never end. Accordingly, the Bush Administration responded with equally innovative strategies and tactics. The War on Terrorism raises difficult constitutional questions concerning how to strike the optimum balance between national defense and individual rights.

Most legal academics and commentators, however, see the issues as straightforward. They have accused President Bush of unparalleled misconduct.[85] Indeed, many professors—including one on this panel—have argued that he and many of his military and legal officials should be prosecuted for war crimes.[86] I find

82 *See supra* notes 74–82 and accompanying text (describing cases like *Quirin* and *Korematsu*).

83 *See* PETER IRONS, JUSTICE AT WAR 13 (Oxford University Press 1983).

84 Doug Struck, *Clinton Dedicates Memorial, Urges Americans to Emulate FDR*, WASH. POST., May 3, 1997, at A01.

85 *See supra* note 1 and accompanying text.

86 *See* Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 CHAP. L. REV. 615, 638 (2009). The Obama Administration initially indicated that it would not pursue this course of action. *See* Editorial, *Prosecuting the CIA*, WALL STREET J., Aug. 25, 2009, at A14. In late August, however, Attorney General Eric Holder announced the appointment of a special counsel to investigate whether CIA officials violated federal law in interrogating suspected terrorists. *Id.* Those officials will undoubtedly argue that they acted under the orders of their superiors, who in turn relied

such rhetoric overheated, particularly when one compares Bush's specific policies to those adopted in previous wars.

1. The Main Features of the Antiterrorism Effort

In this Essay, I can merely provide an outline of the relevant law. This summary will focus on the two key statutes passed by overwhelming margins shortly after the 9/11 attacks.

First, Congress authorized the President to use "all necessary and appropriate force" against those who planned, committed, or aided the terrorist attacks.[87] Invoking this "Authorization for Use of Military Force" (AUMF) and his independent Article II powers, Bush deployed troops to Afghanistan (whose government had backed al Qaeda) and beefed up antiterrorism efforts both at home and abroad.[88] Among other things, Bush claimed the power to indefinitely detain "enemy combatants" (a status determined by the executive branch) and, at his discretion, to try them by military commissions appointed by the Secretary of Defense.[89]

Second, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (USA PATRIOT) Act increased surveillance of suspected terrorists, especially by reducing restrictions on domestic gathering of foreign intelligence; facilitated the deportation of immigrants suspected of involvement with terrorism; authorized law enforcement officials to search homes and businesses without prior notice to the owners ("sneak and

upon the legal opinions of Bush Administration attorneys in the White House and in the Departments of Justice and Defense. *Id.* Hence, the investigation likely will expand in scope, as has occurred with independent counsel inquiries in the past. *Id.*

Such investigations strike me as misguided. Most obviously, they compromise national security by creating a fear of legal liability that might discourage government officials from taking decisive steps that they otherwise would deem necessary to protect America. A related concern is that such possible liability might deter well-qualified candidates from agreeing to serve in the executive branch in the first place. Finally, such investigations and prosecutions necessarily carry with them a political taint, especially when a different party assumes control of the White House. For instance, George W. Bush would have erred gravely if he had prosecuted members of the Clinton Administration for alleged war crimes, such as unilaterally bombing Kosovo. Similarly, Clinton wisely did not pursue charges against the first President Bush for his conduct of the Gulf War.

Examples could be multiplied, but the point is clear: Politicized criminal proceedings against an ex-President for wartime decisions generally are a bad idea. The only exception would be if a President had committed genocide or a crime of similar magnitude which could have no valid justification as a war measure.

87 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

88 *See* Pushaw, *Enemy Combatant*, *supra* note 1, at 1058.

89 *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. 2008).

peek"); permitted government searches of telephone, internet, financial, and other records; and enhanced the Treasury Secretary's power to regulate and monitor financial transactions involving suspected terrorists and their allies.[90] The USA PATRIOT Act's foes have argued that it violates constitutional rights and liberties in many ways, most notably by allowing either the indefinite detention or arbitrary deportation of immigrants and by authorizing federal law enforcement officials to search private homes, business, and records without the affected party's knowledge.[91]

The AUMF and the USA PATRIOT Act have generated multiple lawsuits, although to date the Supreme Court has adjudicated only actions taken under the former statute.[92] Before discussing those cases, I want to highlight three aspects of the War on Terrorism that suggest President Bush actually showed more restraint than his predecessors.[93]

First, unlike Lincoln and Wilson, Bush did not censor speech or the press or criminally prosecute his critics, despite their vehement and often vicious verbal attacks on him and his antiterrorism policies.[94] Admittedly, the USA PATRIOT Act has raised legitimate First Amendment concerns,[95] but they are of a far smaller magnitude than those that resulted from previous Presidents' flagrant suppression of valid opposition to their wartime actions.

Second, in contrast to FDR's treatment of Japanese Americans, President Bush worked with Congress to specifically prohibit and condemn discrimination against Arab and Muslim Americans and to ensure review of all allegations of civil rights abuses.[96] Such sensitivity was welcome in the emotionally charged aftermath of the September 11 attacks.

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90 *See* USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (codified in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, and 50 U.S.C.).

91 Entering the debate over the USA PATRIOT Act would take me far afield, and so I have merely provided a bare summary.

92 *See infra* Part I.D.2.

93 Other scholars have noted this comparative restraint. *See, e.g.*, Goldsmith & Sunstein, *supra* note 6, at 288; Posner & Vermeule, *supra* note 6, at 623.

94 *See* Pushaw, *Enemy Combatant, supra* note 1, at 1006 n.8 (citing such criticisms). In a typical example of intemperate rhetoric, a well-known national columnist declared that Bush was "[r]emarkably brazen," had "trampled civil liberties," had perpetrated "Republican outrages," and had gone to "ludicrous lengths to avoid being challenged." *See* Maureen Dowd, *W's Stiletto Diplomacy*, NEW YORK TIMES, Feb. 27, 2005, Section 4, Column 6.

95 For a thoughtful analysis of these issues, see STONE, *supra* note 5, at 539–42, 552–54.

96 *See* USA PATRIOT Act, *supra* note 90, at Titles I & X.

Third, Lincoln suspended the writ of habeas corpus unilaterally and broadly, whereas Bush and Congress left it intact. The only exception was for a few hundred foreign suspected terrorists imprisoned at the U.S. Naval Base in Guantanamo Bay, Cuba, who were given extensive administrative and judicial review as a substitute.[97]

Of course, President Bush made many mistakes. Even though he won the 2000 election by a razor-thin margin and with help from a controversial Supreme Court decision,[98] Bush governed as if he had a mandate. He came into office with no national experience and little knowledge about military affairs, foreign policy, or constitutional law. After 9/11, Bush asserted

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97 Initially, such detainees would not be designated "enemy combatants" until they had received "multiple levels of review by military officers and officials of the Department of Defense." *See* Memorandum of the Secretary of Navy, Implementation of Combat Status Review Tribunal (CSRT) Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base (July 29, 2004) at enclosure (1). Next, a CSRT would decide whether a Guantanamo prisoner had been held unlawfully and, if so, order his release. *Id*. Conversely, if the CSRT affirmed the Defense Department's determination, the detainee could be tried by a military commission according to the usual procedural rules of military courts, except that the commission could (1) exclude him from any part of the proceeding to protect "national security interests," (2) admit any evidence that had probative value to a reasonable person (including hearsay), and (3) deny the defendant's access to classified information if doing so would not deprive him of a fair trial. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593–595, 614 (2006) (summarizing these procedures). The Detainee Treatment Act (DTA) incorporated these executive regulations and added a requirement that the Secretary of Defense set forth procedures for periodic consideration of "any new evidence" relating to "enemy combatant" status and for an annual review to determine the need to continue to hold foreign inmates. *See* DTA, div. A, tit. X, Pub. L. No. 109-148, §§ 1005–06, 119 Stat. 2739, 2740–44 (Dec. 30, 2005). Furthermore, the DTA granted the U.S. Court of Appeals for the D.C. Circuit "exclusive jurisdiction" to examine whether the Defense Department's standards and procedures were properly applied by the CSRT and were consistent with the federal Constitution and laws. *See id.* at § 1005(e)(2), 119 Stat. at 2744. That court was given similar jurisdiction to review military commission decisions. *See id.* at § 1005(e)(3), 119 Stat. at 2744. Such review would have been inexplicable unless Congress had approved of such commissions.
Because the DTA empowered a federal court to adjudicate claims by Guantanamo prisoners that they were being detained illegally (the basic function of habeas), Congress determined that regular habeas jurisdiction for them was unnecessary. Accordingly, the DTA provided that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo Bay." *See id.* at § 1005(e)(1), 119 Stat. at 2742. Five Justices then reached the counterintuitive conclusion that Congress had neither removed the Court's appellate jurisdiction nor authorized military commissions. *See Hamdan*, 548 U.S. at 566–95. This holding forced Congress to enact the Military Commissions Act (MCA) to make plain that *Hamdan* was wrong on both counts. *See* Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

98 *See* Bush v. Gore, 531 U.S. 98, 103–11 (2000) (per curiam) (reversing a Florida Supreme Court decision interpreting its state's laws as permitting election officials to use different criteria to determine voter intent in recounting contested presidential election ballots as violating the Equal Protection's prohibition on treating voters arbitrarily); *see also* Robert J. Pushaw, Jr., Bush v. Gore: *Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359 (2001) (criticizing the five conservative Republican Justices in the majority for creatively interpreting the Equal Protection Clause to facilitate the election of Bush, the Republican candidate).

sweeping unilateral war powers under Article II, thereby unnecessarily antagonizing a Congress that had given him all the authority he could possibly need in fighting terrorism.[99] Despite the potential for inter-branch conflict, Bush's handling of this crisis earned him extraordinary popular support.[100]

His downfall began with the March 2003 invasion of Iraq, which rested on several assumptions: that Iraq had supported al Qaeda, that it possessed weapons of mass destruction, that victory would be easy, and that a thriving democracy would sprout up.[101] When these suppositions proved to be false, Bush's popularity began to decline, but then increased just enough in the fall of 2004 to ensure his reelection.[102] Yet the Iraq war dragged on and imposed huge costs, which exacerbated the economic devastation wrought by the September 11 attacks.[103] A weakened economy encouraged the government to dramatically decrease interest rates and to tolerate lax lending (especially for housing), which ultimately led to a financial meltdown.[104]

As these troubles piled up, Bush's popularity hit historic lows.[105] Nonetheless, he continued to assert aggressive executive powers as if the United States were in a continuing military emergency akin to the Civil War or World War II, even though the carnage and destruction were clearly not equivalent. Moreover, Bush never demanded the national mobilization and

99 *See supra* notes 87–90 and accompanying text.

100 After September 11, 2001, his approval rating shot to 90%, and it remained in the 60–80% range for the next year-and-a-half. *See* George W. Bush Presidential Job Approval, http://www.gallup.com/poll/116500/Presidential-Approval-Ratings-George-Bush.aspx (last visited July 31, 2009); *see also* Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from* Hamdan, 91 MINN. L. REV. 1451, 1469 (2007) (observing that Bush benefitted from the "rally around the flag" effect until 2003).

101 A good analysis of the legal, political, and factual errors that led to the Iraq War is contained in Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199 (2006). Initially, Bush Administration neo-conservatives pushed the President to invade Iraq with the unrealistic goal of transforming it into a liberal democracy, and they mistakenly predicted that America would be welcomed as liberators. *Id*. at 1230–33, 1247–50. The United States then went to war based upon unproven claims that Saddam Hussein possessed weapons of mass destruction and that he had links to al Qaeda–allegations which neither Congress nor the media investigated independently and rigorously. *Id.* at 1212–16, 1228–30, 1246, 1250–53. Finally, the Bush Administration incompetently planned and executed the war. *Id.* at 1250-51.

102 After hitting a 2004 ratings low of 46% in May, Bush increased his support to over 50% in October and November and won a close reelection. *See* George W. Bush Presidential Job Approval, *supra* note 100.

103 *See, e.g.*, JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT (2008).

104 *See* Robert Hockett, *Bringing It All Back Home: How To Save Main Street, Ignore K Street, and Thereby Save Wall Street*, 36 FORDHAM URB. L.J. 427 (2009).

105 His second-term average approval rating was 37%, with a historic nadir of 25% in October 2008. *See* George W. Bush Presidential Job Approval, *supra* note 100.

shared sacrifice that characterized such all-out wars.[106] Another intractable political problem inhered in the peculiar nature of the War on Terrorism, which measured success primarily in negative terms—thwarting attacks, the details of which could not be publicized for national security reasons—rather than positive battlefield victories, such as Gettysburg and D-Day.[107] Symbolically, then, it was far easier for Bush to rally the public in the wake of the tangible 9/11 atrocities than in the vague domain of undisclosed possible assaults that did not occur.

My preliminary assessment, then, is that Bush consistently took strong actions to fight terrorism; that Americans (and their representatives in Congress) always supported these efforts; but that the Iraq War and the economic downturn fatally weakened his Presidency. Bush did not, however, adopt many of the liberty-infringing policies of his predecessors, such as censoring the press or imprisoning members of a particular ethnic group.[108]

In one area, though, Bush did follow the lead of every President dating back to Washington: using military commissions to try enemy combatants charged with war crimes.[109] Historically, the Court had rebuffed those few military prisoners who challenged the constitutionality of military tribunals, as in *Vallandigham*[110] and *Quirin*.[111] Recently, however, a majority of Justices have become far more receptive to such claims and others relating to habeas corpus.

2. The "Enemy Combatant" Decisions

This new approach began with two 2004 cases. First, in *Hamdi v. Rumsfeld,*[112] the Court held that "enemy combatants" who were American citizens could not be detained indefinitely, but rather had due process rights to notice and a hearing before an impartial decision-maker (which might include a military

106 *See* Goldsmith & Sunstein, *supra* note 6, at 280–81.

107 *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb–Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 713-15 (2008).

108 *See supra* notes 93–97 and accompanying text. For an opposing view, see David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 1–2 (2003).

109 Military tribunals had been used without legislative authorization or judicial review since the American Revolution. *See* John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 83, 89–90.

110 *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863), discussed *supra* notes 57–60 and accompanying text.

111 *Ex parte* Quirin, 317 U.S. 1 (1942), discussed *supra* notes 74–76 and accompanying text.

112 542 U.S. 507 (2004).

commission).[113] Second, *Rasul v. Bush*[114] involved Bush's order detaining non-citizen "enemy combatants" in Guantanamo, which he had made in light of longstanding Supreme Court case law interpreting the federal habeas corpus statute as not applicable to foreigners seized and imprisoned outside of the United States.[115] A majority of Justices weakly distinguished this precedent and ruled that this statute permitted these Guantanamo detainees to file habeas petitions.[116]

Congress quickly made clear that, contrary to *Rasul*, its habeas statute did not give *any* federal court (including the Supreme Court) jurisdiction over aliens at Guantanamo.[117] Instead, Congress worked with the executive branch to craft for these prisoners an elaborate set of procedures, which included several levels of military justice followed by review in the District of Columbia Circuit and Supreme Court.[118] In *Hamdan v. Rumsfeld,*[119] five Justices reached the startling conclusion that Congress had not stripped the Court of appellate jurisdiction over the foreign Guantanamo inmates or authorized their trial by military commissions (even though the AUMF plainly contemplated such tribunals).[120] Again, Congress had to clarify that it meant what it said: No federal court had jurisdiction to entertain habeas petitions from these detainees, and the President could try them by military commissions.[121]

In response, the same five Justices in *Boumediene v. Bush*[122] disregarded centuries of practice and precedent in holding that the Constitution's writ of habeas corpus extends to alien "enemy combatants" who have been captured and detained outside of the

113 *See id.* at 516–34; *see also* Pushaw, *Enemy Combatant*, *supra* note 1, at 1048–52 (analyzing *Hamdi* in detail).

114 542 U.S. 466 (2004).

115 *See id.* at 488–506 (Scalia, J., dissenting) (setting forth this traditional understanding of the habeas statute).

116 *See id.* at 470–85 (majority opinion); *see also* Pushaw, *Enemy Combatant*, *supra* note 1, at 1052–53 (examining *Rasul*).

117 *See* DTA, *supra* note 97, at 2739–44 (codified in scattered sections of the U.S.C., including titles 10, 28, and 42).

118 *See supra* note 97 and accompanying text.

119 548 U.S. 557 (2006).

120 *Id.* at 570–606. For a thorough critique of *Hamdan*, see Pushaw, *Enemy Combatant*, *supra* note 1, at 1058–78. For a sophisticated defense of *Hamdan*, *Rasul*, and *Hamdi*, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007) (contending that the Court properly applied a "common law" model of habeas by interpreting constitutional and statutory provisions on a case-specific basis in light of practical concerns, evolving legal norms, and awareness of the comparative institutional competence of Congress, the President, and the judiciary).

121 *See* Military Commissions Act, 28 U.S.C. § 2241(e) (2008).

122 128 S.Ct. 2229 (2008).

United States' sovereign territory.[123] Accordingly, the Court invalidated Congress's alternative procedures for such detainees as an effective suspension of the constitutional habeas writ and as insufficient to satisfy the Due Process Clause.[124]

Hamdi, *Rasul*, *Hamdan*, and *Boumediene* depart from the Court's usual approach of deferring to the President's exercise of war powers. Instead, they fall within a minority of cases in which the Court has checked a politically weak and unpopular President who persisted in exercising war powers aggressively and in disregard of individual constitutional rights, even though such tough medicine struck the Justices as unnecessary because the military emergency had passed.

3. *Milligan* and *Youngstown*

The classic example is *Ex parte Milligan*,[125] which came down a year after the Civil War had ended. The Court granted the habeas petition of an Indiana citizen who had been given the death penalty by a military tribunal, which violated his constitutional right to an ordinary jury trial because he had never served in the army and the Indiana courts had always remained open.[126] The Court conceded that both this holding and its assertion that "[t]he Constitution . . . [applies] equally in war and in peace" could not be squared with its decisions during the Civil War. The Court apologized for succumbing to the passionate "feelings and interests" caused by the grave threat to "public safety," but vowed in the future to render wholly "legal judgment."[127]

The Justices knew, but did not say, that they could successfully thwart Andrew Johnson because of his precarious political situation. The Republican Lincoln had selected the Democrat Johnson, the only Southern Senator who remained loyal to the United States, as Vice President primarily as an olive branch to the South.[128] After Lincoln's assassination, the politically inept and stubborn Johnson engaged in an acrimonious fight over Reconstruction with the Radical Republicans who controlled Congress, and they eventually

123 *Id.* at 2244–77. For a lengthy explanation of the implausibility of the Court's historical analysis of habeas, see Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2020–46 (2009).

124 *Boumediene*, 128 S.Ct. at 2262–75.

125 71 U.S. (4 Wall.) 2 (1866).

126 *Id.* at 107–08, 118–27.

127 *Id.* at 109.

128 *See* AMAR, *supra* note 25, at 220; MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 2–6 (1973).

impeached him.[129] The last thing Johnson needed was a clash with the Court, which saw little point in allowing a President who did not enjoy congressional support to continue to abridge constitutional liberties.

Unfortunately, the Court quickly broke its promise in *Milligan* to uphold the Constitution "at all times, and under all circumstances"[130] by repeatedly caving in to many Acts of Congress during Reconstruction that appeared to violate the Constitution.[131] The Justices apparently recognized that they could not risk defying the mighty Congress, just as they had backed down from confrontations with Lincoln. Indeed, the Court resumed its posture of deference until after World War II, when the ghost of *Milligan* reappeared.

In *Youngstown Sheet & Tube Co. v. Sawyer*,[132] six Justices rejected President Truman's assertion of independent Article II power to seize and run American steel mills, which faced a labor shutdown, in order to secure steel for the Korean War effort.[133] In the majority's view, Truman had failed to show that military necessity justified his decision to take private property domestically without due process, especially since Congress had not explicitly authorized this action.[134] In his famous concurrence, Justice Jackson argued that Truman had disregarded Congress's will, that in such circumstances the President bore the heavy burden of demonstrating that the Constitution gave him alone the power to act, and that Truman had not met this difficult test.[135] Conversely, Jackson presumed the constitutional validity of congressionally authorized Presidential actions, absent an extremely unlikely scenario in which the federal government as a whole lacked power.[136] As

129 *See* BENEDICT, *supra* note 128, at 6–125.

130 *See Milligan*, 71 U.S. (4 Wall.) at 120–21.

131 *See, e.g.,* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 497–501 (1866) (declining to pass on the constitutionality of federal legislation establishing martial law in the former Confederate states); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 50–51, 76–77 (1867) (refusing to hear a complaint that Congress had unconstitutionally abolished a state government); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 508–09, 512–15 (1869) (holding that Congress could repeal the Court's appellate jurisdiction over a pending case, which had already been briefed and argued, brought by a newspaperman who had been imprisoned for exercising his First Amendment right to criticize Mississippi's military government and who had challenged the constitutionality of the Reconstruction Acts).

132 343 U.S. 579 (1952).

133 *Id.* at 582–89.

134 *See id.* at 585–88.

135 *Id.* at 637–38, 640–55. The full Court expressly embraced Justice Jackson's analytical framework in *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981).

136 *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring). Finally, Jackson suggested that if Congress had neither authorized nor prohibited the President's action, the matter would be resolved politically rather than judicially. *See id.* at 637.

Chief Justice Vinson and two other dissenters stressed, however, many federal statutes and Article II allowed the President to do whatever he considered necessary to win wars (including seizing property), and the Court had often sustained such executive actions.[137]

Because the dissent correctly applied the relevant law, the conclusion seems inescapable that practical factors drove the majority's decision. By 1952, Americans were war-weary, Truman's popularity had hit historic lows, and he did not have the political capital or incentives to challenge the Court.[138] Moreover, the majority apparently believed that the President's interference with Fifth Amendment rights could not be excused by his claimed need to vigorously prosecute the Korean War, which did not pose the same life-or-death threat to the United States as World War II or the Civil War.

Libertarians who hail *Youngstown* do not appreciate that the case was about politics, not law. The same holds true for the Court's recent decisions involving "enemy combatants."

4. The Guantanamo Detainee Cases in Historical Perspective

Hamdi, *Rasul*, *Hamdan*, and *Boumediene* bear an uncanny resemblance to *Milligan* and *Youngstown*. Once again, a majority of pragmatic Justices capitalized on a rare opportunity to uphold individual constitutional rights against an unpopular and politically compromised President, George Bush, who continued to boldly assert war powers long after the crisis of 9/11 had passed.[139]

I seriously doubt that the Court would have rendered the same rulings in late 2001 or 2002, when Americans supported President Bush by huge margins.[140] Moreover, the Justices would surely have deferred to him if the War on Terrorism had metastasized into an epic conflict on the scale of the Civil War or the two World Wars, with attendant national mobilization and

137 *See Youngstown*, 343 U.S. at 668–710 (Vinson, C.J., dissenting) (citing sources).

138 *See* J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 42 (2002) (describing *Youngstown* as "the backlash to the legally clumsy attempt, by a famously unpopular President, to invoke national security as the justification for seizing steel mills during a labor dispute in 1952, an election year in which control of the White House subsequently shifted from one party to the other").

139 For development of this thesis, see Pushaw, *Enemy Combatant*, *supra* note 1, at 1005–16, 1047–83; *see also* Tushnet, *supra* note 100, at 1468–69 (arguing that the Court asserted a strong role because of unique and contingent political circumstances, not because of any permanent features of constitutional law and structure).

140 *See supra* note 100 and accompanying text.

massive sacrifices. Finally, I predict that when the next Fort Sumter, Pearl Harbor, or September 11 occurs, the President will take whatever military response he deems necessary, and the Court will yield to him.

5. Justifying the War on Terrorism

Quite apart from the issue of judicial review is the rationale for the President's actions in the first place. Historically, triumph in war supplied its own justification for any suppression of constitutional rights and liberties. In this tradition, President Bush can defend his policies on the simple ground that they helped him accomplish his overarching goal of preventing further terrorist attacks.[141]

Again, it is possible that America might have avoided this result even if Bush had adopted a different approach that was less intrusive on constitutional liberties. Like his predecessors, however, Bush erred on the side of caution in protecting America. However harsh the current verdict on Bush is, imagine what it would be like if he had not acted forcefully enough and America had suffered further terrorist outrages.

To return to my larger thesis, I am skeptical of post hoc arguments that particular wartime infringements of civil liberties were unnecessary to achieve military victory. I do not deny that, with the benefit of hindsight, we can see that certain Presidential actions went beyond the pale. Obvious examples include Wilson's targeting of political and journalistic dissenters and Roosevelt's mass internment of Japanese Americans.[142] It is gratifying to see that President Bush avoided similar mistakes in waging the War on Terrorism, although he undoubtedly made other errors.[143]

Nevertheless, we should always keep in mind that Presidents in the midst of a shooting war do not have the luxury of hindsight. History teaches that it is naive to suppose that either Congress or the Court can stop a popular President during a military crisis from curbing individual rights and liberties as he deems essential for national security.

141 Charles Allen, *War on Terrorism: Bush Highlights Success of Military, Intelligence Community in Preventing Terrorist Attacks*, FOREIGN POL'Y BULL. 58, 60 (2009).

142 STONE, *supra* note 5, at 12, 135–233, 284–307.

143 *See supra* notes 93–109 and accompanying text.

II. WARTIME RESTRICTIONS ON CIVIL LIBERTIES AS CATALYSTS FOR IMPROVING CIVIL RIGHTS

Many scholars have detected a historical pattern in which fearful Americans unquestioningly back Presidents during wartime when they invade civil liberties, later regret their complicity in such wrongdoing, resolve to avoid such unjust overreactions in the future, and try to compensate by granting civil rights generously.[144] The classic example offered to support this "remorse theory" is that Lincoln's excesses supposedly begat civil rights legislation and the Thirteenth, Fourteenth, and Fifteenth Amendments.[145] Another proffered illustration is that World War II ultimately helped spark the Civil Rights Movement of the 1950s and 1960s.

Collective guilt over wartime limits on individual liberties may be one factor that has contributed to advancements in civil rights laws, but it is usually simplistic to posit a direct causal relation.[146] Rather, such laws represent the culmination of a complex process that involves historical reflection, religious and

144 ALAN BRINKLEY, *A Familiar Story: Lessons From Past Assaults on Freedoms*, *in* THE WARS ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 32–44 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); *but cf*. Posner & Vermeule, *supra* note 6, at 622–25 (rejecting this theory).

145 For a perceptive analysis of the complex relationship between Lincoln's actions during the Civil War and the adoption of the Reconstruction Amendments, see AMAR, *supra* note 25, at 351–401.

146 There is at least one notable exception where a straight line can be drawn. During World War I and its aftermath, the Court held that the government's interest in winning overrode the First Amendment rights of Americans who had criticized the war in violation of federal statutes prohibiting both "sedition" (defined as disloyal or abusive speech or writings about federal or military officials) and "espionage" (which included not merely spying but also obstructing military recruitment and attempting to foment disloyalty, insubordination, or refusal of duty). *See, e.g.*, Schenck v. United States, 249 U.S. 47, 51–52 (1919) (citing statutes). Most notoriously, the Court sustained the conviction of labor leader Eugene Debs, Wilson's political foe who had received over a million votes as Socialist Party candidate for President, for criticizing America's intervention in the war and urging workers not to join the armed forces. *See* Debs v. United States, 249 U.S. 211, 216–17 (1919).

Such federal government abuses later led the Court to reevaluate, and ultimately reject, its historical practice of declining to review the constitutionality of such legislation. *See* MAY, *supra* note 69, at 1–2, 13–16, 191–253. Instead, Justices Holmes and Brandeis developed a test whereby the government could not prohibit expression advocating illegal conduct unless there was a "clear and present danger"—i.e., a reasonable basis for fearing that serious harm would result imminently. *See* Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J. concurring). The full Court adopted this approach in *Brandenburg v. Ohio*, 395 U.S. 444, 447–448 (1969). A few years later, a majority of Justices upheld the First Amendment right of a newspaper to publish classified government documents about the Vietnam War because President Nixon had merely asserted, rather than demonstrated, that their publication would cause grave damage to national security. *See* New York Times v. United States, 418 U.S. 683 (1974).

moral considerations, changing social and ideological norms, economic realities, and visionary leaders.

An obvious flaw of the "remorse theory" is that sometimes civil rights and liberties are actually enhanced during wartime. Indeed, perhaps the greatest grant of freedom and equality at the stroke of a pen, the Emancipation Proclamation, occurred smack in the middle of the supposedly liberty-destroying Civil War.[147]

Furthermore, history refutes the notion that America has progressed in a linear fashion toward ever-expanding respect for civil liberties in each succeeding war and enhanced civil rights after each military conflict.[148] For instance, Lincoln's alleged excesses in curtailing freedom, and civil rights laws enacted in the late 1860s, did absolutely nothing to prevent later Presidents like Wilson and Roosevelt from infringing individual rights and liberties in the course of waging war. Concededly, President Bush avoided some of the more egregious mistakes of the past, such as targeting people for mistreatment solely because they happened to be members of the same minority group as those of a nation America was fighting.[149] Nonetheless, perhaps this self-control reflected the fact that the War on Terror was small potatoes compared to struggles like World War II.[150] If 9/11 had been followed by major attacks on Los Angeles, Chicago, Philadelphia, and Houston, history does not fill me with confidence that the executive branch's response would have been as restrained.

Finally, it is almost impossible to prove a one-to-one correspondence between regret over wartime suppression of fundamental liberties and subsequent civil rights laws. For example, remorse over Lincoln's interference with individual freedoms did not have much to do with the Reconstruction Amendments and statutes. Most importantly, the Fourteenth Amendment's guarantees of Due Process, Equal Protection, and Privileges or Immunities were not aimed at preventing the federal government in later wars from taking the same sorts of draconian actions as Lincoln. On the contrary, these Amendments completed the process Lincoln had started in the Emancipation Proclamation–perhaps grossly beyond the bounds of his Article II powers–by guaranteeing the newly freed slaves (and everyone else) their basic civil rights.[151]

147 *See supra* notes 61–63 and accompanying text; *see also* AMAR, *supra* note 25, at 356–57.

148 *See* Posner & Vermeule, *supra* note 6, at 622–25.

149 *See supra* notes 94–97 and accompanying text.

150 *See* Posner & Vermeule, *supra* note 6, at 623.

151 *See supra* notes 37–67 and accompanying text.

Turning to World War II, Americans eventually felt great national shame over the mistreatment of Japanese Americans.[152] However, that remorse was not the main impetus behind, or primary focus of, the Civil Rights Movement of the 1950s and 1960s, which concerned the plight of African (not Asian) Americans.

Certain events related to World War II did help give rise to this crusade, but the internment of Japanese citizens ranks far down on the list. The most compelling argument was that blacks, having valiantly fought for America overseas and sacrificed for the domestic war effort, deserved as a matter of justice to be treated with dignity rather than face continuing legal discrimination.[153] A related point is that massive wartime production had induced African Americans in the South to migrate in huge numbers to take jobs in Northern and Midwestern industrial cities, which increased both their economic clout and voting power.[154] Similarly, black employment grew in the federal government, which also took steps such as barring racial discrimination in war contracts and, eventually, in the armed forces.[155] Ideologically, the United States' condemnation of Nazism and other regimes touting ethnic superiority forced Americans to confront their own racism.[156] The need for racial change became imperative during the Cold War because segregation contradicted America's professed ideals of democracy, freedom, and justice, thereby harming its foreign relations—especially its efforts to garner support in nations that had formed after the breakup of colonial empires.[157]

Civil rights laws also reflected many factors that had little direct connection to the war. One is the fortuitous emergence of leaders of various sorts: legal and judicial (such as Thurgood Marshall and Earl Warren);[158] religious and moral (most notably Martin Luther King);[159] and political (the Southern President

152 This remorse culminated in the passage of the Civil Liberties Act of 1988, which apologized to Japanese Americans who had been interned and granted them reparations. 50 U.S.C. § 1989b (2000).

153 *See* AMAR, *supra* note 25, at 440–41; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 174, 181–82, 445 (2004).

154 *See* KLARMAN, *supra* note 155, at 173–74, 178–81, 188–89, 288, 290–91, 444–45; PAUL BREST ET AL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 893 (5th ed. 2006).

155 *See* KLARMAN, *supra* note 155, at 178–79, 186 (citing sources).

156 *Id.* at 172–77, 185, 187–88, 291, 304, 444–45.

157 The definitive study is MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE IN THE IMAGE OF AMERICAN DEMOCRACY 250–52 (Princeton Univ. Press 2000). *See also* KLARMAN, *supra* note 155, at 182–86, 288, 291, 444–46.

158 *See* KLARMAN, *supra* note 155, at 193–343, 450–51.

159 *Id.* at 378–80.

Lyndon Johnson supporting the Civil Rights Act).[160] The galvanizing event was the Warren Court's decision in *Brown v. Board of Education*[161] that racial discrimination by states in public schools violated the Equal Protection Clause.[162] The often violent backlash to the desegregation cases in the South helped to turn public opinion in favor of greater protection for blacks, as social mores shifted.[163] Religious faith and values, as embodied by King, also induced many people to fight racism.[164]

In sum, wartime restrictions on basic liberties might be one element that influences subsequent positive developments in civil rights. However, such limits cannot be isolated as the sole, or even primary, consideration.

It is too early to tell whether President Bush's infringements of individual liberties in fighting the War on Terrorism will eventually improve civil rights. However, any cause/effect relationship would be highly unlikely. For one thing, ordinary Americans do not appear to have a collective sense of guilt about the Bush Administration's actions taken pursuant to the AUMF and USA PATRIOT Act,[165] and the Democrats who gained control of the White House and Congress in the 2008 elections have not repealed or significantly amended those laws. Indeed, even today only a minority of Americans support closing the Guantanamo prison,[166] which Barack Obama has yet to shut down[167] even though the intellectual elite have cited it as the crowning symbol of Bush's tyranny.[168] Any future expansion of civil rights will reflect the election of Barack Obama and a more liberal stance on this issue, not regret over antiterrorism policies.

160 *See id.* at 436.

161 347 U.S. 483 (1954).

162 *See id.* at 489–96.

163 *See* KLARMAN, *supra* note 155, at 442. For an exhaustive and insightful analysis of *Brown* and its impact, see *id.* at 290–442.

164 *Id.* at 377–78.

165 *See* Lydia Saad, *Americans Generally Comfortable with Patriot Act*, GALLUP, Mar. 8, 2004, http://www.gallup.com/poll/10858/Americans-Generally-Comfortable-Patriot-Act.aspx.

166 *See* Lymari Morales, *Americans Send No Clear Mandate on Guantanamo Bay*, GALLUP, Jan. 21, 2009, http://www.gallup.com/poll/113893/Americans-Send-No-Clear-Mandate-Guantanamo-Bay.aspx (documenting that only 35% of Americans favor closing Guantanamo, about the same percentage as in 2007).

167 *See* Peter Baker, *The Words Have Changed, But Have the Policies?*, NEW YORK TIMES, April 3, 2009 (noting that President Obama has left Guantanamo open and has continued most of Bush's military policies).

168 For example, David Cole, the most prolific critic of the Bush Administration's policies, conceded that cases like *Rasul* had little legal basis but rather embodied the majority's concern that Guantanamo had become an "international embarrassment." *See* David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 651–53 (2006).

A final difficulty with the "remorse theory" is that many distinguished judges and scholars have posited the opposite hypothesis: that when the President asserts increased powers during an emergency, they tend to become permanent and diminish individual rights and freedoms, especially when the Court approves them.[169] A well-known articulation of this position can be found in Justice Jackson's dissent from the Court's decision to uphold the federal government's internment of Japanese Americans:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, this Court for all time has validated [a] principle . . . [which] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[170]

Logically, the "collective remorse" and "loaded weapon" theories cannot both be correct. Rather, history demonstrates that the truth lies somewhere in the middle. Every armed conflict is unique and requires a distinctive approach in balancing liberty against security.[171] Similarly, when a war ends, civil rights progress at a rate that depends on a huge number of legal, political, ideological, social, economic, and moral variables. More simplistic explanations fail to capture the messiness of the historical evidence.

III. JUSTIFYING EMERGENCY INFRINGEMENTS ON CIVIL LIBERTIES BASED ON LATER CIVIL RIGHTS GAINS

Assuming that wartime curtailments of individual freedoms resulted in later enlargement of civil rights, was the tradeoff worth it? It is impossible to answer this question objectively. Those who actually suffered deprivation of their liberties would surely answer no. For instance, Americans of Japanese descent

169 *See* Posner & Vermeule, *supra* note 6, at 609–21, 626–42 (citing the many thinkers who have espoused this thesis but demonstrating its conceptual, institutional, psychological, normative, and empirical weaknesses).

170 *See* Korematsu v. United States, 323 U.S. 214, 245–46 (1944).

171 *See* Posner & Vermeule, *supra* note 6, at 610, 625–26.

who lost their property and freedom during the Second World War would not feel vindicated even if they (or their children) received civil rights protections decades later. Conversely, the primary beneficiaries of such laws after both World War II and the Civil War, African Americans, would likely have a completely different perspective, especially because their liberty, equality, and dignity had been systematically denied in times of both war and peace.

In short, determining whether permanent civil rights gains compensated for temporary restrictions during military emergencies requires an utterly subjective judgment. Instead, it seems more useful to keep a sharp focus on the main issue–whether the wartime limits were necessary to achieve the greater good of winning the war. If so, then the government's actions were justified, regardless of its later treatment of civil rights. Indeed, subsequent military emergencies might dictate similar draconian measures, regardless of what laws are on the books.

On the other hand, if a particular invasion of civil liberties was not essential to win a war, and a President knew or should have known this fact, the government can never make up for that pointless sacrifice. For example, to the extent that Wilson censored expression to spite his political enemies or Roosevelt imprisoned Japanese Americans because of raw racial prejudice, those sins cannot be expiated by the later passage of civil rights laws. Furthermore, a President can never rely upon the possibility of such legislation as a justification for gratuitously violating individual rights and liberties.

CONCLUSION

War is hell. Winning one requires many hard decisions based on constantly changing military circumstances and incomplete information. Presidents in the midst of a national security crisis often conclude that they have to do unspeakably awful things, as when Lincoln ordered that Union Army deserters be shot[172] and Truman chose to drop atomic bombs.[173]

Keeping in mind the emergency conditions that actually existed and the facts the President had available, it is usually difficult to conclude with certitude that his specific infringement of civil liberties was unnecessary for military success. It is equally speculative to assert that regret over wartime excesses

172 JAMES R. ARNOLD & ROBERTA WEINER, LOST CAUSE: THE END OF THE CIVIL WAR, 1864-1865, at 8 (2002).

173 *See* DAVID MCCULLOUGH, TRUMAN 391–96, 400–01, 428, 436–44, 448, 453–60, 463 (1992).

has directly resulted in enhanced protection of civil rights. Similarly, no one can objectively determine whether such a tradeoff (if one existed) was worth it.

As with all armed conflicts, reasonable people can disagree about the optimum balance between individual rights and collective security in the War on Terrorism. In evaluating the response of the Bush and Obama Administrations to this threat, it is important to recognize the validity of a range of possible responses and to compare Presidents to their real-life predecessors, not to some idealized leader.