

# Introduction

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The articles in this issue of the *Journal*, based on last fall's annual lecture series, are particularly timely in light of the current war against terrorism and the fighting in Iraq and Afghanistan. As anyone who has followed the news can attest, there are a number of legal issues involved regarding how people designated as "terrorists" or "enemy combatants" are to be treated. How far do the normal procedural rules for criminal trials go when applied during wartime? How extensive are the war powers claimed by the executive branch, powers that definitely exist but are not spelled out in the Constitution?

Some of these issues are already being considered in lower federal courts, and so there is good reason to believe that at some point they will reach the Supreme Court. While one can never predict how a current court will act based on past experience, knowing that past experience may be a guide to understanding why courts do—and do not—act in certain ways during times of national crisis.

The six articles that comprise this issue do not, of course, cover fully all war-related issues that have come before the Court, nor could they. But they do give a good sampling of how the Court—which, one should always remember, is a branch of the government and not some abstract body of platonic guardians hidden away in a marble Olympus—has responded when the nation has been threatened in the past.

The record is, as we would expect, mixed. In some instances, the Court has shown such great deference to the political bodies as to almost abdicate its responsibilities for interpreting the Constitution. In other instances, it has essentially told the President and Congress that despite the fact of war, fundamental constitutional safeguards must be observed.

The problem, of course, is that the war on terrorism—the first war in almost two centuries to inflict casualties on our homeland—is very different from the traditional wars we fought during the twentieth century, even

Vietnam. The issues are, in many ways, confusing, since the acts of terrorists are so alien to the rule of law that we cherish so highly. But as prior courts have reminded us, even if our enemies do not observe our constitutional

rules, we must, and how we do that is often difficult to discern.

These lectures give some idea of the problems involved. No doubt we shall learn much more in the years to come.

# Civil Liberties in Wartime

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I have a simple thesis: In time of war—or, more precisely, in time of national crisis—we respond too harshly in our restriction of civil liberties, and then later regret our behavior. To explore this thesis, I will briefly review our experience in 1798, the Civil War, World War I, World War II, the Cold War and the Vietnam War. I will then offer some observations.

## The “Half War” with France

The period from 1789 to 1801 was a critical era in American history. In an atmosphere of fear, suspicion and intrigue, the new Constitution was put to a test of its very survival. Sharp internal conflicts buffeted the new nation, which also found itself embroiled in a fierce international struggle between Europe’s two great powers, the French Republic and Imperial Britain. It was a time of bitter party warfare and rampant hysteria.<sup>1</sup>

By 1798, many of the ideas generated by the French Revolution had aroused deep fear and hostility in some segments of the American population. A rancorous political and philosophical debate raged between the Federalists, then in power, and the Republicans. The Federalists feared that the sympathy of the Republicans for the French Revolution indicated a willingness to plunge the United States into a similar period of violent upheaval. The Republicans feared that the Federalist sympathy for

England denoted a desire to restore aristocratic forms and class distinctions in America.

As the war in Europe raged and the United States found it increasingly difficult to maintain a perilous neutrality, President John Adams sent John Marshall to Paris to negotiate a treaty to guarantee the immunity of American shipping from attacks by French corsairs. When this effort failed because the French demanded “tribute” to help finance their war with England, Americans were outraged at the arrogance of the French. A wave of patriotic fervor swept the nation under the rallying cry “Millions for Defense, but Not One Cent for Tribute.” President Adams placed the United States into a “virtual state of undeclared war.”<sup>2</sup>

Congress gave the President everything he asked for and more. It ordered additional warships, appropriated substantial funds to fortify harbors, established a new Department of the Navy, expanded the army by adding twelve new regiments of infantry, authorized the navy



This 1798 cartoon shows France as a monster, with one foot in Switzerland, saying to Britain "We will come and plant the tree of liberty in your hearts and make your nation free." The Federalists entered into an undeclared war with France over its demand for tribute money to guarantee immunity from attacks by French ships, but the Republicans believed that America should stay out of the Anglo-French conflict.

to attack armed French ships, and abrogated all treaties with France. George Washington was recalled from Mount Vernon to assume command of America's military forces. Adams was suddenly a national hero. Whenever he appeared in public, he was greeted with huzzas. The nation was on a war footing.

The Republicans fiercely criticized these measures. Vice President Thomas Jefferson feared that a war with France would drive the United States into the arms of England and deliver the nation over to the forces of anti-republicanism and monarchy. He believed that if the United States could maintain its distance from the European conflict, the French might defeat the English and thus make republicanism secure once and for all in America.<sup>3</sup> Republican Congressman Albert Gallatin protested that the Federalists had exaggerated the dangers facing the nation and that the measures they proposed would precipitate an unnecessary and disastrous war with

France. He derided as "wild" the Federalist claim that France intended to "subjugate our country."<sup>4</sup> Congressman Brent added that he was no more apprehensive of a French invasion than he was of being "transported before night into the moon."<sup>5</sup>

The Federalists were aghast. Congressman Robert Goodloe Harper warned that the nation had to prepare immediately rather than waiting until invasion was imminent, and Congressman "Long John" Allen of Connecticut warned of "bloodshed, slaughter, pillage, and a complete subjection to France." Congressman Edmund accused the Republicans of being "so degraded, so reduced, and humbled" that they were willing to receive whatever "boon we can beg" from the French. He advocated a more "manly course of conduct." Samuel Dana of Connecticut charged that the Republicans' peace of "passive obedience" was not a peace "worthy [of] the American Republic." Congressman Harper declared that he was



“ready to go to war.”<sup>6</sup> President Adams accused the Republicans of supporting measures that “would sink the glory of our country and prostrate her liberties at the feet of France.” Such persons, he declared, deserve only our “contempt and abhorrence.”<sup>7</sup>

The Federalists accused Republicans of acting as agents of France. Charging that Republicans had resisted “every proposition for a prompt, energetic, and effectual defence of our country,” Congressman Allen raged that “were France herself to speak through an American mouth, I cannot conceive” what it would say “more than what we have heard from certain gentlemen to effect her purposes.” Congressman Harper accused the Republicans of preparing “the people for a base surrender of their rights” and declared that “[whether we want it or not,] we are now in war.” He accused the Republicans of intentionally taking positions that would “tend directly to the destruction of the country,” and wondered “whose servants they were desirous of being.”<sup>8</sup>

Against the drumbeat of imminent war against the world’s mightiest army, the Federalists enacted the Alien and Sedition Acts of 1798. The Alien Acts arose out of the Federalists’ concern that recent immigrants to the United States, many of whom had fled tyrannical governments, constituted a dangerous nest of potential disloyalty and Republican strength. Federalists feared that these immigrants would “contaminate the purity . . . of the American character.”<sup>9</sup> The Alien Friends Act, which was enacted along strict party lines as an “emergency” measure to deal with the impending crisis, empowered the President to seize, detain, and deport any noncitizen he judged to be dangerous to the peace and safety of the United States. The act accorded the alien no right to a hearing and no right to present evidence on his own behalf. Republicans objected that the act was patently unconstitutional. Federalists responded that aliens “cannot complain of any breach of our Constitution” because they have no constitutional rights.<sup>10</sup> Although the Alien Act was never en-

forced, it had a powerful intimidating effect, causing many aliens to flee the country.<sup>11</sup>

The Sedition Act of 1798, which also was enacted as an “emergency” measure, prohibited the publication of “any false, scandalous, and malicious writing” against the government of the United States, the Congress, or the President with intent to defame them or bring them into “contempt or disrepute.”<sup>12</sup> In this legislation, the government of the United States declared war on dissent. Congressman Otis maintained that the act was justified because the very existence of the nation was endangered by a “crowd of spies and inflammatory agents” that had spread across the nation, “fomenting hostilities” and “alienating the affections of our own citizens.”<sup>13</sup> In response to Republican objections that the act violated the First Amendment, Congressman Allen insisted that the First Amendment “was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter, with impunity. A man was always answerable for the malicious publication of falsehood; and what more does this bill require?”<sup>14</sup>

Unlike the Alien Act, the Sedition Act was vigorously enforced, but only against supporters of the Republican party. Prosecutions were brought against the leading Republican newspapers and the most vocal critics of the Adams administration. The act proved an effective weapon for the suppression of dissent. Consider, for example, the plight of Matthew Lyon, a Republican congressman from Vermont. During his re-election campaign, Lyon published an article in which he asserted that under President Adams, “[E]very consideration of the public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.” Because this statement clearly brought the President into “disrepute,” Lyon was convicted and sentenced to prison. The Federalist press rejoiced, but Lyon became an instant martyr and was re-elected to Congress while in jail.<sup>15</sup>



While riding circuit, Justice Samuel Chase so vigorously prosecuted Republicans under the Sedition Act that the House of Representatives voted a bill of impeachment against him in 1804. Although an investigation confirmed his impartiality and intemperance, Chase was saved from conviction by Federalist Senators, who blocked a two-thirds majority vote.

In other illustrative prosecutions under the Sedition Act, Republican journalist Thomas Cooper was convicted for “falsely” accusing President Adams of saddling the nation “with the expense of a permanent navy” and undermining the nation’s credit, James Callender was convicted for “falsely” stating that the President’s goal had been to instigate “a French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant,” and Charles Holt was convicted for “falsely” asserting that the citizens of the United States held a “natural and just abhorrence for standing armies.”<sup>16</sup> In all, the Federalists arrested twenty-five Republicans un-

der the act. At least fifteen of these arrests resulted in indictments. Ten cases went to trial, all resulting in convictions before openly hostile Federalist judges and juries.

Of all the Federalist judges, Justice Samuel Chase was the one Republicans most feared and loathed. They referred to Chase’s conduct in sedition trials from 1798 to 1800 as “Chase’s Bloody Circuit.”<sup>17</sup> In 1804, the House of Representatives voted a bill of impeachment against Chase. The articles of impeachment found that in his conduct of the trial of Callender, Chase had committed misconduct in his rulings on the composition of the jury, his refusal to permit witnesses to testify for the defense, his “rude, contemptuous, and

indecent conduct during the trial” and his persistent refusal of continuances to the defense. The articles declared that the trial had been marked by “manifest injustice, partiality and intemperance” and by “an indecent solicitude for the conviction of the accused.”<sup>18</sup> Only considerations of Chase’s age and the presence of a block of Federalist senators saved him from conviction by the required two-thirds majority.

The Supreme Court did not have occasion to rule on the constitutionality of the Sedition Act at the time, and the act expired by its own terms on the last day of Adams’s term of office. President Jefferson thereafter pardoned all those who had been convicted under the act, and in 1840 Congress repaid all the fines, noting that the act had been passed under a “mistaken exercise” of power and was “null and void.”<sup>19</sup> The Sedition Act was a critical factor in the demise of the Federalist party, and the Supreme Court has never missed an opportunity in the years since to remind us that the Sedition Act of 1798 has been judged unconstitutional in the “court of history.”<sup>20</sup>

## The Civil War

During the Civil War, the nation faced perhaps its most severe challenge. As in most civil wars, there were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. Moreover, the nation had to cope with the stresses of slavery, emancipation, conscription, and staggering casualty lists, all of which triggered deep division and even violent protest. Faced with these tensions, President Abraham Lincoln had to balance the conflicting interests of military security and individual liberty. At the core of this conflict was the writ of *habeas corpus*, which has historically guaranteed a detained individual the right to a prompt judicial determination of whether his detention by government is lawful.

Shortly after the attack on Fort Sumter, the Sixth Massachusetts Volunteers attempted to march through Baltimore in order to reach the nation’s capital. A mob of Confederate sympathizers attacked the soldiers, resulting



On the streets of Baltimore, in 1861, the Sixth Massachusetts Volunteers fought Confederate sympathizers who were trying to prevent the Union’s attempt to march to Washington and defend the nation’s capitol.

in sixteen deaths and widespread rioting. To prevent additional Union troops from entering the city, the mayor ordered the destruction of all railroad bridges connecting Baltimore with the North. The nation's capital was isolated and gripped in fear.<sup>21</sup> Members of the Cabinet insisted on decisive and immediate action. On April 27, to restore order in Baltimore and to enable Union forces to protect Washington, Lincoln suspended the writ of *habeas corpus* and declared martial law in Maryland.<sup>22</sup> Lincoln's private secretaries, John Nicolay and John Hay, later revealed that the stress of this crisis put Lincoln in a state of severe "nervous tension."<sup>23</sup> Soon thereafter, in the course of arresting suspected secessionists, Union soldiers seized John Merryman, a cavalryman who had allegedly burned bridges and destroyed telephone wires during the April riots. Merryman immediately filed a petition for a writ of *habeas corpus*, seeking his release from military detention. The judge assigned to hear Merryman's petition was Chief Justice Roger B. Taney.



As commander of Fort McHenry, General George Cadwalader (above) had custody of John Merryman, the Confederate cavalryman who had allegedly participated in the Baltimore riots.

Taney ruled in *Ex parte Merryman*<sup>24</sup> that only Congress was authorized to suspend the writ of *habeas corpus* and that Lincoln's order was therefore unconstitutional. Moreover, because Merryman was not a member of the military forces of the United States, and because the civil courts in Maryland remained open and functioning, ordinary judicial process, rather than military authority, had jurisdiction over the matter. Indeed, Taney "supposed it to be one of those points of constitutional law upon which there was no difference of opinion . . . that the privilege of the writ could not be suspended, except by act of Congress."<sup>25</sup> To support this judgment, Taney invoked the text of the Constitution,<sup>26</sup> Chief Justice John Marshall's opinion in *Ex parte Bollman*,<sup>27</sup> Joseph Story's *Commentaries on the Constitution*,<sup>28</sup> and President Thomas Jefferson's application to Congress for authority to suspend the writ of *habeas corpus* when he found it necessary to deal with the Aaron Burr conspiracy. In Taney's judgment, the matter was without doubt: "[T]he president has exercised a power which he does not possess under the constitution."<sup>29</sup> Taney therefore issued the writ of *habeas corpus* and commanded General George Cadwalader, who was in charge of Fort McHenry and had custody of Merryman, to appear before him and to "have with you the body of John Merryman" in order to comply with whatever the "[Court shall] determine."<sup>30</sup>

Taney's scathing attack on Lincoln and his administration, which he intended to be a decisive rejection of excessive executive authority, was celebrated throughout the Confederacy. In the North, it quickly became a critical part of the anti-administration literature. Not surprisingly, however, Taney's action was severely criticized by the pro-administration press. The *Washington Evening Star* complained that it exhibited "a determination on his part palpably to ignore the existing state of the country." The *New York Times* added that Taney's decision was "officious and improper" because it "presents the ungracious spectacle" of a

judicial officer who is "eager . . . to exculpate a traitor."<sup>31</sup>

Lincoln flatly refused to comply with the Chief Justice's ruling.<sup>32</sup> When the U.S. marshal arrived at Fort McHenry to serve the writ on Cadwalader, he was denied entry to the fort. Taney was stymied. Although noting that the U.S. marshal had the legal authority to seize Cadwalader and bring him forcibly before the court, Taney recognized that the marshal "will be resisted in the discharge of that duty by a force notoriously superior" to his own and, "such being the case, the Court has no power under the law." Taney concluded that all he could do was to "reduce to writing the reasons under which I have acted" and report them to the President, in the hope that he would "perform his constitutional duty to enforce the laws, in other words, to enforce the process of this Court."<sup>33</sup> Lincoln simply ignored the court's order.

Given the chaotic and fearful state of the Union, there was no widespread public opposition either to Lincoln's suspension of the writ of *habeas corpus* or to his disregard of Taney's decision.<sup>34</sup> Merryman was released several weeks later. Although charged with treason, he was never tried because the government recognized that no Maryland jury would convict him.<sup>35</sup>

On July 4, in a special address to Congress, Lincoln argued the matter in his own behalf. He maintained that although the Constitution "is silent" on whether suspension of the writ of *habeas corpus* is a presidential or congressional power, the "war power" and the President's constitutional role as "commander-in-chief" placed upon him the responsibility to defend the nation against imminent destruction.<sup>36</sup> He asserted that Chief Justice Taney's interpretation of the Constitution would allow "all the laws, but one, to go unexecuted, and the Government itself go to piece, lest that one be violated." This, he implied, was implausible.<sup>37</sup> Acknowledging that it was uncertain whether his actions were "strictly legal or not," Lincoln insisted

that they were undertaken in circumstances of "public necessity." He also hastened to assure Congress that the authority he had assumed had "been exercised but very sparingly."<sup>38</sup>

Two years later, in his replies to Erastus Corning and the Ohio Democrats, Lincoln elaborated on his rationale for the suspension of *habeas corpus*. "Civil courts," he argued, "are organized chiefly for trials of individuals, or, at most, a few individuals acting in concert; and this in quiet times, and on charges of crimes well defined in the law." They are "utterly incompetent" to deal with the demands of a full-scale rebellion. The relevant provision of the Constitution for "a case of rebellion," he maintained, is the clause providing that the "'privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.'" That provision, he explained, "plainly attests the understanding of those who made the Constitution, that ordinary courts of justice are inadequate to 'cases of rebellion' . . . [and] attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rules, would discharge."<sup>39</sup>

Whatever the merits of Lincoln's reasoning, his defiance of Chief Justice Taney's order in *Merryman* did not generate any appreciable public outcry.<sup>40</sup> No doubt the public agreed with the President that this was no time to quibble over strict adherence to the Constitution. The absence of any resistance to this initial assertion of aggressive executive authority eased the way for Lincoln to proceed on other fronts as well. Only a few weeks later, Lincoln suspended the writ in Florida. Over the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. His most extreme suspension order, in September 1862, was applicable *nationwide* and declared that "[A]ll persons . . . guilty of any disloyal practice . . . shall be subject to martial law."<sup>41</sup>

Although there were several accomplished constitutional lawyers in Congress, the legislative branch proved much less concerned

than the Chief Justice about its prerogatives with respect to the suspension of *habeas corpus*. Congress silently deferred to the President and then, in 1863, enacted legislation that ratified the President's actions.<sup>42</sup> Once suspension of the writ and declaration of martial law had been accepted by Congress and the public, the administration felt free to employ these tactics at will to enforce conscription, combat draft resistance, and defy judicial orders that might otherwise have interfered with government policy.<sup>43</sup>

William Seward was widely quoted in the Democratic press as having commented to the British minister in Washington that "I can touch a bell on my right hand and order the arrest of a citizen in Ohio. I can touch the bell again and order the imprisonment of a citizen of New York, and no power on earth but that of the President can release them. Can the Queen of England, in her dominions, say as much?" These arrests, which usually took place at night, "spread fear and hate" among those who dissented from the administration's policies.<sup>44</sup>

It is unknown exactly how many civilians were arrested by military authorities during the Civil War. Estimates range from 13,000 to 38,000.<sup>45</sup> Most of these arrests were in the border states and, as the war moved south, in the states of the Confederacy; most were for such offenses as draft evasion, desertion, sabotage, and trading with the enemy. Although phrases such as "treasonable language," "Southern sympathizer," "disloyalty," and "inducing desertion" appear occasionally in the prison records, relatively few individuals were arrested for their political beliefs or expression.<sup>46</sup>

Of those arrested for disloyal speech, a few were persons of influence. The most prominent example was Clement Vallandigham, a former Ohio congressman who was the most forceful spokesman of the Copperheads. Vallandigham was convicted by a military tribunal and exiled by Lincoln for making a speech in Ohio in which he described

the Civil War as "wicked, cruel, and unnecessary," depicted it as "a war for the freedom of the blacks and the enslavement of the whites," characterized General Order no. 38 as a "base usurpation of arbitrary authority," and urged citizens to use "'the ballot-box' to hurl 'King Lincoln' from his throne."<sup>47</sup>

Most of those arrested for disloyal expression, however, were men of obscurity whose outbursts were hardly threatening to the war effort. David Lyon of Illinois, for example, was arrested for saying that "anyone who enlists is a God Damn fool," William Palmer of Ohio was arrested for writing that "not fifty soldiers will fight to free Negroes" and Jacob Wright of New Jersey was arrested for saying that anyone who enlists is "no better than a goddamned nigger."<sup>48</sup>

If there is a black mark on Lincoln's civil liberties record, it is surely that he did not exercise sufficient oversight of his military commanders in their relations with the civilian population. Although Lincoln himself did not encourage such conduct, did not propose a new Sedition Act, and frequently counseled restraint, he clearly gave too much rein to his military officers, who too often assumed that war substitutes the law of force for the rule of law.

Shortly after the Civil War ended, the Supreme Court finally considered the constitutionality of Lincoln's suspensions of the writ of *habeas corpus*. Lambdin Milligan was seized by military authorities in Indiana for allegedly conspiring to engage in criminal acts to aid the Confederacy. He was tried by a military commission, convicted, and sentenced to death. In *Ex parte Milligan*,<sup>49</sup> the Supreme Court held that the government could not constitutionally suspend the writ of *habeas corpus* or impose martial law even in time of war or insurrection if the civil courts were open and functioning, as they were in Indiana. To justify a suspension of the writ, the Court added, "necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil government."<sup>50</sup> In his

opinion for the Court, Justice David Davis explained:

The Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchism or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>51</sup>

### World War I

The story of civil liberties during World War I is, in many respects, an even more disturbing chapter in our nation's history. When the United States entered the war in April 1917, there was strong opposition to both the war and the draft. Many citizens believed that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy. Many German-Americans, Irish-Americans, socialists, pacifists, and anarchists were sharply critical of the Wilson administration. Such compelling figures as Jane Addams, Eugene Debs, and Emma Goldman all opposed the war, as did more mainstream critics such as Robert Jackson and Frank Murphy. During Congress's debate on the war resolution, Republican Senator Frank Norris of Nebraska protested that "[W]e are about to put the dollar sign upon the American flag,"<sup>52</sup> and Senator James Reed warned that the reinstatement of the draft "will have the streets of our American cities running red with blood."<sup>53</sup>

President Wilson had little patience for such dissent. After the sinking of the *Lusitania*, he warned that disloyalty "must be crushed out" of existence,<sup>54</sup> and in calling for the first federal legislation against disloyal expression since the Sedition Act of 1798, he insisted that disloyalty "was . . . not a subject on which there was room for . . . debate," for disloyal individuals "had sacrificed their right to civil liberties."<sup>55</sup> In these and similar pronouncements, Wilson set the tone for what was to follow.

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917. Although the act dealt primarily with espionage and sabotage, several provisions had serious consequences for the freedom of speech. Specifically, the act made it a crime for any person willfully to "cause or attempt to cause insubordination, disloyalty, or refusal of duty in the military forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States."<sup>56</sup> Although the congressional debate makes clear that the 1917 Act was intended, not to suppress dissent generally, but to address very specific concerns relating directly to the operation of the military, aggressive federal prosecutors and compliant federal judges soon transformed it into a full-scale prohibition of seditious utterance.<sup>57</sup> The administration's intent in this regard was made evident in November 1917 when Attorney General Charles Gregory, referring to war dissenters, declared: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."<sup>58</sup>

In fact, the federal government worked strenuously to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the administration found it necessary to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, President Wilson established the Committee for Public Information (CPI), under the





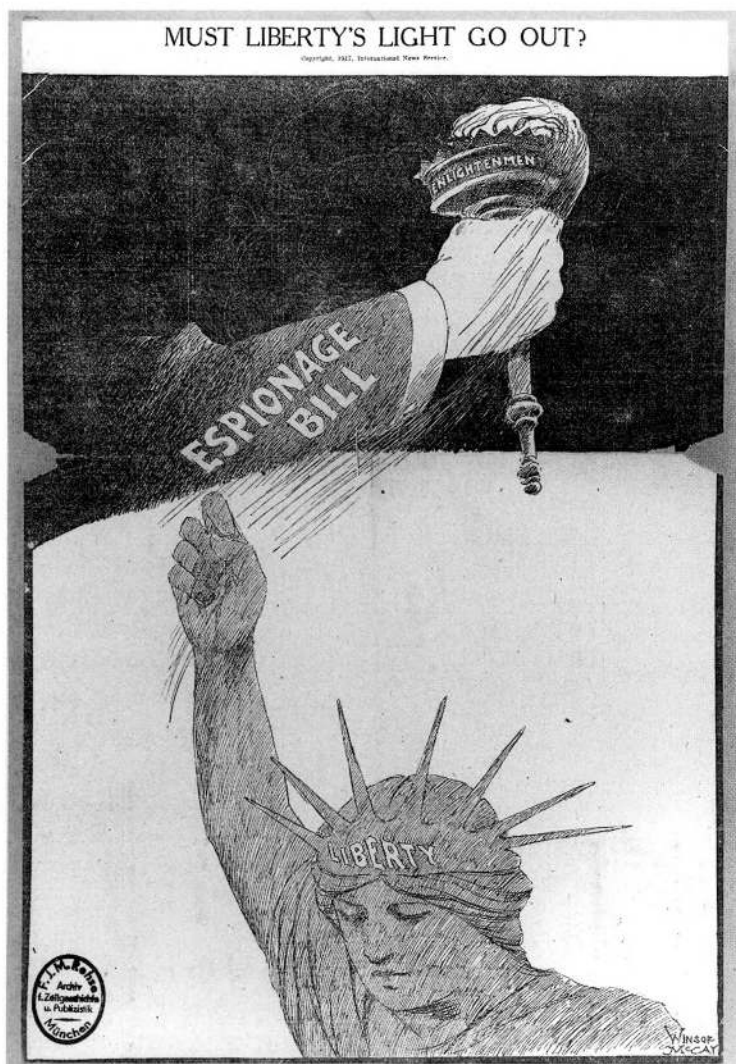
The Espionage Act of 1917 was enacted very shortly after the United States entered World War I. Although the act dealt primarily with espionage and sabotage, several provisions had serious consequences for freedom of speech.

direction of George Creel, the charge of which was to promote support for the war. The CPI produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German and of all persons whose loyalty was open to doubt.

In the first month of the war, Attorney General Gregory asked every loyal American to act as a "voluntary detective," suggesting that "citizens should bring their suspicions . . . to the . . . Department of Justice."<sup>59</sup> As a result, literally thousands of accusations of disloyalty poured into the department each

day. The CPI and the Department of Justice actively encouraged patriotic "citizens groups" to support this effort. The actions of these groups went far beyond the reporting of suspected disloyalty. With implicit immunity, they engaged in breaking and entering, bugging offices, tapping telephones, and examining bank accounts and medical records. Vigilantes ransacked the homes of German-Americans and attacked those who questioned the war. In Texas, six farmers were horsewhipped because they declined to contribute to the American Red Cross; in Oklahoma, a former minister who opposed the sale of Liberty Bonds was tarred and feathered; in Illinois, an angry mob





Thousands of accusations of disloyalty were reported to the Justice Department each day under the Espionage Act, and many citizens groups were encouraged to illegally tap telephones and break and enter into the offices of those suspected of disloyalty. Lawyers who criticized the war—or even defended the war's critics—were subjected to ostracism.

wrapped an individual suspected of disloyalty in an American flag and then murdered him on a public street.<sup>60</sup>

After the war, Assistant Attorney General John Lord O'Brian, one of the most thoughtful government officials of this era, described these citizens groups as one of the "chief embarrassments" caused by the war "mania."<sup>61</sup> Even Creel later lamented that these associations, which he had helped create, were "hysteria-manufacturing bodies, whose patriotism was . . . a thing of screams, violence, and extremes."<sup>62</sup> It was in this atmosphere that federal judges were called upon to apply the Espionage Act of 1917.

The general tenor of the legal profession in this era was both politically and jurisprudentially conservative. Bar associations tended to be severely patriotic, and lawyers who criticized the war—or even defended war critics—were subjected to ostracism and occasionally even formal discipline. Moreover, there was as yet no deeply rooted commitment to civil liberties within the legal profession, and there was no well-developed understanding of the freedom of speech. In this environment, and in the absence of any clear judicial precedents protecting this freedom, it was unlikely that many judges would stand up to the pressures for suppression.

Nonetheless, a few judges did take a strong stand in support of civil liberties. In particular, federal district judges George Bourquin of Montana, Charles Amidon of North Dakota, and Learned Hand of New York stood fast against the tide. Judges Bourquin and Amidon insisted that in order to sustain a prosecution under the Espionage Act, the government had to offer convincing evidence that the defendant had specifically intended to interfere with the war effort and that the speech was likely to have that effect.<sup>63</sup> Judge Hand embraced a different approach. In his opinion in the *Masses* case,<sup>64</sup> Hand argued that speech did not violate the Espionage Act unless the speaker expressly urged others to do something unlawful. "If that not be the test," he cautioned, "I can see no escape from the conclusion that under this [Act] every political agitation . . . is illegal." This distinction, he emphasized, "is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom."<sup>65</sup>

Few other judges displayed the wisdom—or courage—of Judges Bourquin, Amidon, and Hand. The Department of Justice prosecuted more than 2,000 individuals for allegedly disloyal or seditious expression in this era, and in an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed disloyal. The prevailing approach in the lower federal courts is well illustrated by the decision of the United States Court of Appeals in *Shaffer v. United States*.<sup>66</sup> In *Shaffer*, the defendant was charged with possessing and mailing copies of a book, *The Finished Mystery*, in violation of the Espionage Act. The book contained the following passage, which was specified in the indictment:

If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one

blue-jacket on the sea or one khaki-coat in the trenches.<sup>67</sup>

Shaffer was convicted, and the Court of Appeals affirmed, with the following reasoning:

It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here . . . is whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute . . . .

The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. The greatest inspiration for entering into such service is patriotism, the love of country. To teach that . . . the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war . . . .

It is argued that the evidence fails to show that [Shaffer] committed the act willfully and intentionally. But . . . he must be presumed to have intended the natural and probable consequences of what he knowingly did.<sup>68</sup>

This approach was embraced by almost every federal court that interpreted the Espionage Act during the course of the World War I.<sup>69</sup> The result, as Judge Hand had feared, was the suppression of virtually all criticism of the war. Applying this standard, juries almost invariably returned a verdict of guilty.<sup>70</sup> Rose Pastor Stokes, the editor of the socialist *Jewish Daily News*, was sentenced to ten years in prison for saying "I am *for* the people, while the government is for the profiteers" during an antiwar statement to the Women's Dining Club of Kansas City.<sup>71</sup> D. T. Blodgett was sentenced to twenty years in prison for circulating a leaflet

urging voters in Iowa not to re-elect a congressman who had voted for conscription.<sup>72</sup> The Reverend Clarence H. Waldron was sentenced to fifteen years in prison for distributing a pamphlet stating that “[I]f Christians [are] forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in.”<sup>73</sup> As Paul Murphy has observed, these judges and juries were clearly “swayed by wartime hysteria.”<sup>74</sup>

In 1919, O’Brien explained that the Espionage Act “was not directed against disloyal utterances.” Rather, its “sole aim” was “to protect the process of raising and maintaining our armed forces.”<sup>75</sup> In practice, however, the act became an efficient tool for the blanket suppression of all “disloyal utterances.” Professor Zechariah Chafee later concluded that under the “bad tendency” interpretation of the Act, all “genuine discussion among civilians of the justice and wisdom of continuing a war . . . becomes perilous.”<sup>76</sup>

But even this was not enough. Angered by the rulings of Judges Bourquin, Amidon, and Hand, and determined to ensure that no similar decisions would be possible, Congress enacted the Sedition Act of 1918, which made it criminal, among other things, for any person to utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag, or to utter any words supporting the cause of any country at war with the United States or opposing the cause of the United States.<sup>77</sup>

Even the signing of the Armistice did not bring this era to a close. The Russian Revolution had generated deep anxiety in the United States, and a series of violent strikes and spectacular bombings triggered the period of intense public paranoia that became known as the “Red Scare” of 1919–1920. Attorney General A. Mitchell Palmer announced that the bombings were an “attempt on the part of radical elements to rule the country.”<sup>78</sup> The *New York Times* proclaimed: “Red Peril Here!”<sup>79</sup>



Attorney General A. Mitchell Palmer (above) fueled the hysteria of the Red Scare by charging in a sensationalist way—and often unwarrantedly—that Communists had instigated violent strikes and race riots.

Attorney General Palmer established the General Intelligence Division (GID) within the Federal Bureau of Investigation (FBI) and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID unleashed a horde of undercover agents and confidential informants to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of stunning raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. The general procedure was to make wholesale arrests of people in places believed to be radical hangouts. The GID aggressively fed the Red Scare by publicly disseminating sensational—and often unwarranted—charges that communists and other dissidents had instigated violent strikes and race riots. The public was ecstatic. The *Washington Post* proclaimed that “[T]here is no time to waste on hair-splitting over any supposed infringements of liberty.”<sup>80</sup> Attorney General Palmer described

the “alien filth” captured in these raids as creatures with “sly and crafty eyes . . . lopsided faces, sloping brows and misshapen features” whose minds were tainted by “cupidity, cruelty, . . . and crime.”<sup>81</sup> More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter, and Roscoe Pound, published a report on the activities of the Department of Justice that carefully documented that the government had acted without legal authorization and without complying with the minimum standards of due process.<sup>82</sup> This report marked the beginning of the end of this era. As the *Christian Science Monitor* observed in June 1920, “[I]n the light of what is now known, it seems clear that what appeared to be an excess of radicalism” was met with a real “excess of suppression.”<sup>83</sup>

And where was the Supreme Court in all this? The story of the Court in this era is too familiar—and too painful—to bear repeating in detail. In a series of decisions in 1919 and 1920—*Schenck*, *Frohwerk*, *Debs*, *Abrams*, *Schaefer*, *Pierce*, and *Gilbert*<sup>84</sup>—the Court consistently upheld the convictions of individuals who had agitated against the war and the draft, individuals as obscure as Mollie Steimer, a Russian-Jewish émigré who had distributed antiwar leaflets in Yiddish on the lower East Side of New York, and as prominent as Eugene V. Debs, who had received almost a million votes as the Socialist party candidate for President in 1912.

*Gilbert v. Minnesota* illustrates the Court’s thinking at the time. Joseph Gilbert made a speech charging that “We were stampeded into this war by newspaper rot to pull England’s chestnuts out of the fire.” Gilbert was tried and convicted under a state law declaring it unlawful for any person to teach or advocate “that men should not enlist in the military or naval forces.” Justice Joseph McKenna affirmed the conviction, explaining that “[E]very word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for

which it was prosecuted.” McKenna added that it would be a “travesty on the constitutional privilege” Gilbert “invokes to assign him its protection.”<sup>85</sup>

Although Justices Oliver Wendell Holmes and Louis Brandeis (eventually) separated themselves from their brethren and launched what became a critical underground tradition within the Court’s First Amendment jurisprudence,<sup>86</sup> the Court as a whole showed no interest in the rights of dissenters. As Harry Kalven once observed, these decisions left no doubt of the Court’s position: “While the nation is at war, serious, abrasive criticism . . . is beyond constitutional protection.” These decisions, he added, “are dismal evidence of the degree to which the mood of society penetrates judicial chambers.” The Court’s performance, he concluded, was “simply wretched.”<sup>87</sup>

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.<sup>88</sup> In 1924, Attorney General Harlan Fiske Stone ordered an end to the FBI’s surveillance of political radicals. “A secret police,” he explained, is “a menace to free government and free institutions.”<sup>89</sup> Between 1919 and 1923, the federal government released from prison every individual who had been convicted under the Espionage and Sedition acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights.

Over the next half-century, the Supreme Court overruled every one of its World War I decisions, holding, in effect, that every one of the individuals who had been imprisoned or deported in this era for his or her political dissent had been punished for speech that should have been protected by the First Amendment.<sup>90</sup>

## World War II

On December 7, 1941, Japan attacked Pearl Harbor. On February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to “prescribe military areas” from which “any or all persons may be

excluded.” Although the words “Japanese” or “Japanese American” never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.<sup>91</sup>

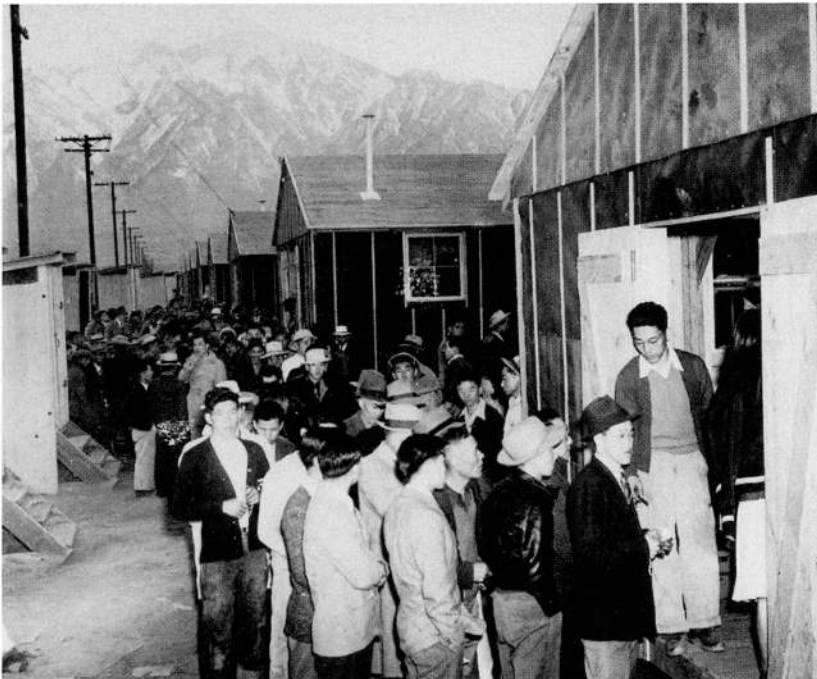
Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon, and Arizona. Two-thirds of these individuals were American citizens, representing almost 90 percent of all Japanese Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. They were told to bring only what they could carry. Many families lost everything.

On the orders of military police, these individuals were assigned to temporary “detention camps,” which had been set up in converted racetracks and fairgrounds. Many families lived in crowded horse stalls, often in unsanitary conditions. Barbed-wire fences and armed guard towers surrounded the com-

pounds. From there, the internees were transported to one of ten permanent internment camps, which were located in isolated areas in wind-swept deserts or vast swamplands. Men, women, and children were placed in overcrowded rooms with no furniture other than cots. Although the internees had been led to believe that these would be “resettlement communities” rather than concentration camps, they once again found themselves surrounded by barbed wire and military police. There they remained for some three years.

All this was done even though there was not a single documented act of espionage, sabotage, or treasonable activity committed by an American citizen of Japanese descent or by a Japanese national residing on the West Coast.<sup>92</sup>

Why did this happen? Certainly, the days following Pearl Harbor were dark days for the American spirit. Fear of possible Japanese sabotage and espionage was rampant, and an outraged public felt an understandable instinct to lash out at those who had attacked us. But



In 1942, 120,000 persons of Japanese descent—two-thirds of whom were U.S. citizens—were forced to leave their homes in California, Oregon, Washington, and Arizona. No charges were brought against them; they did not know where they were going or for how long they would be detained.

this act was also very much an extension of more than a century of poisonous racial prejudice against the “yellow peril.” Relations with Japan had been tense, at best, for several decades preceding Pearl Harbor. Much of this unease stemmed from Japan’s protest of the discrimination experienced by individuals of Japanese ancestry in the United States. Laws passed in the early 1900s denied Japanese the right to become naturalized American citizens, to own land, and to marry outside of their race. In 1924, immigration from Japan was halted altogether. Racist statements and sentiments permeated the debate from December 1941 to February 1942 about how to deal with individuals of Japanese descent.

In the immediate aftermath of Pearl Harbor, however, there was no clamor for the mass internment of either Japanese aliens or Japanese Americans. Shortly after the attack,

Attorney General Francis Biddle assured the nation that there would be “no indiscriminate, large-scale raids.”<sup>93</sup> Congressman John M. Coffee expressed his “fervent hope” that “residents of the United States of Japanese extraction will not be made the victim of pogroms directed by self-proclaimed patriots and by hysterical self-anointed heroes.”<sup>94</sup> And in Hawaii, where the military never instituted an internment of Japanese Americans, the military governor assured the public that “[T]here is no intention or desire on the part of the federal authorities to operate mass concentration camps.” He added that “[T]his is America and we must do things the American Way. We must distinguish between loyalty and disloyalty among our people.”<sup>95</sup>

In the days and weeks following Pearl Harbor, the FBI arrested approximately two thousand Japanese aliens who were on its list of



The evacuees were told to bring only what they could carry. Many lost their businesses. This San Francisco dry-goods store hastily tried to sell off its merchandise before closing.



potentially dangerous enemy aliens. These individuals were given hearings and were then either released, paroled, or interned, along with German and Italian nationals who had been found to be dangerous to the national security. On December 10, 1941, FBI Director Hoover reported that “practically all” of the persons whom the FBI intended to arrest had been taken into custody. The offices of Naval Intelligence and Military Intelligence shared this assessment.<sup>96</sup>

In the next several weeks, however, a demand for the mass evacuation of all persons of Japanese ancestry, including American citizens, exploded along the West Coast. To some extent, this demand was fed by fears of a large-scale Japanese invasion of the mainland. Conspiracy theories abounded, and neither government nor military officials did anything to allay these anxieties. To the contrary, local officials were quick to pass on to the public even the “wildest rumors of Oriental treachery.” Los Angeles Mayor Fletcher Bowron, for example, helped spread unsubstantiated (and false) reports that Japanese fishermen and farmers had been seen mysteriously waving lights along the shoreline. By January, California was awash in suspicion.<sup>97</sup>

On January 2, the Joint Immigration Committee of the California legislature asserted that even ethnic Japanese born in the United States are “totally unassimilable” and charged that “every Japanese, wherever born, or residing,” owes primary allegiance to “his Emperor and Japan.”<sup>98</sup> On January 4, Hearst newspaper columnist Damon Runyon asked whether anyone could doubt the “continued existence of enemy agents” among the Japanese population. On January 14, Republican Congressman Leland M. Ford insisted that “all Japanese, whether citizens or not, be placed in inland concentration camps.” The American Legion demanded the internment of all individuals of Japanese extraction.<sup>99</sup>

Such demands were inflamed still further by the Report of the Commission on Pearl Harbor, which was released on January 25.

Chaired by Justice Owen Roberts, the report, which was hastily researched and written, asserted that persons of Japanese ancestry living in Hawaii had engaged in espionage and facilitated the bombing of Pearl Harbor. Although these assertions proved to be unfounded, the report played a key role in turning Americans against Americans.

On February 4, California Governor Culbert Olson declared in a radio address that it was “much easier” to determine the loyalty of Italian and German aliens than of Japanese aliens and Japanese Americans, and that “[A]ll Japanese people, I believe, will recognize this fact.”<sup>100</sup> Governor Olson added that the public feel “they are living in the midst” of their enemies. California Attorney General Earl Warren argued that, unlike the situation with respect to Germans and Italians, it was simply too difficult to determine which Americans of Japanese ancestry were loyal and which were not. Warren observed that “[T]here is more potential danger among the group of Japanese who are born in this country than from the alien Japanese who were born in Japan.”<sup>101</sup>

Although General John L. DeWitt, the top Army commander on the West Coast, initially resisted the idea of mass incarceration, the increasing political pressure from West Coast officials took a toll. DeWitt himself came to the rather bizarre view that “[T]he very fact no sabotage has taken place to date is a disturbing and confirming indication” that the Japanese had carefully orchestrated their subversion so that when it came, it would come on a mass basis.<sup>102</sup> Like many of the participants in this process, DeWitt frequently expressed crudely racist sentiments, including his infamous quip that “[A] Jap is a Jap.”<sup>103</sup>

Throughout this period, the Department of Justice maintained that a mass evacuation of Japanese Americans was both unnecessary and unconstitutional. FBI Director Hoover reported to Attorney General Biddle that the demand for mass evacuation was based on “public hysteria” rather than on fact. He repeatedly assured Biddle that the

FBI had already identified suspected Japanese agents and taken them into custody. Hoover remarked that DeWitt was “getting a bit hysterical.” Biddle strongly opposed internment as “ill-advised, unnecessary, and unnecessarily cruel.” In response to an effort on the part of the California congressional delegation to pressure him into supporting internment, he replied that “[U]nless the writ of *habeas corpus* [were] suspended, . . . [I know of no lawful way in which] Japanese born in this country . . . could be interned.”<sup>104</sup>

The public clamor on the West Coast, however, continued to build. The American Legion, the National Sons and Daughters of the Golden West, the Western Growers Protective Association, the California Farm Bureau Federation, the Chamber of Commerce of Los Angeles, and all the West Coast newspapers cried out for a prompt evacuation of Japanese aliens and citizens alike.

On February 14, General DeWitt officially recommended that all persons of Japanese extraction should be removed from “sensitive areas.” Five days later, President Roosevelt signed Executive Order 9066. The matter was never discussed in the Cabinet “except in a desultory fashion,”<sup>105</sup> and the President did not consult General George Marshall or his primary military advisors, the Joint Chiefs of Staff. The public rationale for the decision, laid out in General DeWitt’s “Final Report on the Evacuation of the Japanese from the West Coast,” was that time was of the essence and that the government had no reasonable way to distinguish loyal from disloyal persons of Japanese descent.<sup>106</sup>

Why did President Roosevelt sign the Executive Order, over the legal, constitutional, and pragmatic objections of the Attorney General, the Director of the FBI, and the Office of Naval Intelligence? Biddle has speculated on Roosevelt’s thinking:

I do not think he was much concerned with the gravity or implications of this step. He was never

theoretical about things. What must be done to defend the country must be done. The decision was for his Secretary of War, not for the Attorney General, not even for J. Edgar Hoover, whose judgment as to the appropriateness of defense measures he greatly respected. The military might be wrong. But they were fighting the war. Public opinion was on their side, so that there was no question of any substantial opposition . . . . Nor do I think that the constitutional difficulty plagued him . . . . That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.<sup>107</sup>

Undoubtedly, public opinion played a key role in the thinking of both the military and the President. Even Secretary of War Henry Stimson thought internment a “tragedy,” and it seems certain that the War Department yielded to the “clamor of politicians.”<sup>108</sup> Even most civil-liberties groups were relatively quiet in the immediate aftermath of the President’s decision, presumably in the interest of national unity. Politics certainly played a role in Roosevelt’s thinking. 1942 was an election year. Because of the attack on Pearl Harbor, public opinion strongly urged the President to focus American military force on the Pacific. Roosevelt preferred a Europe-first policy. The incarceration of 120,000 individuals of Japanese ancestry was, in part, a way to pacify the “Asia-Firsters.” As Peter Irons has observed, the internment decision “illustrates the dominance of politics over law in a setting of wartime concerns and divisions among beleaguered government officials.”<sup>109</sup>

In *Korematsu v. United States*,<sup>110</sup> decided in 1944, the Supreme Court, in a 6–3 decision, upheld the President’s action. The Court, in an opinion by Justice Hugo Black, offered the following explanation:



[W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of dire emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger . . .

To cast this case into outlines of racial prejudice . . . confuses the issue. *Korematsu* was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the . . . military authorities . . . decided that the [ ] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area] . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.<sup>111</sup>

In the years after World War II, attitudes about the Japanese internment began to shift. Many participants reconsidered their actions. Some knew even at the time that internment was immoral and unconstitutional. In his dissenting opinion in *Korematsu*, Justice Frank Murphy charged that the government had gone beyond “the very brink of constitutional power” and fallen into the “ugly abyss of racism.”<sup>112</sup> In April 1942, Milton Eisenhower, the National Director of the War Relocation Administration, which

was responsible for running the detention camps, predicted sadly that “[W]hen this war is over . . . we, as Americans, are going to regret the . . . injustices” we have done. Two months later, he resigned his position.<sup>113</sup>

Attorney General Biddle, who had consistently opposed internment, continued to deplore the government’s action. In 1962, he wrote that this episode showed “the power of suggestion which a mystic cliché like ‘military necessity’ can exercise on human beings.” Because of a “lack of independent courage and faith in American reality,” the nation had missed a unique opportunity to “assert the human decencies for which we were fighting.”<sup>114</sup>

Justice Wiley Rutledge, who voted with the majority in *Korematsu*, once told Chief Justice Harlan Fiske Stone that “I have had more anguish” over this issue than any other “I have decided” on the Supreme Court.<sup>115</sup> Rutledge’s biographer later observed that the Japanese internment cases “pushed Wiley Rutledge along the path to his premature grave.”<sup>116</sup>

Justice William O. Douglas, who also joined the majority in *Korematsu*, vacillated between describing his vote to uphold the Japanese exclusion as “one of my mistakes” and defending—or at least explaining—the Court’s action. In 1980, Douglas confessed that *Korematsu* was “ever on my conscience.” On the other hand, he explained that the Court “is not isolated from life. Its members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors.” Although this “does not mean that community attitudes are necessarily translated” into Supreme Court decisions, it does mean that “the state of public opinion will often make the Court cautious when it should be bold.”<sup>117</sup>

In 1962, Chief Justice Earl Warren, who played a pivotal role in this episode as California Attorney General, reflected on the Court’s decision in *Korematsu*. Warren observed that war is “a pathological condition” for the nation, and that in such a condition, “[M]ilitary judgments sometimes breed action that, in more

stable times, would be regarded as abhorrent.” This places judges in a dilemma, because the Court may conclude that it is not in a very good position “to reject descriptions by the Executive of the degree of military necessity.” Moreover, judges cannot easily detach themselves from the pathological condition of warfare, although with “hindsight, from the vantage point of more tranquil times, they might conclude that some actions advanced in the name of national survival” had in fact violated the Constitution.<sup>118</sup> In his 1974 memoirs, Warren conceded that Japanese internment was “not in keeping with our American concept of freedom and the rights of citizens,”<sup>119</sup> and in later years he admitted privately that he deeply regretted his own actions in the matter.<sup>120</sup>

Years before he was appointed to the Supreme Court, Tom Clark served as an Assistant Attorney General under Francis Biddle. In that capacity, Clark acted as Biddle’s liaison with General DeWitt’s legal staff. Clark also assigned lawyers to assist the local United States attorneys in the prosecution of the criminal cases for violation of the internment orders.<sup>121</sup> Upon retiring from the Supreme Court in 1966, Justice Clark stated that “I have made a lot of mistakes in my life . . . One is my part in the evacuation of the Japanese from California . . . As I look back on it—although at the time I argued the case—I am amazed that the Supreme Court ever approved it.”<sup>122</sup>

On February 19, 1976, as part of the celebration of the Bicentennial of the Constitution, President Gerald Ford issued Presidential Proclamation 4417, in which he acknowledged that, in the spirit of celebrating our Constitution, we must recognize “our national mistakes as well as our national achievements.” “February 19<sup>th</sup>,” he noted, “is the anniversary of a sad day in American history,” for it was “on that date in 1942 . . . that Executive Order 9066 was issued.” President Ford observed that “[W]e now know what we should have known then”—that the evacuation and internment of loyal Japanese American citizens was “wrong.” Ford concluded by calling

“upon the American people to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience” and “resolve that this kind of action shall never again be repeated.”<sup>123</sup>

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. The commission was composed of former members of Congress, the Supreme Court, and the Cabinet, as well as several distinguished private citizens. The commission heard the testimony of more than 720 witnesses, including key government personnel who were involved in the issuance and implementation of Executive Order 9066. It reviewed hundreds of documents that had not previously been available. In 1983, the commission unanimously concluded that the factors that shaped the internment decision “were race prejudice, war hysteria, and a failure of political leadership,” rather than military necessity. The Commission recommended that “Congress pass a joint resolution, to be signed by the President, which recognizes that a grave injustice was done and offers the apologies of the nation for the acts of exclusion, removal, and detention.”<sup>124</sup>

In 1983, Fred Korematsu filed a petition for writ of error *coram nobis* to have his conviction set aside for “manifest injustice.” The following year, Judge Marilyn Patel granted Korematsu’s petition.<sup>125</sup> Judge Patel found that in its presentation of evidence to the federal courts in the course of Korematsu’s prosecution and appeal, including in the Supreme Court of the United States, the United States government had *knowingly and intentionally* failed to disclose critical information that directly contradicted key statements in General DeWitt’s “Final Report,” upon which the government had asked the courts to rely.<sup>126</sup> In granting Korematsu’s petition, Judge Patel observed that the Supreme Court’s decision in *Korematsu* “stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting

constitutional guarantees." It stands "as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." And it stands "as a caution that in times of international hostility" the judiciary must be prepared to exercise its authority "to protect all citizens from the petty fears and prejudices that are so easily aroused."<sup>127</sup>

Four years later, President Ronald Reagan signed the Civil Liberties Act of 1988,<sup>128</sup> which officially declared that the Japanese internment had been a "grave injustice" that was "carried out without adequate security reasons" and without any documented acts of "espionage or sabotage." The act declared that the program of exclusion and internment had been "motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." It offered an official presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the United States government.<sup>129</sup>

Over the years, *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result.<sup>130</sup>

### The Cold War

As World War II drew to a close, the nation moved almost seamlessly into what came to be known as the Cold War. The Berlin blockade, the fall of China, the Soviet atomic bomb, the Korean War, and the Cuban missile crisis were not a string of independent events, but "a slow-motion hot war, conducted on the periphery of rival empires." During this era, the nation demonized members of the Communist party, "endowing them with extraordinary powers and malignity." Hoover, the Catholic Church, the American Legion, and a host of political opportunists all fed—and fed upon—the image of the domestic Communist as less than a full citizen of the United States.<sup>131</sup>

When Harry Truman became President in 1945, the federal and state statute books were already bristling with anticommunist legislation. As the glow of our wartime alliance with the Soviet Union evaporated, Truman came under increasing attack from a coalition of southern Democrats and anti-New-Deal Republicans who sought to exploit fears of Communist aggression. As House Republican leader Joe Martin declared on the eve of the 1946 election, "[T]he people will vote tomorrow" between chaos and communism, on the one hand, and "the preservation of our American life," on the other. In Wisconsin, Joseph R. McCarthy castigated his opponent as "Communistically inclined," and in California Richard Nixon charged that his opponent "consistently voted" the Moscow line.<sup>132</sup> The Democrats lost fifty-four seats in the House.

Thereafter, the issue of loyalty became a shuttlecock of party politics. In 1947, Truman's Secretary of Labor demanded that the Communist party be outlawed. "Why," he asked, "should they be able to elect people to public office?" Attorney General Tom Clark ordered individuals arrested because they "had been making speeches round the country that were derogatory to our way of life." By 1948, Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World." Leaving no doubt of the matter, he proclaimed: "I want you to get this straight now. I hate Communism."<sup>133</sup> There were limits, however, to Truman's anticommunism. In 1950, Truman vetoed the McCarran Act, which called for the registration of all Communists. Truman explained that the act was the product of public hysteria and would lead to "Gestapo witch hunts."<sup>134</sup> Congress passed the act over Truman's veto.<sup>135</sup>

The red-baiting in the 1950 elections reached unprecedented levels. Challenging Herbert Lehman for the Senate in New York, John Foster Dulles said of Lehman: "I know he is no Communist, but I know also that the Communists are in his corner." In California,

Congressman Nixon secured election to the Senate by circulating a pink sheet accusing his Democratic opponent, Helen Gahagan Douglas, of voting the Communist party line. And in Florida, Congressman George A. Smathers defeated Claude Pepper by describing him as “Red Pepper” and calling him an “apologist for Stalin.”<sup>136</sup>

The long shadow of the House Committee on Un-American Activities fell across our campuses and our culture. University of Chicago President Robert M. Hutchins observed that “The question is not how many teachers have been *fired* [for their beliefs,] but how many think they *might* be. The entire teaching profession,” he declared, “is intimidated.”<sup>137</sup> In hearings before HUAC, such prominent actors as George Murphy and Ronald Reagan testified that the media had been infected with sly, un-American propaganda and insisted on loyalty oaths for members of the Screen Actors Guild. Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, Lillian Hellman, James Thurber, and Arthur Miller. Fear of ideological contamination swept the nation like a pestilence of the national soul.

In 1954, Congress enacted the Communist Control Act, which stripped the Communist party of all rights, privileges, and immunities.<sup>138</sup> Only one Senator, Estes Kefauver, dared vote against it. Irving Howe lamented “this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy.”<sup>139</sup> Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included not only the McCarren and Communist Control acts, but also: extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private

political beliefs and associations; and direct prosecution of the leaders and members of the Communist party of the United States.<sup>140</sup>

The Supreme Court’s response was mixed, and evolved over time. The key decision was *Dennis v. United States*,<sup>141</sup> which involved the prosecution under the Smith Act of the leaders of the American Communist party.<sup>142</sup> The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a 6–2 decision, the Court held that this conviction did not violate the First Amendment. Although the Court in *Dennis* overruled its World War I decisions upholding the convictions of socialists and anarchists under the Espionage Act of 1917, it could not bring itself to invalidate the convictions of these Communists under the Smith Act of 1940.<sup>143</sup> Rather, diluting the Holmes-Brandeis clear-and-present-danger standard, the Court concluded that because the violent overthrow of government is such a grave harm, the danger need be neither clear nor present to justify suppression. In a plurality opinion, Chief Justice Fred Vinson explained that the “formation by petitioners” of a “highly organized conspiracy, with rigidly disciplined members,” combined with the “inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned,” persuaded them “that their convictions were justified.”<sup>144</sup>

In a highly prescient dissenting opinion, Justice Black observed that “Public opinion being what it now is, few will protest the conviction of these” Communists. “There is hope,” he added, “that in calmer times, when present pressures, passions and fears subside, this . . . Court will restore the First Amendment liberties to the . . . place where they belong in a free society.”<sup>145</sup>

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld the Subversive Activities Control Act, sustained far-reaching legislative investigations of “subversive” organizations and



The Court upheld the conviction of the leaders of the Communist party in its 1951 *Dennis* decision. Above, Eugene Dennis (center), the General Secretary of the American Communist party, is served a subpoena by Robert E. Stripling (right), investigator for the House UnAmerican Activities Committee.

individuals, and affirmed the exclusion of members of the Communist party from the bar, the ballot, and public employment.<sup>146</sup> In so doing, the Court clearly put its stamp of approval on an array of actions we look back today on as models of McCarthyism.

In *Garner v. Board of Public Works of Los Angeles*,<sup>147</sup> for example, the Court upheld a requirement that all public employees must execute a loyalty oath and a non-Communist affidavit. The Court reasoned that “[P]ast loyalty may have a reasonable relationship to present and future trust.”<sup>148</sup> Similarly, in *Adler v. Board of Education*,<sup>149</sup> the Court sustained New York’s Feinberg law, which prohibited any member of the Communist party from holding any position in any public school. The Court explained that the state may properly “protect the schools from pollution.”<sup>150</sup>

Reflecting on these and similar cases, William Wiecek has noted that it was “natural” for the Justices to draw upon the prevail-

ing “anticommunist image as a kind of general template” for their decisions. As Justice Douglas observed about *Korematsu*, Justices of the Supreme Court are “not exempt from the fears and beliefs” of their times. For the Justices of the Cold War era to resist “the ideological and emotional pressures” of pervasive anticommunism would have required a high degree of courage, wisdom, and equanimity, qualities that were perhaps beyond the reach of a majority of the Vinson Court. They therefore found themselves compelled by the national mood to reach results that were often unsupported in fact. They tended to accept without serious question “a generic ‘proof’ of Communism’s seditious nature,” and simply shut their eyes “to the real-word consequences” of their decisions.<sup>151</sup> As David Caute has concluded, in the early 1950s “[T]he Constitution was concussed in the courts,” and this was especially so in the Supreme Court, which too often served as “a compliant instrument of



Three of the eleven Communist leaders convicted of conspiracy to overthrow the government prepared for their hearing. In *Dennis v. United States* (1951), the Court upheld the Smith Act, which made it illegal to belong to a subversive organization.

administrative persecution and Congressional inquisition.”<sup>152</sup>

Toward the end of the decade, however, with changes in its composition and perspective, the Court began to take a more critical look. In *Watkins v. United States*,<sup>153</sup> for instance, the Court narrowly construed the authorizing resolution of the House Committee on Un-American Activities, sharply limiting the permissible breadth of its activities. Chief Justice Warren explained that the “mere summoning of a witness and compelling him to testify” about his “beliefs, expressions, or associations” is a serious governmental interference with the First Amendment, and that “[W]hen those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous.”<sup>154</sup>

That same day, in *Yates v. United States*,<sup>155</sup> the Court adopted a narrow interpretation of the Smith Act, effectively rendering the act a dead letter. Over the next decade, the Court constrained the power of legislative committees to investigate political beliefs,<sup>156</sup> invalidated restrictions on the mailing of Communist political propaganda,<sup>157</sup> limited the circumstances in which an individual could constitutionally be denied public em-

ployment because of her political beliefs or associations,<sup>158</sup> and restricted the authority of a state to deny membership in the bar to individuals because of their past Communist affiliations.<sup>159</sup> Although the Court proceeded in fits and starts during this decade, in the end it played an important role in helping bring this sorrowful era to a close.

### The Vietnam War

In the Vietnam War, as in the Civil War and World War I, there was substantial and often bitter opposition to both the war and the draft. Lest we forget the stresses of those years, it is useful to recall Theodore White’s eyewitness account of the 1968 Democratic Convention:

On Wednesday, the Democratic Convention defeated the peace plank by a close margin, while in Grant Park the National Guard had arrived in force, to join the police. The National Guard fired tear-gas grenades at the demonstrators on Michigan Avenue, while triple ranks of picket lines of Chicago policemen in blue helmets and carrying billy-clubs block the Michigan Avenue bridges. The demonstrators chant “Peace Now, Peace Now,” and

as they approach the Chicago police picket-lines they chant to the police "Hey, Hey, Go Away" . . .

Then, like a fist jolting, like a piston extending from its chamber, comes a hurtling column of police . . . As the scene clears, there are police clubbing youngsters, police dragging youngsters, police rushing them by the elbows, their heels dragging, to patrol wagons . . . It is a scene from . . . the Russian Revolution. Gas grenades explode, the police lift a yellow barricade and carrying it like a battering ram they rush the crowd again. There are splotches of blood . . . Demonstrators in the front rank kneel, with arms folded across their breasts, and begin singing "America the Beautiful." Those behind them chant "Peace Now, Peace Now." Violence bursts again. A commotion explodes in the front rank; one sees the clubs coming down. There is much blood now. The chants change to "The Whole World is Watching."<sup>160</sup>

Over the next several years, the nation suffered through a period of intense and often violent struggle. After President Nixon announced the American "incursion" into Cambodia, student strikes closed a hundred campuses. Governor Ronald Reagan, asked about campus militants, replied: "If it takes a bloodbath, let's get it over with."<sup>161</sup> On May 4, National Guardsmen at Kent State University responded to taunts and rocks by firing their M-1 rifles into a crowd of students, killing four and wounding nine others. Protests and strikes exploded at more than 1,200 of the nation's colleges and universities. Thirty ROTC buildings were burned or bombed in the first week of May. The National Guard was mobilized in sixteen states. As Henry Kissinger put it later, "The very fabric of government was falling apart."<sup>162</sup>

Despite all this, there was no systematic effort during the Vietnam War to prosecute individuals for their opposition to the war. As Todd Gitlin has rightly observed, in comparison to World War I, "[T]he repression of the late Sixties and early Seventies was mild."<sup>163</sup> There are many reasons for this, including, of course, the compelling fact that most of the dissenters in this era were the sons and daughters of the middle class, and thus could not so easily be targeted as the "Other." But the courts, and especially the Supreme Court, played a key role in this period.

In 1969, in *Brandenburg v. Ohio*,<sup>164</sup> the Court overruled *Dennis* and held that even advocacy of unlawful conduct cannot be punished unless it is likely to incite "imminent lawless action." The Court had come a long way in the fifty years since World War I.<sup>165</sup> But the Court did not rest there. In other decisions, it held: that the Georgia House of Representatives could not deny Julian Bond his seat because of his express opposition to the draft;<sup>166</sup> that a public university could not deny recognition to the Students for a Democratic Society (SDS) because the organization advocated a philosophy of violence;<sup>167</sup> that school children had a right to protest the war even on school premises;<sup>168</sup> that the government could not punish an individual for treating the American flag with contempt;<sup>169</sup> that the government could not conduct national security wiretaps without prior judicial approval;<sup>170</sup> and that the government could not constitutionally enjoin publication of the Pentagon Papers, even though the Defense Department claimed that publication would endanger national security.<sup>171</sup>

This is not to say that the government did not find other ways to impede dissent. The most significant of these was the FBI's extensive effort to infiltrate and to "expose, disrupt and otherwise neutralize" allegedly "subversive" organizations, ranging from civil-rights groups to the various factions of the antiwar movement.<sup>172</sup> In this counterintelligence program (COINTELPRO), the FBI



In *Healy v. James* (1972), the Court held that a public university could not deny recognition to the Students for a Democratic Society (SDS) on the ground that the organization advocated a philosophy of violence. SDS worker Judy Pardun, pictured, displayed "New Left" buttons in 1965.

compiled political dossiers on more than half a million Americans.

Although Attorney General Stone had ended the FBI's surveillance of political radicals in 1924, twelve years later President Roosevelt secretly authorized Hoover to resume the FBI's investigation of suspected fascists and communists. The FBI promptly re-established an aggressive informer program and a massive classification system. In a 1938 memorandum,

Hoover stressed the need to preserve the "utmost degree of secrecy in order to avoid criticism." Conceding that such undercover activities were "repugnant to the American people," he explained that it would be unwise to seek special legislation that might focus attention on the government's plan to develop a program of such magnitude.<sup>173</sup>

The outbreak of the war in Europe forced the FBI's actions into the open, and in January



1940 Hoover revealed to a House subcommittee that the FBI had revived the GID.<sup>174</sup> Upon learning of this development, Senator George Norris of Nebraska fumed that the FBI “exists only to investigate violations of law,” not to gather information about political dissidents. He warned that these activities “are going to bring into disrepute the methods of our entire system of jurisprudence.”<sup>175</sup> Defending the Department of Justice against this accusation, Attorney General Robert Jackson replied that “[O]ne of the first steps which I took upon assuming office was to review the activities and attitude of the Federal Bureau of Investigation” and to reaffirm “the principles which Attorney General Stone laid down in 1924.” He assured Congress that Director Hoover agreed with these principles and that he and Hoover fully understood that the “usefulness of the Bureau depends upon a faithful adherence to those limitations.”<sup>176</sup> Little did he know.

Several years later, Attorney General Biddle informed Hoover that there was “no statutory authorization or other justification for keeping a ‘custodial detention’ list of citizens,” that the classification system used by the FBI was “inherently unreliable,” and that Hoover’s list should “not be used for any purpose whatsoever.” Hoover, however, simply renamed the project “Security Matter” rather than “Custodial Detention” and directed FBI agents to continue their work. He cautioned that this program “should at no time be mentioned or alluded to in investigative reports discussed with agencies or individuals outside the Bureau.”<sup>177</sup>

By the late 1950s, after the Supreme Court began to embrace restrictive interpretations of the Smith Act and other anticommunist legislation, Hoover decided to take matters into his own hands. Not content merely to compile extensive files on organizations and individuals he viewed as dangerous to the national security, Hoover launched COINTELPRO in 1956. This program reflected a systematic effort to harass dissident organizations, sow dissension within their ranks, and inform public and pri-

vate employers of the political beliefs and activities of dissenters. Targeted initially at the Communist party, the program gradually expanded to include socialist, white hate, black nationalist, civil rights, antiwar, and New Left groups as well. COINTELPRO was launched without any executive or legislative authorization, and its existence was a closely guarded secret, shielded from public view by a carefully crafted system of multiple filings.<sup>178</sup>

When these activities finally came to light, they were sharply condemned by congressional committees. In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities made the following findings:

The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts . . . . The Government, operating primarily through secret informants, [has] swept in vast amounts of information about the personal lives, views, and associations of American citizens. Investigations of groups . . . have continued for decades, despite the fact that those groups did not engage in unlawful activity. [FBI] headquarters alone has developed over 500,000 domestic intelligence files. [The] targets of intelligence activity have included political adherents of the right and the left, ranging from activist to casual supporters.<sup>179</sup>

Following the example of Attorney General Stone after the Red Scare, Attorney General Edward Levi declared that such practices were incompatible with our national values and, in 1976, instituted a series of guidelines designed sharply to restrict FBI surveillance of political and religious organizations and activities.

### “The Secret of Liberty”

What can we learn from this history? I would like to offer seven observations. First, we have achieved consensus on two key propositions: the Constitution applies in time of war, but the special demands of war may affect the application of the Constitution. We have thus rejected the more extreme positions—that the Constitution is irrelevant in wartime, and that wartime is irrelevant to the application of the Constitution. What this means in practice is that in applying the applicable constitutional standard in any particular area of the law, whether it be clear and present danger, compelling governmental interest, probable cause, or whatever, it is appropriate to take the special circumstances of wartime into account in determining whether the government has sufficient justification to limit the constitutional right at issue. What it does *not* mean, however, is that courts should abdicate their responsibilities in the face of assertions of national security or military necessity.

Second, we have a long history of overreacting to the perceived dangers of wartime. Time after time, we have allowed our fears to get the better of us. Although each of these six episodes presented markedly different challenges, in each we went too far in restricting civil liberties. Of course, this proposition cannot be proved with the exactitude of a mathematical formula. Nor can it be proved merely by looking back and blithely inferring that because each of these crises ended well, the restrictions of civil liberties were unwarranted. The fallacy of that logic is too patent to require explication. As with any counterfactual, we cannot know for certain what would have happened if Lincoln had not suspended the writ of *habeas corpus*, or Wilson had not prosecuted those who protested the war, or Roosevelt had not interned Japanese Americans. Perhaps the South would have succeeded, perhaps we would have lost World War I, perhaps Japanese Americans would have sabotaged the Pacific Coast, perhaps the Berlin Wall would

still be standing. Perhaps. But it is difficult to believe, with the benefit of hindsight,<sup>180</sup> that any of these consequences would have resulted.

Because it is impossible to know the counterfactual for certain, we have to rely to some degree on reasoning by inference. Certainly we know that in every one of these episodes, we came, after the fact, to regret our actions and to understand them, in part, as excessive responses due largely to public hysteria and government manipulation. Certainly we know that it is human nature to be risk-averse in the face of danger, especially when we can mitigate the danger to ourselves by disadvantaging “others,” whether they be suspected Jacobins, secessionists, anarchists, Japanese Americans, communists, or “hippies.” This response enables us both to secure our own safety and to vent our anger and frustration at those we already view with contempt. Certainly we know that the actual motivations for the restriction of civil liberties in many of these episodes were more complex than the government let on, and that they frequently involved a range of political, as well as military, considerations. All of these factors help to explain and to ratify our after-the-fact conviction that in each of these instances we *unnecessarily* sacrificed the constitutional rights of others.

Third, it is often argued that given the sacrifices we ask some individuals—especially soldiers—to make in time of war, asking others to surrender some of their peacetime freedoms to help the war effort is requesting a small price to pay. As members of Congress argued in defense of the Sedition Act of 1918, surely people can restrain their criticism of the government in order to maintain the national unity that is essential to the war effort.<sup>181</sup> And as the Court argued in *Korematsu*, “[H]ardships are part of war, and war is an aggregation of hardships.”<sup>182</sup>

This is a seductive argument, but a dangerous one. To fight a war successfully, it is necessary for soldiers to risk their lives. But it is not necessarily “necessary” for others to

surrender their freedoms. That necessity must be convincingly demonstrated, not merely presumed. And this is especially true when, as is almost always the case, the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents, and noncitizens. In those circumstances, “we” are making a decision to sacrifice “their” rights—not a very prudent way to balance the competing interests.

It is also worth noting that this argument is particularly insidious when the freedom of speech is at issue. A critical function of free expression in wartime is to help us make wise decisions about how to conduct the war, whether our leaders are leading well, whether to end the war, and so on. Those questions cannot be put in suspension during a war. The freedom of speech in this context is not merely a right of the individual, but a fundamental national interest that is essential to the very existence of democratic decision-making in wartime.

Fourth, the Supreme Court matters. It is often said that presidents do what they please in wartime. Attorney General Biddle once observed that “[T]he Constitution has not greatly bothered any wartime President,”<sup>183</sup> and Chief Justice William Rehnquist, in his recent book on this subject, concluded that “[T]here is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt.”<sup>184</sup> The record, however, is more complex than this might suggest. Although presidents may think of themselves as bound more by political than by constitutional constraints in time of war, the two are linked. Lincoln did not propose a Sedition Act, Wilson rejected calls to suspend the writ of *habeas corpus*, and George W. Bush has not advocated loyalty oaths. The fact is that even during wartime, presidents have not attempted to restrict civil liberties in the face of settled Supreme Court precedent. Although presidents often push the envelope where the law is unclear, they do not defy established constitutional doctrine.

Perhaps this is because they respect the law. Perhaps it is because they do not want to pick a fight with the Supreme Court in the midst of a war. But whatever the explanation, the phenomenon is unmistakable, and it is important. The Supreme Court is not powerless to influence these matters. As Chief Justice Rehnquist has noted, a decision “in favor of civil liberty will stand as a precedent to regulate future actions of Congress and the Executive branch in future wars.”<sup>185</sup> The record bears this out.

What this suggests is that in periods of relative calm, the Court should consciously construct constitutional doctrines that will provide firm and unequivocal guidance for later periods of stress. Clear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, Presidents, and even Supreme Court Justices are essential if we are to preserve civil liberties in the face of wartime fear and hysteria. Malleable principles, open-ended balances, and vague standards may serve us well in periods of tranquility, but are likely to fail us when we need the Constitution most.<sup>186</sup>

Fifth, it is often said that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency. The decisions most often cited in support of this proposition are *Korematsu* and *Dennis*. Clinton Rossiter once observed that “the government of the United States, in the case of military necessity,” can be “just as much a dictatorship, after its own fashion, as any other government on earth.” The Supreme Court, he added, “will not and cannot be expected to get in the way of this power.”<sup>187</sup>

In fact, however, this does not give the Court its due. There are many counterexamples. During World War II, for instance, the Court consistently upheld the constitutional rights of American fascists and other dissidents in a series of criminal prosecutions and denaturalization proceedings. In 1943, the Court held in *Schneiderman v. United States*

that the government could not denaturalize an American citizen because of his membership in the Communist party unless it could prove by “clear, unequivocal and convincing evidence” that he had personally endorsed the use of “present violent action which creates a clear and present danger of public disorder or other substantive evil.”<sup>188</sup> The following year, in *Baumgartner v. United States*, the Court held that an individual could not be denaturalized for making even “sinister-sounding” statements “which native-born citizens utter with impunity.”<sup>189</sup> *Baumgartner* effectively ended the government’s program to denaturalize former members of the German-American Bund.<sup>190</sup>

In *Taylor v. Mississippi*,<sup>191</sup> an individual was prosecuted for stating that “it was wrong for our President to send our boys . . . [to be] shot down for no purpose at all.” The Court held that even in wartime, “criminal sanctions cannot be imposed for such communication.”<sup>192</sup> In *Hartzel v. United States*,<sup>193</sup> the defendant was convicted for distributing pamphlets that depicted the war as a “gross betrayal of America,” denounced “our English allies and the Jews,” and assailed the “patriotism of the President.” Although the case was in many respects a rerun of *Schenck*, the Court reversed the defendant’s conviction because the government failed to prove that he had specifically intended to obstruct the draft. The Court added that “[A]n American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul” of the law.<sup>194</sup> This decision went a long way towards ending government efforts to prosecute anti-war dissent during World War II.<sup>195</sup>

In 1943, at the height of the war, the Court held in *West Virginia State Board of Education v. Barnette*<sup>196</sup> that the government cannot require children in the public schools to pledge allegiance to the American flag, explaining that “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>197</sup> The Court held that, less than one year after Pearl Harbor, civilians in Hawaii could not be tried by military tribunals.<sup>198</sup> And in 1944, the Court held that Executive Order 9066 did not authorize the detention of individuals of Japanese ancestry who had been found to be loyal American citizens, effectively marking the end of the Japanese-American internment.<sup>199</sup>

During the Cold War, the Court rejected President Truman’s effort to seize the steel industry<sup>200</sup> and, as I have already indicated, helped end the era of McCarthyism. And during the Vietnam War, the Court repeatedly rejected national security claims by the Executive. So, although it is true that the Court must be careful not to overstep its bounds, it is also true that the Court has a long record of fulfilling its constitutional responsibility to protect individual liberties—even in time of war.

Sixth, we have made great progress over time in our protection of civil liberties. This is true not only when we are at peace, but when we are at war as well. Almost all of the major restrictions of civil liberties that I have discussed would be less thinkable today than they were in 1789, 1861, 1918, 1942, 1950, or 1968. This is a profound constitutional achievement, and one we should not take for granted.

My final observation concerns the war on terrorism. The current President Bush deserves high marks for his almost letter-perfect response to the risk of hostile public reactions against Muslims and Muslim-Americans. The contrast with Wilson’s rhetoric about German-Americans and Roosevelt’s treatment of Japanese Americans is truly striking. On the other hand, the administration has instituted a number of deeply troubling policies. It has indefinitely detained both foreign nationals and American citizens without recourse to judicial review; it has imposed an unprecedented degree of secrecy on detention and deportation hearings; it has constricted the scope of the Freedom of Information Act;<sup>201</sup>

it has proposed a program (Terrorist Information and Prevention System, or TIPS) that recalls almost precisely the World War I program that George Creel described as a “thing of screams and extremes;” it has dramatically expanded federal authority to investigate individuals and organizations suspected of “terrorist” activity;<sup>202</sup> and, in disregard of the judgments of Attorneys General Stone and Levi, it has significantly eased the Justice Department’s guidelines for FBI surveillance of political and religious activities.<sup>203</sup>

The threat of terrorism is, of course, real, and we expect our government to protect our safety. But we can already discern disturbing—and all-too-familiar—patterns in some of our government’s reactions. To their credit, some federal courts have stepped in to limit these actions.<sup>204</sup> It remains to be seen how this Supreme Court will meet its test in this crisis.

It is, of course, much easier to look back on past crises and find our predecessors wanting, than it is to make wise judgments when we ourselves are in the eye of the storm. But that challenge now falls to us. As Justice Brandeis once observed, “[T]hose who won our independence . . . knew that . . . fear breeds repression” and that “courage [is the] secret of liberty.”<sup>205</sup> Those, I think, are the two most fundamental insights for us to bear in mind.

To strike the right balance in our time, we need political leaders who know right from wrong, federal judges who will stand fast against the furies of their age, members of the bar and the academy who will help us see ourselves clearly, an informed and tolerant public who will value not only their own liberties but also the liberties of others, and, most of all, Justices of the Supreme Court with the wisdom to know excess when they see it and the courage to preserve liberty when it is imperiled.

\*I am grateful to the University of Chicago Law School’s Harry Kalven, Jr. Research Fund for financial support and to Shana Wallace, Jake Kreilkamp, Justin Sandburg, Kelsi Brown Corkran, and Nancy Stone for their invaluable

research assistance and editorial suggestions. I had the privilege of delivering versions of this essay both as the Bernard L. Rudin Lecture at the New York University School of Law and as part of the “Chicago’s Best Ideas” lecture series at the University of Chicago Law School. Specific parts of this essay have been developed more fully in Geoffrey R. Stone, “Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled,” 70 *U. Chi. L. Rev.* 335 (2003); Geoffrey R. Stone, “Abraham Lincoln’s First Amendment,” 78 *N.Y.U. L. Rev.* 1 (2003); Geoffrey R. Stone, “The Origins of the ‘Bad Tendency Test’: Free Speech in Wartime,” 2002 *Sup. Ct. Rev.* 411; and Geoffrey R. Stone, “Free Speech in World War II: ‘When Are You Going to Indict the Seditious?’,” 2 *Int’l J. Const. L.* (forthcoming). For a full treatment of these issues, see Geoffrey R. Stone, **Free Speech in Wartime** (New York: Norton, forthcoming).

## ENDNOTES

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<sup>6</sup>*Id.*, at 1484 (April 20, 1798); *id.* at 1824 (May 26, 1798); *id.*, at 1503 (April 20, 1798); *id.*, at 2071 (July 2, 1798).

<sup>7</sup>Letter from John Adams to the inhabitants of Arlington and Sandgate, Vermont, June 25, 1798, in Charles Francis Adams, ed., 9 **The Works of John Adams** 202 (Boston: Little, Brown, 1854); John Adams, “To the Inhabitant of Chester County, in the South of Pennsylvania,” *Claypoole’s American Daily Advertiser* (May 29, 1798).

<sup>8</sup>*Annals*, 5<sup>th</sup> Cong., 2d Sess. 1482 (April 20, 1798); *id.*, at 2072–73 (July 2, 1798); *id.*, at 1531 (April 24, 1798); *id.*, at 1342 (March 28, 1798).

<sup>9</sup>John C. Miller, **Crisis in Freedom: The Alien and Sedition Acts** 41 (Boston: Little, Brown, 1951).

<sup>10</sup>*Annals*, 5<sup>th</sup> Cong., 2d Sess. 2018 (June 21, 1798). See also *id.*, at 1985 (June 19, 1798).

<sup>11</sup>See An Act Concerning Aliens, 5<sup>th</sup> Cong., 2d Sess., in **1 The Public Statutes at Large of the United States of America** 570–72 (Boston: Little, Brown, 1845). Congress also enacted the Alien Enemies Act, which provided that in the case of a declared war, citizens of an enemy nation residing in the United States could be apprehended, detained, and either confined or expelled at the direction of the President. The Alien Enemies Act was adopted with bipartisan support and has remained a permanent part of American wartime policy. See An Act Respecting Alien Enemies, 5<sup>th</sup> Cong., 2d Sess., in **1 Public Statutes at Large** 577–78.

<sup>12</sup>See An Act for the Punishment of Certain Crimes Against the United States, 5<sup>th</sup> Cong., 2d Sess., in **1 Public Statutes at Large** 596–97.

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<sup>14</sup>*Annals* 5<sup>th</sup> Cong., 2d Sess. 2097 (July 5, 1798).

<sup>15</sup>Francis Wharton, **State Trials of the United States During the Administrations of Washington and Adams** 333 (Philadelphia: Carey and Hart, 1849).

<sup>16</sup>*Id.*, at 659; *id.*, at 689; Smith, **Freedom's Fetters**, 379.

<sup>17</sup>Elizabeth Lawson, **The Reign of Witches: The Struggle Against the Alien and Sedition Laws** 43 (New York: Civil Rights Congress, 1952).

<sup>18</sup>**The Trial of Samuel Chase** 6 (Smith, 1805).

<sup>19</sup>*Cong. Globe*, 26<sup>th</sup> Cong, 1<sup>st</sup> Sess. 411 (May 23, 1840). See 26<sup>th</sup> Cong., 1<sup>st</sup> Sess., Doc. 86, House Rep.

<sup>20</sup>*New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

<sup>21</sup>See William H. Rehnquist, **All the Laws But One: Civil Liberties in Wartime** 17 (New York: Knopf, 1998).

<sup>22</sup>See Mark E. Neely, Jr., **The Fate of Liberty: Abraham Lincoln and Civil Liberties** 4 (New York: Oxford University Press, 1991). This order was narrow in scope, encompassing only those areas that would cut off travel routes to and from Washington, DC. The significance of this suspension is that ordinarily federal officials who arrest individuals must do so subject to the requirements of the Constitution (right to counsel, privilege against compelled self-incrimination, right to confront witnesses, right to be prosecuted only for the violation of constitutionally permissible criminal laws, etc.), and an individual held unlawfully can file a petition for a writ of *habeas corpus* asking a court to determine whether the detention is lawful. Suspension of the writ of *habeas corpus* disables courts from intervening in this process. This enables the government to detain individuals indefinitely without judicial oversight. Martial law takes the matter a step further: it substitutes martial law, which has been defined as “no law at all,” for the ordinary criminal justice system, and allows the government to prosecute individuals using military commissions, rather than in the federal courts. See Rehnquist, **All the Laws but One**, 23, 126; Daniel Farber,

**Lincoln's Constitution** 146–52 (Chicago: University of Chicago Press, 2003); *Luther v. Borden*, 48 U.S. 1 (1849) (upholding the use of martial law in Rhode Island to put down an armed insurrection).

<sup>23</sup>Neely, **The Fate of Liberty**, 5–7.

<sup>24</sup>17 *Federal Cases* 144 (C.C. Md. 1861).

<sup>25</sup>*Merryman*, 17 Fed. Cas. 148.

<sup>26</sup>Taney noted that Article I, Section 9 of the Constitution, which deals exclusively with the legislative power, is the only provision of the Constitution that mentions suspension of the writ of *habeas corpus*. He therefore reasoned that this was a power assigned exclusively to the Congress. The relevant provision of Article I, section 9, provides: “The Privilege of Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

<sup>27</sup>4 Cranch (8 U.S.) 75, 101 (1807) (“If at any time, the public safety should require the suspension of the powers vested by [the *Habeas Corpus* Act] in the courts of the United States, it is for the legislature to say so”).

<sup>28</sup>Taney cited Joseph Story, 3 **Commentaries on the Constitution** § 1336 (Boston: Little, Brown, 1891) (“[T]he power is given to congress to suspend the writ of *habeas corpus*”).

<sup>29</sup>*Id.*

<sup>30</sup>*Ex parte Merryman*, 17 Fed. Cas. 144, 148. (C.C. Md. 1861).

<sup>31</sup>Quoted in Rehnquist, **All the Laws But One**, 34–35.

<sup>32</sup>Lincoln even contemplated having Taney arrested if he pursued the matter further. See Harold M. Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** 84 n.8 (New York: Knopf, 1973).

<sup>33</sup>Quoted in Carl Sandburg, **I Abraham Lincoln: The War Years** 280 (New York: Harcourt, Brace and Co., 1939).

<sup>34</sup>See Rehnquist, **All the Laws But One**, 40.

<sup>35</sup>See James M. McPherson, **Battle Cry of Freedom: The Civil War Era** 289 (New York: Ballantine, 1988). In the summer of 1861, Lincoln permitted the arrest of several members of the Maryland legislature whom he feared were plotting to vote on a secession measure in coordination with a planned Confederate attack. See Neely, **The Fate of Liberty**, 5–18.

<sup>36</sup>Abraham Lincoln, “Special Address to Congress, July 4, 1861,” in James D. Richardson, comp., **VI A Compilation of the Messages and Papers of the Presidents, 1789–1897**, 25, 31 (Washington, DC: Government Printing Office, 1897).

<sup>37</sup>As Yale Professor Henry Dutton argued at the time, “[I]f the Constitution is destroyed, of what use” is the writ of *habeas corpus*? Dutton, “Writ of *Habeas Corpus*,” 9 *Amer. L. Reg.* 705, 716 (1861).

<sup>38</sup>Abraham Lincoln, “Message to Congress in Special Session, July 4, 1861,” in Don E. Ferenbacher, ed., **Speeches**

and Writings: 1859–1865, 246–262 (New York: Literary Classics, 1989).

<sup>39</sup>Lincoln, “Letter to Erastus Corning and Others, June 12, 1863,” *Speeches and Writings* 454–58.

<sup>40</sup>To the contrary, even Democratic newspapers tended to support the President’s action. See Neely, *The Fate of Liberty*, 187. Whether Lincoln had a legal right simply to disobey Taney’s order is a different question than whether he had a legal right to suspend the writ of *habeas corpus*. It is certainly arguable that even if the suspension was lawful, Lincoln had a legal obligation to defend his action in the courts. For an excellent discussion of this question, see Farber, *Lincoln’s Constitution*, 188–92.

<sup>41</sup>Roy P. Basler, ed., 5 *The Collected Works of Abraham Lincoln* 436–37 (New Brunswick, NJ: Rutgers University Press, 1956).

<sup>42</sup>An Act Relating to *Habeas Corpus*, and Regulating Judicial Proceedings in Certain Cases, 12 Stat 755 (March 3, 1863). The act provided that “[D]uring the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof.”

<sup>43</sup>See Neely, *The Fate of Liberty*, 90–92.

<sup>44</sup>Sandburg, II *Abraham Lincoln*, 154–55.

<sup>45</sup>See Neely, *The Fate of Liberty*, 113–38 (concluding that the best estimate is near the upper end of this range); Rehnquist, *All the Laws But One*, 49–50 (estimating 13,000).

<sup>46</sup>See Neely, *The Fate of Liberty*, 26–28, 44, 131–38, 44; Paul Finkelman, “Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian,” 91 *Mich. L. Rev.* 1353, 1361 (1993).

<sup>47</sup>This is not a verbatim transcript of the speech, which does not exist, but the specification of the charge against Vallandigham. See Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History* 310 (Durham, NC: Duke University Press, 2000); Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War* 154 (Lexington, KY: University Press of Kentucky, 1970). For a fuller account, see Stone, “Lincoln’s First Amendment.”

<sup>48</sup>See Neely, *The Fate of Liberty*, 58–61.

<sup>49</sup>4 Wall. (71 U.S.) 2 (1866). The Supreme Court was unanimous in reversing Milligan’s conviction, although the Justices were divided on the rationale. Five Justices held the military trial unconstitutional; four Justices held that it violated the 1863 *habeas corpus* statute.

<sup>50</sup>*Id.*, at 127.

<sup>51</sup>*Id.*, at 120–21. For an excellent discussion of *Ex parte Milligan*, see Rehnquist, *All the Laws But One*, 89–137. <sup>52</sup>65th Cong., 1st Sess. in 55 *Cong. Rec.* S. 214 (April 4, 1917).

<sup>53</sup>Quoted in Edward M. Coffman, *The War to End All Wars: The American Military Experience in*

*World War I* 25 (New York: Oxford University Press, 1968).

<sup>54</sup>Woodrow Wilson, “Third Annual Message to Congress,” quoted in David M. Kennedy, *Over Here: The First World War and American Society* 24 (New York: Oxford University Press, 1980).

<sup>55</sup>Quoted in Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (New York: Norton, 1979).

<sup>56</sup>Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

<sup>57</sup>See Stone, “Learned Hand”; Stone, “Bad Tendency.”

<sup>58</sup>*New York Times* 3 (Nov. 21, 1917). See Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to the Present* 108 (Cambridge, MA: Schenkman, 1978).

<sup>59</sup>Quoted in Murphy, *World War I*, 94–95.

<sup>60</sup>See Meirion Harries and Susie Harries, *The Last Days of Innocence: America at War, 1917–1918* 282–308 (New York: Vintage, 1997); H. C. Peterson and Gilbert C. Fite, *Opponents of War* 18–19 (Madison: University of Wisconsin Press, 1957); Murphy, *World War I*, 128–32; Goldstein, *Political Repression*, 111; Harry Scheiber, *The Wilson Administration and Civil Liberties: 1917–1921* 16–17 (Ithaca, NY: Cornell University Press, 1960).

<sup>61</sup>John Lord O’Brien, “Civil Liberty in War Time,” 62 *Rep. N. Y. Bar Assn.* 275, 279 (January 17, 1919).

<sup>62</sup>George Creel, *Rebel at Large: Recollections of Fifty Crowded Years* 196 (New York: G. P. Putnam’s Sons, 1947).

<sup>63</sup>See *United States v. Hall*, reported in 65<sup>th</sup> Cong., 2d Sess., in *Cong. Rec.* S. 4559–60 (April 4, 1918); *United States v. Schutte*, 252 F. 212 (D. N.D. 1918). See Stone, “Bad Tendency.”

<sup>64</sup>*Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

<sup>65</sup>*Id.*, 540.

<sup>66</sup>255 F. 886 (9th Cir. 1919).

<sup>67</sup>*Id.*, 887.

<sup>68</sup>*Id.*, 887–89.

<sup>69</sup>See, e.g., *Goldstein v. United States*, 258 F. 908 (9<sup>th</sup> Cir. 1919); *Coldwell v. United States*, 256 F. 805 (1<sup>st</sup> Cir. 1919); *Kirchner v. United States*, 255 F. 301 (4<sup>th</sup> Cir. 1918); *Deason v. United States*, 254 F. 259 (5<sup>th</sup> Cir. 1918); *Doe v. United States*, 253 F. 903 (8<sup>th</sup> Cir. 1918); *O’Hare v. United States*, 253 F. 538 (8<sup>th</sup> Cir. 1918); *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917) (reversing Judge Hand’s opinion); *United States v. Nagler*, 252 F. 217 (W.D. Wis. 1918); and *United States v. Motion Picture Film “The Spirit of ’76,”* 252 F. 946 (S.D. Cal. 1917). For additional citations, see David M. Rabban, *Free Speech in Its Forgotten Years* 256–59 (Cambridge, UK: Cambridge University Press, 1997).

<sup>70</sup>See Rabban, *Forgotten Years*, 257.

<sup>71</sup>*United States v. Stokes* (unreported) (D. Mo. 1918), rev’d 264 F. 18 (8<sup>th</sup> Cir. 1920). See Zechariah Chafee, *Freedom*

- of Speech 52–53 (Cambridge, MA: Harvard University Press, 1941); Peterson and Fite, **Opponents of War**, 185–86. See “Mrs. Stokes Denies Assailing Red Cross,” *New York Times* 13 (May 22, 1918); “Mrs. Stokes Denies Disloyal Intent,” *New York Times* (May 23, 1918); “Mrs. Rose R. Stokes Convicted of Disloyalty; Illegal to Impair National Morale, Says Judge,” *New York Times* 1 (May 24, 1918). On March 9, 1920, a federal court of appeals overturned Mrs. Stokes’s conviction, ruling that the district judge had gone “too far in his charge to the jury” because of his inappropriate “partisan zeal.” “Ten-Year Sentence of Mrs. Rose Stokes Overruled by Federal Court in St. Louis,” *New York Times* 1 (March 10, 1920). On November 15, 1921, the government finally dismissed the charges against Stokes. “Mrs. Stokes Freed,” *New York Times* 5 (November 16, 1921).
- <sup>72</sup>See Walter Nelles, ed., **Espionage Act Cases** 48 (New York: National Civil Liberties Bureau, 1918).
- <sup>73</sup>*United States v. Waldron* (unreported) (D. Vt. 1918). See Chafee, **Free Speech**, 55–56 n.42. The government was especially aggressive in its prosecution of clergymen who supported peace or conscientious objection. See “Warn Seditious Pastors,” *New York Times* 16 (March 31, 1918).
- <sup>74</sup>Murphy, **World War I**, 190.
- <sup>75</sup>O’Brian, “Civil Liberty,” 299–300.
- <sup>76</sup>Chafee, **Free Speech**, 52.
- <sup>77</sup>Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.
- <sup>78</sup>Quoted in Robert K. Murray, **Red Scare: A Study in National Hysteria, 1919–1920**, 9 (New York: McGraw-Hill, 1955).
- <sup>79</sup>*New York Times* (March 11, 1919).
- <sup>80</sup>*Washington Post* 4 (Jan. 4, 1920).
- <sup>81</sup>“Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others,” Hearings before the Committee on Rules, House of Representatives 27 (1920). See Murray, **Red Scare**, 219; Goldstein, **Political Repression**, 158.
- <sup>82</sup>See R. G. Brown, et al., **To the American People: Report Upon the Illegal Practices of the United States Department of Justice** (National Popular Government League, 1920).
- <sup>83</sup>*Christian Science Monitor* (June 25, 1920).
- <sup>84</sup>*Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefter v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Gilbert v. Minnesota*, 254 U.S. 325 (1920).
- <sup>85</sup>254 U.S. at 326–27, 333.
- <sup>86</sup>See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Pierce v. United States*, 252 U.S. 239 (1920) (Brandeis, J., dissenting); *Schaefter v. United States*, 251 U.S. 466 (1920) (Brandeis, J. dissenting); *Gilbert v. United States*, 254 U.S. 325 (1920) (Brandeis, J., dissenting).
- <sup>87</sup>Harry Kalven, Jr., **A Worthy Tradition: Freedom of Speech in America** 147 (New York: Harper and Row, 1988).
- <sup>88</sup>*Cong. Rec.*, 66<sup>th</sup> Cong., 2d Sess. 293–94 (Dec. 13, 1920).
- <sup>89</sup>Quoted in Max Lowenthal, **The Federal Bureau of Investigation** 298 (New York: Sloane, 1950).
- <sup>90</sup>See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- <sup>91</sup>Executive Order No 9066, 7 Fed. Reg. 1407 (1942). On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified as 18 U.S.C. § 1383 (1974) (repealed 1976).
- <sup>92</sup>See United States Commission on Wartime Relocation and Internment of Civilians, **Personal Justice Denied** 3 (Washington, DC: United States Government Printing Office, 1983).
- <sup>93</sup>**Annual Report of the Attorney General of the United States** 14 (1942).
- <sup>94</sup>Quoted in Commission on Wartime Relocation, **Personal Justice Denied**, 48.
- <sup>95</sup>*Id.*, 265.
- <sup>96</sup>See Eric K. Yamamoto, et al., **Race, Rights, and Reparation: Law and the Japanese-American Internment** 98 (Gaithersburg, MD: Aspen, 2001).
- <sup>97</sup>Ed Cray, **Chief Justice: A Biography of Earl Warren** 115 (New York: Simon and Schuster, 1997).
- <sup>98</sup>Quoted in Commission on Wartime Relocation, **Personal Justice Denied**, 67–68.
- <sup>99</sup>Cray, **Chief Justice**, 117; Peter H. Irons, **Justice at War: The Story of the Japanese-American Internment Cases**, 38 (New York: Oxford University Press, 1984).
- <sup>100</sup>Quoted in Cray, **Chief Justice**, 117.
- <sup>101</sup>Quoted in Cray, **Chief Justice**, 118, 121; Irons, **Justice at War**, 29–41.
- <sup>102</sup>Quoted in Yamamoto, **Race, Rights, and Reparation**, 100.
- <sup>103</sup>Quoted in Commission on Wartime Relocation, **Personal Justice Denied**, 65–66 (statement of General DeWitt on January 4, 1942).
- <sup>104</sup>Richard Gid Powers, **Secrecy and Power: The Life of J. Edgar Hoover** 249 (New York: Free Press, 1987); Don Whitehead, **The FBI Story** 188 (New York: Random House, 1956); Francis Biddle, **In Brief Authority** 215–24 (Garden City, NY: 1962).
- <sup>105</sup>Biddle, **In Brief Authority**, 219.
- <sup>106</sup>See Irons, **Justice at War**, 56–65.
- <sup>107</sup>*Id.*
- <sup>108</sup>*Id.*, 214, 219.
- <sup>109</sup>Irons, **Justice at War**, 42.
- <sup>110</sup>323 U.S. 214 (1944). See also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); *Yasui v. United States*, 320 U.S. 114 (1943) (same).
- <sup>111</sup>*Id.*, 219–20, 223–24.
- <sup>112</sup>*Id.*, 233.



- <sup>113</sup>Irons, *Justice at War*, 72.
- <sup>114</sup>Biddle, *In Brief Authority*, 226.
- <sup>115</sup>Wiley B. Rutledge to Harlan Fiske Stone, June 12, 1943, quoted in Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 676 (New York: Viking Press, 1956).
- <sup>116</sup>Fowler V. Harper, *Justice Rutledge and the Bright Constellation* 173 (Indianapolis, IA: Bobbs-Merrill, 1965).
- <sup>117</sup>William O. Douglas, *The Autobiography of William O. Douglas: The Court Years, 1939–1975*, 39, 279–80 (New York: Random House, 1980). On the other hand, Justice Hugo Black, the author of *Korematsu*, did not find these cases difficult. Years later, he volunteered that “I would do precisely the same thing today.” Justifying his position, Black noted that “[W]e had a situation where we were at war. People were rightly fearful of the Japanese in Los Angeles, many loyal to the United States, many undoubtedly not.” Black added that this was especially problematic because “[T]hey all look alike to a person not a Jap.” “Justice Black, Champion of Civil Liberties for 34 Years on the Court, Dies at 85,” *New York Times* 76 (September 26, 1971).
- <sup>118</sup>Earl Warren, “The Bill of Rights and the Military,” 37 *N.Y.U. L. Rev.* 181, 191–92 (1962).
- <sup>119</sup>Earl Warren, *The Memoirs of Earl Warren* 149 (New York: Doubleday, 1977).
- <sup>120</sup>See Cray, *Chief Justice*, 520.
- <sup>121</sup>See Biddle, *In Brief Authority*, 216–19; Irons, *Justice at War*, 119.
- <sup>122</sup>Quoted in John D. Weaver, *Warren: The Man, The Court, The Era* 113 (Boston: Little, Brown, 1967).
- <sup>123</sup>Presidential Proclamation 4417, “An American Promise,” February 19, 1976, quoted in Yamamoto, *Race, Rights, and Reparation*, 400.
- <sup>124</sup>Commission on Wartime Relocation, *Personal Justice Denied, Part 2, Recommendations*, 5, 8.
- <sup>125</sup>*Korematsu v. United States*, 584 F Supp 1406 (N.D. Cal. 1984).
- <sup>126</sup>584 F. Supp., 1417. See Yamamoto, *Race, Rights, and Reparation*, 293–330; Irons, *Justice at War*, 206–18; Peter Irons, “Fancy Dancing in the Marble Palace,” 3 *Const. Comm.* 35, 48–49 (1986).
- <sup>127</sup>584 F. Supp., 1420. Gordon Hirabayashi also successfully filed a petition for a writ of *coram nobis*. See *Hirabayashi v. United States*, 828 F.2d 591 (9<sup>th</sup> Cir. 1987).
- <sup>128</sup>102 Stat. 903, Public Law 100–383 (Aug. 10, 1988) (codified at 50 U.S.C. app. § 1989(b) (1996)).
- <sup>129</sup>The Civil Liberties Act of 1988 authorized a payment of U.S.\$20,000 to each surviving internee. By 1998, the total payout was \$1.6 billion, paid to 80,000 claimants. See Elazar Barkan, *The Guilt of Nations* 30–31 (New York: Norton, 2000).
- <sup>130</sup>See Dennis J. Hutchinson, “‘The Achilles Heel’ of the Constitution: Justice Jackson and the Japanese Exclusion Cases,” 2002 *Sup. Ct. Rev.* 455, 485 n. 99.
- <sup>131</sup>William M. Wiecek, “The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*,” 2001 *Sup. Ct. Rev.* 375, 417, 428–29.
- <sup>132</sup>Quoted in David Cauter, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* 26–27 (New York: Simon and Schuster, 1978).
- <sup>133</sup>Quoted in Cauter, *The Great Fear*, 27, 28, 33.
- <sup>134</sup>*New York Times* (September 21, 1950).
- <sup>135</sup>64 Stat. 987, 50 U.S.C. § 671.
- <sup>136</sup>Quoted in Cauter, *The Great Fear*, 37.
- <sup>137</sup>*New York Herald Tribune* (December 24, 1947), quoted in Cauter, *The Great Fear*, 429 (emphasis added).
- <sup>138</sup>68 Stat. 775, 50 U.S.C. § 841.
- <sup>139</sup>Irving Howe, “The Shame of U.S. Liberalism,” 1 *Dissent* 308 (Autumn, 1954).
- <sup>140</sup>See generally Ralph S. Brown, *Loyalty and Security* (New Haven, CT: Yale University Press, 1958); Cauter, *The Great Fear*; Frank J. Donner, *The Age of Surveillance: The Aims and Methods of America’s Political Intelligence System* (New York: Alfred A. Knopf, 1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).
- <sup>141</sup>341 U.S. 494 (1951).
- <sup>142</sup>The Alien Registration Act of 1940, known as the Smith Act, declared it unlawful for any person to “teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” 54 Stat. 670–71 (1940), 18 U.S.C. § 2385.
- <sup>143</sup>See Geoffrey R. Stone, “Dialogue,” in Lee C. Bollinger and Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 7–8 (Chicago: University of Chicago Press, 2002) (“[O]ne might say that the Court learns just enough to correct the mistakes of the past, but never quite enough to avoid the mistakes of the present”).
- <sup>144</sup>341 U.S., 510–11.
- <sup>145</sup>*Id.*, 581.
- <sup>146</sup>See, e.g., *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961) (upholding the Subversive Activities Control Act’s requirement that Communist and Communist-front organizations register with the government); *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding a New York law providing that no person who knowingly becomes a member of any organization that advocates the violent overthrow of government may be appointed to any position in a public school); *Barenblatt v. United States*, 360 U.S. 109 (1949) (upholding the power of the House Committee on Un-American Activities to require an instructor at Vassar College to answer question about his past and present membership in the Communist party).
- <sup>147</sup>341 U.S. 716 (1951).
- <sup>148</sup>*Id.*, 720.
- <sup>149</sup>342 U.S. 485 (1952).
- <sup>150</sup>*Id.*, 493.

- 151Wiecek, "Legal Foundations," 379, 429, 434.
- 152Caute, **The Great Fear**, 144.
- 153354 U.S. 178 (1957).
- 154*Id.* at 197. *See also Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
- 155*Yates v. United States*, 354 U.S. 298 (1957).
- 156*Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963).
- 157*Lamont v. Postmaster General*, 381 U.S. 301 (1965).
- 158*Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).
- 159*Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).
- 160Theodore H. White, **The Making of the President 1968**, 369–73 (New York: Simon and Schuster, 1969).
- 161*San Francisco Chronicle* 1 (April 8, 1970).
- 162Henry Kissinger, **White House Years** 513 (Boston: Little, Brown, 1979).
- 163Todd Gitlin, **The Sixties: Years of Hope, Days of Rage** 415 (New York: Bantam Books, 1987).
- 164395 U.S. 444 (1969).
- 165See Frank Strong, "Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg—And Beyond," 1969 *Sup. Ct. Rev.* 41.
- 166See *Bond v. Floyd*, 385 U.S. 116 (1966).
- 167See *Healy v. James*, 408 U.S. 169 (1972).
- 168See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).
- 169See *Smith v. Goguen*, 415 U.S. 566 (1974).
- 170See *United States v. United States District Court*, 407 U.S. 297 (1972).
- 171See *New York Times v. United States*, 403 U.S. 713 (1971).
- 172See Goldstein, **Political Repression**, 445.
- 173Theoharis, **Spying on Americans**, 71; Donner, **Age of Surveillance**, 56 (quoting a memorandum written by J. Edgar Hoover on October 10, 1938).
- 174Goldstein, **Political Repression**, 247.
- 17576<sup>th</sup> Cong., 3d Sess. in 86 *Cong. Rec.* S. 5642 (May 7, 1940) (reading into the record a February 22, 1940 letter from Senator Norris to Robert Jackson).
- 17676<sup>th</sup> Cong., 3d Sess. in 86 *Cong. Rec.* S. 5643 (May 7, 1940) (reading into the record a March 1, 1940 reply from Robert Jackson to Senator Norris).
- 177Goldstein, **Political Repression**, 248; Theoharis, **Spying on Americans**, 40–44.
- 178See Donner, **Age of Surveillance**, 178–84; Theoharis, **Spying on Americans**, 133–52.
- 179Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, Intelligence Activities and the Rights of Americans, Book II, S. Doc. No. 13133–4, 94<sup>th</sup> Cong., 2d Sess. 5–9 (1976).
- 180On the problems of hindsight, see Jeffrey J. Rachlinski, "A Positive Psychological Theory of Judging in Hindsight," 65 *U. Chi. L. Rev.* 571 (1998).
- 181In support of the Sedition Act of 1918, Senator William Borah argued that "[I]f our soldiers are . . . in France for the purpose of maintaining and protecting . . . our form of government, our Constitution and our flag," then "is it too much to ask complete devotion upon the part of those who remain at home to the things for which our boys are fighting and dying upon the western front?" Senator Poindexter expressed exasperation "that, regardless of its effect upon the war," some men "attached so much more importance to the right of free speech, while at the same time we take men's bodies, conscript them into the Army, . . . subject them to the dangers of the firing line" and commandeered their property to "subject it to the purposes of the war." "I should like to know," he asked, "what distinction there is . . . while we are taking their bodies and their property if we also take away from them somewhat of this license of speech which is so much defended?" *Cong. Rec.*, 65<sup>th</sup> Cong. 2d. Sess. 4633, 4637 (April 5, 1918).
- 182323 U.S., 219.
- 183Biddle, **In Brief Authority**, 219.
- 184Rehnquist, **All the Laws But One** 224.
- 185*Id.*, 222.
- 186See Vincent Blasi, "The Pathological Perspective and the First Amendment," 85 *Colum. L. Rev.* 449 (1985).
- 187Clinton L. Rossiter, **The Supreme Court and the Commander-in-Chief** 54 (Ithaca, NY: Cornell University Press, 1951).
- 188320 U.S. 118, 157–58 (1943).
- 189322 U.S. 665, 677 (1944).
- 190For a full discussion of the denaturalization cases, see Kalven, **A Worthy Tradition**, 423–36. The Court also overturned the decision to deport labor leader Harry Bridges, ruling in 1945 that there was no evidence showing that Bridges had any connection with any organization advocating illegal overthrow of the government, except in wholly lawful activities. *Bridges v. Wixon*, 326 U.S. 135 (1945).
- 191319 U.S. 583 (1943).
- 192*Id.*, 586, 590.
- 193322 U.S. 680 (1944).
- 194*Id.*, 683, 689. *See also Keegan v. United States*, 325 U.S. 478 (1945) (overturning the convictions of twenty-four members of the Bund who had been charged with advocating draft evasion).
- 195See Murphy, **Constitution in Crisis**, 227; Kalven, **A Worthy Tradition**, 185–87.
- 196319 U.S. 624 (1943).
- 197*Id.*, 642.
- 198*Duncan v. Kahanamoku*, 327 U.S. 304 (1946).
- 199*Ex parte Endo*, 323 U.S. 283 (1944).
- 200*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>201</sup>Homeland Security Act of 2002, H.R. 5005, 107<sup>th</sup> Cong., §§ 201–4 (2002).

<sup>202</sup>USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (October 26, 2001), §§ 201–25, 302, 501–8.

<sup>203</sup>See the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigation, VI(a)-(b) (2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last accessed 25 August 2003).

<sup>204</sup>See, e.g., *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (2002) (rejecting a proposed interpretation of the Freedom of Information Act that would expand the government's author-

ity to maintain the secrecy of information covered by the Act and holding that the government had not made an adequate showing to justify its refusal to disclose the names of post-September-11 immigration and material witness detainees); *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6<sup>th</sup> Cir. 2002) (requiring greater openness in deportation hearings related to September 11); but see *North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198 (3d Cir. 2002) (upholding new secrecy rules for deportation hearings related to September 11).

<sup>205</sup>*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

# Military Curfew, Race-Based Internment, and Mr. Justice Rutledge

JOHN M. FERREN

The story is well known. A few months after Pearl Harbor, a curfew was imposed on West Coast residents of Japanese ancestry, including American citizens. Then they were confined at internment camps around the country. This tragic episode continues to generate scrutiny, including three new books last year.<sup>1</sup> But there is at least one story, as yet untold, that will be of particular interest to students of the Supreme Court. Why did Justice Wiley Rutledge, the Court's newest member, who was known for his unyielding allegiance to civil liberties, join the majority in allowing internment?

First, the curfew case, then a little about Rutledge, and finally the internment story. In June 1943, in *Hirabayashi v. United States*,<sup>2</sup> the Court resolved criminal charges against Gordon Hirabayashi, an American citizen and university student born to Japanese immigrants in Seattle. He had been convicted of violating two orders issued in the spring of 1942 by Lieutenant General John L. DeWitt, the Pacific Coast military commander, in furtherance of a presidential Executive Order approved by Congress. One DeWitt order imposed a curfew on every person of Japanese ancestry who lived within large coastal sections of California, Oregon, and Washington that the general designated as "military areas." A second series of

orders, called "exclusion orders," required all such persons to leave their homes and report to an assembly center as a "preliminary step" to relocation and internment by the government.<sup>3</sup>

Hirabayashi contended that Congress unconstitutionally had delegated to the military commander its legislative authority to impose the curfew, and that in any event the Fifth Amendment prohibited discrimination "between citizens of Japanese descent and those of other ancestry."<sup>4</sup> In rejecting the first argument, Chief Justice Harlan Fiske Stone wrote for a unanimous Court that Congress itself had "contemplated and authorized" DeWitt's curfew order as a means for enforcing the President's Executive Order, and



Less than four months after the surprise Japanese attack on Pearl Harbor (pictured), a curfew was imposed on West Coast residents of Japanese ancestry, including American citizens. The curfew was followed by an order to confine them to internment camps.

thus that “no unlawful delegation of legislative power” had occurred.<sup>5</sup>

As to the discrimination issue, Stone again spoke for all the Justices. Congress and the President, he wrote, had a “wide scope” for exercising their “judgment and discretion” over the “choice of means” for implementing the war power. Thus, “at a time of threatened air raids and invasion by the Japanese forces,” the Court should evaluate *Hirabayashi*’s Fifth Amendment rights under a highly deferential test, namely:

whether in the light of all the facts and circumstances there was any substantial basis for the conclusion . . . that the curfew as applied was a protective measure necessary to meet

the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.<sup>6</sup>

Even though the Fifth Amendment contained no equal protection clause, Stone conceded, legislative discrimination based on race alone might be serious enough to violate due process. But given the “facts and circumstances” in this “particular war setting,” he concluded, “[we] cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.” Stone wrote that espionage by persons

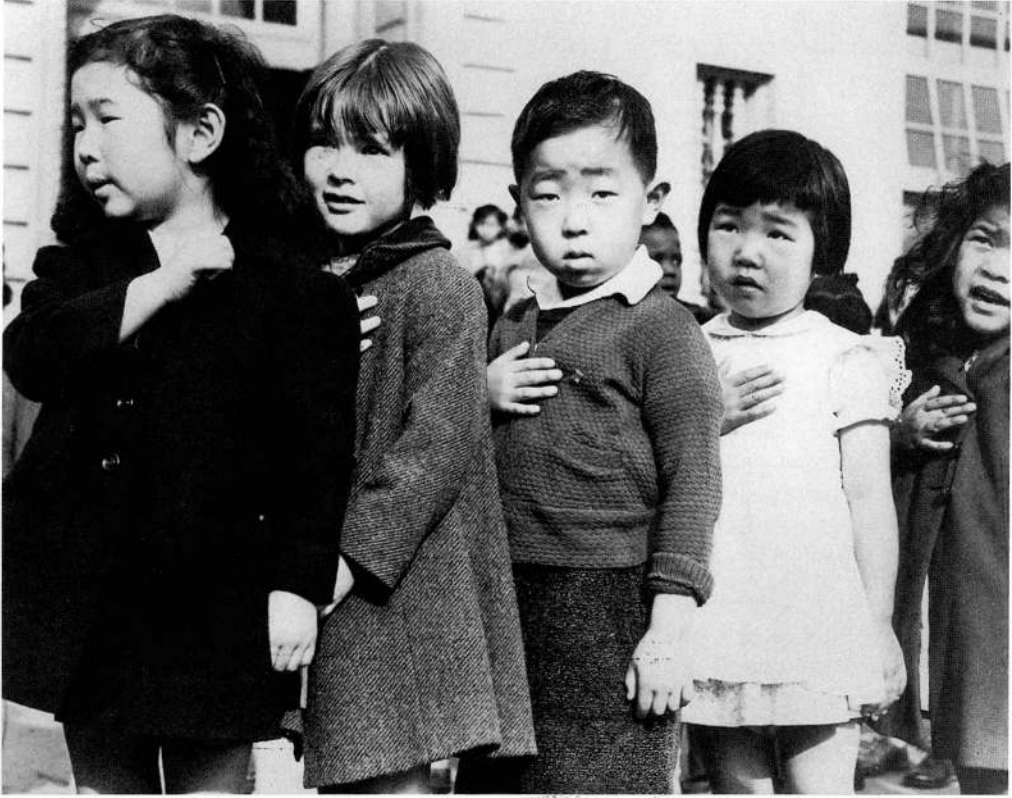


Soldiers posted the Curfew Order in Bainbridge Island, Washington on March 24, 1942.

sympathetic to the Japanese government had been “particularly effective in the surprise attack on Pearl Harbor,” that of the “126,000 persons of Japanese descent in the United States,” approximately 112,000 were concentrated around Seattle, Portland, and Los Angeles, and that “social, economic and political conditions”—code words for legalized racial discrimination of various sorts—had “intensified their solidarity” and “in large measure prevented their assimilation.” This solidarity, observed Stone, was evidenced by the attendance of many children of Japanese parents at “Japanese language schools” in addition to the public schools, and by the attendance of as many as 10,000 of these children at schools in Japan “for all or part of their education.” Accordingly, concluded the Chief, “we cannot

reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained” and “separately dealt with.” Indeed, “it is not for any court to sit in review of the wisdom” of legislative and executive action or to “substitute its judgment” for those charged with implementing the war power. The deferential test was met. The curfew order must be sustained.<sup>7</sup>

Finally, concluded the Chief Justice, because Hirabayashi received concurrent three-month sentences for violating the curfew and the exclusion orders, the Court, in sustaining the curfew, had “no occasion” to consider the redundant conviction and sentence for violating the potentially more intrusive



In his opinion in *Hirabayashi v. United States*, Chief Justice Stone observed that legalized racial discrimination had intensified the “solidarity” of Japanese-Americans, as evidenced by the attendance of many children of Japanese parents at Japanese-language schools or at school in Japan “for all or part of their education.” These children pledged allegiance to the United States flag at a San Francisco public school prior to the relocation order.

exclusion order<sup>8</sup>—a ruling that ignored the fact that Hirabayashi would be left with a criminal record showing two convictions, not one.<sup>9</sup>

Justice William O. Douglas concurred separately. He was not troubled by imposing a curfew, or even temporary detention, on all Japanese Americans. “[W]here the peril is great and the time is short,” he wrote, “temporary treatment on a group basis may be the only practicable expedient. . . . [S]peed and dispatch may be of the essence.”<sup>10</sup> Then, extending his discussion to evacuation and detention, Douglas suggested that, after compliance with the exclusion order, but only after compliance, Hirabayashi and others might have an administrative or a habeas corpus remedy that would allow them to gain freedom by proving

their loyalty—an imperfect remedy, he recognized, but one not foreclosed by the Court’s ruling.<sup>11</sup>

Initially, Justice Wiley Rutledge—and no other Justice—joined Douglas, who in his first draft had included language even more deferential to the military, at least in tone, than the Chief’s. Douglas emphasized that a country, in waging war “to win,” cannot second-guess “the decisions of its generals,” and that a “nation which can require the individual to give up his freedom and lay down his life . . . certainly can demand these lesser sacrifices from its other citizens.”<sup>12</sup>

Justice Frank Murphy alone among the Justices had reserved decision at the conference and soon circulated a dissent, based primarily on the lack of evidence that Japanese

Americans were generally disloyal.<sup>13</sup> But, as Peter Irons has documented in his brilliant study, *Justice At War*, Murphy began to have second thoughts about speaking as a lone dissenter. He may have responded more to gentle nudges from Justice Stanley Reed stressing judicial precedent than to Justice Felix Frankfurter's accusation that Murphy was portraying his colleagues as "behaving like the enemy."<sup>14</sup> In any event, Murphy eventually turned his dissent into a concurrence. He retained paragraphs emphasizing that "[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals," that the treatment of Japanese Americans bore "a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and other parts of Europe," and that the curfew order was at "the very brink of constitutional power." But Murphy concluded, finally, that the "provisions of the Constitution protecting essential liberties" must yield to the military's reasonable conclusion that individual determinations of disloyalty before imposition of a curfew could not have been made "without delay that might have had tragic consequences."<sup>15</sup>

Murphy's law clerk at the time reportedly believed that if any other Justice had signed on to Murphy's dissent, he would not have changed.<sup>16</sup> And Rutledge seemed tempted to do so.<sup>17</sup> Ultimately, however, Rutledge went out on his own, removing his name from the Douglas concurrence and writing a brief concurrence emphasizing disagreement with an implication in Stone's opinion that neither Douglas nor Murphy expressly addressed. Stone had left room for due process review of a military commander's exercise of discretion in wartime. But other language in his opinion supplied by Justice Hugo Black, stating that it was "not for any court to sit in review of the wisdom" of a military judgment,<sup>18</sup> seemed inconsistent with any enforceable protection of civil liberties in a wartime case, unless the military itself decided to offer the protection. That was an absolutist proposition Rutledge could

not accept, so he wrote one paragraph, in part, as follows:

I concur in the Court's opinion, except for the suggestion . . . that the courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring . . . some degree of military control short of suspending habeas corpus. The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen.<sup>19</sup>

It is interesting to note that Rutledge initially drafted a longer concurrence expressing "strong sympathy with Mr. Justice Murphy's views" and calling General DeWitt's order "a racial discrimination only war's highest emergency could sustain" and "something which approaches the ultimate stain on democratic institutions constitutionally established."<sup>20</sup> But Rutledge receded in favor of the one point he published, confined as narrowly as possible to the legal question presented.

Rutledge truly had been torn. Before the Court announced *Hirabayashi* and a companion curfew case, *Yasui v. United States*,<sup>21</sup> he wrote the Chief: "I have had more anguish over this case than any I have decided, save possibly one death case in the Ct. of Appeals."<sup>22</sup> But why the "anguish"? Who, in brief, was Wiley Rutledge?

\* \* \* \* \*

When FDR met Rutledge, the President reportedly said, "Wiley, you have a lot of geography."<sup>23</sup> And indeed he did. The son of a Baptist preacher, Rutledge was born in Kentucky in 1894, grew up in Tennessee, graduated from the University of Wisconsin,



began law school at Indiana, came down with tuberculosis and found treatment in North Carolina, then married his college sweetheart and “chased the cure” by heading west to New Mexico. He taught high school there before moving to Colorado, where he completed law school, practiced for two years, and then began to teach. In 1926, Rutledge joined the law faculty at Washington University in St. Louis, where he eventually became dean, and in 1935 he accepted the deanship at the State University of Iowa.<sup>24</sup>

In St. Louis, Rutledge became an outspoken advocate for the New Deal, and at Iowa he was one of the few law deans in the country who spoke out in favor of Roosevelt’s Court-packing plan. In 1939, he was runner-up to Frankfurter<sup>25</sup> and then Douglas<sup>26</sup> for nomination to the Supreme Court; he received a seat instead on the U.S. Court of Appeals for the District of Columbia.<sup>27</sup> Four years later, upon the resignation of Justice Byrnes, Wiley Rutledge, age 48, received FDR’s last appointment to the Supreme Court.<sup>28</sup>

There were two major reasons for his selection, according to an analysis prepared for the Attorney General: Judge Rutledge’s sound review of “administrative decisions, especially in the labor field,” and his strong commitment to civil liberties.<sup>29</sup> Attorney General Francis Biddle and his assistant, Herbert Wechsler, had been looking for a Justice who would support the more liberal views of Black, Douglas, and Murphy on individual rights, as against the more conservative positions of the other New Deal Justices, Reed, Frankfurter, and Robert Jackson.<sup>30</sup> In Rutledge, they found their man. In fact, in the years ahead, Rutledge, with Justice Murphy, would outdistance Black and Douglas in support of individual rights in both federal and state criminal trials,<sup>31</sup> in proceedings to revoke naturalized citizenship,<sup>32</sup> and in prosecutions for war crimes—in particular, the dissents from military-commission convictions of Japanese generals Yamashita and Homma after World War II.<sup>33</sup>

Pearl Harbor, however, was another matter. Several months before the surprise attack, Rutledge acknowledged to his friend Willard Wirtz, with respect to those who advocated violent overthrow of the government, that “undemocratic controls” might become necessary when it appeared the danger had become so great that our democracy otherwise might not survive. He worried that the “danger with conceding this” would be the tendency to take such action too early.<sup>34</sup> But on the trial record in *Hirabayashi*—more judicial notice than fact—Rutledge was willing to accept at least one undemocratic control: as a way of protecting against espionage and sabotage, a racially discriminatory curfew could be imposed in wartime on a population that embraced mostly loyal Japanese Americans.

Insight into the Justice’s thought process is available through remarks he made at the time to his law clerk, Victor Brudney, in later years a distinguished professor of law at Rutgers and then Harvard. While at the Solicitor General’s office before his clerkship, Brudney had been assigned to examine the constitutionality of a particular aspect of the President’s Executive Order that did not involve the problems suggested by General DeWitt’s directives. In the course of his inquiry, Brudney learned that the FBI, like Attorney General Biddle, had expressed serious doubts about the necessity for imposing sweeping restrictions that applied without differentiation to all persons of Japanese ancestry.<sup>35</sup> Brudney suggested to Justice Rutledge that the Court might benefit from receiving that FBI analysis.<sup>36</sup> More in astonishment than in anger, Rutledge confronted his clerk (as Brudney recalled the words):

What do you think you are doing? Don’t you understand that there are only nine of us sitting here, and that the generals have said this [curfew] is necessary for the preservation and security of the country? Pearl Harbor was attacked and more may happen! Who are we to question this? What



In February 1942, newspapers anticipated the removal of all persons of Japanese ancestry.

makes you think any of us will question this? Too much is at stake, and we are too far removed from the realities. Cut it out!<sup>37</sup>

Rutledge's anguish about the discrimination against mostly loyal Japanese Americans was real, but his inclination to trust military judgment during wartime—while clinging, theoretically, to the Court's right of judicial review—controlled his judgment in *Hirabayashi*. Rutledge wrote from his head in concurring separately to provide assurance that the courts had the power and responsibility to protect against overreaching by generals; but he emoted to Brudney from the heart, revealing fear of further attack on the mainland and judicial incompetence to second-guess military necessity. "This was well before the tides had turned in the war," recalled Brudney, "and the pressure in these matters was simply unbelievable."<sup>38</sup>

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Sixteen months after *Hirabayashi*, on October 11, 1944, a day when *The Washington Post* printed an eight-column headline, "Americans Blast 38 Ships Off Japan,"<sup>39</sup> the Supreme Court began hearing argument in *Korematsu v. United States*.<sup>40</sup> This was the infamous case in which a 6–3 majority upheld the evacuation and exclusion from their homes and, implicitly, the indefinite internment of 112,000 West Coast residents of Japanese ancestry—including 70,000 native-born American citizens—without regard to their loyalty to the United States during World War II.<sup>41</sup> *Korematsu* resolved the issue left open in *Hirabayashi* and upheld the constitutionality of the portions of General DeWitt's exclusion orders requiring persons of Japanese ancestry to leave the designated "military areas" and to gather at "assembly centers."<sup>42</sup> Although the Court's ruling went no further, it



Some groups of evacuees boarded special motor coaches in Seattle, Washington.

was apparent that almost all those “assembled” would leave under military control for indefinite detention at ten “relocation centers” (commonly called “internment” camps) spread from California to Arkansas.<sup>43</sup> The only limitation came in a companion case, *Ex parte Endo*, in which the Court unanimously granted a Japanese American’s demand for release from a relocation center largely because the Justice Department conceded she was “a loyal and law-abiding citizen.”<sup>44</sup>

Here, then, is the *Korematsu* story. On May 30, 1942, a San Leandro, California police officer stopped a young man who claimed to be of Spanish-Hawaiian origin and produced an obviously altered draft registration card in the name of “Clyde Sarah.” He soon acknowledged that he was Fred Korematsu, age 23, occupation welder, born of Japanese parents in Oakland. He was arrested and jailed for violating Exclusion Order No. 34, one of a series that required everyone of Japanese ances-

try in the prescribed military area to leave as a “protection against espionage and sabotage.” No one ever questioned Korematsu’s loyalty to the United States. In September, the District Court found Korematsu guilty of a misdemeanor and entered an order placing him on probation for five years. Despite granting bail, the judge watched helplessly while military police seized Korematsu as he left the courtroom and escorted the young man to an assembly or a relocation center (it’s not clear which) pending his appeal.<sup>45</sup>

At the end of March 1943, the U.S. Court of Appeals for the Ninth Circuit certified Korematsu’s case (along with *Hirabayashi* and *Yasui*) to the Supreme Court. While the two curfew cases were ready for review on the merits, the Court of Appeals posed only a procedural question in *Korematsu*: whether the district judge’s probation order, in which he had failed to impose either a fine or a prison sentence, amounted to a “final decision” ripe for

appeal. The Supreme Court answered “Yes” and returned *Korematsu* to the Court of Appeals for consideration on the merits. Relying exclusively on *Hirabayashi*, the appellate court affirmed the District Court’s order.<sup>46</sup>

The government’s war-power rationale for sustaining the exclusion order was the same as its justification for the curfew, but the real-world sequence of events—compulsory evacuation from one’s home, temporary detention at an assembly center, then indefinite confinement at a relocation center, without any finding of individual wrongdoing—felt exponentially more outrageous than a curfew to those who suffered the consequences. When *Korematsu* reached the Supreme Court again, the Solicitor General, Charles Fahy, tried to duck the reality of confinement by emphasizing during oral argument that the only issue was evacuation, that is, *Korematsu*’s conviction solely for refusing to leave the military area. Questions of detention, he stressed, were not before the Court. *Korematsu*’s counsel Charles Horsky, a volunteer ACLU attorney and formerly a lawyer in the Solicitor General’s office, took the opposite tack. Compelled evacuation inescapably embraced an order to report for temporary detention followed by indefinite confinement; realistically, Horsky emphasized, there was but one, nonseverable order at issue.<sup>47</sup>

Because the Supreme Court did not transcribe oral arguments at the time, the only record of the *Korematsu* argument is the handwritten notes of Colonel Archibald King, the Judge Advocate General’s observer. King’s record shows that the advocates stuck hard to their positions while the Justices tried to pin down whether confinement was part of the case. Under pressure, Fahy acknowledged that temporary detention was necessary to facilitate evacuation. But a temporary hold would open the door to “permanent detention,” Justice Jackson observed. And, interjected Justice Rutledge, “Assuming all that you say, . . . should not the order have given some assurance of the temporary character of the detention?” All Fahy could reply was that this

suggested limitation would impose “too strict a rule” on needed military flexibility.<sup>48</sup>

In conference, according to notes preserved by Douglas and Murphy, the Chief Justice pressed the government’s view. Only violation of the order to leave the area was at issue, argued Stone; General DeWitt’s relocation order had not yet been invoked.<sup>49</sup> Applying the traditional understanding that a court decides only issues squarely presented, Stone was saying that the most severe deprivation, relocation, was not before the Court and would have to await the next case. Stone was wrong here. The exclusion order itself not only required evacuation from the area but also authorized transfer to a relocation center.<sup>50</sup> Moreover, Stone’s distinction between failure to leave and relocation ignored the intermediate step of temporary detention for weeks or even months at an assembly center, usually a racetrack or fairground that housed people in “converted horse stalls.”<sup>51</sup> In any event, Black, Reed, and Frankfurter joined their Chief at conference, while Owen Roberts, Douglas, Murphy, and Jackson called his hair-splitting disingenuous; they perceived a case, fundamentally, of unconstitutional confinement. There must have been more than a little tension—indeed, a moment of high drama on the nation’s highest court—when the most junior Justice, after the others had divided 4 to 4, was ready to speak. Announced Rutledge: “I had to swallow *Hirabayashi*. I didn’t like it. At that time I knew if I went along with that order I had to go along with detention for [a] reasonably necessary time. Nothing but necessity would justify it.” Because of *Hirabayashi*, he concluded, “I vote to affirm.”<sup>52</sup>

Straightaway, Stone assigned the opinion to Black as the Justice most likely to keep the majority intact.<sup>53</sup> Initially, Justice Black made the task easier by proceeding from Stone’s suspect premise: that only exclusion from the area was at issue. Then, relying on *Hirabayashi*, though acknowledging that exclusion was “a far greater deprivation” than a curfew, Black circulated an opinion sustaining the conviction

of “remaining in a prohibited area” without reaching, as he put it, the “constitutional validity of the detention orders.”<sup>54</sup> The truth, however, as Black soon recognized, was that the detention issue could not be rejected out of hand, because the exclusion order itself required everyone affected to gather at assembly centers as way-stations intended “‘to insure orderly evacuation and resettlement’” of Japanese Americans.<sup>55</sup> No one affected could leave the area to live instead with a cousin in Ohio or New Jersey.<sup>56</sup>

In subsequent drafts, therefore, Justice Black expressly acknowledged Korematsu’s argument that the exclusion order embraced temporary, then indefinite, detention, and that these related deprivations should be treated as inextricably linked subsets of one unlawful order.<sup>57</sup> But Black himself continued to treat the three subsets as legally distinct and severable requirements, with only exclusion before the Court untainted by any detention and thus justified by a modest extension of *Hirabayashi*.

Justice Black had circulated his first draft in early November.<sup>58</sup> Almost immediately, Rutledge and Reed signed on without comment. In other chambers, however, Black’s handiwork caused explosions. Justice Roberts saw the exclusion orders and war relocation program, not as a sequence of legally severable steps of increasing severity, but as a “single and indivisible” effort to convict and punish an American citizen “for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.” “I need hardly labor the conclusion,” he pronounced, “that Constitutional rights have been violated.”<sup>59</sup>

Justice Murphy saw the situation in similar terms, calling the exclusion a “fall[] into the ugly abyss of racism.” But unlike Justice Roberts, who focused mainly on the majority’s unwillingness to deal with internment, Murphy reviewed the use of the war power it-

self and found that the government had overreached. “The judicial test” under the war power, wrote Murphy—citing precedent far more stringent than Stone’s rather relaxed test in *Hirabayashi*—is “whether the deprivation is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.” Murphy saw no such danger here that would preclude evaluation of Japanese Americans “on an individual basis,” since “nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these ‘subversive’ persons was not actually removed until almost eleven months had elapsed.”<sup>60</sup> He noted that the British had required only six months to examine the loyalty of 74,000 Germans and Austrians before “alien tribunals or hearing boards.”<sup>61</sup>

Justice Jackson, who at conference had proclaimed, “‘I stop with *Hirabayashi*,’”<sup>62</sup> circulated a curious dissent. He acknowledged the evils that Roberts and Murphy had cited, adding his own complaint that the record gave the Court insufficient information for reviewing the military order. But courts, he added, “never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.” And if a court were to sustain a racially discriminatory military order under the Due Process Clause, wrote Jackson, that would be “a far more subtle blow to liberty than the promulgation of the order itself.” Why? Because a military order, he said, “is not apt to last longer than the military emergency,” whereas an approving court order “for all time” would validate the “principle of racial discrimination in criminal procedure” that would “lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” Accordingly, Jackson seemed to be saying, the very likelihood of

approving a military order that “may overstep the bounds” of the Constitution was reason enough for the courts to forbear from passing in review. Rather than taking the chance of legitimating an unconstitutional order they were in no position to scrutinize, implied Jackson, the courts—for lack of information and expertise—simply should back off and permit the military to do its job.<sup>63</sup>

That sounds like the doctrine of abstention, which would have left Korematsu to his plight. In his last paragraph, however, striking a Janus-like posture, Jackson did an about-face and announced that he “would reverse the judgment and discharge the prisoner.”<sup>64</sup> While he believed he could not review the merits of a military judgment, he would not have the Court be a party to enforcing an order that facially violated constitutional principles. Therefore, because the military had sought a court’s help by initiating the criminal proceeding, Jackson, in effect, would remove that proceeding from the criminal court’s docket and, as a consequence, free Korematsu.

As a matter of law, of course, Justice Jackson did review a military judgment, for he voted to “reverse” Korematsu’s conviction. Probably the only way he could have invoked an abstention rationale would have been to say that the case presented a nonjusticiable political question, a result that would have left the young man entirely without protection aside from the military itself. But Jackson, in the end, was not going to tolerate what he believed would be a perverse outcome; he concluded that courts should not “execute a military expedient that has no place in law under the Constitution.”<sup>65</sup> In answer to Jackson, Justice Frankfurter filed a concurrence to remind that the war power is as much a provision of the Constitution as any other, and that “dialectic subtleties” should not be employed to avoid judicial review of its use.<sup>66</sup>

In the meantime, Justice Douglas was having second thoughts. He, too, had circulated a dissent emphasizing the inevitability of indefinite relocation once someone, such as

Korematsu, had been excluded from a military area and detained at an assembly center.<sup>67</sup> To Douglas, therefore, Justice Black’s opinion was deficient, first of all, in failing even to accept that temporary assembly—and thus at least some period of detention—was inherent in the exclusion order. Douglas recognized that Korematsu had no lawful way of leaving the area without remaining for a while against his will in an assembly center. Nor did Korematsu fall within categories, such as the elderly or the infirm<sup>68</sup> or certain agricultural workers,<sup>69</sup> who might qualify during the assembly period for exemption from relocation. But, possibly because there was an escape route from the assembly centers at least for a few, Douglas offered Black a bargain: Douglas would withdraw his dissent if Black agreed to add a sentence that, while not acknowledging an inevitable link between steps one and three—exclusion and relocation—at least recognized and justified the tight link between steps one and two, exclusion and temporary detention.<sup>70</sup> Douglas believed that the majority opinion would be disingenuous without accepting at least that reality, and he was prepared to retreat from his own view that relocation also was at issue if Black would cure the defect Douglas had identified.

Black agreed. “Some of the members of the Court,” wrote Black in words supplied by Douglas,<sup>71</sup> “are of the view that evacuation and detention in an Assembly Center were inseparable.”<sup>72</sup> But, continued Black quoting Douglas, even if that assembly process “was conceived as a part of the machinery for group evacuation[,] . . . any forcible measure” justified by “military imperative,” such as the evacuation here, “must necessarily entail some degree of detention or restraint.”<sup>73</sup> This military necessity coupling evacuation with temporary detention was constitutional, according to Douglas’s concurrence earlier in *Hirabayashi*, and thus approval of that coupling supplied for Douglas the missing legal piece required for candid approval of the exclusion order in *Korematsu*.

But now the Chief Justice was not satisfied. He was troubled by Black's failure to state expressly that Korematsu's violation of the exclusion order did not necessarily expose him to indefinite detention under a relocation order. Stone was insistent here because Justice Roberts now was arguing forcefully in dissent regarding the inevitability of relocation—the very point that Douglas had abandoned. Black recognized that Stone still was misreading the record. Exclusion and relocation were not legally separable any more than exclusion and assembly were; the exclusion order embraced all three. Nonetheless, Black compromised. Douglas did not object. And in the end, Black wrote: Had Korematsu “left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. . . . It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied *or is certain to be applied to him*, and we have its terms before us.”<sup>74</sup>

At that point, the coherency of Black's opinion unraveled. The terms of an assembly and relocation order *were* before the Court; the exclusion order that Korematsu violated inexorably triggered both kinds of detention, absent an identified, applicable exemption. Indeed, once Black compromised with Douglas by accepting that, for some Court members, temporary detention was in the case, there was no credible way to ignore that indefinite relocation was as well. Perhaps one could try to distinguish temporary assembly from indefinite relocation as meaningfully different in degree for constitutional purposes, but compulsory assembly for weeks or months in a horse stable, although temporary, hardly seems an insignificant detention. Possibly for this reason, therefore, Black personally continued to avoid that kind of distinction. In fact, he began the majority opinion by stressing that any discrimination against “a single racial group” is “immediately suspect,” requiring

“the most rigid scrutiny.” Ironically, as a result, *Korematsu* can be cited today as seminal authority for holding racial classifications of any kind inherently suspect.<sup>75</sup> But despite requiring “rigid scrutiny,” Black did not apply his own test to determine the result here. Instead, he adopted a formalistic analysis that defined the problem away by shifting the focus from the terms of the DeWitt order to the terms of the charge against Korematsu.

Thus, for his own rationale in the majority opinion—in contrast with the alternative added to satisfy Douglas—Black steadfastly employed the fiction that no detention whatsoever was at issue, simply because the prosecutor, in charging Korematsu with failure to evacuate, had not added a count charging failure to assemble.<sup>76</sup> Unlike Douglas, therefore, Black never was willing to confront the constitutional implications of Korematsu's failure to leave the area through the only door legally available marked, in practical effect, “detention exit.” Black accordingly was willing to achieve the government's purpose by deciding a “hypothetical case,”<sup>77</sup> without legitimating what really had been going on. Technically, therefore, one can say that the Supreme Court never upheld relocation and internment. But by acknowledging that “some members of the Court” found that “evacuation and detention in an Assembly Center were inseparable,” the majority opinion effectively sustained major racial discrimination tantamount to imprisonment under the war power and—to use Justice Jackson's analogy—left a loaded weapon ready for use in the next case.

The decision to affirm the Court of Appeals came down 6–3 on December 18, 1944. The majority's unwillingness to deal with the reality that Fred Korematsu and thousands like him faced indefinite confinement was one of the saddest episodes in the Court's history. Because Korematsu was arrested and jailed immediately upon violating the evacuation order, there was no way, under the majority's theory, for him to test the relocation provision



Lieutenant General John L. De Witt (right) was the military commander of the Pacific Coast who directed the evacuation of residents of Japanese ancestry from so-called military areas along the West Coast as a "protection against espionage and sabotage." De Witt used false claims of subversive activities to document military necessity for the evacuation program.



short of leaving home voluntarily for a relocation center. Furthermore, even without regard to relocation, the evacuation and assembly requirements were obviously much more intrusive than was *Hirabayashi's* curfew order. It was disingenuous for the majority to conclude, without elaboration, that the degree of deprivation was legally insignificant. Finally, the Court did not even purport to require trial-court findings that General DeWitt had a basis for his expressed judgment that everyone of Japanese descent inherently was "subversive,"<sup>78</sup> that the military exclusion areas had to be as large as they were, or that there was no feasible basis for checking into loyalty short of evacuation and internment. This failure to insist on a more satisfactory record might have revealed what Justice Department lawyers knew at the time

but were pressured not to disclose to the Court: that DeWitt had documented military necessity for the evacuation program with false claims of subversive activities.<sup>79</sup>

Throughout the circulation of draft opinions, Wiley Rutledge had remained silent.<sup>80</sup> He had signed on with Black before Douglas added the gloss linking exclusion to detention, even though he was aware from chambers research that detention and then relocation were inherent in the exclusion order. Nor, once the detention issue was in the opinion, did Rutledge address the majority's purported severance of relocation from the case. Why was Rutledge so quick to vote for affirmance? And why, during all that was going on, did he watch passively, unlike his active participation in *Hirabayashi*?



The short answer is to take Rutledge at his word: when he agreed to join in *Hirabayashi*, he knew that he was deciding *Korematsu*. *Hirabayashi* and the first *Korematsu* case were argued the same day, May 11, 1943,<sup>81</sup> less than three months after Rutledge joined the Court. Although *Korematsu* at the time presented only the threshold question of whether the defendant's probation order was a final, appealable decision, it was clear to all the Justices that, soon after the curfew challenge was resolved, the Court would have to deal with DeWitt's exclusion order. It was true, of course, that *Korematsu* was challenging constraints far more severe than a curfew. It also was true that Rutledge himself, concurring in *Hirabayashi*, had written that the courts had "power to protect the civilian citizen" when a military officer—though entitled to "wide discretion"—oversteps "bounds beyond which he cannot go."<sup>82</sup> But how was a court to discern such bounds?

Remember Rutledge's exclamation to Victor Brudney while discussing *Hirabayashi*: "Pearl Harbor was attacked and more may happen! Who are we to question this?"<sup>83</sup> There was no satisfactory way, in Rutledge's view, to weigh the constitutional demands of civil liberty against the constitutional authority—and responsibility—to wage war. The "generals have said this [curfew] is necessary for the preservation and security of the country," Rutledge had stressed to Brudney.<sup>84</sup> How, then, the Justice later would have asked himself, can judges question the military judgment of generals who say that evacuation and relocation, too, are necessary?

The answer, of course, should have been that judges are in the business of weighing competing demands and values—in setting the "bounds"—in virtually an infinite variety of difficult situations, including those in wartime. The Constitution, as Rutledge himself well recognized, does not exempt generals from court scrutiny entirely. Judges, thus, are duty-bound to declare when the military strays too far from constitutional values antithetical to the war

power. Indeed, judges did so in World War II. Federal district courts ruled against the military in at least three cases challenging the exclusion of Nazi sympathizers from designated areas near the East Coast.<sup>85</sup> And the Supreme Court itself struck down the continued use of martial law in Hawaii after Admiral Nimitz had testified it still was necessary.<sup>86</sup> In this connection, however, it is important to note that Justice Rutledge had not served in the military, so he did not bring to judicial review of General DeWitt's orders the healthy skepticism of command judgments shared by former officers and enlisted personnel who had seen the military's mindset from the inside. Deference to the military probably came more easily to Rutledge than to many judges.<sup>87</sup>

It is not a stretch, moreover, to understand how an external threat—indeed, a bombing of American territory—would push the Justice's alarm button, allowing him, with profound "anguish" to accept temporary suspension of civil liberty, however racially discriminatory it turned out to be, to protect our very soil, not just our institutions and way of life.<sup>88</sup> He had to know that many American people in the days following Pearl Harbor, especially on the West Coast, were terrified.<sup>89</sup> More fundamentally, he had written earlier in the year, for a symposium on constitutional rights in wartime, not only that "[W]ar is autocratic" but that the present war was "different" in "total scope" from all others in our history, requiring mobilization of society more pervasively—with greater "alterations of power and liberty"—than ever before.<sup>90</sup> Wiley Rutledge the civil libertarian "couldn't bear the thought of those cases coming down," according to his law clerk at the time,<sup>91</sup> but Wiley Rutledge the judge was not about to interfere with the judgment of John DeWitt the general.

In reality, of course, the relocation program was a political, not merely a military, decision—including heavy deference to racial prejudice reflected in demands for internment by western governors and by California

Attorney General Earl Warren, who were loudly opposed to mere evacuation and uncontrolled Japanese-American migration inland.<sup>92</sup> Thus, Rutledge was not deferring simply to military judgment. He was deferring, more significantly, to the President, who ultimately was responsible for that judgment. Wiley Rutledge had profound, even reverential, regard for Franklin Roosevelt. Beginning with the Depression and then during the war, Rutledge saw Roosevelt as a national savior, without whom our institutions themselves might have collapsed and our territory been overtaken. Rutledge believed that Roosevelt had kept our national life whole for the common people. Now Roosevelt was leading the nation—after Wilson's failed peace at Versailles—toward a second chance at a safe world order, if only the Axis powers could be defeated. Roosevelt had appointed Rutledge to the Supreme Court. At some level of consciousness, Wiley Rutledge was not going to turn his back on his President.<sup>93</sup>

There were other human factors affecting Rutledge. The two Justices he respected most at the time were Stone and Black. He had enormous regard for the Chief Justice, a man with strong impulses to protect civil liberties, who so unhesitatingly saw the need to support the government's position first in *Hirabayashi*, then in *Korematsu*. Rutledge occasionally had disagreed with Stone and did not shrink from taking a position contrary to the Chief's. But *Korematsu* was not a patent or an admiralty case. Without a doubt, Stone, who was twenty-two years Rutledge's senior, was a judicial father figure to the much younger and newest Justice, who must have felt that kinship—and the wisdom of that senior judgment—in this case.<sup>94</sup>

Then there was Hugo Black. In contrast with the New-Hampshire-born Stone—the elite Amherst college graduate, Columbia law dean, and Republican Attorney General under Coolidge<sup>95</sup>—Black came from Alabama, earned a law degree from the state university, and served in the United States Senate as a pas-

sionate New Dealer.<sup>96</sup> Eight years Rutledge's senior, Black was more the brother than the elder to his newest colleague. They both came from modest beginnings, and from their earliest years they both were Democrats.<sup>97</sup> Most significantly for *Korematsu*, Rutledge knew Black as a committed civil libertarian and had unqualified respect for Black as a person and as a judge. And they had become friends.<sup>98</sup> Stone, therefore, had been shrewd indeed to charge Black with a writing assignment that, from the initial 5–4 vote in conference, made absolutely clear that the Chief had to hold an uncomfortable Justice Rutledge.<sup>99</sup>

Did Rutledge later have regrets? All who see an indelible national stain when looking back at the relocation program, and who know of Justice Rutledge's strong commitment to civil liberties, are likely to assume that he must have wished at some point that he had voted to reverse in *Korematsu*.<sup>100</sup> Many would like to believe that Rutledge surely must have come to realize—as *Korematsu*'s counsel argued to the Court—that by May 1942, when the relevant exclusion order was issued, “all danger of Japanese invasion of the West Coast had disappeared.”<sup>101</sup> And some people like to say that a reflective Justice such as Rutledge, looking back to December 1944 when the Court issued its opinion, would have seen the folly of the relocation effort and wished he had used the lesson of hindsight to pitch the decision toward preventing another such travesty.<sup>102</sup>

Rutledge, to be sure, never would have wished that he had trifled with the date as of which the Court was obliged to decide the case. Furthermore, even if Rutledge, taking stock, were to have accepted the factors affecting his vote that we have ascribed to his psyche, there is little reason to believe that he would have voted differently in *Korematsu* if given a second opportunity. Rutledge freely corresponded and chatted with friends about his agony over deciding particular cases. His papers at the Library of Congress are full of such talk. But not a word of this sort about *Korematsu* can be found, either in writing or in the memories of

those available for interviews who knew him. There is the possibility, of course, that a man who had been a Justice less than two years when the Court decided *Korematsu* might have come out differently had the case reached him later, when his confidence as a Justice had increased—say, in early 1946, when he dissented from the war-crimes convictions of generals Yamashita and Homma. But, if so, would he not have told somebody and left a record of that? We should add that Justice Rutledge died in 1949; he had fewer than five years after *Korematsu* to reflect.

There can be no doubt that the anguish Rutledge felt over *Hirabayashi* was even more intense when he voted in *Korematsu*. Both decisions went against the very core of who he was and what he believed. From that perspective, perhaps we can understand his silence during Court deliberations after the conference. His pain—his very awareness of what he decided he had to do—may have short-circuited any contribution he otherwise might have made. He may have felt a paralysis of sorts, caught between the military necessity he accepted and the inability of the Court—including Rutledge himself—to come up with an entirely convincing opinion sustaining it. But he took a stand nonetheless, not acknowledging a legal distinction under the war power between a curfew and an evacuation/internment program that even the conservative Roberts and Jackson could discern.

The question remains: did Wiley Rutledge abandon principle out of loyalty to his President, or did he act instead with a kind of courage by coming to grips, intellectually and emotionally, with facts he reluctantly had to agree created a military necessity that justified a constitutionally sound exception to his deepest instincts and principles? Many who knew him best would not hesitate to choose the second answer, but the fact that he accepted Black's first draft and then a draft embracing a second theory without engaging in the debate may say something else to others.

If it demonstrated anything, *Korematsu* showed that virtually an intractable situation can arise in which coherent, satisfactory resolution will be impossible, leading to repercussions from a judicial decision that can last for decades. And yet the judges—as even Justice Jackson finally agreed—cannot walk away. The irony for Wiley Rutledge, when viewed in hindsight, is that he participated in a Court majority that handed down a ruling of a sort he would have berated in other contexts as another “*Dred Scott* decision.”

## ENDNOTES

<sup>1</sup>Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (2001); Erica Harth, ed., *Last Witnesses: Reflections on the Wartime Internment of Japanese Americans* (2001); Eric L. Muller, *Free to Die For Their Country: The Story of the Japanese-American Draft Resisters in World War II* (2001).

2320 U.S. 81 (1943).

<sup>3</sup>Peter Irons, *Justice at War: The Story of the Japanese Internment Cases* 88 (1983); *Hirabayashi*, 320 U.S. at 83–87.

<sup>4</sup>*Id.* at 89.

<sup>5</sup>*Id.* at 89, 92.

<sup>6</sup>*Id.* at 93–95.

<sup>7</sup>*Id.* at 93, 96–99, 100, 101; see William H. Rehnquist, *All the Laws But One* 207 (1998).

<sup>8</sup>*Hirabayashi*, 320 U.S. at 105.

<sup>9</sup>See *Benton v. Maryland*, 395 U.S. 784 (1969) (eviscerating *Hirabayashi*'s “concurrent sentence doctrine”); Rehnquist, *supra* note 7, at 205.

<sup>10</sup>*Hirabayashi*, 320 U.S. at 105, 107 (Douglas, J., concurring).

<sup>11</sup>*Id.* at 109.

<sup>12</sup>William O. Douglas, draft concurring opinion in *Hirabayashi v. United States*, June 7, 1943, Box 79, *Hirabayashi* and *Yasui* folders, Papers of William O. Douglas (hereafter Douglas Papers), Library of Congress, Manuscript Division, Washington, DC, quoted in Irons, *supra* note 3, at 244–45; 390 nn. 44, 52; 391 n. 69.

<sup>13</sup>Irons, *supra* note 3, at 244.

<sup>14</sup>*Id.* at 234, 242, 244–47; compare *id.* at 246 with Howard Ball and Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* 112 (1992) and J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* 308 (1968); Felix Frankfurter to Frank Murphy, June 10, 1943, Reel 127, Papers of Frank Murphy (hereafter Murphy Papers), Bentley Historical Library, University of Michigan,

Ann Arbor, Michigan, used with permission (on film at Library of Congress, Manuscript Division, Washington, DC).

<sup>15</sup>*Hirabayashi*, 320 U.S. at 109, 110, 111, 113 (Murphy, J., concurring).

<sup>16</sup>Irons, *supra* note 3, at 247.

<sup>17</sup>*Id.*; see Wiley Rutledge (hereafter WR) to the Chief Justice [Harlan Fiske Stone], August [sic: June] 12, 1943, Box 68, *Hirabayashi* folder, Papers of Harlan Fiske Stone (hereafter Stone Papers), Library of Congress, Manuscript Division, Washington, DC.

<sup>18</sup>*Hirabayashi*, 320 U.S. at 93; Tinsley E. Yarbrough, **Mr. Justice Black and His Critics** 234 (1988).

<sup>19</sup>*Hirabayashi*, 320 U.S. at 114 (Rutledge, J., concurring).

<sup>20</sup>WR, draft concurrence in *Hirabayashi v. United States*, Box 93, *Hirabayashi* folder, Papers of Wiley Blount Rutledge, Jr. (hereafter Rutledge Papers), Library of Congress, Manuscript Division, Washington, DC.

<sup>21</sup>320 U.S. 115 (1943).

<sup>22</sup>WR to the Chief Justice [Harlan Fiske Stone], August [sic: June] 12, 1943, Box 68, *Hirabayashi* folder, Stone Papers.

<sup>23</sup>Interview with Stanley Temko, September 27, 1995; telephone interview with Herbert Wechsler, October 3, 1995.

<sup>24</sup>Fowler V. Harper, **Justice Rutledge and the Bright Constellation** 1, 4, 7–13 (1965).

<sup>25</sup>See Joseph P. Lash, **From the Diaries of Felix Frankfurter** 154 (1975); 2 Harold L. Ickes, **The Secret Diary of Harold L. Ickes, 1936–39: The Inside Struggle** 539–40, 545–46 (1954); 3 *Sidney Fine, Frank Murphy: The Washington Years* 33 (1984); Max Freedman, ed., **Roosevelt and Frankfurter: Their Correspondence—1928–1945** 482 (1967); Michael E. Parrish, **Felix Frankfurter and His Times: The Reform Years** 274–75 (1982); WR to Irving Brant, January 5, 1939, Rutledge Papers (hereafter all correspondence can be found in the Rutledge Papers unless otherwise indicated); WR to Guy M. Gillette, February 18, 1939.

<sup>26</sup>See *Washington Post*, March 21, 1939, p. 9, col. 3; Jerome Frank to William E. Borah, March 13, 1939, Papers of William E. Borah, Library of Congress, Manuscript Division, Washington, DC; WR to Emmett Ray Feighner, March 14, 1939; WR to Clay Apple, March 20, 1939; WR to Irving Brant, March 20, 1939; WR to William O. Douglas, March 20, 1939.

<sup>27</sup>*New York Times*, March 22, 1939, p. 15, col. 1; Attorney General Frank Murphy to President Franklin D. Roosevelt, March 21, 1939; WR to Irving Brant, March 21, 1939.

<sup>28</sup>89 *Cong. Rec.* 681, February 8, 1943; Felix Frankfurter to WR, January 10, 1943; WR to President Franklin D. Roosevelt, February 15, 1943.

<sup>29</sup>Herbert Wechsler, "Memorandum for the Attorney General," November 12, 1942, Judicial Folder, Attorney General File, Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, New York. Authorship con-

firmed by telephone interview with Herbert Wechsler, October 3, 1995.

<sup>30</sup>Telephone interviews with Herbert Wechsler, October 3, 1995; March 7, 1997.

<sup>31</sup>*E.g.*, *Canizio v. New York*, 327 U.S. 82, 91 (1946) (Rutledge, J., dissenting); *Parker v. Illinois*, 333 U.S. 571, 577 (1948) (Rutledge, J., dissenting); *Michelson v. United States*, 335 U.S. 469, 488 (1948) (Rutledge, J., dissenting); *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting).

<sup>32</sup>*E.g.*, *Knauer v. United States*, 328 U.S. 654, 675 (1946) (Rutledge, J., dissenting).

<sup>33</sup>*In re Yamashita*, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting); *Homma v. Patterson*, 327 U.S. 759, 761 (1946) (Rutledge, J., dissenting).

<sup>34</sup>WR to W. Willard Wirtz, August 6, 1941; *cf.* WR to Virgil Hancher, June 19, 1945 ("I recognize only one limitation on free expression, so far as preventing it is concerned. That is military security in time of war.").

<sup>35</sup>Victor Brudney to author, March 14, 2001 (enclosure); *accord* telephone interview with Victor Brudney, October 3, 1995; Robinson, *supra* note 1, at 104, 114.

<sup>36</sup>Victor Brudney to author, March 14, 2001 (enclosure); *accord* telephone interview with Victor Brudney, October 3, 1995.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*; Robinson, *supra* note 1, at 104, 114.

<sup>39</sup>*Washington Post*, October 11, 1944, p. 1, col. 1–8.

<sup>40</sup>323 U.S. 214 (1944).

<sup>41</sup>Irons, *supra* note 3, at 73; Nanette Dembitz, "Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions," 45 *Colum. L. Rev.* 175, 175 (1945); *Korematsu*, 323 U.S. at 233, 242 (Murphy, J., dissenting).

<sup>42</sup>*Korematsu*, 323 U.S. at 221. In *Hirabayashi*, 320 U.S. at 84, the Civilian Exclusion Order referred to the assembly center as a "Civil Control Station."

<sup>43</sup>*Korematsu*, 323 U.S. at 221; Irons, *supra* note 3, at vii. Even today, on the highway on Mt. Lemmon outside Tucson, Arizona, there is a sign for the "Gordon Hirabayashi Recreation Area at the 'Prison Camp.'" E-mail from Stephen L. Wasby to the Law and Courts Discussion List (March 11, 2001). In his dissent, Justice Roberts called an "Assembly Center" a "euphemism for a prison" and characterized "Relocation Centers" as a "euphemism for concentration camps." *Korematsu*, 323 U.S. at 225, 230 (Roberts, J., dissenting).

<sup>44</sup>323 U.S. 283, 294 (1944).

<sup>45</sup>Irons, *supra* note 3, at 93–94, 153–54; *Korematsu*, 323 U.S. at 216–17; *Korematsu v. United States*, 319 U.S. 432, 432–33 (1943).

<sup>46</sup>Irons, *supra* note 3, at 227; *Korematsu v. United States*, 319 U.S. at 433, 436; *Korematsu v. United States*, 140 F.2d 289 (9<sup>th</sup> Cir. 1943).

<sup>47</sup>Irons, *supra* note 3, at 302–4, 312–16.

- <sup>48</sup>*Id.* at 312, 316–17.
- <sup>49</sup>*Id.* at 320–21.
- <sup>50</sup>*Id.* at 320, 338.
- <sup>51</sup>Robinson, *supra* note 1, at 129; David M. Kennedy, **Freedom From Fear: The American People in Depression and War, 1929–1945** 753 (1999).
- <sup>52</sup>*Id.* at 321–23; conference notes of Justice Murphy, “No. 20, O.T. 1944,” Reel 129, Murphy Papers.
- <sup>53</sup>Irons, *supra* note 3, at 323.
- <sup>54</sup>Draft opinion of the Court by Justice Black, November 11, 1944, Box 116, *Korematsu* and *Endo* file, Rutledge Papers.
- <sup>55</sup>*Korematsu*, 323 U.S. at 221.
- <sup>56</sup>The first exclusion order authorized affected persons to migrate to approved destinations of their choice, but that procedure soon was discontinued because, according to General DeWitt’s final report, “the interior states would not accept an uncontrolled Japanese migration.” Dembitz, *supra* note 41, at 201.
- <sup>57</sup>*Korematsu*, 323 U.S. at 221.
- <sup>58</sup>Irons, *supra* note 3, at 327.
- <sup>59</sup>*Korematsu*, 323 U.S. at 225, 226 (Roberts J., dissenting).
- <sup>60</sup>*Korematsu*, 323 U.S. at 233, 234, 241 (Murphy, J. dissenting).
- <sup>61</sup>*Id.* at 242 n. 16 (Murphy, J., dissenting).
- <sup>62</sup>Irons, *supra* note 3, at 322.
- <sup>63</sup>*Korematsu*, 323 U.S. at 242, 245–48 (Jackson, J., dissenting).
- <sup>64</sup>*Id.* at 248 (Jackson, J., dissenting).
- <sup>65</sup>*Id.* (Jackson, J., dissenting). For a thorough analysis of Justice Jackson’s position see Dennis J. Hutchinson, “‘The Achilles Heel’ of the Constitution: Justice Jackson and the Japanese Exclusion Cases,” 2002 *Sup. Ct. Rev.* 455 (2003).
- <sup>66</sup>*Korematsu*, 323 U.S. at 224, 225 (Frankfurter, J., concurring).
- <sup>67</sup>Irons, *supra* note 3, at 333–34.
- <sup>68</sup>*Id.* at 329.
- <sup>69</sup>Dembitz, *supra* note 41, at 199 n. 92.
- <sup>70</sup>Irons, *supra* note 3, at 334; Bruce Allen Murphy, **Wild Bill: The Legend and Life of William O. Douglas** 234 (2003); Ball and Cooper, *supra* note 14, at 114–15.
- <sup>71</sup>William O. Douglas to Hugo Black, December 6, 1944, Box 113, *Korematsu* folder, Douglas Papers; *Korematsu*, 323 U.S. at 219, 222, 223.
- <sup>72</sup>*Korematsu*, 323 U.S. at 222.
- <sup>73</sup>*Id.* at 219, 223.
- <sup>74</sup>*Id.* at 221–22 (emphasis added).
- <sup>75</sup>*Id.* at 216; see Robinson, *supra* note 1, at 229.
- <sup>76</sup>See *Korematsu*, 323 U.S. at 216, 222.
- <sup>77</sup>*Id.*, 323 U.S. at 231 (Roberts, J., dissenting).
- <sup>78</sup>Dembitz, *supra* note 41, at 192; *Korematsu*, 323 U.S. at 236 and n. 1.
- <sup>79</sup>Kennedy, *supra* note 51, at 757–58.
- <sup>80</sup>Irons, *supra* note 3, at 333.
- <sup>81</sup>*Hirabayashi*, 320 U.S. at 81; *Korematsu*, 319 U.S. at 432.
- <sup>82</sup>*Hirabayashi*, 320 U.S. at 114 (Rutledge, J., concurring). Professor Hutchinson has noted that the Court granted certiorari in *Korematsu* in March 1944 when the war was turning in the Allies’ favor and there were indications that the relocation program would end. Although the Court thus might have found reason to deny certiorari and avoid the detention issue, Hutchinson persuasively suggests that the Justices probably did not want the Ninth Circuit’s *Korematsu* opinion, indiscriminately applying *Hirabayashi*, to stand unscrutinized. Hutchinson *supra* note 65, at 477–78.
- <sup>83</sup>Telephone interview with Victor Brudney, October 3, 1995.
- <sup>84</sup>*Id.*
- <sup>85</sup>*Scherzberg v. Maderia*, 57 F. Supp. 42 (E.D. Pa. 1944); *Ebel v. Drum*, 52 F. Supp. 189 (D. Mass. 1943); *Scheuller v. Drum*, 51 F. Supp. 383 (E.D. Pa. 1943); Dembitz, *supra* note 41, at 226 n. 23, 232.
- <sup>86</sup>*Duncan v. Kahanamoku*, 327 U.S. 304 (1946).
- <sup>87</sup>Interview with Neal Rutledge, September 22, 1995.
- <sup>88</sup>Interview with Neal Rutledge, September 22, 1995; accord interview with Harry Shnideman, November 29, 1995; WR to W. Willard Wirtz, August 6, 1941 (“undemocratic controls” necessary when “danger becomes too great” for “the democratic institution” otherwise “to survive”).
- <sup>89</sup>*E.g.*, interview with Neal Rutledge, September 22, 1995; interview with the Hon. John Paul Stevens, September 28, 1995; interview with Philip B. Kurland, January 29, 1996; telephone interview with Byron Kabot, May 7, 1996; see Rehnquist, *supra* note 7, at 188.
- <sup>90</sup>Wiley B. Rutledge, “Forward,” 29 *Iowa L. Rev.* 379, 380, 381 (1944).
- <sup>91</sup>Interview with Harry Shnideman, November 29, 1996.
- <sup>92</sup>Kennedy, *supra* note 51, at 753; Robinson, *supra* note 1, at 96, 101–2, 117; Rehnquist, *supra* note 7, at 188, 204; Dembitz, *supra* note 41, at 201.
- <sup>93</sup>Interview with Daniel Pollitt (Rutledge son-in-law), September 22, 1995.
- <sup>94</sup>Interview with Neal Rutledge, September 22, 1995; telephone interview with John P. Frank, December 12, 1995.
- <sup>95</sup>Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** 18, 42–48, 81–84, 143–47 (1956).
- <sup>96</sup>Roger K. Newman, **Hugo Black: A Biography** 3, 17–20, 117, 125–230 (1994).
- <sup>97</sup>*Id.* at 3, 6.
- <sup>98</sup>Interview with Daniel Pollitt, September 22, 1995; interview with Neal Rutledge, September 22, 1995; interview with Mary Lou (Rutledge) Needels, May 30, 1996; interview with Jean Ann (Rutledge) Pollitt, June 19, 1996.
- <sup>99</sup>See telephone interview with John P. Frank, December 12, 1995.
- <sup>100</sup>*Id.*
- <sup>101</sup>*Korematsu*, 323 U.S. at 218.
- <sup>102</sup>See Eugene V. Rostow, “Our Worst Wartime Mistake,” 191 *Harper’s Magazine* 193, 197 (September 1945).

# The Supreme Court in Times of Hot and Cold War: Learning from the Sounds of Silence for a War on Terrorism

DOUGLAS W. KMIEC

## Introduction

Justice William J. Brennan once remarked that the Court has never fully developed a jurisprudence of national security. It is simply too episodic, he said.<sup>1</sup> Our present Chief Justice would, it would seem, largely agree, though his own research shows some greater willingness for the Court to superintend—at least after the fact<sup>2</sup>—the actions of the executive in times of war or similar crisis. My assignment in this essay was to ask the question slightly differently; namely, has the posture of the Court differed in times of hot or cold war, and if so, how has it differed? As will be evident momentarily, that question is less helpful to our present circumstance than it might seem. Why? Because, frankly, we are in neither a hot nor cold war, but something quite different<sup>3</sup>—something that has the potential to be not only hot, but blistering, and something which will likely never be fully appreciated as having gone truly cold.

It has been said often that the war on terrorism is not like a conventional hot war. It does not always involve a nation state or sovereign claimant, though it can, as the war in Afghanistan and Iraq suggests. Our enemies do not uniformly aim at military or diplomatic targets, though, as we know from the U.S.S. Cole and embassy bombings, they may. The present war is also likely to be long-lasting with no def-

inite end date—no V-E or V-J Day—because, frankly, we know neither the E nor the J, nor how to define V.

So, too, the circumstance we now confront is not like the Cold War: there is no sinister communistic ideology seeking to undermine democratic thought. Americans generally have only the vaguest notion about the fanatical Islamic beliefs that underlie the hatred of our



Since the attack on the World Trade Center in 2001, the author argues, the United States has entered a new kind of war—one that can be characterized as neither cold nor hot.

al-Qaeda enemies. Our President has repeatedly emphasized that those who attacked us do not represent mainstream Muslim belief, and we hardly fear that the fundamentalists who have declared jihad or war against us will surreptitiously win over the hearts and minds of our youth. Joe McCarthy and the like might have thought a Communist takeover imminent in the 1950s, but in the American home of the twenty-first century, the philosophical influence of radical Islam is more annoying than worrisome. Yet, living today when it may not be safe to work in an office tower or even open the day's mail is unnerving. Surely not a violent overthrow of the republic, but just as surely a more pervasive, deeply troubling, and insidious constraint on American freedom. In this time of coldly calculated terrorist hatred that can boil over anywhere, any time, national security and its reconciliation with civil liberty may be less informed by the Court's past wartime history than even Justice Brennan be-moaned.

In times of terrorist war, history cannot repeat itself, since the nation has not previously been threatened by a fully analogous war-like hatred. The present war is sustained internationally and delivered domestically. It is as likely to result in harm to military personnel as to average citizens. Perhaps the closest analogue to the modern terrorist is the pirate and brigand of old. While the lawlessness of both makes them cousins, the analogy ultimately fails, since the modern cousin can commandeer technological resources that threaten a far broader scope of civilization than a frigate upon the high seas ever could.

With these qualifications, let us briefly examine some of the past decisions of the Court in times of hot or cold war for the information or guidance they do yield. The examination focuses on the competing roles of the political branches and the Court in selected precedents from the Civil War, World Wars I and II, and the various shades of cold war associated with the Korean "conflict" as well as our

“intervention” in Vietnam. What we will see succinctly is that the judiciary has, by conscious, institutional choice, played little role during hot war and reserved its relatively rare attempts at constitutional boundary-keeping to postwar analysis. In cold war, there has been greater, but still infrequent, judicial involvement. In these colder periods, an unvarnished claim of military emergency has not been permitted to dispose of free-speech claims associated even with classified information. The pseudo-normalcy of cold war periods seemingly allows civil-libertarian claims to prevail over asserted military need. Will our present desire for normalcy also incline the Court to be less deferential to military needs in a war on terrorism that has no predicted end? Perhaps. Here, the parallel to the cold war seems useful, but only if the present tenuous peace lasts and the horrible memory of 9/11 recedes.

In reviewing the Court’s role in hot- and cold-war periods and contemplating what its role yet may be in the terrorized times in which we live, several postures of constitutional adjudication emerge. At one extreme, some argue that war should make no difference—the Court is simply duty-bound to protect individual civil liberty, whether or not such impedes military success. At the other end of the spectrum, some contend that the Court cannot be asked to assess military or foreign-affairs decision-making, even that which seems contrary to basic postulates of civil liberty. As discussed below, these various judicial approaches have indeed been proffered by individual members of the Court. That said, no differentiation of hot- and cold-war periods should obscure the Court’s overarching institutional reticence with respect to foreign policy generally. Properly, the Court manifests respect for the constitutional assignment to (and accountability of) the exercise of war power by the political branches. These political actors are in a far better position to measure threat and to gauge public sentiment for meeting it. The political branches are constitutionally designed to undertake such inquires. The

Court is not. Finally, there is the judicial desire to avoid embarrassment and futility. Chief Justice Roger Taney’s judicial disquisition that Congress, not Abraham Lincoln, possessed the power to suspend habeas corpus resulted neither in John Merryman’s release from custody during the Civil War<sup>4</sup> nor enhanced respect for judicial judgment.<sup>5</sup> When Lincoln’s subordinate commander General Cadwalader barred the Court’s officer from even entering the fort where Merryman was held, the judicial power of the United States was reduced to the Chief Justice writing the President a letter in the hope that he might respond favorably. Perhaps it was this unhappy experience that would convince Justice Robert Jackson, fourscore years later, to confess the absence of any role for the Court in the review of military questions. In his dissenting opinion in *Korematsu v. United States*,<sup>6</sup> Jackson opined that “[T]he military reasonableness of [military] orders can only be determined by military superiors . . . [T]he courts wield no power equal to its restraint.”<sup>7</sup> Yet judicial or constitutional nihilism has not been the way of the Court, either. Indeed, it would be Justice Jackson—albeit in a post-World War II and arguably cold-war Korean “conflict” period—who would join a Court majority to curtail executive military power and presume to supply a detailed template for how the Court would assess such disputes in the future.<sup>8</sup> In many ways, Jackson’s qualification of Jackson serves to frame the ambivalence of the Court’s approach to the review of military questions.

More on Justice Jackson’s dissent to himself later, but first let us look at what academic scholars almost uniformly condemn—the Japanese exclusion cases. Of course, this brings us to the threshold of hot war.

## I. Hot War

### A. Judicial Endorsement of War Power

It is fair to construe the Court’s unanimous 1943 opinion in *Hirabayashi v. United States*<sup>9</sup> as a full-throated judicial endorsement of the



military decisions of war. Gordon Hirabayashi was a senior at the University of Washington who was convicted of violating the curfew and exclusion orders of the military on the West Coast in May 1942.<sup>10</sup> The Ninth Circuit affirmed his conviction and certified questions of law to the Court.<sup>11</sup> As indicated, the Court's disposition was without dissent, though there is some historical evidence that a dissent was only narrowly averted; some writers claim one was even suppressed.<sup>12</sup> Hirabayashi had received a concurrent sentence for the curfew and exclusion violations, but in order to write the broadest possible endorsement of wartime action, Chief Justice Harlan Fiske Stone confined his analysis to the curfew provision alone.<sup>13</sup>

After reciting various procedural matters, Stone's opinion began by referencing the comment of Charles Evans Hughes that "The war power of the national government is 'the power to wage war successfully.'" <sup>14</sup> The President and Congress were described as having a wide constitutional scope for the "exercise of judgment and discretion."<sup>15</sup> Moreover, wrote the Chief Justice, "[I]t is not for any court to sit in review of the wisdom of [the] action of the [political branches] or substitute its judgment for theirs."<sup>16</sup> The Chief Justice admonished that military decisions were to be judged not at the time of opinion, but in light of the war conditions prevailing when those military decisions were made.<sup>17</sup> Thus, in *Hirabayashi*, factual averments included not only the Japanese surprise attack of December 7, 1941 at Pearl Harbor, but also the judicial acceptance of the military argument that the Japanese had thereby gained "naval superiority," and that therefore "reasonably prudent men . . . had ample ground for concluding that they must face the danger of invasion, [and] take measures against it."<sup>18</sup> To the argument that these measures could not include a curfew applicable only to persons of a given ancestry, rather than to those few who might be judicially found to be disloyal, the Court responded in the negative.<sup>19</sup> Wrote the Chief Justice, "[W]e

think that constitutional government, in time of war, is not so powerless and [it] does not compel so hard a choice if *those charged with the responsibility of our national defense* have reasonable ground for believing that the threat [of sabotage and espionage] is real."<sup>20</sup>

In adopting and applying this posture of minimal scrutiny against a claimed loss of individual liberty based on generally illicit criteria, the Court readily accepted the military's proffered suppositions. Military affidavits recited that Army and Navy bases were located in proximity to the suspect population, that espionage by persons sympathetic to Japan played a role in Pearl Harbor, and even that Japanese-Americans, for various reasons, had not been fully assimilated into the larger population.<sup>21</sup> These race- or ethnicity-specific qualities would readily run afoul of the Due Process Clause in peacetime—or, today, the Equal Protection Clause that has been judicially incorporated within it. But in time of hot war, the Court concluded that it was the military, not the Court, that must "scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."<sup>22</sup> That racial distinctions in other contexts were repugnant, said the Court, did not matter in wartime.<sup>23</sup>

Does the Court's deference in *Hirabayashi* have any limit? In the words of Chief Justice Stone, "We need not now attempt to define the ultimate boundaries of the war power."<sup>24</sup> Justice William Douglas was less generous, but hardly more specific.<sup>25</sup> In his concurrence, he accepted the proposition that "military measures of defense might be paralyzed if it were necessary to try [individual issues of loyalty]. But a denial of that opportunity in this case does not necessarily mean that petitioner could not have had a hearing on that issue in some appropriate proceeding."<sup>26</sup> What that appropriate proceeding might be, Justice Douglas did not say, and the internal deliberations of the Court suggest that Douglas himself could not define such review. Indeed, Justice Hugo Black complained to Justice Felix Frankfurter that Douglas was seeking to bring "a thousand

habeas corpus suits in the district courts.”<sup>27</sup> Justice Jackson thought the idea of individual loyalty review so farfetched that he labeled it a “hoax.”<sup>28</sup> Nevertheless, one commentator reports that Justice Douglas groused about the Stone opinion as being overly favorable to the military and its “perception of the likelihood of a Japanese invasion.”<sup>29</sup>

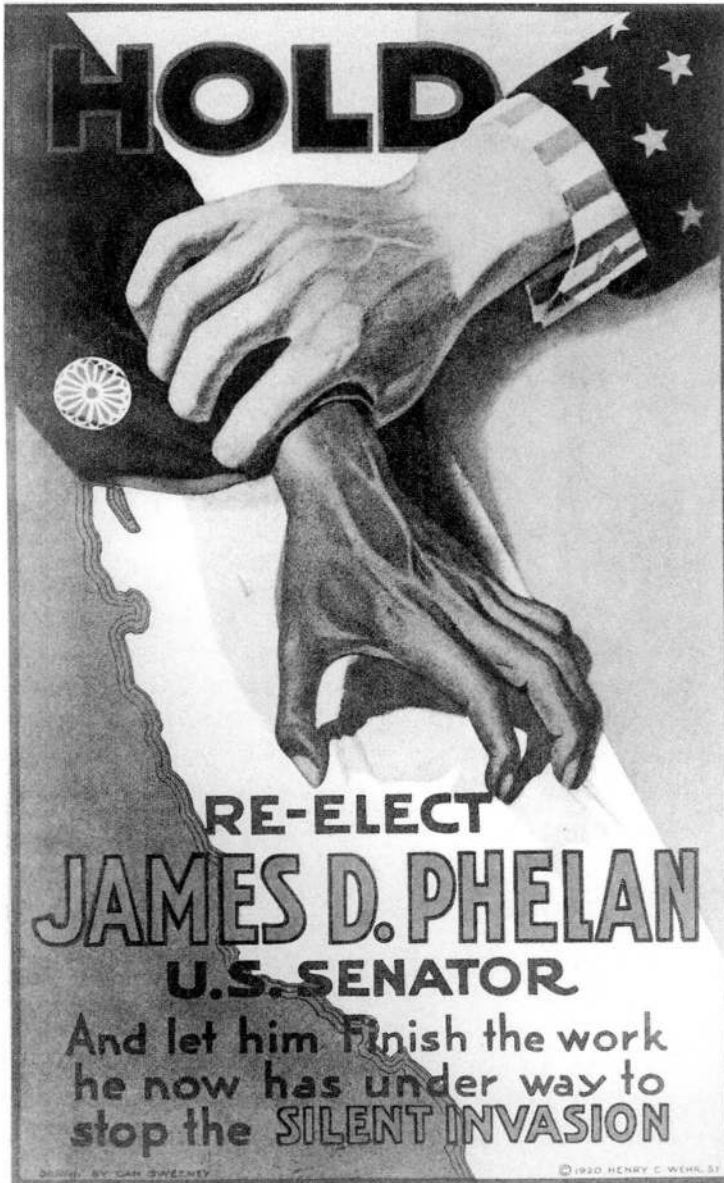
Justice Douglas’s attempt to at least contemplate, if not fully define, a method of judicial review of some sort has contemporary resonance. It is, of course, quite similar to the present debate over whether the judiciary may superintend the military’s capture, classification, and continued detention of alleged “enemy combatants” in the war on terrorism. As this is written, counsel for Yaser Esam Hamdi, caught warring against the United States and the Northern Alliance in Afghanistan, argues for some *ex parte* judicial review of the factual basis for his confinement.<sup>30</sup> The military, through the Department of Justice, has resisted this.<sup>31</sup> Fearing disclosure of classified information, and arguing that the district court’s “production order leaves no doubt but that the district court applied an improper, *de novo* standard of review to the military’s determination that Hamdi is an enemy combatant,” today’s government lawyers are unconsciously borrowing from the hot-war precedent of *Hirabayashi*.<sup>32</sup> In initially remanding the matter to the trial court,<sup>33</sup> and in subsequently dismissing Hamdi’s habeas petition as a matter of law,<sup>34</sup> the Fourth Circuit similarly admonished that “[A]llowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Article I and II on their heads.”

Deference, whether in the hot war of World War II or the present circumstance, has never played well with the academic mind that insists, from the comfort of armchair study, that there be greater judicial intervention to ensure the subordination of military to civilian power and accountability. Both are desirable, and the academic nostrum that “[t]he Court must review the exercise of military power in

a way which permits ample freedom to the Executive, yet assures society as a whole that appropriate standards of responsibility have been met” is unassailable.<sup>35</sup> Yet such bromides exist at too high a level of generality to resolve real cases. The problem of generality is lessened if one focuses on what the academics condemn most strongly in the military decision-making of the hot war of World War II: that is, the express or implied racial stereotype applied by General John DeWitt, the source of most of the military relocation orders on the West Coast. The general did employ harsh, racially tinged terminology in his reports. In times of war, this is at least an understandable, even if not excusable, description of how one describes an enemy.<sup>36</sup>

That covert racial hatred existed as an additional motivation is surely contemptible, and as Chief Justice William Rehnquist has commented, “[I]t is difficult to defend [the] mass forced relocation under present constitutional doctrine.”<sup>37</sup> Yet criticism of unequal treatment hardly answers or denies the military concern of avoiding espionage and sabotage by those who bore systematic inequality and lived in proximity to war defense plants in a geographic area of the country that feared invasion. The menace of the “fifth column,” as espionage was then called, was hardly unknown in the war in Europe.<sup>38</sup> Moreover, a presidential commission, not just a single military commander, had documented that “[e]spionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor.”<sup>39</sup> The Commission was chaired by Associate Justice Owen J. Roberts. Although the Commission report did not reference sabotage, “It did enumerate in detail the espionage activities of Japanese residents in Hawaii, and helped turn the tide in favor of stricter measures.”<sup>40</sup>

Chief Justice Rehnquist suggests that the Court might have drawn a distinction between the relocation of Japanese nationals and their native-born children.<sup>41</sup> Given the plenary authority over alienage, this is plausible, yet



Racial and ethnic segregation of Japanese immigrants predated the World War II exclusion orders. Discriminatory state laws precluding intermarriage and naturalized citizenship prevented Japanese assimilation. This 1920 senatorial election poster shows that racial hostility had been in place for decades.

the military order actually fashioned and presented to the Court was broader than this. It is doubtful whether Chief Justice Stone would have insisted that the military address only the clearest cases of risk. Indeed, by virtue of the Nationality Law of Japan, even some of the children of Japanese citizens at the time retained dual citizenship.<sup>42</sup> Fine-grained distinctions were not reconcilable with the exigency. As Chief Justice Stone wrote, "The extent of

[the] danger [of espionage and sabotage] could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."<sup>43</sup>

### B. The Attempt to Say Nothing

Thus far, we have focused on the Court's unanimous and largely unequivocal affirmation of military power in a time of hot war. This unanimity disappeared in the famous—or infamous—case of *Korematsu v. United States*.<sup>44</sup> In *Korematsu*, the Court upheld, 6–3, the criminal conviction of Fred Korematsu, a Japanese-American, for failing to observe his exclusion from a military area on the West Coast.<sup>45</sup> The basis for the exclusion was the same presidential executive order and ratifying act of Congress that were at issue in *Hirabayashi*.<sup>46</sup> Chief Justice Stone assigned the main opinion to Justice Black, whose civil-libertarian credentials were already well established. Black wrote simply and directly: “In

the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”<sup>47</sup> Black admitted that exclusion was more intrusive than curfew, but it also had “a definite and close relationship to the prevention of espionage and sabotage.”<sup>48</sup> That said, the Court was careful to take one case at a time, and in an opinion of the same day, the Justices would differentiate authority to exclude from authority to detain, at least as the latter related to someone of conceded loyalty.<sup>49</sup> Nevertheless, the Justices perceived the military's judgment to exclude as reasonable in context,<sup>50</sup> and the Court was not going to say



This January 1942 cartoon shows Associate Justice Owen J. Roberts as a physician offering medicine from a bottle labeled “Truth about Pearl Harbor” to Uncle Sam. Roberts’s special investigating commission reported that the disaster was due to “dereliction of duty” and “errors of judgment” by the military commanders in Hawaii. It also found that “Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack.”



Might the Court have drawn a distinction between the relocation of Japanese nationals and their native-born children? The author doubts that the Court would have addressed only the clearest cases of military risk, particularly since some children retained dual citizenship in Japan.

otherwise, even though the decision was again said to manifest racial prejudice, or what today would be called racial profiling. Justice Black dealt with the race argument in a commonsense fashion:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in

our military leaders—as inevitably it must—determined that they should have the power to do just this.<sup>51</sup>

More interesting for our present inquiry into the Court's approach to military matters is the debate between Justices Frankfurter and Jackson over what, if anything, the Court should say while deferring to the military's judgment. Justice Jackson formally did not defer to the military in *Korematsu* (he dissented), even as he was willing to concede that the military's approach was reasonable military precaution.<sup>52</sup> Jackson thus attempted to separate military necessity from constitutional integrity. He wrote, "[I]f they were permissible military procedures, I deny that it follows that they are constitutional."<sup>53</sup> Jackson's argument was that "[M]ilitary decisions are not susceptible of intelligent judicial appraisal."<sup>54</sup> In words that echo the modern debate over what

latitude military tribunals should have to consider hearsay or other evidence outside federal evidentiary rules, Jackson commented that military decisions “do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy.”<sup>55</sup>

In all this, Justice Jackson was not just making an argument of nonjusticiability. It was not simply a political question for him. The absence of manageable standard gave Jackson pause, but it was ultimately the legacy that a judicially standardless opinion would leave that prompted Jackson’s admonition of judicial silence.<sup>56</sup> Military orders, right or wrong, constitutional or not, he supposed, are transient things, but a judicial opinion justifying them under the Constitution is dangerous:

The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. . . . 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.<sup>57</sup>

Jackson needed no further proof of his claim than the slide from curfews in *Hirabayashi* to the acceptance of exclusion in *Korematsu*.

In response, Justice Frankfurter argued that Jackson could not simply declare military power to be outside constitutional analysis.<sup>58</sup> “The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace.”<sup>59</sup> Moreover, the Court had a special obligation, argued Frankfurter, to construe the document “in the context of war.”<sup>60</sup> Such construction was admitted to be

different than peacetime. An “action is not to be stigmatized as lawless because like action in times of peace would be lawless.”<sup>61</sup> This, of course, did not mean that Justice Frankfurter approved of the military action. That, he quickly reminded us, was not his job, nor was it that of the Court: “That is their business, not ours.”<sup>62</sup> So what level of judicial inquiry did Frankfurter recommend? It is unclear. On the one hand, he wrote that the business of war was the military’s.<sup>63</sup> On the other hand, he suggested that review of military action is of no greater strain on judicial capability than the Court determining whether Congress has stayed within the commerce power.<sup>64</sup> I take Justice Frankfurter at his word, though modernly one might think the judicial tongue to be planted firmly in cheek.

### C. Saying as Little as Possible

On the same day as *Korematsu*, the Court announced its decision in *Ex parte Mitsuye Endo*.<sup>65</sup> Endo was conceded by the War Department to be a loyal citizen, and, by means of habeas corpus, challenged her continued detention.<sup>66</sup> The Court, per Justice Douglas, decided unanimously in her favor.<sup>67</sup> Two things are noteworthy. First, in the best of our constitutional tradition, the Court declined to reach out for an unnecessary constitutional argument when the case could be more narrowly decided on the proposition that the War Relocation Authority, a civilian entity, simply lacked implied authority to detain an admittedly loyal citizen. Second, the Court emphasized that it was disciplining, not the military directly, but its civilian delegate. Some may consider these matters to be judicial fig leaves, but they supply plentiful and important cover for this reason: unlike the Jackson dissent of *Korematsu*, they at least provide rudimentary tools of analysis that allow the Court to be more than an agnostic sideline observer. For this reason, they are also compatible with Justice Jackson’s admonition not to leave a “loaded gun”<sup>68</sup> lying about to injure important civil liberty.

The Court's deference to military authority emerged intact in *Endo*. That deference can be seen in the words of the opinion and its timing. In language, Justice Douglas freed Endo, but he did "not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary."<sup>69</sup> Judicial deference to political decision-making could also be seen in the Court's willingness to delay the announcement of its opinion until after the President had decided to allow loyal Japanese to be released from internment camps generally.<sup>70</sup> Political scientists criticize the Court for this delay, but in truth, it was salutary.<sup>71</sup> Chief Justice Stone was advancing constitutional comity, merely seeking to avoid gratuitous judicial embarrassment of the executive.

#### D. Contemporary Application

In light of our present wartime conditions, one additional feature of *Endo* is noteworthy: the Court pointedly did not question the jurisdiction of military tribunals. Citing *Ex parte Quirin*,<sup>72</sup> the Court specified that it was not construing the extent of the military's permissible jurisdiction, as it had done in *Ex parte Milligan*<sup>73</sup> after the Civil War.<sup>74</sup> This nodding acceptance of military jurisdiction should not obscure the fact that reconciling the competing roles of military and civilian courts is difficult. Figuring out this puzzle is very much a part of the present circumstance of a festering war on terrorism. Are detainees "enemy combatants," or criminal defendants? Pre-9/11, in a time of peace and prosperity, attacks upon federal buildings and the World Trade Center itself were unquestioningly routed to federal district court. Even then, there were some who openly questioned whether the competing interests of national security and fair-trial guarantees were compatible. After the more recent and more devastating attack of 2001, it was again supposed that

even foreign terrorists could be disposed of by the normal rules of criminal procedure. Not to proceed with traditional criminal charges, trials, and sentencing procedures, civil libertarians contended, would signal that the terrorists had actually won. Is this unassailable? By the reckoning of Justice Jackson's dissent in *Korematsu*, perhaps normal peacetime process ought not be subjected to the inevitable distortions necessary to accommodate wartime necessity.

For reasons that now seem elusive or, at best, naive, Zaccarias Moussaoui—arrested in Minnesota before he could put his nascent flight school training to evil use—was directed into criminal court and labeled a criminal defendant.<sup>75</sup> Arguably, he should have been labeled an enemy combatant, like his almost identical counterparts, Yaser Esam Hamdi and Jose Padilla, who are locked in a military brig, subject to interrogation and detention for the length of the war.<sup>76</sup> Hamdi and Padilla are nominally U.S. citizens, a fact that makes Mr. Moussaoui's "peace-time-like" treatment all the more ironic. Indeed, all the benefits of the ill-fitting criminal path have flowed to Moussaoui. He has alternately fired his publicly subsidized counsel and obliquely invited their help.<sup>77</sup> And when not equivocating over whether to plead guilty (or at least half-guilty), he fires off handwritten motions that contain more epithet than reasoning. All of this has meant delay and of course, because of the due process observed in garden-variety criminal practice, no questioning of him has been possible to learn how we might avert additional terrorist attack.<sup>78</sup>

Now some bigger terrorist confederates have been captured, most notably Ramzi bin al-Shibh, who was arrested in Pakistan in September 2002.<sup>79</sup> Mr. bin al-Shibh, a 30-year-old Yemeni man, is—through financial transaction, planning, and otherwise—believed to be a ringleader of the 9/11 attacks.<sup>80</sup> For example, Mr. bin al-Shibh allegedly had a penchant for sending Moussaoui and the other hijackers financial subsidies.<sup>81</sup> It should come



as no surprise that Mr. Moussaoui's sometime public defenders want to subpoena Mr. bin al-Shibh and Khalid Shaik Mohammed, the operations chief for al-Qaeda. As a matter of federal law in a capital case, they may have that right as the district judge has ruled.<sup>82</sup> Only one problem: Mr. bin al-Shibh and Mr. Mohammed are being held at an undisclosed location, and the essence of their interrogation is properly classified.<sup>83</sup> And without access to essential witnesses, either the case will need to be extended indefinitely or Mr. Moussaoui will be given some diluted form of confrontation. Neither outcome is a good one. As this is going to press, the Justice Department has urged the district judge to drop the Department's indictment of Moussaoui as a strategic way to appeal to the Fourth Circuit the trial judge's ruling upholding Moussaoui's subpoena. The Department has argued that "the Constitution does not require, and national security will not permit, the government to allow Moussaoui, an avowed terrorist, to have direct access to his terrorist confederates who have been detained abroad as enemy combatants in the midst of a war." The Department is almost surely right in that statement, except that, having chosen to charge Moussaoui in a federal court, a fair trial without access to material witnesses is impossible.

Might the Department of Justice be wise to create new quarters in a military brig outside the United States, where Mr. Moussaoui and our national security could more comfortably coincide? At least there, to use Justice Jackson's terms, the "transient" nature of military need would not permanently alter the rule of law.<sup>84</sup> And if Mr. Moussaoui is to face charges, they could be brought before a military tribunal, which, while not immune from the obligations of witness confrontation, does allow—by conscious, advance design—greater evidentiary flexibility to the presiding officer.

While the prescription to keep Mr. Moussaoui out of the peacetime judicial process follows Justice Jackson's caution to avoid

littering the law with war-specific precedent, the proceedings in the Fourth Circuit with reference to Mr. Hamdi parallel Justice Douglas's approach in *Endo*.<sup>85</sup> Following the September 11, 2001 attack on the United States, the President, with congressional approval, ordered U.S. armed forces into Afghanistan to subdue al-Qaeda and the governing Taliban regime. In the process, thousands of enemy combatants were captured, including Hamdi, who was armed, on the field of battle, and fighting for the Taliban.<sup>86</sup> Hamdi was initially taken to the Naval Base in Cuba for questioning, but was transferred to the military brig in Norfolk, Virginia, when it was learned that he was born in Louisiana and may not have renounced his citizenship.<sup>87</sup>

In February 2002, the President determined Hamdi and others like him to be unlawful enemy combatants outside the prisoner-of-war protections of the Geneva Convention.<sup>88</sup> Nevertheless, when a series of habeas petitions were filed on his behalf, a federal district judge ordered that Hamdi be allowed to meet with counsel in an unmonitored setting.<sup>89</sup> The Fourth Circuit reversed.<sup>90</sup> Taking a page from Justice Douglas in *Endo*, Chief Judge J. Harvis Wilkinson reminded his brother judge at the trial level that "[T]he order arises in the context of foreign relations and national security, where a court's deference to the political branches is considerable."<sup>91</sup> "The federal courts have many strengths," Judge Wilkinson continued, "but the conduct of combat operations has been left to others."<sup>92</sup> To judicially contradict the President on Mr. Hamdi's status as an enemy combatant—or even just to allow unmonitored access to counsel—has "sweeping implications for the posture of the judicial branch during a time of international conflict . . .," reasoned the court.<sup>93</sup> By the same token, Judge Wilkinson was not initially prepared to dismiss the action.<sup>94</sup>

On remand, the Defense Department supplied a sworn affidavit as to the facts of Hamdi's capture. This, too, did not satisfy the trial judge, but following *Endo* and its



caution not to write more broadly than necessary in this security-sensitive field, the Fourth Circuit reversed again, although on very narrow grounds.<sup>95</sup> The appellate court found that habeas review was reasonably satisfied with the government's sworn declaration reciting that the defendant was captured armed and in league with hostile forces in a combat zone and that the decision to detain was a proper exercise of war power. Were this not sufficient, Judge William B. Traxler stated at oral argument, "[y]ou would have judges making credibility decisions on actions taken during a war and overseeing decisions made by the military."<sup>96</sup> Indeed, the appellate court noted that the district judge had demanded copies of all of Hamdi's statements, notes taken by interviewers, the names and addresses of all interrogators, the statements of those foreign nationals who had taken immediate custody of Hamdi, and more. "The risk created by this order," reasoned the Fourth Circuit, "is that judicial involvement would proceed increment by increment, into an area where the political

branches have been assigned by law a preeminent role."<sup>97</sup>

To summarize, hot-war precedent seems to be guiding the early judicial response to the war on terrorism. It is highly deferential to military decision. This judicial approach is not without its critics. Insofar as the Attorney General has launched investigations focused on individuals with characteristics in common with those who attacked our nation on 9/11 (e.g., Islamic fundamentalists; those associated with Muslim charities suspected of laundering money; those traveling to or from destinations in the Middle East known to harbor terrorists; and so forth), allegations of racial profiling fill the air. Racism deserves condemnation, but the use of the term sometimes obscures more than it reveals. As Justice Douglas observed years later about the Japanese relocation, "It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country . . . . But those making plans for defense of the Nation had no such knowledge and were



In 1988, President Ronald Reagan signed into law the Civil Liberties Act, which supplied U.S. \$20,000 in reparations to Japanese internment-camp survivors and their next of kin.



In 1814, General Andrew Jackson declared martial law in the city of New Orleans in response to the British capture of the area. Although the Treaty of Ghent ended the war on Christmas Eve 1814, Jackson deliberately suppressed word of peace in order to maintain military authority until March 1815. The battle depicted above took place on January 8, 1814.

planning for the worst.”<sup>98</sup> If individual injustice results from wartime necessity, it is more likely remedied outside the judiciary. True, some lower courts would respond to *coram nobis* petitions to effectively expunge the *Hirabayashi* and *Korematsu* convictions.<sup>99</sup> Yet efforts to obtain monetary reparation through the judicial branch failed.<sup>100</sup> Ultimately, it would be the political branches who would attempt to rectify (as best as money can ever rectify anything)—in peacetime—the perceived necessities of war. President Reagan signed into law the Civil Liberties Act of 1988, which supplied U.S.\$20,000 in reparations to internment-camp survivors and their next of kin.<sup>101</sup>

## II. Cold War

Cold war as a concept is a bit elusive. It cannot simply mean the absence of U.S. troops in hostile territory, since the United States has seldom not been militarily engaged somewhere in the world. Nor, for the sake of analytical

completeness, would one necessarily limit this term to the more colloquial 1950s and 1960s and a concern with subversive communist influence. In this essay, the term is used more broadly to refer to periods of time in which the domestic soil of the United States itself was not perplexed by hostility. When one’s own territory is threatened, in dispute, or under siege, as it was in the War of 1812,<sup>102</sup> the Mexican-American War, the Civil War, and World War II, the war is hot. At other times, it is fair to say the war is cold (or at least colder)—often fought through the skirmishing of diplomatic endeavor, targeted but not continuous military engagement, and intelligence and counterintelligence. Does the Court’s appraisal of constitutional authority differ in these cold-war periods? The short answer is yes. In periods of cold war, judicial review is more searching. In his now colloquial “clear and present danger” test,<sup>103</sup> Justice Oliver Wendell Holmes told us that context matters, and it does. In the first part of this essay, surveying hot-war judicial review,

executive power was largely conceded. By contrast, the different—less apparently exigent—context of cold war invites the Court to inquire more directly into the origin, scope, and purposes of executive power.

#### A. The Constitution and Foreign Affairs Power—The “Inherent” Executive Advantage

The design of the Constitution leaves questions of foreign affairs opaque. In concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>104</sup> Justice Jackson lamented:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.<sup>105</sup>

Jackson wrote these words as a prelude to a concurrence that, remarkably and quite unusually, would second-guess and set aside executive or military decision-making.

Why is the *Youngstown* outcome unusual? Because, notwithstanding the textually divided allocation of authority over matters of war between legislative and executive branches in the Constitution, the Court has long recognized that the President has inherent power in the area of foreign affairs. This is especially true in those foreign-affairs contexts that bear most closely upon matters of national security. As Acting Attorney General John K. Richards

nically summarized in legal advice in the late nineteenth century:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President . . . In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory, . . . the President is not limited to the enforcement of specific acts of Congress. [The President] must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.<sup>106</sup>

The notion of inherent presidential authority in foreign affairs has been derided by academics and said to flow only from dicta in *United States v. Curtiss-Wright Export Corp.*<sup>107</sup> In actuality, its pedigree is far older, and largely consistent with Justice George Sutherland’s formulation in *Curtiss-Wright*. One familiar endorsement of executive power is Alexander Hamilton’s exposition in *Federalist* no. 74 that “[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.”<sup>108</sup> Every President from the first onward readily put this inherent power to work. Consider for example, George Washington’s diplomatic reception of France’s Citizen Genet (1793), establishing the unilateral executive recognition of foreign governments, or his neutrality proclamation during the French and British war of 1794. Hamilton and James Madison would debate inherent presidential authority in the Pacificus-Helvidius letters, but Congress’ subsequent ratification of Washington’s unilateral action suggests that Pacificus (Hamilton) had the better of it.

Inherent presidential authority is thus deeply rooted. Yet, when the managed threats of cold war heat up, that authority—even when coupled with the Commander-in-Chief text of the Constitution<sup>109</sup>—begs reconciliation with other express delegations of the power to Congress to declare war<sup>110</sup> or to raise and support armies and govern their general organization.<sup>111</sup> Academic writers in thrall of congressional power tend to insist that these clauses give plenary authority to the legislature over the deployment of military force.<sup>112</sup> For example, John Hart Ely contends that absent a direct attack—something that, unfortunately, is no longer remote or unthinkable—the President is without authority to act militarily.<sup>113</sup>

Agreeing with Ely and similar sentiments, the cold-war cases are more equivocal than their hot-war counterparts. To illustrate, consider the following cases: *Curtiss-Wright* (strongly affirming inherent presidential power);<sup>114</sup> *Youngstown* (resolving strongly against inherent executive authority);<sup>115</sup> and *New York Times v. United States*<sup>116</sup> (also resolving against inherent power but in a fashion that gives it fairly ample acknowledgment). Finally, the cold-war equivocation is evident in cases dealing with communist advocacy, which unevenly reconciled civil-liberty claims with the needs of national security throughout the subtle—and not always decipherable—evolution of the “clear and present danger” test.

## B. The Cold-War Cases

**1. *Curtiss-Wright*.** The decision in *Curtiss-Wright* concerned the validity of a 1936 criminal indictment premised upon the alleged violation of a presidential prohibition of sales of arms or munitions to certain countries in South America.<sup>117</sup> The President had issued his prohibitory proclamation pursuant to his own authority as well as that specifically vested in him by a congressional resolution.<sup>118</sup> The defendants argued, among other things, that the President lacked authority in his own right and that Congress could not delegate it to him on the broad terms that it had—in particular, upon

the President’s discretion that the proclamation was necessary to re-establish peace in the region.<sup>119</sup>

Justice Sutherland wrote for the Court over one unelaborated dissent.<sup>120</sup> He pointed out two features that have influenced the Court’s thinking on foreign affairs ever since: the President’s power is both textual as well as inherent; and the President’s authority in external matters is necessarily more extensive than that dealing with domestic questions.<sup>121</sup> Sutherland’s case for inherent power rested partially on historical account and assessment.<sup>122</sup> In particular, he cited Congressman John Marshall’s proposition from 1800 that “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>123</sup>

Justice Sutherland did not explain the origin of the quotation in his opinion, but it is traceable to the so-called Robbins/Nash debate on the floor of Congress on March 7, 1800.<sup>124</sup> Robbins/Nash involved an extradition question, specifically whether it was proper for President Adams to direct a federal court to grant a British extradition request for Robbins—alias Thomas Nash—who was suspected of committing mutiny aboard a British frigate.<sup>125</sup> The Republicans challenged Adams’s intervention in what they claimed was a judicial matter.<sup>126</sup> Marshall refuted this proposition with multiple examples of executive questions arising under treaties that were beyond judicial competence: “the establishment of the boundary line between the American and British dominions” (pursuant to the Jay Treaty); President Washington’s neutrality proclamation; and the disposition of vessels or “prizes made within the jurisdiction of the United States [and of] privateers fitted out in their ports.”<sup>127</sup>

The issue of executive determination of who was entitled to the possession of the prize of a belligerent vessel is particularly interesting for present purposes, since it parallels, in some ways, President Bush’s asserted authority to determine who is an enemy combatant. Like modern-day advocates of searching

judicial review over the combatant determination, the Republicans of Adams's day argued against presidential intervention in extradition. The Republicans insisted that the Washington administration had conceded prize determinations to the courts.<sup>128</sup> Marshall responded tellingly, however, that both the concession and the judiciary's assumption of the duty was subject to "national demand (or interest)," but that ultimately any judicial decision would be "regulated by the principles established by the executive department."<sup>129</sup>

Marshall's reasoning explaining why extradition was an executive, not a judicial, matter also seems to bolster the proposition that it is for the President, not the Court, to determine a question of combat status under the laws of war and international agreement (the Geneva Conventions). In portraying the President as the "sole organ" or decision-maker, Marshall instructed us to evaluate: (1) the origin of the matter; (2) the operational duties needed to be undertaken to carry it out; and finally, (3) the nature of the judgment necessitated.<sup>130</sup> In brief, was it a juridical point of law or "political law," as Marshall called it? In matters of extradition, as in our relationship with Afghanistan, Iraq, or al-Qaeda, the origin of the matter is one, not of private lawsuit, but of sovereign integrity. In terms of the nature of the duties undertaken, the detention of enemy combatants—like the earlier detention of British mutineers—involves the practical power of executive officers. Executive officers are the ones at risk in apprehending and holding enemy combatants. Finally, whether to extradite or treat someone as a lawful or unlawful enemy combatant involves the delicate interpretation of international agreement. Marshall opined that it was the executive, not Congress or the Courts, who must have this necessary capability.<sup>131</sup> Marshall asked rhetorically:

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely, as in the department whose

duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations; to understand the manner in which the particular stipulation is explained and performed by foreign nations; and to understand completely the state of the union?<sup>132</sup>

Perhaps it is a shame that Justice Sutherland did not extend his opinion in *Curtiss-Wright* with this historical elaboration of Marshall's views. If he had, the modern-day criticism that Marshall "[a]t no time . . . suggest[ed] that the President could act unilaterally to make foreign policy"<sup>133</sup> could be put to rest. Nevertheless, Justice Sutherland traced executive foreign-affairs authority—rightly, in my judgment—to a concept of sovereignty that is preconstitutional, derived from the incorporation of the American polity in the Declaration of Independence. The logical corollary is that even as "[r]ulers come and go; [and] governments end and forms of government change; . . . sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense."<sup>134</sup> Yet Justice Sutherland was careful to observe that even as the President's power "does not require as a basis for its exercise an act of Congress, . . . like every other governmental power, [it] must be exercised in subordination to applicable provisions of the Constitution."<sup>135</sup>

And therein lies the rub, of course. Indeed, there is an often-overlooked portion of Marshall's "sole organ" defense of executive power. Several paragraphs after his expansive description of executive power, Marshall went on to posit that "[C]ongress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract, but till this be done, it seems the duty of the executive department to execute the contract, by any means it possesses."<sup>136</sup> The first part of this observation is benign—Congress can determine means. But does the second proposition follow—that Congress may

devolve on others the *whole* execution of foreign policy? Historians suggest that while “it is impossible to be confident about the implications of [this aspect of Marshall’s] remark . . . there is no compelling reason to read this one sentence to contradict the overall tenor of his comments.”<sup>137</sup> If true, that is good news for the executive—and of course, intellectually tidy. Yet the remark certainly clouds that which Marshall clarified just sentences earlier. Moreover, the remark plants a mischievous seed, allowing the notion to emerge that the legislature can compartmentalize the executive’s foreign-policy needs and national-security functions in ways that may have insufficient correspondence to security threat.

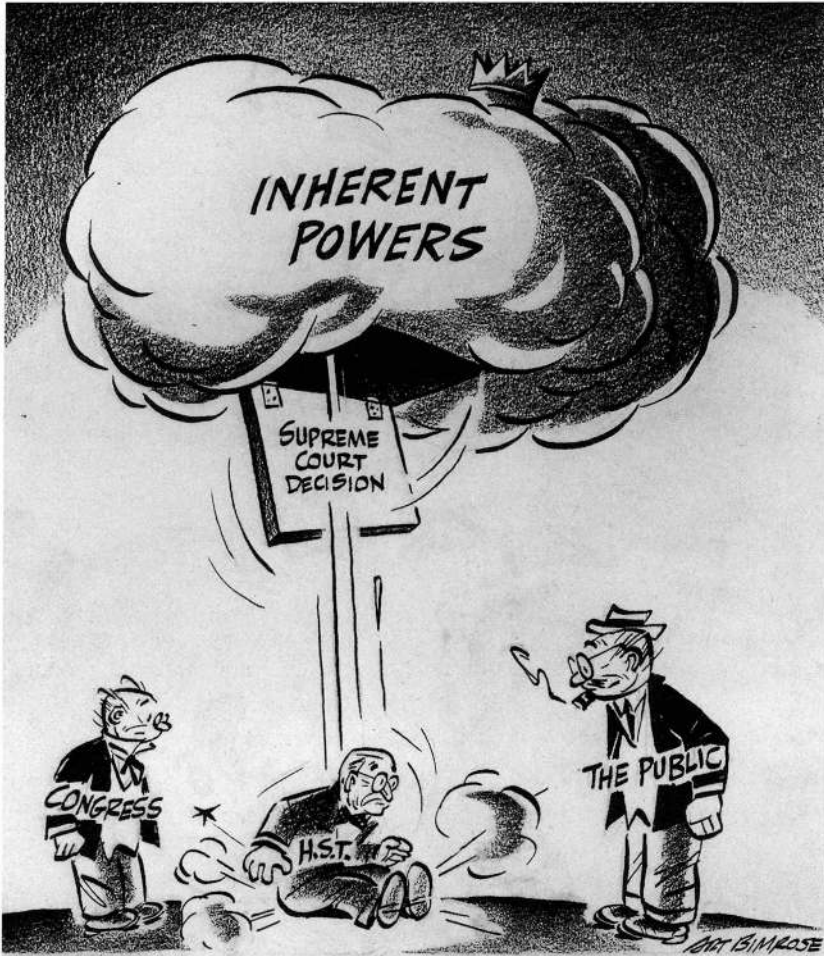
We now know that preventing FBI and other foreign-intelligence officers from sharing information with their counterparts in criminal-law enforcement (and vice versa) made us more vulnerable to terrorists. We frankly did not fully perceive this vulnerability during the colloquial cold war period beginning in the late 1940s, nor even in the latter part of the 1970s when Congress enacted the Foreign Intelligence Surveillance Act (FISA)<sup>138</sup> to codify intelligence-gathering directed at foreign agents, whether or not they were U.S. persons. Prior to FISA, these exercises were thought to be entirely constitutional premised only upon inherent executive power. However, in the 1980s the Justice Department was led to believe by lower-court misconstruction of FISA that the law erected a wall between law enforcement and foreign intelligence.<sup>139</sup> In this regard, several courts of appeal opined that FISA could only be used if the government’s primary purpose was the pursuit of foreign intelligence, and not criminal prosecution.<sup>140</sup> Even after 9/11, the special court created to administer FISA exacerbated this formalistic separation when, in May 2002, it ruled that “[L]aw enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation, or expansion of FISA searches or surveillance.”<sup>141</sup>

The recent attacks upon our sovereignty tragically illustrate that erecting artificial boundaries between law-enforcement investigations and foreign intelligence gathering can be unworkable. This is a boundary unsustainable in a real world and unobserved by any al-Qaeda cell, even as academic apologists would continue to applaud such parchment separation, and others like it, as the “Due Process of Foreign Policy Administration.”<sup>142</sup>

On recent appellate review, no wall was found to exist.<sup>143</sup> There was no FISA language supporting it, and the USA Patriot Act now makes clear that a FISA warrant can be obtained even if criminal prosecution is a parallel mechanism through which terrorism is to be addressed.<sup>144</sup> It is interesting to assess this appellate deconstruction of the illusory FISA wall from the standpoint of Marshall’s commentary upon inherent executive power in the area of foreign affairs. Unless Marshall’s caveat swallows his rule, it is fair to say that previous judicial attempts to construct that wall were incipient violations of the separation of powers, intruding deeply into the “internal organization and investigative procedures of the Department of Justice which are the province of the Executive branch.”<sup>145</sup> Of course, this was not the first time that inherent executive power in the area of foreign affairs was controversially limited. *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>146</sup> a case that arose in the midst of an undeclared hot war turning rapidly cold, is exhibit A.

**2. Youngstown.** Historian Charles Lofgren undertook an exhaustive study of the Korean “conflict.”<sup>147</sup> In the early 1950s, it was politically expedient, if not constitutionally correct, not to call it a war.<sup>148</sup> Again, presidential power, like free speech, is contextual. When *Youngstown* was decided, the nation was tired of war, tired of the mounting loss of life (over 108,000 American lives had been expended in Korea at the time of *Youngstown*), and unwilling to distort domestic labor policy to further vanquish a distant foe that it feared





This June 4, 1952 cartoon expressed approval for the Supreme Court's decision that President Truman's seizure of the steel mills was unconstitutional.

ideologically, but did not perceive as an immediate danger to its own national territory. *Youngstown* involved a looming labor stoppage in the steel industry that, by uncontroverted affidavit, would have seriously curtailed the production of military munitions being shipped to Korea.<sup>149</sup> There was no evidence that the threatened strike would have been of short duration. Essentially, two routes existed for responding to the strike: one under Taft-Hartley, "created to deal with peacetime disputes," and one involving the Wage Stabilization Board, created for war pursuant to the Defense Production Act.<sup>150</sup> President Truman chose the latter route, which delayed the strike ninety-nine days (slightly longer than the alternative

cooling-off period under Taft-Hartley of eighty days), but matters did not settle.<sup>151</sup> On April 9, 1952, Truman issued an executive order to temporarily take possession of steel plants to continue their operation.<sup>152</sup>

Truman understood his actions as preserving the status quo. He immediately reported his thinking to Congress and invited them to act either in affirmation of his action or contrary to it.<sup>153</sup> Congress did neither. Instead, the steel firms sought injunctive relief in federal district court, and it was granted.<sup>154</sup> The Supreme Court affirmed, 6-3, with Justice Black writing the lead opinion affirming the lower court and curtly informing the President that "The Founders of this Nation entrusted

the law-making power to the Congress alone in both good and bad times."<sup>155</sup> The President lacked specific statutory authority to take possession of private firms, and his responsibility as Commander-in-Chief apparently did not include supplying legislatively unauthorized munitions to his men and women in the field. Black stated that "[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."<sup>156</sup>

Justice Black's opinion is remarkable for its brevity and lack of meaningful reference to the inherent aspect of presidential power in foreign affairs. Yet the most startling aspect of *Youngstown* is the flip of positions by Justices Jackson and Frankfurter from the constitutional territory they individually staked out in the Japanese exclusion cases.<sup>157</sup> There, you will remember, Jackson was minimalist, urging the Court to stay clear of the review of military action and to be hesitant to issue judicial opinions that sanctioned actions that could not be fully reconciled with a peacetime constitution.<sup>158</sup> By contrast, Frankfurter thought the Court had little choice but to resolve constitutional dispute, whether in war or in peace.<sup>159</sup> In *Youngstown*, it was just the opposite. Justice Jackson cautioned the Court to scrutinize presidential claims of foreign affairs power in order to preserve the "equilibrium established by our constitutional system."<sup>160</sup> It was now Justice Frankfurter who urged restraint. After all, Frankfurter wrote, "The Framers . . . did not make the judiciary the overseer of our government."<sup>161</sup> Moreover, Frankfurter espoused that "It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available."<sup>162</sup>

Justice Frankfurter was particularly disturbed by Justice Jackson's typology that sought to pigeonhole various presidential ac-

tions as acting in accord with Congress, in areas of twilight where Congress had not spoken, or unilateral and contrary to congressional will.<sup>163</sup> In Jackson's mind, the President was on weak ground when he acted either before Congress did or contrary to it.<sup>164</sup> Academic commentators have rightly criticized Jackson's schematic analysis for failing to account for the difference between domestic and external spheres or the importance of national security.<sup>165</sup> However, its more basic defect may have been that pinpointed by Justice Frankfurter: namely, that war power issues should be met "without attempting to define the President's powers comprehensively . . . It is as unprofitable to lump together in an indiscriminating hotch-potch past presidential actions . . . as it is to conjure up hypothetical future cases. The judiciary may . . . have to intervene . . . But in doing so we should be wary and humble."<sup>166</sup>

Frankfurter's admonition of judicial restraint is so similar to Jackson's in the earlier Japanese cases that the mind craves an explanation for their reversal of role. Could it be that both perceived the dangers of an activist Court, but only where it disadvantaged a favored interest? Jackson feared the insidious harm to civil liberty from an overly expansive judicial endorsement of military necessity.<sup>167</sup> Frankfurter, by contrast, worried more about a judicially active Court weakening the proper allocation of powers needed to meet a national emergency.<sup>168</sup>

In the end, Truman may have lost not because of any long-lasting denial of inherent presidential authority in matters of foreign affairs, but because his war policy was second-guessed by the Court. In dissent, Chief Justice Fred Vinson observed that "There [was] no judicial finding that the executive action was unwarranted [in light of the emergency. Rather,] the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law."<sup>169</sup>

If the issues of gravity and immediacy sound familiar, it is because they often arise



in the speech context. Free-speech cases from times of both hot and cold war bring gravity and immediacy into especially sharp relief. Initially in World War I and well into the Cold War or McCarthy-era investigations of subversive influence, the Court was deferential to reasonable assessments of gravity. Thereafter, the Court ruled out either prior restraint or after-the-fact punishment, except where it believed the speech incited imminent harm.<sup>170</sup> Can the speech cases from times of war be kept in a separate analytical box from the executive's foreign-affairs authority? Perhaps not. After all, the real issue in both is: What constitutes a dangerous threat to public order or security? And in the foreign-affairs context alone, Lofgren tells us that "[t]o answer that question takes one beyond the province of constitutional law."<sup>171</sup> For this reason, in most military cases, as we have seen, the Court is deferential. Is that also true when speech and national security interests directly conflict?<sup>172</sup> It would seem not. Overlay speech doctrine and that deference lessens considerably. The next case illustrates.

### 3. *New York Times Company v. United States*.

If cold war is understood as the lack of external threat to sovereign territory, then one can scarcely countenance anything more controversial—and, to many, unpleasant and unpopular—than the U.S. military involvement in Vietnam. While the Court steadfastly refused to consider challenges to the legality of the intervention in Vietnam,<sup>173</sup> it took up a matter related to the conduct of that intervention in *New York Times Company v. United States*.<sup>174</sup> Here, the Court could not keep speech claims and claims of inherent executive authority in entirely separate categories. Congress had not acted, and inherent presidential authority was asserted to preclude the publication of a large number of classified volumes containing defense analysis.<sup>175</sup> The volumes had been stolen and delivered to the *New York Times* and the *Washington Post*.<sup>176</sup> The strength of the First Amendment doctrine

against prior restraints prompted six Justices, in a hurried per curiam opinion, to find that the government had not met its heavy burden to overcome the presumption against such restraint.<sup>177</sup>

That said, virtually every Justice, whether in majority or dissent, displayed "a strong undercurrent favoring *Curtiss-Wright's* vision of executive supremacy in foreign affairs."<sup>178</sup> Justices Douglas and Black noted that there was "no statute barring the publication by the press of the material," and further, that given the absence of a declared war, the Court "need not decide . . . what leveling effect the war power . . . might have."<sup>179</sup> Similarly, in a separate concurrence, Justice Brennan observed that a narrow class of prior restraints are permitted when the nation is at war, but that the so-called Pentagon Papers materials—which the *Times* and *Post* portrayed as largely historical in nature—did not present a like question.<sup>180</sup> Justice Brennan did posit that even without a war, if certain information "would set in motion a nuclear holocaust," suppression would be permissible.<sup>181</sup> Given the biological threat posed by the rogue actions of Iraq and the announced nuclear-development program of North Korea, this insight has renewed timeliness.

Not surprisingly, the dissenters attempted to lay out the need for greater judicial deliberation (the case was decided with unusual haste—fifteen days from district-court complaint to Supreme Court opinion), even as the newspapers involved had possession of the documents for an extended (three-month) period. The dissenters also lamented the lack of reasonable judicial deference in the evaluation of matters that threaten the security of the nation. Justice John Marshall Harlan was joined by Chief Justice Warren Burger and Justice Harry Blackmun in the dissenting observation that "It is plain . . . that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted."<sup>182</sup> The dissenters did not want an

abdication of all review, but preferred one that would be confined to determining whether the matter fell within “the proper compass of the President’s foreign relations power.”<sup>183</sup> Instrumentally, Justice Harlan posited that any decision of nondisclosure be made by the head of the appropriate Executive Department pursuant to principles that apply in executive-privilege cases.<sup>184</sup>

Insofar as *New York Times* involved a claimed need for prior restraint—a form of governmental action least susceptible to justification under the First Amendment’s original understanding—it is difficult to fully evaluate this decision’s meaning for general matters of national security. Nevertheless, our understanding of the opinion has been facilitated somewhat by the subsequent release of a “secret brief” filed by Solicitor General Erwin Griswold on behalf of the government’s case.<sup>185</sup> This brief, initially filed under seal with the Court and only obliquely alluded to by the Solicitor General in oral argument, laid out eleven objections to publication of the Pentagon Papers in terms of national security.<sup>186</sup> Now that this briefing material is public, the question can be asked whether the Court’s disposition was sufficiently deferential to the government’s concerns. More important, is the Pentagon Papers standard well suited to meeting terrorist threat?

Regrettably, the judicial standard itself is not readily identifiable from the Court’s brief per curiam, or from the Justices’ individual opinions (each member of the Court wrote). Academic reviewers, however, believe the governing rationale to be that articulated by Justice Stewart: namely, no restraint of a publication unless it would result in “direct, immediate, and irreparable damage to our Nation or its people.”<sup>187</sup> The Court found the governmental interest insufficient to meet this standard, even as the sealed brief now demonstrates how some materials thought to be possessed by the news organizations (four so-called negotiating volumes) disclosed which nations were helping America (clandestinely)

to seek peace.<sup>188</sup> This assistance, especially from nations not in overtly friendly relations with the United States at that time, was likely to evaporate with disclosure, Solicitor General Griswold argued.<sup>189</sup> What is more, the volumes contained derogatory comments about specific persons that, if known, would strain or end needed diplomatic relationships for intelligence and communication.<sup>190</sup>

While it would later be learned that the negotiating volumes had not, in fact, been leaked to the news organizations, there was ample other classified information of potentially great value to our enemies that had been. For example, the stolen materials sought to be enjoined contained: the names of CIA and National Security Agency operatives still active in Southeast Asia,<sup>191</sup> military plans for dealing with armed aggression in Laos;<sup>192</sup> a discussion of our intelligence methods not then known to the Soviet Union;<sup>193</sup> a Joint Chiefs memorandum recommending “a nuclear response” in the event of a Chinese attack on Thailand;<sup>194</sup> and a fulsome discussion of the extent to which the National Security Agency had been able to break the codes of other nations.<sup>195</sup> With respect to the last item, the Solicitor General pointed out the obvious: that disclosure of our code-breaking abilities would permit an enemy nation “‘to minimize our chance of successful interception’ with adverse consequences for current U.S. military operations.”<sup>196</sup>

Why was this not enough to warrant injunctive relief? It was not so largely for reasons that had developed separately in the First Amendment cases during cold-war periods—specifically, the need to show that advocacy (or publication) would result in *immediate* or *imminent* harm.<sup>197</sup> Not fully realizing how this nuance of speech jurisprudence might trump inherent executive power over foreign affairs, Griswold lost his case at oral argument when he conceded:

[T]he materials specified in my closed brief . . . materially affect the security of the United States. It will



The author posits that Solicitor General Erwin Griswold suggested, in his arguments for the Pentagon Papers case, that the doctrine that speech or publication can be punished only after the fact and only when harm is immediately upon us is not sustainable in time of cold war.

affect lives. It will affect the process of the termination of the war. It will affect the process of recovering prisoners of war. I cannot say that the termination of the war, or recovering prisoners of war, is something which has an "immediate" effect on the security of the United States. I say that it has such an effect on the security of the United States that it ought to be the basis of an injunction in this case.<sup>198</sup>

Why did Griswold not see this as a fatal concession? Perhaps it was because the need for immediacy or imminent lawless action to punish speech or publication was only a late-in-history judicial graft on the First Amendment. More proximate to the founding, Joseph Story would write that "[T]he language of [the First Amendment] imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint."<sup>199</sup> But Story

also observed that the speech right exists *only if* the speaker "does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government."<sup>200</sup> That this amendment was intended, therefore, to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, is a supposition too wild to be indulged by any rational man. In Griswold's day, the accepted reading of this passage condemned prior restraints, but it did not necessarily make them all unconstitutional. Griswold might well have understood the Story passage as confirming a right to speak without restraint only if there is no disturbance of public peace or subversion of the government. After *New York Times*, by contrast, speech or publication can be punished only after the fact, and only when harm is immediately upon us. This is now standard doctrine, but is it completely faithful to the original understanding and sustainable in the national security context? Erwin Griswold, I believe, was suggesting otherwise in a time of cold war.

Much work has been done tracing the development of modern free-speech doctrine.<sup>201</sup> It has not proceeded in a straight line. Unlike *New York Times*, many cases in the war context are strikingly unprotective of speech. For example, in the hot-war case of *Schenck v. United States*,<sup>202</sup> the Court upheld postspeech convictions under the Espionage Act of 1917 for circulating antiwar literature to men who had been called by the draft.<sup>203</sup> Speech was given little protection in the between-World-Wars decision of *Whitney v. California*,<sup>204</sup> upholding Anita Whitney's conviction under the California Criminal Syndicalism Act for having the "bad tendency" to advance subversion. In like manner, in *Dennis v. United States*,<sup>205</sup> and its shading in *Yates v. United States*,<sup>206</sup> the Court upheld Smith Act convictions of abstract communist advocacy of the "overthrow and destruction of the Government of the United States."<sup>207</sup> In each case, the Court attempted

to articulate what harm constitutes a “clear and present danger” suitable for postspeech punishment.<sup>208</sup> All this changed dramatically in *Brandenburg v. Ohio*,<sup>209</sup> where issues of bad intent or tendency and the gravity of public harm were set aside for a singular focus upon imminence.<sup>210</sup> The *Brandenburg* Court wrote that “[T]he Constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action or is likely to incite or produce such action.”<sup>211</sup>

Of course, Holmes’s original “clear and present danger” formulation, forged in the heat of World War I, impliedly stressed imminence in a context capable of evaluating the gravity of a speech-adduced harm.<sup>212</sup> Writing for a plurality in *Dennis*, Chief Justice Vinson formulated the “clear and present danger” test to do the same by embracing the formula of Judge Learned Hand: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>213</sup> Academic commentators, of course, frowned upon Hand’s formula as insufficiently generous to “protected” speech—the adjective, of course, begging the question.<sup>214</sup>

Does the terrorist threat now undermine the standard academic commentary that reflexively immunizes all speech activity short of imminent harm from illegal action?<sup>215</sup> What would Solicitor General Griswold tell us? My supposition is that it was startling to Griswold that a lack of immediate or imminent damage to national security would preclude the injunctive relief he sought in *New York Times*. Griswold argued that an imminence standard was overly narrow and that it would be better phrased as “great and irreparable harm to the security of the United States.”<sup>216</sup> Griswold did not know the diabolical nature of the present al-Qaeda threat, of course, but with extraordinary prescience, he further stated, “In the whole diplomatic area the things don’t happen

at 8:15 tomorrow morning. It may be weeks or months.”<sup>217</sup> Indeed, al-Qaeda would bring it to New York at 8:48 a.m. one unexceptional September morning, and an anxious nation is still uncertain what dangers lie ahead.

### C. Beyond Hot and Cold War: Response to Terrorism

Appropriately, President Bush and the Congress have not perceived a need for any substantial prior restraint of speech or publication in the present crisis. The Patriot Act and other measures are aimed largely at updating means of intelligence-gathering and strengthening existing laws that punish the provision of “material support” to terrorist organizations.<sup>218</sup> As these investigative powers were expanded to encompass the full implications of international terrorism, Congress was careful to provide that, for example, document and other court production orders shall not be issued “solely upon the basis of activities protected by the first amendment to the Constitution.”<sup>219</sup> Section 802 of the Patriot Act<sup>220</sup> creates a federal crime of “domestic terrorism” that extends to “acts dangerous to human life that are a violation of the criminal laws [and] appear to be intended . . . to influence the policy of a government by intimidation or coercion.”<sup>221</sup> While civil libertarians argue over the supposed vagueness of such formulations, it is reasonably plain that the aim of Congress by this provision is the suppression, not of speech, but of highly endangering action.

In a few contexts, the Bush administration has asked for secrecy. For example, the Chief Immigration Judge issued a blanket memorandum closing to all but counsel certain “special interest” deportation cases related to international terrorism. The government’s need for secrecy is multifaceted, and is said to include the need to protect intelligence sources that may have been employed in finding the deportee being held, to prevent disclosure of how much the government knows about means of illegal entry, and to avoid witness intimidation

and the alteration of behavior by those who might be “tipped off” by the detention of another. The lower courts have divided on the effort. The Third Circuit recognized the scope of executive discretion in foreign affairs and immigration,<sup>222</sup> while the Sixth Circuit<sup>223</sup> discovered a new First Amendment right of access to executive action by analogy to precedent that deals with access to criminal proceedings.<sup>224</sup> In the Third Circuit, Chief Judge Edward Becker remarked:

We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.<sup>225</sup>

The counterpoint by Judge Damon Keith in the Sixth Circuit was more rhetorical and far less deferential to executive function. Judge Keith wrote: “Democracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”<sup>226</sup> The immigration process is, by design, largely conducted within the executive branch, and most cases have not been directly tied to 9/11. Yet, it is not facetious to posit the different visions of the Third and Sixth Circuit as the descendants of the long-running—and never fully resolved—competing suppositions of *Curtiss-Wright* and *Youngstown*.

These contrasting perspectives over constitutional authority may never be fully settled. However, even before 9/11, the judicial insistence on proof of imminence in *New York Times* had become the anomaly when the case touched foreign affairs. In other words,

since *New York Times*, the Supreme Court, both on the merits and in matters of justiciability, has more often embraced the deference of *Curtiss-Wright*<sup>227</sup> than the artificial cabinings of *Youngstown*. For example, in *Haig v. Agee*, Chief Justice Burger upheld the Secretary of State’s implicit authority to revoke Agee’s passport as “an inhibition of action” or conduct, rather than a suppression of speech.<sup>228</sup> Similarly, in *Dames & Moore v. Regan*, Justice Rehnquist for the Court upheld the nullification of private attachments under the government’s hostage accord with Iran.<sup>229</sup> The case implicated inherent power, since, on its face, the International Emergency Economic Powers Act (IEEPA) was silent as to whether the executive could suspend private claims.<sup>230</sup> In a twist that may further confirm Justice Antonin Scalia’s suspicions about reliance upon legislative history, one academic writer complained about the decision in *Dames & Moore* that the Court “ignored the statute’s legislative history, which clearly evinced congressional intent to restrict presidential power, in favor of the statutory language,” which favored it.<sup>231</sup>

The distance the Court has traveled away from *Youngstown* and back toward *Curtiss-Wright* in the pre-9/11 cold-war era is probably best summarized by the following passage from Justice Rehnquist’s opinion in *Dames & Moore*: “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take. . . . Such failure of Congress specifically to delegate authority does not, ‘especially. . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.”<sup>232</sup> This is well said, for it echoes the wisdom of Chief Justice Vinson’s dissent in *Youngstown*: “Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed.”<sup>233</sup> “[The Framers did not] create an

automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.”<sup>234</sup>

### Conclusion

What do we know from these hot- and cold-war examples?

1. Context matters. There is one Constitution, but it applies differently in peacetime and wartime. Each constitutional actor is expected to understand this, including individual citizens. Those who wish to preserve freedom run the risk of losing it altogether if the scope of peacetime freedom is assumed to govern every era. Freedom is necessarily governed by truth—the truth of the human person, as well as the truthful or authentic need to preserve the sovereign community in which human persons can live and thrive.
2. The level of risk and the level of libertarian sacrifice matters. Of course, the greater the threat, the greater the reasonableness of expecting peacetime liberties to bear some of the costs of security. A mechanical or unthinking requirement of imminence should not obscure this.
3. The judiciary is not sidelined in war, but the limits of its institutional capacity are obvious. That said, the Court acts at its best when it is, not absent, but abstentious. Deciding opinions on nonconstitutional grounds, after the times of greatest threat have passed, and on the narrowest possible basis aids, the country in returning to normalcy when the sword of war is returned to its sheath.
4. The Court can play a constructive role in ensuring that the political branches are both engaged in a unified war effort. Yet an opinion such as *Youngstown* and the inquiry into whether Congress and the President have acted together is merely a reasonable starting point. Justice Jackson’s *Youngstown* categories are useful, but hardly self-evident in application, nor do they fully credit the

inherent foreign-affairs powers of the presidency in times of war.

5. Rights matter, but rights are subject to diminution both by one’s own government and by the terror that threatens the continuation of one’s government. As difficult as it may be, the Court’s job is to keep a jealous eye on both threats, or at least not to blind the executive from doing so.

### ENDNOTES

<sup>1</sup>William J. Brennan, Jr., “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises,” December 22, 1987 lecture to the law school of Hebrew University, Jerusalem, Israel.

<sup>2</sup>For example, when various citizen, nonmilitary members of secret societies plotted in 1864 to assassinate the Governor of Indiana and free Confederate prisoners, they were put on trial before a military tribunal, even as the civilian courts remained open. They were sentenced to hang. However, in 1866, more than a year after the Civil War had concluded, the Supreme Court held in *Ex parte Milligan* (4 Wall. 2 [1866]), that such civilians could not be tried before a military tribunal. *Id.* As Chief Justice Rehnquist has observed: “[t]he courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim *Inter Arma Silent Leges*—in time of war the laws are silent.” William H. Rehnquist, “Dwight D. Opperman Lecture,” 47 *Drake L. Rev.* 201, 204, 208 (1999).

<sup>3</sup>“The events of September 11 differ from the events of the post World War II era in several ways . . . . Though the ultimate objective of terrorism is political, the enemy implements its goals by destruction. Unlike traditional warfare, the enemy is not easily identifiable . . . . Further, civilian’s lives are at stake. As horrible as it was, . . . Pearl Harbor was an attack on our military base. It was a statement of military power . . . . The victims [of September 11] were not people in the military who had volunteered to risk their lives to defend their country. Rather, they were an assortment of blue and white collar civilian workers.” Lori Sachs, Comment, “September 11, 2001: The Constitution During Crisis: A New Perspective,” 29 *Fordham Urb. L. J.* 1715, 1744–45 (2002).

<sup>4</sup>In 1861, Merryman allegedly destroyed rail bridges near Baltimore to impede the movement of Union troops. He was taken into custody and held without a hearing pursuant to President Lincoln’s suspension of the writ of habeas corpus.

<sup>5</sup>*Ex parte Merryman*, 17 F.Cas. 144, 148 (1861). See also Rehnquist, *supra* note 1, at 203. Chief Justice Rehnquist

notes that “Lincoln ignored the order, but in his address to the special session of Congress which he had called to meet on July 4, 1861, he averted to it.” Lincoln plaintively asked: “Must [the laws] be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen’s liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted, and the government itself go to pieces less that one be violated?” *Id.* The Chief Justice has borrowed this passage as his title for a fascinating look at the application of law in wartime. William H. Rehnquist, **All The Laws But One** (1998).

<sup>6</sup>323 U.S. 214 (1944).

<sup>7</sup>*Id.* at 248 (Jackson, J. dissenting).

<sup>8</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson’s concurring opinion and concurrence in judgment demonstrates the Court’s difficulty in dealing with questions of military or war power. *Id.* at 634.

<sup>9</sup>320 U.S. 81 (1943).

<sup>10</sup>*Id.* at 83–84.

<sup>11</sup>*Id.* at 84–85.

<sup>12</sup>Sidney Fine, **Frank Murphy: The Washington Years** 437 (1984).

<sup>13</sup>See *Hirabayashi*, 320 U.S. at 85.

<sup>14</sup>*Hirabayashi*, 320 U.S. at 93 (quoting Charles Evans Hughes, “War Powers Under the Constitution,” 42 *A.B.A. Rep.* 232, 238).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 93–94.

<sup>18</sup>*Id.* at 94.

<sup>19</sup>*Id.* at 94–95.

<sup>20</sup>*Id.* at 95 (emphasis added).

<sup>21</sup>*Id.* at 95–96.

<sup>22</sup>*Id.* at 100.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 102.

<sup>25</sup>*Id.* at 106–109 (Douglas, J., concurring).

<sup>26</sup>*Id.* at 108 (Douglas, J. concurring).

<sup>27</sup>Fine, *supra* note 12, at 439 (citing a letter from Justice Frankfurter to Justice Stone dated June 4, 1943).

<sup>28</sup>*Id.* (citing Joseph P. Lash, **From the Diaries of Felix Frankfurter** 251–252 [1975]).

<sup>29</sup>Joel B. Grossman, “The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective,” 19 *U. Haw. L. Rev.* 649, 676 (1997).

<sup>30</sup>See generally, *Hamdi v. United States*, 294 F. 3d 598 (4<sup>th</sup> Cir. 2002).

<sup>31</sup>*Id.*

<sup>32</sup>See Respondent’s brief at 47–48, *Hamdi v. United States*, 296 F. 3d 278 (4<sup>th</sup> Cir. 2002) (No. 02-6895).

<sup>33</sup>*Hamdi v. United States*, 296 F. 3d 278, 284.

<sup>34</sup>*Hamdi v. Rumsfeld*, 316 F. 3d 451 (4<sup>th</sup> Cir.2003).

<sup>35</sup>Eugene V. Rostow, “The Japanese American Cases—A Disaster,” 54 *Yale. L. J.* 489, 515 (1945).

<sup>36</sup>Yet the racial or ethnic segregation that mattered most to the issue of the reasonable likelihood of espionage actually predated the exclusion orders. Federal legislation denied the Japanese American naturalized citizenship. State law precluded property ownership as well as intermarriage. If one really desires to know what prevented Japanese assimilation into American culture, these discriminatory federal and state provisions and others like them have obvious explanatory power and predate the war by two decades. The Supreme Court knew this and indeed referenced this information. This displeased yet another batch of academics, who chastised the Court for ranging into the purview of sociology. (If you are a Supreme Court Justice, you cannot win for trying.)

<sup>37</sup>Rehnquist, *supra* note 2, at 207.

<sup>38</sup>*Hirabayashi v. United States*, 320 U.S. at 81, 96.

<sup>39</sup>*Id.* at 96 (citing “Attack Upon Pearl Harbor by Japanese Armed Forces,” Report of the Commission Appointed by the President, S. Doc. No. 77–159, at 12–13 [1942]).

<sup>40</sup>Frances Biddle, **In Brief Authority** 215–216 (1962).

<sup>41</sup>Rehnquist, *supra* note 2, at 207.

<sup>42</sup>*Hirabayashi*, 320 U.S. at 97.

<sup>43</sup>320 U.S. at 99. Twenty years later, Attorney General Francis Biddle would conclude that there was no military necessity and that the evacuation was the product of public pressure from the best citizens of California, including that State’s Attorney General (Earl Warren), who of course would later serve the Court as Chief Justice. See Biddle, *supra* note 40, at 217. Biddle writes:

One cannot altogether blame General DeWitt. Stringent measures were the order of the day. On December 30, 1941, the commander of the Canadian Army’s Pacific forces had recommended removal of all persons of Japanese descent, whether or not citizens, from the coastal area; the evacuation began the following February and was completed by October. It was not DeWitt’s task to protect the civil liberties of American citizens. He was a soldier, and I suppose in the face of the public clamor he decided that he could not take a chance. (*Id.*)

<sup>44</sup>323 U.S. 214 (1944).

<sup>45</sup>*Id.*

<sup>46</sup>Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942); 18 U.S.C. 97(a) (making it a misdemeanor to fail to obey a military order).

<sup>47</sup>*Korematsu*, 323 U.S. 214, 217–218 (1944).

<sup>48</sup>*Id.* at 218.

<sup>49</sup>*Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

<sup>50</sup>Biddle, *supra* note 40, at 225. Biddle writes that the military, after Pearl Harbor, could not afford to be caught by surprise again:

Hong Kong had surrendered to the Japanese on December 25, 1941. On January 2, Manila was captured. On January 25, Singapore fell, with 60,000 prisoners of war. At the end of February the naval units of the Allies were largely destroyed at the Battle of the Java Sea, and Burma was occupied early in March. It is against this background of early defeats in the Pacific that the judgment to evacuate must be weighed. (*Id.*)

<sup>51</sup>*Korematsu*, 323 U.S. at 223.

<sup>52</sup>*Id.* at 245 (Jackson, J., dissenting).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*See id.* at 247–248. Whether foreign affairs is less manageable for the Court than other subjects has been questioned. *See, e.g.*, Norman Dorsen, “Foreign Affairs and Civil Liberties,” 83 *Am. J. Int’l L.* 840, 844 (1989) (arguing that foreign affairs is no more difficult than antitrust and family law). Even Professor Dorsen acknowledges, however, that the consequences of judicial error in reviewing foreign policy may be greater.

<sup>57</sup>*See Korematsu*, 323 U.S. at 246.

<sup>58</sup>*Id.* at 224–225 (Frankfurter, J., concurring).

<sup>59</sup>*Id.* at 224.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 225.

<sup>63</sup>*See id.*

<sup>64</sup>*See id.*

<sup>65</sup>*Endo*, 323 U.S. at 283.

<sup>66</sup>*Id.* at 285, 294–295.

<sup>67</sup>*Id.* at 297.

<sup>68</sup>*See supra* note 57 and accompanying text.

<sup>69</sup>*Endo*, 323 U.S. at 301; *contra* Grossman, *supra* note 29, at 681.

<sup>70</sup>Grossman, *supra* note 29, at 681.

<sup>71</sup>*See id.* at 681–682 (citing Peter Irons, *Justice at War* 344 [1983]).

<sup>72</sup>317 U.S. 1 (1942).

<sup>73</sup>4 Wall. 2 (1866).

<sup>74</sup>*Endo*, 323 U.S. at 297.

<sup>75</sup>*See* Roger Parloff, “Dicta: Closed Doors,” *The American Lawyer*, November 2002.

<sup>76</sup>*See, e.g.*, Tom Jackman, “Judge Gives Moussaoui More Time to Prepare,” *Washington Post*, August 17, 2002, at A08.

<sup>77</sup>*Id.*

<sup>78</sup>*See, e.g.*, Jackman, *supra* note 76.

<sup>79</sup>*See, e.g.*, Philip Shenon, “Prosecutors Say Business Card Ties Suspect to Flight 93 Pilot,” *New York Times*, September 25, 2002, at A14.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*See, e.g.*, Philip Shenon, “Court Papers Show Moussaoui Seeks Access to Captured Al Qaeda Members,” *New York Times*, November 1, 2002, at A20. 18 U.S.C. 3005 provides that “The defendant shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.”

<sup>83</sup>*Id.*

<sup>84</sup>*See supra* notes 52–54, and accompanying text (discussing Justice Jackson’s dissent in *Korematsu*).

<sup>85</sup>*See supra* notes 66–70, and accompanying text (explaining Justice Douglas’ narrow approach in *Endo*).

<sup>86</sup>*See, e.g.*, Tom Jackman, “Judges Wary of Interference in Hamdi Case,” *Washington Post*, October 29, 2002, at A16 (hereafter cited as Jackman, “Judges Wary”).

<sup>87</sup>*Id.*

<sup>88</sup>*See id.*

<sup>89</sup>*See id.*

<sup>90</sup>*Hamdi v. Rumsfeld*, 296 F. 3d 278 (4<sup>th</sup> Cir. 2002).

<sup>91</sup>*Id.* at 281.

<sup>92</sup>*Id.* at 283.

<sup>93</sup>*Id.* at 282.

<sup>94</sup>*See id.* at 283.

<sup>95</sup>*Hamdi v. Rumsfeld*, 316 F. 3d 450.

<sup>96</sup>Jackman, “Judges Wary,” *supra* note 86.

<sup>97</sup>*Hamdi v. Rumsfeld*, 316 F. 3d 470.

<sup>98</sup>*Defunis v. Odegaard*, 416 U.S. 312, 339 n.20 (1974) (Douglas, J. concurring).

<sup>99</sup>*See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting citizens petition for writ of *coram nobis*); *Hirabayashi v. United States*, 828 F.2d 591 (9<sup>th</sup> Cir. 1987), (granting citizens petition for writ of *coram nobis*).

<sup>100</sup>*Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (dismissing claims for damages because the statute of limitations had run); *rev’d* 782 F. 2d 227 (D.C. Cir.1986); *vacated by* 482 U.S. 64 (1987).

<sup>101</sup>Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. 1989(b) [1988]).

<sup>102</sup>An early experience with martial law in the United States occurred in 1814, when General Andrew Jackson declared martial law in and about New Orleans in response to the British capture of the area. Nominally, the Treaty of Ghent ended the war on Christmas Eve 1814. Jackson deliberately suppressed word of the peace, however, in order to maintain military authority. For his accurate account of the peace, Jackson had reporter Louis Louailler arrested on charges of inciting a mutiny. Jackson did not end



martial law and release the reporter until March 1815, when he received “official” word of the peace treaty. See generally Debora K. Kristensen, “Finding the Right Balance: American Civil Liberties in Time of War,” 44 *DEC Advocate* (Idaho) 20 (2001).

<sup>103</sup>*Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>104</sup>343 U.S. 579.

<sup>105</sup>*Id.* at 634–635 (Jackson, J., concurring).

<sup>106</sup>22 Op. Att’y Gen. 13, 25–26 (1898) (dealing with the regulation of the landing of foreign submarine cables).

<sup>107</sup>299 U.S. 304 (1936).

<sup>108</sup>*The Federalist* no. 74 at 447 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

<sup>109</sup>U.S. Const. Art. II § 2, cl. 1.

<sup>110</sup>U.S. Const. Art I § 8, cl. 10.

<sup>111</sup>U.S. Const. Art I § 8, cl. 11.

<sup>112</sup>John Hart Ely, *War and Responsibility* 5–6 (1993).

<sup>113</sup>*Id.*

<sup>114</sup>299 U.S. 304.

<sup>115</sup>343 U.S. 579.

<sup>116</sup>403 U.S. 713 (1971).

<sup>117</sup>299 U.S. 304, 311–12.

<sup>118</sup>*Id.* at 312–313.

<sup>119</sup>*Id.* at 314.

<sup>120</sup>*See id.*

<sup>121</sup>*Id.* at 318–319.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 319 (citing 10 *Annals of Cong.*, 613 [1800]).

<sup>124</sup>*See* 10 *Annals of Cong.*, 541, 613 (1800).

<sup>125</sup>*Id.* at 542.

<sup>126</sup>*See, e.g., id.* at 543. Mr. Sedgwick believed the proper inquiry in the Robbins/Nash debate was whether the President had interfered in a judicial matter. *Id.*

<sup>127</sup>John Marshall, Speech (March 7, 1800), in 4 *The Papers of John Marshall* 96–98 (Charles T. Cullen, ed., 1984).

<sup>128</sup>*Id.*

<sup>129</sup>*Id.* at 101.

<sup>130</sup>*Id.* at 104.

<sup>131</sup>*Id.* at 105.

<sup>132</sup>*Id.*

<sup>133</sup>Louis Fisher, *Presidential War Power* 60 (1995).

<sup>134</sup>*Curtiss-Wright Export Co.*, 299 U.S. 304, 316–317 (1936).

<sup>135</sup>*Id.* at 320.

<sup>136</sup>Marshall speech, *supra* note 128, at 104.

<sup>137</sup>H. Jefferson Powell, “The Founders and The President’s Authority Over Foreign Affairs,” 40 *Wm. & Mary L. Rev.* 1471, 1527 (1999).

<sup>138</sup>Federal Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, et. seq. Enacted to cover both electronic surveillance and physical searches. FISA authorizes a special court to permit such searches “if there is probable cause to believe that . . . the target of the [search] is a foreign power or an agent of a foreign power.” *Id.* The defini-

tion of an agent of foreign power, if the agent is a U.S. person, is closely related to criminal activity. The term includes any person who “knowingly engages in clandestine intelligence-gathering activities . . . which activities involve or may involve a violation of the criminal statutes of the United States,” or any person who “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor.” *Id.* at 1801(b)(2)(A),(C).  
<sup>139</sup>*See infra* note 141.

<sup>140</sup>*See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4<sup>th</sup> Cir. 1980); *United States v. Pelton*, 835 F.2d 1067, 1075–76 (4<sup>th</sup> Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 937 (1988).

<sup>141</sup>In re Sealed Case No. 02–001 310 F. 3d 717 (FISC 2002) (Foreign Intelligence Surveillance Court 2002) (quoting the lower court decision, which the Foreign Intelligence Surveillance Court of Review reversed in its first published opinion, decided November 18, 2002).

<sup>142</sup>Harold Hongju Koh, “Why The President (Almost) Always Wins In Foreign Affairs: Lessons of the Iran-Contra Affair,” 97 *Yale L. J.* 1255, 1286 (1988).

<sup>143</sup>In re Sealed Case No. 02–001 310 F. 3d 717.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.* at 731.

<sup>146</sup>343 U.S. 579.

<sup>147</sup>Charles A. Lofgren, *Government from Reflection and Choice* 225 (1986). In denying presidential power in his *Youngstown* concurrence, Justice Jackson disdainfully called it “the Korean enterprise.” 343 U.S. at 643.

<sup>148</sup>Lofgren, *supra* note 147.

<sup>149</sup>343 U.S. at 678 (Vinson, C. J., dissenting).

<sup>150</sup>*Id.* at 706–7 (describing the different uses of the War Stabilization Board and the Taft-Hartley Act to prevent work stoppages).

<sup>151</sup>*Id.* at 707–8.

<sup>152</sup>Exec. Order No. 10.340, 17 Fed. Reg. 3139 (April 9, 1952).

<sup>153</sup>*See Youngstown*, 343 U.S. 579, 710.

<sup>154</sup>*See id.* at 582.

<sup>155</sup>*Id.* at 589.

<sup>156</sup>*Id.* at 587.

<sup>157</sup>*See infra* notes 52–64 and accompanying text.

<sup>158</sup>*See supra* notes 56–57, and accompanying text.

<sup>159</sup>*See supra* notes 58–64, and accompanying text.

<sup>160</sup>343 U.S. at 638 (Jackson, J., concurring).

<sup>161</sup>*Id.* at 594 (Frankfurter, J., concurring).

<sup>162</sup>*Id.* at 595.

<sup>163</sup>*See id.* at 635–639 (Jackson, J., concurring) (grouping presidential actions into three categories).

<sup>164</sup>*Id.*

<sup>165</sup>Roy Brownell II, “The Coexistence of *United States v. Curtiss-Wright* and *Youngstown Sheet & Tube v. Sawyer* in National Security Jurisprudence,” 16 *J. L. & Pol* 1, 48–62 (2000).

<sup>166</sup> *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring).

<sup>167</sup> *Id.* at 650, 652–653 (Jackson, J., concurring).

<sup>168</sup> *Id.* at 594. Justice Frankfurter wrote:

Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that reasonably manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. *Id.*

<sup>169</sup> *Id.* at 709 (Vinson, C. J., dissenting).

<sup>170</sup> *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931). The Court overturned—in a context unrelated to war or national security—an injunction issued under Minnesota law that provided for the restraint of speech that was found to be “malicious, scandalous, and defamatory.” *Id.* The Court noted that the primary motivation for the First Amendment speech guaranty was the avoidance or prior restraint, and “[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications . . . is significant of the deep-seated conviction that such restraints would violate constitutional right.” *Id.* at 713, 718.

<sup>171</sup> Lofgren, *supra* note 147, at 225.

<sup>172</sup> 343 U.S. at 709 (Vinson, C. J., dissenting).

<sup>173</sup> *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir, 1973); cert. denied, 416 U.S. 936 (1974); *see generally*, Robert P. Sugarman, “Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions,” 13 *Colum. J. Transnat’l L.* 470 (1974).

<sup>174</sup> 403 U.S. 713.

<sup>175</sup> *Id.* at 714.

<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> Koh, *supra* note 142, at 1309.

<sup>179</sup> 403 U.S. at 720, 722 (Douglas, J., and Black, J., concurring).

<sup>180</sup> *See id.* at 726 (Brennan, J., concurring) (citing Holmes’ “clear and present danger” opinion in *Schenck v. United States*, 249 U.S. 47).

<sup>181</sup> *Id.* at 726 (Brennan, J. concurring).

<sup>182</sup> *Id.* at 756 (Harlan, J. dissenting).

<sup>183</sup> *Id.* at 757.

<sup>184</sup> *See id.*

<sup>185</sup> John Cary Sims, “Triangulating The Boundaries of Pentagon Papers,” 2 *Wm. & Mary Bill of Rts. J.* 341, 347 (1993).

<sup>186</sup> *See id.* at 378–379.

<sup>187</sup> *See, e.g., id.* at 407, citing 403 U.S. at 730 (Stewart, J. concurring).

<sup>188</sup> *See id.* at 379 nn. 147–148 (explaining that these negotiating volumes had not been given to the *Times* and the *Post* by Daniel Ellsberg, who had leaked the classified documents).

<sup>189</sup> *Id.* at 380–381.

<sup>190</sup> *Id.* at 381.

<sup>191</sup> *Id.* at 382 (citing Brief for the United States [Secret Portion]), *New York Times v. United States*, 403 U.S. 713 (1971) (hereinafter cited as Secret Brief).

<sup>192</sup> *Id.* (citing Secret Brief).

<sup>193</sup> *Id.* at 384–385 (citing Secret Brief).

<sup>194</sup> *Id.* at 385 (citing Secret Brief).

<sup>195</sup> *Id.* at 387–394 (discussing the NSA code-breaking).

<sup>196</sup> *Id.* at 387.

<sup>197</sup> *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>198</sup> 71 **Landmark Briefs and Arguments of the Supreme Court of the United States; Constitutional Law 228** (Philip B. Kurland and Gerhard Casper, eds., 1975).

<sup>199</sup> Joseph Story, **Commentaries on The Constitution of the United States**, sec. 993 (reprinted, Carolina Academic Press, 1987) (1833).

<sup>200</sup> *Id.* (emphasis added).

<sup>201</sup> *See, e.g.,* David Rabban, “The First Amendment in Its Forgotten Years,” 90 *Yale L. J.* 514 (1981); John F. Wireninus, “The Road to Brandenburg: A Look At The Evolving Understanding of the First Amendment,” 43 *Drake L. Rev.* 1 (1994).

<sup>202</sup> 249 U.S. 47.

<sup>203</sup> *Id.* The leaflets at issue in *Schenck* were conventional political speeches that under established doctrine today—rightly—could not be punished, even as the Supreme Court described them as employing “impassioned language” to imply that “conscriptio[n] was despotism in its worst form and a monstrous wrong against humanity, in the interest of Wall Street’s chosen few.” *Id.* at 50–51. Other cases followed in *Schenck*’s immediate pattern, including: *Frohwerk v. United States*, 249 U.S. 204, 207–8 (1919), where the Court affirmed Espionage Act convictions of two individuals who had published a dozen news articles critical of the war; *Debs v. United States*, 249 U.S. 211 (1919), resulting in the imprisonment of Socialist party candidate Eugene Debs, who also encouraged resistance to the war along with a broadside against capitalism; and *Abrams v. United States*, 250 U.S. 616 (1919), where more leafletters were convicted, though under a more sweeping amendment to the Espionage Act that made “disloyal, scurrilous, and abusive language about the form of government of the United States” criminal conduct. *Id.* Justice Holmes dissented from *Abrams*, attempting—rather late in

the day—to make an unsuccessful attempt to distinguish speech like that in *Schenck*, which obstructed the operations of government, from more general governmental criticism. *Id.*

<sup>204</sup>274 U.S. 357 (1927).

<sup>205</sup>341 U.S. 494 (1951).

<sup>206</sup>354 U.S. 298 (1957), overruled by *Burks v. United States*, 437 U.S. 1 (1978).

<sup>207</sup>Smith Act, 54 Stat. 670, 671 (codified as 18 U.S.C. §§ 371, 2385 [1948]).

<sup>208</sup>As noted in the text, however, the Court did not always use the “clear and present danger” test as Holmes first articulated it in *Schenck*. Indeed, given his later dissent in *Abrams v. United States*, 250 U.S. 616 (1919), some would say that *Holmes* did not always use the “clear and present danger” test as Holmes first articulated it.

<sup>209</sup>395 U.S. 444 (1969).

<sup>210</sup>*See id.*

<sup>211</sup>*Id.* at 447 (emphasis added).

<sup>212</sup>*Schenck*, 249 U.S. 47.

<sup>213</sup>*Dennis*, 341 U.S. 494, 510 (1951) (quoting Learned Hand’s lower-court opinion in *Dennis v. United States*, 183 F. 2d 201, 212).

<sup>214</sup>*See, e.g.*, Kristensen, *supra* note 102, at 22. Kristensen finds the Hand approach “troubling,” since “a threat that is remote but extremely grave might justify suppressing otherwise constitutionally protected speech. Luckily, this ‘test’ was later overruled [by *Brandenburg*].” *Id.*

<sup>215</sup>Academic commentary observes that “*Brandenburg* does not answer, however, how imminence and likelihood are to be appraised. Are these requirements to be assessed relative to the harms to be prevented, so that the more serious the danger, the less in the way of imminence or

likelihood that will be required? Or is some showing of imminence and likelihood necessary no matter how great the harm?” Erwin Chemerinsky, *Constitutional Law* 813 (1997).

<sup>216</sup>Kurland and Casper, *supra* note 197, at 231.

<sup>217</sup>*Id.*

<sup>218</sup>*See* USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001) (hereafter cited as Patriot Act).

<sup>219</sup>Patriot Act, § 215, 115 Stat. 272, 287–88 (amending 50 U.S.C. 1862(a)(1)).

<sup>220</sup>Patriot Act, § 802, 115 Stat. 272, 376–77 (codified at 18 U.S.C. § 2331).

<sup>221</sup>*Id.*

<sup>222</sup>*New Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198 (3d Cir. 2002).

<sup>223</sup>*Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6<sup>th</sup> Cir. 2002).

<sup>224</sup>*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>225</sup>*New Jersey Media Group*, 308 F. 3d at 220.

<sup>226</sup>*Detroit Free Press*, 303 F. 3d at 683.

<sup>227</sup>*See* Koh, *supra* note 142, at 1314. On the topic of justiciability, Koh writes: “Recent decisions have erected standing bars to foreign affairs suits by aliens, citizens, taxpayers, and Members of Congress.” *Id.*

<sup>228</sup>*Haig v. Agee*, 453 U.S. 280 (1981).

<sup>229</sup>*Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>230</sup>*Id.*

<sup>231</sup>Koh, *supra* note 142, at 1310.

<sup>232</sup>*Dames & Moore*, 454 U.S. at 678 (citing *Haig v. Agee*, 453 U.S. 280).

<sup>233</sup>*Youngstown*, 343 U.S. at 702 (Vinson, C. J., dissenting).

<sup>234</sup>*Id.* at 682 (Vinson, C. J. dissenting).

# Alarm Bells from the Past: The Troubling History of American Military Commissions

MICHAL R. BELKNAP

Among the most controversial of President George W. Bush's responses to the deadly September 11, 2001 al-Qaeda attacks on the World Trade Center and the Pentagon was his issuance two months later of an order authorizing the trial before military commissions of aliens suspected of membership in that murderous organization or of involvement in terrorist activities.<sup>1</sup> Two years after Bush's promulgation of that November 13, 2001 military order, no terrorist has yet stood trial before such a tribunal. That is not a bad thing. The history of American military commissions suggests that this is a legal device vulnerable to abuse that should be used only with the utmost caution.

Besides being susceptible to misuse, military commissions are a type of court unfamiliar to most twenty-first-century Americans. The United States has not employed such tribunals since the immediate aftermath of World War II. Although long forgotten here, military commissions are a well-recognized method for dealing with irregular fighters, such as al-Qaeda terrorists, who ignore internationally accepted laws of war. When such "unlawful combatants" fall into the hands of the enemy, the detaining state may subject them to trial in either a civil court or a military one.<sup>2</sup>

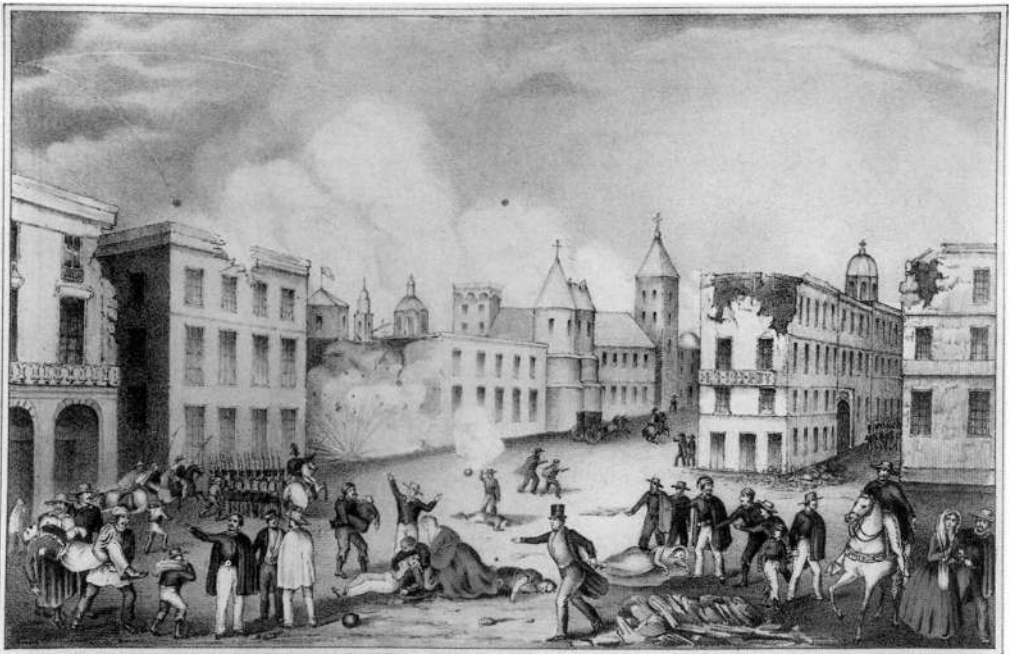
Americans began subjecting such defendants to military justice during the Revolutionary War. In 1780, acting pursuant to a congress-

sional resolution, a court martial tried and convicted Joshua Hett Smith, a civilian, of aiding and abetting the treason of General Benedict Arnold.<sup>3</sup> A military court also decided the fate of a more famous Arnold accomplice, Major John Andre of the British Army, who, while out of uniform and in disguise, received from the notorious traitor papers concerning the American fortifications at West Point. Andre was convicted of spying, a violation of the customary laws of war.<sup>4</sup> In 1818, U.S. General Andrew Jackson used courts martial to try two British civilians accused of inciting Creek Indians to wage war against the United States.<sup>5</sup>

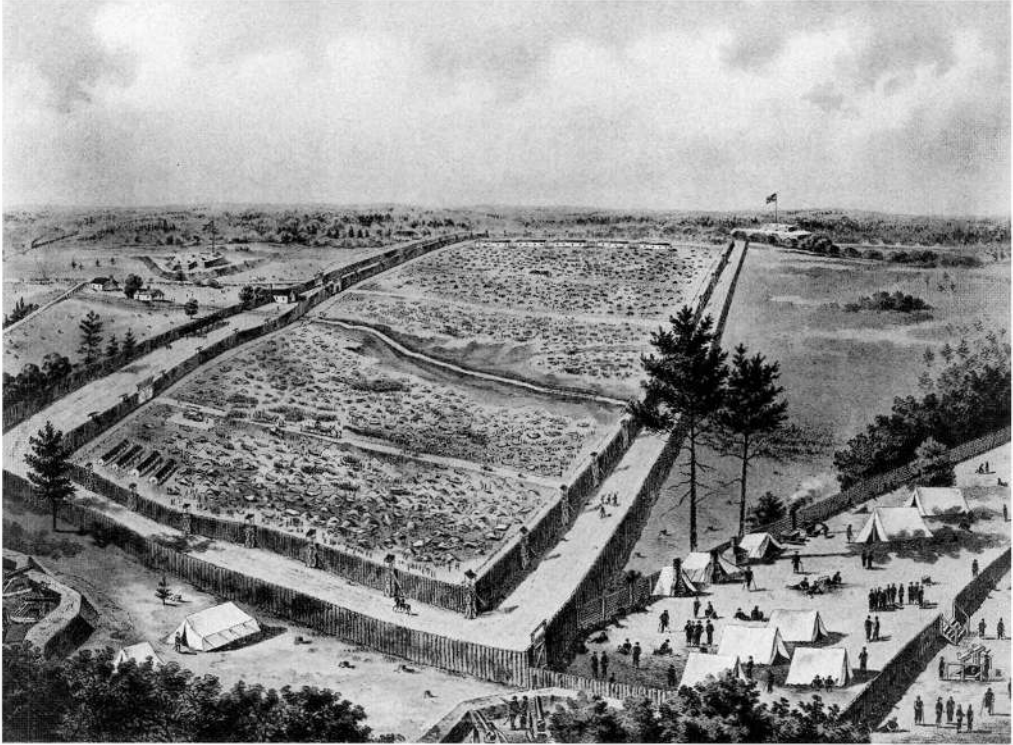
Although in each of these cases a group of soldiers vested with judicial power adjudged



Major John André of the British Army was captured as a spy near West Point in 1780 after receiving secrets about American fortifications from General Benedict Arnold.



The first military commission occurred during the Mexican War, when General Winfield Scott declared martial law and issued a general order providing that certain crimes against American soldiers (and crimes committed by American soldiers) should be punished by military commissions. This lithograph shows Vera Cruz during the bombardment on March 25, 1847.



Military commissions such as the one utilized to try Confederate Army Captain Henry Wirz, the commander of the notorious Andersonville prison camp (pictured), were used widely during the Civil War. Such commissions continued for more than five years after the end of the war.

a defendant guilty of violating the laws of war, the tribunals that decided them were not military commissions. The first use of something comparable to what President Bush authorized in his order of November 13, 2001 occurred during the Mexican War. After invading central Mexico, General Winfield Scott declared martial law and issued a general order providing that certain crimes against American soldiers committed by Mexican civilians (including murder, robbery, and theft) should be punishable by military commissions. In addition, Scott mandated the use of such tribunals to try members of his own army who had been accused of similar offenses; the Articles of War authorized the court-martial of American troops only for the offenses the Articles enumerated, which were limited mainly to breaches of discipline.<sup>6</sup> “In essence,” law professor Carol Chomsky ex-

plains, “these military commissions [which General Zachary Taylor also employed] replaced the civilian criminal courts in occupied, hostile territory after the declaration of martial law.”<sup>7</sup> To punish violations of the “laws of warfare,” Scott employed another type of military tribunal, referred to as a “council of war.” These court-martial-like bodies provided the models for what we refer to today as military commissions.<sup>8</sup>

During the Civil War, the Union Army made extensive use of this type of military commission to punish war crimes.<sup>9</sup> Most of these trials took place in hotly contested border areas, and the defendants were generally accused of guerrilla activities, horse-stealing, and bridge-burning.<sup>10</sup> After the fighting ended, Captain Henry Wirz, the commandant of the infamous Confederate prison camp at Andersonville, Georgia, was tried before a

military commission on charges of violating "the laws and customs of war."<sup>11</sup>

Although widely used during the Civil War, military commissions had many critics, some of whom questioned their legality. To be sure, Francis Lieber, the pioneering political scientist who drafted for the War Department a comprehensive "general order" governing the conduct of United States armies in the field, maintained that under the conditions that prevailed in many places, "[A] citizen . . . must be tried by military courts because there is no other way to try him and repress the crime which may endanger the whole country."<sup>12</sup> But statutory authority for what he advocated was meager.<sup>13</sup> Disputing Lieber's conclusion, in 1864 a commission headed by General John A. Dix, commander of the Department of the East, concluded "that no persons except such as are in the military or naval service of the United States are subject to trial by military courts, spies only excepted; and that except in districts under martial law, a military commission cannot try any person whatsoever not in the U.S. military or naval service."<sup>14</sup> Justice David Davis of the U.S. Supreme Court also became increasingly concerned about the propriety of trying civilians before military tribunals.<sup>15</sup> So did both houses of Congress, which in March 1865 passed resolutions condemning the practice.<sup>16</sup>

Despite this condemnation, however, the trial of civilians before military commissions continued during the Reconstruction period following the Civil War. Military commissions were used in the occupied South, as they had been in conquered territory during the Mexican War, to restrain misbehaving soldiers.<sup>17</sup> The defendants in many of these Reconstruction trials, however, were civilians. Some were accused of participating in guerrilla warfare activity while the war was still going on, but others were charged with offenses such as selling liquor to soldiers and defrauding the government.<sup>18</sup> Section 3 of the Military Reconstruction Act (which Congress passed on March 2, 1867 to provide for army

supervision of the South while it was being restored to what the North regarded as loyal rule) authorized commanders placed in charge of southern states to employ military commissions when they considered these necessary to suppress insurrection, disorder, and violence or to punish breachers of the public peace.<sup>19</sup> According to Pulitzer-Prize-winning historian Mark Neely, there were 1,435 military commission trials between the end of April 1865 and January 1, 1869. There were still more in 1869 and 1870.<sup>20</sup>

Although initiated to deal with the emergency of the Civil War, military commissions continued for more than five years after it ended. This happened despite an 1866 Supreme Court decision holding it was unconstitutional to subject civilians to military trials where the civil courts were open and functioning.<sup>21</sup> Military commission trials also continued despite a June 12, 1867 opinion issued by Attorney General Henry Stanberry. Stanberry concluded that because hostilities had ceased, any act conferring military authority over civilians must be strictly construed. Consequently, commanders might properly supersede civil jurisdiction by the institution of such tribunals only in extreme emergencies.<sup>22</sup> Although military-commission trials continued long after the Civil War ended, their number did eventually decline, and they ended entirely when all of the southern states were readmitted to the Union.<sup>23</sup>

The United States had no further experience with this type of trial until World War II. In 1942, President Franklin D. Roosevelt authorized the use of a military commission to try eight German saboteurs who had been captured after landing in New York and Florida on a sabotage mission.<sup>24</sup> After hostilities ended in 1945, the United States made extensive use of actual military commissions and of specially constituted military tribunals staffed by civilian lawyers and judges to try enemy soldiers, sailors, and civilians for war crimes.<sup>25</sup> Some of these bodies, such as the courts that tried the leading German war criminals

at Nuremberg and the top leaders of Imperial Japan in Tokyo, were international bodies in which a number of nations joined in prosecuting and judging the accused.<sup>26</sup> Others were purely American operations. For example, the United States alone tried thirteen senior German generals and admirals at Nuremberg for war crimes, as well as for initiating wars of aggression and invasions of other countries.<sup>27</sup> It also prosecuted a number of bureaucrats from the Economic and Administrative Main Office (Wirtschaftsverwaltungs-Hauptamt, or WVHA) for war crimes and crimes against humanity.<sup>28</sup> The United States also assumed sole responsibility for trying officers of the Japanese Imperial Navy for killing unarmed American prisoners of war in the Marshall Islands and trying two Japanese generals for outrages perpetrated by their troops in the Philippines.<sup>29</sup> The most famous of these purely American post-World War II trials was that of General Tomoyuki Yamashita. A U.S. military commission sentenced Yamashita to death for crimes committed by his troops, which included exterminating Filipino civilians and cruelly and inhumanely mistreating both civilian detainees and prisoners of war.<sup>30</sup>

During the half a century after Yamashita's execution, military commissions of the type that had sentenced the Japanese general to death disappeared from the American legal landscape. Although they had become unfamiliar by the time President Bush issued his order of November 13, 2001, the sort of tribunals for which that order provides are hardly unprecedented. While it is stretching a point to say that these executive creations are authorized by statute,<sup>31</sup> Congress has repeatedly recognized and accepted their existence. Military commissions received their first congressional recognition in legislation passed in 1863. The 1874 version of the Articles of War provided for them in section 1343, and the 1917 one did so in article 15.<sup>32</sup> Three provisions of today's Uniform Code of Military Justice (UCMJ) also mention this type of court. Article 36 autho-

rizes the President to prescribe the rules of procedure for "military commissions and other military tribunals."<sup>33</sup> Article 104 says that any person who renders certain kinds of assistance to the enemy "shall suffer death or such other punishment as a court-martial or military commission may direct."<sup>34</sup> Perhaps most reflective of the approach taken by the UCMJ, a statute that Congress enacted in 1950, soon after World War II, is Article 21. It declares that the provisions of the code conferring jurisdiction on courts martial "do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."<sup>35</sup> In other words, it does not eliminate whatever authority they already had.

That authority is, of course, limited by the Constitution. In the 1866 case of *Ex parte Milligan*, the Supreme Court raised serious doubts about the constitutionality of military commissions, at least when they were used outside a theater of operations to try defendants who were not members of the American armed forces. Such a tribunal convicted Lambdin P. Milligan and several fellow antiwar Democrats of committing treason during the Civil War. Their trial, as well as their alleged offenses, had taken place in Indiana—a state that was not in rebellion against the national government—and at a location far removed from the scene of the fighting.<sup>36</sup> In granting them a writ of habeas corpus, the Supreme Court held that trying a citizen who was not a member of the armed forces before a military commission, rather than in a civilian federal court authorized by Congress, in an area where such courts were open and satisfactorily administering criminal justice, violated both the Sixth Amendment's guarantee of a speedy and public trial before an impartial jury and the Fifth Amendment's requirement that all prosecutions not involving members of the military be initiated by grand-jury indictment.<sup>37</sup> The Court rejected the government's contention that the emergency created by the existence





Because the Nazi saboteurs had passed military lines after landing from submarines and had taken off their military uniforms, they were considered unlawful belligerents and forfeited their right to be treated as prisoners of war. They were tried by a military commission for violation of the laws of war. Attending the trial at the Department of Justice were (from left to right) Attorney General Francis Biddle, J. Edgar Hoover, and Colonel Ristine.

of a war justified using military commissions in areas not within a theater of operations.<sup>38</sup>

The government fared much better three-quarters of a century later in *Ex parte Quirin*. The petitioners in that case were the German saboteurs whom President Roosevelt had ordered tried before a military commission. After landing in this country from submarines in 1942, these eight Nazi agents disposed of their military uniforms, thereby forfeiting their right to be treated as prisoners of war.<sup>39</sup> That made trying them legal under international law. Since none of the saboteurs was a member of the American armed forces, however, *Milligan* seemed to dictate that they be tried in a civil court. Convinced precedent required this, the military lawyers appointed to represent them petitioned for a writ of habeas corpus and carried the case quickly up to the Supreme Court.<sup>40</sup> The Court unanimously rejected their argument. Noting that *Milligan* had been a nonbelligerent who was neither part of

nor associated with the enemy's armed forces, the Court maintained that its opinion in his case did not govern this one.<sup>41</sup> Because the *Quirin* petitioners had passed military lines out of uniform for purposes of committing sabotage, they were unlawful belligerents. That made it constitutional to try them before a military commission for violation of the laws of war.<sup>42</sup>

Precisely what *Quirin* made constitutional is unclear. In his opinion for the Court, Chief Justice Harlan Fiske Stone announced: "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war."<sup>43</sup> Among the questions which *Quirin* leaves unanswered is whether its holding applies to America's foes in the current fight against terrorism. Unlike World War II, that conflict is not a war declared by Congress. Also, al-Qaeda is not a nation-state, like Germany. The Association

of the Bar of the City of New York takes the position that there must be a predicate war to justify the use of military tribunals, and that only hostilities between states qualify as wars.<sup>44</sup> *Quirin* also does not resolve the question of whether international-law scholar Jordan Paust is correct when he argues that whatever authority the President derives from his power as Commander-in-Chief to set up military commissions “applies only during actual war within a war zone or relevant occupied territory.”<sup>45</sup> If Paust is right, of course, it is unconstitutional for President Bush to use military commissions sitting in Cuba to try violations of the law of war committed against Americans in Afghanistan or New York.

*Quirin* also provides no clear answer to the question of whether trying a U.S. citizen before

such a commission would violate the Constitution. Although all of the petitioners in that case were German-born, two had become naturalized United States citizens. One of those, Herbert Hans Haupt, had been recruited for the sabotage mission after finding himself in Germany at the end of an ill-fated odyssey that began when he fled Chicago for Mexico after getting his girlfriend pregnant.<sup>46</sup> His attorney, Kenneth Royall, insisted that Haupt had never taken an oath of allegiance to Germany, joined the German army or the Nazi party, or done anything else that constituted renunciation of his U.S. citizenship. Hence, he remained a U.S. citizen.<sup>47</sup> The Supreme Court found it “unnecessary to resolve” Royall’s contention.<sup>48</sup> Since it never decided Haupt’s citizenship status, one can argue both that *Quirin* is and that it is not



One of the saboteurs, 22-year-old Herbert Hans Haupt (center), had been recruited for the sabotage mission in Germany, where he returned after fleeing Chicago for Mexico when he got his girlfriend pregnant.

a precedent for trying a U.S. citizen before a military commission.

*Quirin* clearly offers no support for the Bush administration's apparent attempt to foreclose habeas corpus review of the President's November 13, 2001 order. That order declares that the individuals to whom it applies "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on [their] behalf, in . . . any court of the United States."<sup>49</sup> This stipulation replicates one Roosevelt included in his 1942 proclamation, setting up the military commission that tried the *Quirin* defendants. That provision was clearly intended to prevent the Nazi saboteurs from challenging the legality of the commission by petitioning a civilian court for a writ of habeas corpus.<sup>50</sup> The government argued that Roosevelt's proclamation precluded any court from granting the Nazi saboteurs a hearing, even on the issue of whether his decree applied to their case.<sup>51</sup> Bending over backwards to avoid conflict with the Executive, the Supreme Court claimed the President's directive did not have that effect. It then went on to assert that "[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contention that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."<sup>52</sup>

The Court reiterated that point in *In re Yamashita*. In that case, it declared that where "military tribunals have lawful authority to hear, decide, and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."<sup>53</sup> While Congress had not authorized the courts to review the determinations of such tribunals, however, the judiciary was empowered to look into whether the detention about which a petitioner complained was within the authority of those holding him. Judges could use their power to grant writs of habeas corpus "for the purpose of inquiring into the cause of restraint of liberty."<sup>54</sup> Congress had not

deprived, and could not deprive, those it subjected to trial by military commission of the right to question whether the Constitution and laws of the United States withheld the power to conduct such trials. "It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus," the Supreme Court declared.<sup>55</sup>

Although asserting very firmly its power to determine whether the military had jurisdiction to try General Yamashita, the Court declined to issue him the writ of habeas corpus that he sought.<sup>56</sup> In doing so it affirmed the legitimacy of military commissions, such as the one that had tried the Japanese general. "An important incident to the conduct of war," the Court asserted, "is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military efforts, have violated the law of war."<sup>57</sup> The legal basis of the commission was the war power, and it was not limited to achieving victory in the field, Stone declared. Along with that went the authority to try and punish enemy combatants. This is what Congress had used in creating bodies such as the one that tried Yamashita.<sup>58</sup>

Four years later, the Supreme Court again endorsed the use of military commissions to try enemy war criminals. In *Johnson v. Eisentrager* (1950), it affirmed a federal district court's dismissal of habeas corpus petitions filed by former German soldiers who had been convicted by such a tribunal for continuing to engage in belligerent activity against American forces in China after Germany surrendered, officially taking it out of the war.<sup>59</sup> "The jurisdiction of military authorities during or following hostilities to punish those guilty of offenses against the laws of war is long-established," the Court declared. It considered "well established" the power of the military to

exercise jurisdiction over “enemy belligerent prisoners of war, or others charged with violating the laws of war.”<sup>60</sup>

Although the Supreme Court repeatedly endorsed military commissions during and after World War II, those rulings did not eliminate all constitutional limitations on such tribunals. Despite the ambiguity created by the Court’s failure to rule on Haupt’s citizenship status, trying a United States citizen before such a body—even for his involvement with the enemy in a foreign war—would appear to be unconstitutional, at least if done within the United States. In *Milligan*, the Supreme Court rejected as unsound the proposition that, in time of war, the commander of an armed force, when convinced that the exigencies of the country demand it, may suspend all civil rights and their remedies and subject citizens as well as soldiers to his will, restricted only by whatever restraints superior officers and the President may impose. Except for members of the military, all “citizens of states where the courts are open, if charged with a crime are guaranteed the inestimable privilege of trial by jury,” the Court declared.<sup>61</sup> Resort to martial law was permissible only where, due to foreign invasion or civil war, the courts were closed and it was “impossible to administer criminal justice according to law.”<sup>62</sup> Historian Frank Klement lauds this proclamation “in sweeping terms and living prose that the constitutional rights of citizens would be protected by the federal courts, in times of war as well as in peace.”<sup>63</sup> Chief Justice William Rehnquist echoes his praise, declaring: “The *Milligan* decision is justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime.”<sup>64</sup>

During World War I, the government continued to adhere to *Milligan*’s rejection of military trials for civilians, ignoring the many panicky voices advocating this method of combating subversion. In 1917, New York attorney Henry A. Forster argued that it might be necessary to court-martial “all enemy spies and

some enemy sympathizers.”<sup>65</sup> A Minnesota judge joined him in calling for the use of military tribunals because they “can’t be fooled with a lot of technicality and red tape.”<sup>66</sup> Attorney General Thomas Gregory reported hearing “from every section of the country . . . the cry that the disloyal and seditious should be tried by military courts-martial.”<sup>67</sup> Gregory and President Woodrow Wilson opposed what they regarded as constitutionally dubious legislation, however, and none of it passed.<sup>68</sup>

Indeed, Wilson and his Attorney General had such strong reservations about military trials within the United States that the President commuted the death sentence a German naval officer had received in such a proceeding. Lothar Witzke, who had entered this country in civilian clothes for purposes of spying, was guilty of espionage. Wilson spared his life only because the Attorney General advised him that the defendant should have been tried in a civilian court.<sup>69</sup>

Of course, under the Supreme Court’s subsequent decision in *Quirin*, Witzke could have been tried before a military commission. *Quirin*, however, did not rest on pre-existing case law and was essentially an exercise in judicial fiat. According to political scientist David Danelski, in the Nazi saboteur case, Chief Justice Stone “began with an essentially intuitive justification and then asked his law clerks to find authorities to support it.”<sup>70</sup> Stone thought he saw a distinction between this case and *Milligan*. The venerable 1866 precedent seemed to require civil trials for the Nazi saboteurs, because they were not members of the American armed forces and the civilian criminal courts were open and functioning where they had committed their crimes, been captured, and were being tried. Stone believed *Quirin* could be distinguished from *Milligan* on the basis that these petitioners were unlawful belligerents. That, he thought, placed them within the jurisdiction of military tribunals, which the President, as Commander-in-Chief, could set up independently of the Fifth and Sixth Amendments on which *Milligan* rested.

“But Stone’s clerks could find little authority to support his justification,” Danelski reports.<sup>71</sup> For that reason, at almost every crucial point in his *Quirin* opinion, the Chief Justice found himself forced to cite analogous cases, rather than ones that were truly on point.<sup>72</sup> Although resting on a foundation of sand, his handiwork pleased Attorney General Francis Biddle. “Practically . . . the Milligan case is out of the way and should not again plague us,” Biddle wrote to President Roosevelt the day the Supreme Court published its decision.<sup>73</sup>

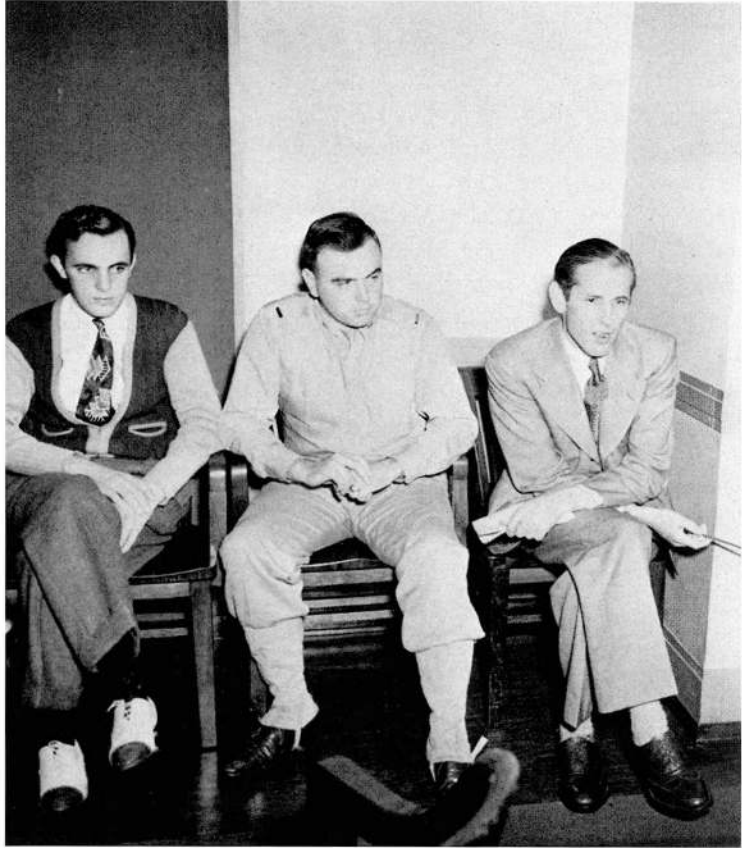
The sort of trial its apparent elimination made possible has very real practical advantages. One benefit of military commissions, as Gary Solis points out, is that violations of the law of war are likely to be better judged by those whose business is armed conflict than by civilian jurists unfamiliar with warfare.<sup>74</sup> Proponents of such tribunals also contend that they can do the job of trying accused al-Qaeda terrorists more quickly than can the civil courts.<sup>75</sup> Another advantage of such tribunals is juror safety. As Solis observes, “Courtroom security on a military base or ship is an easier matter than in a civilian courthouse.”<sup>76</sup> Trying suspected terrorists before military commissions also reduces the opportunities for them to exploit their trials for political purposes by turning courtrooms into platforms from which to broadcast their message to the world. As former Solicitor General Robert Bork warned readers of *National Review*: “An open trial . . . covered by television, would be an ideal stage for an Osama bin Laden to spread his propaganda to all the Muslims in the world.”<sup>77</sup> Bork’s preference for closed proceedings is in line with the views of those who see as a major advantage of military-commission trials for suspected terrorists the fact that these can be held in secret. As Attorney General John Ashcroft told journalist Tom Brokaw, “Frankly, you don’t want to compromise intelligence information in times of war.” Proponents of military tribunals fear civilian trials might do just that. As Solis notes,

however, “Secret intelligence sources and intelligence gathering techniques need not be revealed in a commission.”<sup>78</sup>

Despite the evident advantages of military commissions, there is ample evidence to suggest that unrestrained resort to such tribunals may be dangerous. The fact that the principal precedent supporting them has no real legal foundation merely makes more disturbing a pattern of abuses and injustices associated with their past use. History reveals, for example, that the secrecy cited as one of the great advantages of military commissions can hide not only sensitive defense information from the enemy but also governmental blundering from the American public. The *Quirin* case illustrates this problem. All of the Nazi saboteurs were arrested within two weeks after the first of them splashed ashore on Long Island. To outside observers, this rapid roundup looked like an example of brilliant counterintelligence and skillful investigative work. The FBI basked in the warm glow of laudatory publicity.<sup>79</sup> Its director, J. Edgar Hoover, who had been actively seeking favorable publicity ever since some of his agents gunned down gangster John Dillinger outside a Chicago theater in 1934,<sup>80</sup> hurried up from New York to announce the capture. He gave the Bureau sole credit for the apprehension of the saboteurs.<sup>81</sup>

Actually, as a public trial would have revealed, two of the German agents were far more responsible for the arrests than were Hoover and his men. The saboteurs who landed on Long Island had barely gotten ashore when they encountered an unarmed Coast Guard beach patrolman, John Cullen. The leader of the saboteur team, George John Dasch, first tried to convince Cullen that the Germans were fisherman who had run aground. Then, saying he did not want to have to kill him, he offered the Coast Guardsman \$260 U.S. to forget the encounter. The saboteurs left the beach and headed for New York City, while Cullen dashed off to report the incident to his superiors. By daybreak, the Coast Guard had discovered uniforms and explosives that the saboteurs had

Although the FBI took full credit for the capture of the saboteurs, the men were caught only because one of them, 39-year-old George John Dasch, turned himself in. Here, Dasch (right) awaits trial with Haupt (left), on whom he had informed, and Lt. Meakin of the U.S. Army. The secrecy of the military trial enabled the FBI to hide its blundering in the case.



buried on the beach, and by 11:00 a.m. it had reported the incident to the FBI.<sup>82</sup>

The Bureau did nothing with the information. Fortunately, after Dasch and another member of his team, Ernest Peter Burger, confided in one another that they had become deeply disaffected with the Nazi regime, Dasch, with his partner's tacit support, contacted the FBI. By then, the Coast Guard had informed the Bureau about Cullen's encounter with the four men on the Long Island shore, and agents had taken possession of the military uniforms and explosives found buried there. When Dasch telephoned the New York field office for the purpose of paving the way for a meeting with Director Hoover, however, the agent who answered the phone took no action beyond simply recording the call. The turncoat saboteur contacted the Bureau again five days later, this time from Washington. The agent

who took that call thought he was a crackpot. When he had the caller brought to his office, however, Dasch matched the description Cullen had given of one of the men on the beach. Once Dasch produced a briefcase containing \$82,550 in \$50 bills, the agent became convinced he was what he claimed. The turncoat saboteur ultimately gave the FBI a 254-page typed confession. Using information supplied by Dasch, the invisible writing on a handkerchief he gave agents, and some help from Burger, the FBI tracked down most of the other saboteurs. It arrested Haupt when he walked into its Chicago office in a bold attempt to clear himself of draft-evasion charges.<sup>83</sup>

Although the Bureau had apprehended the saboteurs far less because of skill than because of luck, that is not what a joyous public, celebrating one of America's few successes in a war this country had been losing, was told.

The publicity-seeking Hoover hustled up to New York to announce and claim credit for the arrests. According to Attorney General Biddle, it was generally believed that a particularly brilliant FBI agent had managed to get on the inside and make regular reports to America, probably by attending the sabotage school where the Nazi agents trained. That, of course, was nonsense. Hoover did not bother to correct such convenient misconceptions, however.<sup>84</sup> Indeed, according to testimony that Agent Norvel D. Willis gave during the saboteurs' military trial, FBI officials actually offered to arrange a presidential pardon for Dasch if he would plead guilty and not testify about his role in the apprehension of his confederates.<sup>85</sup> Although Secretary of War Henry Stimson insisted that a secret proceeding was necessary because "particular evidence which was especially dangerous" would come out during a public hearing,<sup>86</sup> the secrecy of the *Quirin* trial seems really to have been designed less to safeguard national security than to preserve the self-inflated reputation of the FBI.

A public trial would have embarrassed not only the Bureau but also the Coast Guard. The reason Cullen pretended to take Dasch's \$260 bribe and left the saboteurs on the beach was that he was in no position to capture them; he had no weapon. Although the United States had been at war for six months, the Coast Guard was still employing unarmed beach patrols on Long Island.<sup>87</sup> Cullen did the best he could, which was to run directly to his station, report his encounter with the saboteurs, and turn in the \$260. By daybreak, the Coast Guard had checked the location he identified and unearthed the uniforms and explosives the Germans had buried on the beach. Inexplicably, it then waited until 11:00 a.m. to inform the FBI of its discovery. This delay gave the saboteurs time to flee the area. When the Bureau was finally notified, they were already in Queens, buying new clothes.<sup>88</sup> Thus, the secrecy often cited as one of the benefits of military commission trials enabled both the Coast Guard

and the FBI to hide their blundering from the public and thus avoid political accountability for their mistakes.

Seventy years earlier, another supposed advantage of such tribunals—the rapidity of their proceedings—facilitated massive injustice in the prosecution of nearly 400 Native Americans. The defendants in these trials were Dakota Sioux who had participated in an 1862 uprising during which seventy-seven American troops, twenty-nine citizen soldiers, and approximately 358 white settlers were killed. The leaders of the Dakota received assurances from the commander of the volunteer troops who defeated them, Brigadier General Henry H. Sibley, that he would punish only those who had committed "murders and outrages upon the white settlers."<sup>89</sup>

Sibley did not keep his word. That is perhaps not surprising, for these cases are a classic example of the problems that can arise when we confuse the concepts of "enemies" and "criminals," failing to distinguish between those who merely carry out obligations they owe to societies with which we are in armed conflict and those who break rules of law applicable even to acts committed by members of one nation against another.<sup>90</sup> Many of the 392 Dakota who stood trial between September 28 and November 3 were accused of nothing more than participation in the fighting. Nevertheless, the six-member military commission Sibley appointed to hear their cases convicted all but sixty-nine of them and sentenced 303 to death.<sup>91</sup> Chomsky reports that "All defendants found to have participated in any fighting, whether against soldiers or against settlers, whether in a pitched battle or in a raid, were convicted and sentenced to be hanged."<sup>92</sup> The high rate of conviction and the harsh sentences imposed are hardly surprising, for all members of the commission were local residents who had themselves participated in the fighting against the Dakota.<sup>93</sup> They did not need much time to find their foes guilty and condemn them to death, trying as many as forty-two in a single day.<sup>94</sup>

Local ministers and officials who reviewed the transcripts of these military commission hearings for President Abraham Lincoln found their contents disturbing.<sup>95</sup> Even General Sibley, although maintaining that with troops in the field “it would have been impossible to devote as much time in eliciting the details in each of so many hundred cases,” conceded that the commission had not concerned itself with the “degree of guilt” of individual defendants.<sup>96</sup> Worried that injustice had been done to the Dakota, Lincoln commuted the death sentences of all but thirty-nine of them.<sup>97</sup> “It has become a commonplace observation,” Chomsky notes, “that the United States-Dakota war trials were unfair.”<sup>98</sup>

Along with such examples of unfairness, the history of American military commissions includes a number of notorious political trials. Several of these occurred amidst the passions of the Civil War, when, as Chomsky observes, “[I]rregularities in trial procedure and overzealousness in prosecuting and sentencing” often marred the proceedings of such tribunals.<sup>99</sup> The case of Clement L. Vallandigham illustrates her point. Vallandigham was a pro-southern “Copperhead” Democrat, who called openly for an end to efforts to preserve the Union by force and condemned the abolition of slavery, the Union’s military draft, the Lincoln administration’s suspension of the writ of habeas corpus, and its policy of subjecting civilians to arbitrary arrest.<sup>100</sup> His speeches challenged an administration policy of silencing dissenting voices, exemplified by Lincoln’s September 24, 1862 proclamation making “all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any other disloyal practices” subject to martial law and liable to trial by court-martial or military commission.<sup>101</sup> In line with that policy, General Ambrose Burnside, commander of the Department of the Ohio, issued General Orders Number 38, which proclaimed that “The habit of declaring sympathies for the enemy will not be allowed in this Department.

Persons committing such offenses will be at once arrested.”<sup>102</sup>

On May 1, 1863, while seeking the Democratic gubernatorial nomination (and apparently courting martyrdom in the hope that it would enhance his appeal to his fellow Democrats), Vallandigham gave a speech at a political rally in which he claimed the war was a wicked, cruel, and unnecessary struggle being fought to crush liberty and erect despotism. It would, he charged, bring freedom to blacks but slavery for whites. Vallandigham also lambasted General Orders Number 38 and urged resistance to Burnside’s directive. Four days later, soldiers arrested him.<sup>103</sup>

Brought to trial before a military commission, Vallandigham maintained that it had no jurisdiction over him. Because he was not in the army, navy, or militia, the dissident Democrat contended, he could be tried only in a civilian court after being charged by a grand jury. A petition for a writ of habeas corpus, filed with Judge Humphrey H. Leavitt, failed to secure his release, and the U.S. Supreme Court refused to grant a writ of certiorari in the case.<sup>104</sup>

This challenge to the commission’s jurisdiction consumed nine days, but Vallandigham’s trial took only two.<sup>105</sup> He did not even have time to subpoena one of his witnesses.<sup>106</sup> The only person to testify for the defense was Samuel S. Cox, a Democratic congressman who had been present at the speech that triggered Vallandigham’s arrest. He claimed to have heard no advocacy of forcible resistance to laws or military orders. The army officers who testified for the prosecution did not dispute Cox. Indeed, one of them admitted that Vallandigham had said he would not counsel resistance to military or civil law.<sup>107</sup> Nevertheless, the commission convicted the defendant and sentenced him to close confinement for the duration of the war.<sup>108</sup>

The Vallandigham prosecution provoked massive protest by Democrats and even drew criticism from many Republicans.<sup>109</sup> Responding to this denunciation, Lincoln



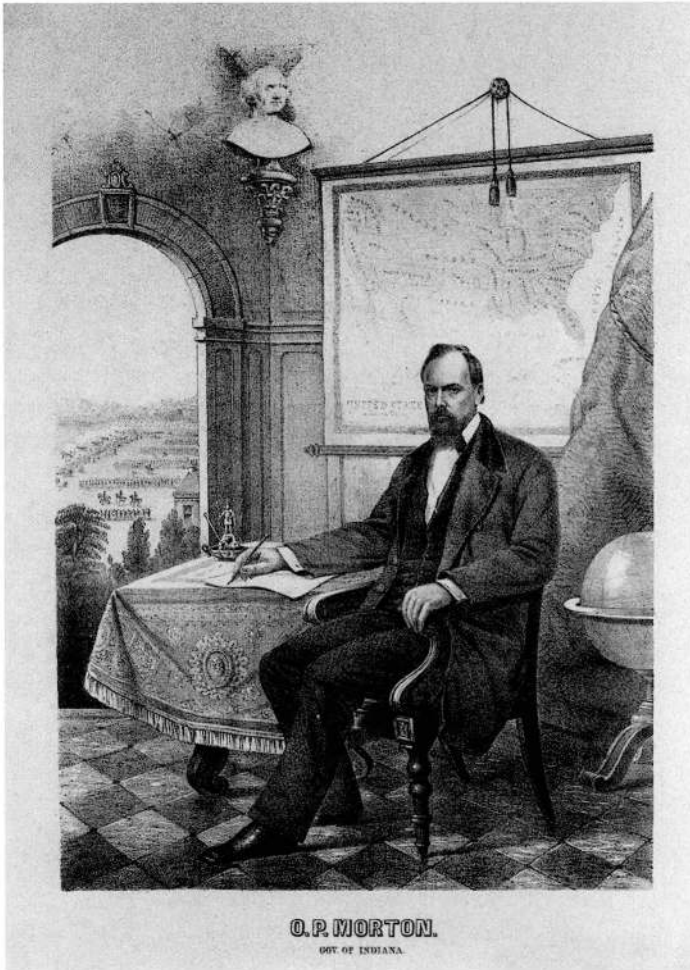


When Clement L. Vallandigham was brought to trial before a military commission for protesting the Civil War and the Lincoln administration's suspension of the writ of habeas corpus, he maintained that the court had no jurisdiction over him because he was not a soldier. This cartoon shows Lincoln menaced by Copperheads (Peace Democrats), with Vallandigham leading the way.

conceded that it would have been wrong to arrest the Ohio Democrat merely for giving a speech that damaged the political prospects of his administration. But, he insisted, the defendant had been hurting the army by encouraging desertion and discouraging enlistments.<sup>110</sup> Nevertheless, the whole affair proved sufficiently embarrassing that the President changed Vallandigham's punishment from imprisonment to banishment beyond the Union lines.<sup>111</sup>

Like Vallandigham's case, *Ex parte Milligan* illustrates how military commissions have been abused for political purposes. One of the men arrested with Milligan, Harrison Horton Dodd, was probably guilty of treason. Dodd had accepted money from Confederate agents to subsidize a revolt by an organization he had created, called the Sons of Liberty. A military posse took him into custody after a detective learned that he was expecting a shipment of revolvers, intended for use in a

"rebellion" (for which he had tried without much success to enlist support). Dodd, however, escaped from custody in the middle of his trial and fled to Canada.<sup>112</sup> The defendants he left behind, including Milligan, were tried for treason, not because they had committed that offense, but because prosecuting them served the political interests of Indiana's Republican Governor, Oliver P. Morton, who wanted to discredit the Democratic opposition on the eve of the 1864 elections. Morton asked an aide, Brigadier General Henry B. Carrington, and the commander of the local military department to dig up evidence against top Democrats and make arrests. Detectives working for Carrington put several men allegedly associated with the Sons of Liberty (an organization that existed mostly in Dodd's head and on paper) under surveillance. One was Milligan, whom Dodd had—apparently without bothering to tell him—appointed a major general in the organization's military branch.<sup>113</sup>

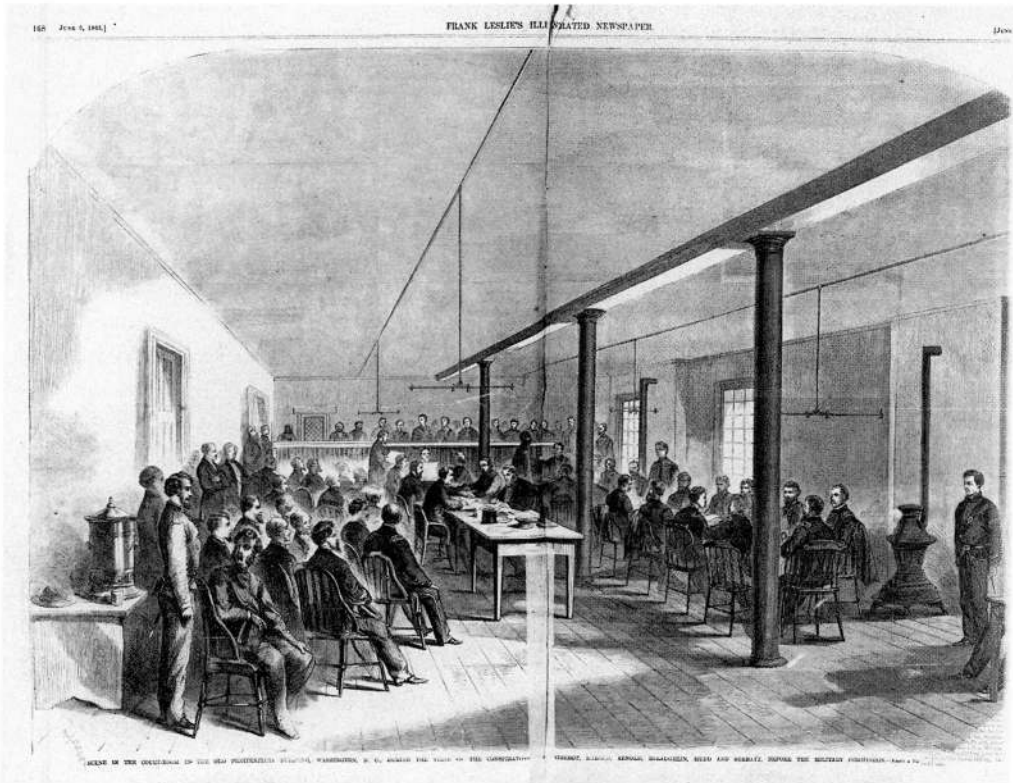


Milligan was tried for treason because Indiana governor Oliver P. Morton wanted to discredit the Democrats on the eve of the 1862 election. Prosecuting Milligan, although he was innocent of the treason charge, served that purpose.

As historian Frank Klement reports, “Morton was most anxious that [the] trial before a military commission begin in September, in time to grind grist for the October state elections.”<sup>114</sup> Klement adds that Major Henry L. Burnett, the judge advocate who chose the members of the commission, “selected seven army officers, several of whom were personal friends of the governor and strong partisans.”<sup>115</sup> Dodd’s escape was, of course, a political bonanza for the Republicans. The commission convicted him in absentia and sentenced him to death. It then recessed for a number of days while several members gave political speeches.<sup>116</sup>

The Republicans won the gubernatorial election. After celebrating that victory, Judge

Advocate Burnett prepared for the upcoming presidential contest by drafting charges and specifications against the remaining defendants.<sup>117</sup> As was customary in military commissions, the accused were arraigned on a series of general allegations (“Conspiracy Against the Government of the United States,” “Affording Aid and Comfort to Rebels Against the Authority of the United States,” and “Inciting Insurrection”), each one accompanied by more particularized stipulations of the conduct that made each accused guilty of that offense. Neither the charges against Milligan and his co-defendants nor the specifications enumerated under them cited any federal statute criminalizing the conduct in which they had allegedly engaged.<sup>118</sup> Because



Conspirators in the plot to assassinate President Lincoln were tried before a military tribunal because Secretary of War Edwin Stanton and Judge Advocate General Joseph Holt feared a civilian jury sitting in Washington, DC might not convict them. Pictured is the conspirators' trial in the courtroom in the old Penitentiary building.

they were being tried by a military tribunal, however, that did not matter. As Chief Justice Rehnquist has pointed out, since “a military commission could simply decide for itself what acts were criminal, and what sentence was appropriate upon conviction, a defendant before such a commission suffered [a] serious deprivation, compared with his counterpart in a civil court.”<sup>119</sup> Also handicapping Milligan and his co-defendants was the fact that, under then-existing rules, the judge advocate (in their case, the highly partisan Major Burnett) was, in effect, not only the prosecutor but (because he told the members what the law was) the judge as well.<sup>120</sup>

Not surprisingly, the commission convicted every defendant and sentenced all but one to death.<sup>121</sup> Although Governor Morton had publicly pronounced the accused guilty even before the trial began, he now launched

a campaign for executive clemency.<sup>122</sup> As always, his motives were political: “[h]e had used the arrests and trials as a stratagem to insure his own and Lincoln’s reelection, but now he did not want the blood of the convicted men upon his hands,” Klement explains.<sup>123</sup> Fortunately for Morton as well as for the defendants, the Supreme Court overturned their convictions in *Ex parte Milligan*. Nevertheless, *Milligan’s* history offers a dramatic demonstration of how military tribunals can be misused for political purposes.

Had the Supreme Court decided that case a year earlier, it would have prevented another proceeding that further tarnishes the reputation of military commissions, enhancing the impression that what they provide is not justice but a legalistic veneer for vengeance. The eight men and women accused of conspiring with John Wilkes Booth to assassinate

President Lincoln were tried before a military tribunal primarily because Secretary of War Edwin Stanton and Judge Advocate General Joseph Holt feared that a civilian jury sitting in Washington, DC, where there were many southern sympathizers, might not convict them. Stanton and Holt persuaded the new President, Andrew Johnson, to use a military tribunal, despite the fact that former Attorney General Edward Bates considered this unconstitutional.<sup>124</sup> His successor, James Speed, probably did also, until Stanton pressured him into issuing an opinion affirming its legality.<sup>125</sup> As one student of the case has written, "The defendants were at a clear disadvantage in being tried by military officers, none of whom had served previously as judges or attorneys."<sup>126</sup>

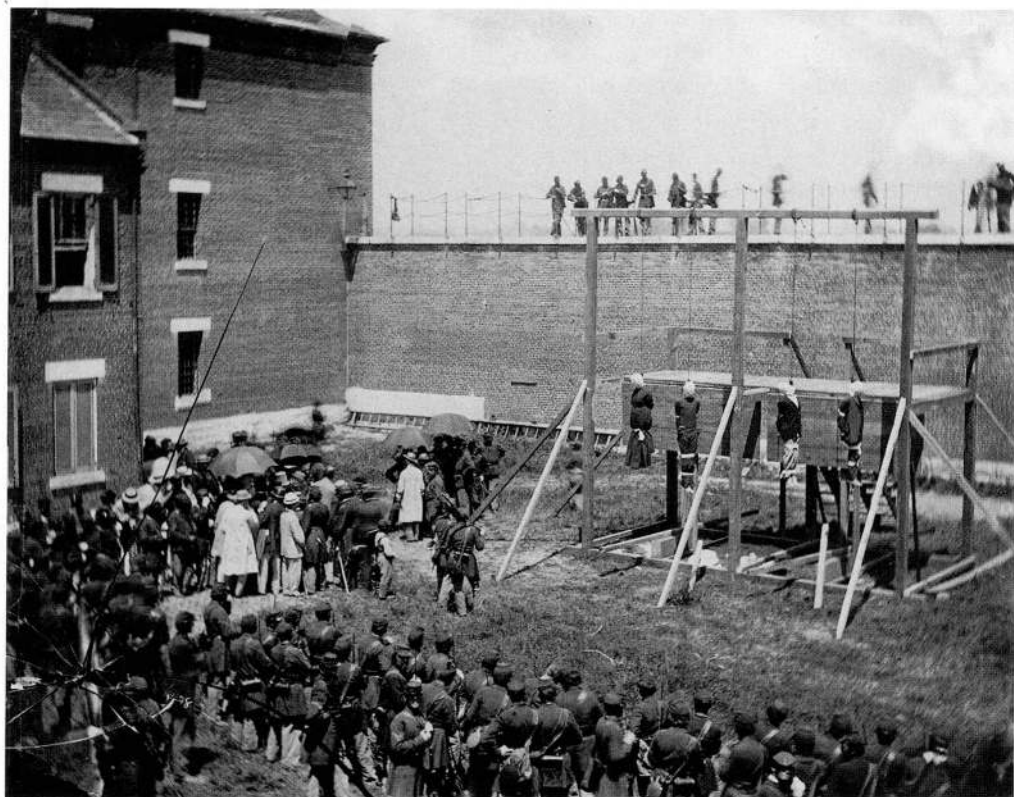
They were also disadvantaged by the fact that much of the prosecution's most damning evidence had little to do with them. It showed that the president of the Confederacy, Jefferson Davis, and various Confederate agents operating out of Canada had conspired to kill Lincoln and also to commit such atrocities as starting epidemics on the East Coast.<sup>127</sup> As Chief Justice Rehnquist has pointed out, the most this evidence tended to prove was that Booth had murdered Lincoln, something no one was disputing.<sup>128</sup> Besides being of dubious relevance and inflammatory, this evidence was also false: all of the witnesses the prosecution called to prove these contentions lied.<sup>129</sup>

Despite the quality of its evidence and its failure to establish that many of the accused had participated in the alleged conspiracy to kill Lincoln, Vice President Johnson, Secretary of State William Seward, and General Ulysses S. Grant, the military commission convicted all of the accused.<sup>130</sup> Chief Justice Rehnquist believes that the government presented evidence proving that four of the accused were guilty of something, although in several cases not the crime with which they were charged.<sup>131</sup> He also thinks that the evidence against Edward Spangler, a stagehand who briefly held Booth's

horse outside Ford's theater while he was inside killing Lincoln, was barely sufficient to support a finding that Spangler hindered the pursuit of the assassin.<sup>132</sup> That leaves George Atzerodt, who agreed to kill Johnson, but lost his nerve and never got closer to the Vice President than the bar at the hotel where he was living, Dr. Samuel Mudd, who set Booth's broken leg while he was a fugitive, and Mrs. Mary Surratt, who owned a boarding house where one of the conspirators lived under an assumed name and where Booth met with other members of the group and who also delivered a package for him on the day of the assassination.<sup>133</sup> The Chief Justice does not seem to find the evidence against Atzerodt particularly persuasive and regards that against Mudd as "too sketchy to have convicted him as a conspirator in the plot to kill Lincoln."<sup>134</sup>

On the other hand, Rehnquist finds it "difficult to fault the commission for having found Mary Surratt guilty of conspiracy."<sup>135</sup> Her trial remains highly controversial, however, primarily due to the tactics employed by prosecutors determined to convict and execute her. Stanton helped one of the principal witnesses against Mrs. Surratt get a government job soon after the trial.<sup>136</sup> Although prosecutors introduced into evidence most of the other items taken from Booth's body, they failed to produce his diary, an omission that looks all the more suspicious because there were pages missing from this document, which, even as it stood, would have weakened the government's case.<sup>137</sup> Finally, Judge Advocate General Holt apparently hid from President Johnson a petition signed by five of the nine members of the commission asking him to commute Surratt's death sentence.<sup>138</sup>

Holt and Stanton wanted to avenge Lincoln's murder, and they used a military commission to obtain vengeance a civilian jury probably would have denied them. Their objective in trying Captain Henry Wirz before such a tribunal was similar. Wirz had been the commandant of the Confederacy's infamous Andersonville prison camp. Along with



Mary Surratt, the owner of the boardinghouse where the conspirators met, was hung on July 7, 1865 along with three of the other alleged conspirators in Lincoln's assassination. Prosecutors had been determined to secure her execution, and the Secretary of War helped one of the principal witnesses against her get a government job soon after the execution.

much of the Northern public, Stanton believed that Davis and other high-ranking Confederates were responsible for Lincoln's death and had also conspired to murder Union prisoners of war. They could not prove any of this, so Wirz became a convenient scapegoat and his trial an outlet for northern rage.<sup>139</sup> The war was over, and the offenses of which he was accused—murder and conspiracy—were state crimes. Nevertheless, he was tried by a military commission. Wirz argued that the commission had no jurisdiction over anyone who was not a member of the U.S. armed forces, but Stanton and Holt responded that because his crimes had been committed in pursuit of military objectives, they were violations of the law of war. The prosecutors won the jurisdictional argument.<sup>140</sup>

Wirz had probably committed war crimes for which he deserved severe punishment.<sup>141</sup>

But his trial by a military commission was a mockery of justice that has left lingering doubts about his guilt. The judge advocate, of course, served as both prosecutor and judge. In addition, two of his friends were members of the commission. Entries in the diary of one of these, who served as its president, show that he was not only prepared to defer completely to the judge advocate, but was also biased against the accused.<sup>142</sup> The prosecution's star witness turned out to be an army deserter who had lied about his identity.<sup>143</sup> Much of its evidence was hearsay, and the testimony of government witnesses was vague and contradictory.<sup>144</sup> Nevertheless, the commission convicted Wirz and ordered him "to be hanged by the neck til he be dead."<sup>145</sup> "Like the *U.S.-Dakota* trials," writes Peter Maguire, "the Trial of Captain Henry Wirz provided a dramatic spectacle of vengeance."<sup>146</sup>



The desire of victims for vengeance is natural, and retribution is one of the purposes of punishment. It is supposed to be administered, however, only after an impartial process decides that the recipient's conduct merits condemnation. Often, in the past, military tribunals have failed to provide that process. They have delivered retribution quickly, but often unfairly and for political reasons. Protest- ing the way the case of General Yamashita was handled, Justice Wiley Rutledge, who certainly had no sympathy for anyone who would commit the sort of atrocities with which the Japanese general was charged, maintained that even Yamashita should be given a fair trial: "there can be and should be justice administered according to law," Rutledge declared.<sup>147</sup> He feared that in its haste to punish an enemy, this country was forsaking "the basic standards of trial," which were among the very things the nation had been fighting to preserve.<sup>148</sup> We could do that again through hasty and excessive resort to military commissions in the war against terrorism. The result, as Yamashita's American lawyer, Frank Reel, warned, could be "damage, to ourselves and to the faith of men the world over in the honesty and objectiveness of our legal structure."<sup>149</sup>

## ENDNOTES

<sup>1</sup>"Military Order-Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (November 13, 2001) (hereinafter cited as Military Order). The order defines the class of persons that it subjects to possible military trial as including "any individual who is not a United States citizen" with respect to which the President determines in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
- (i) is or was a member of the organization known as al Qaida [sic.]
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation there of, that have caused, threaten to cause, or have as their aim to cause, injury to, or adverse effects on the United States, its citizens, national security, foreign policy, or economy;

or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii).

*Id.* at §

For examples of the critical reaction to President Bush's November 13 military order, see Michal R. Belknap, "A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective," 38 *Cal. W. L. Rev.* 433 (2002) (hereinafter cited as Belknap, "Pedigree"); Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, "*Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? A Report on the President's Military Order of November 13, 2001, Regarding 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'*" 57 *The Record* 39 (2002); Elisa Massimino, "Alien Justice: What's Wrong with Military Trials of Terrorist Suspects?," 29 *Human Rts.* 14 (2002); Ved P. Nanda, "Let U.N. Tribunal Try Terrorists," *Denver Post*, November 25, 2001, available at 2001 WL 27672488; Jordan J. Paust, "Antiterrorism Military Commissions Courting Illegality," 23 *Mich. J. Int'l L.* 1 (2001); Neal K. Kytal and Lawrence H. Tribe, "Waging War, Deciding Guilt: Trying Military Tribunals," III *Yale L. J.* 1239 (2002). For the views of those on the pro-military commission side of this controversy, see Ralph Dannheisser, "Senators Say Bush Antiterror Approach Legal, But Needs Safeguards; Ashcroft Justifies Tribunals Before Judiciary Committee," U.S. Dept. St. Information Programs, December 6, 2001, available at <http://usinfo.state.gov/topical/pol/terror/01120620.htm>; Robert Bork, "Having Their Day in (a Military) Court," *Nat. Rev.* December 17, 2001, available at <http://www.nationalreview.com/17dec01/bork121701.shtml>; Robert C. O'Brien, "Trying Circumstances," 25 *Los Angeles Law.* 48 (2002); Gary D. Solis, "Military Commissions and Terrorists," in *Evolving Military Justice* 195 (Eugene R. Fidell and Dwight H. Sullivan, eds., 2002).

<sup>2</sup>Solis, *supra* note 1, at 198.

<sup>3</sup>*Id.* at 199.

<sup>4</sup>What George Washington utilized in Andre's case was a court of inquiry, which was charged with studying the incident to determine whether Andre was a spy. William Winthrop, *Military Law and Precedents* 518 (1920, reprinted 1979). Nevertheless, World War II President Franklin D. Roosevelt considered this case an "absolute parallel" to the Nazi saboteurs' case, which he created a military commission to try. David J. Danelski, "The Saboteurs' Case," *J. Sup. Ct. Hist.* 61, 65 (1996). Journalist Andrew Curry agrees with Roosevelt's characterization of these cases, asserting that "[T]here are a few famous cases of British agents brought up before military tribunals during the Revolutionary War." Curry, "Liberty and Justice: Military Tribunals in America: A Controversial Tool with

- a Storied Past,” *U.S. News and World Rep.*, December 10, 2001, at 52, 53.
- <sup>5</sup>Solis, *supra* note 1, at 199.
- <sup>6</sup>Carol Chomsky, “The United States–Dakota War Trials: A Study in Military Justice,” 43 *Stan. L. Rev.* 13, 63 (1990).
- <sup>7</sup>*Id.* at 64.
- <sup>8</sup>*Id.* at 65.
- <sup>9</sup>*Id.* at 66.
- <sup>10</sup>Mark E. Neely, Jr., **The Fate of Liberty: Abraham Lincoln and Civil Liberties** 168–169 (1991).
- <sup>11</sup>Lewis L. Laska and James M. Smith, “‘Hell and the Devil’: Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865” 68 *Mil. L. Rev.* 77, 95–98 (1975). The prosecution alleged that Wirz had violated the laws and customs of war by conspiring with others to injure the health and destroy the lives of prisoners at Andersonville and by himself murdering thirteen prisoners. *Id.* at 97–98.
- <sup>12</sup>Letter from Francis Lieber to Henry W. Halleck, June 13, 1864, quoted in Neely, *supra* note 10, at 160.
- <sup>13</sup>Chomsky, *supra* note 6, at 66.
- <sup>14</sup>Quoted in Neely, *supra* note 10, at 144.
- <sup>15</sup>Frank L. Klement, “The Indianapolis Treason Trials and *Ex parte Milligan*,” in **American Political Trials** 97, 108 (Michal R. Belknap, ed., 2d ed. 1994) (hereinafter cited as Klement, “Indianapolis Treason Trials”).
- <sup>16</sup>*Id.* at 109, 117 n.83. Because no bill containing this expression of disapproval ever secured the approval of both the House and Senate, although it was passed by both houses of Congress, it never became law.
- <sup>17</sup>Neely, *supra* note 10, at 177–178.
- <sup>18</sup>*Id.* at 177.
- <sup>19</sup>14 Stat. 428, 428 (1867).
- <sup>20</sup>Neely, *supra* note 10, at 176–177.
- <sup>21</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
- <sup>22</sup>Winthrop, *supra* note 4, at 849–850. It should be noted that Stanberry was an opponent of the Military Reconstruction Acts; he attempted to hamstring their operation and refused to appear to defend them in the famous case of *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). See Harold M. Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** 502, 504 (1973).
- <sup>23</sup>Neely, *supra* note 10, at 179.
- <sup>24</sup>For histories of this case, see Louis Fisher, **Military Tribunals: The *Quirin* Precedent**, CRS Report for Congress, Order Code RL31340 (March 26, 2002) (hereinafter cited as Fisher, **Military Tribunals**); *idem*, **Nazi Saboteur on Trial: A Military Tribunal and American Law** (2003) (hereinafter cited as Fisher, **Nazi Saboteurs**); Danelski, *supra* note 4; Michal R. Belknap, “The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case,” 89 *Mil. Law Rev.* 59 (1980) (hereinafter cited as Belknap, “Supreme Court”).
- <sup>25</sup>For detailed discussions of these cases, see 2 Leon Friedman, **The Law of War: A Documentary History** (1972) and Peter Maguire, **Law and War: An American Story** 101–201 (2000).
- <sup>26</sup>On the Nuremberg prosecutions of German leaders, see Bradley F. Smith, **Reaching Judgment at Nuremberg** (1977); Robert E. Conot, **Justice at Nuremberg** (1983); Ann Tusa and John Tusa, **The Nuremberg Trial** (1984); and Telford Taylor, **The Anatomy of the Nuremberg Trials: A Personal Memoir** (1992), written by one of the top American prosecutors, who went on to be a distinguished law professor. The best work on the trials of the Japanese leaders is Richard H. Minear, **Victors’ Justice: The Tokyo War Crimes Trial** (1971). The Supreme Court ruled that the body that tried the Tokyo defendants was “no a tribunal of the United States,” and hence, that it had no power or authority to review, affirm, set aside, or annul the judgments and sentences imposed upon them. *Hirota v. McArthur*, 338 U.S. 197, 198 (1948).
- <sup>27</sup>Friedman, *supra* note 25, at 1421–1470.
- <sup>28</sup>*Id.* at 1254–1280. The defendants in this case were accused of murder, plundering public property, torture, illegal imprisonment, and enslavement, and deportation to slave labor of, and brutalities, atrocities, and other inhumane acts against, prisoners of war and civilians in occupied territories. *Id.* at 1256–1257.
- <sup>29</sup>*Id.* at 1471–1281; *Homma v. Patterson*, 337 U.S. 759 (1946); A. Frank Reel, **The Case of General Yamashita** (1949).
- <sup>30</sup>Friedman, *supra* note 25, at 1596–1598. General Yamashita sought a writ of habeas corpus from the U.S. Supreme Court, but the Court declined to issue one. *In re Yamashita*, 327 U.S. 1 (1946).
- <sup>31</sup>Belknap, “Pedigree,” *supra* note 1, at 441.
- <sup>32</sup>Solis, *supra* note 1, at 200.
- <sup>33</sup>10 U.S.C. § 836 (2002).
- <sup>34</sup>10 U.S.C. § 904 (2002).
- <sup>35</sup>10 U.S.C. § 821 (2002). For the version of the Uniform Code of Military Justice enacted by Congress in 1950, see Pub. L. 81–506, 64 Stat. 107 (1950).
- <sup>36</sup>Klement, “Indianapolis Treason Trials,” *supra* note 15, at 103–08.
- <sup>37</sup>*Milligan*, 71 U.S., at 121–123.
- <sup>38</sup>*Id.* at 120–121, 124–127. In the most famous and widely quoted passage in its *Milligan* opinion, the Court declared:
- The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. *Id.* at 120–121.
- <sup>39</sup>Danelski, *supra* note 4, at 66–67; “Geneva Convention Relative to the Treatment of Prisoners of War,” opened for

signature August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4A(1), (3), Art. 5, Art. 13, Art. 25, Art. 82, Art. 84, Art. 105.

<sup>40</sup>Belknap, "Supreme Court," *supra* note 24, at 67–73. For a fascinating discussion of the unusual and complicated procedural history of *Ex parte Quirin* by a man who worked on the case as a young lawyer and went on to become a distinguished Yale Law School tax professor, see Boris I. Bittker, "The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction," 14 *Const. Comment.* 431 (1997). The *Quirin* petitioners were represented by Colonel Cassius M. Dowell, a career Judge Advocate General's Corps officer, and Kenneth Royall, a wartime volunteer with a distinguished record as a North Carolina trial lawyer.

<sup>41</sup>*Ex parte Quirin*, 317 U.S.1, 45 (1942).

<sup>42</sup>*Id.* at 31. For an excellent brief discussion of the Supreme Court's handling of the constitutional issues raised by *Quirin*, see William M. Wiecek, "Sabotage, Treason, and Military Tribunals in World War II," in **Total War and the Law: The American Home Front in World War II**, 43, 45–55 (Daniel R. Ernst and Victor Jew, eds., 2002).

<sup>43</sup>317 U.S. at 45–46.

<sup>44</sup>Committee on Military Affairs and Justice, *supra* note 1, at 48–50.

<sup>45</sup>Paust, *supra* note 1, at 5. In his opinion for the Court, Chief Justice Stone announced: "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 29.

<sup>46</sup>For biographical sketches of all of the *Quirin* defendants, see Fisher, **Nazi Saboteurs**, *supra* note 24, at 6–16. The other naturalized U.S. citizen in the group was Ernest Peter Burger.

<sup>47</sup>Belknap, "Supreme Court," *supra* note 24, at 70.

<sup>48</sup>317 U.S. at 20.

<sup>49</sup>Military Order, *supra* note 1, § 7(b)(2).

<sup>50</sup>Attorney General Francis Biddle told Roosevelt that this portion of his proclamation would produce the same practical results in the Nazi saboteur case as suspending the writ of habeas corpus, without raising the broad policy questions that would follow suspension of the writ. Belknap, "Supreme Court," *supra* note 24, at 65.

<sup>51</sup>317 U.S. at 12–13.

<sup>52</sup>*Id.* at 25. According to William Wiecek, the Justices resented President Roosevelt's "high-handed attempt by mere proclamation to oust the civil courts of any role in considering the civil-liberties issues [in] the case." They were "resolved to rebuff this dangerous overture." Wiecek, *supra* note 42, at 50.

<sup>53</sup>In *re Yamashita*, 327 U.S. 1, 8 (1946).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 9. According to Wiecek, in *Yamashita*, Stone "repeated his *Quirin* performance" by insisting that "civil courts retained the power to review the legality of the proceedings before a military commission." Wiecek, *supra* note 42, at 62.

<sup>56</sup>327 U.S. at 25–26.

<sup>57</sup>*Id.* at 11.

<sup>58</sup>*Id.* at 12.

<sup>59</sup>339 U.S. 763 (1950).

<sup>60</sup>*Id.* at 786 (quoting *Duncan v. Kahanamoka*, 327 U.S. 304, 312, 313–314).

<sup>61</sup>71 U.S. at 123.

<sup>62</sup>*Id.* at 127.

<sup>63</sup>Klement, "Indianapolis Treason Trials," *supra* note 15, at 112.

<sup>64</sup>William H. Rehnquist, **All the Laws But One: Civil Liberties in Wartime** 137 (1998).

<sup>65</sup>Henry A. Forster, "Are Native American Enemy Sympathizers Subject to Court-Martial?," 85 *Cent. L. J.* 132, 132 (1917).

<sup>66</sup>Quoted in H.C. Peterson and Gilbert C. Fite, **Opponents of War, 1917–1918** 216 (1957).

<sup>67</sup>*Id.*

<sup>68</sup>Quoted in David M. Kennedy, **Over Here: The First World War and American Society** 80 (1980).

<sup>69</sup>Curry, *supra* note 4, at 52–53.

<sup>70</sup>Danelski, *supra* note 4, at 72. In a letter to Bennett Boskey, Stone, while insisting that his opinion reached the right conclusion, acknowledged that "my authorities are meager." Wiecek, *supra* note 42, at 52.

<sup>71</sup>*Id.* This theory seems to have originated with Assistant Solicitor General Oscar Cox, who advised Attorney General Francis Biddle on June 29, 1942 that "Under the internationally accepted 'law of war,' apart from our Constitution, enemy aliens or domestic citizens who came through the lines out of uniform for the purpose of engaging in hostile acts . . . are subject to trial by military tribunals." Cox was aware that in *Ex parte Milligan*, the Supreme Court had ruled that such tribunals might not be used where the civil courts were open and functioning, but he insisted that *Milligan* did not apply to defendants such as the Nazi saboteurs. Memorandum from Oscar Cox to the Attorney General (June 29, 1942), Oscar Cox Papers, Franklin D. Roosevelt Library, Hyde Park, New York (copy on file with the author).

<sup>72</sup>Danelski, *supra* note 4, at 72.

<sup>73</sup>Memorandum from Francis Biddle to the President (October 29, 1942), OF5036, Franklin D. Roosevelt Manuscripts, Roosevelt Library (copy on file with the author).

<sup>74</sup>Solis, *supra* note 1, at 203. This author's own research on the infamous court-martial of Lieutenant William Calley for the My Lai massacre in Vietnam and public reaction to the guilty verdict returned by a military jury in that case



suggest that Solis is correct. See Michal R. Belknap, **The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley** (2002).

<sup>75</sup>Solis, *supra* note 1, at 204. Bruce Fein, once an associate deputy attorney general in the Reagan administration, has argued that “At a time of warfare, expedition is critical.” Belknap, “Putrid Pedigree,” *supra* note 1, at 434. at <http://www.abanet.org/journal/ereport/n29court.html>.

<sup>76</sup>Solis, *supra* note 1, at 204. Professor Ruth Wedgewood of Yale Law School has also expressed concern about the safety of jurors and judges—and of innocent civilians as well—if terrorists are tried in civilian courts, rather than before military tribunals. O’Brien, *supra* note 1, at 51.

<sup>77</sup>Bork, *supra* note 1.

<sup>78</sup>Solis, *supra* note 1, at 203. Solis does acknowledge, however, that there are civil procedures in place to meet national security contingencies and that no compromise of national security has occurred in the six federal civilian trials of Islamic militants already held. *Id.*

<sup>79</sup>George Lardner, Jr., “Nazi Saboteurs Captured! FDR Orders Secret Tribunal,” *Washington Post Magazine*, January 13, 2002, at W12, 14–15.

<sup>80</sup>Kenneth O’Reilly, **Hoover and the Un-Americans: The FBI, HUAC and the Red Menace** 26–35 (1983). By 1938, Attorney General Homer Cummings had become so concerned about the FBI’s publicity activities that he directed Hoover to limit them. *Id.* at 34.

<sup>81</sup>Lardner, *supra* note 79, at 15. Secretary of War Henry Stimson was furious about the publicizing of the arrests. Military Intelligence had wanted to watch and wait until August, when two more teams of saboteurs were expected to land in America. “Hoover’s grandstanding ruined that plan.” *Id.*

<sup>82</sup>*Id.* at 14.

<sup>83</sup>*Id.*; Fisher, **Nazi Saboteurs**, *supra* note 24, at 28–29, 33–34, 40–42.

<sup>84</sup>Lardner, *supra* note 79, at 15.

<sup>85</sup>Belknap, “Supreme Court,” *supra* note 24, at 67.

<sup>86</sup>Danelski, *supra* note 4, at 66.

<sup>87</sup>Belknap, “Supreme Court,” *supra* note 24, at 67.

<sup>88</sup>Lardner, *supra* note 79, at 14.

<sup>89</sup>Chomsky, *supra* note 6, at 17–22.

<sup>90</sup>For a fascinating discussion of the problems posed by efforts to distinguish enemies from criminals, an argument that the former concept should be reserved for nations and the latter for individuals, and criticism of the present war on terrorism for failing to do that, see Anne-Marie Slaughter, “Beware the Trumpets of War,” *25 Hav. J.L. and Pub. Pol’y* 965 (2002).

<sup>91</sup>Chomsky, *supra* note 6, at 23–28. The commission sentenced those defendants it found to have engaged only in plundering, rather than fighting against whites, to terms of imprisonment ranging from one to ten years. *Id.* at 28.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 55.

<sup>94</sup>*Id.* at 27.

<sup>95</sup>*Id.* at 53.

<sup>96</sup>Quoted in *id.* at 54.

<sup>97</sup>*Id.* at 30, 32–33. Lincoln granted clemency to those prisoners he believed had participated only in “battles” rather than “massacres.” *Id.*

<sup>98</sup>*Id.* at 46.

<sup>99</sup>*Id.* at 59.

<sup>100</sup>Michael Kent Curtis, “Lincoln, Vallandigham, and Anti-War Speech in the Civil War,” *7 Wm. and Mary Bill Rts. J.* 105, 113 (1998).

<sup>101</sup>*Id.* at 117.

<sup>102</sup>*Id.* at 119.

<sup>103</sup>*Id.* at 121–22. The allegation that Vallandigham courted arrest in order to make himself a martyr is made by Frank L. Klement, **The Limits of Dissent: Clement L. Vallandigham and the Civil War** 154 (1970) (hereafter cited as Klement, **Limits of Dissent**).

<sup>104</sup>*Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 254 (1864).

<sup>105</sup>Curtis, *supra* note 100, at 121, 131.

<sup>106</sup>Klement, **Limits of Dissent**, *supra* note 103, at 166.

<sup>107</sup>Curtis, *supra* note 100, at 123–124; *Vallandigham*, 68 U.S. at 245–246. The judge advocate stipulated that if the other two persons whom Vallandigham had summoned as witnesses had testified, they would have given evidence substantially the same as that presented by Cox. *Id.* at 246.

<sup>108</sup>Curtis, *supra* note 100, at 131.

<sup>109</sup>*Id.*

<sup>110</sup>Neely, *supra* note 10, at 165, 174.

<sup>111</sup>Curtis, *supra* note 100, at 131.

<sup>112</sup>Klement, “Indianapolis Treason Trials,” *supra* note 15, at 101–104.

<sup>113</sup>*Id.* at 101–102.

<sup>114</sup>*Id.* at 103.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at 104.

<sup>117</sup>*Id.* at 105. The gubernatorial election was on October 11, almost a month before the November 8 presidential election. *Id.* at 104, 107.

<sup>118</sup>Rehnquist, *supra* note 64, at 84–85.

<sup>119</sup>*Id.* at 86.

<sup>120</sup>Klement, “Indianapolis Treason Trials,” *supra* note 15, at 107.

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at 107–108.

<sup>123</sup>*Id.* at 108.

<sup>124</sup>Edward Steers, Jr., **Blood on the Moon: The Assassination of Abraham Lincoln** 209, 211 (2001).

<sup>125</sup>*Id.* at 209. Secretary of the Navy Gideon Wells also believed that because the civil courts were open and functioning in the District of Columbia, they should try the accused. Guy W. Moore, **The Case of Mrs. Surratt** 30 (1954). Speed justified his conclusion that a military commission could be employed to try the conspirators by pointing

out that Washington was a war zone, ringed by fortifications, that martial law existed in the District of Columbia, and that while the police and courts were functioning there, the principal authority was the armed forces. Speed also characterized the accused as “enemy belligerents,” whose actions were designed to thwart the government’s military effort. Steers, *supra* note 124, at 212–213.

<sup>126</sup>Moore, *supra* note 125, at 30. at 32.

<sup>127</sup>Steers, *supra* note 124, at 222–223.

<sup>128</sup>Rehnquist, *supra* note 64, at 153–154.

<sup>129</sup>Steers, *supra* note 124, at 224–225. One of these witnesses, Sanford Conover, wound up being sentenced to ten years in the Albany Penitentiary for perjury. Moore, *supra* note 125, at 32–33.

<sup>130</sup>Steers, *supra* note 124, at 227.

<sup>131</sup>Rehnquist, *supra* note 64, at 161–162. Lewis Payne and David Herold clearly attempted to murder Seward. Steers, *supra* note 124, at 112, 126, 130. George Atzerodt agreed to kill Johnson and took substantial steps toward doing so, although he lost his nerve in the bar of the Vice President’s hotel. *Id.* at 112, 166. Michael O’Laughlin and Samuel Arnold were involved in an earlier unsuccessful plot to kidnap Lincoln, although by the time of the assassination they had apparently gone home to Baltimore. *Id.* at 84–88.

<sup>132</sup>Rehnquist, *supra* note 64, at 162.

<sup>133</sup>Steers, *supra* note 124, at 112, 166, 144–145, 83, 110.

<sup>134</sup>Rehnquist, *supra* note 64, at 155–157, 167.

<sup>135</sup>*Id.* at 165.

<sup>136</sup>Moore, *supra* note 125, at 94.

<sup>137</sup>*Id.* at 72–73. According to William Hanchett, “[The] revelation that Booth had carried a diary [caused] lasting damage to the reputations of Stanton, Holt, and Special Judge Advocate [John] Bingham, for it helped to establish the facts—so scornfully rejected and ridiculed at the 1865 conspiracy trial—that there really had been a plot to kidnap Lincoln, and that Booth’s decision to kill was made at the last moment. Hanchett, **The Lincoln Murder Conspiracies** 85 (1983).

<sup>138</sup>Moore, *supra* note 125, at 105, 111; Steers, *supra* note 124, at 227.

<sup>139</sup>Laska and Smith, *supra* note 11, at 132, 83, 89–90.

<sup>140</sup>*Id.* at 96, 90.

<sup>141</sup>*See id.* at 116–120.

<sup>142</sup>*Id.* at 106–107. The president of the commission was Major General Lew Wallace, who later gained fame as the author of *Ben Hur*.

<sup>143</sup>*Id.* at 119, 129–130.

<sup>144</sup>*Id.* at 118–120.

<sup>145</sup>*Id.* at 126–127.

<sup>146</sup>Maguire, *supra* note 25, at 40.

<sup>147</sup>*In re Yamashita*, 327 U.S. 1, 41 (Rutledge, J. dissenting).

<sup>148</sup>*Id.* at 42.

<sup>149</sup>Reel, *supra* note 29, at 241.

# The Supreme Court, Separation of Powers, and the Protection of Individual Rights during Periods of War or National Security Emergency\*

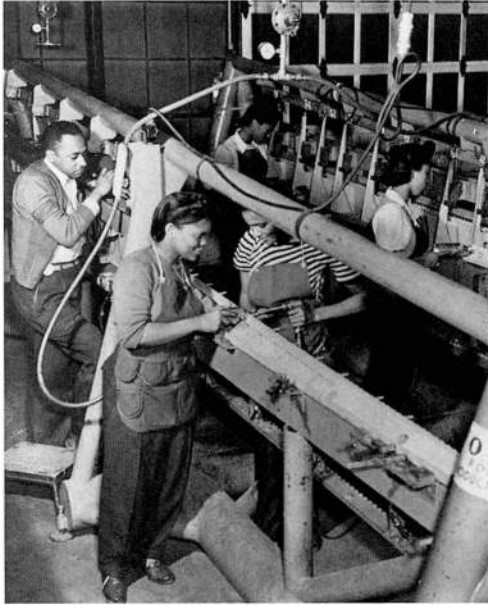
ROBERT F. TURNER

To paraphrase Lincoln, there is little that I could say on the history of the Supreme Court's handling of civil-liberties issues during periods of war or national emergency that could add or detract from the truly *masterly* job Chief Justice William Rehnquist has already done in **All the Laws But One**.<sup>1</sup> I highly recommend that book to any who have not yet read it. Because the Chief Justice has provided such an outstanding overview of the subject, I shall depart a bit from what I might otherwise have said on this topic.

While I do not intend to challenge the Chief Justice's book—I would give it a grade of A+—one of my goals this evening is to challenge another popular book. In 1990, my very able friend Professor Harold Koh, of Yale Law School, published a volume called **The National Security Constitution**. It was selected by the American Political Science Association for the 1991 Richard E. Neustadt Award as “the best book on the American presidency,” and has been tremendously influential in the academic community.<sup>2</sup> In the book, Professor

Koh argues against what he called “unchecked executive discretion”<sup>3</sup> in foreign affairs. He argues two points that I believe are fundamentally mistaken. First, he perceives a struggle within the judiciary between two foreign policy paradigms, each represented by a landmark twentieth-century Supreme Court decision. He then argues that the courts have been too reluctant to intervene in this area.

Professor Koh's central thesis is that the Court's landmark 1936 decision in *United States v. Curtiss-Wright Export Corporation*<sup>4</sup>



The Court's 1936 decision in *Curtiss-Wright* concerned an alleged violation of a prohibition of sales of arms or munitions to certain countries in South America. These men and women worked the production line at a St. Louis plant making airplanes for the Curtiss-Wright Corporation.

was essentially, to use his word, “trumped” by Justice Robert H. Jackson’s concurring opinion in the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*, often referred to as the “Steel-Seizure Case.”<sup>5</sup>

Candidly, I think Professor Koh has presented us with a false dichotomy. I see no fundamental conflict between *Curtiss-Wright* and *Youngstown*. For more than sixty years, the Supreme Court has been guided by *Curtiss-Wright* in dealing with issues of foreign affairs. The case has been cited time and again by the Court in literally scores of decisions since 1936, making it the most frequently cited foreign-affairs case in our history. Indeed, it is evident that Justice Jackson himself saw no conflict between his views in the Steel Seizure case and in the earlier *Curtiss-Wright* case, since he expressly cited *Curtiss-Wright* as controlling authority for foreign-affairs cases in which the President acts with the concurrence of Congress<sup>6</sup>—a fact pattern he proceeded to *distinguish* from that of the Steel Seizure case.

Those of you who are knowledgeable about *Curtiss-Wright* will likely realize by the time I am finished that I believe the Court achieved the right result—but for the wrong reasons. It remains the seminal case in the area of foreign affairs, however, and I think rightly so.

I believe that Professor Koh has made a simple but serious error. Because administration lawyers, in attempting to justify President Truman’s order directing Commerce Secretary Charles Sawyer to seize privately owned steel mills during the Korean War, made reference to his “Commander-in-Chief” and “war” powers, Koh asks us to view the case as comparable to *Curtiss-Wright*. But as Columbia Law School’s Professor Louis Henkin correctly observed in his 1972 volume on *Foreign Affairs and the Constitution*, “Youngstown has not been considered a ‘foreign affairs case.’”<sup>7</sup>

Indeed, the distinction is clear from even a cursory reading of both Justice Hugo Black’s majority opinion and Justice Jackson’s concurrence. Consider this language from the opinion of the Court:

The order cannot properly be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces . . . . Even though “theater of war” be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to *take possession of private property* in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.<sup>8</sup>

The Court clearly perceived this as a Fifth Amendment case involving the taking of private property without due process of law. The same theme is apparent from Justice Jackson’s concurring opinion, in which he wrote:

[N]o doctrine that the Court could promulgate would seem to me more

sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the *internal affairs* of the country by his own commitment of the Nation's armed forces to some foreign venture . . . . We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his *exclusive* function to command the instruments of national force, at least *when turned against the outside world for the security of our society*. But, when it is turned *inward*, not because of rebellion but because of a *lawful economic struggle* between industry and labor, it should have no such indulgence.<sup>9</sup>

Indeed, in a concurring opinion joined by Chief Justice Burger and two other members of the Court in *Goldwater v. Carter*,<sup>10</sup> the Taiwan Treaty case, then-Associate Justice William Rehnquist noted:

The present case differs in several important respects from *Youngstown*. . . . In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact . . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."<sup>11</sup>

In my view, Professor Koh's primary error is a failure to understand the constitutional foundation for the President's primary responsibility in managing the nation's external affairs. A few brief quotations from his book may be illustrative:

One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authority among the branches. Nowhere does the Constitution use the words "foreign affairs" or "national security."<sup>12</sup>

[T]he first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with *Congress*, not the president, being granted the dominant role.<sup>13</sup>

Article I gives Congress almost all of the enumerated powers over foreign affairs and Article II gives the president almost none of them.<sup>14</sup>

Harold Koh is an exceptionally intelligent, articulate, and, indeed, charming legal scholar. If I seem to be picking on him, it is because his book has been so influential in the academic community. For many legal scholars, it has become the new "conventional wisdom." But, with all due respect, I submit that in this instance, Koh has not done his homework. He simply does not understand the theory by which the Framers entrusted the President with primary responsibility in foreign affairs.

### Locke and the Executive Power Clause

The Framers of our Constitution were remarkably well-read men. They were familiar with John Locke's *Second Treatise of Civil Government*, in which Locke coined the term "Federative Power" to describe "the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."<sup>15</sup> For reasons of what we now often call "institutional competency," Locke argued that this "federative" power over external relations must be placed in the hands of the Executive:

These two Powers, *Executive* and *Federative*, though they be really

distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security* and *interest of the publick without*, with all those that it may receive benefit or damage from, yet they are always almost united. And though this *federative power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.

Locke explained that

what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be *left* in great part to the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.<sup>16</sup>

In *Federalist* no. 64, John Jay came close to plagiarizing Locke's *Second Treatise*. But in those days, the argument was so well known as to not warrant a footnote. After discussing the need for secrecy, speed, and dispatch, Jay explained to the American people that, under the new Constitution, the President "will be able to manage the business of intelligence in such manner as prudence may suggest."<sup>17</sup> The primary basis of the President's authority over foreign affairs is found in Article II, Section I, of the Constitution, which vests in the President the nation's "executive" power. While a member of the First Congress, James Madison explained in June of 1789 "that the Executive power being in general terms vested in the President" by the Constitution, "[A]ll



Thomas Jefferson repeatedly recognized that the President had large areas of responsibility in which his discretion was unchecked by the other branches of government.

power of an Executive nature, not particularly taken away must belong to that department."<sup>18</sup>

The idea that the President had large areas of responsibility in which his discretion was unchecked by the other branches of government was recognized repeatedly by Thomas Jefferson, perhaps the best-read of our Founding Fathers. In an April 1790 memorandum to President Washington, responding to an inquiry about where the Constitution had placed the general control of diplomacy, Jefferson observed that the Constitution had vested the nation's "executive Power" in the President. He then reasoned:

The transaction of business with foreign nations is *Executive* altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.<sup>19</sup>

Jefferson wrote "endorsed by Washington" in the corner of his copy of this memorandum, a position that is corroborated by Washington's own diary. Three days after receiving Jefferson's memo, Washington recorded this entry:

Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.<sup>20</sup>

It appears that Professor Koh was unaware of this history when he wrote *The National Security Constitution*. He attributes the first claim of a broad “executive Power” over foreign affairs to Alexander Hamilton, who, in 1793, did embrace the same paradigm in his first *Pacificus* essay. To defend President Washington's proclamation of neutrality, Hamilton reasoned:

The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . .

It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.<sup>21</sup>

In his landmark 1922 book, *The Control of American Foreign Relations*, the late Professor Quincy Wright noted: “[W]hen the constitutional convention gave ‘executive power’ to the President, the foreign relations power was

the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto.”<sup>22</sup> In a line that would shock most commentators today, Professor Wright added: “Declarations of foreign policy may be made by Congress in the form of joint resolutions, but such resolutions are not binding on the President. They merely indicate a sentiment which he is free to follow or ignore.”<sup>23</sup>

A decade before the landmark *Curtiss-Wright* decision, writing for the Court majority in *Myers v. United States*, Chief Justice William Howard Taft provided an excellent survey of early constitutional history of the Executive Power Clause and then stated:

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, [and] . . . that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication.<sup>24</sup>

As late as 1959, in a speech at Cornell Law School, even Senate Foreign Relations Committee Chairman J. William Fulbright asserted that “The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs ‘which the Constitution does not vest elsewhere in clear terms.’”<sup>25</sup>

What all this means, I submit, is that Professor Koh and *numerous* other modern scholars are mistaken in their suggestion that the reason Presidents Washington, Adams, Jefferson, Madison, Monroe, and so on played the senior role in the making and conduct of American foreign relations was a fluke, a usurpation, or a matter of “convenience” because of their superior institutional competency. On the contrary,

it was part of the original plan. And that was widely understood by both political branches until about the time of the Vietnam War, when we seem to have suffered something like a national “hard drive” crash and both branches stopped mentioning the Executive Power Clause.

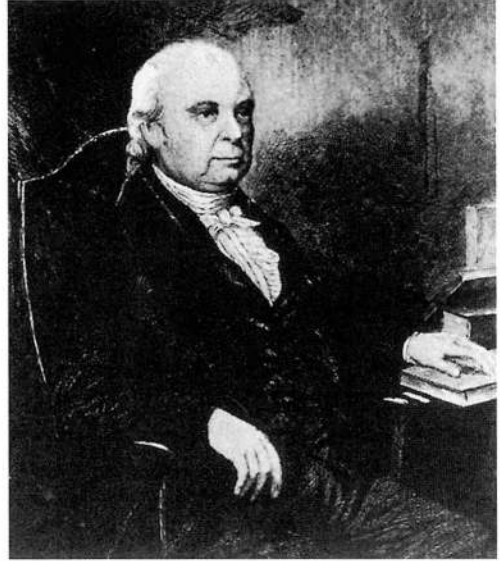
### John Marshall and *Marbury v. Madison*

If one cannot come from the University of Virginia without paying tribute to Thomas Jefferson, anyone with a love for history probably ought not come to the Supreme Court without a reference to Jefferson’s Federalist rival, Chief Justice John Marshall, and his first major opinion—perhaps the most famous of all Supreme Court decisions—*Marbury v. Madison*.<sup>26</sup>

As a bit of Supreme Court trivia, this was a decision that almost did not and perhaps should not have happened. Had John Jay not turned down President John Adams’ offer to again name him Chief Justice after the resignation of Chief Justice Oliver Ellsworth, Secretary of State John Marshall would not have been named to the Court and thus would not have been there to issue his masterly *Marbury* opinion.

One might add that, certainly by modern rules of professional responsibility, John Marshall probably should have recused himself from any part in the consideration of the case, since both he and his brother James had played key roles in the transactions that led to the litigation and an affidavit from James was a part of the evidence. Indeed, Secretary of State Marshall had signed the very commissions that his successor, defendant James Madison, had failed to deliver to the “midnight judges.” And had the Chief Justice recused, the Court might then have lacked a quorum to even decide the issue. This, at least, was the conclusion of Mr. Justice Burton 150 years later in a fascinating article in the *ABA Journal*.<sup>27</sup>

One might observe further that no one represented the defendant before the Court in



Although Levi Lincoln, Jefferson's Attorney General, made an appearance as a witness at *Marbury's* trial, no one represented the defendant before the Supreme Court.

the case of *Marbury v. Madison*. Jefferson’s Attorney General, Levi Lincoln, did make an appearance, but only as a witness. Nor, apparently, was any record of the case kept by the Court beyond a few notations that hearings were held and the final opinion issued.

Then there is the fact that Chief Justice Marshall held that the Court *lacked jurisdiction* to issue the writ being sought. That should have ended the case. But Marshall reversed the normal order of things in his opinion and pontificated at great length in *Marbury* about the merits of the dispute before turning to jurisdiction and dismissing the case. His words were thus mere *obiter dictum*, yet they were widely embraced as establishing the fundamental right of the Court to judicial review. Thereafter, the Court would have the power to declare acts of Congress null and void as contrary to the Constitution.

The Jefferson administration technically won the case, but Jefferson was outraged at what he viewed as Marshall’s challenge to the fundamental principle that the three branches of the federal government were created independent and coequal. In Jefferson’s view, that



meant that each branch was competent to decide the meaning of the Constitution in its own sphere of activity, and no branch could impose its own interpretation on the other two.<sup>28</sup>

I mention *Marbury v. Madison* in part because it is so fundamental to understanding the important role in our system of government entrusted to the Supreme Court, and also because of the important distinction Chief Justice Marshall drew between two types of issues. He explained:

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, *and is accountable only to his country in his political character, and to his own conscience . . .*

The subjects are political. *They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.*<sup>29</sup>

I mention this because of the popular view today—and Harold Koh is hardly alone in this contention—that the courts should play a much greater role in resolving national security disputes. Some want the courts to get involved in the oversight of intelligence activities, military deployments, and the like. I believe Chief Justice Marshall was correct when he asserted that some presidential discretion under the Constitution is unchecked—and, I would submit, *intentionally* unchecked—save by the President’s own conscience or by the voters in a future election.<sup>30</sup> He was also correct—as was the Court in *Youngstown*—in *distinguishing* cases involving the conduct of foreign relations from those involving individual rights. But that distinction, as important as it is, does not solve all of our problems, as the line between such cases is not always a clear one.

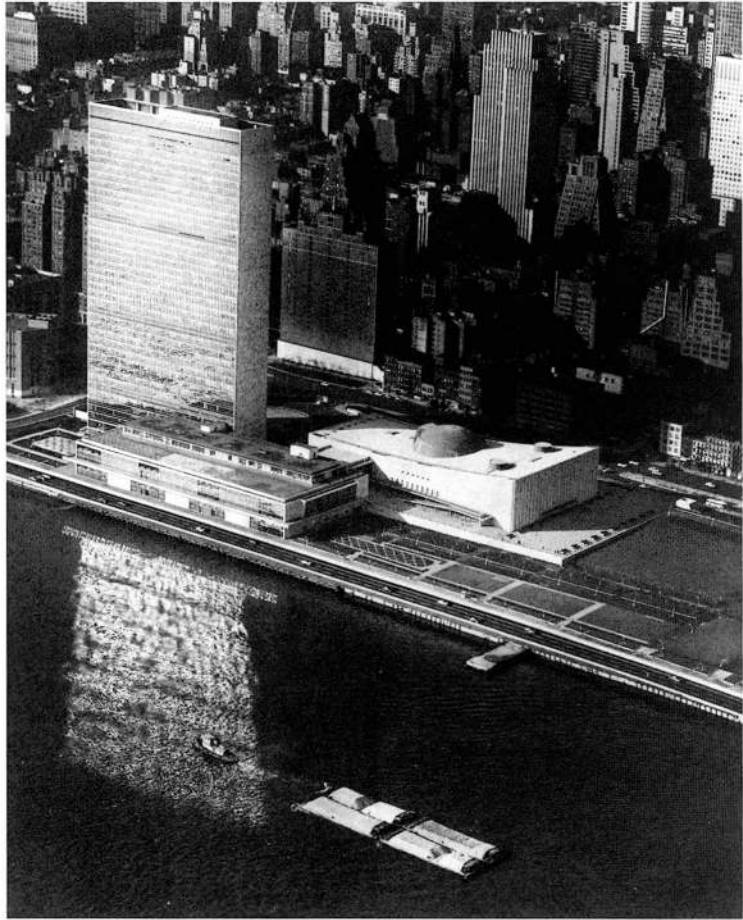
### The Constitutional Significance of Formal Declarations of War

Permit me to make one more digression before I try to draw some lessons from Supreme Court civil-liberties cases. There is a lot of discussion these days about the importance of a formal “declaration of war.” Even Justice Jackson seemed to stumble on this point a bit in *Youngstown*.<sup>31</sup> Time will not permit me to go into a detailed discussion of this issue, but a brief comment may be useful.

Summarized briefly, when on August 16, 1787, James Madison moved to change the power being given to Congress from the power to “make War” to the more limited power to “declare War,” he was importing into our Constitution a term of art from the Law of Nations. And the great publicists on international law—men such as Grotius, Burlamaqui, and Vattel—all argued that formal declarations of war were only necessary for what we would today describe as “aggressive” wars.<sup>32</sup> During the past century, with treaties such as the Kellogg-Briand Pact and the UN Charter, the world community outlawed the kinds of wars historically associated with formal declarations, and no nation has clearly issued a true “declaration of war” in more than half-a-century.

I would add that as early as 1800, the Supreme Court upheld the use of congressional joint resolutions that did not formally “declare war” as a means of authorizing the President to engage in hostilities,<sup>33</sup> and that the point was affirmed again the following year by Chief Justice Marshall in the case of *Talbot v. Seeman*.<sup>34</sup> So I submit that focusing on the existence of a formal “declaration of war” may be less useful in the modern era than looking to see whether Congress has ratified a presidential decision that the nation faces a serious crisis. Indeed, I suspect that formal congressional sanction may be more important in its impact upon civil-liberties issues than it is on the lawfulness of a presidential decision to use force.

With treaties such as the Kellogg-Briand Pact and the United Nations Charter, the world community outlawed the kinds of wars historically associated with formal declarations, and no declarations of war have been issued in more than fifty years. Pictured is the United Nations building in the 1950s.



And thus, while I would agree with the observation of the Chief Justice when he wrote that “Without question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war,”<sup>35</sup> I would place the emphasis upon the existence of either legislative authorization of the conflict or—far more preferable—legislative authorization for the infringement of civil liberties. For in these situations, Justice Jackson’s concurrence in *Youngstown* is particularly appropriate.<sup>36</sup>

### Presidential Power in a Post-UN Charter Era

This next point may surprise some of you, but when the Senate consented to the ratification of

the UN Charter in 1945 and the House joined the Senate later that year in passing the UN Participation Act (UNPA), the view embraced in the unanimous committee reports and floor debates of both chambers was that the President was empowered by the Constitution and the Charter to send U.S. forces into combat for peacekeeping purposes without any need for further congressional authorization.<sup>37</sup> Indeed, an amendment to the UNPA offered by Senator Burton Wheeler that would have expressly required the President to get the approval of both houses of Congress by joint resolution before sending U.S. troops into hostilities that had been authorized by the UN Security Council got fewer than ten votes and was widely denounced by the leaders of both political parties.<sup>38</sup>



President Truman was assured by Foreign Relations Committee Chairman Tom Connally (above) that he had ample authority to send U.S. troops to Korea in 1950 without congressional approval.

When President Truman pondered how to respond to the invasion of South Korea in June 1950, he telephoned Foreign Relations Committee Chairman Tom Connally and was assured that he had ample authority to send U.S. troops without congressional approval, and Connally was part of a consensus chorus from Congress urging the President to “stay away” from Congress on the issue. Ironically, the once top-secret records from this period show that Truman had actually directed the State Department to draft an authorization statute and had repeatedly expressed a desire to go before a joint session of Congress before he was talked out of it by congressional leaders of both parties.<sup>39</sup>

Thus, I would argue that the President’s constitutional powers today during the war on terrorism, like the powers of Presidents during Vietnam and Operation Desert Storm, are equivalent to the powers held by James Madison in the War of 1812 and FDR in World War II. But that is perhaps another topic.

\* \* \* \* \*

I have already made the point that, as a general matter, the President’s political powers over diplomacy and foreign affairs—some of which are exclusive and others of which are checked by congressional negative or veto—are largely beyond the reach of the courts. As Justice Brennan observed in *Baker v. Carr*, “Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views.”<sup>40</sup>

That often changes when *individual rights* become an issue and ripe “cases or controversies” come before the courts. Even when individual rights are involved, however, the courts are generally deferential to the political branches of government when issues of national security are at stake. In *Haig v. Agee*, when the Court balanced the constitutional right to travel of American citizen Philip Agee—a former CIA employee who was traveling around the world exposing the identities of alleged CIA case officers in foreign countries—the Court once again observed that it was “obvious and unarguable” that “no governmental interest is more compelling than the security of the Nation.”<sup>41</sup> In Agee’s case, there was evidence that his behavior was getting intelligence operatives killed, and the Court upheld the revocation of his passport. Congress later passed a law making it a criminal act to intentionally disclose the identities of U.S. intelligence agents.<sup>42</sup>

In the modern era, the government sometimes loses, especially when it attempts to exercise prior restraint on the news media. These cases—along with those involving discrimination on racial or religious grounds—are subjected to the highest levels of scrutiny by the Court. But even in the Pentagon Papers<sup>43</sup> case, the various opinions were replete with strong language about broad, unconstrained presidential power over the nation’s foreign affairs and

"EXCEPT FOR THOSE OF US WHO ARE ABOVE IT"



In 1981, the Supreme Court upheld the revocation of Philip Agee's U.S. passport following evidence that the former CIA employee had been caught traveling around the world exposing the identities of CIA operatives and endangering their lives and national security. This 1977 cartoon expressed fears that the FBI and CIA operated outside the law.

military operations. For example, in their concurring opinion, Justices Potter Stewart and Byron White acknowledged:

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power [is] largely unchecked by the Legislative and Judicial branches.... For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of

power than does, say, a prime minister of a country with a parliamentary form of government.<sup>44</sup>

When the Court in 1974 unanimously rejected a claim of executive privilege in *United States v. Nixon*, it repeatedly emphasized that the case did not involve a claim by the President to protect military, diplomatic, or national security secrets. Consider this excerpt from the decision:

He [Nixon] does not place his claim of privilege on the grounds they are military or diplomatic secrets. As to these areas of Art. II duties the courts

have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman S.S. Corp.* . . . , dealing with Presidential authority involving foreign policy considerations, the Court said:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.<sup>45</sup>

### Should the Laws Be Silent in Wartime?

Let me turn now to a fundamental issue. The final chapter of Chief Justice Rehnquist's **All the Laws But One** is entitled "*Inter Arma Silent Leges*," Latin for "In war, the laws are silent." Before we dismiss that as dangerous silliness, we must keep in mind that some of our greatest presidents have found the principle persuasive. In attempting to justify the violation of the First Amendment rights of Clement L. Vallandigham, President Lincoln reasoned: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of the wiley [*sic*] agitator who induces him to desert?"<sup>46</sup> I am less impressed with that reasoning than are some, but I think there is a parallel that does strike home. In order to protect our security during time of war, we empower our President and his agents to make quick decisions on the basis of imperfect information that we know will occasionally result in the destruction of innocent human lives—some of them Americans. In such a setting, given the tremendous stakes involved, we do not permit our young soldiers, upon being ordered to charge up Hamburger Hill, to seek an injunction from their local federal district judge. As General

Sherman put it, "War is Hell!" Does it make sense to tie the President's hands by telling him that our courts will stay his hand and prevent him from taking the steps he believes are necessary to protect the nation until he proves in court that each decision he makes will not at least temporarily violate another citizen's civil liberties?

When I listen to some of our legislators or representatives of the ACLU insist that there be no curtailment of civil liberties in the current war, my mind goes back to the horrors of seeing totally innocent women and children blown into little pieces because someone somewhere along the line made an error. Perhaps it was faulty intelligence or an error in programming coordinates for an artillery strike. Perhaps, from a distance, a noncombatant with a farm implement over his shoulder looked like a soldier carrying a rifle. Or maybe in the dark, as happened tragically in Operation Desert Storm, an American armored personnel carrier was mistaken for an Iraqi tank and destroyed by "friendly fire." The end result is the same, and it is a painful thing to witness. And I cannot help but wonder if those who think the highest priority must be to avoid any constraints on the civil liberties of those safe at home do not need some sort of a "reality check" about the inherent horrors of war.

The Chief Justice selected the title of his superb book from a quotation from an address to Congress by Abraham Lincoln on July 4, 1861:

Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?

Once again, being from the University of Virginia, I cannot help but observe that Thomas Jefferson said it at least as well more than half a century earlier, when, in a letter to Maryland newspaper editor J. B. Colvin dated September 20, 1810, he reasoned:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the*

*highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>47</sup>

It would be difficult, I suggest, to find a greater champion of civil liberties in our nation's formative years than Jefferson. Yet, in practice, as Leonard Levy has observed in his book *Jefferson and Civil Liberties*, Jefferson sometimes subordinated the protection of civil liberties to what he perceived as more critical ends. As Governor of Virginia during the Revolutionary War, he feared that we might lose all of our freedoms if we did not unite together, and he had little interest in protecting the rights of those who opposed his cause. Writing about the trial of Aaron Burr for treason, in which I believe John Marshall had quite properly dismissed the case, Jefferson reasoned:

I did wish to see these people get what they deserved; and under the maxim of the law itself, that *inter arma silent leges*, that in an encampment expecting daily attack from a powerful enemy, self-preservation is paramount to all law, I expected that instead of invoking the forms of the law to cover traitors, all good citizens would have concurred in securing them. Should we have ever gained our Revolution, if we had bound our hands by manacles of the law . . . ?<sup>48</sup>

If we move forward to the Civil War era, in the *Milligan* case, the government argued before the Supreme Court that the Bill of Rights was only for peacetime and, like other laws, was "silent amidst arms, and when the safety of the people becomes the supreme law."<sup>49</sup> These are not frivolous arguments, in my view, but I firmly believe they are *wrong*. The law ought not be silent during war. And I would empha-

size that I am not just talking about U.S. constitutional law, but also our obligations under international law. But that, too, is another topic.

### Balancing Competing Interests

Much of law involves balancing competing interests and values. Many of those we cherish as Americans are encompassed in our Bill of Rights. For example, the Fifth and Fourteenth Amendments assure us that we may not be deprived of our liberties without due process of law. But I would note that this is not the only right protected by that justly famous clause in the Fifth Amendment providing in part that "No person shall be . . . deprived of life, liberty, or property, without due process of law." Note that this list is not alphabetical. "Liberty" interests are listed ahead of "property," but "life" is listed first. And the simple reality is that, in time of war, if the government fails to place any restrictions on our civil liberties, many of our fellow citizens—in and out of military uniform—may well lose their lives. There are no simple answers in such a setting.

To mention one of the most obvious cases—at least obvious to me, because I have spent a lot of extra hours waiting at airports to have strangers search through my belongings and run their hands and little magic wands around my person—is that after September 11, anyone who wishes to fly is likely to be seriously searched. Like many Americans, I find that experience inconvenient and at least mildly offensive—but I find it less offensive than having my plane blown up because the authorities did not search another passenger on my flight.

But what about our Fourth Amendment protections against "unreasonable searches and seizures" without "probable cause?" The security personnel at airports have no evidence of wrongdoing that would warrant searching me. The short answer is that what is "reasonable" is contextually dependent. As a frequent flyer, I encounter relatively few people who enjoy being "frisked" or having to arrive an hour

earlier for their flight. But I find fewer still who do not understand that these new security procedures are in our interest.

In a similar way, what constitutes “due process of law” is also contextually dependent. As Chief Justice Rehnquist observed for the Court majority in the 1987 *Salerno*<sup>50</sup> case, which involved the detention without bail or trial of an alleged organized crime leader for more than two years, “We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” Referring specifically to periods of “war or insurrection,” he added that “[T]he Government may detain individuals whom the government believes to be dangerous.”<sup>51</sup>

### Conclusions

In 1759, Benjamin Franklin wrote: “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”<sup>52</sup> I would add that if we sacrifice our Bill of Rights on the altar of the War on Terrorism, Osama bin Laden will have won a far greater victory than was evident as we searched for bodies in the days and weeks after September 11. Every American will be a victim.

Our Constitution remains the Supreme Law of the Land in war as in peace. I believe that in the conduct of war and foreign affairs, the President has a tremendous amount of largely unchecked power—discretion vested in his office because our Founders realized that defending the nation required unity of design, secrecy, and speed and dispatch. And they knew that a large deliberative assembly like Congress could neither exercise those attributes nor anticipate all of the rapid changes that might occur on a battlefield or in a foreign government that might necessitate a dramatic shift in American policy.

But, as the Court correctly observed in *Youngstown*, the President’s war powers do not include a broad power to discard the Bill of Rights whenever it becomes inconvenient. I am

not suggesting that there are no situations in which the President or his military agents may interfere with constitutionally protected liberties in extreme circumstances in order to further operational success or protect the lives of other citizens. But the general principle ought to be to curtail civil liberties no more than is reasonably necessary for the national safety, and to secure the sanction of the Congress where possible when the rights of individuals must be limited.

The Supreme Court has historically been reticent to tie the President’s hands during wartime, all the more so when the war is going badly and the perceived threat to the nation is greatest. Past experience suggests that to do otherwise would invite presidents to ignore judicial edicts, quite possibly with the strong support of the public. At the same time, for the Court to embrace highly questionable constitutional practices—such as the internment of Americans of Japanese ancestry during World War II—can have lasting harm far in excess of that produced by the wrongheaded policies themselves. Thus, it may be wiser, in some settings, for the Court to avoid passing judgment on some controversial decisions of the political branches—particularly when Congress has authorized the action—until peace has been restored and judicial pronouncements may be enunciated both to redress past wrongs and to establish principles for future guidance.

Finally, I commend to you Chief Justice Rehnquist’s closing words in **All the Laws But One**, which are worth repeating here:

[T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the



government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat *different voice*.<sup>53</sup>

And that seems like a good note on which to close.

\*This article is drawn from remarks delivered to the Supreme Court Historical Society at the United States Supreme Court on Wednesday, November 12, 2002, as part of the Silverman Lecture Series.

### ENDNOTES

<sup>1</sup>William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998).

<sup>2</sup>To cite but a single example, see Peter M. Shane and Harold H. Bruff, *Separation of Powers Law: Cases and Materials* 592 (1996).

<sup>3</sup>Harold Hongju Koh, *The National Security Constitution* 5 (1990).

<sup>4</sup>*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In *Curtiss-Wright*, the Court recognized the special nature of the separation of powers concerning foreign policy:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 319.

<sup>5</sup>*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Koh, *The National Security Constitution* 72.

<sup>6</sup>Justice Jackson, it will be recalled, set forth a three-part test in evaluating presidential uses of power, beginning with "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." To this sentence he affixed footnote number 2, which read: "It is in this class of cases that we find the broadest recent statements of presidential power, including those relied

on here. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304. . . involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. at 635–36 n.2.

<sup>7</sup>Louis Henkin, *Foreign Affairs and the Constitution* 341 n.11 (1972).

<sup>8</sup>343 U.S. at 587 (emphasis added).

<sup>9</sup>*Id.* at 642 (emphasis added).

<sup>10</sup>*Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>11</sup>444 U.S. at 1004–05.

<sup>12</sup>Koh, *The National Security Constitution* 67.

<sup>13</sup>*Id.* at 75.

<sup>14</sup>*Id.* at 118.

<sup>15</sup>John Locke, *Two Treatises of Government* §§ 145 and 146 (P. Laslett, rev. ed., 1963).

<sup>16</sup>*Id.*, § 147 (emphasis in original). See also 1 Montesquieu, *Spirit of the Laws* 151 (Thomas Nugent, trans., 1949); 1 William Blackstone, *Commentaries on the Laws of England* 245 (1765); and Adam Smith, *Lectures on Jurisprudence* 204–9 (1978).

<sup>17</sup>*The Federalist* no. 64 at 435 (Jacob E. Cooke, ed., 1961).

<sup>18</sup>Madison to Edmund Pendleton, June 21, 1789, in *5 Writings of James Madison* 405–06 n.1 (Gaillard Hunt, ed., 1904).

<sup>19</sup>16 *The Papers of Thomas Jefferson* 378–79 (emphasis in original). Consider also these excerpts from Jefferson's "minutes of a conversation" of 10 July 1793 with "Citizen Genet" of France:

He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him the Constitution had made the President the last appeal.

Quoted in 4 John Bassett Moore, *A Digest of International Law* 680–81 (1906).

<sup>20</sup>4 *George Washington Diaries* 122 (John C. Fitzpatrick, ed., 1925).

<sup>21</sup>15 *The Papers of Alexander Hamilton* 39, 42 (Harold C. Syrett, ed., 1969).

<sup>22</sup>Quincy Wright, *The Control of American Foreign Relations* 147 (1922).

<sup>23</sup>*Id.* at 278.

<sup>24</sup>*Myers v. United States*, 272 U.S. 52, 137, 163–64 (1926).



<sup>25</sup>J. William Fulbright, "American Foreign Policy in the 20<sup>th</sup> Century Under an 18<sup>th</sup>-Century Constitution," 47 *Cornell L. Q.* 1, 3, (1961) (emphasis in original).

<sup>26</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>27</sup>Included in *The Occasional Papers of Mr. Justice Burton* 29–31 (Edward G. Hudon, ed., 1969).

<sup>28</sup>*See, e.g.*, Jefferson to George Hay, June 2, 1807, 11 *Writings of Thomas Jefferson* 213–15 (Mem. ed. 1903, Andrew A. Lipscomb, ed.) ("The Constitution intended that the three great branches of the government should be co-ordinate, and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch . . . I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, denounced as not law").

<sup>29</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch.) at 165–66 (emphasis added).

<sup>30</sup>There are, of course, important checks even in the national security area. The President may not raise military forces without authorization and appropriations from Congress, and major hostilities are likely to be contingent upon additional funding, which Congress has no obligation to provide. I submit that Congress may not lawfully place "conditions" on appropriations for the purpose of usurping discretion vested by the Framers in the President, such as controlling where troops may be deployed or compelling the President to negotiate a particular international agreement. To recognize such a power in Congress would presumably permit Congress to place similar "conditions" on judicial appropriations—for example, providing that no funds shall be available beyond judicial salaries if certain laws are held to be unconstitutional or if a prior decision is not reversed—which could impair or even eliminate the doctrine of judicial review.

<sup>31</sup>"Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration . . . Assuming that we are in a war *de facto*, whether it is or is not a war *de jure*, does that empower the Commander-in-Chief to seize industries he thinks necessary to supply our army?" 343 U.S. 642–43. In footnote 10 to his concurring opinion, Justice Jackson argued that "[T]his doctrine espoused by the President's counsel departs from the early view of presidential power," and quoted from President Jefferson's December 1801 "First Annual Message to Congress," in which Jefferson, in deferential language, reported on the exchange between the U.S. schooner *Enterprise* and a warship from Tripoli. *Id.* at 643. In reality, however, we now know that Jefferson's report to Congress departed dramatically from the decision his Cabinet had made on March 15 of that year and the actual orders given to Commodore Dale and Lieutenant Sterrett, who commanded the enterprise. For a discussion of this deception, see Robert F. Turner, "War and the For-

gotten Executive Power Clause of the Constitution," 34 *Va. J. Int'l L.* 903, 910–15 (1994).

<sup>32</sup>*See, e.g.*, Turner, "War and the Forgotten Executive Power Clause of the Constitution" 906–16.

<sup>33</sup>*Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

<sup>34</sup>5 U.S. (1 Cranch) 1 (1801).

<sup>35</sup>Rehnquist, *All the Laws But One* 218.

<sup>36</sup>*See* endnote 6.

<sup>37</sup>*See, e.g.*, Robert F. Turner, "Truman, Korea, and the Constitution," 19 *Harv. J. L. and Pub. Pol.* 533 (1996). The unanimous report of the House Foreign Affairs Committee on the U.N. Participation Act stated that "The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations which will actually be carried out by and under the authority of the President. . . . [T]he ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder." *Id.* at 547–48. The report also quoted this language from the earlier report of the Senate Foreign Relations Committee unanimously recommending Senate consent to the ratification of the UN Charter: "[T]he committee is convinced that . . . any subsequent congressional limitation designed to provide . . . that employment of the armed forces of the United States . . . could be authorized only after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter. . . . Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war." *Id.* at 551.

<sup>38</sup>91 *Cong. Rec.* 11, 392–405 (1945).

<sup>39</sup>*See, e.g.*, Turner, "Truman, Korea, and the Constitution" 563–76.

<sup>40</sup>*Baker v. Carr*, 369 U.S. 186, 211 (1962).

<sup>41</sup>*Haig v. Agee*, 453 U.S. 280 (1981).

<sup>42</sup>Intelligence Identities Protection Act of 1982, Pub. L. 97–200, 96 Stat. 122, June 23, 1982. I would add a footnote to the Agee story. In the mid-1990s, according to press reports, Agee appeared on a Canadian television program with a former senior Soviet intelligence officer. Some harsh words were exchanged. But when the Russian threatened to discuss Agee's former "connection" with the KGB, the American reportedly immediately shifted his tone and became very solicitous of the Russian's feelings. A 1999 book alleged to be based upon highly classified materials smuggled from the archives of the Soviet KGB reported that Agee was a KGB "asset" who had approached the KGB residency in Mexico City with an offer of "reams of information about CIA operations," but had been turned away because the offer seemed "too good to be

true” and thus was likely a CIA plot. Agee then offered his assistance to the Cuban DGI (Cuban Intelligence Service), and—according to this source—much of the information for Agee’s subsequent books was actually provided by Soviet intelligence. See Christopher Andrew and Vasill Mitrokhin, **The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB** 230–34 (1999). About the same time, Agee and his wife moved from Germany and took up residence in Cuba.

<sup>43</sup>*New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>44</sup>*Id.* at 727–28.

<sup>45</sup>*United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>46</sup>Frank L. Klement, **The Limits of Dissent** 183 (1970).

<sup>47</sup>Jefferson to J. B. Colvin, September 20, 1810, 11 **Works of Thomas Jefferson** 146 (Paul Leicester Ford, ed. 1905).

<sup>48</sup>Quoted in Leonard W. Levy, **Jefferson and Civil Liberties** 18 (1989).

<sup>49</sup>Quoted in Rehnquist, **All the Laws But One** 121.

<sup>50</sup>*United States v. Salerno*, 481 U.S. 739 (1987).

<sup>51</sup>*Id.* at 748.

<sup>52</sup>Franklin to Josiah Quincy, September 11, 1773, reprinted in *Historical Review of Pennsylvania* (1759), quoted in **The Oxford Dictionary of Political Quotations** 141 (Anthony Jay, ed., 1996).

<sup>53</sup>Rehnquist, **All the Laws But One** 224–25 (emphasis added).

# Property Rights versus “Public Necessity”: A Perspective on Emergency Powers and the Supreme Court\*

HARRY N. SCHEIBER

Chief Justice Earl Warren once wrote that a free government is continuously “on trial for its life.”<sup>1</sup> And never are the foundations of constitutional liberties more fragile than in periods of emergency, when government invokes extraordinary powers. Invariably, emergency powers involve the immediate curtailment of some rights; at their extreme in martial law, they can warrant an entire suspension of normal civilian governmental functions, as well as full suspension of due-process guarantees.<sup>2</sup> Once the constitutional fabric has been stretched to accommodate urgent public necessity in such situations, moreover, restoration to its earlier condition is not automatic or inevitable. On the contrary, as Justice Robert Jackson presciently warned, once the Supreme Court validates as constitutional the abridgement of essential rights during an emergency—and especially when the Court does so in relation to “the vague, undefined and undefinable ‘war power’”—any principle that is thus articulated to justify such emergency action “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.”<sup>3</sup>

The history of American law since the 1940s indicates that Jackson had it right. There has been a steady expansion of discretionary presidential emergency powers, and a consequent weakening of congressional authority in this regard. And the judiciary has largely acquiesced in this process—indeed, in some respects it has advanced it.<sup>4</sup>

Even so, the history of the last few decades does not tell the whole story. The present-day content of classic Fifth Amendment guarantees of life, liberty, and property has been shaped in vital ways over the course of two centuries by the constitutional jurisprudence that came out of successive military and peacetime emergencies. Understandably enough, it is “life” and



Although the Civil War cases involving emergency war powers get more attention, many important cases from that era bore directly on government confiscation and property rights.

“liberty” rather than “property” that immediately come to mind when one thinks of the crises in which the exercise of the war powers or other extraordinary government powers have had the greatest impact. The due-process questions raised by the use of martial law in the Civil War and in World War II, the severe repression of First Amendment freedoms during World War I, and the systematic prosecution of dissenters against the war policy during the Vietnam conflict are all well known and well studied.<sup>5</sup> The present study, however, has a different focus. I am concerned here with the problem of how property rights—the third element in the “life, liberty, property” triad—have figured in American constitutional law in varied situations in which emergency powers were mobilized. Several distinctive types of events are included in the scope of the discussion: (1) periods of declared war; (2) periods of armed conflict without formal congressional declaration of war, of which there have been many, dating from the campaign against the Barbary pirates and down to the present day and the so-called war on terrorism; (3) crises stemming from fire or natural disasters in peacetime; and (4), uniquely important from the standpoint of property rights, periods of economic crisis, most especially the New Deal years of the 1930s depression, when a great deal of the present-day constitutional and statutory appa-

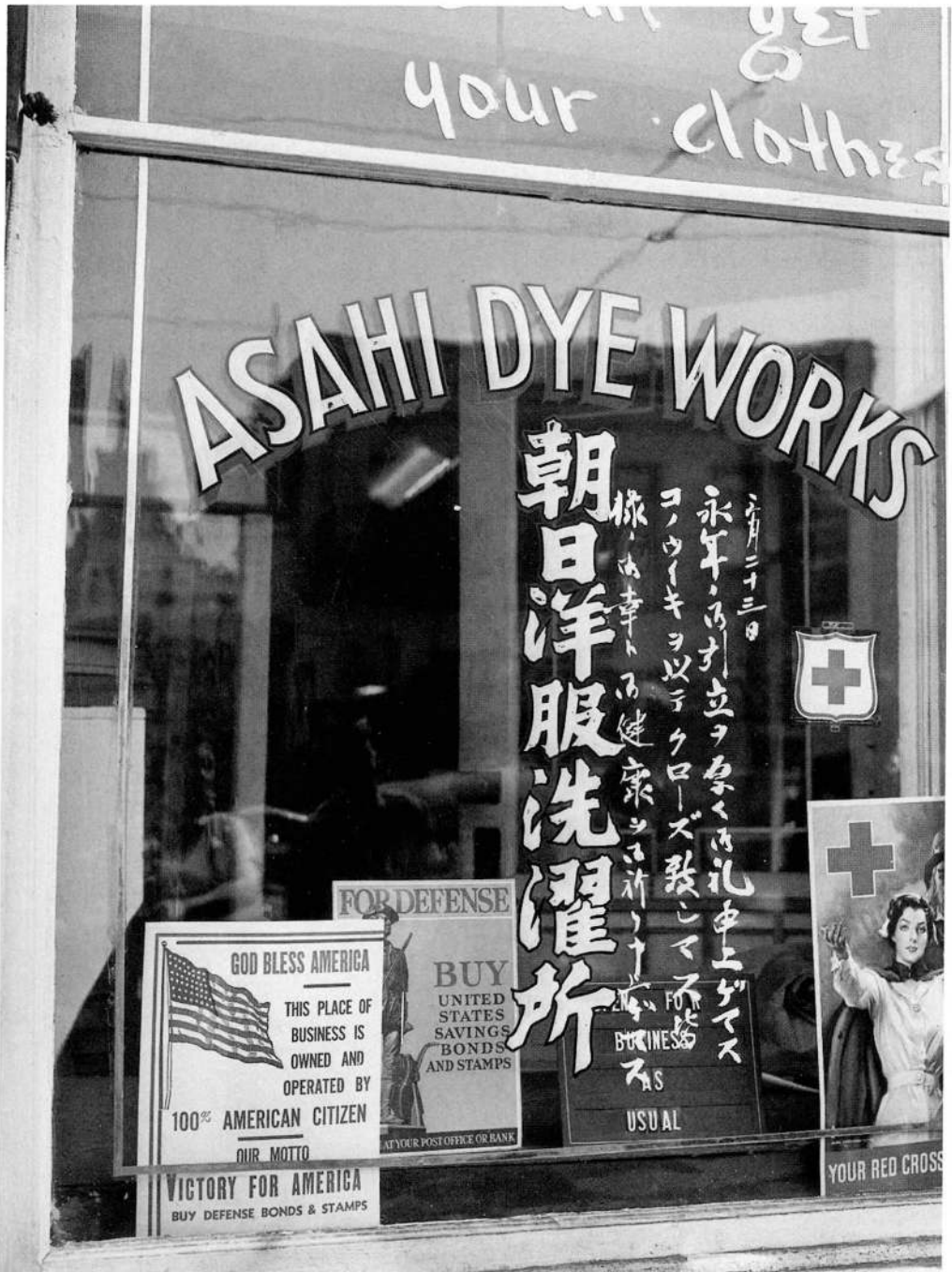
ratus of emergency powers was first laid in place.

\* \* \* \* \*

Some general aspects of the property-rights nexus with emergency powers require some attention before proceeding to the specifics of the Supreme Court’s history on this matter:

1. *Even in the highest moments of drama in the government’s denial of basic rights during emergencies, property rights may be at issue, albeit only below the surface or as a secondary consequence.*

Consider what is today quite universally regarded, in retrospect, as the indefensible action of the government during World War II in subjecting tens of thousands of Japanese Americans—citizens as well as aliens—to arbitrary removal from their homes and a long period of internment under armed guard in the internment centers located in bleak and desolate locations in the western United States.<sup>6</sup> We do not think immediately of property rights as part of the suffering that ensued. But property losses were an important dimension of the policy. To illustrate: In one roundup of Japanese Americans immediately after Pearl Harbor, the Federal Bureau of Investigation and military



Properties left behind by Japanese-American internees, such as this San Francisco laundry, were turned over to the Federal Reserve Bank in San Francisco, an agency ill prepared and lacking the expertise (and perhaps the integrity) to guard their interests. In disposing of the property while the internees were absent, the bank probably realized only a tenth or less of market value on behalf of the owners.

officers in charge of detention distributed to each of the prisoners a document entitled "Citizen Detention Questionnaire," which read as follows:

We know that you are inconvenienced. However, we ask that you recognize our problem [and that] our job is not pleasant in this regard.

We know that your being detained leaves some of your property, particularly real property, unguarded. It is our desire to protect every bit of your property pending your detention . . . Some of you will immediately believe that this is a ruse to make you divulge your holdings in order that the government might take possession of the same. While the government might do that, it could do the same without the aid of any information that you might give it. THIS QUESTIONNAIRE HAS BEEN PUT UP IN ORDER THAT WE MAY BE BETTER ABLE TO PROTECT YOUR PROPERTY.<sup>7</sup>

To the vast majority of the internees, the promises of benevolence with respect to their property rights proved to be almost completely meaningless. The photographic record tells the story of how, notoriously, farmland and homes were thrown onto the market at any price the owner could obtain before families were herded into buses and trains for removal to the distant campus; or how returnees came back at the end of the war to find their businesses or other properties trashed or taken over illicitly. Property left behind by the Japanese Americans on the West Coast was turned over to the Federal Reserve Bank in San Francisco, an agency ill prepared and lacking the expertise (and perhaps the integrity, in the circumstances) to guard the interests of the internees. The federal official who headed the administration of internment would estimate that in disposing of the property while the internees were absent, the Federal Reserve Bank proba-

bly realized only a tenth or less of market value on behalf of the owners.<sup>8</sup>

This episode serves as a vivid reminder that when civil liberties are suspended and normal due process is not allowed to persons incarcerated for whatever "emergency" reasons government puts forth to justify its actions, there is inevitably an immediate economic impact on such persons and their families and/or jobs or business affairs. It is similarly the case with the burden of legal expenses when persons are caught in the toils of the law, whether involving criminal prosecutions or civil claims, stemming from "emergency" measures against them. This constitutes an important dimension, in very human terms, of how "the great rights" under pressure in emergencies implicate economic interests of the persons, groups, or organizations who are the target of government actions.<sup>9</sup>

*2. Many of the leading cases in which the federal courts have confronted the issue of emergency powers have been cases primarily concerned, however, with seizure or uses of private property, rather than with incarceration or restraint of persons.*

Again, the pictorial record serves as a reminder as to this dimension of history, exemplified in the photograph (used as an illustration in many history textbooks) of the Montgomery Ward Company's president, Sewell Avery, being forcefully carried out of his office in 1944 by helmeted soldiers—with the U.S. Attorney General present in person to oversee Avery's ejection. This operation was carried out in response to Avery's refusal to accept War Labor Board emergency regulations that guaranteed certain labor-union rights, leading to a government takeover of Montgomery Ward by the government.<sup>10</sup>

Of course, the ramifications of that episode and of the several cases in the Supreme Court directly involving individual or corporate property-rights issues, as they will be discussed in this study, extended far beyond the specific property questions at the bar. In most



In 1944, after the Montgomery Ward Company failed to obey a government order to hold fair union elections, the government took over the executive offices, and when the company chairman, Sewell Avery, refused to leave, soldiers carried him out. This cartoon parodies the famous photograph of the eviction and urges greater cooperation between industry and labor during World War II.

of these cases, two opposed "age-old, time-honored principles of law . . . [met] head-on in conflict."<sup>11</sup> Those principles were the doctrines of vested property rights on the one side, and, on the other, the claims of "necessity" advanced by the government, whether under the umbrella of the war powers or in a peacetime crisis context. It was the doctrinal resolution of these cases, however, that counted in these instances. That is to say, although property rights may have been the immediate issues before the courts, it was the expanding scope of emergency powers in the generic sense that had an impact extending far beyond property rights and into the crucial domains of law regulating the guarantees of "life and liberty."

3. *American constitutional doctrine regarding emergency powers and property rights in the United States is grounded*

*in a long and complex history in Anglo-American law regarding the scope of government authority, both in domestic crises and in wartime.*

The doctrines of taxation, eminent domain, and police power have been in a constant situation of tension with the basic guarantee of "vested rights" throughout the full course of American legal history. Courts have constantly reappraised and redefined private rights in the light of successive challenges based on changing circumstances, public needs as expressed in legislation and litigative claims, and, above all, a time-honored concept of "public rights" as a validating canon for governmental interventions that trench on private property claims.<sup>12</sup>

Thus, the very foundations of emergency powers more generally are rooted deeply in

legal and jurisprudential concepts that had property rights as a major focus. Both in English common law and in the doctrines of international law, long predating the founding of the United States as an independent nation, juridical writers and the courts had much to say about property in relation to emergency powers. For example, in the history of how the eminent-domain power was formulated and applied by American state courts in the early nineteenth century, judges relied to a very great extent upon Vattel, Pufendorf, Binkershoek, Grotius and other writers of the continental natural-law and civil-law schools for the basic concepts of both positive state power and its limitations in regard to property rights.<sup>13</sup> When considering more generally municipal law and the proper limits of sovereign power in the nation-state, the civil-law writers gave extensive attention to the problem of property rights in relation to “public necessity.” They sought to define the boundaries that separate private property rights and the claims of the sovereign (which, in the common-law courts and treatises, became also the claims of the public); and they developed a classification of conditions under which property could properly be seized or damaged by government, and with what requirements for compensability. These writers asserted that such extraordinary powers could legitimately be used for the public welfare—for *salus populi*—and not just for the narrow interests of sovereign itself. The doctrine of *salus populi* was invoked specifically as validating government’s trenching on ordinary property rights in the face of potentially mortal crises, including epidemics, fires, safety hazards, and other peacetime emergencies—not only in war.<sup>14</sup> In these “times of necessity,” or “times of exigencies,” as such crises were described, there were few limits on the sovereign’s authority to act quickly and decisively.<sup>15</sup>

Much the same line of doctrine was to be found in the English courts and in Anglo-American treatises on the common law. A long

history of precedent in the common-law courts on private torts provided a robust doctrinal reinforcement for rules that immunized public officials from individual liability in emergencies that threatened the public good.<sup>16</sup> With few exceptions, the American state courts accepted English precedent in regard to emergencies such as fire, ruling that it was lawful for government officers to raze houses to the ground in order to prevent the spread of flames to nearby woods or structures. The judges thus systematically applied the rationale of “necessity” to rationalize takings without compulsory compensation to property owners in emergencies of this sort.<sup>17</sup> Similarly, in the nineteenth century, the claims of “public necessity”—or even of merely “the expedience of the state”<sup>18</sup>—as a parallel to “emergency” claims were advanced to warrant a major expansion of the legitimacy of eminent-domain takings for a variety of uses.<sup>19</sup> It was a matter for the legislature to decide whether to compensate for losses suffered by property owners, and if so at what level.<sup>20</sup>

The claims of the public and its welfare similarly were prominent in the common law of waterways, with writers beginning with Lord Matthew Hale contending for a classification of shoreline waters, navigable waters, and waters privately owned by “affected with a public interest”—a concept imported into American constitutional law first in the law of waters and then, most famously, in the *Munn* case in 1877, with its enormous impact on constitutional doctrine for more than half a century thereafter.<sup>21</sup>

Destruction of property by military or other officials in wartime to prevent equipment, supplies, or structures from falling into the hands of the enemy or in order to impede enemy troop movements was viewed from the same perspective by the law writers and in the precedents from the English courts. That is, they defined the natural rights of the sovereign as including, above all, the right—and, indeed, obligation—of seeing to



the self-preservation of the state and to *salus populi*. Moreover, there was a hard pragmatic aspect to the doctrines warranting takings and damages to property in wartime—namely, that if governments were to be held strictly liable for monetary damages for property destroyed during military operations, it would likely produce bankruptcy of the national treasury.<sup>22</sup>

4. *An important element of the doctrinal legacy from the civil-law and natural-law writers, in influencing American property and emergency-powers law, was the jurisprudence of "the law of nations."*

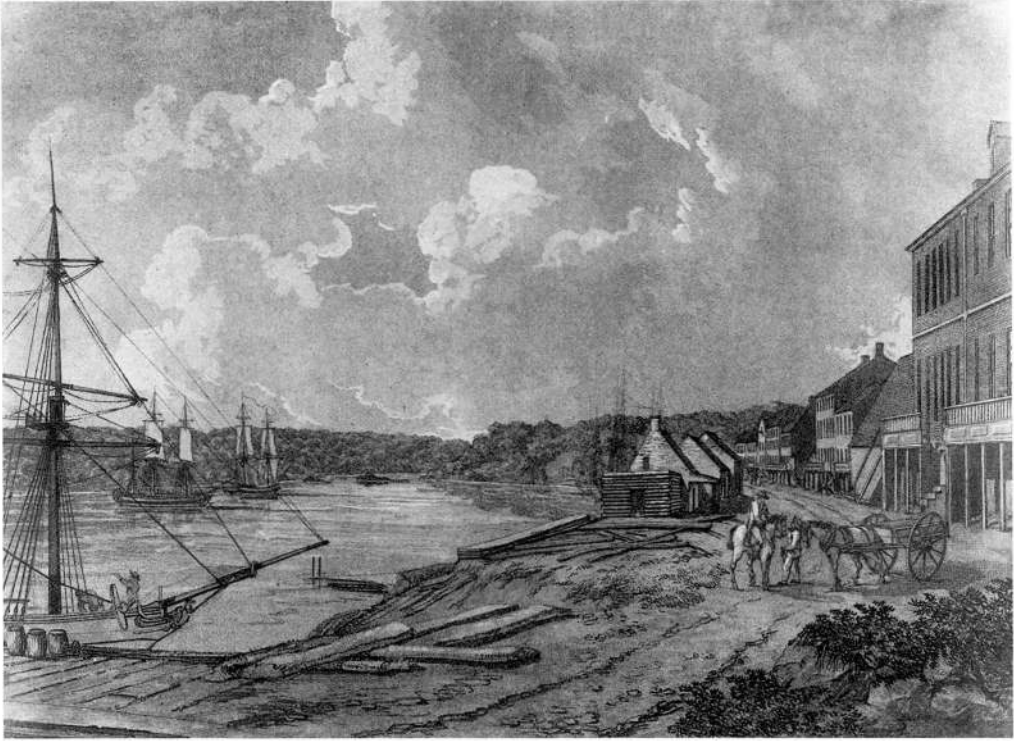
In their writings on international law, then termed "the law of nations," the civil lawyers and natural-law writers sought to identify moral principles that might underpin rules of law that would restrain the actions of sovereigns in wartime, although they conceded that such restraints were a matter of the sovereign's own grace, accepted in the interests of humane considerations. Their theories on these matters were motivated in part, too, by a desire to protect property rights in commerce, especially in cases in which the cargoes of vessels captured on the high seas or in port were taken as prizes by warships or privateers. These writers also addressed the question of the status of foreign merchants and their property in inventories held in countries that suddenly were at war with the nation of their own citizenship. In their arguments defending such rights against arbitrary action of the host government once war broke out, the civil-law writers showed a great solicitude for the property rights of alien enemies caught by the outbreak of hostilities. Their justification for such solicitude was in part a practical one, based on considerations of how retaliation in the event of arbitrary seizures might escalate such harms, and also on considerations of how lack of comity in such situations might be detrimental more generally to the interests of the commerce so vital in the economy of

the early nation-states and their mercantilist empires.<sup>23</sup>

As was true of the doctrinal heritage of civil and common law in the general realm of property rights versus public needs, the law of nations, too, would play a major part in shaping the U.S. Supreme Court's jurisprudence of emergency powers. The relationship of accepted principles of international law to the enumerated powers and to the war power was a major preoccupation of the Marshall Court in the first decades of the nineteenth century, as will be discussed further below. The basic problem of how that relationship should be defined in light of modern developments in international law and evolving consciousness of human rights remained a prominent issue in our law in subsequent eras of American history.<sup>24</sup> Indeed, the debate persists in full vigor to our own day.<sup>25</sup>

\* \* \* \* \*

The varied interwoven configurations of property-law doctrine and the emergency power in American constitutional law came at first largely from tests of the war power in the nineteenth century. Without restricting myself to landmark cases, and without pretending to touch on all the landmark decisions, I would like to discuss three types of cases that were of particular importance from the Republic's beginnings to the Reconstruction era. First was a pair of Marshall Court decisions on property issues that arose from America's confrontations with France and Great Britain that culminated in the War of 1812. Then I will turn to a landmark case on individual liability of military officers in the field, originating from an incident in the War with Mexico. Two cases from the Civil War era will be considered. I will conclude my analysis with a brief examination of some twentieth-century developments that have elaborated and, to a great degree, transformed



Although the United States never formally declared war on France, it did suspend commercial intercourse between the two countries in 1799 and authorize the President to stop any American ship on the high seas suspected of carrying cargo to France or its dependencies, including those in the West Indies. An American captain who captured a prize ship returning from the French islands was found to have done so illegally by the Supreme Court in 1804, but his indemnification was later paid by Congress.

the heritage from the previous eras of constitutional law.

### 1. Marshall Court Decisions on Prizes and Confiscation of Enemy Property

Two decisions of the Marshall Court will illustrate a few vitally important aspects of its jurisprudence in the early years of the Republic.

In the case of *Little v. Barreme*, decided in 1804, the Court confronted the highly interesting question of what roles Congress and the Executive played, respectively, in fashioning emergency policies in a situation of “imperfect” war.<sup>26</sup> The Court adopted this last phrase because the situation involved hostilities against France in the absence of a war declaration, the specific legislation at issue before them being the act of February 1799 suspend-

ing commercial intercourse between France and the United States. In coming to its decision, however, the Court also ruled on what the personal liabilities were of the American naval officer who was found to have acted outside the law in an action on the high seas.

The statute had authorized the President to stop and examine all American flagships on the high seas suspected of carrying cargoes *to* any port in France or any of its dependencies, including the West Indies island possessions that were so important as a market for American mainland producers in that era. The crux of the Court’s decision was that when Congress specifically authorized such an action (involving cargoes en route *to* specified ports), it was not open to the President to instruct naval commanders (as he did in official orders implementing the act) to interdict cargoes en route “*to or from*” French ports.

The cargo vessel in question had been boarded and seized by the U.S. Navy brigantine *Boston*, commanded by Captain Little. He brought the prize vessel into Boston for judgment and condemnation, and the district court initially ruled that it had been a lawful capture and thus validated the prize. On appeal, the vessel was determined to be Danish (despite suspicious circumstances that gave credence to Captain Little's conclusion that it was American). For the Marshall Court, however, the key issue had to do with the President's instructions and their legality. In his opinion for the Court, Chief Justice John Marshall found that there was no justification for a finding that the vessel was bound *to* a French port; rather, it was clearly proceeding *from* the French islands. Hence, its capture was illegal under the terms of the statute. On this finding, the Court held Captain Little personally liable for all damages to the owners' interests with respect to capture, detention, and value of cargo. It was a harsh judgment, and it obviously pained Marshall greatly. He expressed eloquently his personal sympathy for the plight of an officer engaged in a military operation of this sort, with all its dangers, and in light of "that implicit obedience which military men usually pay to their orders of their superiors, which indeed is indispensably necessary to every military system." Yet he had become convinced, Marshall wrote, "that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."<sup>27</sup>

The Court's assertion in this case of congressional power to specify limits—even only implicitly, in this instance, on presidential war powers—was fated to become a lightning rod for constitutional controversy in every war or war-related emergency from that day to our own. The *Barreme* case is remembered best for that reason, and for the way in which the Court advanced its institutional campaign to exercise jurisdiction and to maintain its posture in defense of the rule of law at a time of inflamed

public opinion.<sup>28</sup> But I would like to dwell for a moment on the consequence for Captain Little and others who found themselves in a position similar to his in subsequent years. Both civilian officials in emergencies of all kind and military and naval officers in war situations are forced to depend—as was this naval captain—on the generosity of the legislature after the fact to relieve them of the personal obligation to pay indemnification in cases in which their actions are challenged in private suits and found, in retrospect, to have been illegal. It is sometimes said that for military and other officials in a similar position, the possibility of being held personally liable after the fact can serve as a source of restraint—as an effective check, as it were, on the exercise of arbitrary power. That is, the officer has to calculate whether the emergency action is clearly enough justified by explicit law, or at least by what evidence of authentic "urgent necessity" might be adduced afterward to justify the action taken.<sup>29</sup>

The extent to which such a check is truly effective in reducing the possibility of unwarranted action is a matter of speculation, and certainly individual personality will play a part in a specific situation. One can hardly doubt that Captain Little—who, in fact, did win relief later from Congress—would have believed that the Court had acted unwisely in not extending the cloak of immunity to him in the circumstances *precisely because* the Court's doctrine might serve to instill excessive caution in commanders, or even subject them and the country to harms that speedy and forceful action could have headed off.

As our Mexican War case of *Harmony v. Mitchell* reveals, the problem persisted for the military leadership of the country in later years.<sup>30</sup> Indeed, even a century after the Mexican War, the indemnification question plagued the commanders who had been in charge of martial law in Hawaii during World War II, as postwar private indemnification suits followed as soon as the Supreme Court ruled the regime to have been unconstitutional. The generals and other military and



During the Mexican War, U.S. Army Colonel Alexander William Doniphan (pictured) ordered the seizure of merchandise (pulled by a train of mules with wagons) valued at U.S.\$90,000 from Manuel Harmony, a naturalized American citizen who had developed a lucrative business trading with U.S. Army forces during their southward march into Mexico. Doniphan justified the seizure of goods, animals, and wagons as being necessary for his troops on their long march to Chihuahua and so that Harmony would not sell to the enemy.

civil officials who were being sued personally complained of inadequate legal support and promise of financial backing from the War Department, predicting that if they were not given such backing, no commander in a future war would risk fortune and reputation by moving resolutely (as they believed they had done) to do what they deemed necessary. Unlike Chief Justice Marshall, the federal trial judge who presided over the generals' trial in Hawaii instructed the jury that a *respondeat superior* defense was sufficient, so that even if the generals had exceeded their constitutional authority, if they had "exercised reasonable judgment in good faith, under the circumstances as [they] saw them at the time," they could not be held liable. Consequently, unlike Captain Little, the World War II generals did not have to look to Congress to make them

whole financially after enduring an extended period of litigation in the civil courts.<sup>31</sup>

*Brown v. U.S.*, decided in 1814, is the other Marshall Court case to be considered here in which the Justices' understanding of the law of nations, together with its applicability in the American constitutional context, became a determinative factor in adjudication of emergency powers. *Brown* was a property case in that it involved the claims of legal ownership to a cargo of timber and lumber products originally loaded at a Georgia harbor and then taken to New Bedford, Massachusetts for safekeeping when the war with Britain broke out.<sup>32</sup> There it was unloaded, with some of it held on the wharfs but the timber floated on a nearby creek for safekeeping. It was subsequently seized as being enemy-owned and therefore subject to the embargo against Great Britain during the War of 1812. An informer who stood to gain from the proceeds of condemnation reported the location of the property, and the government moved to seize it. The entire legal question in the Supreme Court appeal turned on the law of nations and its rules, pertaining to whether a sovereign at war had the authority to seize property in this status when it was held on land as opposed to seizure of the property of enemy aliens taken as a prize at sea.

In the Court's majority opinion, Chief Justice Marshall conceded that under the executive war power, the President might legitimately order confiscation of enemy-owned property on any terms. But in that respect, "the will" must be express, with no implication from silence that such a discretionary power was intended to be effective, or else there must be a specific act of Congress authorizing confiscations of particular kinds. Lacking such express intent, Marshall ruled, the law of nations would provide the basis for adjudication. That law provided for "mitigations of this rigid rule" of the sovereign's plenary authority over enemy persons and property in wartime, mandating "the humane and wise policy of modern times" that provided immunity from seizure for

enemy property on land.<sup>33</sup> Marshall offered an excursus into the writings of Vattel, Chitty, and other sources of the law of nations. He also cited the traditional view taken by British admiralty courts, admitting that they were not following the humane rule themselves in the present war, since they had taken American property similarly situated on their soil. The depth of Marshall's commitment to international law was evidenced in his response to that fact. If English admiralty courts "have done wrong, and proceeded against the modern law of nations in these cases," he wrote, "this honorable Court will not, *for that reason*, adopt so unjust a practice."<sup>34</sup>

This was one of those rare occasions on which the Marshall Court was bitterly split, as Justice Joseph Story—whose decision in circuit court was overturned in this case—reprinted verbatim his lengthy opinion from the circuit case, presenting an entirely different interpretation of the law-of-nations heritage and insisting upon the need for application of English admiralty precedent. To this he appended a strident declaration of the implicit or inherent powers of the President, buttressed by a Hamiltonian-style exposition on the Necessary and Proper Clause as relevant to the conduct of war.<sup>35</sup> From a property case, then, emerged a framework for continuing debate of vital constitutional questions of much larger import. As it had done in other decisions as well, in this case the Marshall Court laid out here the basic framework of future constitutional controversies. It did so, moreover, in specific terms that remain strikingly familiar to us as we deal with issues of our own day raised by the "war on terrorism" and more generally by the modern "National Security Constitution."<sup>36</sup>

## 2. "Military Necessity," Judicial Review, and Personal Liability: The Mexican War Trader's Case

The Marshall Court's decisions supporting private rights in relation to the war power in

these early cases found echoes in a decision, *Mitchell v. Harmony*, that arose during the war with Mexico and involved the property claims of Manuel Harmony, a naturalized American citizen.<sup>37</sup> Harmony was a trader in the western territories who decided to follow behind the U.S. Army forces on the famous march southward into the heart of Mexico under the command of Colonel A. W. Doniphan. With a train of mules and with wagons and merchandise valued at U.S.\$90,000 or more, Harmony apparently did well selling to settlers along the route and probably to the Army as well. At a moment when the march had reached an admittedly dangerous region far from the base of their force or in reach of reinforcements, Doniphan ordered the column to move on to Chihuahua, some 300 miles farther into the interior. Harmony decided the risk was too great to warrant continuing, and he prepared to pull out. On Doniphan's orders, Colonel Mitchell, the officer directly in charge, then seized Harmony's entire stock of goods, together with wagons and animals, for use of Mitchell's troops—but also, as he would claim later, to assure that Harmony would not trade with the enemy. Following the war, Harmony sued Mitchell personally for restitution. In a remarkable, almost strident, charge to the jury, the trial judge put his own spin on the facts (including a statement to effect that the long march on Chihuahua, though it proved a military triumph in the end, seemed close to folly when it was ordered), and he virtually instructed the jury to find for Harmony. And so it did, with an appeal taken to the federal courts immediately by the colonel.

Chief Justice Roger Taney wrote the opinion for the Supreme Court in 1851, finding for Harmony and ordering Mitchell to pay full damages and interest. Taney's position reflected and advanced the rule on illegal instructions that Marshall had stated in *Barreme*. Property rights were to be respected, Taney averred, no matter what a military officer's "zeal for the honor and interest of his

country . . . in the excitement of military operations.” In what would become an explicit standard on which future courts would rely in reviewing not only property takings but other executive actions in wartime, Taney wrote that to justify seizure, “the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.”<sup>38</sup> The burden of proving that a qualifying emergency had existed fell upon the officer in command; and it would then be “for a jury to say” whether the suspension of private rights for “the common and public good” had been justified.<sup>39</sup> Relying, one must assume, on the New York trial judge’s characterization of the Chihuahua march, Taney found that Mitchell had taken Harmony’s property in order to support “a distant and hazardous expedition” in an aggressive action; the commander was not seeking to defend his troops in the face of an impending attack by the enemy. In such circumstances, Taney declared, “[We] think it very clear that the law does not permit it.”<sup>40</sup>

Apart from implanting the potent language about “danger . . . immediate and impending” as a justification for emergency actions, Taney also reinforced the Marshall Court’s position that asserted the power of judicial review. Most important of all for future adjudication, the Court reserved to the judiciary and normal judicial process the authority to reach a final judgment as to whether a government action was supported by the claim of “necessity.” If “it is the emergency that gives the right,” it would be the Court that would establish whether the emergency, as a prior condition, actually existed in fact. “Necessity” was at the crux of the inquiry as to constitutionality. On that crucial element in emergency-power law, the Court was unwavering, whether in the hands of Federalists or those of their Jacksonian succession.<sup>41</sup>

### 3. Confiscation, Compensation, and Emergency Powers: The Civil War Crisis

In the standard constitutional account of emergency powers, the Civil War era is remembered best, understandably enough, for the landmark postwar decision in *Ex parte Milligan*.<sup>42</sup> The Court’s split-opinion ruling in *Milligan* went by a narrow majority against the government and declared that constitutional rights must be respected in wartime emergency situations unless there were conditions of actual, not merely anticipated, invasion—a reiteration of the Taney Court rule from *Harmony*—and, further, unless the civilian courts were closed and unable to function. So would the law stand on the question of martial law for the next eighty years, until World War II.<sup>43</sup>

As crucially important as *Milligan* is in the history of emergency powers, there were also important cases from that era that bore directly upon property rights. The most far-reaching legal change in the Civil War years and after was, of course, with regard to emancipation of the slaves—an issue that had been framed in legal discourse down to 1861, against the rising outrage of abolitionist sentiment, in property-law terms. Without revisiting that dramatic subject, there were interesting cases that arose from wartime policies that touched general property rights in wartime. Two of these cases will be considered, *United States v. Pacific Railroad*<sup>44</sup> and *Miller v. United States*.<sup>45</sup>

Both the arguments of counsel and the opinions of a divided Court in *Miller*, decided in 1870, addressed the ways in which the war powers under the Constitution were affected by the terms of the law of nations. That issue was interwoven with others—due process concerns rooted in the Fifth and Sixth amendments, plus the question of whether states in rebellion had a status equivalent to that of foreign enemy states.

By acts of 1861 and 1862, dating from the dark days for the Union cause, when the military outcome of the Civil War was hardly certain, Congress had authorized the President

to issue a proclamation for confiscation of the property of Confederate civil and military officers (and also all former office-holders in the United States who accepted an office in the Confederate government). The 1862 Act is best remembered, of course, for its historic provisions granting freedom to all slaves who escaped from or were captured by the Union forces in the hands of slave-owners "engaged in [the] rebellion . . . or who should in any way give aid and comfort thereto." The statute also authorized the President to employ African Americans "in the suppression of the rebellion," opening the way to their recruitment for the Union armies.<sup>46</sup>

These were revolutionary measures, constituting the portentous first legislative steps toward full emancipation and equal rights for blacks. By contrast, the Union government's implementation of the confiscation policy became largely bogged down by complexities stemming from deference to the northern state governments' policies, conflicting effects of presidential pardons and amnesties, and the like.<sup>47</sup> Ironically, however, it was a confiscation action, in *Miller*, that the Court seized upon to re-examine some fundamental constitutional issues that the southern states' secession had raised—and to advance significantly the doctrine of emergency war powers.

Samuel Miller was a locally prominent judge and legislator in Virginia, and he served the Confederate States government and his own state during the rebellion in various public offices, thus clearly qualifying him as a candidate for confiscation action under the 1861 and 1862 statutes. On information *ex parte* in an affidavit from one Thacher, a New York resident, that Miller had admitted to him in private conversation that he was dedicating 10 percent or more of his income voluntarily to the cause of the Confederacy, the federal district attorney in Detroit moved to attach and confiscate common stock of significant value in two Michigan railroad corporations.<sup>48</sup> In accord with the procedures specified in the statutes, this was done under admiralty and revenue-collection rules.

In these proceedings, no personal service of notice was required and no opportunity for jury trial was afforded. The federal marshal served notice upon the company offices in Michigan, and then notice of his action was filed in the federal district court by the federal attorney. Following that filing, in early 1864, the government confiscated Miller's stock holdings.

After the war, Miller and then, after his death, his heirs sued in federal court for recovery of his losses by that action. Their claims denied in the courts below, they brought their case to the Supreme Court in the December 1870 term, six years after the confiscation. It was also five years after the Appomattox surrender, but, as the Court's opinions would indicate, important constitutional questions still remained outstanding.

Justice William Strong wrote for the Court, upholding the government, and, in a dissent joined by Justice Nathan Clifford, Justice Stephen Field took issue with virtually every aspect of the majority's decision. On the extent of congressional authority to take enemy property, the majority essentially endorsed the argument of government counsel—that under rules of law in the law of nations, Congress might have ordered confiscation of Miller's property (or any other enemy's) "by the mere force of the statute, without any other proceedings whatever, or it could adopt any other process it should choose."<sup>49</sup>

The statutory language had specifically adverted in a preamble to the fact that ordinary judicial process was impossible, by dint of the rebellion's having closed federal courts and offices. Under those circumstances, the character of the emergency bore directly on the validity of suspending ordinary due-process guarantees, opting for revenue and admiralty procedures. Even that aspect of the controversy was not a necessary element of justification in the Court's broad view of governmental power in this emergency context. For once the guns at Fort Sumter had sounded, the condition of war "was alike an actual and a recognized fact, [and] the United States were invested with

belligerent rights in addition to the sovereign powers previously held."<sup>50</sup>

"[T]he power to declare war," the Court declared, "involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor."<sup>51</sup> Having thus reconfirmed the broad and virtually plenary authority of Congress vis-à-vis enemies in time of war, the Court also provided a wholesale endorsement of delegation of a wide discretion to the President. The statutes would become effective when the President decided to issue a proclamation initiating their enforcement. Once such a proclamation actually was issued from the White House, however, Congress prescribed specifically that "*made it the duty of the President*" to confiscate.<sup>52</sup>

Rejecting arguments that the confiscation violated the due-process provisions of the Fifth and Sixth Amendments, the Court further ruled that the statutes, being an exercise of the war power and not criminal law, were not constrained by those amendments. The Court also rejected arguments that the law of nations protected Miller because he was not a foreign enemy. A person abetting a rebellion had no more rights than those of an alien enemy; and the Marshall Court decisions that spoke of rules of war as giving benefit of "civilized" and "humane" consideration to property rights were not taken as mandatory restrictions on the legitimate authority of a government at war.

In a strident and comprehensive dissent, Justice Field contended that the statutes were plainly criminal law, so that the confiscation had been a taking in stark violation of established property rights. By the majority's validation of a proceeding *in rem* under admiralty and revenue rules against a property holder in this way, Field declared, the court "works a complete revolution in our criminal jurisprudence."<sup>53</sup> He was willing to accept the broad scope of the war power as Chief Justice Marshall had laid it out in *Brown*, but

the abridgment of enemy property rights that Marshall had conceded as legitimate should not apply to Miller. "By enemies is meant permanent inhabitants of the enemy's country," Field contended, and Miller's residence in Virginia, even during the rebellion, did not meet that definition.<sup>54</sup>

One final aspect of *Miller* and its doctrinal heritage is of special interest here, because the majority opinion adverted to a "doctrine of confiscation" in terms that we will encounter again, with broad ramifications, in a case involving seizure of property during World War I.<sup>55</sup> This element of the Court's findings was derived from its reading of the law of nations. "The whole doctrine of confiscation," expressed in the rules of war in the authoritative texts, "is built upon the foundation that it is an instrument of coercion, which, by depriving the enemy of property within reach of his power . . . impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war."<sup>56</sup>

The second Civil War property case of special interest, *United States v. Pacific Railroad* (1887), came to the Court later in time and involved very large financial stakes. Whereas the Miller confiscation case had involved the dry-as-dust procedural issues of taking intangible property from a company office in a town hundreds of miles distant from the field of battle, the *Pacific Railroad* case originated with the orders of a Union Army general promulgated in the heat of battle and facing a potentially catastrophic defeat if he failed to act decisively. A Confederate force led by General Sterling Price, in his famous western campaign of fall 1864, had invaded Missouri and was threatening the defenses of St. Louis, a major Union city. Defending against the Confederate force was General William Rosecrans, who ordered his Union Army to destroy several large, strategic railroad bridges "as a military necessity" in order to slow Price's advance.<sup>57</sup> St. Louis was spared, and as the tide of battle turned Rosecrans found it equally imperative,



as a matter of "military necessity," to rebuild those same bridges for use of his own force. He met with the officers of the railroad company, obtaining agreement that they would do as much rebuilding at their own expense as was possible; but the general also announced his intention to order the reconstruction by the government of any bridge the companies lacked the capacity to restore. He would, he said, expect the companies to bear the costs involved for the government in reconstructing bridges, through a withholding of any freight revenues owed them for carrying military or other government freight. If this arrangement were later to come up in a court of law, it was entirely agreeable to Rosecrans; he anticipated a settlement of any dispute "on principles of law and equity." For the moment, however, the vicissitudes of war required instant action, and the railroad's officers were in no position to quarrel with the arrangements that Rosecrans imposed.<sup>58</sup>

Justice Field wrote for a unanimous Court this time, ruling on the company's claim that the government should refund freight earnings withheld since the war on the basis of Rosecrans's order. Unlike in the Michigan bond case involving Miller's property rights, in this instance Field invoked the war powers and government discretion in the broadest terms. The stated "necessities of war" were determinative for the Court, and those "necessities . . . called for and justified" both Rosecrans's action in destroying the bridges and his orders for their reconstruction. "The safety of the state in such cases overrides all considerations of private loss," Field wrote: "*Salus populi* is then, in truth, *suprema lex*."<sup>59</sup> In the heat of battle, with invading troops on the march, the Court did not assert the need for close judicial scrutiny of the commanding general's decision to invoke "necessity." As we shall note, some of the landmark twentieth-century cases would be of a different character, both as to wartime situations and as to the shift in emphasis to adjudicating the claims of "necessity" in response to general economic crises in peacetime.

The civil-law doctrine as formulated by Vattel was extensively cited in this opinion, as it had been relied upon repeatedly in the previous deliberations of the Court on emergency power. Approvingly quoted was Vattel's rule that when damage was caused by "inevitable necessity" in the course of active combat, it was no different from loss at the hands of enemy troops. "All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself."<sup>60</sup> Were the state to be held responsible for such private losses in war, moreover, it would completely exhaust the public resources, and hence was "a thing utterly impracticable."<sup>61</sup>

Field buttressed his argument further with historical examples that militated against compensation to the company for the bridges rebuilt by the government, citing various decisions by Congress on claims for reimbursement. There was a consistent pattern, he concluded, "[that] sufferings by the general ravages of war had never been compensated by this or any other government."<sup>62</sup> Some emotional effect must have been evoked from another reference—viz., a veto message by President Grant, in which the old commanding general refused to sign a special act of Congress compensating a homeowner for losses suffered when his home, which had served enemy sharpshooters, had been burned on order of Union officers to prevent its being used by the Confederates. Private property, Grant declared, was, "[as] a general principle of both international and municipal law," subject to be occupied, taken, "or even actually destroyed, in times of great public danger, and when the public safety demands," with no legal obligation on the part of the government to pay compensation.<sup>63</sup>

Having endorsed this broad construction of war powers, however, the Court placed on the government, no less than the railroad company, the obligation to carry burdens that war placed upon it. Although there was no

requirement to pay the company any reimbursement for its expenses in replacing bridges destroyed by the retreating Union forces, the opinion continued, neither was there an obligation upon the company to reimburse the government for the Army's expenses in rebuilding their other bridges. To that extent, the Court did place a judicial barrier in the way of *indirect* government "impressments," as it were, of private-property rights. And it comes as no surprise that it was Justice Field who wrote for the Court. The decision as he framed it presaged his strong support for both governmental authority (where it met his standard of legitimacy) and famously unyielding arguments for property rights against government action that he believed crossed the boundary line limiting its constitutional authority.<sup>64</sup>

Judicial consideration of where that line ought to be drawn in a wartime emergency was one distinctive kind of exercise in constitutional interpretation. Distinctively different in vital respects was the judicial quest to determine the legitimacy of broad emergency power in economic crises. Especially interesting among the twentieth-century developments were two vital questions. First, could powers once granted in wartime, explicitly to meet the war emergency, continue to be exercised after the hostilities had ended, and if so, was there any limit on their duration? And second—and no less difficult and portentous—was it constitutional (whether a wise policy or not) for Congress to delegate to the Executive broad discretion to declare the existence of emergencies and then suspend normal guarantees of rights? Such authorizations to the President to declare emergencies have proliferated dramatically, in fact, since the 1930s, both as to scope and as to number of authorizations. To what extent, then, has the "traditional" Constitution—as known until, say, the 1930s—been supplanted by a qualitatively different structure of governance, and with effects for the future upon the traditional guarantees of fundamental liberties to which

Earl Warren referred as the underpinnings of "a free government"?

Many historians and legal scholars have written on these themes, and it is not my intention here to go over the same ground very broadly.<sup>65</sup> Rather, in the concluding section of this study, I want to underline some of the ways in which the constitutional theory of property rights has been of prominent concern to the Supreme Court in its ongoing reconsideration of emergency powers.

\* \* \* \* \*

The issues we have discussed had typically been embedded, as considered by the high court, in cases arising from the war power. In the twentieth-century cases, one of the Justices' concerns was to clarify the relationship between the powers associated with conduct of war and the "ordinary" emergency power as exercised by civilian government in peacetime. I want to examine here some specific doctrines that the Court formulated in this enterprise, but also to discuss briefly the larger process of changes in policy and law that have produced the seemingly irreversible increase in the Executive's power and the consequent distribution of real power in the modern American constitutional order.

### 1. The Impact of Mobilization During World War I

When the United States entered World War I, the President and Congress moved quickly to put policies in place for mobilization of labor and resources. In addition to sweeping laws regulating freedom of speech and instituting censorship of the press through controls over use of the mails, Congress authorized the President to nationalize or take over the operations of railroads and water-transport systems, telephone and telegraph companies, and ship-building facilities. Under the Lever Act of August 1917, further presidential powers were legislated, covering a vast array of economic

activities and interests. Given unlimited authority to create agencies and reorganize the government to implement Lever Act powers, President Wilson ordered new controls over mining, food supply and prices, mineral production, and the processing of alcoholic beverages. Meanwhile, Congress extended virtually plenary power over the property of enemy governments and enemy aliens, together with authority to establish comprehensive presidential control over imports and exports.<sup>66</sup> All this, of course, happened parallel to the harsh campaign of repression of speech and press under espionage and sedition acts, against the background of a war-propaganda operation under the Committee for Public Information, that further enhanced Executive authority and curtailed traditional individual rights in addition to the property rights affected by the economic controls.<sup>67</sup>

Two constitutional issues that arose from the administration of emergency powers during the war and the immediate postwar years are of special interest to us in light of the earlier history. The first issue—a familiar one, with roots in the Marshall Court decisions—concerned the property rights of enemy aliens as presented in the case of *U.S. v. Chemical Foundation, Inc.*, decided in October 1926, eight years after the armistice that ended hostilities.<sup>68</sup> It is a curious case in that the petitioner was the federal government itself, which had brought suit to obtain invalidation of a transfer of certain industrial patents “seized” as enemy property during the war. The wartime government officer in charge, the Alien Property Custodian, had taken control of valuable patents to chemical processes, together with various trademarks, and then transferred this property by sale. The purchaser was the Chemical Foundation, a corporation founded under the laws of Delaware in 1919 for the stated purpose of purchasing the patents in question. Once it had ownership, the foundation was empowered to manage these rights “in a fiduciary capacity for the Americanization of such industries as may be affected thereby, for

the exclusion or elimination of alien interests hostile or detrimental to the said industries, and for the advancement of chemical and allied science and industry in the United States.”<sup>69</sup> The transfer of the patent rights was made at private sale for \$271,000. It was done without notice, an unusual arrangement justified by a provision obligating the corporation “to grant non-exclusive licenses upon equal terms to qualified American manufacturers.”<sup>70</sup>

The corporation apparently was up and running, and bringing in revenues that supported the salaries of its top officers and directors, meanwhile contributing to the “Americanization” of technologies that had been developed in Germany and the stream of revenue that they were producing. All this attracted the government’s attention when Warren Harding’s appointees in the Justice Department succeeded the Wilson administration after the 1920 election. What the government’s lawyers found improper—and possibly illegal—was that the same individuals as had conceived the project of forming this corporation and had provided the legal counsel on which the terms of the patent transfer to the corporation had been written were also the key officers and directors of the corporation. They included, above all, the Alien Property Custodian himself!

The government initially filed a complaint in federal district court, alleging: that a small group of chemical manufacturers had conspired to obtain these patents “at nominal prices” through the establishment of the Chemical Foundation, Inc.; that they had used the patents obtained to further combinations and monopoly of “certain chemical industries” in the United States; and that the property had been obtained through “fraudulent deception” in violation of federal statutes governing the terms of sale for government property. The trial court rejected the claim of unlawfulness in the transfer, and the case came to the Supreme Court on appeal on the question of whether the sale had been illegal under the statutes forbidding conflicts of interest such as appeared

so blatantly here when government officers or fiduciaries transferred property held by the federal government.

In accord with the basic doctrine of the law of nations, adopted by the Marshall Court in the early cases and asserted in categorical terms again in Civil War cases,<sup>71</sup> the Court now reaffirmed that enemy property is entirely at the mercy of the U.S. government when the war powers are invoked legitimately. As a war measure, the Trading with the Enemy Act “should be liberally construed,” the Court declared. The power of a war government was plenary: “Congress was untrammelled and free to authorize the seizure, use or appropriation of [enemy] properties without any compensation to the owners.” Although the government might stand ready to negotiate compensation with Germany or its nationals, this matter was not a justiciable one. The President had been free to determine at his discretion how the properties should be disposed

of, by what agency, and under what terms. Hence, the contract for transfer stood valid and binding.

This sweeping reaffirmation of plenary government control over enemy alien rights would take on even greater importance in a later era of American constitutional law, when the Court effectively merged the *Chemical Foundation* ruling on unlimited presidential authority in this regard (under the Trading with the Enemy Act, still in effect, amended, well into our own day) with the doctrine of exceptional breadth of presidential authority vis-à-vis Congress in foreign affairs, set forth in the famous *Curtiss-Wright* decision of the late 1930s.<sup>72</sup>

The second issue of long-term importance to which I would like to give brief attention is the “durational” one with respect to war measures. This had come up to the Court in various Civil War era cases,<sup>73</sup> but after November 1917 the question arose again, with respect



This widow from a small Texas town wrote to President Roosevelt in 1942 pleading for rent control so that she and her daughter would not be evicted from her home. The Office of Emergency Management imposed rent controls during the war to protect those living on the home front.

to legislation actually enacted after the cessation of hostilities but before any formal end to the war by treaty. The cases raising this issue concerned the prohibition of manufacture and sale of hard liquor, and also the imposition of rent controls in the District of Columbia. The Court ruled that such emergency legislation was valid under the war powers not only during the period of the fighting, but for a reasonable period beyond that time.

In two decisions written by Justice Oliver Wendell Holmes, Jr., the arguments of "necessity" for the rent-control legislation were considered in a framework of analysis that was embedded in police-power jurisprudence. That is to say, Holmes argued that, like traditional peacetime powers for regulation of public health, safety, and welfare, the war powers might go "to the verge" and so be found to require payment of compensation to property owners who suffered from government action. But as late as 1921, in his opinion for the court in *Bloch v. Hirsh*,<sup>74</sup> he ruled against the contention that there had been an effective "taking" in the rent controls. Three years later, however, the Court looked again at the question of whether changed circumstances had rendered the same law unconstitutional.<sup>75</sup>

The Court's reaffirmation that the termination of hostilities was not determinative as to emergency powers was only one side of the coin. The other was that by stressing the importance of "circumstances," the Court was, in effect, asserting here that it would examine the factual evidence presented in suits relating to the continued existence of emergency conditions. It would not take a congressional statement regarding the "necessity" issue as determinative. We will encounter this important question—viz., who has the final say as to necessity, whether of a congressional emergency statute or an act of a military commander in the field or at sea?—in other decisions that followed.

One final observation is appropriate concerning the impact of constitutional change during World War I. Because the Trading with

the Enemy Act remained in force, with its provisions for presidential declaration of a war-related emergency, a significant arsenal of latent authority was available to Franklin D. Roosevelt when global events during the 1930s presaged the outbreak of World War II. In the interim, since the Hundred Days of 1933, Congress had given the President a great panoply of new emergency powers with which to address the economic crisis in the Depression. "Even before 1939," Clinton Rossiter has written, "Mr. Roosevelt, in an emergency *to be ascertained and declared by himself*, could have prohibited transactions in foreign exchange, seized power houses and dams, increased the army and navy beyond their authorized enlisted strength, devaluated the dollar, forbidden all Federal Reserve transactions except under regulations which he approved, seized (in war or when war was imminent) any plant refusing to give preference to governmental contracts or to manufacture arms for a fair price, requisitioned any American vessel, and exercised complete control over all communications in the United States."<sup>76</sup> Open-ended congressional authorizations empowering the Executive to declare an emergency had effected that fundamental change in the constitutional order that has been so frequently remarked.

Even in the first years of his administration, when emergency power centered only on the domestic economic crisis, FDR so often invoked the Trading with the Enemy Act and the arsenal of earlier constitutional adjudications on the emergency power that it could plausibly be said that Roosevelt was governing largely on the basis of "the First World War Constitution"<sup>77</sup> By the end of World War II, however, that version of the Constitution had yielded to one even more dramatically subject to presidential powers under invocations of emergency. The number of statutes authorizing the President to suspend normal processes and constitutional guarantees, along with the scope of their subject matter, continued to expand through the decades following the war. And, of

course, with the current crisis following 9/11, the constitutional issues involved today are of new and urgent importance.

## 2. The New Deal and After: A Transformed Constitutional Order

Reflecting on the events of his first hectic months as President in 1933, the year of the Hundred Days and the founding of the New Deal, FDR wrote: "Every day that went by . . . brought before me and the Cabinet and the Congress some new emergency which cried out for action."<sup>78</sup> The responses that Roosevelt espoused, insofar as they were not merely pragmatic and asserted *ex cathedra*, rested upon the constitutional foundation of emergency powers. It is axiomatic in the work of virtually all constitutional historians and analysts of 1930s political history to begin with the words from FDR's inaugural in which he compares the Depression to a war—and tells the country, and Congress in particular, that he requires the same degree of discretionary power as though it were an armed conflict. Throughout the New Deal years, the rhetoric of "war" persisted, as it does in a different context today (the "war on terror," the "war on drugs," and other causes and policies). And Roosevelt never let up in pressing the Congress for expanded statutory authority, never failed to interpret in the broadest possible terms such authority as was given him in legislation. Not least important, he never slackened in pressing claims to act on prerogative power by asserting the inherent authority of the President as "commander-in-chief" or in exercising general "executive" powers.

The high point of drama in that constitutional story, more than matching the significance of even the "Court-packing" episode, was an overt threat from FDR in 1942 (during one of the most difficult periods of the war) to nullify a statute if Congress did not do his will. This was in relation to a provision of the Emergency Price Control Act that exempted agriculture from the wartime controls to a degree that Roosevelt believed was un-

dermining the economic regime and harming the war effort. "In the event that the Congress should fail to act, and act adequately," he proclaimed, "I shall accept the responsibility, and I will act."<sup>79</sup> In that instance, Congress yielded, and the issue was quieted. In many other instances, however, both as to economic measures and as to foreign policy, taking broad liberties with both the Constitution and the specific terms of neutrality legislation, Roosevelt did not bother to go to Congress at all, whether to seek compliance after the fact or to make explicit threats. Domestic emergency and overseas threats spoke for themselves as justification for executive initiatives in the implicit philosophy of his administration.<sup>80</sup>

The full story of the New Deal and the Court—and especially the "constitutional revolution" that so fundamentally altered the inherited "Lochner era" and interwar doctrines of contract, police-power, and separation-of-powers law—has been told many times (albeit in divergent interpretive versions) by eminent scholars, and there is little purpose in reviewing that aspect of the property-rights issue here.<sup>81</sup> In addition, however, to the Court's responses to those questions, largely raised by congressional legislation and actions of the Executive, there was another dimension of judicial response to which I do want to give brief notice. This was the way in which the Justices sought to work out what might be termed a "generic" emergency-power doctrine that would be applicable generally, at least in peacetime, and that could be a reliable and consistent check against abuse of property rights. The Court's approach to this problem was exemplified in the famous Minnesota Mortgage case, to which we turn next.

## 3. The "Generic" Emergency Power: The Rhetoric of Rights, Powers, and "Necessity"

In few areas of constitutional law has the Supreme Court produced such ambiguous rhetoric, so many Delphic pronouncements, and such complex doctrinal confusion as it

long did in its quest for a generic doctrine of emergency powers. In the war-powers cases, the lines had been drawn fairly clearly—and resolved largely in the government's favor, as has been noted here. In the matter of peacetime uses of emergency powers, however, as the Great Depression spread its baleful effects throughout the nation, the Court's position was anything but certain.

The case of *Loan Association v. Blaisdell*<sup>82</sup> brought to the Court a challenge to the constitutionality of a mortgage-payments moratorium law enacted in Minnesota in 1933. The statute was enacted amidst a wave of foreclosures that was feeding what the Minnesota attorney general declared in argument was a perilous decline of public order. Declaring an emergency, the statute provided for "temporary and conditional relief"<sup>83</sup> by authorizing state trial courts to stop a foreclosure and approve extension of time for payments due. Significantly, the act was to be effective "only during the continuance of the emergency" and in any event for no longer than two years from the time of its passage.<sup>84</sup>

Argument centered on whether the extension of state police power to this extent was in blatant violation of the Contract Clause, which, after all, had been written in the 1780s against the background of "stay laws" not much different than Minnesota's statute. Was the emergency of such moment that it warranted an abrogation—even if only temporary—of obligations of a mortgage contract? And if so, on what principle would a limit on the reach of the Contract Clause owing to emergency conditions be justified in generic terms?

The Court had already faced such a question two years earlier in a more familiar type of police-power case, *New State Ice Company v. Liebmann*.<sup>85</sup> The regulation of ice business by the State of Oklahoma was at issue, and the Court's majority, including Chief Justice Charles Evans Hughes, struck down the law on grounds that the ice business was not "affected with a public interest"—the standard, dating from *Munn* in 1877, that was still being ap-

plied regularly when state regulatory laws were challenged. Justice Louis Brandeis's dissent in this case is famous for its memorable argument that the principles of constitutional federalism meant that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." What is recalled less commonly is that Brandeis did not rely wholly on the appeal to the principle of federalism: he also contended for recognition by the Court of exceptional circumstances. The Depression, he asserted, in language that foreshadowed FDR's famous declaration in his 1933 inaugural speech, had produced "an emergency more serious than war." For the Court to apply the tired standard of business affected with a public interest, discounting completely the urgency of such a crisis, appeared to Brandeis a dangerous course.<sup>86</sup>

By introducing the emergency aspect through a focus on circumstances in the Oklahoma case, Brandeis was invoking a standard of adjudication in regard to property rights that resonated with the reasoning applied in at least one major case of an earlier day involving state (as opposed to national) authority. Specifically, in *Noble State Bank v. Haskell* in 1911, the Court, in a unanimous opinion written by Justice Holmes, had upheld an Oklahoma statute that required banks to pay compulsory assessments to support a statewide deposit guarantee fund. Although it was a less startling use of the regulatory power than the Minnesota mortgage moratorium twenty-three years later, still it was open to a serious challenge under the terms of the Contract Clause. The Court's decision upholding the Oklahoma statute was rendered at a moment when the Panic of 1907, a serious event in the national financial markets, was still a fresh memory. It was therefore especially significant in the history of property rights and emergency powers that Holmes specifically stated that the Oklahoma law had been enacted in hopes that it "would make a [bank] failure unlikely and a general panic almost impossible." The power

of a state to head off an emergency in this way “must be recognized, if government is to do its proper work.”<sup>87</sup>

In judging the constitutionality of such statutes, Holmes went on to say, it was of course necessary to draw lines as to their reach and constitutional limits: “[As] elsewhere in the law,” he wrote, “lines are pricked out by the gradual approach and contact of decisions on the opposing sides.”<sup>88</sup> Here, then, was precisely the same approach as that which Holmes would apply in the post–World War I rent-control cases. The Court would consider circumstances, and after making a determination as to whether the state government’s action was reasonable in light of those circumstances, it would decide whether the cumulative “pricking out” process had come so far that the dots had been connected and a firm doctrinal boundary line had been formed.<sup>89</sup>

The echo of those cases and principles of adjudication were heard in the Hughes Court’s approach to the issues posed in *Blaisdell*. Writing for the majority, the Chief Justice underlined the urgency of conditions in Minnesota that lay behind the legislature’s decision to adopt such a measure, quoting from Marshall in *McCulloch v. Maryland* the famous phrase that “[I]t is a Constitution we are expounding . . . intended to endure for ages to come and consequently to be adapted to the various crises of human affairs.”<sup>90</sup> Adverting to the evidences of far-reaching social instability and the threat of violence that Minnesota had introduced in argument, Hughes compared the economic crisis there to the “limited and temporary interpositions” that the Constitution must permit, even against the Contract Clause’s terms, “if made necessary by a great public calamity such as fire, flood, or earthquake.” To ignore the severity of the crisis in Minnesota, would amount to a blindness to the importance of “the maintenance of a government by virtue of which contractual relations are worth while.” Having made this important rhetorical move, Hughes then proceeded to attempt a generic construct that would serve as a

principled basis for application of emergency powers—a construct that would be responsive to what he termed the “growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.”<sup>91</sup>

At hand for Hughes in *Blaisdell* was the highly enigmatic dictum, from a 1917 decision, that “[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”<sup>92</sup> This effort at a generic doctrine was suggestive but hardly sufficient, as Hughes recognized, and so he offered his own formulation of the appropriate general principle: The existence of an emergency itself, Hughes wrote, “does not create power;” however, “emergency may furnish the occasion for the exercise of power . . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions.”<sup>93</sup>

Not long after deciding *Blaisdell*, the Court shifted ground in its decisions on comparable regulatory measures in the states that were prompted by Depression conditions. Rather than adhere to the approach it had taken in the Minnesota case, building on the concept of emergency power, the Court instead allowed a much broader discretion for state legislatures in their decisions and programs for economic regulation by two famous shifts away from earlier doctrine: by its repudiation in *Nebbia v. New York*<sup>94</sup> of the “affection with a public interest” standard for judging which specific economic interests might be regulated and which ones must be immune; and by its extension of the congressional regulatory power’s reach under an expansive interpretation of the Commerce Clause. The latter movement, essentially giving Congress a broad-ranging police power in economic regulation, culminated in *Wickard v. Filburn*.<sup>95</sup>

Historians and legal scholars have recognized the importance of *Filburn* as a landmark



Commerce Clause case. What is almost never mentioned, however, is the important fact the Court decided this case in the parlous early days of America's involvement in combat during World War II. It was in the midst of emergency conditions, then, with a full mobilization of the economy and of labor under way, that the Court upheld in *Filburn* an extreme degree of governmental control over the cultivation and uses of farm products. Whether the Court would have reached so firm a position on what now amounted to a nearly plenary police power for Congress had the case come up in a different context unrelated to war emergency is a question worth pondering. In any event, the kind of efforts that the Court had made earlier toward constructing a generic emergency power doctrine—most notably in *Wilson v. New* and in *Blaisdell*—had proven to be a false start. It had given way to action along these other doctrinal paths that the Court followed in its progressive accommodation of the new impulse for enlarged governmental authority over property rights and operations of the economy generally.<sup>96</sup>

And so the Court has made a record of giving ground in both the New Deal and the World War II periods with respect to state regulatory regimes, and from that time to the present day with respect to war powers, as Congress itself has vested the President with a wide and powerful discretion with respect to invoking emergency powers in the name of national security. It would be misleading, however, to conclude that the Court had removed itself altogether from any role in protecting property rights when emergency powers were at issue. This was signaled by the extraordinary Steel Seizure case, *Youngstown Sheet & Tube Company v. Sawyer*, decided by the Court in 1952.<sup>97</sup>

#### 4. Executive Powers and Judicial Intervention: The Steel Seizure Case

The Steel Seizure case was concerned above all with adjudging the claims advanced by the Truman administration as to the "inher-

ent powers" of the President. American troops were in the field of battle in Korea, and a steel strike was in the offing that would undercut production in this vital war-related industry. Hence, President Truman ordered the Secretary of Commerce to seize the nation's steel plants and operate them under government direction until the strike issues had been settled. In his opinion for the Court's six-member majority, Justice Hugo Black ruled that the principle of separation of powers must prevail, and since no congressional statute had authorized the President to seize these industrial facilities, his action was patently unconstitutional.

One centrally important aspect of the Steel Seizure case merits brief additional mention here.<sup>98</sup> Government counsel pressed the Court to be mindful of what it termed "the necessity, the vital necessity" of keeping the steel mills running. Their argument from this premise, of course, was that responsibility properly rested with the President, and not the judiciary, in establishing whether such "vital necessity" should prevail over other considerations, even what in less urgent situations might be legitimate constitutional barriers.<sup>99</sup> Here was the time-honored claim, then, of "necessity"—and the persistent question whether, once the Executive (or, in a different context, the military authorities under authority of the President as Commander-in-Chief) declares an emergency, administrative discretion prevails and is immune from effective judicial review of circumstances as well as the law.

President Truman and members of his administration had said in widely noticed public statements that the question lay outside the proper realm of the judiciary. The same argument denying jurisdiction was made by the government lawyers in the lower courts. To Justice Black, we can be certain, this was a challenge of a very special order. For one so dedicated to the notion of the federal courts as the palladium of liberty, one must think, no argument would have been more unacceptable than a claim that the Supreme Court should rule itself out of the arena of constitutional

process. This had been Black's stated position earlier in the 1946 martial law case *Duncan v. Kahanamoku*, when he wrote the Court's majority opinion ruling that the Army's military administration in Hawaii during World War II had been illegal. Perhaps even more tellingly, Black had expressed the same concern in even stronger terms in his private exchanges with the other Justices, including especially Chief Justice Harlan Fiske Stone, when the latter sought to soften and narrow draft opinions that Black circulated while *Duncan* was being considered. His message was simple: if the Army and the government can close federal courts in Hawaii and keep them from functioning to protect due process and constitutional liberty, then by the same reasoning, they could close the Supreme Court itself.<sup>100</sup> The Court thus made clear in *Duncan* that it would not supinely accept as determinative a decision by the military that "necessity" required a prolonged imposition of martial law in the absence of invasion or insurrection when there was no statute law or constitutional provision on which such a policy could be justified.

That the Court has an important role to play in scrutinizing claims of "necessity" when emergency powers are invoked is a proposition given special force, moreover, by what historical study in archival records has proven with respect to the way in which the notorious Japanese-American internment cases were argued during World War II. We know now that the Solicitor General, in oral argument before the Supreme Court, suppressed evidence that clearly would have discredited the Army's claims that there was imminent danger of sabotage or espionage and that time pressure had required the mass removal of Japanese Americans from the West Coast without conducting loyalty investigations of individuals that would have indicated the degree of any real danger that was posed by their presence.<sup>101</sup>

In *Youngstown*, though by no means denying congressional authority to vest specific emergency powers in the Executive, the Court asserted its power to hold the President ac-

countable when the terms of statutory grants of power were exceeded, let alone when Congress had authorized a different way of handling the emergency.<sup>102</sup> When the Court's decision was announced, Earl Warren, then governor of California, welcomed it because of its reaffirmation that "[E]veryone in the nation, including the President, is subject to the written provisions of law."<sup>103</sup> And, as Maeva Marcus's analysis of the Court's later decisions on separation of powers and on claims of inherent presidential powers has shown, the *Youngstown* Court's basic proposition regarding rule of law under the Constitution was deployed successfully against the Nixon administration to confront a President bent on asserting uncontrollable power in defiance of the judiciary and Congress alike.<sup>104</sup> The persistence of this rule-of-law ideal has operated prominently, too, in the post-9/11 "war on terror," as lower federal courts and units within the Department of Justice itself have engaged in an ongoing, intensive confrontation between "necessity" and the nation's traditional commitments to liberty and constitutional due process.<sup>105</sup>

The division of opinion among the Justices in *Youngstown* was an indicator of the Court's continuing inability to formulate a workable generic theory of emergency power. Indeed, Jackson adverted to "the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves . . . . A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." The Delphic pronouncements of the Court in *Blaisdell* and other earlier cases did not serve. Hence, Jackson offered an alternative approach to assessing constitutionality of presidential actions according to a categorization of "practical situations" based on cases "as they actually present themselves."<sup>106</sup>

Jackson's effort at working through the conceptual problem was reminiscent of Chief

Justice Stone's dictum in his concurring opinion in the Hawaii martial law case. Stone wrote that the meaning and reach of "martial law" must be viewed in terms of the situation presented to the Court: "Its object, the preservation of the public safety and good order, defines its scope." But even this pragmatic approach could not be open-ended. "A law of necessity," Stone declared, can justify important sacrifices of constitutional liberty in order to avoid undermining national defense and security when military power needs to be exercised in a war emergency. Stone ended by going full circle, however, stating that government's power to command such sacrifice "may not extend beyond what is required by the exigency which calls it forth."<sup>107</sup> Thus, in the Hawaii case, he would not accept as fiat the military commander's judgment of necessity, and after reviewing the situation that had produced the decision to impose martial law and assessing the persuasiveness of the evidence that had been presented at trial as to imminence of real danger, Stone found against the Army.

### 5. The Pacific Railroad Doctrine Revivodus: *Caltex of the Philippines*

One encounters no comparable ambiguities or judicial *angst* over the application of traditional emergency-powers doctrines when the Court considered the conventional issue of property losses in the heat of battle. In *U.S. v. Caltex of the Philippines, Inc.*,<sup>108</sup> a case decided in 1952, the issue was similar to that of the Civil War situation in which bridges were burned in order to defend St. Louis against Price's army. In *Caltex*, a private corporation that owned large facilities of storage and movement of fuel oil in the Philippines suffered heavy financial losses when the commander of U.S. forces in Manila seized the properties as Japanese invading forces were advancing toward the port and Japanese bombers were attacking the city. To have the Caltex facilities and fuel taken by the Japanese and used

for their naval vessels would have been catastrophic from the standpoint of American forces in the Pacific. The American military torched the facilities as Japanese troops were literally entering Manila. After the war, Caltex sued for compensation.

In an 8-1 decision, the Court cited the doctrine of "necessity" in precisely the terms that Justice Field had done in *Pacific Railroad*, stating that losses experienced in this manner in the heat of battle fell upon the unfortunate sufferers. Field was quoted at length on this point:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.<sup>109</sup>

Whether or not what Field had written was only "a maxim" at the time, the *Caltex* Court declared, "It is law today."<sup>110</sup> Hence, the corporation could not hope, in this case, to receive compensation for its loss. Had the same losses occurred in the heat of battle as the Japanese directly engaged U.S. forces, as happened immediately after the torching, certainly no claim for compensation would have been honored. Therefore, the Army's decision to destroy the property when enemy forces were actually in sight, with Japanese capture of the port nearly certain, had to be judged in the same light. It was not a "taking" or impressment of property, requiring compensation, for the U.S. military

commanders were not seeking to appropriate the facilities and fuel for their own use in field operations.<sup>111</sup> The torching of the property had been intended to prevent the enemy from having the advantage of using it against the United States and its Pacific forces.<sup>112</sup> And so the “fortunes of war” argument—the extreme version of “necessity” and *salus populi* from the common law—prevailed here, just as it had done in classic emergency situations since the beginnings of the Republic. Here there was no difficulty deriving from lack of an adequate generic theory.

### Conclusion

The *Caltex* story can serve as a reminder of the historic core doctrine from which emergency powers took root—and of the durability of that legacy. However, the larger history of the Supreme Court’s efforts to tame and cabin the reach of powers justified by “necessity” and to fashion a proper balance between emergency imperatives and the guarantees of constitutional liberty, including the protection of property rights in various forms—the history that I have sought to illustrate with the cases discussed here—is indicative of how complex and challenging is the vital process of constitutional adjudication in a system that rests upon the fundamental ideal of a free government “on trial for its life.”

*\*Acknowledgments:* This study is based in part on a lecture delivered at the U.S. Supreme Court in fall 2002 under auspices of the Supreme Court Historical Society. I wish to thank Justice John Paul Stevens for his hospitality and his generous introduction on that occasion, and to thank Justice David H. Souter for his interest in the project. I am grateful also to Rob Tennyson and Kathryn Mengerink of the University of California, Berkeley for excellent bibliographic and research assistance. My wife, Jane L. Scheiber, is coauthor with me of published articles and a book in progress on martial law in World War II Hawaii, and in that

capacity, as well as from our several collaborations in research on the history of civil liberties, she has contributed importantly to whatever may be of merit in the present work. Any errors of fact or interpretation are my own alone.

### ENDNOTES

<sup>1</sup>Earl Warren, “The Bill of Rights and the Military,” in *The Great Rights*, ed. Edmond Cahn (New York, 1963), 89 (lecture delivered in 1962).

<sup>2</sup>*See, inter alia*, Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* ([original edition], Princeton, 1948), a book that remains a uniquely insightful analysis of emergency powers, its enduring importance being reflected in the influence it has had in framing the conceptual basis for most recent studies on this theme. *See especially ibid.*, chapter 18, on the World War II period. The full reach and impact of martial law were experienced in the Territory of Hawaii during World War II, in an episode of martial law and military government that is unique in American history for its duration and the number of citizens affected, on which *see* Harry N. Scheiber and Jane L. Scheiber, “Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai’i, 1941–46,” *Hawaii Law Review*, 19 (1997), 477–648.

<sup>3</sup>*Woods v. Miller*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting).

<sup>4</sup>Jules Lobel, “Emergency Power and the Decline of Liberalism,” *Yale Law Journal*, 98 (1989) 1385; Harold H. Koh, “Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair,” *Yale Law Journal*, 97 (1988) 1255; Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York, 1997). The expansion of presidential discretionary authority during the Cold War years also was built upon a key shift in constitutional doctrine in the New Deal era, expanding Commerce and Contract Clause doctrine as an alternative to a more confining emergency powers doctrine, as Michael R. Belknap has shown in “The New Deal and the Emergency Powers Doctrine,” *Texas Law Review*, 62 (1983) 67f., and as is explored further (stressing the cultural change reflected in legal realism, acceptance of deference of legislative judgments, and the Court’s famous downgrading of property rights as less than a “preferred freedom”) in Daniel Hulsebosch, “The New Deal Court: Emergence of a New Reason,” *Columbia Law Review*, 90 (1990), 1973.

<sup>5</sup>*See, e.g.*, Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York, 1991); Harry N. Scheiber, *The Wilson Administration and*

**Civil Liberties, 1917–1921** (Ithaca, NY, 1960); Gilbert C. Fite and H. C. Peterson, **Opponents of War** (Madison, WI, 1957); Peter Irons, **Justice at War: The Story of the Japanese-American Internment Cases** (New York, 1983); Melvin I. Urofsky, **Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953** (Columbia, SC, 1997).

Rossiter, **Constitutional Dictatorship**, remains, as noted above, of unique importance. The constitutional issues as framed by Rossiter and others have been revisited in a wide-ranging fashion in a recent article by Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal*, 112 (2003), 1011ff. For a valuable study from a present-day comparative perspective, see Venelin I. Ganey, "Emergency Powers and the New East European Constitutions," *American Journal of Comparative Law*, 45 (1997), 585ff. See also Jon B. Gould, "Playing with Fire: The Civil Liberties Implications of September 11<sup>th</sup>," *Public Administration Review*, 62 (2002), 74–79.

<sup>6</sup>See Roger Daniels, Sandra C. Taylor, Harry H. L. Kitano, and Leonard J. Arrington, eds., **Japanese Americans: From Relocation to Redress** (Seattle, 1986); and Irons, **Justice at War**.

<sup>7</sup>A copy of this questionnaire is in the files of the civil case of *Zimmerman v. Poindexter et al.*, Case #730 (1950), Civil Case Files, Records of the U.S. District Court, District of Hawaii, Record Group 21, Sierra Pacific Regional Records Center, San Bruno, California.

<sup>8</sup>Dillon S. Myer, **Uprooted Americans: The Japanese Americans and the War Relocation Authority** (Tucson, AZ, 1971), 255. Myer states here that the War Relocation Authority staff estimated that some U.S.\$200 million worth of property was owned by evacuees who were interned; the government paid \$38,474,140 after the war, a sum which, he writes, "of course did not cover all losses." In addition, the State of California moved aggressively during evacuees' incarceration years to bring escheatment actions against properties found to have been owned by alien Japanese residents. There is no estimate given of losses suffered in those proceedings. *Ibid.*, 254–55.

<sup>9</sup>And this says nothing of the ways in which the heated rhetoric with which governments often justify emergency powers in a war atmosphere can inflame public opinion and set the stage for instances of private violence, not only against property, but (as with lynchings and the mob violence against labor organizations during World War I) against life itself. See Fite and Peterson, **Opponents of War**, *passim*.

<sup>10</sup>See David M. Kennedy, **Freedom from Fear: The American People in Depression and War, 1929–1945** (New York, 1999), 641–42 *et passim* on this incident and the larger context of wartime labor and other economic controls.

<sup>11</sup>*Caltex v. United States*, 120 Court of Claims 518, 554 (Jones, C. J., dissenting). The case went on appeal from this court to the Supreme Court and is discussed in the text below.

<sup>12</sup>See Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," *California Law Review*, 72 (1984), 217 ff.; *id.*, "Economic Liberty and the Constitution" [The Seaver Institute Lecture at the Huntington Library], in **Essays in the History of Liberty** (San Merino, CA, 1988), 75ff.; and *id.*, "Private Rights and Public Power: American Law, Capitalism and the Republican Polity," *Yale Law Journal*, 107 (1997), 823–61.

<sup>13</sup>Harry N. Scheiber, "The Jurisprudence—and Mythology—of Eminent Domain in American Legal History," in **Liberty, Property, and Government: Constitutional Interpretation before the New Deal**, ed. E. F. Paul and H. Dickman (Albany, NY, 1989), 217, 223–25.

<sup>14</sup>William J. Novak, **The People's Welfare: Law and Regulation in Nineteenth-Century America** (Chapel Hill, NC, 1996), *passim*.

<sup>15</sup>See James B. Thayer, "The Right of Eminent Domain," 19 *Monthly Law Reporter* (n.s., 1856), 241–42 *et passim* on the heritage of the common-law cases from England and from the civil-law writers, upholding the "attributes of sovereignty . . . coeval with the State itself" being as much a "natural right" of the State as any individual rights were "natural." Cf. George Haskins, "Law versus Politics in the Early Years of the Marshall Court," *University of Pennsylvania Law Review*, 130 (1981); and Novak, **People's Welfare**, *passim*.

<sup>16</sup>A tort case from the early seventeenth century known to every law student in torts class, *Mouse's Case* (77 Eng. Rep. 1341), decided claims against a bargeman in England who ran into a storm while carrying passengers and their baggage. He had overloaded the barge, and when it was threatened with capsizing, he threw the baggage overboard in order to protect the vessel and save the passengers in his charge. When the English court decided the case, he was found exempt from liability because he had acted in the interest of the passengers; the court specifically invoked the controlling importance of the public good in this private law context. The doctrine of immunity from damages set forth in that case reinforced the doctrines in the common law that protected public officials from individual civil liability for damages when they acted in emergencies to head off disastrous losses of life or property or to protect the public health from spread of disease.

<sup>17</sup>Novak, **The People's Welfare**, *passim*.

<sup>18</sup>*Beekman v. Saratoga and Schenectady Railroad*, 3 Paige 45 (N.Y. Ch. 1831) at 73 (Walworth, Ch.).

<sup>19</sup>Tony A. Freyer, "Reassessing the Impact of Eminent Domain in Early American Economic Development," *Wisconsin Law Review* 1981 (1981), 1263–86; Harry N.

Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789–1910," *Journal of Economic History*, 33 (1973), 232–51; *id.*, "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," *Law in American History*, ed. Donald Fleming and Bernard Bailyn (Boston, 1971), 329–402. *diss.*

<sup>20</sup>Eminent-domain takings did, of course, require compensation under the terms of the Fifth Amendment and the provisions of nearly all state constitutions. But in practice, the owners in many states were often very inadequately compensated, if they were compensated at all, either by government or by private business firms upon which firms eminent-domain power was devolved under the doctrines of public use and public utilities. It was left to the courts to define the line between a taking (for which compensation must be paid) and a police power regulation (noncompensable). When the courts required compensation, the legislatures were still left with large discretionary authority to establish the formulae for determining money damages. See Freyer, "Reassessing," and Scheiber, "Property Law," note 19, *supra*. On a related point, see Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* 74–96 (Cambridge, UK, 1993), regarding the police power and its reach, especially with regard to property law development in the post-Revolutionary era as an instrument of conservatives to head off egalitarianism.

<sup>21</sup>Scheiber, "Road to *Munn*," 334–60, 390–402. A civil-law perspective on an issue central to Lord Hale's analysis of rights in waterways may be found in E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758 edition; trans. Charles G. Fenwick, Washington, DC, 1916; reprinted in the Legal Classics Library, New York, 1993).

<sup>22</sup>This element of civil-law doctrine found its way explicitly into a landmark American case in which the Court quoted Vattel as follows: "Were the state strictly to indemnify all those whose property is injured [by destruction incident to wartime operations], the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion, a thing utterly impracticable." *U.S. v. Pacific Railroad*, 120 U.S. 227 (1887) 235 (Field, J., quoting Vattel, *Law of Nations*, Book III, c. 15, sec. 232). Later in the present study, below, the Pacific Railroad case will be considered.

<sup>23</sup>See, *inter alia*, Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (Cambridge, MA, 1976); J. S. Reeves, "The Influence of the Law of Nature Upon International Law in the United States," *American Journal of International Law*, 3 (1909), 547ff.; and the citations in text below of the Marshall Court cases.

<sup>24</sup>Consider, for example, the crucial influence of international law in the influential decision invalidating (under principles accepted as universal) an American naval vessel's seizure of a Spanish-flag fishing boat in offshore waters during the War with Spain, in the famous case of *The*

*Paquette Habana*, 175 U.S. 677 (1900), in which the decision stated that "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction" in the absence of a treaty or "controlling executive or legislative act or judicial decision" (*id.*, 700). The Supreme Court in earlier years had consistently adhered to the dictum of the Marshall Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations" unless clearly overridden by the terms of the Constitution).

<sup>25</sup>See, e.g., Harold Hongju Koh, "The Spirit of the Laws," *Harvard International Law Journal*, 43 (2002), 23ff.; and Michael J. Glennon, "May the President Violate Customary International Law? Can the President Do No Wrong?" *American Journal of International Law*, 80 (1986), 923ff.. The arguments for the need to honor emerging principles of international law have received new prominence since the 9/11 attacks and the incarceration of foreign combatants and even American citizens being denied access to counsel or right to confront witnesses, or even to be advised of the specific charges against them.

<sup>26</sup>6 U.S. 170 (1804). In the case of *Amelia*, 1 Cranch 1 (1801) the court had found that a neutral armed vessel in possession of the French might, be lawfully captured as a matter of the war powers and the rules of international law.

<sup>27</sup>*Id.*, at 178–79.

<sup>28</sup>See Part 2, by Herbert A. Johnson, of the book by George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–15* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. II, New York and London, 1981). Johnson is the authoritative source on the Marshall Court's project for incorporating international law into the constitutional jurisprudence of the United States. See also the excellent brief overview and analysis in R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, LA, 2001), 274–91.

<sup>29</sup>See Rossiter, *Constitutional Dictatorship*, 143–44; and Gross, "Chaos and Rules," *passim*.

<sup>30</sup>See discussion of *Mitchell v. Harmony*, below.

<sup>31</sup>*Honolulu Star-Bulletin*, "No Verdict Yet," December 22, 1950 (report of charge to the jury). With Jane L. Scheiber, coauthor, the present writer is completing a book-length study of martial law in Hawaii, including analysis of the civil indemnification trials.

<sup>32</sup>12 U.S. 110 (1814).

<sup>33</sup>*Id.*, 122–23.

<sup>34</sup>*Id.*, 119. Emphasis in original.

<sup>35</sup>*Id.*, 145–51.

<sup>36</sup>Koh, "Why the President (Almost) Always Wins," 1283ff., 1316–17. Koh derives his concept of a "National Security Constitution" from the formulation set forth by Jackson in his *Youngstown* concurrence, in *Youngstown*

*Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634ff. (1952) (Jackson, J., concurring). Maeva Marcus, **Truman and the Steel Seizure Case: The Limits of Presidential Power** (New York, 1977) is the definitive study of this case. See also text below on *Youngstown* in light of property-law/emergency-powers precedents.

<sup>37</sup>54 U.S. 115 (1852).

<sup>38</sup>*Id.*, 134 (emphasis added).

<sup>39</sup>*Id.*, 135.

<sup>40</sup>*Id.*

<sup>41</sup>It should be noted, however, that the staunch Jacksonian Justice Peter Daniel did, as he often would, dissent. In this instance, he dissented on procedural grounds, expressing his outrage that the New York trial judge should have presented the kind of instructions that left the jury little choice but to hold against Colonel Mitchell. *Id.*, 138ff. On the Taney Court's various assertions of judicial power, together with analysis of instances in which it advocated exercise of judicial restraint, see Bernard Schwartz, **From Confederation to Nation: The American Constitution, 1835–1877** (Baltimore, 1973), 23–37.

<sup>42</sup>71 U.S. 2 (1866). For a full discussion of the case and its background, see Charles Fairman, **Reconstruction and Reunion, 1864–88**, part 1 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 6, New York and London, 1971); see also Neely, **Fate of Liberty**, 160–84.

<sup>43</sup>See John P. Frank, "Ex parte Milligan v. the Five Companies: Martial Law in Hawaii," *Columbia Law Review*, 44 (1944) 639.

<sup>44</sup>120 U.S. 227 (1887).

<sup>45</sup>78 U.S. 268 (1870).

<sup>46</sup>Confiscation Acts of August 6, 1861, and July 17, 1862; Phillip Shaw Paludan, "A People's Contest": **The Union and Civil War, 1861–1865** (New York, 1988), 64–65, 79ff., 208.

<sup>47</sup>Harold M. Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** (New York, 1973), 177–81.

<sup>48</sup>The affidavit also stated that Miller held \$109,000 in Indiana state bonds, similarly using income thereof for support of the Confederacy. How a New York resident could have had this conversation in July 1863, as the affidavit claimed, in the midst of the heavy fighting in the eastern section of the Confederacy was not made clear in the record, despite challenge by Miller's counsel. 78 U.S. at 276, 279.

<sup>49</sup>*Miller v. United States*, 78 U.S. at 291.

<sup>50</sup>*Ibid.* at 306.

<sup>51</sup>*Ibid.* at 305.

<sup>52</sup>Quoted *ibid.* at 296 (emphasis added).

<sup>53</sup>*Ibid.* at 323.

<sup>54</sup>*Ibid.* at 317–18.

<sup>55</sup>See discussion of the *Chemical Foundation* case in text below.

<sup>56</sup>*Ibid.* at 306.

<sup>57</sup>120 U.S. 227, 229.

<sup>58</sup>*Ibid.* at 229–30 (a detailed account of the meeting and commitments made).

<sup>59</sup>*Ibid.* at 234. This issue is dealt with in the concluding section below on the twentieth century.

<sup>60</sup>*Ibid.* at 235 (quoting Vattel, **Law of Nations**).

<sup>61</sup>*Ibid.* at 235–36.

<sup>62</sup>*Ibid.* at 236.

<sup>63</sup>*Ibid.* at 238 (quoting Grant's veto message from *Congressional Globe*, 42d Cong., 2d sess., part V, p. 4155–56).

<sup>64</sup>Field's dissent also reflected his general posture of drawing bright lines between legitimate state power and the sphere of private rights, with very full powers to be allowed the state where its authority met his standard of legitimate action. On Field's position in the 1870s decisions and after, see the authoritative study by Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897," in **American Law and the Constitutional Order**, ed. Lawrence M. Friedman and Harry N. Scheiber (expanded ed., Cambridge, MA, 1987), 246ff.; see also Hyman, **More Perfect Union**, 348ff.

<sup>65</sup>See especially works by Rossiter, Lobel, Koh, Belknap, and Gross as cited in the notes, *supra*.

<sup>66</sup>The Lever Food Control and Fuel Act, 40 Stat. 276 (1917); Trading with the Enemy Act, 40 Stat. 411 (1917); Rossiter, **Constitutional Dictatorship**, 243–45. A thorough overview of the emergency administration under Wilson is in Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development** (7th ed., New York, 1991). The adjudication of suits arising from implementation of Wilson's war agencies and their regulatory regimes is analyzed fully in Christopher N. May, **In the Name of War: Judicial Review and the War Powers Since 1918** (Cambridge, MA, 1989), a work of exceptional quality. My own framework and interpretations of the modern developments, as presented in this section, differ in some important respects from May's, but I want to acknowledge my special indebtedness to his work for its insights and scope of the research regarding modern war-powers jurisprudence.

<sup>67</sup>Scheiber, **Wilson Administration and Civil Liberties**; Paul L. Murphy, **World War I and the Origin of Civil Liberties in the United States** (New York, 1979); James R. Mock and Cedric Larson, **Words that Won the War: The Story of the Committee on Public Information, 1917–1919** (Princeton, NJ, 1939).

<sup>68</sup>272 U.S. 1 (1926).

<sup>69</sup>*Ibid.* at 6 (quoting the corporation's charter).

<sup>70</sup>*Ibid.* at 7–8.

<sup>71</sup>See especially *Lamar v. Brown*, 92 U.S. 187 (1876), and discussion of this and related cases in Roger I. Roots, "Government by Permanent Emergency: The Forgotten History of the New Deal Constitution," *Suffolk University*

*Law Review*, 33 (2000), 259, 273ff. See also discussion of *Miller*, the Civil War case, *supra*.

<sup>72</sup>*United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936). On this critical development, see Koh, "Why the President (Almost) Always Wins," discussing how the merger of presidential foreign-affairs power and enemy-alien property doctrine was achieved in the *Dames and Moore* decision. See also Walter LaFeber, "The Constitution and United States Foreign Policy," *Journal of American History*, 74 (1987), 695ff.; Edward S. Corwin, **The President: Office and Powers, 1787–1948** (3rd ed., New York, 1948). Chapters 4–6.

<sup>73</sup>See James G. Randall, **Constitutional Problems Under Lincoln** (New York, 1926), chapter 3.

<sup>74</sup>256 U.S. 135 (1921).

<sup>75</sup>*Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). See full discussion in May, **In the Name of War**, 223–53.

<sup>76</sup>Rossiter, **Constitutional Dictatorship**, 219.

<sup>77</sup>The phrase was used often by Edward S. Corwin.

<sup>78</sup>Franklin D. Roosevelt, **On Our Way** (New York, 1934), quoted in Corwin, **The President: Office and Powers**, 538.

<sup>79</sup>Presidential Message of September 7, 1942, quoted in Rossiter, **Constitutional Dictatorship**, 268.

<sup>80</sup>Walter LaFeber, "The Constitution and Foreign Policy," *Journal of American History*, 74 (1987), 695ff.

<sup>81</sup>See Belknap, "The New Deal"; Paul L. Murphy, **The Constitution in Crisis Times, 1918–1969** (New York, 1972), 97–169; Charles W. McCurdy, "'The Liberty of Contract' Regime in American Law," in **The State and Freedom of Contract**, ed. Harry N. Scheiber (Stanford, CA, 2000), 160, 193–97; and generally, Laurence H. Tribe, **American Constitutional Law** (Mineola, NY, 1978).

<sup>82</sup>290 U.S. 398 (1934).

<sup>83</sup>*Ibid.* at 425.

<sup>84</sup>Laws of Minnesota, 1933, chapter 339, quoted in *ibid.* at 416.

<sup>85</sup>285 U.S. 262 (1932).

<sup>86</sup>286 U.S. 262, 307–8.

<sup>87</sup>*Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911). Emphasis added.

<sup>88</sup>*Ibid.* at 112 (citing *Hudson County Water Co. v. McCarter*, 209 U.S. 249, 355).

<sup>89</sup>*Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); see text above on *Block v. Hirsh*, and see also May, **In the Name of War**, chapter 8. This quest for the line between the policy power and "takings" that required compensation characterized Holmes's approach to police power more generally in the post-1910 cases, culminating in his famous opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), on which see Lawrence M. Friedman, "A Search for Seizure: *Pennsylvania Coal Co. v. Mahon* in Context," *Law and History Review*, 4 (1986), 1–23.

<sup>90</sup>The emphasis in italics of the word "crises" is as written in by Hughes himself.

<sup>91</sup>290 U.S. 398 at 442–43.

<sup>92</sup>*Wilson v. New*, 243 U.S. 332 at 348 (1917) (a unanimous decision upholding constitutionality of the federal eight-hour law for railroad workers). For an insightful comment on the inadequacy of similar formulae on the problem of "necessity," see Kenneth W. Dam, "The Legal Tender Cases," *The Supreme Court Review*, 1981 vol., 367, 408–12 (1982).

<sup>93</sup>290 U.S. at 426.

<sup>94</sup>*Nebbia v. New York*, 291 U.S. 502 (1934); see also Scheiber, "Road to *Munn*," 330–31.

<sup>95</sup>*Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>96</sup>See Murphy, **Constitution in Crisis Times**; Scheiber, "Redesigning the Architecture of Federalism," 357–65; Belknap, "The New Deal and the Emergency Powers Doctrine," 67ff.; and Barry Cushman, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution** (New York, 1998).

<sup>97</sup>343 U.S. 579 (1952). The authoritative analysis of the case, with in-depth discussion of the background facts, contending doctrinal arguments, and the process of adjudication and decision, is in the classic study by Marcus, **Truman and the Steel Seizure Case**, note 36 *supra*. Symposium "Youngstown at Fifty," *Constitutional Commentary*, 19 (2002), 1–289.

<sup>98</sup>The diversity of views in the concurring opinions is discussed fully in *ibid.* But see also Koh's analysis in "Why the President (Almost) Always Wins," cited earlier, of Justice Jackson's analysis of the National Security Constitution.

<sup>99</sup>Argument of the Solicitor General, quoted in Marcus, **Truman and the Steel Seizure Case**, 170.

<sup>100</sup>Scheiber and Scheiber, "Bayonets in Paradise," 624–29.

<sup>101</sup>Irons, **Justice at War**, 280ff., 316–18.

<sup>102</sup>In this instance, Congress had given Truman a way to handle the threatened strike under terms of the Taft-Hartley Act, but he declined to invoke that statute and its provisions, preferring more direct action under the seizure policy.

<sup>103</sup>Warren, quoted in Marcus, **Truman and the Steel Seizure Case**, 213.

<sup>104</sup>Marcus, *ibid.*

<sup>105</sup>*New York Times*, "Report on U.S. Antiterrorism Law Alleges Violation of Civil Right," July 21, 2003, p. 1 (reporting on internal investigations by Justice Department on civil-rights and civil-liberties violations in the implementation of the USA PATRIOT Act).

<sup>106</sup>343 U.S. 579, 634–35.

<sup>107</sup>*Duncan v. Kahanamoku*, 327 U.S. 304, at 335, 337.

<sup>108</sup>344 U.S. 149 (1952).

<sup>109</sup>344 U.S. at 153–54 (quoting 120 U.S. at 234).

<sup>110</sup>344 U.S. at 154.

<sup>111</sup>The Court also cited as precedent a decision from the Spanish-American War in which sixty-six buildings



owned by an American mining and trading corporation were destroyed by U.S. forces in Cuba when the American commanders received information that the property might contain yellow-fever germs that would threaten their troops with the disease. The Court ruled that because the decision had been taken in good faith to assure “the health, efficiency, and safety” of forces under arms and at war, it was valid under the rules of war; the American ownership

of the buildings did not serve as a basis for a claim, as they were in enemy territory and hence to be treated in law as enemy property. *Juragua Iron Co., Ltd. v. U.S.*, 212 U.S. 297 (1909).

<sup>112</sup>And in that respect, the Court pointed out, it was distinguished from the taking of Harmony’s wagon train and cargo in the Mexican War case of *Mitchell v. Harmony*, discussed above.

# The Judicial Bookshelf

**D. GRIER STEPHENSON, JR.**

Standard nomenclature in Supreme Court literature contrasts the “old Court” and the “new Court” (or, sometimes, the “modern Court”). By most accounts, the dividing line between the two falls during the years 1937–1940, when the nation witnessed a judicial and constitutional revolution. The proverbial “irresistible force” (in the form of President Franklin Roosevelt’s New Deal program to cope with the Great Depression) met the “immovable object” (in the guise of the Supreme Court under the leadership of Chief Justice Charles Evans Hughes that, for a short time, stymied many of the President’s initiatives). The result was Roosevelt’s audacious assault on the Court through the Court-packing plan and the hasty change of mind by Hughes and Justice Owen J. Roberts that gave Roosevelt the five sure votes he needed so that his agenda could receive the constitutional stamp of approval. This flip-flop was promptly followed by the Court’s adoption of a new agenda for itself, one that elevated civil liberties into a preferred position in the hierarchy of constitutional values and demoted property interests, which heretofore had been accorded heightened judicial protection.

To be sure, the categories of old Court and new Court, as they are usually understood, are helpful in understanding a pivotal period in Supreme Court history. Yet they may obscure as much as they reveal in grasping fundamental changes in the Court’s development across more than two centuries. For this task, perhaps the nomenclature of “classical Court” and “modern Court” (albeit with the “new” or post-1937 Court being a subset of the latter) is more appropriate. Compared to the relatively sudden transformation after 1937, however, the shift from classical to modern Court occurred gradually during roughly the last thirty years

of the nineteenth century. That would include the last three years of the Chase Court (1864–1873), all of Morrison Waite’s Chief Justiceship (1874–1888), and the first twelve years of the Fuller Court (1888–1910).

The era of the classical Court was marked by (1) an exceedingly limited federal jurisdiction, (2) a structure that made the Bench mainly a court of errors, not a court of legal policy, and (3) onerous circuit-riding duties. Those familiar with the history of federal jurisdiction know that the great bulk of litigation in the federal courts until after the Civil War consisted of admiralty and diversity cases. The latter posed

questions that would have been heard by state courts except for the fact that the parties were citizens of more than one state and because the dollar amount at issue met a threshold set by Congress. The relatively small number of cases in the Supreme Court that raised federal constitutional questions usually came from the highest court of a state; under section 25 of the Judiciary Act of 1789, these qualified for Supreme Court review only if the court below had ruled against the federal claim.

Moreover, except for admiralty and a handful of other cases, the Supreme Court was the sole tribunal in existence to hear appeals within the federal judicial system (the circuit courts were principally trial, not appellate, bodies). There was no intermediate appellate bench between the circuit courts and the Supreme Court. Thus, much of the Justices' energy was expended reviewing trial-court decisions, regardless of their importance. Every case in federal court, it seemed, had an equal

claim on the Supreme Court's time, unless it was a criminal case.<sup>1</sup>

The burden of review by right of an ever-expanding number of circuit-court rulings was compounded by the system of judicial staffing that Congress had decreed in 1789. There were three types of federal courts (district, circuit, and Supreme Court), but only two types of federal judges (district judges and Supreme Court Justices). A circuit court for a district was staffed by the local district judge and, after 1793,<sup>2</sup> a Supreme Court Justice assigned to that circuit. Except for a brief period in 1801 when Congress created separate circuit judgeships (before a new Congress repealed that measure in 1802) and a distance-driven creation of a circuit judgeship for California in 1855, there were no distinct circuit judges until 1869, when Congress also reduced the circuit-riding duties of the Justices.

In contrast, the era of the modern Court has been marked by (1) a vastly expanded



As the sole court of appeal for almost all cases originating in the federal courts, the Supreme Court saw a surge in such cases under Chief Justice Morrison Waite and was severely overworked. Relief did not come until three years after the death of Waite (third from right, facing).

federal jurisdiction, (2) a marked increase in cases involving individual rights, and (3) a structure that has allowed the Court to become a court of policy for the nation. The first and second were propelled by the outcome of the Civil War. The three Reconstruction amendments to the Constitution (the Thirteenth in 1865, the Fourteenth in 1868, and the Fifteenth in 1870), combined with congressional statutes to enforce those amendments, imposed new restrictions on state authority as a means of protecting individual rights. Moreover, the “convenient vagueness”<sup>3</sup> in the language of the all-important Section 1 of the Fourteenth Amendment presented the Supreme Court with unprecedented opportunities to determine just how broad or narrow those protections for individual rights would be.

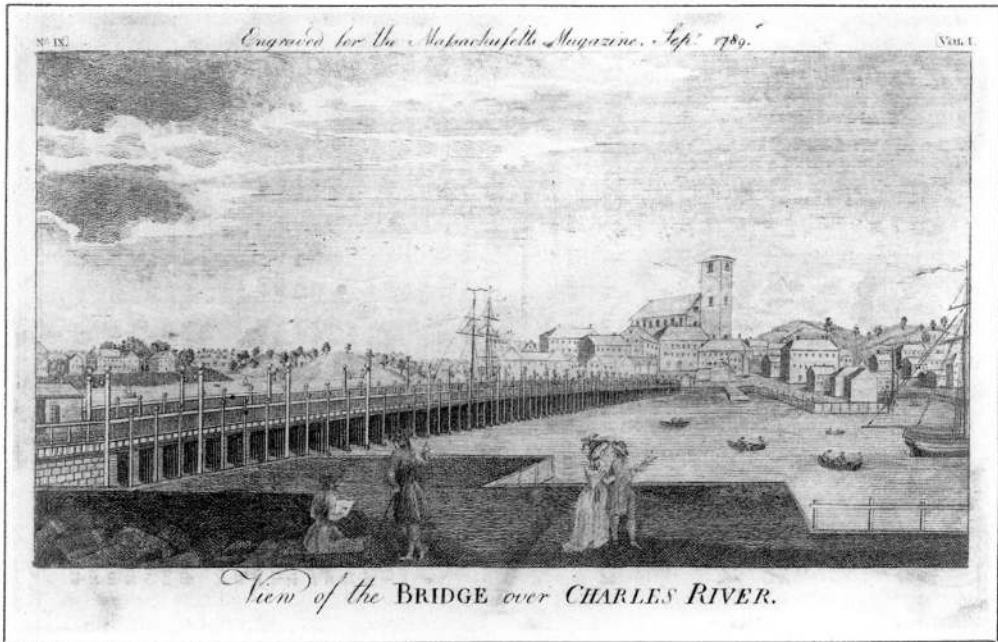
The addition of those amendments proved even more significant for the federal judiciary because of a jurisdictional leap Congress took in 1875. It was then that Congress granted the circuit courts full Article III jurisdiction: the authority to entertain suits involving a statute, the Constitution, or a treaty of the United States, as well as a right of removal of such cases from state to federal court. Nearly simultaneously, the number of cases raising issues under the Bill of Rights, while small by contemporary standards, became a discernible part of the Supreme Court’s business for the first time. Ratification of the Fourteenth Amendment also reopened the federalism-rattling question of the applicability of the Bill of Rights to the states, even as it allowed the federal courts to become the arbiters of racial equality.

Despite a docket invigorated by the arrival of such novel issues alongside the standard judicial fare, the organization of the federal courts during the 1870s and 1880s remained as it had been in 1800, with the exceptions of the addition of separate circuit judges and the reduction (but not elimination) of the Justices’ circuit-riding duties. The Waite Court, for instance, remained the sole court of appeal for al-

most all cases originating in the federal courts. This was a painful fact, because the number of such cases was surging.

The first steps toward relief did not come until three years after Waite’s death. (If any Chief Justice can be said to have died from overwork, it was Morrison Waite.) His Court had demonstrated how anachronistic the classical organization of the federal courts had become. The system was breaking down under the strain.<sup>4</sup> Congress responded in 1891 with the Circuit Court of Appeals Act. In at least three ways, the statute—passed 101 years after the Supreme Court’s first session—radically broke with the classical tradition. First, it created a layer of intermediate appellate courts—the circuit courts of appeals. For the first time, for most cases in federal court, the first point of appeal would not be the Supreme Court of the United States. Second, for certain categories of cases, the circuit courts of appeals would ordinarily be the court of last resort. Third, the Supreme Court was granted limited certiorari jurisdiction, under which the High Court’s review of a case would be discretionary, not by right. The effects of the 1891 legislation were nearly instantaneous. In Waite’s last Term, 482 new cases had been docketed, a number that grew to 623 new cases in 1890 after Melville Fuller became Chief Justice. In 1891, after the new law had been in effect for only a few months, new cases dropped to 379, and then to 275 in 1892.<sup>5</sup> The statute also eliminated circuit-riding by the Justices, ironically just as interstate rail transportation had become reliable, fast, and comfortable.

Viewed alongside these developments, the Court of the late nineteenth century was truly part classical and part modern. Organizationally, the Waite Court had far more in common with the Marshall Court (1801–1835) than nearly all of the Fuller Court (1888–1910) that succeeded it. In other respects, however, the Waite Court had more in common with the Fuller and later twentieth-century Courts than with any Court that preceded it. Given the nature of Reconstruction amendments, cases



In his new work, *Law in America*, Stanford University legal historian Lawrence Friedman describes how the Charles River Bridge case epitomized the shift in American law away from protecting vested interests.

arising under them invariably involved a claim that constitutional rights had been violated. True, the claim was frequently a claim associated with property, but that was no less a claim based on an individual right. Moreover, the docket in that transition period had its share of juror and voting rights cases that went to the heart of the question regarding those whom the Constitution had admitted to the political community—those to be counted among “We the People.”<sup>6</sup> Thus, in that transition one finds the earliest signs of a “rights culture” developing, in which Americans would routinely look to the judiciary to both vindicate and sustain their liberties.

Readers of *Law in America*<sup>7</sup> by Stanford University legal historian Lawrence Friedman will likely conclude that this transformation from classical to modern was probably inevitable. “American law,” Friedman writes, “is a reflection of what goes on in American society in general. The reflection may not be exact: it may be like the reflection of a face in a slowly moving river, that is, somewhat refracted and

distorted. But it is a reflection nonetheless.”<sup>8</sup> And one might add that if social conditions and trends shape the law, then surely the law also shapes society. By “the law” Friedman refers to “collective action: action through, and by a government.” The term encompasses the legal system, which in the United States actually means at least fifty-one such systems, each with officials who make, interpret, and enforce legal rules and lawyers “who advise people on how to follow the rules or cope with the rules or get around the rules, or how to use them to their best advantage.”<sup>9</sup>

The book offers an ambitious survey of American law from colonial times to the present. That is no easy task for what is no more than a 183-page essay. Almost a century ago, a U.S. attorney general remarked that practically every Supreme Court decision “becomes a page of history.”<sup>10</sup> With respect to Friedman’s compact volume, nearly every page contains at least one pithy observation on the relationship between American law and culture. Readers are forewarned: his pace is fast, and his style is

both grand and sweeping. To skip a paragraph, or to wander off mentally for a moment, risks missing a decade or two. This volume thus differs in two significant respects from the same author's *A History of American Law*, originally published three decades ago.<sup>11</sup> First, the older book was, in word count, at least six times longer than the new one. Second, it was largely a study of eighteenth- and nineteenth-century legal developments, with the twentieth-century rating only an epilogue.

Several themes emerge from Friedman's whirlwind tour. Although American law derives from English law (the latter being all that the earliest settlers knew), law on this side of the Atlantic underwent important modifications because of different conditions. Embarrassingly, one American addition to the English legal tradition was the law of slavery. Hardly embarrassing was the egalitarian thrust Americans injected into other parts of the law. Primogeniture, under which land passed to the eldest son, was largely replaced by partible inheritance, under which land was typically divided equally among children.<sup>12</sup> Without that change, the family farm that was a dominant feature of American society in the eighteenth and nineteenth centuries would have been impossible. Moreover, public policy tended to favor "dynamic property, not static property. English law had had the habit of protecting vested rights . . . American law took a sharp turn away from this position. The laws strongly favored doers, not holders; the active farmers, merchants, builders of roads and canals, not men who simply owned or held on to property."<sup>13</sup>

The Charles River Bridge case,<sup>14</sup> which Friedman calls "a notable instance,"<sup>15</sup> epitomized this modification. The facts of this Contracts Clause<sup>16</sup> decision by the early Taney Court deserve a brief restatement. In 1785, the Charles River Bridge Company agreed to construct a link between Boston and Charlestown, Massachusetts, in exchange for a state charter that granted to the company the right to collect tolls for forty years. Six years after

the first pedestrians, wagons, and carriages crossed the bridge in 1786, the Massachusetts legislature extended the charter for an additional thirty years. The bridge business proved profitable: by 1814 stock in the company was selling for six times its original price. By 1828, however, public pressure for a second bridge moved the legislature to charter the Warren Bridge Company. This new bridge would touch the Charlestown bank of the river less than ninety yards from the first bridge. Making Charles River Bridge stock even shakier, tolls on the Warren Bridge would cease after six years.

Not surprisingly, investors in the first bridge made loud their protestations against a second bridge. In their view, the state was obliged to protect, not virtually to destroy, their capital. Although their charter (which under *Dartmouth College v. Woodward*<sup>17</sup> was constitutionally equivalent to a contract between the state and the investors) contained no explicit grant of a bridge monopoly, the Charles River Bridge investors argued that it should be construed broadly; otherwise, no investment in public improvements would be safe. Defenders of the Warren Bridge insisted on a narrow reading of their rival's charter. Thus, on one side was existing privilege; on the other was the drive for progress, or "creative destruction."<sup>18</sup> The opinion of the Court by Chief Justice Taney, which sided with the Warren Bridge Company, seized on a way both to protect vested rights and to encourage new investment and growth. The social and economic needs of a growing nation would come first. Charter rights would be protected, but strictly construed. Uncertainties in charters would be resolved against the risk-takers and in favor of the larger public good.

A second theme of *Law in America* is the "law explosion" and the shift in legal energy from the "periphery" (the states) to the "center" (the national government).<sup>19</sup> Both began in the late nineteenth century and were propelled by technology, urbanization (and later suburbanization), and the emergence of

a national economy and a real-time communications system. "A national economy meant national problems."<sup>20</sup> Both the proliferation of laws and the increasingly important role of the national government in public policy are illustrated by the Supreme Court's transition-era decision in *Munn v. Illinois*,<sup>21</sup> the most important due-process decision of the nineteenth century. Indeed, Felix Frankfurter once counted it "among the dozen most important decisions in our constitutional law."<sup>22</sup> The effects of *Munn* still reverberate in the twenty-first century.

Technology allowed American farmers, especially those in midwestern states, to become the most productive in the world. They benefited from a revolution in agricultural machinery and an expanded—even continental—railroad network. Farmers now had speedy and efficient access to far-flung markets and sup-

pliers that had largely been out of reach for most producers in the prewar years. Inflows of wheat by rail into Chicago by 1868, for example, were counted in the tens of millions of tons, allowing the city to become the grain capital of the world. Thanks to the telegraph, commodity fluctuations in Chicago nearly instantly affected prices in New York, and, after the laying of the Atlantic cable, in England. With expanded opportunity, however, came increased dependency. Farmers were no longer self-sufficient or reliant on local markets only. Maintaining agricultural prosperity now hinged on continued access to distant markets at a reasonable cost.

Squeezed by declines in grain prices in the late 1860s and very early 1870s, farmers faced hikes in freight rates and encountered what they thought was erratic and unresponsive service from the same railroads on which



A theme in Friedman's book is the redirection of law away from the states toward the national government. This change was helped by an expansion in technology, which allowed, for example, farmers to become the most productive in the world. Thanks to the telegraph, commodity fluctuations in Chicago nearly instantly affected prices in New York and, after the laying of the Atlantic cable, in England.

their livelihood now depended. Higher charges for transporting and storing grain, in turn, seriously and negatively affected an industry in which a difference of a few cents in commodities prices could spell the difference between farm affluence and ruin. Working through the National Grange of the Patrons of Husbandry (the Grangers), farmers succeeded in obtaining a provision in Illinois's new constitution of 1870 authorizing the needed relief. The state legislature in 1871 then enacted a set of rate regulations for the railroads and warehouses and established a commission to enforce them.

Chief Justice Waite's opinion in *Munn* upholding the legislation in its entirety—against a challenge under the recently enacted Fourteenth Amendment—was highly significant in at least two ways: it vindicated legislative power to make laws; and, while minimizing the judicial oversight role, it was nonetheless a reminder that state regulation had to conform to the federal Constitution, as determined by an institution of the national government. And by the end of the Waite era, it was apparent that a majority of the Supreme Court was ready to subject such regulations to more stringent constitutional scrutiny.

A third theme of **Law in America** is the rights culture that began to grow to epidemic proportions about a half-century ago. For Friedman, this was an outgrowth of the individualism that has characterized American society practically from the outset.<sup>23</sup> Again one finds the inception of this phenomenon in the late nineteenth century, as the Supreme Court and the rest of the federal judiciary underwent its transition from classical to modern. Not only did white male Americans increasingly look to the judiciary—which, more often than not, came to mean the federal judiciary—to vindicate their rights, but other parts of the population (women and African Americans in particular) that had never enjoyed the same panoply of rights resorted to both the judicial and legislative processes to expand the notion of equality—hence, the notion of what Friedman calls “plural equality.”<sup>24</sup> “Group rights

turn out to be, in the end, primarily individual rights.” Why? “Chiefly to allow its members to exercise the full range of individual choice, to achieve their own ‘personal best.’”<sup>25</sup>

A subset of individualism and the rights culture is religious liberty, a concern as old as the oldest English settlements in North America and the subject of **Religious Freedom**<sup>26</sup> by constitutional historian Melvin Urofsky of Virginia Commonwealth University. This comprehensive study, which opens in the colonial period, is as current as the end of the Supreme Court's October 2000 Term, including the Establishment Clause decisions in *Mitchell v. Helms* and *Santa Fe Independent School District v. Doe*.<sup>27</sup> As of this writing, the only important religious liberty decision by the Court that came down too late to be included is the school-voucher case of *Zelman v. Simmons-Harris*.<sup>28</sup> Four chapters of narrative and analysis are followed by a reference chapter entitled “Key People, Cases, and Events” that contains eighty-four entries written by James F. Van Orden. The sixth chapter is a 170-page collection of excerpts from thirty documents, addresses, statutes, and judicial decisions, ranging from the Virginia Rules on Conduct and Religion of 1619 to *Agostini v. Felton*,<sup>29</sup> the landmark sectarian school-aid case from 1997. The book concludes with a chronology, a table of cases, and a fourteen-page annotated bibliography covering both primary and secondary sources from the Internet and the printed page. **Religious Freedom** should prove to be a valuable resource for novices and scholars alike.

The reader confronts the contemporary relevance of the topic on the first page of the Preface: “[T]he history of religious freedom in the United States has a greater meaning to Americans in the wake” of the horrendous events of September 11, 2001. “The type of open, free society enjoyed in the United States, in which religion is a matter of private conscience, offends those who believe that their religion calls for conformity to a specific set of divinely inspired rules, which dictate not





In his book *Religious Freedom*, Melvin Urofsky engagingly reveals the legal problems faced by the Church of Jesus Christ of Latter-Day Saints in the late nineteenth century, particularly in regard to the practice of polygamy. This portrait of a Mormon and his six wives was taken in 1885, three years after Congress disfranchised polygamists and their wives.

only the mode and content of religious worship, but how people live their everyday lives as well . . . [This] model proposed by fundamentalists of any religion . . . is not only offensive but worrisome as well."<sup>30</sup>

Yet the American tradition of religious toleration and an avoidance of an official church—at least at the national level—were an outgrowth more of necessity than of high-minded principle. The ban in Article VI of the Constitution of a religious test for public office meant that, in its leadership, the federal government could not be sectarian. In the First Amendment, the twin provisions of non-establishment and free exercise have had complementary objectives—preserving liberty and order. The Free Exercise Clause preserves a sphere of religious practice free of interference by the government. Most Americans in the late 1700s probably did not crave toleration for beliefs other than their own. Given the presence of so many faiths, however, they had no choice. The violent alternative—as tragi-

cally demonstrated in some places in the world even today—was unacceptable. Even though a few states still maintained some kind of officially supported or designated church when the Bill of Rights was ratified in 1791, the Establishment Clause declared that the nation could not have one. Nonestablishment was thus part of the price of union. Then as now, the First Amendment sets the government off limits as a prize in a nation of competing faiths. The Establishment Clause thus protects free exercise by disabling all groups so that none can employ public resources to threaten the others.

Yet widespread agreement on the importance of religious liberty has not guaranteed similar agreement on what the Constitution's three religion clauses allow and forbid. That much is apparent from the continued presence of religious-freedom cases on the Supreme Court's docket in nearly every Term. Neither has consensus on the importance of religious liberty meant that the United States has been free of religious persecution, as Urofsky's

gripping account of the legal problems faced by the Church of Jesus Christ of Latter-Day Saints (the Mormons) in the late nineteenth century illustrates.

A national campaign against the Mormons began fifteen years after Brigham Young led his band of believers in 1847 to the Utah Territory, where they established a theocratic community called Deseret. Once in Utah, Mormons were geographically well removed from most of the rest of the country, but distance did little to lessen the widespread and intense opposition to their distinctive and well-publicized practice of polygamy, which many Americans considered as morally offensive as slavery. Accordingly, in 1862 Congress made polygamy a crime in any U.S. territory, punishable by a fine and imprisonment up to five years; it revoked the territorially granted charter of the Mormon Church; and it annulled all acts passed by the Utah territorial legislature that it deemed protective of polygamy. In 1874, another congressional act transferred local jurisdiction in civil and criminal cases to district courts staffed by federal appointees, and limited other courts, controlled by Mormons, to cases involving estates, guardianships, or divorce. Congress also gave the U.S. Supreme Court jurisdiction over capital cases and bigamy convictions appealed from the Utah Territory's Supreme Court. Still more federal legislation in 1882 (Congress was indeed becoming intensely serious in its efforts to eradicate polygamy) disfranchised polygamists and their wives (the territorial legislature had conferred the right to vote on women in 1870). It also made it easier to obtain convictions for polygamy by criminalizing "unlawful cohabitation," thus eliminating any prosecutorial need to show proof of marriage. Prosecutors had only to demonstrate that a man lived with two or more women who were neither his mother nor his sisters, not that they were formally married. Finally, a statute passed in 1887, among other things, directed the attorney general to seize all real property valued above \$50,000 that belonged to the Mormon

church.<sup>31</sup> Cumulatively, the statutes all had the same objective: to dissolve the church, or at least to force it to abandon polygamy.

The Supreme Court's direct involvement in this anti-Mormon crusade began after George Reynolds, who was Brigham Young's personal secretary, was convicted of polygamy in 1875, sentenced to five years at hard labor, and fined \$5,000. When his appeal reached the High Court, his principal argument was that the trial judge had erred by not instructing the jury that his sincerely held religious belief in polygamy was grounds for acquittal. Thus, Reynolds was not asking the Court to invalidate Congress's criminalization of polygamy, but asking the Court to carve out a religiously based exemption, grounded in the Free Exercise Clause, to an otherwise valid law of general application. Taking that step "would be introducing a new element into criminal law," Waite observed for the Court in rejecting Reynolds's contention. "Laws are made for the government of actions," explained the Chief Justice in this first construction of the Free Exercise Clause, "and while they cannot interfere with mere religious belief and opinions, they may with practices."<sup>32</sup> In short, when the dictates of the government collided with the dictates of religion, law trumped faith.

The Waite Court upheld other anti-Mormon/antipolygamy policies as well. These were not litigated in a First Amendment context, yet the outcome in each directly affected the degree of free exercise of religion allowed communicants of that church. *Murphy v. Ramsey*,<sup>33</sup> for example, upheld the disfranchisement of polygamists and their wives. Congress had plenary authority over how territories would be governed, explained Justice Stanley Matthews. "[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth," he added, "than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation

of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."<sup>34</sup>

Just months later, *Cannon v. United States*<sup>35</sup> allowed trial courts to draw inferences about the 1882 statute's prohibition of "cohabitation." The defendant had married three women, but "lived" only with one. Another occupied separate quarters in Cannon's house, and the third lived in a separate house. Angus Cannon claimed that the law criminalized only multiple sexual relationships, but that he was living sexually only with one woman, having explained to the others that he had to abide by the law. Speaking for the Court, Justice Samuel Blatchford, over dissents by Miller and Field, gave the statute a broad sweep against Cannon's defense. "Compacts for sexual nonintercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates."<sup>36</sup> For a Bench with Victorian sensibilities, such language was as explicit as one finds in the *U.S. Reports* during this period.<sup>37</sup>

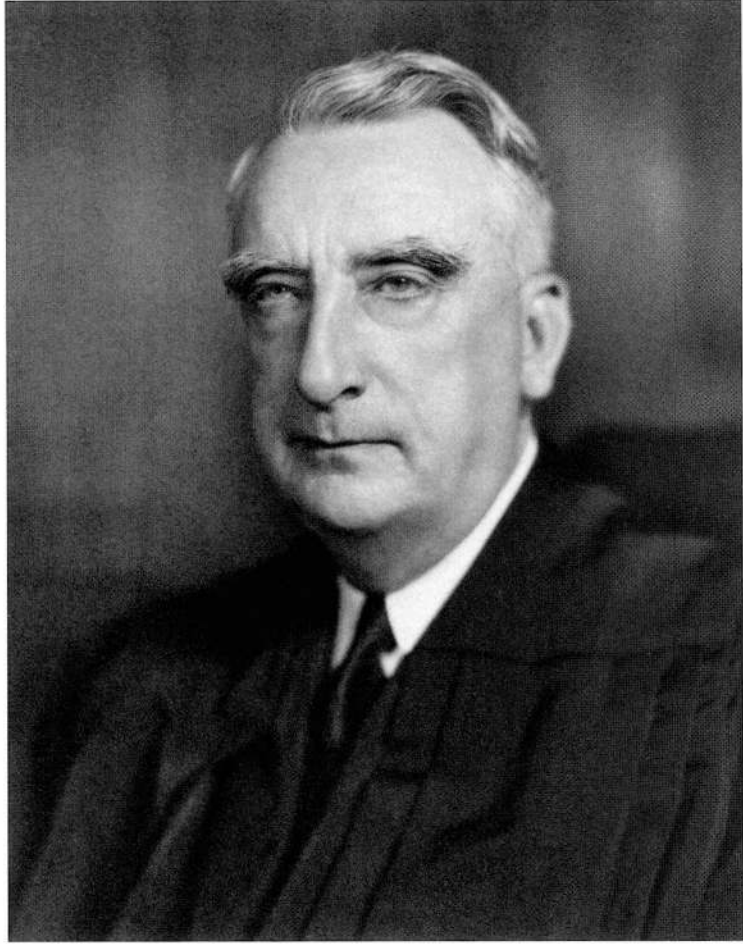
The statutorily decreed confiscation of church property was upheld two years after Waite's death in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.<sup>38</sup> With Justices Field and Lamar dissenting, Justice David J. Brewer—in language similar to contemporary court opinions dealing with seizure of property connected with racketeering and organized crime—decreed that the confiscation was lawful because the stance of the church in furtherance of polygamy was unlawful. Only after the church officially recanted doctrinally on polygamy in 1890 was Congress inclined to re-

ciprocate, as it did in restoring church property by 1896.

It would be another half century before the Court seriously engaged the First Amendment's other guarantee of religious liberty: the Establishment Clause. That occurred when Fred M. Vinson was Chief Justice.<sup>39</sup> Since his death almost exactly fifty years ago, this thirteenth Chief Justice has oddly fallen nearly out of sight. Few recall his lengthy career in all three branches of the national government and his record of remarkable accomplishments. Instead, little lingers besides a reputation as a mediocre figure on the Supreme Court's roster. Indeed, it is worse than that: the most commonly cited scholarly ranking of all ninety-six Justices through 1967 counts him among the eight "failures."<sup>40</sup> This state of affairs may be about to change, however. Publication of **Chief Justice Fred M. Vinson of Kentucky**<sup>41</sup> by James E. St. Clair and Linda C. Gugin—journalism and political science professors, respectively, at Indiana University Southeast—should certainly rescue Vinson's public service from oblivion. It may even lead others to revisit and reappraise his Chief Justiceship. The authors' carefully researched and engaging account of Vinson's life should be necessary reading for anyone interested in either the New Deal and wartime years or the Supreme Court between Harlan Fiske Stone and Earl Warren. Their book is noteworthy for another reason as well: for the first time, a modern biography is available for every Chief Justice from Marshall through Warren.

This "folksy, bushy-browed man"<sup>42</sup> from Louisa, Kentucky, was a veteran of local Kentucky politics and a prominent member of the U.S. House of Representatives, where, as a member of the Ways and Means Committee, he helped to fashion the Social Security Act of 1935. Named to the U.S. Court of Appeals by Franklin D. Roosevelt in 1938, he left the bench in 1943 at his President's request to be the country's economic czar as Director of the Office of Economic Stabilization, a position he held until 1945 when FDR, in his last major

With the publication of James E. St. Clair's and Linda C. Gugin's biography of Fred M. Vinson (right), there is finally a modern biography of every Chief Justice from Marshall through Warren.



appointment, named Vinson Director of the Office of War Mobilization and Reconversion. Picked by President Harry Truman to be Secretary of the Treasury in July 1945, Vinson was also Truman's choice for Chief Justice upon the death of Stone in 1946.

By 1952, Truman was trying to convince Vinson to run for President. The nomination might, in fact, have been within his reach.<sup>43</sup> His life to that point would have provided the perfect raw material for any political publicist. "He was the stuff of American legends," write St. Clair and Gugin. True, Vinson had not been born in a log cabin, but he had been born in the residence attached to the jail where his father was the elected jailkeeper.<sup>44</sup> Reared in a small mountain town in a family of meager means,

Vinson "became a scholar and star athlete [in baseball and basketball] at [Centre College] through raw intelligence, hard work, and determination; married his hometown sweetheart; won election after election with the support of Republicans as well as Democrats; sat at the right hand of Presidents to help them in times of war and peace; and took on the job as Chief Justice to restore respect for a fractured Supreme Court."<sup>45</sup>

But Vinson resisted and remained on the Bench. "There is none of the virus of that type in my blood," he explained. "My sole desire and ambition is to assist in maintaining and securing the respect of the country for the Court and its product."<sup>46</sup> On January 23, 1953, he administered the oath of office to

Dwight D. Eisenhower as the 34<sup>th</sup> President.<sup>47</sup> On September 8, the Chief Justice succumbed to a heart attack at the age of 63.

His refusal to heed Truman's pleadings might have been the only time he ever said "no" to a President. "Available Vinson,"<sup>48</sup> as some called him, had given up a lifetime judicial appointment in 1943 to answer FDR's call. In 1948, Truman wanted him to make a trip to Moscow to meet with Soviet Premier Joseph Stalin with the objective of reducing tensions between the two countries. Vinson agreed to go, saying he would leave immediately, but told Truman that he would have to resign the Chief Justiceship.<sup>49</sup> This he would surely have done had Secretary of State George Marshall not nixed the plan as a bad idea that might damage the Western alliance. Vinson was indeed an intensely loyal person.

Yet the same strengths that made Vinson so appealing to Roosevelt and Truman may have undercut his stature among his fellow Justices at the Court and among scholars who have followed the work of the Court at that time. Vinson was a pragmatist, not an ideologue, on a Bench marked by sharp ideological and jurisprudential (and personal) divisions. Vinson's style was to focus "on the problem at hand with no fixed ideological or philosophical position but rather with a belief that solutions would present themselves after a thorough study of the matter and after open, honest, and harmonious debate. He was fond of saying, 'Things go better when you don't get hot and bothered.'"<sup>50</sup> That leadership style apparently worked better in the executive branch than in the judiciary.

Neither, with one important exception, was Vinson among those Justices regarded as being at the cutting edge of constitutional law in the realm of civil liberties that was taking shape. Moreover, without the flair for writing possessed by a Hugo Black or a Robert Jackson, he seemed to fall short intellectually. A tendency to assign opinions in some very important cases to others also did nothing to enhance his reputation among

Court-watchers. Even Vinson's deserved reputation as a peacemaker and problem-solver was no match for the personal conflicts that persisted among some of his colleagues and for a growing tendency toward nonunanimous decisions.<sup>51</sup> Aside from the bad feelings between Black and Jackson, which were public knowledge,<sup>52</sup> there were the behavioral eccentricities of Felix Frankfurter, who took affront when Vinson did not vote the way the former thought he should. According to one Vinson law clerk, "[T]here was a period when Frankfurter would not sign a Vinson opinion no matter what it said . . . Frankfurter, even though he agreed with every word, would write a separate concurrence, a practice that greatly irritated Vinson,"<sup>53</sup> who placed a premium on solidarity.

Nonetheless, Vinson's Chief Justiceship may well deserve higher marks than it has received, particularly because of his record on civil rights. He was personally opposed to racial segregation, at a time when segregation was legally imbedded in many states and informally entrenched in others, and anguished over how it could most wisely be eradicated. He authored the Court's opinion in *Shelley v. Kraemer*,<sup>54</sup> which ended judicial enforcement of any racially restrictive covenants in deeds. His opinion in *McLaurin v. Oklahoma State Regents*<sup>55</sup> declared unconstitutional the bizarre policy of a state university that kept a black graduate student physically separated from his peers in the classroom. Most important, perhaps, was his opinion in *Sweatt v. Painter*,<sup>56</sup> decreeing an end to application of the separate-but-equal doctrine in the context of legal education in Texas. Vinson's opinion took into account professional and psychological inequalities that were unavoidably the result of racially separate law schools, thus anticipating the thrust of Chief Justice Warren's opinion in *Brown v. Board of Education*,<sup>57</sup> which was decided only months after Vinson's death. One suspects that *Brown* would not have come down entirely as it did had the Vinson Court not already

engaged in some significant trail-blazing on its own.

Recent decisions by the Court under another Chief Justice have generated renewed political and scholarly interest in the Eleventh Amendment. **State Sovereign Immunity**,<sup>58</sup> by Melvyn R. Durchslag of the law school at Case Western Reserve University, is a compact and useful study for anyone interested in exploring this corner of American constitutional law. It also complements nicely two older book-length treatments of the subject.<sup>59</sup> Durchslag's volume is one of the first titles to appear in Reference Guides to the United States Constitution, a series under the general editorship of Jack Stark that promises a walloping thirty-seven titles. Well-researched, provocative, and largely accessible even to the layperson, this entry sets a high bar for those to follow.<sup>60</sup>

The text of the Eleventh Amendment could hardly be more straightforward: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States." Students of the Constitution know that, in taking aim at *Chisholm v. Georgia*,<sup>61</sup> which understandably so unnerved financially beleaguered state governments, this was the first of four amendments intended wholly or partly to reverse a decision by the U.S. Supreme Court.<sup>62</sup> Yet, anyone even vaguely familiar with Eleventh Amendment jurisprudence will agree with two points made by William P. Marshall in the Foreword. "The only thing certain about the Eleventh Amendment . . . is that its meaning and application remain entirely unresolved." Moreover, the amendment "has become shorthand for the debate over the meanings of federalism and state sovereignty."<sup>63</sup> That is an understatement: the amendment has become a battleground in the federalism wars. Its construction today directly shapes congressional authority to set national policy that encompasses state governments. Should the amendment be read mainly as a limita-

tion of the diversity jurisdiction of the federal courts, or as the constitutional embodiment of sovereign immunity for the states?

Some background may demonstrate why the amendment is important in understanding questions of individual rights in the context of federalism today. In 1890, *Hans v. Louisiana*<sup>64</sup> went beyond the actual language of the amendment by barring a suit in federal court by a citizen of Louisiana against the state of Louisiana after the latter failed to pay interest on its bonds. The Court concluded that the principle of sovereign immunity—that a state cannot be sued without its consent—was an implied limitation on the jurisdiction of the federal courts outlined in Article III. As a result, the federal courts were off-limits to suits against states by citizens and noncitizens alike. Other cases, however, greatly diminished this immunity. Indeed, on the same day *Hans* was decided, *Lincoln County v. Luning*<sup>65</sup> held that a state's sovereign immunity did not extend to its municipal subdivisions.<sup>66</sup> Then *Ex parte Young*<sup>67</sup> held that state officials, as distinguished from the state itself, were subject to suits brought in federal court. *Fitzpatrick v. Bitzer*<sup>68</sup> allowed Congress to abrogate a state's Eleventh Amendment immunity in a suit for damages because of Congress's authority under Section 5 of the Fourteenth Amendment (ratified 70 years after the Eleventh Amendment) "to enforce, by appropriate legislation, the provisions of the" amendment. Similarly, *Pennsylvania v. Union Gas Co.*<sup>69</sup> allowed suits against states for monetary damages on the basis of Congress's powers under Article I. Relying on the political process to safeguard federalism,<sup>70</sup> the Court reasoned that a clear statement in a statute of an intention to abrogate state immunity was an adequate check on congressional overreaching.

This theory was rejected seven years later in *Seminole Tribe v. Florida*.<sup>71</sup> The Court overruled *Union Gas* and denied that Congress could negate a state's immunity from suit in federal court under its Article I powers, with or without a clear intention to do so. The trend

toward augmenting political safeguards with judicial checks continued in *Alden v. Maine*.<sup>72</sup> The Fair Labor Standards Act allowed aggrieved state workers to sue their employer in state court for violating the law's overtime provisions. Because Maine had not consented to suit, the Court reasoned that Congress could not compel the state courts to accept the suit. "[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment," declared Justice Anthony Kennedy. Rather, the immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." Because the Eleventh Amendment confirmed but did not establish state immunity, "[I]t follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."<sup>73</sup> Just as *Seminole Tribe* closed the federal courts to suits against states when Congress acted on its Article I powers, *Alden* blocked them from the courts of unconsenting states. One Term later, the same five Justices comprising the majority in *Seminole Tribe* and *Alden* restricted Congress's authority under the Fourteenth Amendment to abrogate state immunity. *Kimel v. Florida Board of Regents*<sup>74</sup> held that Congress could not force states to submit to suits for monetary damages in federal courts brought by employees under the Age Discrimination in Employment Act (ADEA). In reasoning similar to that followed in *City of Boerne v. Flores*,<sup>75</sup> the Court found that the ADEA was not "appropriate legislation" under Section 5 of the amendment because its protections against age discrimination went far beyond what the Court had held the amendment required.<sup>76</sup> The effect of these and other recent cases has been profound, because they have "place[d] the interests of individuals, constitutionally declared by federal law, largely at the mercy of state charity." To do so, the author

believes, "is a direct threat to the supremacy of federal law, a constitutional value at least as explicit as the constitutional value of state autonomy."<sup>77</sup>

Ironically, the first amendment to the Constitution after ratification of the Bill of Rights arose from a dispute over federalism, one of two genuine American contributions to political science. Uncertainty over the precise nature of the relationship between national and state governments has had far-reaching consequences for the nation since the beginning. "When we come near the line," James Wilson had insisted at the Philadelphia Convention in 1787, "it cannot be found . . . A discretion must be left on one side or the other . . . Will it not be most safely lodged on the side of the National Government?"<sup>78</sup> With respect to the federal judiciary, the Eleventh Amendment unequivocally answered Wilson's query in the negative. Hence the second dimension to the irony of this presumably straightforward amendment: 200 years "after its ratification, [it] continues to be a work in progress and is likely to continue to be so for quite some time."<sup>79</sup>

The Eleventh Amendment is one of the many subjects treated in the new edition of **A Companion to the United States Constitution and Its Amendments**<sup>80</sup> by political scientist John Vile of Middle Tennessee State University. The operative word in the title is *companion*. The book is a concise desktop compendium that first charts the events that culminated in the Constitution and then explicates the origin and contemporary application of every article, section, and clause in the document. The narrative and analysis draw on areas of scholarly consensus and integrate key Supreme Court cases as well. Those decisions, however, have been frugally chosen. The author's objective was "to present materials in such a way that the reader's view of the constitutional forest remains unobscured by attention to too many judicial trees."<sup>81</sup> So structured, the volume is both similar to and different from the venerable **The Constitution**

and **What It Means Today**,<sup>82</sup> the first edition of which originally appeared in 1920, or even **Understanding the Constitution**,<sup>83</sup> first published in 1949. Vile's **Companion** covers much the same ground, but it is intentionally more focused and considerably less detailed than either of the others. Moreover, it contains additional reference features, such as glossary-style summaries of some fifty leading decisions, following the twelve substantive chapters. Aside from the timely presentation, the advantage is that essential facts and information are thus more quickly accessible.

As is true for other books surveyed here, Vile's handbook prominently displays the heavy imprint of the Supreme Court, both classical and modern, on the nation's fundamental law.

### THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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VILE, JOHN R. **A Companion to the United States Constitution and Its Amend-**

**ments**, 3<sup>rd</sup> ed. (Westport, CT: Praeger, 2001). Pp. xvi, 309. ISBN: 0-275-97252-6 (paper).

### ENDNOTES

<sup>1</sup> Congress did not extend a right of appeal to the Supreme Court in federal criminal cases until the 1890s. Thus, unless a criminal case managed to reach the Supreme Court through some extraordinary route such as habeas corpus or by certification or had originated in certain territorial courts, the federal trial (circuit) court had the final word, even in matters of life and death.

<sup>2</sup> Originally there were three judicial circuits, with two Justices obliged to sit as circuit judges together in each one. In 1793, Congress lifted some of that burden by specifying that circuit courts could be held by a single Justice sitting with the district judge, thus effectively providing a "back-up" Justice for each circuit court.

<sup>3</sup> Charles M. Hough, "Due Process of Law Today," 32 *Harvard Law Review* 218, 218 (1919).

<sup>4</sup> A backlog of about 600 cases in May 1876 had ballooned to about 1,500 at the time of Waite's death in March 1888. Bruce R. Trimble, **Chief Justice Waite: Defender of the Public Interest** (1938), 250, n. 43. Such numbers pointed to what Waite himself called an "oppressive wrong." Speaking at a bar association meeting at the Academy of Music in Philadelphia in September 1887, the Chief Justice spelled out the grim reality: "[B]usiness is now more than three years and a half behind; that is to say, that cases entered now, when the term of 1887 is about to begin, are not likely to be reached in their regular order for hearing until late in the term of 1890." "Remarks of Chief Justice Waite," 36 *Albany Law Journal* 318 (1887).

<sup>5</sup> Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1927), 97, 102.

<sup>6</sup> For example, see *United States v. Reese*, 92 U.S. 214 (1876), and *Strauder v. West Virginia*, 100 U.S. 303 (1880).

<sup>7</sup> Lawrence M. Friedman, **Law in America: A Short History** (2002), hereafter cited as Friedman.

<sup>8</sup> *Id.*, 37.

<sup>9</sup> *Id.*, 4.

<sup>10</sup> Address of Attorney General George W. Wickersham to the Bar of the Supreme Court on the death of Chief Justice Melville W. Fuller. 219 U.S. xv (1910).

<sup>11</sup> Lawrence M. Friedman, **A History of American Law** (1973).

<sup>12</sup> Friedman, 30.

<sup>13</sup> *Id.*, 43.

<sup>14</sup> *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Peters) 420 (1837).

<sup>15</sup> Friedman, 49.

<sup>16</sup> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. Constitution, Article I, Section 10, para. 1.



<sup>17</sup>17 U.S. (4 Wheaton) 518 (1819).

<sup>18</sup>The term comes from the title of Stanley I. Kutler's **Privilege and Creative Destruction: The Charles River Bridge Case** (1971). James Willard Hurst referred to that view of property as the "release of energy." The phrase comes from the title of the first chapter of his **Law and the Conditions of Freedom in the Nineteenth-Century United States** (1956).

<sup>19</sup>Friedman, 183, 170. Friedman questions the truth of the late Representative Thomas P. (Tip) O'Neill's observation that "[A]ll politics is local." "In a way," writes Friedman, "all politics seems to be national. . . . The typical American could not name his state representative to save his soul, or his member of the county board. Local politics is squeezed into obscure channels and late-night programming. . . . Neither Social Security nor the atom bomb nor the war on terrorists will be handed over to Kentucky or Vermont." *Id.*, 171–72.

<sup>20</sup>*Id.*, 126.

<sup>21</sup>94 U.S. 113 (1877).

<sup>22</sup>Felix Frankfurter, **The Commerce Clause Under Marshall, Taney, and Waite** (1937), 83.

<sup>23</sup>Friedman, 177.

<sup>24</sup>*Id.*, 147.

<sup>25</sup>*Id.*, 178–79.

<sup>26</sup>Melvin I. Urofsky, **Religious Freedom: Rights and Liberties Under the Law** (2002), hereafter cited as Urofsky. The book is a recent title in the *America's Freedoms* series, under the general editorship of the author of this review essay.

<sup>27</sup>530 U.S. 793 (2000); 530 U.S. 290 (2000).

<sup>28</sup>536 U.S. 639 (2002).

<sup>29</sup>521 U.S. 203 (1997).

<sup>30</sup>Urofsky, xxi.

<sup>31</sup>*Id.*, 119–21.

<sup>32</sup>*Reynolds v. United States*, 98 U.S. 145, 166 (1879).

<sup>33</sup>114 U.S. 15 (1885).

<sup>34</sup>*Id.*, 45.

<sup>35</sup>116 U.S. 55 (1885).

<sup>36</sup>*Id.*, 72.

<sup>37</sup>Urofsky, 123.

<sup>38</sup>136 U.S. 1 (1890).

<sup>39</sup>The case was *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). The decision also was the first to apply the Establishment Clause to the states by way of the Fourteenth Amendment.

<sup>40</sup>The results of this survey are reported in Henry J. Abraham, **Justices and Presidents**, 3<sup>rd</sup> ed. (1992), 412–14.

<sup>41</sup>James E. St. Clair and Linda C. Gugin, **Chief Justice Fred M. Vinson of Kentucky: A Political Biography** (2002), hereafter cited as St. Clair and Gugin.

<sup>42</sup>*Id.*, 333.

<sup>43</sup>This was, after all, well before the post-1968 revolution in presidential nomination politics. In Vinson's day, as had been true for decades, state party chieftains were the ones

who, more often than not, principally made and unmade presidential candidacies. To be sure, a candidate might enter a few primaries to demonstrate vote-getting potential, but the views of party leaders mattered most. D. Grier Stephenson, Jr., "Choosing Presidential Candidates: Why the Best Man Doesn't Necessarily Win," 117 *USA Today* 15–18 (March 1989). Reprinted in Bruce Stinebrickner, ed., **American Government 90/91, American Government 91/92, and American Government 92/93** (1990, 1991, 1993).

<sup>44</sup>This fact explains the title of the first chapter: "A Long Journey from 'Jail.'" St. Clair and Gugin, 1.

<sup>45</sup>*Id.*, 334. Centre College, in Danville, Kentucky, is about 120 miles west southwest of Vinson's hometown of Louisa, itself barely a mile from the West Virginia state line. Athletic teams at Centre were called the Praying Colonels in Vinson's time there as a student. *Id.*, 12. Today, Centre College press releases usually refer to the teams as the "Colonels." St. Clair and Gugin seem not to have included one delightful piece of Vinson lore from Centre, where he—or at least his portrait—is affectionately, if irreverently, referred to as "Dead Fred." "Shortly after his death in 1953, members of the chapter of Phi Delta Theta—of which Vinson was a member—were sitting around the fraternity house just prior to a game at Centre. They were talking and the subject of Vinson, their recently deceased fraternity brother, came up. Someone said, 'Isn't it too bad that Fred Vinson won't be going to any more Centre football games?' Another Phi Delt responded, 'Why don't we take him.' He then removed a portrait of Vinson from the mantle and they carried it to the football game where it sat in the stands with a prime viewing location. This ritual immediately became a campus tradition and Fred Vinson has attended every Centre home football game since his death." "Feature: Dead Fred Back for Another Exciting Autumn," Centre College press release, October 3, 2001, <http://www.centre.edu/web/news/fredvinson.html> (last accessed 27 August 2003).

<sup>46</sup>St. Clair and Gugin, 334.

<sup>47</sup>Vinson must have had a cordial relationship with Eisenhower as well, despite their party differences: St. Clair and Gugin report that he occasionally played bridge with the new President at the White House. *Id.*, 335.

<sup>48</sup>This is the title of chapter 6. *Id.*, 125.

<sup>49</sup>"Justices should confine themselves to their Court duties and stay out of all side activities," he told the President. *Id.* 193.

<sup>50</sup>*Id.*, xii.

<sup>51</sup>According to St. Clair and Gugin, nonunanimous decisions increased from 64 percent in Stone's last year as Chief to 81 percent in Vinson's last year. Nonetheless, Vinson gallantly tried to lead by example: he wrote only three concurring and thirteen dissenting opinions. *Id.*, 328.

<sup>52</sup>Alpheus Thomas Mason, **Harlan Fiske Stone** (1956), 642–45.

<sup>53</sup>St. Clair and Gugin, 177.

<sup>54</sup>334 U.S. 1 (1948).

<sup>55</sup>339 U.S. 637 (1950).

<sup>56</sup>339 U.S. 629 (1950).

<sup>57</sup>347 U.S. 483 (1954).

<sup>58</sup>Melvyn R. Durchslag, **State Sovereign Immunity** (2002), hereafter cited as Durchslag.

<sup>59</sup>Clyde E. Jacobs, **The Eleventh Amendment and Sovereign Immunity** (1972); John V. Orth, **The Judicial Power of the United States: The Eleventh Amendment in American History** (1987). The author acknowledges the importance of both. Durchslag, 167.

<sup>60</sup>The book's weakness is its skimpy subject and name index, which numbers only two pages. Durchslag, 175–76. Compounding the problem is the complete absence of page numbers in the four-page table of cases that precedes the subject-name index, plus the fact that none of the case names appears in the subject-name index. In the table of cases, for example, *Testa v. Katt*, decided by the Vinson Court, is followed by its citation [330 U.S. 386 (1947)], but no indication is given of where the reader might find the case discussed. The defect is even more serious for ground-breaking decisions such as *Ex parte Young* (209 U.S. 123 [1908]), to which the author refers at various places in the text. Those hoping to use the book as a *reference* (as the series title promises) thus have a task awaiting them.

<sup>61</sup>2 U.S. (2 Dallas) 419 (1793).

<sup>62</sup>Aside from the Eleventh Amendment's reversal of *Chisholm*, the first sentence of Section 1 of the Fourteenth Amendment (1868) reversed a particularly odious holding of *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857); the Sixteenth Amendment (1913) reversed *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895); and the Twenty-Sixth Amendment overturned part of *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>63</sup>Durchslag, xiii. Marshall himself has written on the Eleventh Amendment as well: "The Diversity Theory of the Eleventh Amendment: A Critical Evaluation," 102 *Harvard Law Review* 1372 (1989).

<sup>64</sup>134 U.S. 1 (1890).

<sup>65</sup>133 U.S. 529 (1890).

<sup>66</sup>Durchslag, 89.

<sup>67</sup>209 U.S. 123 (1908).

<sup>68</sup>427 U.S. 445 (1976).

<sup>69</sup>491 U.S. 1 (1989).

<sup>70</sup>A preference for political, as opposed to judicial, checks had been articulated by Justice Harry Blackmun in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

<sup>71</sup>517 U.S. 44 (1996).

<sup>72</sup>527 U.S. 706 (1999).

<sup>73</sup>*Id.*, 729.

<sup>74</sup>528 U.S. 62 (2000).

<sup>75</sup>521 U.S. 507 (1997).

<sup>76</sup>Most of the analysis of these cases appears in Durchslag between pages 105 and 146.

<sup>77</sup>Durchslag, 153.

<sup>78</sup>Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 13<sup>th</sup> ed. (2002), 147.

<sup>79</sup>Durchslag, xxi.

<sup>80</sup>John R. Vile, **A Companion to the United States Constitution and Its Amendments**, 3<sup>rd</sup> ed. (2001).

<sup>81</sup>*Id.*, xiv.

<sup>82</sup>Edward S. Corwin, Craig R. Ducat, and Harold W. Chase, **Edward S. Corwin's The Constitution: And What It Means Today**, 14<sup>th</sup> ed. (1978).

<sup>83</sup>J. W. Peltason and Sue Davis, **Corwin & Peltason's Understanding the Constitution**, 15<sup>th</sup> ed. (2000).

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