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Civil Liberties in Uncivil Times: The Perilous Quest to Preserve American Freedoms

Kenneth Lasson

University of Baltimore School of Law, klasson@ubalt.edu

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Kenneth Lasson
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Abstract

The perilous quest to preserve civil liberties in uncivil times is not an easy one, but the wisdom of Benjamin Franklin should remain a beacon: “Societies that trade liberty for security end often with neither.” Part I of this article is a brief history of civil liberties in America during past conflicts. Part II describes various actions taken by the government to conduct the war on terrorism – including invasions of privacy, immigration policies, deportations, profiling, pre-trial detentions, and secret military tribunals. Part III analyzes the serious Constitutional questions raised by the government’s actions in fighting terrorism. The thesis throughout is that the farther we stray from our hard-won freedoms in order to vanquish those who would destroy our way of life, the more we become like them – and the more hollow our ultimate victory.
CIVIL LIBERTIES IN UNCIVIL TIMES

The Perilous Quest to Preserve American Freedoms

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INTRODUCTION

I. A BRIEF HISTORY OF AMERICAN LIBERTIES DURING WARTIME
   A. The First Hundred Years
   B. The Twentieth Century
   C. The Rehnquist Thesis

II. THE “WAR” AGAINST TERRORISM
   A. Legislative Precursors to 9/11
   B. Legislative Responses to 9/11
   C. Recent Federal Actions Limiting Civil Liberties

III. ANALYZING THE CONSTITUTIONAL QUESTIONS
   A. The Patriot Act and Its Progeny
   B. Immigration Policies and Pre-Trial Detentions
   C. Secret Military Tribunals

CONCLUSION
CIVIL LIBERTIES IN UNCIVIL TIMES
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By Kenneth Lasson*

The Constitution is not a suicide pact.
– Justice Robert Jackson

He was not a suicide bomber, he was on a military operation and he was a martyr.
– Mariam Farhat

INTRODUCTION

The simple vision sanctifying the Declaration of Independence – that life, liberty, and the pursuit of happiness are inalienable rights – is quintessential to the American psyche. No less taken for granted are the deep-rooted notions of fairness and justice nurtured by the Constitution and guaranteed by the Bill of Rights: the First Amendment’s fundamental freedoms, limitations on unreasonable governmental intrusions, and procedural protections afforded those accused of having committed a crime.

In times of terror and tension, however, civil liberties quickly become subjective. Survival, after all, is still and understandably a nation’s strongest instinct – even at the cost of individual rights. As this is being written at the dawn of the Twenty-first Century, over two

* Professor of Law, University of Baltimore. I am grateful to my research assistant on this project, Michelle Weiler, for her diligence and skill in bringing together disparate elements of a lengthy manuscript. Thanks are also due to two former assistants, Tora Scott and Carl Zacarias, who worked on earlier drafts.

1 Dissenting in *Terminiello v. City of Chicago*, 337 U.S. 1 at 37 (1949). This oft-quoted dictum is in fact a paraphrase of Justice Jackson’s statement (“There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”), and has been variously attributed to others, like Justices Oliver Wendell Holmes (see Editorial, 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 860) and Arthur Goldberg (see, e.g., Amy Hack, *Forfeiting Liberty*, 2 *CARDOZO PUBLIC L. POL’Y & ETHICS J.* 469 at 514). Holmes never said it. Goldberg did, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 at 160 (1963).

2 Newly elected member of Hamas, on her pride at losing three sons in *jihad* (“I knew what he was going to do. And when he succeeded, I was happy and I thanked G-d. . . . They are all martyrs.”) Quoted in Fiona Bartongaza, *Mother of All Martyrs*, NEW YORK POST (Online Edition), February 27, 2006.
centuries of traditional American ideals appear to be genuinely in jeopardy. This article examines the perilous quest to preserve them.

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Citizens have been deprived of various rights and freedoms from the earliest colonial days, especially in their religious beliefs and practices. Such restrictions, particularly during times of war, were not eliminated by either the birth of the nation or the adoption of the Bill of Rights. In most of these cases the limitations on liberty were deemed warranted as necessary to insure order or preserve national security.

Only in hindsight have we come to realize that this end-justifies-the-means approach has seldom if ever been justified – that the government’s regulation of basic freedoms does not ultimately preserve national security. As Justice Brennan observed, “After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”

Put another way: Must we become like our enemies in order to defeat them? We may debate the question of whether hindsight has always proven that limitations on liberties were always unjustified, but in an era suicide bombers and non-governmental terrorist groups bent on destruction of democracies, does historical experience retain any relevancy? Have we reached the point where we must fairly face the question of whether there are limits to historical perceptions?

In any event, achieving a proper balance between individual rights and national security, however, is less a matter of simple adherence to abstract principle than it is a daunting task of

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eternal vigilance. The wartime challenge we face is to remember well the lessons learned in the past. In this day and age, when whole societies appear to be genuinely in jeopardy at the hands of international terrorists and rogue nations with weapons of mass destruction, to what extent can we afford to indulge in the civil liberties we have known and cherished?

Part I of this article is a brief history of civil liberties in America during past conflicts – focusing particularly on the internment of Japanese-Americans during World War II. It also questions the thesis promulgated by Chief Justice William Rehnquist in his 1998 book, *All the Laws but One*, that in times of war Presidents and courts rightly restrict freedom and defer to the military on matters of national security. Part II describes the various actions taken by the government to conduct the so-called war against terrorism – including invasions of privacy, immigration policies and controls, profiling, pre-trial detentions, and secret military tribunals Part III analyzes the serious Constitutional questions raised by the government’s actions in its conduct of the current war against terrorism.

Our national purpose has become how best to preserve both the national security and the individual liberties we enjoy as Americans – noble and fundamental goals, the acquisition and maintenance of which themselves raise issues both profound and practical.

How best can we once again meet that historic challenge?
I. A BRIEF HISTORY OF AMERICAN LIBERTIES DURING WARTIME

The First Hundred Years

The Revolutionary War

The status of American civil liberties during wartime is hardly a new issue. Suppression of fundamental freedoms during times of real or threatened hostilities began very shortly after the nation’s founding.

In 1798, only seven years after enactment of the Bill of Rights, the United States found itself on the brink of war with France – which itself was in the middle of a revolution raging throughout Europe. In response, Congress passed the Alien and Sedition Acts, making it a crime for an individual or organization to publish criticism of federal officials or the government, and authorizing the president to detain or deport citizens who did. These measures were not popular. A few states passed resolutions in protest, calling the laws “palpable violations” of the Constitution and charging that the states’ “silent acquiescence [in accepting the acts was] highly criminal.”

When Thomas Jefferson was elected President in 1800, he pardoned those convicted under the Alien and Sedition Acts – but the laws were never repealed, despite strong public opposition. The Sedition Act expired under its own terms, and the Alien Act remained on the

4 Although the deprivation of religious liberties during the colonial period is a relevant precursor to the subject matter of this Article, a thorough treatment of that subject must, for space reasons, be presented elsewhere. For a summary of religious freedom in early America, see Kenneth Lasson, Free Exercise in the Free State: Maryland’s Role in Religious Liberty and the First Amendment, 31 J. OF CHURCH & ST. 201 (1989) and Free Exercise in the Free State: Maryland’s Role in the Development of First Amendment Jurisprudence, 18 U. BALT. L. REV. 81 (1988).
5 Chs. 58, 66, 74, 1 Stat. 570, 577, 596 (1798).
books until the time of World War II. 7

_Tensions between the Press and the Military_

Although the press and military play critical roles in the maintenance of democracy, the inherent objectives of each are often at odds with one another. It is because of their differing (and sometimes opposing) purposes that governmental restrictions on the media during times of tension and war have often increased. Despite the public’s dependency on the press for news and opinion, the military has virtually unfettered power to limit access to the battlefield. Outright suppression of dissenting points of view has been has been less commonplace in America’s wartime history than in that of other nations, but the military has always exercised its right to impose restrictions on reporters and its inclination to manipulate the information they receive.

Military officers generally view secrecy and surprise as essential to successful war strategy. The press, on the other hand, exists to gather and report as much news as it can and to hold the government accountable – an objective that is fundamental to traditional American values.

The inherent tensions between a free press and a strong military surfaced early on.

When James Madison introduced the Bill of Rights to the House of Representatives, he included two separate amendments that reflected his intent to protect the press from all governmental encroachments:

_The People shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments, and the freedom of the press, as one of the great_

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bulwarks of liberty, shall be inviolable. . . . No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.\(^8\)

During debate in the House of Representatives, Madison argued that “the liberty of the press is expressly declared to be beyond the reach of the government.” Although the House passed both amendments, the Senate rejected them. Few details of its debate were reported; the language that the Senators finally agreed upon would eventually form the basis for the First Amendment: “That Congress shall make no law, abridging the freedom of speech, or of the press…”\(^9\)

\textit{The War of 1812}

A few decades later, America once again found itself having to balance the protection of individual freedoms against the necessity of national security. During the War of 1812, after British forces captured an American position near New Orleans, General Andrew Jackson declared martial law. Although the war officially ended with the signing of the Treaty of Ghent in December of 1814, Jackson, because he felt that continuation of martial law would help maintain order in New Orleans, tried to silence reports that the treaty had been signed.

However, a journalist named Louis Louailler reported the cessation of hostilities and called for an end to martial law. General Jackson had him arrested. Louailler, charged with

\(^8\) There were five versions of the amendment: the one introduced by Madison; a new version by a House select committee (which was passed by the House unchanged); the Senate's initial revision; a second Senate draft resulting from a floor amendment; and the final version produced by a conference committee. The various texts can be found in \textit{1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (1789)} (J. Gales ed. 1834).

\(^9\) Although this language may not reflect the Founders’ intention to ensure that the press be free from \textit{all} governmental restrictions – executive, judicial, or legislative – at that point in history the legislature was viewed as the primary source of federal power, and use of the word “Congress” may be interpreted to mean that the press not be limited by any of the branches of government. Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in \textit{1 J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 492} (Philadelphia 1865). \textit{See also} Mark P. Denbeaux, \textit{The First Word of the First Amendment}, \textit{80 NW. U. L. REV.} \textit{1156} (1986); and Kelly, \textit{Criminal Libel and Free Speech}, \textit{6 U. KAN. L. REV.} \textit{295}, 306 (1958).
provoking rebellion among the troops, was tried and acquitted by a military court, but was not released until Jackson lifted his proclamation of martial law in March of 1815.\textsuperscript{10}

Practically all of the other military trials of civilians during wartime resulted in convictions.\textsuperscript{11}

\textbf{The Civil War}

Perhaps the first big test of American civil liberties came during the Civil War.

Most of the substantial opposition to the war was effectively controlled by way of executive orders rendered by President Lincoln – who reasoned that, since the expressed threat to the Union was military in nature, it could be addressed in the same way as the military conduct of the war.\textsuperscript{12}

The President believed that survival of the Union rested in part on security for the nation’s capital in Washington, D.C. Railroad bridges north of Baltimore had already been burned. Lincoln summoned troops from the northeast to Washington and, in April of 1861, authorized the commanding general of the U.S. Army, Winfield Scott, to suspend the writ of habeas corpus (that is, the right of a suspect to be brought promptly before a judge who could determine the sufficiency of the evidence against him) wherever “necessary…for the public safety” along any military line between Philadelphia and Washington.\textsuperscript{13} Seeking to guard against further destruction of the railroad line through Baltimore, Lincoln declared that political criminals could be tried before military tribunals. By October of 1861, suspension of habeas corpus had been expanded to “anywhere between Bangor, Maine, and Washington;” by August

\textsuperscript{10} REHNQUIST at 70.
\textsuperscript{11} Id. See also Eric L. Muller, \textit{All the Themes But One}, 66 U. CHI. L. REV. 1395, 1418 (1999).
\textsuperscript{13} REHNQUIST at 25.
of 1862, suspension of the writ was nationwide and extended to both draft resisters and “persons arrested for disloyal practices.” In addition, the postal service put restrictions on what it deemed “treasonable correspondence.”

In September of 1862, Lincoln issued a proclamation providing that persons “discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels” should be subject to “martial law and liable to trial and punishment by courts-martial or military commissions.” Thus, suspects were denied access to civil courts and subjected to military trial procedures on charges not otherwise allowable. At about the same time, another executive order directed U.S. marshals and local police chiefs to arrest and imprison “any person or persons who may be engaged, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.” As a result, more than 13,000 Americans were jailed without trial.

The lawfulness of Lincoln’s new system of justice was soon tested in civil courts. In late May of 1861, a man named John Merryman was arrested and imprisoned for participating in the destruction of the railroad bridges during a riot in Baltimore. His attorney applied for a writ of habeas corpus from Chief Justice Roger Taney, but military officials refused to produce Merryman. Justice Taney ruled that the President, acting alone, did not have the authority to

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14 See REHNQUIST at 60.
16 REHNQUIST at 60.
17 Id. at 75, 83-85.
18 Emerson, supra note at 980.
suspend habeas corpus – reasoning that since the federal courts were open and functioning, civilians could only be detained and tried by civilian courts.\textsuperscript{19}

President Lincoln responded in a message sent to a special session of Congress: while the Constitution did not express which branch of government could suspend the writ of habeas corpus, he argued, when Congress was not in session during an emergency such authority was vested in the President. The writ expressed “such extreme tenderness of the citizens’ liberty,” he argued, that it was dangerous to national security. During a period of war the president could not follow Taney’s advice, he said, and allow “all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated.”\textsuperscript{20}

As it turned out Merryman never did have a trial, but he was eventually released from prison on bail.

Nevertheless, the administration continued to limit free speech by arresting those who expressed sympathy for the South. The State Department went so far as to keep a record book entitled “Arrests for Disloyalty.” Even more extreme, in the summer of 1861, a dozen or more legislators were arrested to prevent them from enacting an ordinance of secession for the state of Maryland.\textsuperscript{21}

Nor did the press escape governmental regulation.

Although reporters continued to pursue news of the war, and many of them had access to the front lines, military generals could exclude them either temporarily or permanently. Indeed

\textsuperscript{19} Id. at 26-38.
\textsuperscript{20} Lincoln in a Special Session Message to Congress (July 4, 1861), 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 25 (J. Richardson, comp.). Lincoln was responding to Chief Justice Taney’s conclusion that only Congress is authorized under the Constitution to suspend the writ of habeas corpus “when, in cases of rebellion or invasion, the public safety does require it.” U.S. CONST. art I, § 9; \textit{see} Ex parte Merryman, 17 F. Cas. 144, 148 (1861).
\textsuperscript{21} \textit{See} REHNQUIST at 45-6.
at one time or another they were routinely banished by both Northern and Southern generals.\textsuperscript{22} For example, General Sherman expelled every newspaper correspondent from the lines and threatened “summary punishment” to anyone who would reveal his troops’ movements.\textsuperscript{23} Similarly, military censors exercised their authority – shutting down, for example, the \textit{Chicago Times} for its attacks on President Lincoln.\textsuperscript{24}

The Lincoln Administration was especially concerned about the New York press, because of its size and influence. While the \textit{Times}, \textit{Tribune} and \textit{Herald}, all supported the Union war effort, other newspapers did not. A grand jury investigated over a hundred Northern papers listed by the New York \textit{Journal of Commerce} as opposed to “the present unholy war,” and found five of them to be offensive. As a result, the Postmaster General ordered them excluded from circulation. The owner of the \textit{New York News} fought the ban by circulating his paper privately. The government responded by ordering U.S. marshals to seize all copies of the paper, even arresting a newsboy. Eventually, the newspaper failed.\textsuperscript{25}

Meanwhile, the pro-war New York papers did nothing to support their competition – nor was there any outcry about abridgment of their First Amendment rights. On September 24, 22 J. MATHEWS, \textit{REPORTING THE WARS} 34 (1957) at 80-81; M. STEIN, \textit{UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS} 21 (1968) at 18; B. WEISBERGER, \textit{REPORTERS FOR THE UNION} 105-06 (1953).

\textsuperscript{23} Randall, \textit{The Newspaper Problem in Its Bearing upon Military Secrecy During the Civil War}, 23 AM. HIST. REV. 303, 318 (1918) (citing S. BOWMAN, \textit{SHERMAN AND HIS CAMPAIGNS} 447-48 (1865)). Apparently the order continued for some time; Sherman had a reporter excluded from all Union lines for violating the order in 1863. \textit{Id.} at 318-19. Eight correspondents accompanied General Sherman on his march through Georgia to the sea, however. P. KNIGHTLEY, \textit{THE FIRST CASUALTY – FROM CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS A HERO, PROPAGANDIST, AND MYTH MAKER} 28 (1975).


\textsuperscript{25} REHNQUIST at 46, 63-64. http://law.bepress.com/expresso/eps/1090
1862 – two days after the publication of the Emancipation Proclamation – President Lincoln himself issued another directive which provided that anyone caught “discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels” would be subject to “martial law and liable to trial and punishment by courts-martial or military commissions…”26 Six months later, in mid-April of 1863, General Ambrose Burnside (commander of the Department of Ohio) promulgated an order which stated in part: “The habit of declaring sympathies with the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested with a view to being tried as above stated [by military commissions] or sent beyond our lines and into the lines of their friends.”27

That same month a man named Clement Vallandigham, speaking at a rally at the state Democratic convention in Columbus, Ohio, criticized Burnside’s order and denied the government’s right to try civilians before military commissions. He traveled around the state, defending the right of the people to assemble to debate the administration’s war policy. General Burnside discovered Vallandigham’s itinerary, and sent a dozen “observers” to take notes.28 When Vallandigham returned to his home several days later, he was arrested and charged with “publicly expressing . . . sympathies for those in arms against the Government of the United States, declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its effort to suppress the unlawful rebellion.” The charge went on to say that Vallandigham had declared that “the present war is . . . wicked, cruel and unnecessary . .

26 Id. at 60.
27 Id. at 63.
28 Id. at 65-66.
one not waged for the preservation of the Union, but for the purpose of crushing our liberty and to erect a despotism. A war for the freedom of the blacks and enslavement of the whites."

The next morning Vallandigham was tried before a military commission comprised entirely of General Burnside’s subordinates. Not surprisingly, he was found guilty of violating the General Order. He was sentenced to imprisonment for the duration of the war. His petition for a writ of *habeas corpus* (arguing that it had not been suspended in Ohio) was denied by the United States District Court. Vallandigham petitioned the Supreme Court to review the decision. In February of 1864, the Court refused, holding that it had no jurisdiction to review decisions of a military commission.

President Lincoln came under heavy criticism for what had become known as the Vallandigham Affair. He attempted to ameliorate the situation by changing Vallandigham’s sentence from imprisonment for the duration of the war to banishment “beyond the Union lines” into the Confederacy. But both “Peace Democrats” and “War Democrats” drafted a letter to the President denouncing the arrest and trial as a violation of Vallandigham’s constitutional rights. Lincoln defended the trial, arguing that the country was facing a rebellion and was

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29 *Id.* at 66.
30 *Id.* at 66-67.

Even Justice Rehnquist, who generally advocates judicial deference to the military in times of war, questions this result:

Vallandigham was not only tried by a military commission, rather than a jury, but the charge upon which he was tried was that he violated an order issued by Burnside—an order that forbade the expression of sympathy for the enemy. A criminal trial in a civil court must be based on a charge that the defendant engaged in conduct prohibited by an Act of Congress (in a federal court), or by an act of a state legislature (in a state court). Burnside’s order had no such pedigree; it was not even based on an order of the President or the Secretary of War. It originated with Ambrose Burnside, the commanding general of the military district of Ohio. Members of the armed forces are naturally accustomed to being governed by such orders. But Vallandigham was not a soldier; he was a civilian. . . . The justification for convicting Vallandigham was Lincoln’s proclamation of September, 1862, invoking martial law. But what is martial law? Much has been written both before and after this time in an effort to describe this regime, but in fact the nation had only limited exposure to it between the close of the Revolutionary War and the Civil War.

32 *Id.* at 63
therefore under military rule; he characterized Vallandigham’s speech as a direct threat to the military, undermining the effectiveness of the draft and thereby of the army itself.

“Must I shoot a simple-minded soldier boy who deserts,” asked Lincoln, “while I must not touch a hair of a wily agitator who induces him to desert?”

Lincoln’s defense of his actions was not addressed to the constitutional lawyers or professors but to the general public, which may explain how such an infringement on a citizen’s freedom of speech could occur. The question remains whether Lincoln’s actions would pass constitutional muster had they occurred fifty years later, when the Supreme Court’s First Amendment jurisprudence began to take shape.

Lincoln also prohibited any trade with the Confederacy, and required all individuals desiring such commerce to apply for a permit from the Department of the Treasury. Subsequently, although the Mississippi River was an important western trade route to both the North and the South, in the summer of 1861 both sides took steps to stop commercial traffic.

The Union’s trade policies shifted frequently from prohibition to encouragement, with the result that individual civil liberties could easily be lost in the shuffle.

For example, after Union forces occupied Memphis, the town was soon flooded by a wave of northern merchants, many of them who happened to be Jewish. Union military leaders expressed their frustration with trade that they felt undermined their military goals.

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33 REHNQUIST at 73.

34 See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 298 [NEED YEAR] (citing Schenck v. United States., 249 U.S. 47 (1919)).


36 See Letters from Ulysses S. Grant to Mary Grant (Dec. 15, 1862) and to Christopher Wolcott (Dec. 17, 1862) in JOHN SIMON, ED. THE PAPERS OF ULYSSES S. GRANT 43-4 and 56 (1979).
Ulysses S. Grant, commander of the Union forces, issued his now-famous General Order Number 11:

I. The Jews, as a class, violating every regulation of trade established by the Treasury Department, and also Department orders, are hereby expelled from the Department.

II. Within twenty-four hours from the receipt of this order by Post Commanders, they will see that all of this class of people are furnished with passes and required to leave, and any one returning after such notification, will be arrested and held in confinement until an opportunity occurs of sending them out as prisoners unless furnished with permits from these Head Quarters.

III. No permits will be given these people to visit Head Quarters for the purpose of making personal application for trade permits.

Jewish community leaders complained bitterly and tried to get the measure rescinded. They sent a letter to Lincoln protesting Grant’s “inhuman order, the carrying out of which would be the grossest violation of the Constitution and our rights as citizens under it, (and) which will place us…as outlaws before the whole world.” The leader of the delegation, Cesar J. Kaskel, traveled to Washington, D.C. to speak with the president himself.

Lincoln gave Kaskel and audience, and was persuaded that General Order Number 11 should be rescinded. As the President later put it, he “did not like to hear a class or nationality condemned on account of a few sinners.” (During his subsequent campaign for the presidency, Grant received numerous letters asking him to explain General Order Number 11. He expressed great regret about having issued it, and said he was wrong to have done so.)

In October 1864, Union General Alvin Hovey ordered the arrest of a group of men led by Lambdin Milligan for conspiracy against the United States. They were charged with giving “aid and comfort to rebels, inciting insurrection, disloyal practices, and violation of the laws of

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37 General Order No. 11 (Dec. 17, 1862), in SIMON, ED., GRANT PAPERS 50.
39 Id. at 125. This episode is not mentioned by Rehnquist. See supra notes _____ and accompanying text. See generally Muller, supra note 9 at 1421-23.
Milligan and the others were tried and convicted – largely on the basis of evidence which would have been of questionable admissibility in a civil court – and were sentenced to hang. Their counsel filed petitions for habeas corpus, contending that a military commission could not impose sentences on civilians living in a state not at war.

The petition found its way to the Supreme Court. In *Ex Parte Milligan*, the government argued that the military commission was empowered by martial law, and that its decisions could be reviewed only by military authority. The Bill of Rights, it said, represented “peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.”

The petitioners urged that the government’s claim be rejected, arguing that martial law could be imposed only by necessity, and even then only by Congress. In April of 1866, the Court ordered that the writ should issue, holding that a military commission had no jurisdiction to try and sentence Milligan and his co-conspirators. Habeas corpus could be suspended, said the Court, only in accordance with Article I, Section 9 of the Constitution: “Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.” As the petitioners had requested, the Court denied the government’s contention that the Bill of Rights was suspended in time of war or rebellion.

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41 See generally Rehnquist at 123-27 (citing U.S. v. Hudson, 11 U.S. (7 Cranch) 32 (1812)). Hudson held that “the legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense” prior to prosecution in federal court. In effect, Hudson abolished federal common law crimes in the United States.

42 Ex parte Milligan, 71 U.S. 2, at 1 (1866). The procedural history is briefly explained before the opinion begins.

43 Ex parte Milligan, 71 U.S. at 20.

44 Id. at 127.

45 Id. Thus the Milligan decision is “justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at
Except for the brief Spanish-American War, which lasted but a few months and was not fought on American soil, for almost fifty years after the Civil War the United States was at peace and threats to civil liberties virtually non-existent.

### The Twentieth Century

#### World War I

Restrictions on anti-war expression during the first World War were both widespread and intensive.

Following the assassination of Archduke Franz Ferdinand and his wife in June of 1914, a month of threats and counter-threats took place between the Allied and Central Powers, culminating in Germany’s invasion of France in August of 1914. The initial reaction of the American public was one of isolationism. There had, after all, been no invasion of or attack on American soil. Even after German submarines sank the *Lusitania* and three U. S. merchant-marine vessels without warning, and President Woodrow Wilson (with Congress’s approval declared war, public opinion was divided.46

Wilson was critical of foreign-born American citizens who opposed the “pro-British foreign policy.” In a message to Congress on December 7, 1915, he said:

> The gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed by our generous naturalization laws to the full freedom and...
opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life.\textsuperscript{47}

Shortly thereafter, in June of 1917, Congress passed the Espionage Act. Together with various amendments embodied in the Sedition Act, it criminalized any interference with military operations as well as any acts causing “insubordination, disloyalty, mutiny, or refusal of duty.” The Acts also banned from the mail any material “advocating treason, insurrection, or forcible resistance to any law of the United States.”\textsuperscript{48}

These laws were vigorously enforced, resulting in substantial suppression of speech. For example, it became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional (though the Supreme Court had not yet held it valid), to say that the sinking of merchant ships was legal, to urge that a referendum should have preceded our declaration of war, or to declare that war was contrary to the teachings of Christ. In addition, people were punished for criticizing the Red Cross and the Y.M.C.A. Under the Minnesota Espionage Act it was held a crime to discourage women from knitting by suggesting that “no soldier ever sees those socks.” Almost two thousand prosecutions were brought under the federal statutes, and there were many others under state legislation.\textsuperscript{49}

It was through these cases that the Supreme Court’s first thorough analysis of the First Amendment began, a jurisprudential evolution that has continued to the present day.

Before 1917, the Court had never had occasion to decide a case in which it was claimed that the federal government had violated the First Amendment by abridging the freedoms of speech or press. The Espionage Act changed that status quo. Although no decisions were

\begin{itemize}
\item \textsuperscript{47} \textit{The Messages and Papers of Woodrow Wilson} 150, 151 (Albert Shaw ed., 1924). Wilson made similar statements during his 1916 presidential campaign. \textit{Id.}
\item \textsuperscript{48} 18 U.S.C.A. § 1717.
\item \textsuperscript{49} Z. CHAFEEO, \textit{Free Speech in the United States}, 51-52 (1941).
\end{itemize}
rendered until after the war was over, in each case thereafter the Court saw fit to reject various First Amendment claims, usually by applying the “clear-and-present-danger” test.

The first decision to invoke that standard was Schenck v. United States. Together with other members of the Socialist Party (of which he was general secretary), Schenck had distributed a leaflet opposing the war and the draft, some copies of which had reached men who had been conscripted. Schenck and his comrades were indicted under the Espionage Act for conspiring to obstruct recruiting and cause insubordination in the armed forces.

Justice Oliver Wendell Holmes, speaking for the Court on the First Amendment issue, wrote: “It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints.” But he made it clear that the First Amendment did not protect all utterances. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

In upholding the convictions, Justice Holmes explained:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

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51 Id. at 52 (emphasis supplied).
52 Id.
Other cases went even further in sanctioning curtailment of wartime expression under the Espionage Act of 1917. Eugene V. Debs, the Socialist leader, was prosecuted for creating insubordination in the armed forces on the basis of a speech in which he denounced the war as a capitalist plot and supported fellow socialists who had been convicted of resisting the draft. Apparently his most extreme statement was, “You need to know that you are fit for something better than slavery and cannon fodder.” Debs was given a ten-year sentence.

The Supreme Court unanimously upheld the conviction, finding that the speech was designed to obstruct recruitment, because its meaning was “so express” that that goal would be “its natural and intended effect.”53

The officers of a German-language newspaper were found guilty of violating the provision against false news reports in publishing articles slanted toward the German position. Victor Berger’s Milwaukee Leader was denied second-class mailing privileges for printing editorials, strongly pro-German in tone, attacking the war and the draft.54

Meanwhile, on the battlefields, reporters’ access to the front lines was rare and news reports were heavily censored. This was due in part to the creation of the Committee on Public Information in 1917 by the State, Navy, and War Departments. News correspondents in Europe were required to be accredited, and such status could be revoked for violating censorship regulations. For example, the press was not permitted to report on the failure of supplies to reach American troops in Europe, because the War Department believed that such stories would disturb the nation’s confidence in the war effort.55

55 Id. at 169. See also J. Mathews, supra note 19 at 249; P. Knightley, supra note 20 at 129. The story was published only when a reporter returned to New York, broke his correspondent's pledge to clear all stories, and
In 1919, after a terrorist bomb exploded at the home of U.S. Attorney General A. Mitchell Palmer, the Justice Department responded by launching the infamous Palmer Raids, in which thousands of immigrants across the country were rounded up and hundred of them deported – not for their involvement in the attack, but for their political associations.\(^{56}\)

In *Abrams v. United States*, the Court held that even advocating a labor strike could be unlawful under the 1918 Sedition Act, because of the risk that it would stop production of munitions. The defendants had thrown leaflets, calling for a general work stoppage, out of a window and onto the street. The Court stuck firmly to the position that any interference with the war effort could validly be suppressed – although it was in this case that Justices Holmes and Brandeis began to express dissenting views regarding wartime speech.\(^{57}\)

In 1917, the Espionage Act was also challenged for denying second-class mailing privileges to any newspaper violating its provisions. Postmaster General Albert Burleson determined that various articles published in the *Milwaukee Leader* were intended to interfere...

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\(^{56}\) See, e.g., United States ex rel. Diamond v. Uhl, 266 F. 34, 39-40 (2d Cir. 1920) (upholding deportation of Italian non-citizen for advocating assassination of public officials and unlawful destruction of property); United States ex rel. Rakics v. Uhl, 266 F. 646, 648, 652 (2d Cir. 1920) (affirming deportation of Hungarian immigrant belonging to IWW); Guiney v. Bonham, 261 F. 582, 583, 586 (9th Cir. 1919) (denying writ of habeas corpus to British Columbian native charged with advocating unlawful destruction of property). A notable exception to this pattern occurred in Ex parte Jackson, 263 F. 110, 112 (D. Mont. 1920), where the court granted a writ of habeas corpus and decried the unlawful conduct of the government raiders who “perpetrated a reign of terror, violence, and crime against citizen and alien alike.” Id. (emphasis added). See David Cole, *Enemy Aliens and American Freedoms*, *The Nation*, 9/23/02.

\(^{57}\) Abrams v. United States, 250 U.S. 616, 630 (1919). See, e.g., United States ex rel. Diamond v. Uhl, 266 F. 34, 39-40 (2d Cir. 1920) (upholding deportation of Italian non-citizen for advocating assassination of public officials and unlawful destruction of property); United States ex rel. Rakics v. Uhl, 266 F. 646, 648, 652 (2d Cir. 1920) (affirming deportation of Hungarian immigrant belonging to IWW); Guiney v. Bonham, 261 F. 582, 583, 586 (9th Cir. 1919) (denying writ of habeas corpus to British Columbian native charged with advocating unlawful destruction of property). A refreshing exception to this pattern is Ex parte Jackson, 263 F. 110, 112 (D. Mont. 1920), in which Judge Bourquin granted a writ of habeas corpus and decried the unlawful conduct of the government raiders who “perpetrated a reign of terror, violence, and crime against citizen and alien alike.” Id. (emphasis added).
with the success of United States military operations and obstruct the recruitment and enlistment services, and revoked the paper’s second-class mailing privileges.\(^{58}\)

The Supreme Court upheld another conviction brought under the Espionage Act in *Pierce v. United States*. The defendants had been charged with distributing anti-war pamphlets entitled *The Price We Pay*, which stated that “our entry into [the war] was determined by the certainty that if the allies do not win, J.P. Morgan’s loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.”\(^{59}\) Justices Brandeis and Holmes dissented:

> The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.\(^{60}\)

**World War II**

Although the assertion lingers that during World War II there was no overt effort by the government to suppress public criticism of wartime policy,\(^{61}\) the evidence suggests otherwise.\(^{62}\)

In June of 1940, for example, Congress made it a crime for anyone – with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military and naval forces of the United States [to] advise, counsel, urge, and cause insubordination,  

\(^{60}\) Id. at 273.
\(^{61}\) REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Vintage 1998).
\(^{62}\) Muller, supra note 9 at 1395.
disloyalty, mutiny, and refusal of duty by members of the military and naval forces of the United State, [or] to distribute and cause to be distributed written and printed matter advising, counseling, and urging insubordination, or to conspire to commit any of the said prohibited acts.\textsuperscript{63}

Even before the Japanese attacked Pearl Harbor and America’s formal entry into World War II, the America First Committee – well-known for its outward disapproval of United States involvement – found itself under grand-jury investigation for opposing American engagement.\textsuperscript{64} David Dellinger and his anti-war organization People’s Peace Now were harassed and investigated for opposing the war. The Black press also found itself threatened by J. Edgar Hoover and Attorney General Francis Biddle for publishing articles critical of the war effort.\textsuperscript{65}

In October of 1941, two months before the attack at Pearl Harbor, the commander of the Military Department of Hawaii, Lt.Gen.Walter Short, urged passage of a state law to grant the governor extraordinary powers in the event of war. The territorial governor of Hawaii, Joseph Poindexter, called a special session of the legislature, which quickly enacted the Hawaii Defense Act.\textsuperscript{66} That law implemented Section 67 of the Hawaii Organic Act, the charter of the territory enacted by Congress in 1900, which provided that the Governor “may in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, suspend the writ of habeas corpus or place the territory or any part thereof under martial law until communication may be had with the President and his decision thereon made known.”\textsuperscript{67}

\textsuperscript{63} 18 U.S.C.A. at 9, 11.
\textsuperscript{64} United States v. Pelley, 132 F.2d 170 (1942).
\textsuperscript{65} Blanchard, \textit{supra} note ____ at 189-229.
\textsuperscript{66} Organic Act, ch. 339, \textdegree 67, 31 Stat. 141 (1900).
\textsuperscript{67} \textit{Id.}
Within a few hours of the Japanese attack on Pearl Harbor, Poindexter signed an order placing the territory under martial law and suspending the writ of habeas corpus. General Short assisted him in this effort by issuing his own proclamation, which declared his intention to push for legislation that would establish censorship and regulate blackouts, meetings, possession of arms, and the sale of intoxicating liquors. Offenders would be sentenced by military tribunals or held in custody until the civil courts could resume their normal functions.

The Supreme Court also confronted the question of civil liberties for non-citizens – an question very much in issue today – in deciding whether captured German saboteurs could constitutionally challenge the President’s power to order them tried by a military tribunal. The petitioners were eight Germans caught as they tried to enter the country for the purpose of “... sabotage, espionage, hostile or warlike acts, or violations under the law of war.” They argued that under the Constitution they had a right to demand a jury trial at common law in the civil courts.

The Court held that the President had authority under the Constitution to order the petitioners tried before a military tribunal as unlawful belligerents under the Articles of War. In a per curiam opinion (which kept the facts from the public), the Court unanimously found in favor of the government.

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69 Id. at 490, 502. In 1942, military authorities arrested Harry White, a stockbroker in Honolulu, and charged him with embezzling stock belonging to another person. He was tried before a military provost court. White’s objection to the court’s jurisdiction, and his demand for a jury trial, were both denied. He was subsequently convicted and sentenced to five years in prison. *Ex parte* White, 66 F. Supp. 982, 984 (D. Haw. 1944).
70 *Ex Parte* Quirin, 317 U.S. 1, 20 (1942).
71 Id.
72 Id.
At the subsequent military trial all eight men were convicted and sentenced to death. Five days later six of them were executed by electric chair. The Supreme Court later issued a full opinion later, but not before several behind-the-scenes exchanges in which Justice Frankfurter exhorted his colleagues to yield to the President as a matter of patriotism and penned a bizarre soliloquy with the already-executed men: “You damned scoundrels have a helluvacheek to ask for a writ. . . . You’ve done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress. . . . [Y]our bodies will be rotting in lime . . . [and] remain in . . . custody and be damned.” He also encouraged his brethren not to engage in “abstract constitutional discussions” but to leave any unresolved issues to be decided “during peacetime.”73

Equally shocking, perhaps, was a statement attributed to President Franklin Roosevelt who, it has often been suggested, did not order bombardment of the Nazi death camps because he was worried about being perceived as fighting a war for the Jews. He is said to have told two members of his cabinet (Treasury Secretary Henry Morganthau, who was Jewish, and Leo Crowley, director of the Office of Economic Welfare, who was Catholic, both of whom were urging him to intervene on behalf of the Jews) that “you should remember, this is a Protestant country, and you Jews and Catholics are here under sufferance. You have to go along with everything I want.”74

73 Jonathan Turley, The Dark History of A Military Tribunal, NAT’L L. J, October 28, 2002 at A17. The Court in Quirin expressly stated that it was not ruling on whether the President could create military tribunals without Congressional authority. Id.

The Japanese Internment Camps

The most serious abrogation of civil liberties during wartime – and perhaps in all of U.S. history – involved the internment of the Japanese-Americans during World War II. This long and painful episode provides a useful basis for analyzing the validity of “military necessity” as a justification for limiting individual rights under the Constitution.

Even before the attack on Pearl Harbor, Japanese-Americans were the targets of racism. In 1905, an “Asiatic Exclusion League” was formed to keep Japanese and Koreans from immigrating into the United States. In 1907, President Roosevelt negotiated the so-called “Gentlemen’s Agreement,” under which the Japanese government would not issue passports to people seeking to live in America, but the United States would permit parents, wives, and children of laborers already in the U. S. to immigrate. Similar racism was reflected in the Webb-Hartley law of 1913, which limited leases to three years to aliens that were unable to become citizens.75

After the attack on Pearl Harbor, the newspapers were filled with propaganda of Japanese subversion and traitors.76 One Honolulu newspaper reported that Japanese-American farmers had planted their tomatoes in a configuration that would point to American airfields around Pearl Harbor.77 Although no Japanese planes were ever sited, 1,400 rounds of ammunition were fired at supposed Japanese enemy planes.78

75 WAUGE, ISAMI, ET. AL., CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, FIVE VIEWS, AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA (1998), http://www.cr.gov/history/online_books/5views/5views4.htm#top.
76 MIKE WRIGHT, WHAT THEY DIDN’T TEACH YOU ABOUT WORLD WAR II 165 (Presidio, 1998).
77 Id. at 166.
78 Id. at 165.
In February of 1942, General John DeWitt, recommended to Secretary of War, Henry L. Stimson to evacuate all west coast Nikkei (Issei and Nisei collectively): 79

[The Japanese race] is an enemy race and while many second and third generation Japanese born on American soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted. . . . The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken. 80

DeWitt had little sympathy for the argument that few if any of the Nikkei posed a security threat. In his words, “A Jap is a Jap.” 81 Roosevelt told Stimson to “go ahead [and do what he] thought the best” 82 and shortly thereafter, the President signed Executive Order 9066. 83 This directive gave DeWitt the legal power to exclude any and all persons, citizens or aliens, from designated areas on the West Coast. 84 Subsequently about 112,000 people, including 70,000 American citizens, were ordered to “relocation centers.” 85

Internment camps, which the government called “relocation centers,” were established in Manzanar and Tule Lake, California; Topaz, Utah; Rivers, Arizona; Heart Mountain Wyoming. 86 Privacy was non-existent in the internment camps. A family was given a 20- by 25-foot space. 87

79 During internment, it did not matter that may Japanese-Americans were U.S. citizens. Nisei (American born, second-generation persons), Issei (first generation Japanese immigrants who were US citizens), Kibei (native American citizen of Japanese immigrant parents), and Ikkei (ethnic Japanese) were all deprived of their civil liberties. WRIGHT at 168.
81 See THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 66 (1982).
82 Id. at 190-91.
84 Id. Although the order was not explicitly racially based, the Japanese race was commonly understood as the target. See also Debora K. Kristensen, 44-DEC Advocate (Idaho) 20 (2001).
85 Rehnquist at 192.
86 WRIGHT, supra note ___ at 168-69. See also WAUGE, ISAMI, et. al., supra note ____.
87 WRIGHT, supra note ___ at 168-69.
Toilets were communal; diarrhea was common, caused by contaminated water.\textsuperscript{88} Each internee received a straw mattress, blanket, and very little else for space that resembled a horse stall.\textsuperscript{89}

Justice Rehnquist’s description of the internees’ experience itself is misleadingly brief: “There was no physical brutality, but there were certainly severe hardships – physical removal from the place where one lived, often forced sale of houses and businesses, and harsh living conditions in the Spartan quarters of the internment centers.”\textsuperscript{90}

Although the internment caps were not as harsh as those seen in Nazi Germany, their impetus was similar: the Japanese-Americans were being punished for being born into an unpopular race.\textsuperscript{91} Physical abuse was not uncommon. In 1943, as a response to riots, internees at Tule Lake were beaten, kicked, and sprayed with tear gas.\textsuperscript{92} After the war, each internee was given $25 and a train ticket to the place he once called home.\textsuperscript{93}

For their part, the interned \textit{Nikkei} could not understand why the government had placed them in detention camps, much less behind barbed wire. But even more puzzling to them was why in 1944 several hundred \textit{Nisei} interns were ordered out of the relocation centers and into the U.S. Army – the same Army that continued to guard their parents and their brothers and sisters. Why would the same government that had evacuated them as military risks now want them to serve?

At least some of the incentive to draft \textit{Nisei} out of the camps appears to have come from a segment of the Japanese-American community itself. In June 1942, the War Department

\begin{thebibliography}{99}
\bibitem{88} Id.
\bibitem{89} WAUGE, ISAMI, et. al., \textit{supra} note ____.
\bibitem{90} REHNQUIST at 192.
\bibitem{92} WAUGE, ISAMI, et. al., \textit{supra} note ____.
\bibitem{93} ISSERMAN, at 86.
\end{thebibliography}
changed the selective service classification of the *Nisei*-American citizens all to IV-C, the
category for “aliens not acceptable to the armed forces.”94 Almost immediately, an organization
called the Japanese American Citizens League (JACL) began lobbying the government to allow
*Nisei* to volunteer and join the military in order to demonstrate their loyalty.95 This idea
appealed to Dillon Myer, the director of the civilian War Relocation Authority that had been
created in November of 1942 to administer the interment camps.96 He too began pressing for the
right of *Nisei* to volunteer.97

In January 1943, the War Department agreed – with the proviso that volunteers be
screened to determine if their loyalty was questionable. A questionnaire was distributed to
young men in all ten of the relocation centers and soon expanded to include all evacuees, *Issei*
and *Nisei*. The four-page survey, entitled “Application for Leave Clearance,” included two
pointed questions:

#27. Are you willing to serve in the armed forces of the United States on combat
duty wherever ordered?

#28. Will you swear unqualified allegiance to the United States of America and
faithfully defend the United States from any or all attack by foreign or domestic forces,
and forswear any form of allegiance or obedience to the Japanese emperor, to any other
foreign government, power or organization?98

The *Nisei*, having been interned for almost a full year now, were concerned that a “yes”
answer to Question 27 would be tantamount to volunteering to join the armed forces and leaving
their parents and siblings to fend for themselves in the camps. They were also chagrined by

94 32 CFR º622.43 (Supp 1943) (defining selective service classification IV-C). The classification of the Nisei as
IV-C is reported in BILL HOSOKAWA, THIRTY-FIVE YEARS IN THE FRYING PAN 52 (McGraw-Hill, 1978).
95 See Mike Masaoka with BILL HOSOKAWA, THEY CALL ME MOSES MASAOKA: AN AMERICAN SAGA
115, 120-28 (Morrow, 1987); Bill Hosokawa, JACL in Quest of Justice 193-212 (Morrow, 1982).
96 RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS: DILLON’S MYER AND AMERICAN RACISM (California,
1987).
97 PAGE SMITH, DEMOCRACY ON TRIAL 289 (Simon & Schuster, 1995).
98 EDWARD H. SPICER, ET. AL., IMPOUNDED PEOPLE 143 (Arizona, 1969).
Question 28: how could they “forswear” an allegiance to the Japanese Emperor to whom they had never sworn allegiance in the first place?

But the loyalty questionnaires did ultimately serve to cull volunteer Nisei, many of whom served on the segregated 442d Regimental Combat Team. As stories of their bravery in battle made their way back to the United States late in 1943, the JACL began lobbying the War Department to reopen the draft to the Nisei as well, and to force into the service the overwhelming majority of their compatriots who had no intention of answering the army’s call for volunteers. By mid-February of 1944, induction notices began to appear in the mail at all ten relocation centers, including Tule Lake.

The drafting of the Nisei were greeted in the camps with a measure of disbelief. Issei parents, who had already lost their homes, their livelihoods, their security, and their dignity, were now to lose their sons as well. Residents of all of the camps complained about the unfairness of the government’s decision simultaneously to incarcerate and to draft the very same community of people.

Although most of the young men who received draft notices complied with their orders and showed up for their physical exams, some draftees refused to comply. If we are loyal enough to serve in the army, they asked, what have we been doing in concentration camps for the last year and a half? The resisters were quickly indicted for failing to comply with the draft,

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99 Id. at xv.
100 BILL HOSOKAWA, JACL IN QUEST OF JUSTICE 221 (Morrow 1982).
101 For a description of the activities of the draft resistance movement at Heart Mountain, see Okamoto v United States, 152 F.2d 905, 906 (10th Cir. 1945).
102 Id.
arrested by the FBI, and taken to jail. All of them found themselves charged with felonies and facing the possibility of additional years of incarceration.103

Their cases came to trial in the summer and fall of 1944. Most of the federal district judges hearing them ran perfunctory trials, and meted out sentences of from two to five years in prison.104

One notable exception occurred in July of 1944. Judge Louis H. Goodman of the United States District Court for the Northern District of California was assigned the prosecution of twenty-seven young men from the Tule Lake Relocation Center who had refused to show up for their physicals.

The resisters and their court-appointed attorneys faced an uphill battle. Public feeling was strongly against them; the local newspaper referred to them as “the Japanese” or “American-born Japs.”105

The defendants were advised by their attorneys to plead guilty as charged, which they did.106 Judge Goodman, however, asked another attorney to file a motion to quash the

103 Id. at 1428. See also United States v Fujii, 55 F Supp 928, 932 (D. Wyo. 1944).

For example, Judge T. Blake Kennedy of the District of Wyoming, could not conceal his frustration with the Heart Mountain resisters: “Personally this Court feels that the defendants have made a serious mistake in arriving at their conclusions which brought about these criminal prosecutions. If they are truly loyal American citizens they should, at least when they have become recognized as such, embrace the opportunity to discharge the duties of citizens by offering themselves in the cause of our National defense.”Such a pronouncement is not surprising from a judge who referred to the Nisei resisters as “you Jap boys” in open court. American Civil Liberties Union,The Vietnam War and the Status o f Dissent, June 4, 1967.

105 The day after the Tule Lake defendants arrived, an article appeared on the front page of the paper entitled, “Not Enough Food, Japs Complain in Jail Here”:

Not enough ricee – that wasn’t exactly the plaint of the Japanese prisoners in the county jail today; their complaint was “Not enough mealee.” According to the custom of all county jails, only two meals a day are served to prisoners: some kind of meat, such as stews and often a quarter of beef is served every day, and each meal has plenty of succulence and nutriment, said Sheriff Arthur A. Ross. But this doesn’t seem to be enough for those who have been raised on rice in the old country. They want three mealees, so solly, please. Wolff v. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), noted in 81 HARV. L. REV. 685 (1968).

106 Wolff v. Local Bd. No. 16, 372 F.2d 817 (2d Cir 1967).
indictment as violative of the Fifth Amendment’s due process clause. He also filed a motion to withdraw the guilty pleas that had already been entered.\textsuperscript{107}

Unlike every other federal judge that summer, who had tried the \textit{Nisei} draft resisters and convicted them, Judge Goodman bluntly dismissed all charges against the defendants. The “war powers vested in the executive,” he said, “may be sufficient constitutional justification” for the internment itself. But “[n]o such dangers are the basis for the prosecution of defendants for refusing to be inducted.”\textsuperscript{108}

“It does not follow,” said Judge Goodman, “that because the war power may allow the detention of the defendant at Tule Lake, the guaranties of the Bill of Rights and other Constitutional provisions are abrogated by the existence of war.” Applying the basic test of due process, Goodman found it shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion. “The issue raised by this motion must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of due process. It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens.”\textsuperscript{109}

The government did not appeal Goodman’s decision. The defendants were returned to their relocation center where, despite their victory in court, they resumed their lives behind barbed wire.\textsuperscript{110}

\textsuperscript{107} \textit{Id.} at 823.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} Had the government appealed, it is likely that Goodman's ruling would have been reversed. In a later \textit{Nisei} draft resistance case, the Court of Appeals for the Ninth Circuit spoke disapprovingly of Goodman's \textit{Kuwabara} opinion. \textit{See} Takeguma v United States, 156 F.2d 437, 441 (9th Cir. 1946) (refusing to distinguish \textit{Kuwabara} on its facts and noting that to the extent \textit{Kuwabara} did not accord with the court's own opinion, it was not good law).
During the internment years, other legislative actions likewise affected thousands of Japanese-Americans. In 1943 California passed a statute which prohibited “aliens ineligible to citizenship” from earning their living as commercial fishermen in coastal waters. Well after the war ended, Congress saw fit to provide partial restitution for losses and damages resulting from the internment. The Evacuation Claims Act, however, was not a cure-all. While losses by Japanese-Americans were estimated to be around $400 million, only ten percent of this amount was disbursed to former internees.

In 1981 Congress established a special commission to investigate the historical, legal, economical, and psychological impacts of the forced internment of over 120,000 persons of Japanese ancestry.

111 One fisherman’s suit went all the way to the Supreme Court, which ruled that the statute was unconstitutional. Other discriminatory measures were more subtle. In 1944, a federal statute amended the Nationality Act of 1940 to permit U.S. citizens to renounce citizenship during wartime. The Department of Justice had intended that the law encourage leaders of disturbances at the Tule Lake Segregation Center to renounce their citizenship, therefore making themselves eligible for further detention when the camps were dismantled. Instead, 5,522 renunciations came from Japanese-Americans (5,371 were from persons confined at Tule Lake), rather than the several hundred expected from pro-Japan elements. When the concentration camps were closed, many internees regretted renouncing their U.S. citizenship, citing coercion, intimidation, and fears of hostility by the dominant society. Lawsuits to revalidate citizenship continued until 1965, including Abo v. Clark (77 F. Supp. 806), which returned U.S. citizenship to 4,315 Nisei.

Japanese-Americans likewise found it difficult to defend their land holdings during World War II. A total of 79 cases were tried under the Alien Land Law of 1913 (including 59 after the war). The first challenge to the Alien Land Law was Harada v. State of California, in which the Superior Court of Riverside County declared in 1918 that Jukichi Harada could purchase property in the name of his children, who were U.S. citizens though still minors. Subsequent court cases in other jurisdictions had differing results, some ruling that minor children could not own property. Two escheat cases had particular significance in invalidating the Alien Land Law. The case of Oyama v. State of California in 1948 determined that non-citizen parents could purchase land as gifts for citizen children. The Fujii v. State of California case in 1952 resulted in the Alien Land Law of 1913 being declared unconstitutional. Legal obstacles to land purchases by Asians were thus removed.

Japanese-Americans have also endured informal discriminatory practices. In 1945, a Japanese-American family challenged the constitutionality of segregated schools, and the Los Angeles County Superior Court concurred that segregation on the basis of race or ancestry violated the Fourteenth Amendment. In 1947 the California legislature repealed the 1921 provision. Shopping, dining, and recreational activities at some business establishments were denied to Japanese-Americans in previous years. Restrictive covenants in housing affected where they lived. When
Supreme Court Cases

The internment of Japanese-Americans gave rise to the most important and controversial cases decided by the Supreme Court during World War II.

As the war progressed, various restrictions were relaxed. Some Nisei had volunteered for military service and fought in Europe; other internees received permission to relocate to the eastern and Midwestern United States. All remaining internees were released by the beginning of 1945, three years after their evacuation, when the Supreme Court held that the continued detention of loyal citizens against their will exceeded the scope of Executive Order 9066 and its implementing statutes.113

These regulations resulted in four cases reaching the Supreme Court: United States v. Hirabayashi,114 and Korematsu v. United States,115 and Yasui v. United States116 and Ex Parte Endo.117 All involved children of Issei parents. The Court upheld the convictions in Hirabayashi, Korematsu and Yasui without addressing the bases for the claims of military necessity.118

United States v. Hirabayashi challenged both the curfew and the subsequent relocation. Gordon Hirabayashi was born in Seattle, and attended the University of Washington. In May 1942, Hirabayashi disobeyed the curfew established by the President’s Executive Order, and two deceased members of the highly decorated 442nd Combat team were returned to the United States after World War II, some cemeteries refused to allow them grave-sites solely because of their ancestry.

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113 Ex Parte Endo, 323 U.S. 283, 300-02 (1944).
114 320 U.S. 81, 101-02 (1943).
117 323 U.S. 283, 300-02 (1944).
days later failed to register for evacuation. He was indicted and convicted in a federal court in Seattle on two misdemeanor counts, and was sentenced to imprisonment for three months on each count.  

Hirabayashi asserted that the Executive Order was unconstitutional. The case was heard by the Supreme Court in late spring of 1943, while world war was still being waged. The Court declined to address the constitutionality of the relocation, but (by an 8-0 vote) it upheld the curfew. In so doing it gave the government great deference in exercising its war-making authority:

> 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. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in light of facts of public notoriety. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

Minoru Yasui was born in the United States and became a lawyer and a member of the Oregon bar. Yasui violated the curfew order applicable to Portland, where he resided. He was convicted in the federal court in Portland and was sentenced to imprisonment for one year. As in Hirabayashi, the Court narrowed the scope of review to the issue of the curfew – which it unanimously upheld.

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119 Hirabayashi, 320 U.S. at 83-84.
120 Id. at 101-02.
121 Id. at 115.
A year after Hirabayashi, the Court heard both Korematsu and Endo, each of which attacked the legality of the relocation.

Fred Korematsu, also born in the United States, was convicted of remaining in San Leandro, California, and thereby violating a military-exclusion order. A federal court in San Francisco overruled his claim that the orders in question were unconstitutional, suspended his sentence, and placed him on probation for five years.122

The Supreme Court upheld the conviction, in the process reaffirming the constitutionality of the government’s forced relocation of Japanese-Americans. Relying heavily on Hirabaysahi’s deference to the military in a time of war, the Court gave short shrift to the arguments that many of those targeted were full-fledged U.S. citizens who posed no demonstrable threat to national security, had not committed any crimes, and quite likely had been singled out solely because of their race:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the [the West Coast] 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. We cannot by availing ourselves of the calm perspective of hindsight now say that at that time these actions were unjustified.123

Ex Parte Endo was decided when hostilities were coming to an end, and America’s military superiority was manifest. The issue in this case was not a direct challenge to the

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122 Korematsu, 323 U.S. 214.
123 Id.
regulations, but a writ of habeas corpus claiming that Mitsuye Endo, having proven her loyalty, could no longer be constitutionally detained at the Topaz Relocation Center in Utah.\textsuperscript{124}

The Court agreed, finding that neither Executive Order 9066 nor its implementing statutes in any way authorized the incarceration of loyal citizens. “In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between liberties and the exigencies of war, that the lawmakers intended to place no greater restraint on the citizens than was clearly and unmistakably indicated by the language they used.”\textsuperscript{125}

Applying this approach, the Court found that Executive Order 9066 and Congress’ confirmation of it said nothing about detention after evacuation. Thus Endo’s continued detention at an internment center was improper.\textsuperscript{126}

Though the Supreme Court must have fully understood that after the Battle of Midway in 1942 there was little danger of a Japanese attack on mainland United States, it nevertheless upheld the constitutionality of the internment in November of 1944. How else to fathom the Court’s rationale, except to point to the fact that the war was still on?

Not all of the wartime cases brought before the Supreme Court, however, were decided in the government’s favor. In 1944, a civilian ship-fitter in the Honolulu Navy Yard named Lloyd Duncan was arrested after a brawl with two armed marine sentries, and charged with violation of a general order prohibiting assault on military or naval personnel. He was tried over his objection by a military court, found guilty, and sentenced to six months in prison. In \textit{Duncan v.} 

\begin{footnotes}
\item[124] Id. at 223-24.
\item[125] Id. at 300.
\item[126] The Court ordered that Endo be released. Id. at 306.
\end{footnotes}
Kahanamoku, decided after the end of World War II, the Court focused upon interpreting the Hawaii Organic Act statute rather than directly addressing the limitations imposed by the terms of the Constitution.127

The Court in Duncan reaffirmed the general proposition that the judiciary has an obligation to protect citizens’ constitutional rights even during times of war.128 Congress, said Justice Black, intended to permit martial law only in times of military necessary. The Organic Act of Hawaii, in authorizing martial law, did not intend the military organization to supersede the civilian system any more than necessary. The Court went on to evaluate the dangers apprehended by the military at the time White and Duncan committed their respective offenses. It concluded the military dangers were not sufficiently imminent to require civilians to evacuate the area or any buildings necessary to carry on the business of the courts. Finally, the Court saw no military necessity to try a common brawler and a “normal” embezzler before military tribunals, these offenses bearing no relationship to the military.129

Duncan thus contrasts sharply with Hirabayashi and Korematsu, in which the Justices upheld the extraordinary discretionary authority exercised by the government in the internment of Japanese-Americans.130

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128 Id.
129 Id. at 316-17. Justice Murphy filed a concurring opinion, which tracked much more closely the Milligan doctrine with its prohibition against trial of civilians by military courts where the civil courts were able to function. Id. at 325-35. Chief Justice Stone also concurred, noting that the full record in this case showed the conditions prevailing in Hawaii throughout 1942 and 1943, that from February 1942 on the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order. Id. at 337. Two members of the Court, Justices Frankfurter and Burton, dissented, accusing the majority of using the hindsight of 1946 to view the situation in Hawaii at the times Duncan and White were actually tried. Id. at 337-58. See also Rehnquist, at 217.
The Press in World War II

Restrictions on the press also became more severe during World War II.

Immediately following the Japanese attack at Pearl Harbor, Congress created the Office of Censorship, which in turn instituted a Code of Wartime Practice.\textsuperscript{131} To gain access to the front lines, a reporter had to be accredited, one of the requirements for which was that he agree to submit all his work to military officials for censorship.\textsuperscript{132}

In 1942 William Dudley Pelley, Lawrence A. Brown, and the Fellowship Press, Inc, were convicted of sedition for making anti-government and pro-Nazi statements in their newspaper \textit{Silver Shirt}. Pelley was sentenced to fifteen years in prison, Brown to five, and the Fellowship Press was fined $5000.\textsuperscript{133}

Not all of those tried during wartime were convicted. In 1944, Joseph E. McWilliams and thirty other defendants were indicted for conspiracy to interfere with, impair, and influence the loyalty, morale, and discipline of the United States armed forces by printing and distributing

\textsuperscript{131} Executive Order 8985, 3 C.F.R. 1047 (1938-1943).
\textsuperscript{133} United States v. Pelley, 132 F2d 170, 171 (1942). The indictment charged violations of Section 3, 50 U.S.C.A., which provides as follows:

\begin{quote}
Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more (than) $10,000 or imprisonment for not more than twenty years, or both.’ (Section 3.)

If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18.’ (Section 4.)
\end{quote}
publications advising, counseling, and urging insubordination and refusal of duty by members of the military and naval forces of the United States. The indictment addressed the origin of the issue that began with a movement in Germany in 1933 to substitute the existing form of government in the United States with a National Socialist form by causing insubordination, disloyalty, mutiny, and refusal of duty by members of the military and naval forces of the United States.\footnote{United States v. McWilliams, 54 F.Supp. 791 (1944).}

The defendants were charged with conspiring in the District of Columbia with one another, with officials of the German Reich, and with the leaders and members of the Nazi Party. Furthermore, as part of the conspiracy the defendants and co-conspirators printed and circulated forty-two specified publications, used thirty-five specified agencies as distributors, and otherwise disseminated twenty-four specified representations and charges.\footnote{Id.}

The case went before a jury in April of 1944, and ended in a mistrial some eight months later as a result of the judge’s sudden death. Thereafter on several occasions various of the defendants moved for trial, but without result. It was finally dismissed, the court finding that the defendants had not been accorded their Constitutional right to a speedy trial, and that the statute of limitations had passed.\footnote{United States v. McWilliams, 82 U.S. App. D.C. 259; 163 F.2d 695 (1947).}

Nor did censorship always end in conviction. In 1944, for example, James Omura, the editor of \textit{Rocky Shimpo}, a Japanese newspaper in Denver, published editorials critical of the federal government’s decision in January of that year to open the military draft to the \textit{Nisei} internees. Omura was arrested and tried for conspiring to counsel others to evade the draft,
although his sole contribution to the conspiracy were the opinions he voiced in his column.\textsuperscript{137} A federal jury acquitted him, although his career as a journalist was adversely affected.\textsuperscript{138}

In 1944 Elmer Hartzel was convicted under the 1917 Espionage Act for anonymously mailing to military leaders his writings “depict[ing] the war as a gross betrayal of America, denounc(ing) our English allies and the Jews and assail[ing] in reckless terms the integrity and patriotism of the President of the United States. Even though the Court said that it was aware “of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal,” it nonetheless reversed Hartzel’s conviction for insufficient evidence.\textsuperscript{139}

\textit{McCarthyism and the Korean War}

Following World War II, it was not long before the “Red Scare” overtook much of the popular press – fueled in large measure by Senator Joseph McCarthy. His anti-Communist witch-hunts, coupled with the machinations of the House Un-American Activities Committee, served to roil up both citizens and politicians.\textsuperscript{140} Only later would “McCarthyism” – which has since been defined as the persecution of innocent people by sensational but unproven accusations

\footnotesize
\begin{itemize}
  \item \textsuperscript{137} Okamoto v. United States, 152 F2d 905, 906 (10th Cir.) (1945).
  \item \textsuperscript{138} MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS 189-229 (Oxford 1992).
  \item \textsuperscript{139} Hartzel v. United States, 322 U.S. 680, 683, 689 (1944).
\end{itemize}
– become recognized as one of the worst abuses of constitutional civil liberties in American history.\footnote{The definition appeared in a NEW YORK TIMES editorial on May 7, 2003, shortly after Congress released some of theretofore-secret archives of the Senate’s permanent subcommittee on investigations.}

Congress had passed the Smith Act in 1940, which made it a crime to advocate violence against the government. The Act was little used until the McCarthy era, when the fear of communism led to the prosecution of Communist and Socialist party officials. In \textit{Dennis v. United States},\footnote{341 U.S. 494 (1951).}\footnote{\textit{Id.} at 496.} leaders of the Communist Party were indicted under §3 of the Smith Act for “willfully and knowingly conspiring (1) to organize as the Communist Party a group of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.”\footnote{\textit{Id.} at 501.}

The Supreme Court deferred to executive and legislative power in upholding the convictions of individuals who merely studied communism. The purpose of the Act, said the Court, was “to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.”\footnote{See Conor Gearty, \textit{Reflections On Human Rights and Civil Liberties In Light of the United Kingdom’s Human Rights Act 1998}, 35 U. RICH. L. REV. 1 (2001) (“Surely support for the civil liberties of}
unpopular political groups is said to be a very large part of the rationale for the free speech guarantee. In reality, of course, politics cannot be avoided by deploying the tricks of the constitutional lawyers’ trade. Grand rights claims in venerable documents merely divert the course of political energy into the courtroom, where the forces of the State reconstitute themselves dressed in the garb of constitutional necessity. The judges read the political runes as best they can, often without realizing that this is what they are doing, and express what their instincts tell them in the only language available to them, constitutional law."

http://law.bepress.com/expresso/eps/1090
It is within the power of the Congress to protect the Government of the United States from armed rebellion and is a proposition which requires little discussion. . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence.145

In a vigorous dissent, Justice Black argued that the Smith Act was unconstitutional. “Violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force,” he wrote.146 “Once we start down that road we enter territory dangerous to the liberties of every citizen.”147

The provision authorizing the deportation of immigrants for membership in the Communist Party was not removed until 1991,148 although its substance resurfaced in 1996 as part of the Congressional Anti-terrorism and Effective Death Penalty Act.149

Today the prevalent view is that the Supreme Court failed effectively to confront the excesses of the McCarthy era. Dennis has been called “disastrous” and “shameful.”150 Justice Frankfurter’s opinion was labeled by one of his own biographers as a “judicial abdication of responsibility.”151 In fact, all of the Justices in Dennis have been similarly criticized.152

145 Dennis, 341 U.S. at 501.
146 Id. at 590.
147 Id. at 581.
148 Hunter, supra note ___ at ___.
149 Id. This Act was designed as a response to the Oklahoma City bombing, and allowed for the deportation of immigrants on the basis of “secret evidence.” See generally Melissa K. Mathews, Restoring the Imperial Presidency: An Examination of President Bush’s New Emergency Powers, 23 HAMLINE J. PUB. L. & POL’Y 455 (2002).
150 Michael E. Parrish, Justice Frankfurter and the Supreme Court, in The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas 61, 77 (Jennifer M. Lowe ed., 1994); Ronald Dworkin, Taking Rights Seriously 148 (1977); see also Howard Ball & Phillip J. Cooper, Of Power and Right: Hugo Black, William O. Douglas, and America’s Constitutional Revolution 145 (1992) (stating that the Court in Dennis was “not sensitive to the preservation of freedoms for political deviants”).
Yet the notion that the *Dennis* decision was simply ill-considered is likewise misplaced, because it ignores the idea that most cases reflect the tenor of the times. When *Dennis* was decided in 1951, McCarthyism was at its peak. Within the preceding two years, mainland China had become a Communist state, the Soviet Union had detonated its first atomic bomb, and North Korea had invaded South Korea. Alger Hiss, a former State Department official, had been convicted of perjury. Ethel and Julius Rosenberg had been executed for passing nuclear secrets to the Soviets. The Red Scare was in full bloom.  

Elected in 1946, McCarthy believed that by the 1950’s the highest levels of American government, including the State Department, had been infiltrated by communists, who were causing various failures in American foreign policy. He made this claim most famously in a 1950 Lincoln Day speech in Wheeling, West Virginia – in which he professed to know, without any apparent evidence, the names of 205 Communists working in the State Department.  

Internal investigations were nevertheless conducted by various liberal organizations – such as the Congress of Industrial Organizations, the NAACP, and the American Jewish Committee – which subsequently expelled members alleged to be communists. In 1954 Hubert Humphrey – the liberal co-founder of Americans for Democratic Action – proposed legislation to outlaw the Communist Party. Against
this backdrop, it is unrealistic to expect that a majority of the Supreme Court could have denied the constitutionality of loyalty oaths, anti-communist investigations, or criminal prosecutions for subversion.\textsuperscript{157}

Although the American Civil Liberties Union and some journalists – notably Edward R. Murrow – fought strongly against McCarthyism, the general paranoia about the evils of communism diluted their opposition. Many lawyers hesitated to defend liberal-minded clients.\textsuperscript{158} But even the ACLU was divided over whether to regard Communist Party affiliation as protected by the First Amendment.\textsuperscript{159} Until the early 1960's, in fact, the ACLU itself included a strong anti-communist disclaimer in every brief it filed.\textsuperscript{160}


\textsuperscript{158} Some claim the ACLU’s equivocation contributed to the era’s anti-communist hysteria. See Corliss Lamont, The Trial of Elizabeth Gurley Flynn by the American Civil Liberties Union (1968) at 22; and Jerold Simmons, The American Civil Liberties Union and the Dies Committee 1938-1940, 17 Harv. C.R.-C.L. L. REV. 183, 206-07 (1982).


\textsuperscript{160} For example, the ACLU’s anti-communist faction proposed three controversial new policies regarding communism in 1953. The statements condemned the Communist Party suggested that communists might be unfit to teach, endorsed the consideration of political associations in employers’ hiring and firing decisions, and approved firing those who invoke the Fifth Amendment in response to questions about subversive associations. In 1949, the ACLU adopted an anti-Communist resolution opposing “any form of ... the single party state, or any movement in support of them.” Minutes of the Board of Directors (Aug. 2, 1954), microformed on American Civil Liberties Union: Records and Publications 1917-1975, Reel 12 (Microfilming Corp. of America); see also Charles L. Markmann, The Noblest Cry: A History of the American Civil Liberties Union 171-72 (1965). Future ACLU Executive Director Aryeh Neier conceded that “[i]t was tough in the 50s to defend communists and we ran away.” J. Anthony Lukas, The ACLU Against Itself, N.Y. Times Magazine, July 9, 1978, at 11. See also David Caute, The Great
A Senate investigation later dismissed McCarthy’s claims about Communists in the State Department as fraudulent. 161

In May of 2003, Congress released some of the theretofore-secret archives of the Senate’s permanent subcommittee on investigations. McCarthy, it turns out, preferred to screen witnesses prior to their appearance in open session so that he could weed out those who were more combative and articulate. He chose only those who gave the impression of being weak or confused, or who would cast doubt on their veracity by invoking their Fifth Amendment right against self-incrimination. Nevertheless, despite repeated threats that witnesses who refused to cooperate would be jailed for perjury, none of them ever were. But dozens of them, including 42 Army engineers, lost their jobs after testifying. 162

Vietnam

The Supreme Court’s disposition on civil liberties during the Vietnam era was varied. On the one hand, the Court upheld the conviction of David Paul O’Brien for burning his draft card on the steps of the South Boston Courthouse, in the process rejecting his claim that he was merely engaging in political expression protected by the First Amendment. The Court refused to accept O’Brien’s contention that the motivation behind the statute forbidding destruction of draft cards was to suppress anti-draft and


anti-war speech, instead ruling that the law served the government’s legitimate interest in maintaining an effective selective-service system.\textsuperscript{163}

On the other hand, in \textit{New York Times Co. v United States} (the “Pentagon Papers” case),\textsuperscript{164} the Court rejected the government’s efforts to halt publication in the \textit{Times} and the \textit{Washington Post} of a stolen, top-secret military report detailing the history of American military involvement in Vietnam. Here, the government contended publication of the document would compromise ongoing military operations and peace negotiations, and was likely to endanger the lives of American soldiers in battle or captivity. But the majority of the Court concluded that the First Amendment rights of the newspapers and their readers were superior to the military concerns.\textsuperscript{165}

In \textit{Cohen v. California}\textsuperscript{166} and \textit{Gillette v. United States},\textsuperscript{167} both decided during the Vietnam War, the Court refused to enforce laws which prohibited speech condemning the draft and the rights of religious objectors. Indeed, it was at the height of Vietnam and of the Cold War when the Court finally overruled \textit{Whitney v. California},\textsuperscript{168} rejecting the old criminal-syndicalism laws and permitting the government to punish those who advocated illegal action only if their speech is intended (and is likely) to produce “imminent lawless action.”\textsuperscript{169}

Thus, the Court found that general opposition to the war or defense effort, no matter how strongly expressed, is constitutionally protected. Just because such

\begin{footnotes}
\textsuperscript{164} 403 U.S. 713 (1971).
\textsuperscript{165} \textit{Id.} at 718-20, 722-24, 727, 739-40, 747. Justice Harlan wrote a dissenting opinion that appears to be consistent with Justice Rehnquist’s views: that the scope of judicial authority to overrule the executive’s national security judgments was “exceedingly narrow.”\textit{Id.} at 758
\textsuperscript{166} 403 U.S. 15, 91 S Ct 1780 (1971).
\textsuperscript{167} 401 U.S. 437, 91 S. Ct. 828 (1971).
\textsuperscript{168} Whitney v. California, 274 U.S. 357 (1927).
\end{footnotes}
expression might be seen or heard by members of the active armed forces, or might have some detrimental effect on recruitment or the draft, is not sufficient to deny First Amendment protection.

This point was underscored in the 1966 case of Bond v. Floyd. Julian Bond had been elected to the Georgia House of Representatives, but the state legislature refused to give him a seat because of his statements opposing the draft and criticizing American policies in Vietnam. At that time Bond was communications director of the Student Non-Violent Coordinating Committee, which had issued a strong statement opposing the war:

We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia, and in the United States itself.

We maintain that our country’s cry of “preserve freedom in the world” is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies. We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the “freedom” we find so false in this country.

We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well it may cost their lives as painfully as in Vietnam.

The Court unanimously held that the refusal to seat Bond violated his First Amendment rights: “Certainly there can be no question but that the First Amendment


\[\text{\footnotesize 171} \] Bond, 385 U.S. at 119-21.
protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system."\textsuperscript{172}

This position stood in stark contrast to the Court’s early First-Amendment jurisprudence, especially as expressed in the World War I-era cases of \textit{Schenk} and \textit{Debs}. While much of that evolution took place in circumstances not involving wartime dissent, \textit{Bond} confirmed the current more expansive reading of free-speech guarantees against national-security claims. Although the Court simply declared that the statement in \textit{Bond} was protected (without reference to clear-and-present-danger or balancing criteria), it did articulate the idea that free and open debate of wartime policies and regulations is essential to the life of a democracy.\textsuperscript{173}

Thus, by the mid-1960's a general right to express strong dissent to war and defense policies had come to be broadly tolerated. Even if the government chooses to disregard or reject the opposition, it recognizes the inevitability of such protest in a society that aspires to remain democratic. By now the issue was no longer the right of open dissent, but the extent to which the First Amendment protects expression specifically urging resistance to the Selective-Service laws, and the proper Constitutional line to be drawn between “expression” and “action” in various forms of protest.\textsuperscript{174}

The draft-card burning cases of the 1960’s focused directly on the difficulty of separating governmental control of expression from governmental control of action. Although the Selective Service Act did not then specifically prohibit the intentional destruction of draft cards, it did require all those registered to have their cards in their

\textsuperscript{172} Id. at 132.


\textsuperscript{174} Id. See also President Johnson’s press conference of November 18, 196, as reported in the N.Y. TIMES at 1, col. 1.
possession at all times.\textsuperscript{175} Violation of this regulation was punishable by a fine of $10,000 and/or imprisonment for five years.\textsuperscript{176} In 1965, Congress passed an amendment to the Selective Service Act which provided that anyone who “knowingly destroys [or] mutilates” a draft card is subject to penalties under the Act.\textsuperscript{177}

Following passage of this amendment, the number of draft-card burnings increased and several prosecutions ensued. All of the courts involved, however, concluded that draft-card burning is expressive conduct that comes within the purview of the First Amendment. All of them relied upon the balancing test – with one court balancing in favor of First Amendment rights\textsuperscript{178} and three others against.\textsuperscript{179}

Meanwhile, expression urging or advising resistance to the draft was on the increase. In September of 1967, for example, a group of 320 ministers, professors, and writers signed a document entitled “A Call to Resist Illegitimate Authority,”\textsuperscript{180} in which they recounted various methods of resistance to the war being used by different persons, including the refusal to be inducted. “We believe that each of these forms of resistance against illegitimate authority is courageous and justified.”\textsuperscript{181} The U.S. Conference on Church and Society, including Catholic, Protestant, and Jewish leaders, issued their own

\textsuperscript{175} 32 C.F.R. §§ 1617.1, 1623.5 (1957).
\textsuperscript{176} 50 U.S.C. App. § 462(b)(6) (1964).
\textsuperscript{178} O’Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967).
\textsuperscript{179} United States v. Miller, 88 S. Ct. 1673 (1968); United States v. Smith, 368 F.2d 529 (8th Cir. 1966); United States v. Cooper, 279 F. Supp. 253 (D. Colo. 1968). See also Emerson, supra note \_1004 (“[E]nforcement of the law against acts of civil disobedience may spill over into suppression of freedom of expression. In these and other ways there is a tension between these two means of political communication, speech and action.”)
\textsuperscript{180} A CALL TO RESIST ILLEGITIMATE AUTHORITY, IN CIVIL DISOBEDIENCE THEORY AND PRACTICE, at 162.
\textsuperscript{181} DECLARATION OF CONSCIENCE AGAINST THE WAR IN VIETNAM, IN CIVIL DISOBEDIENCE THEORY AND PRACTICE, at 160 (Hugo A. Bedau ed. 1969).
public statement: “We hereby publicly counsel all who in conscience cannot today serve
in the armed forces to refuse such service by non-violent means.”182

Although anti-war protests were widespread, they were generally tolerated as
constitutional free speech. Nevertheless, dissent was stifled by way of various forms of
harassment from the executive and legislative branches of government. For example,
while President Johnson acknowledged the right of citizens to protest, he also let it be
known that he “was dismayed by the demonstrations” and he gave his “full endorsement
to the Justice Department’s Investigation of possible Communist infiltration of the anti-
draft movement”;183 and he said that the Federal Bureau of Investigation “was keeping an
eye on anti-war activity.”184 Former Attorney General Nicholas Katzenbach told a news
conference that “the Justice Department [has] started a national investigation of groups
behind the anti-draft movement,” adding that “[t]here are some Communists involved in
it; we may very well have some prosecutions.”185 Six months later the national secretary
of the Students for a Democratic Society said that there “seems to be a national
investigation” of his organization by the F.B.I.186 There was also evidence that
opposition to the Vietnam war was being taken as unfavorable evidence in loyalty-
security investigations.187

182 N.Y. TIMES, Oct. 26, 1967, at 10, col. 8. Similar expressions have been made by numerous
organizations and individuals.
184 N.Y. TIMES, April 16, 1967, at 1, col. 1.
186 N.Y. TIMES, April 19, 1966, at 6, col. 1.
Similar assaults upon wartime dissent came from Congress. Many legislators denounced opposition to the war as disloyal conduct.\textsuperscript{188} In 1965, the Senate Internal Security Subcommittee made public a staff report which attacked a number of individuals as having “persistent records of Communist sympathies and/or of association with known Communists and known Communist movement and front organizations,” and asserted that the antiwar demonstrations had “clearly passed into the hands of Communists and extremist elements.”\textsuperscript{189} The named individuals were not given the opportunity to reply.

In March of 1967, the House Committee on Un-American Activities issued a report on a protest scheduled for April known as Vietnam Week, the theme of which was stated as follows: “The real objective of Vietnam Week is not the expression of honest dissent to promote the best interest of the American people and their Government, but to do injury and damage to the United States and to give aid and comfort to its enemies.”\textsuperscript{190}

Other forms of harassment included harsh physical interference by police officers against anti-war demonstrators, as well as intimidation (e.g., photographing of persons participating in peaceful antiwar marches and vigils). There were also attempts by draft boards to accelerate the induction of antiwar demonstrators have also occurred.\textsuperscript{191}

Summarizing the situation in June 1967, the American Civil Liberties Union said:

[T]o applaud the fact that dissent has not been muted, despite the rising emotionalism of the Vietnam War, is not to say we may relax the civil libertarians’ vigil. There are signs, ominous signs, that a storm is brewing.


\textsuperscript{189} Senate Comm. on the Judiciary, Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, the Anti-Vietnam Agitation and the Teach-In Movement: The Problem of Communist Infiltration and Exploitation, S. \textit{Doc. No. 72}, 89th Cong., 1st Sess. 45 (1965) at xv.


\textsuperscript{191} Emerson, \textit{supra} note 1006.
The random collection of incidents attached to this statement illustrate[s] the steadily accelerating strains on unpopular expression. Such instances show that dissent is now the object of official and private intimidation and harassment. Unless these, and others, are vigorously and courageously opposed, unless the right and importance of dissent are re-affirmed and defended, the nation could slip back into a new era of McCarthyism with its dangers to a free society – fear, conformity, and sterility.\textsuperscript{192}

In January of 1968, the Constitutional issues involved in this form of expression were raised by the indictment of five members of the group which had issued “A Call to Resist Illegitimate Authority.”\textsuperscript{193} The defendants – Rev. William Sloane Coffin, Jr., Michael Ferber, Mitchell Goodman, Marcus Raskin, and Dr. Benjamin Spock – were charged with conspiracy to “counsel, aid and abet diverse Selective Service registrants [to] refuse and evade service [and to] fail and refuse to have in their personal possession registration certificates and notices of classification [draft cards],” as required by the Selective Service regulations; and with conspiracy to “hinder and interfere” with the administration of the Selective Service Act, all in violation of section 462(a).\textsuperscript{194}

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Ironically, contrasted with past censorship, the Vietnam War provided the press with an unprecedented opportunity for freedom. Throughout the conflict, accredited journalists had almost unfettered access to the wartime theatre – even permitted to ride along with military transports. They faced virtually no censorship. In return, the military simply asked that the press refrain from reporting items such as planned offensive and

\textsuperscript{192} American Civil Liberties Union, \textit{The Vietnam War and the Status of Dissent}, June 4, 1967.

\textsuperscript{193} \textit{A Call to Resist Illegitimate Authority} and \textit{Declaration of Conscience Against the War in Vietnam}, supra at note 178.

troop movements. In fact only a handful of violations of the limited guidelines occurred.\textsuperscript{195}

Nevertheless, the Vietnam War resulted in a significant deterioration in press-military relations, in large part because reporters began to mount their own opposition to the war. Increasingly, the media were filled with negative stories concerning the United States’ war effort, such as the widespread use of napalm and Agent Orange.\textsuperscript{196} The media’s distrust and cynicism was likewise inflamed after the Joint U.S. Public Affairs Office started regularly to manufacture victories and exaggerate enemy casualties.\textsuperscript{197}

After the war, large numbers of servicemen were left with a sense that the press was biased, sympathetic to the enemy, and ultimately responsible for the loss of public support for the war. Young soldiers from Vietnam would eventually take commanding positions in the military, and in later conflicts their memories and impressions of an unpatriotic press would serve to shape the military’s restrictions on the media.\textsuperscript{198}

\textit{Grenada}

In 1979, a bloodless coup led by Maurice Bishop took place on the Caribbean island of Grenada, and the new ruling junta began to develop increasingly strong military and economic ties with Cuba and the Soviet Union. Four years later, in 1983, Bishop

\begin{footnotesize}
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\item The press dubbed the military’s daily briefings as the “Five O’Clock Follies.” Zelnick, \textit{supra} note 189 at 31.
\item Id.
\end{enumerate}
\end{footnotesize}
was deposed and executed; martial law was imposed, and Grenadan troops were ordered to shoot any curfew violators.199

In October of 1983, faced with a growing threat to Americans and American interests in Grenada, the United States and six neighboring nations sent troops into the island. The only resistance they faced came from about 1000 Cuban construction workers/militiamen, who held out for two days.200

The invasion occurred in almost total secrecy, because – for the first time in American history – reporters were completely excluded from observing any part of the military operation.201 The government enforced the news blackout by refusing to transport the press to Grenada, turning away chartered press boats, and removing any reporters who had already reached the island.202 During this period, the only news about Grenada to reach the American public came from the Pentagon and the White House.203 The press were not granted access to the island until the civilian airport reopened – eleven days after the fighting ceased.204

Officials in the Reagan administration and in the military offered several reasons for the news embargo. Secretary of Defense Caspar Weinberger claimed that the

203 Cody, supra note 199 at A11, col. 1.
invasion force was not large enough to insure the safety of the press – and that he simply complied with the wishes of the military commander who did not want press coverage of the operation. General John W. Vessey, Jr., Chairman of the Joint Chiefs of Staff, defended the press exclusion on the ground that the success of the mission depended on the element of surprise. Retired Vice Admiral William Mack speculated that the military force was already at sea when the government decided to invade: “You couldn’t put the press aboard without a difficult flight to the ships.”

But this explanation rings hollow. Although in the past the government and the press, working together, have insured operational security and secrecy without resorting to a total news ban, members of the press do not seek a guarantee of safety when they cover wartime news. The obstacles to providing for press coverage of the Grenada operation were no more severe than those encountered during previous military operations.

The media reacted angrily to the exclusion policy in Grenada. Editorials in daily newspapers condemned the news blackout, and commentators contrasted the Grenada experience with the freedom of access to war stories that reporters have had in earlier conflicts. Ten news organizations released a statement calling for the government to “reaffirm the historic principle that American journalists” should be present at U.S.

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207 Engber at 878.

208 See, for example, Editorial, WASH. POST, at A22, col. 1; Editorial, N.Y. TIMES, Oct. 28, 1983, at A26, col. 1. 

military operations,” and to guarantee that future “military plans should include planning for press access.”

Meanwhile (in November 1983), General Vessey established the Media-Military Relations Panel to develop proposals for future press coverage of military conflicts. This commission, named the “Sidle Panel” after its chairman (retired Major General Winant K. Sidle), was comprised of representatives from journalism schools, the military, and the press. The Sidle Panel sent questionnaires focusing on press access and censorship to major news organizations, and held hearings at which the news media asserted that the press has a right, grounded in both the First Amendment and historical practice, to cover wartime news. Some organizations opposed censorship in any form. Most press representatives acknowledged the need for military accreditation of reporters.

Although the government claimed to recognize the public’s right to information about military operations, it emphasized the need to strike a balance between the public’s right to information and the military’s security concerns. Particular concern was expressed about television news coverage and the attendant risk of compromising security.

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213 Letter from Keith Fuller, Executive Vice President, Associated Press, to General John W. Vessey, Jr. (Jan. 23, 1984).

operational security. “On-scene review before transmission” was suggested, together with accreditation of reporters by the Pentagon in order to discourage sensational or inaccurate coverage.215

The Sidle Panel concluded that “it is essential that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces.”216 The panel recommended development of a press-pool system for combat zones in remote or otherwise inaccessible areas, under which selected members of the press would be formed into small groups (“pools”) and allowed to access restricted areas on the condition that they share their information with excluded colleagues. However, the panel emphasized that the pools would only be used in the initial stages of combat, not as the principal means of coverage.217

The panel also recommended that the military develop “security guidelines” governing press coverage of operations (violation of which would result in a reporter being excluded from the operation) and that the Pentagon expand programs designed to improve media-military communications and understanding.218

In October 1984, the Defense Department announced that it had created a press pool that could be assembled on short notice to cover military operations. Although the goal was provide for full coverage within twenty-four to thirty-six hours, the decision to extend the use of press pools beyond that period would rest with the operation commander. In a departure from past practice, the military, rather than the news media,
would select the news organizations that would participate in the pool. The Pentagon, however, reserved the right to decide against bringing the press on a particular military action.

Although some members of the press criticized the vagueness of the report and the institution of a pool system, initial media response to the Sidle panel’s report was favorable. The press agreed to the pool arrangement primarily to get access to the front line. They formed a group to stand by in readiness for any military operation.

The Persian Gulf War

Although the press-pool idea had been used in Panama in 1989 – where news of the operation immediately leaked and the military criticized the media’s inability to keep the mission a secret – the Persian Gulf War was the first major conflict to test the pool system.

On August 2, 1990, Iraq invaded Kuwait, which immediately requested assistance from the United Nations. In mid-January of 1991, a coalition of U.N. forces (led by the United States) attacked both Iraqi forces in Kuwait and military targets in Iraq. Over the next seven weeks, Americans witnessed instantaneous media coverage of the conflict – including that from a CBS news team which drove to the front line and was captured by

221 Cassell, supra note at 945-6. See also Peter Schmeisser, Shooting Pool, THE NEW REPUBLIC, Mar. 18, 1991; at 21, 22.
Iraqi soldiers, and from a CNN correspondent who broadcast live from behind enemy lines.  

In general the public believed it was being told the truth about Operation Desert Storm, and did not consider the reports of stunning, virtually casualty-free victories for the coalition, as anything but factual. By contrast (Americans were told) the Iraqi people were deliberately misled by a government-controlled media, which were publishing false accounts of great losses by the coalition forces.  

Hindsight affords the opportunity to examine more accurately the U.S. military censorship that did take place. Saudi Arabia, it turned out, was described as one of the most hostile nations in the world to the notion of press freedom. The Pentagon interceded on behalf of the American press corps to demand and secure visas and transportation into the war zone. In exchange, the press agreed to certain rules of conduct and guidelines: the media were told what information could not be reported because it might jeopardize operations and endanger lives, their reports were subjected to security review prior to release, and access to the front line was restricted to one member of the media pool.

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229 A pool included a representative from each news medium. Office of Ass’t Secretary of Defense (Public Affairs), CENTCOM Pool Membership and Operating Procedures (Jan. 30, 1991). Each medium controlled its own pool members. Id. Membership in a pool rotated every two or three weeks. Id. To be
The number of reporters allowed into the pool was tightly limited.\textsuperscript{230} Even pool reporters were highly restricted in the scope of their coverage. Virtually ignored was one of the Sidle Panel’s principal recommendations – that pool coverage be limited to those situations where it is the only feasible way of getting reporters to the scene.

The Pentagon chose not to publicly release any negative footage, only videos illustrating the unfailing accuracy of the bombs. Throughout Desert Storm, briefing officers were able to craft the impression of a high-tech war operation, cultivating the perception that its firepower seldom missed the target – in general, telling the public only what they wanted it to know.\textsuperscript{231} In contrast to the sensational photographs and video offered up at press conferences, after the conflict ended the Pentagon disclosed that the much-ballyhooed “smart bombs” made up only seven percent of the U.S. explosives dropped on Iraq and Kuwait. While the smart bombs were ninety-percent accurate, the 81,980 tons of conventional bombs were merely twenty-five-percent accurate.\textsuperscript{232}

Similarly, it came to light that restrictions had been placed on images of recognizable casualties, scenes of fighting, or anything resembling a religious observance.\textsuperscript{233} Only thirty-eight of the 1,104 Operation Desert Storm photographs in eligible for pool selection, a reporter had to maintain: (a) a continuous presence of at least three weeks in Saudi Arabia; and (b) a long-term presence covering Department of Defense operations. \textit{Id.} By the end of the war, nearly 20 18-member pools had been established.

\begin{footnotesize}
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\item \textsuperscript{232} Barton Gellman, \textit{U.S. Bombs Missed 70 Percent of the Time}, in \textit{THE MEDIA AND THE GULF WAR} 197 (Hendrick Smith ed., Seven Locks Press 1992). Senior officers had the opportunity to view extensive footage of the bombs missing their targets – some hitting civilian buildings. \textit{Id.}
\item \textsuperscript{233} See generally Kenneth Lasson, \textit{Religious Liberty in the Military: The First Amendment under Friendly Fire}, 9 J. L. & RELIGION 471 (1993). See also, Kenealey, \textit{supra} note at 292; and Smith, \textit{supra} note at 203.
\end{itemize}
\end{footnotesize}
America’s three major news-magazines showed actual combat activity. Overall, there was virtually no coverage of the ground war until it was over.\footnote{Jeffery A. Smith, War and Press Freedom 34 (Oxford University Press) (1999).}

Meanwhile, journalists who tried to function outside of the pool system were often detained or denied access completely. “[W]e didn’t have the freedom of movement to make an independent assessment of what the military is all about,” said one reporter. “Everything was spoon fed.”\footnote{Michael Getler, Do Americans Really Want to Censor War Coverage This Way?, in The Media and the Gulf War 160, 166 (Hendrick Smith ed., Seven Locks Press 1992) (quoting retired Army Col. David Hackworth).} Another said that he “had more guns pointed at me by Americans or Saudis who were into controlling the press than in all my years of actual combat.”\footnote{Cover letter accompanying Report of 17 News Executives to Secretary Richard Cheney, Covering the Persian Gulf War (June 14, 1991). See also Kenealey at 290-91 and Zelnick at 37.} The pool system was called “a disaster,” “dysfunctional,” and “a smoothly functioning dictatorship.”\footnote{Laurence Jolidon, Military Pool Broke Down, Gannett News Service, March 4, 1991 (quoting Peter Copeland of Scripps-Howard). Howard Kurtz, Journalists Say "Pools" Don't Work: Lack of Access Hampers Coverage, WASH. POST, February 11, 1991, at A1 (quoting Chris Hedges, New York Times reporter and Stanley Cloud, Time magazine's Washington bureau chief).} According to various media spokes-people, the restrictions made it impossible for reporters and photographers to tell the public the full story of the war in a timely fashion. Yet, the military continued to use pool coverage and enforce its restrictions for nearly every facet of Desert Shield and Desert Storm.\footnote{Kurtz, supra note 231.}

The disagreement between the press and the military during Operation Desert Storm mirrored the arguments of the past. The media complained that the command was stingy with information, that whatever was disclosed was varnished to such a high public-
relations gloss that the accuracy was suspect, and that government censorship was preoccupied with style and packaging as opposed to substance. 239

Numerous courts and commentators have recognized that, even if the press has no constitutional right of access to the front line in a foreign war zone, an informed citizenry is essential to a democracy. As the Supreme Court has put it, “[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”240 In seeking out the news the press therefore acts as an agent of the public at large.”241

This function is even more important when there is a foreign conflict. Then, it becomes essential that the government be “vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice, of life and liberty, or prolonged after its just purposes are accomplished.”242 Press access, in the broadest terms, permits the public to serve as a check on executive power, foreign policy, and the military.243


241 Saxbe, 417 U.S. at 863.

242 See Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31 (1941) (social interest in vote of freedom of press especially important in wartime).

On the other side, the command accused the media of being petulant, meddlesome, and recklessly unsympathetic to the realities of military operations.244

It can be seen that the competing considerations bearing on the press’ right of access in times of war – we do not want to compromise our military efforts, yet we want to be kept honestly informed – were on classic display. American strategy called for a large-scale ground attack from an unpredictable direction – a plan later credited with having enabled the coalition to retake Kuwait without suffering heavy casualties.245 Obviously, if the press had reported this maneuver in advance, the critical element of surprise could have been severely compromised.246

Dissatisfied members of the media challenged the government’s system of restraints in court. In Nation Magazine v. United States Department of Defense247 the complaint was dismissed as moot and too abstract. Past injury alone, according to the court, “is not sufficient to merit the award of relief against future conduct.”248

The quick and apparently successful conclusion of the Persian Gulf War served to preserve the Supreme Court’s policy of delicate avoidance. In the future, it is likely the Court will still have to address once again the difficult issue of military censorship. If it is to remain consistent with the standing principals on prior constraint, the Court will have to place a heavy burden of persuasion on the military. On the other hand, the desire

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246 Zoglin, It Was a Public Relations Rout Too, TIME, Mar. 11, 1991, at 56. But from another perspective the Gulf War was a disaster for relations between the military and the media. See Jonathan Alter, In Bed with the Pentagon, NEWSWEEK, March 10, 2003 at p. 45. See infra note 442 and accompanying text.


not to interfere with successful war-waging might compel the Court to relax the burden – thereby weakening the policy against government censorship that lies at the core of the First-Amendment protection for the press.\textsuperscript{249}

Prior restraints deal with speech, and the right of access deals more with conduct. There are strong arguments that the media’s claim of a right of access involves more “conduct” than “speech,” and is therefore outside the protection of the First Amendment.\textsuperscript{250} The Supreme Court has often relied on this distinction, in several cases holding that the press’ news-gathering activities are subject to regulation because they do not directly involve speech.\textsuperscript{251}

This debate will likely resurface each time America becomes involved in war.\textsuperscript{252}

\textit{The Rehnquist Thesis}

The late Chief Justice William Rehnquist weighed in with his own analysis of the status of American civil liberties during wartime in his 1998 book, \textit{All the Laws but One}. However, its underlying premise – that there are times when civil liberties must be subordinated to national security – is flawed.

Rehnquist contrasts Lincoln’s suspension of habeas corpus during the Civil War with restrictions authorized by Congress during World War I, when the executive branch

\begin{footnotes}
\textsuperscript{250} \textit{Id}.
\textsuperscript{252} The war in Iraq engendered a new press policy, under which the Pentagon “embeds” 500 correspondents for up to two months with American combat units, twenty percent of whom will come from the foreign press. Alter, \textit{supra} note 240 (“Will some media . . . end up “in bed” with their military protectors? . . . Not clear, but one thing we know: for now, . . . the anger that military officers felt toward the news media during the Vietnam War has subsided. They need every reporter in the region – no matter how skeptical – to help fight Saddam Hussein in what may be the mother of all propaganda wars.”).
under Woodrow Wilson was granted powers to punish and silence subversive speakers. Although the latter period saw no trials of civilians before military courts (and an increased involvement of the civil courts in the adjudication of individual-rights claims), Rehnquist concludes that the Wilson administration had the same instinctive desire to suppress harsh criticism of the war effort as had Lincoln’s administration during the Civil War.²⁵³

According to Rehnquist, the Court’s reluctance to countermand the government during wartime is inevitable, even desirable. In an interview following publication of his book, he speculated on what he might have decided to do under similar circumstances:

I think one of the most difficult things in the world to do, is to second-guess people who were in leadership positions at that time. . . . . [I]t’s very easy, in the atmosphere of the late 1990s, to say something was a very bad thing to have done. But so far as criticizing people who were in leadership positions at that time, you’ve got to realize they operated under the ethos and the standards of the times in which they lived.²⁵⁴

The Chief Justice points out that these military officials were not entrusted with the protection of anyone’s civil liberties, but to make sure that vital areas were as secure as possible from espionage or sabotage. The traditional unwillingness of courts to decide constitutional questions unnecessarily serves to illustrate the Latin maxim, Inter arma silent leges: “In time of war the laws are silent.”²⁵⁵

²⁵³ REHNQUIST at 182.
²⁵⁵ Rehnquist at 202, quoting Cicero. There was no reason, says the Chief Justice, to think that Gordon Hirabayashi and Fred Korematsu were any less loyal to the United States than was Mitsuye Endo. But the Court in Hirabayashi confined itself to the issue of the curfew, not the requirement to report to the relocation center, and it appears that a majority of the Court at the time (June 1943) was unwilling to say that one detained in a relocation center would be entitled to release upon a finding of loyalty. It wasn’t until a year and a half later that the Court came around to this view in Endo, when the United States’
Nor is Rehnquist especially concerned about the evacuation and internment of the Issei, who “were both by tradition and by law in a quite different category” from their citizen children, the Nisei. “Distinctions that might not be permissible between classes of citizens must be viewed otherwise when drawn between classes of aliens.” Due to genuine fears of Japanese attack and invasion of the West Coast, and because the Issei were so concentrated in that area, the Chief Justice argues that the government was justified in relocating them.256

If the courts are prone to judicial reluctance during wartime, would it not be better to withhold a decision until after the war when they would be more inclined to follow judicial norms? We must recognize, says Rehnquist, the human factor that inevitably enters into even the most careful judicial decision.257 But Rehnquist makes no apologies for treating civil liberties differently during time of war:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order – in favor of the government’s ability to deal with conditions that threaten the national well-being. . . . And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.258

For example, Rehnquist compares the internment of Japanese-Americans with the less restrictive treatment of German-Americans and Italian-Americans. The Issei, he says, were tightly concentrated along the West Coast, where Japanese military activity

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256 Strangely, Rehnquist does not address the fact that the Nikkei of Hawaii were never evacuated from the island and never interned. Muller, supra note 9 at 1406.

257 A pertinent example is Duncan, determining whether a stockbroker could be tried for fraud by a military court in Hawaii in 1943. “One need not wholly accept Justice Holmes’s aphorism that ‘the life of the law has not been logic.’” REHNQUIST at 222. See also Langham, supra note at 245.

258 REHNQUIST at 222-23.
was feared – whereas Germans and Italians were more dispersed along the East Coast, where the perceived danger was the sinking of ships rather than bombings or troop invasions. This, though it was on the East Coast where two groups of Nazi soldiers did in fact infiltrate the mainland United States with the goal of attempting sabotage, and did so with the assistance of American citizens of German descent.259

In other words, according to Rehnquist, the government decided to evacuate/intern all Japanese-Americans living on the West Coast for essentially military reasons.260

Rehnquist cites various judicial declarations to make clear that the government’s authority to infringe upon civil liberties is greatest in time of declared war.261 “When a nation is at war many things which might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight,” wrote Justice Oliver Wendell Holmes in Schenck.262 “Otherwise impermissible ethnic or racial distinctions may be permissible during wartime,” said Chief Justice Harlan Stone in Hirabayashi.263 “A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few,” observed Judge Learned Hand.264

Besides his assertion that the balance between an individual’s interest in freedom and the government’s interest in order must shift during wartime in favor of the government; Rehnquist concludes that there is no reason to think future wartime

259 See Ex Parte Quirin, 317 U.S. 1 (1942).
260 REHNQUIST at 136-37 and 187-188.
261 REHNQUIST at 218.
262 249 U.S. 47, 52 (1919).
263 320 U.S. at 100.
presidents will act differently from Lincoln, Wilson, or Roosevelt. Also, future Justices will decide questions no differently from their predecessors – avoiding or narrowing their interpretation of the Bill of Rights until after the crisis is over. And this, according to Rehnquist, is an altogether desirable result.265

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The primary problem with Rehnquist’s thesis is that it is based upon a highly filtered reading of history, one that fails to recognize or assess the extent of the harms done that later proved needless.

For example, in discussing Lincoln’s suspension of habeas corpus during the Civil War, he appears unfazed by the fact that suspects could not seek review in civil courts and were subject to trial by military tribunals for offenses unknown to civil law – that, in one observer’s words, Lincoln had created an “extra-judicial system of freewheeling military justice”266

Rehnquist also leaves out events that run counter to his thesis – such as when Lincoln exempted the Jews of Tennessee from General Grant’s over-reaching expulsion order. He disapproves of the Court’s decision in Milligan (in which the majority of the Justices rejected the government’s defense of Lincoln’s wartime regime of military justice for civilians), saying the court went out of its way to “to declare that Congress had no authority to do that which it never tried to do.”267

Rehnquist similarly slants Twentieth-Century wartime deprivations of civil liberties. Describing the internship of Japanese-Americans, he glosses over deprivations

265 REHNQUIST at 221-224.  
266 Muller, supra note ___ at 1399.  
267 REHNQUIST at 137.
endured by the internees. He ignores Justice Jackson’s ringing dissent in *Korematsu.*

Nor does he adequately address the question of why the East-Coast Italians and Germans were not treated in a similar way to the Japanese – even though some of the latter were caught trying to commit sabotage. Nor does he address the fact that that there were no instances of Japanese subversion on the U.S. mainland.

Rehnquist also fails to make any mention of other deprivations of civil liberties, such as the editorial censorship of James Omura’s newspaper, the grand-jury investigation of the America First Committee, the harassment of Dellinger’s People’s Peace Now organization, the conviction of William Dudley Pelley and the Fellowship Press, the indictment of Joseph McWilliams, and the conviction of Elmer Hartzel.

Similarly, the late Chief Justice ignores or minimizes the Twentieth-Century wartime victories won by libertarians. For example, Congress refused to ratify Woodrow Wilson’s proposal to subject a person to up to ten years imprisonment and a $10,000 fine for publishing anything deemed by the President to be useful to the enemy. Wilson himself opposed a bill suggested by an assistant attorney general that would authorize military trials and the death penalty for civilians who interfered with the war effort.

\[268 \text{Id. at 201.} \]
\[269 \text{Id. at 210.} \]
\[270 \text{See supra notes and accompanying text.} \]
\[271 \text{Muller, supra note 9 at 1418 (citing HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES: 1917-1921 63 (Cornell 1960). In 1917, the general conviction rate in federal court was 70 percent. Department of Justice, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1917 125 (GPO 1917). In 1918, the rate was 75 percent. Department of Justice, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1918 156 (GPO 1918). The 1919 rate was 72 percent. Department of Justice, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1919 120 (GPO 1919). In 1920, the rate dropped to 69 percent, where it remained for the year 1921 as well. Department of Justice, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1920 201 (GPO 1920); Department of Justice, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1921 151 (GPO 1921).} \]
Rehnquist likewise chooses to disregard federal judge Louis Kaufman’s opinion in *U.S. v. Kuwabara*, chastising the government: “It is shocking to the conscience that an American citizen [can] be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion.”272

*All the Laws but One* says barely anything about the Korean or Vietnam Wars. Rehnquist gives short shrift to the *Pentagon Papers* case, in which the Supreme Court found that the government had not met its burden of proof that there was enough of a threat to national security to justify prohibiting the *Washington Post* and *New York Times* from publishing wartime documents.273

Not surprisingly, Rehnquist avoids mentioning instances where wartime Presidents and courts have exercised restraint before limiting liberties, and to decline discussing non-war situations that likewise threatened the national security.274

How would Rehnquist explain the Court’s pro-speech decisions during the Vietnam era, when the government was unable to control the widespread anti-war sentiment that took place around the country? At that time there was substantial domestic turmoil. The anti-war and anti-draft movements were as vocal as any such movement during World War I.275

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273 See supra note 2 and accompanying text.
274 REHNQUIST at 218.
In short, *All the Laws but One* might be a good brief supporting his proposition that in wartime security needs trump individual rights, but it is a bad history. The political and judicial record on civil liberties in wartime is a good deal more complex than the simple black-letter case the Chief Justice presents.\(^{276}\)

\(^{276}\) Muller, *supra* note 9 at 1416-17.
II. THE “WAR” AGAINST TERRORISM

Shortly after the terrorist attacks of September 11, 2001, the government instituted a number of measures designed to enhance national security – including a broad range of espionage activity, 277 beefed-up immigration policies and controls, 278 the establishment of an Office of Homeland Security, 279 unlimited pre-trial detentions, 280 and secret military tribunals. 281 Many of the new practices and procedures were embodied in the USA Patriot Act of 2002. 282

The new regulations and legislation gave rise to serious questions about their underlying wisdom and reasonableness: the extent to which we should be willing to sacrifice individual liberties for national security, the justification for increased governmental spying on law-abiding citizens, and regulatory actions that are unrelated to terrorism and do nothing to stop it. 283

Civil libertarians – both liberals and conservatives (many of whom are uncomfortable with any governmental intrusion into personal freedoms) – feel that questioning the actions of an overreaching government is the essence of patriotism. Thus, wiretapping should be overseen by meaningful judicial review, law-enforcement agents

277 Within a month of the September 11th tragedy, a seven-judge court met in secrecy in a sealed room at the Justice Department and approved “black-bag” searches, wiretaps, and wiretapping in the interest of national security. See William Carlsen, Secretive U.S. Court May Add to Power: Bush Wants to Use Terrorism Panel in Criminal Probes, SAN FRANCISCO CHRONICLE, October 6, 2001 at p. A3.
283 See Nadine Strossen, ACLU Reaches Out to Skeptics, Students, CIVIL LIBERTIES (Fall 2002).
should notify occupants that homes will be or have been searched, and no one (neither citizens nor non-citizens, unless the danger they pose to the state can be clearly demonstrated) should be subjected to indefinite detention.\textsuperscript{284}

In an era when the potential for terrorist acts of mass destruction far more than theoretical, where should the line be drawn between protection of individual rights and national security?

\textit{Legislative Precursors to 9/11}

\textit{The Foreign Intelligence Surveillance Act of 1978}

Before passage of the Foreign Intelligence Surveillance Act in 1978, the CIA and FBI had illegally shared information with one another, creating a great expansion in the scope of domestic surveillance which resulted in investigations of political candidates, anti-war protesters, and civil rights leaders like Martin Luther King, Jr.\textsuperscript{285} Responding to these perceived abuses of domestic surveillance, particularly during the administrations of Lyndon Johnson and Richard Nixon, Congress sought (1) to regulate domestic electronic surveillance of foreign intelligence information, and (2) to protect national security by providing tools by which foreign intelligence crimes could be detected and prevented.\textsuperscript{286}

Under FISA, the federal government was allowed to conduct electronic surveillance of “foreign powers” and “agents of foreign powers” for foreign intelligence information, with judicial approval. To get approval for such surveillance under FISA, a

\textsuperscript{284} Susan Goering, \textit{Citizens Must Fight Attacks on Our Rights}, BALTIMORE SUN (10/28/02).

\textsuperscript{285} Id.

high-ranking government official was required to certify to the court that the purpose of the surveillance was to obtain foreign intelligence information. Courts in turn devised a “primary purpose” test, which required that the Department of Justice set up a procedure limiting contact between foreign intelligence agents in the FBI and federal prosecutors.\textsuperscript{287}

Application of the primary-purpose test, along with the policy of the Department of Justice, resulted in “a wall” that some believe prevented the discovery of intelligence that may have prevented the 9/11 attack. Following the events of 9/11, Congress responded to this concern by amending the original FISA in the Patriot Act, requiring the government to show that a “significant purpose” (as distinguished from the more difficult-to-prove primary purpose) of the surveillance is foreign intelligence gathering – ostensibly allowing for greater surveillance of American citizens.\textsuperscript{288}

\textit{Legislative Responses to 9/11}

Prior to 2001 there was some doubt as to whether international terrorism was on the increase or decrease. In fact the number of terrorist incidents and deaths during the 1990’s declined significantly in comparison with those recorded in the 1980’s.\textsuperscript{289}

All of that changed on September 11, 2001, with the demonically coordinated suicide attacks via hijacked domestic airliners.\textsuperscript{290} The simultaneous assaults, carried out in New York, Pennsylvania, and Virginia by nineteen avowed terrorists, killed close to

\textsuperscript{288}Id. at 324.
\textsuperscript{289}The exact figures were 5,431 incidents and 4,684 deaths during the 1980's, as opposed to 3,824 incidents and 2,468 deaths in the 1990's. Barry Gewen, \textit{Thinking the Unthinkable}, NEW YORK TIMES, September 15, 2002 at section 7, page 12.
3,000 people and have caused billions of dollars in property damage and insurance costs.  

Recent Federal Actions Limiting Civil Liberties

The Use-of-Force Resolutions

Both the United States and the North Atlantic Treaty Organization characterized 9/11 as an “armed attack” on the United States. This terminology was purposeful, signaling that the U.S. regarded the event as equivalent to an act of war under international law, as it was labeled by the President. Accordingly, for the first time in its history, NATO invoked its collective self-defense clause.

It followed naturally that on September 12, 2001 the U.S. would turn to the U.N. Security Council in hopes of obtaining a strong “use-of-force” resolution. What it received instead, however, was a statement of support – which specifically recognized America’s “inherent right of individual and collective self-defense in accordance with the Charter” and called on “all States to work together urgently to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks.” The resolution further addressed the issue of responsibility: “[T]hose responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.”

293 Addicott, 220.
296 U.N. Charter art. 51.
Although Congress elected not to exercise its power to declare war,\(^\text{297}\) it almost unanimously passed its own use-of-force resolution, which left no doubt as to its resolve to authorize the President to use military force if necessary. Among other things, the Joint Resolution recognized the authority of the President under the Constitution “to take action to deter and prevent acts of international terrorism against the United States…[and] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”\(^\text{298}\)

Thus armed with resolutions from Congress, NATO, and the United Nations, the President quickly ordered the intelligence community to gather evidence to identify and locate those who committed the terrorist attacks, and to determine if any international state entity may have provided support. A substantial body of evidence pointed directly to the already-notorious al Qaeda – an umbrella organization founded in 1989 by a Saudi national named Osama bin Laden and Abdallah Azzam, a member of the Palestinian Moslem Brotherhood\(^\text{299}\) – and to the ruling Taliban government in Afghanistan.\(^\text{300}\)

From the early 1990s until the end of 2001, al Qaeda, whose expressed agenda is to “attack the enemies of Islam all over the world,”\(^\text{301}\) operated openly in Afghanistan

\(^{297}\) U.S. Const. art. I, § 8, cl. 11.

\(^{298}\) Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224. This resolution was passed by every member of the Senate and every member of the House of Representatives, save one (Rep. Barbara Lee, 9\textsuperscript{th} Dist. California).


\(^{301}\) Id.
with the full support of the Pashtun-dominated Taliban.\textsuperscript{302} Indeed Afghanistan became a training ground for thousands of Arab and non-Arab al Qaeda militants, including Kashmiris, Chechens, Uzbeks, Uighurs, and others who were encouraged to infiltrate numerous other countries for the purpose of carrying out terrorist attacks.\textsuperscript{303} At the same time, radical Islamic fundamentalists began to make increasingly bold and public statements to support their terrorist actions.

The United States gave the Taliban regime an ultimatum: to turn over the al Qaeda leaders and shut down all terrorist camps in Afghanistan, or be attacked.\textsuperscript{304} When the Taliban leadership refused to comply, the U.S. (and its principal ally Great Britain) used overwhelming military force, which in several months appeared to rout both al Qaeda and the Taliban from Afghanistan. Since then, al Qaeda has been forced to revert to clandestine terrorist operations.\textsuperscript{305}

In his 2002 State of the Union address, President Bush famously characterized Iraq, Iran, and North Korea as “an axis of evil” because of their continuing support and sponsorship of terrorist groups.\textsuperscript{306} (The official annual State Department list of nations considered sponsors of terrorism currently also includes Libya, Syria, Sudan, and Cuba.)\textsuperscript{307} The President declared that the “United States of America will not permit the


\textsuperscript{303}Cordesman, supra note 3.

\textsuperscript{304}Bush Issues Ultimatum to the Taliban, Calls Upon Nation and World to Unite and Destroy Terrorism, CONGRESSIONAL QUARTERLY, Sept. 22, 2001, at 2226.


\textsuperscript{307}National Security Institute, \textit{Terrorist Profiles}, at http://nsi.org/Library/Terrorism/profterr.txt.

http://law.bepress.com/expresso/eps/1090
world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”

Much of the debate that followed centered around the question of international law, which justifies the use of armed force only as a means of self-defense: Could the U.S. go beyond its “War on Terrorism” rhetoric and take military action against those nations it identifies as rogue supporters of terrorist activities, but which have not actually physically engaged in an act of aggression against the United States? Would such a quest be able to sustain the economic costs it would engender, not to mention the perhaps even greater danger to international peace and security?

On the one hand, the Supreme Court has amply confirmed the constitutional principle that, during wartime, the law of survival is paramount – trumping other fundamental rights to speech, liberty, and property. On the other hand, the Court has drawn distinctions even where military action is involved. The question of when the rules of war take effect is complicated, involving more than a simple congressional declaration. In the current conflict, the Court may be required to distinguish still further between conducting the domestic “war on terrorism” and law-enforcement actions against other crimes that also pose a national security threat, such as international drug cartels and organized crime.

Can the Supreme Court be convinced a war is being fought if (as in the war against terror has no foreseeable end?

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308 CONGRESSIONAL QUARTERLY, supra note ____ at 2226.
310 Jeff Bleich, When War Comes to the Court: The True Limits of Our Freedoms May Soon Be Revealed, OR. ST. B. BULL., 21, 23 (2001).
Indeed the Court has determined that even serious criminal or economic crises do not necessarily “increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.”\textsuperscript{311} The “war on drugs,” for example, also has its paramilitary and international aspects – involving unprecedented resources for interdiction, heavy criminal penalties for sales, and aggressive profiling and prosecuting of drug suspects. But while the fight against drug trafficking has been called a “war,” the Court has determined that it is essentially a law-enforcement program and has thus prohibited using intrusive technology to detect drug use through people’s walls, or using race or nationality as factors in profiling drug “mules.” It has also required the same standards of proof for probable cause in drug violations as for any other criminal activity.\textsuperscript{312}

The “war on terrorism,” however, while still ostensibly in its infancy, is a new hybrid of military action and law enforcement. While the enemy may have the same goal as that of a warring nation – to destabilize the U.S. government and economy and undermine its citizens’ security for political ends – modern terrorists are not a traditional enemy with fixed territory and a standing army, but a transnational group of criminals living both here and abroad who attack private citizens wherever they may be.\textsuperscript{313}

How the Court understands the post-September 11th status of the nation is likely to affect not only its wartime jurisprudence but also its approach to domestic criminal law more generally. Justice O’Connor has already suggested as much. “[I]t is possible, if not likely, that we will reply more on international rules of war than on our cherished

\textsuperscript{311} Id. at 24.
\textsuperscript{312} Id.
\textsuperscript{313} Id. at 25.
constitutional standards for criminal prosecutions in responding to threats to our national security.\textsuperscript{314}

\textit{The USA Patriot Act of 2001}

By the end of 2001 America’s complacency in its enjoyment and expectation of ever-expanding constitutional liberties had been brought to an abrupt end. Almost immediately after the President’s post-9/11 declaration of a war on terrorism, law-enforcement agencies began rounding up suspects; close to a thousand of them were arrested or detained without any formal charges having been filed.\textsuperscript{315}

The new millennium’s first major test of the extent to which the Constitution must bridge the gap between freedom and security came with the passage of the USA Patriot Act of 2001.\textsuperscript{316}

The investigative and enforcement provisions of the Patriot Act were sweeping. Particularly affected were protections against the invasion of privacy. The government was now permitted to conduct secret searches of homes and offices, and (if it persuades a judge that the subject might flee or destroy evidence) to copy records without their owner’s assent. Judicial authority was been expanded to issue a single warrant under which a “roving” wiretap can be installed on all telephones a suspect uses anywhere


\textsuperscript{315}Debora K. Kristensen, 44-Dec Advocate (Idaho) 20, 22, 2001. \textit{See infra} notes and accompanying text.

within the United States. Law-enforcement agencies were now allowed to monitor e-mail and Internet use.\textsuperscript{317}

The Act also required the attorney general to detain non-citizens who he determines pose a threat to national security until they can be deported, and if their home country refused to take them back, to detain them until he decides they no longer pose a threat to national security. All detention and deportation cases involving non-citizens and certified by the attorney general as national security risks must be heard in federal court in Washington, D.C. and nowhere else. U.S. intelligence agencies and the military can share otherwise secret grand jury information in terrorism and national security cases. And the statute of limitation for terrorism crimes (formerly five years) was lifted completely.\textsuperscript{318}

The USA Patriot Act provided its own definitions for “terrorist organization,” “domestic terrorism,” and “international terrorism.” A terrorist organization is any group designated by the Secretary of State as a terrorist organization, or a group of two or more individuals that commits, plans, or prepares to commit terrorist activities. Domestic terrorism is defined as the unlawful use of (or threat to use) violence by a group or individuals committed against American people or property, or to intimidate or coerce a government civilian population in furtherance of political or social objectives. International terrorism involves acts dangerous to human life that violate the criminal laws of the United States or any state, or that would be a criminal act if committed therein. International terrorist acts occur outside the United States or transcend national

\textsuperscript{317} Id. at § 206.

\textsuperscript{318} Id. at § 204, § 201, § 412, § 203, § 809.
boundaries in terms of how terrorist accomplish them, the persons they appear intended to coerce or intimidate, or the place in which the perpetrators operate.\textsuperscript{319}

Given the tenor of the times, there was little surprise that Congress, in October 2001, quickly passed the USA Patriot Act by an overwhelming margin.\textsuperscript{320} To appease whatever legislative opposition was voiced about the Act’s expansive grant of power to law-enforcement agencies, the Senate agreed to a four-year sunset limitation on its wiretapping and surveillance provisions.

Not surprisingly, libertarians almost immediately perceived the new law as an unnecessary threat to fundamental freedoms in the name of national security.

For example, in a mailing to its membership in November 2002, the American Civil Liberties Union spelled out the reasons for its strong objections – specifically, that the Act:

(1) allowed for indefinite detention of non-citizens on minor visa violations; minimizes judicial supervision of federal surveillance (despite fact that judges deny wiretaps very rarely);

(2) expanded the government’s ability to conduct secret searches; allows delayed notification in many cases;

(3) permitted sharing of sensitive information in criminal cases with intelligence agencies without judicial review;

\textsuperscript{319} A.C.L.U. Membership Letter, November 7, 2002 [on file with author].

(4) gave the Attorney General and Secretary of State the power to designate domestic groups as terrorist organizations and deport any non-citizen who belongs to them;

(5) granted FBI broad access to sensitive business records about individuals without having to show evidence of a crime, and to student records based on mere certification that records are relevant; provides overly broad definition of “terrorism” (e.g., under the new definitions, acts of simple civil disobedience could cause groups like People for the Ethical Treatment of Animals to become targets of “terror” investigations);

(6) allowed the Attorney General summary power to violate the attorney-client privilege by monitoring communications between those detained by Justice Department and their lawyers;

(7) established military tribunals to try suspected terrorist that will not be required to follow same principles of law and evidence required in civilian courts;

(8) silenced dissent by equating criticism with aid to terrorists, and declaring that public debate would “erode our national unity diminish . . .our resolve . . . give ammunition to America’s enemies, and pause to America’s friends”; and

(9) allowed the FBI to spy on Americans in their churches, on the Internet, in bookstores, and in libraries – even if there is no evidence a crime might have been committed. (Librarians can be charged with a crime if they so much as inform their patrons that the government has been investigating their reading habits.)

Criticism of the USA Patriot Act as unnecessary and overbearing came from other quarters as well.\textsuperscript{322} Harvard Law Professor Laurence Tribe worried that “the twin [Constitutional] pillars” of checks-and-balances and open public accountability were both seriously eroded by the new regulations.\textsuperscript{323}

U.S. Attorney General John Ashcroft staunchly defended the USA Patriot Act, emphasizing the need for authorities to be equipped with new powers to detect and prosecute terrorists:

> As terrorists have learned to adapt to the changing tactics of law enforcement, so, too, have we learned to adapt to the changing needs of America's domestic security. . . .And among the chief lessons we have learned in the past ten months is that our ability to protect the homeland today has been undermined by restrictions of the decades of the past.\textsuperscript{324}

Ashcroft’s position found its own supporters – even among law professors. Douglas Kmiec, the dean at Catholic University, argued that the line is no longer clear between what is criminal and what is terrorist or related to foreign intelligence. Detaining and trying unlawful combatants in military tribunals may be perfectly warranted; if anything, the Justice Department’s treatment of terrorist suspects has erred

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\textit{Debate, and Dissent; Other Cities Have Also Raised Concerns, Council Takes Stand Against Patriot Act, Wisconsin State Journal, 10/16/02.}
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\textsuperscript{324} Testimony from the Hearing on the Nature of the Terrorist Threat to the House Select Committee on Homeland Security, 107th Cong. (July 11, 2002) (Testimony of Attorney General John Ashcroft).
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too greatly on the side of civil liberties; regular criminal trials are subject to pretrial
gymnastics that are wholly unsuited to a court’s criminal-justice function.325

Oren Gross, while recognizing that the real threat of terrorism will cause
democracies “to embrace and employ authoritarian measures,” nevertheless suggested
that extra-legal measures may be appropriate in “truly extraordinary occasions . . . at
times even violating otherwise accepted constitutional dictates, when responding to
emergency situations.”326

William Barr, who served as Attorney General under the first President Bush,
reflected widespread support for the legislation among conservatives:

The danger to our civil liberties comes from the terrorists, . . . not the
government’s actions. I think [those actions] have been restrained,
moderate, well within the law and pose no genuine civil liberties concerns. . .
The Constitution doesn’t give civil liberties to our enemies. The
Constitution is concerned with us winning the war by either killing or
incapacitating those who are trying to kill us.327

“Patriot II”

By early 2003 the Justice Department had drafted new legislation called the
Domestic Security Enhancement Act of 2003, designed to expand even further the new
government powers for domestic surveillance created by the 2001 USA Patriot Act.328

As drafted, the so-called “Patriot II” would have removed existing protections
under the Freedom of Information Act, making it easier for the government to hide whom

325 Attacks on Ashcroft Miss True Threat to Our Liberty, NEW JERSEY L. J., 9/12/02. See also notes infra and accompanying text regarding the use of military tribunals.
it is holding and why, and preventing the public from ever being able to assess whether the government has overreached. Another section would have nullified existing consent decrees against state law-enforcement agencies which prevent them from spying on individuals and organizations.\(^{329}\)

Perhaps the most troubling provision in the proposed new law would have stripped U.S. citizenship from anyone who gave “material support” to any group that the attorney general designates as a terrorist organization.\(^{330}\) Under the Constitution, Americans cannot be involuntarily deprived of citizenship. The new measure would have allowed the government to overcome that guarantee by arguing that anyone who provides “material support” to an organization on the attorney general’s blacklist – even if that support were otherwise lawful – intends to relinquish citizenship and therefore may be immediately expatriated.\(^{331}\)

The proposed new legislation was widely criticized by both liberals and conservatives.\(^{332}\) The American Civil Liberties Union declared that the government “has resorted to detentions, deportations and other tactics reminiscent of the Palmer Raids that led to our founding 83 years ago.” The ACLU claims that the Justice Department is aggressively wielding its new power to force banks, Internet service providers, telephone companies, and credit agencies to turn over their customers’ records – without having to


\(^{330}\) Draft, supra note 355, at § 125.

\(^{331}\) Balkin, supra note 356.

\(^{332}\) See Matt Welch, Get Ready for PATRIOT II, Alternet http://www.alternet.org/story/15541/.
disclose the investigation to the customers, and without having to prove to a judge that there is probable cause a crime has been committed.333

III. ANALYZING THE CONSTITUTIONAL QUESTIONS

Determining the proper extent to which civil liberties can be curtailed during times of terror, before history plays itself out, is a daunting but necessary task. Hindsight, of course, is almost always superior to foresight. Nevertheless, although the best speculation may be little more than educated guesswork, history should be instructive.

Fear of the unknown will always be a factor in fighting an intractable enemy – particularly one which treats suicide as martyrdom – but in the perilous quest to preserve civil liberties in uncivil times, we must be ever vigilant not to tread on hard-won individual rights without a reasonable degree of certainty that preventive and investigative measures are temporary and necessary.

The Patriot Act and its Progeny

Sixteen of the provisions of the Patriot Act of 2001 were originally set to expire at the end of 2005,334 virtually assuring that renewal of the Act would be hotly debated in Congress. Indeed the sunset provisions brought directly into play the concerns of a wide variety of groups and individuals.335 Nearly 400 communities and the legislatures of seven states expressed similar misgivings.336

333 ACLU Online, April 4, 2003 (ACLUOnline@aclu.org).
336 See Letter to Congress dated Feb. 15, 2006 from Caroline Fredrickson, Director, Washington Legislative Office, American Civil Liberties Union, available at
Some of these concerns were addressed in the reauthorization of the Patriot Act, which passed Congress in early March of 2006. The most important amendments were produced by a bipartisan cross-section of Congress:\(^{337}\)

* The renewed Act now guarantees that those receiving a subpoena gag order (also known as a National Security Letter) can challenge that order in court through judicial review.\(^{338}\)

* The former requirement that an individual served with a secret subpoena must reveal to the FBI the name of his attorney has been removed.\(^{339}\)

* Libraries operating in their traditional role are not subject to secret subpoenas.\(^{340}\)

The changes, however, do not require that there be any individualized suspicion of wrongdoing by Americans before their financial, medical, library, and bookstore records can be searched.\(^{341}\)

In particular, the government’s demand for records still contains an automatic and potentially permanent gag order, which is virtually impossible to challenge in view of the bill’s requirement that a court accept the government’s “national security” certification supporting a gag order as “conclusive.” From the perspective of civil libertarians, this provision actually makes the former Patriot Act more restrictive. While a gag order is no longer indefinite, it will last for an initial one-year period that can be

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\(^{337}\) [See ACLU Reform the Patriot Act Blog](http://blog.reformthepatriotact.org).

\(^{338}\) *Id.* [See also Sununu Delivers Remarks on Senate Floor Regarding Legislation to Strengthen Patriot Act](http://www.sununu.senate.gov/pressapp/record.cfm?id=251585&&year=2006) (last visited Feb. 22, 2006) (hereinafter “Sununu”).

\(^{339}\) Stirland, *supra* note 438. This provision, Senator Sununu remarked, could have had the unintended effect of discouraging people from seeking legal advice.

\(^{340}\) *Id.*

renewed indefinitely at the government’s discretion. Worse still, unlike the old law, which did not make government certifications conclusive, the new law binds courts to accept such certifications. Federal courts had, in fact, rejected certifications where they failed to provide sufficient facts to meet the compelling interest standard demanded by the First Amendment for a prior restraint on speech. 342

In addition, secret searches of homes and offices will remain available in any federal case under a vague standard, and notice can be delayed for months. There is still no requirement that roving wiretaps name a target or a facility being monitored, and government agents need not verify that a suspect is actually using the facility before eavesdropping on private conversations. 343

The reauthorized Patriot Act expands the Secret Service’s power to impose “exclusion zones” to apply to non-Presidential events, and it increases fines and criminal penalties that the Treasury Department has used in the past to coerce non-profit organizations and businesses into checking employees against flawed government lists. 344

Privacy Issues

It is of no small concern that Fourth-Amendment rights continue to be jeopardized by the USA Patriot Act. For example, government agents are empowered to enter a home or office when the occupant is away, take photographs and remove property, and have no obligation to inform the occupant until afterwards. There have been challenges to the so-called “sneak-and-peek” warrants which permit delayed notice of a search,

342 See ACLU Letter, supra note 341. 343 Id. 344 Id.
where (the government argues) the warrant may have an “adverse result” on an investigation.345

In November of 2002, the Bush administration won approval for wider use of surveillance against terror and espionage suspects when a federal appeals court declared that such surveillance does not violate the Constitution. The ruling by a three-judge panel, sitting as the Foreign Intelligence Surveillance Court of Review appointed by Chief Justice Rehnquist, ruled that the standard of evidence required to open a wiretap for national security purposes is generally much lower than that needed for domestic criminal cases.346

The court emphasized, however, that it was not ready “to jettison Fourth Amendment requirements in the interest of national security,” but that it also recognized the validity and importance of FISA.347

For over two decades, the FISA court had seldom turned down a government request for a wiretap. Nevertheless, the court said that the Attorney General had gone too far in his zeal for wiretaps, citing some 75 cases in which the Justice Department tried to circumvent rules designed to protect Americans from surveillance.348

The President through his Attorney General continues to argue that circumventing FISA is necessary to monitor al Qaeda operatives in the United States. He

347 In re Sealed Case, 310 F.3d 717, Nos. 02-001, 02-002, (Foreign Int. Surv. Ct. Rev. Nov. 18, 2002).
did not explain, however, how such a policy can be justified under the separation-of-powers principles embodied in the Constitution.\textsuperscript{349}

Civil libertarians fear that the government has already been using the new anti-terror measures to conduct espionage wiretaps in ordinary criminal investigations. The Fourth Amendment still exists, and citizens continue to be entitled to protection against unreasonable searches. When police watch a suspect with high-powered, inter-connected and intelligent cameras that are linked to criminal-history databases, they are in effect conducting unwarranted and possible unconstitutional searches. This practice is especially nefarious when put to political uses, as they have been in Washington, D.C.\textsuperscript{350}

Moreover, there is no certain proof that surveillance cameras are effective. In fact crime actually increased in Great Britain despite the installation of up to two million cameras in streets, shops, banks, and other public areas.\textsuperscript{351}

The courts have ruled that warrantless monitoring of attorney-client conversations with prisoners who had been placed under special administrative measures does not violate the Fourth Amendment because there can be no expectation of privacy in prison.\textsuperscript{352} However, the question of whether the Sixth Amendment’s guarantee of the right to counsel presumes confidentiality has yet to be fully addressed.

Supporters of the Patriot Act argue that some of the 9/11 hijackers used library Internet terminals to communicate. The “apocalyptic visions of the demise of American civil liberties,” they say, “are widely overblown.” Nevertheless, many communities

\textsuperscript{349} Bruce Fein, Scant…or onerous surveillance?, WASH. TIMES, February 7, 2006.
\textsuperscript{351} US Watchdog Slams Police Over Use of Aerial Cameras, MORNING STAR, June 15, 2002 at 3.
around the country have passed local measures opposing the Patriot Act.\textsuperscript{353} The power granted by the Patriot Act to the FBI to pursue library records and computer hard drives (in order to determine what books patrons have checked out, the web pages they have visited, and where they have sent e-mails) is ripe for abuse.\textsuperscript{354}

\textbf{Immigration Policies and Pre-Trial Detentions}

Following the events of September 11, 2001, concerns for national security measures understandably provoked a re-examination of immigration laws, focusing not only on who should be allowed into the country but under what conditions they are allowed to remain.

For some time, there have been widespread misgivings about the effectiveness of the Immigration and Naturalization Service (INS) in carrying out its functions under existing laws. According to the latest INS statistics, over 30 million visas were granted to foreign nationals in 1998, mostly to enter the United States for purposes of study, teaching, travel, or business. By some analyses, as many as forty percent of those granted visas have overstayed them, and as many as ninety percent of non-detained individuals who received final deportation orders failed to surrender to the INS. For these failures, the agency has been widely and roundly criticized.\textsuperscript{355}


\textsuperscript{354} The American Library Association suggests not so facetiously that the next step might be hidden cameras filming library patrons in the act of reading. Editorial, Big Brother on Campus?, BALTIMORE SUN, Jan. 31, 2003 at p. 18A.

Although responsibility for the bombing in 1995 bombing of the federal building in Oklahoma City that left 168 people dead was eventually traced to an American dissident, at first it was feared that the incident had been perpetrated by a Middle Eastern terrorist group.\(^{356}\) In response Congress passed the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) – designed to protect the country from foreign terrorism.

After the terrorist attacks of 9/11, the Immigration and Nationality Act was modified by the USA Patriot Act, which allowed the Attorney General to take into custody any alien certified to be inadmissible or deportable on one of six grounds: (1) espionage; (2) sabotage; (3) export restrictions; (4) attempt to overthrow the United States Government; (5) terrorist activities; and (6) any other “activity that endangers the national security of the United States.” The government is then required to begin either criminal or deportation proceedings within seven days of the detention. However, certain certified alien terrorists who are not likely to be deported in the foreseeable future due to the continuing nature of the investigation, are subject to indefinite detainment.\(^{357}\)

A 2001 Supreme Court decision, *Zadvydas v. Davis*, arguably exempted suspected alien terrorists as a “small segment of particularly dangerous individuals” that the government could subject to indefinite detention.\(^{358}\) The new law seems to satisfy the Court’s jurisprudential criteria, in that it specifically provides (a) for judicial review of suspected alien terrorists’ detentions via habeas corpus; (b) for fixed time limits for review of the Attorney General’s initial certification; and (c) that an alien whose


\(^{357}\) Immigration and Nationality Act, 8 U.S.C. § 1001 et seq. (2001); *see also* section 412(a)(7). The changes are codified as 8 U.S.C. §1226a.

\(^{358}\) 533 U.S. 678 (2001). *See infra* notes and accompanying text.
“removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months if release threatens national security or the safety of an individual or the community.” Furthermore, the Attorney General is required to review certification every six months; the suspected alien terrorist can request a reconsideration of the certification every six months.\footnote{8 U.S.C. §1226b.}

The Patriot Act makes aliens subject to deportation for virtually any activity in association with a “terrorist organization.” Because the Act defines “terrorist activity” to include virtually any use or threat to use a weapon against a person or property, and defines a “terrorist organization” as any group of two or more persons that engages in such an act, virtually every dissident organization is encompassed – including a pro-life organization that once threatened workers at an abortion clinic, the African National Congress, the Irish Republican Army, and the Northern Alliance in Afghanistan. Once a group has been designated as “terrorist,” aliens are deemed deportable for everything from recruitment to fund-raising to providing any kind of material support, including payment of dues. Conceivably, the law would extend to those who might support or join counter-terrorism groups.\footnote{David Cole, \textit{Terrorizing Immigrants in the Name of Fighting Terrorism}, 29 \textit{WTR HUM. RTS.} (2002) 11-12.}

Congress may want to make further changes to tighten the existing law, including more thorough screening and background checks of individuals seeking visas to enter the United States and tracking the millions of illegal aliens who have overstayed their visas.\footnote{Eric Schmitt, \textit{Agency Finds Itself Under Siege, With Many Responsibilities and Critics}, USA TODAY, Mar. 15, 2002, A11.}
The degree to which such legislation encourages racial profiling or an atmosphere of bigotry and fear in the general population is difficult to predict.\textsuperscript{362} Laws that have a negative impact on the majority of law-abiding aliens – especially those made guilty merely by their association with an ethnic or racial class – are anathema to fundamental American principles of fairness and justice. The Supreme Court has ruled that guilt by association violates the First and Fifth Amendments.\textsuperscript{363} Everyone, including aliens, has a First-Amendment right to associate with groups regardless of their goals, so long as they are not illegal. Likewise, under Fifth-Amendment jurisprudence, guilt is personal.\textsuperscript{364}

The Patriot Act also allows the government to deny entry into the country purely on the basis of what an applicant may have said, particularly if the words could be construed as endorsing terrorist activity. But in the Immigration and Nationality Act of 1990, after years of politically-motivated denials of visas that proved embarrassing, Congress explicitly repealed such grounds for exclusion.\textsuperscript{365}

Prior to 9/11, aliens could be detained only so long as the government had reason to believe that they posed a threat to national security, but they could be released upon order of an immigration judge. The new regulations gave the INS greater detention powers: Now, even if a judge rules in favor of the alien, INS prosecutors can keep him

\textsuperscript{362} Laurie Goodstein, American Sikhs Contend They Have Become a Focus of Profiling at Airports, N.Y. TIMES, Nov. 10, 2001, at B6.


\textsuperscript{365} See USA Patriot Act, Pub. L. No. 107-56, § 411(a), amending 8 U.S.C. § 1182 (a) (3) (B) (iii) (V) (b). See also Immigration Act of 1990, PL101-649(S358) §§ 534 and 602. See also David Cole, Terrorizing Immigrants in the Name of Fighting Terrorism, 29 HUM. RTS. Q. 11, 12 (2002).
locked up simply by filing an appeal of the release order, without any showing that the appeal – which routinely takes many months – is likely to succeed.366

Moreover, the Patriot Act gives the attorney general himself the power to detain aliens – defining a suspected terrorist so broadly that it includes even those who may have provided humanitarian aid to an organization disfavored by the government. Detentions may be based merely on “reasonable grounds to believe” that an alien has engaged in terrorist activity, a standard that the INS has likened to the “reasonable suspicion” required for a brief stop-and-frisk under the Fourth Amendment. Reasonable suspicion, however, does not always justify a custodial arrest, much less indefinite detention.

The Act also permits detention for up to seven days without filing any charges. Yet the Supreme Court has ruled in a criminal setting that charges must be filed within forty-eight hours except in the most extraordinary circumstances. Hundreds of immigrants not charged with any crime, much less involvement in the 9/11 attack, have been detained in secret, even where judges rule that there is no basis for detention, and without going before a judge at all.367

After 9/11, the INS increased the scrutiny of refugees to the United States and their relatives. According to the new rules, before boarding a plane for the U.S., refugees must meet with a representative of the International Organization for Migration (funded by the State Department), who will compare them with photographs in their application

367 See infra notes 402 and 403 and accompanying text. See also Cole, supra note 372 at 13.
documents. Refugees are fingerprinted at major ports of entry in the United States before they are allowed to go to their final destinations.\footnote{Dessie P. Zagorcheva, \textit{Globalization, Terror, and the Movements of People}, 36 INT’L LAW 91, 96 (2002).}

For immigrants already on U.S. soil, the federal government launched sweeps of workplace where significant numbers of undocumented immigrants were thought to be working. Critics of such actions have argued that U.S. employers knowingly and actively recruited into their firms many of the undocumented immigrants, and suggest that the government should be targeting employers rather than the undocumented workers. Several industries – such as commercial aviation, meat-packing, agribusiness, construction, and hospitality services – could collapse if undocumented immigrants were summarily deported. Moreover, many immigrants who are the targets of these enforcement actions have children who are U.S. citizens.\footnote{James H. Johnson, \textit{U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks}, 27 N.C. J. INT’L L. & COM. REG. 419, 454. \textit{See also} Jesus Lopez, Jr. et. al., \textit{Rocky Slams Airport Workers’ Arrest}, SALT LAKE TRIB., Dec. 13, 2001, at A-1, available at 2001 WL 4653975, and Kevin Cantera et al., \textit{Airport Buzzes with Blame}, SALT LAKE TRIB., Dec. 14, 2001 at C1, 2001 WL 4654080.}

Both the AEDPA and the USA Patriot Act present new challenges with regard to protecting the civil liberties of Arabs and Arab-Americans – both of which groups have been denied the protection afforded to normal criminal defendants.\footnote{Adrienne R. Bellino, \textit{Changing Immigration for Arabs with Anti-terrorism Legislation: September 11th Was Not the Catalyst}, 16 TEMP. INT’L & COMP. L.J. 123-4, 145.}

In short, if maintaining traditional American civil liberties is itself central to preserving national security, our immigration policies need substantial shoring.

\footnote{Other limitations on immigration, such as restricting student visas for citizens of certain nations, is now being discussed as a serious possibility.}
Deportations

Following the events of 9/11, the Attorney General, wielding power bestowed upon him by Congress, gave immigration judges the authority to close to the public certain “special interest” deportation hearings in the interest of national security. About 750 such cases were active at the time. The Chief Immigration Judge issued a directive consistent with that of the Attorney General, requiring the judges in his jurisdiction presiding over special-interest deportation cases to close all proceedings to the public, press, family, and friends of the deportee. Only the deportee’s attorney could view the record.371

In December of 2001, the government began removal proceedings against Rabih Haddad, suspected of funding terrorist organizations through an Islamic charity he operated in Detroit, as an alien subject to deportation for overstaying his tourist visa. Without prior notice to Haddad or his attorney, his bail hearing was closed to the public. Bail was denied and he was taken into custody, where he remains.372

Various suits were filed claiming that the directive violated the First-Amendment right of access to deportation hearings.373 At virtually the same time, media plaintiffs in Newark sought access to and information about deportation hearings held in the Newark

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371 See 67 Fed. Reg. 36799 (May 28, 2002); 8 C.F.R. §3.46(f)(3). “Special interest” cases are defined as those involving aliens identified by the Department of Justice to “have connections with, or possess information pertaining to terrorist activities against the United. States.” The Department of Justice also created an interim rule authorizing immigration judges to issue protective orders sealing documents, court records, and prohibiting deportees and their attorneys from disclosing specified information. In the war on terror, the government is rounding up foreigners, checking their immigration status, and then, sometimes, deporting them. It won't give out their names. This American Life: Secret Government, National Public Radio, Jan. 10, 2003. See also supra notes 402 and 403and accompanying text.

372 In December 2002, Haddad’s attorney filed a notice of appeal with the Board of Immigration Appeals, part of the Justice Department. Lebanese Man Appeals Deportation Order, WASH. POST, Dec. 28, 2002 at A9.

Immigration Court which, pursuant to the same directive, had been denied because they involved “special-interest” cases.\textsuperscript{374}

Both the deportation hearings and media organizations in each case were in separate federal jurisdictions. The appellate court in each circuit reached diametrically opposite decisions.

In \textit{Detroit Free Press v. Ashcroft}, the district court had granted the media plaintiffs’ motion. In August of 2002, the Court of Appeals for the Sixth Circuit affirmed, finding that the directive violated the public’s right of access to deportation hearings conferred by the First Amendment, and that any closing of deportation hearings must be done on a case-by-case basis.\textsuperscript{375}

In \textit{North Jersey Media Group v. Ashcroft}, the district court recognized a presumption of openness for deportation hearings, holding that the directive was not so narrowly tailored that it curtailed the public’s right of access in the least restrictive manner. Consequently, said the court, the government failed to overcome the strict-scrutiny standard, and operation of the directive was enjoined. Less than two months after the \textit{Detroit Free Press} decision, the Court of Appeals for the Third Circuit reversed, thereby reinstating the directive that required the hearings be closed.\textsuperscript{376}

The split in the circuits meant that the Supreme Court, which once ruled that all criminal trials must presumptively be open, would have to decide the issue.\textsuperscript{377} However,


\textsuperscript{375} 2002 U.S. App. LEXIS 17646 at .

\textsuperscript{376} 2002 U.S. App. LEXIS 21032 (3d Cir., 10/8/02).

in May of 2003, the Court declined to review the decisions, thus leaving intact, at least for the time being, the split in the circuits.  

**Profiling**

Even in the face of official condemnation, racial profiling of South Asians and people of Middle-Eastern extraction by police and public security personnel appears to be distinctly on the increase.

To many observers, it simply makes sense to focus law-enforcement energies on Arab and Middle Eastern men: like it or not, the argument goes, they are the people who constitute the real threat, and no amount of political correctness will change that. Terrorist attacks of such enormous proportions as those which occurred on 9/11, followed by a declaration of war, makes racial profiling a temporary necessity that no patriotic American should protest. It has become necessary to get information from people likely to know the Arab, Muslim, and Middle Eastern suspects. It is hard to avoid the assumption that this kind of information will not come from the population at large, but from the Middle Eastern communities themselves.

On the other hand, profiling can amount to a coded racial appeal of the type that has had negative reverberations throughout U.S. history. Although the assumption of guilt on the basis of racial identity is not new, it is contrary to American principles of fairness and justice, an inadequate means by which to preserve constitutional values in a

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period of distress. The government’s implicit justification for racial profiling also serves to encourage hate crimes.\textsuperscript{380}

Another argument against profiling is that it fails to fathom the nature of the enemy in the current war against terrorism. Al Qaeda has shown itself to be intelligent, resourceful, patient, and adaptable. Fighting terrorists effectively may well require ensuring good relations with the Arab and Muslim communities in the United States.\textsuperscript{381}

As is often the case in times of national crisis, non-citizen immigrants were the hardest hit by the Bush Administration’s anti-terrorist regulations. Following 9/11, the government secretly rounded up and detained somewhere between 1,500 and 2,000 people, mostly foreigners. Not one of them was charged with involvement in the 9/11 attacks; except for four people indicted in August 2002 for supporting terrorism, no one has been charged with a terrorist act. The vast majority were arrested on various immigration charges and then effectively disappeared. Their cases were not listed on any public docket, their hearings were closed, and the presiding judges were instructed to neither confirm nor deny that the cases exist.\textsuperscript{382}

The policies promulgated by the government would deprive all Americans of their due-process rights, not just immigrants. A case in point is that of Jose Padilla, a U.S. citizen arrested on American soil on suspicion of plotting to plant a bomb. He has been


More than a year later, the government acknowledged that most of those detained after the 9/11 attacks were deported, released, or convicted of relatively minor crimes not directly related to terrorism. Several dozen were held as material witnesses. Associated Press, December 12, 2002 (CHICAGO TRIBUNE, 12/12/02 at 16).
held indefinitely in a Navy prison, and denied access to counsel.383 According to the White House, Padilla will stay confined to a brig in South Carolina “until the end of the war.”384

The government alleges that Padilla was an “enemy combatant” who plotted to assemble a “dirty bomb” that would spread radioactive contamination over a wide area. It cited three cases in support of its argument that enemy combatants can be detained for purposes of intelligence-gathering and ensuring they are unable to further assist the enemy: Ex Parte Quirin (where the Supreme Court held that eight Nazi soldiers, captured on U.S. soil in 1942, none of them U.S. citizens, could be tried in military tribunals); In Re Territo (in which the Court upheld denial of habeas corpus in 1946 to a U.S. citizen who had been raised in Italy, joined the Italian army, and captured in 1943, was held as prisoner of war and transferred to camp in California); and Colepaugh v. Loone (in which the Court refused to overturn the death sentence of an American citizen who had become a Nazi spy, who had slipped ashore in Maine in 1944, and who had been tried in secret military tribunals and sentenced to hang).385

383 Strossen, supra note 318. Padilla was born in Brooklyn and grew up in Chicago, where he became part of a violent street gang. He was convicted at age 13 of a fatal shooting; at age 21 he was again arrested for another shooting. Hardball with Chris Matthews, MSNBC-TV, June 10, 2002. In December 2002, a federal judge ruled that Padilla must be able to meet with his lawyer for the narrow purpose of responding to the government’s allegations. See Editorial, A Voice of Reason, WASHINGTON POST, December 11, 2002 at A32.

384 This American Life: Secret Government, National Public Radio, Jan. 10, 2003. In December 2002, in response to defense attorneys’ attempts to meet with Padilla to help him challenge his detention, a federal judge ruled the government has the right to hold him as an enemy combatant – but that Padilla also has a right to meet with an attorney. The government has appealed that decision. Tom Brune, U.S. Asks Judge to Rethink ‘Dirty Bomb’ Case, NEWSDAY, January 11, 2003.

385 The sentence was later commuted by President Truman. Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957). See also Julie Kay, War of, for Words, BROWARD COUNTY BUSINESS REVIEW, 10/21/02.
In June of 2002 Padilla filed a petition for habeas corpus in the Southern District of New York, arguing his detention violated the Fourth, Fifth, and Sixth Amendments. In November of 2005, Padilla finally won the right for his case to be heard, when the government announced that he would be charged with “providing – and conspiring to provide – material support to terrorists, and conspiring to murder individuals who are overseas.”

A case similar to Padilla’s is that of Yaser Hamdi, who was born in America to Saudi parents, and who was captured on the battlefield in Afghanistan. Like Padilla, Hamdi is being held in a Navy brig, uncharged and without access to counsel. When a habeas corpus petition was filed on his behalf, the U.S. Court of Appeals for the Fourth Circuit held that his detention was legal and he was not authorized to challenge his designation as an enemy combatant. That decision has been roundly criticized.

In reviewing that decision, the Supreme Court found that although Congress was authorized to detain “enemy combatants,” due process requires that such a person be given a meaningful opportunity to consent to the factual basis for the detention, before a neutral magistrate. Three years after his initial capture, it was announced that Hamdi

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386 Rumsfeld v. Padilla, 542 U.S. 426, 432 (2004). The Court of Appeals for the Second Circuit held that the President lacked authority to detain Padilla, and the government subsequently petitioned for certiorari. In June of 2004, the Supreme Court dismissed the action without reaching that issue, finding that the District of South Carolina and not the District of New York was the proper place to file the habeas petition, thus the Supreme Court.
389 See, e.g., editorial, Citizens, Beware, BOSTON GLOBE, January 10, 2003. As the American Bar Association’s criminal justice section has pointed out, never in the history of the United States have citizens been held without the right to speak to a lawyer. See Julia Kay, South Florida Lawyers on ABA Task Force Lead Fight for Right of Enemy Combatants to Counsel, BROWARD DAILY BUSINESS REVIEW, Oct. 21, 2002 at A10.
would be allowed to return to Saudi Arabia where he would have to renounce any claim of American citizenship, and to accept travel restrictions as it was determined he was not a major threat.  

Even liberals defend detentions in some cases. Professor Tribe, for example, feels it would be “suicidal” to release captured soldiers who belong to an enemy force committed to the murder of American civilians, whether it is the army of a nation-state or of a trans-national group like al Qaeda. Military detention may indeed be constitutional “if review by a federal court confirms the executive’s assertions that people detained are in fact enemy combatants.”

Similarly, some lawyers think that the Bush administration is well within its authority to order detention of unlawful combatants until the conclusion of the armed conflict, and then to try them before either a military tribunal or civilian court.

But liberals and conservatives agree that the detention policy can go way beyond what is necessary in order to achieve national security. Prof. Tribe also feels that the government has gone too far:

When it comes to the fundamental right to talk to a lawyer, to talk to a judge, not to have the government unilaterally by its own say-so draw the boundary between the preventive wartime model and the reactive judicial model, there’s really no difference between citizens and non-citizens. This is not like any other war. It’s not like the Civil War, the Revolutionary War, World War I or II. This one by definition can go on forever like the war on cancer or the war on drugs. Because that’s right,

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392 Citizens, Combatants and the Constitution, NEW YORK TIMES, June 16, 2002 at section 4, page 13. See also Rich Lowry, Throw Away the Key, NATIONAL REVIEW, 6/20/02.

we have to be unusually careful about checks and balances and about openness and accountability.\textsuperscript{394}

Indeed it appears that the government has made more than one mistake in its sweep of men of Middle-East descent following the 9/11 bombings. For example, Hady Hassan Omar was arrested in September of 2001, taken from his wife and child, and held in solitary confinement in a maximum-security penitentiary in Louisiana under the new anti-terror measures. He was not allowed to see an attorney. He was in captivity for 73 days. After he was released, he filed suit in a federal court, arguing that the government exceeded its constitutional powers and deprived him of his civil rights.\textsuperscript{395}

In all, close to 1,150 young Muslim men were rounded up in the aftermath of 9/11. More than 400 people have been deported following lengthy internment periods and closed hearings. Only three of those arrests resulted in terrorism-related indictments.\textsuperscript{396}

Terrorism is not like traditional crime, which calls for apprehension of the perpetrator, trial, and conviction. The nature of the terrorist threat requires that a strong effort be made to prevent it before it occurs, and that goal calls for a greater use of extraordinary investigative and prosecutorial techniques. What it also calls for, however, is greater accountability.\textsuperscript{397}

\textsuperscript{394} \textit{Liberty vs. Security}, The NewsHour with Jim Lehrer, September 10, 2002.

\textsuperscript{395} Matthew Brzezinski, \textit{Hady Hassan Omar’s Detention}, \textit{New York Times}, October 27, 2002 at section 6, p. 50. The case is still pending.

\textsuperscript{396} \textit{Id. See also} Transcript, \textit{60 Minutes}, April 7, 2003.

\textsuperscript{397} \textit{See} comments of Loretta Taylor (a former federal prosecutor), \textit{Liberty vs. Security}, The NewsHour with Jim Lehrer, September 10, 2002.
Secret Military Tribunals

A rhetorical theme of the Bush Administration that has resonated well with the public is that the United States will “bring justice to the terrorists and them to justice.”

In the military campaign in Afghanistan, approximately five hundred al Qaeda and Taliban fighters were captured and turned over to U.S. forces for disposition; about three hundred of them were transported to Guantanamo Bay, Cuba for temporary internment. Among the detainees were citizens of some twenty-five countries, including Britain, Australia, France, Belgium, Sweden, Algeria, Yemen, Afghanistan, Pakistan, and Saudi Arabia.

Two questions immediately arose concerning due process. First, were these individuals entitled to treatment as prisoners of war under the Geneva Conventions? Second, if criminal trials were to be pursued by the United States, should the accused be tried in a federal district court or by a military tribunal?

The Third Geneva Convention covers the treatment of prisoners of war and procedures for criminal proceedings against them, including the definition of who constitutes a bona fide POW. After some internal debate, the Bush Administration affirmed that the Geneva Conventions of 1949 did apply to the conflict in Afghanistan

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and, hence, to the Taliban government. However, since al Qaeda is a terrorist organization, under the law of war its members are not considered as part of an armed force. They did not carry arms openly, bear a fixed distinctive sign visible at a distance, and conduct their operations in accordance with the laws and customs of war – all requirements under international law.403

Moreover, they used civilians as both the means and targets of their attacks. Having engaged in acts of war both in the September 11th attacks and in fighting alongside the Taliban in an internationally-recognized armed conflict in Afghanistan, they can be deemed responsible for breach of the law of war, but are not entitled to the status of prisoners of war. The United States argued further that the Taliban fighters had likewise forfeited any special status because they had “adopted and provided support to the unlawful terrorist objectives of the al Qaeda.”404

Thus it was determined that neither the terrorists who planned and executed the 9/11 attacks nor the Taliban who gave them harbor are entitled to receive POW benefits.

403 See Convention (III) Relative to the Treatment of Prisoners of War, Geneva 1949, Art. 12 states:

“Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them. Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.”

Nevertheless, the Bush Administration has declared that all detainees would be treated in accordance with humanitarian principles set out in the Geneva Conventions.\textsuperscript{405}

POWS are liable to prosecution by the forces holding them for violations of the laws and customs of war or grave breaches of the Geneva Conventions. Even a citizen of a “party to a conflict” who is captured by his own sovereign government – such as John Philip Walker Lindh, an American-born Taliban fighter captured while engaged in combat against U.S. forces\textsuperscript{406} – can be prosecuted by his own government for treason, murder, and other crimes. But a POW may only be tried according to the rules laid out in the Third Geneva Convention, which provide for basic due process: “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.”\textsuperscript{407}

The use of military commissions to try enemies of the United States for war crimes and related violations of international law, such as crimes against humanity, committed abroad (or in the case of the Civil War, was not fully under the control of the U.S. government), has a long history. It is also legal under international law: all nations have jurisdiction to punish war criminals, and the Geneva Convention requires each signatory to search them out and bring them to justice in its own courts. In theory at

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\textsuperscript{407} Third Geneva Convention, supra note \textsuperscript{407}, art. 102, 6 U.N.T.S. at 3394, 75 U.N.T.S. at 212.
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least, the United States shares with other countries jurisdiction over war criminals, and it could exercise that jurisdiction through civilian federal district courts.\footnote{Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes, 153 MIL. L. REV. 1, 47-48 (1996).}

Congress, however, has authorized these courts to try war crimes only when either the perpetrator or the victim is a U.S. national.\footnote{18 U.S.C. §2441 (2001). While an International Criminal Court recently was established, it does not have authority to prosecute acts committed in Afghanistan prior to July 1, 2001. Rome Statue of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). More than the required sixty nations ratified this agreement on April 11, 2002, establishing the International Criminal Court, and the agreement enters into force on July 1, 2002. Nations Approve First Permanent World War Crimes Tribunal, CNN.com Law Center, at http://www.cnn.com/2002/LAW/04/11/international.court.ap/index.html.} For some cases, military forums are the only workable option; in an international armed conflict, commanders in the field have the authority to convene them.\footnote{As of April 2002, the Bush Administration was making plans to employ a military commission to try Abu Zubaydah, al Qaeda’s chief of operations, who had been apprehended in Pakistan. Newton, supra note at 78. See also Philip Shenon & Neil A. Lewis, U.S. Says a Key Detainee Had Planned More Attacks, N.Y. TIMES, Apr. 3, 2002, at A10.}

The rules governing the operation of the tribunals that the Pentagon released in March of 2002 closely matched the recommendations of the American Bar Association a month earlier.\footnote{Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002). See also Molly McDonough, Pentagon Releases Rules on Tribunals, 1 A.B.A. J. e-Report, Mar. 22, 2002, available at http://www.abanet.org/journal/ereport/m22trib.html.} The ABA had urged that military tribunals be used in limited circumstances and in accordance with fair trial standards. It adopted a resolution that these special commissions not be used to try alleged violations of the laws of war by U.S. citizens, lawful resident aliens, or other aliens who were in the United States legally. The ABA also called upon the Department of Defense to require that military tribunals observe the fair trial standards contained in the Uniform Code of Military Justice and the International Covenant on Civil and Political Rights. Finally, the resolutions urged the
president and Congress to consider the impact of military tribunals on possible prosecutions of U.S. citizens in other nations.\footnote{James Podgers, \textit{ABA Tackles Tribunals Issue}, 1 No. 5 A.B.A. J. E-Report 1, Feb. 8, 2002; Molly McDonough, \textit{An Uncertain Risk: Late Resolutions on Military Tribunals May Still Be in the Works}, 1No. 3 A.B.A. J. E-Report 9, Jan. 25, 2002.}

Are military tribunals necessary under existing law?

The U.S. government has effectively applied its experience combatting organized crime (using civilian courts) to fighting terrorism.\footnote{Two high-profile examples of those recently prosecuted in U.S. criminal courts: Sheik Omar Rahman, convicted for the 1993 World Trade Center bombing; and Wadih el-Hage, convicted for bombing the American embassies in Kenya and Tanzania. See James Orenstein, Editorial, \textit{Rooting Out Terrorists Just Became Harder}, N.Y. TIMES, Dec. 6, 2001, at A29.} In addition, federal district courts have the legal authority under both domestic and international law to prosecute nonresident aliens for terrorist crimes committed on foreign soil, as well as for war crimes.\footnote{American Bar Association Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions, at \url{http://www.abanet.org/leadership/military.pdf} (last modified Jan. 4, 2002).}

A widely cited precedent is \textit{United States v. Yunis},\footnote{681 F. Supp. 896 (D.D.C. 1988).} which involved the criminal trial of an Arab terrorist who participated in the hijacking of a Royal Jordanian Airlines airplane at Beirut International Airport in June 1985. The only connection the hijacking had with the United States was the fact the plane carried some American citizens. After reviewing the pertinent international agreements relating to hostage-taking and hijacking, the federal district court denied a defense motion to dismiss for lack of jurisdiction, and Yunis was convicted of conspiracy, hostage taking, and air piracy.\footnote{\textit{Id.}, Ihsan A. Hijazi, \textit{Beirut Highjackers Free Travelers, Blow Up Jet}, N.Y. TIMES, June 13, 1985, at A8.} On appeal, the Court of Appeals for the D.C. Circuit noted that jurisdiction is not precluded by norms of customary international law.\footnote{United States v. Yunis, 924 F.2d 1086, 1089-90 (1991).}
In short, U.S. district courts have jurisdiction to try individuals for terrorist-related offenses under a variety of statutes, and in at least one case involving a foreign national who tried to commit an in-flight bombing of an American Airlines flight from Paris to Miami in December 2001 that power is being exercised. Instead of charging suspected al Qaeda war criminals with violations of the law of war, the federal courts apply parallel statutes related to the *malum en se* crime, or apply the appropriate “terrorist statute.”

Some observers have noted, however, that trials of suspected terrorists in an ordinary district court also carry moral and practical downsides, not the least of which is that they tend to underscore the weakness of American policy over the past decade in dealing with terrorism against U.S. targets. Also, both the CIA and the FBI have concentrated on solving past cases, rather than taking action to prevent future terrorist attacks.

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The question of where best to try enemy combatants was brought to a head in November of 2001, when President Bush signed an executive order that authorized the creation of military tribunals for the purpose of prosecuting certain “non-citizens” who may have engaged in terrorist acts against the United States, or who aided/abetted terrorists. In so doing the President re-asserted that those detained at Guantanamo Bay

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419 Examples: the plane explosion over Lockerbie, Scotland in 1988; the bombing of the World Trade Center bombing in 1993; the attack against U.S. military personnel in Saudi Arabia in 1996; the U.S. embassy bombings in Africa in 1998; and the attack on the U.S.S. Cole in 2000.

420 Anderson, 607.

were unlawful belligerents not entitled to prisoner-of-war status, suspended the attorney-client privilege, and ordered that over a thousand people be detained without publicly identifying them.\footnote{422}

Although the Constitution requires that Congress authorize and regulate military tribunals,\footnote{423} the President assumed that power in an Executive Order dated November 13, 2001.\footnote{424}

A military tribunal consists of a panel of officers who are authorized to render a verdict and sentence. Historically, the question has been whether tribunals are constitutionally capable of prosecuting non-citizen belligerents for offenses in violation of the law of war (and not whether they can be used to prosecute citizens). As noted earlier, the Supreme Court rendered its opinion on the issue in the post-American Civil War case of \textit{Ex Parte Milligan}\footnote{425} – holding that as long as the civilian courts were operating, the use of military tribunals to try citizens who were not actual belligerents was unconstitutional. The standard for the use of military tribunals to prosecute non-citizen belligerents for offenses in violation of the law of war is set out in the World War II era case of \textit{Ex Parte Quirin}.\footnote{426}
Although it is well established that the Fifth and Sixth Amendments apply both to citizens and non-citizens alike, such protections do not extend to individuals subjected to trial in military tribunals for war crimes. 427 In Application of Yamashita, the Supreme Court traced the history of military tribunals and concluded that by recognizing them “in order to preserve their traditional jurisdiction over enemy combatants . . . Congress gave sanction, as we held in Ex Parte, to any use of military commissions contemplated by the common law of war.” 428 Under customary and treaty-based international law, military tribunals are appropriate forums for trying war criminals and unlawful combatants, 429 although they do not necessarily provide all of the Geneva Convention rights afforded to prisoners of war. 430

President Bush’s order providing for the trial before military commissions of aliens suspected of involvement in terrorist activities or membership in al Qaeda 431 has been controversial – perhaps proving once again that, especially on the question of how best to balance individual rights with national security, reasonable people can differ.

Members of the President’s own party had sharply differing views. Sen. Orrin Hatch (R. Utah), the senior Republican on the Senate Judiciary Committee, supported

427 See Johnson v. Eisentrager, 339 U.S. 763 (1949) (holding that German nationals who were convicted of war crimes and detained by U.S. authorities abroad were not entitled to constitutional protections).
429 Ex Parte Quirin, 317 U.S. at 31 and n.8.
431 Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §2(A)(1)(i)-(iii), 66 FED. REG. 57,833, 57,834 (2001).[hereinafter Military Order]. The order defines the class of persons subject to military trial to include “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 Quida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, 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)...
Bush, but Rep. Robert Barr (R. Ga.), a member of the House Judiciary Committee, decried the Administration’s lack of respect for civil liberties. Tim Lynch, director of the Cato Institute’s project on criminal justice, accused Bush of “arrogance” and his administration of trying to take presidential power “farther than it has gone before.”

Even the conservative Heritage Foundation warned the administration to proceed with caution.

Both liberals and conservatives have criticized the military order as a deprivation of basic constitutional rights, such as that to be tried before an independent court and jury, an appeal to independent judges, and full access to the evidence used to support a conviction. Now a detainee can be tried, convicted, and ultimately executed without any independent judicial review, and without anyone outside the military – including the defendant – ever seeing the evidence upon which the conviction rests.

As the liberal group Common Cause pointed out in calling upon the President to reconsider, in our efforts to hunt down and bring to justice war criminals who have killed thousands of Americans, we have to make sure that justice itself does not become a casualty. “The policies your executive order would permit – namely secret trials with unappealable verdicts – seem eerily reminiscent of the kind of trials we have rightly criticized in other countries.”

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Even some prominent conservatives joined the liberal media in denouncing the Administration’s plan to try terrorists before secret military tribunals.436 “It is a good sign for American democracy that voices are being raised against President Bush’s attempt to scuttle due process by sending foreign terrorist suspects to military tribunals,” editorialized the Boston Globe.437 “Why in the world do they need to use military tribunals?” asked the Greensboro (North Carolina) News and Record, noting that Timothy McVeigh, the domestic terrorist who blew up a federal building in Oklahoma City, had been tried in a regular court of law.438 An op-ed in the Milwaukee Journal-Sentinel said, “Rarely, but inevitably, there comes a time when the American people must tell a president ‘enough.’ That time is now.”439

Spokesmen for the Bush Administration, meanwhile, have not been coy in defending the decision to use secret military tribunals in the legal war on terrorism. Vice President Richard Cheney argued that terrorists did not deserve the guarantees and safeguards afforded to defendants by the civilian judicial system. Attorney General Ashcroft said similarly that “foreign terrorists who commit war crimes against the United States” are not entitled to the protections of the American Constitution.”440

Other proponents of military tribunals argue that they would bring such criminals to justice quickly, that the President’s order would prevent reprisals against jurors by supporters of terrorist defendants, and that – because the proceedings could be held in

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secret – the government could avoid disclosing classified information and the methods used to obtain it. “An open trial…covered by television, would be an ideal stage for Osama bin Laden to spread his propaganda to all the Muslims in the World.”

Moreover, despite criticism in the media, the President’s order appeared to enjoy overwhelming public support. A Newsweek poll found that 67 percent of Americans approved the plan, although ideas about how it should operate sometimes differed substantially.

The Bush Administration moved to placate opponents by promising additional regulations outlining the actual procedures for the military commissions, to be drafted by the General Counsel of the Department of Defense, which would provide for greater procedural protection than the original order requires. At the same time, however, the Administration challenged critics on grounds of national security and war-time exigency.

In hearings before the Senate Judiciary Committee, Ashcroft bluntly told lawmakers that their “power of oversight is not without limit,” and that in some areas “I cannot and will not consult with you.”


442 Thirty percent thought the proceedings should be conducted entirely in public, and another twenty-eight percent believed they should be mostly public. Fifty-five percent believed the tribunals should have some international involvement, while only forty percent agreed with the Bush Administration that they should be run entirely by Americans. A seventy-four percent majority said military commissions should be used to try foreign suspects captured elsewhere in the world, but fifty-seven percent opposed using them to try non-citizens who had lived in this country for many years. A substantial majority, forty-two percent, did not want the commissions to consist entirely of military personnel, expressing the opinion that civilian federal judges should play some role in their proceedings. Fifty-nine percent considered it somewhat likely that the government would overuse military tribunals in cases involving non-citizens that belonged in the regular criminal court system, while another eighteen percent considered this highly unlikely. Jennifer Barrett, Newsweek Poll: Public Backs Military Tribunals, Dec. 1, 2001.

443 Alberto R. Gonzales, Editorial, Martial Justice, Full and Fair, N.Y. Times, Nov. 30, 2001, at A25 (promising that the Military Order will be interpreted to give full and fair trials in military commissions).

Nevertheless, when the government prosecuted the first alien accused of terrorist activities after the order was issued, it brought the case in a civilian court, rather than before a military commission.\footnote{This was the case of Zacarias Moussaoui. See infra note 459 and accompanying text.}

Various law professors also argue in favor of having suspects tried by international tribunals. Paul Williams and Michael Scharf, for example, write that the U.S. has been able to prosecute only a handful of “low-level culprits and ideological supporters.” With potentially thousands of al Qaeda terrorists who could conceivably fall into the hands of the U.S. military, they claim that this process will neither serve as adequate justice nor as an effective deterrent to further acts of terror. Moreover, domestic prosecution prevents the early apprehension of terrorists: this is what happened when the Clinton Administration declined Sudan’s offer in 1996 to turn over Osama bin Laden because there was not sufficient probable cause to try him in U.S. courts.\footnote{Paul R. Williams & Michael P. Scharf, Editorial, \textit{Prosecute Terrorists on a World Stage}, \textsc{L.A. Times}, Nov. 18, 2001, at M5. See also Error! Main Document Only. \textit{Shaden Yousef, Comment: Military Tribunals: Cure for the Terrorism Virus or a Plague All Their Own?}, 42 Hous. L. Rev. 911 (2005) (arguing that Error! Main Document Only. President Bush’s military commissions are unconstitutional as currently constructed).}

Unlike in European tribunals, hearsay statements cannot be introduced in an American court.\footnote{As one observer pointed out, Osama bin Laden’s telephone call to his mother, telling her that “something big” was imminent, would be inadmissible if the source of information was, say, his mother’s best friend. Ruth Wedgwood, \textit{The Case for Military Tribunals}, \textsc{Wall St. J.}, Dec. 3, 2001, at A18.} Moreover, there are limitations on what an intelligence community concerned with possible future attacks might be willing to expose in open court.

Although the Classified Information Procedures Act of 1980 promulgates rules on using secret information in court, trials must remain open. Non-classified information might also be of great interest to terrorists, such as disclosure that one of their manuals of procedure had been seized (allowing them to make adjustments). In the 1993 World
Trade Center bombing, extensive engineering data on the construction of the towers was offered in evidence; while such information is public, it is much easier to obtain when brought into open court in a trial. In short, the perpetrators of terrorist attacks are not morally and legally analogous to those who commit domestic crime.\textsuperscript{448} Even Harvard’s Lawrence Tribe – not generally known for his conservative views – concedes that civilian juries in wartime are not inherently likely to be any more fair than military tribunals.”\textsuperscript{449}

Others feel that the appropriate forum for trying accused terrorists ought to be some form of international tribunal, convened under the authority of some international body, rather than simply the national courts of the United States – because the crimes committed by the terrorists are offenses against the world at large and universal morality. Moreover, those who try them should be seen to have the impartiality that is presumed to come with international rather than merely national institutions of justice. Supporters of this view tend to be academics, journalists, or members of the international non-government organization (NGO) community.\textsuperscript{450}

The virtue of international tribunals is not so obvious to European citizens, who naturally look to their own governments for security and justice. Moreover, governments do not want the burden of hosting an international tribunal, or perhaps worse, being


responsible for the imprisonment of convicted terrorists for long periods of time. They would rather see the United States bear these risks.

Still others argue that, in view of the fact that the 9/11 attacks were directed against American property and people, allowing the United States to make the decisions and bear the security risks would be the morally correct thing to do.\footnote{See Anderson, supra note 454 at 596.}

Non-military international tribunals have also been criticized as inappropriate and ineffective forums for trying terrorists. Such standing tribunals are a relatively new concept, often formed by the countries on the winning side in an armed conflict. They are “costly and cumbersome”\footnote{See Aryeh Neier, The Military Tribunals on Trial, N.Y. REV. OF BOOKS, Vol. 49, No. 2, Feb. 14, 2002, at 11; and Byard Q. Clemmons, The Case for Military Tribunals, 49-May Fed. Law 27, 31 (2002).} – as witness the international war-crimes tribunal in The Hague has been under attack for being too slow and expensive. Moreover, because these proceedings are public, they do not provide for the adequate protection of sensitive information.\footnote{The lengthy trial of Slobodan Milosevic is but one example. Johanna McGeary, Will Milosevic Get His?, TIME, Feb. 18, 2002, at 48.} International tribunals are also problematic because of such issues as the absence of a death penalty, possible security compromises of sources and techniques, and reduced levels of due process provided to the accused.\footnote{Anthony H. Cordesman, Strategic Studies Inst., Transnational Threats from the Middle East: Crying Wolf or Crying Havoc? 91-92 (1999).}

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All of the arguments pro and con have thus far been academic. The first suspect who could have been tried by a military tribunal – Zacarias Moussaoui, a French-Moroccan who was arrested in August 2001 as a co-conspirator in the 9/11 attacks – was instead arraigned in a federal district court in Alexandria, Virginia, where he will
stand trial.\footnote{Moussaoui was indicted on December 11, 2001 and charged with conspiring with Osama bin Laden and other members of al Qaeda to murder thousands of Americans. Under the President’s order Moussaoui could have been tried before a military tribunal because he was a French citizen of Moroccan descent. Administration officials said the decision to prosecute Moussaoui in federal court followed a contentious debate between the Pentagon, which wanted to try him in an overseas military tribunal, and the Justice Department, which has secured convictions in several important terrorist cases in American courts. According to Press Secretary Ari Fleischer, the Attorney General recommended that the cases be heard in a civilian criminal court, and the President concurred. David Johnston & Philip Shenon, \textit{Man Held Since August is Accused of Helping in Sept. 11 Terror Plot}, N.Y. TIMES, Dec. 12, 2001, at A-1, col. 2 and B-7. In the opinion of Elisa Massimino of the Lawyers Committee for Human Rights: “The Moussaoui indictment makes it hard to imagine a case that could justify the use of military courts inside the United States.” \textit{Alien Justice: What’s Wrong with Military Trials of Terrorist Suspects?}, 25 HUM. RTS. 14, 14 (2002). \textit{See also} Brooke A. Masters, \textit{Invoking Allah, Terror Suspect Enters No Plea}, WASH. POST, Jan. 3, 2002, at A1. In early April of 2003, the federal judge overseeing the trial of Moussaoui said that she was “disturbed” at the volume of classified material prosecutors were withholding from the accused conspirator, and suggested that they may be unfairly preventing him from preparing a defense. Richard B. Schmitt, \textit{CHICAGO TRIBUNE, Another Hitch in Moussaoui Case}, April 5, 2002 at p. 14. In April of 2005, Moussaoui pleaded guilty to conspiring with al Qaeda to hijack planes and commit other crimes. His sentencing trial began on March 7, 2006.} None of the nearly 500 al Qaeda and Taliban prisoners being held either in Afghanistan or at Camp X-Ray in Guantanamo Bay, Cuba have been found by the Pentagon to be suitable for the new military tribunals.\footnote{Charles V. Pena, \textit{Blowback: The Unintended Consequences of Military Tribunals}, 16 NOTRE DAME J.L. ETHICS & PUB. POL. Y. 119 (2002), citing Pauline Jelinek, \textit{Pentagon: No Tribunal Candidates}, YAHOO! NEWS, Feb. 26, 2002.}

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It is inevitable that, once again, the Supreme Court will ultimately be called upon to assess the nature of the threat – criminal or military, abroad or here at home – and to decide whether or not the ordinary rules of constitutional law apply.

Former Justice Sandra Day O’Connor has already cautioned that “we’re likely to experience more restrictions on our personal freedom than has ever been the case in our country.” The limit will come, she suggests, at the point where “the cost to civil liberties from legislation designed to prevent terrorism outweigh[s] the added security that that
legislation provides.” That point is never easy to find during the heat of battle. Finding it in hindsight, however, may mean finding it too late.457

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President Bush’s Military Order refers to several statutes, but in issuing it he seems to have relied primarily on the inherent powers of his office, especially his authority as Commander-in-Chief of the armed forces.458 The Constitution does not empower the President to subject anyone he suspects of terrorist activity to a military trial (as the Supreme Court ruled in Ex Parte Milligan).459 On the other hand, the Court has endorsed the use of such tribunals to try foreign military personnel in places where there has been actual combat.460

Imperfect as the Military Order may be, the fundamental concept of using military commissions can well be justified morally, politically, and legally. They can be shaped to accommodate the Constitution, international law, and the Geneva Conventions. It is not unreasonable to expect them (as opposed to international tribunals or even ordinary U.S. district courts) to be the vehicle for the prosecution of at least the most serious categories of alleged terrorists (those who by their conduct and ideology have made themselves not merely criminals, but enemies). Considering the sheer number of possible defendants, and the fact that the United States gained custody of them in the context of

458 Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001). However, Jordan Paust contends that there are significant limitations on the President’s authority to set up military commissions pursuant to his Commander-in-Chief power: “The President’s Commander-in-Chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized.” Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, 23 MICH. J. INT’L L. 5 (2001).
armed conflict against a terrorist network and its state sponsors, the military tribunal model is arguably appropriate.

But the Military Order could as well be much too sweeping in its scope. By proclaiming that the proposed tribunals “shall have exclusive jurisdiction with respect to offenses” committed by the individuals to whom the order applies, and that those charged “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 the individual’s behalf, in . . . any court of the United States,” the President sought to insulate his military tribunals from all oversight by the civilian federal judiciary.

Permanent residents of the United States, like citizens, should be accorded full constitutional protection. The Military Order, however, fails to treat alien permanent residency as a separate and protected category of non-citizen. Federal courts must still deal with the clear language of the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” That language applies as well to permanent residents. As Professor Tribe has stated, “[N]ot even Congress could empower a president to subject any resident alien to trial by tribunal whenever the president claims reason to believe that the accused ever aided or abetted what the president deems international terrorism.”

Secretary of Defense Donald Rumsfeld acknowledged that the new measures are extra-ordinary. “Our normal procedure is that if somebody does something unlawful . . .

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461 Military Order, supra note __.
the first thing we want to do is apprehend them, then try them in a court and then punish them.” In the case of people like Jose Padilla, however, Rumsfeld says that is not our first priority:

We are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Quaeda. Now our job, as responsible government officials, is to do everything possible to find out what that person knows, and see if we can’t help our country or other countries.464

While on the surface the use of military tribunals to try terrorists apprehended outside the United States for war crimes committed in other countries makes a good deal of sense, it is certainly not an unavoidable necessity. General courts-martial appear to have the authority to hear all such cases, and Congress has given the civilian federal courts jurisdiction in a large percentage of those that might arise. That does not leave us with clear guidelines. Professor Fletcher’s argument hits home: we are in a state of collective confusion. “Our conceptual waffling has become dangerous, for at the same time that we cannot articulate what we are doing, we believe strongly that we must be doing the right thing. . . .We cannot agree on what we are doing, other than to affirm that it is the right thing to do!”465

A healthy democracy, however, depends on openness. The possibility that military commissions established to try alien members of al Qaeda might be misused to hide from American citizens information that they need to monitor and control their own government is reason enough to be skeptical about the Bush Administration’s plans.

Even if military tribunals are legal, using them to fight terrorism on the home front would be as unwise as it is unnecessary.

Perhaps the Secretary of Defense is right: the war on terrorism is so important that we need to lock people up, without charges, for the duration of the war, just to find out what they know. Perhaps it’s true that the new battlefields are not just in Afghanistan or Iraq or Israel, but extend everywhere, even onto our own soil. Perhaps it’s true that, although in every other war American courts have permitted some kind of trial for enemy combatants, this war is different. Perhaps it’s true that we have to trust the government when it says the secret evidence against these defendants, even though they are Americans, cannot be revealed in a court of law for legitimate security purposes.

Perhaps the time has come for us to re-think our basic constitutional rights.

But if so, it’s not to be done lightly, and certainly not off the record.466

CONCLUSIONS

Government officials have responded to terrorist attacks by proposing and enacting “anti-terrorism” legislation. Policy-makers believe that curtailing privacy and certain civil liberties can help prevent terrorism.467

The reason that academics have been slow to weigh in on the issue is much more likely due to the length of time it takes to write and produce law-review articles than to the fact that they have little to say. Even those who appear on talk shows and write op-ed pieces understand the relative values of hindsight and history.

467 See Timothy Lynch, Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism, Cato Institute (Policy Analysis No. 443, 6/26/02); See also Roger Pilon, Two Kinds of Rights, REASON MAG., December 2001]. Cf. Comments of Christopher Whitcomb, Debate with Nadine Strossen, Milton S. Eisenhower Symposium at Johns Hopkins University, 11/7/02.
But Americans especially must be careful not to tread on hard-won individual rights without a reasonable degree of certainty that preventive and investigative measures are temporary and absolutely necessary.

National security and individual liberty, after all, are two sides of the same coin. Counter-terrorism measures should be the least-restrictive means by which security can be enhanced. In light of the government’s demonstrably aggressive aspirations, who is to say that the American Civil Liberties Union is overstating the point when it suggests that the Bush Administration’s “insatiable appetite for control” is out of control?

The legislation promulgated in the wake of 9/11 – enabling secret arrests, detentions, trials and deportations of terrorist suspects; ethnic profiling; the Terrorist Information Prevention System; and new surveillance techniques – has been criticized by both liberals and conservatives. Both Democrats and Republicans have decried the USA Patriot Act as triggering governmental intrusions, such as the search for and seizure of previously private records, upon the mere assertion of the possibility of a connection to terrorist activity.

To be sure parts of the Patriot Act – like information-sharing between the CIA and FBI. – have been acceptable even to its harshest critics But the government already has enough investigative powers to prosecute suspected terrorists. The Patriot Act goes too far, and in so doing violates everyone’s civil liberties.

It is well-settled Constitutional law that basic First-Amendment, due-process, and equal-protection rights are not limited to citizens, but apply to all persons within the United States or subject to U.S. authority. These are human rights, not privileges of

468 Comments of Nadine Strossen, Debate with Christopher Whitcomb, Milton S. Eisenhower Symposium at Johns Hopkins University, 11/7/02.
citizenship. So too, *arguendo*, are the criminal-procedural protections afforded by the Fifth and Sixth Amendments which, arguably at least, could be extended to individuals subjected to trial in military tribunals.

The Administration’s underlying defense of its policies is that unprecedented risks warrant unprecedented responses. Indeed it is hard to dispute the idea that the world grows more dangerous every day. But that aphorism was equally apt during earlier conflicts. No better example was World War II, in which there was also a surprise attack on American soil (at Pearl Harbor) and when weapons of mass destruction inflicted far more severe damage that those used in World War I. It was true as recently as during the cold war with the former Soviet Union, armed as that nation was with huge stockpiles of nuclear, chemical, and biological weaponry.

While the Bush Administration may arguably be justified in seeking to destroy weapons of mass destruction possessed by our self-proclaimed enemies, even to replace their rogue regimes, it has yet to make the case that these threats justify compromising our fundamental principles of liberty and justice.469

Perhaps the most egregious aspect of the USA Patriot Act is its elevation of secrecy as a prosecutorial tool. As one federal judge recently put it, “Democracies die behind closed doors.”470 Government policies that rely on deception and dogma to conceal failures often collapse in failure. Though it is obviously unreasonable to expect the military to disclose every aspect of its operations, the public – aware that actions taken today will likely have a long-lasting effect upon the country’s foreign relations –


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should at least know what its fighting forces are trying to accomplish in the name of the United States.

The government should have to bear a heavy burden of proof that its restrictions on our civil liberties are absolutely necessary. We should hold people accountable for their own actions, not blame them based on their ethnic, political, or religious identities. No one should be imprisoned without a public accounting, reviewable in a civil court.471

In these times of terror and tension, the urge to use whatever means necessary to defeat our enemies is understandable. Perhaps this war on terrorism is so potentially cataclysmic that we must lock people up indefinitely, without formally charging them, in order to prevent them from perpetrating acts of mass destruction, or merely to find out what they know. Perhaps this war is fundamentally different from all that have been waged in the past. Perhaps we have no choice but to trust the government and its intelligence agencies when they demand secrecy.

But to do so, we must fully understand, is to abandon the Constitution that we have fought so long to preserve.

The farther we stray from our hard-won freedoms in order to vanquish those who would destroy our way of life, the more we become like them – and the more hollow our ultimate victory.

The perilous quest to preserve civil liberties in uncivil times is not an easy one, but the wisdom of Benjamin Franklin should remain a beacon: “Societies that trade liberty for security end often with neither.”

471 See Cole, supra note 443.