A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies

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Historical comparisons between presidents are notoriously difficult. They involve assessing choices made at different times, under different circumstances, and, often, in the face of varying norms, values, and public expectations. The subject of this symposium is no exception. Comparing President George W. Bush's approach to habeas corpus with President Abraham Lincoln's is no easy task, and certainly not one that can be accomplished with sufficient depth in the brief time we have here today. But even a brief comparison is useful, for it helps illuminate the choices made by each president. And important distinctions can be drawn—distinctions that shed light on our continuing evaluation of the Bush administration's approach to national security issues and that provide another perspective on Lincoln's wartime policies. In essence, while Lincoln's suspension of habeas corpus has rightly been criticized for unnecessarily infringing civil liberties, it differs in quality and in kind from the Bush administration's approach to habeas corpus, which was part of a deliberate assault on the Constitution itself.

I will begin with some brief background on habeas corpus. I will then address the Bush administration's approach to habeas corpus and how it fits into the administration's detention policy in the "war on terror" more generally. I will conclude with a discussion of Lincoln's Civil War suspension of habeas corpus, and how it offers a valuable window into actions taken during the past eight years.

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Derived from the Latin meaning "you have the body," habeas corpus was the most important and celebrated of the English writs to become part of America's legal system.[1] For centuries, the writ of habeas corpus has safeguarded individual liberty by

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1 CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 1 (2006).

affording people seized by the government the right to question the grounds for their detention before a judge.[2] William Blackstone described habeas corpus as a "bulwark of our liberties."[3] Alexander Hamilton deemed the writ the most important protection against arbitrary state power.[4] This country's Founders enshrined the protections of habeas corpus in the Constitution, which provides that the writ shall not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it."[5] This provision—known as the Suspension Clause—has been called "[t]he most important human right in the Constitution."[6] It ensures access to the courts for those imprisoned by the government, and makes possible "the full realization" of other constitutional guarantees.[7]

Habeas corpus, however, does more than protect the freedom of the individual from unlawful physical restraint. It also serves an important structural function in our constitutional system. By preventing the arbitrary exercise of detention power, it helps ensure checks and balances among the branches of government and adherence to the rule of law.[8]

The suspension of habeas corpus, on the other hand, has always been understood as an exceptional power.[9] It is a power that may be exercised, if at all, only in a true exigency and only then as a temporary measure until courts can again perform their required function of examining the basis for a prisoner's detention and dispensing justice.

Over time, habeas corpus has been most commonly employed as a post-conviction remedy—a mechanism for those imprisoned under the judgment of a state or federal court to seek review of their conviction based on constitutional error.[10] However, it is important to remember that habeas corpus historically provided a check against unlawful executive detention, a remedy for those detained without charge, without trial, and without judicial process.[11]

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2 *Id.*

3 1 WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 133 (2002).

4 THE FEDERALIST 84, (A. Hamilton), at 511 (Clinton Rossiter ed. 1961).

5 U.S. CONST. art. I, § 9, cl. 2.

6 Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution,* 32 B. U. L. REV. 143, 143 (1952).

7 David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006).

8 WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 145 (1980).

9 *Id.* at 141.

10 *Id.* at 155–56.

11 Immigr. and Naturalization Services v. St. Cyr, 533 U.S. 289, 301 (2001); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L, REV. 1038, 1238 (1970).

The Bush administration's detention of prisoners at Guantánamo and elsewhere implicated the core function of habeas, for it consisted of an effort to deprive prisoners of all meaningful review of their executive confinement. Further, this confinement was potentially permanent, lasting for the duration of a "war on terror" without any clear end. Centuries ago, the King of England might lock a prisoner in the Tower of London to avoid habeas corpus. After September 11, the President of the United States brought them to Guantánamo.

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After September 11, the Bush administration had to decide where to bring prisoners captured by U.S. forces and how it would treat them. Some of the prisoners had been captured in Afghanistan following the U.S.-led invasion of that country; others, however, had been seized at various places across the globe, from Bosnia to the Gambia.[12]

Guantánamo was not chosen by accident. The Bush administration deliberately brought hundreds of prisoners to the U.S. naval base there because it was located in territory that was controlled entirely by the United States but was not formally part of the United States.[13] As a previously secret Justice Department legal opinion makes clear, the Bush administration believed that this absence of formal sovereignty over Guantánamo meant that habeas corpus would not extend to the territory, therefore avoiding judicial review of the detention and treatment of the prisoners there.[14] At the same time, the Bush administration made a series of determinations that the prisoners at Guantánamo, as well as others held as "enemy combatants," in the global "war on terror," were not entitled to any protections under U.S. or international law, including under the Geneva Conventions.[15] In short, Guantánamo was designed as a legal black hole.

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12 Boumediene v. Bush, 128 S.Ct. 2229, 2241 (2008).

13 HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR 97 (2007).

14 Memorandum from Patrick F. Philbin and John C. Yoo to William J. Haynes II (Dec. 28, 2001), Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–37 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).

15 Memorandum from President George W. Bush to The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), Humane Treatment of al Qaeda and Taliban Detainees in THE TORTURE PAPERS, *supra* note 14, at 134–35.

In seeking to deny Guantánamo detainees' habeas corpus rights, the Bush administration relied on formal legal constructs, not exigency. It argued that because the detainees were foreign nationals held outside the United States, they were necessarily outside the reach of the federal habeas corpus statute, the Suspension Clause, and the Constitution generally. In other words, the Bush administration did not claim habeas corpus needed to be suspended to deprive Guantánamo detainees of habeas review because they had no right to that review in the first place.[16] The Bush administration further maintained that by designating detainees at Guantánamo as "enemy combatants" it could hold them indefinitely, potentially for life, without charge. The Bush administration also applied the same argument to the thousands of others being detained by the United States outside the nation's borders, including at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan, secret CIA-run prisons (or "black sites"), as well as two individuals (Jose Padilla and Ali al-Marri) seized and held in military detention within the United States.[17] The result: a global-wide detention network that sought to place an entire category of persons permanently beyond the law.

Meanwhile, without court scrutiny, the Bush administration implemented a system of indefinite detention without charge, sham military tribunals, and state-sanctioned torture and abuse authorized at the highest levels of the U.S. government. Further, under the Bush administration's view, any action taken by the executive was legal if done in the name of national security, even if Congress explicitly prohibited that action. Secrecy pervaded every aspect of Guantánamo. Indeed, the Bush administration refused even to disclose the names of the prisoners, many of whom disappeared for years into U.S. custody in violation of basic principles of the U.S. Constitution and international law. The fact that over time Guantánamo would be brought—at least partially—within a legal framework had nothing to do with the Bush administration, which resisted affording detainees any protections and sought to undermine court rulings every step of the way. Rather, it had to do with the resilience of habeas corpus, which ultimately led to three landmark Supreme Court decisions invalidating important components of the Bush administration's post-9/11 detention policy.

16 *See* Jonathan Hafetz, *The Guantanamo Effect and Some Troubling Implications of Limiting Habeas Rights Domestically*, 10 N.Y. CITY L. REV. 351, 351 (2007).

17 BALL, *supra* note 13, at 27–28, 70-71; Hafetz, *supra* note 16, at 354.

The first in that trio, *Rasul v. Bush*, held that Guantánamo detainees had a right to habeas corpus review under federal statute.[18] The Supreme Court, moreover, rebuked the Bush administration for departing from the United States' most fundamental and deeply held legal principles, noting that "[e]xecutive imprisonment has been considered oppressive and lawless" since the Magna Carta.[19] The administration, however, then defied the Supreme Court, trying to block habeas review by creating military boards—known as Combatant Status Review Tribunals—that lacked the most basic elements of due process, denying detainees an opportunity to see and respond to the evidence against them before a neutral decision maker and relying on information gained through torture and other coercion.[20] The administration also pushed Congress twice to amend the federal habeas statute, which had been in place since the Nation's founding, to repeal access to habeas corpus for individuals detained as "enemy combatants."[21]

The second decision, *Hamdan v. Rumsfeld*, reaffirmed detainees' right to habeas corpus and invalidated the military commissions established unilaterally by President Bush to try detainees for war crimes.[22] The Court ruled that the commissions failed to comply with the Uniform Code of Military Justice and the Geneva Conventions.[23] Further, the Court rejected the notion that any prisoner was outside the law, ruling that, at a minimum, the baseline protections of Common Article 3 of the Geneva Conventions applied to all persons in U.S. custody.[24]

The third and final decision, *Boumediene v. Bush*,[25] was the most important and far-reaching. Once again, the Supreme Court ruled that Guantánamo detainees were entitled to habeas corpus.[26] But this time, the Court made clear that the right to habeas was grounded in the Constitution's Suspension Clause, not merely in federal statute, striking down Congress's most

18 Rasul v. Bush, 542 U.S. 466 (2004) (finding a right to habeas corpus under 28 U.S.C. § 2241).

19 *Id.* at 474 (internal quotation marks and citation omitted).

20 *See* Hamdi v. Rumsfeld 542 U.S. 507, 509–13.

21 *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) [hereinafter "DTA"]; Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §948a (2006)) [hereinafter "MCA"].

22 Hamdan v. Rumsfeld, 548 U.S. 557, 558–59 (2006). The Court ruled that the first court-stripping statute, the DTA, did not apply to pending cases. *Id.* at 575–76.

23 *Id.* at 613, 631–32.

24 *Id.*

25 128 S.Ct. 2229 (2008).

26 *Id.* at 2234.

recent court-stripping legislation.[27] Even more importantly, the Court did not limit its ruling to Guantánamo, but instead held that habeas could potentially reach anywhere the United States deprived a person of liberty. The political branches, the Court explained, did not have the power to "switch the Constitution on or off at will" merely by altering the place of detention.[28] Treating detention as a shell game, where a prisoner's location could be shifted to evade habeas review, the Court explained, would make the scope of the Suspension Clause "subject to manipulation by those [Executive branch officials] whose power it is designed to restrain."[29] The Court thus dealt a powerful blow not only to Guantánamo but also to the broader concept of a lawless enclave on which Guantánamo and other post-9/11 detention sites were based.

Supporters of the Bush administration have invoked Lincoln as a historical precedent. Lincoln, they argue, suspended habeas corpus in the exercise of his commander-in-chief power to defend the nation in a time of crisis. Bush merely followed his example by making necessary abridgments of civil liberties in wartime, one of which was to limit access to the federal courts by those detained for security purposes.

Before comparing the two presidents, let us review briefly the actions taken to suspend habeas corpus during Lincoln's administration. Following the firing of the first shots on Fort Sumter by the Confederacy in April 1861, President Lincoln took a number of steps to protect the Union, including calling for the blockage of Southern ports and for the states to supply 75,000 new militia members.[30] Lincoln also authorized army generals to suspend the writ of habeas corpus where necessary "for the public safety," initially along the military line between Philadelphia and Washington (following rioting in Maryland) and later to other places, as far north as Maine.[31] At the time, Lincoln confronted the real prospect that Washington, D.C., might be taken by Confederate forces.[32]

Congress was not in session when Lincoln suspended habeas corpus.[33] When Congress met several months later in a special session (convened by Lincoln), Lincoln defended his suspension of

27 *Id.* at 2243.

28 *Id.* at 2259.

29 *Id*

30 *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 997 (2008).

31 *Id.* at 998.

32 *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 16–17 (2003).

33 *Id.* at 158–59.

the writ in a July 4 message to legislators.[34] He famously asked Congress, "[A]re all the laws *but one* to go unexecuted, and the government itself to go to pieces lest that one be violated?"[35] In effect, Lincoln asserted that in a time of emergency, a president needed the ability to take action to preserve the republic and its constitutional fabric, even if that meant suspending a right as fundamental as habeas corpus.[36]

Although Congress quickly ratified a number of Lincoln's emergency measures, it did not act on his suspension of habeas corpus for almost two years. Then, in March 1863, Congress enacted the Habeas Corpus Act, which authorized the President to suspend habeas corpus in any case within the United States where the public safety might require it.[37] The act, however, also limited the length of time individuals other than prisoners of war could be held without criminal charge.[38]

Lincoln's suspension of habeas corpus during the Civil War led to abuses and deprivations of basic freedoms that, in many instances, could not be justified on grounds of necessity. In addition, many individuals were charged and tried before military commissions, rather than civilian courts, even though some of those military proceedings took place in areas where the civilian courts were open and functioning—a practice the Supreme Court eventually struck down as unconstitutional.[39]

Some of Lincoln's actions also raised significant separation of powers concerns. Perhaps most notably, Lincoln allowed his officers to ignore judicial orders granting habeas relief to prisoners, including one from Roger Taney, Chief Justice of the Supreme Court, sitting as a circuit judge in *Ex parte Merryman*.[40]

Yet, Lincoln's approach to habeas corpus differed from Bush's in important ways—ways that illuminate some of the most deeply problematic aspects of the Bush administration's "war on terror." Lincoln acted out of a genuine sense of exigency, initially suspending habeas corpus when the nation's capital was under siege and, indeed, the nation's survival itself hung in the balance. Admittedly, the suspension power was later exercised more broadly, and extended to areas not under any direct threat. But it was also intended to be temporary, as suspension of

34 *Id.*

35 Abraham Lincoln, Special Session Message (July 4, 1861), 7 COMP. MESSAGES & PAPERS PRES. 3226 (James D. Richardson ed., 1917).

36 FARBER, *supra* note 32, at 159.

37 Act of Mar. 3, 1863, § 1, ch. 81, 12 Stat. 755.

38 *Id.* §§ 2–3.

39 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

40 17 F. Cas. 144 (C.C.D. 1861) (No. 9,487).

ordinary judicial process for a limited period of time when observance of that process was not believed possible or feasible.

Lincoln's suspension also reflected a more limited vision of executive power. Lincoln initially suspended habeas corpus when Congress was not in session—and hence when legislative approval was not an option. To be sure, the suspension continued without congressional imprimatur until March 1863, and led to the imprisonment of more than thirteen thousand individuals in military jails without charges or trial, including newspaper editors considered sympathetic to the Confederate cause.[41] But Lincoln did seek to promptly justify his actions before Congress and, more importantly, never asserted the power to act against the specific instruction of Congress even as he maintained presidential authority to suspend the writ in a time of emergency.[42]

President Bush, by contrast, did not seek temporary limits on habeas corpus, but sought to deny access to the writ to an entire category of people in a conflict he himself insisted was of potentially limitless duration and scope and would last at least several generations. The Bush administration also explicitly discriminated based on alienage, as part of an effort to create a permanent second-class justice system for foreign nationals detained under the elastic and malleable label of "enemy combatant"—an effort that later gained congressional sanction through court-stripping legislation.[43]

The purpose underlying the actions of these two presidents differed in another important respect. At bottom, Lincoln's suspension rested on the notion that in a time of crisis and public danger, habeas corpus might have to be sacrificed temporarily to preserve the public safety and the larger framework of government—a situation expressly contemplated by the Suspension Clause and consistent with the writ's history.[44] President Bush too sought to defend the nation, albeit from a different threat than that which confronted Lincoln—the threat posed by al Qaeda and other terrorist organizations rather than an internal armed rebellion. But, as time has made clear, the Bush administration's efforts to eliminate habeas corpus had little, if anything, to do with security, and everything to do with covering up embarrassment, if not illegality.

41 Steven R. Shapiro, *The Role of the Courts in the War against Terrorism: A Preliminary Assessment*, 29 FLETCHER F. WORLD AFF. 103, 104 (2005).

42 FARBER, *supra* note 32, at 158–59.

43 MCA, *supra* note 21; DTA, *supra* note 21.

44 *See* U.S. CONST. art. I, § 9, cl. 2.

The Bush administration's detention policies were driven by an effort to shield dubious and in some instances patently unlawful practices from public and judicial scrutiny. The administration continued to oppose habeas corpus for detainees at Guantánamo (and elsewhere) in order to evade review of its underlying effort to deny those detainees basic protections under the Constitution and international law, including the Geneva Conventions, to which every prior administration had adhered. Those protections included the right to due process, the right to a fair trial, and the right to be free from torture and other abuse.[45] The Bush administration also opposed habeas corpus because it feared that, in many cases, meaningful review would cause its assertion that the detainees were dangerous terrorists (or "the worst of the worst") to crumble and thereby expose the underlying falsehood on which Guantánamo rested. And, finally, it opposed habeas corpus because it feared that courts would impose checks on its quest for unprecedented and untrammeled executive authority—a power grab encapsulated by David Addington's statement that "We're going to push and push and push until some larger force makes us stop."[46]

Lincoln, by contrast, acknowledged that a president's war powers were constrained by the laws of war and, moreover, sought to codify the laws and usages of war in military regulations so that Union forces could better understand and follow them—an effort that resulted in the "Lieber Code," a foundation for the development of the modern law of war.[47] Lincoln also did not assert the authority as commander-in-chief to override or ignore acts of Congress, as Bush did on numerous important issues, including by claiming the power to disregard the long-established and categorical prohibition against torture.[48] Lincoln's suspension of habeas corpus, in short, did not reflect an effort to expand executive power in a way that was designed to avoid legal constraints and permanently insulate that power from judicial review and accountability.

This is not to deny that there were violations of the laws of war or abuses of individual liberties during Lincoln's presidency.

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45 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 26, 35–36 (William S. Hein & Co., 2004).

46 *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 126 (2007).

47 *See* FRANCIS LIEBER, THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 31 (1863) (General Order No. 100); Barron & Lederman, *supra* note 30, at 994–95; *see also* Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 230–32 (1998) (describing influence of the Lieber Code).

48 *See generally* FARBER, *supra* note 48.

Lincoln's suspension of habeas corpus, moreover, raised significant constitutional concerns, including over the president's emergency power to suspend the writ, for how long, and under what circumstances.[49] But the history surrounding the suspension of habeas corpus during Lincoln's presidency may be understood as a product of the unfortunate, if familiar, tendency toward over-reaction in a time of war.

President Bush's actions toward habeas corpus and the treatment of detainees generally reflect something very different. While Bush administration officials also invoked national security, they sought to eliminate habeas corpus to cover-up illegality, to cloak unlawful detention and mistreatment in secrecy, and to institutionalize an unprecedented expansion of executive power. Their various maneuvers through years of battles over habeas corpus in the courts and in Congress were taken not to defend the rule of law but to undermine it—in defiance of the Constitution and of the truth itself.

49 *See generally* Stephen I. Vladeck, *The* Field *Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 397–415 (2007) (discussing the historical and continuing controversy over Lincoln's suspension of habeas corpus).

A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From The Civil War To The War on Terror

Kyndra Rotunda[*]

It was a new kind of war, and the U.S. faced a new kind of enemy. Clandestine saboteurs operated in the shadows waiting for the perfect opportunity to strike. Our country was not secure. Our homeland was under siege. Our military hunted an enemy it called "enemy combatants." It brought some of these enemy combatants before special Military Commissions instead of before civilian criminal courts. Public debate ensued about the procedures that should be applied to these captured enemy combatants. What was their status? What were their rights? What should be their fate? U.S. courts, including the Supreme Court, became embroiled in the controversy as it struggled to answer these questions from on-high. The year was 1863. We were at war—the Civil War.

Some say that the issues arising in the present-day War on Terror are unprecedented, and that the procedures to deal with captured enemy combatants are novel. In reality, there is nothing new under the sun. Many of the legal issues arising in the current War on Terror arose over one hundred years ago, during the Civil War.

This article compares and contrasts the military trials that brought the Lincoln conspirators to justice with the present day Military Commissions. It concludes that, over time, the President and Congress, through statutes and treaties and executive orders, have created procedural rules that extend more rights to captured enemy soldiers today than would have been imagined in Lincoln's time.

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There are important differences. From Lincoln's time through FDR, Congress and the President together decided what those rights would be. In modern times, the Court (even though it is fiercely divided) has stood firm against the President, even when he has the full support of Congress. And, the more things change, the more they are the same. In the military trials of Lincoln conspirators, and the trials of Nazi saboteurs during World War II, there was what today we would call "unlawful command influence." That remains true today, by people who claim to have the best interests of the detainees at heart.

In discussing modern day judicial branch involvement with military trials, this article analyzes the role of the Supreme Court vis-à-vis the President during a time of war. In *Youngstown Sheet & Tube Co. v. Sawyer*,[1] the Supreme Court made clear that a President's executive authority is at its *highest* when both the President and Congress act in concert, and at its *lowest* when the President acts contrary to the will of Congress.[2] Consistent with this test, in previous conflicts, the Supreme Court has deferred to Congress and the Executive about war-time procedures, especially when the two branches agreed. However, one unique feature of the current conflict is that the Supreme Court has stepped in even when Congress and the President were united. Thus, in *Boumediene v. Bush*, the Court invalidated the Detainee Treatment Act of 2005, which had established procedures for detaining enemy combatants captured abroad in the Global War on Terror.[3]

One feature of Military Commissions that has not changed over the years is that Presidents have a tendency to interfere with ongoing Military Commissions. For instance, during the Civil War, President Johnson refused to follow the Military Commission's request for clemency in ordering one of the Lincoln conspirators (Mary Surratt) to be hanged. During World War II, FDR made clear that he would execute Nazi prisoners regardless of what the Supreme Court decided. These earlier interferences came before the *Youngstown* standard evolved. But, similar infractions have occurred even after *Youngstown*. In the current war, President Obama has unilaterally halted trials in Guantanamo Bay, which contradicts existing federal law, the Military Commissions Act of 2006.[4]

1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
2 *Id.* at 592.
3 Boumediene v. Bush, 128 S. Ct. 2229 (2008).
4 10 U.S.C.A. § 948b (West 2006).

According to the test that Justice Jackson's concurring opinion articulated in *Youngstown*, President Obama's executive authority is at its lowest ebb, because his decision to halt trials is contrary to an existing federal statute (The Military Commissions Act of 2006). Yet, he has halted the trials, which not only runs afoul of Justice Jackson's power analysis in *Youngstown*, but may amount to unlawful command influence.

To see where we are today and to put the present situation in perspective, let us first consider the role of Military Commissions in the Civil War.

I. LINCOLN'S ASSASSINATION, BOOTH'S CO-CONSPIRATORS, AND THE HUNTER COMMISSION

On April 14, 1865, actor John Wilkes Booth shouted, "Sic simper tyranus!"[5] as he vaulted from the box seating that overlooked the Ford's Theater Stage. He had just assassinated President Lincoln. But, he did not act alone and President Lincoln was not the only target.

John Wilkes Booth had conspired with other Confederate sympathizers to topple the federal government by assassinating President Lincoln and other national leaders, including Vice President Andrew Johnson, Secretary of State William H. Seward and General Ulysses S. Grant.[6] Booth succeeded, but by some twist of fate, the other attackers were unsuccessful. One would-be assassin, George Atzerdot, lost his nerve and retreated before attacking Andrew Johnson. Another co-conspirator, Lewis Powell, carried out the assault on William Seward and stabbed Seward multiple times. But, Seward miraculously survived. General Grant fortuitously canceled his plans to attend the Ford's Theatre Production with the Lincolns, where he would have faced the same fate as Abraham Lincoln.[7]

Booth escaped through the rear door of the theater, where he took his horse's reins from a stage-hand named Peanuts and disappeared into the Washington darkness and across the Potomac River.[8] Later, Union troops would corner Booth in a

5 W.P. CAMPBELL, THE ESCAPE AND WANDERINGS OF J. WILKES BOOTH UNTIL ENDING OF THE TRAIL BY SUICIDE IN OKLAHOMA, TRAVELERS SER. NO. 7 (1922), *available at* http://ia341037.us.archive.org/1/items/johnwilkesboothe00camp/johnwilkesboothe00camp.pdf.

6 Edward Steers, Jr., *Introduction* to THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS XI, XI (Edward Steers, Jr. ed., 2003) [hereinafter THE TRIAL].

7 *Id.*

8 HARLOD HOLZER, THE PRESIDENT IS SHOT: THE ASSASSINATION OF ABRAHAM LINCOLN 100, 118, 123 (2004), *available at* http://www.highlightskids.com/Lincoln/pdfs/PresidentisShot.pdf.

Maryland farm-house barn and he would surrender his life for his crime. Booth's final words were, "Say to my mother that I died for my country."[9] But his co-conspirators would face a military court —a Military Commission.

Within a few weeks of Lincoln's assassination the government had arrested eight suspects.[10] On May 1, 1865, President Johnson, by Executive Order, established a Military Commission to try eight suspected co-conspirators in the assassination of President Lincoln.[11] One of them was a woman named Mary Surratt.[12] She owned a guest-house where the conspirators allegedly met and hatched their plot.[13]

The Military Commission that heard the case of Booth's eight co-conspirators was comprised of nine military officers, headed by the Army Judge Advocate General (JAG).[14] It came to be known as the "Hunter Commission," named after its ranking member Major General David Hunter.[15] The Commission established its own procedural rules with a few guiding principles established by President Johnson. The President ordered that the "trials be conducted with all diligence consistent with the ends of justice."[16] The Order also required "the said Commission to sit without regard to hours."[17] He said the orders should "avoid unnecessary delay, and conduce to the ends of public justice."[18]

The Hunter Commission rules consisted of eleven succinct points that ranged from providing prisoners some procedural

9 *Id.* at 155; James Speed, U.S. Attorney General, *Opinion on the Constitutional Power for the Military to Try and Execute the Assassins of the President,* July, 1865, *in* THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 403, 409 (Benn Pitman, comp., 1865) [hereinafter THE ASSASSINATION].

10 The eight co-conspirators were David Herold, Mary Surratt, Lewis Powell, Edman Spangler, Samuel Arnold, Michael O'Laughlen, George Atzerodt, and Samuel Mudd. The ninth conspirator, John Surratt Junior remained at large. Steers, *supra* note 6, at XII.

11 Proceedings of a Military Commission, May 1, 1865, *in* THE ASSASSINATION, *supra* note 9, at 17.

12 While in prison, and during the Military Commission, Mary Surratt received some special privileges because of her gender. She was not shackled in court, as the other prisoners were, and she was allowed to choose which foods she would eat. The male conspirators were shackled in court (two of them also wore a seventy-five pound ball around their ankles), and the male conspirators were fed only military rations. OSBORN H. OLDROYD, THE ASSASSINATION OF ABRAHAM LINCOLN: FIGHT, PURSUIT, CAPTURE, AND PUNISHMENT OF THE CONSPIRATORS 119–20, 132 (The Lawbook Exchange, Ltd. 2001).

13 HOLZER, *supra* note 8, at 70.

14 Proceedings of a Military Commission, *supra* note 11, at 17.

15 *See* ROBERT AITKEN & MARILYN AITKEN, LAW MAKERS, LAW BREAKERS AND UNCOMMON TRIALS 77 (2007).

16 Proceedings of a Military Commission, *supra* note 11, at 17.

17 *Id.*

18 *Id.*

protections, to specifying petty details, such as what time they would break for lunch each day. The rules were as follows:

1. The Commission would convene daily at 10 A.M., recess at 1.P.M. for an hour.
2. The prisoners would be allowed legal counsel, who would take an oath prescribed by Congress before being permitted to appear.
3. The examination of witnesses would be conducted on the part of the Government by one Judge Advocate, and by counsel on the part of the prisoners.
4. The testimony would be taken in short-hand by reporters, who would take an oath that they would "record the evidence faithfully and truly." They would also be required to swear that they would not communicate any part of the proceedings of trial, except by authority of the presiding officer.
5. A copy of the evidence would be taken each day and given to the Judge Advocate General, and one to the prisoners' lawyers.
6. Only official reporters would be admitted to the court-room. The rule specified that the Judge Advocate General would furnish daily, at his discretion, to an agent for the Associated Press, "a copy of such testimony and proceedings as may be published, pending the trial, without injury to the public and the ends of justice. All other publication of the evidence and proceedings is forbidden, and will be dealt with as contempt of Court, on the part of all persons or parties concerned in making or procuring such publication."[19] [Ultimately, the testimony of three witnesses was taken in secret session.[20]]
7. The presiding officer would furnish a pass to those permitted to attend the trial. No person without a pass would be allowed into the trial.
8. The argument of any motion, unless otherwise ordered by the Court, would be limited to five minutes for each side.
9. After the argument was closed, the Court would immediately deliberate and make its decision.
10. The Provost Marshal would ensure the prisoners attended the trial, and would be responsible for their security. Their lawyers could have access to them in the presence, but not in hearing, of a guard.
11. Counsel for the prisoners would be required to "immediately furnish" a list of defense witnesses.[21]

While the Commission allowed the defendants to have legal counsel, it only gave them a few days to find lawyers. All of the

19 Steers, *supra* note 6, at 21.
20 *Id*.
21 *Id.*

defendants managed to find lawyers, but some were not able to appear by the time the trial started.[22] These lawyers came later, after the trial had already begun.[23]

For instance, testimony began in the trial on May 12th but it was not until the next day, May 13th, that Reverdy Johnson (counsel for Mary Surratt) appeared in court and was unprepared.[24] He said:

> I am here at the instance of that lady [pointing to Mrs. Surratt], whom I never saw until yesterday, and never heard of, she being a Maryland lady, and thinking that I could be of service to her, protesting, as she has done, her innocence to me. Of the facts I know nothing, because I deemed it right, I deemed it due to the character of the profession to which I belong, and which is not inferior to the noble profession of which you are a member, that she should not go undefended. I knew I was to do it voluntarily, without compensation; the law prohibits me from receiving compensation; but if it did not, understanding her condition, I should never have dreamed of refusing upon the ground of her inability to make compensation.[25]

The trial was, for all intents and purposes, secret. The Commission controlled what information was released to the public. Only approved reporters were allowed to attend the trials, and at the end of each day, the Commission specified what information the reporters could report.[26] Additionally, the Commission closed the trial on three distinct occasions, to take testimony from three Government witnesses.[27]

The Military Commission charged the defendants with conspiracy to murder President Lincoln, and other members of his administration including Vice President Andrew Johnson, Secretary of State William H. Seward and Ulysses S. Grant,

22 OLDROYD, *supra* note 12, at 127. Mary Surratt obtained a very able defense lawyer, Reverdy Johnson. He was a former attorney general, a sitting U.S. Senator and he went on to hold the post of minister to Great Britain from 1868–1869. Lawyers for the other defendants were also distinguished. One was a Congressman from Maryland, and two others went on to become judges. Steers, *supra* note 6, at XVIII; Thomas Reed Turner, *The Military Trial*, *in* THE TRIAL, supra note 6, at XXI, XXVI.

23 OLDROYD, *supra* note 12, at 127.

24 *See id.*; Douglas Linder, *The Trial of the Lincoln Conspirators* 6 (Univ. Mo. at Kan. City Sch. of Law), *available at* http://ssrn.com/abstract=1023004.

25 OLDROYD, *supra* note 12, at 127–28 (emphasis added).

26 *See* James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict after Lincoln's Murder*, WASH. POST, Dec. 9, 2001, at F1; *Trial of the Assassins*, N.Y. TIMES, May 16, 1865, at 1, *available at* http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9903E6DC1E3DE53BBC4E52DFB366838E679FDE.

27 Proceedings of a Military Commission, *supra* note 11, at 21 n.* (unnumbered).

Lieutenant General of the Army of the United States.[28] The prosecution maintained that the Lincoln conspirators were part of a much larger conspiracy orchestrated by the President of the Confederacy, Jefferson Davis in 1864.[29] It said that Davis had deployed Confederate Secret Service agents to Canada to disrupt the war efforts and demoralize U.S. citizens. Davis' plans involved attacking civilian populations, burning northern cities, bombing factories and ships, and using germ warfare to infect the civilian population. Prosecutors presented the testimony of three government witnesses that linked Booth and his conspirators to Jefferson Davis and the Confederate Secret Service.[30]

Although not required under the rules, the military hooded the prisoners with gray wool hoods that tied at their neck and had a small opening for their mouths. The prisoners were hooded twenty-four hours a day, except for when they were in court and it was in session.[31] Eventually (around June 6, 1865,

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28 *Id.* at 18–19. The charges read:

> For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A.D. 1865, and on divers other days between that day and the 15th day of April, A.D. 1865, combining, confederating, and conspiring together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late, and at the time of said combining, confederating, and conspiring, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof; Andrew Johnson, now Vice-President of the United States aforesaid; William H. Seward, Secretary of State of the United States aforesaid; and Ulysses S. Grant, Lieutenant-General of the Army of the United States aforesaid, then, in command of the Armies of the United States, under the direction of the said Abraham Lincoln; and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of said rebellion, afterward, to-wit, on the 14th day of April, A.D. 1865, within the Military Department of Washington aforesaid, and within the fortified and intrenched lines of said Military Department, together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln, then President of the United States and Commander-in-Chief of the Army and Navy of the United States, as aforesaid; and maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, then Secretary of State of the United States, as aforesaid; and lying in wait with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson, then being Vice-President of the United States; and the said Ulysses S. Grant, then being Lieutenant-General, and in command of the Armies of the United States, as aforesaid.

Id.

29 Edward Steers, Jr., *General Conspiracy*, *in* THE TRIAL, *supra* note 6, at XXIX–XXX.

30 *Id.* at XXX–XXXV.

31 OLDROYD, *supra* note 12, at 120.

or roughly six weeks after their capture), the Judge in charge of the Military Commissions decided that the prisoners were suffering too greatly from the hooding and ordered the guards to remove the prisoners' hoods.[32]

The trial lasted for nearly two months, and included testimony from hundreds of witnesses. Together, the defense and prosecution subpoenaed 483 witnesses and examined 361 of them at trial.[33] The trial transcript exceeded 4,500 pages and stood over twenty-six inches tall.[34] According to these transcripts, members of the Commission visited the crime scene where Booth shot President Lincoln.[35] It also briefly recessed the trial in order to survey the sanity of one defendant, Lewis Payne.[36] At another point in the trial, defendant Mary Surratt developed "severe sickness" and was taken from the courtroom. However, it appears from the trial transcript that the trial continued in her absence.[37]

The Military Commission ultimately convicted all eight conspirators. The Commission sentenced four defendants to prison terms and four (Herold, Atzerodt, Payne and Surratt) to death by hanging within two days of the verdict.[38] It recommended clemency for defendant Mary Surratt, based on her age (she was almost forty-two years old) and her gender. President Johnson refused to grant her clemency, and insisted that she be hung for her role in the conspiracy. He said that she "kept the nest that hatched the egg."[39]

Hours before Mary Surratt was to face the gallows, her lawyer filed an emergency writ of habeas corpus. The basis of Surratt's habeas petition, like petitions filed today, sought to defeat the jurisdiction of the Commission by appealing to the Constitution. Surratt's petition argued that she was a private citizen of the United States, in no manner connected with the Armed Forces, who had not crossed enemy lines and who had not

32 THOMAS REED TURNER, BEWARE THE PEOPLE WEEPING: PUBLIC OPINION AND THE ASSASSINATION OF ABRAHAM LINCOLN 148–49 (1991).

33 TRIAL OF THE ALLEGED ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND JUNE 1865, FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN 16 (T.B. Peterson & Bros. 1865) [hereinafter TRIAL OF THE ASSASSINS AT WASHINGTON].

34 *Id.*

35 *Id.* at 47 (noting that on May 16, 1865, "the Court paid an informal visit, at half past nine o'clock this morning, to the scene of the President's assassination. The visit was made at the suggestion of the Judge Advocate-General . . . ").

36 *Id.* at 155.

37 *Id.* at 166.

38 LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 66 (2005).

39 *See* Joseph M. Perillo, *Screed for a Film and Pillar of Classical Contract Law:* Shuey v. United States, 71 FORDHAM L. REV. 915, 922–23 (2002).

committed any war crime. As a private citizen, she alleged, she was entitled to an open public trial, before a jury, in a U.S. Criminal Court and not before a military tribunal. For these reasons, her petition argued that the Military Commission was unlawfully convened and that the court could not allow the Commission's judgment to stand.[40]

The Court ordered the military to produce the defendant Surratt and answer the writ. But, the Military did not comply and instead presented an Executive Endorsement, dated that very morning, July 7, 1865, 10.a.m., drafted and signed by President Johnson. It suspended the writ of habeas corpus.[41]

The Judge deferred to President Johnson's suspension of the writ, stating: "This Court finds it powerless to take any further action in the premises, and therefore declines to make orders which would be vain for any practical purpose."[42] The Court went on to state: "The Court has no further power in the case . . . for if the petitioner be executed this day, as designed, the body cannot be brought into Court, and therefore is an end to the case."[43] Just a few hours later, the United States hanged Mary Surratt and the other three defendants.[44] The executions, of course, mooted further appeals.

II. LAW GOVERNING MILITARY TRIBUNALS: FROM THE REVOLUTIONARY WAR TO THE CIVIL WAR

At the time of the trial of the Lincoln conspirators, America was a young country, less than 100 years old. While the country was young, its experience with Military Commissions was not. It had previously used Military Commissions to try war criminals during the War of Independence. In 1780, George Washington used Military Commissions (then called the "Court of Inquiry") to try British intelligence officer John Andre for spying.[45] Americans captured Major Andre, who was out of uniform,

40 Fisher, *supra* note 38, at 209–10.

41 The endorsement stated:

> To Major General W.S. Hancock, Commander, &c.—I, Andrew Johnson, President of the United States, do hereby declare that the writ of habeas corpus has been heretofore suspended in such cases as this, and I do hereby especially suspend this writ, and direct that you proceed to execute the order heretofore given upon the judgment of the Military Commission, and you will give this order in return to the writ. Andrew Johnson, President.

TRIAL OF THE ASSASSINS AT WASHINGTON, *supra* note 33, at 210.

42 *Id.*

43 *Id.*

44 *See* OLDROYD, *supra* note 12, at 205.

45 MAROUF HASIAN, IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 40 (2005).

dressed in civilian clothes, and carrying documents (which were stuffed inside his boots) from West Point Commandant, Benedict Arnold.[46] The documents revealed that Benedict Arnold was conspiring with British Forces to surrender West Point in exchange for a bribe.[47]

General George Washington's fourteen member court of inquiry faced the question of whether to try Major Andre as a soldier, or a spy.[48] It found sufficient evidence to treat him as a spy and it concluded that he should suffer death.[49] Major Andre appealed to General Washington and urged Washington to view him instead as a common soldier. Andre claimed that he had not been behind enemy lines, but instead was traveling on "neutral ground," a fact he believed was dispositive in whether he was a soldier or a spy, and thereby subject to a Military Commission.[50] General Washington maintained that Andre was a spy because he substituted civilian clothes for his military uniform and adopted an assumed name.[51] Major Andre was hanged on October 2, 1780[52] about two weeks after American soldiers had captured him.[53]

General Andrew Jackson also used Military Commissions, both during the War of 1812 and during the Indian War in 1818.[54] Jackson imposed martial law in New Orleans, which included restrictions on civilians leaving the city and a curfew.[55] One defendant was acquitted by a Military Commission, in part because he maintained that the Commission did not have jurisdiction to try him because he was a civilian. Jackson disagreed with the acquittal and refused to release the defendant. The defendant, despite having won acquittal by the Military Commission, remained in jail.[56]

The United States built on these historical precedents when it created Military Commissions during the Civil War. Beginning in 1863, Union forces used Military Commissions to

46 *Id.* at 35–40; FISHER, *supra* note 38, at 11.

47 FISHER, *supra* note 38, at 11.

48 HASIAN, *supra* note 45, at 40.

49 *Id.* at 44.

50 *Id.* at 45.

51 FISHER, *supra* note 38, at 11–12.

52 HASIAN, *supra* note 45, at 44.

53 *Id.* at 44 (noting that Major Andre was captured on September 21, 1780; that the Board of Inquiry decided to treat him as a spy on September 29, 1780; and that it hanged Major Andre on October 2, 1780).

54 John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, CATO SUP. CT. REV. 83, 89 (2006).

55 FISHER, *supra* note 38, at 25.

56 *Id.* at 25–26.

try Confederate spies found in Union ranks.[57] Military Commissions tried approximately 2,000 cases during the Civil War, and went on to try another 200 cases during Reconstruction.[58]

While the notion of using Military Commissions during war was not unprecedented, President Johnson received criticism for trying U.S. civilians before military courts.[59] Did not their status as U.S. civilians entitle them to trial before U.S. civilian courts? U.S. Attorney General, James Speed, prepared a legal opinion for President Johnson on the *Constitutional Power of the Military to Try and Execute the Assassins of the President*.[60] In that opinion, he differentiated between open, active participants who wear uniforms, and secret but active participants who operate as spies and do not wear uniforms. He considered open participants to be legitimate combatants and secret participants to be illegitimate combatants—"enemy belligerents."[61] It is interesting that one hundred forty years later, the U.S. uses the same definition, though some people say that the term originated with the Bush administration, but the history dates to the Civil War.[62]

While Attorney General Speed may have been the first American to refer to detainees who violated the laws of war as "enemy belligerents" or "enemy combatants," the notion of treating enemy soldiers who refuse to follow the laws of war differently from those who do follow the laws of war was not, even then, a novel concept. To reach his conclusions, Speed cited to writings by Cicero and also to Wheaton's *Elements of International Law,* which drew distinctions between legitimate combatants and illegitimate combatants. Speed concluded that "[t]hese banditti that spring up in a time of war are respecters of no law, human or divine, of peace or of war, are *hostes humani generis*, and may be hunted down like wolves."[63] Though not required, the military can opt to take banditti prisoners and

57 *Id.* at 50–51.

58 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 834, 853 (2d ed. rev. & enl. 1920).

59 Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L LAW 35, 40 (2007).

60 Speed, *supra* note 9, at 403.

61 *Id.* at 404–05. Speed also referred to these enemy belligerents interchangeably as "banditti," "public enemies," "secret foes," and "spies." *Id.* at 405–07.

62 *See* Megan Gaffney, *Boumediene v. Bush: Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L.L. REV. 197 (2009); Daniel Williams, *After the Gold Rush—Part I:* Hamdi*, 9/11, and the Dark Side of Enlightenment*, 112 PENN. ST. L. REV. 341, 408 (2007); Jules Lobel, *The Preventative Paradigm & The Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1420–21 (2007); Daniel Nasaw, *Obama Administration to Abandon Bush term "Enemy Combatants,"* THE GUARDIAN, March 13, 2009, http://www.guardian.co.uk/world/2009/mar/13/enemy-combatant-guantanamo-detainees-obama.

63 Speed, *supra* note 9, at 406.

punish them by military tribunals for "any infraction of the laws of war."[64] He opined that:

> [S]urely no lover of mankind, no one that respects law and order, no one that has the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities.[65]

He argued that Booth's statement after assassinating Lincoln "sic simper tyrranis" and Booth's dying statement, "[s]ay to my mother that I died for my country," illustrated that Booth (and his co-conspirators) was not "an assassin from private malice, but that he acted as a public foe."[66]

Attorney General Speed's opinion differentiating prisoners of war (POWs) and non-POW enemy combatants was not only backed by historical precedent, but it also reflected what was already *actually happening* on the Civil War battlefield. General Order Number 100 specified that enemy soldiers captured in uniform were treated as prisoners of war.[67] Spies, defined as "a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy," were not treated as POWs and were punishable by death, regardless of whether the spy successfully communicated the information.[68] Similarly:

> [A] messenger or agent who attempts to steal through the territory occupied by the enemy, to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.[69]

Did it matter that civilian courts remained open? According to Attorney General Speed, the fact that civilian courts remained open was not dispositive on whether Lincoln's assassins could be tried by Military Tribunals.[70] He concluded that military tribunals *can* operate when civil courts are open for the limited purpose of trying "offenders and offenses against the laws of war."[71] Speed explained:

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64 *Id.*

65 *Id.* at 407.

66 *Id.* at 409.

67 *Instructions for the Government of the Armies of the United States in the Field*, General Order No. 100, Apr. 24, 1863, § 3, nos. 49, 56, 63, *in* THE ASSASSINATION, *supra* note 9, at 410, 413–14.

68 *Id.* § 5, no. 88, at 416.

69 *Id.* § 5, no. 100, at 416.

70 Speed, *supra* note 9, at 409.

71 *Id.* at 407.

> The fact that the civil courts [i.e. Article III courts] are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in a time of war, from trying an offender against the law of war than they have a right to interfere with and prevent a battle. . . . If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in a time of war, killed another in battle.[72]

United States Supreme Court precedent at the time supported Speed's view of the issue. In *Ex parte Vallandigham*, the Supreme Court refused to hear a case challenging the conviction of a U.S. citizen and resident of Ohio by Military Commission, on the grounds that it lacked jurisdiction.[73] It said that Vallandigham's petition was not "within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court."[74] The Court deferred entirely to the Military Commission, finding that it had no original jurisdiction to review, reverse, or revise proceedings of Military Commissions.[75]

The defendant, Clement L. Vallandigham was a trial lawyer and a former Ohio Congressman. Vallandigham's crime was sympathizing with the South and uttering "disloyal sentiments" in a public speech.[76] For instance, he called the Civil War "wicked, cruel and unnecessary" and said it was waged "for the purpose of crushing our liberty" and that it was a "war for the freedom of the blacks and enslavement of the whites . . . ."[77]

Vallandigham ably represented himself at his trial, and insisted that the Military Commission lacked jurisdiction to try him. He maintained that only a civilian court would have jurisdiction over him.[78] The Military Commission disagreed with his argument, found him guilty, and ordered Vallandigham to be confined in a military prison for the remainder of the war.[79] Three days after the Commission found Vallandigham guilty and sentenced him, President Lincoln commuted Vallandigham's sentence, and ordered his troops to release Vallandigham outside

72 *Id.* at 409.
73 *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 254 (1863).
74 *Id.* at 251.
75 *Id.* at 253.
76 FISHER, *supra* note 38, at 56–58.
77 *Vallandigham*, 68 U.S. (1 Wall.) at 244–45 (1863).
78 FISHER, *supra* note 38, at 57.
79 *Id.*

of the Union's military lines.[80] In effect, Lincoln deported Vallandigham to the Confederacy.

III. LAW GOVERNING MILITARY TRIBUNALS: RECONSTRUCTION THROUGH WWII

In 1866, the year after the Hunter Commission tried and convicted Lincoln's assassins, and after the Civil War was over, the Supreme Court revisited the question of whether and when the law required civilian defendants to be tried by civilian authorities during a time of war. In *Ex parte Milligan*,[81] the Supreme Court drew a line to clarify which cases could come before Military Commissions.

The case involved Lambdin P. Milligan.[82] Union forces arrested him in 1864, in Indiana, for crimes of conspiracy.[83] It charged Milligan with joining and aiding a secret society known as the "Order of American Knights" or "Sons of Liberty."[84] This secret society aimed to overthrow the government and it conspired with the enemy to seize war supplies and to liberate prisoners of war, among other violations.[85] Milligan was not a Confederate soldier and Indiana was not at war with the Union.[86] He had not been behind enemy lines.

Consistent with President Lincoln's suspension of habeas corpus, a Military Commission found Milligan guilty and sentenced him to death.[87] He filed for a writ of habeas corpus. Eventually his case reached the Supreme Court in 1866, after the Civil War was over.[88] The Supreme Court, in a 5-to-4 decision, held that Military Commissions could not try civilians, who had not associated with the enemy and were "nowise connected with military service,"[89] if the civilian courts were open.[90] In setting out this distinction, the Court left open the possibility that Milligan *could* have been tried by Military Commission for his war crimes if deemed an enemy combatant—that is, if he had

80 *Id.*
81 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
82 *Id.* at 107.
83 *Id.* at 6.
84 *Id.*
85 *Id.* at 6–7.
86 *Id.* at 7–8.
87 *Id.* at 107.
88 FISHER, *supra* note 38, at 58.
89 *Ex parte Milligan*, 71 U.S. (4 Wall.) at 118–27.
90 *Id.*

associated with the enemy[91] or if he were in some way connected with military service.[92] The Court stated:

> On her soil [in Indiana, where the defendant was arrested], there was no hostile foot; if once invaded, that invasion was at end, and with it all pretext for martial law. 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.[93]

Milligan had never been in the military, had no connection to the military or the state militia, and had never been in any state involved in the rebellion.

The minority opined that Congress "had power, though not exercised, to authorize the Military Commission which was held in Indiana."[94] In a reference to Lincoln's assassination and the conviction of eight conspirators, the Supreme Court dissenters in *Milligan* deferred to the Executive authority. It stated that the Military Commission "was approved by [President Lincoln's] successor [President Andrew Johnson] in May, 1865, and the sentence was ordered to be carried into execution. The proceedings therefore had the fullest sanction of the executive department of the government."[95]

Congress regarded the Supreme Court decision in *Milligan* as an act of judicial lawmaking and, in 1867, responded to what it regarded as an activist court, by limiting the Court's jurisdiction to hear cases involving military law.[96]

Some commentators argue that *Milligan* prohibited civilians from ever being tried before Military Commissions, so long as civilian courts were open.[97] Others maintain that the test in *Milligan* is not such a simple one and that it would permit the military to try civilian enemy belligerents before Military Commissions.[98] Many years later, during World War II, the

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91 Yoo, *supra* note 54, at 90 ("By implication, if Milligan had been an enemy combatant, not a civilian, a military commission *could* have tried him for war crimes.").

92 *Ex parte Milligan*, 71 U.S. (4 Wall.) at 122.

93 *Id.* at 126–27.

94 *Id.* at 137 (Chase, C.J., concurring in part, dissenting in part).

95 *Id.* at 132.

96 Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 433; Ronald D. Rotunda, *Congressional Power to Regulate the Jurisdiction of the Lower Federal Courts in School Busing*, 64 GEO. L.J. 839 (1976).

97 See David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1028 (2008); Gregory H. Shill, *Enemy Combatants and a Challenge to the Separation of War Powers in al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), 31 HARV. J. L. & PUB. POL'Y 393, 398–99 (2008).

98 *See* Yoo, *supra* note 54, at 90 ("By implication, if Milligan had been an enemy combatant, not a civilian, a military commission *could* have tried him for war crimes."); al-Marri v. Pucciarelli, 534 F.3d 213, 301 (2008) (Wilkinson, J., concurring in part,

Supreme Court, in *Ex parte Quirin*,[99] agreed with the later view. That is, it made clear that enemy belligerents (including a U.S. citizen) can be tried before Military Commissions even when civilian courts are open. It made clear that *Milligan* is narrow.

The *Quirin* Case considered whether Nazi saboteurs could be tried before Military Commissions. The year was 1942, and the United States was at war with the German Reich. Only six months after the attack on Pearl Harbor,[100] eight German saboteurs boarded two submarines in French ports, and began their trip to the United States.[101] Hidden under miles of dark water, they made the journey across the Atlantic ocean undetected.[102] At least one of them was a U.S. citizen.[103]

Their submarines came ashore in the middle of the night, under the cover of darkness.[104] One landed in New York, the other in Florida.[105] Each four-man team unloaded explosives, fuses, and timing devices.[106] Some wore German uniforms.[107] They buried their uniforms in the sand, and dressed as civilians in order to blend-in and escape detection.[108] At this point, they became spies, unprivileged combatants under the laws of war. Roving among unsuspecting civilians, they began surveying buildings.[109] Their plan was to attack the United States, from within its own borders.[110]

Within days of coming ashore, they contacted two Americans.[111] They met for drinks and discussion with one of

dissenting in part) (stating and explaining that the principles of *Milligan* do not apply because al-Marri "plainly qualifies as an enemy combatant."). *See also* Christina D. Elmore, *An Enemy Within Our Midst: Distinguishing Combatants From Civilians in the War Against Terrorism*, 57 U. KAN. L. REV. 213, 221–22 (2008) (discussing proponents of both views). *See also* Ex Parte Quirin, in which defendant Hans Haupt argued that *Milligan* stood for the proposition that his U.S. citizenship insulated him from trial before Military Commission. 317 U.S. 1, 45 (1942). The Supreme Court settled that question in the *Quirin* case and decided that the *Milligan* case would allow enemy belligerents, who had taken an active part in hostilities, to face trial before a military tribunal. *Id.* at 45–46. Therefore, citizenship and whether civilian courts were open were not dispositive.

99 317 U.S. 1 (1942).

100 On the morning of December 7, 1941, the Japanese navy launched a stealth attack against the United States naval base at Pearl Harbor, Hawaii, which resulted in the United States becoming militarily involved in World War II. H.P. WILLMOTT, THE SECOND WORLD WAR IN THE FAR EAST 68 (Smithsonian Books 2002) (1999).

101 *Ex parte Quirin*, 317 U.S. at 21.

102 *Id.*

103 *Id.* at 20.

104 *Id.* at 21.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *See* FISHER, *supra* note 38, at 35.

110 *Ex parte Quirin*, 317 U.S. at 21.

111 *See* Cramer v. United States, 325 U.S. 1, 5 (1945); Haupt v. United States, 330

them, Anthony Cramer.[112] However, even years later it remains unclear whether Cramer knew of their plan or whether he helped them carry it out. The other American was Hans Haupt, whose son was one of the saboteurs.[113]

On the verge of their planned attacks, one of the saboteurs lost his nerve and decided to abandon the plan.[114] He took a train to Washington, D.C., intending to confess.[115] After a long wait, he met with officials at the Federal Bureau of Investigation (FBI) and informed them of the plan.[116] However, when FBI Director J. Edgar Hoover announced their capture, he left out the untidy fact that the FBI only knew about the plan because of the voluntary admission of one of the participants.[117] Instead, Hoover credited the FBI's investigatory powers for discovering the saboteurs.[118] The trials were held in secret.[119] If they had been public, the entire nation would have known that the FBI caught the saboteurs by accident.[120] The Nazis would have known that this plan failed by happenstance, and they would have been more likely to try to infiltrate saboteurs again.[121]

The United States tried and convicted Cramer for treason, but the Supreme Court later reversed that conviction.[122] Hans Haupt was also tried.[123] He had provided shelter and a car for his saboteur son and, unlike Cramer, definitely knew about the plan.[124] The United States convicted him for providing shelter, sustenance and supplies, and the Supreme Court upheld his

U.S. 631, 634 (1947).

112 *See Cramer*, 325 U.S. at 5.

113 *Haupt*, 330 U.S. at 632.

114 FISHER, *supra* note 38, at 93.

115 *Id.*

116 *See* Morris D. Davis, *The Influence of* Ex Parte Quirin *and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. 121, 122 (2008).

117 Tony Mauro, *A Mixed Precedent for Military Tribunals*, LEGAL TIMES, Nov. 19, 2001, at 15.

118 *Id.*

119 Charles Lane, *Liberty and the Pursuit of Terrorists*, WASH. POST, Nov. 25, 2001, at B1 ("The trial was held in secret not only to protect legitimate intelligence sources and methods, but also to conceal the embarrassing fact that J. Edgar Hoover's FBI had failed to uncover the plot until one of the Germans came to Washington and offered a detailed confession.").

120 *Id.*

121 LOUIS FISHER, CONG. RESEARCH SERV., REPORT NO. RL31340, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT 3–4 (2002).

122 Cramer v. United States, 325 U.S. 1, 48 (1945).

123 Haupt v. United States, 330 U.S. 631, 632 (1947).

124 *Id.* at 633 ("Sheltering his son, assisting him in getting a job, and in acquiring an automobile, all alleged to be with knowledge of the son's mission, involved defendant in the treason charge."); *Cramer*, 325 U.S. at 3 ("There was no evidence, and the Government makes no claim, that he had foreknowledge that the saboteurs were coming to this country or that he came into association with them by prearrangement.").

conviction.[125] The government tried Cramer and Hans Haupt in Civilian Article III Courts.[126]

The government tried the saboteurs in military courts—including the U.S. citizen saboteur.[127] The U.S. citizen (the son of Hans Haupt) had been behind enemy lines, unlike Hans Haupt and unlike Mr. Milligan. A war crime tribunal convicted the saboteurs of the following crimes: (1) Violating the laws of war; (2) Relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy; (3) Spying; and (4) Conspiracy to commit the former three crimes.[128]

On an expedited schedule, the Supreme Court decided to hear the saboteurs' appeals.[129] The main question was whether prosecutors could try the saboteurs by Military Commissions or whether they were entitled to trial by civil courts with all the rights afforded to U.S. citizens.[130] FDR made his views abundantly clear. He told Attorney General Francis Biddle, "One thing I want clearly understood" is that "I won't give them up . . . I won't hand them to any United States Marshal armed with a writ of habeas corpus."[131]

The Supreme Court understood FDR's position, loud and clear. Understanding that FDR planned to execute the prisoners no matter what decision the Supreme Court reached, it yielded to his view and validated the trial by Military Commissions.[132] The Court first issued a short opinion rejecting the claims of Quirin and the others.[133] The Court said it would write a full opinion in the fall, after returning from vacation.[134] A few days after the Court issued this initial opinion, the Government executed six of the eight German saboteurs, long before the Supreme Court

125 *Haupt*, 330 U.S. at 633, 644.

126 Article III of the United States Constitution vests judicial power in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

127 *See* Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942) (appointing a Military Commission to try the eight saboteurs, including Herbert Haupt).

128 *Ex parte* Quirin, 317 U.S. 1, 23 (1942).

129 *Id.* at 19.

130 *Id.* at18–19, 24.

131 Andrew C. McCarthy, *The End of Discretion*, THE NEW CRITERION, January 2008.

132 *Id. referencing* JACK GOLDSMITH, THE TERROR PRESIDENCY (2007); *see also* David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 69 (1996) (describing Supreme Court discussions during pre-argument conferences of Biddle's view that FDR would execute the saboteurs regardless of how the Supreme Court ruled).

133 *Ex parte* Quirin, 63 S. Ct. 1, 2 (1942); Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L. J. 15, 38 (2006).

134 *See Ex parte Quirin*, 63 S. Ct. at 2; Fisher, *supra* note 133, at 38–39.

issued its lengthier opinion.[135] FDR commuted the sentence of two saboteurs because they cooperated with the investigation.[136]

The Supreme Court upheld the convictions in a full opinion that it issued the next fall.[137] The Supreme Court held:

> [T]he detention and trial of [the saboteurs]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.[138]

In a unanimous opinion, the Court found no such conflict.[139] The Court determined that the President's constitutional power to wage war necessarily included the power to hold war crimes trials, and punish war criminals.[140] Further, Congress had explicitly sanctioned Military Commissions in its articles of war.[141]

Aside from deciding that the President could initiate Military Commissions, the Supreme Court also discussed the specific charges brought against the saboteurs.[142] Looking to military history, it found that wearing a uniform was central to lawfully waging war, and that historically spies lurking around behind enemy lines were put to death.[143] The Court did not define the outside jurisdictional boundaries of Military Commissions, but found that clandestinely entering the United States to wage war, without wearing a uniform, most certainly violated the laws of war.[144]

In *Quirin*, the Supreme Court revisited *Milligan* and clarified that even U.S. citizens can be brought to trial before Military Commissions when U.S. courts are open, *if* they are unlawful enemy combatants.[145] The American citizen saboteur was not insulated from being tried by a military court because he had crossed enemy lines, which made him an unlawful enemy belligerent.[146] His father, Hans Haupt, and Anthony Cramer received civilian trials because, although they aided the

135 Davis, *supra* note 116, at 124.
136 McCarthy, *supra* note 131.
137 *Ex parte Quirin*, 317 U.S. at 48.
138 *Id.* at 25.
139 *Id.* at 48.
140 *Id.* at 28–29.
141 *Id.* at 29.
142 *Id.* at 29–31.
143 *Id.* at 31–32.
144 *Id.* at 45–46.
145 *Id.* at 45.
146 *Id.* at 37–38.

saboteurs, they had not crossed enemy lines and thus were not unlawful belligerents.[147] Therefore, *Quirin* rejected the view that civilians are always entitled to Article III civilian trials when civilian courts are open.[148] It clarified the reach of *Milligan* once and for all.

In 1946, four years after Military Commissions convicted and executed the Nazi saboteurs, another Military Commission case made its way to the Supreme Court.[149] General Yamashita was a commanding general of the Imperial Japanese Army in the Philippines during WWII. He eventually surrendered to the United States and became a POW.[150] A Military Commission tried, convicted, and sentenced him to death by hanging for allowing his soldiers to commit brutal atrocities against people of the U.S. and its allies.[151] On over one hundred occasions, his soldiers attacked unarmed civilians and POWs, and destroyed public, private, and religious property.[152]

Yamashita's defense at trial, and on appeal, was that he could not be held responsible for crimes committed by his soldiers.[153] The Supreme Court disagreed, and determined that international law permits holding commanders responsible for "permitting [their soldiers] to commit the extensive and widespread atrocities."[154] Justices Murphy and Rutledge authored strongly worded dissents, criticizing the Court for permitting "revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander."[155] They argued that General Yamashita could not be held responsible for acts without proving he specifically committed, ordered, or condoned, the atrocities.[156]

Despite the spirited disagreement about whether General Yamashita formed the requisite criminal intent to be held liable, the Court reaffirmed *Quirin* and made clear that trial by Military Commission was permissible.[157] It concluded that the articles of war, authorized by Congress, allowed Military Commissions.[158]

147 *Id.* at 37–38.
148 George Lardner, Jr., *Nazi Saboteurs Captured!*, WASH. POST, Jan. 13, 2002, (Magazine), at 12.
149 *See In re* Yamashita, 327 U.S. 1 (1946).
150 *Id.* at 5.
151 *Id.* at 5, 13–14.
152 *Id.* at 14.
153 *See id.* at 6.
154 *Id.* at 14, 17.
155 *Id.* at 41 (Murphy, J., dissenting).
156 *See id.* at 40; *Id.* at 43–44 (Rutledge, J., dissenting).
157 *Id.* at 7–9.
158 *Id.* at 11.

The Court called Military Commissions "an appropriate tribunal for the trial and punishment of offenses against the law of war."[159] It acknowledged significant judicial deference to Military Commissions:

> If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.[160]

Considering *Quirin* and *Yamashita*, the United States entered the Global War on Terror backed by significant legal precedent to hold Military Commissions and even to prosecute before military courts an "enemy combatant" who "passes the military lines."[161]

IV. LAW GOVERNING MILITARY TRIBUNALS IN THE GLOBAL WAR ON TERROR

After September 11th, the President ordered the Department of Defense to establish Military Commissions, which would try enemy combatants for war crimes.[162] President Bush patterned his Order after Roosevelt's order during WWII,[163] which the Supreme Court had unanimously upheld in *Ex parte Quirin*.[164] President Bush made a few departures from FDR's order, to give the detainees more rights. For instance, do not apply to citizens and the trials are public.

Just as Presidents Johnson, Lincoln, and Roosevelt had issued Executive Orders during the Civil War and WWII eras calling for military trials, President Bush issued an Executive Order laying the groundwork for Military Commissions.[165] President Bush's November 13, 2001 order instructed the Secretary of Defense to draft rules governing the Commissions.[166] At a minimum, the president directed "full and fair" trials with a Commission that decides both fact and law, admission of any evidence having probative value to a reasonable person, protection of classified information, conviction and sentence by a two-thirds majority, and review of the trial record by either the secretary of defense or the President himself.[167]

159 *Id.* at 7.
160 *Id.* at 8.
161 *See Ex parte* Quirin, 317 U.S. 1, 31 (1942).
162 Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 13, 2001).
163 *See* Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).
164 *Ex parte Quirin*, 317 U.S. at 48.
165 Military Order of Nov. 13, 2001, *supra* note 162.
166 *Id.* § 4.
167 *Id.*

Responding to the President, the Secretary of Defense then drafted Military Commission Order Number One, which set forth Military Commission procedures.[168] Section five, *Procedures Accorded the Accused*, guaranteed the accused several rights:

- A copy of charges in defendant's language
- The presumption of innocence until proven guilty beyond a reasonable doubt
- Detailed military defense counsel
- Access to information the prosecution intends to use at trial and any evidence tending to exculpate the defendant
- Guarantees that the defendant is not required to testify against himself, but may testify on his own behalf (the right to remain silent)
- The defendant's right to be present except when it violates laws governing classified information or when the defendant is disruptive
- Access to information used in sentencing
- The right to present evidence and make a statement at a sentencing hearing
- Open public trials
- The protection against double jeopardy, i.e., prosecutors cannot charge defendants twice for the same crime (double jeopardy).[169]

Military Commission Order Number One provided substantially greater procedural protections for detainees captured during the Global War on Terror than the Hunter Commission provided for Lincoln's assassins.[170] It provided appointed legal counsel, incorporated the presumption of innocence, guaranteed the guilt beyond a reasonable doubt standard, ensured defendants the right to remain silent, and protected defendants against double jeopardy (being tried twice for the same crime).[171]

Military Commission Order Number One granted defendants more rights than criminal defendants presently receive in many European countries, which routinely accept hearsay and do not require proof beyond a reasonable doubt in order to convict.[172] Further, its guarantee of "open public trials" allowed more

168 U.S. Dep't of Defense, Military Commission Order No. 1, Aug. 31, 2005, *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

169 *Id.* § 5.

170 *See* discussion *supra* Part I.

171 *Id.*

172 *See generally* John R. Spencer, *The Concept of "European Evidence,"* 4 ERA FORUM 29 (2003).

protections that the Nazi saboteurs received in the *Quirin*, where the saboteurs were tried in secret.[173]

In 2006, the Supreme Court in *Hamdan v. Rumsfeld* rejected the rules governing President Bush's Military Commissions by narrowly construing Congress' Authorization for the Use of Military Force (AUMF).[174] It found that, as a statutory matter, Congress had *not* authorized Military Commissions,[175] but invited Congress to authorize them:

> Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.[176]

Congress did as the Supreme Court suggested and passed the Military Commissions Act of 2006 (MCA).[177] The MCA authorized Military Commissions and codified several procedural protections.[178] For instance, under the MCA, defendants can only be convicted by a two-thirds majority of the Commission and for sentences exceeding ten years, including the death penalty, a three-fourths majority is required to convict.[179] The Military Commissions Act also adopted a robust appeals process, which includes an internal appeal to the Convening Authority, an appeal to the Court of Military Commission Review, an appeal to the D.C. Circuit Court, and ultimately an appeal to the U.S. Supreme Court.[180] The Military Commissions Act of 2006 represents another instance where both Congress and the President acted in concert to authorize Military Commissions.

V. THE SUPREME COURT, CONGRESS AND THE PRESIDENT DURING A TIME OF WAR

A brief walk through time reveals that significant historical precedent dating back to the Revolutionary War supports using Military Commissions. It also reveals, not surprisingly, that the procedural protections have evolved to provide substantially more due process over time. The Hunter Commission seemed

173 *See* Lane, *supra* note 119.

174 Hamdan v. Rumsfeld, 548 U.S. 557, 593–95 (2006).

175 *Id.*; *see also* Glenn Sulmasy, John Yoo & Martin Flaherty, Debate, Hamdan *and the Military Commissions Act*, 155 U. PA. L. REV. (PENNUMBRA) 146, 146–47 (2007), http://www.pennumbra.com/debates/pdfs/sulmasy_yooflaherty.pdf.

176 *Hamdan*, 548 U.S. at 636–37 (Kennedy, J., concurring in part).

177 Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950p (Supp. 2008)).

178 10 U.S.C. § 948b(a)–(f) (Supp. 2008).

179 *Id.* § 949m(a), (b)(2).

180 *Id.* §§ 950d(b)–(d), 950g.

more concerned with efficiency than with affording due process. FDR granted more rights than the Hunter Commission offered. The Military Commissions Act of 2006 incorporated fundamental procedural protections, including the right to remain silent and protection against double jeopardy.[181]

In all of the incidents discussed above, the President and Congress acted in concert. But, does it matter? Is it relevant that both democratic branches of government agree on the proper course of action? The Supreme Court answered these questions in *Youngstown Sheet & Tube Co. v. Sawyer*.[182]

The year was 1951 and the U.S. was embroiled in the Korean War. At the same time, steel companies were in a dispute with their employees. Being unable to reach a resolution, the Steel Union announced a nationwide strike, which would halt steel production.[183] President Truman responded by issuing Executive Order 10340, which directed the Secretary of Commerce to possess and operate various steel mills around the United States.[184] Based on the fact that steel was necessary for weapons and other war materials, the President considered it within his role as Commander in Chief to keep the steel mills operational.[185]

The steel companies filed suit in the District Court, claiming that the President lacked authority to seize the steel mills and that the seizure was not authorized by Congress.[186] Writing for the Supreme Court, Justice Black concluded, in a pithy opinion, that the President's actions were not sanctioned by Congress and were not specifically authorized by the Constitution.[187] It said that seizing private property to ensure continuing production "is a job for the Nation's lawmakers, not for its military authorities."[188]

Justice Jackson filed a separate concurring opinion,[189] which explored the contours of Presidential power and presented the notion that, in each instance, Presidential Power is either strengthened or weakened by whether Congress agrees or disagrees. Jackson said that the President's "powers are not fixed but fluctuate, depending upon their disjunction or

181 *See id.* §§ 948r, 949h.
182 343 U.S. 579 (1952).
183 *Youngstown* at 582–83.
184 *Id.* at 583.
185 *Id.* at 582.
186 *Id.* at 583.
187 *Id.* at 586–87.
188 *Id.* at 587.
189 *Id.* at 634 (Jackson, J., concurring).

conjunction with those of Congress."[190] Justice Jackson created three groupings to express the notion of progressive Presidential power.[191]

In the first grouping, the President's power is at its height when he acts in accordance with Congress, whether express or implied. In this instance, his power includes "all that he posses in his own right plus all that Congress can delegate."[192] In the second grouping, Congress is silent and neither affirms nor denies his authority, leaving the President with only his specified, independent powers. Justice Jackson explained that "there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain."[193] When Congress fails or refuses to act, the President's actual power depends on the circumstances—"imperatives of events and contemporary imponderables rather than on abstract theories of law."[194] In the third grouping, the President acts against the express or implied will of Congress. In this instance, his power is at its "lowest ebb" and "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[195] Presidential claim to power in this instance must be "scrutinized with caution" because the balance of power is at stake.[196]

Justice Jackson placed the President's steel seizure in group three, because President Truman acted contrary to the will of Congress.[197] He concluded that the President's powers as Commander in Chief were not large enough to encompass controlling internal affairs of the country, including seizing the steel mills,[198] particularly because the Constitution delegates to Congress the power to "raise and *support* Armies" and to "*provide* and *maintain* a Navy" that leaves Congress, not the President, with the burden of supplying the armed forces.[199] In this case, Congress specified procedures for seizing private property; and the President, without any authority, flouted those procedures.[200] For these reasons, the Supreme Court did not sanction the President's decision to seize the steel mills.[201]

190 *Id.* at 635.
191 *Id.* at 635–38.
192 *Id.* at 635.
193 *Id.* at 637.
194 *Id.*
195 *Id.*
196 *Id.* at 638.
197 *Id.* at 639–40.
198 *Id.* at 642.
199 *Id.* at 643.
200 *Id.* at 639.
201 *Id.* at 585, 587–88.

The Supreme Court in *Hamdan v. Rumsfeld* adopted Justice Jackson's opinion in *Youngstown*, and reiterated that a President's authority is "at its maximum" when he acts in concert with Congress and at its "lowest ebb" when he acts incompatibly with Congress.[202] In 2008, the Supreme Court again reaffirmed *Youngstown's* twilight analysis in *Medellin v. Texas*,[203] quoting from *Youngstown*: "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[204] It went on to say, "The President's authority to act must come from an act of Congress or the Constitution itself."[205] Both *Hamdan* and *Medellin* make clear that the twilight analysis in *Youngstown* is still the law today.

But, sandwiched between *Hamdan* and *Medellin*, is *Boumediene v. Bush*, where a divided Supreme Court did not follow the *Youngstown* analysis but instead invalidated a joint war time decision by Congress and the President.[206]

The *Boumediene* case concerned the Detainee Treatment Act of 2005 ("DTA"), a set of procedures passed by Congress that governed status hearings of detainees captured abroad in the War on Terror.[207] The DTA gave the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction" to review the Military's Combatant Status Review Tribunals ("CSRTs").[208] In *Hamdan v. Rumsfeld*, the Supreme Court held that the DTA did not apply to pending cases.[209] Congress responded to *Hamdan* by amending the law to clarify that it did apply to pending cases.[210] That is, Congress made clear that the Court of Appeals for the District of Columbia Circuit, and only the Court of Appeals for the District of Columbia Circuit would have jurisdiction to hear CSRT appeals stemming back to September 11, 2001.[211]

Rejecting the judgment of Congress and the Executive, the Supreme Court in *Boumediene* invalidated the DTA. But the Court was sharply divided. The dissent criticized the Court for decreeing that there was "no good reason to accept the judgment of the other two branches" and it argued that the court was not competent to "second-guess the judgment of Congress and the

202 Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part).
203 Medellin v. Texas, 128 S. Ct. 1346 (2008).
204 *Id.* at 1368.
205 *Id.*
206 Boumediene v. Bush, 128 S. Ct. 2229 (2008).
207 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 28 U.S.C. 2241).
208 *Id.*
209 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
210 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.
211 *Id.*

President."[212] It went on to opine that the Court "must leave undisturbed the considered judgment of the coequal branches."[213] In *Boumediene*, the Court stood firm against the other two branches of government, and to Justice Jackson's test articulated in *Youngstown*.

VI. PRESIDENTIAL ORDERS IN THE CONTEXT OF *QUIRIN, YOUNGSTOWN*, *HAMDAN* & *BOUMEDIENE*

In November 2008, Barack Obama was elected President of the United States. On January 22, 2009, shortly after taking office, President Obama issued an Executive Order closing (eventually) the United States military detention facility at Guantanamo Bay and halting the Military Commissions presently underway.[214] His order called for a committee to review whether and how the detainees should be prosecuted.[215] The Executive Order declares that it "shall be implemented consistent with applicable law."[216] However, the present Military Commissions are not a creature of the Executive Branch. They exist in the present format because of an act of Congress.[217] The new Presidential Order commands the impossible. How can an order to disregard a federal law be consistent with that law?

The twilight zone test set out in Justice Jackson's concurring opinion in *Youngstown*, and adopted in *Hamdan* and *Medellin*, makes clear that the President may not unilaterally stop Military Commissions and craft his own, novel procedures, outside of the democratic process. Because Congress has already spoken, and has passed a federal statute that governs Military Commissions, the President's power is at its "lowest ebb." When President Truman unconstitutionally refused to follow the Taft Hartley Act, and attempted to substitute his own procedures,[218] the Court enjoined Truman's attempted seizure of the steel mills.

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212 Boumediene v. Bush, 128 S. Ct. 2229, 2296 (2008) (Scalia, J., dissenting).

213 *Id.* at 2297.

214 Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf.

215 *Id.* § 4(c)(3):

> Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

216 *Id.* § 8(b).

217 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

218 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

President Obama now refuses to follow the Military Commissions Act, and substitute his own, yet to be determined, procedures. The problem is that a federal statute already governs these procedures.

Justice Burton's concurrence in *Youngstown* reflected Justice Jackson's twilight zone analysis. Burton observed that "[i]n the case before us, Congress authorized a procedure which the President declined to follow."[219] Justice Burton further stated that "[t]he controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency."[220] He went on to conclude that, under those circumstances, the President's order "invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers."[221] President Obama's Order halting Military Commissions does the same thing and should receive the same treatment as President Truman's Executive Order.

President Truman's steel seizure case involved private property. The seizures impacted U.S. citizens and were not akin to decisions made on the battlefield. Yet those factual distinctions are constitutionally irrelevant. Can the President's power as Commander in Chief override a specific federal statute that governs how the President can conduct Military Commissions? The President does not have more authority under his Commander in Chief role to act contrary to federal statute when it comes to holding Military Commissions in a time of war. In *Youngstown*, the Court acknowledged a long line of cases that upheld "broad powers" for Commanders during a time of war.[222] But, it distinguished those cases:

> Such cases need not concern us here. Even though "theatre of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.[223]

Under *Quirin*, *Yamashita* and *Youngstown*, the Commander in Chief's role during an active war was expansive. However, the Supreme Court in *Hamdan* found that the *Youngstown* twilight analysis *does* apply to a President's decision to hold Military

219 *Id.* at 659 (Burton, J., concurring).
220 *Id.* at 660.
221 *Id.*
222 *See id.* at 587.
223 *Id.*

Commissions during war-time.[224] It said that President Bush's Executive Order calling for Military Commissions (which was identical to FDR's order in *Quirin*) now required specific Congressional endorsement.[225] It found that Congress's Authorization for the Use of Military Force (AUMF) did not clearly grant authority for Military Commissions.[226] As noted above, the *Hamdan* case led to Congress to enact the Military Commissions Act of 2006. That law consequently ties the hands of the Commander in Chief. That is why President Obama cannot waive away the statute by issuing an Executive Order.

Before *Hamdan*, no Congressional statute existed that governed Military Commissions; *Quirin* was the law, and it accepted that the establishment of Military Commissions was within the President's discretion. After *Hamdan,* however, Congress drafted a federal law governing Military Commissions in the Global War on Terror. Given *Youngstown*'s twilight analysis, President Obama's power to adopt rules for Military Commissions inconsistent with the Military Commissions Act is now at its lowest ebb. The Court has never invalidated the Military Commissions Act.

While the Supreme Court has definitely pruned the Commander in Chief's power during a time of war, it has not left President Obama without a remedy. When the U.S. entered the War on Terror in 2001, *Quirin* was the law, and the President enjoyed extensive war time power, including the wide discretion regarding Military Commissions. *Youngstown* had limited the President's war-time power in some instances, by finding that the President did not have power to take private possession of property, but had left *Quirin* intact.

In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court applied Justice Jackson's twilight zone test in *Youngstown* to evaluate Military Commissions. It found that the President's Executive Order calling for Military Commissions required specific endorsement from Congress—something not required under *Quirin*. It invited Congress to pass legislation endorsing the President's play for Military Commissions.[227]

The President has only one alternative. Just as the Court in *Hamdan* invited Congress to endorse President Bush's Military Commissions plan, Congress can endorse President Obama's plan. President Obama must persuade Congress to amend (or do

224 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 594–95 (2006).
225 *Id.* at 595.
226 *Id.* at 594.
227 *See* discussion *supra* Part IV.

away with) the Military Commissions Act of 2006. But, he cannot act alone. Disregarding existing, controlling federal law all together runs afoul of *Youngstown* and *Hamdan* and violates "the essence of the principle of separation of powers," just as Truman violated the separation of powers in the *Youngstown* steel seizure context.[228] What impact the *Boumediene* case may have on President Obama's decisions regarding Military Commissions remains to be seen.

VII. PRESIDENTIAL ORDERS & UNLAWFUL COMMAND INFLUENCE

President Obama's Executive Order halting military trials may amount to unlawful command influence. President Obama directed the Secretary of Defense to refrain from charging any additional detainees under the Military Commissions Act of 2006, and halted trials already underway.[229] His order also declared: "Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order."[230] But saying it does not make it so.

Because meddling commanders threaten the independence of Military Trials, the Uniform Code of Military Justice (UCMJ) makes certain levels of command influence illegal.[231] It is a punishable crime, and (among other things) prohibits any Commander from influencing an action of any military tribunal.[232]

Congress included the same prohibition in the recently enacted Rules for Military Commissions. Under the Military Commissions Act, it is unlawful for any official to improperly influence the action of Military Commissions in the Global War on Terror.[233] In fact, the Military Commissions Rule is actually

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228 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660 (1952) (Burton, J., concurring).

229 Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Section 7 states:

> *Military Commissions*. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a Military Commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such Military Commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Id. § 7, at 4899.

230 *Id*. § 8, at 4899.

231 *See* Rules for Courts Martial, Manual for Courts-Martial, pt. II, ch. I, R. 104, at II-4 (2008), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf [hereinafter Rules for Courts-Martial].

232 *See id*.

233 *See* Rules for Military Commissions, Manual for Military Commissions, pt II, ch.

more broad than the Courts Martial Rule because it covers "*all persons*" and specifies that "*no person* may attempt" to unlawfully, or by unauthorized means, influence the Military Commission.[234] The Courts Martial Rule only applies to "all persons subject to the code."[235]

Courts consistently recognize the deleterious impact of unlawful command influence on military trials. One court called it the "mortal enemy of military justice."[236] Another referred to it as "a malignancy that eats away at the fairness of our military justice system."[237] Military Courts have interpreted the crime of unlawful command influence to include even *the appearance* of unlawful command influence.[238] Tests include "whether a reasonable member of the public . . . would have a loss of confidence in the military justice system and believe it to be unfair."[239] Another query is whether the command influence placed "intolerable strain on public perception" of the military justice system."[240] Figuratively speaking, the test for unlawful command influence asks whether the Commander was "brought into the deliberation room"—whether he controlled the trial or the court.[241]

After President Obama's order to halt military trials, most judges and prosecutors in Guantanamo Bay dutifully complied although the statute gives no president the power to order prosecutors to ask for, or order a judge to grant, a continuance.[242] They accepted the unlawful command influence.

Prosecutors filed motions to stop the trials, and judges granted them, with one lone exception.[243] Army Colonel Judge James Pohl, who was presiding over the prosecution of al-Nashiri, the alleged mastermind of The Cole bombing in 2000,

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I, R. 104, at II-8 (2007), *available at* http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf [hereinafter Rules for Military Commissions].

234 *Id*. R. 104(a)(2) (emphasis added).

235 *See* Rules for Courts-Martial, R. 104(a)(2).

236 Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 263 (1996) (citing United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986)).

237 *Id.* (citing United States v. Gleason, 39 M.J. 776, 782 (A.C.M.R. 1994)).

238 *See id*. at 264–65 (citing United States v. Allen, 31 M.J. 572, 590 (N-M C.M.R.1990)).

239 United States v. Allen, 31 M.J. 572, 590 (N-M.C.M.R. 1990).

240 United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003).

241 *Allen*, 31 M.J. at 590.

242 Carol J. Williams, *Judge Says He's Forging Ahead*, L.A. TIMES, Jan. 30, 2009, at A9.

243 *Id*.

refused to stop the trial.[244] Pohl said that the Military Commissions Act of 2006 governed the proceedings, and stated that, "[t]he public interest in a speedy trial will be harmed by the delay in the arraignment."[245] Pohl also stated: "The Commission is bound by the law as it currently exists not as it may change in the future."[246] Judge Pohl pointed out that the Military Commissions Act of 2006 gave the military judges "sole authority" to grant delays once charges had been referred for trial.[247]

On the heels of his refusal, the Pentagon issued a statement. Pentagon spokesman Geoff Morrell said that "Pohl would soon be told to comply with Obama's executive order."[248] He went on to explain, "all I can really tell you is that this department will be in full compliance with the president's executive order. There's [sic] no if, ands or buts about that."[249] He then added, "while that executive order is in force and effect, trust me that there will be no proceedings continuing, down at Gitmo, with Military Commissions."[250] As predicted, a few days later, the charges against al-Nashiri were dropped.[251] Colonel Pohl was not involved in that decision.[252] Normally, unlawful command influence occurs in the shadows. This time it occurred while the Pentagon celebrated it in a press release.

These Pentagon orders make clear that President Obama was not just "brought into the deliberation room," but that he blocked the deliberation room door and sent the judge and jurors home. The Executive Order left no room for Judge Pohl to exercise judicial discretion or to issue rulings in a case before him. This interference undermined the integrity of the judicial system and is precisely why the military has laws prohibiting unlawful command influence.

244 *Id.*; *Military Judge Refuses to Halt Trial of USS Cole Bombing Suspect*, FOXNEWS, Jan. 29, 2009, http://www.foxnews.com/politics/2009/01/29/military-judge-refuses-halt-trial-uss-cole-bombing-suspect (last visited Mar. 24, 2009).

245 Ruling on Government Motion to Continue Arraignment, United States v. Al-Nashiri, (Jan. 29, 2009), *available at* http://www.defenselink.mil/news/Jan2009/DelayArraignment_MJ.pdf.

246 *Id.*

247 *Id.*

248 Williams, *supra* note 242.

249 Geoff Morrell, Pentagon Press Secretary, U.S. Dep't of Defense News Briefing with Geoff Morrell from the Pentagon (Jan. 29, 2009), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4345.

250 *Id.*

251 *Charges Dropped in USS Cole Terror Trial,* MSNBC, Feb. 5, 2009, http://www.msnbc.msn.com/id/29042139 (last visited Mar. 25, 2009).

252 *Id.*

Military Courts have repeatedly held that almost any interference with military trials amounts to unlawful command influence. For instance, one court found that a hospital commander committed unlawful command influence when he criticized witnesses (after the military trial was over) for testifying on behalf of alleged drug offenders.[253]

Another court held that an Army General committed unlawful command influence when he told his subordinate officers that they should not recommend a trial or bad conduct discharge for a soldier, and then testify that that same convicted solder is a "good soldier" at the sentencing hearing.[254] The General believed that the two positions were inconsistent. The court found unlawful command influence and said: " . . . in this area [unlawful command influence] the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous."[255]

In another case, after a military judge ruled leniently in three cases, the Judge Advocate General of the Air Force, and other senior JAG Officers, launched an informal inquiry into whether the judge had been subjected to unlawful command influence by his chain of command. The U.S. Court of Military Appeals barred such inquiries and said that only investigations that were "outside the adversary process" and "made by an independent judicial Commission established in strict accordance with the guidance contained in section 9.1(a) of the AGA Standards . . . " were permitted. The court was concerned that the inquiry itself could amount to unlawful command influence.[256]

In *United States v. Lewis*, a military prosecutor and his supervising lawyer (the Staff Judge Advocate, or SJA) aggressively sought to recuse a Marine Corps judge on the grounds that the judge had a personal relationship with the defendant's lawyer (who was a former Marine). The prosecutor alleged that the judge and civilian defense counsel had interacted socially, even while the trial was ongoing.[257] The prosecutor introduced evidence that the military judge and defense counsel were seen together at a play, while the case was ongoing.[258]

253 United States v. Sullivan, 26 M.J. 442 (CMA 1988).
254 United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).
255 *Id.* at 653.
256 United States v. Ledbetter, 2 M.J. 37, 42 (C.M.A. 1976).
257 United States v. Lewis, 63 M.J. 405, 408 (C.A.A.F. 2006).
258 *Id.* at 409.

When initially questioned about attending the play with defense counsel, the Judge failed to disclose that interaction. Later, she explained that it had "slipped [her] mind."[259] She then conceded that she and the defense counsel had "occasional social interaction with no discussions of any military trials pending before me."[260]

In addition to the social relationship, the prosecutor also pointed out that the defense counsel had a practice of sending copies of e-mails about pending cases to this particular judge and that the defense counsel had previously expressed a preference for this military judge in other cases.[261]

The prosecutor also introduced evidence that the judge had been voir dired about her personal relationship with defense counsel in several other cases.[262] In one instance, after being voir dired by the prosecutor in an earlier case, the judge told a colleague that she felt she had been put "through an inquisition" and that "it would take . . . a few days to get back on good terms with the government."[263] The prosecutor introduced this prior statement as evidence of partiality toward this particular defense counsel.[264]

The military judge at first denied the prosecution's motion to recuse. The prosecutor sought a three-day continuance to determine whether the government would appeal the ruling. The judge denied that request. The prosecutor then amended the request and asked for only a three hour continuance in order to

259 *Id.*
260 *Id.*
261 *Id.* at 408–09.
262 *Id.* at 409.
263 *Id.* at 408.
264 The prosecution's motion for refusal went as follows:

> Ma'am, at this time taken all of the facts that have come to light during this inquiry, your previous involvement with the companion cases, having worked with Colonel [JS] in the past, having a social relationship limited to interactions at the barn, as well as the fact that defense counsel in the Neff case apparently received statements from the assistant civilian defense counsel expressing in the Scamahorn case displeasure with the way that you had been voir dired in the Curiel case; also the fact that civilian defense counsel in this case has made a habit of CC'ing you on electronic mail messages which contained disputed and contested substantial issues relating to suborning perjury, discovery issues, and making recommendations to you as to what would be an appropriate resolution for failure to comply with pretrial milestones: All of that taken together, ma'am, would you agree that creates an appearance of impartiality [sic] that a reasonable person might perceive with respect to this case, ma'am?

Id. at 408–09.

seek a stay of the proceedings. The judge denied that request, too.[265]

Ultimately, after consulting with other judges in the circuit, the judge changed her mind and recused herself.[266] She stated, "I'm emotional about this"[267] and explained that she was "mortally disappointed in the professional community that is willing to draw such slanderous conclusions from so little information."[268] She went on to explain, "I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]"[269] She held prosecutors responsible for her inability to be objective, stating " . . . my emotional reaction to the slanderous conduct of the SJA has invaded my deliberative process on the motions."[270]

After the sitting judge recused herself, the military assigned a new judge, LTC FD.[271] Incredibly, he accepted the case only to almost immediately recuse himself, too. What were his reasons for recusal? "The manner in which [trial counsel] handled the voir dire in this case particularly offends me."[272] He characterized the SJA's voir dire of the former judge as a "crass, sarcastic, and scurrilous characterization of the social interaction between Major [CW] and Ms. [JS] . . . " He explained that he could "neither understand nor set aside" the "ignorance, prejudice, and paranoia on the part of the government."[273]

But, how, exactly did the diligent voir dire of a former judge prejudice the present judge? It seems that the military judges mounted a united, public, front against voir dire directed at them. One can only understand this as a warning to JAG prosecutors that judges are off limits. Arguably, it is this united front that taints the fairness of military trials—not prosecutors doing their jobs.

On appeal, the U.S. Court of Appeals for the Armed Forces held that the prosecutor and the SJA's diligent attempts to recuse the judge amounted to unlawful command influence.[274] Without citing any evidence that the prosecutor, or SJA, were

265 *Id.* at 409–10.
266 *Id.* at 411.
267 *Id.* at 410.
268 *Id.* at 410–11.
269 *Id.* at 411.
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.* at 414–15.

actually influenced by their chain of command, or acted out of anything but professional diligence, the Court of Appeals found unlawful command influence. It said:

> *[t]o the extent that* the SJA, a representative of the convening authority, advised the trial counsel in the voir dire assault on the military judge and *to the extent that* his unprofessional behavior as a witness and inflammatory testimony created a bias in the military judge, the facts establish clearly that there was unlawful command influence on the court-martial.[275]

That is—the Court simply held that *if* the prosecutors acted as puppets for the Command then unlawful command influence occurred. But, it failed to answer the dispositive question of *whether* the Commander was at all involved.

The Court of Appeals for the Armed Forces agreed with the lower court, also without citing any evidence that the prosecutors were motivated by any commander. It simply said, "a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government's conduct with respect to MAJ CW [the military judge]."[276] It did not explain why a reasonable observer would reach such a conclusion.

It is unclear how a prosecutor aggressively seeking to recuse a judge, whom the prosecutor reasonably believed was biased, amounts to unlawful command influence. How would it lead one to believe that the procedures were not fair? In fact, the opposite is true. One would think that a military prosecutor facing off against a military judge in open court demonstrates that the proceedings *are* fair; that they *are not* orchestrated; that both prosecutors and defense counsel diligently represent their clients, despite the fact that they all work for the military.

Whether one agrees, or disagrees, with the holding in *Lewis*, one cannot deny the fact that its holding would prohibit President Obama from stopping military trials already underway. If minor interferences with a trial amount to unlawful command influence, then surely halting a trial altogether qualifies as well. If the *mere theoretical possibility* that a Commander encouraged a prosecutor to recuse a judge amounts to unlawful interference, then certainly a President *actually* halting a trial and *involuntarily removing* the judge qualifies as well. Is there any greater "interference" than ordering a judge to stop a trial?

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275 *Id.* at 412 (emphasis added).
276 *Id.* at 415.

Ironically, one of the sitting judges [Judge Susan Crawford] who decided the *Lewis*[277] case later yielded to, and facilitated, President Obama's order to halt Military Commissions that were already underway in Guantanamo Bay. Only a few months after *Lewis*, Secretary Robert Gates designated Judge Crawford as the convening authority for Military Commissions.[278] Her position as the convening authority meant that she would supervise the office of Military Commissions, review and approve charges, and appoint members of the Military Commission, along with other duties.[279]

When Judge Pohl would not yield to President Obama's order to halt the trials, Judge Crawford intervened and dismissed the charges against al-Nashiri, who was the alleged mastermind of the Cole Bombing.[280] The case was not before her.

The same Pentagon official who said approximately one week before the dismissal that "Pohl would soon be told to comply" confirmed that Crawford yielded to the President's order. He stated, "[i]t was her decision, but it reflects the fact that the president had issued an executive order which mandates that the Commissions be halted . . . ."[281] On the heels of her decision in *Lewis*, in which she took a rigid stand against unlawful command influence with relatively weak facts, she yielded to President Obama's order to halt military trials.[282]

That is—the same Judge who believes that diligent voir dire directed at military judges amounts to unlawful command influence, holds different, and inconsistent, views when the command influence originates with a sitting President. The precise reason for the inconsistency is unclear. However, one reasonable explanation for the inconsistency is that, perhaps, Judge Crawford herself was a victim of unlawful command influence. That is—perhaps she can *identify* unlawful command influence, but she cannot *resist* it when the order comes from the highest commander—the President and Commander in Chief. Indeed, that is why the Military prohibits unlawful command influence, and defines it broadly.

277 *Id.* at 406; *see also* News Release, U.S. Department of Defense, Seasoned judge Tapped to head Detainee Trials, www.defenselink.mil/REleases/Reelase.aspx?ReleaseID=10493.

278 News Release, *supra* note 277.

279 *Id.*

280 *Id.*

281 *Charges Dropped in USS Cole Terror Trial,* MSNBC, Feb. 5, 2009, http://www.msnbc.msn.com/id/29042139 (last visited Mar. 25, 2009), *quoting* Geoff Morrell.

282 *Id.*

In *Hamdan v. Rumsfeld*, the Supreme Court criticized President Bush for changing the rules governing Military Commissions after the trials were already underway. It said that changing the rules "at the whim of the Executive" was "irregular."[283] Surely, if the Supreme Court thinks that changing the rules mid-trial is unfair, it would also conclude that halting the trials all together in violation of a governing federal statute is also unfair.

CONCLUSION

Over time, the procedures that govern military trials have evolved to provide substantially greater due process. For instance, the Hunter Commission, which tried Lincoln's assassins, afforded defendants few procedural protections, FDR offered more protections and the Guantanamo Bay Military Commissions afford defendants even greater procedural protections. These protections now include the right to remain silent, protections against double jeopardy, appointed counsel, and extensive appellate opportunities, including an appeal to the U.S. Supreme Court.

But, despite the evolution of procedural protections, history shows that Presidents nonetheless have consistently interfered with Military Commissions. For instance, President Johnson disregarded the Hunter Commission's plea for clemency to spare Mary Surratt's life, suspended the writ of habeas corpus, and ordered her immediately executed. During the War of 1812, President Jackson disregarded a Military Commission's acquittal of a defendant and ordered the defendant to remain in jail. During WWII, FDR made it known to the Supreme Court that he planned to execute the Nazi saboteurs, no matter what the Court decided in the *Quirin* case. The Court yielded to his authority and validated the findings of the Military Commission.

In the Global War on Terror, President Obama has halted Military Commissions in violation of the Military Commissions Act, and possibly in violation of the prohibition against unlawful command influence. Executive interference with military trials undermines their legitimacy and cuts against the evolution of procedural protections. What good are procedural protections if the Executive, acting alone, can undo them? What good are independent judges when a President can unseat them, or order cases before them to be dismissed?

What is historically different about what is occurring today

283 Hamdan v. Rumsfeld, 548 U.S. 557, 633 n.65 (2006).

is that the Supreme Court is taking a more active role in war time matters to police Military Commissions. In *Boumediene*, it stood firm against the President, even though he acted in concert with Congress. In *Hamdan*, it found that President Bush's Executive Order calling for Military Commissions did not grant authority for them—despite the fact that it had previously found, in *Quirin*, that FDR's virtually identical order did. It invited Congress to pass laws specifically authorizing Military Commissions. But, when Congress did that, the Supreme Court in *Boumediene* invalidated some aspects of those rules.

What impact *Boumediene* will have on President Obama's decisions, and on future Presidential decisions, remains to be seen. Will its new level of involvement help to curtail unlawful command influence with Military Commissions? Perhaps, but we cannot know for sure. One thing is clear: the Supreme Court's involvement in war time decisions stands in stark contrast to the way it responded in previous wars, including during the Civil War and World War II. Only time will tell whether the Supreme Court's increased involvement regarding Military Commissions is for better or for worse; or whether unlawful command influence will continue to be a constant feature of Military Commissions.

International Law and Domestic Legitimacy: Remarks prepared for *Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?*

Scott Sullivan[*]

INTRODUCTION

It is serendipitous that the bicentennial of Abraham Lincoln's birth coincides with the seating of a new American president facing tremendous economic and national security difficulties. The success of the Lincoln Presidency in concluding and assuring the survival of the United States from the divisions of the Civil War reminds us of the enormous hardships the American people can bear and the power of a perseverant president.

The focus of this symposium on Lincoln's Constitutionalism in a Time of War and this particular panel of discussants on Suspending Rights to Sustain Public Safety is apt. Lincoln's policies during the Civil War are perhaps most noteworthy for their elevation of necessity over formalism. His political pragmatism asserted that no President can allow the foundation of the nation to crumble due to reflexive pursuit of rigid formalism.[1] In other words, the President's responsibility to faithfully execute the laws of the nation could not countenance a world in which, when referencing habeas corpus protections, "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated."[2] Under Lincoln's doctrine, no law would morally be held as preeminent when the fabric of the nation is at risk of being pulled asunder. In comparison to many of the rather drastic measures taken during the Civil War, the policies of the Bush Administration appear tame and unobjectionable. I presume that Professors John Yoo and

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1 *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1981), *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430–31 (Roy P. Basler ed., 1953).

2 *Id.* at 430.

Kyndra Rotunda will assert arguments that, in comparison to the measures of President Lincoln, the comparatively subdued nature of Bush Administration policies should be left unmolested by the courts and accepted by the populace as similarly necessary measures justified by a terrorist threat that killed over 3,000 people on September 11 and continues to hang over our shores.

I am sympathetic to these assertions. Many of the substantive elements of the Bush Administration's response to September 11 were not, in and of themselves, objectionable. The reality, however, is that despite the nature and magnitude of the threat of terrorism, the policies that have come to represent the cornerstones of President Bush's execution of the war on terror have been repudiated—not only by the courts—but they have been repudiated by our allies abroad and our population at home.

I intend to use my contribution to this symposium to reflect on the interplay between domestic policies in armed conflict and the international legal regulations promulgated under international law relative to the ability of the state to have its policies viewed as "legitimate" by its population and international allies.

I. THE POWER AND PROCESS OF LEGITIMATION

Lincoln's execution of the Civil War demonstrated little patience with legal niceties that could potentially impede his prosecution of the war effort.[3] Some of Lincoln's most controversial acts include unilaterally suspending habeas corpus rights in parts of the Confederacy,[4] engaging in military action that was unsanctioned by Congress,[5] embracing the concept of total war that led to the burning of Atlanta by General Sherman's troops,[6] and ordering a military blockade in the absence of congressional authorization.[7]

Critics argued that each of these acts violated the laws of the United States and core principles of separation of powers that vested particular foreign affairs powers, such as the power to declare war, and, more implicitly, the judgment to suspend

3 *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 11–12 (2001).

4 Curt Bentley, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, 2007 BYU L. REV. 1721, 1745 n.120 (2007) ("For example, Abraham Lincoln unilaterally suspended the Writ of Habeas Corpus, ignoring Justice Taney's decision in *Ex parte* Merryman, 17 F. Cas. 144 (1861), during the Civil War.").

5 LOUIS FISHER, PRESIDENTIAL WAR POWER 38 (1995).

6 Major Jeffrey F. Addicott, *Operation Desert Storm: R. E. Lee or W. T. Sherman?*, 136 MIL. L. REV. 115, 122–23, 128–29 (1992).

7 FISHER, *supra* note 5, at 38.

habeas corpus during certain emergencies.[8] Despite these critiques his presidency progressed with the unmistakable air that despite legal uncertainty, or even Constitutional violation, the preservation of the Union was a goal of sufficient importance to override any particular provision of law.[9] This doctrine was justified by the administration as one of "necessity" that if not authorizing power to the President beyond the scope of the Constitution, at least provided substantial bend to Constitutional prerogatives in times of national emergency.[10]

The rights-restricting actions imposed during the ongoing war on terror have been much more restrained than that of the Civil War. Unlike Lincoln's broad grants of power to military commanders to suspend habeas corpus as they saw fit, there has been no suspension of the right of habeas corpus.[11] The detention facilities at the U.S. Naval Station at Guantanamo Bay compare quite favorably to the harsh treatment and occasional summary execution suffered during the Civil War. Similarly, President Bush has received Congressional authorization for each major military operation in which his administration engaged, despite his clear belief that such assent is Constitutionally unnecessary.[12]

In such light, it is curious that Benjamin Wittes represented mainstream sentiment, both domestically and abroad, when he stated before the Senate Judiciary Committee that, "[a] few years ago in the winter of 2002, almost nobody doubted . . . that the United States is entitled to detain enemy forces in the war on terrorism. Today, doubt concerning the legitimacy of war on terrorism detentions is more the norm than the exception."[13]

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8 *See* Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1358–60 (1993) (reviewing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991)).

9 *See* NEELY, *supra* note 3, at 235.

10 *See* Neely, *supra* note 3, at 12–13; Paul Finkelman, *Limiting Rights in Times of Crises: Our Civil War Experience—A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L., POL'Y & ETHICS J. 25, 39–41 (2003).

11 The Honorable Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 740 (2007) ("The United States Constitution explicitly allows for the complete suspension of habeas corpus rights during wartime, but the current administration recognized that the more judicious approach would be to delay, not eliminate the right of Article III court review.").

12 Memorandum Opinion For the Deputy Counsel to The President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm (noting that the President has broad constitutional power to take military action in response to the Terrorist Attacks on the United States on September 11, 2001).

13 *Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System: Hearing Before the Committee on the Judiciary United States Senate*,

A. The Underpinnings of Legitimate State Action and Failings in the War on Terror

The conventional wisdom that President Lincoln's draconian restrictions on civil rights and infringements on Constitutional culture were legitimate while President Bush's were not begs the question of what "legitimacy" is composed of and how it is derived. Clearly, this question is enormous in its breadth and cannot be adequately examined in the time and space limitations here. This conventional wisdom, however, is consistent with much of what we understand of how state actions and institutions gain legitimacy through collective acceptance, even when those actions are also considered normatively suspect.

1. Building Legitimacy in State Action

In a 2005 article in the Harvard Law Review, Richard Fallon noted that legitimacy has three dimensions—legal, sociological, and moral.[14] Legal legitimacy derives from decisions and state actions that the public views as comporting with existing law.[15] Sociological legitimacy accrues when the public views an institution or position of the state as "approximately or on the average oriented to certain determinate 'maxims' or rules" that the society acknowledges as culturally defining.[16] Moral legitimacy differentiates itself from the others by emphasizing the degree to which the action of the state is intuitively justifiable under prevailing moral standards and is thus a respectable use of power.[17] Despite the reliance of each dimension on different, although somewhat overlapping justification, each of these types of legitimacy share the characteristic that they represent a collective process of determination and conclusion based on the extrapolation of cultural norms relative to relevant social goals being pursued.

It is important to note that the threshold a policy or institution must reach in terms of its legal, sociological or moral legitimacy is not fixed.[18] Similarly, the strands of legitimacy are

110th Cong. 13 (2008) [hereinafter *Improving Detainee Policy*] (statement of Benjamin Wittes), *available at* http://www.fas.org/irp/congress/2008_hr/detainee.pdf.

14 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

15 *Id.* at 1794–95.

16 MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 124 (Talcott Parsons, ed., A.M. Henderson & Talcott Parsons trans., 1957); Fallon, *supra* note 14, at 1795–96.

17 Fallon, *supra* note 14, at 1796–1801 (describing moral legitimacy).

18 *See generally id.* at 1796–99 (discussing moral legitimacy and ideal and minimal theories as thresholds for such).

intertwined.[19] Because legitimation is a collective process, state actions are judged relative to the collective's baseline understanding of whether the policy goal and policy actor are worthy of societal trust in producing normatively good results consistent with cultural values.[20] In the context of armed conflict and national security, this background understanding adjusts to society's perception of the urgency of governmental action and whether the institution executing state action is acting sincerely in response to the public interest rather than engaging in self-dealing.

2. Legitimation Failings in the War on Terror

The dissipation of the legitimacy of the war on terror policy Wittes cites from 2002 to the present is unquestionably due to a variety of missteps relating to the substantive provisions of U.S. policy.[21] In this vein, he argues that the Bush Administration "obtusely refused to tailor the detention system contemplated by the laws of war to the very unusual features of the current conflict."[22]

There is no doubt that the public's view of a policy as being normatively "correct" in substance plays a great role in ascertaining the legitimacy Fallon describes.[23] Because the trustworthiness of the actor (the President) is instrumental in society's acceptance of state action, disclosure, debate and the aura of the incorporation or airing of dissenting views heightens the acceptability of acts otherwise contrary to other collective values. Similarly, tailoring substantive policy as closely as possible to existing law demonstrates (real or imagined) adherence to previously made policy judgments that retain value to society.

President Lincoln often implicitly recognized these limitations through his speeches and actions during the Civil War. He justified deviations from existing norms by invoking a "necessity" defense that was underscored by the pervasive effects of the war on nearly every American and the procedural difficulties of Congressional action inherent to the time.[24] Instead of simply asserting plenary executive power over the use of force and the suspension of individual rights, he conceded that

19 *See generally id.* at 1789–94.

20 *See generally id.* at 1811, 1818, 1848–51.

21 *Improving Detainee Policy*, *supra* note 13, at 13.

22 *Id.*

23 Fallon, *supra* note 14, at 1795.

24 JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 191–92 (2007).

his actions required Congressional ratification.[25] These acts of ratification provided external validation which made societal acceptance more palatable.[26] In contrast, Congressional validation of war on terror policies was seen as an unacceptable divestiture of the Administration's theory of executive power and, as such, a last resort only to be taken following repudiation by the judicial branch.[27]

B. International Affairs, International Law, and the Effect on Legitimacy

The legitimating value Lincoln gained through Congressional ratification may ultimately tell a lesson that is more about the value of external validation than domestic checks and balances. For Lincoln, congressional ratification of imposing a military blockade and suspending habeas corpus was essential because the Constitutional text clearly invoked Congressional powers in those actions, even if such powers were not explicitly granted to the legislature.[28]

In the war on terror, international law, and especially international humanitarian law, has played a crucial role in providing the previously established standards in the most fevered debates over detention policy and accepted means of interrogation.[29] The primacy of international law in these realms is somewhat surprising given the American predisposition to dismiss the importance of international law generally. In spite of this general attitude to such law, I believe that international law has acted as a cornerstone here in gauging the legitimacy of state action as a general matter. This is due to the greater incorporation into a rights-oriented regime affecting traditionally domestic concerns combined with (1) its place as an external benchmark of executive action; and (2) the absence of domestically embedded rules and standards acting contrary to the thrust of international law.

1. The Transformation of International Law

Notions of appropriate presidential fashion are not the only things to have changed since Lincoln's tenure. The substantive scope and nature of international law has changed dramatically

25 NEELY, *supra* note 3, at 8.

26 *Id.* at 29–30.

27 *See generally* GOLDSMITH, *supra* note 24, at 205–13.

28 Of course, the predominant view of the time was that the suspension of habeas corpus was exclusively granted to Congress as discussed in *Ex parte* Merryman, 17 F.Cas. 144, 148–52 (C.C.Md. 1861) (No. 9,487).

29 *See* GOLDSMITH, *supra* note 24, at 39–42, 60–64, 113–14.

since Lincoln's management of the Civil War. While notions of the customs and practices of war figured prominently (albeit often pejoratively) in the Lincoln White House, these notions were locked in great ambiguity and considered the vestiges of non-analogous imports of international European conflicts of relatively recent vintage.[30]

Debates continue to roil among academics and policy-makers over the proper Constitutional station of treaty and customary international law and the forces of compliance international law exerts over state action.[31] Those very worthy debates are beyond the scope of this Essay. However those debates might be resolved, the materially different perception of the legitimacy of the war-oriented actions of Presidents Bush and Lincoln, in part, seems to reflect the power of international law framework to organize and set the terms of the debate prior to the initiation of armed conflict—a framework that sets the tone by which legitimacy can be ascertained or denied.

This economic integration has caused greater political integration that in turn has spurred greater legal integration in international law.[32] Simultaneously, the substantive scope of international law has dramatically expanded to one emphasizing individual rights and away from traditional conceptions of sovereignty.[33] This movement has sparked a proliferation of international legal restrictions that emanate from outside the federal government generally, and outside the Executive Branch, specifically.[34]

The legal landscape of extra-executive forces regulating executive action has changed dramatically since Lincoln's presidency.[35] Following World War II, the United States faced growing mistrust of government power in the wake of Vietnam and Watergate.[36] These led to a number of congressional actions more strictly regulating executive action in armed conflict and foreign affairs, including more stringent regulation of intelligence

30 *See* NEELY, *supra* note 3, at 139–44, 150, 234–35.

31 Christopher Linde, *The U.S. Constitution and International Law: Finding the Balance*, 15 J. TRANSNAT'L L. & POL'Y 305, 307 (2006).

32 Jay Lawrence Westbrook, *Legal Integration of NAFTA Through Supranational Adjudication*, 43 TEX. INT'L L.J. 349 (2008).

33 *Id*. at 351–52.

34 *Id*. at 357.

35 Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 873–76 (2007).

36 Richard Morin & Dan Balz, *Americans Losing Trust in Each Other and Institutions*, WASH. POST, Jan. 28, 1996, at A1.

gathering,[37] the President's use of force,[38] federal criminal liability for actions of soldiers in the field,[39] as well as more generous rules on access to federal courts under habeas corpus and civil suit actions.[40] These restrictions were heightened by the proliferating growth in international law in regulating state behavior through the exercise of universal jurisdiction and international criminal prosecutions,[41] which left American officials exposed to ambiguous legal norms and systems of criminal justice "not beholden to any government and a prosecutorial system without real political checks and balances."[42] As a matter of domestic law, "lawfare" was made more tangible by congressional actions restricting the President's power over military affairs, increasing access to federal courts under habeas corpus and civil suit actions, and the expanding scope of international law regulating behavior on the battlefield.[43]

The enforcement of the law of war during Lincoln's presidency was based on reciprocity.[44] As such, the nature of one state's obligation under the law could expand or contract based on the degree of compliance honored by its enemy.[45] Moreover, the substantive limitations imposed on a state by the customary international law of the time were abstract in substance, quintessentially international in nature, and infrequently enforced by penalty.[46] Perhaps most importantly, the law of war, reflecting international law of the time more generally, unquestionably emphasized state restraint rather than individual right.

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37 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1863 (2006)).

38 War Powers Act of 1973, 50 U.S.C. § 1541 (2006).

39 War Crimes Act of 1996, 18 U.S.C. § 2441 (2000); *see also* GOLDSMITH, *supra* note 24, at 64 (discussing OLC memoranda assessing the reach of Miranda rule applicability in Afghanistan).

40 *Compare* Johnson v. Eisentrager, 339 U.S. 763 (1950); Rasul v. Bush, 542 U.S. 466, 484 (2004); and actions under the Bivens doctrine, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1972).

41 Milena Sterio, *The Evolution of International Law*, 31 B. C. INT'L & COMP. L. REV. 213, 213–14 (2008).

42 GOLDSMITH, *supra* note 24, at 62.

43 *See* William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS., 247, 249–50 (2008).

44 Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 878–79 (2007).

45 *See* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368–71 (2009) (for a discussion of the general principles of reciprocity).

46 *See generally* Robert Fabrikant, *Lincoln, Emancipation, and "Military Necessity": Review of Burrus M. Carnahan's Act of Justice, Lincoln's Emancipation Proclamation and the Law of War*, 52 HOW. L.J. 375, 388–90 (2009) (for a discussion of the international law of war at the start of the Civil War) (book review).

Contemporary international law triumphs rights over encouraging restraint.[47] While customary international humanitarian law in Lincoln's era provided protection to noncombatants such as women,[48] children[49] and the elderly,[50] these protections were not intrinsic to the person, but reflective of institutional values of the aristocracy and organized religions of the day.[51] International humanitarian law of the time was also considered irrelevant in matters considered domestic in nature and thus subject to the internal sovereign order of the state.[52] This externally oriented view of international law norms has likewise given way to an atmosphere in international law that all that is domestic is also international.[53] A shift toward regulating internal as well as international activity has permeated the regulation of international humanitarian law as well.[54]

The development of a rights-oriented focus of international humanitarian law is due, in large part, to the continuing proliferation of rights-based treaties and doctrines including the International Covenant on Civil and Political Rights (ICCPR) as well as the Universal Declaration of Human Rights.[55] The drafting, interpretation and scholarship that have surrounded the growing structure of human rights law has encouraged a growing "parallelism between norms, and a growing measure of convergence in their personal and territorial applicability."[56] Common Article 3 of the Conventions affords rights to individuals in non-international armed conflict.[57] Similarly, Article 2(7) of the U.N. Charter acts to ensure that matters within states' domestic jurisdiction shall not prejudice the application of enforcement measures within the U.N. structure.[58]

47 Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHINESE L.J. 455, 488 (2009) (noting that "the protection of human rights is a chief imperative of contemporary international law").

48 Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 242 (2000).

49 *Id.*

50 *Id.*

51 *See generally* Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (1997) (for a discussion of humanitarian law during the Civil War).

52 Meron, *supra* note 48, at 247.

53 *Id.*

54 *Id.* at 247–48.

55 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum For Potential Victims*, 20 INT'L J. REFUGEE L. 533, 537 (2008).

56 Meron, *supra* note 48, at 245.

57 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

58 Meron, *supra* note 48, at 247; U.N. Charter art. 2, para. 4.

The expanding scope and transformation of the underlying premise of international law from organizing state action to protecting human rights has altered the way in which states react to international law as a guidepost in determining state policy and behavior.[59] As related to the war on terror, the Geneva Conventions have taken center stage in the tension between international law and U.S. policy.[60]

2. Geneva as a Touchstone

It is a paradox in many ways that President Lincoln is considered a crucial figure in the structural development and substantive content of the contemporary law of international armed conflict. The Leiber Code, promulgated by Lincoln in 1863, provided both one of the earliest governmental codifications delineating acceptable and unacceptable behavior and tactics by government troops, and also endorsed the broad-based suffering of civilian populations as a byproduct of a total war doctrine justified under military necessity.[61]

It has become a fundamental rallying cry by opponents to U.S. policy in the domestic and international political arenas that the U.S. must "follow the Geneva Conventions."[62] The belief that the Bush Administration has sought to circumvent the Conventions has led to a pervasive conclusion that the United States' "take on the Geneva Conventions destroys America's international reputation for the rule of law."[63]

The substantive significance of Geneva compliance is largely lost on the vast majority of non-academic commentators making this plea. The reality is that the general population, understandably, does not know what the Conventions require in any detail. Nor does it seem likely to me that a comprehensive understanding of each of the Conventions, their applicability, and the rights afforded to various classes of detainees would matter to the underlying debate. A comprehensive understanding of the substantive provisions of the Conventions ultimately does not matter. I suspect the cry for Geneva Conventions compliance represents two broader understandings that are viewed as crucial to the American public: (1) the

59 *See generally* Chan, *supra* note 47, at 488.

60 Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1076–77, 1093–99.

61 Charles A. Flint, *Challenging the Legality of Section 106 of the USA PATRIOT Act*, 67 ALB. L. REV. 1183, 1190 (2004).

62 Faiz Shakir, *Fox Guest: We Should Ignore McCain Since He 'Was So Traumatized' By P.O.W. Experience*, THINK PROGRESS, Sept. 19, 2006, http://thinkprogress.org/2006/09/19.damato/.

63 Thomas P.M. Barnett, *The State of the World*, ESQUIRE, May 1, 2007, at 108.

Conventions represent the presence of defined extra-executive checks on executive action; and (2) failing to comply with the Conventions is viewed as the repudiation of a previously made commitment to other nations.

Beyond the domestic base, however, is the fact that much of the domestic legal debate has unfolded within the framework of international law, that U.S. policies at home and abroad violated such law, and that U.S. population and the international population found such violations as highly objectionable.

The belief that the U.S. was acting in violation of international law not only affected the perception of U.S. policy, but also materially affected the ability of the nation to sew together a sturdy and cohesive web of allies who could be relied upon to provide assistance in a variety of different ways.

The influence of international law as a legitimating device (or, in this case a de-legitimating device) is evident through President Bush's handling of the question of the applicability of Geneva Convention protections for individuals detained pursuant to the war on terror.[64] Likely more than any other single body of law, the Bush Administration's decision to forego adherence to the Geneva Conventions in favor of a more generalized promise to respect the "spirit" of Geneva law has drawn criticism by both the American and global population.

The decision to forego a structural commitment to the Conventions in favor of a spiritual one implied that the details of the protections encompassed therein were not only unimportant, but also needed to be discarded in order to pursue the effective prosecution of the war on terror.

II. SOME POSSIBLE LESSONS ON A ROLE FOR INTERNATIONAL LAW

During the Civil War, President Lincoln's policies were patently clothed in the threat of the dissolution of the nation.[65] The Constitutional doctrine that flowed from this obvious threat was based, and accepted, on a premise of necessity that was understood by the populace, even when the resulting policies were unpopular.[66] The war on terror does not share these characteristics. The threat to America is not only foreign to our

64 *See* Sharon Kehnemui Liss, *Bush:Gitmo Prisoners Protected by Geneva Conventions*, FOX NEWS, Jun. 9, 2005, http://www.foxnews.com/story/0,2933,44169,00.html.

65 Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 169 (1993).

66 Williams, *supra* note 11, at 681.

common understandings but is also less intense in its severity. The latency of the threat is further complicated by the fact that the policies that have been created to address the terrorist threat are unfolding in a political culture that remains scarred by the increasingly routine nature of government abuses of power and position that have come to light over the past fifty years, not only as a general matter, but within the realm of national security concerns in particular. These realities have placed a premium on building consensus, both internationally and domestically, and forcing the political investment of as many institutions and groups as possible.

The contemporary framework of international law and international organizations has served as an obstacle to the legitimation of current U.S. policy, but also created an unmatched structural opportunity for President Obama to incorporate U.S. policy preferences into the goals, operations, and structures of the international system. This can perhaps best be done by incorporating structural restraints on the exercise of U.S. power as the general rule while simultaneously opening the debate over the normative desirability of provisions of international law that he perceives as obstructing U.S. goals.

Similarly, purveyors of international law are best served not by reflexive service to provisions of existing law, but through the advocacy of the type of structural limitations that international law has proven most effective—procedural safeguards and overarching principles of action.

The process of public debate in the United States encourages an airing of policy choices that may tweak the executive's proposed policy or encourage more fundamental restructuring of policy frameworks. As an international matter, the incorporation of allies, enemies and NGOs forces recognition of an underlying value to a controversial policy in an attempt to stake out substantive grounds for the purpose of compromise.[67] In both circumstances, the policy of the President no longer emanates from the executive branch alone, but creates investment among a group of actors that, as a consequence of that investment, creates legitimacy.

67 This policy movement among allies and NGOs is evident in recent discussions as to the approach of the Obama Administration's approach to future of the detainees at Guantanamo Bay. *See* Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16.

A. Consensus Building and International Dialogue

The conflict between exercising unilateral power and engaging in a consultative process is, at heart, playing out the tension between exercising the discretion that attaches to unilateral power against the intrinsic constraints that accompany seeking approval from other parties. In resolving this tension, the executive branch sacrifices discretion to some degree each time it pursues external approval. Similarly, presidential policies are vulnerable to the external challenge of illegitimacy when the foundation of those policies is exclusively the unilateral power of the President.[68] This give-and-take represents a core element of many commentators' critiques of the Bush Administration's failure to engage in consultation and consensus building.[69] Instead of integrating legal constraints into a broader framework of war policy, the Administration "chose to push its legal discretion to its limit, and rejected any binding legal constraints."[70]

Working within international law affecting security policy encourages the executive branch to engage in its policy decision-making and execution in as transparent a manner as possible and justifies such actions in public in order to preserve underlying policy goals that might otherwise be compromised.

Moreover, the incorporation of international law does not preclude legislative override where necessary. The last-in-time doctrine enables the political branches to supersede international law through the passage of contradictory federal legislation.[71] The formal incorporation of Congress through such a process fosters public debate both domestically and internationally, and also provides incentive for the legislature to come off the sideline to place preferred policies on solid legal footing. Regardless of its success or failure, the process of forming legislation and engaging in the political machinations that surround prospective legislation encourages a broader public dialogue as well as a focal

68 As a doctrinal matter this concept is a rough corollary of judicial assessment of the constitutional validity of executive action in Youngstown. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (holding a violation of Presidential authority based on an external constitutional challenge).

69 *See*, *e.g.*, *Lawmakers react to Miers' withdrawal*, CNN, Oct. 27, 2005, http://www.cnn.com/2005/POLITICS/10/27/miers.reax/index.html (quoting Senator Charles Schumer from New York suggesting Bush should take his time "carefully with real consultation and real consensus. One of the reasons for this problem–this mistake–is that there was no real consultation.").

70 GOLDSMITH, *supra* note 24, at 119.

71 Justin C. Danilewitz, *The Ties That Bind: U.S. Foreign Policy Commitments and the Constitutionality of Entrenching Executive Agreements*, 14 J. TRANSNAT'L L. & POL'Y 87, 91 (2004).

point for discussion of policy issues upon which debate can unfold. The focal points of such debates tend to revolve around legislation that sparks the greatest public concern and reflects positions centered on popular understanding of the "most important" points surrounding the issue.

Invitation for public debate in the policy-making process enables dissenting views to voice opinions and air grievances. More broadly, incorporating the public into the debate acts as a functional and productive way to curb the vitriol of dissent—which perceives itself as unduly marginalized and unjustly silenced in affecting the actions and direction of government. Public inclusion in the broader policy judgments of war and armed conflict not only enables public opinion an outlet and opportunity for enhanced focus but also encourages public investment in the policy outcome that is ultimately embraced at the conclusion of the process, even if that outcome reflects a decision against the passage of any legislation.

B. Extra-Executive Structural Regulations

International law provides a substantive framework for many of the types of legal difficulties that occur frequently among nations but are typically under-examined in the domestic legal context. In such circumstances, international law can provide the structural design to move the executive toward consensus building through constraints that guard against the intrinsic temptation of the executive branch to maximize its own power at the potential cost of losing its credibility. Where norm vacuums exist in sorting out the law as a domestic matter, international law often provides a basic substantive framework around which more extensive law can be built domestically.

These structural and touchstone characteristics of international law assist the public in assessing, and accepting, final provisions of law carried out in policy. Specifically, incorporating international law in the domestic process (1) promotes international and domestic political dialogue; (2) encourages the executive branch to engage in formal and informal justification of its policies; and (3) incentivizes transparency through public disclosure.

The importance of structural limitations surrounding executive action is demonstrable in the discussion surrounding the treatment of prisoners at Guantanamo Bay. Addressing the issue of the standard of treatment of U.S. detainees, President Bush asserted that the U.S. would treat detainees "humanely

and, to the extent appropriate and consistent with military necessity . . . ."[72] The power of this statement as a force of legitimation, is compromised by the fact that "it was very vague, it was not effectively operationalized into concrete standards of conduct, and it left all of the hard issues about 'humane' and 'appropriate' treatment to the discretion of unknown officials."[73]

Even setting aside the question of ambiguity in determining core terms such as "humane" and "appropriate," the President's statement fails on an even more fundamental level. The failure to effectively operationalize questions of treatment implies that the President's commitment is being less than fully absorbed by lower officials, but the failure reaches beyond that. It is the failure of any extra-executive check on the formulation of the policy, and a total lack of observable way to ensure that the overarching policy statement is being implemented, that dooms the President's assertion to face endless scrutiny and skepticism.

CONCLUSION

My characterization of international law as a device that facilitates sociological legitimacy of policy decisions relative to the war on terror is simply to note that the key position international law compliance has taken in the ongoing debate over national security law issues. American history is rife with examples of the importance of international affairs in major domestic policy determinations. What makes the ongoing war on terror so interesting is the expansive manner in which international law has guided the manner in which these important domestic decisions are discussed, digested, and weighed as a domestic matter—and how that process has transpired with little handwringing over the validity or relevance of international law writ large.

72 George W. Bush, Memorandum on Humane Treatment of Taliban and al Qaeda Detainees, (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf

73 GOLDSMITH, *supra* note 24, at 120.

Lincoln and Habeas: Of Merryman and Milligan and McCardle

John Yoo[*]

Three cases define the Supreme Court's encounter with the Civil War: *Ex parte Merryman*,[1] *Ex parte Milligan*,[2] and *Ex parte McCardle*.[3] All three case names bear the styling "ex parte" because all three were brought on behalf of citizens detained by the armed forces of the Union. All three detainees sought release under the ancient writ of *habeas corpus*, which requires the government to demonstrate to a federal judge the factual and legal grounds for detention.[4] I will explain why the cases of the Civil War did not assume the landmark importance, despite their circumstances and language, as a *Marbury v. Madison*, *McCullough v. Maryland*, or *Brown v. Board of Education*, but instead showed the deferential attitude of the Supreme Court to the other branches of the government during wartime.

Merryman was a Maryland militia officer who had blown up railroad bridges between Washington, D.C. and the North, and was training secessionist troops in the earliest days of the Civil War.[5] Milligan was an alleged member of an insurgent force in Indiana that was sympathetic to the Confederacy.[6] He was tried and sentenced by a military commission—an old form of ad hoc military court established by commanders for the trial of violations of the laws of war and the administration of justice in occupied territory.[7]

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1 *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

2 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

3 *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

4 BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

5 *See Merryman*, 17 F. Cas. at 144–46; *see also* Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 (1993) [hereinafter "Paulsen, *The* Merryman *Power*"].

6 *Milligan*, 71 U.S. (4 Wall.) at 6.

7 *See* Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, *in* PRESIDENTIAL POWER STORIES 93, 95–96, 105–06 (Christopher H. Schroeder & Curtis A. Bradley eds., 2008).

In both *Merryman* and *Milligan*, federal courts ordered the release of the petitioners on the ground that the military had exceeded its constitutional authority.[8] Both contained stirring language about the vitality of constitutional rights even under the pressure of wartime and the need to maintain checks and balances on the executive's wartime powers.[9] In *Merryman*, Chief Justice Taney, writing an opinion in chambers, protested that the military had arrested suspected Confederates in Maryland and refused to recognize civilian authorities without the approval of Congress.[10] Taney had ordered General George Cadwalader, commander of Fort McHenry, to appear in his courtroom on May 27, 1861, and to bring the imprisoned Merryman with him.[11] Cadwalader refused to obey.[12] Taney held the general in contempt of court, but the U.S. Marshal could not gain entry to the fort.[13]

Taney then issued an opinion ordering Merryman's release.[14] The Constitution has "been disregarded and suspended," Taney wrote from his courtroom in Baltimore, "by a military order, supported by force of arms."[15] He warned that "if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws."[16] Instead, Taney proclaimed, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[17] He ordered the opinion and all of the proceedings sent to the new President. "It will then remain for that high officer, in fulfillment of his constitutional obligation to

8 *Merryman*, 17 F. Cas. at 147–48, 152; *Milligan*, 71 U.S. (4 Wall.) at 107.

9 *Merryman*, 17 F. Cas. at 149–50; *Milligan*, 71 U.S. (4 Wall.) at 118–28.

10 *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 10 (1991).

11 *Merryman*, 17 F. Cas. at 146.

12 *Id.*

13 *Id.* at 146–47. For some background on John Merryman and the history of the case, *see* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 186–98 (2006) and Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive: Ex Parte Merryman*, 31 J. S. CT. HIST. 262 (2006). For a useful essay on *Milligan*, see Bradley, *supra* note 7. The cases also receive attention in DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed. 1964) (1951). On the experience of Maryland at the outbreak of the Civil War, *see generally* DEAN SPRAGUE, FREEDOM UNDER LINCOLN 1–44 (1965); Charles B. Clark, *Baltimore and the Attack on the Sixth Massachusetts Regiment, April 19, 1861*, 56 MD. HIST. MAG. 39 (1961).

14 *Merryman*, 17 F. Cas. at 146–47.

15 *Id.* at 152.

16 *Id.*

17 *Id.*

'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[18]

Milligan, decided five years later, sounded a similar theme. Justice Davis declared: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[19] Rejecting Attorney General Speed's argument (and Lincoln's) that the war gave the executive branch the right to hold Milligan and try him by a military court, the Court responded: "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[20] Claims to the contrary risked "anarchy or despotism," and led from a false assumption, "for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."[21] The Court held that the military could not detain and try Milligan in "the theatre of active military operations" where "the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[22] Only if a foreign invasion were "actual and present," rather than threatened, could martial law prevail.[23]

Nevertheless, neither *Merryman* nor *Milligan* has secured a place in the firmament of great Supreme Court decisions. *Merryman* remains unknown to almost all but those scholars who toil in the academic fields of the separation of powers or the early days of the Civil War.[24] As we will see, it did little to delay Lincoln from ordering the detention of suspected Confederate spies, sympathizers, and conspirators behind the Union lines. *Merryman* usually receives attention in work on the early days of the Civil War, filled with stories of the struggle between Unionists and Southern sympathizers in Maryland and the other border states. Rarely do we learn about the legal response to the opinion, which included outright presidential defiance and a

18 *Id.* at 153.

19 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

20 *Id.* at 121.

21 *Id.*

22 *Id.* at 127.

23 *Id.*

24 For the most penetrating recent work, *see* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994) [hereinafter "Paulsen, *The Most Dangerous Branch*"] and Paulsen, *The* Merryman *Power*, *supra* note 5.

critique of the role of the Supreme Court in American society. The *Merryman* opinion itself is rarely reproduced in prominent casebooks used for the teaching of constitutional law, which usually relegate the case to a one-paragraph note in discussions of the debate over judicial review.[25]

Milligan, on the other hand, has seen a burst of attention in this decade. This is due entirely to the Bush administration's policies in the War on Terror and the associated cases taken up by the Rehnquist Court.[26] Aside from this recent interest in the decision, *Milligan* usually goes unexamined and unremembered. In his Pulitzer Prize-winning book, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, historian Mark Neely titled a chapter "The Irrelevance of the *Milligan* Decision."[27] Despite the opinion's broad language, for example, military trials continued throughout the occupied South.[28] As Neely observes, scholars were kinder to the decision.[29] The first American encyclopedia on political science, published in 1881, provides an entry on military commissions that holds that they can be used for purposes directly contrary to *Milligan*.[30] In 1890, Professor John Burgess of Columbia University, the leading political scientist on Reconstruction at the turn of the century, wrote: "It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded."[31]

Remembrance of *Merryman* and *Milligan* usually occurs during wartime. Perhaps this should come as no surprise, as that is the context within which they were decided. But they usually do not have much effect. During World War I, neither *Merryman* nor *Milligan* had any direct relevance because no military commissions or detentions occurred on American soil. During World War II, the Supreme Court narrowed *Milligan* to its facts. In *Ex parte Quirin*,[32] the Court upheld the military detention and trial of Nazi saboteurs—one of whom was an American citizen—on the orders of President Franklin Roosevelt.[33] According to the unanimous *Quirin* majority,

25 *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005) (failing to mention *Merryman* at all).

26 *See* Bradley, *supra* note 7, at 93.

27 NEELY, *supra* note 10, at160–84.

28 *Id.* at 176–77.

29 *See id.* at 179–81.

30 *Id.*

31 *Id.* at 181.

32 317 U.S. 1 (1942).

33 *Id.* at 20, 47; *see also* David Danelski, *The Saboteurs' Case*, 1 J. S. CT. HIST. 61 (1996).

Milligan stood for the proposition that the military could not apply the laws of war to civilians in areas outside the battlefield where the civilian courts remained open.[34] But it did not apply to those covered by the laws of war, namely combatants.[35] The Court held: "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war."[36] *Milligan* most notoriously had no effect on the Court's decision in *Korematsu v. United States*, which upheld President Roosevelt's order and Congress's approval of the military detention of about 120,000 Japanese-Americans for their suspected disloyalty.[37]

Milligan's lack of relevance has continued to this day. In *Hamdi v. Rumsfeld*, a four-Justice plurality upheld the detention of an alleged terrorist, a U.S. citizen captured in Afghanistan, but required judicial review of the detention to protect due process standards.[38] Nevertheless, the *Hamdi* plurality concluded that *Milligan* did not require a civilian trial because it did not apply to prisoners who had joined or associated themselves with enemy forces.[39] Both *Hamdi*, and later *Hamdan v. Rumsfeld*, take *Quirin* as the relevant gloss over the original *Milligan* precedent.[40] Today's law schools do only slightly better. Most leading casebooks relegate *Milligan* to summary notes of no more than one or two pages.[41] Most concentrate on *Ex parte Quirin*, the case of the Nazi saboteurs tried by military commission or the enemy combatant cases decided in the last four years.[42] Professors probably spend more time teaching students about the Supreme Court's protections for the national market in milk.[43]

McCardle, which provides the epilogue to our story, involved a Vicksburg, Mississippi newspaper editor tried by a military commission for publishing "incendiary and libelous" articles calling for violence against Union authorities.[44] Because of *Milligan*, Congress stripped the Supreme Court of jurisdiction in *McCardle* and prevented the Court from reviewing the

34 *Quirin*, 317 U.S. at 45–46.

35 *Id.*

36 *Id.* at 45.

37 *See* Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

38 Hamdi v. Rumsfeld, 542 U.S. 507, 509–10 (2004).

39 *Id.* at 521–22.

40 *Id.* at 522; Hamdan v. Rumsfeld, 548 U.S. 557, 590–93 (2006).

41 *See, e.g.*, STONE, ET AL., *supra* note 25, at 386–87, 396–97.

42 *See, e.g.*, *id.* at 383–98

43 *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U. S. 456 (1981); United States v. Carolene Prod. Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934).

44 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

constitutionality of Military Reconstruction.[45] Without going too much into the details of *McCardle*, the decision may help us understand why *Merryman* and *Milligan* failed to revolutionize the judicial role in wartime.

I.

Lincoln faced national security challenges that have never confronted another American president. This was true with the Civil War *in toto*, the deadliest, most destructive war in our history,[46] where American fought American, and brother fought brother. It was also true in the personal sense. Except for James Madison's flight from the capital in the face of British invaders in 1814, the nation's government has never been under the direct threat of immediate attack as it was during the Civil War.[47] When the South seceded, Washington, D.C. was the mid-nineteenth century version of West Berlin—an island of freedom surrounded by a sea of enemy territory. On the one side lay Virginia, the very capital of the Confederacy.[48] You can see General Robert E. Lee's ancestral home in Arlington from downtown Washington. On the other three sides was Maryland, a slave state that had voted for John Breckinridge of Kentucky (as had all of the states of the Deep South) in the 1860 election.[49] The only rail links between the North and the nation's capital passed through Maryland.[50] Throughout the Civil War, and even as late as 1864, Confederate forces would periodically threaten the capital with attack.[51]

That precarious strategic situation made it imperative that the Union secure the Border States such as Maryland. Lincoln reportedly said, for example, that while he welcomed God's support, he must have Kentucky's.[52] He could just as easily have said that of Maryland. It was the necessity to ensure that Maryland remained in the Union that led to *Merryman*.[53] When Fort Sumter fell, it appeared to Northerners that Maryland might join the states of the upper South in secession.[54] Sumter

45 Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1254 (2007).

46 *See* C. Vann Woodward, *Editor's Introduction* to JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA xvii, xviii–xix (1988).

47 *See* MCPHERSON, *supra* note 46, at 285–86.

48 *Id.* at 284–85.

49 *See id.* at 230, 232, 284–85.

50 *Id.* at 284–85, 287.

51 *See generally id.*

52 CHARLES PIERCE ROLAND, AN AMERICAN ILIAD: THE STORY OF THE CIVIL WAR 42 (2002).

53 *See* Paulsen, *The Most Dangerous Branch*, *supra* note 24, at 278.

54 NEELY, *supra* note 10, at 4.

surrendered on April 14, 1861; the next day Lincoln issued a proclamation requesting 75,000 volunteers to suppress the rebellion and enforce federal law.[55] Lincoln's intention to use force to compel the Southern states to return to the Union prompted Virginia, North Carolina, Tennessee, and Arkansas to secede.[56] Sentiment to follow their example in Maryland was strong. Maryland's governor and Baltimore's mayor telegraphed Lincoln to warn him to "[s]end no troops here."[57] Lincoln even had to travel secretly through Baltimore on his way to his inauguration.[58]

Maryland's resistance quickly turned violent. Rushing to defend Washington, D.C. on April 19, the Sixth Massachusetts regiment was attacked by a secessionist mob as it switched railroad lines in Baltimore.[59] Four soldiers and a dozen civilians were killed.[60] For the following week, Maryland rebels succeeded in isolating the capital from the North.[61] The mayor and chief of police in Baltimore ordered the destruction of the railroad bridges running to the North.[62] Secessionists cut the telegraph lines between the North and the capital.[63] Washington officials expected a Confederate attack on the defenseless capital at any moment.[64] It was not until April 25 that reinforcements from New York arrived, and only then by bypassing Baltimore to the east.[65]

Meanwhile, Lincoln and his advisors worried about how to keep Maryland in the Union.[66] At first, Lincoln presented his homespun humor, but within it was a steely determination. On April 22, when a delegation of the Baltimore YMCA came to see him and asked that he stop federal troop movements and make peace with the Confederacy, Lincoln exclaimed that they "would have me break my oath and surrender the Government without a blow. There is no Washington in that—no Jackson in that—no manhood nor honor in that."[67] He explained that in order to

55 Proclamation Calling Militia and Convening Congress, (Apr. 15, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 331–32 (Roy P. Basler et al. eds., 1953); DAVID HERBERT DONALD, LINCOLN 296 (1995).

56 MCPHERSON, *supra* note 46, at 278–82.

57 DONALD, *supra* note 55, at 297.

58 Paulsen, *The* Merryman *Power*, *supra* note 5, at 90.

59 MCPHERSON, *supra* note 46, at 285.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 DONALD, *supra* note 55, at 299.

66 *Id.*

67 Reply to Baltimore Committee (Apr. 22, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 341–42.

defend the capital, Union troops must cross Maryland. "Our men are not moles, and can't dig under the earth; they are not birds, and can't fly through the air. . . . Keep your rowdies in Baltimore," he warned, "and there will be no bloodshed."[68] Lincoln took a prudent attitude toward the Maryland state government. When the Maryland legislature met on April 26, General Winfield Scott proposed to arrest them rather than let them secede.[69] Lincoln, however, ordered him off to await the outcome of their deliberations; if they did vote to secede, he ordered Scott "to the bombardment of their cities—and in the extremist necessity, the suspension of the writ of habeas corpus."[70] Lincoln's April 25 order appears to be the first official mention of the idea of suspending the writ, and its tie to the other option of bombarding Maryland cities reflects the extreme pressures on the President. Luckily, the legislature did nothing.[71]

Nevertheless, concerns about rebel marauders and the security of the rail link between Washington and Maryland led Lincoln to take that step of "extremist necessity" just two days later. In an order to General Scott, the President declared:

> You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of Washington . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally . . . are authorized to suspend that writ.[72]

Scott immediately authorized the commanders in Pennsylvania, Maryland, Delaware, and Washington to suspend the writ if necessary.[73] Neither Lincoln nor Scott publicized the order, nor did they issue it as a public proclamation, nor was it sent to the courts or Congress at the time.[74] Lincoln would publicly suspend the writ in Florida in a public proclamation on May 10.[75]

John Merryman was one of the Maryland citizens swept up by Union troops after the suspension of habeas corpus.[76] He was

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68 *Id.*

69 DONALD, *supra* note 55, at 299.

70 Abraham Lincoln to Winfield Scott (Apr. 25, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 344.

71 DONALD, *supra* note 55, at 299.

72 Abraham Lincoln to Winfield Scott (Apr. 27, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 347.

73 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 567–68 (Nat'l Historical Soc'y, 2d ser. 1971) (1894).

74 NEELY, *supra* note 10, at 9.

75 Proclamation Suspending Writ of Habeas Corpus in Florida (May 10, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 364–65.

76 DONALD, *supra* note 55, at 299.

a farmer, state legislator, and an officer in the Maryland militia.[77] Union officers accused him of drilling a secessionist cavalry unit that had participated in the destruction of the railroad bridges and telegraph lines leading to the North in April.[78] Troops arrested him at his home on May 25, 1861 and imprisoned him at Fort McHenry.[79] Merryman immediately petitioned for a writ of habeas corpus directly with Chief Justice Taney in chambers at the Supreme Court, rather than to the federal court in Baltimore.[80] In one of those happy historical coincidences, historian Carl Swisher reports that Merryman's father and Taney had gone to Dickinson College together.[81] Chief Justice Taney, of course, was a Marylander who had become Andrew Jackson's Attorney General and then Secretary of the Treasury during the great Bank War.[82] As Chief Justice, he wrote the majority opinion in *Dred Scott v. Sanford*, which, by holding the Compromise of 1850 unconstitutional, hastened the coming of the Civil War.[83]

Taney moved with alacrity to defend Merryman's rights, but with little success. He personally rushed to Baltimore to take up the case rather than wait in the capital. The very next day, he issued a writ to General George Cadwalader, commander of Fort McHenry, to appear before him and to bring Merryman with him.[84]

Cadwalader was no simple-minded soldier, but the son of a distinguished Philadelphia family.[85] Law and War ran in his blood. He was a peculiar American breed of soldier-lawyer in the tradition of Colonel Alexander Hamilton and General Henry Halleck. His grandfather, John Cadwalader, was a brigadier-general in command of Pennsylvania troops during the Revolutionary War.[86] He had served under Washington at the battles of Trenton and Princeton.[87] He was supposed to support Washington's crossing of the Delaware, but couldn't get his

77 Paulsen, *The* Merryman *Power*, *supra* note 5, at 90.

78 *Id.*

79 CARL B. SWISHER, THE TANEY PERIOD 1836-64, 5 THE OLIVER WENDELL DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 844 (1974).

80 *See* NEELY, *supra* note 10, at 10.

81 SWISHER, *supra* note 79, at 845.

82 BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT 7–8, 100–02, 144 (Gaunt, Inc. reprint 1997).

83 Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How it Changed History*, 82 CHI.-KENT L. REV. 3, 13 (2007).

84 *Ex parte* Merryman, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487).

85 *See generally* The Historical Society of Pennsylvania, Collection 1454, Cadwalader Family Papers (2007), *available at* http://www.hsp.org/files/findingaid1454cadwaladerpart1.pdf.

86 *Id.* at 2–3.

87 *Id.* at 3.

artillery across the frozen river.[88] His father, Thomas Cadwalader, graduated from the University of Pennsylvania, entered the bar, and reached the rank of major general in command of the First Division of the Pennsylvania militia during the War of 1812.[89] The pressure was on for son George. Born in Philadelphia in 1806, he went to Penn like his father, graduated at the ripe old age of 17, and was later admitted to the bar.[90] He became a general and served with distinction in the Mexican-American War of 1848.[91] His brother was a federal district judge in Philadelphia at the outbreak of the Civil War.[92]

Cadwalader sent an aide to Taney's courtroom in full military regalia to notify the Chief Justice that neither he nor Merryman would appear.[93] The aide relayed Cadwalader's response, that "he is duly authorized by the president of the United States . . . to suspend the writ of habeas corpus, for the public safety."[94] Although a "high and delicate trust," and one to be exercised "with judgment and discretion," the General claimed his instructions were "that in times of civil strife, errors, if any, should be on the side of the safety of the country."[95] He asked for a postponement of the proceedings until he could receive instructions from President Lincoln.[96] Taney instead issued an immediate contempt order against Cadwalader.[97] But the U.S. Marshal was denied entry at the gate of the fort.[98]

Taney was left to issue an opinion, which sought to pull the heart out of Lincoln's energetic response to the fall of Fort Sumter. The Constitution's discussion of the suspension occurs in one sentence, in Article I, Section 9, and it does so in the passive voice: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[99] Taney held that the Suspension Clause's placement in the Article where Congress's powers lay, and judicial commentary since ratification,

88 *Id.* at 3–4.

89 *Id.* at 3–4.

90 *Id.* at 5; *see also* 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL SOCIAL, AND MILITARY HISTORY 335 (David Stephen Heidler, Jeanne T. Heidler, & David J. Coles eds., 2000).

91 The Historical Society of Pennsylvania, *supra* note 85, at 5.

92 *Id.*

93 *Ex parte* Merryman, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487); *see also* Swisher, *supra* note 79, at 845.

94 *Merryman*, 17 F. Cas. at 146.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 147.

99 U.S. CONST. art. 1, § 9.

recognized that only Congress could suspend the writ.[100] If military detention without trial were permitted to continue, Taney wrote, "the people of the United States are no longer living under a government of laws."[101] Without congressional suspension, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[102] Taney's opinion not only found Lincoln's suspension unconstitutional, but it clearly questioned the legal bases for Lincoln's other unilateral responses to secession, such as the calling up of volunteers, the imposition of a blockade on Southern ports, and the withdrawal of funds from the Treasury to raise an army.[103]

Taney's decision in *Merryman* was not just an attack on Lincoln's suspension of the writ, but upon the President's right to interpret the Constitution. Lincoln had come to office criticizing the Supreme Court for its decision in *Dred Scott*.[104] During the Lincoln-Douglas debates, he had argued that the Court's decision only applied to slave and owner in the case itself, and not to any other cases.[105] In his First Inaugural Address, Lincoln declared that "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[106] The Court had lost immense prestige, at least with Republicans, who rejected the idea of judicial supremacy behind the decision in *Dred Scott* and suspected the federal courts of supporting slavery and the South.[107]

For Taney, however, the President's oath to uphold the Constitution required him to carry out the Supreme Court's orders.[108] The *Merryman* decision was another declaration of judicial supremacy in interpreting the Constitution, to be expected of the Justice who wrote *Dred Scott*, though perhaps not from President Andrew Jackson's former attorney general. Taney clearly wanted to dramatize the conflict between the

100 *Merryman*, 17 F. Cas. at 148.

101 *Id.* at 152.

102 *Id.* at 152.

103 *See id.* at 149; SIMON, *supra* note 13, at 200.

104 ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 22–23, 396 (1946)

105 *See id.* at 417–18.

106 Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 262, 268.

107 *See* SIMON, *supra* note 13, at 138–39.

108 *See* BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT 497–98 (Greenwood Press 1970) (1922).

President and the judiciary. He appeared before a crowd at the Baltimore courthouse to receive General Cadwalader's response, and declared that the general was defying the law and that he too might be under military arrest soon.[109]

Public response to Chief Justice Taney's decision in the North was, for the most part, withering. "The Chief Justice takes sides with traitors, throwing around them the sheltering protection of the ermine," thundered the *New York Tribune*, probably the North's most influential newspaper.[110] "When treason stalks abroad in arms, let decrepit Judges give place to men capable of detecting and crushing it."[111] It claimed that Taney had engaged in "a gross perversion of [the Court's] powers to employ [the writ of habeas corpus] as the protecting shield of rebels against a constitutional government."[112] It concluded that "[n]o Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies."[113] Nor did *The New York Times* display much charity to the elderly Chief Justice: "Too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he uses the powers of his office to serve the cause of the traitors."[114] A few Republican organs supported Taney, concluding that although Lincoln's actions may be necessary, the Court should not bless them, but instead should enter the violation of the Constitution on the record, "to stand as a warning, in more peaceful times yet to come, that here is an act, the necessity of which was the justification, and which is not to be made a precedent at any time when the public exigency is less pressing."[115]

Lincoln answered Taney, and the widespread claims of executive dictatorship, in his message to the special session of Congress on July 4, 1861.[116] Lincoln stressed that the Confederacy had fired the first shot before Lincoln or the national government had taken any action that might threaten slavery.[117] The South's action, therefore, was not the response to any unconstitutional action of the government, but an effort to

109 *See id*. at 492–94.

110 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 369 (rev. ed. 1926) (1922).

111 *Id*.

112 *Id*. at 369–70.

113 *Id*. at 370.

114 *Id*.

115 *Id*. at 370–71.

116 Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 421–41.

117 *Id*. at 423–26.

overturn the results of democratic elections and a rejection of the constitutional processes of "time, discussion, and the ballot box."[118] In response, Lincoln argued, "no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation."[119] Lincoln claimed he had responded with the support of public opinion: "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them."[120] Lincoln avoided the question whether he had acted unconstitutionally, but justified his actions on Congress's political support after the fact: "It is believed that nothing has been done beyond the constitutional competency of Congress."[121] That summer, Congress enacted a statute, not explicitly authorizing war against the South, but rather declaring that Lincoln's actions taken that spring "respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, . . . as if they had been issued and done" by Congress.[122]

Lincoln directly responded to the Chief Justice too, but not by name. He acknowledged that the "legality and propriety" of the suspension has been questioned, and that the "attention of the country" had been directed to his presidential duty "to take care that the laws be faithfully executed."[123] He made a nod toward the idea that the government could violate a single law, if that act would save the country: "Are all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated?"[124] Lincoln argued that he would break his oath to preserve, protect, and defend the Constitution if he blindly obeyed one provision above the survival of the Republic.[125] But Lincoln was too good a lawyer to rely solely on claims of a Lockean prerogative.[126] He claimed that the Suspension Clause's passive tense left open the question of who could suspend the writ:

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118 *Id.* at 425.

119 *Id.* at 426 (footnotes omitted).

120 *Id.* at 429.

121 *Id.*

122 Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326 (1861).

123 Message to Congress in Special Session, *supra* note 116, at 429–30 (internal quotations omitted).

124 *Id.* at 430.

125 *Id.*

126 JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 37–38 (2005).

> [A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented . . . by the rebellion.[127]

Lincoln promised a legal opinion from Attorney General Bates to provide a more complete justification,[128] which was issued the next day.[129] Drawing on *The Federalist*, Bates's opinion argued that each branch of the government was co-ordinate and could independently exercise its unique constitutional powers free from the orders of the other.[130]

Taney lost his confrontation with Lincoln. The administration continued the system of military detentions. Later that summer, Lincoln ordered the detention of Maryland legislators, the step he would not take in April.[131] In October, the administration expanded the authority of generals to suspend habeas corpus from Washington all the way up "the military line" to Maine.[132] Lincoln delegated to Secretary of State William Seward the supervision of military arrests in the first year of the war.[133] Seward allegedly told the British ambassador to the United States that he could "ring a [little] bell on his desk" and arrest any citizen in the nation—"[c]ould even the Queen of England do as much?"[134] Despite this anecdote, the most reliable estimates indicate that the government detained 864 civilians—approximately half were from the border states, while a third were Southerners—until the War Department took over detentions in 1862.[135] President Lincoln would suspend habeas nationwide on September 24, 1862, two days after releasing the preliminary Emancipation Proclamation, in a move to prevent opposition to the first conscription law.[136] Congress did not enact a law authorizing the suspension of habeas corpus and instituting a system of review until March 3, 1863, finally curing the defect claimed by *Milligan*.[137] Historian James G. Randall,

127 Message to Congress in Special Session, *supra* note 116, at 430–31.
128 *Id.* at 431.
129 10 Op. Att'y Gen. 74 (1861).
130 *Id.* at 81–86.
131 NEELY, *supra* note 10, at 15.
132 *Id*. at 14.
133 *Id*. at 19.
134 *Id*.
135 *Id.* at 24–26.
136 Proclamation Suspending the Writ of Habeas Corpus, Sept. 24, 1862, *in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 436–37. *See also* NEELY, *supra* note 10, at 52.
137 *See* NEELY, *supra* note 10, at 68; *see also* Act of Mar. 8, 1863, ch. 81, 12 Stat. 755 (1863).

author of the widely read *Constitutional Problems Under Lincoln*, estimated that the Lincoln administration detained approximately 13,500 civilian prisoners.[138] Neely's more recent work puts the number at about 12,600, though the records are incomplete.[139]

Supporters of the Union came to believe that these measures saved Maryland from secession.[140] *Merryman* had become a footnote to the start of the war, rather than a landmark for the development of internal security policies during the War.[141] Writing on *Merryman*, Harvard historian Charles Warren observed that the lack of popular support for the Court depressed the Chief Justice.[142] Writing in 1863, Taney despaired that the Court would not "ever be again restored to the authority and rank which the Constitution intended to confer upon it."[143] He concluded that the "supremacy of the military power over the civil seems to be established, and the public mind has acquiesced in it and sanctioned it."[144] Nevertheless, Warren argued, if Taney had lived another four years, he would have seen his opinion followed to the full in *Ex parte Milligan*. "Never did a fearless Judge receive a more swift or more complete vindication," Warren wrote.[145]

But did he?

II.

Milligan was not just a vindication of *Merryman*, but a dramatic expansion of it. *Merryman* had demanded that Congress suspend the writ of habeas corpus.[146] *Milligan* addressed a broader question: even if the writ were suspended, can the President and Congress subject civilians behind the lines to military trials when the civilian courts are open and functioning?[147] Unlike *Merryman*, *Milligan* did not reach the Justices under the pressure of secession and sabotage, but came up after the assassination of President Lincoln and Lee's surrender at Appomattox.[148] Yet *Milligan* drove the courts into

138 NEELY, *supra* note 10, at 115.
139 *Id*. at 130.
140 *Id*. at 29–30.
141 *See id*. at 29–34.
142 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES History 95–96 (1922).
143 *Id*. at 96.
144 *Id*.
145 *Id*.
146 *See Ex parte* Merryman, 17 F. Cas. 144, 148–52 (C.C.D. Md. 1861) (No. 9,487).
147 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
148 General Robert E. Lee surrendered the Confederate Army of Northern Virginia to General Ulysses S. Grant in the town of Appomattox, Virginia on April 9, 1865. BURKE

conflict once more with the political branches; this time not with the President, but with Congress.

Milligan took place in the midst of inter-branch strife over Reconstruction.[149] The issues were complex, and centrally involved the Constitution. If the Confederacy were considered an enemy nation, the laws of war permitted recaptured territory to be subject to occupation by Union military authorities.[150] But if the Southern states had never left the Union, as Lincoln had argued from the beginning, then they could claim an immediate restoration of their political rights.[151] They could again pass their own laws, run their own courts and police, and exercise their rights in the federal government, which could have included voting on the appropriations for the army and blocking legislation to protect the new freedmen. In the unprecedented circumstances of the Civil War, there were no rules for the re-admission of rebellious states to the Union or how much authority the national government could exercise in occupied territory.[152]

Milligan came to the Court just as President Johnson and radical Republicans in Congress were reaching their fateful split over Reconstruction policy. Johnson sought relatively lenient conditions for re-admission of the Southern states to the Union. He declared the war over in December 1865 and allowed Southern states to re-establish governments, sometimes with former Confederates in positions of power.[153] Johnson also offered amnesty to those who swore an oath of loyalty to the Union.[154] He did not demand of the Southern states any more protections for the freedmen than ratification of the Thirteenth Amendment—meaning that the rights of the former slaves would be governed by state law—and did not require states to grant them suffrage.[155] Southern states responded by adopting new

DAVIS, TO APPOMATTOX 402 (1959). President Lincoln was assassinated on April 14, 1865. 3 WARREN, *supra* note 142, at 140.

149 3 WARREN, *supra* note 142, at 140.

150 *See* WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 244–49 (Lawbook Exch. 10th ed. 2002) (1871).

151 *See id*. at 248–49.

152 For a review of the issues, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 176–280 (1988); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 (1974); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 282–306 (1973); HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR (1969).

153 *See* ALBERT E. CASTEL, THE PRESIDENCY OF ANDREW JOHNSON, at 49–52, 56 (1979); FONER, *supra* note 152, at 185–99 (1988); JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 54–55 (Daniel J. Boorstin ed., 1961).

154 FRANKLIN, *supra* note 153, at 29–30.

155 CASTEL, *supra* note 153, at 44–45; FONER, *supra* note 152, at 239–40.

constitutions that recognized the end of slavery, but little more. Their legislatures quickly enacted "Black Codes" which sought to keep the freedmen in a state of second-class citizenship by restricting their economic and political rights.[156] They held elections that sent Congressmen and Senators, including former Confederate Vice President Alexander Stephens and former generals and officials of the Confederacy, to the sitting of the 39th Congress in December 1865.[157] Johnson sought a swift reunion of the sundered Union by using the powers of Lincoln's energetic executive, which would set Reconstruction policy, to restore the respect for state sovereignty of the antebellum Constitution.

Congress would have little of it and refused to seat the elected representatives of the new Southern governments.[158] Radical Republicans wanted to provide the freedmen with a level of economic and political equality denied them by the Southern governments. In April 1866, Congress enacted the Civil Rights and Freedman Bureau bills over President Johnson's veto.[159] Radicals also believed that military government had to continue in the South because Union troops were the surest guarantee for the security and rights of the freedmen when state governments in the South could not be trusted.[160] President Johnson went to the country to oppose the radicals, but the 1866 midterm elections gave them a tremendous victory.[161] In less than two years, they would use their majority to place the South under military government, strip the Supreme Court of jurisdiction, and bring Johnson within one vote in the Senate of being the only President impeached and removed from office.[162]

Milligan came to the Court in the midst of this strife, and had a significant impact on the struggle, but its origins reached back two years to the tentative months when Abraham Lincoln's

156 CASTEL, *supra* note 153, at 47–48; FONER, *supra* note 152, at 199–201.

157 *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 452–53 & n.372 (2001); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1066–67 & n.100 (1984).

158 *See* CASTEL, *supra* note 153, at 55; CHARLES FAIRMAN, 6 OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 117 (Paul A. Freund ed., 1971); FONER, *supra* note 152, at 239.

159 CASTEL, *supra* note 153, at 70–71, 75; *see also* FAIRMAN, *supra* note 158, at 125–28.

160 *See* FONER, *supra* note 152, at 273–76.

161 *See id.* at 267; *see also* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 15–16 (1973) [hereinafter "BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON"].

162 *See* FONER, *supra* note 152, at 273–75; CASTEL, *supra* note 153, at 192; BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, *supra* note 161, at 92–93.

re-election had been in doubt.[163] Lambdin Milligan was an Indiana Copperhead Democrat who wanted peace with the Confederacy.[164] In an odd coincidence he had joined the Ohio Bar and placed first in the same examination as Edwin Stanton, who would become Lincoln's Secretary of War and would approve Milligan's detention and conviction.[165] Milligan fervently believed that secession was legal and that Lincoln and the Union had overstepped their constitutional authority in waging the Civil War.[166] He took an active role in Democratic politics in Indiana and ran for the party's 1864 nomination for governor, but his strict anti-war position lost.[167]

His opposition apparently went beyond political measures. Milligan organized the secret Democrat society, known as the Order of American Knights, or the Sons of Liberty.[168] With Indianapolis printer Harrison Horton Dodd as the Grand Commander, Milligan was appointed a "major general" of the Sons of Liberty along with a few other prominent Democrats in the state.[169] Although they planned attacks on prisoner of war camps, rebellion against Union authority, and establishment of an independent Northwestern Confederacy, none of these plans came to fruition.[170] That did not stop Dodd, however, from accepting money from Confederate spies in Canada to pay for the planned revolt.[171] Acting on a tip by an informant, Union officers found 400 revolvers and ammunition at Dodd's printing shop.[172]

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163 Kenneth M. Stampp, *The Milligan Case and the Election of 1864 in Indiana*, 31 MISS. VALLEY HIST. REV. 41, 41–42 (1944)

164 *See* Frank L. Klement, *The Indianapolis Treason Trials and* Ex Parte Milligan, *in* AMERICAN POLITICAL TRIALS 104 (Michal R. Belknap ed., 1981) [hereinafter "Klement, *The Indianapolis Treason Trials*"]; Allan Nevins, *The Case of the Copperhead Conspirator*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 90 (John A. Garrety ed., 1962), at 109–110.

165 Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 104.

166 *Id.*

167 No good biography exists of Milligan, but there are several helpful articles about him and his case. *See*, *e.g.*, Darwin Kelley, *Lambdin P. Milligan's Appeal for State's Rights and Constitutional Liberty during the Civil War*, 66 IND. MAG. HISTORY 263 (1970); Klement, *supra* note 165; Allan Nevins, *supra* note 164; Stampp, *supra* note 163. A short book is DARWIN KELLEY, MILLIGAN'S FIGHT AGAINST LINCOLN (1973). For a broader examination of political opposition to Lincoln in the Midwest, *see* FRANK L. KLEMENT, THE COPPERHEADS IN THE MIDDLE WEST (1960).

168 *See* Nevins, *supra* note 164, at 111.

169 J. HOLT, REPORT OF THE JUDGE ADVOCATE GENERAL ON THE "ORDER OF AMERICAN KNIGHTS," OR "THE SONS OF LIBERTY": A WESTERN CONSPIRACY IN AID OF THE SOUTHERN REBELLION 4 (1864).

170 *See* Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 106; Stampp *supra* note 163, at 48.

171 Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 107.

172 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 96–98 (1998).

The conspiracy suited the needs of the powerful Republican Governor, Oliver Morton. Worried about his re-election and the fate of the Republican Party in the 1864 elections, Morton ordered the arrest of Milligan and his fellow conspirators.[173] Morton appears to have urged a military trial because its proceedings would run through the election season.[174] Successfully draping Indiana Democrats in the mantle of disloyalty, Morton won re-election by a comfortable margin in October,[175] as did Lincoln in November,[176] no doubt helped more by Sherman's capture of Atlanta than anything.[177]

At the end of the proceedings, a military commission of seven army officers convicted four of the conspirators.[178] It sentenced three of them, including Milligan, to death.[179] It had not helped that the ringleader, Dodd, escaped from his room above the post-office and made it to Canada, and that one of Milligan's comrades had turned informant.[180] With his re-election secure, however, Governor Morton decided to recommend commutation of their sentences to the military authorities, who remained unmoved.[181] His opponent in the election, Democrat Joseph E. McDonald, a former congressman and state attorney general, journeyed to Washington to personally meet with Lincoln to plead for clemency.[182] Lincoln read over the trial record, found some errors, and told McDonald that there would be "such a jubilee over yonder" in Virginia—anticipating Lee's surrender to Grant—that "we shall none of us want any more killing done."[183] He promised McDonald, "I will still keep them in prison awhile to keep them from killing the new government."[184] Lincoln's assassination on Good Friday, April 14, 1865, prevented him from keeping his promise.[185] President Johnson, who had convened a military commission to quickly try and execute the assassins, was in no mood for mercy and approved the death sentences of Milligan and his co-defendants.[186]

173 Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 107–08.

174 *See* Stampp, *supra* note 163, at 51–52.

175 *See* Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 110.

176 *Id.* at 113.

177 DONALD, *supra* note 55, at 531.

178 *See* Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 108, 114.

179 *Id.* at 459.

180 *Id.* at 458.

181 *Id.* at 459–60.

182 Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 104; *see also* IND. REPUBLICAN STATE CENT. COMM., OLIVER P. MORTON OF INDIANA: SKETCH OF HIS LIFE AND PUBLIC SERVICE 48 (1876) (detailing the re-election of Governor Morton).

183 FAIRMAN, *supra* note 158, at 197.

184 *Id.*

185 *See id.;* DONALD, *supra* note 55, at 596–99.

186 FAIRMAN, *supra* note 158, at 196–97.

On May 10, Milligan filed for a writ of habeas corpus in the federal circuit court in Indianapolis.[187] The next day, the two federal judges on circuit—Justice David Davis and Judge David McDonald—sent a remarkable letter to the President.[188] They asked that Johnson delay execution of the sentence until the federal courts had time to determine whether military commissions had jurisdiction over civilians unconnected to the military.[189] Unlike Chief Justice Taney, they did not appear to believe that they had the authority to order the President to suspend the executions. Instead, they argued that allowing the executions would open the government to the charge of oppression and would be a stain on the national character.[190] They also doubted the wisdom of the policy. The judges did not question "the guilt of these men" or "that their trial had a most salutary effect on the public mind by developing and defeating a most dangerous and wicked conspiracy against our government."[191] Rather, they argued that the trial had achieved its purpose and that Indiana was now "quiet and peaceable."[192] Executing Milligan and his comrades now would only make them "political martyrs."[193] Stanton also put in a plea for his former bar mate.[194] Johnson ultimately commuted Milligan's sentence to life imprisonment.[195]

The two judges on the circuit sent the case to the Supreme Court, which heard oral arguments on March 5, 1866.[196] Milligan's counsel added three shrewdly chosen co-counsel: Jeremiah Black, who had been Chief Justice of the Pennsylvania Supreme Court, Attorney General and Secretary of State in the Buchanan administration, and had been defeated for confirmation to the Supreme Court in 1861 by one vote;[197] James A. Garfield, a brigadier general during the opening years of the Civil War at age 31, Republican congressman from Ohio, and future President;[198] and David Dudley Field, brother of sitting Justice Stephen J. Field and father of the Field Code that would

187 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 7 (1866).
188 *See* FAIRMAN, *supra* note 158, at 197–98.
189 *Id.* at 198.
190 *Id.*
191 *Id.* at 198–99.
192 *Id*.
193 *Id.*
194 Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 115.
195 *Id*. at 116.
196 FAIRMAN, *supra* note 158, at 199–200.
197 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 9 (1866); Derek P. Langhauser, Commentary, *An Essay: Nominations to the Supreme Court of the United States: Historical Lessons for Today's Debate,* 205 EDUC. L. REP. 553, 568 (West 2006).
198 IRA RUTKOW, JAMES A. GARFIELD 15–16 (2006); FAIRMAN, *supra* note 158, at 143; Castel, *supra* note 153, at 19.

be the basis of American civil procedure in the nineteenth century.[199] As Milligan's chances rose with these choices, the government's odds dropped with its own. In addition to Attorney General James Speed, who was not thought of as an able oral advocate,[200] the government added Henry Stanbery, who would replace Speed as Attorney General that summer and would be nominated by Johnson to a seat on the Supreme Court;[201] and, inexplicably, General Benjamin Butler, a Massachusetts lawyer who had won notoriety for his tough occupation government of the City of New Orleans.[202] Butler, for example, had issued General Order No. 28 that declared that any woman who showed disrespect to a Union soldier or officer would be treated as "a woman of the town plying her avocation."[203] He would be known as "Beast Butler" throughout the South for decades.[204] After an unsuccessful military career, Butler would be elected to the House of Representatives and would be the lead House prosecutor of the Johnson impeachment before the Senate.[205]

The transcript of oral argument is lengthy, occupying sixty-two pages of the U.S. Reports.[206] Each side received three hours of time; not exactly the days accorded Daniel Webster, but a luxury under today's standards.[207] On April 3, 1866, the Court announced that it was ordering the release of Milligan, who went free on April 10.[208] However, the Court did not release its opinion until December.[209] Justice Davis wrote for the Court that these new tribunals had no jurisdiction over a citizen who was not a resident of one of the rebellious states, not a prisoner of war, and not in the armed forces of the Confederacy or the Union.[210] The law of war, which applied to combatants and the battlefield, held no sway over "citizens in states which have upheld the authority of the government, and where the courts

199 FAIRMAN, *supra* note 158, at 4; LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 340 (1973).

200 *See* FAIRMAN, *supra* note 158, at 201.

201 Congress reacted by decreasing the size of the Court by one seat. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 427 (2006).

202 FONER, *supra* note 152, at 45, 491–92.

203 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR, *supra* note 90, at 2335.

204 *See* SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE, FREDERICKSBURG TO MERIDIAN 105 (1963).

205 William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 916 (1991).

206 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 22–84 (1866).

207 FAIRMAN, *supra* note 158, at 200.

208 THE MILLIGAN CASE 44 (Samuel Klaus ed., 1997).

209 FAIRMAN, *supra* note 158, at 214.

210 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124–27 (1866); FAIRMAN, *supra* note 158, at 197-99; *see also* Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 116–17.

are open and their process unobstructed."[211] The Bill of Rights demanded that Milligan receive a jury trial in federal court for violations of civilian law, and these provisions could not be waived in the face of emergency.[212] "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."[213] Neither the President nor Congress, therefore, could impose martial law that overrode the constitutional protections in a criminal trial, except in cases of actual invasion in which the "courts and civil authorities are overthrown."[214] What was good for the occupation of Virginia, Davis concluded, was not good for Indiana.[215]

Chief Justice Chase wrote a concurring opinion joined by three other Justices.[216] He found that Milligan fell within the Habeas Corpus Act of 1863, which had authorized Lincoln to suspend the writ of habeas corpus.[217] The Act required the military to supply the courts with lists of prisoners, and to release the prisoners if a grand jury did not choose to indict them of a crime.[218] Milligan had not been indicted by a grand jury, so he was entitled under the statute to go free. Chase refused to reach the question of whether the President and Congress together could authorize the use of military commissions in wartime: "When the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals."[219] Chase would have allowed Congress to authorize military tribunals in wartime even when the courts were open; a necessity, he argued, because the courts might prove incompetent to stop threatened danger or judicial officers might be aligned with the rebels.[220]

It was not the judgment in *Milligan* that was particularly objectionable, but rather the reasoning of the Court's opinion. Congress's authority was not directly presented in *Milligan*.

211 *Id.* at 121.
212 *Id.* at 125–26.
213 *Id.* at 125.
214 *Id.* at 126.
215 *Id.* at 127.
216 *Id.* at 132 (Chase, C.J., concurring).
217 *Id.* at 133–34.
218 *Id.* at 133.
219 *Id.* at 140.
220 *Id.* at 140–41.

Justice Davis's desire to address its scope, and to limit it in such broad terms, immediately plunged the Court into the maelstrom of Reconstruction politics. When the Court announced the opinion in December, its implications for congressional plans for Reconstruction were obvious to all. *Milligan* suggested that any continuation of military occupation in the South was unconstitutional, and signaled that Republicans would have to count the judiciary among their opponents.[221] The Republicans immediately recognized *Milligan* as a challenge, with Thaddeus Stevens declaring it to be a "most injurious and iniquitous decision [that] has rendered immediate action by Congress upon the question of the establishment of governments in the rebel States absolutely indispensable."[222] "In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face," wrote *The New York Times*.[223] "The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it."[224] Comparing *Milligan* to *Dred Scott*, *Harper's Weekly* declared that the decision "is not a judicial opinion; it is a political act."[225] The *New York Herald* raised the idea of reforming the Court: "a reconstruction of the Supreme Court, adapted to the paramount decisions of the war, looms up into bold relief, on a question of vital importance."[226]

Just as Republican papers attacked *Milligan*, Democratic papers praised it. The *National Intelligencer*, which often represented the views of the Johnson administration, attacked the Court's critics: "[A]s in war times, these monopolists of patriotism denounced those who upheld the sacred liberties of the citizen as guaranteed by the Constitution, so now, in the midst of peace, they assail those who maintain the rights of the States as guaranteed by that same instrument."[227] Democrats in Congress similarly interpreted *Milligan* as requiring a quick re-admission of the Southern States to the Union and decried the Republican vitriol hurled at the Court. Aaron Harding criticized the Republicans for their "attempt to bring into ridicule and contempt the last refuge of liberty [the Supreme Court] for the

221 *See id.* at 124–25; CONG. GLOBE, 39th Cong., 2d Sess. 251 (1865).
222 CONG. GLOBE, 39th Cong., 2d Sess. 251 (1865).
223 3 WARREN, *supra* note 142, at 151.
224 *Id.*
225 *Id.* at 154.
226 *Id.* at 153.
227 *Id.* at 157.

oppressed."[228] Michael Kerr went further, accusing the Republicans in Congress of attempting to "govern this country without the aid of the unrepresented States, the Constitution, or the Supreme Court."[229] It was no favor to the Supreme Court when, on the anniversary of the Battle of New Orleans, it was toasted at a Democratic party dinner as "the great conservative power of the government; never more needed or better appreciated than now."[230] Johnson's annual message to Congress, delivered in December 1866, had asked for the immediate re-admission of the Southern states because they had met his condition of adopting the Thirteenth Amendment.[231] The new Republican majorities ignored him. Now Johnson and his Democrat allies sought to project the image that the Court was on their side.

The possibility that the Court would throw its weight behind Johnson worried congressional Republicans. They nonetheless proceeded with their plans for Reconstruction and, on March 2, 1867, passed a Reconstruction Act that required the adoption of black suffrage, new constitutions adopted by majority vote, and ratification of the Fourteenth Amendment before the Southern states would regain their representation in Congress.[232] To guarantee the equal rights of the freedmen, Congress created five military districts in the former Confederacy to provide military protection.[233] The army would have the duty to protect all persons, to suppress insurrections, disorder, and violence, and to punish those who disturbed the peace.[234] A supplementary Act gave the military commanders the authority to remove state officers who impeded Reconstruction.[235] Johnson vetoed the Act and in his message argued that with the surrender of the Confederacy, the war powers of the government had ended, and the Southern states had resumed their place in the constitutional structure.[236] He also claimed that military occupation of the South violated *Milligan*.[237] Congress overrode Johnson's veto on the very same day by far more than the two-thirds majorities required: 135 to 48 in the House, and 38 to 10 in the Senate.[238]

228 CONG. GLOBE, 39th Cong., 2d Sess. 1167 (1865).
229 *Id.* at 624.
230 FAIRMAN, *supra* note 158, at 222–23.
231 CONG. GLOBE, 39th Cong., 2d Sess. 1–5 (1866).
232 Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428–29; *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 139 (1993).
233 SCHWARTZ, *supra* note 232, at 139.
234 *Id.*
235 *Id.*
236 FAIRMAN, *supra* note 158, at 307–08.
237 *Id.* at 308.
238 *Id.* at 308–09.

Enforcement of the Reconstruction Act produced the first demonstration of *Milligan*'s desuetude as military commissions continued in the South. From the end of the war until January 1, 1869, the Union army conducted 1,435 military trials, though they steadily declined throughout this period.[239] Some of them involved cases from the war, some from Reconstruction; some were of Southern civilians, some were of Union soldiers. The Reconstruction Act allowed military commanders to use commissions to try civilians when the civilian courts were thought to be inadequate. Military governors became embroiled in reviewing state enforcement of the laws governing everyday life. They suspended various laws, such as debt collection, that were being enforced in a discriminatory manner by state officials, and substituted military enforcement when state authorities applied criminal and civil laws unjustly. This state of affairs did not end until all of the Southern states rejoined the Union.[240] Some lower federal courts relied upon *Milligan* to stop these military commission trials, but the record shows that they were unsuccessful in preventing their widespread use in the South.[241]

In the first year of Reconstruction, the Supreme Court studiously refused to entertain cases by states, such as Mississippi and Georgia, challenging the constitutionality of military government in the South.[242] One might say that Congress had even sought the cooperation of the other two branches in Reconstruction—the reliance on military governors recognized President Johnson's paramount role, and Congress had expanded habeas jurisdiction in a February 1867 law designed to allow freedmen to seek the protection of the federal courts.[243] But that changed with the case of *Ex parte McCardle*.[244] Colonel William McCardle, the editor of the *Vicksburg Times*, vituperatively attacked Reconstruction. In one editorial he called the military governors "each and all infamous, cowardly, and abandoned villains," and in others he called for resistance to the military, Southern government by whites only, and opposition to the Fourteenth Amendment.[245] Union officers arrested McCardle on November 8, 1867, and brought him before a military commission to face trial for inciting insurrection,

239 NEELY, *supra* note 10, at 176–77.

240 *Id.* at 178–79.

241 *See* 3 WARREN, *supra* note 142, at 164–65.

242 *See, e.g.*, Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867) (dismissed as political question); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) (same).

243 Habeas Corpus Act of 1867, 14 Stat. 385 (1867).

244 74 U.S. (7 Wall.) 506 (1868).

245 SCHWARTZ, *supra* note 232, at 140; William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 236 n.42 (1973).

disorder, and violence and impeding Reconstruction.[246] When the federal district court denied McCardle's petition for a writ of habeas corpus, he appealed to the Supreme Court under the new 1867 habeas law.[247]

When the Supreme Court announced that it would hear *Ex parte McCardle* in January 1868, it was apparent that a test of the constitutionality of the Reconstruction Act was on the way.[248] It was no coincidence that McCardle was represented by Milligan's lawyers.[249] The Johnson administration made its views known by refusing to defend the statute.[250] General Grant arranged for the Army to be represented by Lyman Trumbull and Matthew Carpenter, two Republican Senators who had played important roles in the consideration of the Reconstruction Amendments.[251] To illustrate the depths to which the Court had become embroiled in the fight over Reconstruction, one of the days of oral argument was interrupted when Chief Justice Chase had to leave to preside over the organization of President Johnson's impeachment trial in the Senate.[252]

Reports from oral argument suggested that the Court was sympathetic to McCardle's argument that the Reconstruction Act violated *Milligan*.[253] Congress responded swiftly. In January and February of 1868, it considered legislation requiring that six Justices agree before the Court could strike down federal legislation.[254] The House passed the bill, but the Senate could not reach a consensus.[255] However, after the end of oral argument in *McCardle*, Congress overrode President Johnson's veto and removed the Supreme Court's appellate jurisdiction over habeas corpus appeals under the 1867 statute.[256] Only after Johnson's acquittal, and Grant's election to the Presidency, did the Court announce in 1869 that it accepted the stripping of its jurisdiction and would not reach the merits of the *McCardle* petition.[257] Thus, *Milligan* became the motivating factor that led

246 *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 322 (1867); SCHROEDER-LEIN & ZUCZEK, *supra* note 235, at 184.

247 SCHWARTZ, *supra* note 232, at 140.

248 *Id.*; FAIRMAN, *supra* note 158, at 449–50.

249 *See McCardle,* 73 U.S. (6 Wall.) at 323; *Ex parte* Milligan*,* 71 U.S. (4 Wall.) 2, 9 (1866).

250 *See* HYMAN, *supra* note 152, at 504.

251 *Id.*

252 FAIRMAN, *supra* note 158, at 455.

253 *Id.*

254 *See* CONG. GLOBE*,* 39th Cong., 2d Sess. 478 (1868).

255 Stanley I. Kutler, Ex Parte McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835, 838 (1967).

256 Van Alstyne, *supra* note 245, at 240.

257 *Id.* at 243–44 (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–15 (1868)).

to the only clear example of congressional jurisdiction-stripping in the Court's history.[258]

III.

In concluding, it is worth putting forth some hypotheses about why the Court's decisions in *Merryman* and *Milligan* sparked such sharp reactions from the political branches. In *Merryman*, Chief Justice Taney issued a writ to President Lincoln, who refused to follow it—probably the only unambiguous example of a President of the United States refusing to obey an order of the federal judiciary. Despite the praise for *Milligan* in later years, it prompted Congress to enact the only clear example of jurisdiction-stripping in the Court's history. Along with the Jeffersonian impeachment of Justice Samuel Chase[259] and President Franklin Roosevelt's court-packing plan,[260] these Civil War episodes remain among the most direct challenges to the Supreme Court's authority by the elected branches of government.

Most of the blame surely lies with the Justices themselves. In *Milligan*, the majority could have resolved the case on the narrow statutory ground that the Habeas Corpus Act required release, an outcome that would probably have received the approval of a unanimous Court. Instead, Justice Davis's majority stretched to address a constitutional question with obvious implications for the great struggle between President Johnson and the Reconstruction Congress. The Court may have believed that it was helping to settle the matter, but it only contributed to the political instability and constitutional conflict over the occupation of the South. Its views did not prevail, as military government continued over the former states of the Confederacy until the Compromise of 1877 removed Union troops in exchange for finding Republican Rutherford Hayes the winner of the 1876 presidential election.[261] The Court would have been better served by following the doctrine of judicial restraint, best expressed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*,[262] to interpret statutory questions to avoid constitutional questions.

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258 For a contrary view, see STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968); Van Alstyne, *supra* note 245.

259 *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 76–82 (1971).

260 *See* WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 83–84 (1995).

261 Vincent P. DeSantis, *Rutherford B. Hayes and the Removal of the Troops and the End of the Reconstruction*, *in* REGION, RACE AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 417, 417–18 (J. Morgan Kousser & James McPherson eds., 1982).

262 297 U.S. 288, 356 (1936) (Brandeis, J., concurring).

Deciding *Milligan* only on the application of the Habeas Corpus Act would have kept the Court out of a constitutional confrontation between the political branches that it could not settle.

Merryman tells a different story. Like Davis, Chief Justice Taney sought to insert the federal courts into the great constitutional controversy of the day. Taney, of course, had a history of overreaching. He had wanted to settle the question of slavery in the territories in *Dred Scott*, but instead only accelerated the movement toward Civil War. *Merryman*, however, unlike *Milligan*, presented no obvious statutory or jurisdictional means to evade the constitutional question of whether the President could suspend habeas corpus during a period of rebellion without the consent of Congress. Merryman was an American citizen held by the executive branch without criminal charge; he had a right to appeal to a federal court to require the government to explain the legal basis for his detention.

Taney's mistake was that he gave Lincoln no time to organize the federal government's response to the unprecedented challenge of secession. Civil War was a calamity unlike any that the nation had faced before or since. Taney deliberately sought out a constitutional confrontation with the executive branch during the chaotic circumstances of the first weeks of the war, when the very security of the capital city was at stake. It would have been understandable and reasonable if Taney had given President Lincoln the benefit of the doubt and allowed the military time to restore the security of the Baltimore-Washington, D.C. area before pressing forward with *Merryman*. Taney, however, believed that the Supreme Court had the final and immediate authority to resolve the constitutional question of habeas suspension, regardless of the circumstances.[263]

Despite their different settings, both *Merryman* and *Milligan* have that in common. The terrible divisions of the Civil War, and the Taney Court's role in hastening its coming, had not yet weaned the Justices from their attachment to judicial supremacy. *Merryman* and *Milligan* displayed a remarkable lack of deference to the political branches during wartime. War is the subject under which the structural advantages of the President and Congress are at their height, and where the courts have the least competence.[264] War involves unpredictability and uncertainty,

263 *See Ex parte* Merryman, 17 F.Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

264 My views on the separation of powers in wartime can be found in YOO, *supra* note 126.

unforeseen circumstances, difficult tradeoffs between competing values, and, in a Civil War, the highest of stakes. While some believe that the courts should still decide cases challenging government authority without taking account of wartime conditions, this approach ignores the costs of judicial intervention, not only to the war effort but also to the Court. *Merryman* and *Milligan* reveal the wages of judicial supremacy, not just to the President and Congress, but to the institution of the Supreme Court as well.

The Fed's Backroom Bailout Policy:

Reportedly more than $2 trillion in loans and guarantees without a timely public record, expanding its regulatory powers despite a history of malfeasance and, since October 2008, rewarding banks for holding their surging reserves rather than lending.

Robert D. Auerbach[*]

Since the Federal Reserve (the Fed) started its loan policies in 2007, it has loaned and guaranteed perhaps $2 trillion or more.[1] That estimate does not count the 96 percent increase in the monetary base of the money supply in the four months since October 2008 which the Fed has created; an increase of $795 billion.[2] At this rate the base of the money supply was closing in on $1 trillion.[3] A huge surge in the monetary base is necessary to keep the Fed's target short term interest rate near zero.

Where is all that money? Most is being held by the nation's banks.[4] Since October 2008, the Fed has paid interest to the banks if they held the money.[5] As I will explain, that policy intensifies the financial crisis.

Complete timely records of the Fed's bailout actions and deliberations, if they exist, would establish responsibility for its unelected officials. Bloomberg news was turned down by the Fed

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1 Mark Pittman et al., *Fed Defies Transparency Aim in Refusal to Disclose (update2)*, BLOOMBERG.COM, Nov. 10, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOngFPgq7r3M. The monetary base calculated by the St Louis Federal Reserve would expand to over $1.7 trillion by May 29, 2009. http://research.stlouisfed.com/fred2/data/WSBASE.txt.

2 FED. RESERVE. AGGREGATE RESERVES OF DEPOSITORY INSTITUTIONS AND THE MONETARY BASE (2009), *available at* http://www.federalreserve.gov/releases/h3/current/h3.pdf.

3 *Id.*

4 *Id.*

5 Reserve Requirements of Depository Institutions, 73 Fed. Reg. 59,482 (Oct. 9, 2008) (to be codified at 12 C.F.R. pt. 204). *See also* Press Release, Federal Reserve Board (Oct. 6, 2008), http://www.federalreserve.gov/newsevents/press/monetary/20081006a.htm (announcing that the Fed "will begin to pay interest on depository institutions' required and excess reserve balances.").

in its Freedom of Information Act (FOIA) request for details and has taken the matter to court.[6]

Evidently, the Fed intends to continue its record of blocking transparency as it did for seventeen years when it denied possessing transcripts of its monetary policy committee meetings.[7] Nevertheless, they were forced to show them during a Congressional investigation.[8] They were around the corner from Alan Greenspan's office. Beginning in 1994, the Greenspan Fed began to destroy the source records of those transcripts, which had been sent to the National Archives.[9]

The Fed is the major regulator of the nation's financial firms with regulatory jurisdiction over financial holding companies—that includes the large trillion dollar banks—and foreign banks.[10] It is now assuming, and Congress is suggesting, legislation for more Fed regulatory power,[11] even though the Fed's regulatory function is fundamentally flawed and remains a catalyst for more crises.[12]

The primary conflict of interest at the Fed is its outdated organization that gives bankers inside the Fed bureaucracy substantial authority to regulate the banks.[13] The banks in each of their district elect six of the nine members of the boards of directors at each of the twelve Federal Reserve district banks.[14]

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6 Mark Pittman and Bob Ivry, *U.S. Taxpayers Risk $9.7 Trillion on Bailout Programs (Update1)*, BLOOMBERG.COM, Feb. 9, 2009, http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aGq2B3XeGKok ("Bloomberg requested details of Fed lending under the Freedom of Information Act and filed a federal lawsuit against the central bank Nov. 7 seeking to force disclosure of borrower banks and their collateral.").

7 *See* ROBERT D. AUERBACH, DECEPTION AND ABUSE AT THE FED; HENRY B. GONZALEZ BATTLES ALAN GREENSPAN'S BANK 87 (2008).

8 *Id.* at 108.

9 *Id.* at 103.

10 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, 1–4 (1994).

11 THE DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 9 (Mar. 2008) (suggesting "[t]he Federal Reserve should have primary oversight responsibilities for such payment and settlement systems, should have discretion to designate a payment and settlement system as systemically important, and should have a full range of authority to establish regulatory standards.").

12 Press Release, U.S. Sec. and Exch. Comm'n, Statements of Chairman Cox on IG Reports Regarding CSE Program (Sept. 26, 2008) (transcript available at http://www.sec.gov/news/press/2008/2008-231.htm).

13 The Federal Reserve Board, *The Structure of the Federal Reserve System, Board of Directors, Selection and Representation*, http://www.federalreserve.gov/pubs/frseries/frseri4.htm (last visited Feb. 26, 2009) (characterizing Class A directors of the board of directors as typically being bankers).

14 *Id.* (describing the Federal Reserve Banks' board of directors as divided into three classes, where two classes—six of the nine total members—are elected by member banks in their district).

When J. P. Morgan bought Bear Stearns in 2008, its CEO, Jamie Dimon, was also on the board of directors of the bank regulator, The New York Federal Reserve Bank.[15] Sanford Weil, the CEO of Citigroup, was elected to the same board in 2001 and his bank was later investigated by Attorney General Eliot Spitzer regarding the Citigroup-WorldCom scandal.[16]

A false argument can be advanced: "Who better knows how to regulate the banks than the banks being regulated?" I could fill a book with the answers from the eleven years I assisted the Chairmen, Ranking Members of the House of Representatives Committee on Financial Services who carried out investigations during the tenure of four Federal Reserve Chairmen: Arthur Burns, William Miller, Paul Volcker, and Alan Greenspan.[17]

During the 1990s I assisted Chairman/Ranking Member Henry B. Gonzalez with his Congressional investigations of the Alan Greenspan Federal Reserve.[18] As I promised Henry B., as they called Gonzalez in his district, I did write a book about those investigations that was recently published.[19]

It is especially appropriate at Chapman University School of Law to mention material included in my book by or about my dissertation chairman and friend for many years, Milton Friedman.[20] In Chapter 9, "When Five Hundred Economists Are Not Enough," Milton is quoted from a Reuters' 1993 interview on the results of an astounding Congressional investigation in which I assisted:

> The Fed's relatively enhanced standing among the public has been aided 'by the fact that the Fed has always paid a great deal of attention to soothing the people in the media and buying up its most likely critics.' Recognizing that the Fed employs 'probably half of the monetary economists in the U.S. and has visiting appointments for two-thirds of the rest,' he [Friedman] saw few among the academic community who were prepared to criticize the Fed policy.[21]

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15 Biography of Jamie Dimon, Federal Reserve Bank of New York, http://www.newyorkfed.org/aboutthefed/orgchart/board/dimon.html (last visited Feb. 26, 2009).

16 Press Release, Federal Reserve Bank of New York, *Sandford Weill Elected to NY Fed Board of Directors* (Jan. 10, 2001), http://www.newyorkfed.org/newsevents/news_archive/aboutthefed/2001/oa010110.html; *See* Elizabeth Douglass, *N.Y. Widens Salomon Investigation*, L.A. TIMES, Aug. 24, 2002, at C1.

17 *See* AUERBACH, *supra* note 7, at 106–147.

18 *Id*.

19 *See generally id*.

20 Jerry Hicks et al., *Orange County Newswatch; Teacher's Pet*, L.A. TIMES; ORANGE COUNTY EDITION, April 21, 1992, at A1 (noting that Chapman University President James L. Doti studied economics under Milton Friedman at the University of Chicago).

21 AUERBACH, *supra* note 7, at 142–43.

Unfortunately, Milton died in 2006 and could not read the finished manuscript.[22]

The devastating 1906 earthquake in San Francisco played a role in the creation of the Federal Reserve.[23] The terrible calamity shocked financial markets.[24] Still staggering in 1907, the nation's financial system was hammered when the Bank of England raised its rates causing an outflow of gold from the United States.[25] These events led to runs for deposits in private sector banks that were caught short.[26] The U.S. Treasury, which was also short of money due to expenditures on the Panama Canal, could not come to the rescue.[27] Remedies for the panic and banking collapse were worked out in a backroom deal with New York bankers who were locked in an all-night session under the piercing eyes of a Wall Street power broker, John Pierpont Morgan.[28]

Does this remind you of the following Federal Reserve negotiations in 1998?

> Working from the offices of the New York Fed Bank [in 1998], the Fed orchestrated a bailout of LTCM [Long-Term Capital Management] by private-sector banks. . . . Greenspan could not or would not tell Congress the details of the bailout, apparently because the nation's central bank produced no detailed public records of its actions. Hundreds of lawyers and many large financial firms were evidently involved in this operation. These actions put the Greenspan Fed in the same league as the tycoons of an earlier age, such as John Pierpont Morgan (1837-1913), whose enormous financial deals, which had widespread economic effects, were made out of sight of the public or its elected officials.[29]

The end of a federal government without a central bank came after Congress created the Federal Reserve in 1913.[30] The Fed has come a long way since 1913. Congress reorganized it in 1935, with its main power centered at the Washington D.C.

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22 Jonathan Peterson, *Milton Friedman: 1912–2006; Economist changed the world*, L.A. TIMES, Nov. 17, 2006, at A1.

23 Kerry A. Odell & Marc D. Weidenmier, *Real Shock, Monetary Aftershock: The 1906 San Francisco Earthquake and the Panic of 1907*, 64 J. ECON. HIST. 1002, 1003–04, (2004).

24 *Id*.

25 *Id*.

26 *Id*.

27 A.P. Andrew, *The Treasury and the Banks Under Secretary Shaw*, 21 Q.J. ECON. 519, 542 (1907).

28 Ellis W. Tallman & Jon R. Moen, *Private Sector Responses to the Panic of 1907: A comparison of New York and Chicago*, ECON. REV., March/April 1995, at 5–8.

29 AUERBACH, *supra* note 7, at 177.

30 The History of the Federal Reserve: Federal Reserve Bank of Cleveland, http://www.clevelandfed.org/About_Us/who_we_are/about_the_system/history.cfm (last visited Feb. 27, 2009).

headquarters[31] in two committees: the seven-member Board of Governors, all of whom are nominated by the President and confirmed by the Senate, and the Federal Open Market Committee (FOMC).[32] The FOMC is composed of the Board of Governors and five of the twelve Federal district bank presidents, each of whom receives his/her appointment from the district Federal Reserve bank's boards of directors, subject to approval by the Board of Governors, without having to be publicly questioned, and have their credentials and background examined during a Senate confirmation process.[33]

The next power increase came in 1951.[34] The U.S. Treasury Department lost its authority to issue money in an agreement during the Truman Administration to end the practice of pegging interest rates at low levels in order to support the price of government bonds purchased by banks in an effort to help finance the government in World War II.[35] Its responsibilities for issuing currency and coin dwindled to running the Bureau of Printing and Engraving that prints money ordered and issued by the Federal Reserve.[36]

It is a pity that so many people in Congress think they can appropriate money, when all they can do is vote for spending bills that, when signed by the President, go to the Treasury which must then sell securities to obtain borrowed funds. Only the Federal Reserve can order the printing presses to finance the spending bills with new money.

Severe regulatory problems were uncovered during the tenure of Fed Chairman Alan Greenspan (1987–2006). A Gonzalez-led congressional investigation received information, partially confirmed by the president of the New York Fed, that Federal Reserve officers were taking gifts and socializing with the bankers they were examining.[37] Greenspan even approved of the right of Fed bank examiners to give their resumes for employment to the banks they were examining.[38]

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31 Board of Governors of the Federal Reserve: Federal Reserve Bank of Cleveland, http://www.clevelandfed.org/About_Us/who_we_are/about_the_system/governors.cfm (last visited Feb. 28, 2009) (noting that "[t]he Board of Governors in Washington, DC,[sic] provides general oversight of the Reserve Banks.").

32 Melcher v. Fed. Open Market Comm., 644 F. Supp. 510, 518 (1986).

33 *See id.*

34 DONALD R. WELLS, THE FEDERAL RESERVE SYSTEM: A HISTORY 93–94 (2004); *see also* AUERBACH, *supra* note 7, at 5.

35 WELLS, *supra* note 34, at 94.

36 Bureau of Engraving and Printing-About the BEP, http://www.moneyfactory.gov/section.cfm/2 (last visited Mar. 25, 2009).

37 AUERBACH, *supra* note 7, at 61.

38 *Id.* at 63–64.

The 1999 Financial Modernization Bill (Gramm-Leach Bliley Act) further destroyed bank examination of the trillion dollar banks.[39] The 1999 bill repealed the provisions in the banking laws of 1932 and 1933 (the Glass-Steagall acts) that separated banks from underwriting and other investment bank activities. Banks could now be combined with other financial businesses with the approval of the Federal Reserve. Academics who misunderstood turf wars praised the functional examination of financial conglomerates being spread to many different entities, including state insurance regulators.[40] The barrier between deposits—much of which are a liability of the taxpayers—and other activities in these conglomerates is now protected by little more than the fictional potted plant between their desks.[41]

In 1998, Secretary of the Treasury Robert Rubin warned the Senate Banking Committee about some serious concerns if the Modernization Law—which would create superbanks—was passed.[42] He said, "these large aggregations could present competitive problems in the initial stages, and then subsequently, if small banks are not able to compete, then you can have other kinds of pricing mechanisms develop once they're gone."[43] The bill to create superbanks was required to keep together the large financial conglomerate Citigroup, an institution built by its former CEO Sanford Weill.[44] Citigroup hired Rubin a month before the bill became law.[45]

During the recent bailout, the locus of policy has shifted from the FOMC to the Board of Governors.[46] The Board has the immense power to bypass the congressional appropriation process to make loans to individuals, partnerships and corporations that are "unable to secure adequate credit accommodations from other banking institutions" provided there are "unusual and exigent circumstances" and, before 2002, provided at least five of the seven Fed governors authorized the

39 *Id*. at 162.

40 *See id*. at 163.

41 *See id*. at 186 (noting that, under the Gramm-Leach-Bliley Act, bank operations that sold insurance would only be regulated by state agencies).

42 *Competition In The Finance Services Industry: Hearing on H.R. 10 Before the S. Banking, Housing and Urban Affairs Comm.*, 105th Cong. 30 (1998) (statement of Robert Rubin, Treasury Secretary of the United States).

43 *Id.*

44 #242 [of the 400 Richest Americans] – Sanford Weill, FORBES.COM, Sept. 21, 2006, http://www.forbes.com/lists/2006/54/biz_06rich400_Sanford-Weill_HRFZ.html.

45 Ken Brown & David Enrich, *Rubin Defends His Role at Citi*, WSJ.COM, Nov. 29, 2008, http://online.wsj.com/article/SB122791795940965645.html#.

46 Patrick McGee, *FOMC Preview: Fed Expected to Maintain Aggressive Policy Stance*, FOREXTV.COM, Jan. 28, 2009, http://www.forextv.com/Forex/News/ShowStory.jsp?seq=220568&category=Us+Economic+News,FED.

action.[47] In 2001, the law was amended after the 9/11/01 terrorist attacks so that, if there are less than five governors in office, this loaning power could be authorized by a "unanimous vote of all available members then in office—if at least 2 members are available."[48] Few may argue about the meaning of "available" in an explosive financial crisis; for other occasions it may not be clear.

Under the authority of its Board of Governors, the Fed stopped a run on an investment bank.[49] Reportedly, Chairman Ben Bernanke received an early morning crisis request from New York Fed Bank President, Timothy Geithner.[50] Bernanke "did a head count" authorizing J.P. Morgan Chase to bailout/takeover/rescue (depending on where you sit) Bear Stearns.[51]

The Fed's accounting rules for Bear Stearns' assets of mainly "mortgage backed securities and other mortgage-related assets," which "Bear Stearns valued at $30 billion on March 14," are suspect.[52] Morgan will "absorb the first $1 billion of any losses" and the "Fed is on the hook for the rest."[53]

What about the market value now? Testifying in his role as President of the New York Fed Bank, Geithner informed the Senate Banking Committee that he would report quarterly on the "fair value."[54] The members of the Senate and House Banking and Financial Services Committees should be continually updated on the estimated value and the complete details of the method of estimation. This information should not be kept secret from the taxpayers.

The Fed then expanded its loan faculties to investment banks;[55] a move that may have saved Bear Stearns had the Fed

47 *See* 12 U.S.C. § 343 (2006).

48 *See* 12 U.S.C. § 248(r)(2)(A) (2006).

49 *See* Greg Ip, *Crisis management: Fed's Fireman on Wall Street Feels Some Heat; Debate Over Bear Stearns Rescue Puts Geithner in Spotlight; Bernanke's War Room*, WALL ST. J. (Eastern Addition), May 30, 2008, at A1.

50 *Id.*

51 *Id.*

52 Jonathan Weil, *Fed's Bear Stearns books Look Prime for Cooking*, BLOOMBERG.COM, June 18, 2008, http://www.bloomberg.com/apps/news?pid=20601039&sid=a70JZmfcakF0&refer=home#.

53 *Id.*

54 *Turmoil in the U.S. Credit Markets: Examining the Recent Actions of the Federal Financial Regulators Before the S. Banking, Housing and Urban Affairs Comm.*, 110th Cong. 57 (2008) (statement of Timothy Geithner, President, Federal Reserve Bank of New York).

55 *See* Edmund L. Andrews, *Fed Loosens Standards on Emergency Loans*, N.Y. TIMES, Sept. 15, 2008, at A1, *available at* http://www.nytimes.com/2008/09/15/business/15fed.html.

taken action several weeks earlier. They could have saved Lehman Brothers had they used Section 13-3 of the Federal Reserve Act or they could have made it a bank holding company with access to the Federal Reserve's loan window as they did in the same month for Goldman Sacks and Morgan Stanley.[56] But, very mysteriously, several officials in the backroom of the New York Federal Reserve claimed they lacked the power at that time to bailout Lehman Brothers.[57]

Like the promised quarterly reports,[58] Congressional banking and financial services committees should also receive a complete transcript of the Board of Governors' meetings. While the Fed's Freedom of Information Office offers a $6 CD recording of the Fed's "open meetings," the informational content is minimal due to the many statutory exceptions contained in the inaptly named Government in the Sunshine Act.[59]

The New York Federal Reserve Bank should provide Congress with a complete record of its backroom negotiations as well as full minutes of its board of directors' meetings. Two former chairmen of the House Banking committee—Henry Reuss (1975–80) and Henry B. Gonzalez (1989–94, Ranking Member until 1999)—managed to obtain the minutes of the board of directors' meetings at the twelve Fed Banks.[60] They were deliberately vacuumed, as emphasized by one Fed Bank president who told his board of directors in 1976:

> I would think that if this involves a lot of work, which it will . . . that someone on Mr. Reuss' Committee, a friendly individual should know what we're being called upon to do. Because I think this can be used against Reuss if we react intelligently and as I see it in the St. Louis case, it's appalling how skimpy or meaningless our minutes are, I'm sure we did this with great wisdom knowing that a man named Reuss would ask for them. The minutes are really terribly shallow. Tell nothing.[61]

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56 12 U.S.C. § 343 (2006). Lehman Brothers filed for bankruptcy on September 15, 2008. Seven days later the New York Times reported this latter action was taken for two hold investment banks. Andrew Ross Sorkin and Vikas Bajaj, *Shift for Goldman and Morgan Marks the End of An Era*, NYTIMES.COM, September 22, 2008.

57 Joe Nocera & Edmund L. Andrews, *Struggling to Keep Up as the Crisis Raced On*, N.Y. TIMES, Oct. 23, 2008, at A1, *available at* http://www.nytimes.com/2008/10/23/business/economy/23paulson.html?scp=1&sq=Struggling%20to%20keep%20up%20as%20the%20crisis%20raced%20on&st=Search.

58 *See supra* note 54 and accompanying text.

59 Government in the Sunshine Act, 5 U.S.C 552(b) (2006); *see also* FRB: FOIA Exceptions, http://www.federalreserve.gov/generalinfo/foia/exemptions.cfm (last visited Apr. 2, 2009).

60 *See* AUERBACH, *supra* note 7, at 19, 159.

61 *Id.* at 19.

Despite this apparent deliberate destruction of the record, there was some valuable information such as the discovery of the Fed's role in the Watergate scandal cover-up.[62] Reuss's investigation led to the 1977 Federal Reserve Reform Act that brought Fed bank directors under the scope of federal conflict-of-interest laws.[63] Now the Board of Governors and the New York Fed Bank should present the congressional oversight committees—the Senate and House Banking and Financial Services Committees—with the complete records of the negotiations and their meetings with their new multi-trillion dollar loan policies.

I wish to close with an example of poor policy being used by the Fed to discourage banks to lend.

Bank reserves supplied by the Fed have risen from $44 billion in September 2008 to an astounding $901 billion in January 2009.[64] Consider what the Fed initiated in October 2008 as the financial crisis deepened: It began to pay interest on these reserves.[65] It said this policy helped it control reserves.[66] That questionable rationale now means the Fed is paying banks to hold record reserves rather than lending money; a policy that intensifies the crisis.

I testified before a Financial Services Subcommittee in 2003 against the payment of interest on reserves because that policy would lead to a number of problems including parallel actions and asymmetrical information as has existed in the commercial bank lending markets where competition has been impeded.[67]

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62 *Id.* at 20–28 (discussing how Fed Chairman Burns "doesn't want the system to get involved" in the Watergate affair even though the Fed was the source of some of the money used to pay the Watergate burglars).

63 *Id.* at 19.

64 Jim McTague, *Where's the Stimulus?*, Barron's at 27, Feb. 2, 2009, http://online.barrons.com/articles/SBI123335947137335199.html.

65 *See infra* Figure 1; *see also* Press Release, Board of Governors of the Federal Reserve System, 2008 Monetary Policy Releases (Oct. 6, 2008), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20081006a.htm.

66 *See* Board of Governors of the Federal Reserve System, *Monetary Policy Report to the Congress,* July 15, 2008, at 30:

> The authority to pay interest on reserves could be helpful to the Federal Reserve in limiting the volatility in the federal funds rate. The ability to pay interest on reserves would also allow the Federal Reserve to manage its balance sheet more efficiently in circumstances in which promoting financial stability required the provision of substantial amounts of discount window credit to the financial sector. In light of these considerations, the Federal Reserve has asked the Congress to accelerate the effective date of statutory authority to pay interest on reserve balances, which is currently October 2011.

67 *Business Checking Freedom Act of 2003: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial* Services, 108th Cong. 28(1st Sess. 2003) (testimony of Robert Auerbach).

Without adequate competition, the interest payments on reserves would, in large part, pass through to bank stock holders not the deposit holders, as some academics have theorized.[68] There was little doubt that the banks had successfully lobbied so that both sides of the aisle would favor paying interest on the reserves. I estimated, at the time, the present value of the future stream of interest payments would be $16.7 billion.[69]

I worked on legislation that was passed in 1980 that gave the Fed the right to pay interest on deposits in special cases in which they had to raise reserve requirements to control the money supply.[70] I discussed these "supplemental reserve requirements," worked out with former Fed Chairman Paul Volcker, when I testified in 2003.[71] No one was interested, not even the Fed, when they testified about the need for paying interest on deposits.

The effect of paying interest on reserves held at the Fed—now at the rate of ¼ of 1 percent—is to reduce the banks' incentive to lend.[72] As the Fed's target interest rate is raised—which it must do in the future to prevent substantial inflation or a rise in interest rates from financing of dollars of federal government deficit—the interest on reserves will likewise be raised.[73] If the spread between the risk-free rates of return on alternative income-earning assets increases, there will be a greater incentive for banks to hold reserves and decrease lending.[74] Lending has taken a hit, as shown in Figure 2, for percentage changes in commercial loans from banks.[75] The correct policy at this time should not be to penalize bank lending with a risk-free rate of return from the Fed to reward banks for holding the huge amount of reserves the Fed has supplied.

68 *Id.* at 29.

69 *Id.*

70 *Id.*

71 *Id.* at 36–37.

72 *See id.* at 33–34.

73 Federal Funds - Fedpoints, Federal Reserve Bank of New York, http://www.newyorkfed.org/aboutthefed/fedpoints.html (last visited Apr. 4, 2009).

74 *Business Checking Freedom Act of 2003-H.R. 758 and H.R. 859 Before the Subcomm. On Financial Inst. and Consumer Credit of the H. Comm. on Financial Services*, 108th Congress 6 (2003) (statement of Donald Kohn, Governor, Federal Reserve Board of Governors).

75 *See infra* Figure 2, available at http://www.economagic.com/em-cgi/charter.exe/fedstl/busloans+1990+2009+2+0+0+290+545++0 (last visited Apr. 4, 2009).

Figure 1: H.3 Aggregate Reserves of Depository Institutions

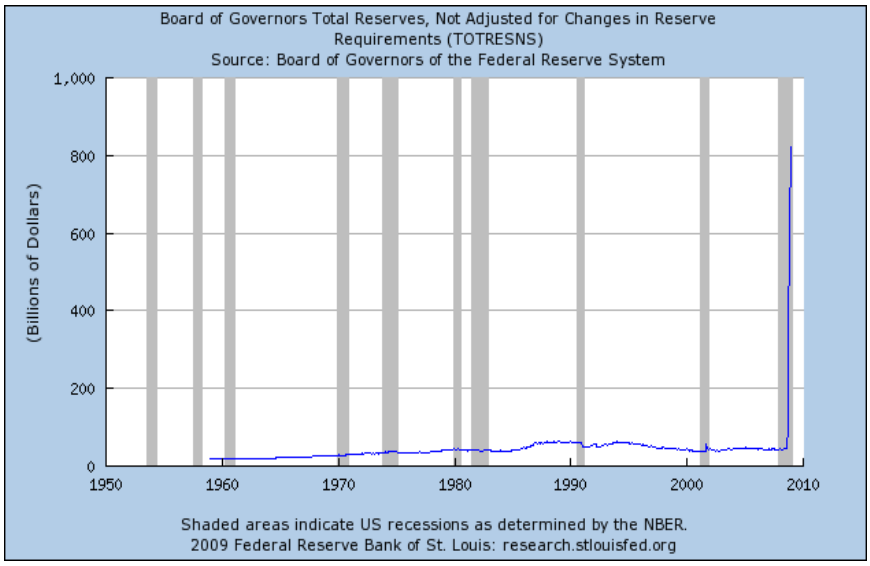

Figure 2: Commercial and Industrial Loans at All Commercial Banks, Percentage monthly changes at annual rates

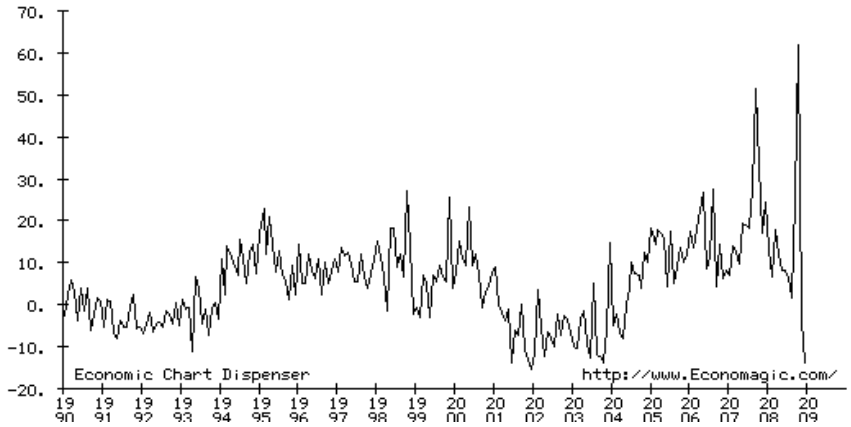

Figure 3: Federal Reserve Board of Governors: Press Release[76]
Release Date: October 6, 2008

Interest on Reserves

The Financial Services Regulatory Relief Act of 2006 originally authorized the Federal Reserve to begin paying interest on balances held by or on behalf of depository institutions beginning October 1, 2011. The recently enacted Emergency Economic Stabilization Act of 2008 accelerated the effective date to October 1, 2008.

Employing the accelerated authority, the Board has approved a rule to amend its Regulation D (Reserve Requirements of Depository Institutions) to direct the Federal Reserve Banks to pay interest on required reserve balances (that is, balances held to satisfy depository institutions' reserve requirements) and on excess balances (balances held in excess of required reserve balances and clearing balances).

The interest rate paid on required reserve balances will be the average targeted federal funds rate established by the Federal Open Market Committee over each reserve maintenance period less 10 basis points. Paying interest on required reserve balances should essentially eliminate the opportunity cost of holding required reserves, promoting efficiency in the banking sector.

The rate paid on excess balances will be set initially as the lowest targeted federal funds rate for each reserve maintenance period less 75 basis points. Paying interest on excess balances should help to establish a lower bound on the federal funds rate. The formula for the interest rate on excess balances may be adjusted subsequently in light of experience and evolving market conditions. The payment of interest on excess reserves will permit the Federal Reserve to expand its balance sheet as necessary to provide the liquidity necessary to support financial stability while implementing the monetary policy that is appropriate in light of the System's macroeconomic objectives of maximum employment and price stability.

[76] A full copy of this press release can be found at http://www.federalreserve.gov/newsevents/press/monetary/20081006a.htm. *See also* Reserve Requirements of Depository Institutions, 70 C.F.R. 59482, 59482–83 (Oct. 9, 2008) (to be codified at 12 C.F.R. pt. 204).

ADDENDUM

Jim McTague, the Washington editor of Barron's, highlighted a part of the author's speech at the January 30, 2009 Chapman University School of Law symposium:

> University of Texas Professor Robert Auerbach, an economist who studied under the late Milton Friedman, thinks he has the makings of a malpractice suit against Federal Reserve Chairman Ben Bernanke, as the Fed is holding a record number of reserves: $901 billion in January as opposed to $44 billion in September [beginning in October], when the Fed began paying interest on money commercial banks parked at the central bank. The banks prefer the sure rate of return they get by sitting in cash, not making loans. Fed, stop paying, he says.[77]

Two weeks later, Federal Reserve Chairman Ben Bernanke told the National Press Club audience:

> Importantly, the management of the Federal Reserve's balance sheet and the conduct of monetary policy in the future will be made easier by the recent congressional action to give the Fed the authority to pay interest on bank reserves. Because banks should be unwilling to lend reserves at a rate lower than they can receive from the Fed, the interest rate the Fed pays on bank reserves should help to set a floor on the overnight interest rate.[78]

That was an admission that the Fed's payment of interest on reserves did impair bank lending, a counterproductive policy in the 2008–09 financial crisis. Also, William T. Gavin, a Federal Reserve economist, wrote "[f]irst, for the individual bank, the risk-free rate of ¼ percent must be the bank's perception of its best investment opportunity."[79]

Also, Bernanke's rationale for preventing banks from lending at lower interest rates was illogical at the time when the Fed's target interest rate for federal funds was zero to a quarter of one percent. The banks would be unlikely to lend at negative rates of interest even without the Fed paying them to hold reserves.

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77 Jim McTague, *Where's the Stimulus?*, BARRON'S, at 27, Feb. 2, 2009, http://online.barrons.com/articles/SBI123335947137335199.html.

78 Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve System, Speech at the National Press Club Luncheon (Feb. 18, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20090218a.htm.

79 William T. Gavin, *More Money; Understanding Recent Changes in the Monetary Base,* FED. RES. BANK OF ST. LOUIS REV. 57 (Mar./Apr. 2009), *available at* http://research.stlouisfed.org/publications/review/09/03/Gavin.pdf.

The Unique Economic Policy Environment of Interwar and Postwar America

Michael A. Bernstein[*]

Significant transformations in the economic policy environment in the United States have almost always been the exclusive product of significant turmoil, conflict, and war. Within the crucible of open rebellion, Abraham Lincoln struggled to develop an altogether unique set of fiscal, financial, and procurement practices that served both to further federal objectives in the Civil War and forever reorient the role and impact of central government in the nation's economic life.[1] It is clear that the Lincoln government felt compelled to take extraordinary action with respect to civil liberties, judicial due-process, and civil rights in defense of the Union. Similarly, its Treasury and War Departments implemented unprecedented economic policies in pursuit of military victory and the resolute winning of the peace that would follow.[2] The economic practices thus deployed—most importantly, the imposition of income and excise taxation, the establishment of a national banking system, and the issuance of paper money—forever changed Washington's presence in the macroeconomy[3] and they yielded results that were powerfully and uniquely tied to the political, commercial, and social circumstances of their day.[4] Quite similarly, almost a century later, another unique set of political and economic contexts emerged in American history that would set the stage for another dramatic and vastly consequential change in the policymaking practices of the nation's government. Pondering those quite special circumstances, spanning the period from the Great Depression of the twentieth century through the height of

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1 *See generally* Robert D. Hormats, *Abraham Lincoln and the Global Economy*, HARV. BUS. REV., August 2003, at 60.

2 *See* JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR & RECONSTRUCTION 374–83 (1982); *see also* Stanley L. Engerman, *The Economic Impact of the Civil War*, 3 EXPLORATIONS ENTREPRENEURIAL HIST. 176, 176–99 (2d. ser. 1966).

3 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 22–23 (1988).

4 *See* BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS & POLITICS IN THE CIVIL WAR 202–07, 226–29, 232–35 (1970).

the Cold War conflict with the Soviet Union and its allied states, sets the events and outcomes of the Lincoln era in sharp relief while also affording a better appreciation of the forces that have shaped late twentieth century American experience. While the following derives primarily from several prior works, the content remains relevant to this discussion of constitutional approaches to wartime finance and economics, both in the context of the Civil War and today's War on Terror.[5]

America's greatest depression was not brought to an end by inspired policy choices. Far from it. World War II achieved what the New Deal could not. National unemployment fell to only 7 percent by the time of the Japanese naval offensive in the Hawaiian and Aleutian Islands. America's formal entry into the conflict brought almost instantaneous resolution of the nation's persistent economic difficulties. A wholly collectivized and centralized approach—through rationing, price controls, and federal allocative planning—provided for the kind of reflation and economic recovery that had seemed so unattainable during the worst years of the Great Depression itself. When unemployment fell to just over one percent in the last year of the war, it was clear that, while hardly inspired by specific economic concerns, President Franklin Roosevelt's "arsenal of democracy" nevertheless contained rather vivid policy lessons for economists, politicians, government officials, and the public at large.[6]

New Deal recovery policy has generally been seen as beset by a fundamental contradiction between two strategies. That contradiction was epitomized by the conflict between the advocates of economic planning within Roosevelt's inner circle who celebrated the efficiency and rationality of large-scale enterprise, and those committed to trust-busting, who maintained that excessive concentrations of market power in major sectors of the economy had caused the economic crisis of the thirties. The result of the contradiction was the strange brew of New Deal economic policy, the bewildering movement of the president from a planning initiative to a reform initiative

5 The following, with the exception of the conclusion, is excerpted from MICHAEL A. BERNSTEIN, A PERILOUS PROGRESS: ECONOMISTS AND PUBLIC PURPOSE IN TWENTIETH CENTURY AMERICA 74 (Princeton Univ. Press 2001); MICHAEL A. BERNSTEIN, THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-1939, at 186 (Cambridge Univ. Press 1987); UNDERSTANDING AMERICAN ECONOMIC DECLINE 15 (Michael A. Bernstein & David E. Adler, eds., Cambridge Univ. Press 1996); Michael A. Bernstein, *A Brief History of the American Economic Association*, 67 AM. J. ECON. & SOC. 1007 (2008).

6 MICHAEL A. BERNSTEIN, A PERILOUS PROGRESS: ECONOMISTS AND PUBLIC PURPOSE IN TWENTIETH CENTURY AMERICA 74 (Princeton Univ. Press 2001) [hereinafter PERILOUS PROGRESS].

agenda, and the generally poor record of Roosevelt's first two terms with respect to economic recovery.[7]

Ever the consummate strategist, Roosevelt evaluated economic policy proposals primarily with reference to electoral and political impacts, far less with convictions concerning the logical coherence or intellectual (not to mention professional) pedigree of the argument. As a result, his economic decisions tended to be skittish, sometimes timid, and often unpredictable. Federal government vacillation between the imposition of a centralized blueprint for recovery, as exemplified by the Industrial Codes of the National Recovery Administration, and the prosecution of antitrust tactics to foster a competitive revival never ceased. Fiscal spending targets were more often than not simply too low to do the job, and their allotment was driven as much by hardheaded projections of their influence in the electoral college as by closely measured multiplier effects on consumption and investment.[8]

Consumption and investment behavior played a major part in the great prosperity of the late forties and fifties. On the domestic side, reconversion was itself an investment stimulus. Modernization and deferred replacement projects required renewed and large deployments of funds. Profound scarcities of consumer goods, the production of which had been long postponed by mobilization needs, necessitated major retooling and expansion efforts. Even fear of potentially high inflation, emerging in the wake of the dismantling of the price and wage controls of the war years, prompted many firms to move forward the date of ambitious and long-term investment projects. On the foreign side, both individuals and governments were eager to find a refuge for capital that had been in virtual hiding during the war itself. Along with a jump in domestic investment, therefore, a large capital inflow began in the United States in late 1945 and early 1946.[9]

Domestic consumption was the second major component of postwar growth. Bridled demand and high household savings due to wartime shortages, rationing, and controls, coupled with the generous wage rates of the high-capacity war economy all contributed to a dramatic growth in consumer spending at war's end. The jump in disposable income was bolstered by the rapid

7 MICHAEL A. BERNSTEIN, THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-1939, at 186 (Cambridge Univ. Press 1987) [hereinafter GREAT DEPRESSION].

8 PERILOUS PROGRESS, *supra* note 6, at 76.

9 UNDERSTANDING AMERICAN ECONOMIC DECLINE 15 (Michael A. Bernstein & David E. Adler eds., Cambridge Univ. Press 1996).

reduction in wartime surtaxes and excises that had been a central part of the federal government's strategy of war finance. And the baby boom of the wartime generation expressed itself economically in high levels of demand for significant items like appliances, automobiles, and housing. G.I. Bill benefits additionally served to increase the demand for housing and such things as educational services with associated impacts on construction and other bellwether sectors.[10]

Foreign demand for the American exports grew rapidly in the immediate postwar years. In part the needs of devastated areas could only be met by the one industrial base that had been nearly untouched by war-related destruction. Explicit policy commitments to the rebuilding of allied and occupied territories, such as the Marshall Plan in Europe, also served to increase the foreign market for the output of American industry. Even so, one of the most powerful influences on the impressive postwar growth of the American economy was the unique and special set of arrangements developed for international trade at the Monetary and Financial Conference of the United Nations in 1944. Along with the creation of the International Bank for Reconstruction and Development (known today as the World Bank) and the International Monetary Fund, the Conference decided to establish fixed exchange rates between the U.S. dollar and all other internationally traded currencies. The value of the dollar was itself set in terms of gold at $35 per ounce. This installed a benchmark against which the value of all other currencies was measured. American postwar prosperity and the benefits of world economic leadership continued throughout most of the 1950s. The added fiscal stimulus of the Korean War also played a role in maintaining the high levels of growth and employment characteristic of the decade.[11]

Federal research expenditures had increased more than tenfold between 1938 and 1944, from $68 million to $706 million per year.[12] As Clark Kerr of the University of California had so accurately and succinctly implied some years later, what had been the "Land Grant College" funding strategies of the nineteenth century gave way to the "Federal Grant University" systems of the twentieth.[13] Further stimulated by Russia's successful test of an atomic bomb in September 1949 (and of a "super" or "hydrogen" bomb in the summer of 1953), the coming of war in the Korean peninsula the following year, and such

10 *Id.* at 15–16.
11 *Id.* at 16.
12 PERILOUS PROGRESS, *supra* note 6, at 100.
13 *Id.* at 102.

challenges to America's aeronautical capabilities as the orbiting of a Russian earth satellite (the *Sputnik*) in October 1957, government support of science and engineering became the basis of yet a new (and more powerful) "arsenal of democracy."[14]

High rates of growth, robust levels of employment, and stable prices were the standards by which a capitalist society could demonstrate its advantages over command economies premised upon socialist or communist designs. As the emblematic "Kitchen Debate" between Soviet premier Nikita Khrushchev and Vice President Richard Nixon had suggested in 1959, winning the cold war involved more than husbanding a credible nuclear deterrent, deploying fleets, garrisons, and air wings around the world, and utilizing special forces in counterinsurgency campaigns. It also required that an economic system deliver the goods to the people. Prosperity was an essential weapon in the struggle for the hearts and minds of any society.

A vigorous national economy was thus essential both to equip the armed forces and to demonstrate the virtues of American capitalism. Guns *and* butter were the protocol; a "New Economics" could provide the means to that end. Both the experience of the Great Depression and the challenges of world war had made clear to a new generation of specialists that the public sector occupied a crucial niche in the mechanisms of the national economy. Properly managed and monitored, the macroeconomy not only would provision an appropriate quantity and quality of public goods on its own behalf but also would afford the private sector the wherewithal to expand output targets, enhance productivity, and maintain employment. Interweaving public and private accumulation strategies, reckoning with the "mixed economy" of the postwar era, denoted the ascendancy of what was arguably the defining characteristic of the arguments of John Maynard Keynes. Independent of specific policy initiatives, Keynesianism represented a new way of thinking about the economy as a whole, one that dovetailed with broader governmental objectives tied to the struggle against Communism. Whatever the intellectual foundations of the "Keynesian revolution," its historical moorings were made fast by the exigencies of the Cold War.[15]

Recapturing the presidency and the Congress in the election of 1952 encouraged many Grand Old Party stalwarts in the belief that the potent Democratic influence of two decades had, at long

14 *Id.*
15 *Id.* at 107.

last, come to an end. Whatever the tenuous nature of their control on Capitol hill—one seat in the Senate, nine seats in the House of Representatives—and despite the ideological moderation of the Dwight Eisenhower, whose national popularity had prompted some of his champions to indulge fantasies of a bipartisan presidential endorsement, Republicans viewed with satisfaction the imminent opportunity to dismantle the most objectionable manifestations of the New Deal and the Fair Deal. The blurring of party differences wrought by the beginnings of the Cold War, the marginalization of the Right by the victory of the Grand Alliance over fascism, the suppression of the Left by the gathering momentum of McCarthyism—all this emboldened the enemies of federal economic intervention, primarily but not solely Republicans, to settle accounts.[16]

To be sure, the run-up to the 1952 campaign had been an occasion for spirited and, at times, hot-tempered debate within the major parties themselves. Supporters of Senator Robert Taft of Ohio refused to make Eisenhower's nomination unanimous at the Republican national convention in Chicago. Harry Truman's decision to step down sparked a struggle for power among the Democrats as well—the wounds of the "Dixiecrat" rebellion still festering after the party's improbable victory in 1948. The president's choice of Illinois governor Adlai Stevenson as his successor eased tensions in the four-way race for the nomination that emerged between Averell Harriman (governor of New York), Estes Kefauver (senator from Tennessee), Richard Russell (senator from Georgia), and Stevenson himself. But in the final analysis, on election day, Eisenhower's thirty-three million votes, then the largest popular tally in a presidential canvass, signaled what some pundits referred to as "the revolt of the moderates" and the start of what the president-elect himself hoped would be a "Second Era of Good Feelings." No matter how the 1952 returns were read, it was clear that, in the wake of Roosevelt's reconfiguration of his party, one of the great transformations of American political history had taken hold: on the one side, the party of Jefferson, the defender of states' rights and localism, had in short order become the champion of federal authority and centralized power; on the other, the party born of the nineteenth-century crisis of the Union, the vanguard of a modern administrative state, stood as a resolute critic of Washington's increasing presence in almost every aspect of the nation's life.[17]

Unlike any other industrialized nation in the world at the

16 *Id.* at 115.
17 *Id.* at 115–16.

time, the United States met the 1950's with an economy not only physically intact but also organizationally and technologically robust. The demographic echoes of war set the stage for acceleration in the rate of population growth, while the labor market effects of demobilization surprisingly sparked a rise in wages and incomes. Rapid and profitable conversion to domestic production was further engrossed by foreign demand—most vividly and poignantly emanating from those regions most devastated by the war itself—for the products of American industry and agriculture. As for international finance, the nation stood as creditor virtually to the entire world, and the dollar, both by default and by the multilateral agreement first reached by the Allied nations at Bretton Woods, had become a kind of numeraire to a newly emergent system of global commerce. With no small justification, the fifties and sixties would come to be regarded as a golden age of American capitalism.[18]

Macroeconomic management, demanding under any circumstances, was made substantially easier for a postwar generation that found itself the beneficiaries of historical circumstance. Far from solving the cruel puzzle of idle capacity and widespread unemployment that had characterized the Great Depression, and unlike the challenge to rationalize allocation and maximize production in the emergency of war, the task that lay before American economists by the mid-1950s was both more straightforward and less difficult. More straightforward because, thanks to both the "Keynesian revolution" in economic thought and the policy experience derived from mobilization and war, the relationship between individual market behavior and aggregate outcomes was finally subject to systematic understanding. Less difficult because, given the sturdy rebound of the economy in the wake of World War II, there existed both the confidence (most especially exemplified by the moderate rates of return in the markets for Treasury bills and other government obligations) and the means (most vividly represented by rising income tax receipts) to realize fiscal spending targets with a minimum of redistributive implications.[19] Indeed, so optimistic were politicians and the vast majority of economists concerning the effectiveness of stabilization policy techniques that it became fashionable by the early 1960s to speak of the "end of the business cycle."[20]

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18 *Id.* at 117–18.

19 *Id.* at 118.

20 Michael A. Bernstein, *A Brief History of the American Economic Association*, 67 AM. J. ECON. & SOC. 1007, 1019 (2008).

A remarkably prosperous decade in the United States, the 1950s were nevertheless punctuated by three recessions. Relatively brief and mild, these downturns stood as a sturdy challenge to mainstream macroeconomists who believed that a new learning could make such fluctuations a thing of the past. They also assumed, especially in the case of the last slump (which occurred right on the eve of the 1960 presidential campaign), a growing significance in the minds of politicians eager to "score points" in electoral contests that had been, at least since the thirty-fourth president's reelection in 1956, fairly tame. For Massachusetts Senator John F. Kennedy in the very closely contested presidential race of 1960, tarring his opponent, Vice President Richard Nixon, with the brush of the 1959 recession was a useful and ultimately successful, if decidedly opportunistic, tactic.[21]

Faced with an economy the insipid performance of which had left the unemployment rate around seven percent, the new administration in Washington was also discomfited by middling productivity gains in the nation's workplaces that now weakened America's international trade position. What had been almost two decades of unchallenged national supremacy in world markets, a circumstance both facilitated and recognized by the Bretton Woods agreements of 1944, could no longer be sustained in the face of the revitalization of the economies of Western Europe and Japan. As they reestablished their international economic presence, nations like the Federal Republic of Germany and Japan exploited the advantages of an advanced technological base that was the outgrowth of the recent rebuilding of their major industries. Ironically enough, they also thrived because of their relative insulation, under international treaties and protocols (exemplified by the erection of a "nuclear umbrella" by the United States to forestall what was feared to be the potential for Soviet and Chinese aggression), from the burdens of defense spending. Consequentially, their major manufacturing sectors—such as automobiles, electronics, and steel—became powerful competitors with their American counterparts. Whatever the concerns of President Kennedy's advisors with the domestic weaknesses of the national economy, the international context within which these difficulties emerged could not be ignored.[22]

Given these fairly stark international realities, it was hardly surprising that some of the most powerful policy makers in the Kennedy government sought to frame the nation's economic

21 PERILOUS PROGRESS, *supra* note 6, at 130–31.

22 *Id.* at 132–33.

challenges with respect to global financial networks. Both Treasury secretary Douglas Dillon and his undersecretary for monetary affairs, Robert Roosa, regarded the growing imbalance between imports and exports, and the potential drain on national gold stocks of which it warned, to be the defining economic policy problem of the New Frontier. In this assessment they were joined by William McChesney Martin, chair of the Federal Reserve System Board of Governors. As a central banker, Martin was further troubled by the inflationary bias that any deterioration in the value of the dollar (and thus in its "buying power") would engender. Both Treasury and the Fed were thus of like mind that relatively high interest rates were, by late 1961 and early 1962, a desirable and appropriate goal of administration economic policy.[23]

For President Kennedy's Council of Economic Advisers, however, no matter how customary and venerable the medicine, the proposed monetary cure was worse than the fiscal disease. The debate over the proper "mix" of fiscal and monetary policy during the Kennedy administration would become emblematic of national policy discussions through the remainder of the century. Late in 1961, the members of the CEA began to formulate a plan to bring unemployment down to the four percent level. In their view, the most efficient and politically expedient method to reach that target was through an income tax cut. An annual macroeconomic growth target of five percent had been made part of the party's convention platform at Los Angeles.[24]

For this purpose, lead presidential economic advisor Walter Heller's adroit skill in rendering policy argument as graceful prose linked up well with his colleague James Tobin's sharply honed analytical instincts. Turning to another White House staff economist Arthur Okun, Tobin asked his former Yale colleague to estimate, if possible, the relationship between the level of unemployment and the magnitude of the gross national product. Out of that statistical protocol emerged "Okun's Law," a rather straightforward calculation which showed that for every one percent reduction in unemployment there could be garnered (through direct impacts on levels of output and indirect reductions in the "underemployment" of contracted labor in slack times) a three percent increase in national product.[25] In President Kennedy, Heller and his colleagues found a sympathetic student of the New Economics, nervous all the same

23 *Id.* at 133.
24 *Id.* at 133–34.
25 *Id.* at 134.

about its political implications; in William Martin of the Federal Reserve System, and, to a lesser extent, Douglas Dillon at Treasury, they encountered more problematic skeptics. The timidity of his first budget message to the Congress notwithstanding, the president had refrained from asking for a tax increase to supplement additional military expenditures (between $3 and $4 billon) in the wake of the Berlin crisis.[26] Taking the measure of the naysayers at Treasury and the Federal Reserve Board had, by contrast, less to do with persuasive argumentation premised on scholarly credentials than with straightforward and hardheaded struggles for the president's ear. By far, Douglas Dillon was the easier opponent for the New Frontiersmen of the Kennedy Administration. A lone Republican in a Democratic cabinet, his freedom of maneuver was already quite constrained. More to the point, so profound was the mutual admiration between Heller and Undersecretary Roosa that the Kennedy Council enjoyed special access to the highest echelons in the Treasury building.[27]

Federal Reserve Board Chair William McChesney Martin had neither the political obligations to President Kennedy nor the official responsibilities to the executive branch that constrained the conduct of Secretary of Treasury Dillon. The "independence" of the Fed from the executive branch was the result of both conscious intent in its founding legislation and decades of practice among a Board of Governors whose sensibilities were more attuned to the needs of the nation's banking industry than anything else. Martin had refused, contrary to the traditional script, to offer his resignation to the new president. By early 1963 the president encouraged his Council of Economic Advisors to prepare, for inclusion in his 1963 budget message, the formal tax-cut proposal so long debated and which he believed the Fed (in the person of its chair, now comforted by his renewed term and authority) would, if not endorse, simply tolerate. Its ultimate legacy was the Revenue Act of 1964. Peacetime deficit spending as an explicit growth policy of the federal government had finally come home.[28]

Federal intervention in the national economy, both in the mid-nineteenth and late twentieth centuries, was the product of unique circumstances tied to serious and threatening developments both within and beyond the nation's borders. The very contexts within which powerful and unprecedented

26 *Id.* at 135.
27 *Id.* at 135–36
28 *Id.* at 136.

manipulation of economic outcomes by the national government made sense were themselves the product of singular forces of historical change, armed conflict, geopolitical struggle, and ideological contestation. For particular generations of Americans, the responsibility of the national government to take decisive steps to influence market outcomes was forged in these critical epochs—years during which the nation was tested, reconfigured, and ultimately strengthened. For all these reasons, it seems (and seemed) obvious to many that economic policy lessons thus learned in grave moments could then be generalized and universally applied. Even so, it is the unfortunate reality of history that its lessons are rarely straightforward, and its implications become complex riddles that often take generations to unravel. As vividly demonstrated by the profound difficulty of simply applying the jurisprudence of the Lincoln years to the present-day War on Terrorism, the economic policy practices of the mid to late twentieth century are clearly not directly applicable to the exceptional challenges occasioned by the Great Crash of 2008. Even so, by appreciating their exceptional qualities, we are warned off of simplistic (and dangerous) decisions—and we are reminded that, in facing dilemmas both vexing and unnerving, our generation is hardly alone.

Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People*

*Timothy A. Canova***

In recent months, there has been a resurgence of interest in the presidency of Abraham Lincoln, in no small part because a new president, also from Illinois, has openly and repeatedly identified with and invoked Lincoln.[1] Academic interest in Lincoln has mostly focused on the darker side of wartime presidential powers, such as the suspension of civil liberties and overstepping lines of constitutional authority. Far less attention has been given to Lincoln as the activist executive who set a new standard for mobilizing public finance in a crisis, pursuant to express Congressional authority under the Legal Tender Acts, presidential authority at its zenith.[2] There is a modern tendency to dismiss any lessons from the past, to believe that we have little to learn from earlier ages and that our age is superior to all that has come before.[3] This is particularly so in the world of finance. Perhaps the great financial crash of 2008 and its grim economic aftermath may allow scholars to approach with some humility Lincoln's monetary experiment in issuing greenbacks directly into circulation. Lincoln, after all, did mobilize public

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1 Lee Siegel, *Obama's Muse: His literary and political inspiration, the career of Abraham Lincoln, has a double edge*, WALL ST. J., Nov. 15, 2008, at W3; John F. Harris and Alexander Burns, *Straw Man? Historians say Obama is no Lincoln*, POLITICO, Dec. 15, 2008, http://www.politico.com/news/stories/1208/16569.html; James Oakes, *What's So Special About a Team of Rivals*, N.Y. TIMES, Nov. 20, 2008, at A43.

2 Recall Justice Jackson's concurrence in the steel seizure case: "when the President acts pursuant to an express or implied authorization, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3 According to Ortega y Gasset, "our age is characterized by the strange presumption that it is superior to all past time; more than that, by its leaving out of consideration all that is past, by recognizing no classical or normative epochs, by looking on itself as a new life superior to all previous forms and irreducible to them." JOSÉ ORTEGA Y GASSET, THE REVOLT OF THE MASSES 44 (Anonymous trans., W.W. Norton & Co., Inc. 1957) (1932).

finances and therefore public energy on a grand scale that continues to elude our own generation.

Lincoln is remembered for overcoming enormous political and military challenges. Often overlooked, however, is the economic and financial chaos he confronted upon taking office. In the weeks prior to Lincoln's inauguration, the nation was swept by fear, the hoarding of gold, and a panic perhaps more dangerous than other classic Keynesian liquidity traps in March 1933 and September 2008, since there was no central bank in 1861 with the authority to issue currency and inject liquidity into the financial system to try to break a downward spiral by restraining the psychology of hoarding.[4]

Lincoln's approach to public finance was effective. It empowered the federal government with renewed fiscal capacity, mobilized a massive army, unleashed great latent energy and enormous economic growth.[5] As we bemoan the many ills in today's financial marketplace, we may consider what Lincoln would do if he was alive today. Would a president who asserted executive control over public finance in time of a great civil war do so in our time of obstinate foreign wars and market drama? Today the task may be greater, particularly if private financial interests have undermined the integrity of regulatory agencies and Congress alike. Of course, if he were alive today, Lincoln would also have to contend with all kinds of international financial constraints, far different from what he faced in his own time. This should not diminish from Lincoln's model of national economic sovereignty, but should instead prod us to think how his approach could be updated and squared with the realities of

4 ROBERT P. SHARKEY, MONEY, CLASS, AND PARTY: AN ECONOMIC STUDY OF CIVIL WAR AND RECONSTRUCTION 26–27, 39, 44 (John Hopkins Press 1959) (1959). It is somewhat misleading to refer to the decades prior to the Civil War as a period of "unprecedented quiescence of monetary issues." Jeffrey Rogers Hummel, *Civil War Finance: Lessons for Today*, 12 CHAP. L. REV. 596, n. 30 (2009). This ignores both the political and economic turmoil surrounding the First and Second Banks of the United States, including the conflict between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson over the First Bank, constitutional challenges to the First Bank, and President Andrew Jackson's veto of the recharter of the Second Bank on constitutional grounds, as well as the financial turmoil that resulted in the wake of these disputes. WILLIAM F. HIXSON, TRIUMPH OF THE BANKERS: MONEY AND BANKING IN THE EIGHTEENTH AND NINETEENTH CENTURIES 89–120 (1993).

5 This was the view of Lincoln articulated by the economic historian Eliot Janeway who wrote that Lincoln "never organized the Union for victory – he was too practical to try. Instead, he inspired and provoked it to mobilize the momentum for victory. The result was inefficient but irresistible. A victory small enough to be organized is too small to be decisive." ELIOT JANEWAY, THE STRUGGLE FOR SURVIVAL: A CHRONICLE OF ECONOMIC MOBILIZATION IN WORLD WAR II 16 (Yale University Press 1951). As argued below, it was in part through the Legal Tender Acts that Lincoln was able to provide the tools to mobilize.

today's global financial marketplace and national political institutions.

At the time of this writing, the U.S. banking and financial system remains in serious trouble, unemployment and home foreclosures are at dangerously high levels. The real economy suffered a deep contraction, one of the sharpest drops in history.[6] The recovery appears weak and fraught with danger. The U.S. trade and current account deficits exceed $700 billion a year, requiring capital inflows of more than $2 billion a day.[7] Meanwhile, the federal budget deficit has grown from more than $485 billion in the final year of the Bush administration to $1.6 trillion today.[8] Now, with the first installment of a bank bailout costing $700 billion, a fiscal stimulus package of $787 billion, and the Federal Reserve spending another trillion to prop up the markets, a big question on the minds of investors and public officials around the world is how the U.S. will pay for this spending, and whether so much federal borrowing will ultimately undermine the value of the dollar and lead to renewed inflation and some future financial chaos.[9]

This essay will consider Lincoln's financing of the Civil War and its possible application to today's crisis. Lincoln expanded the scope of federal authority by creating the nation's first fiat currency since the American Revolution, a strategy that was seen by many, including himself, as necessary to the financing of the Union's military efforts.[10] This approach harkened back to the emergency measures of the Continental Congress during the American Revolution and the economic development strategies of the colonies prior to the Revolution. It foreshadowed New Deal financing during the Great Depression and was also comparable to the low interest rate financing of the U.S. effort in World War II. Perhaps an enriched view of this history will provoke fresh

6 Michael Tsang & Whitney Kisling, *Obama May Inherit Bull Market After $6 Trillion Loss*, BLOOMBERG, Nov. 5, 2008, http://www.bloomberg.com/apps/news?pid=20601110&sid=akRyOGDs1EHI#.

7 *See* Jennifer Hughes, *Drop in US inflows spooks dollar,* FINANCIAL TIMES, Feb. 15, 2006, http://www.ft.com/cms/s/0/dda665fc-9e58-11da-b641-0000779e2340.html (reporting disturbing drop in U.S. capital inflows from approximately $3 billion a day to approximately $2 billion a day); *US surprises: trade deficit down; budget shortfall up*, MERCOPRESS, Aug. 13, 2008, http://en.mercopress.com/2008/08/13/us-surprises-trade-deficit-down-budget-shortfall-up.

8 Rodger Runningen, *U.S. Deficit to Reach Record $490 Billion in 2009*, BLOOMBERG, July 28, 2008, http://www.bloomberg.com/apps/news?pid=20601103&refer=news&sid=ae7O8o2c0iNY.

9 Nelson D. Schwartz, *Hearing Stimulas, Fearing Debt*, N.Y. TIMES, Jan. 30, 2009, at B1 (reporting estimate by Niall Ferguson, a Harvard historian, that $2.2 trillion in new U.S. government debt will be issued in 2009, assuming approval of the stimulus plan).

10 MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY 45 (1992).

insights about today's financial difficulties and challenging institutional environment.

I. LINCOLN'S LEGAL TENDER ACTS

When Lincoln was elected in November 1860, the money supply in the United States consisted of about 28% gold coins, 3% silver coins, and about 69% in bank created money, mainly bank notes and bank deposits (or check book money) created by state-chartered banks.[11] This was not a money supply conducive to a strong national government. Indeed, on the day of Lincoln's inauguration, March 4, 1861, the Union was on shaky ground.[12] When Fort Sumter was fired upon barely a month later, the Union Army had only 17,000 soldiers.[13] Lincoln's response was to organize the most impressive mobilization of military manpower in American history up to that time. Within a year, the Union Army numbered nearly 200,000, by the end of 1863 it was more than 600,000, and by the end of 1863, the fateful year of Gettysburg and Vicksburg, the Union Army exceeded 900,000 men.[14]

The costs of this military buildup and the war were enormous. According to William Hixson, the federal government spent about $35 million on the war effort in 1861.[15] In 1862 it spent about $446 million, about a thirteen-fold increase.[16] It was not enough. Union wartime spending rose to $683 million in 1863, $826 million in 1864, and $1.2 billion in 1865.[17]

How was this war effort financed? There was no federal income tax at the start of the war.[18] Most federal revenues came from the sale of public lands and customs duties.[19] But with homesteading rampant, public land sales revenue was falling.[20] Also, without duties on southern exports, and despite passage of

11 HIXSON, *supra* note 4, at 129.

12 The day of Lincoln's first inauguration, March 4, 1861, was also the birth of the college that would become Chapman University. The History of Chapman University, http://www.chapman.edu/about/chapfacts/history/history2.asp (last visited March 14, 2009).

13 HIXSON, *supra* note 4, at 129.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id. a*t 132, 139.

18 *Id.* at 130.

19 *Id.*

20 The Homestead Act was passed in 1862. LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 108 (Vanderbilt University Press 1968) (1968). The Morrill Land-Grant College Act, which provided for use of public lands for establishing colleges, was signed by Lincoln in the same year. *Id.* at 114–15.

the Morrill Tariff in the days before Lincoln took office, customs revenues began to fall as well.[21]

In 1861, the nation's fiscal house was in crisis when Congress authorized the Treasury to borrow $250 million by selling bonds to big banks and paying 7% interest.[22] In July 1861, in carrying out this Congressional authorization, Treasury Secretary Salmon Chase entered into agreements with the banks of New York, Philadelphia, and Boston, which, like all banks at the time, were state-chartered banks.[23] These banks were to purchase U.S. Treasury bonds with $50 million in gold.[24] The plan was for the Treasury to then spend the gold back into circulation, which it hoped would then be deposited back into the banks, thereby allowing them to lend again and again to the Treasury.[25] However, due to the psychology of fear and hoarding that swept the nation, the gold did not return to the banking system.[26] The banks suspended payment in gold and so did the Treasury.[27]

This left Chase with few viable options, hoping the banks would extend loans to the Treasury or pay for US Treasury bonds in the form of banknotes and bank credits rather than gold.[28] During the Buchanan presidency, the federal government was paying ruinous interest rates of 10 to 12%, and the yield would likely have to rise even higher to induce the banks to lend to the Treasury.[29] This was neither a viable nor a sustainable option.

Instead, Congress found other means, with Lincoln signing the first of three Legal Tender Acts on February 25, 1862,[30] to create a new government-issued, irredeemable paper currency

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21 SHARKEY, *supra* note 4, at 18; Roger L. Ransom, *The Economics of the Civil War*, EH.NET ENCYCLOPEDIA, (ed. Robert Whaples), Aug. 25, 2001, http://eh.net/encyclopedia/article/ransom.civil.war.us. The North was harmed by the loss of tariff revenues from Southern cotton exports, as well as the loss of Southern purchases of Northern manufactured products. *Id.*

22 SHARKEY, *supra* note 4, at 20.

23 *Id.* at 21.

24 *Id.*

25 *See id.* (Stating that "[i]n essence, though not in legal form, the banks were acting as underwriters").

26 *Id.* at 27.

27 *Id.*; HIXSON, *supra* note 4, at 129–31. In praising the "de facto regime of quasi-free banking" prior to the Civil War, Hummel argues that the currency "consisted solely of state bank notes redeemable for specie on demand." Hummel, *supra* note 4, at 596. This ignores the gold hoarding that preceded Lincoln's inauguration and the suspensions of payment in gold later that year, indicating a failure in the free banking regime. The weaknesses in the free banking regime were perhaps masked by major discoveries of gold in California beginning in 1849, but became apparent when gold production slowed at a time of rising public financing requirements. HIXSON, *supra* note 4, at 121–31.

28 HIXSON, *supra* note 4, at 130–31.

29 SHARKEY, *supra* note 4, at 18.

30 HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49.

(i.e., not redeemable in gold or other specie), United States Notes known as "the Greenback," which were declared by government fiat to be legal tender for all private debts (hence, the term fiat money).[31] By war's end there would be nearly $450 million in these Greenbacks.[32]

The Constitution provided no specific authority for Congress to create a currency, but neither was there any express prohibition on such Congressional power.[33] At the time, numerous public officials, businessmen, bankers, and financial experts supported The Legal Tender Acts.[34] They called on the federal government to assert constitutional authority over the currency and keep the profit from the issuance of currency for the taxpayer, a practice known as "seigniorage."[35] For instance, in the floor debate, Representative Thaddeaus Stevens argued that the government and not the banks should have the profit from creating a medium of exchange.[36]

Lincoln himself wrote, in a letter dated December 6, 1864, that Treasury Secretary Chase had thought the issuance of legal tender notes was "a hazardous thing but we finally accomplished it and gave the people of this Republic the greatest blessing they ever had—their own paper money to pay off their debts."[37] Although Chase had misgivings about the Greenback, by February 1862, Chase wrote, in a letter to the *New York Post*, "I

31 MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY 45 (1992) (describing fiat paper money as "notes that are issued on the fiat of the sovereign" specified in value and declared as legal tender for payment of debts).

32 HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49. Congress began removing the greenback from circulation in 1879 when it made the greenback redeemable in gold. GRETCHEN RITTER, GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA 24, 38 (Cambridge Univ. Press 1997).

33 *See* HIXSON, *supra* note 4, at 89–90. Delegates to the Constitutional Convention voted down a proposed clause that would have given the federal government specific authority to issue paper money, and also voted down a proposed clause that would have denied the federal government such authority. *Id.*

34 The list of public officials included Congressional leaders, majorities in both houses of Congress, the President, an apparently reluctant but willing Treasury secretary, Salmon Chase, and Attorney General Edward Bates. HIXSON, *supra* note 4, at 131, 133-35, 150 (reporting the support of Henry C. Carey, the so-called founder of the American School of Economics); SHARKEY, *supra* note 4, at 30, 31, 35 ("Letters of support [for the first Legal Tender Act] from various bankers and business men pointed up the fact that the [opposing] opinions of the associated bankers [of New York, Boston, and Philadelphia] voiced in Washington, by no means represented the sentiments of the business community at large.").

35 Seigniorage is defined as "the return on the monopoly right to print money held by domestic monetary authorities." PETER MOLES & NICHOLAS TERRY, THE HANDBOOK OF INTERNATIONAL FINANCIAL TERMS 491 (1997).

36 BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 192 (1970).

37 HIXSON, *supra* note 4, at 133.

consent to the expedient of United States Notes in limited amounts being made a legal tender."[38]

Of the $3 billion direct cost of the war to the North, taxes paid for about 20 percent, borrowing in the form of bank paper covered about 65 percent, and the Greenback paid for about 15 percent.[39] The peak years for the new currency were 1862 and 1863 when the Greenback paid for nearly 40 percent of the costs of the Civil War to the North.[40] In his December 1862 message to Congress, Lincoln explained the necessity of the action:

> The suspension of specie payments by banks . . . made large issues of United States Notes [Greenbacks] unavoidable. In no other way could the payment of the troops . . . be so economically or so well provided for. The judicious legislation of Congress . . . has made them a universal circulating currency . . . saving thereby to the people immense sums in discounts and exchanges.[41]

This was the same message to Congress in which Lincoln said:

> The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.[42]

Some historians insist the Greenback was not necessary because it never accounted for a majority of the funds used to carry on the war and that the government may have been able to sell its securities below par.[43] More persuasive are those like Leonard Curry, who concludes: "To leave the country dependent on a motley array of irredeemable, often counterfeited, frequently worthless bank paper was not only to invite, but to insure, disaster."[44] Likewise, historian Robert Sharkey points out that a majority of the members of Congress "were not willing to subject the credit of the government to such a trial."[45]

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38 *Id.* at 133–34.

39 *Id.* at 132–33, 139–40; Hummel, *supra* note 4, at 599, fig. 3. Ransom put the direct government expenditure costs to the North at $2.7 billion and concluded that the Greenback accounted for about 18 percent of all government revenues. Ransom, *supra* note 21.

40 HIXSON, *supra* note 4, at 132.

41 *Id.* at 134.

42 Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., Rutgers Univ. Press, 1953) (1953).

43 *See* DON C. BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879 25-57 (Harvard Univ. Press 1965) (1931); SHARKEY, *supra* note 4, at 32–33.

44 LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 197 (Vanderbilt Univ. Press 1968) (1968).

45 SHARKEY, *supra* note 4, at 33.

In addition to the Greenback, Congress passed legislation in 1862 creating the National Banking System, providing for the chartering of federal banks that were required to purchase large amounts of federal bonds to hold as security against the national bank notes they would issue.[46] Although the National Banking System did not take the form of a central bank, it can still be seen as a forerunner of the Federal Reserve, also privately-owned and directed to support the federal government's fiscal needs by purchasing federal bonds.[47] While this was an improvement from the chaos that had preceded the National Banking Act, it was still lacking from the perspective of government finance when compared with the approach of the Federal Reserve during World War II, which kept interest rates near zero percent for federal government securities.[48]

For the Confederacy, the cost of the war was about $2.25 billion, of which about $250 million was raised in taxes and $500 million was borrowed.[49] The rest, about $1.5 billion, or nearly 60 percent of the Confederacy's war costs, was in printing press money.[50] The Confederate currency collapsed in value, the victim of a counterfeiting war strategy by the North.[51]

There has also been criticism of the inflation that coincided with the Greenback, with some claiming this was the result of not making the Greenback redeemable in gold.[52] But, as discussed above, the record shows a rather wise management by Congress, with the amount of paper currency issued limited to only about 12 percent of the total financing of the war and peaking at less than 40 percent in 1862 and 1863.[53] According to Roger Ransom, Northern wages did not keep pace with inflation, but fell by about 20 percent during the war.[54] Even this, Ransom concluded, was not as severe as it would seem since agriculture, not industry, was the largest economic sector in the North, and "farmers fared much [better] in terms of their income during the war than did wage earners in the manufacturing sector."[55]

46 Ransom, *supra* note 21.

47 Committee for Monetary Reform v. Board of Governors of the Federal Reserve System, 766 F.2d 538, 540 (D.C. Cir. 1985) ("The Federal Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts.") (citing to 12 U.S.C. § 321).

48 Richard H. Timberlake, *Federal Reserve System*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, 2008, http://www.econlib.org/library/Enc/FederalReserveSystem.html.

49 HIXSON, *supra* note 4, at 148.

50 *Id.*

51 *Id.*

52 FRIEDMAN, *supra* note 31, at 57.

53 Hixson, *supra* note 4, at 132, 140.

54 Ransom, *supra* note 21.

55 *Id.*

The inflation in the North was less a function of any over-issuance of currency and more the result of a classic wartime boom with excess demand pulling up prices faster than manufacturing wages.[56] Public administration was at a rather rudimentary and unsophisticated stage of development at the time of the Civil War.[57] It would have to wait until the next century, after civil service reforms and the rise of a federal bureaucracy during World War II for the tools to contain such inflationary forces.

For instance, throughout World War II, the federal government found the means to finance an even more impressive military buildup and war effort. As a practical matter, the central bank lost its independence during the 1941–1951 period.[58] The Federal Reserve was required by political convention with the White House and Treasury to purchase government securities in any amounts and at any price needed to keep the yield on government debt pegged at near zero for short-term securities and barely two percent for long-term bonds, the functional equivalent of printing money for the war effort.[59]

With such an easy money policy during World War II, the federal government was able to increase wartime spending to nearly forty-five percent of Gross Domestic Product (GDP), nearly double today's levels of federal spending.[60] Some economists point to the easy money and heavy reliance on seigniorage during World War II to explain the end of the Great Depression.[61] Of course, easy money without federal spending would likely not have increased either the velocity of money or aggregate demand. While easy money in the 1930s brought some recovery from the Depression,[62] it was only the massive fiscal

56 GEORGE T. MCJIMSEY, THE DIVIDING AND REUNITING OF AMERICA: 1848–1877 87–89 (1981).

57 *See Id.* at 196–97.

58 *See* Timothy A. Canova, *American Wartime Values in Historical Perspective: Full-Employment Mobilization or Business as Usual*, 13 ILSA J. INT'L & COMP. L. 1, 13–14 (2006) [hereinafter Canova, *American Wartime Values*].

59 *Id.* at 13.

60 Timothy A. Canova, *Non-State Actors and the International Institutional Order: Central Bank Capture and the Globalization of Monetary Amnesia*, 101 AM. SOC'Y INT'L L. PROC. 469, at 470–71 nn.8–9 (2007) (citing to tables of the 1984 and 2007 Annual Reports of the Council of Economic Advisers).

61 Hummel, *supra* note 4, at 605.

62 Christina D. Romer, *What Ended the Great Depression?*, 52 J. ECO. HISTORY 757, 757–58 (Dec. 1992). Romer cites to a 1956 article by E. Cary Brown for support that fiscal policy "seems to have been an unsuccessful recovery device in the 'thirties—not because it did not work, but because it was not tried." *Id.* at 758.

stimulus, albeit accommodated by the central monetary authority that ended the Depression once and for all.[63]

The economy roared, with real growth rates of greater than fifteen percent for three consecutive years, the fastest economic growth in American history.[64] Yet, the federal government also managed to maintain price stability through a program of regulatory controls on prices, wages, and capital flows, and margin requirements on borrowing for private consumption, stock speculation, and housing construction.[65] In fact, consumer price inflation was less than three percent a year for the final three years of the war.[66]

The World War II model was actually extended for several years after the war, in large part because of the need for continued massive federal spending on the Marshall Plan reconstruction of Europe and Japan, the Korean War effort, and the G.I. Bill of Rights spending on education, health care, housing, and jobs for the sixteen million veterans of World War II (fully one-quarter of the U.S. work force).[67]

This followed a long tradition of federal government intervention to promote economic growth. For example, Alexander Hamilton, as Treasury Secretary, in his Report on Manufacturers, much of which was adopted by Congress, had called for subsidies to industry, paid for in part by tariffs on imports, to encourage the growth of manufacturing, as well as the building of roads and canals.[68] Decades later, Henry Clay would incorporate Hamilton's ideas into the "American System," which was adopted by Lincoln in his fiscal program of subsidies to encourage economic development, which could be seen as a

63 Bruce Bartlett, *The Real Lesson of the New Deal*, FORBES, Feb. 13, 2009 (arguing that "in terms of fiscal policy, Roosevelt's error [in the 1930's] wasn't that he spent too much, but that he didn't spend nearly enough").

64 Canova, *American Wartime Values*, *supra* note 58, at 5 n.12.

65 *Id.* at 14–15, n.67.

66 *Id.* at 16. Hummel seems to acknowledge that a central bank-dominated monetary regime is fully capable of producing high inflation and contributing less to economic growth than a monetary regime characterized by Treasury-issued currency when he writes that "during America's Great Inflation of the 1970s, seigniorage accounted for only 2 percent of federal revenue, which translates into less than half a percent of GDP." Hummel, *supra* note 4, at 607.

67 Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL'Y 341, 393–94 (2007) [hereinafter Canova, *Closing the Border*].

68 MICHAEL LIND, HAMILTON'S REPUBLIC: READINGS IN THE AMERICAN DEMOCRATIC NATIONALIST TRADITION 72–73 (1997).

modification of mercantilism and a precursor to Keynesian economic policies.[69]

To be sure, critics of this model will claim that the cure is worse than the disease, and that an easy money policy and active fiscal policy can work only if the federal government imposes controls which are said to be incompatible with a free-market economy, and that inflation is bound to return once the controls are lifted or relaxed.[70] But this line of argument understates the range of government regulations and interventions that are routinely imposed on any free-market economy, even during times of hard money. Further, it also ignores the moral and strategic context in which wartime controls have been imposed. If inflation is merely delayed, the question becomes what was gained during the interval of delay. The World War II era controls that suppressed and delayed inflation until the late 1940s and early 1950s provided the federal government with the breathing space and resources necessary to win a world war against fascist tyrannies in less than four years and then to rebuild war-torn Europe and Japan and integrate one-quarter of the U.S. work force.[71] Not a bad trade-off, indeed.[72]

Likewise, Lincoln used the resources of easy money for grand purposes. It took four bloody years of fighting but the scourge of

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69 MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT 23, 72–73 (2004); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (Oxford U. Press, 1970) (1970).

70 *See* MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 558 (1963). The authors argue:

> The result was that "prices," in any economically meaningful sense, rose by decidedly more than the 'price index' during the period of price control. The jump in the price index on the elimination of price controls in 1946 did not involve any corresponding jump in 'prices'; rather it reflected largely the unveiling of price increases that had occurred earlier. *Id.*

See also Robert Higgs, *Wartime Prosperity? A Reassessment of the U.S. Economy in the 1940s*, 52 J. ECO. HISTORY 41, 54–55 (Mar., 1992), *available at* http://www.independent.org/publications/article.asp?id=138.

71 *See* Canova, *American Wartime Values*, *supra* note 58, at 15–16.

72 Hummel also argues that the World War II debt burden was reduced by high inflation after the war. Hummel, *supra* note 4, at 603. But inflation remained largely contained throughout the 1950s and 1960s, rising to significantly high levels only in the late 1970s. It is more accurate to conclude that the World War II debt burdens were reduced by maintaining low interest rates and high real economic growth rates which contributed to high tax revenues even while tax rates were being reduced. Hummel also repeats the claim of Robert Higgs that war always "ratchets up" post war spending and government intervention. *Id.* at 592, n. 3. First, it is instructive to point out that federal spending during World War II peaked at about forty-five percent of GDP; today it is about twenty-six percent of GDP. Moreover, it may be that, had U.S. and foreign governments spent and intervened far more in their economies prior to the 1930s, the global Great Depression and the cataclysm of World War II may very well have been averted.

slavery was finally lifted from the nation. Both wartime presidents, Lincoln and Roosevelt, understood they could ill afford to lose their wars or pass them on to future generations.[73]

As Justice Jackson would write in his concurrence in the so-called Steel Seizure case, *Youngstown Sheet & Tube Company v. Sawyer* (1952), "the power to legislate for emergencies belongs in the hands of Congress."[74] National emergencies and war need not expand the powers of Congress and the President, but they do provide the opportunity for the elected branches to act to the full extent of their constitutional powers. This was the case with the constitutional legacy of the Legal Tender Acts that paved the way for other far-reaching monetary reforms during the New Deal.

In June 1864, after securing re-nomination and with the financial position of the Union in better shape, Lincoln accepted the resignation of his Treasury Secretary Salmon Chase.[75] Several months later, partly to placate the Radical wing of his party, Lincoln nominated Chase as Chief Justice of the Supreme Court. In one of history's great ironies, when the Legal Tender Acts were challenged, Chase would twice vote to declare the Greenback unconstitutional.[76]

In *Hepburn v. Griswold* (1870), Chase refused to disqualify himself and in fact delivered the decision declaring the Greenback unconstitutional and ruling that Congress could not make the Greenback legal tender in payment of all debts, public and private.[77] As characterized by Milton Friedman and Anna Schwartz, Chief Justice Chase essentially convicted himself of having been responsible for an unconstitutional action in his prior capacity as Secretary of the Treasury.[78]

At issue before the Court in *Hepburn* was the validity of contracts made before the war.[79] The decision was applied also to contracts entered into after the war.[80] A major portion of the nation's money supply was suddenly rendered worthless for the

73 *See* Timothy A. Canova, *The Mystical Roots of American Political Democracy: Social Justice and Religious Belief in a Newer World*, in RELIGION AS ART (Univ. of New Mexico Press 2009) (discussing the similarities between Lincoln and Roosevelt as mystical political leaders).

74 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

75 CLARENCE EDWARD MACARTNEY, LINCOLN AND HIS CABINET 259–60 (Charles Scribner's Sons, 1931).

76 FRIEDMAN & SCHWARTZ, *supra* note 70, at 46–47.

77 Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

78 FRIEDMAN & SCHWARTZ, *supra* note 70, at 46.

79 *Id.*

80 *Id.* at 47.

satisfaction of debts.[81] But, then, two vacancies on the Court were filled by President Grant and amid charges of court-packing, the Legal Tender Acts came up once again before the new Court.[82] This time, in *Knox v. Lee* (1871), the Greenback was upheld as constitutional, reversing *Hepburn* by a 5-to-4 vote, this time with Chase in dissent.[83] The Court held in *Knox* that Congress did indeed have authority to reasonably decide what definition of legal tender would best serve the public interest.[84] Finally, in *Julliard v. Greenman* (1884), in a third Legal Tender case, the Court upheld the power of Congress to create legal tender currency in peacetime.[85]

During this time there were parallel Court decisions holding that the Legal Tender Acts were not intended to bar enforcement of private contracts requiring payment of debts in gold.[86] Such "gold clauses" were a device to protect creditors from repayment in depreciated currency, particularly until the Greenback became redeemable in gold in 1879.[87] Half a century later, by Executive Order in April 1933, President Franklin Roosevelt ordered the seizure of gold in an effort to forbid hoarding.[88] Gold clauses were once again used to protect creditors.[89] But later in 1933, Congress simply outlawed these gold clauses by joint resolution, and in 1935, the Supreme Court upheld the constitutionality of the joint resolution by a 5-to-4 vote, holding that Congress has authority to exert ultimate control in defining lawful media of exchange to satisfy debts, even for private contracts made prior to the legislation.[90]

The cumulative effect of the Legal Tender cases and the gold clause cases was to permit Congress to once again authorize the issuance of Greenbacks, this time during the Great Depression. According to Milton Friedman and Anna Schwartz, the Thomas Amendment to the Agricultural Adjustment Act of 1933 authorized the issuance of $3 billion in United States Notes.[91] In addition, the amendment authorized the Treasury to revalue its gold holdings and realize a large "paper" profit; as a result, it

81 *Id.* at 48.
82 *Id.* at 47 n.47.
83 Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).
84 *Id.* at 553.
85 Julliard v. Greenman, 110 U.S. 421, 450 (1884) (upholding an act of 1878 reissuing greenbacks and declaring them to be legal tender in payment of private debts).
86 FRIEDMAN & SCHWARTZ, *supra* note 70, at 469.
87 *Id.* at 468–69.
88 *Id.* at 462–63.
89 *Id.* at 463.
90 *Id.* at 469.
91 *Id.* at 470.

could print additional paper money titled "gold certificates" to a nominal value of nearly another $3 billion.[92]

Within each of these lines of cases, the Legal Tender cases and the gold clause cases, urgent circumstances existed that initially justified the use of positive regulation to compel citizens to accept government paper as legal tender for payment of all debts, private and public. In both the 1860s and 1930s democracy and freedom were subject to the gravest of challenges. The responses of Congress and the President were similar. In each instance, the federal government asserted sovereignty over the currency and financial system, thereby empowering the government with enormous fiscal capabilities that helped mobilize the nation for war and develop the country's economic resources for decades.

II. EARLY AMERICAN HISTORY

Much like Lincoln's Greenback, colonial governments issued paper currency that was not redeemable in gold and was declared by government fiat to be legal tender for the payment of debts.[93] The colonial currencies were lent into circulation through state-controlled land banks and were secured by mortgages on the borrowers' property at low interest rates, usually five percent.[94]

According to historian James Ferguson, "[a] modern economist finds the tactics of colonial government analogous to those of the New Deal and in some ancestral relationship to present-day Keynesian doctrine."[95] For instance, during the Great Depression, first under Hoover and then under Roosevelt, the Reconstruction Finance Corporation lent millions to U.S. industry.[96] Likewise, the federal Home Owners' Loan Corporation, founded in 1933, offered mortgage loans directly to homebuyers at five percent with repayment periods of up to twenty-five years.[97] But the moneys for these New Deal lending programs were mostly borrowed by the Treasury Department through the sale of government bonds.[98] In contrast, some

92 *Id.* at 470, 518 n.33.

93 A. Barton Hepburn, History of Currency in the United States 71 (The Macmillan Co. 1915) (1915).

94 E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 5 (Univ. of North Carolina Press 1961).

95 *Id.*

96 MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933–1965 29(Oxford Univ. Press 1975)(1975).

97 C. LOWELL HARRISS, HISTORY AND POLICIES OF THE HOME OWNERS' LOAN CORPORATION 1 (National Bureau of Economic Research 1951);

98 GELFAND, *supra* note 96, at 48.

colonial governments actually created the currency that was lent into circulation without incurring government borrowing costs.[99]

While Lincoln's Greenback was spent into circulation and earned no interest for the government, the colonial currencies were actually lent into circulation, thereby earning interest for colonial governments. In fact, in the middle colonies, "the loans served as a substitute for taxes," and the interest received by these colonial governments "was sufficient to pay most of the ordinary cost of administration."[100] While land banks were less successful in New England and the south, currency emissions in New York, New Jersey, Delaware, and Maryland were regarded as stable, and were never great enough in volume as to impair credit.[101]

According to Ferguson, historians agree that Pennsylvania's currency was held in universal esteem, a principal factor in the colony's growth and prosperity, and maintained "without fear of repudiation and to the manifest benefit of the province":

> Pennsylvania managed a land bank almost continuously after 1723 without mishap. For more than twenty-five years before the French and Indian War, the interest received by the government supported expenses without the necessity of direct taxes. Relative freedom from taxation probably contributed to Pennsylvania's remarkable growth.[102]

None other than Adam Smith, the grandfather of classical economics, described the currency emissions in glowing terms:

> The government of Pennsylvania without amassing any treasure [i.e., any stock of gold or silver] invented a method of lending, not money indeed, but what is equivalent to money, to its subjects. [It advanced] to private people at interest, upon security on land to double the value, paper bills of credit . . . . made transferable from hand to hand like bank-notes, and declared by act of assembly to be legal tender in all payments from one inhabitant of the province to another.[103]

According to numerous historians, the price level in Pennsylvania during the fifty-two years prior to the American Revolution and while Pennsylvania was on a paper standard "was more stable than the American price level has been during

99 HIXSON, *supra* note 4, at 53.

100 FERGUSON, *supra* note 94, at 5–6.

101 *Id.* at 6–8.

102 *Id.* 6, 13, 16. Hummel asserts, "No one needs to be reminded that government cannot create resources out of thin air." Hummel, *supra* note 4, at 597. The colonial experience suggests otherwise. Colonial governments created currency out of thin air, lent the currency into circulation, and the result was the bringing to market of real resources. *See* HIXSON, *supra* note 4, at 53–54.

103 HIXSON, *supra* note 4, at 48–49 (words in brackets are Hixson's).

any succeeding 50 year period."[104] This price stability was due in large part to the commonwealth's wise management of its currency emissions. In *The Wealth of Nations*, published in 1776, Adam Smith wrote:

> Pennsylvania was always more moderate in its emissions of paper money than any other of our colonies. Its paper currency accordingly is said never to have sunk below the value of the gold and silver which was current in the colony before the first emission of its paper money.[105]

Thomas Pownall, also writing during this period, concluded that there "never was a wiser or better measure, never one better calculated to serve the uses of an encreasing country . . . never a measure more steadily pursued, nor more faithfully executed for forty years together."[106]

The British did not look favorably on the colonial practices, and the British Parliament passed the Restraining Act of 1764 forbidding enactment of such legal tender laws.[107] According to William Hixson, Parliament acted at the behest of British bankers who "wanted the colonies, rather than creating their own notes, to acquire a colonial money supply by borrowing banknotes in Britain (at interest payable in specie [i.e., gold or silver coin])."[108] Protests immediately broke out in New York, Pennsylvania, Maryland, Virginia, and South Carolina, "colonies which were scarcely in the grip of leveling elements."[109]

Benjamin Franklin fought enactment of the Restraining Act of 1764 and tried to get it repealed.[110] One of the main reasons for the alienation of the American colonies from the mother country, according to Franklin, was the restrictions on paper money.[111] Franklin wrote, "Every colony was ruined before it made paper money" as gold coin was drawn away by the purchase of imports from Britain.[112]

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104 Richard A. Lester, *Currency Issues to Overcome Depressions in Pennsylvania, 1723 and 1729*, 46 JOURNAL OF POLITICAL ECONOMY 324, 325 (June 1938), (quoted in HIXSON, *supra* note 4, at 51.)

105 ADAM SMITH, THE WEALTH OF NATIONS 356–57 (ed. Edwin Cannan 1994).

106 THOMAS POWNALL, THE ADMINISTRATION OF THE COLONIES, 4th ed. (London 1768), at 185, (quoted in FERGUSON, *supra* note 94, at 16).

107 FERGUSON, *supra* note 94, at 15.

108 HIXSON, *supra* note 4, at 56.

109 FERGUSON, *supra* note 94, at 15.

110 *Id.* at 16.

111 *Id.*

112 HIXSON, *supra* note 4, at 47 (brackets omitted). According to Ferguson, there was significant popular unrest in New York which was "stilled only by the repeal of the Townshend duties, but also by a special act of Parliament which allowed the colony to issue paper money." FERGUSON, *supra* note 94, at 16.

The monetary experiment continued during the American Revolutionary War, which was paid to a remarkable extent by issue of paper currency known as the "Continental" despite an acute shortage of specie.[113] But the paper money was issued and counterfeited in large quantities out of all proportion to increases in the output of goods and services.[114] Therefore the currency declined sharply in value in terms of gold and silver, and there was runaway price inflation during the war.[115]

Previously, in many of the colonies, counterfeiting was a serious problem that threatened and often did undermine the confidence and value of their currencies, particularly in the south and northeast colonies.[116] Pennsylvania's lieutenant governor, Patrick Gordon, in a speech to the state Assembly, warned:

> It may not unjustly be compared to the Poisoning the Waters of a Country; the blackest, and most detestable Practice that is known, and which the Laws of Nations, and those of War condemn even in declared Enemies; for as that destroys the Lives of the innocent in taking their Natural Food, this would effectively overthrow all Credit, Commerce and Traffick, and the mutual Confidence that must subsist in Society, to enable the Members of it to procure to themselves and Families their necessary Bread.[117]

While most counterfeiting of colonial currencies had been carried on by private criminal gangs, with the advent of the open rebellion, the British made counterfeiting a wartime strategy.[118] According to historian Kenneth Scott, "for the first time in history, counterfeiting was resorted to by a government to undermine confidence in the currency, and thereby the credit, of the enemy."[119]

The Continental currency actually held its value during the first year or two of the Revolution even though it was not redeemable in specie.[120] But as early as the first week of January 1776, if not before, a printing press aboard the *H.M.S. Phoenix*, a British ship of forty-four guns lying in New York harbor, was turning out counterfeits of the thirty dollar bill of emission.[121] When New York fell to the British, it became and remained the

113 HIXSON, *supra* note 4, at 73.
114 *Id.*
115 *Id.* at 73–74.
116 KENNETH SCOTT, COUNTERFEITING IN COLONIAL AMERICA 93 (Oxford Univ. Press 1957).
117 *Id.* at 11.
118 *Id.* at 253.
119 *Id.*
120 FERGUSON, *supra* note 94, at 18.
121 Scott, *supra* note 113, at 253.

chief source of counterfeits made by the British or with British sanction.[122]

The record is replete with evidence of a massive and largely successful counterfeiting effort by the British.[123] Franklin wrote that "immense quantities of these counterfeits, which issued from the British government in New York, were circulated among the inhabitants of all the States, before the fraud was detected."[124] This, he said, depreciated the whole mass, "first, by the vast additional quantity, and next by the uncertainty in distinguishing the true from the false; and the depreciation was a loss to all and the ruin of many."[125]

According to Scott, "[f]requently the colonies were put to the trouble and expense of recalling whole emissions. Sometimes trade was greatly hampered or, as in Virginia in 1773, came to a complete standstill."[126] Moreover, the general depreciation of the Continental currency (hence the term, "not worth a Continental") meant that the Continental Congress was forced to issue even more currency to pay for its war efforts. While the specie value of the currency emissions remained roughly steady in 1777 and 1778, a period of intense counterfeiting, the paper amounts of the currency issued rose sharply.[127] A vicious cycle set in. Previous counterfeiting and over-issuance was depreciating the currency so greatly while the demands of war remained so pressing "that money had to be printed every month, then every fortnight."[128] In 1779, John Jay defended the issue of paper money and blamed depreciation on the widespread counterfeiting by the British.[129]

Gouverneur Morris, the person chiefly responsible for planning the use of paper money, had previously been opposed to the project.[130] But like others in the Continental Congress, he agreed that in a crisis, paper money was the only option available.[131] Without the power to tax, however, the Congress had no effective means of retiring its paper money from circulation after it had served its purpose of paying for war provisions.[132] Appeals were made to the states to tax a portion of

122 *Id.* at 253–54.
123 *See id.* at 253–63.
124 *Id.* at 260.
125 *Id.*
126 *Id.* at 262.
127 FERGUSON, *supra* note 95, at 28.
128 *Id.* at 29.
129 HIXSON, *supra* note 4, at 78.
130 DONALD R. STABILE, THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776–1836 23 (1998).
131 *Id.*
132 HIXSON, *supra* note 4, at 86–87.

the paper money and send those back to Congress to retire the bills, but to no avail, the money was not forthcoming.[133] The states did not come through, and this defect in the allocation of taxing authority contributed further to the depreciation in the currency.[134]

Franklin was more sanguine than others about the currency depreciation which he viewed as "a kind of imperceptible tax" that was more progressive than other taxes:[135]

> The general effect of the depreciation [of Continental and state bills] among the inhabitants of the states has been this, that it has operated as a gradual tax upon them. Their business has been done and paid for by the paper money, and every man has paid his share of the tax according to the time he retained any of the money in his hands and to the depreciation within that time. Thus it has proved a tax on money, a kind of property very difficult to be taxed by any other mode: and it has fallen more equally than many other taxes, as those people paid most, who, being richest, had most money passing through their hands.[136]

Franklin's defense of the inflation tax was probably a combination of putting the best face on a bad situation, along with a vestige of his general enthusiasm with paper money going back to the pre-Revolutionary experience in colonial Pennsylvania. While many were horrified by the depreciation and inflation, others believed the war could not have been fought and independence could not have been won without the issues of paper money.[137] According to the historian Donald Stabile, "Highly regarded leaders such as Thomas Paine and Alexander Hamilton looked at the issuance of paper money as a necessary and a reasonable substitute for taxes."[138] Franklin stressed that when the war began, the colonies "had neither arms nor ammunition, nor money to purchase them or to pay soldiers" and it was the paper currency that allowed Congress to pay, clothe and feed the troops, fit out ships, and conduct the war.[139]

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133 STABILE, *supra* note 130, at 23.

134 *Id.* at 23–24.

135 *Id.* at 24.

136 HIXSON, *supra* note 4, at 79 (quoting BENJAMIN FRANKLIN, THE WRITINGS OF BENJAMIN FRANKLIN 9:134–35 (Albert Henry Smith ed., 1907)). In another letter, Franklin wrote: "The currency as we manage it is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides victuals and ammunition: and when we are obliged to issue a quantity excessive, it pays itself off by depreciation." *Id.* (quoting FRANKLIN, *supra* note 132, at 7: 294).

137 STABILE, *supra* note 130, at 24.

138 *Id.* As Stabile concluded, currency emissions during the Revolution were overlarge, but supported by many as "a necessary evil." *Id.* at 33.

139 HIXSON, *supra* note 4, at 77.

The numbers support these conclusions. According to Hixson, the total cost of war for the American side was about $168 million and the original specie value of Continental currency issued was about $46 million, or nearly 40 percent of the war's total costs to the colonies.[140]

After the war, the Articles of Confederation marked a period of weak federal authority. Class warfare between debtors and creditors broke out throughout the new nation during a time of such harsh treatment of debtors as debtor's prisons.[141] According to Hixson, "By the end of 1786, seven states had new issues of paper money in circulation—the size and legal-tender status of the various issues reflecting the balance of power between creditors and debtors of the particular states."[142] Not all state currencies were badly managed, but even where the legal tender bills were kept fairly steady, the problems of interstate commerce in a confederation with multiple currencies still existed.[143]

The Constitutional Convention settled the issue in favor of creditor interests by adopting Article I, Section 10, forbidding states from emitting bills of credit (paper money) or passing any law impairing the obligation of contracts, which included debt contracts.[144] In the drafting of the Constitution, creditor interests clearly had the upper hand. Early American history has since been skewed against paper money. As Ferguson concludes:

> Upon reviewing the evidence, it appears that the impression of colonial public finance conveyed by later scholars gives a misleading background for a financial history for the Revolution. The efforts of the American provinces to create a medium of exchange, provide agricultural credit, and equip government with the means of incurring and discharging responsibilities, hardly constitute a "dark and disgraceful" picture, nor, on the whole, a record of failure. Most colonies handled their currency with discretion and were successful in realizing the purposes associated with its use.[145]

In creating the Greenback, Lincoln and the Civil War Congress had to overcome the traditional bias against a government-issued fiat currency. The multiple interconnected crises that they faced—political disintegration, economic stagnation, financial panic, and military exigency—suggest the

140 *Id.* at 74.
141 *Id.* at 84–85.
142 *Id.* at 85.
143 *Id.*
144 U.S. CONST. ART. I, § 10.
145 FERGUSON, *supra* note 94, at 24.

nature of the sea change in conventional thinking. Necessity was once again the mother of invention.

III. WHAT WOULD LINCOLN DO?

Some economists dismiss the significance of Treasury-issued fiat currency by pointing out facile similarities with today's system of Federal Reserve-issued fiat currency. For instance, Hummel argues that the two processes work out roughly the same financially.[146] The Fed creates money and loans it to the Treasury at interest; but after covering its operating expenses (several billion dollars), the Fed rebates around ninety percent of such interest payments (some tens of billions of dollars) back to the Treasury.[147] This ignores that the money rebated annually is in the tens of billions of dollars, while the Treasury must pay in the hundreds of billions of dollars in interest to its bondholders, both domestic and foreign, who happen to also own shares in the Federal Reserve banks that take part in deciding the interest rate that Treasury will pay to its bondholders.

Hummel makes an important concession about the difference between government issued currency and privatized currency issuance: "The one thing that does change under a central bank is who is in charge of issuing fiat money, and the resulting incentives."[148] Indeed. When Treasury issues currency and spends it into circulation, it pays no interest. When Treasury issues currency and lends it into circulation, it earns interest, and is thereby able to reduce the tax burden for taxpayers. When a central bank, like the Federal Reserve, issues currency and lends it to Treasury, it is that same central bank that now sets the rate of interest on all short-term Treasury borrowing, including the interest that Treasury pays to bondholders other than the Federal Reserve, such as the commercial banks and investment banks that hold trillions of dollars in Treasury debt and also happen to exercise formal and informal influence in the Federal Reserve's interest rate decisions.

History bears out certain advantages that Treasury-issued currency has over a regime dominated by an autonomous central bank. For instance, the Greenback allowed the North to issue currency and spend it into circulation without incurring interest charges. However, to the extent that Greenbacks were insufficient in the amount of United States Notes actually issued, the North had to finance much of the rest of its war effort by

146 Hummel, *supra* note 4, at 604.
147 *Id.* at 604–05.
148 *Id.* at 605.

borrowing banknotes at significant interest rates, thereby adding to the burdens of future taxpayers.[149]

Likewise, during World War II, the effect of central bank-issued money was ameliorated by the fact that the Federal Reserve was not functionally independent and interest rates on all government debt were essentially set by the Treasury.[150] As a result, the Treasury was able to borrow at near zero interest rates.[151] This was the so-called "pegged period" in which the Federal Reserve kept interest rates pegged at 3/8 of one percent on short-term Treasury debt and about 2 percent for longer-term Treasury bonds.[152]

By contrast, in more recent years, the Federal Reserve has set interest rates on all Treasury debt through decisions made by its Federal Open Market Committee (FOMC), a committee which includes the seven members of the Fed's Board of Governors, as well as the twelve unelected and un-appointed presidents of the regional Federal Reserve Banks, which are privately owned by the same commercial banks that have profited by the higher interest rates set by the FOMC on Treasury securities.[153]

Several economists, including Nobel laureate Paul Krugman, have spoken of "cognitive regulatory capture" to describe the intellectual uniformity that has pervaded central bank thinking and let to the triumph of deregulatory ideology.[154] With regards to the Federal Reserve, the agency capture is not just cognitive capture, but a matter of institutional design. The presidents of the regional Federal Reserve Banks, though acting functionally as officers of a supposedly federal agency, are not appointed by the President of the United States and not subject to Senate confirmation.[155] The Federal Reserve System further evades

149 HIXSON, *supra* note 4, at 139–42. *See also* BERT W. REIN, AN ANALYSIS AND CRITIQUE OF THE UNION FINANCING OF THE CIVIL WAR 31–51 (Amherst C. Press 1962) (discussing the Union's use of greenbacks and borrowing to finance the Civil War).

150 Canova, *American Wartime Values, supra* note 58, at 13.

151 *Id.*

152 Timothy A. Canova, *Financial Liberalization, International Monetary Dis/order, and the Neoliberal State*, 15 AM. U. INT'L L. REV. 1279, 1300 (2000) [hereinafter Canova, *Financial Liberalization*].

153 *See* Canova, *American Wartime Values*, *supra* note 58, at 21–22; Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 116–18 (1989).

154 Paul Krugman, *Nobel Laureate Paul Krugman on the Economy: The Return of the Depression Economics*, The Washington Post (Transcript, Dec. 15, 2008), http://www.washingtonpost.com/wpdyn/content/discussion/2008/12/11/DI2008121102406.html. (last accessed August 16, 2009).

155 After Timothy Geithner stepped down as president of the New York Federal Reserve Bank to become Treasury Secretary, the New York Fed named William C. Dudley as its new president after a search headed by the chairman and deputy chairman of the board of directors of the privately-owned New York Fed. There was no formal

oversight by not relying on a penny of congressional appropriations, and by its exemption from various statutes such as the Federal Advisory Committee Act and certain provisions of the Freedom of Information Act.[156] Finally, the governors themselves serve for fourteen-year terms, longer than three presidential administrations and longer than any other officer of the federal government.[157]

Although the Federal Reserve rebates much of the interest it receives from the Treasury, it has traditionally set short-term interest rates much higher than during the 1941–1951 peg, while surrendering the long-term rate to market forces.[158] As a result, the Treasury's interest rate burdens have risen to enormous levels: net interest payments by the federal government have risen from about $14 billion in 1970 to $52 billion in 1980, $184 billion in 1990, and approximately $250 billion by 2008.[159]

To focus only on the interest payments rebated by the Federal Reserve to Treasury, while ignoring the Treasury's enormous interest payments to private bondholders misses key differences between a regime of Treasury-issued currency and a monetary regime dominated by central bank-issued currency. Of

involvement by the Obama administration or Congress in the search, and certainly no input from any other interests from civil society. Press Release, Federal Reserve Bank of New York, New York Fed Names William C. Dudley President, (Jan. 27, 2009), (on file with Chapman Law Review).

156 In late 2008, the Federal Reserve refused a request by Bloomberg news to disclose information about the recipients of more than $2 trillion in emergency loans from U.S. taxpayers made by the Fed and the assets the Fed is accepting as collateral. Bloomberg filed suit under the Freedom of Information Act and the Fed responded by asserting the Fed's express FOIA exemptions related to trade secrets and commercial information. Mark Pittman, *Fed Refuses to Disclose Recipients of $2 Trillion (Update 2)*, BLOOMBERG NEWS, Dec. 12, 2008, http://www.bloomberg.com/apps/news?pid=20601109&sid=apx7XNLnZZlc&refer=home. The District Court rejected the Fed's argument and ordered the Fed to disclose the identities of the borrowers in several of its emergency lending programs. Bloomberg L.P. v. Board of Governors of the Federal Reserve System, No. 08 Civ. 9595 (LAP), 2009 WL 2599336 at *17 (S.D.N.Y. Aug. 24, 2009) (Preska, C.J.). The Fed subsequently asked for a delay in enforcement of the disclosure order until the case can be heard by the U.S. Court of Appeals for the Second Circuit where it is presently pending at the time of this writing. Mark Pittman, *Federal Reserve Says Disclosing Loans Will Hurt Banks (Update1)*, BLOOMBERG, Aug. 27, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aAOhgVw78e3U.

157 *See* Canova, *American Wartime Values*, *supra* note 58, at 22. There have been numerous challenges to the constitutionality of the Federal Reserve System, on both private non-delegation and Appointments Clause grounds, but all have been dismissed by the U.S. Court of Appeals for the D.C. Circuit on narrow procedural grounds (lack of standing for private plaintiffs and a newly-created equitable discretion doctrine for congressional plaintiffs). Canova, *Closing the Border, supra* note 63, at 404.

158 Canova, *American Wartime Values, supra* note 58, at 14–15, 21.

159 Economic Report of the President: 2009 Report Spreadsheet Tables, Council of Economic Advisors, Table B-80, http://www.gpoaccess.gov/eop/tables09.html (last accessed March 4, 2009). Hummel seems to acknowledge the disadvantage of central-bank issued currency: "Such privately created money, even when its quantity expands, provides no seigniorage." Hummel, *supra* note 4, at 607.

course, in addition to the interest paid by Treasury to private bondholders must be added the trillions of dollars in hidden subsidies and guarantees made by the Federal Reserve to prop up U.S. financial institutions, interbank lending, and money markets. Last year, after the Federal Reserve subsidized J.P. Morgan's $29 billion acquisition of Bear Stearns, former Fed Chairman Paul Volcker questioned the central bank's independence.[160] Since then the Fed has come to the rescue of other clients, including the American Insurance Group (AIG), Citigroup, and Bank of America, and creditors and counterparties of AIG such as Goldman Sachs and perhaps various favored hedge funds, while propping up financial markets for the same private financial interests.[161]

The Federal Reserve, now the model of autonomous central banks around the world, is not a disinterested entity, but is stacked with the representatives of financial institutions that have numerous interests that conflict with the interests of the Treasury Department and the taxpayer. The enormous transfers of wealth from the taxpayer to large financial institutions that are a central feature of a privatized system of money creation make little sense at any time, and particularly in a time of war, economic recession, or other national crisis. Such wealth transfers apparently made little sense to Lincoln or Roosevelt, both of whom found ways around the straight-jackets of so-called "sound money" and "sound finance."

Roosevelt followed Lincoln's wartime example by taking control of the commanding heights of finance to pay for the military effort in World War II.[162] During Lincoln's tenure, this meant having the Treasury issue currency directly into circulation, as authorized by Congress. During World War II, it meant bringing the Federal Reserve under the direction of the Treasury to lend freely to the federal government. In both of these models, the federal government asserted its financial and economic sovereignty to achieve the most important policy objectives of generations in crisis. It is certainly fair to ask what a comparable assertion of financial and economic sovereignty would or should look like today.

160 Pedro Nicolaci da Costa, *Former Fed Chair Volcker: Financial Crisis not Over*, REUTERS, Mar. 20, 2008, http://www.reuters.com/article/telecomm/idUSN1933392020080320.

161 Andrew Ross Sorkin & Mary Williams Walsh, *A.I.G. Reports Loss of $61.7 Billion as U.S. Gives More Aid,* N.Y. TIMES, Mar. 2, 2009, http://www.nytimes.com/2009/03/03/business/03aig.html.

162 Hummel, *supra* note 4, at 593.

The present financial and economic crisis, the worst since the Great Depression, has raised a range of proposals, most of which involve the expenditure of large sums of federal revenue, including the $787 billion fiscal stimulus, the $700 billion Troubled Asset Relief Program (TARP) to assist financial institutions in distress, Treasury Secretary Geithner's proposal to spend up to another $2 trillion of taxpayer money to purchase the toxic assets of failing banks in partnership with certain hedge funds deemed co-investors.[163] The programs already authorized will add significantly to the federal budget deficit, which now exceeds $1.6 trillion and could soon approach $2 trillion a year. As Hummel correctly points out, all of this additional debt, much of it foreign debt, raises the specter of a possible sovereign default by the U.S.[164]

The economic recovery of the 1930s, however insufficient in size, was spurred in large part by the monetary stimulus stemming from the devaluation of the dollar and inflows of gold.[165] It could be that a similar devaluation, if done in an orderly way, could help inflate our way partly out of this debt deflation. The experience of the 1940s suggests, however, that further fiscal stimulus may be needed to pull out of the present recession and keep the economy from falling into a deeper financial crisis and depression. If what is needed is federal spending of the magnitude of the 1940s (recall, 45 percent of GDP), then several questions are raised: (1) what would be the appropriate outlets for spending when it makes no sense to have assembly lines producing aircraft carriers, tanks, warplanes, and other armaments; and (2) how to pay for such a massive fiscal stimulus.

Perhaps a new G.I. Bill of Rights for the present generation would restore the purchasing power for the middle class to put the economy back on a growth path. Others point to the vast physical infrastructure needs of the public sector, which has been estimated in the trillions of dollars just to repair roads and

163 Mike Caggeso, *Fed Announces $800 Billion in Homeowner, CONSUMER AND SMALL BUSINESS AID*, Moneymorning.com, Nov. 26, 2008, http://www.moneymorning.com/2008/11/26/consumer-business-bailout/; Pallavi Gogoi, Sue Kirchhoff, Barbara Hagenbaugh & Kathy Chu, *Bailout plan: Foreclosure issues still a major hurdle*, USATODAY, Feb. 13, 2009, http://www.usatoday.com/money/economy/2009-02-10-bailout-details_N.htm.

164 Hummel, *supra* note 4, at 611–12; *see also* Michael Pettis, *Is the US trade deficit sustainable? Is China's trade surplus?*, Jan. 13, 2009, http://mpettis.com/2009/01/is-the-us-trade-deficit-sustainable-is-china%E2%80%99s-trade-surplus/.

165 Romer, *supra* note 62, at 759.

bridges, as well as water, sewage, and other capital improvements.[166]

One proposal that was rejected as an amendment to the 2009 fiscal stimulus package would have authorized the Treasury to issue bonds for spending on transit, water, highway, bridge, and road infrastructure projects by federal, state or local government.[167] One problem with this proposal, as with the entire stimulus package, is that it would have added to the federal deficit and national debt, made the U.S. more dependent on foreign borrowing, and possibly undermined the value of the dollar and stability of U.S. financial markets.

A somewhat different approach was proposed in 1999 by Representative Ray LaHood (like Lincoln, a Republican from Illinois), who introduced legislation to create $360 billion in United States Notes to be lent interest-free to state and local governments over a five-year period to fund capital projects.[168] The bill, entitled the State and Local Government Empowerment Act, received about 22 cosponsors but never made it out of

166 *See* John Bacino, *Investing in Crumbling Infrastructure in the States Before It's Too Late*, PROGRESSIVESTATES.ORG, Aug. 9, 2007, http://www.progressivestates.org/blog/650/investing-in-crumbling-infrastructure-in-the-states-before-its-too-late (last visited Mar. 10, 2009).

167 H.R. 852, which was introduced by Representative Loretta Sanchez (Democrat-California) and did not specify actual amounts to be appropriated, would have authorized the Secretary of the Treasury to issue bonds, to be known as "Re-Build America Bonds," for spending on transit, water, highway, bridge, and road infrastructure projects by any governmental unit. H.R. 852, 111th Cong. (2009) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-852. Congresswoman Sanchez is a 1982 graduate of Chapman University. Congresswoman Loretta Sanchez – About Loretta, http://www.lorettasanchez.house.gov/index.php?option=com_content&task=view&id=18&Itemid=21 (last visited Mar. 10, 2009).

168 H.R. 1452, the State and Local Government Empowerment Act, introduced April 15, 1999 in the 106th Congress, 1st Session. H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452. The bill had at least twenty-two cosponsors and was referred to the House Banking and Financial Services Subcommittee on Domestic and International Monetary Policy, and the House Budget Committee. *Id.* In 2003, LaHood introduced apparently similar legislation, H.R. 4310 and H.R. 4371, to direct the Secretary of Commerce instead of Treasury to make noninterest bearing loans to state and local governments for capital projects. This time, the legislation had seven cosponsors, including Representative Rahm Emanuel (Democrat-Illinois), who is now President Obama's White House Chief of Staff. H.R. 4310, 4371, 108th Cong. (2004) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452&tab=related.

committee.[169] Significantly, Mr. LaHood is now Secretary of Transportation in the Obama administration.[170]

Mr. LaHood's proposal was a variation of the Sovereignty Loan Proposal, an initiative drafted by a private Illinois citizen Ken Bohnsack, and like the Sovereignty Loan Proposal, was modeled on Lincoln's Greenback.[171] Under the LaHood proposal, the annual increase in the money stock would be well below the current levels of money growth, and therefore no more inflationary than privately-issued currency by the logic of monetarists.[172] In addition, the newly-issued currency could be removed from circulation when paid back to the Treasury, or circulated again in the form of new loans to state and local governments. Most importantly, the $360 billion that would have been created under the LaHood proposal would not add a single penny to the federal deficit, the national debt, or foreign borrowing. The federal government would incur no interest or principal obligations.[173] Furthermore, if the issuance of these United States Notes were to lead to some devaluation of the dollar, perhaps that would provide some monetary stimulus to recovery.

In addition to the needs of state and local governments, and proposals for fiscal stimulus to restore economic growth, there is the problem of the financial system itself. The federal government has pumped nearly $700 billion into the biggest commercial banks, which were sinking under the weight of their declining portfolios of mortgage-backed securities, unmarketable derivatives, and other asset-backed securities.[174] A number of

169 H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452. According to Section 5 of the bill, every state, county, township, incorporated municipality, school district, and Indian tribe would have been entitled to obtain a loan in amounts based on resident population. Section 7 provided maturity periods of the loans to be between 10 and 30 years, and based on the estimated number of years of the useful life of the infrastructure financed by the loan. Upon repayment, the funds would be transferred to the U.S. government, presumably for use in future interest-free loans. *Id.*

170 U.S. Department of Transportation / Ray LaHood http://www.dot.gov/bios/lahood.htm. LaHood has a record of supporting mass transit and transportation infrastructure construction and improvement. Adam Doster, *"Ray LaHood? Really?*, PROGRESS ILLINOIS, Dec. 17, 2008, http://progressillinois.com/2008/12/17/ray-lahood-really.

171 Telephone Interview with Ken Bohnsack (Feb. 4, 2009). Bohnsack has recently suggested that the LaHood proposal should be revised from interest-free loans to outright grants to state and local governments for capital investment. *Id.*

172 Monetarist Theory of Economics, http://www.interzone.com/~cheung/SUM.dir/econthym1.html (last visited March 14, 2009).

173 H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452.

174 Dan Wilchins, *U.S. aid to banks seen exceeding $700 billion*, REUTERS, Oct. 21, 2008 http://www.reuters.com/article/ousiv/idUSTRE49K8OK20081021.

commentators advocated nationalization of these banks to restore them to solvency, with an eye to privatizing or converting them into banking cooperatives in the future.[175] This might be one way to stop the financial hemorrhaging without having to spend billions or trillions more in taxpayer money.

Others have proposed having the federal government and/or state governments charter and capitalize new banks, publicly-owned and managed, to lend directly to U.S. businesses and consumers.[176] To the extent new banks are capitalized by the federal government, this would once again provide an opportunity to finance the new investment through the issuance of United States Notes. It could also suggest a return to the colonial model of public finance where the government itself lends money into circulation at interest, and with the interest earned thereby reducing the tax burden on ordinary citizens.

Likewise, the proposal by Senate Republicans, also rejected during the fiscal stimulus debate, to have the federal government offer 30-year fixed rate mortgages at 4 percent, would have required some outlay of public funds, and presumably significant federal borrowing to finance the plan.[177] If the federal government were to borrow at less than 4 percent, then its profit could be applied to pay for the difference between the new 4 percent mortgages and today's prevailing mortgage interest rate, which was estimated at above 5 percent.[178] Once again, although not proposed by the Senate Republicans, this could have also presented an opportunity for the federal government to issue and lend currency directly into circulation and thereby reduce tax burdens by hundreds of billions of dollars from the interest earned on a high volume of such refinancing transactions.

Finally, proposals to have state governments charter and capitalize their own banks would provide a way around the Article I, Section 10 prohibition against states emitting paper money.[179] For instance, in 1919, North Dakota established the

175 Interview by the Real News Network with Timothy Canova, Worst week ever on world markets (Oct. 11, 2008) *available at* http://therealnews.com/t/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=2557 (advocating nationalization model used by Sweden in the 1990s); Tunku Varadarajan, *Nationalize' the Banks: The Weekend Interview with Nouriel Roubini*, WALL ST. J., Feb. 21–22, 2009, at A9.

176 Willem H. Buiter, *'Good Banks' Are the Cost Effective Way Out of the Financial Crisis*, WALL ST. J., Feb. 21–22, 2009, at A11.

177 Jeanne Sahadi, *Stimulus: Senate's housing hope*, CNNMONEY, Feb. 2, 2009, http://money.cnn.com/2009/02/01/news/economy/Senate_stimulus_housing/.

178 *Id.*

179 Ellen Brown, *A Radical Plan for Funding a New Deal*, YES! MAGAZINE, Dec. 2008, http://www.yesmagazine.org/article.asp?id=3162.

Bank of North Dakota, the only state-owned bank in the nation, to lend funds to the private sector to encourage agriculture, commerce, and industry within the state.[180] Created with $2 million of capital, today the Bank of North Dakota operates with more than $160 million in capital, provides federally insured student loans, and draws on a deposit base that includes all state funds and funds of state institutions.[181] While the Bank of North Dakota does not actually create currency, like the land banks in colonial America it does provide credit and, with any interest earned, reduces the tax burdens on its citizens.

For the past generation, the economic orthodoxy has claimed that the Federal Reserve System, the model of an autonomous and largely unaccountable central bank, is the only alternative to allowing elected public officials exercise authority over currency and monetary policy. But these pretensions of economics as a science have led to wrong-headed conclusions that government is incapable of resolving our most important problems and competing claims. Today's collapsing financial bubble economy suggests that we pay a steep price when letting self-interested bankers and their chosen technocrats monopolize these monetary functions. Surely a central bank could be designed that ensures diversity of perspectives and a pluralism of interests while maintaining some degree of policy-making autonomy. We should ask why there is no room for industrial capital, perhaps the National Association of Manufacturers, and the representatives of industrial unions, public sector employees, and student debtors on the boards and committees deciding currency and monetary policy. Instead of a marketplace of ideas and a forum to test one's theories, our central banks have become echo chambers for flawed and outdated orthodoxies.

Perhaps the most important questions we face are not those of economic science or competing models of public finance and currency creation. Rather, perhaps they are political and strategic in nature and ultimately moral questions: whether we face existential challenges as great as did the generations of Americans who looked to Lincoln and Roosevelt for vision and leadership.

According to Lincoln, "The monetary needs of increasing numbers of people advancing toward higher standards of living can and should be met by the government. . . . The issue of

180 Bank of North Dakota, http://www.banknd.nd.gov/bndhome.jsp. (last visited Mar. 10, 2009).

181 About Bank of North Dakota, http://www.banknd.nd.gov/about.jsp (last visited Mar. 10, 2009).

money should be maintained as an exclusive monopoly of the National Government."[182] Lincoln's approach to public finance, like Roosevelt's, was one of populist economic sovereignty: the reassertion of democratic control of the financial system, as permitted under the Constitution, to empower the elected branches of government to meet the needs of the day in an hour of pressing need.

182 HIXSON, *supra* note 4, at 146 (quoting from GORHAM MUNSON, ALLADIN'S LAMP 124 (N.Y.: Creative Age Press 1945) (1945)).

Civil War Finance: Lessons for Today

Jeffrey Rogers Hummel[*]

INTRODUCTION

Randolph Bourne was a young Progressive radical during World War I.[1] Viewing the grotesque excesses of Woodrow Wilson's wartime administration, he wrote an essay in which he coined the maxim: "War is the health of the State."[2] The essay was only published posthumously, because Bourne himself became a victim of the war-induced flu epidemic.[3]

Economists and historians have confirmed the validity of Bourne's maxim in two major respects. First, during war itself, there is a surge in government power, as it increases in scope, size, and intrusiveness.[4] The war brings about higher taxes, wider conscription, more regulation of the economy, and suppression of civil liberties.[5] Governments tend to spend more on war and preparing for war than on anything else.[6] Indeed, prior to the advent of the modern welfare State in the twentieth century, governments usually spent more on war and preparing for war than all other things combined.[7] The State was essentially a war making institution that did a few other things on the side.[8]

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1 A.F. Beringause, *The Double Martyrdom of Randolph Bourne*, 18 J. HIST. OF IDEAS 594, 594 (1957).

2 RANDOLPH BOURNE, *The State*, *in* THE RADICAL WILL: SELECTED WRITINGS 1911–1918 360 (1977).

3 *Id.* For a biography of Bourne, *see generally* BRUCE CLAYTON, FORGOTTEN PROPHET: THE LIFE OF RANDOLPH BOURNE (Louisiana State Univ. Press 1984). I capitalize the word "State" when using it in its broader sense, meaning government in general, to distinguish that meaning from the constituent states within a federal system of government such as the United States.

4 Robert Higgs, *Crisis, Bigger Government, and Ideological Change: Two Hypotheses on the Ratchet Phenomenon*, 22 EXPLORATIONS ECON. HISTORY 2 (1985).

5 Jeffrey Rogers Hummel, *The Civil War and Reconstruction, in* GOVERNMENT AND THE AMERICAN ECONOMY A NEW HISTORY 188, 189 (2007).

6 John Joseph Wallis, *The National Era*, *in* GOVERNMENT AND THE AMERICAN ECONOMY: A NEW HISTORY 148, 152 (2007).

7 *Id.*

8 *See generally* MURRAY N. ROTHBARD, *War, Peace and the State*, *in* EGALITARIANISM AS A REVOLT AGAINST NATURE AND OTHER ESSAYS (2d ed. 2000); BRUCE D. PORTER, WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS (1994); CHARLES TILLY, THE FORMATION OF NATIONAL STATES IN WESTERN

The second respect in which "war is the health of the State" is what Robert Higgs and other economic historians have identified as the postwar ratchet effect.[9] After the war ends, there is demobilization with some cut back in taxes, conscription, regulation, and restrictions on civil liberties, but governments rarely return to their prewar size and power.[10] The State has assumed new functions and exercised new prerogatives that continue long after the fighting is over.[11] In what follows we will survey how these two phenomena apply generally to government finance throughout the history of the United States, then look specifically and in detail at Civil War finance, make some comparisons with the financing of other major American wars, and finally consider the relevance of these observations for today's War on Terror and financial crisis.

I. WAR AND U.S. GOVERNMENT FINANCE

Figure 1 shows total spending of the U.S. government as a percent of Gross Domestic Product (GDP) from 1792 to the present. By using the percentage of GDP, the graph adjusts spending for three factors: (a) any price inflation or deflation; (b) population growth; and (c) the growth of people's real incomes. If the percentage goes up, that means that real government spending per person is rising faster than the economy's output. In other words, more of people's incomes is going to the national government and less to the private sector (or in this case, to other levels of government).[12]

EUROPE (1975); and Charles Tilly, *War Making and State Making as Organized Crime*, *in* BRINGING THE STATE BACK IN 169 (Peter B. Evans et al. eds., 1985).

9 Hummel, *supra* note 5, at 189.

10 ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 59 (1987).

11 *Id.* at 2; Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of Government*, 60 THE PUBL. INTEREST 50, 58 (1980).

12 For Figure 1, data on government expenditures come from U.S. DEP'T OF COM., HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 1086–1134 (U.S. Government Printing Office 1975), pt. 2, as brought forward by BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES FISCAL YEAR 2008 (U.S. Government Printing Office 2008), *available at* http://www.gpoaccess.gov/usbudget/fy08/hist.html. Annual estimates for GDP are from Louis D. Johnston & Samuel H. Williamson, *What Was the U.S. GDP Then?* (MeasuringWorth 2008), http://www.measuringworth.org/usgdp/. Their GDP numbers from 1929 forward coincide with those of the U.S. Bureau of Economic Analysis, whereas previous estimates are drawn from various sources and become increasingly subject to error as you go back in time.

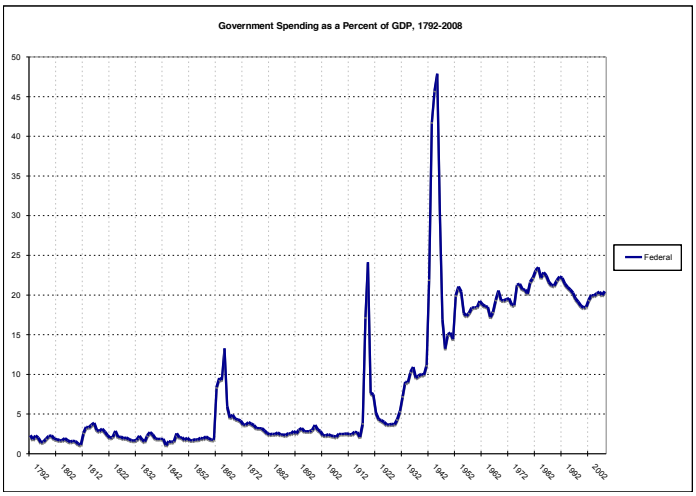

Fig. 1

The graph shows both major peaks and minor peaks during wars. If one looks closely, one can discern the impact of the War of 1812, the Mexican War (1846–1848), and the Spanish-American War (1898). But the Civil War (1861–1865), World War I (1914-1918), and World War II (1939-1945) all induce major peaks in national outlays. Notice also the postwar ratchet effect.[13] Thus, after the Civil War peak of around 13 percent of GDP, the postwar ratchet leaves government spending 50 percent higher than its prewar level. Indeed, federal expenditures even decline slightly as a percent of GDP during the Progressive Era of government activism in the early twentieth century. The World War I ratchet nearly doubles national outlays, from about 2.5 percent of GDP prior to the war to 5 percent of GDP afterwards, despite the alleged Republican retrenchment of the nineteen twenties.[14]

President Franklin Roosevelt's New Deal caused another doubling of federal expenditures during the thirties.[15] This peacetime increase is particularly anomalous because prior to the Great Depression, the general rule, not only in the U.S. but elsewhere in the industrial world, was for governments to rein in spending during depressions and recessions. The fiscal impact of the Great Depression, however, is entirely dwarfed by the

13 *See* Figure 1.

14 *See* Figure 1; Randall G. Holcombe, *Federal Government Growth Before the New Deal*, 47 FREEMAN (1997).

15 *See* Figure 1.

expenditure hike during World War II. Even a brief post-World War II retrenchment never brings spending back to its New Deal level, and then the Korean (1950–1953) and Cold Wars stabilized national outlays at approximately twice that level.

Figure 1 admittedly omits any expenditures by state and local governments. Figure 2 adjusts for that omission beginning at the turn of the twentieth century.[16] Unfortunately, we have no precise figures on how much state and local governments within the U.S. spent during the nineteenth century. Nonetheless, once we can add this spending, the overall pattern does not change. We still observe wartime peaks and postwar ratchets. Moreover, the impact of the New Deal is dampened a bit. Prior to the thirties, state and local governments spent up to twice as much as the national government. The New Deal made federal expenditures greater than those of state and local governments combined, and after World War II the pre-New Deal proportion is sometimes completely reversed, with federal expenditures fully twice as great.[17] In short, part of the increase in federal spending during the administrations of President Roosevelt really represented a change of the locus of spending away from the state and local level.

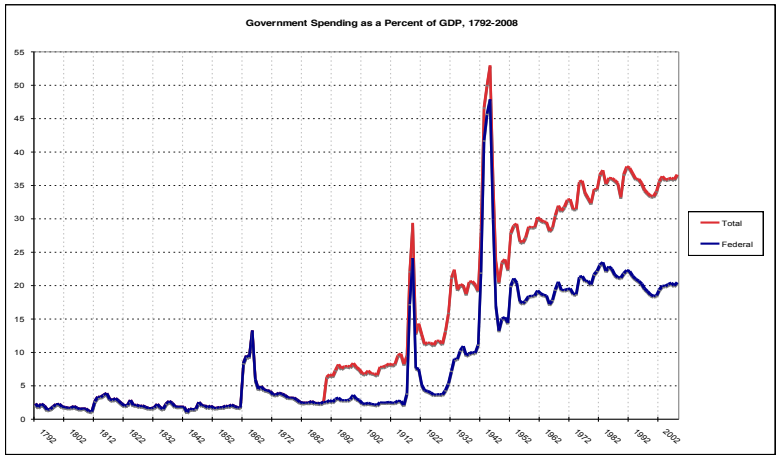

Fig. 2

Prior to the American Civil War, the central government had miniscule peacetime budgets.[18] The highest annual outlays reached was $74.2 million in 1858.[19] That translates into about

16 Sources for Figure 2 are the same as for Figure 1. *See supra* note 12.

17 *See* Figure 2.

18 JEFFREY ROGERS HUMMEL, EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR 221 (1996).

19 *Id.*

$1.5 billion in today's (2009) prices.[20] Adjusting for population, the government in Washington was spending approximately $2.50 per person in 1858, or the equivalent of $50 per person per year today.[21] This was less than 2 percent of GDP. The best guesses of how much state and local governments spent at this time are less than one and a half times as much as the national government, making total spending at all levels of government at most 5 percent of national income.[22] Compare that with today when all government expenditures account for more than one-third of the economy's total output.[23]

The national debt, for all intents and purposes, had been briefly but completely paid off in 1835, under President Andrew Jackson.[24] It had reemerged, mainly as a result of the Mexican War, but in 1860, it stood at a modest $65 million—less than annual outlays in 1858.[25] What makes this doubly amazing is that there were only two sources of federal revenue at the time: a tariff, with relatively low duties because this was an era of expanding free trade; and the sale of public lands, on which Congress had been steadily reducing the price because of the growing appeal of homesteading.[26] In short, most Americans paid no taxes whatsoever directly to the central government.[27] Their only regular contact with representatives of national authority would have been through the United States Post Office—if they had any contact at all.[28]

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20 I have used the Composite Consumer Price Index calculated by John J. McCusker, supplemented by more recent numbers from the Consumer Price Index, to deflate amounts to current prices. *See generally* JOHN J. MCCUSKER, HOW MUCH IS THAT IN REAL MONEY? A HISTORICAL PRICE INDEX FOR USE AS A DEFLATOR OF MONEY VALUES IN THE ECONOMY OF THE UNITED STATES (1992).

21 *Id.*

22 *Id.* at 222.

23 *Id.* Total state and local revenue were found as averaging 1.41 times national revenue in the decade 1836–1845 and 1.15 times in the decade 1846–1855. *See* Wallis, *supra* note 6, at 150; John J. Wallis, *American Government Finance in the Long Run: 1790 to 1990*, 14 J. ECON. PERSPECTIVES 61, 61–82 (2000); John B. Legler et al., *U.S. City Finances and the Growth of Government, 1850–1902*, 48 J. ECON. HIST. 347, 347–56 (1988); and Richard Sylla et al., *Banks and State Public Finance in the New Republic: The United States, 1790–1860*, 47 J. ECON. HIST. 391, 391–403 (1987). Any conceivable differences between government *revenue* and *expenditures* could not possibly push those ratios much above 1.50. According to these estimates, total government revenue averaged 4.0 percent and 4.2 percent of GNP in the two antebellum intervals. For detailed data on expenditures of only state government *see generally* CHARLES FRANK HOLT, THE ROLE OF STATE GOVERNMENT IN THE NINETEENTH-CENTURY AMERICAN ECONOMY, 1820–1902: A QUANTITATIVE STUDY (1977).

24 Hummel, *supra* note 5, at 190.

25 HUMMEL, *supra* note 18, at 222.

26 Hummel, *supra* note 5, at 190–91.

27 *Id.*

28 HUMMEL, *supra* note 18, at 222.

Even the monetary system was significantly deregulated as a result of the prior Jacksonian "divorce" of banking and government at the national level.[29] There was no federally chartered central bank, and the Treasury, as much as feasible, avoided dealing with the many state-chartered banks. The only legally recognized money was specie, that is, gold and silver coins. Although banks were still regulated by the state governments, many states had instituted a de facto regime of quasi-free banking. The economy's currency consisted solely of state bank notes redeemable for specie on demand. Private competition thus regulated the circulation of paper money. Despite trumped-up charges of wildcat banking, it was by comparison a relatively stable and crisis-free monetary system, as attested to by the painless financing of the Mexican War from 1846 to 1848 and the unprecedented quiescence of monetary issues in national politics in the decade prior to the Civil War.[30]

II. THE IMPACT OF THE CIVIL WAR

The cost of waging the Civil War for the Union would ultimately average $1.75 million per day and reach a total of $1.3 billion for 1865 alone.[31] Figure 1 shows federal spending climbing to 13 percent of GDP, but this may be an underestimate. Annual GDP figures during this early period must be interpolated between decennial census data, and so estimates vary. Moreover, the GDP figures used in the graph, from the work of Louis D. Johnston and Samuel H. Williamson, include Confederate output during the war, which understates the war burden unless Confederate government expenditures are included.[32] Earlier GDP estimates of Thomas Senior Berry would put national outlays in 1865 at just under 15 percent of northern GDP, beginning to approach what the central government spends nowadays during peacetime.[33] It is hard to decide from which angle this statistic is more remarkable: that government spending rose from such infinitesimal lows almost to today's heights in only four years, or that today's federal authorities

29 Hummel, *supra* note 5, at 191.

30 *Id.*

31 HUMMEL, *supra* note 18, at 221–22.

32 Johnston and Williamson estimate 1865 nominal GDP at $9.88 billion. *See* Johnston & Williamson, *supra* note 12.

33 THOMAS SENIOR BERRY, PRODUCTION AND POPULATION SINCE 1789: REVISED GNP SERIES IN CONSTANT DOLLARS 27 (1988), whose estimate of 1865 nominal Gross National Product (not much different than GDP) is $8.98 billion.

regularly spend more than they did during the most expensive year of the country's bloodiest war.[34]

How did the administration of President Abraham Lincoln finance this enormous increase? No one needs to be reminded that government cannot create resources out of thin air. There are four potential ways of funding government expenditures, three of which are primary.[35] The least important is government sale of goods and services; the same way private individuals and business raise funds. The Post Office, after all, sells stamps, the U.S. Department of Agriculture sells pamphlets, and the state of California sells lottery tickets (with a monopoly that suppresses market competition).[36] Although we have already observed that the sale of public land was one of two sources of national revenue prior to the Civil War, selling goods and services is not normally a major source of government revenue.[37]

The three primary ways of paying for government expenditures are (1) current taxes; (2) government borrowing, which is equivalent to future taxes, since even if the government's debt is never paid off, the present value of all future interest payments is roughly equal to the total value of the debt; and (3) the issuing of money, which generates inflation and an implicit tax on people's cash balances, as money's purchasing power declines.[38] The technical term that economists use for this last source of revenue is *seigniorage*, from the French word for feudal lord, because in medieval France it was the lord who had a monopoly on the mint and appropriated seigniorage.[39]

The Civil War's unprecedented expenditures struck at the very moment that the Union's anticipated revenues fell.[40] Although the outgoing Congress had raised tariff rates even before Lincoln assumed the presidency, it was clear that the Treasury Department was not going to be able to collect any duties from the South in the foreseeable future.[41] Meanwhile, a

34 Hummel, *supra* note 5, at 197. I must confess that my earlier estimate that federal expenditures reached 20 percent of GDP in 1865 is too high. *Id.*

35 *See infra* notes 46–49.

36 United States Postal Service, http://shop.usps.com (last visited Aug. 1, 2009); United States Department of Agriculture, http://www.usda.gov/wps (last visited Aug. 1, 2009); California State Lottery, http://www.calottery.com/default.htm (last visited Aug. 1, 2009).

37 Hummel, *supra* note 5, at 190–91.

38 *Id.* at 197–99.

39 *See* Kurt Schuler, *The World History of Free Banking, in* THE EXPERIENCE OF FREE BANKING 30–32 (Kevin Dowd ed., 1992); Black's Law Dictionary 1388–1389 (8th ed. 1999).

40 HUMMEL, *supra* note 18, at 222. *See also* ROBERT P. SHARKEY, MONEY, CLASS, AND PARTY: AN ECONOMIC STUDY OF CIVIL WAR AND RECONSTRUCTION 25 (1959).

41 Hummel, *supra* note 5, at 197.

Homestead Act finally passed Congress in 1862, implementing the Republican Party's promise that settlers get free title to 160 acres of government land after five years of settlement.[42]

Lincoln's Secretary of the Treasury, Salmon Portland Chase, had been an abolitionist and a former Democrat.[43] The latter fact meant that he had a strong dislike for governmental control of the economy; he despised government debt, paper money, and internal taxes.[44] A good government in Chase's eyes was a frugal government, yet he was forced to resort to a mixture of all the financial expedients that he disliked.[45] In 1861, Congress implemented a direct tax of $20 million on real estate; although this tax was to be administered by the individual state governments,[46] it was the first internal tax Americans had paid to Washington City in forty-four years.[47] However, the more extensive Internal Revenue Act passed by Congress one year later was not administered through the states but by the newly established Commission of Internal Revenues.[48] Rather than recite all the myriad details of this and other Union revenue measures, it suffices to quote James G. Blaine, an up-and-coming Maine Republican, who called it "one of the most searching, thorough, comprehensive systems of taxation ever devised by any Government."[49]

In addition to all-encompassing excise, sales, and license taxes, the Internal Revenue Act of 1862 also introduced stamp taxes on most legal documents and an inheritance tax.[50] Collection required the creation of an extensive Internal Revenue bureaucracy reaching into every hamlet and town.[51] Even more significant was a national income tax. Although the income tax authorized in August 1861 was never actually collected, more stringent legislation, passed in July 1862, provided the

42 *Id.*

43 Reinhard H. Luthin, *Salmon P. Chase's Political Career Before the Civil War*, 29 MISS. VALLEY HIST. REV 517, 517–19 (1943).

44 HUMMEL, *supra* note 18, at 221.

45 *Id.* at 222.

46 BERT W. REIN, AN ANALYSIS AND CRITIQUE OF THE UNION FINANCING OF THE CIVIL WAR 16 (1962).

47 HARRY EDWIN SMITH, THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871 23–24 (1914).

48 *Id.* at 271–72.

49 James G. Blaine, Twenty Years of Congress: From Lincoln to Garfield, with a Review of the Events Which Led to the Political Revolution of 1860 vol. 1 433 (1884).

50 REIN, *supra* note 46 at 17–18; JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 203 (1982).

51 For an extensive discussion about the creation of the IRS and the administration and collection of taxes during the Civil War see SMITH, *supra* note 47, at 270–91.

government its first ever revenues from that source.[52] The tax ultimately covered all annual incomes over $600 (as low as $6,000 in today's prices) at graduated rates from three to seven and a half percent.[53] To ensure compliance, the government adopted a British practice and withheld money from people's income when it could.[54] With all these measures, the United States achieved higher taxation per capita than any other nation by the end of the Civil War.[55] But all the new and old taxes combined were just sufficient to cover about one-fifth of the Civil War's monetary cost, as indicated in Figure 3.[56]

Financing the Civil War

	Union	Confederacy
taxation:	20 %	7 % + 17 %
borrowing:	65 %	24 %
issuing money:	15 %	52 %

Fig. 3

Meanwhile, borrowing covered about two-thirds of the war's cost.[57] Chase floated some loans directly to the general public, with the aid of an extravagant publicity campaign handled by private financier, Jay Cooke.[58] For most of its borrowing, however, the Union had to rely on banks, and this required that Congress undermine the restraints built into the antebellum financial system.[59] The Treasury's initial war loan of $150 million had put a heavy strain on those northern banks that had subscribed.[60] Once the financial community realized that the war would not be quick or easy, Treasury securities dropped in value.[61] As gold reserves drained from the bank vaults, state

52 *Id.* at 52–53.
53 *Id.* at 52.
54 *Id.* at 53–54.
55 HUMMEL, *supra* note 18, at 223.
56 *See* Figure 3; HUMMEL, *supra* note 18, at 223.
57 *See* Figure 3.
58 JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 262–263 (1995); MCPHERSON, *supra* note 50, at 202.
59 WESLEY CLAIR MITCHELL, A HISTORY OF THE GREENBACKS 20 (1903); HOWARD BODENHORN, A HISTORY OF BANKING IN ANTEBELLUM AMERICA: FINANCIAL MARKETS AND ECONOMIC DEVELOPMENT IN AN ERA OF NATION-BUILDING 229 (2000).
60 HUMMEL, *supra* note 18, at 224.
61 MITCHELL, *supra* note 59, at 38; REIN, *supra* note 46, at 35.

governments permitted the banks to suspend specie payments in December of 1861.[62]

In order to harness banking more tightly to the war effort and create a market for the Treasury's debt, the Republicans drafted the National Currency Acts of 1863 and 1864.[63] These acts fashioned a network of nationally chartered banks, still with us today, regulated by a new federal Comptroller of the Currency, an official still with us today as well.[64] National banks could issue bank notes supplied to them by the Comptroller, but only if they purchased a roughly equivalent value of war bonds.[65] To ensure the national banks did not suffer competition from state-chartered banks, Congress imposed a 10 percent tax in 1865 on the face value of all state banknotes.[66] State banks were henceforth confined to providing other financial services.[67]

Finally, roughly 15 percent of the war's financial outlay was covered through the first fiat money issued since the Constitution's ratification.[68] In early 1862, Congress passed the Legal Tender Act, empowering Secretary Chase to issue a form of paper bills that became popularly known as Greenbacks.[69] The final total of Greenbacks put into circulation reached $431 million, supplemented by a small quantity of interest-bearing notes and other currency.[70] All this government paper coupled with the private bank notes doubled the Union's money stock by 1863.[71] The consequent inflation put specie at a premium.[72] Greenback dollars had fallen in July of 1864 to a low of 35 cents' worth of gold.[73] While gold circulated at a premium over Greenbacks in the northeast, Greenbacks were only accepted at a discount from gold on the west coast.[74]

Adjusting for inflation, workers' wages actually fell by one-third in the North, and economic historians are still debating

62 MITCHELL, *supra* note 59, at 40; REIN, *supra* note 46, at 35.

63 MCPHERSON, *supra* note 50 at 204; REIN, *supra* note 46, at 43.

64 George A. Selgin & Lawrence H. White, *Monetary Reform and the Redemption of National Bank Notes, 1863-1913*, 68 BUS. HIST. REV. 205, 207 (1994).

65 BODENHORN, *supra* note 59, at 229.

66 BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 347 (1970).

67 *Id.*

68 *See* Figure 3.

69 MCPHERSON, *supra* note 50, at 202.

70 REIN, *supra* note 46, at 49.

71 Milton Friedman, *Price, Income, and Monetary Changes in Three Wartime Periods* 42 AMERICAN ECON. REV. 624 (1952).

72 GARY M. WALTON & HUGH ROCKOFF, HISTORY OF THE AMERICAN ECONOMY 298 (9th ed. 2002); Bruce G. Carruthers & Sarah Babb, *The Color of Money and the Nature of Value: Greenbacks and Gold in Postbellum America*, 101 AM. J. SOC. 1556, 1563 (1996).

73 Hummel, *supra* note 5, at 199.

74 HUMMEL, *supra* note 18, at 226.

how much of that was due to heavy taxes versus high seigniorage.[75] Furthermore, the Greenbacks were made legal tender for all payments, public and private, except tariff duties and interest on the Treasury's debt.[76] This led to one of the most astonishing cases of intellectual honesty on the part of a public official, when five years after the war had ended, Chief Justice Salmon P. Chase implicitly branded his prior actions as Secretary of the Treasury unconstitutional in the *Hepburn* decision.[77] However, soon after, President Ulysses Grant packed the Court so that it effectively reversed itself the following year.[78]

Figure 3 also reveals that Confederate States of America—being smaller and poorer than the Union—had to rely much more heavily on seigniorage for war finance. The two percentages for Confederate taxation reflect the fact that formal taxes raised only 7 percent of the war's cost, whereas informal taxation through direct military seizures along with some donations raised another 17 percent.[79] The combined total thus actually exceeded the proportion for Union taxation, but the ability of the Confederacy to borrow fell far short of the Union's.[80] The Confederate Treasury ultimately issued over $1 billion worth of currency, covering more than half the war's cost to the South.[81] The Union blockade and an additional $45 million in paper currency issued by individual southern states contributed to the monetary depreciation.[82] Southerners therefore suffered from hyperinflation, with prices rising by 2,675 percent from 1860 to 1865, compared with 90.5 percent in the North.[83]

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75 *Id.* at 234, 380.

76 Hummel, *supra* note 5, at 199.

77 Hepburn v. Griswold, 75 U.S. 603 (1869) (striking down the Greenbacks' retroactive legal-tender provision); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88 PART I 677 (1971).

78 FAIRMAN, *supra* note 77, at 677; Legal Tender Cases, 79 U.S. 457 (1870–1871). For classic economic studies of the Greenbacks, see generally MITCHELL, *supra* note 59 and WESLEY C. MITCHELL, GOLD, PRICES & WAGES UNDER THE GREENBACK STANDARD (Augustus M. Kelley Publishers 1966) (1908). For a good introduction to the debate about northern real wages *see* Stephen J. DeCanio & Joel Mokyr, *Inflation and the Wage Lag During the American Civil War*, 14 EXPLORATIONS ECON. HIST. 311, 311–36 (1977).

79 *See* Figure 3.

80 *See* Figure 3; David J. Bolt & Mary Mathewes Kassis, *War Finance: Economic and Historic Lessons*, 95 SOC. STUD. 188, 189–90 (2004).

81 *Id.*

82 HUMMEL, *supra* note 18, at 228.

83 For surveys of Confederate finance, see Hummel, *supra* note 5, at 197–203. *See also generally* DOUGLAS B. BALL, FINANCIAL FAILURE AND CONFEDERATE DEFEAT (1991), RICHARD CECIL TODD, CONFEDERATE FINANCE (1954), and CHRISTOPHER SCHWAB, THE CONFEDERATE STATES OF AMERICA, 1861–1865: A FINANCIAL AND INDUSTRIAL HISTORY OF THE SOUTH DURING THE CIVIL WAR (1901). The standard estimate, in Eugene M. Lerner, *Monetary and Fiscal Programs of the Confederate Government, 1861–65*, 62 J. POL. ECON. 506, 507 (1954) is 5 percent from taxation, 5 percent from seizures and donations, 30 percent from borrowing, and 60 percent from the seigniorage. However, JACK

III. COMPARISONS

Upon defeat of the Confederacy at the end of the war, the U.S. government's debt had climbed from just under $65 million to nearly $2.8 billion.[84] The interest alone on this debt commanded about 40 percent of the central government's outlays into the mid-1870s (as compared with less than 10 percent today).[85] To their credit, the post Civil War administrations ran an unbroken string of twenty-eight annual budget surpluses from the war's end to the depression of 1893, despite also cutting taxes.[86] This decline can be observed in Figure 4, which shows the national debt as a percent of GDP.[87]

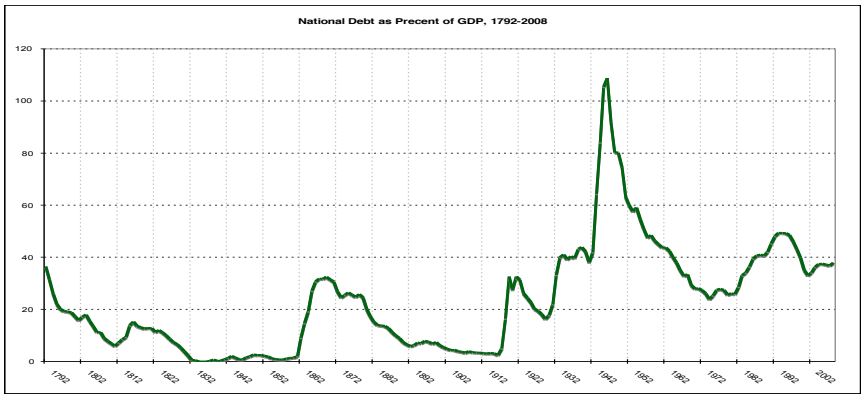

Fig. 4

The trajectory of the national debt in Figure 4 provides additional confirmation of Bourne's maxim, "War is the health of the State." All the major and minor spikes in the debt up through World War II, except for the rise during the Great Depression, are associated with wars.[88] The national debt reaches its highest level during World War II, at about 110

HIRSHLEIFER, DISASTER AND RECOVERY: A HISTORICAL SURVEY 37–41 (1963), points out that these percentages ignore the resources gained through uncompensated impressments. Adding them into seizures changes the percentages to 7 percent from taxes, 17 percent from seizures and donations, 24 percent from loans, and 52 percent from seigniorage. *See also* Richard C. K. Burdekin & Farrokh K. Langdana, *War Finance in the Southern Confederacy, 1861–1865*, 30 EXPLORATIONS IN ECON. HIST. 352, 353 (1993).

84 Bolt & Kassis, *supra* note 80 at 189–90; HUMMEL, *supra* note 18, at 331.

85 Hummel, *supra* note 5, at 217.

86 *Id.*

87 *See* Figure 4 (The sources for Figure 4 are the same as for Figure 1, listed in n. 12 above. The total public debt excludes the holdings of government trust funds, such as OASDI and HI, to avoid double counting, although it does include the holdings of the Federal Reserve System).

88 *See* Figure 4.

percent of GDP.[89] The graph also helps to illustrate two other important relationships. Prior to World War II, there were four significant periods of debt reduction: post-American Revolution, post-War of 1812, post-Civil War, and post-World War I.[90] Each period was also one of tax cuts.[91] While raising taxes to balance the budget may be good accounting, it appears to be bad politics. The only exception is the decline of the national debt as a percent of GDP following World War II.[92] While there were some tax cuts under Presidents Harry Truman and John Kennedy, the main factor eroding the debt was high inflation, peaking in the late 1970s at double-digits.[93] In fact, the rise in government debt as a percent of GDP under President Ronald Reagan had as much to do with the Federal Reserve's taming of inflation as with his fiscal policies.[94]

A second relationship reflected in Figure 4 is the fact that, prior to the Great Depression, the general rule throughout the developed world was that governments *always* ran budget surpluses, except during wars or inadvertently during depressions.[95] This was true of the U.S. government until the Great Depression and the subsequent triumph of Keynesian economics.[96] In the eighty years since 1929, in contrast, the federal government has managed only twelve surpluses: four under Truman after World War II, three under President Dwight Eisenhower, one under President Richard Nixon, and four under President Bill Clinton, after the ending of the Cold War.[97] The War on Terror has simply started to bring the national debt as a percent of GDP back up to Cold War levels.[98]

It is also instructive to compare Civil War finance with the financing of three other major wars displayed in Figure 5. Finance of the American Revolution stands as a precursor to Confederate finance, with a similar low level of *formal* taxation (6 percent), heavy reliance on seigniorage (75 percent), and

89 DENNIS S. IPPOLITO, WHY BUDGETS MATTER: BUDGET POLICY & AMERICAN POLITICS 4 (2003).

90 *See* Figure 4; Benjamin U. Ratchford, *History of the Federal Debt in the United States*, 2 AM. ECON. ASS'N. 131, 137–41 (1947).

91 Ratchford, *supra* note 90, at 137–41.

92 *See* Figure 4.

93 Iwan Morgan, *Jimmy Carter, Bill Clinton, and the New Democratic Economics*, 47 HIST. J. 1015, 1015–1027 (2004).

94 ROBERT J, SAMEULSON, THE GREAT INFLATION AND ITS AFTERMATH: THE PAST AND FUTURE OF AMERICA AFFLUENCE 105–08, 135–38 (2008).

95 OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, at 5 (2009).

96 Ratchford, *supra* note 90, at 131–32, 137–41.

97 OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, *supra* note 95, at 21–22.

98 *See* Figure 4.

resulting hyperinflation.[99] On the other hand, the proportions during World War I are almost identical to those of the Union during the Civil War.[100] In both cases, seigniorage covered about 15 percent of the war's cost.[101] The resulting cumulative inflation during World War I was more severe, however, ranking as the highest the U.S. had experienced up to that time (outside of the Confederacy) since the American Revolution.[102]

Financing Other U.S. Wars

	Revolution	WWI	WWII
taxation:	6 %	25 %	40 %
borrowing:	19 %	60 %	37 %
issuing money:	75 %	15 %	23 %

Fig. 5

One difference between the Civil War and World War I was how the fiat money was generated. Greenbacks were simple fiat money, printed by the Treasury and used directly to make government purchases.[103] But the Federal Reserve (Fed) was set up in 1914, shortly before U.S. entry into World War I, and it replaced Treasury-issued fiat money with central bank-issued fiat money.[104] The process is a bit more difficult to understand but works out the same financially. The Fed simply creates money out of thin air and loans it to the Treasury, which in turns spends it.[105] Or in the case of World War I, the Fed actually loaned money to private banks so long as they purchased Treasury securities, re-loaning the created money to the

99 *See* Figure 5. The figures in Figure 5 for the American Revolution are derived from E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790 (1961). Those for World Wars I and II come from GARY M. WALTON & HUGH ROCKOFF, HISTORY OF THE AMERICAN ECONOMY 418, 500 (9th ed. 2002). Additional details on U.S. finance of the two world wars can be found in ROBERT HIGGS, *The World Wars*, *in* GOVERNMENT AND THE AMERICAN ECONOMY A NEW HISTORY (2007) and HIGGS, *supra* note 10.

100 *Compare* Figure 5 *with* Figure 3.

101 *See* Figure 5 and Figure 3.

102 *See* Lawrence H. Officer & Samuel H. Williamson, *Annual Inflation Rates in the United States, 1775–2008* (MeasuringWorth 2009), http://www.measuringworth.org/inflation/.

103 WALTON & ROCKOFF, *supra* note 99, at 457.

104 MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960 189 (1971).

105 Bob McTeer and Pamela Villarreal, *How the Fed Creates Money*, BRIEF ANALYSIS (Nat'l Ctr. for Pol'y Analysis, Dallas, Texas), Feb, 28, 2008, at 1.

Treasury.[106] The Treasury pays interest directly or indirectly to the Fed for these loans but the Fed, after covering its operating expenses, has rebated around 90 percent of these interest payments back to the Treasury.[107] The one thing that does change under a central bank is who is in charge of issuing fiat money, and the resulting incentives.[108]

World War II finance stands out for two reasons. Seigniorage covered nearly a quarter of the war's cost, the highest percentage for any U.S. war outside of the two hyperinflations: the American Revolution and the Confederacy.[109] By pegging the interest rate on Treasuries at very low rates (2.5 percent for long-term Treasury bonds, and 0.375 percent for short-term Treasury bills), the Fed automatically monetized much of the World War II debt.[110] The total money stock tripled and inflation became so rampant that the government imposed comprehensive wage and price controls, along with rationing, when the inevitable shortages resulted.[111] This heavy reliance on seigniorage undermines the widely believed myth that it was wartime deficit financing that finally ended the Great Depression.[112] What looked like fiscal policy was really monetary policy in disguise.

Taxation covered another 40 percent of World War II's cost, the highest percentage for any *major* U.S. war until the Cold War.[113] This was mainly achieved by expanding the coverage of the income tax, which furnished three-fourths of all wartime tax receipts.[114] Despite major peacetime tax hikes under both Presidents Herbert Hoover and Franklin Roosevelt, only 4 million Americans were touched by the national income tax as late as 1939.[115] Five years later the number was around 42 million.[116] It was F.D.R. and World War II that brought income taxes to the common man.[117]

106 DONALD R. WELLS, THE FEDERAL RESERVE SYSTEM: A HISTORY 29–30 (2004).

107 Edward Flaherty, *Debunking the Federal Reserve Conspiracy Theories*, http://www.publiceye.org/conspire/flaherty/Federal_Reserve.html.

108 *See supra* notes 103–107 and accompanying text.

109 *See* Figure 5.

110 FRIEDMAN & SCHWARTZ, *supra* note 104 at 562–63.

111 WALTON & ROCKOFF, *supra* note 99 at 554–55.

112 *See* Figure 5.

113 *See* Figure 5.

114 WALTON & ROCKOFF, *supra* note 99 at 554–55.

115 *History of Income Tax,* ENCYCLOPEDIA OF BUSINESS AND FINANCE (Ed. Allison McClintic Marion, Gale Cengage, 2001), *available at* http://www.enotes.com/business-finance-encyclopedia/income-tax-history.

116 *Id.*

117 *Id.*

IV. LESSONS?

The impact of the War on Terror on government finance can be gleaned from Figure 6, which depicts *both* federal expenditures and receipts as a percent of GDP from 1940 to 2008.[118] The end of the Cold War brought a modest decline of expenditures from a high of 23 percent to less than 19 percent of GDP, bestowing the peace dividend of the Clinton years.[119] The wars in Afghanistan (2001–present) and Iraq (2003–present) have merely pushed spending back up toward Cold War levels.[120] More striking is the behavior of federal revenue, which shows far greater consistency than expenditures, having bumped up against 20 percent of GDP since the Korean War, for well over half a century.[121] That is quite an astonishing statistic when you think about all the changes in the tax code over the intervening years. Tax rates go up, tax rates go down, and the total bite out of the economy remains relatively constant.[122] This suggests that 20 percent is some kind of structural-political limit for federal taxes within the United States. It also suggests that variations in the deficit resulted primarily from changes in spending rather than in taxes.

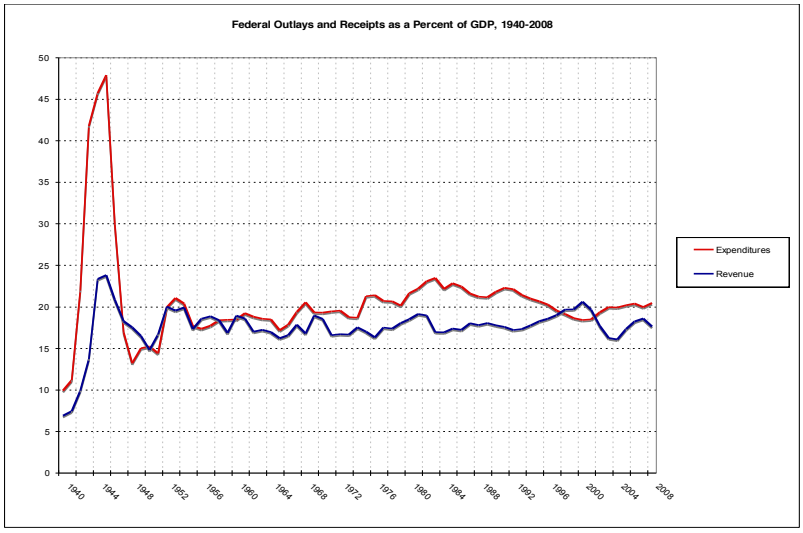

Fig. 6

118 The sources for Figure 6 are the same as for Figure 1. *See supra* note 12.
119 *See* Figure 6.
120 *See* Figure 6.
121 *See* Figure 6.
122 *See* Figure 6.

Another implication of Figure 6 is that throughout the post-World War II period, taxes have covered the greater portion of national spending. All the acrimonious political debates about the size of the deficit have been squabbles about marginal items. The deficit never exceeded 6 percent of GDP and was usually far less, leaving little room for reliance on either government borrowing or seigniorage.[123] In fact, seigniorage has become an utterly trivial source of government revenue, not just in the United States but also throughout the developed world.[124] This is partly a consequence of globalization, in which international competition between central banks restrains their monetary expansions[125] and partly the result of sophisticated financial systems, with fractional reserve banking, in which most of the money that people actually use is created privately by banks and other financial institutions rather than by government.[126] Consider how little of your own cash balances are held in the form of Federal Reserve notes and Treasury coin versus in the form of bank deposits and money market funds. Such privately created money, even when its quantity expands, provides no seigniorage. Consequently, during America's Great Inflation of the 1970s, seigniorage accounted for only 2 percent of federal revenue, which translates into less than half a percent of GDP.[127]

Unlike the War on Terror, the current financial crisis appears destined to have a gargantuan impact on government finance. The critical date was Thursday, September 18, 2008, when the interest rate on Treasury bills temporarily went negative, accompanied by the misbehavior of other credit market indicators.[128] This was what caused Fed Chairman Ben Bernanke and Treasury Secretary Henry Paulson to hit the panic button.[129] Up until this point, the Fed had conducted various bailouts, Bear Stearns being the most prominent, but had not

123 *See* Data360.org, Federal Government Surplus (Deficit) as Percent of GDP, http:www.data360.org/dsg.aspx?Data_Set_Group_Id=409.

124 Posting of Jeffrey Rogers Hummel to Liberty and Power Group Blog, http://hnn.us/blogs/entries/53544.html (Aug. 20, 2008, 23:10 EST).

125 Joshua Aizenman & Yothin Jinjarik, Globalization and Developing Countries-A Shrinking Tax Base? (Jan 1, 2006) (unpublished manuscript, on file with Department of Economics, UCSC Paper 615), *available at* http://repositories.cdlib.org/ucscecon/615/.

126 Posting of Jeffrey Rogers Hummel to Liberty and Power Group Blog, http://hnn.us/blogs/entries/53544.html (Aug. 20, 2008, 23:10 EST).

127 Jeffrey Rogers Hummel, *Death and Taxes, Including Inflation: The Public versus Economists*, 4 ECON. J. WATCH 48 (2007).

128 David R. Henderson, *Bernanke's Hype*, FORBES.COM, Sep. 28, 2008, *available at* http://www.forbes.com/2008/09/28/bernanke-bailout-crisis-oped-cx_drh_0928henderson.html.

129 Jason Turcotte, *Who Hit the Panic Button?*, REAL ESTATE WEEKLY, Oct. 29, 2008, at 10S.

allowed those actions to affect the money stock.[130] In Fed speak, the interventions had been sterilized.[131] But after September 18, the monetary base, which consists of government created money directly controlled by the Fed, went through the roof.[132]

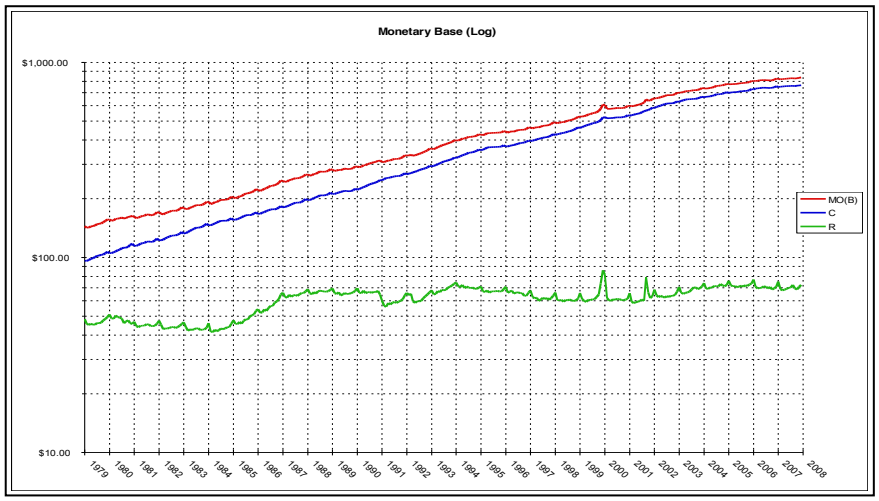

Fig. 7

Figure 7 shows the behavior of the monetary base since the Great Inflation and before the current crisis, mostly under Fed Chair Alan Greenspan.[133] The base has two components: (a)

130 Matthew Goldstein, *Bear Stearns' Big Bailout*, BUS. WEEK ONLINE, Mar. 14, 2008.

131 A sterilized intervention is a way for a central bank to alter its debt composition without affecting its monetary base. *See* http://www.investopedia.com/terms/s/sterilizedintervention.asp (last visited August 1, 2009).

132 FED. RESERVE, STATISTICAL RELEASE H.3 (503): AGGREGATE RESERVES OF DEPOSITORY INSTITUTIONS AND THE MONETARY BASE (Oct. 9, 2008).

133 The source for Figure 7 is the enormously convenient website of the St. Louis Federal Reserve, http://research.stlouisfed.org/fred2/ (last visited July 26, 2009). For the monetary base I have used the *Board of Governors Monetary Base, Not Adjusted for Changes in Reserve Requirements* (BOGUMBNS). *Id.* For currency in circulation, I have used the *Currency Component of M1* (CURRNS). *Id.* I have subtracted the latter from the former to get total reserves. The St. Louis Fed website does give several alternative direct estimates of reserves. However, those compiled by the St. Louis Fed are adjusted for changes in reserve requirements, whereas those compiled by the Board of Governors exclude any excess reserves held in the form of vault cash, all required clearing balances, and Fed float. This critical detail can only be found in the footnotes of the Federal Reserve System, Board of Governors, weekly Statistical Release H.3: http://www.federalreserve.gov/releases/h3/. For some idea of how massive the resulting distortion can be, consider December 2007 where the Board of Governors reported total reserves of $42.7 billion. If you add in vault cash not covering reserve requirements, that number jumps to $60.3 billion. Additionally, when you bring in required clearing balances and float, the number rises to $72.6 billion, 70 percent greater than the board's estimate. If the distortion were consistent across time, the Board's reserve totals would still tell us something, but the distortion is not close to consistent across time, in part because banks increasingly used vault cash in their ATMs. Required clearing balances

currency and coin in the hands of the general public and (b) reserves held by banks and other depository institutions. Between 1986 and 2005, the total base grew at a steady rate of under 6.5 percent annually.[134] But nearly all of the growth was concentrated in currency, much of which was going abroad.[135] The Fed estimates that the proportion of U.S. currency held by foreigners rose from 25 to 50 percent over these nineteen years.[136] As a result total bank reserves were almost constant.[137]

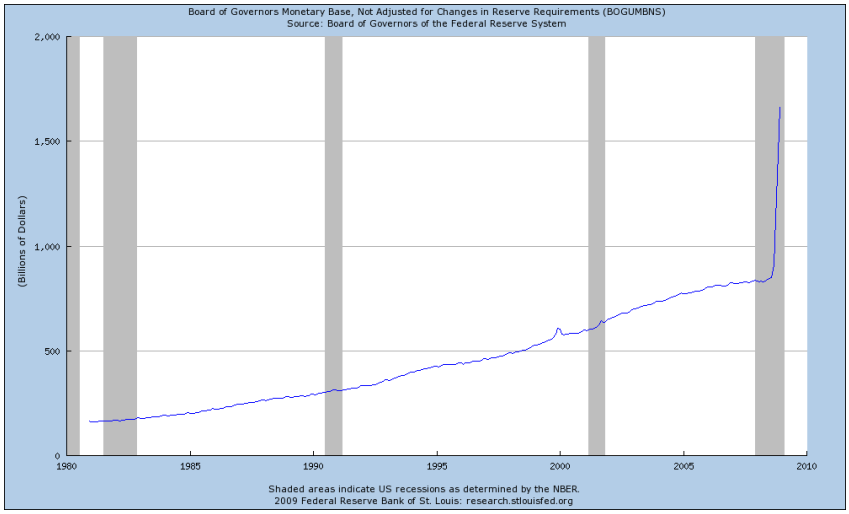

Fig. 8

Figure 8 brings base growth forward to the present.[138] Talk about a "hockey stick," over the mere three months after September 18 the base doubled, from $850 billion to $1.7 trillion.[139] Almost all of that increase was concentrated in bank reserves, which during that short period exploded by an incredible factor of thirteen.[140] Moreover, the Fed's balance sheet

arise out of the Fed's check-clearing operations, pay interest. For an explanation, see E. J. Stevens, *Required Clearing Balances*, 29 FED. RES. BANK OF CLEVELAND ECON. REV. 1, 2–14 (1993).

134 David R. Henderson & Jeffrey Rogers Hummel, *Greenspan's Monetary Policy in Retrospect Discretion or Rules?*, 109 CATO INST. BRIEFING PAPERS 1, 3 (2008).

135 *Id.* at 3.

136 *Id.*

137 *Id.*

138 Figure 8 was directly created on the St. Louis Fed website. *See supra* note 133, series BOGUMBNS.

139 *See* Figure 8.

140 *See* Figure 8.

grew even larger, as depicted in Figure 9.[141] It peaked at $2.3 trillion in December 2008, as the Treasury loaned over half a trillion of newly borrowed money to the Fed, which turned around and loaned it to foreign central banks through currency swaps.[142] The Fed's balance sheet has since fallen back down to $1.8 trillion as of February 11, 2009, but that is still more than twice its size less than half a year ago.[143]

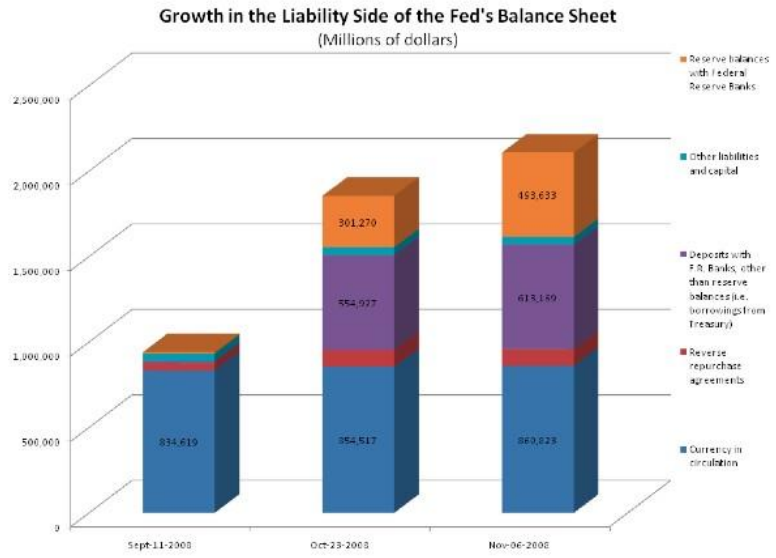

Fig. 9

Under normal circumstances, such a massive and sudden monetary expansion would bring both high inflation and great seigniorage. However, these are not normal circumstances, and so far we have seen neither. Whether the Fed's actions will ultimately bring inflation or not is still an open question that

141 The source for Figure 9 is Federal Reserve System, Board of Governors, weekly Statistical Release H.4.1. *See* FED. RESERVE, STATISTICAL RELEASE H.4.1: FACTORS AFFECTING RESERVE BALANCES, http://www.federalreserve.gov/releases/h41/. *See also* posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entries/61061.html (Feb. 2, 2009, 12:53 EST) and posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entries/60613.html (Jan. 26, 2009, 12:15 EST).

142 James Hamilton, *Federal Reserve Balance Sheet*, ECONOBROWSER, http://www.econbrowser.com/archives/2008/12/federal_reserve_1.html (12/21/08).

143 *See* FED. RESERVE, STATISTICAL RELEASE H.4.1: FACTORS AFFECTING RESERVE BALANCES OF DEPOSITORY INSTITUTIONS AND CONDITION STATEMENT OF FEDERAL RESERVE BANKS (Feb. 12, 2009).

depends largely on its ability to reverse course as the new money begins to circulate throughout the economy. However, a virtually unnoticed change in the Fed's operations ensures that its actions will not contribute much seigniorage to federal finance. Buried within the bailout bill enacted on October 3, 2008, setting up the Troubled Asset Relief Program (TARP), was a provision permitting the Fed to pay interest on bank reserves.[144] The Fed did so, and currently the interest that banks earn on their reserves is set at the Fed's target interest rate for Federal funds.[145]

This seemingly technical change not only gives banks an incentive to just hold reserves rather than loan them out—thereby dampening increases in bank created money and in the price level—but it also essentially converts reserves into more government debt.[146] Paper fiat money, whether in the form of Greenbacks or Federal Reserve notes, earns no interest and therefore allows the government to purchase real resources without incurring any future tax liability.[147] Currency and coin will continue to earn no interest and therefore be a minor source of government seigniorage.[148] But with the Fed having to divert potential government revenue to pay interest on the base money held by banks, seigniorage, already trivial, has virtually been eliminated as a source of future funding.[149] And this constraint will become tighter as the general public continues to replace its use of currency with reliance upon bank debit cards and other forms of electronic fund transfers.[150]

In short, the U.S. government is now virtually confined to only two sources of revenue: (1) current taxes and (2) borrowing, which represents future taxes. Furthermore, this restriction arises at a moment when government expenditures are programmed to soar upward.[151] Even before the current financial crisis, the aging of the baby boomers portended unprecedented

144 Press Release, Federal Reserve (Oct. 6, 2008).

145 *Id.;* Press Release, Federal Reserve (Dec. 16, 2008).

146 Posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entires/58090.html (Oct. 25, 2008, 18:10 EST).

147 *Id.*

148 *Id.*

149 *Id.*

150 Posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entries/58090.html (Dec. 10, 2008, 21:27 EST); Posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entries/56095.html (October 25, 2008, 18:10 EST); Posting of Jeffrey Rogers Hummel to Liberty & Power Group Blog, http://hnn.us/blogs/entries/55621.html (Oct. 13, 2008, 22:49 EST).

151 Press Release, The White House, White House Releases State by State Numbers; American Recovery and Reinvestment Act to Save or Create 3.5 Million Jobs (Feb. 17, 2009).

increases in Social Security and Medicare.[152] Now add to that a $700 billion TARP, President Barack Obama's nearly $800 fiscal stimulus, plus whatever additional money Congress appropriates for further financial bailouts.[153] Federal expenditures could therefore realistically rise from a little over one-fifth of GDP to over one-third within a single year. Some of these expenditures, particularly the TARP, will supposedly be reversed after the financial crisis is over.[154] But others will surely join social insurance in permanently ratcheting up the total.

Before jumping too hastily to the conclusion that Bourne's maxim has become obsolete—with financial crises now replacing war as the health of the State—recall the 20-percent-of-GDP ceiling on total federal tax receipts that has proved binding for over half a century. The barrier may only be breachable during a truly major war, such as the Civil War or World War II, and even during the height of World War II, when the proportion of federal tax revenue was at its highest for all of U.S. history, it never reached even 25 percent of GDP.[155] The prospects are therefore sobering. Everyone knows that there is a limit to how much debt an individual or institution can pile on if future income is rigidly fixed.

Although many governments around the world have experienced sovereign defaults, U.S. Treasury securities have long been considered entirely risk free.[156] Yet that may be changing already. Economists have started considering a possible Treasury default, while the business news media and investment rating agencies have begun openly discussing a potential risk premium on the interest rate that the U.S. government must pay.[157] The premiums of the much (and unfairly) maligned credit default swaps recently raised the probability of a U.S. Treasury default from a 1 percent chance over the next 10 years to a 6 percent chance.[158] The market for credit default swaps prices the default risk on the bonds of some

152 Ronald Lee & Jonathan Skinner, *Will Aging Baby Boomers Bust the Federal Budget?,* 13 J. ECON. PERSP. 117, 117 (1999).

153 Press Release, The White House, White House Releases State by State Numbers; American Recovery and Reinvestment Act to Save or Create 3.5 Million Jobs (Feb. 17, 2009).

154 H.R. 1424, 110th Cong. (2008) (enacted).

155 Press Release, Republican Policy Committee, Tax Overpayment Causes Record Tax Burden (Feb. 6, 2001).

156 Greg Ip, *We're Borrowing Like Mad. Can the U.S. Pay* It Back? WASH. POST, Jan. 11, 2009 at B1.

157 *Id.* and Laurence J. Kotlikoff, *The Emperor's Dangerous Clothes,* 5 THE ECONOMISTS' VOICE article 3 (2008), http://www.bepress.com/ev/vol5/iss2/art3/.

158 *Id.*

European governments still higher.[159] War, not only the health of the State, can of course bring about the demise of a State, as the Confederate example reminds us.[160] We can only begin to wonder whether fiscal crises will bring the demise of the modern welfare State.

159 Jonathan Tirone & Zoe Schneeweiss, *Austria Default Risk Passes Italy's as East Bet Sours (Update 1)* BLOOMBERG (March 5, 2009), http://www.bloomberg.com/apps/news?pid=20601095&refer=east_europe&sid=av0_TxrNeFvg.

160 Lieutenant Colonel H. Wayne Elliott, *Book Reviews: A Government of Our Own*, 148 MIL. L. REV. 281 (1995).

Trading Civil Liberties for Apparent Security is a Bad Deal

Marjorie Cohn[*]

Framing the discussion as a tradeoff between civil liberties and security creates a false distinction. This discourse is not new in the United States. Benjamin Franklin warned, "[t]hey who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."[1] Throughout our history, we have grappled with this apparent tension.

Unfortunately, all too often, we have lost our liberties—with no tangible benefit. It has been primarily the executive branch that has overreached beyond the lines that separate our three branches of government. Under the guise of his "Global War on Terror,"[2] former president George W. Bush arrogated to himself a level of presidential authority that violated the Constitution and made us less safe.

As U.S. military leaders said, the two things that have posed the biggest threat to our soldiers in Iraq are Abu Ghraib and Guantánamo, which have served as recruitment tools[3] and have become the symbols of American cruelty and hypocrisy.

I. LINCOLN'S SUSPENSION OF CIVIL LIBERTIES

President Abraham Lincoln also put civil liberties on hold in an effort to preserve the Union when he suspended the writ of habeas corpus without Congressional approval after anti-Union

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1 BENJAMIN FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (1818).

2 Mr. Bush's "war on terror," widely accepted as a real war, is a misnomer. Although there are terrorists who seek to do us harm, terrorism is a tactic, not an enemy; one cannot declare war on a tactic.

3 Think Progress, *Mora: Abu Ghraib and Guantanamo are 'first and second identifiable causes of U.S. combat deaths in Iraq,'* June 17, 2008, http://thinkprogress.org/2008/06/17/mora-abu-ghraib-and-guantanamo-are-first-and-second-identifiable-causes-of-us-combat-deaths-in-iraq/.

riots occurred in Baltimore.[4] But then, as now, suspension of the Great Writ was used as a tool to suppress dissent.

Lincoln ignored court orders and Congressional laws that sought to limit his power to incarcerate citizens without giving them access to courts.[5] People were arrested not for what they had done, but "for what probably would be done."[6] Lincoln said arrestees would include the "man who stands by and says nothing when the peril of his Government is discussed," or one who "talks ambiguously—talks for his country with 'buts' and 'ifs' and 'ands.'"[7]

Lincoln also imposed martial law and used military force in areas of the North where there was strong Confederate sympathy.[8] In violation of Congressional legislation, Lincoln authorized military trials, convictions and punishment of civilians who were accused of aiding the South.[9] Tens of thousands were arrested by military authorities and several thousand were tried by military commissions even though civil courts were functioning.[10] In *Ex parte Milligan*, the Supreme Court declared military trials of civilians, where civil courts were available, to be unconstitutional.[11]

Many Northerners suspected of treason were tortured and some were handcuffed and suspended by their wrists.[12] Water torture was routinely used and people were doused with strong streams of water until their skin broke.[13]

As historian James G. Randall said, "No president has carried the power of presidential edict and executive order (independently of Congress) so far as [Lincoln] did . . . It would

4 *See* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 716 (2009) (discussing Lincoln's suspension of habeas corpus); *see generally* Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal For Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 57 (2008) (further discussing Congressional reaction to Lincoln's suspension of habeas corpus following pro-secession riots in Baltimore).

5 Michael Kent Curtis, *Lincoln, the Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 ME. L. REV. 1, 3 (2007).

6 *Cf.* Abraham Lincoln, To Erastus Corning and Others, *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865 458 (1989).

7 *Id.*

8 Norman W. Spaulding, *The Discourse of Law in the Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2054 (2005).

9 Curtis, *supra* note 5, at 12.

10 *NPR All Things Considered: Analysis: Suspension of civil liberties during wartime*, (NPR News radio broadcast, Nov. 16, 2001).

11 Ex parte Milligan, 71 U.S. 107 (1866).

12 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 442 (David S. Heidler & Jeanne T. Heidler, eds., 2000).

13 *Id.* at 442–43.

not be easy to state what Lincoln conceived to be the limit of his powers."[14]

But while Lincoln rationalized his usurpation of power as a temporary remedy, expecting an early end to the conflict—he called it medicine prescribed during an illness—Bush's "war on terror,"[15] on the other hand, is slated to last for years, perhaps forever.

The danger of presidential overreaching was anticipated by the Founding Fathers. James Madison, in The Federalist No. 27, wrote: "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[16]

Former Attorney General John Ashcroft painted the defenders of civil liberties as anti-American fear-mongers when he said on December 6, 2001, "[t]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists - for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends."[17]

II. THE U.S. GOVERNMENT'S HISTORY OF SUPPRESSION OF CRITICISM

But surveillance in this country has historically been aimed at slaves, immigrants, political radicals, suspected lawbreakers, the poor, workers, and anyone with a credit card or a computer. It has frequently been used by the government to stifle criticism of its policies.

In 1798, capitalizing on the fear of war, the Federalist-led Congress passed the four Alien and Sedition Acts to suppress dissent against the Federalist Party's political agenda.[18] The Naturalization Act extended the time necessary for immigrants to reside in the United States because most immigrants sympathized with the Republicans.[19] The Alien Enemies Act provided for the arrest, detention and deportation of citizens of any foreign nation at war with the United States.[20] Many of the 25,000 French citizens living in the U.S. could have been expelled had France and America gone to war, but this law was never

14 J. G. RANDALL, LINCOLN THE LIBERAL STATESMAN 123 (1947).

15 Curtis, *supra* note 5, at 8.

16 THE FEDERALIST NO. 47, at 261 (James Madison) (J.R. Pole ed., 2005).

17 *Anti-Terrorism Policy Review: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2001) (testimony of Attorney General John Ashcroft).

18 Curtis, *supra* note 5, at 15, 27.

19 GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 30 (2004).

20 *Id*. at 30.

used. The Alien Friends Act authorized the deportation of any non-citizen suspected of endangering the security of the U.S. government;[21] the law lasted only two years and no one was deported under it.[22]

The Sedition Act carried criminal penalties for any person who spoke, wrote, printed or published anything "false, scandalous and malicious" with the intent to hold the government in "contempt or disrepute."[23] The Federalists claimed it was necessary to suppress criticism of the government in wartime.[24] The Republicans objected that the Sedition Act violated the First Amendment, which had become part of the Constitution seven years earlier.[25] The Act was employed exclusively against Republicans.[26] It was used to target newspaper editors and congressmen who criticized President John Adams.[27] One Federalist leader wrote that the tensions with France could provide "a glorious opportunity to destroy faction," that is, the Jeffersonian party.[28]

According to Professor Michael Kurt Curtis, "[m]ilitary suppression of reactionary, anti-war speech during the Civil War may well have paved the way for civil suppression of socialist and other anti-war speech during World War I."[29]

Subsequent examples of repressive legislation passed and actions taken as a result of fear-mongering during periods of xenophobia are the Espionage Act of 1917,[30] the Sedition Act of 1918,[31] the Red Scare following World War I,[32] the forcible internment of people of Japanese descent during World War II,[33] and the Alien Registration Act of 1940 (the Smith Act).[34]

During the McCarthy period of the 1950s, in an effort to eradicate the perceived threat of communism, the government engaged in widespread illegal surveillance to threaten and

21 *Id.* at 30–31.
22 *Id.* at 33; Alien Friends Act, 1 Stat. 570, 572 (1798).
23 STONE, *supra* note 19, at 36.
24 *Id.* at 37.
25 *Id.* at 39.
26 *Id.* at 46–48.
27 *Id.*
28 Curtis, *supra* note 5, at 27.
29 Curtis, *supra* note 5, at 30.
30 Espionage Act, ch. 30, 40 Stat. 217 (1917); STONE, *supra* note 19, at 12.
31 STONE, *supra* note 19, at 12
32 *Id.* at 220–26.
33 *Id.* at 286–87.
34 Alien Registration (Smith) Act, ch. 439, 54 Stat. 670 (1940); STONE, *supra* note 19, at 251–52.

silence anyone who had an unorthodox political viewpoint.[35] Many people were jailed, blacklisted and lost their jobs.[36] Thousands of lives were shattered as the FBI engaged in "red-baiting."[37]

COINTELPRO (counter-intelligence program) was designed to "expose, disrupt and otherwise neutralize" activist and political groups.[38] In the 1960s, the FBI targeted Dr. Martin Luther King Jr. in a program called "Racial Matters."[39] King's campaign to register African-American voters in the South raised the hackles of FBI director J. Edgar Hoover, who disingenuously said King's organization was being infiltrated by communists.[40] In fact, the FBI was really concerned that King's civil rights and anti-Vietnam War campaigns "represented a clear threat to the established order of the U.S."[41] The FBI wiretapped King's telephones, securing personal information which it used to try to discredit him and drive him to divorce and suicide.[42]

In response to the excesses of COINTELPRO, a congressional committee chaired by Senator Frank Church conducted an investigation of activities of the domestic intelligence agencies.[43] The Church Committee concluded that "intelligence activities have undermined the constitutional rights of citizens and . . . they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."[44] The committee added, "[i]n an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward 'big brother government' . . . . Here, there is no sovereign who stands above the law. Each of us, from presidents to the most disadvantaged citizen, must obey the law."[45] The

35 ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 208 (1998).

36 *Id.* at 211.

37 *See* Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 893 (1998) (referring to the "red-baiting fever of the 1950s").

38 STONE, *supra* note 19, at 494; *see generally id.* at 491–97 (for a broad overview of COINTELPRO).

39 KENNETH O'REILLY, RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA 1960–1972, at 125–26 (1991).

40 *Id.* at 127–28.

41 Dorothy Ehrlich, *Taking Liberties: The Growing Scope of Government Power,* L.A. DAILY J., Feb. 26, 2002.

42 O'REILLY, *supra* note 39, at 136.

43 STONE, *supra* note 19, at 495–96.

44 Intelligence Activities and the Rights of Americans, Final Report of the Senate Committee to Study Governmental Operations with respect to Intelligence Activities, Book II (1976), http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIId.htm.

45 *Id.*

committee stressed that the "advocacy of political ideas is not to be the basis for governmental surveillance."[46]

III. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Congress established guidelines to govern intelligence-gathering by the FBI.[47] Reacting against President Richard Nixon's assertion of unchecked presidential power, Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to regulate electronic surveillance while protecting national security.[48]

FISA established a secret court to consider applications by the government for wiretap orders.[49] It specifically created only one exception for the President to conduct electronic surveillance without a warrant.[50] For that exception to apply, the Attorney General must certify under oath that the communications to be monitored will be exclusively between foreign powers, and that there is no substantial likelihood that a United States person will be overheard.[51]

The FISA court rarely denied a wiretap request by the executive.[52] But in 2002, in direct violation of FISA and the Fourth Amendment, Bush signed an executive order establishing his Terrorist Surveillance Program.[53] It authorized the National Security Agency to wiretap people within the United States with no judicial review.[54] The NSA has eavesdropped on untold numbers of private conversations.[55] It has combed through large volumes of telephone and Internet communications flowing into and out of the United States, collecting vast personal information that has nothing to do with national security.[56] Whistleblower Russell Tice, a former U.S. intelligence analyst, recently said

46 *Id.*

47 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–63 (2006)).

48 *Id.*

49 50 U.S.C. § 1803.

50 50 U.S.C. § 1802.

51 *Id.*

52 Electronic Privacy Information Center, Foreign Intelligence Surveillance Orders 1979-2007, *available at* http://epic.org/privacy/wiretap/stats/fisa_stats.html; Protect America Act of 2007 (Terrorist Surveillance Program), Pub. L. No. 110-55, 121 Stat. 552 (2007).

53 Exec. Order No. 13260, 67 Fed. Reg. 55 (March 19, 2002).

54 ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 1 (2006), http://www.fas.org/sgp/crs/intel/m010506.pdf. *See generally* STONE, *supra* note 19, at 552, for examples of the Bush administration's surveillance tactics.

55 *See* BAZAN & ELSEA, *supra* note 54, at 2.

56 STONE, *supra* note 19, at 552.

that most journalists in the U.S. have been subjected to surveillance.[57]

Electronic surveillance was first used during the Holocaust when IBM worked for the Nazi government organizing and analyzing its census data.[58] Death camp barcodes—linked to computerized records—were tattooed onto prisoners' forearms.[59]

The advent of digital technology has raised surveillance to a new level. Social Security numbers, credit cards, gym memberships, library cards, health insurance records, bar codes, GSM chips in cell phones, toll booths, hidden cameras, workplace identification badges, and the Internet all provide the government with effective tools to keep track of our finances, our politics, our personal habits, and our whereabouts through data mining.[60] The Privacy Foundation determined in a 2001 survey that one-third of all American workers who use the Internet or email on the job are under "constant surveillance" by employers.[61]

IV. CIVIL LIBERTIES SUPPRESSION AFTER 9/11

One month after the terrorist attacks of September 11, 2001, Ashcroft rushed the USA Patriot Act through a timid Congress.[62] The Act lowered the standards for government surveillance of telephone and computer communications, and placed in effect, "an FBI agent behind every mailbox."[63] It created a crime of domestic terrorism targeting political activists who protest government policies, which was so broadly defined as to include even environmental and animal rights groups.[64]

After September 11, 2001, hundreds of people of color, particularly those of Middle Eastern descent, were detained in U.S. prisons.[65] Most were suspected of no crime or connection to the events of 9/11; yet they were held incommunicado, in

57 Kim Zetter, *Whistleblower: NSA Targeted Journalists, Snooped on All U.S. Communications*, WIRED BLOG NETWORK, http://www.wired.com/threatlevel/2009/01/nsa-whistleblow-2/.

58 EDWIN BLACK, IBM AND THE HOLOCAUST, 46–47 (2001).

59 *Id.* at 352.

60 AMERICAN CIVIL LIBERTIES UNION, AMERICA'S SURVEILLANCE SOCIETY (2008) http://www.aclu.org/safefree/spying/37802res20081118.html.

61 Editorial, *Closely Watched Judges: Judicial Spat Highlights Workplace Privacy*, SACRAMENTO BEE, Sept. 11, 2001, at B6.

62 STONE, *supra* note 19, at 552–53; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

63 Marjorie Cohn, *Bush's War on Democracy*, TRUTHOUT, Aug. 31, 2004, http://www.uncle-scam.com/Breaking/aug-04/to-8-31.pdf [hereinafter Cohn, *Bush's War*].

64 *Id.*

65 *News in Brief*, N.Y.L.J., Mar. 2, 2006, at 1.

indefinite, preventive detention, many subjected to abusive treatment, in violation of the Constitution.[66]

Rabih Haddad, a Lebanese immigrant, described the conditions of his confinement.[67] Strangely reminiscent of the prisoners in Guantánamo, he described his 6' by 9' solitary cell, the camera permanently fixed on him, his lack of exercise, and "waves of cockroaches" in his cell at night.[68]

These roundups were evocative of our government's excesses during World War II, when it interned thousands of Japanese-Americans, in a shameful and racist overreaction.[69] In 1944, the Supreme Court upheld the legality of the Japanese internment in *Korematsu v. United States*.[70] But Justice Robert Jackson warned in his dissent that the ruling would "lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[71]

That day came with the decision of a New York federal judge, dismissing a case that challenged the detention of hundreds of Arab and Muslim foreign nationals shortly after 9/11.[72] None was convicted of any crime involving terrorism.[73] U.S. District Judge John Gleeson ruled in *Turkmen v. Ashcroft* that the round-up and indefinite detention of foreign nationals on immigration charges based only on their race, religion or national origin did not violate equal protection or due process.[74] This is not surprising in light of the anti-immigrant hysteria sweeping our country today.[75]

Three developments on Bush's watch had a chilling effect on protected First Amendment activity: 1) the shift from reactive to preemptive law enforcement; 2) the enactment of domestic anti-terrorism laws; and 3) the relaxation of FBI guidelines on surveillance of Americans.[76]

66 *Id.*

67 Letter from Rabih Haddad to Mr. Thayer (Jan. 27, 2002), http://www.aila.org/content/default.aspx?docid=2051.

68 *Id.*

69 Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States: *A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37 (2003).

70 Korematsu v. United States, 323 U.S. 214 (1944); *see also* Serrano & Minami, *supra* note 69, at 37.

71 *Korematsu*, 323 U.S. at 246.

72 Turkmen v. Ashcroft, WL 1662663, at *1 (E.D. N.Y. 2006).

73 *See id.*

74 *Id.*

75 Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377 (2006).

76 Cohn, *Bush's War*, *supra* note 63.

Like Bush's "preemptive" or "preventive" war strategy, which led us into Iraq in violation of the United Nations Charter, law enforcement in the United States moved from reaction to "preemption," in violation of the Constitution.[77]

Collective preemptive punishment against those who seek to exercise their First Amendment rights has taken several forms: content-based permits, where permission to protest is screened for political correctness; pretextual arrests in anticipation of actions that haven't yet occurred (like Lincoln); the setting of huge bails of up to $1 million for misdemeanors; the use of chemical weapons; and the employment of less lethal rounds fired without provocation into crowds. Protestors were painted by the government and the mainstream media as violent lawbreakers.[78]

In his 1928 dissent in *Olmstead v. United States*, Justice Louis Brandeis cautioned, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[79] Seventy-three years later, former White House spokesman Ari Fleischer warned Americans that "they need to watch what they say, watch what they do."[80]

Milton Mayer and a colleague discussed the escalation of surveillance that accompanied the rise of German fascism:

> what happened here was the gradual habituation of the people, little by little, to being governed by surprise; to receiving decisions deliberated in secret; to believing that the situation was so complicated that the government had to act on information which the people could not understand, or so dangerous that, even if people could understand it, it could not be released because of national security.[81]

V. A POLICY OF TORTURE

For more than seven years, pursuant to Bush's "war on terror," the U.S. government has held up to 800 foreign-born men and boys prisoner at Guantánamo Bay, Cuba.[82] No charges have been filed against most of them, and, until the Supreme Court

77 *Id.*

78 *Id.*

79 Olmstead v. United States**,** 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

80 Lisa de Moraes, *WJLA Pulls a "PI" a Second Time*, WASH. POST, Sept. 28, 2001, at C7.

81 MILTON MAYER, THEY THOUGHT THEY WERE FREE, THE GERMANS, 1933–1945, at 166 (1966).

82 National Public Radio, *Q&A About Guantanamo Bay and the Detainees*, http://www.npr.org/templates/story/story.php?storyId=4715916.

decided *Boumediene v. Bush*,[83] all had been denied access to any court to challenge their confinement.[84]

Prisoners released from Guantánamo report being tortured.[85] They describe assaults, prolonged shackling in uncomfortable positions and sexual abuse.[86] There are reports of prisoners being pepper-sprayed in the face until they vomited, fingers being poked into their eyes, and their heads being forced into the toilet pan and flushed.[87] Prisoners who engaged in hunger strikes were brutally force-fed, a practice the United Nations Human Rights Commissions called "torture."[88] Dozens of videotapes of American guards brutally attacking prisoners are reportedly catalogued and stored at the Guantánamo prison.[89] Thirty-two attempted suicides took place in an 18-month period.[90]

As evidence of torture leaked out of Abu Ghraib prison, a Guantánamo-Iraq torture connection was revealed.[91] General Geoffrey Miller, implicated in setting torture policies in Iraq, had been transferred from Guantánamo to Abu Ghraib specifically to institute the same harsh interrogation procedures he had put in place at Guantánamo.[92]

The interrogation policy that permitted torture and abuse came from the top. Former Vice-President Dick Cheney recently admitted that he authorized waterboarding.[93] It is well-established that waterboarding constitutes torture.[94] Torture is considered a war crime under the U.S. War Crimes Act.[95] Bush's National Security Council's Principals Committee, consisting of

83 Boumediene v. Bush, 128 S.Ct. 2229 (2008).

84 *Id.* at 2240–45.

85 Jessica Azulay, *Guantanamo Abuses Caught on Tape, Report Details*, Feb. 2, 2005, http://newstandardnews.net/content/index.cfm/items/1430.

86 *Id.*

87 *Id.*

88 Marjorie Cohn, *US Force-feeding Prisoners in Torture Camp*, Feb. 19, 2006, http://marjoriecohn.com/2006/02/us-force-feeding-prisoners-in-torture.html.

89 David Rose, *They Tied Me Up Like A Beast And Began Kicking Me*, THE OBSERVER, May 16, 2004, http://guardian.co.uk/world/2004/may/16 /terrorism.guantanamo; *British Prisoner Alleges Torture At Guantanamo*, QUEENSLAND COURIER-MAIL, May 17, 2004, at 4.

90 John Mintz, *Clashes Led to Probe of Cleric; Flare-Ups Over Muslim Prisoners' Treatment in Cuba Are Cited*, WASH. POST, Oct. 24, 2003, at. A9.

91 Rose, *supra* note 89.

92 Biography of Major General Geoffrey Miller, Torturing Democracy, http:// www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/geoffrey_miller.html.

93 ABC News: Cheney Defense Hard Line Tactics (ABC Television broadcast, Dec. 16, 2008, transcript available at http://abcnews.go.com/Politics/ Story?id=6464697&page=1).

94 Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, August 2008, *available at* http://www.vanityfair.com/politics/features/2008/08/hitchens200808.

95 18 U.S.C. § 2441 (2006).

Vice-President Cheney, National Security Adviser Condoleezza Rice, CIA Director George Tenet, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and Secretary of State Colin Powell, participated in the sanctioning of "enhanced interrogation techniques"; Bush admitted that he approved.[96] Lawyers from the Department of Justice's Office of Legal Counsel rewrote our laws on torture to facilitate the commission of war crimes and immunize Team Bush from prosecution.[97]

Those who carried out the torture and abuse did so in secret, accountable to no court or public scrutiny.[98] Guantánamo was, according to a spokeswoman from the International Committee of the Red Cross, "a legal black hole."[99]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a treaty the United States has ratified which makes it U.S. law under the Constitution's Supremacy Clause, declares, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[100] Its language is unequivocal. Furthermore, torture doesn't work. The person being tortured will say anything to make the torture stop; his information is unreliable.[101]

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96 Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisers' Interrogation Talks. President Says He Knew His Senior Advisers Discussed Tough Interrogation Methods*, ABC NEWS, Apr. 11, 2008, *available at* http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175. At one meeting, Ashcroft asked aloud, "Why are we talking about this in the White House? History will not judge this kindly." *Id.*

97 Memorandum from the U.S. Dep't of Justice, Office of the Assistant Attorney General to Alberto R. Gonzales (August 1, 2002) (http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf); Memorandum from the U.S. Dep't of Justice, Office of the Deputy Assistant Attorney General to William J. Haynes II, General Counsel of the Dep't of Defense (March 14, 2003) (http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf). *See also Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong., 2d sess., 64–65 (2008) (statement of Marjorie Cohn).

98 Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L., POL'Y AND ETHICS J. 127, 129–36 (2006) (discussing the secrecy surrounding the detentions at Guantanamo).

99 Scott Higham, *No Welcome in Guantanamo as Rights Groups Land*, WASH. POST, Aug. 24, 2004, at A5.

100 G.A. Res. 39/46, U.N. Doc. A/RES/39/46, Art. 2(2) (Dec. 10, 1984).

101 *See* Donald P. Gregg, *Speaking With The Enemy*, N.Y. TIMES, Feb. 8, 2009, at WK11.

VI. THE SLIPPERY SLOPE OF RENDITION

Maher Arar, a Canadian born in Syria, was apprehended by U.S. authorities in New York on September 26, 2002, and transported to Syria, where he was brutally tortured for months.[102] Arar used an Arabic expression to describe the pain he experienced: "you forget the milk that you have been fed from the breast of your mother."[103] The Canadian government later exonerated Arar of any terrorist ties.[104] Arar was a victim of *extraordinary rendition*, where a person is transferred to a country where he will be tortured.

President Barack Obama signed Executive Order 13491, which established a special task force to:

> study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.[105]

Obama's order prohibits extraordinary rendition.[106] The order also ensures humane treatment of persons in U.S. custody or control.[107] But it does not specifically guarantee that prisoners the United States renders to other countries will be free from cruel, inhuman or degrading treatment that does not amount to torture. It does, however, aim to ensure that our government's practice of transferring people to other countries complies with U.S. laws and policies, including our obligations under international law.

One of those laws is the International Covenant on Civil and Political Rights (ICCPR),[108] a treaty the United States ratified in 1992.[109] Article 7 of the ICCPR prohibits the States Parties from subjecting persons "to torture or to cruel, inhuman or degrading treatment or punishment."[110] The Human Rights Committee,

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102 *See* Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106.

103 *Id.*

104 *See* Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1.

105 Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

106 *See id.*

107 *Id.*

108 International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR Supp., No. 16, U.N. Doc. A/6316 (1966).

109 Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 488–89 (2009).

110 G.A. Res. 2200A, *supra* note 108, at 53.

which is the body that monitors the ICCPR, has interpreted that prohibition to forbid States Parties from exposing "individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[111]

Executive Order 13491 also mandates, "The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future."[112] The order does not define "expeditiously," however, and the definitional section of the order says that the terms "detention facilities" and "detention facility" "do not refer to facilities used only to hold people on a short-term, transitory basis."[113] Once again, "short term" and "transitory" are not defined.

In his confirmation hearing, Attorney General Eric Holder categorically stated that the United States should not turn over an individual to a country where we have reason to believe he will be tortured.[114] Leon Panetta, nominee for CIA director, went further and interpreted Executive Order 13491 as forbidding "that kind of extraordinary rendition, where we send someone for the purposes of torture or for actions by another country that violate our human values."[115]

But alarmingly, Panetta appeared to champion the same standard used by the Bush administration, which reportedly engaged in extraordinary rendition 100 to 150 times as of March 2005.[116] After September 11, 2001, President Bush issued a classified directive that expanded the CIA's authority to render terrorist suspects to other States.[117] Former Attorney General Alberto Gonzales said the CIA and the State Department received assurances that prisoners would be treated humanely.[118]

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111 Human Rights Committee, General Comment 20, Article 7, UN Doc. A/47/40 (1992) *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 31 (1994) (emphasis added).

112 Exec. Order No. 13491, *supra* note 105, at 4894.

113 *Id.* at 4893.

114 Transcript of Senate Confirmation Hearings of Eric Holder, Day One, Jan. 16, 2009, http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html.

115 *See* Randall Mikkelsen, *Obama CIA Pick Backtracks on "Torture" Charge*, NEWSDAILY, Feb. 6, 2009, http://www.newsdaily.com/stories/tre5147ta-us-obama-cia-panetta/.

116 *See* Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 14.

117 *Id.*

118 *See* Human Rights Watch, *Developments Regarding Diplomatic Assurances Since April 2004,* (April 14, 2005), http://hrw.org/reports/2005/eca0405/5.htm. The Committee against Torture, which administers the Convention against Torture and Other Cruel,

"I will seek the same kinds of assurances that they will not be treated inhumanely," Panetta told the senators at his confirmation hearing.[119]

Gonzales had admitted, however, "[w]e can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us [sic] . . . . If you're asking me, 'Does a country always comply?' I don't have an answer to that."[120]

The answer to that question is no. Maher Arar's case is apparently the tip of the iceberg. Thirteen CIA operatives were arrested in Italy for kidnapping an Egyptian, Abu Omar, in Milan and transporting him to Cairo where he was tortured.[121] Binyam Mohamed, an Ethiopian residing in Britain, said he was tortured after being rendered to Morocco by the U.S. government.[122] In Mohamed's case, two British justices accused the Bush administration of pressuring the British government to "block the release of evidence that was relevant to allegations of torture" of Mohamed.[123] The Obama White House issued a statement in which it "thanked the UK government for its continued commitment to protect sensitive national security information."[124]

Panetta made clear that the CIA will continue to engage in rendition to detain and interrogate terrorism suspects and transfer them to other countries.[125] "If we capture a high-value prisoner," he said, "I believe we have the right to hold that

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Inhuman and Degrading Treatment or Punishment, which the United States has ratified, recommended to the United States in 2006 that it:

> [S]hould only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.

Conclusions and Recommendations of the Committee Against Torture, (July 25, 2006), http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf.

119 *See* Greg Miller, *Panetta May Consider Some Harsh Methods*, L.A. TIMES, Feb. 7, 2009.

120 Human Rights Watch, *supra* note 118.

121 *See* Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operatives,* L.A. TIMES, June 25, 2005, at A1.

122 *See* Julie Sell, *U.S. Stand on Guantanamo Documents Angers British*, MCCLATCHY NEWSPAPERS, Feb. 5, 2009, http://www.mcclatchydc.com/homepage/story/61625.html.

123 *Id.*

124 *No Torture Pressure—Miliband*, BBC NEWS, Feb. 5, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/7870896.stm.

125 *See* Greg Miller, *Panetta Says Waterboarding is Torture,* L.A. TIMES, Feb. 6, 2009, at A12.

individual temporarily to be able to debrief that individual and make sure that individual is properly incarcerated[.]"[126] He provided no clarification of how long "temporarily" is or what "debrief" would mean.

When Senator Christopher Bond (R-Mo.) asked about the Clinton administration's use of the CIA to transfer prisoners to countries where they were later executed, Panetta replied, "I think that is an appropriate use of rendition."[127] Jane Mayer, columnist for the *New Yorker*, has documented numerous instances of extraordinary rendition during the Clinton administration, including cases in which suspects were executed in the country to which the United States had rendered them.[128] Once, when Richard Clarke, President Clinton's chief counter-terrorism adviser on the National Security Council, "proposed a snatch," Vice-President Al Gore said, "[t]hat's a no-brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."[129]

There is a slippery slope between ordinary rendition and extraordinary rendition. "Rendition has to end," Michael Ratner, president of the Center for Constitutional Rights, told Amy Goodman on *Democracy Now!*[130] "Rendition is a violation of sovereignty. It's a kidnapping. It's force and violence."[131] Ratner queried whether Cuba could enter the United States and take Luis Posada, the man responsible for blowing up a commercial Cuban airliner in 1976 and killing seventy-three people,[132] or whether the United States could go down to Cuba and kidnap Assata Shakur, who escaped a murder charge in New Jersey.[133]

Moreover, "renditions for the most part weren't very productive," a former CIA official told the *Los Angeles Times*.[134] After a prisoner was turned over to authorities in Egypt, Jordan or another country, the CIA had very little influence over how prisoners were treated and whether they were ultimately released.[135]

126 *Id.*

127 *Id.*

128 Mayer, *supra* note 102, at 109–10.

129 RICHARD A. CLARKE, AGAINST ALL ENEMIES INSIDE AMERICA'S WAR ON TERROR 144 (2004).

130 Transcript of Debate, *Despite Celebrated Orders Closing Gitmo and Banning Torture, Has Obama Kept Rendition Intact?* DEMOCRACYNOW!, Feb. 5, 2009, http://www.democracynow.org/2009/2/5/despite_celebrated_orders_closing_gitmo_and.

131 *Id.*

132 *Id.*

133 *Id.*

134 Greg Miller, *CIA Retains Power to Abduct*, L.A. TIMES, Feb. 1, 2009, at A19.

135 *Id.*

VII. THE SUPREME COURT CHECKS THE EXECUTIVE

During the Bush administration, Congress did little to check the president's usurpation of governmental power.[136] The USA Patriot Act, the authorization for Operation Iraqi Freedom, and the Military Commissions Act received very little pushback from the legislative branch.[137] It was the judicial branch that fulfilled its constitutional role to check and balance the executive.

In *Hamdi v. Rumsfeld*, the Supreme Court ruled that due process demands a U.S. citizen held in the United States as an enemy combatant is entitled to a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker.[138]

Hamdi's father, who filed the lawsuit on his son's behalf, said his 20-year-old son was traveling on his own for the first time, and because of his lack of experience, he became trapped in Afghanistan once the U.S. military campaign began.[139] Hamdi, who, according to his father, went to Afghanistan to do relief work, was there less than two months before September 11, 2001.[140] The government filed a document filled with vague generalities to support Bush's designation of Hamdi as an enemy combatant.[141]

Justice O'Connor wrote for the *Hamdi* Court: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[142] O'Connor noted, "even the war power [of the President] does not remove constitutional limitations safeguarding essential liberties."[143] O'Connor echoed a theme she has raised in prior Court decisions, which is particularly relevant today: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[144]

Instead of holding that a president cannot detain an American citizen indefinitely, the Court set forth a balancing test

136 Charlie Savage, *Three Democrats Slam President Over Defying Statutes*, BOSTON GLOBE, May 2, 2006, at A2.

137 *See* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 823 (2007).

138 Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

139 *Id.* at 511–12.

140 *Id.* at 511.

141 *Id.* at 512–13.

142 *Id.* at 536.

143 *Id.* (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426(1934)).

144 *Id.* at 532.

for determining whether a president's designation as an enemy combatant will be upheld.[145] Henceforth, a court reviewing a claim will weigh the private interest of the detained citizen against the governmental interest in determining whether to sustain an enemy combatant designation.[146]

O'Connor made clear that detentions of U.S. citizens must be limited to the Afghanistan context; they are not authorized for the broader "war on terrorism."[147] She acknowledged that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[148]

Justice Souter wrote a concurring opinion, noting that the USA Patriot Act authorizes the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings.[149] Congress, therefore, would require the government to clearly justify its detention of an American citizen held on home soil incommunicado.[150]

Interestingly, Justice Scalia, in his dissenting opinion joined by Justice Stevens, would not permit the indefinite detention of an American citizen in Hamdi's situation.[151] They would require the government to press criminal charges or release the individual, unless Congress were to suspend the writ of habeas corpus.[152] "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal," according to Scalia.[153]

Only Justice Thomas held out for blind deference to the President: "This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."[154]

In *Hamdan v. Rumsfeld*, the Supreme Court struck down the military commissions that Bush and Rumsfeld had established because they violated the Uniform Code of Military Justice and

145 *Id.* at 528–29.
146 *Id.*
147 *Id.* at 520–21.
148 *Id.* at 530.
149 *Id.* at 551 (Souter, J., concurring).
150 *Id.*
151 *Id.* at 554–55 (Scalia, J., dissenting).
152 *Id.* at 554.
153 *Id.* at 568.
154 *Id.* at 579 (Thomas, J., dissenting).

the Geneva Conventions.[155] The Court affirmed that there are no gaps in the Geneva Conventions[156]—everyone must be given due process and treated humanely.

In 2008, the Supreme Court decided *Boumediene v. Bush*, upholding habeas corpus rights for the Guantánamo detainees.[157] In a 5-4 ruling, the Court held that they have a constitutional right to habeas corpus, and that the scheme for reviewing 'enemy combatant' designations under the Combatant Status Review Tribunals is an inadequate substitute for habeas corpus.[158]

Article 1, Section 9, Clause 2 of the Constitution is known as the Suspension Clause. It reads, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[159] In section 7(a) of the Military Commissions Act of 2006, Congress purported to strip habeas rights from the Guantánamo detainees by amending the habeas corpus statute.[160] In *Boumediene*, the Court held that section of the Act to be unconstitutional, declaring that the detainees still retained the constitutional right to habeas corpus.[161]

Justice Kennedy, writing for the majority, reiterated the Court's finding in *Rasul v. Bush*,[162] that although Cuba retains technical sovereignty over Guantánamo, the United States exercises complete jurisdiction and control over its naval base and thus the Constitution protects the detainees there.[163] Kennedy rejected "the necessary implication" of Bush's position that the political branches could "govern without legal constraint" by locating a U.S. military base in a country that retained formal sovereignty over the area.[164] In his dissent, Chief Justice Roberts flippantly characterized Guantánamo as a "jurisdictionally quirky outpost."[165]

Kennedy worried that the political branches could "have the power to switch the Constitution on or off at will" which would

155 Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006) (amending 28 U.S.C. § 2241).

156 *Hamdan*, 548 U.S. at 628–33.

157 Boumediene v. Bush, 128 S.Ct. 2229, 2262 (2008).

158 *Id.* at 2275.

159 U.S. CONST. art. I, § 9, cl. 2.

160 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) (amending 28 U.S.C. § 2241).

161 *Boumediene*, 128 S.Ct. at 2275.

162 Rasul v. Bush, 542 U.S. 466, 480–84 (2004).

163 *Boumediene*, 128 S.Ct. 2251–53.

164 *Id.* at 2258–59.

165 *Id.* at 2293 (Roberts, J., dissenting).

"lead to a regime in which Congress and the President, not this Court, say 'what the law is.'"[166] "Even when the United States acts outside its borders," Kennedy wrote, "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[167]

Thus, Kennedy observed, "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."[168] Indeed, habeas corpus was one of the few individual rights the Founding Fathers wrote into the original Constitution, years before they enacted the Bill of Rights.[169]

"The test for determining the scope of [the habeas corpus] provision," Kennedy wrote, "must not be subject to manipulation by those whose power it is designed to restrain."[170] It was a Republican-controlled Congress, working hand-in-glove with Bush, that tried to strip habeas corpus rights from the Guantánamo detainees in the Military Commissions Act.[171] The Supreme Court has determined that effort to be unconstitutional. Fulfilling its constitutional duty to check and balance the other two branches, the Court has carried out its mandate to interpret the Constitution and say "what the law is."[172]

Finding that the Guantánamo detainees retained the constitutional right to habeas corpus, the Court turned to the issue of whether there was an adequate substitute for habeas review.[173] The Department of Defense established Combatant Status Review Tribunals ("CSRTs") to determine whether a detainee is an "enemy combatant."[174] These kangaroo courts provide no right to counsel, only a "personal representative," who owes no duty of confidentiality to his client and often does not

166 *Id.* at 2259 (citing Marbury v. Madison, 5 U.S. (1 Cranch 137, 177), 2 L.Ed. 60 (1803)).

167 *Id.* (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

168 *Id.*

169 U.S. CONST. art. I, § 9, cl. 2.

170 *Boumediene*, 128 S.Ct. at 2259.

171 Elizabeth M. Iglesias, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 190–91 (2008) ("[t]hrough the MCA, the Republican-controlled Congress, to a significant degree, ratified the procedures established unilaterally by the President's Military Order."); Note, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 706–07 (2007) ("[t]he Bush administration and a Republican-controlled Congress reacted quickly to the decision [in *Hamdan*] by passing a bill that established a system of military commissions . . . on October 17, 2006, the President signed into law the Military Commissions Act of 2006."); David G. Savage, *The Reach of the Writ*, 93 A.B.A. J. 24 (2007).

172 Marbury v. Madison, 5 U.S. (1 Cranch 137, 177), 2 L.Ed. 60 (1803).

173 *Boumediene*, 128 S.Ct. at 2262.

174 *Id.* at 2241.

even advocate on behalf of the detainee.[175] Some personal representatives have even argued the government's case.[176] The detainee does not have the right to see much of the evidence against him and is very limited in the evidence he can present.[177]

The CSRTs have been criticized by military participants in the process.[178] Lt. Col. Stephen Abraham, a veteran of U.S. intelligence, said they often relied on "generic" evidence and were set up to rubber-stamp the "enemy combatant" designation.[179] When he sat as a judge in one of the tribunals, Abraham and the other two judges—a colonel and a major in the Air Force— "found the information presented to lack substance" and noted that statements presented as factual "lacked even the most fundamental earmarks of objectively credible evidence."[180] After they determined there was "no factual basis" to conclude the detainee was an enemy combatant, the government pressured them to change their conclusion but they refused.[181] Abraham was never assigned to another CSRT panel.[182] Many believe that Abraham's testimony regarding the shortcomings of the CSRT's in *Boumediene*'s companion case prompted the Supreme Court to issue a rare reversal of its denial of certiorari and agree to review *Boumediene*.[183]

While the Court declined to decide whether the CSRTs satisfied due process standards, it concluded that "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact."[184] The Court then had to determine whether the procedure for judicial review of the CSRTs' "enemy combatant"

175 *See* David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 335–36 (2007); Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings – CSRT: the Modern Habeas Corpus?* 3 (Seton Hall Public Law Research Paper No. 951245), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245#.

176 *See* Denbeaux & Denbeaux, *supra* note 175, at 3, 16.

177 *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., U.S. Dep't of Def. on Order Establishing Combatant Status Review Tribunal to the Sec'y of the Navy 1–3 (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; *Boumediene*, 128 S.Ct. at 2260.

178 Reply to Opposition of Petition for Rehearing at 4, Al Odah v. United States, 128 S.Ct. 1923 (2008) (No. 06-1196).

179 *Id.* at Appendix i–iii, vii.

180 *Id.* at Appendix vi.

181 *Id.* at Appendix vii.

182 *Id.*

183 Marjorie Cohn, *Supreme Court Checks and Balances in Boumediene*, June 16, 2008, http://www.truthout.org/article/supreme-court-checks-and-balances-boumediene [hereinafter Cohn, *Checks and Balances*].

184 Boumediene v. Bush, 128 S.Ct. 2229, 2270 (2008).

designations constituted an adequate substitute for habeas corpus review.[185] Kennedy wrote:

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.[186]

But in the Detainee Treatment Act of 2005 ("DTA"),[187] Congress limited appellate review of the CSRT determinations to whether the CSRT complied with its own procedures.[188] The United States Court of Appeals for the District of Columbia Circuit had no authority to hear newly discovered evidence or make a finding that the detainee was improperly designated as an enemy combatant.[189]

The *Boumediene* Court noted that "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[190] Since the DTA's scheme for reviewing determinations of the CSRTs did not afford this authority, the Court held that the review of CSRTs was not an adequate substitute for habeas corpus and thus section 7 of the Military Commissions Act functioned as "an unconstitutional suspension of the writ."[191]

In his dissent, Justice Scalia sounded the alarm that the *Boumediene* decision "will almost certainly cause more Americans to be killed."[192] Likewise, the *Wall St. Journal* editorialized, "[w]e can say with confident horror that more Americans are likely to die as a result."[193] Their predictions, however, are not based in fact.[194]

185 *Id.*
186 *Id.*
187 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.
188 Detainee Treatment Act § 1005(e)(2)(c)(i).
189 Cohn, *Checks and Balances*, *supra* note 183.
190 *Boumediene*, 128 S.Ct. at 2271.
191 *Id.* at 2274.
192 *Id.* at 2294 (Scalia, J., dissenting).
193 Editorial, *President Kennedy*, WALL ST. J., June 13, 2008, at A14.
194 *See* Marjorie Cohn, *Scalia Cites False Information in Habeas Corpus Dissent*, (June 20, 2008) http://marjoriecohn.com/2008/06/scalia-cites-false-information-in.html.

Lakhdar Boumediene and five other Algerian detainees from Bosnia were accused of threatening to blow up an American embassy in Bosnia.[195] The Supreme Court of Bosnia and Herzegovina concluded there was no evidence to continue to detain them and ordered them released.[196] The Bosnian officials turned them over to the United States and they were transported to Guantánamo, where they languished for six years until the Supreme Court decided their case.[197]

Many of the men and boys at Guantánamo were sold as bounty to the U.S. military by the Northern Alliance or warlords for $5,000 a head.[198] Indeed, Brig. Gen. Jay Hood, the former commander at Guantánamo, admitted to the *Wall St. Journal*, "[s]ometimes we just didn't get the right folks," but innocent men remain detained there because "[n]obody wants to be the one to sign the release papers . . . [t]here is no muscle in the system."[199]

In *Boumediene,* Kennedy quoted Alexander Hamilton, who wrote in Federalist No. 84 that "arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[200]

"The laws and Constitution are designed to survive, and remain in force, in extraordinary times," Kennedy wrote.[201] "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."[202] Kennedy further elaborated:

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers . . . . Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.[203]

195 Editorial, *Their Day in Court: Guantanamo Lawyers Make the Case for a Tenet of American Law*, WASH. POST, Dec. 5, 2007, at A28.

196 *Id.*

197 *Id.*

198 Gene Lyons, Editorial, *Leaving Office Shouldn't Give Bush a Free Pass,* NEWARK STAR-LEDGER, Jan. 13, 2009, at 13.

199 Christopher Cooper, *Detention Plan,* WALL ST. J., Jan. 26, 2005, at A1, A10.

200 Boumediene v. Bush, 128 S.Ct. 2229, 2247 (quoting THE FEDERALIST NO. 84, at 512 (Clinton Rossiter, ed., 1961)).

201 *Id.* at 2277.

202 *Id.*

203 *Id.*

The Supreme Court acted as a check on the some of the worst excesses of the executive branch during the Bush administration. President Obama has begun to reverse some of the most egregious policies of his predecessor.[204] But he will be tested by the hysteria of those like Berkeley law professor John Yoo, who wrote in the January 29, 2009 *Wall Street Journal* that Obama should keep Guantánamo open, continue to hold prisoners, and even authorize waterboarding.[205]

VIII. CITIZENS' DUTY TO RESIST GOVERNMENT LAWBREAKING

Reichmarshall Hermann Goering of the Third Reich once said: "the people can always be brought to the bidding of the leaders. That is easy. All you have to do is to tell them they are being attacked, and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country."[206]

The Bush administration capitalized on the 9/11 attacks to try to maintain members of Congress and the American people in a state of fear; this enabled the White House to enact several repressive measures which did not make us safer.[207] Bush's Defense Department claimed that as many as sixty-one ex-detainees from Guantánamo had returned to the battlefield of terror.[208] That claim, however, was roundly debunked by reports from Seton Hall School of Law.[209]

It is our duty as citizens in a democracy to speak out when our government fails to live up to our principles and follow the law. We must refuse to trade our liberties for vague promises that it will protect our democracy and make us safer. The Obama administration should bring those to justice who have committed crimes; nobody is above the law. This includes the former Department of Justice lawyers such as John Yoo and Jay Bybee, who gave the Bush officials "legal" cover to commit their

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204 Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions,* WASH. POST, Nov. 9, 2008, at A16.

205 John Yoo, *Obama Made a Rash Decision on Gitmo,* WALL ST. J., Jan. 29, 2009, at A15.

206 Cal Thomas, *Nonpartisan Patriotism*, BALTIMORE SUN, July 4, 2007, at 13A.

207 Marjorie Cohn, *Spinning Fear*, Feb. 13, 2006, http://marjoriecohn.com/2006/02/spinning-fear.html.

208 Daphne Eviatar, *Those 61 Gitmo Recidivists Keep Popping Back Up…,*WASH. INDEP., Jan. 23, 2009, http://washingtonindependent.com/26969/those-61-gitmo-recidivists-keep-popping-back-up.

209 *Id.*; Mark Denbeaux et al., *Justice Scalia, the Department of Defense, and the Perpetuation of an Urban Legend: The Truth about the Alleged Recidivism of Released Guantánamo Detainees*, http://law.shu.edu/publications/guantanamoReports/urban_legend_final_63008.pdf.

crimes.[210] The U.S. government should disclose the identities, current whereabouts and fate of all persons detained by the CIA or rendered to foreign custody by the CIA since 2001. Those who ordered renditions should be prosecuted. And the special task force should recommend, and Obama should agree to, end all renditions.

We cannot gain civil rights by sacrificing civil liberties—they are not mutually exclusive. Our best bet is to uphold the rule of law.

210 *See* Marjorie Cohn, *National Lawyers Guild Calls on Boalt Hall to Dismiss Law Professor John Yoo, Whose Torture Memos Led to Commission of War Crimes*, Apr. 9, 2008, http://marjoriecohn.com/2008/04/national-lawyers-guild-calls-on-boalt.html.

Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist

*M. Katherine B. Darmer**

INTRODUCTION

> It is commonly said that we are a nation of laws, not men. And we are. But beyond the laws, we are also a nation of men and women with a common ethic. Some things are not American. Torture, for damned sure, is one of them.[1]

This essay argues that waterboarding is torture and that torture is illegal and wrong. It strikes me as unfortunate that these are really debatable propositions in 2009,[2] but we know all too well that our country has engaged in waterboarding and that prominent academics and lawyers continue to defend such tactics today.[3]

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* Professor of Law, Chapman University. I thank all of the current and former colleagues who provided helpful comments on earlier drafts. I especially thank Deepa Badrinaryana; Marisa Cianciarulo, Roman Darmer, II; Kurt Eggert, Francine Lipman; Mark Osler and Lawrence Rosenthal. Thanks are also due to the editors and staff of the Chapman Law Review.

1 Richard Cohen, *A Plunge From the Moral Heights*, *in* CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 317, 319 (M. Katherine B. Darmer, Robert M. Baird & Stuart E. Rosenbaum, eds., 2004) [hereinafter, "CIVIL LIBERTIES"].

2 More than seventy years ago, a unanimous Supreme Court held that the use of confessions extracted through torture violated the Due Process Clause. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (describing procedures used as "revolting to the sense of justice"). For a poignant discussion of the case, *see* Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996); *see also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 329–30 (2003).

3 *See, e.g.*, Thomas P. Crooker, *Torture, with Apologies*, 86 TEX. L. REV. 569 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007) and RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) as books that "eschew the practice of principle, articulating instead consequentialist apologies on behalf of official actions ranging from the suppression of dissent to the practice of torture."); *cf.* Alan M. Dershowitz, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in how a Democracy Should Make Tragic Choices*, *in* CIVIL LIBERTIES, *supra* note 1, at 189–214 (advocating availability of "torture warrants" in some situations). For a thorough critique of the "ticking bomb" scenario, *see* Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 21–28 (2008) (pointing out that reasoning is "fallacious" and has no "practical significance") and David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1444 ("in a world of uncertainty and imperfect knowledge, the ticking-

When I first read the August 1, 2002 Department of Justice Memorandum by Jay Bybee and John Yoo regarding torture,[4] my reaction was one that occurs "[t]oo often in the academy."[5] We "talk in muted voices, hushed, pseudo-intellectual whispers, unsure whether we should take a stand . . . ."[6] Despite my initial reticence, the memorandum was roundly, almost uniformly condemned in the academic community.[7] While I did join the choir of condemners, my voice was not among the early, courageous voices of criticism.[8]

Perhaps I was over-awed by the credentials of those who produced the memorandum[9] and felt enduring ties of loyalty to a Justice Department I had only recently left. Perhaps I noted

bomb scenario should not form the point of reference"). Ordinary citizens also seem willing to condone torture. *See id*. at 1425–26 (noting that "American abhorrence to torture . . . appears to have extraordinarily shallow roots" after September 11 and that support for torture "runs independent of progressive or conservative ideology."). Following this article's submission to Chapman Law Review, new allegations surfaced regarding the extent to which waterboarding had been used on particular detainees. *See* note 53, *infra*. These allegations and related subjects were topics of a debate on executive power held at Chapman University on April 21, 2009. John Yoo and John Eastman were on one side of the debate and Lawrence Rosenthal and I were on the other. *See generally* Webcast: Presidential Power Debate (Chapman University School of Law April 21, 2009) (http://www.chapman.edu/law/webcasts/). Because former Administration memoranda regarding the details of waterboarding and other interrogation techniques were released after this article was drafted, those new details are beyond the scope of this article. They will be addressed in more detail in my forthcoming article, *What Can (Should?) Be Done with Waterboarded Confessions?*.

4 Regarding the memo's authorship, *see infra* nn.27–32 and accompanying text.

5 Email from Kurt Eggert dated 3/11/09 (on file with author; sent regarding issue unrelated to torture).

6 *Id.*

7 *See*, *e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 & n.182 (2006) ("In the two years since it was leaked to the public, the Bybee Memorandum has been withered by criticism for the poor quality of its legal analysis (citing sources of criticism, including statement by Yale Law School Dean Harold Hongju Koh that it was "perhaps the most clearly erroneous legal opinion I have ever read.")); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1703–09 (2005) (analyzing memo and concluding that the quality of legal work reflected therein "is a disgrace"); Luban, *supra* note 3, at 1455 (noting "near consensus that the legal analysis in the . . . Memo was bizarre"); *cf.* Erwin Chemerinsky, *Civil Liberties and the War on Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3, 12 (2009) (calling for investigation and prosecution of Bybee, Yoo and others for war crimes).

8 As an edited book I was working on regarding civil liberties and national security went to press (*see* CIVIL LIBERTIES, *supra* note 1) the Abu Ghraib scandal came to light, as did the August 1, 2002 memorandum regarding interrogation techniques, which I included in the book more than five years ago without "weighing in" as to the memo's merits. *See id.* at 17 (describing Abu Ghraib and development regarding the memo).

9 John Yoo, who has acknowledged an important role in drafting the memorandum, is a professor of law at Berkeley and former law clerk to the Honorable Clarence Thomas. He is widely published in leading law reviews. At the time this article was drafted, Professor Yoo held a distinguished visiting professorship at Chapman University School of Law. Jay Bybee, the memorandum's signatory, is now a judge on the United States Court of Appeals for the Ninth Circuit.

that, beyond the memorandum's authors, there were other serious lawyers and academics (including at my own institution)[10] who defended the Administration as taking prudent, defensive measures. Having lived and worked in Manhattan, I was deeply affected by the tragedy of September 11[11] and was reluctant, even within the academy and far removed from real-world decision making, to be "on record" opposing any legitimate tactic that *might* make us safer. I failed to appreciate that what the Memo was defending were tactics like waterboarding.[12] I was not yet willing to believe that the Justice Department—in which I had substantial faith—was actually defending *torture*. Rather, I noted the Administration's disavowal of the Memo, assumed the Memo was not broadly representative of Administration views, and accepted the explanation that Abu Ghraib was perpetrated by a "few bad apples."[13] I was unwilling to accept the notion that the Memo reflected and sought to justify a "torture culture." The term "waterboarding" was not yet in the popular lexicon.

In the immediate aftermath of the attacks, moreover, I was fully supportive of what appeared to be appropriate law enforcement responses. I was impressed with President Bush's declaration that hate crimes against Muslims would not be tolerated and by his Administration's swift move against the perpetrators of hate crimes. Aggressive use of material witness

10 *See* David Glenn, *'Torture Memos' vs. Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), March 20, 2009, at A12 (noting that Chapman's Law School Dean John C. Eastman is one of Professor Yoo's "staunchest advocates;" "After September 11, we were in unchartered territory, Mr. Eastman says . . . . [A]nd I think John actually got it right most of the time").

11 The World Trade Center was for me, like all New York residents, both symbol and guidepost. I worked in the shadow of the towers, in lower Manhattan, as an Assistant United States Attorney for four years. In my early days in the office, respected senior colleagues were prosecuting those responsible for the first attacks on the Towers, which attacks occurred in 1993. Other colleagues became involved later in the investigation of the attacks on the U.S.S. Cole. The name Osama bin Laden was familiar to me even before September 11, and it was the first name that crossed my mind when the terrorists struck. When the towers collapsed, I felt an acute sense of "survivor's guilt." Having left Manhattan for the comparative safety of Chapman's academic halls in 1999, I listened raptly to the tales of former colleagues' stories of escape from lower Manhattan. I broke down in a faculty meeting when a cousin's wife could not at first be located in New York City on the day of the attacks. A well-respected FBI agent whom I had briefly worked with died at the Towers. Visiting Manhattan now is disorienting, with the lack of the landmark as a point of reference a constant reminder of the horror of how it was lost.

12 *See* CIVIL LIBERTIES, *supra* note 1, at 303–15 (excerpted copy of the memorandum).

13 *See* Luban, *supra* note 3, at 1452 (noting that "Abu Ghraib is not a few bad apples—it is the apple tree."); *see also* Statement of Senator Patrick Leahy on Abuse of Foreign Detainees, Oct. 1, 2004, *available at* http://leahy.senate.gov/press/200410/100104C.html (noting that the Bush Administration has maintained that the abuses that occurred at Abu Ghraib were a result of "a few bad apples").

warrants and other temporary detentions[14] struck me as prudent.

As time went on, however, unease set in, and then alarm. Those of Middle Eastern descent were targeted for questioning. Detentions at Guantanamo continued, with minimal process for detainees.[15] Even more troubling, it became plain that tactics such as waterboarding had been used by our country in interrogating suspects.[16] Those who had read the August 1, 2002 Memo with a more jaundiced view than I had were already on record with dire warnings regarding the Memo's implications.[17] Their concerns were realized.

This short essay, thus, is largely simply an acknowledgment of the important role played in this debate by voices more forceful and prescient than my own. Because the August 1, 2002 Memo and related memoranda have been so thoroughly and effectively addressed by others,[18] I will draw heavily on that work to address the question whether waterboarding is torture and then turn to a January 29, 2009 *Wall Street Journal* op-ed published by Professor John Yoo on the eve of this symposium.[19]

Professor Yoo himself has defended waterboarding quite recently. In his January 29, 2009 op-ed, for example, Yoo decried the Obama Administration's decision to terminate the CIA's "special authority to interrogate terrorists" and suggested that "coercive interrogation methods," including waterboarding, were appropriately used in the prior Administration.[20] In light of this continued debate, I believe it is important to acknowledge the

14 *See* Michael Greenberger, *Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment* 3 (Univ. of Md. Sch. of Law Research Paper No. 2004-01, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=494763.

15 *See* JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY 134–35 (2008).

16 *See*, *e.g.*, Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 CHAP. L. REV. at 623–24 (detailing abuses, including torture at both Guantanamo Bay and Abu Ghraib); *see also generally* Ernesto Hernández-López, Boumediene v. Bush *and Guantanamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117 (2009) (placing detentions at Guantanamo Bay in historical, post-colonial context).

17 *See* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 75–85, 98–100 & n.110 (2005) (discussing the torture memo controversy and noting several articles criticizing the memos).

18 *See*, *e.g.*, Waldron, *supra* note 7, at 1703–09.

19 I acknowledge the inelegance of a focused piece on waterboarding given the contemporaneity of Yoo's brief visitorship at Chapman, but with issues related to memoranda written by Yoo being addressed almost daily in the press, it is impossible to ignore them.

20 John Yoo, *Obama Made a Rash Decision on Gitmo*, WALL ST. J., Jan. 29, 2009, at A15.

extensive and thorough extant criticism of Yoo's role in developing a "torture culture" during the War on Terror.

This paper is an outgrowth of my Symposium presentation on a panel entitled *Civil Liberties for Civil Rights: Justifying Wartime Decline of Civil Liberties by a Gain of Civil Rights*, a title that reflects some ambiguity.[21] In the context of this symposium addressing wartime, however, it strikes me that those who framed this discussion had in mind that we have given up certain freedoms in order to gain more safety. Indeed, Yoo himself subscribes to this view, rejecting as "naïve" and "high-flying rhetoric" President Obama's inaugural speech statement "that we can 'reject as false the choice between our safety and our ideals.'"[22] This essay subscribes to our new president's vision, however, that holding certain ideals as sacrosanct can be done consistent with making us safer, particularly in the long run.[23] While some minor inconveniences such as longer lines at airports and greater scrutiny of luggage may have made us marginally safer, the fundamental transgressions of civil liberties that are the topic of this particular paper have not, I submit, made us more secure. Instead, they have resulted in a "plunge from the moral heights"[24] with no demonstrable increase in our safety. Indeed, torture arguably makes us less safe because it makes it

21 In grappling with the title of the symposium panel, I started with my office copy of Black's Law Dictionary in an effort to illuminate the understood difference between the juxtaposed terms. Black's Law Dictionary formerly defined "civil liberties" as "Personal, natural rights guaranteed and protected by Constitution . . . ." And for "civil rights," it said simply "see Civil liberties." BLACK'S LAW DICTIONARY (5th ed. 1979). Sometimes I think we think of "civil liberties" in terms of negative liberties, or freedom *from* governmental interference with, e.g., free speech, whereas "civil rights" sometimes connotes positive rights. "Civil rights" is often also a term associated with the attainment of right by minority groups. *See*, *e.g.*, WEBSTERS II NEW RIVERSIDE DICTIONARY (1984) (defining "civil liberty" as "[f]reedom from governmental infringement of such individual rights as freedom of speech and action"). Indeed, the more current version of Black's Law Dictionary reflects this distinction, with civil liberty defined as "freedom from undue governmental interference or restraint . . . also termed civil right." Civil right is then separately defined as "the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil Rights Include especially the right to vote, the right of due process, and the right of equal protection under the law" BLACK'S LAW DICTIONARY 263 (8th ed. 2004).

22 Yoo, *supra* note 20.

23 I acknowledge concerns that the reality of our new president's policies regarding civil liberties may not live up to campaign rhetoric. *See* Remarks of Nadine Strossen, Chapman University Dean's Dialogue Series (March 13, 2009) (available at http://www.chapman.edu/law/webcasts/); William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants,'* N.Y. TIMES, March 14, 2009, at A1 (noting the current Justice Department's argument "that the president has the authority to detain terrorism suspects [in Guantanamo] without criminal charges . . .").

24 Richard Cohen, *A Plunge from the Moral Heights* in CIVIL LIBERTIES, *supra* note 1, at 317.

more likely that our own troops will be tortured in return[25] and also inflames anti-American sentiment. Perhaps more important, even if waterboarding *has* made us safer, it is an abandonment of core principles to engage in it and thus we should reject it categorically, Yoo's past and current arguments notwithstanding.[26]

I. THE BYBEE-YOO TORTURE AND POWER MEMORANDUM

The August 1, 2002 memorandum, prepared for Alberto R. Gonzalez, counsel to the President, was prepared by the United States Department of Justice Office of Legal Counsel ("OLC") and signed by Jay S. Bybee, then Assistant Attorney General[27] and now a Ninth Circuit judge. John Yoo, a professor of law at Berkeley who served in the OLC when the memorandum was prepared, drafted and defended the memo,[28] which is sometimes referred to as the "Yoo Memorandum," sometimes as the "Bybee Memorandum,"[29] and sometimes as the "Torture Memorandum."[30] Because Yoo is widely acknowledged as the

25 *See* Chemerinsky, *supra* note 7, at 12 (noting concerns raised by military personnel and their loved ones that other countries will not follow international law when dealing with American prisoners).

26 In his dissenting opinion in *Olmstead v. United States*, Justice Brandeis stated that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). I re-read this passage recently in a context unrelated to the subject of torture, but it resonated in this context and I note that Nadine Strossen, in a recent article, referred to Brandeis's warning in the context of discussing Yoo and other Bush Administration lawyers. *See* Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?,* 31 NOVA L. REV. 279, 287 (2007); *see also* Cohn, *supra* note 16, at 623 (also citing to Brandeis's *Olmstead* dissent in the context of the War on Terror). Dean Erwin Chemerinsky has also cited to Brandeis's dissent in the context of the War on Terror. *See* Chemerinsky, *supra* note 7, at 15.

27 *See* CIVIL LIBERTIES, *supra* note 1, at 303–15 (excerpted copy of OLC memorandum) [hereinafter "BYTAP Memo"].

28 *See id.* at 321–23; Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture In U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 469–70 (2007) (noting that Yoo drafted the memo).

29 Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 36 (noting that the "Bybee Memo" . . . "was actually authored by John Yoo, and eventually withdrawn by Jack Goldsmith") and n.167 (noting that author refers to memo as "Yoo Memo" for clarity); *cf.* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1229 & n.179 (2006) (referring to memorandum as the "Bybee Memorandum" while noting that many have ascribed the writing to Yoo and that the memo has been described as "Yoo's most famous piece of advice"); Waldron, *supra* note 7, at 1703–04 (referring to memorandum as the "Bybee Memorandum"); Luban, *supra* note 3, at 1454–55 (also referring to the document as the "Bybee Memorandum").

30 *See* Glenn, *supra* note 10, (referring to various Yoo Memoranda as the "Torture Memos").

primary author but Bybee, who was Yoo's superior, actually signed the memo and bears ultimate responsibility for its contents, I believe it more appropriate to refer to the memorandum as the "Bybee-Yoo Memorandum." Moreover, the memorandum is as astonishing for its arrogation of virtually unlimited executive powers as it is for its narrowly circumscribed definition of "torture,"[31] and so I will refer to the memorandum as the "Bybee-Yoo Torture and Power Memorandum," or BYTAP Memo.[32]

Two provisions of the BYTAP Memo have come under the most sustained attack: (1) the narrow definition of "torture," which evidence suggests was solicited in order to justify waterboarding tactics the Administration was already using when the Memo was written;[33] and (2) the claim of unlimited executive power to engage in *any* tactic, including torture.[34]

With regard to the narrow definition, the BYTAP Memo starts with the statutory prohibition on torture, which forbids the infliction of "severe physical or mental pain or suffering."[35] The full definition of "torture" is as follows:

> "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> the intentional infliction or threatened infliction of severe physical pain or suffering;

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31 *See* Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 16 (2006).

32 As an aside, there is something unsettling about the degree of opprobrium faced by Professor Yoo when contrasted with the relative quiet regarding Judge Bybee. I have read no reports of protests at the Court of Appeals where Judge Bybee sits, whereas Yoo has been the target of a number of protests (including a very loud one outside the building where this is being written). I also note that Alberto Gonzalez seems to have faced more vilification than others equally complicit in the failings at the Justice Department. Is it a coincidence that Yoo and Gonzalez, who seem to have faced the sharpest criticism, are Asian and Latino, respectively, whereas Jay Bybee is a white man? I think this is a troubling question, but one that I will leave aside for now while acknowledging its existence.

33 MARJORIE COHN, COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW 36 & n.19 (2007) (noting that memo was written after Attorney General Gonzalez met with lawyers for the Defense Department and for Vice President Dick Cheney "to discuss specific interrogation techniques") (citing Michael Hirsh, John Barry, & Daniel Klaidman, *A Tortured Debate Amid Feuding and Turf Battles, Lawyers in the White House Discussed Specific Terror-Interrogation Techniques Like "Water- Boarding" and "Mock Burials,"* NEWSWEEK, June 21, 2004, at 50).

34 *See* Chemerinsky, *supra* note 31, at 16.

35 *See* 18 U.S.C. §§ 2340–2340A (2006) (discussed in BYTAP Memo, *supra* note 12, at 305).

> the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> the threat of imminent death; or
>
> the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .[36]

The BYTAP Memo then borrows from language contained in a statute addressing medical care and concludes that those statutes suggest that "severe pain" as used in the anti-torture statute "must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury *such as death, organ failure, or serious impairment of bodily functions*—in order to constitute torture."[37]

But even this narrowed definition would not limit the President, according to the BYTAP Memo. Rather, "[i]n order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as *not applying to interrogations undertaken pursuant to his Commander in Chief authority*."[38] In other words, despite the constitutional command that the executive branch execute the laws (including those categorically forbidding torture), the BYTAP Memo concludes that, simply by invoking the term "Commander in Chief," the president could authorize any interrogation technique, including torture.[39] In short, the BYTAP Memo permitted the conclusion that *waterboarding isn't torture, but even if it is, the President can do it. He can do anything*.

The BYTAP Memo has been harshly criticized for, among other things, failing to construe the torture ban in a way that would avoid conflict with international law, using an unrelated medical statute in order to reach a narrow definition of "severe pain," failing to recognize that the statutory ban on torture does *not* admit of exceptions,[40] and asserting the view that the President has a "blank check," despite the fact that such a position "is against the great weight of precedent."[41] The BYTAP

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36 18 U.S.C. § 2340.

37 BYTAP Memo, *supra* note 12, at 305 (emphasis added).

38 *Id*. at 311 (emphasis added).

39 Dawn E. Johnsen, *What's A President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 403 (2008); *see also* Chemerinsky, *supra* note 31, at 16.

40 *See*, *e.g.*, Margulies, *supra* note 29, at 37–40.

41 *Id*. at 39.

Memo has also been criticized for starting from the premise that international and domestic laws wrongly frustrate the ability of United States officials to act with flexibility,[42] while ignoring long-term consequences of acting unilaterally.[43] The BYTAP Memo is premised on "the epic assertions of executive power proclaimed by Yoo."[44]

The conservative Jack Goldsmith, who succeeded Yoo at OLC, found that Yoo's memoranda were not only one-sided but contrary to law.[45] "The idea that Congress could not oversee the interrogation of detainees . . . 'has no foundation in prior OLC opinions, judicial decisions, or in any other source of law.'"[46] The BYTAP Memo does not acknowledge the President's constitutional obligation to take care that the laws are "faithfully executed," nor does it acknowledge Congress's delegated powers to make rules and regulations for the conduct of the armed forces and for "captures."[47]

Dean Harold H. Koh of the Yale Law School has described the August 1, 2002 BYTAP Memo as "perhaps the most clearly erroneous legal opinion I have ever read."[48] Yet the BYTAP Memo has "proved to be enormously influential."[49] Although the Justice Department formally withdrew the BYTAP memo shortly after it was leaked, the Administration adhered to many of its premises even while issuing a new memorandum (the "Levin Memo") that embraced the unequivocal rhetoric that "torture is abhorrent."[50] As Professor Margulies points out, "Levin deserves substantial credit for clear and resonant language that accurately represented the consensus on this issue. If one reads the [Levin] memo more carefully, however, loopholes appear, justifying what the Administration had already done."[51] One of

42 *Id*. at 22.

43 *See id*. at 47–48.

44 *Id*. at 82.

45 Glenn, *supra* note 10, at A12 (citing JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007)).

46 *Id.* Goldsmith ultimately resigned over concerns regarding the BYTAP Memo. *See* Johnsen, *supra* note 39, at 403.

47 U.S. CONST. art. II, § 3; U.S. CONST. art. I, § 8.

48 *See* Morrison, *supra* note 7, at n.182.

49 Luban, *supra* note 3, at 1454.

50 *See* Margulies, *supra* note 29, at 40–41 (citing Memorandum from Daniel Levin, Acting Asst. Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004)).

51 *Id*. at 41; *see also* Luban, *supra* note 3, at 1456 ("Although the Levin Memo condemns torture and repudiates [the BYTAP Memo's] narrow definition of 'severe pain,' a careful reading shows that it does not broaden it substantially."); *cf.* Chemerinsky, *supra* note 31, at 16 ("The significance of the Torture Memo in terms of the Bush Administration's views of executive power cannot be overstated.").

the tactics the Administration sought to justify was waterboarding.[52]

II. WATERBOARDING AND TORTURE

The United States admits to having "waterboarded" suspects under the auspices of the CIA and continued to claim the authority to use the technique as recently as 2005.[53] The BYTAP memo's narrow definition of torture may well have been designed to allow for this particular procedure.[54]

Professor Jeremy Waldron's article, *Torture and Positive Law: Jurisprudence for the White House*[55] is a powerful indictment of the BYTAP Memo and other lawyerly efforts to justify coercive interrogation techniques in the wake of September 11. Waldron disagrees with the argument that we should be more sympathetic to the use of torture in circumstances presented after 9/11. Rather, "the various municipal and international law prohibitions on torture are set up precisely to address the circumstances where torture is likely to be most tempting. If the prohibitions do no hold fast in these circumstances, then they are of little use in any circumstance."[56] In his view, the torture prohibition "operates in our law as an *archetype*—that is, as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle."[57] This principle was violated by the use of waterboarding.

The history of water torture has been thoroughly laid out in a recent article by Evan Wallach, a judge on the United States Court of International Trade.[58] Judge Wallach traces the use of the technique throughout history, including by the Japanese against Allied prisoners of war in World War II, by the United States during its occupation of the Philippines and in one instance, domestically, by a sheriff in Texas.[59] "In all cases,

52 *See* Margulies, *supra* note 29, at 41.

53 *See* Clarke, *supra* note 3, at 2, 39–40 & n.195 (noting that waterboarding was used on at least three detainees); *see also* Cohn, *supra* note 16, at 624 (noting that United States has admitted to waterboarding); Margulies, *supra* note 29, at 41 (noting that waterboarding was used "at least for three high-level al Qaeda detainees"). New details have now emerged regarding the extent to which waterboarding was used: 183 times on one detainee and 83 times on another. *See* Memorandum from Steven G. Bradbury for John A. Rizzo, Senior Deputy General Counsel, CIA, 37 (May 30, 2005).

54 *See* COHN, *supra* note 33, at 36 (describing Newsweek account).

55 Waldron, *supra* note 7.

56 *See id*. at 1686.

57 *Id*. at 1687.

58 Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture In U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).

59 *Id.* at 476–77.

whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators."[60]

Judge Wallach recounts the description provided by a United States aviator subjected to the practice by Japanese captors:

> I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I'd get my breath, then they'd start over again.[61]

Similarly, in the Texas case, law enforcement officers were charged with "handcuffing prisoners to chairs, placing towels over their faces, and pouring water on the cloth until they gave what the officers considered to be confessions."[62] The sheriff was convicted and received a ten-year prison sentence; other defendants also received significant prison sentences.[63] At sentencing, the judge noted that the Texas law enforcement operation would embarrass even a "dictator."[64]

Wallach noted that the "water torture" or "water boarding" technique has long been prized as an interrogation method because it imposes "severe mental trauma and physical pain but no traces of physical trauma that would be discoverable without an autopsy."[65]

During the height of the debate about waterboarding as used by the United States against terrorist suspects, the journalist Christopher Hitchens chose to voluntarily undergo the experience.[66] As he describes it: "I was pushed onto a sloping board and positioned with my head lower than my heart . . . . Then my legs were lashed together so that the board and I were

60 *Id*. at 477. For example, one defendant received a ten-year sentence. *See id*. at 504 & n.159.

61 *Id*. at 476 (quoting Excerpts from testimony of Cpt. Chase Jay Nielsen, Trial Record at 55, United States v. Sawada, 5 L. Rep. Trials of War Criminals 1 (1948)). Nielsen was one of ten U.S. B-25 bombers captured by the Japanese during a raid. The Japanese tried the men before a Japanese Army Tribunal and executed three of the men. The U.S. Army later prosecuted the trial's participants. *See id*. at n.1 (citing CRAIG NELSON, THE FIRST HEROES (2002)).

62 *Id*. at 502.

63 *See id*. at 504 & n.159.

64 *Id*. at 504.

65 *Id*. at 474.

66 Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, August 2008 (available at http://www.vanityfair.com/politics/features/2008/08/hitchens200808).

one single trussed unit."[67] Hitchens was already wearing a hood, and three layers of "enveloping towel" were applied.[68] Then,

> In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist . . . I held my breath for a while and then had to exhale and—as you might expect—inhale in turn. The inhalation brought the damp cloths tight against my nostrils, as if a huge wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me.[69]

After being checked by a paramedic and taking a break, Hitchens endured a second episode:

> I fought down the first, and some of the second, wave of nausea and terror but soon found that I was an abject prisoner of my gag reflex. The interrogators would hardly have had time to ask me any questions and I would quite readily have agreed to supply any answer.[70]

Hitchens took strong issue with the "official lie" that waterboarding "'simulates' the feeling of drowning."[71] In his words, "You feel that you are drowning because you *are* drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure."[72] Even after the ordeal, Hitchens has experienced feelings of panic upon awakening or in circumstances where he is short of breath.[73] He concludes that "if waterboarding does not constitute torture, then there is no such thing as torture."[74]

A majority of Americans share Hitchens' view that waterboarding constitutes torture.[75] Judge Wallach, too, concludes that waterboarding is torture *even under the narrow BYTAP Memo definition*.[76] However, the fact that the BYTAP Memo seems to have been designed to exclude tactics such as

67 *Id.* at 2.
68 *Id.* at 2–3.
69 *Id.* at 3.
70 *Id.*
71 *Id.* at 2.
72 *Id.* at 2–3.
73 *Id.* at 3.
74 *Id.* at 3.
75 Clarke, *supra* note 3, at 2 & n.4 (citing results of 2007 CNN poll).
76 Wallach, *supra* note 58, at 506.

waterboarding from the definition of torture illustrates BYTAP's biggest problem. Surely waterboarding, under any reasonable definition of torture, *is* torture.

Torture is illegal, and given our country's (historic) moral stature,[77] we have a "special responsibility" to enforce the prohibition, as noted by the journalist Eyal Press.[78] We lead by example, and, without condemning torture ourselves, we cannot expect others to do so.[79] That condemnation must be more than rhetorical. Insisting that the United States does not torture is empty rhetoric if we make the claim while inflicting waterboarding on suspects.

Equivocating on torture not only causes us to lose moral standing on the international stage but also places our own soldiers at risk. As Professor Philip B. Heymann points out, if we approve torture in particular circumstances, other countries will do the same.[80] It was that concern that led us to accept Geneva Convention prohibitions on torture, despite the cost of obtaining information that "might save dozens of American lives."[81]

III. YOO'S RECENT OP-ED

Yoo continues to view the Geneva Convention restrictions and other limits on the president's use of coercive techniques as wrong-headed and dangerous.[82] In his recent op-ed, Yoo laments that President Obama will likely "declare terrorists to be prisoners of war under the Geneva Convention," whereas the Bush Administration classified terrorists "like pirates, illegal combatants who do not fight on behalf of a nation and refuse to obey the laws of war."[83]

Alan Clarke argues that the demonization of an enemy, and the claim that some people are just "outside of the law," are

77 *Cf.* Chemerinsky, *supra* note 7, at 11 (noting our country's long history of condemning torture).

78 Eyal Press, *In Torture We Trust?* in CIVIL LIBERTIES, *supra* note 1, at 228.

79 *Id.*

80 Philip B. Heymann, *Torture Should Not Be Authorized* in CIVIL LIBERTIES, *supra* note 1, at 217; *see also* Chemerinsky, *supra* note 31.

81 *Id.* The notion that torture will save lives is a dubious proposition, moreover. "Torture subjects typically know less than what we think we know, and often tell us what we want to hear." Margulies, *supra* note 29, at 34; *see also* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1173 (2001) ("In *Brown [v. Mississippi,* involving torture] and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable"); *cf.* M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 654 (2007) (noting that the criminal justice system has taught us much "about the dangers and unfairness of coerced confessions").

82 Yoo, *supra* note 20.

83 *Id.*

elements of the creation of a torture culture.[84] "We inhabit a world of 'us' against 'the evil doers' which permits a torture culture to take hold. Al-Qaeda becomes equated with pirates and slave traders to be dealt with or extirpated at will."[85] And as Eyal Press argues, torture is "a function not of brute sadism but of the willingness to view one's enemies as something less than human."[86]

Moreover, while some of those classified as "enemy combatants" have in fact been terrorists, others have not been.[87] In demonizing the enemy and acting as though we are justified in treating such a class of persons as "outside the law," we run the grave risk that innocents will be victims, as they have been in the past. As Clarke points out, "[e]xperts estimate that eighty percent of people tortured by our forces and our South Vietnamese allies during the Vietnam War were wholly innocent people who were in the wrong place at the wrong time."[88]

Clarke illustrates in his recent article, *Creating a Torture Culture*, that the use of torture is not easily cabined.[89] Rather:

> Once started, torture and other abusive practices spread. Their logic cannot be easily contained. If it is right to torture in the extreme situation, what about a slightly less extreme case? . . . In every case, harsh practices can be justified on the ground that the person being questioned may harbor information that could save innocent lives.[90]

Relying on history and behavioral science studies, Clarke also points out that torture is a "true slippery slope."[91] Most of us are capable of torture and, "in the absence of enforced prevention rules, systemic abuses become prevalent."[92]

Even after Abu Ghraib and revelations about the extent to which waterboarding was used,[93] Yoo acknowledges no such risk of systemic abuse, focusing instead only on the risk attendant to

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84 Clarke, *supra* note 3, at 18.

85 *Id.*

86 Press, *supra* note 78, at 223–24; *cf. generally* Hernández-López, *supra* note 16, at 139–41 (pointing out European and Western structures' tendency to see non-Westerns as "'others,' savages, or barbarians" and how this tendency excludes non-Westerners).

87 *See* Chemerinsky, *supra* note 7, at 8 (noting mistakes made at Guantanamo Bay).

88 Clarke, *supra* note 3, at 24.

89 *Id.* at 21.

90 *Id*. *See also* Luban, *supra* note 3, at 1445–46 (noting that torture is not limited to "one-off" decisions" and discussing the "normalization of torture").

91 Clarke, *supra* note 3, at 13.

92 *Id*.

93 Regarding recent new information about the extent of the use of waterboarding against two detainees, *see* note 53, *supra*.

foregoing harsh interrogation tactics.[94] With regard to waterboarding specifically, Professor Yoo adheres steadfastly to the view that it is a legitimate practice, acknowledging that President Bush authorized the practice three times and suggesting that President Obama acted precipitously and foolishly in terminating the CIA's "special authority to interrogate terrorists."[95] Yet even before Obama's inauguration, the Department of Justice OLC had "conceded that waterboarding [was] no longer legal" after the passage of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, albeit still claiming that the president could authorize waterboarding and other such techniques "in special circumstances."[96] In eschewing any authority for such practices, the new president is doing nothing more than agreeing to follow the law.

President Obama is also reclaiming some of the moral high ground lost when it was revealed that the United States had engaged in torture. While Yoo predicts that "Mr. Obama may have opened the door to further terrorist acts on U.S. soil by shattering some of the nation's most critical defenses,"[97] we can hope that he has instead begun the laborious process of reclaiming the country's moral standing on the international stage. As *Washington Post* columnist Richard Cohen wrote five years ago in response to the BYTAP Memo:

> The Bush administration constantly reminds us that there's a war on. That's wrong. There are two. One is being fought by soldiers in combat, and the other is being fought for the hearts and minds of people who are not yet our enemies. However badly the administration has botched the first war . . . it has done even worse with the second. It has jutted its chin to the world, appeared pugnacious and unilateralist, permitted the abuse of POWs and others at Abu Ghraib, and now toyed in some fashion with torture. The Bush administration has shamed us all, reducing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.[98]

It is notable that Yoo's opinion piece adhering to the view that waterboarding is an indispensable tool in the War on Terror was written more than eight years after the tragic events of 9/11;

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94 Yoo, *supra* note 20. At the Chapman debate held April 21, 2009, at which time it was known that waterboarding had been used against one detainee 183 times and against another, 83 times, *see* note 53, *supra*, Yoo remained sanguine regarding its use.

95 *Id.*

96 Clarke, *supra* note 3, at 3.

97 Yoo, *supra* note 20.

98 Cohen, *supra* note 1, at 318–19.

it was not written under the same pressures that Yoo and others faced when they first advocated a narrow definition of "torture" when advising the Administration.[99] In other words, even after considerable reflection and presumably after considering the virtual cottage industry that has developed to criticize Yoo's wartime memos, Yoo remains strident in defense of his first instincts.

CONCLUSION

Fortunately, the majority of academics and lawyers acted quickly and decisively to illustrate the dangers of instincts that would act to grab power and inflict torture in the name of making us safer. Not only was the BYTAP Memo formally withdrawn by the Justice Department, but it has been thoroughly deconstructed and criticized by an army of academics.

In the opening quote of his piece, *In Torture We Trust?*, Eyal Press quotes from John-Paul Sartre: "If patriotism has to precipitate us into dishonour, if there is no precipice of inhumanity over which nations and men will not throw themselves, then, why in fact do we go to so much trouble to become, or to remain, human?"[100] Indeed.

99 Yoo, *supra* note 20.

100 Press, *supra* note 78, at 219.

Constitutional Intelligence: Restoring Politics in the War on Terror*

*Roger Pilon***

We are invited in this symposium to draw lessons from Lincoln's constitutionalism for today's War on Terror—and on this panel to consider whether a wartime decline in civil liberties can be justified by a gain of civil rights. As an initial matter, let me suggest that the distinction between civil liberties and civil rights is less than conspicuous. Notwithstanding Wesley Newcomb Hohfeld's efforts in the 1913 and 1917 *Yale Law Journal* to distinguish rights, powers, privileges, and immunities—all of which could be reduced to rights, he concluded—I have never been persuaded that a clear contrast between the two could be drawn, other than nominally.[1]

Accordingly, I will take the basic questions before us to be: Do we at times give up a measure of liberty for a measure of security? And should we? Those questions take us to fundamental moral, political, and legal principles. And the answers to both, I submit, are yes—at times we do and we should sacrifice a measure of liberty for a greater measure of security. Thus, Benjamin Franklin was as wrong when he said that those who would sacrifice liberty for security deserve neither,[2] even if that is sometimes true, as when he said that "there never was a good war or a bad peace."[3] History, of course, is replete with peace agreements that have led only to future wars.[4]

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* This is a revised version of remarks delivered at a symposium on "Lincoln's Constitutionalism in Time of War: Lessons for the War on Terror," Chapman University School of Law, Jan. 30, 2009.

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1 WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed.) (photo. reprint 2002) (1946) (Originally in 1913 and 1917 Yale Law Journal).

2 HISTORICAL REVIEW OF PENNSYLVANIA 289 (1812) (attributed to Jackson and Franklin but disowned by Franklin according to World Cat) ("Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.").

3 Letter from Benjamin Franklin to Sir Joseph Banks (July 27, 1783), *in* JARED SPARKS, THE WORKS OF BENJAMIN FRANKLIN 547 (1882).

4 *See, e.g.,* 12 THE NEW ENCYCLOPEDIA BRITANNICA 331 (15th ed. 2002) (discussing how the Treaty of Versailles led to an upsurge in German militarism, fostered deep resentment, and encouraged future German aggression).

I. LINCOLN'S CONSTITUTIONAL LEGACY

Abraham Lincoln understood those questions. But if one takes some of the things he did during the Civil War out of context, it is easy to fault him, as many have. Early in the war, for example, he suspended the writ of habeas corpus, a power the Constitution seems to reserve to Congress under limited circumstances,[5] but look at the context.

In brief, having participated in the election of 1860 and lost, all but four of the southern states that would soon form the Confederacy seceded from the Union and began seizing federal property in the South.[6] After his inauguration in March of 1861, Lincoln was initially prepared to live with the situation.[7] But when he sought to resupply Fort Sumter, a beleaguered island garrison in Charleston Bay that had remained in Union hands, Confederate forces began firing on the fort before the supply ships could arrive.[8] Two days later the men at the fort surrendered.[9] Northern reaction was intense.[10] When Lincoln called up 75,000 volunteers, the four remaining southern states, including Virginia, joined the Confederacy.[11]

Soon after, Lincoln's focus shifted to Maryland when northern troops traveling to Washington by rail were attacked by a mob in Baltimore.[12] With southern sympathies running high in Maryland, and Virginia now firmly in the Confederacy, Lincoln feared that the capital of the Union would soon be isolated, so he ordered the writ of habeas corpus suspended along any "military line" between Philadelphia and Washington.[13] Notwithstanding the placement of the Suspension Clause in Article I, the Constitution is silent, of course, about who has the power to suspend the writ.[14] More to the point here, however, Congress was not in session and would not again be in session until July

5 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 22–25, 36 (1998).

6 JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 264, 267, 271, 273 (1988) [hereinafter "MCPHERSON, BATTLE CRY OF FREEDOM"]; JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF 9 (2008) [hereinafter "MCPHERSON, TRIED BY WAR"].

7 MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 6, at 262–64.

8 *Id.* at 264, 267, 271, 273.

9 *Id.* at 273–74.

10 *Id.* at 274–75.

11 *See* MCPHERSON, TRIED BY WAR, *supra* note 6, at 22; MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 6, at 280.

12 MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 6, at 285.

13 REHNQUIST, *supra* note 5, at 20–25.

14 "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

4.[15] When Congress finally did convene, it ratified a number of Lincoln's wartime actions, but it would be another two years before it ratified this and Lincoln's later, broader suspension of habeas corpus.[16]

In the meantime, Chief Justice Roger Taney, sitting as a United States circuit judge for the District of Maryland, tried to thwart Lincoln's habeas suspension;[17] but Lincoln ignored Taney's order to bring one John Merryman before the court, famously asking Congress, "[Are] all the laws, *but one* [i.e., habeas corpus], to go unexecuted, and the government itself go to pieces, lest that one be violated?"[18] Three years later, Lincoln would reflect on his action with an analogy:

> Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution through preservation of the nation.[19]

Thus, Lincoln understood that the Constitution is not a suicide pact.[20] Our Constitution, in particular, vests powers flexibly enough to protect both security *and* liberty, as the circumstances warrant. But that becomes clear only if one is clear about the first principles of the matter, which is where I want now to turn.

I will begin by briefly setting forth the general theory or framework. Within that framework I will then look, again briefly, at one crucial element of the current War on Terror—the gathering of foreign intelligence—leaving other elements of the war to others on the panel. As revealed by the *New York Times* on December 16, 2005,[21] based on information leaked by a Justice Department official with a top secret Sensitive Compartmented

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15 At that time in our history, Congress normally met in December of the year after the elections in even-numbered years. But several states held their congressional elections only in the spring of odd-numbered years. As a result, Congress could not meet in 1861 until all representatives had been elected. *See* MCPHERSON, TRIED BY WAR, *supra* note 6, at 23–24.

16 *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

17 *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.).

18 *Memorandum: Military Arrests*, c. May 17, 1861, *in* WITH LINCOLN IN THE WHITE HOUSE: LETTERS, MEMORANDA, AND OTHER WRITINGS OF JOHN G. NICOLAY, 1860–1865, 430 (2000) (original emphasis); *See also* REHNQUIST, *supra* note 5, at 38.

19 MCPHERSON, TRIED BY WAR, *supra* note 6, at 30 (original emphasis).

20 Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004).

21 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

Information clearance,[22] President George W. Bush launched the "Terrorist Surveillance Program"[23] shortly after the terrorist attacks of September 11, 2001, briefing eight key members of Congress as he did so. Although the program was and still is secret, in essence it was designed for gathering intelligence on suspected terrorists by monitoring the electronic communications of individuals outside the United States, even when those communications travel through or involve persons in the United States, and even when doing so would seem to violate the strictures of the Foreign Intelligence Surveillance Act of 1978 (FISA),[24] which purports to provide the administration the "exclusive" means for such monitoring. Finally, I will argue that the administration's various foreign intelligence-gathering activities have been and continue to be not only legal but also perfectly consistent with those background principles.

II. CONSTITUTIONAL BASICS: POWERS GRANTED, RIGHTS RETAINED

Starting at the top, then, let me begin with the very function of a constitution: in the American context, certainly, our Constitution is the document through which "We the People of the United States" authorized, instituted, empowered, and limited the government we created through it. That places us squarely in the individualist, state-of-nature tradition: the people come together in the original position to give the government its powers; the government does not give the people their rights—they are born with those rights. That is the theory of the Constitution's Preamble. Before that, it was the theory of the Declaration of Independence; and before that of John Locke, the philosophical father of the nation.[25]

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22 Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40.

23 President Bush first used the term "Terrorist Surveillance Program" publicly in a Jan. 23, 2006 speech. *See AP picks up White House's 'terrorist surveillance program' terminology*, Media Matters for America, Feb. 9, 2006, *available at* http://mediamatters.org/items/200602090010 (last visited March 31, 2009). Because the administration has modified its secret foreign intelligence gathering activities over time, I will speak generically of those activities rather than use the term "Terrorist Surveillance Program," which seems to refer to the program that was in place from shortly after 9/11 until sometime after it was revealed to the public in December of 2005.

24 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (amended 2008). FISA has been amended several times, including by the FISA Amendments Act of 2008, HR 6304, Pub. L. No. 110-261, 122 Stat. 2436 (2008), signed into law on July 10, 2008; The Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (amending 50 U.S.C. § 1801 (2006)), signed into law on August 5, 2007; and the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), signed by President Bush on October 26, 2001.

25 *See generally* JOHN LOCKE, TWO TREATIESES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1998) (1690) (discussing the origin and purpose of government).

Too often, however, both libertarians and civil libertarians focus only on the last of those constitutional functions—on the limits on power—and understandably so. As Thomas Jefferson observed, and history has amply demonstrated, "the natural progress of things is for liberty to yield, and government to gain ground."[26] But limits on government power are only one side of the constitutional equation; grants of power are the other side, and an undue focus on limits slights that side. The reason we create government in the first place, after all, is to better protect ourselves than we would be able to do, absent government, in the state of nature—where life, Thomas Hobbes reminded us, is "solitary, poore [*sic*], nasty, brutish, and short."[27]

In a word, we came out of the state of nature for our own safety.[28] There are thus *two* rights at issue here, both held against the government we created in the original position: the right to privacy; and the prior right to be secure in our "lives, liberties, and estates."[29] And no matter how finely one tries *a priori* to calibrate the relation between the two, in a world of risk and imperfect knowledge, there will be times *a posteriori* when the calculus must be overridden and liberty must yield to security. All of which is to say that an undue obsession with overweening government can leave us exposed to the very threats we created government to protect us from in the first place, undermining the very purpose of government.

That much is elementary, of course, yet to listen to much of the recent discourse one would think it had been utterly forgotten. Thus, in the debate over the proper role of the National Security Agency (NSA) in gathering foreign intelligence, the critics' obsession with privacy has all too often ignored the calculus entailed in the trade-off between privacy and security. On one hand, if the NSA intercepts your communications in an effort to detect terrorist threats, you will not even know it, much less be able to show an actionable harm.[30] On the other hand, if intelligence gathering is restricted out of an excessive concern for privacy, the communications that precipitated 9/11 may very well

26 DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 3 (Univ. Press of Va. 1994).

27 THOMAS HOBBES, THE LEVIATHAN 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

28 *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (Basic Books, Inc. 1974) (for a sophisticated discussion of the matter).

29 "And 'tis not without reason, that [man] seeks out, and is willing to joyn in Society with others who are already united, or have mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*." LOCKE, *supra* note 25, § 123 at 350 (original emphasis).

30 In fact, it was for lack of standing that the Sixth Circuit dismissed the complaint in ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 648, 653 (6th Cir. 2007).

go undetected. The costs of erring on the side of security are miniscule; while on the side of privacy they can be catastrophic, as we have seen. Intelligence is the first line of defense in the War on Terror. Without timely and adequate intelligence we are defenseless, which is why this war cannot be fought using the reactive, law enforcement model.[31]

III. EXECUTIVE DOMINANCE IN FOREIGN AFFAIRS

But the Constitution hardly precludes that kind of cost-benefit analysis. Nor is it insensitive to where in the government the balance is best struck. Through Article II, it vests responsibility for the security of the nation, and hence for making such calculations, primarily in the *executive*, whose power in such matters is checked in limited ways by Congress, and in still more limited ways by the judiciary, a pattern our history has repeatedly demonstrated.[32] Thus, it is no accident that when Lincoln explained his actions to Congress he pointed to his oath of office, which required him to "preserve, protect, and defend" the Constitution, a duty that overrode any specific constitutional constraints.[33] And he added that the attack on Fort Sumter left him with no choice "but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation."[34]

That distribution of powers is perfectly consistent with our theoretical foundations and our historical practices. Thus, Locke, early on, speaks of the "Executive Power" as the power each of us has in the state of nature to secure his rights.[35] That is the main power we yield up to government once we create it in the original position, charging government to exercise it on our behalf. Later on, once powers are separated—for better protection *against* government—Locke speaks of the "Federative Power," which the executive exercises over *foreign* affairs.[36] And about that power he says, importantly, "it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the *Executive*; and

31 *See generally*, ANDREW C. MCCARTHY, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD 51–58 (2008) (discussing the intelligence failures that have led to terrorist attacks in the United States and the shortcomings of the law enforcement model for fighting terrorism).

32 *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 1–9 (2005); Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1020–23 (2007).

33 *See* Pushaw, *supra* note 32, at 1030–31 n.108.

34 MCPHERSON, TRIED BY WAR, *supra* note 6, at 24.

35 LOCKE, *supra* note 25, § 13, at 275–76.

36 *Id.* § 147–48, at 365–66.

so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good."[37]

Likewise, Montesquieu, described by James Madison in *Federalist* 47 as "the oracle who is always consulted"[38] concerning the separation of powers, writes of the Executive that he "establishes the public security, and provides against invasions."[39]

And not just the theorists but experience too, under the Articles of Confederation, had taught the Framers the folly of legislative dominance in foreign affairs. Here, for example, is Madison at the Constitutional Convention: "Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent."[40]

Madison somewhat overstates the point, however. To be sure, one of the main concerns at the Convention, and a principal reason for urging a new constitution, was the lack under the Articles of Confederation of a unified, forceful executive—remember, the new nation was surrounded by three European powers all stronger than itself.[41] But experience in the states was mixed. As Professor John Yoo has shown, the constitutions of New York (1777), Massachusetts (1780), and New Hampshire (1784) provided for relatively strong and successful executives.[42] By contrast, Pennsylvania (1776), with its twelve-man executive council, and South Carolina (1776), where the executive was all but powerless absent express authority from the legislature, offered models the Convention could have chosen but did not.[43]

Thus, it is no surprise that during the nation's first year under the new Constitution we find Madison writing, "[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, *not particularly taken away* must belong to that department."[44] And a year later, here is Thomas Jefferson, Secretary of State, writing in an April 24, 1790 memorandum to President George Washington:

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37 *Id.*, § 147, at 366 (original emphasis).

38 THE FEDERALIST No. 47 (James Madison).

39 BARON DE MONTESQUIEU, 11 THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1748).

40 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 312 (Adrienne Koch ed., Ohio Univ. Press 1966).

41 *See* YOO, *supra* note 32, at 68.

42 *Id.* at 67–68.

43 *Id.* at 63, 72–73.

44 Letter from James Madison to Edmund Pendleton (June 21, 1789), *in* 5 THE WRITINGS OF JAMES MADISON, 405–06 n. 1 (Gaillard Hunt ed., G.P. Putnam's Sons 1904) (1904) (emphasis added).

> The Constitution . . . has declared that 'the Executive powers shall be vested in the President,' submitting only special articles of it to a negative by the Senate . . . It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate.[45]

And then he adds: "*Exceptions* are to be construed strictly"[46]—a rare point of agreement between Jefferson and Alexander Hamilton.

That balance, until very recently, has only been confirmed by the great preponderance of cases, which hold that the foreign affairs power belongs mainly to the executive, except as specifically reserved. Reviewing recent scholarship that rejects that view, Professor H. Jefferson Powell, who served in the Office of Legal Counsel in the Clinton Justice Department, noted that the problem for those "adopting the congressional-primacy view is that one [must] repudiate or distinguish away most of what the Supreme Court appears to have said on the subject."[47] To be sure, the constitutional text is considerably more underdetermined in foreign than in domestic affairs. But that means only that theory, structure, history, and precedent loom larger, and they all point to executive dominance in foreign affairs.

IV. THE GATHERING OF FOREIGN INTELLIGENCE

Turning, then, to the matter at hand, how does this brief background shed light on the power to gather foreign intelligence? I submit that the question here is not whether the Bush administration's foreign intelligence surveillance activities amount to "warrantless wiretapping" in violation of the Foreign Intelligence Surveillance Act (FISA), for that would beg the separation-of-powers question by presuming congressional supremacy. Rather, to avoid that circularity, the questions at the end of the day are whether FISA was wise and whether it is an unconstitutional intrusion on the vested Article II power of the president,[48] and the two are closely connected.

Consider, as a preliminary matter, whether it was wise. Let us start with the facts, and the overriding fact is that we do not

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45 Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments *in* 16 PAPERS OF THOMAS JEFFERSON 378–79 (Julian P. Boyd ed., 1961) (2000) (original emphasis).

46 *Id.*

47 H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1472 (1999).

48 *See* Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U.L. REV. 375 (2008).

know many of the facts. Foreign intelligence gathering is done in secret, understandably, and the issues are technical. We are not talking here about agents putting on headphones and going down to the telephone company's offices to clamp alligator clips on copper wires.

The practical problem, however, is clear, and it was put well by Judge Richard Posner, writing in the *Wall Street Journal* shortly after the NSA surveillance story broke:

> The administration is right to point out that FISA, enacted in 1978—long before the danger of global terrorism was recognized and electronic surveillance was transformed by the digital revolution—is dangerously obsolete. It retains value as a framework for monitoring the communications of *known* terrorists, but it is hopeless as a framework for *detecting* terrorists. It requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance *is* a terrorist, when the desperate need is to find out *who* is a terrorist.[49]

Posner likened that task to looking for a needle in a haystack.[50]

But the technical problems surrounding FISA are more daunting still. Professor K.A. Taipale, executive director of the Center for Advanced Studies in Science and Technology Policy, has summarized them as follows:

> In modern networks, data and increasingly voice communications are broken up into discrete packets that travel along independent routes between point of origin and destination where these fragments are then reassembled into the original whole message ["packet based"]. Not only is there no longer a dedicated circuit, but individual packets from the same communication may take completely different paths to their destination. To intercept these kinds of communications, filters ["packet-sniffers"] and search strategies are deployed at various communication nodes to scan and filter all passing traffic with the hope of finding and extracting those packets of interest and reassembling them into a coherent message. Even targeting a specific message from a known sender requires intercepting (i.e., scanning and filtering) the entire communication flow. Were FISA to be applied strictly according to its terms prior to any "electronic surveillance" of foreign communication flows passing through the US or where there is a substantial likelihood of intercepting US persons, then no automated monitoring of any kind could occur.[51]

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49 Richard Posner, *A New Surveillance Act*, WALL STREET J., Feb. 15, 2006, at A16 (emphasis added).

50 *Id.*

51 K.A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance*, N.Y.U. REV. OF L. & SEC., NO. 7, SUPL. BULL. ON L. & SEC., Spring 2006, *available at* http://ssrn.com/abstract=889120. *See also* K.A. Taipale, *The Ear of Dionysus: Rethinking Foreign Intelligence Surveillance*, 9 YALE J. L. & TECH.

V. THE STATUTORY ARGUMENTS

Turning now to the legal questions, after the *New York Times* revealed the secret terrorist surveillance program on December 16, 2005,[52] there was an immediate outcry among many civil libertarians.[53] The administration responded six days later with a Department of Justice letter to the majority and ranking members of the House and Senate Intelligence Committees,[54] defending the president's actions on statutory, constitutional, and practical grounds.

The administration's statutory argument rests on the Authorization to Use Military Force (AUMF),[55] which Congress passed only one week after 9/11.[56] Section 2(a) of the Act authorizes the president:

> [T]o 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.[57]

At a minimum, that authorization would seem to entail the power to obtain the foreign intelligence necessary for accomplishing the authorization's purpose—preventing any future terrorist attacks on America.

The critics answered with narrow legal arguments, oblivious it seems to the pressing practical problems the administration faced in the immediate aftermath of 9/11, to say nothing of possible political remedies for the critics' concerns. Thus, their main charge was that the AUMF could not be read as implicitly overriding FISA's prohibition on warrantless domestic wartime surveillance because Congress in FISA expressly and specifically

128, 135–36 (2007) (noting, like Posner, that FISA "provides no mechanisms for authorizing advanced technical methods" to identify terrorists).

52 Risen & Lichtblau, *supra* note 21.

53 *See, e.g.,* Letter from 14 self-described scholars of constitutional law and former government officials "concerned by the Bush administration's National Security Agency domestic spying program" to Members of Congress (Jan. 9, 2006) *available at* http://www.nsawatch.org/DOJ.Response.AUMF.final.pdf [hereinafter "Letter to Members of Congress"]; David Cole, et al., *On NSA Spying: A Letter to Congress*, 53 THE N.Y. REV. OF BOOKS 42, (Nov. 2, 2006). On its editorial page, of course, the *New York Times* itself has kept up what often has seemed like a daily drumbeat of criticism of this and other elements of the War on Terror.

54 Letter from William E. Moschella to Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman (December 22, 2005) *available at* http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

55 Pub. L. No. 107-40, 115 Stat. 224 (2001).

56 *Id.*

57 *Id.*

addressed that issue and limited that surveillance to the first 15 days of war.[58] In short, even though FISA excepts surveillance authorized by statute, and the AUMF was later in time, an unstated *general* "implication" overriding the *specific* and *express* language of FISA cannot reasonably be drawn, critics argued, for the law disfavors repeals by implication.[59]

That is generally true, of course, and were Congress to have drafted the AUMF in the fullness of time—something it rarely does under the best of circumstances—it would be a more compelling argument. But in the wake of the terrorist attacks on New York and Washington on 9/11—recall, the AUMF was passed seven days later—Washington, even when business was able to resume, was an armed camp, with military personnel and equipment on every corner. The AUMF uses few words. A natural reading of its "general" implications aside, one can only assume that legislators did not consider every implication or every related statute, as they might have (but only might) under more normal circumstances.[60]

But if one wishes, later in time, to focus on and argue from narrow points of statutory interpretation, the place to begin is with a thorough and detailed rebuttal of the critics, published by the Federalist Society.[61] There the authors note, among much else, "several reasons for concluding that one need not invalidate FISA in order to uphold the NSA program."[62] Parsing carefully the statutorily defined species of "electronic surveillance" that comes within FISA's ambit, "the range of conversations implicated in this controversy," they conclude, "may be much narrower than commonly supposed."[63]

This is not the forum for close discussion of the statutory arguments, save for an additional practical consideration. The administration's critics have invariably assumed that a fairly sharp line could be drawn between foreign and domestic communications, or persons, or interceptions, when in fact that line is often unknown and unworkable and, worst of all, would seem to require ending the interception once it "crossed our

58 Letter to Members of Congress, *supra* note 53, at 3–4.

59 *Id.*

60 Still, the critics note correctly that insofar as the administration relies on a statutory argument, it had an opportunity to obtain authorization for warrantless surveillance when it sought and obtained amendments to FISA through the USA Patriot Act in October 2001. *Id.* at n. 5.

61 *See* Andrew C. McCarthy, David B. Rivkin, Jr. & Lee A. Casey, *NSA's Warrantless Surveillance Program, Legal, Constitutional, and Necessary* (May 22, 2007), *available at* http://www.fed-soc.org/doclib/20070522_terroristsurveillance.pdf.

62 *Id*. at 54–60.

63 *Id*. at 55.

border"—precisely when we might most want to follow it.[64] Among the absurd results that have flowed from that focus is a recent secret decision by a FISA judge that the statute prohibited the warrantless interception of communications between individuals located *outside* the United States if the communications passed through an Internet switch located *in* the United States.[65] After the decision came to light, the administration pressed Congress strongly and obtained a temporary fix in the form of the Protect America Act of 2007.[66]

VI. THE CONSTITUTIONAL ARGUMENTS

A. The Fourth Amendment

But the main weakness of the critic's statutory argument is circularity: it begs the basic question. In the name of "constitutional avoidance" it simply assumes that Congress has the power to regulate the president's Article II power to gather foreign intelligence, a power presidents have exercised since the nation's founding, in war and peace alike, quite without any statutory micromanagement, and with consistent judicial deference.[67] Notwithstanding that history, critics maintain that congressional regulation of the executive's domestic electronic surveillance for foreign intelligence purposes is constitutional, pointing in part to the Fourth Amendment: Congress may regulate the president's conduct, they say, to ensure that the

64 Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. TIMES, Aug. 2, 2007, at A16. Those who point to FISA's emergency provisions invariably ignore what they actually entail. As the administration has put it: "There is a serious misconception about so-called 'emergency authorizations' under FISA, which allow 72 hours of surveillance without a court order." In particular, the attorney general must determine *in advance* that the FISA application will be approved. Moreover, among other things, "a typical FISA application involves a substantial process in its own right: The work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security Advisor, the Director of the FBI, or another designated Senate-confirmed officer; and, finally the approval of an Article III judge." *See* Memorandum from the U.S. Dep't of Justice on The NSA Program to Detect and Prevent Terrorist Attacks: Myth v. Reality (Jan. 27, 2006) *available at* http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf. Critics often complain that the FISA Court is a "rubber stamp." *See* Del Quentin Wilber, *Surveillance Court Quietly Moving*, WASH. POST, Mar. 2, 2009, at A2. In 2007, the last year for which statistics are available, the court approved all but three of 2,370 applications while making substantive modifications to 86 others. *Id.* But that complaint ignores the applications that were never brought for fear of disapproval.

65 *See* Miller, *supra* note 64.

66 *See* The Protect America Act of 2007, *supra* note 24.

67 *See A Tragic Legacy of Serious Harm to the Constitution and American Security Resulting from Legislative Usurpation of Executive Power: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Congress 27–31 (2008) (statement of Robert F. Turner, Cofounder, Center for National Security Law) [hereinafter "Turner, *Tragic Legacy*"] *available at* http://www.virginia.edu/cnsl/pdf/Turner-War-Powers-in-21stCentury-April08.pdf.

amendment's warrant and probable cause "requirements" are met.[68] To the administration's response that the NSA surveillance at issue, undertaken mainly for national security rather than for law enforcement purposes, falls under the "special needs" exception to such requirements, critics answer that "'special needs' generally excuse the warrant and individualized suspicion requirements only where those requirements are impracticable and the intrusion on privacy is minimal."[69]

The Fourth Amendment prohibits only "unreasonable" searches, of course, not warrantless searches.[70] But to the critics' points: Is satisfying those warrant and individualized suspicion "requirements" impracticable? That is a judgment call that none but those conversant with the classified facts and practices can make.[71] To be sure, officials charged with detecting terrorist activity have an interest in minimizing the difficulties of doing so. But the assurances of the critics, most with no personal acquaintance with the matter, that "the experience of FISA shows that foreign intelligence surveillance can be carried out through warrants based on individualized suspicion"[72] does not give confidence.[73] And is the NSA's intrusion on privacy more than minimal? The critics' assertion that "[w]iretapping is not a minimal intrusion on privacy"[74] would be more convincing if, as noted earlier, they could produce people who even knew that their communications had been intercepted, much less could show that they had been harmed. Here again, the contrast between the respective harms is stark—and surely must play into the meaning of "unreasonable."

In fact, the issue of a "special needs" exception was addressed very recently by the United States Foreign Intelligence Surveillance Court of Review, in only its second opinion, *In re: Directives*,[75] decided on August 22, 2008, but made

68 Letter to Members of Congress, *supra* note 53, at 8.

69 *Id*.

70 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

71 *See infra* notes 109–111 and the accompanying text.

72 Letter to Members of Congress, *supra* note 53, at 8.

73 *See supra* notes 49, 51, 61 and the accompanying text. Indeed, if the *In re Sealed Case*, discussed *infra*, brought anything to light, it is how difficult and confusing it can be for intelligence officials and courts alike to discern and apply FISA's provisions. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curiam).

74 Letter to Members of Congress, *supra* note 53, at 8.

75 *In re Directives*, 551 F.3d 1004 (FISA Ct. Rev. 2008).

public only on January 16, 2009. Ruling under provisions of the then-recently-expired Protect America Act of 2007, which had temporarily revised FISA,[76] the court held that "a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[77] Moreover, after considering the totality of the circumstances and balancing the relevant interests, the court also held "that the surveillances at issue satisfy the Fourth Amendment's reasonableness requirement."[78]

B. The Separation of Powers

Congressional regulation pursuant to the Fourth Amendment is only one branch of the constitutional argument, of course. More fundamental, arguably, is the separation-of-powers issue. And here, it should be noticed, the critics' push for congressional dominance in foreign affairs is but part of a much larger trend, stretching back over more than a century. Today's congressional supremacists see a broad scope for legislation in foreign affairs, which means, ultimately, for adjudication *by the courts*—in short, for the judicialization of war, promoted today largely by the international law branch of the legal academy.[79] But that development did not begin with foreign affairs. Its roots are in the Progressive Era, with an emphasis on the statutory ordering of domains the Constitution had left largely to private ordering, albeit with judicial oversight under the common law.[80] That Progressive vision was finally constitutionalized by the New Deal Court, which is seen by many today, erroneously, as having checked the "activism" of the "Old Court."[81] In truth, however, the New Deal Court opened the floodgates for a surfeit of Progressive legislation—federal, state, and local—regulating vast areas of life, following which the courts were increasingly called

76 *See* The Protect America Act of 2007, *supra* note 24.

77 *In re Directives*, 551 F.3d at 1012.

78 *Id*. at 1016.

79 *See* David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, 51, 60; *cf*. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 44–6. For a critique of the move from traditional liberal internationalism to progressive transnationalism, *see* John Fonte, *The World Is My Constituency*, NATIONAL REVIEW, Nov. 2, 2008 *available at* http://www.hudson.org/index.cfm?fuseaction=publication_details&id=5852.

80 *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 2–8 (2006).

81 *Id*. at 71–77.

upon to adjudicate the often inconsistent and incoherent legislative tangle that poured through.[82]

With the Vietnam War, however, we saw that same Progressive impulse directed to foreign affairs. Between 1964 and 1984, for example, the congressional publication *Legislation on Foreign Relations* increased four-fold, from one 659-page volume to two volumes of over 1,300 pages each.[83] It was a massive expansion of congressional micromanagement of the executive's conduct of foreign affairs, no better illustrated than by the War Powers Resolution (1973) and FISA (1978).[84]

Not surprisingly, those who argue for congressional supremacy in foreign affairs usually ignore the early sources cited above. Instead, they take as their template the 1952 concurrence of Justice Robert Jackson in the *Youngstown* case,[85] which in their hands has achieved all but iconic status. Recall that Jackson distinguished three scenarios: the president's power is at its height when supported by congressional action, he said; in a "zone of twilight" when Congress is silent; and "at its lowest ebb" when at odds with the expressed or implied will of Congress.[86]

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82 I have discussed those issues more fully in *Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War: Hearing Before the Comm. on Homeland Security and Government Affairs, Subcomm. on Fed. Financial Management, Government Information, and International Security, United States S.*, 109th Cong. (statement of Roger Pilon, Vice President for Legal Affairs, B. Kenneth Simon Chair in Constitutional Studies, and Director, Center for Constitutional Studies, Cato Institute), *available at* http://www.cato.org/testimony/ct-rp102005.html, reprinted as *The United States Constitution: From Limited Government to Leviathan*, A.I.E.R. ECONOMIC EDUCATION BULLETIN, 2005.

83 COMM. ON FOREIGN RELATIONS AND FOREIGN AFFAIRS OF THE SENATE AND HOUSE OF REPRESENTATIVES, LEGISLATION ON FOREIGN RELATIONS THROUGH 1964 (1964); COMM. ON FOREIGN RELATIONS AND FOREIGN AFFAIRS OF THE SENATE AND HOUSE OF REPRESENTATIVES, LEGISLATION ON FOREIGN RELATIONS THROUGH 1984 (1984).

84 *See* Turner, *Tragic Legacy*, *supra* note 67.

In the aftermath of the 1960s, congressional intrusion into matters the Constitution left mainly to politics was not limited to foreign affairs, of course. Another area that has seen congressional micromanagement, with predictable consequences, is campaign finance. *See, e.g.* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443. 88 Stat. 1263; Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. At oral argument in a case now before the Supreme Court, *Citizens United v. Federal Election Commission*, former solicitor general Theodore B. Olson, arguing for the petitioner, described the current law as "one of the most complicated, expensive, and incomprehensible regulatory regimes ever invented by the administrative state"—a regime that Deputy Solicitor General Malcolm Stewart, arguing for the government, later admitted would allow for the regulation not only of the movie at issue but of books as well. Transcript of Oral Argument at 3, 37, Citizens United v. Federal Election Commission, No. 08-205, March 24, 2009, a*vailable at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf.

85 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

86 *Id.* at 637.

There are several problems with using that template as a substitute for the Constitution as originally understood and as interpreted and applied by the courts over the years to foreign affairs. First, *Youngstown* was arguably a domestic, not a foreign affairs, case, notwithstanding President Truman's effort to bootstrap a local labor dispute into a foreign affairs matter. Second, Jackson's concurrence was the opinion of only one justice.[87] Third, it was dicta. Fourth, it was metaphor. Fifth, even on its own terms the passage did not say that the president did *not* have power; it said only that his power was "at its lowest ebb,"[88] which is a *political*, not a *legal*, point. Finally, Jackson carefully distinguished the seizure of private property within the United States from a case involving external affairs, noting expressly that the president's "conduct of foreign affairs" was "largely uncontrolled, and often even is unknown," by the other branches.[89] And he added: "I should indulge the widest latitude of interpretation to sustain [the president's] *exclusive* function to command the instruments of national force, at least when turned against the *outside* world for the security of our society."[90]

Administration critics also cite the so-called *Keith* case of 1972.[91] But that too was a domestic case. And the Court there *repeatedly* distinguished it from one involving the president's constitutional power to collect *foreign* intelligence.[92] Writing for an unanimous Court, Justice Lewis Powell quoted from the wiretap provisions of the 1968 Crime Control and Safe Streets Act:[93]

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.[94]

But, critics respond, "FISA specifically *repealed* that provision, FISA § 201(c), 92 Stat. 1797, and replaced it with language dictating that FISA and the criminal code are the

87 *Id.* at 642.
88 *Id.* at 637.
89 *Id.* at 642.
90 *Id.* at 645 (emphasis added).
91 United States v. United States District Court, 407 U.S. 297 (1972).
92 *Id.*
93 *Id.* at 303.
94 *Id.*

'exclusive means' of conducting electronic surveillance."[95] Clearly, Congress can repeal that provision. Consistent with the separation of powers, however, it cannot, by mere statute, repeal or otherwise restrict "the *constitutional* power of the President"—a power it had recently recognized—by "dictating" how the president shall exercise his constitutional power.

To be sure, Article I, section 8 of the Constitution vests power in Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in the government, including the power of the president to gather foreign intelligence.[96] But FISA is hardly "necessary" for carrying that power into execution—presidents have exercised it since the nation's inception, quite without any congressional micromanagement. Nor is FISA "proper" insofar as its restrictions intrude on the president's vested foreign affairs powers or hinder his protection of the nation for so little gain—both of which, unfortunately, are the case.

Those conclusions emerged in various ways in the most authoritative opinion to date on FISA, post 9/11 and post Patriot Act, the *In re: Sealed Case*,[97] decided on November 18, 2002, by the United States Foreign Intelligence Surveillance Court of Review—its first decision since FISA was enacted.[98] Although the government was not bringing an Article II challenge to FISA, it was seeking reversal of the lower FISA court's grant of a surveillance order that imposed restrictions on the internal workings of the Justice Department, restrictions that arose, the court of review found, from several erroneous readings of the statute by prior courts.[99] But in the course of its exhaustive opinion, the court of review spoke directly to the issue of inherent (more properly, vested[100]) executive power.[101] Citing an earlier Fourth Circuit decision, *United States v. Truong*,[102] which dealt with pre-FISA surveillance based on "the President's constitutional responsibility to conduct the foreign affairs of the United States,"[103] the court said:

> The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct

95 Letter to Members of Congress, *supra* note 53, at 6 (original emphasis).

96 U.S. CONST. art. I, § 8.

97 *In re: Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curium).

98 *Id.*

99 *Id.*

100 *See* Lawson, *supra* note 48.

101 *In re: Sealed Case* was also cited repeatedly in the second opinion of the FISA Court of Review, *In re Directives*, 551 F.3d 1004 (FISA Ct. Rev. 2009).

102 United States v. Truong Dinh Hung, 629 F.2d. 908, 911 (4th Cir. 1980).

103 *In re: Sealed Case*, 310 F.3d at 742.

> warrantless searches to obtain foreign intelligence information . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power*.[104]

That does not settle the separation-of-powers question, of course, for it leaves open the relation, in various factual situations, between the president's and Congress's concurrent powers. But it points in the right direction by noting the unmistakable history of judicial support for the president's "inherent authority to conduct warrantless searches to obtain foreign intelligence information."[105] In deciding the issue before it, however, the *Sealed Case* court's main concern was with how there arose a "false dichotomy" between surveillance for foreign intelligence purposes and surveillance for law enforcement purposes—leading to the "primary purpose" test for admitting evidence into criminal prosecutions—and how that led in turn to a "wall" between law enforcement and counterintelligence agents and agencies.[106] In painstaking detail the court traces those errors.[107] Yet the inescapable conclusion that emerges from that troubled history is really quite simple: How could it have been otherwise?

VII. CONGRESSIONAL OVERREACHING AND POLITICS

The complex layers of confusion the *Sealed Case* court lays bare—among prior courts and government officials alike—is the product, quite simply, of repeated efforts by Congress to "get it right." But in a matter so fraught with infinite variety as foreign intelligence gathering, in a world of ever changing technology, statutory micromanagement of the kind revealed in *Sealed Case* is a fool's errand. Classical economists like F.A. Hayek have demonstrated the folly of legislative efforts to manage the economy—the kinds of efforts that emerged from Congress with the New Deal.[108] *Mutatis mutandis*, the same principles apply here. All of which brings us back, not surprisingly, to John Locke: the foreign affairs power "is much less capable to be directed by antecedent, standing, positive Laws, than [by] the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good."[109]

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104 *Id.* (emphasis added).
105 *Id.*
106 *See Id.*
107 *See Id.*
108 *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. J., 519 (Sept. 1945).
109 Locke, *supra* note 25.

And recent experience bears that out. Recall the Senate testimony of former FBI agent Coleen Rowley, based in the FBI's Minneapolis office, about the difficulties she encountered with FBI headquarters agents who feared she did not have enough evidence to obtain a FISA warrant to search the laptop of Zacarias Moussaoui, later convicted as the twentieth 9/11 hijacker.[110] And at Moussaoui's trial, four years later, Rowley's former colleague, FBI agent Harry Samit, testified that only days before 9/11 he tried to get a FISA warrant to search Moussaoui's laptop, only to be told that he didn't have enough to satisfy the FISA restrictions.[111] When FISA was enacted, Congress decided to err on the side of privacy, not security, and we paid the price for it.

None of this is to say, of course, that Congress is powerless in these matters. In foreign affairs in general it has certain enumerated constitutional powers that historically have checked the executive in limited ways. Most prominently, it has the power of the purse—and, ultimately, the power of impeachment. But short of those, it has the *political* power that is inherent in its oversight functions, whether conducted in public or, as is often necessary in these matters, in closed sessions. When Congress tries to micromanage the executive through *legislation*, however, it is the courts that often end up doing the micromanaging, indulging the judicial hermeneutics we see in so many of these cases, trying to discern what Congress "really" meant, issuing fractured opinions and inscrutable guidance over matters beyond their competence. The *In re: Sealed Case* illustrates the struggle: it shows, beyond doubt, how earlier courts, doing the same, led to the erection of the "wall" that may have led, tragically, to the terrorist attacks of September 11.[112]

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110 *Oversight Hearing on Counterterrorism: Hearing before the S. Comm. on the Judiciary*, 107th Cong. (2002), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=279&wit_id=628 (statement of Coleen Rowley, Federal Bureau of Investigation agent).

111 Transcript of Record at 907–51, United States v. Moussaoui, 483 F.3d 220 (2007), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/moussaoui/zmsamit.html (last visited July 16, 2009).

112 *See In re: Sealed Case*, 310 F.3d 717, n.29 (FISA Ct. Rev. 2002) (per curium):

> An FBI agent recently testified that efforts to conduct a criminal investigation of two of the alleged hijackers were blocked by senior FBI officials—understandably concerned about prior FISA court criticisms—who interpreted that court's decisions as precluding a criminal investigator's role. One agent, frustrated at encountering the "wall," wrote to headquarters: "[S]omeday someone will die—and wall or not—the public will not understand why we were not more effective and throwing every resource we had at certain 'problems.' Let's hope the National Security Law Unit will stand behind their decisions then, especially since the biggest threat to us now, [Usama Bin Laden], is getting the most 'protection.'" The agent was told in response that

In the end, as the Framers understood, foreign affairs, with all its variables and subtleties, is more a matter for politics than law. Early on, in secret sessions, President Bush briefed eight key members of Congress about the Terrorist Surveillance Program, to the apparent satisfaction of all. It was only after details of the program were leaked to the press, more than three years later, that opinions shifted. Still, as politics have played out since then, opinion has shifted again as cooler heads have come to the fore. On July 10, 2008, President Bush signed The FISA Amendments Law of 2008, which members of Congress, including then Senator Barack Obama, supported overwhelmingly.[113] Whether those amendments, which substantially loosen FISA's restrictions on the president's foreign intelligence surveillance power, will survive the test of time in an ever-changing world remains to be seen. But a history of repeated revisions suggests that the Framers got it right when they left such matters mainly to the president and politics.

headquarters was frustrated with the issue, but that those were the rules, and the National Security Law Unit does not make them up. *The Malaysia Hijacking and September 11th: Joint Hearing Before the Senate and House Select Intelligence Committees* (Sept. 20, 2002) (written statement of New York special agent of the FBI).

113 H.R. 6304: FISA Amendments Act of 2008, *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-6304; *See* Michael Hayden, *Warrantless Criticism*, N.Y. TIMES, July 27, 2009, at A21:

> Some critics claim that Congress was not aware of the full extent of the program, but the ultimate judgment on the effectiveness of much of the program may actually have been the actions of Congress. In the 2008 amendment to the Foreign Intelligence Surveillance Act, Congress judged it appropriate not only to provide additional legal underpinnings for much of what the agency had been doing but also to recognize the value of its activities by providing additional critically needed capabilities. In my briefings to Congressional overseers from 2001 to 2005, I continually made the point that we simply could not achieve the program's operational effect under FISA procedures as they then existed and it is clear that Congress ultimately agreed.

Justifying Wartime Limits on Civil Rights and Liberties

Robert J. Pushaw, Jr.[*]

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

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

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

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

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

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

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

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

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

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

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

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

7 *See infra* Part II.

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

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

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

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

I. LIMITING CIVIL LIBERTIES TO HELP WIN WARS

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

9 *See infra* Part I.D.

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

11 *See infra* Part I.D.

12 *See infra* note 100 and accompanying text.

13 *See infra* note 166 and accompanying text.

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

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

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

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

A. The Constitutional Design

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

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

Specifically, Article I authorizes Congress to provide for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Lincoln's Constitutionalism

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

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

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

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

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

37 *See id*. at 122.

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

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

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

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

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

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

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

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

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

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

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

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

47 *Id.* at 309.

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

49 *Id.* at 723.

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

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

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

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

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

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

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

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

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

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

55 *Id.* at 665–82.

56 *Id.* at 670.

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

58 *Id.* at 243, 248.

59 *Id.* at 252.

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

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

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

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

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

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

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

C. Roosevelt: Lincoln Redux

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

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

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

66 *Id.* at 132–33.

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

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

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

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

71 *Id.*

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

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

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

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

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

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

74 317 U.S. 1 (1942).

75 *Id.* at 22–48.

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

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

78 *See id.* at 218–19, 223–24.

79 *See id.* at 215–24.

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

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

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

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

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

D. Bush and the War on Terrorism

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

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

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

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

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

85 *See supra* note 1 and accompanying text.

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

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

1. The Main Features of the Antiterrorism Effort

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The "Enemy Combatant" Decisions

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

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

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

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

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

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

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

112 542 U.S. 507 (2004).

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

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

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

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

114 542 U.S. 466 (2004).

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

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

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

118 *See supra* note 97 and accompanying text.

119 548 U.S. 557 (2006).

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

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

122 128 S.Ct. 2229 (2008).

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

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

3. *Milligan* and *Youngstown*

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

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

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

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

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

126 *Id.* at 107–08, 118–27.

127 *Id.* at 109.

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

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

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

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

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

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

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

132 343 U.S. 579 (1952).

133 *Id.* at 582–89.

134 *See id.* at 585–88.

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

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

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

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

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

4. The Guantanamo Detainee Cases in Historical Perspective

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

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

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

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

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

140 *See supra* note 100 and accompanying text.

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

5. Justifying the War on Terrorism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

159 *Id.* at 378–80.

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

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

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

160 *See id.* at 436.

161 347 U.S. 483 (1954).

162 *See id.* at 489–96.

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

164 *Id.* at 377–78.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

"The most awful problem that any nation ever undertook to solve": Reconstruction as a Crisis in Citizenship

Allen C. Guelzo[*]

Reconstruction is the step-child of the Civil War, the black hole of American history. It lacks the conflict and the personalities that make the Civil War so colorful; it also lacks the climactic feuds and battles, and dissipates into a confusing and wearisome tale of lost opportunities, squalid victories, and embarrassing defeats whose ultimate endpoint is the great American disgrace—Jim Crow.[1] It lives with the short end of the historical stick for accomplishing too much, then accomplishing too little, with the result that almost the worst thing that can be said about someone in American history is that they were prominent in Reconstruction, since it throws them into the same mental filing cabinet with Andrew Johnson, Ulysses Grant and the Ku Klux Klan.[2] Its twelve years, from 1865 to 1877, teem with associations and developments that seem regrettable, if not absolutely subversive:

- The first massive intrusion of federal governmental authority in the affairs of individuals and the states, beginning with the first and second Reconstruction Acts of 1867, which effectively reduced all but one of the states of the defeated Confederacy to the status of conquered provinces and imposed military occupation of those states until the civil populations re-wrote their state constitutions in a way that satisfied Congress;[3]

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1 For a chronicle of the history of Jim Crow *see generally* JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW (2003).

2 *Id.*

3 JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 6–9 (2006).

- The first expansion of the category of civil rights recognized and enforced by the federal government, and the first limits on other civil rights (free assembly, legislative independence, freedom of the press) since the Alien and Sedition Acts;[4]
- Massive and wholesale graft, corruption and fraud in the civil governments erected by federal force in the rebel states; and (last but very, very far from least)[5]
- The insertion of race as a political consideration into federal politics, by treating blacks as a "distinct class" to be protected and assisted.[6]

That these initiatives concluded, by 1877, in almost total failure, is greeted by the political Left with a sense of regret for the road-not-then-taken, and on the political Right with a sense of anger that they were ever proposed in the first place. So, on the one hand, we have Mark Brandon declaring that:

> [T]he Constitutional program of the Radicals in Congress—embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments— proposed a fundamental alteration of the order's basic forms and values. Consequently, the Radicals' constitutional program supplanted dominant conventional understandings of the meaning of the original Constitution. In the process, it rendered that Constitution incoherent.[7]

On the other hand, George P. Fletcher argues that Reconstruction "enacted a second American constitution," that American constitutional law really begins with the 14th Amendment, and that only in our own times have we shown the willingness to come to grips with the fact that the Republic of 1789 is dead, and long live 1867:[8]

> This constitutional order stands in radical contrast to the Constitution drafted in Philadelphia and amended by the Bill of Rights in 1791. It defines membership in the American nation, it brings the principle of equality to the fore, and it initiates the process of extending the franchise to virtually all adult citizens. The original Constitution did none of these things.[9]

Is there a better way to look at Reconstruction, which requires neither the repudiation of Reconstruction nor the repudiation of the Constitution? Any realistic answer to that

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4 *Id.*

5 *Id.*

6 HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866 149 (New York, 2000).

7 MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 207 (1998).

8 GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 26 (2001).

9 *Id.* at 29.

question has to begin with a willingness to think about the Civil War which preceded it as embodying three pivotal questions:

1. Can a democracy—or any form of popular government that rests ultimate sovereignty in the consent of the majority—actually work in the way the Founders planned? Lincoln saw clearly, and from the outset, that the real issue of the Civil War was the fragility of democratic process.[10] If political minorities, like the slaveholding South, will always withdraw from the *polis* the moment their will is thwarted, then this is a *de facto* confession that democracy does not really work, after all. Nor was Lincoln the only one. George W. Towle, writing in the *Atlantic Monthly* in the summer of 1864, warned that "the failure of man's self-governing capacity here" must be "the deathblow to its own hopes" everywhere else.[11] "Our failure will not be fatal to us alone; it will involve the fate of the millions who are now seeking to plant themselves against the tremendous force of kingly and patrician prestige."[12]
2. Can democracy endure alongside slavery? Sooner or later, either recognition of natural rights will correct the thinking that justifies slavery and abolish it, or natural rights will wither away and all rights will become dependent on whomever the exercise of power is pleased to bestow them.
3. Can democracy succeed in the face of racial, cultural, linguistic or religious differences? Or, as William Grosvenor wrote more bluntly in *The New Englander* in October 1865, "How shall we deal with four millions of liberated blacks?"[13] Here, of course, is where the business of race intrudes its ugly snout. For in the political environment of slavery, blacks of African descent were the only permissible objects of enslavement, and in intellectual environment of the 19th century, widespread beliefs in white racial supremacy forbade the integration of blacks and whites on anything approximating civic equality. One popular solution was colonization.[14] But

10 DON E. FEHRENBACHER, LINCOLN IN TEXT AND CONTEXT 127 (1987).

11 G.M. Towle, *Our Recent Foreign Relations*, ATLANTIC MONTHLY, Aug. 1864, at 246.

12 *Id.*

13 William Mason Grosvenor, *The Rights of the Nation and the Duty of Congress*, 24 NEW ENGLANDER 755, 757 (1865).

14 ALLAN E. YAREMA, AMERICAN COLONIZATION SOCIETY: AN AVENUE TO FREEDOM? 26–27 (2006).

> this so-called solution collided mightily with the fact that the Civil War had put blacks into federal uniform, and made highly questionable the justice of denying civil rights to those who had fought to defend the civic order.[15] Still, there was no reason to imagine that racism might not prove much stronger than logic. No wonder Grosvenor said, "Rightly considered, it is the most awful problem that any nation ever undertook to solve."[16]

Abraham Lincoln's answer to the first question was *yes*, and so secession had to be resisted; his answer to the second was *no*, and so the United States could not limp on indefinitely "half-slave and half-free." His answer to the third question—which is really the question of Reconstruction as much as it is a question of the Civil War—arrived in one word: CITIZEN. It was the word Lincoln paid to inscribe on the gravestone of his free black valet, William H. Johnson, who died of smallpox in January 1864, smallpox he probably caught from Lincoln, who developed a non-lethal form of the disease on his way back from delivering his address at Gettysburg that November.[17] Buried in the Congressional cemetery, William Johnson's small white marker bears only his name and that single word, CITIZEN.[18] No one noticed it then, but that word is the principle at stake in Reconstruction.

The Constitution does not offer a particularly useful definition of citizenship; in fact, it does not offer one at all. In the five places where the word *citizen* occurs in the Constitution, three of them are used merely to specify that certain officeholders must have been "a Citizen of the United States."[19] The other two discuss the jurisdiction of the federal courts over "Controversies. . . between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," and the "Privileges and Immunities" which "the Citizens of each State shall be entitled to" enjoy equally with all those of "Citizens in the several States."[20] So it appeared that two parallel categories existed—

15 *See infra* note 33 and accompanying text.

16 Grosvenor, *supra* note 13, at 757.

17 James Oakes, *Natural Rights, Citizenship Rights, States' Rights, and Black Rights: Another Look at Lincoln and Race*, *in* OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 115–116 (Eric Foner, ed., 2009).

18 *Id.*

19 U.S. CONST. art. 1, § 2, cl. 2; U.S. CONST. art. 1, § 3, cl. 3 and U.S. CONST. art. 2, § 1, cl. 5.

20 U.S. CONST. art. 3, § 2 and U.S. CONST. art. 4, § 2, cl. 3. The 11th Amendment also refers to litigation "by Citizens of another State, or by Citizens or Subjects of any

the category of citizens of the United States and the category of citizens of individual states—the first of which the Constitution offered no definition, and the second of which it had no power to define.

This two-track system of federal and state citizenship may have seemed more obvious to the Founders than to us, since citizenship, in its classical and liberal forms, has always had a certain two-track aspect anyway.[21] One of those aspects is *participation*: citizenship is what conveys the right to participate in governance and law-making, the contrast here being between a citizen who is an agent in self-government and a subject who is merely ruled. A citizen, in this sense, is a public person, exercising a public role.[22] The other is *status*: citizenship is what conveys certain legal protections and a civic identity.[23] Looked at from this perspective, a citizen is a legal member of the *polis*, and cannot be molested by his government or any other government without judicial consequences.[24] And in a rough-and-ready way, federal jurisprudence before the Civil War sorted out the boundary between federal and state citizenship precisely along the lines of the participation/status dividing line. State citizenship spoke most directly to the rules of civic participation—hence, it was not only theoretically but practically possible to exercise certain civil rights, and particularly voting, within the states without being a citizen of the United States. In Lincoln's Illinois, the single requirement for voting was residence in the state for one year, even though the statutory requirement for residence under federal naturalization law was five years.[25] Hence, white immigrants who would not be deemed naturalized by the federal government could vote legally in Illinois in the 1850s, provided they could swear an oath to a judge of elections

Foreign State" against the United States, which further aggravates the sense of Citizenship being a state prerogative. U.S. CONST. amend. XI.

21 Michael Walzer, *Citizenship*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 217–220 (Terence Ball et al. eds., 1989).

22 Aristotle defines the citizen as someone who "shares in the administration of justice, and in offices." THE BASIC WORKS OF ARISTOTLE 1177 (Richard McKeon ed., 1941).

23 Walzer, *supra* note 21 at 217–220.

24 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATISE ON THE LAWS 293 (Francis Barham ed., 1841). Cicero describes citizens in *De re publica* as those who are protected by "the laws that constitute just marriages and legitimate progenies, under the protection of the guardian deities, around the domestic hearths. By these laws, all men should be maintained in their rights of public and private property. It is only under a good government like this, that men can live happily—for nothing can be more delightful than a well–constituted state." *Id.*

25 *Illegal Voting—An Explanation*, CHI. PRESS & TRIB., Oct. 29, 1858; Act of Jan. 29, 1975, ch. 20, 1 Stat. 414 (repealed 1802).

that they had been Illinois residents for the previous year.[26] Federal citizenship, however, spoke more clearly to status—it spelled out who could be elected, who could sue in federal courts, and to whom "Controversies" between competing state jurisdictions would be referred.[27]

Even there, however, the Constitution still did not convey a very adequate notion of what qualified someone to enjoy the status of federal citizen. The implication of the Constitution, based on the requirement that the president be a "natural born Citizen, or a Citizen of the United States," was that federal citizenship was a matter of *jus soli*, of being born on the national land or soil.[28] But the infamous *Dred Scott v. Sanford* decision of 1857 inserted the requirement of *jus sanguinis*—citizenship by specific birthright—which it then used to deny Dred Scott any standing in the federal courts as a man of "African descent."[29] And so did many of the state courts: even free blacks, ruled the North Carolina Supreme Court, "cannot be considered as citizens in the largest sense of the term."[30] When South Carolina (in the wake of the Denmark Vesey rebellion plot) required incarceration of black sailors on ships visiting Carolina ports, a federal district court ruled that this was a violation of the "privileges and immunities" clause of the Constitution.[31] In other words, American seamen of whatever race possessed a federal citizenship status which South Carolina could not arbitrarily ignore. But this was swept aside by an edict from Andrew Jackson's attorney-general (Roger B. Taney, who would also write the majority opinion in *Dred Scott*): "The African race in the United States even when free . . . were not looked upon as citizens by the contracting parties who formed the Constitution."[32]

So, it might have been possible, on these terms, to have arrived at the end of the Civil War—to emancipate slaves, abolish slavery as a legal institution, and re-unify the nation—and in the process do absolutely nothing about whether the newly-emancipated slaves were citizens of anything. Possible—but not likely. By the end of the war, colonization had turned out

26 *Illegal Voting*, *supra* note 25.

27 *See supra* notes 19–20 and accompanying text.

28 U.S. CONST. art. 2, § 1, cl. 5.

29 Dred Scott v. Sandford, 60 U.S. (19 HOW.) 393 (1857).

30 State v. Newsom, 27 N.C. (5 Ired) 250 (1844).

31 Elkison v. Deliesseline, 8 F. Cas. 493 (Cir. Ct., D.S.C. 1823).

32 DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 70 (1978); Michael Vorenberg, *Reconstruction as a Constitutional Crisis*, *in* RECONSTRUCTIONS: NEW PERSPECTIVES ON THE POSTBELLUM UNITED STATES 167 (Thomas J. Brown ed., 2006).

to be a "humbug," and 180,000 free blacks stood in federal uniforms and had earned federal honors for their fighting.[33] There was also a political consideration in the minds of the victorious Republican party that urged them to establish a definition of citizenship which embraced both *status* and *participation*.[34] Practically speaking, the end of slavery meant an end to the 3/5ths clause in the Constitution; and far from that being the end of a racial humiliation for blacks, what it meant politically was that the Southern states could now return to Congress, demanding full (rather than 3/5ths) representation for their black population, without actually giving those blacks the right to vote for the now-increased representation the South would enjoy.[35] Tactically speaking, it would be possible for the white South to emerge from the Civil War in an even stronger position in Congress than it had enjoyed *before* the war, with blacks still disenfranchised, but their numbers now awarding Southern states larger delegations in the House of Representatives. The result would be the rolling-back of every initiative the Republicans had achieved in their brief dominance of the wartime Congress—protective tariffs, government assistance to the railroads, the homestead act, the national banking system—as well as assumption of the Confederate war debt.

On the other hand, if the freedman could be transitioned from non-citizen to citizen, then (promised Frederick Douglass) "he will raise up a party in the Southern States among the poor, who will rally with him," and so establish a long-term Republican political hegemony in the formerly all-Democratic South.[36] But this would go for nothing if, with the end of hostilities, political pardons were handed out widely to former rebels, allowing them to mobilize their old pre-war political resources and get themselves elected to Congress; and if blacks could be confined to a no-man's-land where they were no longer slaves but not legally

33 Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 44 (2002).

34 Donald G. Nieman, *From Slaves to Citizens: African Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2120 (1996).

35 Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L. J. 259, 265 (2004).

36 *Interview with a Colored Delegation Respecting Suffrage*, *in* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 1865–1870 55 (Edward McPherson ed., Da Capo Press, Inc. 1972) (1871); HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 52 (2007); KENNETH STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 96 (Alfred A. Knopf 1972) (1965); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 33 (2006).

citizens of either the states or the federal Union. Sure enough, no sooner had Andrew Johnson, a former Democrat and Southern Unionist, been sworn in as president after the assassination of Lincoln, than Johnson, on May 29, 1865, issued a broadly-drawn amnesty proclamation, offering pardons to all but the uppermost echelons of the former Confederate leadership—and even they were permitted by "special application" to be pardoned.[37] And to smooth the path to restoration, Johnson added a series of proclamations, appointing interim provisional governors and urging the writing of new state constitutions based upon the voter qualifications in force at the time of secession in 1861—which meant, in large but invisible letters, NO BLACKS.[38]

What this insured was that Reconstruction would be fought as a struggle over citizenship—in effect, to settle whether citizenship could trump race in the same way, at the time of the Founding, it had trumped religion, through the First Amendment. So, from the moment it became clear that Andrew Johnson intended nothing more than the re-creation of the pre-war status quo, minus only slavery, the Republican congressional leadership—Thaddeus Stevens of Pennsylvania in the House, Charles Sumner and Henry Wilson of Massachusetts in the Senate—reached over Johnson's hands, first to replace the old Confederate order with a free-labor economy, and then to define citizenship in such a way as to secure the freedmen's place within the politics and economy of a new South.[39]

It is a good measure of how critical the notion of citizenship was to Reconstruction that the first resistance the ex-Confederates offered took the form, not of the race war that had been so often predicted as the likeliest result of emancipation, but of guarding the precincts of *participation* in the states from black intrusion.[40] The "Black Codes" enacted in the wake of Johnson's amnesty proclamation were aimed at defining blacks as 'vagrants' or 'paupers' who could be excluded from citizenship by excessive poll taxes, forbidding black-white intermarriage, curtailments of free speech (including "insulting gestures"), and most ominous of all, ownership of "fire-arms of any kind, or any ammunition, dirk or bowie knife."[41] It also underscores the

37 *By the President of the Untied States of America: A Proclamation*, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 310–12 (James B. Richardson ed., 1897).

38 *Id.* at 313–14.

39 Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1008–10 (2002)

40 *The Freedmen: Laws of the Southern States Concerning Them*, NEW YORK TIMES, June 10, 1866, at 6.

41 *Id.,* MAJOR GENERAL O. O. HOWARD, COMMISSIONER BUREAU OF REFUGEES,

centrality of the place of citizenship in any discussion of Reconstruction to notice that the first objections from Republicans, when the first session of the new 39th Congress assembled in December 1865, were also based on citizenship. "I deny the right of these States to pass these laws against men who are citizens of the United States,"[42] erupted Henry Wilson, seconded by Lyman Trumbull of Illinois, who introduced a Civil Rights bill just after the New Year which contained a forthright definition of federal citizenship, based on *jus soli*: "[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States," declared the new bill, "and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States . . . as is enjoyed by white citizens."[43] Offences against those rights would be adjudicable in federal courts.[44]

But this would require some serious re-negotiating of the assumptions about citizenship which had prevailed up until the Civil War. Wilson was promptly interrupted by John Sherman of Ohio, who pointed out that "[t]here is scarcely a State in the Union that does not make distinctions on account of color . . . Is it the purpose of this bill to wipe out all these distinctions?"[45] And in the House of Representatives, Wisconsin Democrat Charles Eldridge accused the promoters of the civil rights bill of an "insidious and dangerous" plan to "lay prostrate at the feet of the Federal Government the judiciary of the States."[46] The only citizenship Eldridge knew was the citizenship of the states: "I hold that the rights of the States are the rights of the Union, that the rights of the States and the liberty of the States are essential to the liberty of the individual citizen."[47]

Trumbull's civil rights bill was eventually passed in March 1866, but finally stopping short of including among the rights of federal citizenship the right to vote.[48] Andrew Johnson vetoed it anyway on March 27th.[49] Granting federal citizenship to "our

FREEDMEN, AND ABANDONED LANDS, LAWS IN RELATION TO FREEDMEN, S. Exec. Doc. No. 6, at 170, 192-99 (39th Cong. 2d Sess. 1867); JOHN C. RODRIGUE, RECONSTRUCTION IN THE CANE FIELDS: FROM SLAVERY TO FREE LABOR IN LOUISIANA'S SUGAR PARISHES 1862–1880 67 (2001).

42 CONG. GLOBE, 39th Cong., 1st Sess. 41–42 (1865).

43 Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

44 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 243 (1988).

45 CONG. GLOBE, 39th Cong., 1st Sess. 41–42 (1865).

46 *Id.* at 1154.

47 *Id.*

48 Act of Apr. 9, 1866, *supra* note 45.2.

49 *To the Senate of the United States*, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 413 (James B. Richardson ed., 1897).

entire colored population" when the states had refused to do likewise in terms of state citizenship, argued Johnson, either made federal citizenship null and void, or else overrode state citizenship to the point where it was a useless concept.[50] And it was clearly the latter which Johnson saw as the bill's strategy: "Federal law, whenever it can be made to apply, displaces State law" and interferes with "relations existing exclusively between a State and its citizens."[51] Congress ignored him and overrode the veto.[52]

The Civil Rights Act of 1866 was a landmark in the expansion of the notion of federal citizenship, because it forced into the open for the first time since the Constitutional Convention the inherently problematic linkage of the divided sovereignty of the states and the Union, and the divided tracks of a citizenship of status and a citizenship of participation. The argument of Andrew Johnson and the wartime Democrats in Congress implied that state citizenship covered virtually every ground worth calling citizenship—office-holding, contract, marriage, and, of course, voting. But what this left as the realm of federal citizenship was anyone's guess. The opponents of the civil rights bill and other Reconstruction legislation were opposing federal jurisdiction over both rights of *participation* as well as *status*. If participation *and* status were up to the states to define, was there any worthwhile meaning to the phrase, 'citizen of the United States'? It had been the plea of Charles Sumner in 1854, in his provocative speech on "The Crime Against Kansas," that the crime of Gaius Verres—which had been that he ignored his victim's protest, *civis Romanus sum*—was not less treasonous than the depredations of pro-slavery Border Ruffians who ignored their victims' protests of "I am an American citizen."[53] That plea got Sumner assaulted on the floor of the Senate; those who opposed the Civil Rights Bill of 1866 were, if only metaphorically, doing much the same.[54]

One solution to the deadlock over state and federal citizenship in the former Confederacy was to deny that the one-time Confederate states were any longer states of the Union—that they had, in effect, committed state-suicide by secession, and were to be governed as the western territories were governed,

50 *Id.* at 406.

51 *Id.* at 410, 413.

52 CONG. GLOBE, 39th Cong., 2d Sess. 313, 344 (1866).

53 THE CRIME AGAINST KANSAS: SPEECH OF HON. CHARLES SUMNER, IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH MAY, 1856 4–5 (1856).

54 *Id.*

directly by federal law.[55] In turn, then, *federal* citizenship could assume the burden of defining both status and participation for the inhabitants of the occupied Confederacy. This was the strategy behind the two Reconstruction Acts of March and July 1867, which declared that "no legal state governments or adequate protection for life or property now exists" in any of the old Confederate states except Tennessee and reduced them to "military districts" where "civil tribunals" would operate only at the behest of the military district commander.[56] But even before the bills were passed, they were placed under fire from a new quarter, the Supreme Court, which released its opinions in *Ex parte Milligan* in December, 1866.[57] *Ex parte Milligan* reversed the convictions of Lambdin Milligan and two others who had been imprisoned by a federal military tribunal in 1864, and thus called into question the entire constitutional legitimacy of military authority.[58] Fearful that "the first time that the South with their copperhead allies obtain[ed] command of Congress," they would repeal the civil rights bill and appeal to the Court to overturn the Reconstruction Acts, congressional Republicans leapt ahead in the second session of the 39th Congress to armor-plate the status of federal citizenship with two amendments to the Constitution,[59] the fourteenth (which eliminated any distinction between state and federal citizenship and welded them together on the basis of *jus soli*: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"[60]) and the fifteenth in 1869 (which annexed *participation* to federal citizenship by preventing any state or federal authority from denying the right to vote on account "of race, color, or previous condition of servitude").[61] This was, as future president James Garfield announced in the House, the first time that the federal government "proposes to hold over every American citizen, without regard to color, the protecting shield of law."[62] Taken together, the Reconstruction amendments cemented firmly into place the basic Republican conviction that "no distinction would be tolerated in this purified Republic, but what arose from merit and conduct."[63]

55 OriginalIntent.Org, Original Intent Treatise, Citizenship, http://www.originalintent.org/edu/citizenship.php (last visited August 1, 2009).

56 Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867).

57 *Ex parte* Milligan, 71 U.S. 2 (1866).

58 *Id.* at 135.

59 Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

60 U.S. CONST. amend. XIV, § 1.

61 U.S. CONST. amend. XV, § 1.

62 James Garfield, CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

63 Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).

Although the Democratic opposition raged that the Reconstruction amendments were nothing but what Garret Davis of Kentucky called "a bald, naked attempt to usurp power and to bring all the sovereign and reserved powers of the States to the foot of a tyrannical and despotic faction in Congress," and that it gave the vote "to a race of men who throughout their whole history, in every country and condition in which they have ever been placed, have demonstrated their utter inability for self-government," it was ultimately neither a demonic thirst for centralized government nor an idealized passion for racial egalitarianism which were the drivers of that opposition, but the question of citizenship.[64] Even some of the most radical Republicans were surprisingly uninterested in turning their Reconstruction legislation into a social revolution.[65] "This doctrine does not mean that a negro shall sit on the same seat or eat at the same table with a white man," Thaddeus Stevens replied in 1867, "[t]hat is a matter of taste which every man must decide for himself. The law has nothing to do with it."[66] But insofar as the black man born in the United States and the white man born in the United States were considered politically equal, their identity was based, not on being black or white, but on being citizens.[67]

Unhappily, the history of Reconstruction—like more recent reconstructions—contains within itself a warning that bills and amendments do not carry with them guarantees about security.[68] Military reconstruction was pock-marked by racial violence in Southern cities, aimed largely at intimidating blacks from voting and restricting them to various forms of economic peonage.[69] Congress attempted to contain the violence with the three Force Acts of 1870 and 1871; and Ku Klux Klan violence ensured the election of Republican governments in the former Confederate states, and of Ulysses Grant in 1868 and 1872.[70] But by 1876, many of the old wartime Republican guard were gone—Thaddeus Stevens died in 1868, Henry Wilson left the Senate in 1872 to run as Grant's vice-president, and died in 1875, and Charles

64 Garrett Davis, Cong. Globe, 40th Cong., 3d Sess. 1630–31 (1869); on the larger context of the conservatism of Reconstruction, *see* Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. Am. Hist. 65, 83–84(1974).

65 ERIC FONER, FOREVER FREE 113 (2005).

66 Thaddeus Stevens, CONG. GLOBE, 39th Cong., 2nd Sess. 252–53 (1867).

67 U.S. CONST. amend. XIV, § 1.

68 FONER, *supra* note 65, at 194–95.

69 *Id.*

70 *Id.* at 171, 175, 177–80.

Sumner died in 1874.[71] Also gone was the Republican majority in the House, which was replaced in 1874 by the first Democratic majority since the beginning of the Civil War, and the Republican majority in the Senate, which was lost in the elections of 1878.[72] By then, the full weight of an unsympathetic Supreme Court had finally descended in the *Slaughter-House Cases*, which re-established "that there is a citizenship of the United States, and a citizenship of the State, which are distinct from each other."[73] Hence, the "privileges and immunities" attached to federal citizenship had no application to state governments.[74] The second blow came in *U.S. v. Cruikshank* in 1875, which re-affirmed *Slaughter-House Cases* and added that "the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States."[75] An effort to circumvent *Cruikshank*, in the form of the Civil Rights Act of 1875, lasted only until 1883, when the Supreme Court overturned the Act in the *Civil Rights Cases*.[76]

By that time, even the Republican faithful had lost heart in the fight. The Panic of 1873 pulled the financial rug from under the government's resources, and the cries for help from southern blacks for government intervention increasingly came to sound in Republican ears like the demands of populist farmers for currency inflation or unionized workers for economic regulation.[77] "Is it not time for the colored race to stop playing the baby?" asked the *Chicago Tribune* irritably in 1875.[78] Finally, the deal struck by the electoral compromise of 1877, which gave the presidency to Rutherford B. Hayes and mandated the withdrawal of the last Reconstruction military authorities; in their absence, a lethal combination of strong-arm politicking and economic fragility sent the feeble Reconstruction state governments crashing down.[79] Not until 1888 would Republicans regain sufficient numbers in Congress to renew their efforts to interpose federal supervision of Southern voting with a fresh "Force Bill,"

71 *Id.* at 146; RICHARD NELSON CURRENT, THOSE TERRIBLE CARPET BAGGERS: A REINTERPRETATION 278, 285 (1988).

72 FONER, *supra* note 65, at 190; Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 635 n.232 (2004).

73 Slaughter-House Cases, 83 U.S. 36, 74 (1873).

74 *Id.*

75 United States v. Cruikshank, 92 U.S. 542, 555 (1875).

76 FONER, *supra* note 65, at 194; HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901 150 (2001).

77 RICHARDSON, *supra* note 76, at 137.

78 *Id.*

79 FONER, *supra* note 65, at 198.

drafted by Henry Cabot Lodge.[80] The bill passed the House, only to die a lingering death in the Senate.[81] It had all been, in the memorable title of Judge Albion Tourgee's memoir, "A Fool's Errand."[82]

We should not fool ourselves, however, into thinking that this was an unavoidable, much less an appropriate, conclusion to Reconstruction. Although Reconstruction has more recently been portrayed as a kind of radical fairy-tale, or a Paris Commune in gumbo, Reconstruction's fundamental issue—citizenship, rather than race or centralization, or even civil rights—was a profoundly conservative one.[83] The kind of citizenship imagined by the Reconstruction Republicans is based on the *jus soli* and by the rational assent to a series of propositions (starting with the natural rights proposition of the Declaration of Independence, that all men are created equal), not blood, soil, race or ethnicity, the *jus sanguinis* so beloved of German Romanticism.[84] The cry, *I am an American citizen*, is what must make any power stand down, whether it comes in the form of centralized federal governments or (what is no less exempt from the blandishments of power) centralized state governments, centralized municipal governments, boss-driven school boards, or one-party faculties.[85] Writing online for his magazine, *The American Interest*, Francis Fukuyama has said:

> Americans traditionally distrust strong central government, and champion a federalism that distributes powers to state and local governments. The logic of wanting to move government closer to the people is strong, but we often forget that tyranny can be imposed by local oligarchies as much as by centralized ones. In the history of the Anglophone world, it is not the ability of local authorities to check the central government, but rather a balance of power between local authorities and a strong central government, that is the true cradle of liberty.[86]

80 Edward E. Purcell., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1994–1995 (2003).

81 *Id.*

82 EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 50–51 (1992); RICHARD NELSON CURRENT, THOSE TERRIBLE CARPETBAGGERS: A REINTERPRETATION 368–375 (1988).

83 WILLIAM C. HARRIS, WITH CHARITY FOR ALL: LINCOLN AND THE RESTORATION OF THE UNION 262 (1997); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 111 (1987).

84 Steve D. Shadowen, et al., *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 92, 93 (2009).

85 THE CRIME AGAINST KANSAS, *supra* note 53 at 5.

86 Francis Fukuyama, *Strong States and Liberty*, THE AMERICAN INTEREST ONLINE, Apr. 25, 2008, *available at* http://the-american-interest.com/contd/?p=648.

The price we have paid for ignoring this balance lives on not only in the ugly history of poll taxes, literary tests and grandfather clauses, but also in the federal overreach with which that history has been responded to, in the form of racial gerrymandering and proportional representation schemes. Neither the illness or its maladroit cure—whether local or federal—has much to offer beside the fundamental honor of citizenship; and refusing to recognize the implications of *civis Americanus sum* in the era of Reconstruction is what has helped bring us to our present muddled condition over voting rights, statistical "triggers," and the racial balkanization of the nation.[87] At the end of the day, there is only one political honor any American should aspire to, and only one political privilege that any of us should be permitted to enjoy, and it is contained in that singular and laconic word that President Lincoln engraved on William Johnson's headstone: CITIZEN.

87 Abigail Thernstrom, *Reviewing (and Reconsidering) the Voting Rights Act*, 7 ENGAGE 35, 35–36 (2006).

Discretionary Sentencing in Military Commissions: Why and How the Sentencing Guidelines in the Military Commissions Act Should be Changed*

*Brian Wolensky***

INTRODUCTION

In 2001, during the early days of the "War on Terror," United States officials captured Salim Ahmed Hamdan, the personal driver and bodyguard of Osama Bin Laden, while he was transporting weapons across the Afghani border.[1] From 2002 until his trial in 2008, Hamdan was classified as an enemy combatant[2] pursuant to the Geneva Convention[3] and detained at

* This article was initially written and published when the state of military commissions were in flux. It reflects the events regarding military commissions up to and through April 2009. However, an important decision was made by President Obama in May of 2009. *See* William Glaberson, *Obama Considers Allowing Please by 9/11 Suspects*, N. Y. TIMES, June 6, 2009, at A1, A12. Obama decided to continue the use of military commissions under a new set of rules which provide more protections for detainees. *Id.* Due to the timing of publication, this decision is not incorporated in this article. Although Obama has decided to continue the military commissions, he has not finalized a set of rules. *Id.* This article serves as a recommendation for changes to the rules of the Military Commissions Act, which Congress and the Obama Administration should consider.

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1 Although Hamdan was considered a low level player in Al Qaeda, he was fairly involved with the group. *See* Charge Sheet of Salim Ahmed Hamdan, United States v. Hamdan (Feb. 2, 2008), *available at* http://www.defenselink.mil/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf.

2 Hamdan v. Rumsfeld, 548 U.S. 557 (2006). "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war." *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942). The definition of enemy combatants, as described in *Ex parte Quirin*, was reaffirmed by the Supreme Court in 2004. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004). This classification is important because an enemy combatant can be detained until the end of a current conflict, and is subject to trial by military commission. *Id.* at 521. Further, the United States has classified members of the Taliban, al Qaeda, and associated forces as unlawful enemy combatants, and defines an unlawful enemy combatant as "a person who has

Guantanamo Bay. On August 7, 2008, Hamdan was the first Guantanamo detainee convicted by a United States Military Commission—governed by the Military Commissions Act of 2006 (MCA)—for providing material support for terrorism.[4] Hamdan was sentenced to five and a half years in prison. However, the military commission judge granted "administrative credit"[5] for time served since Hamdan's capture in 2001.[6] As a result, Hamdan only had to serve five additional months.

Hamdan's case, the first application of the MCA,[7] showed weaknesses in the current military commission system, particularly with regard to sentencing.[8] These weaknesses must be fixed to ensure that detainees will be given a fair trial as commissions go forward.[9] In the words of Thomas Paine, "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[10]

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engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents." 10 U.S.C. § 948a (Supp. 2008).

3 Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

4 *See* William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1, *available at* http://www.nytimes.com/2008/08/08/washington/08gitmo.html?partner=rssnyt. Although Hamdan was the first case to be completed by a military commission, in 2007 David Hicks, an Australian detainee, entered a guilty plea and was given a nine month sentence and thus became the first detainee to be released via the MCA. David McFadden, *Gitmo Jury: Life Sentence for Bin Laden Videomaker,* ABC NEWS, Nov. 3, 2008, http://abcnews.go.com/print?id=6169091 (last visited Mar. 8, 2008).

5 An administrative credit is the reduction of a sentence by allowing time held to count forward. After administrative credit was granted to Hamdan, the Government challenged the commission's authority to grant such credit. *See* Corrected Government Motion for Reconsideration, United States v. Hamdan (Sep. 24, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/10/us-motion-re-hamdan-sentence-9-24-08.pdf.

6 Jerry Markon & Josh White, *Bin Laden Driver Gets 5 1/2 Years; U.S. Sought 30*, WASH. POST, Aug. 8, 2008, at A1.

7 Although Hamdan was the first case to be completed by a military commission, on November 4, 2008, Ali Hamza Ahmad Suliman al Bahlul was sentenced to life in prison. McFadden, *supra* note 4. Al Bahlul is seen as an extremist who has publicly expressed interest in destroying the United States. *See* Charge Sheet of Ali Hamza Ahmad Suliman al Bahlul, United States v. al Bahlul, (Feb. 8, 2008) [hereinafter Charge Sheet of al Bahlul], *available at* http://www.defenselink.mil/news/Feb2008/d20080208bahlul.pdf. It is interesting to note that the decision did not appear in many newspapers and hardly received national coverage. This could be due to the fact that many people believe al Bahlul belongs in jail for life. However, it is most likely due to the fact that the decision was handed down the day before the 2008 Presidential Election.

8 One obvious problem that surfaced is whether administrative credit can be granted. *See* Corrected Government Motion for Reconsideration, *supra* note 5 ("The accused is not entitled to administrative credit because nothing in law or regulation authorizes such credit.").

9 *See* McFadden, *supra* note 4.

10 THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT (1795), *reprinted in* THE THOMAS PAINE READER 452, 470 (1987).

Amid the growing criticism of the use of military commissions,[11] President Barack Obama issued an Executive Order shutting down Guantanamo Bay and suspending the use of the commissions until their procedures are reviewed and a course of action planned.[12] While shutting down Guantanamo may be viewed as a publicity move,[13] abandoning military commissions and the MCA would be a catastrophic move that could have devastating effects. The MCA is by no means perfect—in fact, as discussed throughout, its sentencing guidelines, among other things, must be changed—however, abandoning the MCA at this point would take the United States back to square one.

In summation, current military commissions and the MCA are not perfect, however, it is the most just system in place and it may not be practical to start anew; therefore, it is crucial to improve the MCA while continuing its use. The sentencing guidelines provided by the MCA, which grant wide discretion to the commissions, is surely an area requiring improvement. The goal of this Comment is to analyze the sentencing guidelines and rules to propose changes that should be made.[14]

Part I of this Comment provides a brief history and description of military commissions and explains where the authority for commissions originated—particularly the United States Constitution,[15] Supreme Court jurisprudence,[16] and the Law of War.[17] Part I further examines the significance of the

11 *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, FACT SHEET: MILITARY COMMISSIONS ACT, *available at* http://www.aclu.org/pdfs/legpriorities2007p2.pdf [hereinafter ACLU FACT SHEET].

12 Section 3 of the Order deals with the closure of Guantanamo, while Section 7 halts the current military commissions. Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

13 *See* Daphne Eviatar, *Why Closing Gitmo Isn't Enough*, WASH. INDEP., Nov. 14, 2008, http://washingtonindependent.com/18503/why-closing-gitmo-isnt-enough (providing general objections to Guantanamo Bay) (last visited Mar. 13, 2008). *But see* Kyndra Miller Rotunda, *Don't Close Gitmo*, WASH. TIMES, June 23, 2008, at A24 (citing numerous reasons why keeping Guantanamo open is the best course of action for the United States).

14 Although the current state of the MCA and military commissions are in flux, the suggestions in this Comment are applicable to any decision that may be made regarding the commissions. If the commissions are reinstated, or if a new type of court or system is established, this Comment serves as guidance for those commissions or systems as well. Further, as will be discussed below, military commissions have been established in almost every war in American history, thus, this Comment offers sentencing guidance for future commissions.

15 *See* U.S. CONST. art. I, § 8, cls. 9, 10.

16 *See generally Ex parte* Quirin, 317 U.S. 1, 48 (1942) (allowing the President to convene and order trial by military commission); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 634–35 (2006) (finding the military commissions authorized by the President unconstitutional, but inviting Congress to write rules governing military commissions).

17 The Law of War consists of two components: (1) treatises, conventions, and agreements between countries and (2) custom. *See* U.S. DEP'T OF DEFENSE REPORT ON

MCA and explains the reasons why the United States must continue to use military commissions.

Part II looks in depth at the MCA, examining the strong congressional intent to provide fair trials to detainees while still preserving United States' national security.[18] Part II also explores the policy reasons behind the sentencing guidelines in the MCA, in particular why such wide degree of discretion was given to the commission with respect to sentencing. Next, Part III describes the problems with the current sentencing guidelines in the MCA, focusing on the problems of (1) administrative credit and (2) excessive commission discretion in sentencing.

Finally, Part IV proposes a solution to the ambiguities in the sentencing guidelines. These changes, if adopted, will provide stability for military commissions, helping to legitimize their use. Further, the changes will ensure that each convicted terrorist is given a fair sentence that is in proportion to the crime committed, while preserving national security.

I. A HISTORICAL OVERVIEW AND THE IMPORTANCE OF MILITARY COMMISSIONS

Before probing into any problems the MCA may or may not have, an overview of the military commissions, its evolution and significance is important to understand. This Part will define and provide a brief history and the authority that created the commissions as well as the importance of the MCA and continuation of the military commissions.

A. A Brief Background of Military Commissions

Under the MCA, a military commission is a court operated by the military "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the Law

THE CONDUCT OF THE PERSIAN GULF WAR, 31 I.L.M. 612, 615 (1992) ("The United States . . . are parties to numerous law of war treaties intended to minimize unnecessary suffering by combatants and noncombatants during war."); U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 2311.01E, LAW OF WAR PROGRAM, sec. 3.1. (May 9, 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf (defining the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities").

18 *See generally* 152 Cong. Rec. S10354 (2006). Military Commissions provide: "Judicial guarantees recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions; "Appropriate protection of national security interests; and Protection and safety for all personnel participating in the process, including the accused." U.S. DEP'T OF DEFENSE, FACT SHEET: MILITARY COMMISSIONS (2007), *available at* http://www.defenselink.mil/news/Aug2007/OMC%20Fact%20Sheet%20Aug%2007.pdf [hereinafter U.S. DEP'T OF DEFENSE, FACT SHEET].

of War and other offenses."[19] Throughout history there have been thousands of combatants subject to rulings by military commissions.[20] However, there is a strong likelihood that many of these combatants did not receive a fair trial because of a desire to quickly punish combatants for their alleged war crimes.[21]

As countries became civilized, military courts evolved. Although not officially dubbed "military commissions," the first military courts in the United States were established to try a spy immediately following the American Revolution, and then again in 1818 to try two British Indian traders for assisting Native Americans in the Seminole Wars.[22] The actual term "military commission" was not coined until the Mexican-American War in 1847.[23] Over the next century and a half, military commissions developed rapidly and were utilized heavily in the Civil War and both World War I and World War II.[24] In 2001, President Bush issued an executive order instituting military commissions to try those detained as enemy combatants during the War on Terror.[25]

1. Domestic and International Authority: The Constitution and Law of War and the Involvement with the Development of the Military Commission

The Constitution gives Congress the power to create military commissions. It states that Congress has the power to "constitute tribunals inferior to the Supreme Court"[26] and to

19 10 U.S.C. § 948b(a) (Supp. 2008). Military commissions are used rather than civilian courts because, according to President Bush, "the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military." News Release, The White House, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

20 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 834 (2d ed., rev. & enl., William S. Hein & Co. 2000) (1920) (finding that during the Civil War and Reconstruction there were over 2000 combatants tried by military commission).

21 MAROUF HASIAN, JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 2 (2005) (claiming that because *foreign* military tribunals violate human rights, do not provide a fair and equal trial, and lack civilian oversight, *our* military commission system also will not be just).

22 WINTHROP, *supra* note 20, at 832. For a brief description of the history and character of military commissions, including their use in previous wars, see John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 CATO SUP. CT. REV. 83, 84–99 (2006).

23 *Id.* ("Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, . . . committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces . . . should be brought to trial before '*military commissions*.'").

24 LEONARD CUTLER, THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11 4, 7 (2005); Yoo, *supra* note 22, at 91.

25 Exec. Order No. 01-28904, 66 Fed. Reg. 57833 (Nov. 13, 2001).

26 U.S. CONST. art. I, § 8, cl. 9.

"define and punish . . . Offences against the Law of Nations."[27] Further, Congress has the power to "declare War," and "raise and support Armies."[28] The Constitution explicitly gave Congress war powers and, as such, "[t]he commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war."[29]

Although Congress has the power to create military commissions, it must be mindful of international law. The Law of War is the main governing principle that countries must follow during times of conflict.[30] One of the main treatises included in the Law of War is the Third Geneva Convention, which was enacted in 1949 to regulate the treatment of prisoners of war.[31] The Law of War places restrictions on the way certain countries can act during times of war and the United States is bound by it when it establishes and uses military commissions.[32]

2. Judicial Authority: Key Supreme Court Decisions and their Consequences on the Evolution of Military Commissions

A major reason for the evolution of military commissions has been the involvement of the United States Supreme Court. Arguably, the most important case was *Ex parte Quirin*, in which a military commission was used to try and convict eight German saboteurs during World War II.[33] The United States Supreme Court held:

> By [the President's] Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.[34]

27 U.S. CONST. art. I, § 8, cl. 10.

28 U.S. CONST. art. I, § 8, cls. 11, 12.

29 WINTHROP, *supra* note 20, at 831.

30 *See* U.S. DEP'T OF DEFENSE REPORT ON THE CONDUCT OF THE PERSIAN GULF WAR, *supra* note 17; U.S DEP'T. OF DEFENSE, DIRECTIVE NO. 2311.01E, *supra* note 17.

31 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

32 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 625 (2006).

33 *Ex parte* Quirin, 317 U.S. 1, 21–23 (1942). *Ex parte Quirin* involved facts similar to those surrounding September 11. First, the saboteurs were not wearing uniforms and were thus unidentifiable as combatants. Second, the attacks were planned in the United States. *Id.*

34 *Id.* at 28.

The Court went on to say that there is a strong presumption that military commissions are constitutional, and there must be a contrary showing before they will be struck down.[35]

Roughly sixty years later, military commissions are again at issue before the Court due to the War on Terror.[36] In *Hamdan v. Rumsfeld*, the Court found the conditions and procedures used by President Bush's military commissions were not valid because, among other things, they violated the Uniform Code of Military Justice.[37] In his concurring opinion, Justice Breyer agreed, stating:

> [A]s presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in . . . the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided.[38]

However, the Court seemingly invited Congress to rewrite the rules governing military commissions.[39] Congress responded to *Hamdan* by enacting the MCA, which provides detailed procedures on the use of military commissions.[40]

A strong history, the Constitution, and the Supreme Court all provide authority to establish and use military commissions. Currently, military commissions are being used to try detainees in Guantanamo Bay for war crimes. To date, the Court has not ruled on the constitutionality of these military commissions. The first trial by military commission since World War II came to a close in August 2008 when Salim Ahmed Hamdan was convicted of providing material support to terrorism.[41] Because military commissions are finally available and ready to move forward, their use should continue.

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35 *Id.* at 28. For another Supreme Court case supporting the use of military commissions, see *In re Yamashita*, 327 U.S. 1, 7–8, 25 (1946) (holding that a military court has the jurisdiction to rule on a commander's actions, and their ruling will be given great deference).

36 Hamdi v. Rumsfeld, 542 U.S. 507 (2004), was one of the first cases before the Supreme Court regarding the War on Terror and the war in Iraq. Although not exclusively dealing with military commissions, the court found that the Government must come up with some criteria in holding enemy combatants, and must give all enemy combatants a chance to be heard. *Id.* at 509. For another current case involving detainees and the War on Terror, see *Rasul v. Bush*, 542 U.S. 466 (2004) (allowing access to federal courts by detainees).

37 Hamdan v. Rumsfeld, 548 U.S. 557, 634–35 (2006).

38 *Id.* at 653 (Breyer, J., concurring).

39 *Id.*

40 *See generally* 10 U.S.C. § 948b (Supp. 2008).

41 Markon & White, *supra* note 6.

B. The Importance of Continuing to use Military Commissions

As outlined above, the President and Congress have the authority to establish military commissions in certain situations. This section discusses why the use of military commissions should continue in the context of the current War on Terror. President Obama recently stalled the use of military commissions until their procedures can be reviewed.[42] Instead of military commissions, Obama is considering trying detainees in United States federal courts, or setting up a new national security court.[43] This would be a devastating mistake for the United States and its reputation.

First, although military commissions face some systemic problems,[44] they currently provide the only mechanism by which to try suspected enemy combatants. One criticism of the MCA is that it has taken a long time to develop.[45] However, commissions are finally in a position to move forward. Starting a new system will place the United States back to square one and delay the process even longer.[46] The MCA and military commissions were finally moving, and detainees were getting their day in court. Scrapping the MCA and starting with some other new system that will undoubtedly face more delays will simply not promote justice.[47]

Second, there is no other viable option to replace military commissions. Moving to federal court would undoubtedly destroy the heightened national security protections imposed by MCA.[48]

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42 *See* Exec. Order No. 13492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

43 *Id.*

44 The American Civil Liberties Union website outlines several perceived problems with military commissions. ACLU FACT SHEET, *supra* note 11. However, many of the comments are overemphasized and were made prior to the application of the MCA. Not all of the problems mentioned by the ACLU are apparent. S*ee* Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, United States v. Hamdan (July 20, 2008), *available at* http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf.

45 *See* Ruling on Motion to Dismiss—Speedy Trial, United States v. Hamdan (July 20, 2008), *available at* http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Dismiss%20Speedy%20Trial%20D-046.pdf. It appears that trials have not moved faster because of the difficulty of collecting evidence world-wide and all of the appeals at the federal level that slow the process of military commissions.

46 In response to the idea of President Obama creating a National Security Court, Ken Gude of the *Guardian* stated: "Any attempt to circumvent a judicial system designed to ensure a fair trial will be met with deserved scorn and would likely lead to additional delays as defendants challenge procedures designed specifically to relax evidentiary standards and restrict defence and public access to classified evidence." Ken Gude, *Guantánamo's Days are Numbered*, GUARDIAN (England), Nov. 11, 2008, http://www.guardian.co.uk/commentisfree/cifamerica/2008/nov/11/barack-obama-guantanamo-bay.

47 *See id.*

48 *See* U.S. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18. *But see* Ann Woolner,

To protect national security, the MCA allows certain evidence to be considered at trial that would otherwise be excluded by a civilian criminal court.[49] The use of the civilian federal court system will bar certain reliable evidence, and force the United States to turn over highly confidential national security information.[50] Quite simply, for a just outcome with respect to detainees who have expressed their intent to destroy the United States,[51] all *reliable* evidence must be admitted at trial.[52] Therefore, the use of the federal court system to try defendants seriously undermines national security—something that should be a primary goal when dealing with the most dangerous people in the world.

Finally, scrapping the MCA may potentially send the wrong message to the international community. Cutting losses should not be done unnecessarily; if the United States gives up on the MCA it would be prematurely giving up on a set of fixable problems. A simple application of the MCA's evidentiary rules to *Hamdan* demonstrates their effectiveness.[53] Furthermore, it is

Fixing Terror Laws No Harder Than Economy, SEATTLE POST INTELLIGENCER, Dec. 9, 2008, http://seattlepi.nwsource.com/opinion/391308_woolneronline10.html. Woolner suggests moving detainees to federal courts because a federal judge knows how to deal with coercive evidence and, even if a terrorist is released, it won't matter because the government will monitor him.

49 *See* U.S. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

50 Chris Selley argues, despite the occurrence of torture with respect to certain detainees in the past, placing them in American courts would be a mistake because they may not get convicted because of procedural rules—a risk that cannot be taken. Chris Selley, *Give Barack Obama a Chance to Fail on Guantanamo*, NAT'L POST FULL COMMENT, Dec. 16, 2008, http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/12/16/chris-selley-give-barack-obama-a-chance-to-fail-on-guantanamo.aspx; *see also* Yoo, *supra* note 22, at 86–87 (explaining why military commissions should admit more evidence than a federal court).

51 Many detainees have been quoted as saying, "[i]f I'm let out of here, I will go immediately and start killing Americans again." Roundtable Press Interview with Condoleezza Rice, Sec. of State, in London, Eng. (Dec. 1, 2008).

52 This Comment does not advocate torture, however it may be defined. However, the MCA allows for the admissibility of statements obtained through some degree of coercion in particular situations in order to protect national security. *See* 10 U.S.C. § 948r(c)–(d) (2008). Many are opposed to this section of the MCA as some suggest it may promote torture and kangaroo courts. *See, e.g.*, Edward M. Gomez, *Bush Signs Torture Bill; Americans Lose Essential Freedom*, S.F. GATE, Oct. 17, 2006, http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=15archive/&entry_id=9952 ("By signing into law the Military Commissions Act of 2006, Bush has made it legal for the C.I.A. to continue operating torture facilities in undisclosed, foreign countries . . . ."). However, the evidentiary exception may be necessary for a fair trial, and may also benefit the defense. S*ee* Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, *supra* note 44, at 15–16. In fact, the coercive measures Hamdan complained about were only used in response to his misbehavior and unwillingness to cooperate. *See id.* at 15.

53 Some evidence obtained by coercion was allowed after looking at the totality of the circumstances and the interests of justice, while other evidence was excluded. Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, *supra* note 44, at 15.

hard to criticize the commissions as "Kangaroo Courts" in light of Hamdan's minimal sentence.[54]

That being said, changes must be made because commissions are far from perfect. The rest of this Comment is devoted to addressing an area of change necessary to the MCA, namely the current sentencing rules and guidelines.

II. POLICIES AND FAULTS BEHIND THE MCA AND ITS SENTENCING GUIDELINES

On October 17, 2006, President Bush signed the MCA.[55] By creating an extensive set of rules that govern military commissions, Congress tried to ensure that detainees will be given a fair trial.[56] This Part examines the MCA and the goals it is meant to accomplish.

A. The General Intent Behind the MCA

The general intent of the MCA, as provided by Congress, is to grant enemy combatants with fair trials, but also to protect national security.[57] Section 948b(f) of the MCA reads: "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Convention."[58] By calling for fair judicial procedures, this section of the MCA shows the strong intent of Congress to hold fair trials for enemy combatants.[59]

Congressional meetings show the intent to preserve national security and provide fair trials. Senator McConnell was quoted as saying, "[the MCA] is vitally important because this bill protects our national security, it protects classified information, and it protects the rights of defendants."[60] Senator Graham, a military lawyer for twenty years, said on the congressional record

54 Will Dunham, *U.S. Terror Tribunals: Fair Trial or Kangaroo Court*, REUTERS, May 26, 2003.

55 Press Briefing, Dep't of Defense, New Military Commissions Rules (Jan. 18, 2007), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3868.

56 *Id.* ("The act and the procedures contained in this manual will ensure that alien unlawful enemy combatants who are suspected of war crimes and other -- and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people.").

57 DEP'T OF DEFENSE, FACT SHEET, *supra* note 18; *see generally* 152 CONG. REC. S10354 (2006).

58 10 U.S.C. § 948b(f) (2008).

59 152 CONG. REC. S10354, (2006) (statement of Sen. McConnell).

60 *Id.*

about the MCA, "[m]y goal is to render justice to the terrorists, even though they will not render justice to us."[61]

If the intent behind the MCA is clearly to protect national security while preserving fundamental liberties, then it naturally follows that the goal in sentencing should be the same. However, Congress has made sentencing under the MCA ambiguous.

B. Intent behind the Sentencing Guidelines in the MCA: The Policy and Intent behind Allowing Judges Great Discretion When Sentencing Convicted Terrorists

The MCA and Chapter X of the Manual for Military Commissions (hereinafter MMC) provide judges with fairly loose sentencing procedures and principles and, as such, judges have wide discretion in deciding how to sentence a convicted enemy combatant.[62] In general, the MCA is in place to provide basic guidelines for sentencing,[63] while the MMC deals with the specifics of sentencing procedures.[64]

1. Sentencing Guidelines and Safeguards: How the MCA and MMC Impose Safeguards to Prevent Abuse of Discretion

As it appears, the MCA and MMC provide only minimal guidelines that commissions must follow when sentencing. In addition to the minimal procedural requirements discussed below, the MMC generally allows commissions to sentence any way they deem fit after hearing aggravating and mitigating factors.[65] Rule 1002 of the MMC reads: "Subject to the limitations in this manual . . . the sentence to be adjudged is a matter *within the discretion* of the military commission."[66] As it appears, so long as a commission stays within the bounds of the sentencing limits provided by 10 U.S.C. section 950v,[67] then its sentence shall be considered legitimate.

While there is much discretion given to the commission in sentencing, the MCA and MMC may provide procedural

61 *Id.* (statement of Sen. Graham).

62 U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, pt. II, ch. X (2007), *available at* http://www.defenselink.mil/news/MANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf [hereinafter MMC].

63 *See* 10 U.S.C. § 948d(d) (Supp. 2008) ("A military commission under this chapter may . . . adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war."); *see also id.* § 949m(a)–(c).

64 *See* MMC, *supra* note 62, at R. 1001, 1006–07, 1009–11.

65 *Id.* at R. 1002.

66 *Id.* (emphasis added).

67 10 U.S.C. § 950v (Supp. 2008) (providing a list of crimes punishable by military commissions, and the maximum punishment that may be given for each crime).

safeguards to combat an abuse of discretion. First, a minimum of two-thirds of the commission's members are to determine the convict's sentence.[68] This provision helps keep discretion in check by taking the power from one single judge and spreading it to an entire panel. Another safeguard allows the "Convening Authority"[69] of the commission to reduce any sentence that may have been handed down by the commission.[70] Again, this is another way to check the discretion of a commission as it allows the reduction of an overly harsh sentence.

Finally, once convicted, a defendant may appeal the sentence to the Court of Military Commission Review, then to the United States Court of Appeals for the District of Columbia, and finally to the Supreme Court of the United States.[71] The appellate procedure afforded the detainees is another way to limit the amount of discretion of a military commission.[72]

In general, although some procedures with regard to sentencing are provided in the MCA and MMC, "[t]he broad mandatory maximums . . . stand as the only meaningful substantive restraints on the sentencing discretion of military commissions."[73] Thus, despite minimal safeguards to prevent abuse of discretion, commissions are generally free to sentence as they please.

2. Intent Behind Sentencing in the MCA

The primary goal of sentencing in military commissions should be no different than the goal of the MCA; to enhance the protection of the United States while preserving fundamental notions of justice for the detainees.[74] However, the lack of

68 *Id.* § 949m(a).

69 The Convening Authority is the one who decides to prosecute certain charges. The Convening Authority also appoints the Chief Judge of the Military Commissions Trial Judiciary. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

70 10 U.S.C. § 950b(c)(2)(C) (Supp. 2008). The MCA is similar to the Federal Rules of Criminal Procedure in this respect. *See* FED. R. CRIM. P. 35 ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.").

71 10 U.S.C. §§ 950c, 950f, 950g (2008); *see also* Press Briefing, Dep't of Defense, *supra* note 55.

72 The Federal Rules of Criminal Procedure allow for an appeal from the district court to the appellate court and then to the Supreme Court, while the rules in the MCA allow for three appeals and review by the convening authority. *Compare* FED. R. APP. P. 3 *and* SUP. CT. R. 10 *with* 10 U.S.C. §§ 950b, 950c, 950f, 950g (2008).

73 Note, *Laser Beam or Blunderbuss?: Evaluating the Usefulness of Determinate Sentencing for Military Commissions and International Criminal Law*, 120 HARV. L. REV. 1848, 1855–56 (2007) [hereinafter *Laser Beam or Blunderbuss?*]. This note puts forth the notion that proportionality and crime control are other policies behind the sentencing discretion given to commissions. *See id.* at 1862–64.

74 *See* DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

information provided by Congress makes it difficult for a commission to determine exactly what to aim towards when sentencing.

On one hand, there is the theory that, because the MCA was created to protect national security and to put dangerous terrorists behind bars,— *the main* intent was to provide for harsh sentences.[75] For example, a death sentence for a non-violent crime such as spying[76] could promote national security through deterrence and incapacitation.[77] However, while the death penalty is allowed under the MCA and MMC,[78] and has traditionally been allowed within other military commissions,[79] the strict procedural requirements for enforcing the death penalty make it an unlikely sentence.[80] An example of this was displayed in the recent case of Ali Hamza Ahmad Suliman al Bahlul, a high-level Al Qaeda operative that was convicted, but only sentenced to life in prison.[81] If he was not given the death penalty under the current MCA, it is hard to imagine that any terrorist will be.

If Congress had intended for the harshest sentence possible to be handed out after a conviction, it most certainly would have stated so. Further, military commissions do not seem to be following the goal of promoting national security, as the only two cases decided did not grant the harshest sentence that could be imposed: (1) al Bahlul was not sentenced to death, but rather life in prison;[82] and (2) Hamdan was sentenced to effectively five months in prison.[83] In addition, a third case was settled before trial, and the detainee was released with almost no punishment.[84]

On the other hand, Congress surely did not provide that a commission grant light sentences in order to preserve fundamental principles of justice. While the non-use of the death penalty in recent cases may show intent to preserve fundamental principles of justice, Congress did in fact call for the death

75 *See Laser Beam or Blunderbuss?*, *supra* note 73, at 1862–63.

76 *See* 10 U.S.C. § 950v(b)(27) (2008).

77 *See Laser Beam or Blunderbuss*, *supra* note 73, at 1863.

78 MMC, *supra* note 62, at R. 1004.

79 CUTLER, *supra* note 24, at 15.

80 *See* MMC, *supra* note 62, at R. 1004.

81 Al Bahlul also contributed seriously to September 11. Further, al Bahlul made propaganda and training videos for al Qaeda and even volunteered to be a September 11th hijacker. *See* Charge Sheet of al Bahlul, *supra* note 7. Even after being convicted, al Bahlul was still not sentenced to death. McFadden, *supra* note 4.

82 McFadden, *supra* note 4.

83 *See* Glaberson, *supra* note 4.

84 McFadden, *supra* note 4 ("A third prisoner, Australian David Hicks, reached a plea agreement that sent him home to serve a nine-month prison sentence.").

penalty upon conviction of certain crimes.[85] While the MCA provides safeguards to help avoid an abuse of discretion, these safeguards do not prevent the imposition of the harshest sentence possible. The commission is to take into account all aggravating and mitigating factors and grant a just sentence.[86] As such, any given commission can grant a harsh or light sentence. Thus, depending on the mood of a commission on any given day, a convicted may be sentenced to death if the crime calls for it.

Further, Congress did not explicitly state what a commission should keep in mind when determining a sentence, and as such, Congress has granted wide discretion to commissions and provided them with little sentencing guidance.[87] For example, the MMC through its sentencing guidelines advocates that the goal in sentencing is to punish the defendant in a way that trial counsel sees fit[88]—this shows the clear intent of Congress to allow the commission to punish as they please. Whether it is to promote national security or to preserve fundamental rights of the convicted, a military commission's sentence should conform to some type of standard. The next section examines the practical problems created from ambiguous sentencing guidelines that provide a large amount of discretion to military commissions.

III. PRACTICAL PROBLEMS CREATED BY MCA SENTENCING GUIDELINES

Once the MCA was applied at trial, problems surfaced that were not anticipated when the MCA was enacted, particularly in dealing with sentencing. It appears that ambiguous sentencing requirements created some confusion in military commissions. Further, these problems are harder to remedy as the MCA has rarely been used.[89] Thus, there is minimal precedent to follow.

85 *See generally* 10 U.S.C. § 950v (2008) (providing a list of all crimes that a detainee can be charged with and the possible sentences that may accompany a conviction).

86 *See* MMC, *supra* note 62, at R. 1001.

87 *See Laser Beam or Blunderbuss?*, *supra* note 73, at 1856 ("Because the commissions face hard limits only at the margins, these conditions can be described as 'bounded discretion.'").

88 MMC, *supra* note 62, at R. 1001(g) (providing that trial counsel can argue various different punishment theories that should be applied).

89 *See* Glaberson, *supra* note 4.

A. Time Held Counts Towards Time Served: The Application of the MCA to Hamdan and the Unfortunate Confusion that Ensued

While it is clear that Congress gave full authority to sentence convicted terrorists via military commissions,[90] Congress provided ambiguous guidelines and procedures for sentencing.[91] Naturally, when the MCA was applied for the first time, problems surfaced. One such problem was that of administrative credit.[92] Administrative credit is the ruling of a court that grants pre-trial time held in prison toward the sentence given; it is a way of reducing a convict's sentence.[93] Administrative credit is currently allowed under the Federal Criminal Justice system in certain situations.[94] The question then becomes, should detainees brought to trial via military commissions be entitled to administrative credit? The rules and procedures in the MCA do not provide an answer to that question.

When Hamdan was sentenced to five and a half years in prison the commission granted administrative credit to count towards his sentence.[95] Effectively, his sentence of five and a half years was reduced to roughly five months, and, in November 2008, he was released to Yemen to serve out the rest of his sentence.[96] Immediately following the sentence, the government filed a motion regarding the issue of administrative credit, requesting that the commission be reconvened, told of the error of

90 *See* 10 U.S.C. § 948b(a) (2008).

91 *See supra* notes 65, 87–88 and accompanying text.

92 *See* Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

93 *See* Michael L. Kanabrocki, *Revisiting* United States v. Allen*: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, 2008 ARMY LAW. 1, 1 (Aug. 2008).

94 18 U.S.C. § 3585(b) (2008) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences"). Administrative credit in the federal system can be granted in two circumstances: "(1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed." *Id.*

95 Markon & White, *supra* note 6. The commission granted administrative credit claiming they had the authority to do so. However, the government claims that nothing in the MCA or MMC allows for the granting of administrative authority. Corrected Government Motion for Reconsideration, *supra* note 5, at 1. Although the commission did not state where they drew the authority to grant administrative credit, it is possible that the commission believed they had authority to grant administrative credit via case precedent. *See* United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984) (granting administrative credit). The Court of Military Appeals in *Allen* was the first military court to grant administrative credit. Kanabrocki, *supra* note 93, at 1.

96 Josh White & William Branigin, *Hamdan To Be Sent To Yemen*, WASH. POST, Nov. 25, 2008, at A1.

administrative credit, and to issue a new sentence.[97] The government contended that Hamdan was held pre-trial as an enemy combatant and as such he should not be granted administrative credit.[98] Judge Allred and the military commission refused to reconsider the sentence without explanation.[99] Thus, the issue of administrative credit was never decided.

Failure to resolve the dispute over administrative credit creates several other problems. First, the clash between prosecutor and commission is sure to arise again and, depending on the military commission, the result may be different—that is, administrative credit may not be granted. Thus, the lack of standards will create inconsistent results, which will lead to instability for military commissions.[100]

Second, Congress has not taken action to quell the confusion. Congress was granted the authority by the Supreme Court to write the MCA and rules that govern commissions.[101] The idea of administrative credit may have been foreseeable to Congress, as there is a federal statute counterpart[102] and previous military cases have granted administrative credit.[103] Yet Congress did not explicitly state whether granting administrative should be allowed. As stated above, both the prosecution and the commission have valid arguments for and against granting

97 Essentially the government argued that Hamdan was held as an enemy combatant pursuant to the Geneva Convention and as such his time held at Guantanamo is a separate issue from the sentence he was given for the crimes he committed. Corrected Government Motion for Reconsideration, *supra* note 5, at 1; Posting of Lyle Denniston to SCOTUSBLOG, http://www.scotusblog. com/wp/?s=hamdan (Oct. 19, 2008, 4:01 PM).

98 Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

99 It appears that Commission Judge Allred read the briefs and did not provide a reason as to why the motion was refused. *See* Ruling on Motion for Reconsideration and Sentencing, United States v. Hamdan, [full case citation] (court & year) (docket no.), *available at*, http://www.scotusblog.com/wp/wp-content/uploads/2008/10/hamdan-sentence-order-10-29-08.pdf; Posting of Lyle Denniston to SCOTUSBLOG, http://www.scotusblog. com/wp/?s=hamdan (Oct. 30, 2008, 3:14 PM).

100 Although dealing with a different set of military courts and problems, commissions that tried World War II criminals faced similar problems with inconsistent results. Eventually, it was the inconsistencies that led to the undermining of the legitimacy of the commissions. Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?*, 24 BERKELEY J. INT'L L. 554, 575 (2006).

101 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 653 (2006) (Kennedy, J., concurring in part). Although the Supreme Court found military commissions recently set up by the President Bush unconstitutional, it invited Congress to make a set of rules that govern military commissions; thus the MCA was enacted. Regina Fitzpatrick, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, 20 HARV. HUM. RTS. J. 339, 347 (2007).

102 18 U.S.C. § 3585(b) (2008).

103 United States v. Allen, 17 M.J. 126, 129–29 (C.M.A. 1984).

administrative credit to detainees but, until a rule is created, confusion will continue to ensue and resources will be wasted. As a result, sentences will continue to lack legitimacy and validity.

Finally, this dispute creates embarrassment for the United States nationally and aboard as the inter-branch conflict remains unresolved. Clearly, the dispute over administrative credit must be solved. However, it is not the only problem that exists with regard to sentencing. The commissions currently have too much discretion in sentencing, as discussed in the next Section.

B. Confusion and Uncertain Results: How Lack of a Guiding Principle led to Serious Problems with Regard to Sentencing

While a lack of rules led to an obvious conflict between different branches of government, the amount of discretion given to a commission combined with minimal guiding principles created another set of problems that may not be readily apparent. Uncertain and inconsistent sentences can lead to serious problems that undermine the validity of military commissions.[104] A goal of most sentencing schemes is to provide just sentences. For example, one goal of the United States Sentencing Commission[105] is to "provide certainty and fairness in meeting the *purposes* of sentencing."[106] While a goal of military commissions may be to provide fairness in sentencing,[107] there is no stated "purpose" of sentencing.

The ability of the commission to sentence not based on a definitive standard will create confusion and uncertain results. One problem created by such discretion given to commissions is those attorneys, defendants, the prosecution, the government and even the public have little idea about how a convicted individual may be sentenced. For example, when Hamdan was sentenced,[108] the prosecution was disappointed;[109] President

104 When Congress was creating new federal sentencing laws, one aim was to rid the system of inconsistent sentences. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 98 (1988) ("The legislators were concerned that disparities generated disrespect for the law . . . .").

105 The United States Sentencing Commission is an independent agency that helps develop sentencing guidelines for federal courts, studies sentencing issues and proposes solutions. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2 (2005), *available at* http://www.ussc.gov/general/USSCoverview_2005.pdf.

106 28 U.S.C. § 991(b)(1)(B) (2008) (emphasis added).

107 *See* U.S. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

108 Glaberson, *supra* note 4.

109 While the prosecution sought thirty years, they were not too upset by the lighter sentence handed down to Hamdan as they were hopeful that the eighty other detainees to come to be tried would receive harsher sentences. Alan Gomez, *Bin Laden Driver Gets 5 ½-Year Sentence*, USA TODAY, Aug. 7, 2008, at A1. However, one prosecutor, John

Bush and the Pentagon were pleased;[110] Hamdan was thrilled with the sentence;[111] and the public was seemingly unsure as to the appropriate reaction toward the sentence he received.[112] However, a different commission might grant life in prison to a detainee convicted of the same charge as Hamdan.[113] One consequence of this uncertainty is that it will be harder for both sides to plea bargain as neither side will be able to gauge the strength of their case.[114] This uncertainty further creates chaotic and disorganized results with no real pattern, which reduces the legitimacy of the MCA.

Inconsistent results come about when each commission is allowed to sentence as they please. For Example, Ali Hamza Ahmad Suliman al Bahlul was charged and convicted of conspiracy and sentenced to life in prison.[115] According to the MMC and MCA, al Bahlul could have been sentenced to death,[116] but the commission decided against it. Currently, in a joint trial, five co-conspirators involved in the September 11 attacks[117] are likely to be convicted and sentenced for the same crimes that al Bahlul committed. However, there is nothing in the MCA or MMC to stop this commission from sentencing the co-conspirators to death instead of life in prison. Clearly every case is different; each has its own set of facts and, as such, each

Murphy, was quoted as saying: "Your sentence should say the United States will hunt you down and give you a harsh but appropriate sentence if you provide material support for terrorism." Glaberson, *supra* note 4.

110 The White House and the Pentagon seemed pleased with the sentence as it demonstrated the fairness of the commissions when Hamdan was given a seemingly mild sentence. Jamie McIntyre, *Bin Laden's Former Driver Guilty in Terror Trial*, CNN.com, Aug. 6, 2008, http://www.cnn.com/2008/CRIME/08/06/hamdan.trial/index.html.

111 Hamdan appeared apologetic and looked forward to his release. Markon & White, *supra* note 6.

112 *See Glaberson*, *supra* note 4; McIntyre, *supra* note 110.

113 *See* 10 U.S.C. § 950v(b)(25) (Supp. 2008) (providing that one who gives material support or resources for terrorism "may be punished as a military commission under this chapter may direct.").

114 An inability to plea bargain can lead to a waste of resources because many more cases are likely to go to trial. Further, military commissions may become flooded with detainees as trials in general will take longer. Steven E. Walburn, *Should the Military Adopt an Alford-Type Guilty Plea?*, 44 A.F. L. REV. 119, 120–22 (1998).

115 McFadden, *supra* note 4. Al Bahlul was given a life sentence, so the defect in administrative credit was not present. *See id.*

116 *See* 10 U.S.C. § 950v(b)(28) (Supp. 2008) ("Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death"); *see also* MMC, *supra* note 62, at IV-21 to 22.

117 Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, are all being charged with conspiracy for their acts leading up to and on September 11. *See generally* September 11 Co-Conspirators Charge Sheets, *available at* http://www.defenselink.mil/news/commissionsCo-conspirators.html (follow "Referred Charges" hyperlinks).

sentence should reflect those differences. However, the case of al Bahlul is factually similar to that of the five co-conspirators of September 11. A sentence of death for the five co-conspirators would be an inconsistent result, creating instability in military commissions.

Although there may be some advantages to allowing such discretion,[118] ensuring that military commissions are legitimate should be the ultimate goal. The uncertainty and inconsistent outcomes that may result will lead to a perception that undermines the validity of the courts. The final section of this Comment examines possible solutions to the problems outlined above.

IV. TWO RULES TO IMPROVE THE VALIDITY OF MILITARY COMMISSIONS

The overall goal of Congress should be to improve the legitimacy of the MCA and military commissions such that, as they continue to go forward, the United States remains protected, while at the same time detainees are given fair trials. Incident to this goal is the improvement of the sentencing guidelines in the MCA.

A. Fixing the Immediate Problem: Administrative Credit Should be Allowed

Congress should expressly authorize military commissions to grant administrative credit under certain circumstances. In other words, a convict might be entitled to deduct time already served if a commission deems it appropriate. In order to preserve the goals behind the MCA—preserving national security while protecting a right to a fair trial—administrative credit must be granted in certain situations.

First, as discussed above, military commissions currently have the authority to grant administrative credit. According to common law and precedent, the military has authority to grant administrative credit.[119] Further, administrative credit may be granted in federal criminal cases in certain situations under 18 U.S.C. section 3585(b).[120] While there is also authority to support

118 *See Laser Beam or Blunderbuss?*, *supra* note 73, at 1864 ("A high tolerance for variability in sentencing may help the commissions respond to the shifting demands of the war on terrorism.").

119 *See* United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984).

120 18 U.S.C. § 3585(b) (2008).

denying administrative credit,[121] the practical effects of allowing for such credit should persuade Congress to do so.

A rule allowing for administrative credit will only apply to a small number of cases. Obviously, administrative credit will not apply in all cases, as detainees such as al Bahlul, who have committed the most egregious acts, will undoubtedly serve life in prison.[122] Also, despite the ability to grant administrative credit, it must not be an absolute guarantee and only limited to certain situations.[123] Because of the small number of cases to which administrative credit may be limited, the release of potentially dangerous terrorists following a reduced sentence becomes less likely and, as such, national security will still be preserved.

Every person tried by a military commission will likely have been detained pre-trial. A law allowing for administrative credit protects the fundamental rights of detainees by acting as a safeguard against unlawful pre-trial detainment. Allowing the application of administrative credit would act as one way[124] to release detainees who may not have committed serious crimes but have been held for a long time. Hamdan was likely granted administrative credit because the commission deemed he had already served his sentence.[125] The ability to grant administrative credit allows a commission to look at the facts of a particular case—why and how long a detainee has been held—and allows for application of a just sentence. As such, a rule allowing for administrative credit also promotes justice.

The main objection to administrative credit is that pre-trial detention is independent of the crime committed and resulting sentence and thus should not count toward the sentence.[126]

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121 The government contends that the Geneva Convention allows for the detainment of enemy combatants until the current conflict is over and, thus, the detainees are held independent of the charges against them and should be forced to serve the full sentence given to them. *See* Corrected Government Motion for Reconsideration, *supra* note 5, at 3–5.

122 *See* McFadden, *supra* note 4.

123 For example, 18 U.S.C. section 3585(b) (2008) allows administrative credit only where a detainee is held "(1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed."

124 Another way enemy combatants can challenge their detainment is through habeas corpus review. Boumediene v. Bush, No. 06-1195, slip op. at 1–2 (U.S. June 12, 2008).

125 Although the commission did not state the reasons why it granted administrative credit, it clearly believed Hamdan had been detained for too long. *See* Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

126 The prosecution's argument is that the detainees were held as enemy combatants and their detainment had nothing to do with the crimes for which they were ultimately charged. *Id.* at 6. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("The United States may detain, for the duration of these hostilities, individuals legitimately

Traditionally, in order to be eligible for administrative credit, a person must have been detained in connection with their crime or any other charge they were arrested for after their original crime.[127] Clearly, it can also be argued that the reason these detainees are held is because they committed the crimes for which they are ultimately charged. As such, they were detained in connection with their crime and thus should be granted administrative credit.

Because there is authority to grant administrative credit, and the practical effects of allowing administrative credit are crucial in providing stability for military commissions, a law permitting administrative credit in certain situations, when the commission deems it necessary, must be enacted. The next section discusses a possible solution to the problems caused by providing commissions with wide discretion without any clear sentencing guidelines.

B. Fixing the Guidelines: Commissions Should Implement the Federal Sentencing Guidelines

The main problem with the large amount of discretion given to commissions is the uncertainty and inconsistency of the results that have developed. If the goal of military commissions is to ensure fair trials while preserving national security, the current arbitrary sentencing procedures will not satisfy either objective. The easiest and most effective change would be to model the commission sentencing guidelines after the federal sentencing guidelines.[128] A sentencing scheme modeled after the Federal Rules of Sentencing would be effortless to create, and

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determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'")

127 *See* 18 U.S.C. § 3585(b) (2008). For an analysis of different types of sentencing credit with respect to the military, see Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, 1999 ARMY LAW. 1 (1999).

128 The federal sentencing guidelines are generally governed by the Sentencing Reform Act of 1984, part of which is codified at 18 U.S.C. § 3553 (2008). Pub. L. No, 98-473, 98 Stat. 1987, 2017 (1984). These guidelines were passed in response to many of the same problems in federal court that current military commissions are facing—inconsistent results and arbitrary sentencing. Weigel, *supra* note 104, at 98. Two reasons the federal sentencing guidelines were established were to "incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation)," and to "provide certainty and fairness by . . . avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct." U.S. SENTENCING COMM'N, *supra* note 105, at 1. Another goal of the sentencing guidelines was to "increase the certainty and severity of punishment by eliminating parole and increasing sentencing severity for some crimes." *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 38 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf.

could be implemented relatively quickly without additional delays for detainees who are awaiting trial.

Application of the federal sentencing guidelines will surely provide stability and thus improve the legitimacy of the MCA. Essentially, the federal guidelines provide judges with sentencing ranges that account for the seriousness of the crime and the defendant's past criminal record.[129] Generally, the guidelines provide for sentences that may be consistently applied, and were created to remedy the exact problem that military commissions are having—inconsistent and arbitrary outcomes that result from too much discretion.[130] The use of the same guidelines in every military commission removes the threat of a panel of military members sentencing a "low level terrorist" such as Hamdan to death, and forces each commission to abide by the sentencing rules. At the same time, some judicial discretion is preserved as the commissions will look at the detailed facts of every case and determine which sentence to apply much like federal judges do.[131]

By following the federal sentencing guidelines, fairness and protection of detainees' rights will be preserved. First, the federal guidelines are part of a proven system that has been in place for decades.[132] The use of this established system will quiet doubters who believe that commissions are "Kangaroo Courts."[133] Further, the use of the guidelines allows Congress to determine the appropriate sentence for a particular crime, rather than allow a military commission to do so on a case-by-case basis. If a convict falls within a sentencing range that is indeed too harsh for one reason or another, the United States Supreme Court has found that "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[134] As such, a commission can still ensure that a convict is given the sentence he deserves.

One objection to the use of the guidelines is that sentencing flexibility will be removed and, essentially, Congress will be making the sentencing decision.[135] However, if the military

129 U.S. SENTENCING COMM'N, *supra* note 105, at 2. The sentencing range is determined by the point on the sentencing table where the criminal record and the seriousness of the crime intersect. *Id.*

130 *Id.* at 1–2.

131 Weigel, *supra* note 104, at 101.

132 U.S. SENTENCING COMM'N, *supra* note 105, at 1–2.

133 *See* Dunham, *supra* note 54.

134 United States v. Booker, 543 U.S. 220, 264 (2005).

135 *See* Weigel, *supra* note 104, at 105 ("It is far better to have an independent judge determine the appropriate sentence in any given case . . . than to turn that problem over to a body which, in the end, acts as a Washington-headquartered restraint upon

commissions are going to succeed, they need a stable foundation to ensure their legitimacy. The use of these guidelines by military commissions will institute a proven system that provides consistency. And while one goal of the guidelines is to impose harsher sentences,[136] the use of the federal guidelines coupled with the allowance of administrative credit will ensure that a convicted detainee is given a fair and just sentence.

CONCLUSION

Even today, after roughly 233 years, new rules are routinely created for United States criminal courts. Courts simply cannot be created with one act from Congress; they need time to grow and develop. While Congress tried to foresee many problems regarding the MCA and military commissions, they were not able to eliminate every problem. And even though problems appeared in the MCA after *Hamdan*, current military commissions must continue to be used as they are the most practical system in place. Military Commissions must continue to improve their validity, they must continue to grow. Changes regarding sentencing must be made in order to improve the legitimacy of military commissions.

A system resembling the Federal Guidelines will provide certain and non-arbitrary results. While some believe that the guidelines will provide overly harsh sentences, allowing administrative credit may effectively reduce sentences while preserving some discretion for the commissions. As such, each detainee will receive the sentence he deserves and the United States will remain protected.

judgments best determined locally and individually.").

136 *See* U.S. SENTENCING COMM'N, *supra* note 128, at 38.