MAKING LAW, MAKING WAR, MAKING AMERICA

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MARY L. DUDZIAK
Judge Edward J. and Ruey L. Guirado Professor of Law, History and Political Science
University of Southern California
mdudziak@law.usc.edu

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A note to the reader:

When I began this essay, a draft chapter in the *Cambridge History of Law in America*, I set out to write an essay based on the literature on law and war in the twentieth century. My editors did not like my first attempt. They did not want an overview of the field as it existed, they told me, but instead encouraged me to write about the field as I thought it should be.

This essay is what resulted. Central to the essay is a critique of the way law and war are conceptualized in legal history, particularly the tendency to mark periods of history into timezones (wartime and peacetime), and to assume that both government power and the relationship between citizen and government depend on what timezone one is in (war or peace). An impact of the timezone conceptualization on scholarship in legal history is that scholars tend not to look for the impact of war and national security on law when the matter at hand is not within the timezone of war. One example of this, now widely documented in my book *Cold War Civil Rights* and other studies, is the impact of Cold War-era national security concerns on civil rights developments after World War II. Because Brown v. Board of Education and civil rights history had been understood to be "domestic" stories, the impact of international affairs and national security, although right there in the primary sources, was overlooked. There are other examples.

Cold War Civil Rights set out to place civil rights history within the context that SHAFR studies: the history of foreign relations. This new project is essentially a call to consider American legal history more broadly within the context of the history of foreign relations – to ask whether international affairs played a role, rather than to assume that American legal history was principally a "domestic" narrative, interrupted by global impacts only during exceptional moments of war. It begins with the idea that once we do that, war and national security become central to the story.

Because war is often treated as a static phenomenon "out there" that law reacts to, one of the arguments along the way is that "wartime" is fuzzy, and our understanding of what conflicts involving military action are "war" and what are not depend in part on ideas and cultural understandings. It might help to understand that this argument is a response to some legal scholarship that sees declarations of war and armistice agreements as neat on-off switches, and measures the impact of war on law only within these markers, missing the impact of the war-related environment on law before and after.

During my work on *Cold War Civil Rights*, I found my association with SHAFR to be essential. I look forward to your comments on this new project. There is much time to set me straight. I will turn to serious work on the book version, under contract with Oxford University Press, this fall. (In the meantime I am completing a different book, also with Oxford, that internationalizes American legal history in a different way, on Thurgood Marshall's work on the independence constitution of Kenya. I would be so interested in speaking with anyone at the meeting about U.S. relations with Kenya in the 1960s, G. Mennen Williams, and related topics. My article on this, "Working Toward Democracy," can be found on-line in the December 2006 *Duke Law Journal*.)

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mdudziak@law.usc.edu
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Abstract

It is often said that in times of war, law is silent, but this essay argues that the experience of the twentieth century provides a sharp contrast to this old saying. It is not just that law was not silent during warfare, but that law provided a language within which war could be seen. War is not a natural category outside the law, but is in part produced by it. Across decades of conflict, law was a marker that defined for the nation some of those times when conflict would be contemplated as a war, and helped cabin other uses of force as peacekeeping, or other non-war actions. The laws of war, by identifying forms of warfare that crossed the humanitarian line, also helped carve out forms of warfare that were right and noble. It was in the realm of international law that law was turned to with utopian hopes more than once during the century, first to outlaw war itself, and then the more modest, but still ill-fated, quest to create a world body that would broker disputes between nations and avoid the inevitability of war.

If law helped to make war, war also made law in the twentieth century. While it has been common to see war's impact on American legal history as episodic, this essay argues instead that the impact of war and national security was central and continuing. War is the mother of states, political scientists have argued. As an engine of statebuilding, war also fueled the development of law related to American statebuilding. Government programs and regulations created during a war did not go away but were drawn upon afterward to serve new purposes. In this way, war-related legal developments became entrenched.

The Supreme Court was affected by wartime pressures. While the beginnings of what is sometimes called the New Deal revolution happened before the U.S. entered World War II, caselaw on Congressional power was consolidated and extended during the war. When the Court turned to individual rights, the story has not been a simple one of a pendulum swinging between rights and security. Instead, security concerns often informed the Court's jurisprudence, but security might be advanced by contracting, expanding or modifying rights, depending on the context. In Brown v. Board of Education, for example, racial discrimination was an international embarrassment, and expanding rights enhanced national security.

The story of Brown helps us to see another important way that law and war together made America during the twentieth century. Projecting an image of American justice can be central to maintaining a conception of American democracy - a story of America for the world. This was seen as essential to U.S. prestige and national security during the Cold War. This became a central issue again after September 11, especially after the exposure of abuses at the hands of Americans at Abu Ghraib. The U.S. seemed to retreat from subordination to legal regulation, as if law itself would undercut American security. But the story of the war, and conceptions of its lawfulness, informed the world's understandings of American identity in a way that no president could control.

A Guide for those with limited time who need to skip ahead:

MAKING LAW, MAKING WAR, MAKING AMERICA

MARY L. DUDZIAK[1]

At the close of the First World War, Woodrow Wilson embarked upon a utopian mission. It was not on American soil that armies had slaughtered each other, but Americans had been there in the carnage, and so in its aftermath an American president took up the task of ensuring that it would never happen again. Wilson hoped to create a world body, a League of Nations, and through it order for a lawless world. By such efforts, world leaders wished to contain a force that had long structured and tortured human affairs, and that had become, in their eyes, newly unthinkable due to the horrifying consequences of modern weaponry. The airplanes and submarines that took bloodshed across continents gave the world a new common goal: to end forever the specter of war.

The League is most famous, of course, for its failure, but in that utopian moment we can see an element that would not be lost on the rest of the twentieth century. Americans and others

[1] Special thanks to Rebecca Leffler for her assistance with this essay.

NOTE: The *Cambridge History of Law in America* requires that authors use only sparse citations, for example for quotations. The literature on law and war largely cannot be cited, unfortunately, and is instead discussed in an accompanying bibliographic essay that is attached at the end. The length limit also restricts my ability to fill in historical examples. I intend to build on this work in the future, and would be grateful for any comments and criticism.

held on to the belief that somehow human action could stave off this most ancient form of politics. And they often turned to law as a means of holding back the forces of war.

War would not be contained by law, of course. Instead war would be a defining feature of the twentieth century. This meant that war would play a central role in the history of American law.

Despite that reality, writing in American legal history touches rather infrequently on war. History is conceptualized as divided into time zones, wartime and peacetime; war is thought of as an exception to "normal" time. Unless the topic under consideration is the exception itself (war), war tends to disappear from the narrative. Writing that does focus directly on law and war shares the assumption that wartime is exceptional. The dominant metaphor is of a pendulum swinging back and forth between protection of rights during peacetime and protection of security during wartime. Switching from one time zone to another is thought to set the pendulum swinging in a new direction.

Zones of peace- and war-time serve a particular function in the law. They enable war to be seen as an exceptional state when, regrettably it is thought, the usual rules do not apply. In times of war, the saying goes, law is silent. Scholars debate the degree to which law really is, or should be, silent during wartime. But that debate does not disturb the underlying conception, that wartime is different from regular time, and that wartime is preceded and followed by periods of normality. This way of thinking about law and war keeps us from seeing sustained impacts over time.

The time zone/pendulum conceptualization of law and war is, however, difficult to maintain in the twentieth century. First, Congress rarely officially declared war in the twentieth century, so formal legal markers of war cannot be employed to mark off the time zones. Second,

military action in one form or another was more or less constant. According to federal government reports the United States was engaged in the use of military force overseas in all but ten of the years since the close of World War I.[1] When American troops went overseas, they took weapons and on occasion killed people. Out of all of this killing, only some made it into the pantheon of American "wars." Or perhaps it would be better to say it this way: of all the events experienced by humans on the ground as warfare, only some were treated by the nation as war. A bullet might have the same trajectory as it cuts through flesh, it might trigger the same nerve endings; what is different is its geopolitical rendering.

Whether military killing is a "war," then, depends less on the nature of the weapons deployed, and more on the narrative brought to bear on the action. Sometimes iconic events, like Pearl Harbor, signaled an unmistakable opening of war. But since, for Americans, twentieth century military engagements defined as wars happened elsewhere, the moment that a war entered the American consciousness was usually some overseas crisis of murky dimensions: the sinking of the battleship *Maine*; the crossing of the 38th Parallel; the Gulf of Tonkin incident. Most often, the United States eased into war over time; beginnings and endings are difficult to see. Constructing events into a "war" upon which American security depended required a narrative about who Americans were as a people and how the new enemy constituted a military threat to interests at home. Constructing some events as not-war helped maintain the idea that wartime was exceptional, and that non-war military involvements were peripheral to the body politic.

This chapter will not follow the traditional conceptualization in which times of peace and war are distinct states of being. It makes four central arguments. First, war and national security have cut through the twentieth century history of American law. No temporal switch changes the

legal terrain as the nation moves into a time of war. Instead, troops are deployed nearly always, although national engagement and mobilization varies over time. Even when soldiers are safe at home, the memory of war and the anticipation of the next conflagration is a continuing aspect of law and legal thought. A central feature of national awareness and engagement with war is a narrative, the construction of a war, the way a conflict is understood and promoted.

Second, while rights are thought to ebb and flow, to be stronger in peacetime and weaker in wartime, rights do not, in fact, track back and forth along a peace-war trajectory. Rights are at the heart of American identity; they are part of the way conceptions of the United States are expressed in law. What the nation is, what it stands for, what dangers it faces, are at stake in many individual rights cases. From this perspective, rights expand, contract and are reconfigured in relation to conceptions of the nation and conceptions of its security needs. Who we are and what we fear more affects rights than what time it is.

Third, "war" is thought of as a natural category, existing outside the law. It is something that law reacts to. But here, as in other contexts, law helps to bring into being the world that it then sets about regulating. There is no natural entity called "war" that exists outside human constructions of it. At times, law has been thought of as a way to stop war. Then, as the law of war was filled in, as humanitarian law defined wars outside the bounds of humanity, it constructed as well a vision of war within those bounds. Law does not turn war off and on, but law does tell us about how we understand war's character.

Fourth, just as the effect of war on rights has been constant rather than episodic, its impact on government power and statebuilding has been central and continuing. Just as nations are at times made by wars, war helped build the modern American state. Government programs and regulations created in wartime were often drawn on after war to serve new purposes. As

national security came to be dependent on the development of weapons technology, a permanent armaments industry developed, drawing upon increasing shares of government revenue. By the 1930s, the historian Michael Sherry has argued, militarization was a central feature of American life and war a central component of political rhetoric; the impact of war and militarization would only increase through the rest of the century.

In this chapter, I will explore the different functions law plays in relation to war: as a means to control war, as an aspect of war-related statebuilding, and as a way to manage American society during war.

After both the first and second World Wars Americans thought law could be used as a mechanism to hold back war or to control its practice. In outlawing forms of warfare as inhumane, however, humanitarian law implicitly carves out forms of war that are right and noble. When it does so, law helps enable certain forms of warfare.

Perhaps ironically, alongside American hopes to eradicate war came an increasing focus on war in the U.S. economy and government. Programs and powers of government originating in wartime were turned to "peacetime" uses; eventually "peacetime" came to be conceptualized not as a time of war's absence, but a time of engagement in war prevention. Long before President Dwight D. Eisenhower warned of the dangers to democracy of a "military industrial complex," war had become a central feature of American political and economic life. War became both an engine of statebuilding and a logic of government.

Finally, law became a way to manage domestic matters that affected war and national security. The conventional narrative of law and war in American history highlights the relationship between civil liberties and executive power. The idea that there is a balance between liberty and security, and that during war the balance tips in favor of security, illustrates

government use of law as a technology of national security: ratcheting back on rights is supposed to make the nation safer. But law has also been a tool of a different kind in what is often called the "war of ideas." Because American law is seen as a reflection of American democracy, at times the protection of legal rights, rather than their curtailment, has aided American war efforts, both by enhancing solidarity at home and by maintaining the image of the nation abroad. In these contexts, too, law is a tool of war.

The chapter ends with a discussion of war and law in the wake of the terrorist attacks of September 11, 2001. The attacks have been viewed as if they created a break from the past, a moment when "everything changed." Instead, the conception of war powers and American sovereignty that came into focus post-9/11 is an extension of developments in the twentieth century, rather than a departure from them. In this moment, fears expressed earlier in the century about the relationship between democracy and militarization become most stark. The era seems characterized by a retreat from law, as the United States took steps to shield its actions from scrutiny by domestic and international courts. But government action was predicated on another image of law – what Ruti Teitel has called the "sovereign police," at watch over the world, submitting to no lesser authority.[2] While this image is powerful, the ultimate lesson of the 9/11 era may be that no sovereign power is without limits.

I. Law as an End to War

"It is not now possible to assess the consequences of this great consummation," Woodrow Wilson said to Congress, in announcing the Armistice on November 11, 1918. "We know only that this tragical war, whose consuming flames swept from one nation to another until all the

world was on fire, is at an end and that it was the privilege of our own people to enter it at its most critical juncture in such fashion and in such force as to contribute... to the great result." Perhaps it is the inevitable fate of wars that they take on transcendent meanings. Perhaps there is a human need to ascribe such meanings to wars, as a way to account, in retrospect, for the uncountable casualties. It would be the ironic fate of this Great War to become the war to end all war. In its wake, world leaders gathered in a hopeless quest to ensure that war itself would not circle the earth again.

Ending War

The question of how peace would succeed war was a focus in the negotiations that led to the Treaty of Versailles. Drafted at the Paris Peace Conference, the treaty contemplated the creation of a League of Nations. The League imagined legal process as a peaceful arena for conflict and an alternative to war. Nations would agree to resolve disputes not by armed conflict, but by arbitration and consultation. Nations that violated the pact would be subjected to boycott by the League's members. Article 10, controversial among American critics in the Senate, pledged signatories to aid any member attacked by another nation. President Wilson crossed the country in a futile effort to raise sufficient American support to carry the treaty through the Senate. In speeches, he urged that the League was the world's only hope against war. Without the League to protect the peace, he warned, the alternative was a militarized nation with "secret agencies planted everywhere," and a President transformed from a civil leader into "a commander in chief, ready to fight the world." A mix of American isolationism and domestic political conflict blocked Wilson's efforts. After a protracted debate, the Senate rejected the treaty, and, as Wilson famously put it, broke "the heart of the world."

If Americans could not prevent war through a League of Nations, perhaps they could do it more directly, through law itself. On August 27, 1928, fifteen nations signed a treaty, the Kellogg-Briand Pact, a solemn pledge of peace. According to the Pact, these nations' leaders were "Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated." This was a radical break from the past, when national security was ensured by armaments rather than by agreements. But the consequences of war had been spelled out in the blood of their citizens, and for some, at least, it seemed too high a price to pay. Therefore the nations pledged to each other "that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." The power of Kellogg-Briand, however, lay only in its rhetoric. The pact had no means of enforcement. In ratifying it, the U.S. Senate made clear that the U.S. retained the right of self-defense, and was not compelled to take action against a nation that broke the treaty. And so, powerful as the ideas behind this peace pact may have been, its words could not hold back the invasion of Manchuria by Japan only three years later, or Italy's invasion of Ethiopia in 1935, or the German march across Europe that began in 1938.

Once World War II had run its course, nations gathered for another conference, this time in San Francisco, hoping once again that they could create a world body and an international legal system that would replace warfare with a rule of law. After the carnage of the war their aim again seemed utopian, but so important was it that it is inscribed in the opening words of the founding document of the body they would create: the United Nations. The Preamble of the U.N. Charter announced that "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our

lifetime has brought untold sorrow to mankind,...do hereby establish an international organization to be known as the United Nations." The Charter was ratified by the United States and, initially, forty-nine other nations, but the U.N.'s effectiveness was quickly hampered by Cold War politics. While it has played an important role in peacekeeping efforts at different times, its continued existence is perhaps the greatest testament to a lasting hope, if not belief, that law and global institutions can be an impediment to the forces of war.

Another step taken to end war through law after World War II was the prosecution of Nazi leaders at Nuremberg. The U.S. prosecution team was led by Supreme Court Justice Robert Jackson, on leave from the Court. The Nazis had engaged in the torture and slaughter of Jews and other innocent civilians, and a horrified world expected retribution. Many also believed that the Nazis had to be held responsible so that acts like theirs would never happen again. Nazi leaders were charged with conspiracy to wage aggressive war, waging aggressive war, war crimes and crimes against humanity. The first two counts criminalized the very act of waging war. Evidence of the crime of aggressive war included Germany's violation of the Kellogg-Briand pact.

The most controversial aspect of the Nuremberg trials was that many of the charges lacked precedent in international law. Law was constructed after the fact and applied to the defendants, something that in the United States would be an unconstitutional *ex post facto* law. Debate raged about whether the tribunal was applying new international law retroactively, and whether that was moral. In his opening statement, Robert Jackson defended the tribunal in this way:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

The prosecuting nations hoped to use international law "to meet the greatest menace of our times: aggressive war," he told the tribunal. "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."

What is most interesting about this moment is the turn to formal legal process -- as if the world itself had too much blood on its hands, and could not bear the usual course of victor's justice: a bullet to the head. After a year-long trial, three of the twenty-four Nazi leaders were acquitted. Twelve were sentenced to death and seven to various prison terms. Two did not stand trial. The variety of outcomes – acquittals and varied sentences of imprisonment as well as executions – seemed in themselves a defense of the trials. It could be argued that they were not simply a long and bureaucratic means of execution. Yet the Allies hoped to do more than to model lawfulness. Through the formalities of a trial, they hoped to display before the world, and embed in historical memory, evidence of the terrible crimes of the war and of the Holocaust. It

was the trial process itself, not the imposition of the sentences, that was supposed to ensure that crimes like these would never happen again.

After World War II, the age of the "Great" and "Good" Wars had passed, and the world slipped into a Cold War, seeming to teeter, at times, on the edges of self-annihilation. Law as a path to peace was supplanted by an arms race. The new way to guard against war was to have more nuclear weapons than your adversary. But a role for legal institutions would survive. Law became a tool of "peacekeepers" on more limited missions in various parts of the world. If law could no longer save the world from itself, it might still enable legal missionaries to act as saviors.

Making War

For the United States, one of the important innovations of the twentieth century was the creation of a new route toward officially sanctioned military actions. The founding of the United Nations created a new body to sanction war – the U.N. Security Council. The United States relied upon this mechanism not long after it was created. On June 24, 1950, North Korean forces crossed the 38th parallel into South Korea, seriously escalating a civil war that had been simmering since the withdrawal of Japan after World War II left Korea without political leadership. Almost immediately, Korea became a Cold War battleground. President Truman ordered ground troops to Korea on June 30, without consulting Congress. He maintained that time was important, and consultation unnecessary: "I just had to act as Commander-in-Chief, and I did." In the USSR's absence, the U.N. Security council sanctioned the "police action" against North Korea's invasion, allowing Truman to justify forgoing Congressional approval.

In later years, Presidents would act without formal Security Council authorization or a declaration of war, but often with some level of consultation with either Congress or the U.N. In

1955, Dwight D. Eisenhower sought congressional authorization to send troops into Taiwan to protect the government from the Communist Chinese. Eisenhower told Congress that his position as commander-in-chief gave him a certain amount of authority to act, but "a suitable congressional resolution would clearly and publicly establish" that such authority existed. Congress then ratified unilateral authority to deploy troops to protect against "international communism." Eisenhower relied on this Congressional resolution when he sent troops into Lebanon without congressional approval in 1958.

President John F. Kennedy continued Truman's and Eisenhower's use of military power without congressional approval. He dispatched air and naval transport for the ill-fated Bay of Pigs invasion intended to overthrow Cuban leader Fidel Castro, and he deployed troops in Vietnam without consulting Congress. Other armed conflicts involved the use of U.S. troops at the direction of the president alone: Laos in 1962, the Congo in 1964, and the Dominican Republic in 1965.

As the war in Vietnam escalated during Lyndon B. Johnson's presidency, Congress authorized military action, but not through a declaration of war. In circumstances that remain disputed, it was reported that a U.S. warship came under fire from the North Vietnamese in the Gulf of Tonkin. Although the veracity of these reports was questioned at the time, it was enough to motivate Congress to pass the Gulf of Tonkin Resolution, which gave Congressional support for "the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."

Congress's failure to pass a declaration of war led to questions of the Vietnam War's legality. The State of Massachusetts filed suit against the Secretary of Defense, arguing that the

war was unconstitutional without a formal declaration of war. The case was dismissed by the Supreme Court as nonjusticiable, over a dissent by Justice William O. Douglas.[3] Meanwhile, Congress continued to pass appropriations bills, funding the war. Some have argued that this and other episodes eroding the use of Congress's formal constitutional role in declaring war cedes excessive war power to the president. For others, however, the power of the purse has become an alternative and more nuanced means through which Congress plays a role in the exercise of war powers.

Intending to reassert a Congressional role in warmaking, Congress passed the War Powers Act over President Richard Nixon's veto in 1973. The Act requires the president to notify Congress within forty-eight hours of sending troops into hostilities. It requires that troops must be removed within sixty days if Congress does not declare war or authorize the use of force. The constitutionality of the Act has been challenged, however, by later presidents. The House Judiciary Committee also engaged in oversight of presidential war-related actions during the Nixon Administration, investigating Nixon's order to bomb Cambodia without Congressional authorization in 1969.

The United States engaged in a number of overseas military engagements in later years. For the most part, these were limited in scope and duration, enabling the nation to maintain the self-conception of a nation at peace, while at the same time sending troops into battle. Presidents drew upon their Commander-in-Chief power, and did not call upon Congress for declarations of war. Some engagements were justified as extensions of the Cold War. For example, in 1983 President Ronald Reagan sent U.S. troops to the island nation of Grenada to put down a coup, based on false assumptions that Cuba, a Communist government, was supporting the coup. In 1985-86, rather than seek lawful authority for his actions, Reagan violated federal law in what

became knows as the “Iran/Contra Affair” by using Iranian arms sales to generate secret funds for the Contra forces seeking to oust the leftist Sandinista government of Nicaragua.

Law Makes War

War was also *made* in the law when war’s contours were labeled and categorized. War since the beginning of recorded history has involved killing and destruction. But all killing and destruction is not the same in the law of war. The twentieth century saw the proliferation of categories of “war crimes,” and also an increasingly complicated U.S. relationship to international law.

This aspect of the law of war is in part a reaction to the history of technology. New mechanisms of destruction led to new forms of atrocities. For example, the modern use of chemical weapons began in World War I. The Germans killed over 5000 Allied troops in just one chlorine gas attack on the Belgian village of Ypres on April 22, 1915. The British also used chemical weapons, and the United States developed chemical weapons capability. After the war, concerns about the horrendous and destructive nature of chemical weapons led to the signing of the 1925 Geneva Protocol on Chemical Weapons prohibiting their use (although not their production or stockpiling).

Spelling out unjust ways of waging war created as well an image of the good war. A lawless waging of war presumed lawful war. And so, just as human rights law carved out the categories of human rights violations, law enabled uses of war that could be seen as right, proper and lawful.

It has been important to the American self-conception that American wars be perceived as the right kind of wars: lawful wars. One of the difficulties, of course, is that the history of warfare does not tend to play out in a tidy narrative. Some U.S. military efforts were conducted

in secret, increasingly common after World War II but decreasingly secret in an age of high tech media. And in the nation's formally acknowledged wars things could always go wrong. On the morning of March 16, 1968, for example, American forces were dispatched on a search and destroy mission against guerillas in the village of My Lai in South Vietnam. American forces had suffered heavy casualties at the hands of guerilla forces hiding among local villagers. Presuming that civilians would be away at market, U.S. troops entered My Lai expecting a firefight. They encountered elderly peasants, children, unarmed women. Somehow their mission of killing continued in spite of the absence of its intended target or any enemy fire. The carnage is hard to imagine. The villagers were not just shot from afar, but bayoneted. At least one girl was raped before being murdered. Some were shot in the back of the head while praying. Others were ordered into a ditch and sprayed with machine gun fire. Lieutenant William Calley, the only person charged in these events, was convicted of murder and sent to prison, but on orders of President Nixon was released after two days and his sentence commuted to home confinement. Calley's defense was that he was simply following the orders of his commander to kill everyone in the village. This defense, of course, had a chilling ring to it, since it had been heard before in the halls of Nuremberg.

How is it that the United States, a nation that saw itself as taking ideas of freedom and justice to other lands, had found itself implicated in the bullet-riddled bodies of children scattered in a Vietnamese rice field? There was no way to undo the horror of My Lai, of course, but there would have to be efforts to extricate America from it all. There would be two ways to do this. First, atrocities need not be seen as the acts of the nation, but only of rogue elements, abusive soldiers. That could be accomplished, perhaps feebly, through the prosecution of Calley. Second, in later years the U.S. would simply loosen itself from the bonds of international law.

In 1998, the Statute of Rome established the International Criminal Court, a permanent international body to prosecute human rights violations, a goal of the human rights movement for decades. The world now had a tribunal that could enforce human rights law – but not against the United States, for the United States refused to sign the treaty. The Clinton administration argued that it would subject American military personnel to politically motivated prosecutions. In defending this position in 2002, Under Secretary of State John Bolton stressed that American troops overseas should be protected from prosecution in non-U.S. courts.[4]

The International Criminal Court decision coincided with a broader withdrawal from international law. The Clinton Administration had signed the Kyoto environmental treaty in 1997, but President George W. Bush pulled the U.S. out of the Treaty in 2001. By this time, the nation had retreated far from Woodrow Wilson's vision. The United States no longer sought to lead the world to peace through law. Instead, the law of the world now seemed dangerous, requiring a retreat behind the borders of American law.

II. War, Statebuilding and Governance

Franklin Delano Roosevelt is remembered as a great wartime president because he led the nation through World War II. But Roosevelt had cloaked his presidency in the metaphor of war from its very beginnings. Delivering his first inaugural address in March 1933 in the face of unprecedented economic crisis, Roosevelt urged the nation to move forward "as a trained and loyal army willing to sacrifice for the good of a common discipline." Larger, national purposes would "bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in times of armed strife." Roosevelt placed himself "unhesitatingly" at the head "of this great army of

our people dedicated to a disciplined attack upon our common problems." He promised to recommend measures to Congress appropriate to a warlike emergency, "that a stricken nation in the midst of a stricken world may require." If Congress failed to respond, "I shall ask the Congress for the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." The speech was celebrated, but Eleanor Roosevelt admitted that it was "a little terrifying" that "when Franklin got to that part of his speech when he said it might become necessary for him to assume powers ordinarily granted to a President in wartime, he received his biggest demonstration."[5]

Roosevelt would not need to go to Congress for warlike powers. They remained in the President's office, left over from World War I. FDR's use of war powers for domestic problems was just one example of a common feature of twentieth century governance. Sometimes, as for Roosevelt, war powers could be used because the domestic problems were analogous to war. Later, increasingly, domestic issues were seen as related to national security and so germane to the war powers. In either case, war became a central logic of twentieth century American statebuilding. At the beginning of the century, war had initiated a quintessential act of nation-building for the United States: the acquisition of territory in the Caribbean and the Pacific. From World War I onward, statebuilding instead took a different form – new federal government regulatory powers.

War's Powers

American constitutional scholars tend to focus inward when examining great debates about the scope of government power in the first decades of the twentieth century, but global events, especially war, had an important impact on the expansion of federal government power.

Although no part of the "Great War" was fought on American soil, many facets of American life were affected by it. More than 50,000 U.S. soldiers were killed in combat, and another 206,000 were wounded. U.S. allies depended heavily on billions of dollars in American loans, and the U.S. provided as much as two-thirds of allied military supplies. The war was thought of as a new kind of war, an unprecedented global conflict. Congress responded with new statutes giving the president power to raise armies by conscription, censor communications with foreign countries, regulate foreign-language press in the United States, and take control of rail, telephone, and telegraph systems.

A decade after World War I, emergency again would grip the nation. U.S. military uniforms were donned once more, this time by the "Bonus Marchers" of 1932, 20,000 veterans and others who traveled to the nation's capital to demand accelerated payment of military pensions (also by the regular U.S. Army troops who would violently disperse them). Roosevelt's "trained and loyal army" took over Washington nine months later.

When the legal history of the era is told, the "Great Depression" that followed the "Great War" and intersected with the beginnings of World War II tends to appear as a domestic interlude between war periods. The three are better seen as continuous. World War I provided not merely starving veterans but also compelling precedents for the powers drawn upon by both Herbert Hoover and FDR to address the economic crisis of the depression. War was invoked as a metaphor to signal the need for national commitment and sacrifice. And the idea of war would, in this context, serve its conventional function: signaling a time of exception; reassuring the nation that an expansion of government power need not be feared. If conceptualized as war-related, it could be imagined as ephemeral.

It was not just the Bonus Marchers who cloaked themselves in wartime imagery during the depression. "We all have been saying to each other the situation is quite like war," Secretary of State Henry Stimson wrote in 1931.[6] As Robert Higgs has written, Americans "looked back with nostalgia on Woodrow Wilson's quasi-dictatorial authority to mobilize resources during World War I. Proposals to revive the authoritative emergency programs of 1917-1918 bloomed like wildflowers." As a presidential candidate, Franklin Delano Roosevelt had already argued that the nation was faced with "a more grave emergency than in 1917." Even before the election New Dealers were researching whether wartime grants of power could be used to allow Roosevelt to enact emergency measures. Once Roosevelt was elected, according to William Leuchtenburg, "There was scarcely a New Deal act or agency that did not owe something to the experience of World War I."

The new President turned immediately to wartime powers. Under the Trading with the Enemy Act of 1917, a World War I measure still on the books, he issued an executive order requiring banks nationwide to close for three days to curb a panic-driven outflow of capital. The President then sought retroactive approval from Congress in the quickly enacted Emergency Banking Act. Other wartime measures were revived with New Deal legislation, many in the famous first Hundred Days. Congress gave the president power to aid farming and industry with the Agricultural Adjustment Act (AAA) and the National Industrial Recovery Act (NIRA); Leuchtenburg argues that "the war spirit carried the Agricultural Adjustment Act through." Roosevelt named as the head of the Agricultural Adjustment Administration George Peek, who had served on the War Industries Board. The Tennessee Valley Authority, a New Deal experiment in regional planning, evolved from a wartime nitrate and electric power project. New Deal public housing projects also had their beginnings in the war. The Civilian Conservation

Corps, formed to use civilians to help conserve natural resources, was purposely structured to be similar to the wartime mobilization of troops. Recruits gathered at Army recruiting stations, wore World War I uniforms, and slept in Army tents. These New Deal programs were defended in militaristic terms. Representative John Young Brown of Kentucky said to his fellow Democrats: "we are at war today . . . . I had as soon start a mutiny in the face of a foreign foe as start a mutiny today against the program of the President of the United States."

Rumors of mutiny were heard, however, in the courts. In 1935, the Supreme Court questioned the broad congressional delegations of power to the executive to regulate commerce for the sake of economic recovery. In *Panama Refining Co. v. Ryan* (1935), the Court held one portion of the delegation of power in the National Industrial Recovery Act unconstitutional. The Act allowed the president to prohibit the interstate shipment of oil in excess of state quotas, but the Court argued that there were not enough guidelines to support this delegation of legislative authority: "Congress left the matter to the President, without standard or rule, to be dealt with as he pleased."[7] *Panama Refining* had limited application, but it was soon clear that the case was the beginning of the unraveling of the New Deal. In *Schechter Poultry Corp. v. United States* (1935), the Court struck down Section 3 of the NIRA, which allowed the president to establish industry-wide regulations on wages, hours, and trade practices for the purpose of restoring economic stability. Wartime analogies would not move the Supreme Court, which found the statute to confer an unconstitutional delegation of government power. "Extraordinary conditions," the Court maintained, "do not create or enlarge constitutional power."[8] Concern for maintaining the constitutional balance of power also led the Court to strike down other New Deal measures, such as the Agricultural Adjustment Act in *United States v. Butler* (1936). This time the specter of totalitarian authority lurked behind the New Deal. Excessive federal power at the

expense of the states threatened to convert the United States "into a central government exercising uncontrolled police power in every state of the Union."[9]

By the end of 1936, federal judges had issued about 1600 injunctions to prevent officials from enforcing acts of Congress. A conflict between the judiciary and the executive branch loomed, leading eventually to Roosevelt's infamous "court-packing plan." While the plan was pending, however, the Court handed down decisions that suggested the judiciary would be more supportive of New Deal goals. In *West Coast Hotel v. Parrish* (1937), the Court suddenly upheld minimum wage legislation almost exactly like legislation it had struck down a year before. In *NLRB v. Jones and Laughlin* (1937) it found the National Labor Relations Act to be constitutional, apparently embracing an analysis of the commerce power it had earlier rejected. Some suspected the Court's purpose was to avoid the court-packing plan, but its apparent change of direction was already underway before the plan was even introduced. Others suggested the Court was simply bowing to Roosevelt's crushing reelection in 1936. More recently, some historians have argued that the Court's jurisprudence shows a more gradual evolution, and later New Deal cases were based on more carefully drawn statutes.

Meanwhile, the court-packing bill was defeated. Although the nation had rallied around the President as war leader in 1933, the rise of Adolph Hitler in Germany gave concentrations of power a more ominous ring. Letters to American newspapers ran strongly against the bill, claiming that FDR was engaging in a dictatorial power grab. Many also saw the courts as America's protection against the potential excesses of majority rule, in which an enflamed majority could harm a minority or support an overly powerful charismatic leader. The Senate Judiciary Committee's May 1937 report on the court-packing bill invoked "the condition of the world abroad" and concluded that the court plan was "a measure which should be so

emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." But in other respects conditions abroad worked to the executive's advantage. Congress and the Court had already shown no hesitation in granting the president extraordinary powers when it came to war and foreign affairs. *Curtiss-Wright v. United States* (1936) confirmed apparently boundless presidential power in foreign relations by upholding a joint resolution of Congress delegating to the president power to embargo arms sales to warring Latin American countries at his discretion. The President's power in this area was not derived only from Congress, the Court declared. It was an aspect of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[10]

World War II Expansion of Powers

By that time Europe was haunted by the specter of another war. In 1935, Hitler violated the Treaty of Versailles by introducing military conscription and creating an air force. In 1936 German troops reoccupied the Rhineland, demilitarized in the Versailles Treaty. Hitler contemplated expanding Germany into Czechoslovakia and Austria. Civil war began in Spain in 1936, resulting three years later in the establishment of a fascist regime; in 1935-36 Italy, under fascist leader Mussolini, invaded and occupied Ethiopia. Japan, which had invaded and occupied Manchuria in 1931-2, invaded China in July 1937. As Roosevelt put it in October 1937, there was an "epidemic of world lawlessness." Congress tried to use law to construct a buffer between the U.S. and the outbreak of war, passing the Neutrality Act of 1937, which forbade the shipment of weapons to nations at war. In 1938, in an effort to democratize war policymaking, Congress toyed with the idea of a constitutional amendment that would allow Congress to call a popular referendum to decide whether to declare or engage in war. Roosevelt argued strongly against it, privately saying that the proponents of the amendment had "no conception of what modern war .

. . involves." The proposed amendment lost a test vote in the House, and was not seriously pursued again.

In 1938, Hitler took Austria and Czechoslovakia, Japan captured the Spratly Islands southwest of Manila, Madrid was occupied by Franco, and Mussolini overran Albania. Roosevelt, alarmed by the speed with which fascism was spreading, began a rearmament campaign. Germany invaded Poland in 1939, leading Britain and France, who had pledged to help defend Poland, to declare war on Germany. By June 1940, Germany had taken Denmark, Norway, the Netherlands, Belgium, and France.

Stunned by the swiftness of Germany's conquest of Europe, Americans again looked to Roosevelt for leadership in the midst of crisis, yet their fears of Hitler had not yet coalesced into a national commitment to go to war. After six weeks of heated debate, the President convinced Congress to repeal the Neutrality Act, putting the U.S. in a position to aid Britain and France, and in September 1940, Congress authorized the first "peacetime" conscription. But the international context complicated domestic politics. The shifts of power involved in the New Deal's "war" on depression began to seem more menacing; it seemed that preparations for the war against the economic emergency could easily slide into preparations for involvement in the world war. It was unclear where one war ended and the other began. Roosevelt added to this ambiguity. In his January 1939 address to Congress, he said: "All about us rage undeclared wars – military and economic. All about us grow more deadly armaments – military and economic. All about us are threats of new aggression – military and economic." As Michael Sherry argues, preparations for World War II were "less a wholly new enterprise than a continuation of the earlier struggle on a different front, one with an identifiable enemy to replace the faceless fear of the Depression."

In May 1941, Roosevelt directly laid the basis for war-related expansion of federal power. He declared an unlimited national emergency, arguing that although war had not come to American soil, "indifference on the part of the United States to the increasing menace would be perilous," and therefore the nation "should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere." The declaration allowed Roosevelt to use leftover World War I provisions as needs arose, and he used his authority to re-instate the Council of National Defense, create an Office of Emergency Management, call military reservists to active duty, regulate banking and foreign trade, and exercise control over industries such as munitions, power, transportation, and communications. The March 1941 Lend Lease Act delegated authority to the president to sell, lend, or lease military materials to nations whose defense was deemed necessary to the United States, and gave him broad discretionary power to regulate the armaments industry.

The expansion of "war powers" was not confined to sites of conflict or strategic resources, but touched the daily lives of average Americans. The War Powers Act of December 1941 gave Roosevelt the authority to redistribute war-related functions, duties, powers, and personnel among government agencies as he saw fit. It gave him broad control over international trade and foreign-owned property in the U.S. and allowed censorship of all communications between the U.S. and any foreign country. A Second War Powers Act soon followed, authorizing executive agencies to acquire any private property necessary for military purposes. It also gave the president the widest economic control ever granted to the executive, allowing him to "allocate . . . materials or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the

national defense." Congress also passed the Emergency Price Control Act, establishing the Office of Price Administration to control prices and rents. The income tax expanded from a "class tax" to a "mass tax," doing more than raising revenue needed at wartime: it provided individual citizens with an opportunity to participate in a wartime politics of sacrifice. The broad-based income tax would stay in place after the war, providing the mechanism for funding an expanded post-World War II state.

The Supreme Court added to the aggregation of federal power. The Court had adopted a more deferential posture in reviewing the constitutionality of acts of Congress in the late 1930s. During World War II the Court stepped back much further, sharply reducing the role of federalism as a limit on Congressional power. Compare the Court's decision in *NLRB v. Jones and Laughlin* (1937), which signaled its new approach to interstate commerce, with *Wickard v. Filburn* (1942), which vastly expanded the federal commerce power. Jones and Laughlin was a major steel corporation with an indisputable presence in interstate commerce, its tentacles reaching throughout the nation. Roscoe C. Filburn was an Ohio farmer, who fed wheat grown on his farm to chickens raised on his farm. Unfortunately, Filburn's homegrown chickenfeed had exceeded his wheat allotment under the Agricultural Adjustment Act. The Court's "cumulative effects" test found Congress could regulate home produced and consumed agricultural products. Even if an individual farmer's home-consumed wheat did not have a substantial effect on interstate commerce, it was still within Congress's regulatory power if, put together with others similarly situated, the cumulative effect of all the wheat was "far from trivial." The Court's holding seemed to decimate federalism as a limit on Congressional power. Why had the Court gone so far?

There is more to the wartime context of the decision in *Wickard* than its date. Secretary of Agriculture Claude Wickard had announced the wheat quotas at issue in a speech, "Wheat Farmers and the Battle for Democracy." He argued that federal control over wheat was crucial, so that the federal government would have a predictable supply. The U.S. needed to send wheat to England, a wheat-importing country, that was isolated by German U-boats from its usual suppliers. Wickard called on farmers to do their patriotic duty and comply with federal law because that would enable the U.S. government to use wheat supplies to help England fight the Nazis. The speech had confused Filburn about his wheat quota, so it was part of the record before the Court. It is important to the history of federalism to see the post-1937 expansion of federal power not as a defensive reaction to the Court-packing plan, but instead in the context of the importance of federal control over the economy during wartime. A stronger role for the states wilted in the face of wartime national security.

Endless War?

By the end of the war, the American economy was booming. New questions arose about the government's ability to maintain prosperity. Roosevelt's war analogies had treated the Depression and World War II as exceptional states requiring temporary solutions. Now permanent solutions were needed. Popular journalist John Gunther expressed Americans' "quarrelsome, anxious mood" after the war, and inquired as to its meaning. Did the nation's lack of vision "show that, to become efficient, this country needs the stimulus of war?"[11]

In an effort to scale national control back to peacetime levels, President Harry S. Truman ordered government officials "to move as rapidly as possible without endangering the stability of the economy toward the removal of price, wage, production, and other controls toward the restoration of collective bargaining and the free market." While most of the wartime control

agencies were shut down by the end of 1945, government control was not surrendered. Some wartime agencies and programs became permanent, and many of the powers held by the dismantled agencies were transferred to permanent agencies. Over one hundred wartime executive orders and statutes were left in place after World War II, giving the president leeway in addressing the increasing tensions overseas. In 1946 Congress passed the Employment Act, basically imposing a duty on the federal government to use all available resources to maintain economic stability.

The Supreme Court signed on to an expansive use of the war power. To ease a postwar housing shortage, Congress passed the Housing and Rent Act of 1947 restricting rents in "defense rental areas." Even though the act was passed after hostilities had formally ended, because the effects of war could be felt on the economy for years, the Court in *Woods v. Cloyd W. Miller* (1948) found the act to be a constitutional use of the war power.

During the Korean war, President Truman's exercise of broad power extended to the homefront. Facing a threatened strike in the steel industry, and concerned that a strike would disrupt production of war materiel, Truman issued an executive order seizing the steel mills. The controversy quickly made its way to the Supreme Court, and the Court put a break on the President's ability to define the scope of war-related executive powers. As Justice Black wrote for the Court majority: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."[12] But in spite of the Court's efforts to pull back on the president's war-related

powers, by mid-century war had become embedded in American governance in a way that no Court could undo.

The most important carry-over from World War II was not the bureaucratic structures, the statues and the judicial precedents – the legal edifice of the war – important as it was. Instead, the most substantial impact on American politics and diplomacy, American culture and law, was the radiation that continued to fall across countrysides. What has often been mistakenly called the "postwar" era emerged under a nuclear cloud. Even to Americans, the destruction of Hiroshima and Nagasaki was ominous, for it was immediately clear that the awful power that had been unleashed upon the Japanese would someday find its way into the hands of American adversaries. And at mid-century, Americans lacked the utopianism of the World War I generation. They did not dare to hope that war would not come again; at the same time they came to believe that the next war would bring a nuclear holocaust and the end of human existence itself. And so at the end of the war, the nation's joyfulness was tinged with the unease we can feel in the words of Dwight Macdonald, as the story of Hiroshima and Nagasaki continued to unfold: "May we hope that the destructive possibilities are so staggering that, for simple self-preservation, [other nations] will agree to 'outlaw' The Bomb? Or that they will foreswear war itself because an 'atomic' war would probably mean the mutual ruin of all contestants? The same reasons were advanced before World War I to demonstrate its 'impossibility'; also before World War II. The devastation of these wars was as terrible as had been predicted – yet they took place."[13] When, half a century later, the anniversary of the end of World War II was celebrated, historical memory embraced "bands of brothers," and not these dark elements. But it is important to remember that when soldiers returned home to kiss lovers and strangers, for many there was in the sweetness a bitter aftertaste.

The overwhelming threat of nuclear arms, and therefore the nation's dependence on nuclear technology, helps us to see the logic underlying the post-World War II "Red Scare," fueled by fears, real and fictional, of American "atom spies," but also exposes a more enduring conundrum: the nation's very existence relied on advancement in military technology. Dwight D. Eisenhower addressed this latter issue in 1960, on the final day of his presidency. Eisenhower, himself a war hero, was swept into office in 1952 in the belief that he would lead the nation out of the muddled war in Korea. Eisenhower succeeded in negotiating a cease-fire that resulted in a stalemate: the permanent militarization of the border between North and South Korea. By the end of his second term this state of affairs served as a metaphor for America in the world. There was simply no escaping the militarization – not just of government and economy but of American life itself. Americans stocked their bomb shelters; children learned to "duck and cover" against a nuclear blast in school; military readiness was a part of daily living. Eisenhower left office warning the American people that peace itself now rested on a tie between the military and American industry. This "military-industrial complex" was both vital – supplying the armaments that would protect American security – and dangerous. As much as "we recognize the imperative need for this development," Eisenhower warned, "we must not fail to comprehend its grave implications." His concern was that the power residing in the alliance of industry and the military might undermine democracy itself. He urged, "We must never let the weight of this combination endanger our liberties or democratic processes." Ultimately American leadership and prestige rested "on how we use our power in the interests of world peace and human betterment." It was no longer possible to take war out of the project of American governance. The question, instead, was to what purpose the nation would put the tools of war.

III. Law as a Tool of War

Tanks and submarines are war materiel, but wars are fought also with other kinds of implements. Strategy is a weapon, information is a weapon. Another tool used in wartime, especially to manage the environment on the homefront, is law. We can see this in the context of World War I civil liberties.

Managing Consent

"LONG LIVE THE CONSTITUTION OF THE UNITED STATES," a World War I circular seemed to shout to its readers. On the other side it began as emphatically: "ASSERT YOUR RIGHTS!" This anti-war circular would result in Charles Schenck being thrown in jail. It was, of course, not the document's quotations from the constitution that would get Schenk and his Socialist Party compatriots into trouble. Instead it was the purpose of their arguments: to encourage opposition to the war and resistance to the draft. Drawing on the Thirteenth Amendment, the circular argued, "A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man....He is forced into involuntary servitude....He is deprived of all freedom of conscience and forced to kill against his will."[14]

Schenck and other Socialist Party members mailed thousands of these circulars to men who had been called up for World War I military service. For this they were arrested for violating the Espionage Act of 1917, which made it a crime willfully to cause "insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States."

The Supreme Court upheld Schenck's conviction, seeing his actions as an attempt to obstruct government enlistment efforts. As Justice Oliver Wendell Holmes wrote for the Court,

"Of course the documents would not have been sent unless it was [sic] intended to have some effect." In this context, the First Amendment would provide no protection. "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." Wartime was an exceptional context: "When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right." Holmes then invoked what would become a central first amendment concept, even though in this case it seemed to have no teeth: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[15] In this case, even if Schenck's efforts were ineffective, it seemed enough that he was doing what he could to impede the draft. The Court upheld his conviction.

Schenck is a classic case in the traditional swinging pendulum analysis. It is taken as a prime example of the way the Court during wartime is less protective of rights, and more protective of national security. But the swinging pendulum analysis is problematic, for in some contexts wartime has been the occasion for the expansion of rights. And the very fuzziness of what time is "wartime" makes movements of the pendulum hard to track.

Another way to view these cases would be to see the Court, like the executive branch, engaged in the project of wartime governance, managing rights – not along a narrow continuum but in a multifaceted way – in a manner that aided, or at least did not undermine, national security. Sometimes the differences on the Court are more about how national security is best enhanced, than about the relative importance of rights and security.

In *Schenck* and other cases, the Court most often accorded the executive branch the powers it sought to raise an army, maintain wartime production, and protect national security. When courts loosened constitutional restraints on executive action, law functioned as a tool enabling wartime governance.

The World War I years were especially repressive. An example of that is the Sedition Act of 1918, which Geoffrey Stone has called "the most repressive legislation in American history." But even in this wartime context, some rights, such as voting rights, expanded, and in a landmark Sedition Act case, prospects of a broader vision of free speech could be seen. The Sedition Act criminalized the saying of things that were thought to endanger the war effort, including "disloyal, profane, scurrilous or abusive language about the form of the government, the Constitution, soldiers and sailors, flag or uniform of the armed forces," or support the German war effort, or opposition to the United States. The only Sedition Act case to reach the Supreme Court was *Abrams v. United States* (1919) involving Russian immigrants who protested the war by throwing leaflets off rooftops and out windows. The Supreme Court upheld their conviction. No matter how hapless their efforts, it was enough that the defendants intended to provoke opposition to the war. A broader future for the First Amendment could be found, however, in the dissent.

In *Abrams*, Justice Holmes, joined by Justice Brandeis, began an important line of dissenting opinions. Government power was greater in wartime, Holmes argued, but "the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." He found Abrams's flyers to be

harmless, and the prosecution to be unconstitutional. Holmes concluded with a vision of constitutionalism that would powerfully inform first amendment jurisprudence:

> Persecution for the expression of opinions seems to me perfectly logical.... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[16]

It may be that the power of Holmes's vision, carved in this wartime case, leads us to a paradoxical conclusion. This wartime suppression of rights, by leading to an expansive and influential vision of the first amendment, albeit in a dissent, ultimately informed a broader vision of free speech rights in the long run.

The context of World War I infused American rights discourse, both where rights were denied and where they were extended. In the final years of the long campaign for woman suffrage, Suffragists used wartime ideology to prove their point. In 1918, picketers from the National Women's Party surrounded the White House, holding banners with messages intended to embarrass the war effort. One banner read: "TO THE RUSSIAN ENVOYS...WE THE WOMEN OF AMERICA TELL YOU THAT AMERICA IS NOT A DEMOCRACY. TWENTY MILLION AMERICAN WOMEN ARE DENIED THE RIGHT TO VOTE."[17] President Wilson, who had resented the suffrage protesters, came to embrace woman suffrage as

a war measure arguing to Congress that it must consider "the unusual circumstances of a world war in which we stand and are judged not only by our own people and our own consciences but also in the view of all nations' and peoples'." The President believed that the suffrage amendment "was vitally essential to the successful prosecution of the great war of humanity in which we are engaged." It was Wilson's "duty to win the war and to ask you to remove every obstacle to winning it." It was not just that the United States hoped to bring democracy to other lands, and in other lands democracy increasingly meant the inclusion of women in government. Also, the nation had made "partners of the women in this war," he continued: "shall we admit them only to a partnership of suffering and sacrifice and toil and not to a partnership of privilege and right?"[18] Once the Nineteenth Amendment was finally ratified in August 1920, some believed that women voters would support the League of Nations, in the interests of peace.[19]

Ideas about wartime rights – and obligations – informed a broad range of policies, even the constitutionality of forced sterilization. In *Buck v. Bell* (1927), Justice Holmes's majority opinion invoked the ultimate sacrifice in wartime to make the lesser sacrifice of sterilization seem, comparatively, inconsequential: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."[20] In eugenic theory, wartime took too many of the best of the gene pool. Sterilization of the genetically inferior helped keep things in balance. In the mistaken science of the 1920s, a denial of rights to the "feeble minded" protected the nation against the genetic consequences of war. *Buck v. Bell* is an example of the way that ideas about war inform law during times we conceptualize as peacetime.

Rights in World War II

National security informed domestic policy during what is often called the "interwar years," but within the United States, December 7, 1941, was seen as ushering in a new era. In one sense, it is easy to tell when World War II began. December 7, 1941, as FDR would call it, was "the day that will live in infamy," the day of the Pearl Harbor attack. Congress declared war on Japan the following day, and on Germany and Italy soon after. But war had been fought in Asia since 1931 and parts of Europe since 1936. The global military experience of the Second World War began in different places at different times. The domestic security environment within the United States had long been affected by these global events, even as the iconic moment of Pearl Harbor allowed America to experience entry into war as a sudden shock, entry into a new world. It was Pearl Harbor that led Justice Felix Frankfurter to tell his law clerk: "Everything has changed, and I am going to war."[21] Pearl Harbor served as a catalytic point, the moment of most intense national mobilization. It led Justice Frank Murphy to become a lieutenant colonel in the Army on inactive status, and to do literally what the rest of the Court did figuratively: during Court recesses, he put on a military uniform.

The Court, like the rest of the country, felt called into wartime service, though they would sometimes differ about how best to serve their country during war. The Justices would have several opportunities to debate the matter.

Soon after Pearl Harbor, Japanese Americans became a target of wartime fears, especially once the West Coast began preparations for a possible attack, including air-raid drills and blackouts. Roosevelt confirmed this nervousness in his December 9 radio address, saying, "The attack at Pearl Harbor can be repeated at any one of many points in both oceans and along both

our coast lines and against all the rest of the hemisphere." Soon, public figures began to call for all persons of Japanese heritage to be confined to camps.

On February 19, 1942, seventy-four days after the attack on Pearl Harbor, Roosevelt issued Executive Order 9066, which authorized the Secretary of War to prescribe certain areas of the country as military areas from which designated people might be excluded. On March 21, Congress passed a statute to enforce the terms of Executive Order 9066. This "exclusion order" was used to relocate people from their homes into internment camps in various places across the U.S. Images of this relocation effort, the photographs of small Japanese-American children tagged with numbers, under armed guard, and of families carrying children and household belongings as they left their homes, are some of the most powerful images of the impact of World War II at home. By the end of the war, thousands of people had been relocated.

Fred Korematsu would become the subject of perhaps the most iconic case about rights at wartime in the twentieth century. An American citizen born of Japanese immigrants, Korematsu had not intended to challenge the exclusion order; he was arrested while walking down a San Leandro, California street with his girlfriend. He was convicted of being a person of Japanese descent present in an area covered by and exclusion order. In 1944, the Supreme Court upheld his conviction.

Justice Black insisted at the outset of his majority opinion that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and therefore "courts must subject them to the most rigid scrutiny." Still, the Court found the exclusion order to be justified under the circumstances. "Korematsu was not excluded from the Military Area because of hostility to him or his race," Black argued. "He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an

invasion of our West Coast and felt constrained to take proper security measures." The Court could not "availing ourselves of the calm perspective of hindsight -- now say that at that time these actions were unjustified."[22]

Justice Roberts disagreed. *Korematsu* was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[23] Justice Murphy also filed a dissent, arguing that the exclusion order "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[24] The most memorable opinion came from Justice Jackson, who distinguished between executive and military actions during wartime, and the role of the courts. It was one thing for the military to distort the constitution during wartime, and entirely another for the courts to do so. "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, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle 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....There it has a generative power of its own, and all that it creates will be in its own image."[25]

Korematsu has been almost universally criticized in the decades since. Records indicate that actual subversive activities by persons of Japanese heritage were rare and quickly identified; detaining all people of Japanese descent – despite proof of citizenship, loyalty, or service to the

United States – was an extreme reaction to a minuscule threat. Pre-existing racism against Japanese on the west coast counted heavily in the decision to exclude them from the area.

Like *Schenck*, the internment cases are often cited for the proposition that rights are restricted during wartime. The conventional assumption seems to hold – there is a trade-off between rights and security, and during wartime the pendulum naturally swings in the direction of security. But all rights cases were not decided in a fashion consistent with this assumption. In another important series of cases, the Court grappled with the question of whether the sacrifice of rights at wartime actually undermined security rather than enhanced it.

In *Minersville School District v. Gobitis* (1940), the Supreme Court took up the constitutionality of compulsory flag salute laws. The Court held that the expulsion of children from public school for refusing to salute the flag based on religious beliefs was not only acceptable, but would protect important national interests. According to Justice Felix Frankfurter, writing for the majority, the flag salute fostered unity, and "National unity is the basis of national security."[26] Just three years later, in *West Virginia State Board of Education v. Barnette* (1943), the Court reversed itself, striking down such a law. This time the Court viewed the liberty/security balance differently. As Justice Jackson wrote for the Court, the "ultimate futility of such attempts to compel coherence is the lesson of … the fast failing efforts of our present totalitarian enemies."[27] According to Richard A. Primus, the reversal "was largely driven by the Court's desire to distinguish America from wartime Germany" where laws compelling salute of the national flag in the name of conformity of action and belief were the norm. It did not help that the West Virginia flag salute was reminiscent of the Nazi salute. Both cases invoked conceptions of national security. For Frankfurter, security required narrowing rights. For Jackson in *Barnette*, security was enhanced by expanding rights.

If rights expand or contract in the context of war, depending on their relation to constructions of national security, is there more to say about *Korematsu*? Conceptions of national identity and national security are framed in reference to perceived dangers. During the Cold War, the Soviet Union was the "other" against whom the United States defined itself and in terms of which the United States understood dangers in the world. During World War II, as John Dower has shown, race permeated the war in the Pacific. During the war, the United States often defined itself in egalitarian terms in contrast to Germany. The Pacific war, however, was framed as a battle against a treacherous race. This rhetoric crept into domestic policy and informed the idea that all "Japs" at home were security risks. Their seeming alienness decoupled even Japanese-American citizens from basic citizenship rights. Viewed this way, the internment cases are an example of the way conceptions of national identity and national security, formed in reference to the perceived threats of an age, inform American law. This helps with what otherwise would seem a paradox: equality rights both expanded and contracted during World War II.

The complicated relationship between rights and security during World War II and after can be seen in the civil rights of African Americans. African Americans participated in the war effort, but faced caps on enlistment and segregation within the armed services. Racial segregation was justified in part on the idea that integration would undermine the cohesion of military units, harming the nation's fighting strength. But the rest of the world noticed American race discrimination, and many came to wonder about the seeming contradiction that a war against Nazi racism was being fought by the segregated Army of a nation rife with racial discrimination. African American activists argued for a "Double V" during the war: victory abroad against fascism, victory at home against racism. Civil rights and labor leader A. Philip

Randolph threatened a march on Washington to protest discrimination in defense industries. The threat of hundreds of thousands of African Americans marching on the nation's capital pressured FDR to issue an executive order banning race discrimination in defense industries. Also during the war, in *Smith v. Allright* (1944), the Supreme Court struck down the "white primary" practices that had kept African Americans from voting in primaries, which in the heavily Democratic South usually selected the winning candidate. Thurgood Marshall, then a lawyer for the NAACP, viewed the case as his most important before *Brown v. Board of Education* (1954).[28] When internment is viewed in the context of the expansion of equality rights, rather than a swinging pendulum, we see a complex terrain of rights affected by conceptions of national identity and national security.

The best example of law as a "loaded weapon" that Justice Jackson warned of in *Korematsu* – the idea that a case of wartime necessity became entrenched as legal precedent – was the Nazi saboteurs case, *In re Quirin* (1942). This case involved eight Nazi terrorists who landed under cover of night on east coast American beaches with the objective of slipping in unnoticed, and committing acts that would terrorize civilians, such as blowing up department stores. But plans went off-track rather quickly, and one of the Nazis who wanted to expose the plot ended up traveling to FBI headquarters and spilling a suitcase full of cash on the table when he was unable through other means to get agents to pay attention to his story. The saboteurs were rounded up and secluded. Once safely away from the press, a story of a supposedly successful FBI sting operation was released to the press with much fanfare. FDR and his Justice Department quickly decided that the saboteurs must be tried by a military tribunal, not in civilian courts. But was this constitutional? The saboteurs' counsel filed a habeas corpus action that found its way quickly before the U.S. Supreme Court. Upon hearing of this action, FDR told his

Attorney General: "I want one thing clearly understood....I won't give them up." He wouldn't have to. The Court decided the case within twenty-four hours, issuing a short order upholding the tribunals. The Court's opinion itself would follow three months later. The tribunals themselves were concluded quickly, with guilty verdicts and death sentences for all. Five days later, FDR commuted two of the sentences to prison terms. The executions of the other six were carried out the same day.

Chief Justice Stone then had the unhappy task of writing an opinion justifying the constitutionality of a process that resulted in executions that had already been carried out. There were inherent difficulties in the arguments and conflicts among the justices' positions, rendering the writing, in Stone's words, "a mortification of the flesh."[29] An opinion was finally released, roundly criticized, and then seemed to drop into oblivion. But *Quirin* would experience a resurrection in the aftermath of the attacks on the United States on September 11, 2001. Again, foreign terrorists had come to the U.S. intent on destabilizing American society. *Quirin* was dusted off and rehabilitated, a tool in a new "war on terror."

Cold War Rights

A Cold War national security environment would succeed World War II, and soon affected domestic as well as international politics. In order to generate political support for foreign aid to non-Communist governments, President Truman characterized the struggle between the U.S. and the Soviets as between two fundamentally different ways of life – one free, the other totalitarian. In a global zero-sum game, anything that undermined the U.S. was seen as aiding its adversary, the Soviet Union. This bipolar conceptualization of world politics, with the U.S. as the leading democracy, would continue to the end of the century, even after the collapse of what President Ronald Reagan called the "evil empire." In the name of the Cold War, the

U.S. would sometimes support brutal, non-democratic regimes because they were anti-communist. And at home, for a time, Cold War domestic politics led to suppression of free speech and political rights, ironically undermining the practice of democracy in the nation held up as the democratic model.

If Communist governments overseas were a threat, Communists at home were feared as a "fifth column" that was ready to undermine American democracy from within. In an atmosphere of Cold War anxiety, a Wisconsin Senator seized the issue as a means of gaining political visibility. On February 9, 1950, in Wheeling, West Virginia, Joseph McCarthy claimed that he held in his hands a list of 205 employees of the State Department who were members of the Communist Party. He had no such list, but his sensational claims that Communists had infiltrated sensitive areas of the government helped fuel the witch-hunts already underway. Just as government and industry had banded together to fight a world war, they banded together to route out communists. Much of the damage done in the name of anti-communism came not simply from the parading of witnesses before House and Senate committees, but from the private industry blacklists that followed. But the government's role was not only investigatory. Leaders of the American Communist Party were prosecuted for violating the Smith Act. By meeting to discuss Marx and Engels, and by sharing a hope that someday a workers' revolution might overthrow capitalism, they were seen as conspiring to achieve violent overthrow of the U.S. government. The Supreme Court upheld their convictions in *Dennis v. United States* (1951). While there was no evidence in the record of the harm to U.S. national security perpetrated by the defendants, Justice Frankfurter insisted in his concurrence that the Court could take judicial notice of the dangers of communism.

In the Cold War context, any political scuffle anywhere in the world seemed at best to affect the global balance between democracy and communism, and at worst a step toward global annihilation. In this context, the proportion of government activity devoted to defense was a reflection of the perceived size of the threat. A 1950 National Security Council report, NSC-68, warned that the U.S.S.R. presented a threat like never before, because "the Soviet Union, unlike previous aspirants to hegemony, is animated by a new fanatic faith, antithetical to our own, and seeks to impose its absolute authority over the rest of the world....With the development of increasingly terrifying weapons of mass destruction, every individual faces the ever-present possibility of annihilation should the conflict enter the phase of total war." The situation was not simply one of national security: "The issues that face us are momentous, involving the fulfillment or destruction not only of this Republic but of civilization itself."

Yet ultimately the battle to contain the Soviet empire would be one not only of weapons, but also of ideology. The conflict was between the freedom characterized by American democracy and the "slavery under the grim oligarchy of the Kremlin." One important way to fight the Cold War was to project a positive image of American democracy.

The United States, unfortunately, did not always project the image of a free, just society. Racism and violence in the American South were making headlines around the world, and the Soviets used it to their advantage. For example, in 1946 Isaac Woodward, an African American veteran on his way home still in uniform, was beaten and blinded in both eyes by police in South Carolina. The same year, George Dorsey returned home to Georgia after serving five years in the U.S. Army only to be lynched by a mob of white men who shot Dorsey, his wife, and their two companions. These incidents were widely reported and caused particular outrage because the men were soldiers.

The widespread publication of stories like these reached beyond U.S. borders, undercutting the image of America the world was intended to see. The Dorsey story, for instance, was reported in a Soviet publication, which characterized it as an example of increasing violence toward African Americans in the United States. The Soviet press reported other lynchings and mob violence, and claimed that African Americans were deprived of economic rights, living in a state of semi-slavery, and were often denied the right to vote. By 1949, the "Negro question" was a principal Soviet propaganda theme, and the U.S. government believed that racism at home was harming U.S. foreign relations. For this reason, civil rights reforms that aided the reconstruction of the global image of American democracy came to be seen as ways to enhance national security. Law became a tool in the Cold War through the protection of some civil rights.

The best example of this was the school segregation cases leading up to *Brown v. Board of Education* (1954). The Justice Department filed *amicus curiae* briefs arguing that segregation damaged U.S. prestige around the world. The *Brown* brief quoted Secretary of State Dean Acheson, who argued that international attention given to American race discrimination was of increasing concern. "The hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions. In such countries the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country." School segregation was a particular focus of foreign criticism, Acheson said. "Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy." For these reasons, race discrimination was a "constant embarrassment" to the U.S. government and

"jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[30] Consequently, the *Brown* decision itself was covered extensively by the Voice of America and in State Department programming for other nations, and was celebrated by the world press. The Court had finally addressed a matter that had been one of the Soviet Union's most successful propaganda themes since the Cold War began.

While *Brown* greatly aided the U.S. image, American diplomats faced new challenges in the early 1960s as peaceful civil rights demonstrators were brutalized in the South. Images from Birmingham, Alabama and elsewhere flooded the international press. Meanwhile, African diplomats from newly independent nations were refused service at restaurants, especially along a Maryland state highway, as they traveled from the United Nations in New York to Washington, D.C. Ultimately the Kennedy Administration supported civil rights legislation, both for the nation and in the state of Maryland. President Kennedy said in an address to the nation: "We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of the free except for the Negroes?" The President then asked his Secretary of State to testify on behalf of the federal civil rights bill, since the bill was needed to aid U.S. foreign affairs. A State Department staff member also testified in Maryland, urging the state legislators that the country needed them to pass a civil rights bill so that the nation could effectively wage the Cold War. In both jurisdictions – federal power to regulate civil rights and federal pressure regarding state civil rights laws – the national government pushed the boundaries of federalism to meet the needs of national security. Congress finally passed the Civil Rights Act in 1964. It would be celebrated around the world as evidence that the United States had moved down the road toward

remedying its civil rights problems. The nation was coming closer to the vision of America that U.S. diplomats hoped to promote overseas.

Rights and security were also in play in several Vietnam War-era cases. In the "Pentagon Papers" case, *New York Times v. United States* (1971), the New York Times and the Washington Post published portions of a top-secret document disclosing government decision-making regarding Vietnam. The government quickly sought to enjoin the newspapers from printing more of the document, arguing that the release of the confidential information was a threat to national security while the U.S. was at war. The case reached the U.S. Supreme Court in just eighteen days. Noting that the sort of "prior restraint at issue in this case went to the heart of first amendment values, the Court held that the government's arguments about the potential harm from publication were not sufficiently compelling to prevent publication. Quickly published as a paperback, *The Pentagon Papers* became an overnight best-seller.

In contrast to World War I, the Supreme Court also upheld the right to disagree publicly with the war, even when the "speech" involved wearing a jacket emblazoned with the words "Fuck the Draft."[31] While the Court held that the First Amendment protected swearing as a legitimate expression of antiwar sentiment, its embrace of dissent was limited. In *United States v. O'Brien* (1968), for instance, the defendant argued that burning his draft card was constitutionally protected free speech. While noting that symbolic conduct was, in some contexts, protected by the first amendment, the Court held that the ban on destroying draft cards was related to the important government interest of maintaining a military draft, even though the record seemed to indicate that Congress had banned draft card burning when it became a favorite form of antiwar protest.

The male-only draft came under scrutiny as well. With an expansion of women's rights through the equal protection clause still on the horizon, a South Dakota district judge upheld the male-only draft in 1968. The judge found that Congress had properly "followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."[32] In 1980, another district judge found the male-only draft unconstitutional, but the Supreme Court overturned the ruling in *Rostker v. Goldberg* (1981). In *Personnel Administrator of Massachusetts v. Feeney* (1979), the Court also upheld a Massachusetts law that granted veterans absolute preference in employment despite the discriminatory impact on women.

Through the debates of the era, judges, legislators, litigants and others often conceptualized rights in terms of national security. Rights could expand, contract and change in ways that aided wartime governance or enhanced national security. Rather than a simple on/off switch triggered by wartime, in the jurisprudence of rights we find images of the nation and its fears.

IV. Law, Sovereignty and the September 11 World

September 11, 2001, brought massive destruction to American soil, as hijackers piloted two airliners into the towers of the World Trade Center in New York City, a third into the Pentagon building outside of Washington, D.C., while a fourth crashed into a field in Pennsylvania after its passengers, upon hearing of the World Trade Center attacks, tried to overcome their assailants. For a moment, these events brought America and the world together, as peoples around the world made pilgrimages to American embassies with flowers and candles to express their grief.

The strikes might have been characterized as a horrific crime. But President George W. Bush soon announced that the nation was in "a new kind of war" that called for a military response.

This "new kind of war" was not against a nation, but against terrorism. As Marilyn Young has argued, the U.S. has engaged in wars against "isms" before, for example in Korea, when the nation portrayed itself as fighting not Koreans but Communists. Terrorists, like Communists, were not confined to a particular state, and so the nation could make war against this new enemy where ever it seemed to reside. The new threat was cast in apocalyptic terms reminiscent of Cold War-era conceptualization of the Soviet threat, so that survival of the nation and civilization itself seemed again at risk. The U.S. first set its sights on the Taliban in Afghanistan, and then Iraq, with U.S. officials variously arguing that there were ties between that nation and the Al Qaeda terrorist group, and that Iraqi President Saddam Hussein had weapons of mass destruction that threatened American security, claims that they could never verify. Acting without United Nations authorization, the U.S. war on Iraq would seem to be a lawless act, flouting the idea of an international rule of law that had once been the promise of the international organization. From another perspective, however, American unilateralism contained a law-like logic. As Ruti Teitel has argued, the U.S. saw itself as the world's superpower, the police power of the world, the enforcer of law that could not itself be subject to the police power. Acting in the face of disapproval of once close allies, the U.S. easily toppled Hussein. That very act, however, was to threaten the country's own legitimacy in the world community.

This new war had more dramatic effects domestically than had any military engagement since Vietnam. Congress passed the "USA Patriot Act" in September 2001, giving the government broad powers to detain and deport noncitizens, and expanded investigatory power

for law enforcement. Most important, the President claimed sole authority to determine the scope of executive power, and his administration tried to render its exercise of power unreviewable. Administration officials justified their actions by asserting that September 11 had "changed everything," and the nation was in a "new kind of war." Critics of Administration policy were dismissed as engaging in "September 10" thinking. And so September 11 inaugurated yet another new time zone, a space of exception, a time when normal rules must be suspended. While legal scholars fiercely debated what constraints applied to such an emergency regime, the Administration acted as though law itself belonged to a bygone era.

Yet rather than a break with the past, the September 11 era illustrates how embedded war had become in American law by the end of the twentieth century. War had a way of uniting the nation. As would become clear with the anemic national response to Hurricane Katrina, a national tragedy was not a metaphor that would rally the nation or appeal to the electorate. And war brought with it the most expansive vision of government power. The most important power of the president, however, was simply the power to frame the September 11 attacks as a "war" in the first place. Framing it as a "war" unleashed the war powers, and the president's continuing efforts to place the ensuing "war on terror" within a traditional American war narrative provided the Administration's primary justification for maintaining those powers indefinitely.

In the name of the "war on terror," hundreds of prisoners taken in Afghanistan and Iraq were not held as prisoners of war in those countries, and were not transported to the United States, but instead were taken to the U.S. military base at Guantánamo Bay, Cuba. The U.S. government claimed that Guantánamo lay beyond the jurisdiction of U.S. courts because it was not located on U.S. territory. The Geneva Conventions protecting prisoners of war did not apply either, the Administration asserted, because the detainees were "unlawful combatants," rather

than conventional military forces. Guantánamo therefore seemed to be a law-free zone. In both the domestic and international context, the Administration claimed sole power to define the lawful scope of its own action. However, in *Hamdi v. Rumsfeld* (2004), the U.S. Supreme Court placed a limited restraint on the power of the executive to define the boundaries of its own power by holding that a U.S. citizen seized in Afghanistan could challenge his detention in U.S. courts. And in *Hamdan v. Rumsfeld* (2006), the Court rejected the government's plan to try detainees before military tribunals with fewer safeguards than those under U.S. military law. Still, the Administration's vision of law was of the sovereign ruler as the embodiment of law itself. The Administration justified such broad power as necessary to combat the threat of global terrorism. The difficulty with this vision was that the world was not inclined to follow along. The lessons of the Cold War, that American leadership rested in part on a sense that the nation hewed to its own moral principles, seemed long forgotten. The consequences of unreviewable power seemed evident not long after *Hamdi* was argued in the Supreme Court, as news broke of the torture of Iraqi prisoners by American soldiers. Images of naked, hooded prisoners flooded the international press, undermining American prestige throughout the world. It was clear that the U.S. had come far from the moment shortly after 9/11 when the world had grieved along with Americans. Now American power seemed tawdry and dangerous.

Prosecutions of soldiers involved in Abu Ghraib, it was hoped, would help distance the prisoner abuse from America itself by illustrating that the perpetrators had violated their nation's norms. But troublesome news from Iraq and Afghanistan continued to reverberate around the world. The image of America became linked, indissolubly, to its pursuit of the "war on terror." The meaning of that engagement, like those that had preceded it, would be inscribed in history books written by those far beyond the command of any American president. When America

makes war, war makes America in the hearts and minds of all who are touched, and in ways beyond American control.

Conclusion

War has traditionally reconfigured sovereign power, with the ascendancy of the victor and the displacement of the defeated. At work in the twentieth century is anther kind of reconfiguration of sovereignty. War, through the century, has driven the expansion of the powers of American sovereignty. Where the ends of that power will lie is the question for the next age.

The great constitutional debates in the post-September 11 era often turned on the nature of a sovereign's war or emergency power, and the question of whether the power to define the state of emergency and suspend the usual rule of law lies solely in the hands of the president. But the more enduring question was what the nation had become before the twin towers fell, and the way war had seeped into its center.

Early in the twentieth century, hopes flourished that global conflict might be avoided if only drafters of a convention could get the words right. Instead law became embroiled in the project of demarcating those wars that crossed the bounds of humanity from those that did not. Law and war acquired an intimate familiarity with each other.

That familiarity welled up domestically too. Government powers did not ebb and flow with wartime. Government programs and regulations created during war did not go away but were drawn upon later to serve new purposes. The Supreme Court, like other branches of government, facilitated war-related statebuilding. While the beginnings of what is sometimes called the "New Deal revolution" on the Court happened before the U.S. entered the war,

decisions during the conflict greatly extended federal power: what began in 1937 was consolidated and extended in a war-related context. This example helps us to see that war's impact on American legal history is not episodic, but central and continuing. Law is a vehicle through which war becomes embedded in American democracy over time.

Similarly, the twentieth century story of individual rights has not been a simple one of a pendulum swinging between rights and security. Instead, security concerns often informed the Court's jurisprudence, but security might be advanced by contracting, expanding or modifying rights, depending on the situation. *Korematsu* during World War II and *Dennis v. United States* during the Cold War are classic examples of decisions in which rights were restricted in the service of conceptions of national security. In *Brown v. Board of Education*, by contrast, racial discrimination was recognized as an international embarrassment that undermined U.S. prestige. This led to an extension of individual rights. Individual rights cases help us to see that conceptions of national identity are at stake in constitutional cases. Reflected across these cases is an image of the nation and its fears.

American national identity, reflected in American law, was not simply a domestic matter, as the story of *Brown* illuminates. Projecting an image of American justice was central to maintaining a conception of American democracy – a story of America for the world. In the context of the Cold War, this mattered immensely to U.S. prestige and U.S. national security. More recently, the world's perceptions of American democracy have not weighed as heavily on American policy makers. Debates over the importance of the American image would again become a central issue after September 11, and especially after the exposure of abuses at the hands of Americans at Abu Ghraib. The U.S. seemed to retreat from legal regulation of its actions, as if law itself was a threat to American security. The new world many supposed had

been created by September 11 required instead that the U.S. project power. But bad news continued to filter out from Iraq, Afghanistan and Guantánamo. As much as the United States tried to hold the reins of power, the story of the war, and conceptions of its lawfulness, informed the world's understandings of American identity in ways beyond any president's control.

Increasingly, the struggle within the United States has been preoccupied with the meaning of constitutional limits on the power of a president who argues that any constraint on his authority threatens security. Domestic dissent over war has sometimes led to political realignment, and a change in direction. It is also the case that, just as the forces of war often come from the outside of a regime, constraints on American sovereign power can come from outside U.S. borders. The rest of the world has long known it has a stake in the nature of American sovereignty. How it will realize that stake will surely be a central story of the twenty-first century.

Bibliographic Essay

Note to SHAFR readers : I would greatly value your suggestions of works that should be included that I have neglected. I am over my word limit, however, so suggestions of what to leave out would also be helpful. Please e-mail me with recommendations at mdudziak@law.usc.edu.

The literature on law and war is extensive, and has expanded significantly since September 11, 2001. This essay cannot be comprehensive. Instead, my aim is to highlight particularly useful works in different relevant areas.

War and the Making of America

Scholars have focused on the way wars have helped "make" America in different ways, whether through the construction of American identity or through statebuilding. These works do not always have law at their center, but they are important for an understanding of the ways war has shaped American law.

On war and national identity, Jill Lepore, The Name of War: King Philip's War and the Origins of American Identity focuses on the way narratives of wars are constructed, and helps us to see that interpretations of wars by various parties infuse them with meaning that is drawn upon in constructions of identity. For David Campbell, national identity and conceptions of national security, are forged in relation to an "other," such as the Soviet Union during the Cold War. David Campbell, Writing Security: United States Foreign Policy and the Politics of Identity (Minneapolis, rev. ed 1998). Works on historical memory focus on the ways the meaning of war is understood and functions over time. Some works on war and memory focus on the United States. See Marita Sturken, Tangled Memories: The Vietnam War, the AIDS Epidemic, and the Politics of Remembering (Berkeley, 1997). Others focus on particular events involving the

United States, such as the use atomic weapons in World War II. Michael J. Hogan, ed., Hiroshima in History and Memory (Cambridge, 1996). The focus of Susan Rubin Suleiman, Crises of Memory and the Second World War (Cambridge, MA, 2006), is global as well as national, because, she argues, the experience of the holocaust was global, and hence operated as a site of collective memory. The cultural production of war, including government efforts to generate support for war, is discussed in James R. Mock, Cedric Larson, Words that Won the War: The Story of the Committee on Public Information, 1917-1919 (Princeton, 1939); Allen M. Winkler, The Politics of Propaganda: The Office of War Information, 1942-1945 (New Haven, 1978); Gerd Horten, Radio Goes to War: The Cultural Politics of Propaganda during World War II (Berkeley, 2002); Walter L. Hixson, Parting the Curtain: Propaganda, Culture, and the Cold War, 1945-1961 (New York, 1977); Thomas Doherty, Projections of War: Hollywood, American Culture, and World War II (New York, 1993); Richard W. Steele, "Preparing the Public for War: Efforts to Establish a National Propaganda Agency, 1940-41," American Historical Review, 75 (Oct., 1970): 1640-1653.

While works on identity, memory and culture have been the focus of historians and cultural studies scholars, writing about statebuilding has been done principally by political scientists. Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government (New York, 1987), sees war and other major crises, such as the Great Depression, as occasions for the expansion of the U.S. government. Central to his thesis is the idea of the ratchet. Once created by war or crisis, government powers do not fully recede after the war is over, but are turned to new uses in peacetime. Then government power expands again to meet the next crisis. Over time, government power ratchets up, and is not cut back. Writing from a libertarian perspective, Higgs sees the expansion of government as a great threat to liberty, but

the idea that war fuels statebuilding is not restricted to libertarian scholarship. Aaron Freidburg also notes that "the imminent threat of war produced pressures for the permanent construction of a powerful central state" in the United States, but he sees this dynamic as coming later, after World War II, and he emphasizes constraints. American "anti-statism," he argues, placed a break on excessive concentration of state power. Aaron L. Friedberg, In the Shadow of the Garrison State (Princeton, 2000). Ira Katznelson and Martin Shefter, eds., Shaped by War and Trade: International Influences on American Political Development (Princeton, 2002), examine war and international trade as two forms of international impacts on American statebuilding. The impact of World War II on the development of the administrative state and other areas is discussed in Daniel R. Ernst and Victor Jew, Total War and the Law: The American Home Front in World War II (Westport, 2002). See also Bartholomew Sparrow, From the Outside In: World War II and the American State (Princeton, 1996). For some scholars, in contrast, the American state is a "New Deal state," with its formative moments in "inter-war years" or peace-time. See Bruce Ackerman, We the People: Volume 2: Transformations (Cambridge, MA, 1998). Works on law and government power in the New Deal-era include Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (New York, 1998); William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (New York, 1995); G. Edward White, The Constitution and the New Deal (Cambridge, MA, 2000); Laura Kalman, "The Constitution, the Supreme Court, and the New Deal, American Historical Review 110 (October 2005): 1052-1080.

If war helped make America, what sort of nation did it make? For some scholars, war made the nation a "warrior state." While some recoil from the expanse of government power inherent in a warrior state, or worry about the implications of militarization for democracy,

others see it as justifying an expansive role for the United States in the world. Supporting the warrior state argument is the pervasive engagement of the United States in military conflict, emphasized in Max Boot, The Savage Wars of Peace: Small Wars and the Rise of American Power (New York, 2002). For an argument that a warrior state is in tension with American constitutional values, see Mark E. Brandon, "War and the American Constitutional Order," in Mark Tushnet, ed., The Constitution in Wartime: Beyond Alarmism and Complacency (Durham, 2005), 11-38. Michael Sherry's comprehensive study, In the Shadow of War: The United States Since the 1930s (New Haven, 1995), does not use the "warrior state" language, nor share Boot's embrace of American empire, but his argument that war and militarization have been central features of American life since the 1930s is consistent with the idea that war played a central role in building the twentieth century American state.

War, Rights and the Pendulum

The most classic works on law and war often focus on the impact of war on civil liberties. The focus is usually on the suppression of rights during wartime, although writers have different views about the degree to which this has been justifiable. Dominant throughout the literature is the idea of a pendulum that swings between rights and security. During wartime, the pendulum is thought to swing away from rights protection, and toward more robust protection of security. When war is over, the pendulum is thought to swing in the other direction. Important to this conceptualization is an assumption shared by most writers: that American history can be divided into time zones (wartime and peacetime), and that wartime is exceptional and different than normal time. The idea of time zones is in tension, however, with some warrior state writers who see American military involvement as ubiquitous, rather than episodic.

A recent and helpful collection, Mark Tushnet, ed., The Constitution in Wartime: Beyond Alarmism and Complacency (Durham, 2005), attempts to move beyond the standard framework for studying law and war, by questioning traditional trade-offs between rights and security, even though the essays often work within the dominant conceptualization of war and American society: the idea that changes to the rights environment are turned off and on during periodic "wartimes." An example of scholarship that examines an impact of international pressures and security-related concerns outside of discreet "wartimes" on American law is the work on the impact of fascism on American law before WWII. For example, David M. Bixby, "The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic," Yale Law Journal 90 (1981) 741-779, argues that concerns about fascism in Europe during Hitler's rise to power informed the thinking of American intellectuals, including members of the Supreme Court, on the weaknesses of a majoritarian form of government, and the need for the courts to act as a bar to majority abuse of minority rights. See also Robert M. Cover, "The Origins of Judicial Activism in the Protection of Minorities," Yale Law Journal 91 (1982) , 1287-1316.

An ambitious work challenging the dominant understanding that wartime has a negative impact on rights is Lee Epstein, Daniel E. Ho, Gary King and Jeffrey A. Segal, "The Supreme Court During Crisis: How War Affects Only Non-War Cases," New York University Law Review 80 (April, 2005), 1-116. These authors argue that a quantitative analysis of civil liberties cases during wartime shows that the impact of war on the Supreme Court is restricted to non-war-related cases. A limitation of this study is that it assumes that the boundaries of wartimes are discreet and discernable. World War II exists, for the authors, from the date of Pearl Harbor, December 7, 1941, to V-J Day, August 14, 1945, and they look for war-related impacts within

that time period. But the nature of twentieth century American warfare has made bright lines difficult to find. It is the case that, as Melvin Urofsky has shown, Pearl Harbor led to a greater level of overt engagement on the part of the Court with the U.S. war effort. Melvin I. Urofsky, "The Court at War, and the War at the Court," Journal of Supreme Court History 1996 (1996), 1-18. But the United States was engaged in the war long before Pearl Harbor. National security concerns related to the overseas conflict affected the nation before and after the formal dates of the war, surfacing in cases like Minersville School District v. Gobitis, 310 U.S. 586, 595 (1940) and Woods v. Cloyd W. Miller, Co., 333 U.S. 138 (1948). Because Epstein, et al., assume that war-related impacts turned off and on during discreet, formal wartimes, the article cannot provide a definitive answer to the question of whether war has an impact on civil liberties cases.

Within the traditional pendulum analysis lies much important work on law and war. An important work on the first amendment is Geoffrey R. Stone, Perilous Times: Free Speech in Wartime, From the Sedition Act to the War on Terror (New York, 2004), finding more repression during World War I than in later twentieth century wars. Important developments in the first amendment during and after World War I are addressed in David Rabban, The First Amendment in its Forgotten Years, 1870-1920 (Cambridge, 1997) and Paul Murphy, World War I and the Origins of Civil Liberties in the United States (New York, 1979).

Paul Murphy, The Constitution in Crisis Times, 1918-1969 (New York, 1972), remains a rich overview of much of the century. William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime (New York, 1998), is principally on the civil war, with twentieth century chapters as well. It is perhaps most interesting as the work of a Supreme Court Justice, crafting a lesson from history that would then undoubtedly inform his own writing of law during wartime. Edward S. Corwin, Total War and the Constitution (New York, 1947), remains a classic. It may

be most important as a primary source on the impact of World War II on legal thinkers, during what E. Blythe Stason in his introduction noted was a time in which Americans found themselves in a "scientific world" defined by the introduction of atomic energy, and yet "a bewildered and thoroughly chaotic world."

The greatest abuse of rights during World War II is often thought to be the internment of Japanese Americans. Two classic works detailing the history of anti-Asian sentiment in California, and the role of prejudice in support for the internment program are Jacobus tenBroek, Edward Norton Barnhart, Floyd W. Matson, Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of the Japanese Americans in World War II (Berkeley, 1970); and Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (Berkeley, 1962). Peter Irons, Justice at War: The Story of the Japanese-American Internment Cases (New York, 1983), details the history of internment, especially the litigation that would justify its constitutionality in *Korematsu* and related cases. Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans (Cambridge, MA 2001), illuminates President Franklin Delano Roosevelt's central role. The experience of internment is described in Jeanne Wakatsuki Houston and James D. Houston, Farewell to Manzanar: A True Story of Japanese American Experience During and After the World War II Internment (New York, 1973). Eric L. Muller, Free to Die for Their Country: The Story of the Japanese American Draft Resisters in World War II (Chicago, 2001), discusses prosecution of internees who were drafted while confined to camps, but some refused to serve a country that had imprisoned them. The imposition of Martial Law in Hawaii is the focus of Harry N. Scheiber and Jane L. Scheiber, "Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946," University of Hawaii Law Review 19 (1997): 477-648.

Linda Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (New York, 1998), considers women's citizenship rights in the context of women's exclusion from the obligation of military service, with chapters on jury service, and veterans' preference policies, among other topics. Sandra F. VanBurkleo, Belonging to the World: Women's Rights and American Constitutional Culture (New York, 2001), is a helpful survey of women's constitutional rights. Phillipa Strum, Women in the Barracks: The VMI Case and Equal Rights (Lawrence, KS, 2002), takes up an important 1996 equal protection case holding that exclusion of women from the Virginia Military Institute violated the constitution.

Some scholars have focused on the impact of war or national security on the expansion of rights. Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (New York, 2000), finds that wartime has been the occasion for the expansion of voting rights. Phillip A. Klinkner with Rogers Smith, The Unsteady March: The Rise and Decline of Racial Equality in the United States (Chicago, 1999), argues that the only sustained progress on racial reform for African Americans has happened in the context of large-scale wars, when African Americans fought, when an ideology of democracy underlying the war was in tension with inequality, and when a civil rights movement exploited this context. To make the thesis work, however, the authors collapse the years 1941-68, encompassing World War II, Korea, the Cold War, and part of Vietnam into one long era when, they argue, all of their factors remained in play. The awkwardness of this periodization is apparent by the inability of their thesis to explain the falling off of reform efforts while African American troops continued to fight in an escalated war in Vietnam, illustrating, perhaps, that war matters, but that war-related time zones don't work. Nevertheless, Klinkner and Smith's effort to distill causal elements from history is important. A more focused work finding limited progress on civil rights during World

War II is Daniel Kryder, Divided Arsenal: Race and the American State During World War II (Cambridge, 2000). Scholars have linked Cold War foreign relations to civil rights reform, as other nations argued that race discrimination undermined U.S. world leadership, aiding the Soviet Union. Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (Princeton, 2000); Thomas Borstelmann, The Cold War and the Color Line: American Race Relations in the Global Arena (Cambridge, MA, 2001). Richard A. Primus, The American Language of Rights (Cambridge, 1999), discusses the impact of anti-totalitarian thinking on American rights during and after World War II. Also important is Richard M. Dafluime, The Desegregation of the U.S. Armed Forces: Strength for the Fight, 1939-1953 (Columbia, MO, 1969).

Law, War and Government Power

A particular concern in the literature on law and war is the expansion of executive power, however war has an impact of the powers of other branches of government as well. Scholarship on the impact of war on presidential power often tracks the assumptions about law and war in the traditional civil liberties literature. The assumption is that wartime is exceptional, and that in temporally discreet wartimes, presidential power has expanded. An important difference in this area, as compared to the civil liberties scholarship, is the emphasis on change over time. Expansions of government power do not fully recede after a war, and most scholars see the expansion of presidential war power as having continued over time. For some scholars, this is a constitutional violation. For others, it is the embodiment of a constitutional vision of a "unitary executive," especially necessary after September 11. On the idea of states of exception, as they

relate to executive power, see Georgio Agamben, State of Exception, Kevin Attell, trans., (Chicago, 2005).

For an historical survey of presidential war power, the standard work is Louis Fisher, Presidential War Power (Lawrence, KS, 1995). See also Edward S. Corwin, The President: Office and Powers, 1787-1984, 5th rev. ed. by Randall W. Bland, Theodore T. Hindson and Jack W. Peltason ((New York, 1984). A helpful historically oriented collection of essays is Demetrios Caraley, The President's War Powers: From the Federalists to Reagan (New York, 1984). Peter Irons, War Powers: How the Imperial Presidency Hijacked the Constitution (New York, 2005), is a critical survey. John Yoo argues for expansive powers in The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11 (Chicago, 2005).

Francis D. Wormuth and Edwin B. Firmage, To Chain the Dog of War: The War Powers of Congress in History and Law (Urbana and Chicago, 1986), focuses on Congress, and decries Congress's diminished role over time in declaring war. See also Louis Fisher, "How Tightly Can Congress Draw the Purse Strings?" American Journal of International Law 83(1989): 758-766; Thomas M. Franck, "Rethinking War Powers: By Law or 'Thurmaturgic Invocation'?" American Journal of International Law 83 (1989): 768; Harold Hongju Koh, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," Yale Law Journal 97 (1988): 1235-1342; Ryan C. Hendrickson, "War Powers, Bosnia, and the 104th Congress," Political Science Quarterly 13.2 (1998): 241-258. On initiating war, a useful collection, including essays on covert actions, is Gary M. Stern and Morton H. Halperin, The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives (Westport, CT, 1994). See also John Lehman, Making War: The 200-Year-Old Battle Between the President and Congress over How America Goes to War (New York, 1992). On the impact of the United

Nations on the power to go to war, see David Golove, "From Versailles to San Francisco: The Revolutionary Transformation of War Powers," Colorado Law Review 70 (1999): 1491-1523. On the meaning of war declarations, and their absence, see Elaine Scarry, "The Declaration of War: Constitutional and Unconstitutional Violence," Austin Sarat and Thomas R. Kearns, eds., Law's Violence (Ann Arbor, 1993).

Christopher N. May, In the Name of War: Judicial Review and the War Powers since 1918 (Cambridge, MA, 1989), focuses on the courts, and argues that the judiciary should defer review of executive action during an emergency, as a way of preserving an appropriate role for the courts related to wartime. Louis Henkin, Foreign Affairs and the United States Constitution, Second Edition (New York, 1997), is a classic work, and David Gray Adler and Larry N. George, eds., The Constitution and the Conduct of American Foreign Policy (Lawrence, KS, 1996) is a helpful collection with contributions by leading scholars.

Among the striking episodes in the exercise of presidential power in wartime was the use of a military tribunal to try German saboteurs during World War II. There is new interest in this episode due to the use of military tribunals after September 11, 2001. New work, detailing the history of military tribunals and addressing contemporary implications, is Louis Fisher, Military Tribunals And Presidential Power: American Revolution To The War On Terrorism (Lawrence, KS, 2005). On the World War II context, see Louis Fisher, Nazi Saboteurs On Trial: A Military Tribunal And American Law, (Lawrence, KS, 2nd ed., 2005). For a shorter work, focusing on the Supreme Court's role, see David J. Danielsky, "The Saboteur's Case," Journal of Supreme Court History, 1996 (1996), 61-82. President Harry S. Truman's seizure of the steel mills during the Korean War is another important episode. The best work on this remains Maeva Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power (New York, 1977).

Helpful primary sources can be found in Alan F. Westin, The Anatomy of a Constitutional Law Case: Youngstown Sheet and Tube Co. v. Sawyer, the Steel Seizure Decision (New York, 1958).

Managing and Making War though Law

The story of efforts to end war through law after the First World War is told in Walters, Francis Paul, A History of the League of Nations, (New York, 1952)(2 vols.) and Warren F. Kuehl and Lynne K. Dunn, Keeping the Covenant: American Internationalists and the League of Nations, 1920-1939 (Kent, OH, 1997). On Woodrow Wilson's role, see Thomas J. Knock, To End All Wars: Woodrow Wilson and the Quest for a New World Order (New York, 1992) and John Milton Cooper, Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations (Cambridge, 2001). On the Kellogg-Briand Pact, see Robert H. Ferrell, Peace in Their Time, (New York, reprint ed., 1968).

United States involvement in the development of international human rights, including U.S. opposition, is detailed in Paul Gordon Lauren, Power and Prejudice: The Politics and Diplomacy of Racial Discrimination (Boulder, CO, 2nd ed., 1996). See also Paul Gordon Lauren, The Evolution of International Human Rights: Visions Seen (Philadelphia, 1998). Eleanor Roosevelt's role is examined in Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (New York, 2001). An important new work, stressing the importance of the Atlantic Charter, is Elizabeth Borgwardt, A New Deal for the World: America's Vision for Human Rights (Cambridge, MA, 2005). The creation of the United Nations and subsequent developments are discussed in Stanley Meisler, United Nations: The First Fifty Years (New York, 1997). On U.N. peacekeeping, see Brian Urquhart's memoir, A Life in Peace and War (New York, 1987). Also helpful is an edited collection, Adam Roberts

and Benedict Kingsbury, eds., United Nations, Divided World: The UN's Roles in International Relations (New York, 1994).

The development of the law of war and war crimes, see Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth-Century Experience (Lawrence, KS, 1999); Peter Maguire, Law and War: An American Story (New York, 2001). On war crimes tribunals, see Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton, 2000). The problem of genocide in the late twentieth century is discussed in Samantha Power's critique of U.S. policy, A Problem from Hell: America and the Age of Genocide (New York, 2002). The problem of redress for victims of mass violence is addressed in Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (New York, 1998).

The U.S. role in the Nuremberg Trials is illuminated in Michael R. Marrus, The Nuremberg War Crimes Trial, 1945-46: A Documentary History (Boston, 1997). On the response to the My Lai massacre, see Michal R. Belknap, The Vietnam War on Trial: The My Lai Massacre and Court-Martial of Lieutenant Calley (Lawrence, KS, 2002). Elizabeth Lutes Hillman, Defending America: Military Culture and the Cold War Court-Martial (Princeton, 2005), illustrates the way that courts martial during the Cold War helped produce a conception of military culture defined in part by race, gender and heterosexuality. On the development of military justice in the United States, see Jonathan Lurie, Military Justice in America: The U.S. Court of Appeals for the Armed Forces, 1775-1980 (Lawrence, KS, rev. ed., 2001).

On the law of armed conflict, see Geoffrey Best War and Law Since 1945 (New York, 1994); Michael Reisman, The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict (New York, 1994); and Adam Roberts and

Richard Guelff, eds. Documents on the Laws of War, 3rd ed. (New York, 2000). A recent, brief synthesis is Michael Byers, War Law: Understanding International Law and Armed Conflict (New York, 2005), and a new critical analysis is David Kennedy, Of War and Law (Princeton, 2006).

September 11 and the Law

The terrorist attacks on the United States on September 11, 2001, and the subsequent American "preemptive" war in Iraq, have spurred a literature of their own. A common assumption is the idea that September 11 "changed everything," so that the rules of an earlier era no longer apply. Questioning this truism, and exploring its implications, is Mary L. Dudziak, ed., September 11 in History: A Watershed Moment? (Durham, NC, 2003), including essays by Marilyn Young and Ruti Teitel. Another helpful collection is John Strawson, ed., Law After Ground Zero (London, 2002). Among the many law review treatments of September 11-related topics is "Law and the War on Terrorism," including a Forward by Viet Dihn, "Freedom and Security After September 11," Harvard Journal of Law and Public Policy 25 (Spring 2002) 399. See also James F. Hoge and Gideon Rose, eds., Understanding the War on Terror (New York, 2005).

While the Bush Administration calls the post-9/11 era a "war" era, scholars debate this characterization. Many prefer to view it as an "emergency," and offer prescriptions for executive power in this context. See Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," University of Pennsylvania Journal of Constitutional Law 6 (2004) 1001; Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism (New Haven, 2006). Mark Tushnet raises the question of whether the "war on

terror" should be regarded as an on-going condition, rather than a temporally confined "emergency," requiring that long-term trade-offs over rights and security, rather than short-term emergency measures, should be contemplated. Mark Tushnet, "Emergencies and the Idea of Constitutionalism," in Mark Tushnet, ed., The Constitution in Wartime: Beyond Alarmism and Complacency (Durham, 2005).

There has been much debate about the legitimacy of executive branch actions pursuing hostilities in Iraq, and in various programs related to what has been called the "war on terror." The legal authority underlying executive branch actions is thoughtfully examined in Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," Harvard Law Review 118 (2005) 2047, and responses to Bradley and Goldsmith, including Derek Jenks and Ryan Goodman, "International Law, U.S. War Powers, and the Global War on Terrorism," Harvard Law Review 118 (2005) 2653-2662.

The "Patriot Act" has spawned its own literature. The U.S. government has made the Act and related government reports available in CD-Rom form. 2006 Complete Guide to the USA Patriot Act, Surveillance Tools Against Terrorism, and Domestic Spying (CD-Rom) (2006). Among the most important critiques of Bush Administration anti-terror policies is David Cole, Enemy Aliens: Double Standards And Constitutional Freedoms In The War On Terrorism (New York, 2003). The debate about whether September 11 made torture a legitimate government policy, and the shocking disclosure of abuse of prisoners by American soldiers at Abu Ghraib prison in Iraq is documented in Karen J. Greenberg and Joshua L. Dratel, eds., The Torture Papers: The Road to Abu Ghraib (Cambridge, 2005); and Karen J. Greenberg, ed., The Torture Debate in America (Cambridge, 2005). A helpful pre-Abu Ghraib collection is Sanford Levinson, Torture: A Collection (New York, 2004).

Endnotes

[1] Richard F. Grimmett, Instances of Use of United States Armed Forces Abroad, 1798-2004, Washington DC: Congressional Research Service, Library of Congress, October 5, 2004, http://www.history.navy.mil/library/online/forces.htm. The tally does not include not-so-covert actions, like the 1961 Bay of Pigs invasion.

[2] Ruti G. Teitel, "Empire's Law: Foreign Relations by Presidential Fiat," in Mary L. Dudziak, ed., *September 11 in History: A Watershed Moment?* (Durham, N.C., 2003), 198.

[3] Massachusetts v. Laird, 400 U.S. 886 (1970).

[4] John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the Federalist Society, Washington, D.C., November 14, 2002, http://www.state.gov/t/us/rm/15158.htm.

[5] Arthur M. Schlesinger, Jr., The Crisis of the Old Order : 1919-1933, The Age of Roosevelt, Volume I (New York, 2003), 1.

[6] William E. Leuchtenburg, The FDR Years: On Roosevelt and His Legacy (New York, N.Y., 1995), 36.

[7] Panama Refining Co. v. Ryan, 293 U.S. 388, 418 (1935).

[8] United States v. A.L.A. Schechter Poultry Corp., 295 U.S. 495, 529 (1935).

[9] United States v. Butler, 297 U.S. 1, 77 (1936).

[10] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936).

[11] Michael S. Sherry, In the Shadow of War: The United States since the 1930s (New Haven: Yale University Press, 1995), 123.

[12] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[13] Dwight Macdonald, "The Bomb," Politics, 2 (September 1945), 257-260.

[14] "Assert Your Rights," (1917), http://1stam.umn.edu/archive/primary/schenck.pdf.

[15] Schenck v. United States, 249 U.S. 47, 51-52 (1919).

[16] Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J. *dissenting*).

[17] Sandra F. VanBurkleo, "Belonging to the World: Women's Rights and American Constitutional Culture (New York, 2001), 196.

[18] *Wall Street Journal*, "President Urges Senate to Extend Suffrage, " October 1, 1918.

[19] *New York Times*, "Cox Sees League Aid in Suffrage Victory," August 19, 1920.

[20] Buck v. Bell, 274 U.S. 200, 207 (1927).

[21] Melvin I. Urofsky, :The Court at War, and the War at the Court," Journal of Supreme Court History 1996 (1996), 1-18.

[22] Korematsu v. United States, 323 U.S. 214, 216, 223 (1944).

[23] Korematsu, 323 U.S. at 226 (Roberts, J., dissenting).

[24] Korematsu, 323 U.S. at 233 (Murphy, J., dissenting).

[25] Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).

[26] Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

[27] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641 (1943).

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[30] Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (Princeton, 2000), 101.

[31] Cohen v. California, 403 U.S. 15, 26 (1971).

[32] United States v. Sinclair, 291 F. Supp. 122 (D.S.D. 1968).