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Death and the War Power

Mary L. Dudziak*

In the vast literature on American war powers, attention is rarely paid to the product of war, the dead human body, and its impact on war politics and war powers. In legal scholarship on the war powers, the practice of war usually happens in the background. Presidents, Congress, and courts are in the foreground. Killing in war is thereby a background phenomenon, an aspect of the social context within which the war powers are exercised. This article puts death at the center of the analysis. Drawing upon the insights of important recent historical works on death, I argue that the dead body has a political life. The political history of American war death recasts an important problem in the history of American war powers: the atrophy of political restraints on presidential power.

Using historian Drew Gilpin Faust's idea of a "republic of suffering" in the Civil War as a point of departure, the article argues that the culture of American war changed when American wars became only foreign wars. The principal character of American civilians' relationship to war death in the 20th century was distance from the carnage. Distance accomplished

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two things: first, a “republic” constituted in relation to war death was lost; and second, the U.S. government could exert control over what civilians at home could perceive. Massive mobilization during World War II might appear to be a challenge to the argument that distance from the battlefield matters, so the article examines the American civilian experience with war’s violence during that war. Using censored and uncensored World War II casualty photographs, I show the way the very view of war death was managed by the U.S. government for the purpose of maintaining domestic mobilization. Civilians therefore engaged a curated view of death meant to enhance their support for the war effort.

The change over time in the civilian experience with war is important to the atrophy of political restraints, but is not recognized in the literature about American war powers history. Cultural distance from war death has increased over time, and has helped to produce the profound apathy that characterizes contemporary American war politics. This apathy enables the current legal structure of war authorization: Congress fails to act, and presidents rely on new interpretations of outdated authorizations, or their own constitutional power. Ultimately, I argue, a crucial and unexamined factor in the demise of political restraints on presidential power to use military force is the distance between American civilians and the carnage their wars have produced.

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Think how much, and of importance, will be . . . buried in the grave, in eternal darkness.

Walt Whitman (1892)¹

I. INTRODUCTION

This article reconceptualizes American war powers history through attention to what is, in essence, the product of war: the dead human body.² War is politics by other means, Carl von Clausewitz famously wrote.³ War is represented in many ways, from heroic paintings of victorious generals,⁴ to names etched in stone on monuments and in graveyards,⁵ to the image of a mushroom cloud rendering the human bodies in its churning inferno into an abstraction.⁶ At the point of contact between the force of destruction and its object, when the bullet meets the body, war is about the production of death.⁷ War accomplishes its politics through the production of dead human bodies, but the bodies can be hard to see in the literature on American war powers.

In scholarship on the war powers, the practice of war usually happens in the background. Presidents, members of Congress and courts are in the foreground.⁸ Killing in war is thereby a background phenomenon—an aspect of the social context within which the war powers are exercised. A central insight of law and society scholarship is that law and social

1. WALT WHITMAN, PROSE WORKS 1892: VOL. I, SPECIMEN DAYS 118 (Floyd Stovall ed., 1963).

2. See, e.g., GERALD F. LINDERMAN, *EMBATTLED COURAGE: THE EXPERIENCE OF COMBAT IN THE AMERICAN CIVIL WAR 124-28* (1987) (on the experience of death in the Civil War); GERALD F. LINDERMAN, *THE WORLD WITHIN WAR: AMERICA'S COMBAT EXPERIENCE IN WORLD WAR II 3-47* (1997) (on soldiers' experience with killing in World War II); DENIS WINTER, *DEATH'S MEN: SOLDIERS OF THE GREAT WAR 170-185* (1978) (describing World War I trench warfare).

3. CARL VON CLAUSEWITZ, *ON WAR* 605 (Michael Eliot Howard & Peter Paret, eds., trans., 1976).

4. See, e.g., Emanuel Leutze, *Washington Crossing the Delaware* (1851), METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/toah/works-of-art/97.34/> (last visited July 17, 2017) (painting of General George Washington).

5. See, e.g., LISA M. BUDREAU, *BODIES OF WAR: WORLD WAR I AND THE POLITICS OF COMMEMORATION IN AMERICA, 1919-1933* 135-137, 162 (2010) (on war memorials for American soldiers in Europe after World War I).

6. See, e.g., JOHN W. DOWER, *CULTURES OF WAR: PEARL HARBOR/HIROSHIMA/9/11/IRAQ 200-01* (2010) (photographs of mushroom clouds over Hiroshima and Nagasaki, Japan in 1945).

7. See, e.g., LINDERMAN (1997), *supra* note 2, at 3-47; LINDERMAN (1987), *supra* note 2, at 124-28; WINTER, *supra* note 2, at 170-185.

8. See, e.g., STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013); H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION* (2014); MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013). Historical scholarship more often sets the exercise of war powers in the context of warfighting and death. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012). Works on international humanitarian law also focus more directly on the carnage of war. See, e.g., ISABEL V. HULL, *A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR* (2014).

context are not separate categories but are embedded in each other.⁹ They are mutually constitutive. It must then matter to an understanding of war powers to consider constitutional power in relation to the death it produces.

Drawing upon the insights of important scholarly works on death,¹⁰ I argue that the dead body has a political life. The cultural and political history of American war dead recasts the history of the atrophy of political restraints on presidential war power. I argue that a crucial factor underlying the military-civilian divide and the lack of contemporary political engagement over the use of military force is the distance between American civilians and the carnage their wars have produced.¹¹ Clausewitz recognized that bombardment of the civilian population could

9. See LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* 23–33 (2009); Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984). See also Mary L. Dudziak, *Legal History as Foreign Relations History*, in *EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS* 135 (Michael J. Hogan, Thomas G. Patterson, and Frank Costigliola, eds., 3rd ed. 2016) (arguing that a law and society approach is relevant to the role of law in the history of foreign relations).

10. Conceptually, the most important relatively recent histories of death are DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2009) and THOMAS W. LAQUEUR, *THE WORK OF THE DEAD: A CULTURAL HISTORY OF MORTAL REMAINS* (2015). Also helpful are STEVEN CASEY, *WHEN SOLDIERS FALL: HOW AMERICANS HAVE CONFRONTED COMBAT LOSSES FROM WORLD WAR I TO AFGHANISTAN* (2014); JOHN TIRMAN, *THE DEATHS OF OTHERS: THE FATE OF CIVILIANS IN AMERICA’S WARS* (2012); KATHERINE VERDERY, *THE POLITICAL LIVES OF DEAD BODIES: REBURIAL AND POSTSOCIALIST CHANGE* (1999).

11. Death matters to legal scholarship on war, especially the concept of proportionality in the law of armed conflict, which relates to the lawfulness of military actions under international law. See JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND USE OF FORCE BY STATES* (2004); Yoram Dinstein, *Collateral Damage and the Principle of Proportionality*, *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 211–24 (David Wippman & Matthew Evangelista eds., 2005); Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 *CASE W. RES. J. INT’L L.* 707, 714–18 (2011); Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 *Y.B. OF INT’L HUMANITARIAN L.* 3, 3–53 (Dec. 2005). See also SAHR CONWAY-LANZ, *COLLATERAL DAMAGE: AMERICANS, NONCOMBATANT IMMUNITY, AND ATROCITY AFTER WORLD WAR I* (2006) (a history of the concept of “collateral damage”); HELEN KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN* (2011). Death is also important to political scientists who study the impact of casualties on American support for war. See, e.g. DOUGLAS L. KRINER & FRANCIS X. SHEN, *THE CASUALTY GAP: THE CAUSE AND CONSEQUENCE OF AMERICAN WARTIME INEQUALITIES* (2010); CHRISTOPHER GELPI, PETER D. FEAVER & JASON REIFLER, *PAYING THE HUMAN COSTS OF WAR: AMERICAN PUBLIC OPINION AND CASUALTIES IN MILITARY CONFLICT* (2009). The casualties that matter to these works are American military casualties and “collateral damage”: the killing of civilians of other nations in distant warzones. See, e.g., CONWAY-LANZ, *supra*, at 224–25; GELPI, FEAVER & REIFLER, *supra*, at 23–64. See also CASEY, *supra* note 10 (detailing the history of American reaction to military deaths since World War I). The distance of American civilians from war’s violence on the battlefield is assumed and its relevance is rarely considered. Literary scholars, in contrast, have critically examined the distance of civilians from war. See, e.g., MARY FAVRET, *WAR AT A DISTANCE: ROMANTICISM AND THE MAKING OF MODERN WARTIME 187–190* (2010); PAUL K. SAINT-AMOUR, *TENSE FUTURE: MODERNISM, TOTAL WAR, ENCYCLOPEDIA FORM* (2015). This Article brings an important dimension to scholarship on war casualties by focusing on the history of American civilians’ relationship with war death. The historical trajectory is from U.S. civilians as close observers and casualties in the Civil War to civilians as occasional distant spectators in contemporary war.

lead undermine a nation's will to battle.¹² When a country goes to war without its own civilians in harm's way, this classic disincentive is absent. American civilians have been protected from the suffering in their country's wars since U.S. wars became only foreign wars, so that the polity and the battlefield were on different continents.¹³ Distance has enabled disengagement, leaving questions of war and peace without a robust political constituency.¹⁴ Disengaged voters leave members of Congress without political incentives to reign in presidential power.¹⁵ In this way, a laudatory safeguarding of American lives has had a side effect of undermining restraints on the use of force.

In the American constitutional design, war powers are divided between the president and Congress.¹⁶ Formally, the President serves as Commander in Chief, and Congress has the power to declare war, and to raise and support armies.¹⁷ In practice, the line between the powers of Congress and the president is blurred, as are other powers related to foreign affairs. "[T]he constitution is an invitation to struggle for the privilege of directing American foreign policy," as Edward S. Corwin has written.¹⁸ The dominant scholarly narrative about the history of the war powers is that, over time, power has devolved to the president, including the power to initiate armed conflict.¹⁹ Recent conflicts over war powers include efforts to repeal the 2001 Authorization for the Use of Military

12. CLAUSEWITZ, *supra* note 3, at 92–94.

13. The United States has experienced terrorist attacks on American soil, and President George W. Bush called the September 11, 2001 attacks an act of war. The counter-attack and subsequent battlegrounds, however, were in faraway countries. See ANDREW J. BACEVICH, *AMERICA'S WAR FOR THE GREATER MIDDLE EAST: A MILITARY HISTORY* (2016); SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 1–12 (Mary L. Dudziak, ed., 2003).

14. On the lack of personal experience on the part of most Americans with military service, see Pew Research Center, *War and Sacrifice in the Post-9/11 Era* (2011). <http://www.pewsocialtrends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era/> (last visited November 6, 2017). See also Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 367 (1994); Richard C. Eichenberg, *Victory Has Many Friends: U.S. Public Opinion and the Use of Military Force, 1981–2005*, 30 INTERNATIONAL SECURITY 140 (2005).

15. See generally DAVID MAHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2nd ed., 2004) (arguing that members of Congress pursue policies with the goal of getting reelected).

16. POWELL, *supra* note 8, at 211–224; ZEISBERG, *supra* note 8, at 5–10.

17. U.S. CONST. art. I, §§ 8, cl. 11–12; U.S. CONST. art. II, § 11, cl. 1.

18. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 171 (1957).

19. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3–30 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1–16 (3rd rev. ed., 2013); Francis D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* iv–xi, 1–88 (2d ed., 1989). *But see* JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* xi–xii (2012) (arguing that the conventional narrative of the rise in presidential power has been accompanied by an “unnoticed revolution” in congressional oversight); WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* 1–50 (2007) (arguing that the traditional narrative “overlook[s] the copious ways in which Congress influences presidential decisions about how often to use force, which kinds of foreign crises warrant actions and which kinds do not, the timing of a deployment, and its scope.”).

Force Against Terrorists (AUMF),²⁰ and a lawsuit claiming that the war against ISIS is unconstitutional because it was not formally authorized by Congress.²¹

20. The future of the Authorization for the Use of Military Force Against Terrorists (AUMF) is hotly contested. The AUMF was originally the legal basis for armed conflict against the terrorists behind the September 11, 2001 attacks, and those who supported them. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047 (2005). However, the war against ISIS prompted the Obama administration to stretch its authority in reliance on the AUMF, though it encouraged Congress to issue new authorization. Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES, Sept. 11, 2014, at A10. The Trump administration has likewise sought new, though expanded, authorization, but maintains that the current AUMF justifies its use of military force against ISIS and against other organizations. Rex Tillerson, Sec'y of State, Testimony to Senate Foreign Relations Committee on AUMF (Oct. 30, 2017) (recommending that any new AUMF be implemented simultaneous with the repeal of the old one and set no geographical or temporal restrictions on authority).

Efforts at AUMF reform in 2017, though promising at their inception, ultimately fell flat. Despite a successful vote on a repeal amendment by the House Appropriations Committee in June 2017, House leadership stripped the Amendment from the appropriations bill the following month. See Barbara Lee, Press Release, *Congresswoman Lee Blasts Dead of Night Removal of 2001 AUMF Repeal Amendment*, July 19, 2017, <https://lee.house.gov/news/press-releases/congresswoman-lee-blasts-dead-of-night-removal-of-2001-aumf-repeal-amendment> (last visited July 19, 2017). A parallel repeal effort in the Senate also failed to garner support necessary to attach to a defense spending bill. Sheryl Gay Stolberg, *Senate Rejects Bipartisan Effort to End 9/11 Military Force Declaration*, N.Y. TIMES, Sept. 13, 2017, <https://www.nytimes.com/2017/09/13/us/politics/senate-rejects-rand-paul-effort-to-end-military-force-declaration.html>. Notably, concerns on repeal efforts tend to criticize lack of a ready replacement. See *id.* To address this qualm, Senators Flake and Kaine have proposed new authorization that could be considered in future repeal efforts. Jeff Flake, Press Release, *Flake, Kaine Introduce Authorization for Use of Military Force Against ISIS, Al-Qaeda, and Taliban*, May 25, 2017, <https://www.flake.senate.gov/public/index.cfm/2017/5/flake-kaine-introduce-authorization-for-use-of-military-force-against-isis-al-qaeda-taliban>.

Though reform efforts have stalled, Congress exhibited renewed fervor to reprise active oversight of military and counterterrorism efforts after the deaths of four U.S. soldiers in Niger in an ambush. Andy Wright, *Congressional Oversight and the Niger Attack*, JUST SECURITY, Oct. 24, 2017, <https://www.justsecurity.org/46257/congressional-oversight-niger-attack/>. In the wake of the attack, Senators expressed outrage at the Trump administration's failure to keep Congress apprised of military activities in Niger. *Id.* Whether this alarm will survive the coming months remains to be seen.

21. Army Capt. Nathan Michael Smith sued President Barack Obama in 2016, arguing that the war against ISIS was unconstitutional because Congress has not authorized it. *Smith v. Obama*, Complaint, filed May 4, 2016, <https://www.documentcloud.org/documents/2823282-Smith-Complaint-as-Field.html> (last visited July 19, 2017). Smith was stationed in Kuwait as part of the American military effort to defeat ISIS. He claimed that fighting an illegal war requires him to violate his oath to "preserve, protect, and defend the Constitution of the United States." *Id.* at 5. The District Court dismissed the case on non-justiciability grounds. *Smith v. Obama*, No. 16-843 (CKK), 2016 WL 6839357 (D.D.C. Nov. 21, 2016). Smith's case was supported by leading constitutional scholar Bruce Ackerman. See Bruce Ackerman, *The War Against ISIS is Unconstitutional*, LAWFARE, May 5, 2016, <https://www.lawfareblog.com/war-against-isis-unconstitutional>; Bruce Ackerman, *Captain Smith's Challenge to the President's War Against ISIS: The Next Step*, LAWFARE, Aug. 23, 2016, <https://www.lawfareblog.com/captain-smiths-challenge-presidents-war-against-isis-next-step>.

President Obama had asked Congress to pass an AUMF against ISIS, but Congress did not act. See Russell Berman, *The War Against ISIS Will Go Undeclared*, THE ATLANTIC, Apr. 15, 2015, <http://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>. Without a new AUMF, the President based continued military action on a broad interpretation of the AUMF against those who perpetrated the September 11, 2001 terrorist attack and their supporters. See Curtis A. Bradley & Jack Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT. LAW 628 (2016). More recently, on October 5, 2017, the American Civil Liberties Union (ACLU) filed a habeas petition on behalf of an unnamed U.S. citizen held as an enemy combatant in Iraq. See ACLU, *ACLU Foundation v. Mattis—Petition for Writ of Habeas Corpus*, ACLU (Oct. 5, 2017), <https://www.aclu.org/legal-document/aclu-foundation-v-mattis-petition-writ-habeas>

Scholars have disagreed about whether presidents have overstepped constitutional limits when they have unilaterally committed U.S. forces to overseas conflicts.²² Some decry the expansion of presidential power as a violation of the Constitution,²³ while others argue that the President's central role is required in a world with nuclear weapons and other technologies that require a more rapid response than Congress can provide.²⁴ Scholars offer two kinds of explanations for the way limits on presidential power have changed over time: institutional reasons and historical reasons. By institutional reasons, I mean the way the relationship between the three branches of government has changed over time, and other structural changes such as the growth of the administrative state.²⁵ By historical reasons, I mean broader historical developments, including Cold War and post-Cold War international relations, and changes in the character of warfare, like the introduction of nuclear and high-tech weapons.²⁶ These approaches are important, but neither focuses on changes relating to the polity—to American civilians' relationship with war. This article argues that the history of civilian engagement and disengagement with war is an essential part of the analysis.

The United States has been continuously at war, but the American people themselves have not been.²⁷ Instead, as Andrew Bacevich has argued, most Americans have now opted out, resulting in a civil-military relationship in which national defense is no longer a collective

corpus?redirect=legal-document/does-v-mattis-petition-writ-habeas-corpus. As part of this petition, the ACLU argued that the AUMF statute does not apply to ISIS, meaning the citizen's detention violates the Non-Detention Act of 1971. *Id.* at 8-9. Resolving this question could accordingly force a court to determine the war against ISIS's legality in light of congressional silence. See Robert Chesney, *Assessing the ACLU Habeas Petition on Behalf of the Unnamed U.S. Citizen Held as an Enemy Combatant in Iraq*, LAWFARE (Oct. 5, 2017), <https://www.lawfareblog.com/assessing-aclu-habeas-petition-behalf-unnamed-us-citizen-held-enemy-combatant-iraq>.

22. Compare FISHER, *supra* note 19 (arguing that the role of Congress in matters of war is essential); with JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) (stressing the importance of presidential power).

23. See ELY, *supra* note 19, at 3-30; FISHER, *supra* note 19, at 1-16.

24. See Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. OF L.A. L. REV. 11, 20-21 (2000).

25. See JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017). As a general rule, the relationship between Congress and the executive branch has been more important than the role of the courts, at least related to the power to initiate armed conflict. See CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918 (1989); Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUDIES Q. 466 (2005).

26. See GRIFFIN, *supra* note 8, at 52-119. See also SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT (Ira Katznelson & Martin Shefter, eds., 2002) (detailing the impact of international affairs on American government and political institutions).

27. James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (January/February 2015), <http://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516/> (last visited July 23, 2017).

responsibility.²⁸ Scholars and military analysts argue that a “military-civilian divide” grew in the aftermath of the U.S. war in Vietnam and the end of the military draft, and has become more pronounced in later years.²⁹ At the same time, war became embedded in American culture so that war was no longer experienced as a rupture but a feature of everyday life.³⁰ This article explores the way this culture of war, in which war is ever-present,³¹ but most civilians are disconnected,³² has played a role in tipping war power ever further toward the executive branch.³³

Civilian disengagement and the military-civilian divide are most often dated from the post-Vietnam era after the elimination of the draft.³⁴ As important as the elimination of the draft was, this periodization misses a significant earlier change in American war that helped produce the contemporary structure of American war politics. The first significant divide between American civilians and their wars began when wars became “foreign” at the turn of the twentieth century, so that the United States could go to war without most civilians being vulnerable to war’s death and destruction.³⁵ The geographic distance of American battlefields enabled cultural distance.³⁶ Examining the effect of this distance between most Americans and the concrete carnage of war helps explain how global American military power could expand alongside increasing indifference on the part of everyday Americans.³⁷

This history also reveals an important dimension of executive branch war power. Presidents have exercised control over war news, including reporting on casualties and censorship of images of the dead.³⁸ During

28. ANDREW J. BACEVICH, *BREACH OF TRUST: HOW AMERICANS FAILED THEIR SOLDIERS AND THEIR COUNTRY* 7–14 (2013).

29. See *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY*, (Peter D. Feaver & Richard H. Kohn, eds. 2d ed., 2001); BACEVICH, *supra* note 28, at 7–14; Thomas E. Ricks, *The Widening Gap Between Military and Society*, *THE ATLANTIC* (July 1997), <https://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158/> (last visited July 17, 2017).

30. See, e.g., MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012); MICHAEL SHERRY, *IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S* (1997).

31. See Andrew Bacevich, *Introduction to THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II* vii–xii (Andrew Bacevich, ed., (2007); ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* (2016); Marilyn B. Young, “*I was thinking, as I often do these days, of war*”: *The United States in the Twenty-First Century*, 36 *DIPLOMATIC HISTORY* 1 (2012).

32. See Feaver and Kohn, *supra* note 29; *The Military-Civilian Gap: Fewer Family Connections*, PEW RESEARCH CENTER, Nov. 23, 2011, <http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/#fnref-9923-1> (last visited July 13, 2017).

33. See FISHER, *supra* note 19, at 1–16.

34. See BACEVICH, *supra* note 28, at 7–14.

35. See generally SHERRY, *supra* note 30 (describing American war and its cultural impact since the 1930s).

36. Young, *supra* note 31.

37. See PEW RESEARCH CENTER, *supra* note 32.

38. See generally CASEY, *supra* note 10 (detailing the way U.S. presidents since World War II

World War II and other conflicts, civilian perception of distant war was managed by the government for the purpose of promoting war mobilization. In this way, a crucial aspect of government war power was the ability to generate the cultural conditions enabling the exercise of the war powers themselves.

My point of departure in Part II is historian Drew Gilpin Faust's insight that broad engagement with death during the Civil War deeply affected the nation, shaping American society and culture.³⁹ In Part III, I contrast the Civil War with the twentieth century's most participatory war, World War II, to illuminate the way civilian engagement was deeply mediated by geographic and cultural distance from the battlefields. World War II is thought of as a "total war" in which the entire country was mobilized, which would seem to belie the argument that American civilians were distant. I address this in Part III A, which examines the sensory experience of war and carnage for U.S. civilians in the warzone during the Pearl Harbor attack. This helps to illuminate the gulf in experience with the distant mainland.⁴⁰ The protection of civilian areas from war's violence raises questions about whether the war was "total" on the mainland. Part III B shows how the war's assumed totality was applied to the U.S. legal context through a critical examination of Edward S. Corwin's classic and influential 1947 book *Total War and the Constitution*.⁴¹ Part III C then examines how American civilians came to perceive distant war's violence and killing through an analysis of censored and uncensored World War II casualty photographs. I compare the view of war in photographs approved by censors that appeared in *Life* magazine images with photographs blocked by censors in U.S. Army Signal Corps archives.⁴² This comparison reveals the way civilian engagement with war death was shaped and mediated through censorship. It also illustrates the way distant war enhances presidential power by increasing the capacity of the government to shape the American peoples' very perception of war. Part IV concludes by arguing that a crucial factor underlying the atrophy of political restraints on American war powers is the culture of American war and the politics of the dead.

have managed news about war casualties).

39. FAUST, *supra* note 10, at xi-xviii.

40. Histories of the U.S. civilian experience focus principally on home front culture and politics, and involvement in war production. See, e.g., JAMES SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* (2011).

41. See EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947); *infra* note 144.

42. *Life* magazine played an important role in shaping civilian understanding of World War II, especially the visual representation of war through photographs. See *LOOKING AT LIFE MAGAZINE* (Erika Doss, ed., 2001).

II. THE POLITICAL WORK OF THE DEAD

The dead have long been central to the culture and politics of American war. “[T]he first great celebrated martyr to the cause of American liberty” was Joseph Warren, a respected doctor and political figure, Sarah J. Purcell writes.⁴³ A musket ball in the face killed him instantly at the Battle of Bunker Hill on June 17, 1775.⁴⁴ It also placed him at the center of American Revolutionary War culture.⁴⁵ In death he became a hero as “[t]he actual grim violence of Warren’s death was transformed and sentimentalized into a tool for mobilizing public support for war.”⁴⁶ A memorial poem and engraving in 1775 showed Warren alive, and called upon enlisted men to be inspired by his example:

Let’s view brave WARREN in yon azure skies;
may ev’ry mind with this lov’d object rise.⁴⁷

As time went on, Warren’s rather grizzly corpse—so disfigured that he would later be identified only by his false teeth—became instead beautiful.⁴⁸ One hundred years after his death, a famous painting by John Trumbull of the moment Warren was killed shows him lying back gently into the arms of a comrade who raises his hand against a British bayonet.⁴⁹ Warren’s face would have been mangled by the musket ball, but it is languid and unscathed. He looks up. He shows no terror or pain.⁵⁰ Americans were called upon to be inspired by his dead body, but their inspiration seemed to require that his face not be blemished by the violence that killed him.⁵¹

The reverent regard for Warren’s body, and its use in mobilizing war support and patriotism, are examples of the way the dead can enable nationalist or sectarian politics. The most important American example of the political power of war dead is the Civil War experience.⁵²

Contemplation of Civil War death and its meaning began with the shooting itself, as Union and Confederate soldiers sent countless letters

43. SARAH J. PURCELL, *SEALED WITH BLOOD: WAR, SACRIFICE, AND MEMORY IN REVOLUTIONARY AMERICA* 11 (2002).

44. *Id.* at 11.

45. *Id.* at 11-14, 18-19.

46. *Id.* at 11.

47. *Id.* at 14.

48. *Joseph Warren at Bunker Hill – Forensics*, YOUTUBE (Oct. 23, 2011), <https://www.youtube.com/watch?v=DdggCICMnkU> (last visited July 16, 2017); PURCELL, *supra* note 43, at 56.

49. PURCELL, *supra* note 43, at 56.

50. *Id.* at 56.

51. See HOLGER HOOK, *SCARS OF INDEPENDENCE: AMERICA’S VIOLENT BIRTH* (2017) (arguing that the memory of the Revolutionary War has been sentimentalized, deemphasizing its violence).

52. See generally FAUST, *supra* note 10 (arguing that death was defining for Civil War-era American culture).

home, reflecting on the possibility of their own deaths.⁵³ Major Sullivan Ballou, a Union soldier from Rhode Island, wrote to his wife Sarah on July 14, 1861 before departing for Manassas and the Battle of Bull Run. “I cannot describe my feelings to you on this calm summer night,” he wrote, “when two thousand men are sleeping around me, . . . and I, suspicious that Death is creeping behind me with his fatal dart, am communing with my God, my country, and thee.”⁵⁴ He did not regret laying down his life for the cause. “I know how strongly American civilization now leans upon the triumph of government, and how great a debt we owe to those who went before us through the blood and suffering of the Revolution” Ballou was “willing, perfectly willing to lay down all my joys in this life” to repay his generation’s debt to their Revolutionary forbears.⁵⁵

If the nation’s survival would be enabled by his death, Ballou imagined that love itself would be “deathless” and endure.⁵⁶ Just one week later, he was killed in the Civil War’s first major battle, at Bull Run.⁵⁷ The grief this brought to Sarah Ballou and her two sons was to be multiplied by hundreds of thousands. Eight hundred and forty-seven soldiers were killed at the Battle of Bull Run. By the end of the Civil War, more than 600,000 soldiers and countless civilians had been killed.⁵⁸

The impact of casualties on American war politics is usually measured by counting the dead.⁵⁹ Historian Drew Gilpin Faust’s landmark study of death in the American Civil War shows that war death did not have a singular impact, so that adding up the dead is insufficient for measuring their impact on society and culture.⁶⁰ Civil War death deeply affected American society and culture as a whole, as Americans North and South were broadly engaged with “the work of death.”⁶¹ It “reigned with universal sway” over the lives of Civil War-era Americans, a Confederate

53. *Id.* at 31.

54. *Id.* Letter from Sullivan Ballou to his wife Sarah, July 15, 1861, in CIVIL WAR LETTERS: FROM HOME, CAMP AND BATTLEFIELD 9–11 (Bob Blaisdell, ed. 2012).

55. Ballou, *supra* note 12. On the death of soldiers as a willing sacrifice, see PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2012).

56. Ballou, *supra* note 12, at 9–11.

57. *Id.* See “My Very Dear Wife” – The Last Letter of Major Sullivan Ballou, MANASSAS NATIONAL BATTLEFIELD PARK, NATIONAL PARK SERVICE, <https://www.nps.gov/resources/story.htm%3Fid%3D253>. Known to northerners at the time as “Bull Run,” the battlefield is now commemorated as Manassas. *First Battle of Manassas: An End to Innocence*, NATIONAL PARK SERVICE, <https://www.nps.gov/nt/twhp/wwwlps/lessons/12manassas/12manassas.htm>.

58. MICHAEL CLODFELTER, WARFARE AND ARMED CONFLICTS: A STATISTICAL ENCYCLOPEDIA OF CASUALTY AND OTHER FIGURES, 1492–2007, at 244 (3d ed. 2008); FAUST, *supra* note 10, at xi.

59. See, e.g., KRINER & SHEN, *supra* note 11; GELPI, FEAVER & REIFLER, *supra* note 11.

60. See FAUST, *supra* note 10, at xii.

61. See FAUST, *supra* note 10, at xiii–xiv, 5–6. See also DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (rev. ed. 2002); MARK S. SCHANTZ, AWAITING THE HEAVENLY COUNTRY: THE CIVIL WAR AND AMERICA’S CULTURE OF DEATH (2008).

soldier emphasized.⁶² Faust argues that “death’s threat, its proximity, and its actuality became the most widely shared of the war’s experiences.”⁶³

In any American war, families of soldiers do the work of death through mourning loved ones killed in the conflict. Civil War families not only mourned, but often searched for the mortal remains of their dead, so that mourning was not only psychological but corporeal.⁶⁴ When a wife in search of her husband’s remains at Antietam learned that he was buried two days earlier, for example, she insisted that his fellow soldiers dig out his body. His corpse confronted her with the “stern reality” of his death, enabling her own transition from wife to widow.⁶⁵ “The intensity with which Civil War Americans sought to retrieve the bodies of their slain kin arose in no small part from this need to make loss real by rendering it visible and tangible.”⁶⁶

The geography of the Civil War erased the boundary between battlefields and domestic life. It “raged across farms and settlements, . . . as well as into countless churches and dwellings,” Faust writes.⁶⁷ Women were killed in their homes by rifle and artillery fire. Children died playing with unexploded shells.⁶⁸ Countless civilians perished from war-related disease and deprivation.⁶⁹ African Americans fleeing from slavery suffered high casualties in camps created for them by the Union army.⁷⁰ According to Faust, “[n]oncombatants were caught up in almost every military action – collateral damage, as they might be designated today. Yet no one then or since has tried to make a systematic compilation or enumeration of such deaths. In an era when military recordkeeping was itself flawed and incomplete, no one thought to account for civilians.

62. See FAUST, *supra* note 10, at xiii.

63. Faust argues that Civil War death would be “the ground on which North and South would ultimately reunite.” *Id.* at xiii. This is a point of disagreement among scholars of the antebellum United States. See CAROLINE E. JANNEY, REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION (2013) (emphasizing the limited nature of post-Civil War reconciliation). There were certainly differences in the experience with death and its memorialization in the American West, where U.S. troops fought Native Americans during the same time period. The Sand Creek massacre in 1864, in which U.S. troops killed unarmed civilians, including children, was not a shared national memory, and continues to be marginalized in U.S. histories of mid-19th century military conflict. See ARI KELMAN, A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK (2013); KINSELLA, *supra* note 11, at 94–103. The scholarly debate about how the impact of war death shaped post-war reconciliation does not diminish Faust’s central point, upon which I rely: that Civil War death had a formative impact on American culture.

64. See FAUST, *supra* note 10, at 142–46. Mark S. Schantz argues that Americans brought a preexisting culture of death to Civil War, and that this affected not only the way they thought about death, but also about the war itself. MARK S. SCHANTZ, AWAITING THE HEAVENLY COUNTRY: THE CIVIL WAR AND AMERICA’S CULTURE OF DEATH (2008).

65. FAUST, *supra* note 10, at 146.

66. *Id.*

67. FAUST, *supra* note 10, at 137.

68. *Id.* at 137–38.

69. *Id.* at 138–140.

70. *Id.* at 139.

Their losses remain the stuff of anecdote and even legend – largely unacknowledged casualties of a war even more devastating than its official statistics imply.⁷¹

For Civil War survivors, the work of war death endured after the battles were over.⁷² The living incorporated death into daily life through mourning rituals and garb.⁷³ They took up the immense task of burying hundreds of thousands of bodies, accounting for them and memorializing them.⁷⁴ As military dead were gathered into cemeteries, the memory of war was built into the American landscape.⁷⁵ In Walt Whitman's words:

The living remain'd and suffer'd, the mother suffer'd,
And the wife and the child and the musing comrade suffer'd,
And the armies that remain'd suffer'd.⁷⁶

An intimacy with death and dying, and a close experience of war's brutal after effects, transformed the United States, Faust argues, creating "a veritable 'republic of suffering,' in the words [of] Frederick Law Olmsted."⁷⁷ Civil War death would ultimately help to constitute American identity itself.⁷⁸

President Abraham Lincoln took up the challenge of how to account for the losses in his iconic address at the Gettysburg battlefield on November 19, 1863. "We cannot consecrate, we cannot hallow this ground," he said, for the dead had already accomplished that with their sacrifice.⁷⁹ The task of the living was instead "for us to be here dedicated to the great task remaining before us."⁸⁰ Lincoln, in essence, gave voice to the fallen, as he offered a particular meaning to their deaths, and from it a collective resolution: that the nation "shall have a new birth of freedom."⁸¹ Lincoln's call was, in many ways, conventional: that war death generated a duty, that a solemn obligation passed to the survivors to ensure that the departed had not died in vain.⁸² In the dead, he found a power of political

71. *Id.* at 138.

72. *Id.* at 161.

73. *Id.* at 135–170.

74. *Id.* at 61–101.

75. *Id.* at 99–101. *See generally* See MICKI MCELYA, *THE POLITICS OF MOURNING: DEATH AND HONOR IN ARLINGTON NATIONAL CEMETERY* (2016).

76. FAUST, *supra* note 10, at 161 (quoting Walt Whitman, *When Lilacs Last in the Dooryard Bloom'd*, in WALT WHITMAN, *CIVIL WAR POETRY AND PROSE* (1995), 33).

77. FAUST, *supra* note 10, at xiii.

78. *Id.* BLIGHT, *supra* note 61, at 6, 12–14, 18–30.

79. Abraham Lincoln, *Gettysburg Address* (November 19, 1863), in *THE AVALON PROJECT*, http://avalon.law.yale.edu/19th_century/gettyb.asp (last visited July 16, 2017).

80. *Id.*

81. *Id.*

82. *See, e.g.*, Warren G. Harding, *Address at the Burial of an Unknown American Soldier at Arlington Cemetery* (Nov. 11, 1921), in *AM. PRESIDENCY PROJECT* <http://www.presidency.ucsb.edu/ws/?pid=126416> (last visited July 20, 2017) (opining that "Our part

regeneration.

Countless memorial addresses in later years echo Lincoln's idea that the living are commanded by the dead and that death generates politics.⁸³ Although the words could not themselves change social practices, their power was amplified by their articulation as the proscription of the dead.⁸⁴

How could dead bodies possess such political power? "The dead have two lives: one in nature, the other in culture," historian Thomas Laqueur writes.⁸⁵ The dead are physical bodies, and they are also "social beings. . . who need to be eased out of this world," as we can see from funeral rites and the creation of memorial parks.⁸⁶ Modern burial practices did not emerge from the needs of the dead, or from public health threats posed by their decaying bodies. Instead, Laqueur argues, our treatment of dead bodies can only be explained as practices that serve the perceived needs of the living. Such customs are "foundationally part of culture."⁸⁷

The cultural work of the dead is visible in the treatment of American war dead. Arlington National Cemetery is especially illuminating. First used as the final resting place for Union soldiers in the Civil War after the number of bodies overwhelmed graveyards in the District of Columbia, it is now reserved for military dead and their spouses.⁸⁸ Relatives and friends of the dead regularly visit, but Arlington's most frequent visitors are tourists. Over three million people visit annually, and the cemetery has a visitors center and tour buses.⁸⁹ The grounds are carefully managed,

is to atone for the losses of heroic dead by making a better Republic for the living."); Rabbi on Iwo, at 5 (pamphlet) (suggesting that the living promised the dead that they would "build the kind of world for which you died") (available at President's Committee on Civil Rights Pamphlets File, Box 28, Papers of the President's Committee on Civil Rights, Harry S. Truman Library, Independence, MO).

83. During World War II, Chaplain Roland B. Gittelsohn's eulogy for the dead after the battle of Iwo Jima in the spring of 1945 is just one example. Gittelsohn saw "the highest and purest democracy" among the Marines of different races and religions interred together in the island cemetery. Rabbi on Iwo, *supra* note 82, at 4. His message, like Lincoln's, was for the living who "now dedicate ourselves, to the right of Protestants, Catholics and Jews, of white men and Negroes alike, to enjoy the democracy for which all of them have paid the price. *Id.* at 5. Gittelsohn's eulogy insisted that practicing equality was a duty of the living called for by death. It was widely distributed. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 10-11 (2d ed., 2011) (discussing Rabbi Roland B. Gittelsohn's eulogy).

84. See, e.g., Harding, *supra* note 82. In response to tragedies as well as wars, death has been an especially powerful basis for a call to action. See REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER* (2009).

85. THOMAS W. LAQUEUR, *THE WORK OF THE DEAD: A CULTURAL HISTORY OF MORTAL REMAINS*, 10 (2015).

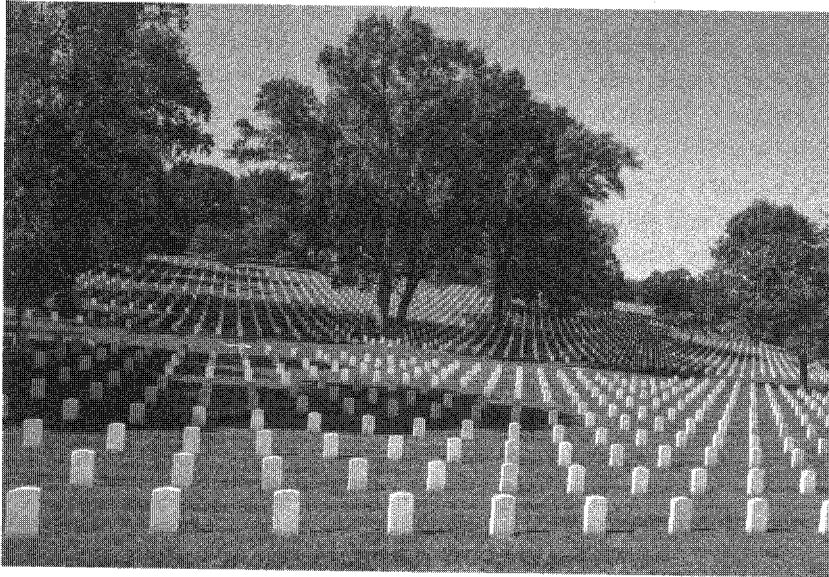
86. *Id.* at 10; Thomas Laqueur, *Spaces of the Dead in Modernity*, *CULTURAL MATTERS* (December 20, 2001), <http://www.probeinternational.org/oldDrupal/UrbanNewSite/spacesofthedead.pdf>.

87. LAQUEUR, *supra* note 85, at 10. See also Joanna Scutts, *Battlefield Cemeteries, Pilgrimage, and Literature after the First World War: The Burial of the Dead*, 52 *ENG. LIT. IN TRANSITION, 1880-1920* 387-88 (2009) (discussing British memorialization of war dead after World War I).

88. See McELYA, *supra* note 75.

89. Visitor Information, *Arlington National Cemetery*, <http://www.arlingtoncemetery.mil/Visit/Visitor-Rules> (last visited Oct. 6, 2017).

with unbroken rows of nearly identical headstones stretching for miles.⁹⁰ The very construction of Arlington shows the cultural work the dead do for the living.⁹¹ Its uniformity abstracts the individual beneath the marker as an element of a broader national purpose, and the resulting sea of headstones reveals the immense cost of war.⁹²



Arlington National Cemetery, 2017.
Photograph by author.

Sites like Arlington and Gettysburg remain places to remember the Civil War and its dead, but the history of American war since that time, has been, in part, a history of the losing of a more intimate connection with the dead. Americans continued to kill and die in war, but nearly all the dying happened elsewhere.⁹³ Civilians were maimed and perished, but fewer of them were Americans.⁹⁴ Over time, what had been a “republic of suffering” became instead a country that could go to war in relative comfort. Part III will address the way this change affected the culture and

90. *See id.*

91. *See* Laqueur, *supra* note 86.

92. *See id.*; *see also* Micki McElya, *Remembering 9/11's Pentagon Victims and Reframing History in Arlington National Cemetery*, 111 *RADICAL HIST. REV.* 51 (2011); MCELYA, *supra* note 75.

93. DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (25th anniv. ed., 2004); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999).

94. TIRMAN, *supra* note 10, at 4-5; *BOMBING CIVILIANS: A TWENTIETH-CENTURY HISTORY* (Yuki Tanaka & Marilyn B. Young, eds., 2010); *CIVILIANS IN THE PATH OF WAR*, (Mark Grimsley & Clifford J. Rogers, eds., 2002).

politics of American war. I will argue that in order to understand the atrophy of political restraints on American war, we must take seriously the cultural work of American war dead.

III. DEATH AND POWER IN WORLD WAR II

During the twentieth century, American war moved offshore. With the exception of skirmishes with Mexico early in the century, the American battlefields and the civilian populations were now on different continents.⁹⁵ Civilian intimacy with war's violence was largely lost. World War II is an especially useful historical example of the way loss of a more direct experience with death mattered to home front engagement and government power. In contrast with all other major powers involved in the war, the American home front was not a battlefield. Distance from the fighting enabled the United States to be the "arsenal of democracy" and enhanced the nation's role as a world leader after the war.⁹⁶

Although civilians on the U.S. mainland were insulated from the carnage, the direct American experience with suffering and death in World War II was not restricted to the military. Civilians in U.S. Pacific Island territories, including Hawai'i, Guam, and the Philippines, felt the full brunt of war. Even though the forty-eight U.S. states were not bombarded, World War II is remembered and written about as a "total war" for the United States. This Part argues that framing the World War II domestic experience as total war obscures the defining feature of the U.S. experience: the polity and the battlefield were largely isolated from each other.

Although it was a major war, World War II did not automatically sustain extensive domestic mobilization. Instead, the remoteness of the war from the mainland meant that the U.S. government had to sustain and mobilize public opinion in support of the war effort.⁹⁷ Ongoing public support required a public relations campaign driven by both marketing and censorship. As this article will show, the very view of war, including the sight of dead bodies, was curated for the purpose of promoting civilian

95. The last military conflicts fought on the mainland were the "Indian Wars" in the nineteenth century and skirmishes with Mexico in 1916. See ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* (2002); Mitchell Yockelson, *The United States Armed Forces and the Mexican Punitive Expedition: Part 1*, 29 PROLOGUE: SELECTED ARTICLES (1997), <https://www.archives.gov/publications/prologue/1997/fall/mexican-punitive-expedition-1.html> (last visited July 23, 2017). The U.S. military has been deployed within the United States in later years, however, in contexts that are most often defined as domestic conflicts. See WILLIAM C. BANKS AND STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* (2016).

96. See SPARROW, *supra* note 40, at 166–73.

97. See SUSAN A. BREWER, *WHY AMERICA FIGHTS: PATRIOTISM AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ* 87–140 (2009).

support for World War II. Ultimately, the cultural production of America's World War II experience played a crucial role in acculturating American civilians to the conditions that enabled a more powerful presidency and expansive war powers.⁹⁸

This history illuminates one way that distant war enhances the power of the executive branch: with information, and the very ability to perceive war and its consequences, in the hands of government, the executive can shape the mood of the citizenry, can damper dissent, and can reinforce her own power.

World War II is often referred to as a "total war." It is a truism that participation in total war enhances executive power. The totality of war is often measured by bombardment of civilians, however. Part III A explores and questions the way American's World War II came to be conceptualized as "total." Drawing from the history of the senses, I compare the visceral experience in the territory of Hawai'i with the limited "sense" of death and destruction on the mainland. Part III B turns to totality and American law, critically examining constitutional scholar Edward Corwin's influential work *Total War and the Constitution*. Finally, Part III C turns to the way American civilians perceived the war as it was unfolding. Using censored and uncensored U.S. military casualty photographs, I show the way the very sight of war was consciously shaped by the U.S. government for the purpose of maintaining American war mobilization.

A. How America's World War II Became Total

American civilians on the Island of Oahu, in the U.S. territory of Hawai'i, did not have the luxury of distance from the violence of World War II.⁹⁹ Fifteen-year-old Norma Hajovsky was lying awake in bed outside Honolulu, Hawai'i on a Sunday morning, December 7, 1941, when she heard what sounded like marbles hitting the pavement. Puzzling at the sound, she jumped up and looked out the window, and saw a plane, with red circles on the wings, strafing the street.¹⁰⁰ Hajovsky would later find the residue of human bodies amid the debris outside of a devastated barracks near her home in military housing.¹⁰¹ Other teenagers in the communities near Pearl Harbor were also pulled quickly into the vortex of war.¹⁰² The island of Oahu was in uproar, families were separated, and

98. See SPARROW, *supra* note 40, at 3–15.

99. See GWENFRED ALLEN, HAWAII'S WAR YEARS, 1941-1945 (1950). Hawai'i became a state in 1959. ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS (1984).

100. Oral history interview by author with Norma Hajovsky, Stanford, Calif. (Jan. 27, 2015).

101. *Id.*

102. See DANIEL INOUE, JOURNEY TO WASHINGTON (1967) (detailing Inouye's experience). The stories of other Hawaiians are recorded in oral history interviews archived at the University of

lives were forever changed.¹⁰³

Explosives fell through ceilings of civilian homes, glass shattered, houses and businesses burned to the ground. There were children among the injured and the charred bodies in the morgue.¹⁰⁴ The well-known military disaster at Pearl Harbor was experienced as an attack on the community as a whole. It galvanized Americans and, as the story is usually told, launched the United States into a total war.¹⁰⁵ Broad-based war mobilization had profound effects on American society, culture and politics. With isolated exceptions, however, war's direct violence could not be seen or heard first-hand within the United States beyond Hawai'i and other island territories.¹⁰⁶

How might the difference in sensory experience between Hawai'i and the mainland matter? Historian Mark Smith writes that "[a]s far as the senses are concerned, all war is total war, pushing them to their limits and beyond, dulling and then overwhelming and then dulling them again. Distinctions become muddled, nerves fray, and the sense of self shatters."¹⁰⁷ Smith draws his insights from the sensory experience of the Civil War, and he certainly describes the experience on December 7 in areas radiating out from the burning ships in Pearl Harbor. Masao Asada could feel the concussion of the bomb blasts while sitting in his truck reading the newspaper after finishing early morning grocery deliveries.¹⁰⁸ Many could hear the explosions, the anti-aircraft fire, and even bullets whooshing past.¹⁰⁹ Residents gathered to see the harbor in flames.¹¹⁰

Seventeen-year-old Daniel Inouye would have breathed it in.¹¹¹ He had first aid training, so he was called in to help even though Japanese

Hawai'i. See AN ERA OF CHANGE: ORAL HISTORIES OF CIVILIANS IN WORLD WAR II HAWAII. Center for Oral History, University of Hawai'i Manoa. <https://scholarspace.manoa.hawaii.edu/handle/10125/29796>.

103. See generally HARRY N. SCHEIBER & JANE L. SCHEIBER, BAYONETS IN PARADISE: MARTIAL LAW IN HAWAII DURING WORLD WAR II (2016) (detailing the imposition of martial law in Hawai'i during World War II).

104. See Elizabeth P. McIntosh, *Honolulu after Pearl Harbor: A report published for the first time. 71 years later*, WASH. POST (Dec. 6, 2012), http://www.washingtonpost.com/opinions/honolulu-after-pearl-harbor-a-report-published-for-the-first-time-71-years-later/2012/12/06/e9029986-3d69-11e2-bca3-aade9b7e29c5_story.html (last visited July 22, 2017).

105. See *infra* at text accompanying notes 136–40.

106. See KENNEDY, *supra* note 93, at 847–49; SCHEIBER & SCHEIBER, *supra* note 103.

107. MARK SMITH, THE SMELL OF BATTLE, THE TASTE OF SIEGE: A SENSORY HISTORY OF THE CIVIL WAR 7–8 (2015).

108. Interview by Warren Nishimoto with Masao Asada, (March 25, 1992) (interview part of AN ERA OF CHANGE: ORAL HISTORIES OF CIVILIANS IN WORLD WAR II HAWAII, available at Center for Oral History, University of Hawai'i, Manoa, <http://scholarspace.manoa.hawaii.edu/handle/10125/29860>).

109. See AN ERA OF CHANGE, *supra* note 107 (digital archive of oral histories of Hawaiians, including residents of Oahu during the Pearl Harbor attacks).

110. See Hajovsky, *supra* note 100.

111. See INOUE, *supra* note 102, at 57–60. Inouye would go on to become a U.S. Senator representing the State of Hawai'i. *Id.* at 292–94.

Americans were under suspicion. Explosives had hit a working-class neighborhood, and a five-block area was burned.¹¹² Inouye went into a house, still smoking, with a box, and tried his best to place the remains of only one charred body in the box.¹¹³ Elizabeth P. McIntosh, a reporter for the *Honolulu Star-Bulletin*, was assigned to cover the hospital.¹¹⁴ Her account was so gruesome her editor refused to print it.¹¹⁵ She saw ambulances speeding through the city as bombs dropped. Their drivers would return covered in blood, “with stories of streets ripped up, houses burned, twisted shrapnel and charred bodies of children.”¹¹⁶ In the morgue, McIntosh saw bodies with blue-black clothing from, she assumed, incendiary bombs. A dead child, a “little girl in a red sweater, barefoot, still clutched a piece of jump-rope in her hand.”¹¹⁷

When she first saw the planes and heard the attack, McIntosh later wrote: “For the first time, I felt that numb terror that all of London has known for months. It is the terror of not being able to do anything but fall on your stomach and hope the bomb won’t land on you.”¹¹⁸ By late morning on December 7, Japanese warplanes left Hawai‘i, never to return.¹¹⁹ Civilians in the U.S. territories of the Philippines and Guam would not be so lucky. Largely forgotten in the iconic Pearl Harbor narrative, they were simultaneously attacked, but there would be no Japanese retreat. They were sites of longer battles, and were occupied for much of the war.¹²⁰

President Franklin D. Roosevelt brought the carnage in the island territory into the heart of American consciousness, turning an unfamiliar place, Pearl Harbor, into an iconic American space.¹²¹ He called the day

112. Army officers later testified that most of the damage in civilian areas came not from Japanese bombs but American anti-aircraft fire that had fallen after not meeting a target. *See* ALLEN, *supra* note 99, at 8. In 1947, the legislature of the Territory of Hawai‘i authorized preparation and publication of HAWAII’S WAR YEARS. The volume was prepared under the direction of the Hawai‘i War Records Committee. University of Hawai‘i. *See id.* at v.

113. *See* INOUE, *supra* note 102, at 59.

114. *See* McIntosh, *supra* note 104.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* McIntosh’s reference to the experience of Londoners was about German bombing of London and other British cities. *See* PETER STANSKY, *THE FIRST DAY OF THE BLITZ: SEPTEMBER 7, 1940* (2008).

119. Hawai‘i was not attacked again but remained under Martial Law. *See* SCHEIBER & SCHEIBER, *supra* note 103, at 2, 9.

120. *See* WAKAKO HIGUCHI, *THE JAPANESE ADMINISTRATION OF GUAM, 1941-1944: A STUDY OF OCCUPATION AND INTEGRATION POLICIES, WITH JAPANESE ORAL HISTORIES* 7 (2013); THERESA KAMINSKI, *ANGELS OF THE UNDERGROUND: THE AMERICAN WOMEN WHO RESISTED THE JAPANESE IN THE PHILIPPINES IN WORLD WAR II* (2015) [hereinafter KAMINSKI 2015]; THERESA KAMINSKI, *PRISONERS IN PARADISE: AMERICAN WOMEN IN THE WARTIME SOUTH PACIFIC* (2000) [hereinafter KAMINSKI 2000]; JOSE M. TORRES, *THE MASSACRE AT ATATE* (2015).

121. *See* EMILY ROSENBERG, *A DATE WHICH WILL LIVE: PEARL HARBOR IN AMERICAN MEMORY* 11-12 (2003).

of the attack “a date which will live in infamy” in an address to a joint session of Congress broadcast to the nation by radio on December 8, 1941.¹²² This news would soon have vast consequences. Before long, Americans would come to feel themselves engaged in a total war.¹²³ Many would enter the armed forces—voluntarily or through the draft. Others worked for war in crucial war industries. Americans would pay for the war with income taxes and war bonds. The sensory experience on the home front included the sounds of violence, but this would often come through newsreels at the movie theater accompanied by a triumphalist musical score.¹²⁴ Home front Americans could see war’s violence through photographs in newspapers and magazines.¹²⁵ It is, of course, obvious that this is viscerally different from the jarring battle experience of pushing senses “to their limits and beyond, dulling and then overwhelming and then dulling them again.”¹²⁶ If World War II could not, for most Americans, overwhelm the senses, then how do we understand the totality of this war for the United States? How can distant war be total war?

“Total war” is a military strategy in which, according to most definitions, civilians are targeted.¹²⁷ The *Oxford English Dictionary* defines it as unrestricted war, especially “war in which civilians are perceived as combatants and therefore as legitimate targets.”¹²⁸ Ubiquity of violence, particularly from aerial bombing, was a central aspect of World War II’s totality.¹²⁹ The other major powers during World War II both used total war as a tactic when they bombed cities, and they experienced it when their own cities were bombed.¹³⁰ Blockades also resulted in massive civilian casualties—an estimate of 900,000 in the siege of Leningrad alone.¹³¹

122. CRAIG SHIRLEY, *DECEMBER 1941: 31 DAYS THAT CHANGED AMERICA AND SAVED THE WORLD* 154–82 (2011).

123. See SPARROW, *supra* note 40, at 160–62.

124. See *U.S. Bombers in First Daylight Raid On Berlin*, in Phillip W. Stewart, *A Reel Story of World War II: The United News Collection of Newsreels Documents the Battlefield and the Home Front*, 47 PROLOGUE (2015), <https://www.archives.gov/publications/prologue/2015/fall/united-newsreels.html> (newsreel).

125. See GEORGE H. ROEDER, JR., *THE CENSORED WAR: AMERICAN VISUAL EXPERIENCE DURING WORLD WAR TWO* (1993), 13–14, 34.

126. See SMITH *supra* note 107, at 7.

127. See, e.g., JOHN DOWER, *THE VIOLENT AMERICAN CENTURY* 17 (2017). See also JEREMY BLACK, *THE AGE OF TOTAL WAR, 1860-1945* 1–11 (2006) (discussing definitions of “total war”). For a broader cultural examination of the idea of totality, see SAINT-AMOUR, *supra* note 11.

128. *Total war*, OXFORD ENGLISH DICTIONARY (3rd ed., 2014).

129. See Mark Neely, *Was the Civil War a Total War?* in *ON THE ROAD TO TOTAL WAR: THE AMERICAN CIVIL WAR AND THE GERMAN WARS OF UNIFICATION, 1861–1871* 34 (Stig Förster & Jörg Nagler, eds., 1997); *A WORLD AT TOTAL WAR: GLOBAL CONFLICT AND THE POLITICS OF DESTRUCTION, 1937–1945* (Roger Chickering, Stig Förster & Bernd Greiner, eds., 2004).

130. See, e.g., A. C. GRAYLING, *AMONG THE DEAD CITIES: THE HISTORY AND MORAL LEGACY OF THE WWII BOMBING OF CIVILIANS IN GERMANY AND JAPAN* (2006); STANSKY, *supra* note 118.

131. See LISA A. KIRSCHENBAUM, *THE LEGACY OF THE SIEGE OF LENINGRAD, 1941–1995*:

The United States engaged in total war as a tactic, for example in the fire bombings of Tokyo with upwards of 260,000 civilian deaths, and of course the atomic bombings that flattened the cities of Hiroshima and Nagasaki.¹³² American cities endured aerial bombing, but they were Manila, Honolulu, and other cities in U.S. territories.¹³³ On the American mainland in 1945, six civilians in Oregon were killed by a Japanese bomb carried across the ocean by balloon.¹³⁴ The explosion brought the sounds of war to Klamath County, otherwise known for its forests and timber industry. With this one exception, only the island territories were on the receiving end of total war's violence, and the American civilian experience of war's violence from enemy fire remained on the periphery of American geography.¹³⁵

The question of how a nation so distant from the carnage would come to see its experience as total war is rather straightforward. When the United States formally entered the war in December 1941, the country joined a war that had long been conceptualized as "total." In the spring of 1941, several months before the Pearl Harbor attack, Fletcher Pratt, a writer on military affairs, rushed out a book called *America and Total War*.¹³⁶ By the time the *New York Times* reviewed the book that May,¹³⁷ "total war" stories had regularly appeared in the *Times* and other American newspapers.¹³⁸ Most total war news stories were about the fighting in Europe, Africa and Asia.¹³⁹ After the United States declared war, the American experience was simply narrated within the ongoing "total war" experience. It appears that there was no debate at the time about whether the description of total war applied to the United States.¹⁴⁰

MYTH, MEMORIES, AND MONUMENTS (2009).

132. See JOHN DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986).

133. See Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40

DIPL. HIST. 373, 387-88 (2016).

134. ROBERT C. MIKESH, *JAPAN'S WORLD WAR II BALLOON BOMB ATTACKS ON NORTH AMERICA 25-27* (1973). Until news coverage of the deaths, the U.S. media voluntarily censored information about Japanese balloon bombs. See *id.* at 25, 27.

135. See KENNEDY (1999), *supra* note 93, at 848.

136. See FLETCHER PRATT, *AMERICA AND TOTAL WAR* (1941).

137. Hanson W. Baldwin, *War and America*, N.Y. TIMES, May 25, 1941, at BR12 (reviewing PRATT, *supra* note 136).

138. *Men of Europe Move to Battle In 'Total' War*, THE AUSTIN STATESMAN (Austin, Tx), May 21, 1940 at 13; See, e.g., Raymond Danielle, *WHEN TOTAL WAR BLASTS A CITY: London under a cruel rain of bombs offers the picture of a struggle where civilians are both victims and heroes*, N.Y. TIMES, Sept. 22, 1940, at SM2; Alvin J. Steinkopf, *Nazis Step Up Raids on Britain As Hitler Warns Germany Will Meet Allies in "Total War."* WASH. POST, Jan. 31 1940, at 1. A New York Herald Tribune story examined the role of American businesses. *Total Defense Seen Required By Total War: New Understanding of U. S. Business Role in World Crisis Stressed by Draper*, N.Y. HERALD TRIBUNE, Feb. 19, 1941 at 31.

139. See Danielle, *supra* note 138; *Men of Europe Move to Battle In 'Total' War*, *supra* note 138; Steinkopf, *supra* note 138.

140. There are contemporary critics of the idea that World War II was total war for the United

Instead, the focus was on what participation in an existing total war would mean.

Once the war was seen as total for Americans, the varieties of World War II experience congealed within this formulation. Forms of American participation in the war were then taken as evidence of the idea that the United States was engaged in a total war. Absent from this conceptualization was the distinguishing characteristic of American war participation: the virtual absence of attacks on civilians within what were at the time the forty-eight American states.¹⁴¹ The most important thing that made war “total” for other nations, civilian death and suffering from military attacks, was missing for Americans on the mainland. Meanwhile, the island territories feeling the brunt of war remained on the edges of American identity.¹⁴² On the mainland, war’s assumed totality could be experienced without its violence. This is how America’s World War II is taught in the United States today.¹⁴³ A distant war is remembered as a time when Americans at home experienced total war.

B. Edward Corwin’s “Total War”

Constitutional scholar Edward S. Corwin took up the question of what made the war “total” in his influential book 1947 *Total War and the Constitution*.¹⁴⁴ The book played an important role in framing the postwar debate about the impact of World War II on executive power. Corwin illustrates the way Americans would come to see the war as “total,” even though the violence never reached the mainland.¹⁴⁵

States, but most scholars use totality when describing America’s World War II without examining its application. For a critical account, see Dennis Showalter, *Global Yet Not Total: The U.S. War Effort and its Consequences*, in *A WORLD AT TOTAL WAR: GLOBAL CONFLICT AND THE POLITICS OF DESTRUCTION, 1937–1945*, 109 (Roger Chickering, Stig Förster, & Bernd Greiner, eds., 2005).

141. See KENNEDY (1999), *supra* note 93, at 847–49.

142. See Immerwahr, *supra* note 133. See also KAMINSKI 2015, *supra* note 120; KAMINSKI 2000, *supra* note 120.

143. For example, a Smithsonian Institution lesson plan explains that “[n]owhere is the totality of the war effort seen more clearly than on posters that connect the campaigns overseas with growing vegetables in a home ‘Victory Garden,’ cleaning one’s plate, or saving bacon grease.” See *World War II on the Home Front: Civil Responsibility*, SMITHSONIAN IN YOUR CLASSROOM 4 (Fall 2007), http://www.smithsonianeducation.org/educators/lesson_plans/civic_responsibility/smithsonian_siyc_f_all07.pdf. The Gilder Lehrman website suggests that World War II poster campaigns urging Americans to increase their productivity at the factory helped “to enlarge people’s views of their responsibilities in a time of Total War.” See William L. Bird Jr. & Harry Rubenstein, *Every Citizen a Soldier: World War II Posters on the American Home Front*, GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <http://www.gilderlehrman.org/history-by-era/world-war-ii/essays/every-citizen-soldier-world-war-ii-posters-american-home-front>.

144. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION: FIVE LECTURES DELIVERED ON THE WILLIAM W. COOK FOUNDATION AT THE UNIVERSITY OF MICHIGAN, MARCH 1946* (1947). See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L. J.* 1259, 1272 (2002); Mark E. Steiner, *Inclusion and Exclusion in American Legal History*, 23 *ASIAN AM. L. J.* 69, 85 (2016); Matthew C. Waxman, *The Power to Wage War Successfully*, 117 *COLUM. L. REV.* 114, 650 (2017).

145. See CORWIN, *supra* note 144.

Corwin began by focusing on what a total war might be. Although the phrase seemed to be newly in use, he wrote that total war “is at least as old as recorded history.”¹⁴⁶ To describe it, he invoked a biblical example from *Deuteronomy*:

Of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth: But thou shalt utterly destroy them. . . as the Lord thy God hath commanded thee.¹⁴⁷

World War II Americans were not obliterated, of course, but Corwin wrote that Americans had engaged in a total war against American Indians to establish sovereignty over the North American continent.¹⁴⁸ The Nazi conquest of Poland was another example of total war,¹⁴⁹ as would be a future nuclear war.¹⁵⁰ Corwin’s examples deepen the puzzle of how the American World War II experience fit the concept.

To bring the U.S. experience within the definition of total war, Corwin suggested that a particular kind of totality fit the American experience and affected American law: “functional totality.”¹⁵¹ He defined “functional totality” as “the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological.”¹⁵² This kind of total war was when “every human element” of a society was involved in the conflict.¹⁵³

Corwin used historical examples to illustrate what functional totality was. For example, during the French Revolution, the Committee of Public Safety ordered that “young men will go into battle; married men will forge arms and transport food; the women will make tents, garments, and help in the hospitals.”¹⁵⁴ Even children and the elderly had orders. In Ethiopia following the Italian invasion in 1935, men were to report for duty, bringing women for cooking and other labor.¹⁵⁵ The United States total war experience, Corwin suggested, was parallel,¹⁵⁶ but Corwin’s examples were from nations under siege, so they did not fit a country far

146. *Id.* at 3.

147. *Id.* at 3 (quoting *Deuteronomy*): The Bible also justified ruthlessness, and supplied a motive for total war: “For...the Lord thy God hath chosen thee to be a special people unto himself, above all people that are upon the face of the earth.” *Id.* Total war, in this rendering, went beyond domination to elimination.

148. *Id.* at 4.

149. *Id.*

150. *See id.* at 6–10.

151. *Id.* at 4–5.

152. *Id.* at 4.

153. *Id.* at 5.

154. *Id.*

155. *Id.* at 5 n.3.

156. *Id.* at 4.

away from the fighting. In France and Ethiopia, a core experience of war's totality was vulnerability to violence.¹⁵⁷ He didn't explain how totality could apply to a society distant from conflict, like the United States. Instead, he assumed its application, and turned his attention to the consequences of total war for government power and individual rights, arguing that "the requirements of total war" are incompatible with fundamental American constitutional principles.¹⁵⁸ Later scholars have largely followed Corwin's lead.¹⁵⁹

More is needed to explain an American totality in World War II. The kind of totality Corwin saw in the American experience did not come from the fighting itself, but from government policies. Many World War II policies—from war bond campaigns to encouraging Victory Gardens—were developed at least in part for the purpose of keeping the home front mobilized.¹⁶⁰ In this way, the federal government helped generate the domestic total war experience in part for the purpose of enabling and justifying the government's own actions. What Corwin saw as evidence of war's totality was instead, at least in part, an effort to maintain the support of civilians for a war that was very far away.

American culture and political identity were powerfully shaped by this war,¹⁶¹ but the polity framed in relation to World War II was quite different from the Civil War "republic of suffering."¹⁶² Death mattered, but its experience was particularized to soldiers and others in the warzone.¹⁶³ Many soldiers felt a gulf in understanding produced by this distance, even in their relationships with their own families,¹⁶⁴ an experience that became a feature of World War II-related memoirs and war films.¹⁶⁵

Corwin's need to puzzle over the application of total war to America's World War II has been lost, and the war's totality for the United States is

157. See, e.g., A.J. BARKER, *THE RAPE OF ETHIOPIA*, 1936 (1971); MARISA LINTON, *CHOOSING TERROR: VIRTUE, FRIENDSHIP, AND AUTHENTICITY IN THE FRENCH REVOLUTION* (2013).

158. CORWIN *supra* note 144, at 130.

159. See, e.g., Katyal & Tribe, *supra* note 144, at 1272; Steiner, *supra* note 144, at 85.

160. See JAMES J. KIMBLE, *MOBILIZING THE HOME FRONT: WAR BONDS AND DOMESTIC PROPAGANDA* 32, 132–37 (2006).

161. See JOHN BODNAR, *THE "GOOD WAR" IN AMERICAN MEMORY* 8 (2010).

162. See *supra* notes 60–82 and accompanying text.

163. See LINDERMAN (1997), *supra* note 2, at 300, 319–30. See also Mary L. Dudziak, "You Didn't See Him Lying...Beside the Gravel Road in France": *Death, Distance, and American War Power*, *DIPLOMATIC HISTORY* (Presidential Lecture, forthcoming 2018) (discussing WWII journalist Ernie Pyle's view that American civilians could not understand the war because they had not seen its carnage).

164. See THOMAS CHILDERS, *SOLDIER FROM THE WAR RETURNING: THE GREATEST GENERATION'S TROUBLED HOMECOMING FROM WORLD WAR II* 193, 279, 265 (2009).

165. See, e.g., WILLIAM M. KAYS, *LETTERS FROM A SOLDIER: A MEMOIR OF WORLD WAR II* (2010); *THE BEST YEARS OF OUR LIVES* (Samuel Goldwyn Company, 1946).

usually assumed and not examined.¹⁶⁶ American wars are often treated as having an equivalency, as data points, as if each one was the same kind of social phenomenon.¹⁶⁷ Once World War II was conceptualized as total, it could be compared with another total war, the Civil War. The impact of distance, and the isolation of civilians from violence, does not figure in the analysis. Instead, the Civil War remains the most important point of comparison in legal scholarship,¹⁶⁸ even though contemporary war has lost the Civil War's essence: the personal engagement by American civilians with more proximate death and dying.

C. Mobilizing for Distant War

On September 7, 1940, the first day of the London Blitz, death rained down on Londoners. Waves and waves of German bombers and fighter planes, stretching for miles, pelted the city.¹⁶⁹ William Samson, who experienced the bombing, wrote: “[t]he first sight of blood and wounding is an experience sharp in its emotional effect, often physically affecting.”¹⁷⁰

In the United States, the blood of an American soldier was not spilled in *Life* magazine photographs until the war was nearly over.¹⁷¹ A pool of blood from a dying soldier's body appeared in the magazine's May 14, 1945 issue. The featured story in the issue was “The War Ends in Europe,” and the magazine's cover was triumphant, with a victorious American soldier standing atop a Nazi shrine.¹⁷² To temper the idea that war was ending, in the middle of the magazine was the caption: “An Episode: Americans Still Died.”¹⁷³ A series of photographs taken by Robert Capa in Leipzig, Germany showed one soldier's body, fallen at an odd angle.¹⁷⁴ He had been shot in the head, and reportedly died instantly. Blood from his head began to pool in the foreground and spread, frame by

166. For an exception, questioning the war's totality for the United States, see Showalter, *supra* note 140.

167. See, e.g., Lee Epstein, Daniel E. Ho, Gary King, & Jeffrey A. Segal, *The Supreme Court During Crisis*, 80 N.Y.U. L. REV. 1 (2005).

168. See Mary L. Dudziak, *Toward a Geopolitics of the History of International Law in the Supreme Court*, 105 PROC. AM. SOC. INT'L L. 532 (2011) (comparing references to the Civil War and the Cold War in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge, eds., 2011)).

169. See STANSKY, *supra* note 118 (detailing the experience in London during the first day of the Blitz).

170. *Id.* at 64 (quoting WILLIAM SAMSON, THE BLITZ: WESTMINSTER AT WAR 26–28 (reprt. 1990) (1947)).

171. ROEDER, *supra* note 125, at 1, 159 n.1 (1993). Dead American soldiers began appearing in *LIFE* in September 1943, but this was the first photograph showing the blood of an American casualty. ROEDER, *supra* note 125, at 1.

172. *Victorious Yank*, *LIFE*, May 14, 1945, at 1.

173. *An Episode: Americans Still Died*, *LIFE*, May 14, 1945, at 40B.

174. *Victorious Yank*, *supra* note 172.

frame, across the floor. In the final image, another soldier, who would have stepped over the crumpled body and the streaming blood, took the dead soldier's place and manned the gun.¹⁷⁵

Images like Capa's photograph of the dead soldier were how most American civilians saw World War II. What is most jarring for a contemporary reader of *Life*, however, is not the pool of blood, in black and white, but the surrounding advertisements. The dead soldier was followed, two pages later, by a cheery advertisement for Hotpoint electrical kitchen appliances and a playful image of cocktails riding on a Ferris wheel to advertise Four Roses whiskey.¹⁷⁶ Images like this were folded into daily civilian life, the way Capa's photographs were interspersed between *Life* magazine advertising. Americans could confront the war, in black and white, and then turn the page.

World War II was fought in photographs on the American home front. The target, or the "enemy," was public complacency. "Fundamentally, public opinion wins wars," General Dwight D. Eisenhower warned.¹⁷⁷ Images were important to efforts to mobilize American public opinion, so the U.S. government "made the most systematic and far-reaching effort in its history to shape the visual experience of the citizenry" during World War II, historian of photography George Roeder writes.¹⁷⁸ Photographers, some serving at great personal risk at the front lines, provided the raw material that would bring the sight of war to the American public at home.¹⁷⁹ "If your pictures are not good, you aren't close enough," Capa said.¹⁸⁰

Photographs were thought to have an impact that was different from print stories. Images could transport war "into the safety and intimacy of our living rooms," historian Susan Moeller writes.¹⁸¹ During World War II, for the first time, photos could appear quickly alongside news articles, since they could be transmitted across the ocean by wire. Long-range airplanes could speedily deliver film, unprocessed negatives, and prints.¹⁸² The image of war was not directly transmitted, but was heavily mediated by government censors and by publishers wary of upsetting their readers.¹⁸³ Censors, in essence, curated for the American public a photographic record of the war that the federal government wanted

175. *An Episode*, *supra* note 173, at 40A–C.

176. *Advertisements*, *LIFE*, May 14, 1945, at 41–42.

177. See SUSAN D. MOELLER, *SHOOTING WAR: PHOTOGRAPHY AND THE AMERICAN EXPERIENCE OF COMBAT* 213 (1989).

178. ROEDER, *supra* note 125, at 2.

179. MOELLER, *supra* note 177, at 197.

180. *Id.* at 9.

181. *Id.* at xii.

182. *Id.* at 181.

183. See ROEDER, *supra* note 125, at 8.

civilians to see.¹⁸⁴

Bloody photographs of American military casualties, like Capa's photographs of the pool of blood, were censored early in the war.¹⁸⁵ President Roosevelt created the Office of Censorship shortly after the U.S. declared war in December 1941.¹⁸⁶ The office had authority over all civilian communication, and initially censored all news that was bad news.¹⁸⁷ Initially, photos of dead American soldiers could not be released, but photos of the enemy could, including brutal photographs of the bodies of Japanese soldiers.¹⁸⁸ The Office of War Information (OWI), established in June 1942, managed the way war was portrayed to the American public. Director Elmer Davis argued that truth would mobilize the American people,¹⁸⁹ but the Office of Censorship initially blocked his efforts to bring the war home. Roeder writes that in 1943 military successes magnified concerns about public complacency.¹⁹⁰ With polls showing that Americans were disgusted by government sugar coating of the war, and concerned that civilians were becoming complacent, military photographers were ordered to "send back to Washington pictures that would 'vividly portray the dangers, horrors, and grimness of War.'"¹⁹¹ In response, "government officials and media editors confronted Americans with increasingly vivid depictions of war's impact," and disturbing images of American war deaths began to appear in *Life* magazine and other publications.¹⁹² The OWI asked the Advertising Council to help by introducing "a grim note in future advertisements."¹⁹³ The Army itself released a disturbing poster with a photograph of a crumpled dead soldier and the warning: "This happens every 3 minutes. Stay on the job and *get it over*."¹⁹⁴

In keeping with the decision to allow a grittier portrayal of war, dead

184. On the inherently political nature of choosing images for viewing, or curating, see *The Potential of the Curatorial Articulation* ONCURATING 4–6, <http://www.on-curating.org/issue-4.html#.WWu0aukpA2w>.

185. See ROEDER, *supra* note 125, at 1, 7–19. In a recent article, John McCallum argues that more images of violence made it past the censors than is usually acknowledged. John McCallum, *U.S. Censorship, Violence, and Moral Judgement in a Wartime Democracy, 1941–1945*, 41 *DIPLOMATIC HISTORY* 543 (2017). It was certainly the case that non-U.S. casualties appeared in the press before photographs of dead Americans were published. Roeder's classic work on World War II photo censorship effectively documents the policy decision to ease censorship in order to enhance domestic war mobilization. See ROEDER, *supra* note 125.

186. See BREWER, *supra* note 97, at 99–100.

187. *Id.* at 100–101.

188. *Id.* at 122. See, e.g., *Guadalcanal: Grassy Knoll Battle*, LIFE, Feb. 1, 1943, at 26–27.

189. BREWER, *supra* note 97, at 98.

190. ROEDER, *supra* note 125, at 1.

191. BREWER, *supra* note 97, at 122; see also ROEDER, *supra* note 125, at 21.

192. ROEDER, *supra* note 125, at 1.

193. *Id.* at 25.

194. *Id.* at 33.

American soldiers became a centerpiece of domestic mobilization efforts. The first *Life* magazine photograph of dead U.S. soldiers was an event in and of itself. Published in September 1943, it showed a peaceful scene from Buna Beach, New Guinea.¹⁹⁵ Three bodies in American military uniforms lay in the sand at the water's edge. Except for their closeness to the surf, and the sand that had begun to wash over one of the bodies, they might be mistaken as sleeping.¹⁹⁶ For an image of war death, the photograph is powerful but disturbingly tranquil. *Life* accompanied it with a full-page editorial. "Why print this picture, anyway, of three American boys dead upon an alien shore? Is it to hurt people? To be morbid?" the magazine asked.¹⁹⁷ "The reason is that words are never enough. The eye sees. The mind knows. The heart feels. But the words do not exist to make us see, or know, or feel what it is like, what actually happens. The words are never right."¹⁹⁸ The purpose of publishing the image was to more powerfully bring the reality of war into American homes. But as Roeder writes, even an image of dead Americans could not reveal war's brutality and horror.¹⁹⁹ George Strock, who took the photograph, rarely bathed when on assignment in New Guinea because, he said, "the damn water smells like dead Japanese bodies."²⁰⁰ Photographers and writers repeatedly insisted, like the cartoonist Bill Maudlin, that war was not like the photographs, and that "you have to go through it to understand its horror."²⁰¹

The war death that Americans could see in photographs, newsreels, and even Hollywood films, was largely intact American bodies.²⁰² In commercial films released before the end of combat, American deaths were "heroic and meaningful," Roeder writes, and "[n]ever hinted at the capacity of the machinery of modern warfare to mutilate the human body."²⁰³ Photographs of mutilated Japanese bodies, however, appeared in *Life* throughout the war in the Pacific.

195. ROEDER, *supra* note 125, at 34; *Three Dead Americans on the Beach at Buna*, LIFE, Sept. 20, 1943, at 35 [hereinafter *Three Dead Americans*].

196. *Three Dead Americans*, *supra* note 195.

197. *Id.*, Henry Luce, *Three Americans, Where These Boys Fell, a Part of Freedom Fell: We Must Resurrect it in Their Name*, LIFE, Sept. 20, 1943, at 34.

198. Luce, *supra* note 197.

199. ROEDER, *supra* note 125, at 34.

200. *Id.*

201. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 202 (2003).

202. *Id.* at 12, 21. See also LARY MAY, THE BIG TOMORROW: HOLLYWOOD AND THE POLITICS OF THE AMERICAN WAY 139–174 (2000) (history of Hollywood films during World War II) This changed in later years as World War II-related films sometimes portrayed veterans still affected by war injuries, including amputations, and the alienation that could accompany the return to civilian life. See, e.g., THE BEST YEARS OF OUR LIVES, *supra* note 165.

203. ROEDER, *supra* note 125, at 21.



"Three dead Americans on the beach at Buna," *Life*, September 10, 1943.
George Strock, LIFE Picture Collection, Getty Images.

Photographs taken by the U.S. Army Signal Corps²⁰⁴ that were censored reveal what could not be seen: bodies of American paratroopers in Italy hit by shrapnel, eyes open and looking skyward, faces mangled;²⁰⁵ a charred lump in a jeep burned in an accident, only identifiable as the remains of a human by its caption;²⁰⁶ a jumbled pile of American military bodies in Papua, New Guinea, waiting for transport to a temporary burial ground.²⁰⁷ Contrasting these photographs with the images released by censors, Strock's photograph of American dead at Buna Beach takes on new meaning. It is not that one set of images is "real war" and the other is not. All photographs are representations. Instead, comparing the images helps us to see what American censors and *Life* publishers sought to convey.

Through *Life* photographs approved for release, American war dead were, in essence, gently arranged for viewing by an American public that would find purpose in them. Censorship functioned in a way that is reminiscent of the careful preparation of a body for viewing at a funeral home. The objective of embalming is not to make the body look the way it did in life, but instead to remove from it the evidence of injury or illness.²⁰⁸ The embalmed body does appear to be dead, but does not reveal the causality of its condition. Censors and publishers carefully arranged the image of American war death, not by staging photos but by choosing the shots.²⁰⁹ The resulting image did not reveal the wounds. The dead appeared as if they were embalmed upon the battlefield. Shielded from what weapons could do to a human body, Americans consumed a noble

204. The U.S. Army Signal Corps is responsible for Army communications. See CENTER OF MILITARY HISTORY UNITED STATES ARMY, GETTING THE MESSAGE THROUGH: A BRANCH HISTORY OF THE U.S. ARMY SIGNAL CORPS (2015). I reviewed hundreds of censored U.S. Army Signal Corps World War II photographs at the Still Pictures Branch, National Archives and Records Service, College Park, Maryland. The records are now declassified. See, Still Pictures Branch, Record Group 319 CE, Records of the U.S. Army Staff, Prints: Photographs of the U.S. and Foreign Nations, 1942-64, [hereinafter 319 CE, NARA] (Boxes 1, 3, 4, 20, 21 and 44 contain still photographs of World War II casualties of the United States and other countries).

205. *Two paratroopers lie dead on the ground*, Italy (Dec. 18, 1943) (image number SC236944) (available at Folder: Italy – American, German Casualties, Box 21, 319 CE, NARA, *supra* note 204).

206. *U.S. soldier looks at remains of one of his buddies*, Liege, Belgium (Dec. 24, 1944) (image number SC236316) (available at Folder: Belgium – American Dead (Dec. 1944) SC200857-SC291777, Box 3, 319 CE, NARA, *supra* note 204).

207. *American dead piled up...awaiting movement for burial*, Manus Island (March 18, 1944) (image number SC236923) (available at Folder: Admiralty Island – American Casualties (1944), Box 1, 319 CE, NARA, *supra* note 204).

208. See generally ROBERT G. MAYER, EMBALMING: HISTORY, THEORY AND PRACTICE (2d ed., 1996).

209. See, e.g., ROEDER, *supra* note 125, at 15. Jan Mieszkowski suggests that the Buna Beach photograph may have been staged, and the bodies moved to achieve an effect. JAN MIESZKOWSKI, WATCHING WAR 103 (2012). There is no evidence to support Mieszkowski's speculation. If the bodies had been arranged, the sand would not have been so undisturbed, including the smoothness of the sand that washed partially over the bodies. *Three Dead Americans*, *supra* note 195.

and beautiful image of their dead.²¹⁰

The view of Japanese bodies approved for release by censors and published in *Life* was strikingly different. Another scene from Buna Beach in the Pacific theater had corpses tangled in debris and was captioned “Maggot Beach.”²¹¹ A burned Japanese head, severed from its body, hung from a tank.²¹² Censors blocked some images of Japanese soldiers’ bodies, however. There were piles of Japanese bodies, somewhat like the censored photographs of piles of American military bodies. What makes a censored photograph of Japanese bodies disquieting is the view of tractor marks in the dirt, as the bodies appear to have been in the process of being buried in a mass grave.²¹³

A clearer understanding of the objectives in censoring or releasing images of dead Japanese soldiers comes from the *Life* magazine photograph below. The body of a Japanese soldier lay on the ground face up. An American soldier stood beside the body, his right foot blurred as if in motion. The American soldier appeared to be in the act of kicking the body in the head.²¹⁴ It is reminiscent of a photograph of a Serbian soldier kicking a bleeding Bosnian civilian in the head in Bijeljina, Bosnia, March 31, 1992, which provoked international outrage.²¹⁵

This view of war was crafted for the purpose of American war mobilization, but the viewers themselves were agents in this exercise. Jan Mieszkowski writes that “[t]o be a member of the war audience is potentially to affirm the natural or inevitable character of the show.”²¹⁶ There is a deeper engagement with viewers in the photograph of the kick, however. Derogatory images of American soldiers were censored during the war,²¹⁷ so the fact that the photograph was not censored shows that it wasn’t thought to put the American soldier in a negative light. Instead, the

210. If the loving portrayal of white male bodies was to be promoted, more would be kept out of view than mangled American corpses. At home, Japanese nationals and Japanese Americans on the west coast were incarcerated in concentration camps. The War Relocation Authority hired Dorothea Lange to photograph and document the relocation and internment program. The government would release images taken by Ansel Adams that tended to show earnest, hardworking, sometimes smiling, nonthreatening internees. In contrast, all of Lange’s photographs were impounded. *IMPOUNDED: DOROTHEA LANGE AND THE CENSORED IMAGES OF JAPANESE AMERICAN INTERNMENT* (Linda Gordon and Gary Y. Okihiro, eds., 2008).

211. *This is Maggot Beach*, LIFE, Feb. 15, 1943, at 26.

212. *A Japanese soldier’s skull is propped up on a burned-out Jap tank by U.S. troops*, LIFE, Feb. 1, 1943, at 27.

213. *Jap casualties are heaped in a trench on the Orote Peninsula for burial*, (July 26, 1944) (image number SC237372) (available at Folder: Guam – American Dead (I.D) (1944-48), Box 20, 319-CE-59, NARA, *supra* note 204).

214. *The Battle of Buna*, LIFE, Feb. 15, 1943, at 23.

215. Anthony Feinstein, *Capturing a war crime*, GLOBE (June 21, 2015, 9:47 PM), <http://www.theglobeandmail.com/news/national/capturing-a-war-crime/article25016202/> <https://iconicphotos.wordpress.com/tag/bosnia/>.

216. MIESZKOWSKI, *supra* note 210, at 8.

217. See ROEDER, *supra* note 125, at 8.

photograph invited the viewer to participate in the violence and in the catharsis of a blow against a despised enemy.²¹⁸



An American soldier, his foot in motion, stands over the body of a Japanese soldier. *Life*, February 15, 1943. George Strock, LIFE Picture Collection, Getty Images.

This photograph dramatically reinforces Susan Sontag's observation that images of war suffering do not necessarily evoke antiwar sentiment. "Photographs of an atrocity may give rise to opposing responses," she writes. "A call for peace. Or a cry for revenge. Or simply the bemused awareness, continually restocked by photographic information, that terrible things happen."²¹⁹ The kicking photograph was participatory, welcoming the viewer into the spectacle. The experience remained in two

218. See generally DOWER, *supra* note 132 (detailing racial hatred in the Pacific War).

219. See SONTAG, *supra* note 111, at 13.

dimensions, however, so the engagement with the viewer was necessarily contained. Even this image could not dissolve the boundary between American soldiers and civilians, a central idea of total war.²²⁰

The images of dead Americans on Buna Beach, of the bleeding American soldier on V-E Day, and of the Japanese soldier's burned and decapitated head "joined the ranks alongside flag-lined main streets, Star-spangled advertisements, and poster-saturated public spaces," Roeder writes.²²¹ They were "components of a visual environment mobilized to make a distant war seem real to those who were expected to supply the resources, human effort, and political support needed for victory."²²² Government censorship shaped the visual field in an effort to manage the emotional connection of Americans at home with war far away. This reveals an important dimension to the way distant war enables expansive government power.

Since World War II, the U.S. military has been persistently mobilized.²²³ As the global footprint of American military power expanded over time, the war experience for American civilians has become even more attenuated.²²⁴ The Korean War did not generate a republic of suffering in the United States, for example. Instead, Americans had to be persuaded that war on the Korean peninsula should matter to them.²²⁵ During the U.S. war in Vietnam, military action came into American households through network television, and war death was presented in body counts on the evening news.²²⁶ With over 1.7 million Americans drafted, a generation was deeply affected by this war.²²⁷ Fighting itself was again distant.²²⁸ With the exception of families of soldiers, the principal collective civilian experience was not with death but with conflict over the war and its consequences.²²⁹

220. See Roger Chickering and Stig Förster, *Are We There Yet? World War II and the Theory of Total War*, in *A WORLD AT TOTAL WAR: GLOBAL CONFLICT AND THE POLITICS OF DESTRUCTION, 1937–1945 2* (Roger Chickering, Stig Förster, & Bernd Greiner, eds., 2005).

221. ROEDER, *supra* note 125, at 1.

222. *Id.*

223. See BACEVICH, *supra* note 31, at vii–xii.

224. See PEW RESEARCH CENTER, *supra* note 32.

225. See STEVEN CASEY, *SELLING THE KOREAN WAR: PROPAGANDA, POLITICS, AND PUBLIC OPINION, 1950–1953* (2008); BREWER, *supra* note 97, at 141–42.

226. See Marilyn B. Young, *Counting the Bodies in Vietnam*, in *BODY AND NATION: THE GLOBAL REALM OF U.S. BODY POLITICS IN THE TWENTIETH CENTURY* 230 (Emily S. Rosenberg & Sharon Fitzpatrick, eds., 2014).

227. See CHRISTIAN G. APPY, *AMERICAN RECKONING: THE VIETNAM WAR AND OUR NATIONAL IDENTITY* (2015).

228. See MARILYN B. YOUNG, *THE VIETNAM WARS, 1945–1990*, ix–x (1991). On the Vietnamese experience with war in their own country, see LIEN-HANG T. NGUYEN, *HANOI'S WAR: AN INTERNATIONAL HISTORY OF THE WAR FOR PEACE IN VIETNAM* (2012); MARK PHILIP BRADLEY, *VIETNAM AT WAR* (2009).

229. See MICHAEL J. ALLEN, *UNTIL THE LAST MAN COMES HOME: POWS, MIAS, AND THE UNENDING VIETNAM WAR* (2009); MELVIN SMALL, *ANTIWARRIORS: THE VIETNAM WAR AND THE*

By the late 20th century, the chasm between most Americans and the direct experience of military conflict grew wider. An all-volunteer armed forces meant that young men were no longer vulnerable to the draft.²³⁰ Greatly increased reliance on military contractors meant that an American military presence could be maintained with fewer troops.²³¹ The cultural distance of war did not lessen its frequency. American presidents of both parties committed U.S. forces to military conflicts without congressional authorization. And when they asked for it, broad power was authorized.²³²

If war death and suffering played a role in shaping American identity during the Civil War, it has moved to the margins of American life in the 21st century.²³³ War losses are a defining experience for the families and communities of those deployed.²³⁴ Much effort is placed on minimizing even that direct experience with war deaths through the use of high-tech warfare, like drones piloted far from the battlefield.²³⁵ If law constrained presidential imperatives for war, it did so only at the margins. Instead, law became a form of professionalization in the armed forces,²³⁶ and a language to explain foreign deaths to a distracted public. As Samuel Moyn has argued, the United States embarked on a “new form of global warmaking so humane that it declined in visibility even as it expanded in reality.”²³⁷

Over time, fewer American families were touched directly by war.²³⁸ In the early twenty-first century, the terrorist attacks on September 11, 2001 generated a sense of national self-identity and collective national

BATTLE FOR AMERICA’S HEARTS AND MINDS (2002).

230. See BETH BAILEY, *AMERICA’S ARMY: MAKING THE ALL-VOLUNTEER FORCE* 1–33 (2009).

231. See generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2d ed., 2007).

232. See generally BARBARA SALAZAR TORREON, *CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2016* (2016) (detailing the use of American troops in military actions with and without declarations and authorizations).

233. See SCHANTZ, *supra* note 63, at 209 (noting that the American culture of death and suffering in the Civil War has been lost).

234. See CASEY, *supra* note 10; CATHERINE A. LUTZ, *HOMEFRONT: A MILITARY CITY AND THE AMERICAN TWENTIETH CENTURY* (2001); JOHN M. KINDER, *PAYING WITH THEIR BODIES: AMERICAN WAR AND THE PROBLEM OF THE DISABLED VETERAN* (2015).

235. See MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* (2013).

236. See Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* 2 (2001), people.duke.edu/~pfeaver/dunlap.pdf (coining the term “lawfare” and explaining the way law is integrated into military operations).

237. Samuel Moyn, *Beyond Liberal Internationalism*, *DISSENT* (Winter 2017), <https://www.dissentmagazine.org/article/left-foreign-policy-beyond-liberal-internationalism>.

238. PEW RESEARCH CENTER, *supra* note 32. According to the Pew Research Center, “[o]nly about one half of one percent of the U.S. population has been on active military duty at any given time during the past decade of sustained warfare.” As fewer families serve, there is a greater distance between most Americans and the experience of military service. PEW RESEARCH CENTER, *supra* note 14.

purpose.²³⁹ War death in the ongoing military conflicts that followed did not.²⁴⁰ Instead, death in war had become part of the calculus when weighing the costs and benefits of military action. The intensive government project of generating an understanding of war to keep the country on board was no longer necessary. For most Americans, war did not disrupt daily life. War was not an existential crisis. It had become a presidential policy option.²⁴¹

IV. CONCLUSION

As this article has shown, the culture of war enables American war politics and powers. The most important feature of the culture of American war in the 20th century and after has been the distance between the polity and the battlefield. It is a benefit, of course, for American civilians to be physically isolated from war's destruction. This is a central purpose of American defense.²⁴² However, it is important to examine the impact of this isolation on the capacity of political restraints on the power to go to war and to sustain armed conflict over time. The cultural history

239. See Dudziak, *supra* note 13.

240. See Andrew Bacevich, *Whose Army?* in *THE MODERN AMERICAN MILITARY 201–203* (David M. Kennedy, ed., 2013).

241. See Matthew C. Waxman & Jack Goldsmith, *The Legal Legacy of Light-Footprint Warfare*, 39 *WASH. Q.* 7 (2016). The importance of this cultural history to the war powers is reinforced by scholarship on public opinion about war. Social scientists have long studied the impact of war casualties on public support for armed conflict. See, e.g., JOHN E. MUELLER, *WAR, PRESIDENTS, AND PUBLIC OPINION* (1973). Christopher Gelpi, Peter D. Feaver, and Jason Reifler, argue that the public's tolerance of casualties is affected by their views about the war itself. Christopher Gelpi, Peter D. Feaver, & Jason Reifler, *Success Matters: Casualty Sensitivity and the War in Iraq*, 30 *INT'L SECURITY* 8 (2005). They find that beliefs about success and about expected human costs are interrelated, so that public toleration of U.S. military deaths is affected by belief about the likelihood of success. GELPI, FEAVER & REIFLER, *supra* note 11, at 45.

Political scientist Adam Berinsky illuminates the determinants of opinions about war and its success or failure, emphasizing that “[t]he facts of war do not speak for themselves.” ADAM BERINSKY, *IN TIME OF WAR: UNDERSTANDING AMERICAN PUBLIC OPINION FROM WORLD WAR II TO IRAQ* 65 (2009). He argues that public opinion on war is shaped by elite discourse and partisan politics. *Id.* at 66–69, 129. “It is not simply a direct reaction to casualties or victories on the battlefield that causes support for war to wax or wane. . . . It is how the war experience gets filtered through domestic politics that matters most.” Adam J. Berinsky, *Assuming the Costs of War: Events, Elites, and American Public Support for Military Conflict*, 69 *J. POL.* 975, 995 (2007).

Most analyses of the effect of U.S. military casualties “assume that war and combat casualties are monolithic events that affect all segments of society equally.” political scientists Douglas L. Kriner and Francis X. Shen write. KRINER & SHEN, *supra* note 11, at 5. They demonstrate that social distance from the costs of war affects war support. Military “casualties are neither uniformly nor randomly distributed across society.” *Id.* War deaths “reverberate loudest for those who experience them most directly through the lens of their local communities.” *Id.* at 111. They affect not only family members of casualties, but also others in the local community. This “casualty gap” affects political engagement, creating “politically salient cleavages in Americans’ wartime opinions and behaviors.” *Id.* Although political scientists disagree about precisely how casualties matter, this literature reinforces the importance of war death and the public’s perception of war to public support and presidential power.

242. *About the Department of Defense*, U.S. DEPARTMENT OF DEFENSE, <https://www.defense.gov/About/> (“The mission of the Department of Defense is to provide the military forces needed to deter war and to protect the security of our country.”).

of death and distance provides the atrophy of political restraints with a context.

In scholarship on the history of twentieth century American war, three distinct lines of analysis intersect: first, a shift in the war powers enhancing executive power over the use of force and undermining the role of Congress; second, conflict and militarization have become ongoing rather than episodic features; and third, a chasm developed between most Americans and the experience of armed conflict, captured in part in the idea of a military-civilian divide. This article contributes to this scholarship by recasting the relationship between American civilians and war. The most important divide is not between civilians and their soldiers but civilian distance from the broader experience of war and war's effects. This chasm was produced once American wars moved offshore, so that violence is exported and its perception at home can be more effectively mediated. The distance of American war during the 20th century and after has put the federal government in the role of managing the perceptions that enable war support in the first place.²⁴³

At the heart of this story is the way the dead body generated a politics, a “republic of suffering,” during the Civil War years,²⁴⁴ and the way that sense of a republic was lost over time. The distance between American civilians and their country's wars was not generated by geography alone. As the history of World War II photography shows, the U.S. government calibrated the way war's violence was portrayed on the home front. Distance enabled government control over what war's violence looked like. Over time, changes in the media and mass communication have altered the government's ability to control access to images of war.²⁴⁵ Nevertheless, the project of shaping a narrative of war, through stories, images and video, remains important to war planning. Just one illustration is the George W. Bush administration's policy of banning photographs of coffins of American war dead as they arrived in the United States.²⁴⁶ The need to maintain public support for military action, or at least to lessen the likelihood of opposition, has long made war a public relations issue.²⁴⁷ A president's ability, albeit imperfect, to shape the way Americans perceive war is a tremendously important aspect of presidential war power.

243. The full history of how American civilian engagement with armed conflict changed over time is beyond the scope of this Article. That broader history is the focus of my work-in-progress on American war politics in the twentieth century and after: *GOING TO WAR: AN AMERICAN HISTORY* (under contract Oxford University Press).

244. *FAUST*, *supra* note 10, at xiii.

245. See generally *SELLING WAR IN THE MEDIA AGE: THE PRESIDENCY AND PUBLIC OPINION IN THE AMERICAN CENTURY* (Kenneth Osgood and Andrew K. Frank, eds., 2010) (detailing efforts of presidents to “sell” wars from 1898 through 2004).

246. See *CASEY*, *supra* note 10, at 3.

247. See *BREWER*, *supra* note 97.

American civilian isolation from war has obvious benefits. A cost of that isolation, however, is vibrant democratic engagement over ongoing American armed conflict. International law scholar David Kennedy argues that “[t]he most unsettling aspect of war today is the difficulty of locating a moment of responsible political freedom in the whole process by which war is conceived, waged, and remembered.”²⁴⁸ What is lacking for Kennedy is engagement with “the human experience of deciding, exercising discretion, and being responsible for the results an unpredictable world serves up.”²⁴⁹ A vibrant “politics of war,” he argues, requires “feeling the weight and the lightness of killing or allowing to live.”²⁵⁰

Kennedy’s focus is on the workings of international humanitarian law, but his critique applies as well to the role of Congress and the American people. If feeling the weight of war matters to restraints on the battlefield, it matters as well to home front politics. Sheltering American civilians from the corporeality of war has drained domestic war politics of its urgency. The dead do political work, as Lincoln so eloquently demonstrated at Gettysburg. The dead have been losing their power in American war politics because it is becoming harder for us to see them.

248. DAVID KENNEDY, *OF WAR AND LAW* 171 (2006).

249. *Id.*

250. *Id.*