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Book Review: in the Name of War: Judicial Review and the War Powers Since 1918. by Christopher N. May.

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BOOK REVIEWS

IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918. By Christopher N. May.[1] Cambridge: Harvard University Press. 1989. Pp. viii, 370. $29.95.

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Over the past several decades, politicians, academics, and (to a lesser extent) judges have debated the locus of the war powers. Attention to this boundary issue, deserved though it may be, has tended to obscure another constitutional dimension of warmaking: when Congress and the president cooperate, as they sometimes do, or when they simply refrain from challenging one another, the checks on governmental action are weak. It was almost forty years ago that Clinton Rossiter, after surveying the previous forty years, opined "that in time of war Congress can pass just about any law it wants as a 'necessary and proper' accessory to the delegated war powers; that the President can make just about any use of such law he sees fit; and that the people with their overt or silent resistance, not the Court with its power of judicial review, will set the only practical limits to arrogance and abuse."[3]

Sobering on its face, Rossiter's observation becomes even more troubling when one realizes that "war" is an inexact term, not neatly distinguishable from "peace." To the extent that war is difficult to define as a condition in the real world, the legitimate scope of the war powers within the Constitution becomes still more problematic, and not least because powerful arguments and authorities give the benefit of the doubt to latitudinarianism. As Alexander Hamilton put it, "unless it can be shewn, that the circumstances which may affect the public safety are reducible within certain de-

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3. C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 100 (1951; expanded edition with additional text by R. Longaker, 1976).

terminate limits . . . , it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy . . . ."[4]

Professor Christopher N. May's book examines how Hamilton's "necessary consequence" provided an attractive pretext for accomplishing "progressive" goals in the aftermath of World War I, and how the Supreme Court dealt with such disingenuous uses of the war powers. The focus is on four areas of federal activity in the months and years following Armistice Day, all set against the backdrop of earlier reform efforts, and all raising questions about the extent of the domestic war powers. To give away the conclusion, Rossiter was not quite correct—not quite everything passed constitutional muster following World War I. Hamilton's "necessary consequence" proved less than absolutely necessary.

I

One role for the war powers was to undergird two "experiments in socialism," as May labels them. In December 1917, the Wilson Administration seized the railroads, an action ratified by Congress in legislation authorizing federal operation for up to twenty-one months after formal reestablishment of peace. Although his treatment of the rail seizure is brief, May finds that contemporaries suspected that the seizure would prove permanent. He gives greater attention to the other experiment, control of communications. President Wilson obtained congressional authorization to take over wire communication companies after alleging that a prospective telegraphers' strike threatened prosecution of the war. In fact, the telegraphers had orchestrated the strike threat in hope of just such an outcome, expecting favorable treatment from federal officials. Leading company officials also welcomed the seizure, predicting that under government control labor problems would be mitigated, rates regularized, and ownership restructured.

Formal seizure of domestic telegraph and telephone services occurred on August 1, 1918, but implementation came mainly *after* the Armistice.[5] While a few critics disputed the war powers rationale, support for the takeover itself was initially widespread. As government operation proceeded under the direction of Postmaster

4. THE FEDERALIST No. 23, at 147-48 (J. Cooke, ed. 1961).

5. In addition, an order dated November 2, 1918, but not announced until November 16, was issued for seizure of international cables. Wilson subsequently justified it as necessary to insure the free flow of news in preparation for the peace conference, but complications resulting from foreign participation in operation of the cables prevented its implementation.

General Albert S. Burleson, the two industry giants, Western Union and AT&T, apparently remained satisfied; but Clarence Mackay, owner of two smaller companies, complained of mistreatment, labor found its expectations dashed, and users encountered mismanagement and higher rates. Few beyond the large companies mourned the end of the experiment in July 1919.

Thanks to the eighteenth amendment, national prohibition enjoyed a longer life. The amendment did not take effect, however, until January 16, 1920. Meanwhile, the wartime Lever Food and Fuel Control Act had outlawed production of hard liquor and had given Wilson sufficient discretionary authority to enable him to restrict brewers to making 2.75 percent beer. The Anti-Saloon League then successfully lobbied for passage of the War-Time Prohibition Act, which was signed into law ten days *after* the Armistice and took effect only on July 1, 1919, to continue "until the termination of mobilization." As one congressman conceded, the law would have been "unconstitutional if passed . . . in times of peace. The only authority that Congress has now for passing this [law] is the war power." But its effective date belied the war power rationale, while other legislation adequately guaranteed conservation and sober soldiers and defense workers.

Indeed, before the War-Time Prohibition Act took effect, Wilson had overcome his earlier worry that a total ban on beer might "introduce a new element of disturbance in the labor situation which I should dread" and used his authority under the Lever Act to prohibit brewing, effective December 1, 1918. Despite a "No Beer, No Work" campaign, the relaxation of controls in early 1919 extended only to "non-intoxicating" beverages, which the Food Administration and Bureau of Internal Revenue interpreted as allowing nothing stronger than 0.5 percent beer. While this interpretation ignored considerable testimony, as well as lower court decisions, that 2.75 percent "war beer" met the non-intoxicating standard, it received legislative endorsement in the Volstead Act's Title I.[6]

A third concern after the Armistice was price and rent regulation. Wartime price controls under the Lever Act had been indirect, at least by later standards, and were aimed especially at guaranteeing high production and protecting the government as a purchaser. By the end of March 1919, these controls had been ended. Then, however, prices began a sharp ascent, labor called for new controls, and Attorney General A. Mitchell Palmer, who har-

6. We commonly associate the Volstead Act with implementation of the eighteenth amendment, but its Title I related to the War-Time Prohibition Act.

bored presidential ambitions, took up the issue. Prosecutions followed, targeted especially at local merchants, for, as May reads Palmer's motives, attacks on local price gougers rather than on large suppliers seemed likely to draw support from the newly enfranchised women voters. In October 1919, Congress remedied one ensuing difficulty when it added criminal sanctions to a key section of the Lever Act. Revealingly, Palmer appeared unworried about the tardiness of the correction, claiming that "the mere fact of adding the penalty after the law was passed doesn't mean that violators of the law from the time it became effective cannot be punished."

After sifting through the official statistics on price-fixing and related cases, May estimates "that there were at least 1,100 prosecutions, and perhaps as many as 1,300, instituted under the Lever Act starting almost a year after the armistice." Overall, more than ninety percent of all the criminal prosecutions under the law, which of course rested on the war powers, arose from offenses following the end of hostilities. Leaders and members of the United Mine Workers also felt the Lever Act's force when Palmer broke the 1919 coal strike with an injunction and criminal proceedings for conspiracy. The basis for still further litigation was laid when the 1919 amendments to the Lever Act became a vehicle for passing rent control for the District of Columbia, a step (as the law explained in part) "made necessary by emergencies growing out of the war . . . ."

Certainly the best known part of May's narrative is his remaining topic, the postwar attack on radicalism under the Espionage and Sedition Acts of 1917 and 1918. On this front, available statistics do not lend themselves to separating prosecutions for post-Armistice activities from those for wartime episodes. What stands out, however, is that perceived internal threats to the domestic political and social order, not challenges to national security, animated the government's actions. (Ironically, this was not inconsistent with the motivations behind the 1918 law.) Criminal indictments were used especially against Wobblies in the West and their sympathizers, while the postal censorship provisions fell hard on socialist publications.

Numbers aside, two bits of evidence provide a sense of the targets of the efforts at repression. One is a poem on the Versailles settlement that helped trigger criminal prosecution of the *Seattle Union Record*:

> And I thought: "Let us face
> At last the naked fact.
> THEY were like beasts
> And WE were like beasts.

We won, thank God, not they!
And we take
What we CHOOSE,
Even as they would have done
By law of club and fang.
But there is NO HONOR
LEFT
And no high sounding aims
For ANY of us!"

As May relates the subsequent indictment, this poem was alleged to contain " 'disloyal, scurrilous, and abusive language' which tended to bring the government, the Constitution, and the military 'into contempt, scorn, contumely, and disrepute.' " The other item is Postmaster General Burleson's official explanation of post-Armistice postal censorship: "The character of the disloyal and seditious matter found in the mails since the signing of the armistice has differed materially from that which the department dealt with during . . . the war. It is now of a radical, revolutionary type, having for its object the solidification of the revolutionary elements in this country and the overturning of our present form of government by force." At least in the criminal prosecutions, juries sometimes proved a hurdle for the government, as did judges when they scrutinized indictments.

II

May places these efforts at government control within the context of what we used to call the progressive "movement." This context, as he develops it, is problematic. True, some progressives espoused more federal direction and even ownership. Nor is it a mistake to see some as buoyant about the possibilities for using the war to push a reform agenda still further. As David Kennedy has summarized, "At the time of the Armistice, progressives hoped to preserve and even to extend many of the collectivist practices and much of the state authority that had grown up during the war."[7]

The problem is that when May explicitly offers interpretations of progressivism (particularly in his first chapter, but also here and there in his recounting of the post-Armistice episodes), he tends toward depicting it primarily as a movement of high-minded reform, with the people battling the interests. It is only a slight exaggeration to say that a reader whose last encounter with progressivism was, say, Eric Goldman's *Rendezvous with Destiny* (1952) would

7. D. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 246 (1980).

feel fully at home with May's first chapter.[8] The result, in May's account, is a jarring clash between progressive aspirations and the tawdry postwar record.

By contrast, historians have increasingly emphasized that one dimension of early-twentieth century reform was a thrust for elite-imposed social efficiency and social control; it was not all a drive against monopolies and for social justice.[9] Had May taken account of this characteristic of the prewar era, he might have discussed more systematically similar motivations behind the post-Armistice willingness to use war-powers justifications. Certainly much of the evidence he so adroitly mines from contemporary sources suggests a use of law in the service of liberal (and not-so-liberal) corporatism within a rationalized social order.

III

Besides exploring the legislative and enforcement history of the post-Armistice actions taken in the name of war, May considers their broader constitutional dimensions. To begin with, he places the post-Armistice events in the context of a prewar assault on judicial review. State and federal judges had struck down hundreds of regulatory laws, which had a twofold effect. For one thing, resulting attacks on judicial review prompted increasingly cavalier attitudes toward constitutional limitations in general, a tendency abetted by the fascination with pragmatism in intellectual circles. For another, judicial constraints resting especially on doctrines of due process and federalism were a reality, and this made pretextual uses of the war powers highly attractive. Existing case law indicated that legal moves against war-related actions might take three forms: allegations that the actions were too remote in time from the period of war (that is, durational challenges); arguments charging the lack of a reasonable relation between the challenged actions and the war emergency; and claims that actions infringed guarantees of the Bill of Rights. Within these categories, to be sure, courts had sometimes overturned actions based solely on executive authority, but legislation resting on the war powers had generally been upheld.

Supporters of continued government controls in the post-Armistice period were well aware of this record. Defending amendments to strengthen the War-Time Prohibition Act, for example,

8. *See* E. GOLDMAN, RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM, esp. chs. 7-10 (1952; rev. ed. 1958).

9. *See* Rodgers, *In Search of Progessivism*, in THE PROMISE OF AMERICAN HISTORY: PROGRESS AND PROSPECTS 113, 122-23 (S. Kutler & S. Katz eds. 1982). (Also published as vol. 10, no. 4, of REVIEWS IN AMERICAN HISTORY [Dec. 1982].)

Congressman Andrew Volstead stated in February 1919: "If Congress finds that it . . . must maintain in the exercise of its war powers a situation which makes it necessary to enact this legislation, our courts can not review that finding . . . . Congress and the Executive must determine what means are necessary for carrying on war. Courts can not be permitted to interfere." At the same time, with no eye on consistency, the legislators largely eschewed any independent obligation to consider constitutional issues. As House Speaker Champ Clark put it while defending the Sedition Act, "That is for the courts." Executive branch officials added their endorsements to the Catch-22 reasoning.

Initially, the Supreme Court responded in the expected fashion. In cases from North and South Dakota, the experiments in control of the rails and wire communications came under attack. In its challenge to the post-Armistice wire controls, South Dakota in particular used what May evaluates as "a sophisticated durational attack, drawing a distinction between Congress's action during the war and the executive's subsequent enforcement efforts." But the Court held that the war power was plenary, and "a mere excess or abuse of discretion . . . involve[d] considerations which are beyond the reach of judicial power."[10] It seems likely, as May suggests, that the Court was also swayed by the announced termination of both experiments, as well as by the states-rights focus of each state's argument. No specific individual or corporate rights were claimed to have been infringed.

Nor did challenges to convictions under the Espionage and Sedition Acts result in any check on federal authority. Because the eight cases decided by the Supreme Court between March 1919 and March 1920 all involved pre-Armistice offenses, they did not pose durational issues. Even so, the decisions revealed a dim view of Bill of Rights arguments: the clear-and-present danger test emerged as a justification for suppression, not a limitation on government power.

The Court also upheld the War-Time Prohibition Act, but with a difference. Writing for a unanimous Court in *Hamilton v. Kentucky Distilleries*, Justice Brandeis conceded in passing that "[t]he war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."[11] Because the law gave distillers adequate time to dispose of their stocks, however, it was not an unconstitutional "taking."

10. Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 183-84 (1919).
11. Hamilton v. Kentucky Distilleries and Warehouse Co., 251 U.S. 146, 156 (1919).

Behind Brandeis's wording lay circumstances and maneuverings that May skillfully describes. The vote in conference had originally been five-to-four *against* the constitutionality of the act. Brandeis succeeded in pulling Holmes to his side by arguments on the merits of the taking issue, but events outside the Court, as well as pressure from Chief Justice White to win over the other four justices, led to the concession just quoted in place of wording in an initial draft that stressed the Court's impotence in the war powers area. As May relates, "*Hamilton* was argued in the Supreme Court on November 20 [1919] and decided on December 15. During this four-week period the daily press brimmed with tales of the government's ongoing enforcement of war powers legislation in a range of settings." Then, too, the direction of the Espionage and Sedition Act cases may have further persuaded Brandeis of the wisdom of recognizing some degree of limitation. In any event, doubts within the High Court became still more apparent three weeks later in *Ruppert v. Caffey*.[12] There the War-Time Prohibition Act's ban on "war beer" survived a challenge against its reasonable relationship to a prohibition scheme, but only by a bare five-to-four majority.

Although their implications went largely unnoticed by contemporaries, May explains that "*Hamilton* and *Ruppert* marked the end of an era." It was now likely that durational, reasonable-relationship, and especially Bill of Rights challenges stressing property rights would at least receive a hearing. Not least, the dangers of allowing wide latitude to the war powers were becoming more apparent. Defeat of the Versailles Treaty in the Senate was followed by disagreements between President Wilson and Republicans in Congress over ending the state of war through ordinary statute. Meanwhile, continued application of the Lever Act resulted in cases testing its constitutionality.

In ten Lever Act cases, lower courts overturned sections of the law on fifth and sixth amendment grounds. The price control provision of Section 4 fell, and in a couple of cases judges struck down the entire section, thereby undercutting use of its anti-conspiracy provision against strikers. No matter that in perhaps twice as many cases courts upheld the Act; enforcement became difficult. The government asked for Supreme Court review of the adverse lower court decisions on an expedited basis, and the Court heard arguments in October 1920. Its decision in *United States v. L. Cohen Grocery Company*[13] came down on February 28, 1921.

Rejecting government arguments that Congress was the sole

12. 251 U.S. 264 (1920).
13. 255 U.S. 81 (1921).

judge of the necessity of exerting its war powers during the period of the Armistice, Chief Justice White wrote for himself and five colleagues that "the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the fifth and sixth Amendments . . . ." The Lever Act's fourth section, which prohibited "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," was void for vagueness.[14] While legislation to repeal the entire act passed three days later, the Court's decision had a real effect, for it "was fatal to scores of profiteering actions then pending in federal courts around the country." Even more, the "decision stands as a landmark in American constitutional history. . . . This was only the second time in the Court's 130-year history that a piece of war powers legislation had been held unconstitutional"—and in the first instance, involving the legal tender issue after the Civil War, the Court had quickly reversed itself.

Congress was slow to learn, however. Rent control in the District of Columbia, originally enacted in 1919 when the Lever Act was amended, was extended three times—in August 1921, May 1922, and May 1924—with the last extension (signed by Calvin Coolidge) carrying control to May 1925. A Coolidge-supported effort at further extension then failed only in the face of strong lobbying by real estate interests. In the course of this sequence, two cases rose to the Supreme Court. Although the Court did not formally invalidate the rent control scheme on either occasion, it tied its rulings closely to the facts of the cases and clearly revealed its conclusion that the judiciary should exercise independent judgment on whether conditions justifying the legislation continued to exist. In the second decision, in April 1924, the Court remanded the case for trial on the issue of whether a housing emergency had been present at the time of the May 1922 extension. Moreover, Justice Holmes in his opinion for the Court stated that "a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared," and included the dictum that "if the question were only whether the statute is in force to-day, upon the facts we judicially know, we should be compelled to say that the law has ceased to operate."[15] Finally, in November 1924, the District of Columbia Court of Appeals took its cue from

14. *Id.* at 88-89. Justices Pitney and Brandeis found the section constitutional, but concurred in the Court's judgment on statutory grounds, and Justice Day did not participate in the case. *See id.* at 93-97. Regarding Brandeis's position, May observes: "In 1917 Brandeis had advised Herbert Hoover on how to secure passage of the Lever Act; this may partly explain his reluctance to find the act unconstitutional."

15. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-49 (1924) (ruling on a requested

Holmes's dictum and held the latest rent control extension unconstitutional, a decision that the Supreme Court declined to review.[16]

IV

In short, Professor May has recounted a fascinating story. His study rests on thorough research into a wealth of contemporary sources, both printed and archival, and into the secondary literature. His 275 pages of text are followed by eighty pages of notes that are *not* padded with the sentence-by-sentence and even clause-by-clause citations that too often dot legal writing. The account deserves the attention not only of students of constitutional history, but of those interested in early twentieth century reform, the Wilson Administration, and policy history in general. My earlier complaint about May's overt interpretations of progressivism reflects practically the only weakness I detect in the book—save the subtitle and the final chapter.

To describe the book as a study of "Judicial Review and the War Powers since 1918" is to misstate its focus. Some who should be attracted will be put off, and others who really are looking for a substantial treatment of the whole picture since World War I will be disappointed. The period since 1925 draws *some* attention in May's final chapter, but only after he has already described the episode over rent control in the District of Columbia as "a fitting one with which to conclude . . . ." In reality, May makes no pretense of giving developments since the mid-1920s the close examination in their own right that the earlier events receive, nor does he review them with an eye toward a detailed unraveling of the fate of the *Hamilton* doctrine as endorsed in *Cohen*. Instead, after noting how the need to use the war powers as a pretext for domestic legislation has disappeared in the face of expansive readings of the commerce power, he briefly surveys the cases developing out of World War II, the Cold War, and Vietnam. From these, he concludes "that, almost without exception, federal judges have been unwilling to intercede during periods of national emergency. While the principle articulated in *Hamilton* has technically endured, it is in constant danger of succumbing to judicial abdication."

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injunction against enforcement of the D.C. rent control law). May again nicely lays out the behind-the-scenes maneuvering that produced the final wording.

16. In his opinion for the District of Columbia's Court of Appeals (not yet the Circuit Court of Appeals for the District), Justice Robb expressed some of the exasperation over Congress's persistence: "[W]e may say with propriety that, if the emergency in question is not at an end, then this legislation may be extended indefinitely, and that which was 'intended to meet a temporary emergency' may become permanent law." Peck v. Fink, 2 F.2d 912, 913 (D.C. Ct. App. 1924), *cert. denied sub nom.* Fink v. Peck, 266 U.S. 631 (1925).

Yet, despite its add-on quality, his final chapter offers sensible generalizations. The Court, he argues, tends toward one of two courses in national security cases. Either it offers ritualistic approval of the challenged actions, or it invokes variants on the political question doctrine to avoid the issues. Notwithstanding efforts to link decisions to unique situations, the former course embeds pernicious doctrines in the Constitution, which makes the latter course preferable although hardly unproblematic. Better still is an approach that defers decisions. May especially recommends that judges utilize the requirement of ripeness, but also allow litigants to return later without meeting roadblocks on mootness grounds. May's discussion of these points is at a high enough level of generality to make detailed responses difficult—and a little unfair. Suffice it to say that as history the final chapter's tie to the post-Armistice interlude is slight.

TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND. By Robert A. Burt.[1] Berkeley: University of California Press. 1988. Pp. 165. $19.95.

Melvin I. Urofsky[2]

Professor Robert Burt's interpretive essay on Louis Brandeis and Felix Frankfurter is at once provocative and frustrating. Professor Burt often throws out a brilliant insight that helps us to understand these two men, yet he does not and cannot provide the type of evidence that would confirm his basic thesis—that their Jewishness shaped their judicial outlook. Being Jewish, even as marginally Jewish as these two, must have affected their lives in some ways. Yet Burt's elucidation of how and why their Jewishness led to their jurisprudence is far from convincing.

Burt first became attracted to this topic when, as he relates, he noticed the very high percentage of fellow Jews teaching in law schools such as Yale and Harvard. This led him to wonder why Jews entered the profession, and this in turn led him to the careers of Brandeis and Frankfurter, "two Jews who attained great prominence at a time when the American legal profession generally was inhospitable to Jews." He began his research, and concluded that "Jewishness was distinctively associated with outsider status, with homelessness, for both Brandeis and Frankfurter." Their different

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