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The Limits of U.S. Governmental Power in Times of Crisis

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By

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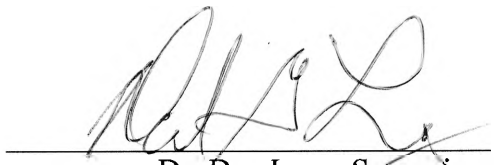

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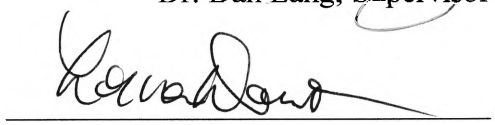

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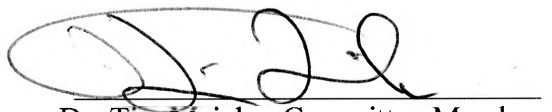

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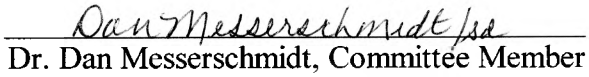

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Abstract

Government's Emergency Power Throughout the History of the United States

This paper reviews the use of power by the United States government during times of crisis. This paper analyzes both the arguments from Thomas Hobbes and John Locke regarding how limited both believe government should be. Throughout this debate John Locke believes that in leaving a state of nature we must enter into civil society through a social contract with each other. Hobbes' view of the state of nature is such that he believes that there should be virtually no limitations on the power of government in eliminating citizens from the state of nature conditions. These debates are important today in answering how much power should be given to our government in times of crisis and what protections need to be put in place to ensure government does not abuse its power. The following essay analyzes 1) President Abraham Lincoln's use of martial law and suspension of *habeas corpus* during the Civil War, 2) Hawaii's use of martial law after the attack on Pearl Harbor, and 3) 2001 Patriot Act and the future of such emergency powers within the United States. In analyzing these cases the focus remained on whether within these emergency powers the government ever: suspended the writ of *habeas corpus*, seized private property, set up military courts to try civilians, or advanced other restrictions of citizen's civil rights. In evaluating these elements one can look at whether government has given back these powers when the threat subsided or has been used to extend government's power or merely as a tool in bringing us out of the state of nature and back into civil society. The findings of this paper suggest that in each case the government gives power back to its citizens, doing such in manner that is timely and respectful of citizens' rights/liberties.

Throughout the history of the United States there have been crises that have made the government make many tough decisions as to what its role should be in enforcing civil rule. Many times the government for security reasons, in these times of crises, has seized many powers from civil society. Some of these powers seized are what we call liberties and were given to people when they were born (i.e. liberty, life, property), while others that we call rights, were given to us by the government (i.e. right to vote, freedom of speech). The focus is of this thesis is primarily on martial law, since it is the most obvious seizure of power by the government. These are the only two cases of martial law and they date all the way back to the times of the Civil War. The government has seized these certain powers from civil society in order to regain control of society and end the "state of nature" conditions. This has been seen even as recently as the passage of the Patriot Act in 2001 after the terrorist attacks on the United States. While this is not a case of martial law, it is a significant grab of power by the government as Congress passed the Patriot Act.

In the following thesis I will investigate the role of the US government when it grabs power from civil society for security reasons and whether it gives these certain powers back to the people when the time of threat subsides. I will focus on the effects these cases have had on civil liberties, more specifically, on the erosion of certain legal rights such as the suspension of *habeas corpus* and the government seizure of private property. This remains an important study today as our government looks to combat modern day terrorism and has once again decided it needs to grab power from its citizens. Often, in trying to combat terrorism, governments have traditionally curtailed certain civil liberties for the sake of the protection of the country as a whole. In the following

study, I will focus on the United States government's efforts in crisis situations, to determine, when the country returns to civil society, whether or not the government is trying to seize the opportunity to gain more power over its citizens. This is an extremely important study, in the sense that in a liberal democracy, certain checks and balances have been established to ensure, in times of crises or in times of peace, that the government is not abusing the power it holds over its citizens. In ensuring that this is the case, ultimately, we are ensuring that we are a democracy that lives up to the vision of Abraham Lincoln who that believed "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth" (Basler 1953-55, 22). As you will see in the Lincoln case, the civil war would ultimately serve as a test of this principle.

Research Question

The question to be investigated therefore is: when the United States government seizes certain powers from its citizens (i.e. the suspension of writ of *habeas corpus*, ability to seize private property, and ability of military to control courts) for the sake of security will the US government give these powers back to its citizens when the time of crisis is over? These powers have an impact on both the rights and liberties of citizens and, therefore, are extremely important in understanding what the role of government should be in times of crises and more importantly on the limitations of government in modern day society. Modern day threats of terrorism pose the question every day how government should balance the protection of its citizens from terrorists versus the protection of its citizens from its own grasp of power perhaps needed to ensure domestic security. Another question will focus on whether this power grab by the government is

legitimate? Furthermore, can citizen's rights always be secure within a liberal democracy, like the United States?

Hypothesis To Be Tested

My hypothesis is that when the government for security reasons seizes certain powers such as suspending the writ of *habeas corpus*, seizing private property or using military courts to try civilian cases in military courts that it will not give those powers back to its citizens when the time of crisis is over. I believe that this is due to the fact that government uses the opportunities to extend its scope of power over its citizens. Furthermore, I believe the reason for this is the fact that the government in gaining this power realizes it can utilize this power in other facets of domestic or national security, and therefore, is more reluctant to give back these powers.

To test this hypothesis I will perform a case study analysis of when the United States government has seized powers for security reasons. Since martial law is the most obvious grab of power by the government I will assess the following cases of martial law: Lincoln's informal declaration of martial law and the suspension of *habeas corpus* throughout the Civil War era, and martial law in World War II era of Hawaii after the attacks on Pearl Harbor. These cases represent the only major declarations of martial law made in US history. In many much smaller cases martial law was declared in small towns during the Civil War for the sake of protection against the Confederate army, however, there is little to no detailed cases of martial law from these events. Also, many modified, but unofficial forms of martial law have been used to put down many mining strikes throughout the late 19th and 20th centuries. However, as Harold Relyea points out in a

congressional report on government's emergency powers, these events were sporadic and there remain almost no data specifics around each occasion (Relyea 2005, 1).

I plan on using document analysis in looking at the case of Civil War era's declaration of martial law. *The Fate of Liberty* by Martin Neely written in 1991 offers an extremely detailed look at the circumstances around martial law in Missouri, along with a focus on Lincoln's suspension of *habeas corpus* around the country. Also, Lincoln's suspension of *habeas corpus*, and more specifically, all the details that entailed what rights were taken away from US citizens is highlighted within William Rehnquist's *All The Laws But One*. While these materials will be useful in evaluating martial law, I will primarily focus on primary source to determine the effect martial law had on citizen's overall rights, what was restricted by the government, for how long these rights/liberties were restricted, for how long the government had told them these rights would be restricted and finally if all these rights/liberties taken away were ever given back to the citizens. I will be looking specifically to see if and how *habeas corpus* was suspended, and if the government ever seized private property.

In looking at the case of martial law being declared in World War II era Hawaii I will focus mainly on scholarly articles that look at the specific case of martial law in Hawaii. Both Robert Rankin's *Hawaii Under Martial Law*, and his other piece *Martial Law and the Writ of Habeas Corpus in Hawaii* take a very focused look at the month-by-month orders of the commanding military General in Hawaii to see what rights/liberties the government in Hawaii took away. William Rehnquist's *All The Laws But One* also evaluates the judicial cases surrounding martial law in Hawaii, looking at the Hawaii Organic Act, and the Supreme Court decisions in *Kahanamoku* and *Ex Parte Milligan.*

Since these all deal with the powers of the government to suspend *habeas corpus*, I will also evaluate the decisions behind each as a separate case study in evaluating the role of government in declaring martial law. James Garner Anthony's *Hawaii Under Army Rule* will be crucial in the look in Hawaii as it uses the actual documents to show the progression of martial law, however, the focus will remain on primary sources.

I will look at the 2001 passage of the Patriot Act to see what rights were taken away by the government and for what purpose these rights were taken away. I will evaluate as best I can the results that these increased governmental powers have had in the fight against terrorism. *The Patriot Act*, which is a selection of journal articles from different authors, offers arguments and counter arguments for the passage of the Patriot Act. I will also be utilizing various other resources to show both sides as of the argument for/against use of the Patriot Act. I will also consider the circumstances around the passage of the act to see if government has limited its seizure of power. Although I realize that the 2001 passage of the Patriot Act is not martial law in itself, it provides a modern day context for the government's seizure of power. This case is important to evaluate in order to see the modern day expansion of governmental power so that I can conclude whether the government is using powers that it seized through the Patriot Act to fight terrorism or extend further its hand of power over its citizens. This case is also useful in determining, how or if the government has limited its seizure of certain powers from citizens and whether or not this seizure should be considered legitimate.

These particular cases will be extremely useful in answering the question since they encompass all the major cases of martial law and will help in determining whether or not the government gives back power for security reasons. If we can understand the

extent that government uses its emergency powers and whether or not it gives back the powers it had previously seized, we can understand whether or not the recent fears of the passage of the Patriot Act are well-founded. This will be highly effective in determining what to expect if the government in the future has to suddenly grab power for security reasons. It will allow us to understand what limits the government is placing upon itself and what limits we should be placing upon our government. Finally, I will also look towards the future use and extension of the Patriot Act.

Definitions of Martial Law

Since many of these cases deal with martial law it is necessary to first understand exactly what martial law is, how it has been utilized in the past, and how it can used in the future. There are several definitions, legalistic in their nature, which can be applied for use within this essay. Charles Fairman describes the nature of its use; "Martial rule obtains in a domestic community when the military authority rises superior to the civil in the exercise of some or all of the functions of government" (Fairman 1928, 594). Primarily the English utilized the term during the reign of the Tudors and Stuarts. The punishment laid down was "according to the justice of martial law…upon the heads of civilians …and at times and places quite apart from any military operations" (Fairman 1928, 594).

Many times martial law has signified military law, which at the time was a code for the government of the army (Fairman 1928, 594). Fairman points out with regard to martial law that, "the term is synonymous with military government-power exercised during hostile occupation" (Fairman 1928, 594). He points out in turn that the final connotation of the term concerns "the principles of constitutional law governing the use

of military force in the conduct of government in time of public danger" (Fairman 1928, 594). In terms of its use in the United States, the definition commonly accepted is "an extremity where organized military units must take the place of individual citizens, and where the military commander rises superior to the local magistrate" (Fairman 1928, 595).

There are two degrees of martial law within the United States: absolute (punitive) and qualified (preventive). In the absolute form, the military issues and enforces police regulations, arrests and detains without warrant, and takes measures that seem necessary for the prevention or suppression of breaches of peace. Fairman remarks that the qualified form will "refrain from exercising judicial power; on the termination of qualified martial rule, prisoners will be liberated or surrendered to the civil authorities" (Fairman 1928, 595). In the punitive form, martial law comprehends all this and more, including trial and punishment by military authority. Martial law also differs from the suspension of the writ of *habeas corpus*; "the suspension does not *ipso facto* transfer any power from the civil to the military officers…[and] has in fact existed and been upheld by the courts"(Fairman 1928, 595). Fairman's final qualification of martial law "is characterized by restrictions upon the right of assembly and by other measures [that limit civil liberties]" (Fairman 1928, 595).

Corwin utilizes Professor Albert Venn Dicey's claim that, "Martial Law, in the proper sense of the term, means the suspension of the ordinary law and the temporary government of a country or parts of it by military tribunals" (Corwin 1932, 96). He adds on a longer, more historical form of the definition, which derived from England.

> Martial Law, as a name for the common right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any

> violent resistance to the law, [is a power] essential to the very existence of orderly government, and is most assuredly recognized in the most ample manner by law. It is a power which has in itself no special connection with the existence of an armed force. The Crown has the right to put down breaches of the peace. Every subject, whether a civilian or a soldier, whether..."a servant of the government"...or a person in no way connected with the administration, not only has the right, but is, as a matter of legal duty, bound to assist in putting down breaches of the peace...If, then, by martial law be meant the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England (Corwin 1932, 96).

He goes back to the origins of martial law, because in truth, this form of martial law was adopted by the United States after the Declaration of Independence, which will be discussed later. Corwin offers a summation of his argument as to what martial law truly means:

> Martial Law, in other words, is little more than a general term for the operation in situations of public emergency of certain well known principles of the common law-the right of self-defense of the individual, his right-attended by the correlative liability-to abate a nuisance, his right and duty to arrest one whom he knows to have committed a felony or whom he observes in the act of committing a breach of peace. But if the individual exceeds the rights of "self-help" just enumerated, then he himself becomes subject to the penalties of the law notwithstanding the excellence of his motives, and only an omnipotent Parliament can save him from the unpleasant consequences of his zeal by an act of indemnity (Corwin 1932, 97).

Harold Relyea, a specialist in American national government for the Congressional Research Service, claims that martial law "exists when military authorities carry on government or exercise various degrees of control over civilians or civilian authorities in domestic territory" (Relyea 2005, 1). Even more significantly, he states, "[it] may exist either in time of war or when civil authority has ceased to function or has become ineffective" (Relyea 2005, 1). Furthermore, he leans on the aforementioned Constitutional scholar Edward Corwin's understanding of martial law, which he states

provides more important qualifications than his own understanding does. With respect to Corwin, Relyea points to the following passage from Corwin's essay,

> the employment of the military arm in the enforcement of civil law does not invariably, or even usually, involve martial law in the strict sense, for...soldiers are often placed simply at the disposal and direction of the civil authorities as a kind of supplementary police, or *posse comitatus*; on the other hand, by reason of the discretion that the civil authorities themselves are apt to vest in the military in any emergency requiring its assistance, the line between such an employment of the military and a regime of martial law is frequently any but a hard and fast one (Relyea 2005, 2).

Relyea is stating that martial law can also exist when the civil authority directs the military to perform certain police functions within a state or territory. This is not martial law, as seen by Corwin as the type of martial law that exists purely in a strict sense of the term. For the sake of this thesis, I will utilize Relyea's broader sense of the term where in these cases the civil authority tends to guide the military when it comes to police functions within a domestic territory.

These definitions show the historical context of martial law, while also offering a more modern day form of the phrase. The adoption of martial law by the United States from England is important in the sense that we can see how English authorities interpreted martial law and compare it to how the United States has chosen to interpret the use of martial law. Throughout this essay I will utilize the broad definition of martial law in determining whether or not martial law was declared in certain cases. Even though Fairman claims that the suspension of the writ of *habeas corpus* does not necessarily equate to a declaration of martial law, I will look at this suspension because in all these cases it seems to invariably follow it. For this reason I will focus primarily on whether or not a writ of *habeas corpus* was suspended. It should be noted that the suspension of the writ of *habeas corpus* is constitutional in that it states within the section limiting

Congress that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (U.S. Constitution, art.1, sec. 9). I will also look at whether private property was seized, and what other liberties/rights government officials suspended. Also, I think it is important to determine whether or not military authorities ever took over control of the civilian court system.

Review Of The Literature

Hobbes and Locke are especially important to focus on in looking at martial law because both look at the state of nature and how in times of utter chaos and disaster we are able to exit this state of nature. Hobbes describes his state of nature as one in which people live in "...continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short" (Tuck 2003, 89). This concept, he states, is all part of the natural state of man, a state in which we as people are always in the constant search for power or the façade of power to preserve our lives. Man's whole life is fully defined by this quest for power, "So that in the first place, I put a generall inclination of all mankind, a perpetual and restlesse desire of Power after power, that ceaseth onely in Death" (Tuck 2003, 70). Hobbes also introduces the "Right of Nature", which is

> the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgement, and Reason, he shall conceive to be the aptest means thereunto (Tuck 2003, 91).

Hobbes utilizes the passions of man to show how to transform the state of nature in order to build civil society and political order. The passions are the beginning motions of man and based on appetites and aversions, which display all the passions known in human nature. Those which men have an appetite for are considered good and those which men

have an aversion to are considered evil. Hobbes furthers his argument by claiming that fear is the most common passion that humans can always count on (Tuck 2003, 39-40). The only way Hobbes believes to preserve peace is by creating an all-powerful government, one that could possibly go unchecked; the justification for this lies once again in the fact that anything is better than the state of nature.

Alternatively, Locke claims that the state of nature is rather "Men living together according to reason, without a common superior on earth, with authority to judge between them" (Macpherson 1980, 15). Locke states that all men exist in a "natural state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature" (Macpherson 1980, 8). This state is one of equality "wherein all the power and jurisdiction is reciprocal, no one having more than another" (Macpherson 1980, 15). Both Hobbes and Locke agree on the point that the state of nature very quickly will transform into a state of war due to the emergence of property. It needs to be made clear, however, that Locke is in disagreement with Hobbes as he distinguishes between the state of nature and the state of war. While the state of nature is people living together, governed by reason without a common superior, the state of war occurs when people make attempts at force upon other people, without right. In this case, the attacked party has a right to war as the want of a common judge delineates between the state of nature and the state of war, because in this case it involves force without right (Macpherson 1980, 15).

People soon start to become unequal in society and the emergence of money leads to this growing inequality (Macpherson 1980, 25). The law of reason serves to govern men in the state of nature and there stands no judges of people's actions. Substituting for

judges, people hold legislative and executive powers: "Every man hath a right to punish the offender, and be executioner of the law of nature" (Macpherson 1980, 10). In terms of the overall governing of the state of nature, Locke claims that people have power to judge in their own cases. The state of nature is

> [a] state of liberty, yet it is not a state of license: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it (Macpherson 1980, 9).

Although therein lies no legislative body within the state of nature that governs humans, it does have a law of nature which "teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions" (Macpherson 1980, 9). Locke believes this is also the case with government, since the people consent (tacitly or expressed) to be governed. People can only withdraw expressed consent when the government dissolves. If tacit consent has been given, people have the right to rebel if the social contract is broken. Locke places strong emphasis on the limitations of the legislative power; even though he sees it as the "supreme power," "It is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people" (Macpherson 1980, 68). The legislative power should furthermore be limited so that it

> cannot assume to it self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges (Macpherson 1980, 71).

The power to limit the government is key to Locke in ensuring the government does not take away your property. The importance in ensuring this does not occur is the fact that when people have given their consent and are in contract with the government the state of nature transform into civil society. Written laws will ensure further protection from the

government and the right to rebel will help the people if and when a government ever acts unjustly towards them. Locke clearly can see the dangers in Hobbes' view of giving an executive or any other aspect of government supreme power when it come to governing the people. That being said, Locke introduces the use of the prerogative power by the sovereign to act according to discretion without or with law. This power was given since Locke believed that laws were sometimes silent when it came to the protection of the common good. This discretionary power is given to the executive because there are limitations to written law, and to ensure safety an executive must be able to act without having to rely on the law (Macpherson 1980, 84). Furthermore, this is because while the legislative body need not always be in session, the executive is always necessary.

Locke seems to allow some supreme executive power when therein lies a need for quick response to which written law, he believes will not be able to respond quickly enough. In many ways this counters what Locke perceives as the need to protect citizens from an all too-powerful government. This power allows the executive to "act according to discretion, for the public good, without the prescription of the law, and sometimes even against it" (Macpherson 1980, 84) and serves to directly contradict Locke's theory of having a limited government in place for civil society. The prerogative power was set up for the person that has executive power in order to solve the problem of "legislators not being able to foresee, and provide by laws" (Macpherson 1980, 83) for all situations. Locke claims that the discretion that the prince held could only be used for the good of society in cases where the "municipal law has given no direction (Macpherson 1980, 84). Locke is essentially afraid of the case in which the observation of laws could in fact do harm to the preservation of the people within society.

Locke justifies this power as being absolutely necessary toward the preservation of society and furthermore, it must be carried out by the person holding executive power. The executive is to have this power based on the fact that the legislative branch could not possibly be flexible toward the type of accidents, situations, etc. that arise within society, the ones that require proper response regardless of the laws. If we in the U.S. had to rely on Congress to respond to every problem arising within our country, we would be bogged down by the political process and thus would not ensure responsiveness toward the good of our society. Furthermore, it raises the question as to how we could hold Congress responsible? Going along these lines, Locke claims that the legislatures will not be able to foresee the problem with the laws that they put in place for society. Locke justifies the power also, by the fact that "a good prince, who is mindful of the trust put into his hands, and careful of the good of his people, cannot have too much prerogative, that is, power to do good" (Macpherson 1980, 86). He in essence asserts that the good prince will always break the law for the good of the people and thus is not able to constantly place the law into his own hands. The problem with this statement, however, is the fact that it can be used by "a weak and ill prince, who would claim that power which his predecessors exercised without the direction of the law" (Macpherson 1980, 86). The reign of good princes, as seen by precedent, has always been most dangerous to the liberty of subjects.

A bad prince could come along and use the precedent of the prerogative power that was put in place by a good prince and use it to "promote an interest distinct from that of the public" (Macpherson 1980, 86). This power is proven to be potentially dangerous since "wherever the law ends, tyranny begins" (Macpherson 1980, 103). In the case of when a bad prince intends to promote an outside interest, he is "making use of the power

any one has in his hands, not for the good of those who are under it, but for his own private separate advantages" (Macpherson 1980, 101), and thus introduces tyranny to society. Locke claims that the executive's prerogative power will only at most serve to oppress a small group of people within society and thus will not really be too much of a problem. The cornerstone of this thesis will investigate the use of Locke's prerogative power and see how an executive may use this power in times of crisis. Lincoln and Roosevelt both used this power to dictate orders that allow the grabbing of power to ensure domestic security.

While Locke emphasizes the limiting power of government aside from the issue of the prerogative, Hobbes is more than willing to give up most power to ensure protection from the state of nature. His state of nature is one of war that is incredibly brutal and harsh, any form of governance will be an improvement over the state of nature. In order for the state of nature conditions to disappear and transform into civil society Hobbes introduces the Leviathan, "that Mortall God, to which wee owe under the Immortal God, our peace and defence" (Tuck 2003, 120). Hobbes claims the sovereign is able to hold all judicial power including censorship and judgment of all doctrines received by the people (Tuck 2003, 124). Hobbes preferred a monarchy as opposed to any other form of government due to the fact that it is most efficient. Hobbes seems to be implying that it does not matter if your civil liberties are taken away as long as you are removed from the state of nature as you give your rights to preserve your right to life. People should be focused almost purely on preserving their lives, rather than the effect that giving a sovereign absolute power might have.

Hobbes' and Locke's view on the limitations of government's power, especially in times of crisis, is crucial to the understanding of government power in declaring martial law or grabbing power for security reasons. John Locke alludes to Hobbes' argument of an absolute sovereign indirectly, claiming that in the case of Hobbes the solution is essentially worse than the problem itself and in this type of thinking, "men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions" (Macpherson 1980, 50). The key Locke claims to protecting individuals from an all-powerful government is to ensure that citizens always have the right to rebel under the Social Contract. This, however, places the question of the prerogative powers as laid out in Locke's essay at the forefront of how to protect people once again from a sovereign with free reign on the ruling of his subjects.

Brief History of Martial Law Prior to the Civil War

Since there are two martial law cases within this thesis, I thought it would be helpful to provide a brief history of martial law. In looking towards historical instances in which the government has seized power for security reasons we can date this all the way back to the days of the Revolutionary War. As Gene Healy writes, colonists displayed a fear of military intervention in civil affairs. Healy speaks upon the fears of an unchecked military saying, [there is] "no worse state of thralldom then a military power in any government, unchecked and uncontrolled by the civil power" (Healy 2003, 3). In the event of labor disputes, a civil affair, the government would incorporate the emergency use of national troops. Healy points out that this was a frequent occasion throughout the 19th and 20th centuries for "the federal government repeatedly and illegally used troops to

intervene in labor disputes...army regulars engaged in house-to-house searches and assisted in more than a thousand arrests" (Healy 2003, 5).

Healy points to one particular case in Idaho in 1899 to show how martial law was used to detain men without charges for weeks (Healy 2003, 4). This was the case once again in the 1940's where troops would be used to suppress strikes in Indiana, Montana, and in Washington state. The effect of the usage of troops had such a profound affect on organized labor that historian Jerry Cooper remarks it led to "unrestrained federal military intervention...substantially slowed unionization for more than a decade" (Healy 2003, 4). These cases are very sporadic in their occurrence and were not major enough to be considered among the major cases of martial law declaration. Also, gathering information on these very isolated experiences would be extremely difficult.

General Andrew Jackson is believed to be the first person in US history to declare martial law, as the law "was not part of the experience of a great many Americans in the period prior to the Civil War" (Relyea 2005, 2). Relyea claims that in fact in the time prior to the Civil War martial law "was not considered oppressive [which] is shown by the fact that citizens sometimes petitioned for it" (Relyea 2005, 2). The turning point came when martial law was used to provide defense for cities like Philadelphia and Washington D.C. against Confederate Robert E. Lee's invading army (Relyea 2005, 2). Progressively martial law was enacted by Union troops after areas were taken over and "governed under military authority and martial law" (Relyea 2005, 2).

The literature in the following cases presents a different aspect of government we only see every so often, that is government in crisis. The government in most cases, and as argued by Gene Healy and Harold Relyea, will step in and not only take seemingly

protective measures to protect its citizens, but will also reach its hand out to extend its powers for the future. The answer to this debate is highly interesting, especially since we live in a society that can be easily transformed from a civil society to a state of nature in a short period of time. This period of terrorism and hurricane devastation will continue to present arguments that will need to be further analyzed to determine if we are governed by a true Leviathan or rather a government that will sufficiently checks its powers in the interests of its citizens' rights/liberties.

Case Studies

Declaration of Martial Law-Abraham Lincoln

Abraham Lincoln faced many tough decisions in his term, chief of which was whether not to suspend the writ of *habeas corpus*. Lincoln ultimately deemed this as a necessary measure to keep Confederate troops from taking and burning large cities like Baltimore and Philadelphia. He ordered his men the authority to "suspend the writ of *habeas corpus* for the public safety, you, personally or through an officer in command at the point where resistance occurs, are authorized to suspend the writ" (Neely 1991, 8). Lincoln defended his claim of this necessary action at the time by stating, "these measures...whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity" (Neely 1991, 12). The suspension of the writ ultimately led to the arrest of many Maryland legislators, who were at the time believed to be suspicious secessionists (Neely 1991, 15-18).

In Missouri things were even worse Ulysses S. Grant, not possessed of a profound knowledge of the laws of war, and threatened daily with new challenges from the war,

instituted martial law on August 25, 1861 (Neely 1991, 33). As part of his order for the detaining of certain individuals, Grant also claimed that,

> a few leading and prominent secessionists may be carried along, however, as hostages, and released before arriving here. Property which you may know to have been used for the purpose of aiding the Rebel cause will be taken whether you require it or not (Neely 1991, 33).

This official declaration of martial law also led to the first military commission trials, which in itself, Neely claims, is very interesting since, "no such specific catalog of crimes was established for the use of martial law in the Civil War" (Neely 1991, 40). Neely then describes orders from several Generals, showing how each had declared their own separate martial laws within certain regions and how each served to restrict certain individual liberties (Neely 1991, 62-63). Neely concludes his discussion on Lincoln and his suspension of *habeas corpus* and the declaration of martial law by stating "the clearest lesson is that there is no clear lesson in the Civil War- no neat precedents, no ground rules, no map. War and its effect on civil liberties remain[s] a frightening unknown" (Neely 1991, 235).

Upon taking the oath of office on March 4, 1861, Abraham Lincoln was inheriting a presidency that was to face many difficult tasks; chief among those tasks was trying to unite a country on the verge of civil war on the issue of slavery. Upon entering the White House, Abraham Lincoln declared,

> In my hands, my dissatisfied fellow countrymen, and not in yours, is the momentous issue of civil war. The government will not assail you. You can have no conflict, without being yourselves the aggressors. You have no oath registered in Heaven to destroy the government, while I shall have the most solemn one to "preserve, protect and defend" it (Rehnquist 1998, 15).

The crisis in this case started after Lincoln suspended the writ of *habeas corpus* in Maryland on April 27, 1861 (Rehnquist 1998, 15). This is crucial in the sense that

Congress only has the power to actually suspend the writ, "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (U.S. Constitution, art.1, sec. 9). This was done in part because Confederate troops stood poised just miles outside of Washington, along with the fact that Union troops had just been attacked in Baltimore, MD and telegraph and rail lines had been cut around the capital (Rehnquist 1998, 22). With the secession of Virginia occurring just before, Lincoln was afraid Maryland would fall as well. This would leave the seat of power in Washington surrounded by confederate states. Lincoln believed that it was necessary to carry out this typically Congressional power since Congress was in between sessions and was still in the midst of completing Congressional elections (Basler, 1953, 302).

Initially, Lincoln called for only the suspension of *habeas corpus* and not a full-fledged declaration of martial law in Maryland (Neely 1991, 5). At the time, it was said that Lincoln sought the Attorney General's direction as to what course of action he would be allowed to pursue as President (Neely 1991, 4). Lincoln had been advised to suspend the writ of *habeas corpus* in order to prevent the Maryland legislature from meeting due to some concerns that they might also secede, thereby ensuring that they would not be freed the next day only to reassemble once again (Neely 1991, 7). On April 27, 1861 Lincoln authorized General Winfield Scott to suspend the writ of *habeas corpus* in Maryland, stating,

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

> personally or through an officer in command at the point where the resistance occurs, are authorized to suspend the writ (Neely 1991, 8).

The point of this action was to keep the route to Washington clear for military reinforcements and as mentioned to protect the city from possibly being surrounded by confederate states. Lincoln followed this up by declaring publicly the suspension of the writ of *habeas corpus* for the state of Florida on May 10, 1861.

On July 4, 1861, Lincoln called for a special session of Congress in which he presented a formal response for his actions in the case of Maryland and Florida (Neely 1991, 12). In justifying the measures he had taken Lincoln read the following statement to Congress, assuring them of his intentions with regard to the suspension of the writ of *habeas corpus*,

> The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? (Fehrenbacher 1989, 252).

Essentially Lincoln was relying on power that was not given to the executive power, but rather on the legislative power of the United States within Article I Section 9, Clause 2 of the United States Constitution. Within that section it states, "The Privilege of Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (Fehrenbacher 1989, 253). Lincoln's argument was that the Constitution was silent when it came to saying who should receive this power, although most assume it was Congress, Lincoln believed that framers could not expect

Congress to have to authorize this power in all times of rebellion (Fehrenbacher 1989, 254). He also defended his decision by invoking upholding the oath "that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States" (U.S. Constitution, art. II, sect. 1). Lincoln was essentially admitting he violated separation of powers, however, he claimed that the government as a whole was entitled to suspend *habeas corpus*.

In dealing with the West, Lincoln provided less advice. As a result, Lincoln's local military commanders placed many of these regions under martial law. In Missouri, Ulysses S. Grant on August 25, 1861, issued the following command regarding the use of martial law:

> You will march your men through the country in an orderly manner. Allow no indiscriminate plundering-but everything taken must be by your direction, by persons detailed for the particular purpose, keeping an count of what taken, from whom, its value, etc. Arrests will not be made except for good reasons. A few leading and prominent secessionists may be carried along, however, as hostages, and released before arriving here. Property which you may know to have been used for the purpose of aiding the Rebel cause will be taken whether you require it or not. What you require for the subsistence of your men and horses must be furnished by people of secessionist sentiment, and accounted for as stated above. No receipts are to be given unless you find it necessary to get supplies from friends (Neely 1991, 33).

Along with the seizing of private property of would-be rebels, the military commanders allowed for the closing down of all major newspapers, and severely restricted free speech within the territories under martial law (Neely 1991, 33). As a result of Grant's command John C. Fremont officially declared martial law "In this condition, the public safety and the success of our arms require unity of purpose, without let or hindrance, to the prompt administration of affairs. In order, therefore, to suppress disorder, to maintain as far as now practicable the public peace, and to give security and protection to the persons and

property of loyal citizens, I do hereby extend and declare established Martial Law throughout the State of Missouri" (Fehrenbacher 1989, 269). Lincoln questioned Fremont's use of martial law that many believed placed severe restrictions on civil rights (Neely 1991, 35). As a result of Lincoln being preoccupied with the East, martial law within the West led to many of the local military commanders coming down hard on the citizens of Missouri, specifically citizens within the city of St. Louis because that was the scene of widespread revolt, and guerilla violence. Provost Marshal General Barnard G. Farrar ordered the burning of bridges, indiscriminate arrests made, and claimed that soldiers should " ...not hesitate to seize and hold [citizens] property. Where there is no law there is no property. If they deny the power of the Government they are without law and let them feel the consequences" (Neely 1991, 39). Lincoln sternly objected to the seizing of private property for purely political purposes. Instead he claimed that property could only be seized if it was used for military reasons (Fehrenbacher 1989, 268). He stated there could be 'An Act to confiscate property for insurrection purposes" (Fehrenbacher 1989, 265).

Following that month, September of 1861, Fremont took martial law one step further and tried civilians in military courts. He claimed that civil courts were generally unreliable. Military commissions "were used to restrain the civilian populace...deprive Missourians of rights they would otherwise have enjoyed in the absence of U.S. troops" (Neely 1991, 41). There were preset punishments laid out for crimes such as robbery, rape, and murder; and generally these commissions found the defendants guilty in a swift manner (Neely 1991, 42). However, in many cases these decisions handed down by military commissions were subject to judicial review by higher US courts (Neely 1991,

44). While waiting to be tried, civilians were frequently held in military prisons and were often referred to as prisoners of war. Although records cannot be completely uncovered as to how many prisoners were held by the military, it is believed that in Missouri alone there were well over 5,000 prisoners processed through the court-martial system (Neely 1991, 46). Lincoln was, again very apprehensive about this step sensing that this would be an unusual exercise of power beyond the realm of a President (Fehrenbacher 1989, 287). Furthermore, martial law had been in some places for months without legal authority and approval finally came down from Lincoln when he noted "If General McClellan and General Halleck deem it necessary to declare and maintain martial law at Saint Louis the same is hereby authorized" (Fehrenbacher 1989, 268). This was Lincoln's only seeming approval of martial law, other than when William Seward approved of it on behalf of Lincoln.

On September 24, 1862, President Abraham Lincoln extended his order, with the later approval of Congress, regarding the suspension of the writ of *habeas corpus* to include the entire nation (Neely 1991, 52). Around the country, property was seized, newspaper writers were arrested, and military courts were set up for the trials of civilians. This, however, was not a great change from what had already taken place. Even though Lincoln had not declared the writ of *habeas corpus* suspended nationwide, in most areas the citizens' had already been feeling the effects from local military commanders (Neely 1991, 65). The use of provost courts would, however, begin to slow down as "a result of changing War Department policy" (Neely 1991, 64).

To settle the question of the legality of Lincoln's suspension of *habeas corpus*, Congress enacted the *Habeas Corpus* Act of March 3, 1863 (Neely 1991, 68). The

Congress authorized the President the power to suspend the writ of *habeas corpus*, which power had typically been laid in the hands of the legislative branch of the government (Neely 1991, 68). This proclamation suspending the writ of *habeas corpus* had steadily led to an increase in civilian arrests in the South from 1863 to 1865 (Neely 1991, 76). Many of these arrests were for libelous or slander mail, or desertion from the Union army (Neely 1991, 77). On several occasions harsh arrests or seemingly unjustified civilian arrests were made by Generals who were furious about these deserters or conscription in general (Neely 1991, 79).

Another popular practice that the army utilized was the ability to arrest civilians out of pure convenience. This was especially true with the arrests of liquor sellers, as "generals attempted to remedy the perennial problem of a drunken soldiery" (Neely 1991, 86). This action commenced in 1862 and would last well into Reconstruction, which would be followed by an order from the chief provost marshal of Indiana to "issue an order prohibiting the sale of liquor, by any party, to enlisted men" (Neely 1991, 87). Military arrests continued for fraud and corruption, especially among civilians; "civil law here is constructed with meshes large enough to admit the escape" of such men but military law "does not stand upon soulless forms until the soul of justice is eliminated" (Neely 1991, 95). In this sense, the idea of shutting down certain businesses run by civilians was applauded by many and rarely drew criticism. Needless to say, there was little pity or thought of the arresting of these individuals that were suspected of defrauding other civilians or the government. Military arrests and prejudice also proceeded hand in hand with the rise of anti-Semitism within the United States. There were frequent arrests of Jews. Ulysses S. Grant recommended on December 17, 1862 that

""The Jews [be expelled] as a class...from the Department" because they were "violating every regulation of trade established by the Treasury Department"" (Neely 1991, 108). These acts would continue well into 1865 when the Civil War finally came to an end.

On August 25, 1863, things would take a turn for the worse when Brigadier General Thomas Ewing handed down General Order No. 11, calling for the evacuation of four counties within Missouri (Neely 1991, 47). This order required residents to display their loyalty to the Unionist cause or face the loss of their land and their expulsion from the state of Missouri. President Lincoln subsequently approved this action,

> ...with the matters of removing inhabitants of certain counties *en masse*; and of removing certain individuals from time to time, who are supposed to be mischievous, I am not now interfering, but am leaving to your own discretion (Neely 1991, 48).

Martial law remained in effect for over sixteen more months, ending in 1865 in the state of Missouri when President Lincoln encouraged, "neighborhood meetings where old friendships will cross the memory; and honor and Christian Charity will in to help" (Neely 1991, 47).

With the signing of a surrender agreement on April 9, 1865 the Civil War concluded with severe losses to both sides. After the assassination of President Lincoln five days later by John Wilkes Booth, the country entered into a time of Reconstruction, which lasted a total of twelve years. Some records suggest that more military commissions were held in the South until the later years of Reconstruction. Records have been destroyed and Mark Neely notes that we may never know the fate of later military commissions held (Neely 1991, 174). The decision of *Ex Parte Milligan* would put to rest the questions of military tribunals and suspension of the writ of *habeas corpus*. It concluded that suspension of *habeas corpus* is unconstitutional when civilian courts are

still operating; the Constitution only provided for suspension of *habeas corpus* if civilian courts are actually forced closed (EX PARTE MILLIGAN, 71 U.S. 2 (1866)).

Throughout this case, we see that Lincoln was set on the preservation of the union and wanted this to be done in a legal fashion, one that would follow the Constitution. However, if he had to choose between preserving the union and the Constitution, he was willing to choose the former. This is seen throughout his administration, as he was forced to use prerogative powers, temporarily usurping Congress power to suspend the writ of *habeas corpus*, but the action would later be approved by Congress in the form of the passage of the *Habeas Corpus* Act. In terms of martial law, Lincoln really never delved into the issue; rather he left it up to his cabinet, which in term sometimes left it up to local commanders. On a day-to-day basis Lincoln was more concerned with the east and Washington falling to the Confederates. As a result, in the west local commanders would sometimes invoke martial law. These actions were subsequently approved by Lincoln's cabinet and sometimes by Lincoln himself, though it was mostly the former.

While private property was seized, Lincoln ensured it was seized for military use and condemned officers if they were to use it for any other reason. These local military officers who were told to do anything in their means to preserve the union sometimes curtailed civil liberties/rights. However, for being a scenario in which ensuring protection of domestic security, in this case preservation of the union was taking place it seems the government went a long way to try to ensure the legality of its actions. Furthermore, the government did give back power to local authorities in about five years, which seems to be a fair amount of time considering the crisis that had been occurring. Lincoln was always trying to uphold the Constitution, but believed that could be times in which

desperate times called for desperate measures. Failure could be no option, as it would mean the dissolution of the union. Therefore, in this case it can be concluded that the government was cautious in its seizure of power, attempting to limit the scope of power it needed to preserve the union. Furthermore, and perhaps more importantly, the government gave back power to the people after the time of crisis was over, and did so quickly considering the extent of the crisis.

Judicial Review – President Lincoln Case Study

Ex Parte Milligan (1866)

Lambdin Milligan, an Indiana civilian, was a Northerner who sympathized with the South regarding the war effort. Lambdin, along with four others was arrested for conspiracy to steal Union weapons and invade Union prisoner-of-war camps on October 5, 1864 (Harrison & Gilbert 1994, 57). President Lincoln had previously suspended the writ of *habeas corpus*, claiming,

> Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? I think in such a case to silence the agitator and save the boy is not only constitutional, but withal a great mercy (Harrison & Gilbert 1994, 57).

Milligan was then tried for treason, subsequently found guilty by a military court, and sentenced to hang (Harrison &Gilbert 1994, 57). Milligan petitioned the Indiana Federal Court to issue a writ of *habeas corpus*; the decision on issuing the writ was split and Milligan appealed his case to the Supreme Court (Harrison & Gilbert 1994, 57).

The main question at hand was whether the government had the power, in an area free from invasion or rebellion, and not a theater of military operations-an area where the civil courts were in full discharge of their duties-to suspend the constitutional immunities of a citizen and consign him to a military commission for arrest, trial, and sentence

(Nevins 1967-1969). Milligan's main argument to the Supreme Court was the fact that "said Military Commission had no jurisdiction to try him upon the charges preferred...and that the right of trial by jury was guaranteed to him by the Constitution of the United States" (Harrison &Gilbert 1994, 60). Responding to this argument was the government's counsel Attorney General James Speed, who Rehnquist describes as "one of the feeblest men who has addressed the Court this term" (Rehnquist 1998, 120). The main argument put forth by the government was that the military commissions derived their power from the declaration of martial law within Indiana. In saying such, the government added,

> ...the proceedings of the commission could be reviewed only by military authority. To make matters even more explicit, it was suggested that "the officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it..." As for the Bills of Rights, the government argued that these were "peace provisions of the Constitution, and like all other conventional and legislative laws and enactments are silent amidst arms, and when the safety of the people becomes the supreme law (Harrison & Gilbert 1994, 121).

The government's other counsel, Benjamin Butler, further argued that the Bill of Rights to the Constitution had no application in time of war (EX PARTE MILLIGAN, 71 U.S. 2 (1866)).

Arguments in front of the court were concluded on March 13, 1866, and were followed by an order from the court (Rehnquist 1998, 128). The decision handed down was 5-4 in favor of Milligan and ordered that he be realized from military captivity immediately (Rehnquist 1998, 128). The opinions in favor of Milligan were based on the fact that the military commissions had no jurisdiction

> This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any

> offence whatever of a citizen in civil life, in no wise connected with the military service. Congress could grant no such power...One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior (Rehnquist 1998, 130).

The majority also asserted the claim that the writ of *habeas corpus* could only be suspended under Article I, Section 9 of the Constitution, and that martial law "cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and disposes the civil administration" (Rehnquist 1998, 131). Justice David Davis further explained,

> The Constitution...is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government (EX PARTE MILLIGAN, 71 U.S. 2 (1866)).

Overall, the ruling in *Ex Parte Milligan* would stand as one of the most important Supreme Court decisions in history. The importance of the opinion lies in the placing of limitations on the President with respect to the application of martial law and the use of military commissions when civil courts were still able to function, in essence checking his prerogative power. Politically speaking, the Court had deferred this ruling until after Abraham Lincoln had died due to the post-war conditions. Intact was a radical Republican Congress, and the court was reluctant to hand down any decision that would question the legitimacy of military courts, especially in the occupied south. Ultimately, for this reason the President's ability to suspend *habeas corpus* independently of Congress, a central issue, was left unaddressed. The court essentially ruled that no President or any other official within the United States government stood above the United States Constitution or the Bill of Rights.

Declaration of Martial Law in Hawaii

On December 7th, 1941, the lives of many Americans living in Hawaii were turned upside down with the bombing of Pearl Harbor. In addition to the 2,400 lives that were taken that fateful day, countless others would be affected by the prior passage of the Hawaii Defense Act in September of 1941 by a special session of Hawaii Congress. Territorial Governor, Joseph Poindexter, initiated this special session. The general mood within Hawaii prior to Pearl Harbor was one of fear. As a result, this legislation had already set in motion plans for military rule if civilian rule could not effectively run Hawaii after a crisis situation.

Within hours after the attack on Pearl Harbor, Joseph Poindexter issued a proclamation placing the territory under martial law and officially suspended *habeas corpus* (Rehnquist 1998, 212). In making these proclamations, Poindexter "relied on the authority conferred upon him by the Hawaii Organic Act-the charter of the territory enacted by Congress in 1900" (Rehnquist 1998, 212). The Hawaii Organic Act had declared that,

> The Governor...may in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, suspend the writ of *habeas corpus* or place the territory or any part thereof under martial law until communication may be had with the President and his decision thereon made known (Rehnquist 1998, 212).

Following the guidelines put forth by the Hawaii Organic Act, President Roosevelt was advised of the action that Poindexter had taken, and subsequently, approved the action on December 9th (Rehnquist 1998, 212). Furthermore, Poindexter asked Walter Short to exercise all the powers, "normally exercised by the Governor and by the territorial judges" (Rehnquist 1998, 213). In doing such, Poindexter extended the scope of martial law, thus making Walter Short the new official military governor of the region (Rankin

1944, 213). Walter Short affirmed this and "announced that he had "assumed the position of military governor of Hawaii, and taken charge of the government of the territory"" (Rehnquist 1998, 213).

Meanwhile, President Roosevelt dispatched the Roberts Commission to ensure that martial law had been put in place properly in the region and was absolutely necessary (Garner Anthony 1943, 8). Also, the Commission was reassured that martial law would be lifted within a reasonable time frame (Garner Anthony 1943, 9). With this, martial law was taken over by its administrator Walter Short, who had determined that he would rule by decrees. In total about 181 decrees would be handed down by either him or his successors, from the time martial law was started with the attack on Pearl Harbor till it was concluded on July 29, 1944. At the beginning of his campaign as military governor, Short had claimed "he would shortly publish ordinances regulating, among other things, blackouts, meetings, censorship, possession of arms, and sale of intoxicating liquors" (Rehnquist 1998, 213). In enforcing these new regulations, Short announced he would set up military commissions for the trial of civilians (Rankin 1944, 214). Short claimed, "Offenders against these ordinances...would either be severely punished by military tribunal or held in custody until such time as the civil courts would be able to function," thus meeting the standard set forth in *Ex Parte Milligan* (Rehnquist 1998, 213).

In terms of the provost court's setup, Short's executive officer ordered that the courts would be manned by army officers, who "could impose penalties without regard to what the applicable federal statutes or territorial ordinances provided [for]" (Rehnquist 1998, 213). One of Short's first decrees came to Samuel Kemp, Chief Justice of the Territorial Supreme Court, which declared the following:

> Under the direction of the Commanding General, Hawaiian Department, all courts of the Territory of Hawaii will be closed until further notice. Without prejudice to the generality of the foregoing, all time for performing any act under the process of the Territory will be enlarged until after the courts are authorized to resume their normal functions (Rehnquist 1998, 213).

The Army had now officially taken over the courts, would follow the laws of the United States, along with the regulations set forth by military officials. These courts, however, did not have to follow any sentence guidelines of U.S. law and there could impose any sentence it wanted on those it found guilty. Ordinances handed down by Short would come in the form of general orders, which would be posted by the daily press. General Order No. 1 called for the appointment of a committee of prominent citizens, to "advise the military government"; however, this committee would never meet and was never asked its advice (Rehnquist 1998, 213).

With the issuance of General Order No. 2, daily parts of citizen life began to be restricted in Hawaii, as this order allowed for the closing of all saloons, "but by February 1942, a permit system for operation of bars had been established" (Rehnquist 1998, 213). There were many orders that served to effectively regulate civilian life; the Military Governor handed down 163 of these orders (Rankin 1943, 272). 181 orders would be handed down all the way till March 10, 1943. The general decrease of orders can directly be attributed to the fact that "later, it became the policy to issue fewer general orders by combining several regulations...[and] most activities were already controlled by general orders" (Rankin 1943, 272). Over 135 of these orders came within the first nine months of martial law within the area. These orders "extended from the regulation of radios, prices, traffic, and other topics to the establishment of provost courts and military commissions, and the designation of the military officers to serve on them" (Rankin 273,

1943). The majority of the orders concerned aliens, business and financial matters, traffic, blackouts, the production and sale of food supplies, and means of communication (Rankin 1943, 273). Rankin describes the regulation of civilians as such that, "the ordinary life of the civilian was completely regulated" (Rankin 1943, 273). Currency was burned at the Hawaiian sugar mills, replaced by new Hawaiian currency. The newly installed military government regulated every almost every aspect of Hawaiian life it seemed (Rankin, 1943, 273). However, it is important to note that these orders dealt with regulation, not restriction, therefore not seriously curtailing civil liberties in this instance.

In terms of the court system, as mentioned earlier, provost courts were used to enforce all orders. The military commissions and provost courts were "given the power to try and determine offenses, not only against the rules and regulations of the Military Governor, but also against the laws of the United States of the territory" (Rankin 1943, 273). Ordinarily, the punishments were not supposed to be more severe than the punishments that the US courts had set up; however, in several cases the fines and punishments were extreme.[1] Within the same set of General Orders, Rankin writes, "these bodies were given complete liberty 'to adjudge an appropriate sentence'"(Rankin 1943, 274). The courts essentially replicated the army courts set up for court-martial

[1] General Orders No. 4, December 7, 1941. The fines and imprisonment imposed by the provost courts were more severe than those assessed by the civil courts. The provost court in Honolulu imposed fines for misdemeanors from December 9, 1941 to January 27, 1942, that amounted to $16,892. For the same period a year previous, the civil courts, exercising the same jurisdiction, assessed fines totaling $5,861. Of course, the new and very severe traffic and blackout rules were strictly enforced, which might account for most of the increase. *Honolulu Advertiser*, January 31, 1942. The press, however, carried other instances of the severity of punishment, "17 men and women were fined $1,760 for drunkenness," *Honolulu Advertiser*, March 3, 1942. For speeding, a culprit was fined one dollar for each mile per hour he was traveling above the speed limit. *Honolulu Advertiser*, January 8, 1942. A statement made by a provost court judge was to the effect that "Drunkenness in Honolulu has fallen off to about half what it was in pre-war Hawaii, and where they used to be fined $5 and $10,'he added, "they're paying $100.00 and $150.00, which may explain the drop.'" *Honolulu Advertiser*, March 15, 1942. In rural Oahu crime dropped 90% in 30 days. *Honolulu Advertiser*, January 13, 1942. Of course, factors other than the punishment inflicted by the military courts enter into this remarkable drop in crime. Rankin Robert, "Martial Law in Hawaii," *The Journal of Politics*, Vol. 5, pp.273 (1943).

hearings, along with the record of trial and procedure (Rankin 1943, 274). The sentences handed down by the provost courts went into effect immediately, while the decisions handed down by the military courts had to first be approved by the Military Governor. The jurisdiction these courts assumed was based within the General Orders, which states

> Charges involving all major offenses shall be referred to a military commission for trial. Other cases of a lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of five years, and a fine not to exceed $5,000. Military commissions may adjudge punishments commensurate with the offenses committed and may adjudge the death penalty in appropriate cases[2] (General Order No. 4 1941).

With the declaration of martial law, civil courts had been suspended, which "constituted a very delicate problem" as tensions arose over how long these courts should be allowed to function in place of the civil courts (Rankin 1943, 274).

The original call for the suspension of these courts, Rankin believes, "was a war measure arising out of fear that there might be additional attacks and a desire to aid in the defense of the Islands" (Rankin 1943, 274). On December 16, 1942 the Military Governor agreed to permit the civil court to operate on an extremely limited basis. The territorial circuit courts "were allowed to exercise a few of their normal functions but with severe limitations". It was directed that

> no writs of *habeas corpus*, prohibition, *mandamus*[3], injunction or specific performance shall be issued or granted by a circuit court judge, and further provided that no matter shall be heard or entertained which involves the subpoenaing of witnesses (Rankin 1943, 275).

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[2] General Orders No. 4, December 7, 1941.

[3] "A command issuing in the name of the sovereign authority from a superior court having jurisdiction, and is directed to some person, corporation, or, inferior court, within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the superior court has previously determined, or at least supposes to be consonant to right and justice." Lectric Law Dictionary

Pending business was allowed to be heard, but could at the time not be concluded by a jury trial. However, on January 27, 1942, General Orders allowed for the jurisdiction of civil courts to return to their normal functions prior to the declaration of martial law with the following exceptions:

1. No trial by jury shall be had, no session of the grand jury shall be held, nor shall any writ of *habeas corpus* be issued;
2. No circuit court or district magistrate shall exercise criminal jurisdiction except: Subject to the limitations prescribed by Section 4 in respect to the subpoenaing of witnesses, the circuit and district courts may dispose of cases pending on December 7, 1941, either upon plea or by trial whenever the intervention of a jury is not necessary or by order of *nolle prosequi*[4] or dismissal on proper motion;
3. No suit, action or other proceeding shall be permitted against any member of the armed forces of the United States for any act done in line or under cover of duty; nor shall any suit, action or other proceeding be maintained against any person employed or engaged in any occupation, business or activity under the direction of the Military Governor or essential to the national defense for any act done within the scope of such employment;
4. No judgment or default shall be entered against any party except upon proof by affidavit or otherwise that the party is not engaged in military service nor employed or engaged in any occupation, business or activity under the direction of the Military Governor, or otherwise, essential to the national defense; nor shall any subpoena issue to require the attendance as a witness of any person engaged or employed.[5]

The only seeming rationale was that without witnesses or subpoenaing there could be quicker trials of those charged with violating offenses (Garner Anthony 1943, 38). With so many arbitrary arrests, many were kept in jails for three or four days awaiting trial in busy courtrooms.

In defending his position on martial law, and further loosening the hold of martial law on Hawaii, the Military Governor issued General Orders No.133 on August 31, 1942. He explained the need for martial law

[4] "An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further." Lectric Law Library

[5] General Orders No. 57, January 27, 1942.

> Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of *habeas corpus* has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or close them entirely, if that course shall be necessary.[6]

This allowed for the civil courts to return to many of their normal jurisdictional duties, however, the ultimate authority over crimes remained with the Military Governor (Rankin 1943, 278). The rationale behind this claim seems pretty legitimate as the government had already starting making moves to give some power it seized back to the people, as can be seen in returning some power to the civil courts.

For instance, "Strict blackout rules have been enforced with respect to civilians living near a military operation where night shifts worked under glaring lights" (Rankin 1943, 279). Furthermore, many argued that the courts were handing down cruel and unusual punishments. Two cases, cited by Rankin, include a man who was fined $50.00 and charged with assault and battery when he kicked his car because it would not start. In the second case, Rankin claims that the courts were punishing Japanese citizens unnecessarily, especially when Achiro Deki failed to turn in photographs of vessels and installations (Rankin 1943, 279). In this case his punishment was that, "He was sentenced

[6] General Orders No. 133, August 31, 1942.

to five years at hard labor or till the close of war...[the] officer said the offender was "very fortunate in not being put before a military commission and getting shot" (Rankin 1943, 279). This was also some concern, however, as to the military having the power to license the press, as the military used this as a means to control censorship of the press within General Order No. 14 (Garner Anthony 1943, 40). Newspapers took care not to criticize the military Governor or his administration, thus they would face discipline (Garner Anthony 1943, 38). Despite all these harsh regulations and restrictions there appears to be no flagrant violations of civil liberties aside from the possible censorship of the press. With regard to private property, there is no evidence to suggest the government seized any private property; rather it just regulated aliens property. Furthermore, there is one such indication that for any property seized, the Congress would indemnify the losers (Garner Anthony 1943, 20).

With a colorful ceremony, March 10, 1943, marked the return of civil rights to the citizens of Hawaii. The impetus of this change was due to the fact that President Roosevelt had sent a message to the Honolulu Chamber of Commerce that advised the territory to return civil functions to the citizens in a manner that was compatible with the safety of the territory (Rankin 1943, 286). This, however, would not signify the complete abandonment of martial law within the region, it would rather create a much more extensive modification to martial law. Civil officers thanked the military officials for all their help; this included the Territorial House of Hawaii, which signed a resolution thanking the military for its help for guarding the citizens of Hawaii (Rankin 1944, 216). While it may appear that the citizens wanted some form of martial law, in actuality it was the business owners who wanted to keep martial law intact (Garner Anthony 1943, 105).

HONORABLE MEMBERS:

Is there any member of the Territorial Legislature brave enough and willing enough to sacrifice his or her own selfish motives by introducing a resolution requesting the continuance of Martial Law for the duration?

YOU ARE SUPPOSED TO BE THE VOICE OF THE PEOPLE.

Just 4 months and a few days ago when you all were looking for votes you promised, in all your political speeches and particularly in your radio speeches, that if you were elected (and this includes Delegate to Congress Joseph Farrington) you would cooperate with the Military Governor.

The voting public were satisfied at that time with Martial Law as they still are and voted you all into office trusting that you would fulfill your promise of cooperating with the Military Governor.

Now when the return of Territorial Government is just about to JUMBLE all of the good work done by the Military Governor- I WANT TO KNOW WHERE YOU, the Territorial Senators and Representatives stand on the issue of the Territorial Government or the continuation of Martial Law for the duration.

The people want to know (Rankin 1944, 216).

Besides the Chamber of Commerce, many citizens along with the Chief of Police of Honolulu felt that martial law was extremely beneficial to many aspects of Hawaiian society, "In fact many benefits have accrued from military policy…a slum was cleared, hospital facilities were augmented, traffic was rigidly controlled, [and] and summary punishment of offenders reduced the crime rate" (Rankin 1944, 217). Furthermore, many citizens were called in front of a secret town meeting with the government in which many claimed they felt safer with the military in control, than the usual civil government (Garner Anthony 1943, 107).

A compromise between President Roosevelt and the Honolulu Chamber of Commerce resulted with martial law remaining in force, writ of *habeas corpus* remained suspended, however control and regulation over civilian life was ruled through civil law and the civil courts (Rankin 1943, 286). Functions that were returned to the citizens included,

(a) control of prices; (b) rationing of commodities among civilians; (c) control of hospitals, medical personnel, and medical supplies; (d) food production and

> distribution; (e) control of rents; (f) control of transportation and land traffic, except that the Commanding General may prescribe traffic rules during blackouts; (g) public health, sanitation, and the prevention of diseases among civilians; (h) licensing and regulation of businesses; (i) judicial proceedings, both criminal and civil, except any involving members of the armed forces; (j) control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General; (k) censorship of mail from civilians in the territory; (l) control of liquor and narcotics; (m) schools and children; (n) custody of alien property; (o) collection and disposition of garbage and waste; (p) banking, currency, and securities, except the Commanding General may take steps to keep securities and money out of the hands of the enemy (Rankin, 1943, 287).

This revoked all 181 previous General Orders and ordered just 14 new ones, which allowed for the continuance of the suspension of the writ of *habeas corpus* and martial law to remain in effect.

On October 19, 1944 President Roosevelt issued Proclamation No. 2627 providing that, effective Oct. 24, 1944, the privilege of the writ of *habeas corpus* was restored and martial law terminated and directing the Governor to issue a proclamation accordingly (Rehnquist 1998, 214). Governor Emmons did so accordingly and martial law along with the suspension of the writ of *habeas corpus* was lifted within the territory of Hawaii. Martial law in total lasted about two and a half years and affected the lives of many within the region. With the Battle of the Coral Sea and the Battle of Midway taking place in June and July of 1942, it appears that the Pacific War made a turning point in favor of the United States. The Gilbert Islands and Guadalcanal were also successful victories by American forces, further ensuring security for Hawaii. In these two battles, the Japanese Navy had lost over 4 carriers, but more importantly the United States had thwarted an attack that could have paralyzed and potentially destroyed their naval fleet in the Pacific Rim. Without this protection, Hawaii would have been completely open to an

invasion; instead the Japanese were now on the defensive fearing invasion from the Americans.

Overall, this case once again concludes that power was given back to the people in a seemingly reasonable fashion. In all, martial law lasted almost three years, but considering the threat to security it seems that this is not an unreasonable extension of government's power. In fact, when martial law and the suspension of *habeas corpus* were finally terminated, V-E Day and the subsequent surrender of Japan was almost a year away. The first suspension of *habeas corpus* and declaration of martial law had been approved not only by the Congress of Hawaii, but was also approved by President Roosevelt. Prerogative power issues were raised with respect to President Roosevelt's ability to approve of martial law within Hawaii, and furthermore, the power that the Territorial Governor was given during martial law. This power, however, with respect to the Territorial Governor were conferred upon by the passage of the Hawaii Defense Act. With respect to any restrictions on civil liberties/rights, the government did set up provost courts and had censored the press in some measure. Once again, though, one must take into account the threat of invasion by Japan and also the length of these measures.

The government had set up a commission, which was overseen by President Roosevelt that ensured martial law was absolutely necessary and checked up on it periodically. Furthermore, the U.S. government advocated and successfully passed measures to give many powers back to Hawaiian citizens within a year after the attacks on Pearl Harbor. Almost a year after that, President Roosevelt would finally terminate all measures of martial law, including the suspension of the writ of *habeas corpus*, provost courts, and the censorship of press through licensing. The government always seemed to

take care to limit Hawaii's military government by ensuring certain civic leaders and citizens were placed inside this government. These measures seem extraordinary considering the threat that many in the region felt. Therefore, one could conclude that the government in this case did not use the declaration of martial law to extend its grasp of power and gave back power to the citizens of Hawaii in an efficient, fair, and timely conscious manner.

Judicial Review-Hawaii Case Study

Duncan v. Kahanamoku (1945)

Lloyd Duncan had been employed as a civilian shipfitter in Honolulu when he got into a fight with two armed guards in February 1944 (Rehnquist 1998, 216). He was, subsequently, arrested by the military and charged with a violation of a general order which prohibited the assault of any military personnel (Rehnquist 1998, 216). He was found guilty by a military court, over his objection, and was sentenced to six months in prison (Rehnquist 1998, 216). Harry White was a stockbroker, who in August 1942 had been found guilty of embezzling stock belonging to a civilian (Rehnquist 1998, 216). He was found guilty despite the fact that he had objected to the military provost court's jurisdiction, and had demanded a jury trial to no avail. In both of these cases the United States District Court ruled that the military tribunals had no such power and ordered them set free. The Circuit Court of Appeals reversed this decision and ordered the two to prison. The ACLU appealed the case to be heard in the United States Supreme Court

This cases were combined since they both dealt with the question whether or not the Organic Act during the period of martial law gave the armed forces the power to supplant civilian laws and substitute civilian courts with military courts (Duncan v.

Kahanamoku, 327 U.S. 304, 1946). The opinion of Justice Black decided, "the Organic Act of Hawaii, in authorizing martial law, did not intend the military regime to supersede the civilian regime any more than the necessities of war might require" (Duncan v. Kahanamoku, 327 U.S. 304, 1946). Adding on to this justification, the Court "pointed out that at the time the offenses in question were committed, the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area" (Duncan v. Kahanamoku, 327 U.S. 304, 1946). These matters had nothing to do with the military as well, and therefore, it made no sense for these matters to be tried in a military court.

Justice Murphy filed a concurring opinion at the time, whose decision was based along the lines of the decision in *Milligan*, "with its prohibition against trial of civilians by military courts where the civil courts were able to function" (Rehnquist 1998, 217). Chief Justice Stone agreed with the court's decision, but observed

> The full record in this case shows the conditions prevailing in Hawaii throughout 1942 and 1943. It demonstrates from February 1942 on, the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order (Rehnquist 1998, 217).

The members of the court that dissented, Justices Frankfurter and Burton, accused the majority of using, "the hindsight of 1946 to view the situation in Hawaii at the times that Duncan and White were actually tried" (Rehnquist 1998, 217). In conclusion, Rehnquist agrees with the court's decision and points out that these two men "could not possibly be dressed up as threats to national security" adding that "[even] Edwin Stanton[7] at his most

[7] Secretary of War Edwin Stanton, known for arresting and detaining over 13,000 civilians between 1862 and 1865

autocratic during the Civil War never suggested that military commissions try garden-variety civilian offenses against state law or military orders" (Rehnquist 1998, 216).

The 2001 U.S.A. PATRIOT ACT

On September 11, 2001, the United States was forever changed when terrorist hijackers from a group calling itself Al Qaeda highjacked four U.S. commercial aircraft and strategically crashed them into the World Trade Center in New York, and the Pentagon in Washington D.C. Another one crashed in Pennsylvania as it was headed toward the White House. As a result of that day we presently live in an era where terrorism has developed a commonplace fear among US citizens. Certainly if there was a moment and an opportunity for the government to extend its hand of power over its citizens, the time is now when citizens would most allow government powers it did not usually possess. The government reacted to the attacks on September 11th by passing the 2001 U.S.A. Patriot Act, which gave more powers to the intelligence community and others throughout government in the hopes of combating and preventing another terrorist attack on U.S. soil.

The U.S.A. Patriot Act (Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism) of 2001 was passed by both the House and Senate, thus making it a law on October 26, 2001 (U.S. Public Law 107-56). In signing the bill into law, President Bush exclaimed that the Patriot Act "...will help law enforcement to identify, to dismantle, to disrupt, and to punish terrorists before they strike...this legislation gives law enforcement better tools to put an end to financial counterfeiting, smuggling and money laundering" (George Bush, address to the nation, Washington, DC, 2001). The act was aimed at: 1) enhancing domestic security 2)

enhancing surveillance procedures among the various intelligence agencies 3) combating money laundering internationally 4) protecting U.S. borders 5) removing obstacles to fighting terrorism (U.S. Public Law 107-56).

In creating the USA Patriot Act, Congress essentially created two main provisions, changing the standard for granting a FISA (Foreign Intelligence Surveillance Act) warrant, and helping the intelligence community by letting them see records such as credit card receipts, bank records and library records (Yoo and Posner 2004, 28). It further authorized the use of "trap-and-trace" and pen register procedures for Internet surveillance purposes (Bender 2005, 16). These procedures would be utilized for making copies of URL addresses and emails that potential terrorist plotters would visit. The Patriot Act also changed the way FISA surveillance warrants would operate within the United States. Before the Patriot Act, the government was required to show probable cause before issuing surveillance warrants; after the Patriot Act the government can now spy on both foreign and domestic civilians (Bender 2005, 16). The question at the heart of the debate of the Patriot Act is whether or not the government is effectively balancing the need to enhance its power in national security matters and the protection of civil liberties of Americans? Furthermore, is it attempting to provide limits to this extension of power?

As no martial law was declared in this case, I will continue to focus on the effect of this on the writ of *habeas corpus*, the effect on private property, and what other civil liberties have possibly been violated through this act. Furthermore, I will look at use of prerogative powers by President Bush in his terming of 'enemy combatants' in Guantanamo Bay, Cuba and NSA wiretaps. The Patriot Act had no effect of in any way

suspending the writ of *habeas corpus*; this is specifically brought up within the text of the law. In fact, the legislation only stated that the Attorney General without a writ of *habeas corpus* could detain aliens,

> (B) *HABEAS CORPUS* AND JUDICIAL REVIEW-
> (1) IN GENERAL- Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in *habeas corpus* proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by *habeas corpus* petition or otherwise, any such action or decision. (2) APPLICATION-
> (A) IN GENERAL- Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, *habeas corpus* proceedings described in paragraph (1) may be initiated only by an application filed with (i) the Supreme Court;(ii) any justice of the Supreme Court;(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or (iv) any district court otherwise having jurisdiction to entertain it (U.S. Public Law 107-56).

While this may be controversial, the question we are looking at is whether this is suspending the right to a writ of *habeas corpus* for American citizens; in this case there has been no suspension due to the passage of the Patriot Act.

While the Patriot Act had amended certain provisions of the International Emergency Powers Act, giving the President more power when it came to confiscating foreign aliens' private property, this power was used primarily to freeze al-Qaeda and organizations associated with al-Qaeda's bank accounts. There was a section, however, that provided for the seizure of domestic property if a U.S. citizen was found tied to a terrorist organization. The text of this amendment is as follows:

> Section 806 of Patriot Act:
> Section 981(a)(1) of title 18, United States Code, is amended by inserting at the end the following: (G) All assets, foreign or domestic—(i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or

> organization; (ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property; or (iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property (U.S. Public Law 107-56).

There were no records that I could find regarding the utilization of this practice by the government; therefore, it is hard to draw conclusions as to whether domestic citizens' private property has been seized to this day.

The Patriot Act's effect on civil liberties was quite limited considering that this piece of legislation was drafted so quickly during a time of crisis. The government did possess more expanded powers in deciding what was to be considered terrorism and what would not. The Patriot Act allows the government to come in and obtain records such as library files, background of all airline passengers can now be checked, along with FISA issued wiretaps of "suspected" terrorists. It does seem that Congress needs to provide more oversight with respect to the use of surveillance techniques like sneak and peek searches and roving wiretaps. That being said, it does not appear that the passage of the 2001 Patriot Act has led to any major curtailment of civil liberties. While the Patriot Act has brought to justice more than 3,000 people, there have been roughly only 34 credible complaints of discrimination under the Patriot Act (Yoo and Posner 2004, 29).

One of the main objections after September 11th has been the use of the prerogative power by President Bush in his designation of 'enemy combatants'. This was done through a military order on November 11, 2001 that stated

> (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained,

> and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals (Military Order, *supra* note 15, §§ 2-4).

However, this term was only to be used against foreigners who do not hold the same rights as U.S. citizens. There are about 500 detainees scattered throughout the regions of Cuba, Afghanistan, and other countries in the Middle East. Of these 500, there have only been the cases of Jose Padilla and Yaser Hamdi that have claimed they are U.S. citizens being deprived of their rights. Hamdi was held for three years without charges, he sued and had his case heard at the Supreme Court. Justice O' Connor wrote a plurality opinion representing the Court's judgment, which was joined by Chief Justice Rehnquist, Justices Breyer and Kennedy (HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004)). In this she wrote that although Congress authorized detention of unlawful combatants in its Authorization for Use of Military Force, due process required Hamdi a chance to challenge his detention (HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004)). Justices Souter and Bader Ginsburg concurred with the plurality's judgment with respect to due process, but dissented on ruling that AUMF established Congressional authorization for detention of unlawful combatants (HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004)). Justices Scalia and Stevens restricted the executive power of detention stating the government had only two options to detain Hamdi: either Congress must suspend writ of *habeas corpus* or Hamdi was to be tried under criminal law (HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004)). Justice Thomas dissented and agreed with the government entirely based on the view of having important security interests and the President's broad war-making powers (HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004)). As for the Padilla case, the court ruled that he was to be

considered an 'unlawful' combatant, and therefore it did not have to determine his citizenship, that he could still be subject to detention for his role with al-Qaeda.

As further evidence of the government attempting to place limits on this seizure of power, it has placed sunset restrictions on many of the aspects of the Patriot Act, figuring it would let the results of the Patriot Act dictate its own future. The act as a whole has not suspended the writ of *habeas corpus* for American citizens with the exception of the two cases, which were later settled. The Patriot Act has not allowed the government to illegally seize private property and the only provost courts setup were for foreign detainees with again the exception of the two cases. In terms of civil rights/liberties being restricted there seems to be only a few complaints from citizens regarding government abuses. Considering the circumstances surrounding September 11th, the government has time and again limited its powers through sunset provisions in the Patriot Act, has had Congressional oversight in regard to many of the provisions in the Patriot Act, and has been checked in the small minority of abuses by the U.S. Supreme Court.

Furthermore, this case shows that the government does not appear to be using the Patriot Act to extend its powers throughout a period of crisis. There has been no illegitimate seizure of power, no provost courts setup for U.S. citizens, no suspension of the writ of *habeas corpus* for U.S. citizens, and no gross abuse of citizens' liberties/rights. The government has even made efforts to check its power through judicial review, Congressional oversight, and placing sunset provisions upon the Patriot Act so that its actions can be reviewed before renewal. In terms of the President's prerogative powers in this case, the designation of 'enemy combatants' served to detain

mostly foreign enemies, with a minute minority being domestic citizens, which was settled through judicial review. This seems to be legitimate in the fact that foreign terrorists should not be given the same rights or due process as American citizens, especially during a proclaimed 'War on Terrorism'. As a result, I see no reason why the government should not be expected to give back or restrict its own power when the time of crisis is over.

The Future of the Patriot Act- (Patriot Act II?)

There are 13 sections within the Patriot Act that are set to sunset on December 31, 2005; in anticipation of this Congress has started to discuss the introduction of the Patriot II, which could make those 13 sections permanent and add on to the first Patriot Act. Some of the highlights of the Act include making 13 sections of the Patriot Act permanent that are pretty controversial. These sections include the following:

- **Section 201 (And 805)-** "Authority to Intercept Wire, Oral, and Electronic Communications Relating to Terrorism," and "Material Support for Terrorism"
- **Sections 202 and 217-** "Authority To Intercept Wire, Oral, And Electronic Communications Relating To Computer Fraud And Abuse Offenses," and Section 217, "Interception Of Computer Trespasser Communications.
- **Section 204-** "Clarification of Intelligence Exceptions From Limitations on Interception and Disclosure of Wire, Oral, and Electronic Communications."
- **Section 206-**"Roving Surveillance Authority Under the Foreign Intelligence Surveillance Act of 1978."
- **Section 207-**"Duration of FISA Surveillance of Non-United States Persons Who Are Agents of a Foreign Power."
- **Section 209-**"Seizure of Voicemail Messages Pursuant to Warrants."
- **Section 212 and Homeland Security Act Section 225-**"Emergency Disclosure of Electronic Communications to Protect Life and Limb."
- **Section 214-**"Pen Register and Trap and Trace Authority Under FISA"
- **Section 215-**"Access to Records and Other Items Under the Foreign Intelligence Surveillance Act."
- **Section 220-**"Nationwide Service of Search Warrants for Electronic Evidence."

- **Section 223**-"Civil Liability for Certain Unauthorized Disclosures"
- **Section 225**-"Immunity for Compliance With FISA Wiretap" (Adapted from: Electronic Frontier Foundation, *Let the Sun Set on the Patriot Act*)

In addition to these sections being made permanent, there are discussions to expand a program called Total Information Awareness (TIA), in which the government could seek information on citizen's sensitive financial information on the basis that the information is "in connection with their duties to enforce federal law" (Ramasastry 2003, 139-140).

The Patriot Act II tries to combat terrorism by giving government the initiative to collect any DNA information on individuals who are "suspected terrorists"; this includes domestic citizens whom the government deems as terrorists. The new Patriot Act II would also limit or abolish the liability (in terms of prosecution) on the government if they make any kind of mistake in spying on citizens (Ramasastry 2003, 139-140). Furthermore, if citizens ever find out that they have been spied on by the government they will never be able to let anyone know due to a clause within the act that gags the person, with a threat of criminal prosecution (Ramasastry 2003, 139-140). Whether or not the Patriot Act II will ever be signed into law will remain a mystery until probably later on this year or early next year. A bill regarding this action still needs to pass in the Senate, where Democrats have promised to kill the bill through filibuster so it remains to be seen whether some Patriot Act powers will be renewed. It remains difficult if not altogether impossible to evaluate whether the threat of terrorism has subsided; it appears it has not as threats continue to be made by al-Qaeda and other groups with regard to the United States. What is important, is that the government continue to safeguard liberties and check its powers through sunset provisions, judicial review, and perhaps most

importantly Congressional oversight. Only then can we be rest assured that the government will continue to not extend its grasp of power in this case.

Conclusion

Overall, in looking at these case studies I wanted to determine when our nation is thrust into a state of nature, whether or not the government seizes the moment, and in ensuring our security, tries to extend its hand of power over its citizens. When in a state of nature, Thomas Hobbes and John Locke suggest different means for ensuring the return to civil society. While Locke believes the use of rebellion by the people is to be useful when the social contract is broken, he implores the use of the prerogative power by the executive to respond to crises when laws cannot react quickly enough. He also points out how government should always have limitations upon it, which seems contrary to his use of the prerogative power by an executive.

Thomas Hobbes, however, believes in the use of an absolute sovereign, a Leviathan, in the make up and enforcement of laws to ensure security. His belief is based on the fact that anything is better than having to live within the state of nature. This includes the use of any form of government, preferring monarchy only due to its efficiency, to rule and govern the people. The absolute sovereign is the supreme judicial official and always has the right to censor citizens in the effort to maintain civil society. An apparent theme throughout these case studies that I believe Hobbes would agree with is the push for the restrictions of *habeas corpus* and the set up of provost courts when a state of nature seems to exist, he would seemingly disagree that the government give back power or limit its powers in any form.

In looking at these particular case studies, I believe that my hypothesis was incorrect in the fact that in all three of these cases the government gave back power. It did so, always conscious of limiting its own powers, citizens' rights/liberties, and doing so in a timely fashion when it felt that the threat subsided. In the Civil War case when Abraham Lincoln had suspended the writ of *habeas corpus* in order to ensure the preservation of the Union. He enacted Locke's prerogative power due to the fact that Congress was not in session and was afraid that the seat of national power would fall to the confederates. He justified his actions to Congress, which later approved with the passage of the *Habeas Corpus* Act. In terms of martial law, Lincoln left these decisions up to his cabinet, which in some cases authorized its use in the West. Lincoln was primarily concerned with the situation of secession in the East and perhaps made the mistake of letting his administration decide whether or not local commanders could declare martial law.

While private property was seized, Lincoln ensured it was seized for military use and condemned officers if they were to use it for any other reason. These local military officers who were told to do anything in their means to preserve the union sometimes curtailed civil liberties/rights. Lincoln tried to ensure domestic security, while also making sure the actions were legal and limited in scope. Ultimately, the government did give back power to local authorities in about five years, which seems to be a fair amount of time considering the crisis that had been occurring. Lincoln was always trying to uphold the Constitution, but believed that could be times in which desperate times called for desperate measures. Failure would have resulted in the dissolution of the union and Lincoln believed that the Framers of the Constitution would have never stood for that.

Furthermore, the decision handed down by the Supreme Court in *Ex Parte Milligan* held that military tribunals could not try civilians in areas where civil courts were open, even in wartime. More importantly, it reinforced the concept that no branch of government within the United States government stood above the United States Constitution or the Bill of Rights.

In the case of the territory of Hawaii declaring martial law, this case once again concludes that power was given back to the people in a seemingly reasonable fashion. In all, martial law lasted almost three years, but considering the threat to security it seems that this is not an unreasonable extension of government's power. In fact, when martial law and the suspension of *habeas corpus* were finally terminated V-E Day, and the subsequent surrender of Japan was almost a year away. The first suspension of *habeas corpus* and declaration of martial law had been approved not only by the Congress of Hawaii, but was also approved by President Roosevelt. Prerogative power issues were raised with respect to President Roosevelt's ability to approve of martial law within Hawaii, and furthermore, the power that the Territorial Governor was given during martial law. This power, however, with respect to the Territorial Governor were conferred upon by the passage of the Hawaii Defense Act. With respect to any restrictions on civil liberties/rights, the government did set up provost courts and had censored the press in some measure. Once again, though, one must take into account the threat of invasion by Japan and also the length of these measures. Furthermore, those trials held in provost courts would ultimately be held invalid in the Supreme Court case of *Duncan v. Kahanamoku*, thus extending Fifth, Sixth, and Seventh amendment guarantees to territories like Hawaii.

The government had set up a commission, which was overseen by President Roosevelt, that ensured martial law was absolutely necessary and checked up on it periodically. Furthermore, the U.S. government advocated and successfully passed measures to give many powers back to Hawaiian citizens within a year after the attacks on Pearl Harbor. Almost a year after that, President Roosevelt would finally terminate all measures of martial law, including the suspension of the writ of *habeas corpus*, provost courts, and the censorship of press through licensing. The government always seemed to take care to limit Hawaii's military government by ensuring certain civic leaders and citizens were placed inside this government. These measures seem extraordinary considering the threat that many in the region felt. The government did not use this to extend its hand of power and gave back this power in a timely manner in accordance with the level of threat from the Japanese.

Finally, in bringing a more modern day aspect to this study, I sought to analyze the usage of the 2001 Patriot Act within the United States. The act, a response mainly to the events of September 11th, 2001, sought to strengthen the bonds of intelligence gathering within and outside of the United States. The government would be allowed to suspend the writ of *habeas corpus*, or set up military courts; however with the exception of Hamdi and Padilla, these powers were only to be used on foreigners who are not to be given the same rights/liberties as U.S. citizens. Through President Bush's prerogative powers have been questioned for use of the term "enemy combatant", the government has only seized foreigners under this designation, with the exception of Hamdi and Padilla once again. In those cases, the power of judicial review would serve to check the executive and fix the issue with regard to American citizens being detained without due

process. In terms of the legislation itself, private property of U.S. citizens could only be seized if that person was found tied to a terrorist organization. While the Patriot Act appears to have increased surveillance powers of the government on both domestic and foreign citizens, it has done so with a great deal of caution. The government has placed sunset provisions on the Patriot Act so that its powers may be reviewed; it has also authorized the use of Congressional oversight to ensure civil rights/liberties are not being curtailed.

Today, the future of the Patriot Act, or as described, the introduction of Patriot Act II, remains rather murky as the government continues to carefully wage a 'War on Terrorism', while at the same time ensuring the limitation of government's powers. While it does not appear the threat of terrorism is going away anytime soon, it also appears that the government thus far has done a good job in not trying to extend its hand of power. While these powers have yet to be given back, one can remain encouraged by the fact that the government has been Constitutionally aware of its actions and has set sunset provisions on its powers. When the threat of terrorism does subside, I believe the government, as in the other two cases, will give back power to the citizens, probably through sunset provisions in legislation. Thus far, however, the government has done a good job ensuring separation of powers, as well as maintaining a system of checks and balances, further ensuring that the use of the prerogative powers by the President does not overstep his Constitutional bounds. This the government as a whole has done, while being in a crisis situation, one in which it tries to protect U.S. citizens from terrorists, and ultimately itself.

This study joins with John Locke and points to the importance of challenging government, no matter how dire the crisis, for as Benjamin Franklin put it "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety" (Franklin, Historical Review of Pennsylvania). We should hold this especially true now in the age of terrorism and continue to ensure that any legislation aimed at providing the government with an extended scope of power over its citizens should have sunset provisions or other checks put in place. That being said, in a historical context, we can be somewhat put at ease by the fact that when the government has had to previously face crisis situations, it has done so without trying to exploit its citizens and extend its hand of power.

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