



1-1-2012

The Constitution in Times of National Crisis: Contextualizing Post-September 11 Constitutional Ramifications

Julia L. Ernst

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Ernst, Julia L. (2012) "The Constitution in Times of National Crisis: Contextualizing Post- September 11 Constitutional Ramifications," *North Dakota Law Review*. Vol. 88 : No. 1 , Article 3.
Available at: <https://commons.und.edu/ndlr/vol88/iss1/3>

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THE CONSTITUTION IN TIMES OF NATIONAL CRISIS:
CONTEXTUALIZING POST-SEPTEMBER 11
CONSTITUTIONAL RAMIFICATIONS

JULIA L. ERNST*

ABSTRACT

In response to the tragic events on September 11, 2001, the United States government has shifted the balance between individual liberties, on one hand, and national security concerns, on the other. Some of those changes raised important questions concerning the extent to which this experience has affected the United States Constitution and the values it embodies. To better understand the frictions between national security and fundamental liberties, we must place them into historical context. This Article examines these issues and is based on a presentation for a symposium in Bismarck, North Dakota, entitled *September 11 Ten Years Later: Impact on the Heartland*. After setting the stage for this Article in Part I, Part II examines the underpinnings of the United States Constitution and the fundamental liberties that it seeks to protect. Part III provides a historical perspective demonstrating that United States governmental policies have swung like a pendulum, both enhancing and constricting civil liberties. Part IV considers reactions in the wake of September 11. Finally, Part V suggests this crisis may be different from previous national crises, and questions whether the pendulum will make a full trajectory back to protecting civil liberties.

* Assistant Professor, University of North Dakota School of Law; LL.M., Georgetown University Law Center; J.D., University of Michigan School of Law; B.A., Yale University. I am grateful to the participants at the Central States Law School Association Annual Meeting at University of Toledo College of Law, to my parents, and to Amanda Brossart, Outside Articles Editor of the *North Dakota Law Review*, for insightful comments and suggestions to improve this Article. Bethany Myles provided excellent research for this Article as a Burtness Scholar Research Assistant.

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I. INTRODUCTION

Last year marked the eleventh anniversary of the tragic events of September 11, 2001. Programs across the United States commemorated the anniversary. The organizer of one of these events, Clay Jenkinson, invited me to speak at a symposium in Bismarck, North Dakota, held on September 11, 2011, entitled *September 11 Ten Years Later: Impact on the*

Heartland.¹ He asked me to discuss the strains on the United States Constitution that have arisen in the aftermath of the attacks, particularly framing them within the historical context of the Constitution – including the values it embodies and its global impact upon the evolution of democracies around the world. He also asked me to highlight other national crises the United States has faced over the last two centuries, and the constitutional tensions they have caused.² This Article arises out of that presentation.³

As people throughout the country continue to reflect upon the devastating atrocities that occurred on September 11, 2001, the country also persists in grappling with the lasting impact these terrorist events made upon the nation. Some changes in response to September 11 have shifted the balance between individual liberties, on one hand, and national security concerns, on the other. In particular, responses by the United States government have raised important questions concerning the extent to which this experience has affected the United States Constitution and the values it embodies.

How have the tragedies of September 11 and their aftermath challenged the rights and freedoms that are enshrined in the United States Constitution? Since September 11, 2001, and especially throughout the year surrounding the eleventh anniversary, the United States has engaged in debates over issues including the Patriot Act⁴ and the amendments to the Foreign Intelligence Surveillance Act,⁵ the expansion of the definition of terrorism,⁶ the broadened ability of law enforcement to obtain e-mail

1. Symposium, September 11 Ten Years Later: Impact on the Heartland, September 9-11, Bismarck State College (2011). The symposium was hosted by Bismarck State College with The Dakota Institute of the Lewis and Clark Fort Mandan Foundation. See *September 11 Ten Years Later: Impact on the Heartland*, <http://sandbox.bsccsymposium.org/> (last visited June 4, 2012).

2. Since I teach Constitutional Law at the University of North Dakota School of Law, I was delighted to present on this topic. During the first few weeks of class, my students study the origins of and democratic values enshrined within the United States Constitution and its global impact. Later in the semester, they explore some of the post-September 11 tensions between individual rights and national security. Therefore, I extend my deepest gratitude to Clay Jenkinson and the other symposium organizers for providing me with this wonderful opportunity to discuss these issues with the symposium participants.

3. This Article does not purport to provide a comprehensive examination of the topics it covers. Instead, it encapsulates a presentation that was intended to provide a primarily non-legal audience with a brief overview of the issues, in the hopes of sparking further exploration and debate. Several audience members requested a copy of the presentation, providing the impetus for this Article.

4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”) of 2001, Pub. L. No. 107-56, tit. III, 115 Stat. 272 (Oct. 26, 2001).

5. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1885(c) (2006), [hereinafter FISA].

6. USA PATRIOT Act of 2001 § 802.

communications, Internet activities, library records, and other information from people who are not suspected of wrongdoing,⁷ and the increased discretion of immigration officials to detain and deport people who have immigrated to our country.⁸ Debates have also emerged over the restrictions on habeas corpus under the Patriot Act and subsequent acts,⁹ enhanced interrogation techniques,¹⁰ indefinite detention of detainees without due process protections,¹¹ and the list goes on.

To better understand the frictions between national security and fundamental liberties, we must place them into historical context. Why was the Constitution adopted in the first place, and what principles does it embody that have been so cherished by the people of the United States? Moreover, what tensions have arisen under previous national crises that have tested the Constitution and its ideals since the founding of our nation? This Article, based on the presentation for the September 11 symposium, provides a brief glimpse into some possible responses to these questions. This introduction sets the stage by explaining its genesis in the event commemorating the eleventh anniversary of the tragedies and their impact on the heartland of America. Part II examines the underpinnings of the United States Constitution and the fundamental liberties that it seeks to protect. Part III provides a historical perspective demonstrating the United States governmental policies have swung like a pendulum toward stronger measures to enhance national security, but which constrict civil liberties, during and immediately after national crises. This section also describes how the hypothetical pendulum has oscillated back toward greater protections of civil liberties once the crises have abated. Part IV considers reactions in the wake of September 11 and briefly summarizes some of the concerns that have been raised about the government's responses to these events. Part V concludes by suggesting that this crisis may be different from previous national crises, and if so, questions whether the pendulum will make a full trajectory back to protecting civil liberties. The Article includes a particular focus on specific events in North Dakota and the surrounding region impacting and illustrating the swinging pendulum between protection and liberties.

7. *Id.* § 215 (amending the Foreign Intelligence Surveillance Act, tit. V, § 501(a)(1)).

8. *Id.* § 411, 412.

9. *Id.* § 412; Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)).

10. *Developments in the Law – Presidential Authority, Presidential Power and the Office of Legal Counsel*, 125 HARV. L. REV. 2090, 2103 (2012).

11. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272; Detainee Treatment Act of 2005, Pub. L. No. 109-163, tit. IX, § 1405, 119 Stat. 3136, 3476 (2006) (authorizing the Combatant Status Review Tribunals).

II. GENESIS AND GLOBAL IMPACT OF THE UNITED STATES CONSTITUTION

September 11 has been considered as an attack upon the core of the United States, not only upon its people and upon its physical infrastructure, but also upon its democratic values and freedoms – the very principles upon which the nation was founded.¹² Regardless of whether this perception is valid,¹³ the attacks have had significant, concrete repercussions regarding constitutional freedoms within this country. To provide a broader perspective through which we can relate to the events of September 11 and their repercussions, it is crucial to recall the founding of the United States and the origins of its Constitution. This section will examine the genesis of the Constitution and the freedoms for which the American Revolutionaries fought in the 1700s, which are the same fundamental liberties for which our country's military personnel and their families continue to make countless sacrifices to preserve.

A. ORIGINS OF THE UNITED STATES CONSTITUTION

The United States was founded upon the fundamental principles of limited government, checks and balances, individual liberty, due process of the law, and the precept that no person is above the law.¹⁴ Through their legal heritage from England, the founders of our nation embraced the concepts ensconced in the Magna Carta,¹⁵ written nine hundred years ago, as well as the English Bill of Rights,¹⁶ adopted less than a century before our own revolution, indicating individuals have certain fundamental rights, and also have certain protections against unwarranted governmental intrusion. In addition to these documents, the drafters of the Constitution

12. Richard Briffault, *Facing the Urban Future After September 11, 2001*, 34 URB. LAW. 563, 580 (2002) (“The September 11 attacks have been characterized as an attack on democracy itself.”).

13. Robert MacCulloch & Silvia Pezzini, *The Roles of Freedom, Growth, and Religion in the Taste for Revolution*, 53 J. L. & ECON. 329, 329 (2010) (“For example, some have argued that the origins of the September 11 World Trade Center attack lie in the perceived illegitimacy of the Saudi government and its relationship with the United States.”).

14. *See generally* U.S. CONST.

15. Magna Carta, 1297, 25 Edw. I, c. 9 (Eng.). The Magna Carta was granted in 1215 by King John of England. *See generally* BOYD CUMMINGS BARRINGTON, *MAGNA CHARTA* (1920); ANNE PALLISTER, *MAGNA CARTA: THE HERITAGE OF LIBERTY* (1971); WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* (1965); LOUIS B. WRIGHT, *MAGNA CARTA AND THE TRADITION OF LIBERTY* (1976); R.H. Helmholtz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999).

16. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne (Bill of Rights), 1688, 1 W. & M., c. 2 (Eng.) [hereinafter English Bill of Rights]. *See* Yale Law Sch., Lillian Goldman Law Library, *The Avalon Project*, http://avalon.law.yale.edu/17th_century/england.asp (last visited June 4, 2012).

may also have drawn upon other British laws, such as the Petition of Right of 1628, and the 1679 Habeas Corpus Act.¹⁷ Taken together, these historic documents guaranteed that people could not be punished by the government arbitrarily, but may only be punished through the law of the land, and by due process of that law.¹⁸ They limited the powers of the government and the king, and established that even the king is not above the law.¹⁹ The colonists brought with them these legal doctrines from England, along with others, such as the guarantee of accused persons to a trial by jury, and the right to petition for a writ of habeas corpus to seek release from unlawful detention.²⁰

The founders of the United States, based upon their experiences with an increasingly despotic king who rejected many of these principles, considered these and other rights to be vital safeguards of the people's freedom from arbitrary governmental authority, and brought these principles into our system of government.²¹ The United States Constitution – the oldest written constitution in the world²² – was adopted by the Constitutional Convention in 1787 and ratified by the states in 1788.²³ The Bill of Rights was added in 1791 as the first ten amendments to the Constitution.²⁴ Our Constitution establishes the separation of powers among the three branches of government, providing an elaborate system of checks and balances, so that no one branch of government will become too powerful and become oppressive of individuals within the United States, leading to tyranny over the people and unwarranted restrictions on their

17. Kathleen A. Keffer, *Choosing a Law to Live by Once the King is Gone*, 24 REGENT U. L. REV. 147, 151 (2011). See generally Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 BYU J. PUB. L. 87 (2011).

18. See, e.g., Magna Carta 1225, 9 Hen. 3, c. 29 (“No free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”).

19. King John entered into the Magna Carta as an agreement with the nobles that the king would abide by the laws of England. Moreover, the English Bill of Rights established that the monarchy could not suspend the laws. Keffer, *supra* note 17, at 151-52.

20. Magna Carta 1297, 9 Hen. 3, c. 29; Magna Carta 1225, 9 Hen. 3, c. 29; English Bill of Rights, *supra* note 16. See generally 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769); Keffer, *supra* note 17, at 152; SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 33-35 (2003).

21. Keffer, *supra* note 17, at 147; see also Payandeh, *supra* note 17, at 87.

22. RUDIGER WOLFRUM & RAINER GROTE, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1971 & Supp.) (providing the dates upon which nations adopted their constitutions).

23. Eric R. Nitz, *Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutions to Interpret the Constitution*, 100 GEO. L.J. 295, 297 & n.6 (2011).

24. 1 ANNALS OF CONG. 708 (1789).

freedoms.²⁵ The Constitution also enshrines individual rights, such as the right to freedom of speech, to petition for habeas corpus, to protection against cruel and unusual punishments, to equal protection of the laws, and not to be deprived of life, liberty, or property without due process of law.²⁶ As one specific example, the Fourth Amendment to the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁷

In sum, the Constitution guarantees the protection of the individual against undue intrusion and overreaching from the government.

B. INSPIRATION FOR THE PROLIFERATION OF DEMOCRACIES AND CONSTITUTIONALISM

The principles embodied in our Constitution, as well as other foundational documents such as the Declaration of Independence, have resonated in countries throughout the globe, helping spur an outpouring of constitutionalism, democracy, freedom, equality, and systems of government that are accountable to the people in many countries during the two centuries since its adoption.²⁸ In 1821, in correspondence between two of our founding fathers, Thomas Jefferson wrote to John Adams: “The flames kindled on the Fourth of July, 1776, have spread over too much of the globe to be extinguished by the feeble engines of despotism; on the contrary, they will consume these engines and all who work them.”²⁹

The United States Constitution and the principles of democracy, consent of the governed, restriction of governmental power, freedom of the press, and individual liberty, helped spur the revolutions of 1848, known as

25. See generally U.S. CONST. art. I-III; see also Gary Thompson, *Guantanamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195, 1197 (2011).

26. U.S. CONST., art. I, § 9, cl. 2, amend. I, VIII, XIV.

27. U.S. CONST. amend. IV.

28. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1166 (2011); Larry Kramer, *Political Organization and the Future of Democracy*, reprinted in JACK M. BALKIN & REVA B. SIEGEL, *THE CONSTITUTION IN 2020* (2009).

29. Letter from Thomas Jefferson to John Adams (Sept. 12, 1821), reprinted in 2 THE ADAMS-JEFFERSON LETTERS, 1812-1826, at 575 (Lester J. Cappon ed., 1959).

the Spring of Nations.³⁰ During this time, starting in France and spreading across Europe and Latin America, people rose up against the traditional, autocratic ruling authorities.³¹ The Constitution provided inspiration for these democratic uprisings.³² Although in most of those countries, it took many years to establish a stable democratic system of government, the seeds of democracy had been planted and gradually took root.

The twentieth century witnessed waves of democracy and the adoption and strengthening of written constitutions granting rights to citizens spreading around the globe.³³ The dissolution of the Ottoman and Austro-Hungarian empires after World War I led to at least nominal democracies in many of the new nation-states arising throughout Europe.³⁴ Although the Great Depression in the 1930s brought a retrenchment of fascism and dictatorships,³⁵ the outcome of World War II and subsequent decolonization of newly independent countries swung the pendulum back toward a resurgence of democracies,³⁶ as did the rise of democracies in Latin America during the 1980s,³⁷ the democratic revolutions across Eastern Europe in 1989 and the fall of the Soviet Union in 1991.³⁸

Moreover, over time, governments that were initially more democratic in name than in substance have gradually become more truly democratic.³⁹ According to Freedom House,⁴⁰ as of 2011 there were 117 electoral

30. Rett R. Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91, 99 (1991).

31. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1093-100 (2010).

32. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 7 (2009).

33. See generally Law & Versteeg, *supra* note 28.

34. Franck, *supra* note 28, at 53-54.

35. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1797-98 (2010).

36. Franck, *supra* note 28, at 53-54.

37. Robert F. Turner, *Review Essay: Coercive Court Action and the Law Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law*, 20 YALE J. INT'L L. 427, 440 n.73 (1995) ("In 1979, perhaps a third of the people of Latin America lived under governments that were arguably democratic. By 1986, that figure exceeded 90 percent.").

38. *Id.* at 440.

39. See generally Law & Versteeg, *supra* note 28. For a discussion of some of the difficulties facing countries in the process of democratization, see generally Geoff Gentilucci, *Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile's Augusto Pinochet and South Korea's Chun Doo-Hwan and Roh Tae-Woo*, 5 CONN. PUB. INT. L.J. 79 (2005); Muna Ndulo, *The Democratization Process and Structural Adjustment in Africa*, 10 IND. J. GLOBAL LEGAL STUD. 315 (2003).

40. Freedom House is a non-profit, public interest organization based in the United States that "supports democratic change, monitors freedom, and advocates for democracy and human rights." See *Jyllands-Posten Foundation Contributes \$50,000 to Freedom House*, FREEDOM

democracies out of 195 countries (60%), whereas in 1989 only 69 out of 167 countries could claim this status (41%).⁴¹ As a historical comparison, in 2011 Freedom House rated 87 countries as “free” (45%), and 60 as “partially free” (31%) out of 195 countries, with only 48 countries rated as “not free” (24%).⁴² By contrast, in 1972 only 44 countries were rated as “free” (29%), and only 38 were “partially free” (25%) out of 151 countries, with 69 countries rated as “not free” (46%).⁴³ Most democracies today have written constitutions, many of which have been influenced by the United States Constitution and constitutional law jurisprudence.⁴⁴ Furthermore, constitutions have increasingly become more protective of individual rights and freedoms.⁴⁵

HOUSE, <http://www.freedomhouse.org/article/jyllands-posten-foundation-contributes-50000-freedom-house> (last visited Oct. 31, 2012). According to its website:

We support nonviolent civic initiatives in societies where freedom is denied or under threat and we stand in opposition to ideas and forces that challenge the right of all people to be free. Freedom House amplifies the voices of those fighting for freedom in repressive societies. We work directly with democracy and human rights advocates in their own countries and regions. These reformers include human rights defenders, civil society leaders and members of the media. Freedom House’s programs provide these advocates with resources that include training, expert advice, grants and exchange opportunities. We press the United States, other governments, international institutions and regional bodies to adopt consistent policies that advance human rights and democracy around the world.

About Us, FREEDOM HOUSE, <http://www.freedomhouse.org/about-us> (last visited Nov. 7, 2012).

41. ARCH PUDDINGTON, *FREEDOM IN THE WORLD 2012: THE ARAB UPRISINGS AND THEIR GLOBAL REPERCUSSIONS* 29 (2012), available at http://www.freedomhouse.org/sites/default/files/inline_images/Electoral%20Democracy%20Numbers%20FIW%201989-2012--Draft_0.pdf.

42. *Id.*

43. *Id.*

44. See generally William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human*, 15 *NOVA L. REV.* 1 (1991); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932 (2010); Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 *WISC. L. REV.* 597; Law & Versteeg, *supra* note 28.

There is a growing literature on the influence of American constitutionalism on other nations. That literature usually focuses on the construction of domestic authority and the degree to which other nations have patterned their constitutions on that of the United States. The ongoing work of the Comparative Constitutions Project takes a different approach, measuring the incidence of common provisions in all national constitutions since 1789. The connection between the very process of constitution-making and recognition, however, suggests a previously unrecognized influence of the United States on global constitutionalism — not necessarily its particular structures or doctrines, but the drafting and implementation of a constitution itself as part of the process of obtaining international recognition.

Golove & Hulsebosch, *supra* note 44, 1062 n.451 (citations omitted).

45. See generally Law & Versteeg, *supra* note 28.

One phenomenon that can easily be documented, for example, is rights creep, or the fact that the number of rights found in the average constitution is increasing over time. A related phenomenon is that of generic rights constitutionalism: a growing set of rights is common, or generic, to nearly all constitutions.

Additionally, the past year has witnessed the Arab Spring – a new wave of protests sweeping through the Middle East, rising up against dictatorships and demanding democratic reforms.⁴⁶ Throughout history, millions of people have given their lives in their fight for their freedom and their rights, and many more continue to make tremendous sacrifices today.

C. INFLUENCE ON HUMANITARIAN LAW AND HUMAN RIGHTS

In addition to the rise of democracies in countries around the world, the United States Constitution and the principles underpinning it have also helped shape the development of international law, particularly international human rights and humanitarian law.⁴⁷ For example, the Geneva Conventions, to which the United States is a party, set forth the standards of humanitarian treatment that countries must provide to prisoners of war, such as the right to a fair trial before a regularly constituted court for persons accused of war crimes, protection of the rights of prisoners, and the prohibition of torture and inhumane treatment.⁴⁸ The rights espoused in the

Id. at 1247; *see also* Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331 (2012).

[C]ountries that are newcomers to the rule of law often draw upon the experience of more seasoned democracies. In the past several decades, waves of democratization have spread across the world, including Europe in the 1970s (Greece, Portugal, and Spain), Latin America in the 1980s (Brazil, Chile, and Argentina), and Eastern and Central Europe in the 1990s. The U.S. Supreme Court, the German Constitutional Court, and other similar national courts serve as significant role models for these new democracies.

Barroso, *supra* note 45, at 343.

46. *See generally* PUDDINGTON, *supra* note 41. Recall the regime change in Tunisia, Egypt, and Libya, civil uprisings in Syria and Yemen and Bahrain, and major protests in Algeria, Iraq, Jordan, and Morocco. *Id.* at 16-20.

47. *See generally* Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. 53 (1990).

48. The four Geneva Conventions and two protocols include the following: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (Protocol II). Article 3 of the Third Geneva Convention is known as “Common Article 3” because it is common to all four of the 1949 Geneva Conventions. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter Common Article 3]. It provides:

Universal Declaration of Human Rights,⁴⁹ drafted in part by Eleanor Roosevelt, are fundamentally the same as those in the United States Constitution.⁵⁰ Under the Convention Against Torture,⁵¹ which President Ronald Reagan signed in 1988 and the Senate ratified in 1990,⁵² the United States and other nations have committed to prohibit torture against any person, to take active measures to prevent torture, and to prohibit the transfer of detainees to countries where they may be subjected to torture. The International Covenant on Civil and Political Rights,⁵³ which the United States also joined under the administration of President George Herbert Walker Bush in 1992,⁵⁴ guarantees civil and political rights of individuals, including the right to due process and fair and impartial trials, the right to presumption of innocence until proven guilty, freedom from

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be found to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.

Common Article 3, *supra* note 48, at art. 4.

49. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/811 at 71 (1948).

50. David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 *FORDHAM INT'L L.J.* 445, 467 (2012).

The principles embodied in the Universal Declaration [of Human Rights] are not “foreign” or “alien” concepts. They are fundamental American values, codified in the US Constitution, and then restated in the Universal Declaration and other international human rights instruments. Although the specific language included in international human rights treaties is slightly different from the language of the US Constitution, the underlying values are the same.

Id.

51. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85 (signed 10 December 1984, entered into force 26 June 1987).

52. Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 *LOY. U. CHI. L.J.* 523, 544 (2011).

53. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

54. Michael J. Perry, *A Right to Religious Freedom: The Universality of Human Rights, The Relativity of Culture*, 10 *ROGER WILLIAMS U. L. REV.* 385, 387 n.6 (2005).

arbitrary arrest and detention, the right to habeas corpus, the right to privacy, the prohibition of torture and of cruel, inhuman, and degrading punishment, as well as the right to equality, democracy, political participation, freedom of thought, freedom of religion, freedom of speech, and freedom of assembly. The rights guaranteed in these international treaties are reflective of the very rights guaranteed by our own United States Constitution, which has provided an amazing legacy to the world.⁵⁵

III. CONSTITUTIONAL TENSIONS DURING PREVIOUS NATIONAL CRISES

Of course, governments find it easier to protect individual rights and liberties during times of peace than in times of war. Our nation has witnessed the recurrent testing of constitutional protections during times of national crises. It is important to contextualize the responses of our government after September 11 by examining some of the other critical moments in our nation's history. Such challenges to constitutional protections have occurred, for example, during the Quasi War of 1798, the Civil War, World War I, World War II, and the Cold War, among others. Broadly speaking, in times of national emergencies, our government has tended to erode constitutional values in favor of augmenting its own power in the name of protecting the national security of the country.⁵⁶

A. QUASI WAR OF 1798

Consider the events that occurred shortly after our country's founding, during the Quasi War of 1798 between the United States and France, and the challenges they posed to the separation of powers enshrined within the Constitution to ensure that no one branch of government seizes too much

55. Unfortunately, the United States Constitution is not currently perceived to be as influential internationally as it has been in the past. Part of this decline may be attributable to the fact that so many other written constitutions enshrining civil rights and liberties have burgeoned around the world, thereby diluting the effect of our own. Another reason may be the tarnished reputation of the United States with respect to its human rights record as a result of the torture scandals in recent years. Moreover, the failure of United States judges to consider and cite the constitutions of other democratic nations throughout the world may cause judges and other policy makers in other countries, in turn, to ignore the United States Constitution. Furthermore, the perceived policy of isolationism by the United States government may exacerbate these issues. For an analysis of American exceptionalism, see CATHERINE POWELL, *A Tale of Two Traditions: International Cooperation and American Exceptionalism*, in *THE FUTURE OF HUMAN RIGHTS* 103, 103-19 (William F. Schulz ed., 2008).

56. Joseph Margulies, *Evaluating Crisis Government*, 40 No. 6 CRIM. LAW BULL. 627, 631 (2004) ("The essential pattern of executive overreaction, judicial acquiescence, and official regret is correct as far as it goes.").

power.⁵⁷ During this episode of our nation's history, the United States proclaimed neutrality with respect to the hostilities then raging between England and post-Revolution France.⁵⁸ This declaration infuriated the French, which had supported the colonies during the American Revolution and had entered into two treaties with the new nation.⁵⁹ The French navy began seizing American ships trading with Great Britain. In response, Congress passed a law authorizing the United States Navy to attack French warships.⁶⁰ Today, proponents of expanded presidential authority sometimes refer to the Quasi War of 1798 to justify broad executive war powers and unilateral war-making by the president.⁶¹ Yet during the Quasi War, President John Adams was generally acting pursuant to this legislation passed by Congress that authorized the United States naval activities against France.⁶²

57. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1005 n.527 (1999).

It could be argued (and has been argued) that the framers' model was appropriate for the eighteenth century but not for contemporary times, when it is important to concentrate greater power in the President to respond promptly to national emergencies, including terrorist attacks. The framers were fully aware of such arguments and rejected them. Living in a time of crisis and emergency, they decided to vest in Congress the core powers over war and spending. Other than granting the President the power to repel sudden attacks, they relied for their safety primarily on Congress. As noted in one study:

Despite glib assertions of the novelty and gravity of the post-Korean war period, the threats confronting the United States during the first quarter century of government under the Constitution imperiled the very independence and survival of the nation. The United States Government fought wars against France and England, the two greatest powers of that period, to protect its existence, preserve the balance of power, and defend its commerce. Notably, both conflicts, the Franco-American War [the Quasi-War of 1798-1800] and the War of 1812, were authorized by statute.

Id. at 1005 (quoting David S. Friedman, *Waging War Against Checks and Balance — The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213, 228 (1983)).

58. J. Gregory Sidak, *The Quasi War Cases – and Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 480-82 (2005).

59. *Id.*

60. *Id.* An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, ch. 53, § 1, 1 Stat. 565, 565 (1798); An Act in Addition to the Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 62, § 1, 1 Stat. 574, 574 (1798); *see also* An Act to Authorize the Defense of Merchant Vessels of the United States Against French Depredations, ch. 60, §1, 1 Stat. 572, 572 (1798).

61. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1233 (2006). For example, the Federalist Society has promoted the concept of a “Unitary Executive, a doctrine that places all executive power directly under the President and leaves no room for independent commissions, independent counsels, congressional involvement in administrative details, or statutory limitations on the President’s power to remove executive officials.” *Id.*

62. Sidak, *supra* note 58, at 480-82.

There is an instance, however, where President Adams attempted to go beyond his authority as authorized by Congress. In part of the authorizing statute mentioned above, Congress legislated that the Navy was authorized to seize American vessels sailing to any French port in order to prevent American goods from being transported to France.⁶³ President Adams unilaterally expanded that law, and he authorized the Navy to seize vessels sailing either to *or from* any French port.⁶⁴ Under the President's authorization, United States Navy Captain George Little had seized a vessel that he had thought was American (although it actually turned out to be Danish) that was traveling away from a French port, so the action was not authorized by the statute.⁶⁵ Captain Little was sued for damages, and the case was appealed to the Supreme Court.⁶⁶ Safeguarding the principle of the separation of powers and rejecting the aggrandizement of presidential authority, the Court held an order of the President that is in contradiction with an act of Congress is illegal as it is beyond the proper authority of the President granted by the Constitution.⁶⁷ The President does not have inherent powers that permit him to ignore a law passed by Congress.⁶⁸ Chief Justice John Marshall reasoned that the Constitution gives the power to make laws to the legislative branch of government, and gives the power to enforce those laws to the executive branch.⁶⁹ Therefore, when the President attempts to go beyond the authority of legislation, he is acting unconstitutionally, and his actions are void.⁷⁰

63. Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT'L SEC. L. & POL'Y 319, 330 (2012) (indicating the Quasi-War of 1798 "underscored the primary role of Congress over war.").

64. *Id.* (emphasis added).

65. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176 (1804).

66. *Id.*

67. Fisher, *supra* note 61, at 1236 ("[T]he Court decided that when a collision occurs in time of war between a presidential proclamation and a congressional statute, the statute trumps the proclamation.").

68. Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 1987 n.48 (2009).

In the seminal case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Marshall Court acknowledged the President's vast discretion in directing the military and his inherent power to meet emergencies, but indicated that Congress in authorizing a war (here, against France) could specify certain boundaries on the President's conduct. Accordingly, the President did not have independent Article II power to go beyond the explicit legislative directive to seize ships going "to" French ports by ordering the seizure of all ships going "to" and "from" France.

Id.

69. Fisher, *supra* note 63, at 330 ("The policy decided by Congress in a statute necessarily prevailed over conflicting presidential orders. Congress not only initiated wars but through statutory action could define their scope and purpose.").

70. Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 58 n.225 (2000)

Moreover, the Supreme Court ruled Capitan Little could be held personally liable for violating the statute under the President's orders.⁷¹ Justice Marshall stated:

I was strongly inclined to think that . . . in consequence of orders from the legitimate authority [i.e., from the President, that] . . . the claim of the injured party for damages would be against that government from which the orders proceeded . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which – without those instructions – would have been a plain trespass.⁷²

In this case, Justice Marshall was upholding two Constitutional principles that had been adopted by the nation's founders: first, the Constitution's commitment to separation of powers, so the President does not become too powerful and usurp the lawmaking authority of Congress;⁷³ and second, the principle that no person is above the law, even if that person is acting illegally because they are following the orders of a superior.⁷⁴

B. CIVIL WAR

As another example, during the Civil War, President Abraham Lincoln unilaterally suspended the writ of habeas corpus, which enables a prisoner to seek a legal determination as to whether the imprisonment is lawful.⁷⁵ At first, President Lincoln ordered the suspension only in a limited region of

("The Court concluded that the President's order was legally void because he had misinterpreted the statute.")

71. *Barreme*, 6 U.S. (2 Cranch) at 170. ("A commander of a ship of war of the *United States*, in obeying his instructions from the President of the *United States*, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.")

72. *Id.* at 179.

73. *But see* Sidak, *supra* note 58, at 499 ("The conventional wisdom about the Quasi War cases, and of the now-archaic words in the War Clause concerning letters of marque and reprisal, is incorrect. The Quasi War cases concern national sovereignty and supremacy, not the separation of powers.")

74. John F. Pries, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1736 (2012).

75. Andrew Franz, "Shall Not Be Suspended, Unless . . .": *A Tale of Habeas Corpus*, 43 No. 3 Crim. Law Bull. 330, 335 (2007) ("Lincoln's unilateral suspension of habeas corpus during the early phases of the Civil War is a classic example of our judiciary's weakness during times of war. The Civil War was the earliest indication that our judicial system's traditional role of defending minority interests might go by the wayside during war, be it civil, foreign or domestic." (citation omitted)). For a general discussion, *see generally* BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS* (2011); MARK E. NEELY, JR. *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

the country to protect the Union troops.⁷⁶ Union troops arrested John Merryman, a farmer and state senator, because he was in favor of secession and allegedly had participated in destroying railroad bridges.⁷⁷ Justice Roger Taney ignored President Lincoln's suspension of habeas corpus and ordered the military produce Merryman before the court.⁷⁸ The military and the President refused to honor the court's order, so Justice Taney declared President Lincoln's suspension of habeas corpus to be unconstitutional, because the authority to suspend habeas corpus is held by Congress, not by the President.⁷⁹ Congress had initially refused to pass legislation approving the suspension of habeas corpus, and several lower federal courts also ruled the President's suspension was unconstitutional without Congressional approval. In February of 1862, President Lincoln issued another proclamation releasing many of the prisoners and providing them with amnesty for engaging in "disloyal and treasonable practices."⁸⁰ However, a few months later, responding to opposition to conscription into the Union Army, President Lincoln issued a nationwide suspension of habeas corpus, directing very broadly:

Now, therefore, be it ordered, First – That during the existing insurrection and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts martial or military commissions:

Second – That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military

76. Margulies, *supra* note 56, at 630.

77. Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience – A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 33-41 (2003). For additional discussions of John Merryman and the suspension of habeas corpus, see MARVIN R. CAIN, *LINCOLN'S ATTORNEY GENERAL: EDWARD BATES OF MISSOURI* 144-45 (1965); WILLIAM H. REHNQUIST, *CIVIL LIBERTY AND THE CIVIL WAR, THE GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY*, 49-65 (1997).

78. Finkelman, *supra* note 77, at 33-41.

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

80. Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 393-94 n.39 (2007).

prison, or other place of confinement by any military authority or by the sentence of any court martial or military Commission.⁸¹

That order gave tremendous discretion to anyone in the military to imprison people who were suspected of any “disloyal practice” for the entire duration of the warfare and without any recourse.⁸² Shortly thereafter, Congress passed the Habeas Corpus Suspension Act of 1863,⁸³ validating President Lincoln’s proclamation and ending the constitutional controversy. But throughout the course of the Civil War, over thirteen thousand Americans – some estimates range as high as thirty-eight thousand – whose loyalty to the Union was questioned were arrested and held by the military without charges and without judicial review.⁸⁴

After the Civil War ended, the act authorizing the suspension was no longer in effect, and Congress subsequently passed a new law largely restoring the writ of habeas corpus.⁸⁵ In 1866, the Supreme Court decided in *Ex Parte Milligan*⁸⁶ that Congress’s suspension of the writ of habeas corpus during the Civil War did not authorize the President to convict citizens before military tribunals where the civil courts were open and functioning.⁸⁷ Instead, the government should indict Milligan under the criminal code and try him in an Article III court with a trial by jury.⁸⁸

C. WORLD WAR I

As another example, consider the circumstances which arose during World War I.⁸⁹ The First World War had led to a dramatic expansion of

81. Proc. No. 1, 13 Stat. 730 (1862).

82. Franz, *supra* note 75, at 335-36 (“Lincoln’s orders were based on his conviction that fundamental rights could be violated if the very existence of the union and the legal order were at stake. The Congress did nothing but ratify these actions, which served only to further strengthen the President’s confidence in such matters. Lincoln went on making unilateral proclamations, decrees and edicts-including the rescission of habeas corpus, fundamental speech, and association rights-and causing the most vaguely conceived disloyalties to be classified as crimes against the state.”).

83. Act of Mar. 3, 1863, ch. 18, 12 Stat. 755.

84. Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 717 (2010); Margulies, *supra* note 56, at 631; Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 74 (2002).

85. *But see Ex parte McCordle*, 74 U.S. 506 (1868) (involving the arrest of a newspaper editor, where act allowing Supreme Court jurisdiction to hear habeas corpus appeals was repealed, but court still had jurisdiction under the Judiciary Act of 1789).

86. 71 U.S. (4 Wall.) 2 (1866).

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

88. *But see Ex Parte Quirin*, 317 U.S. 1, 18-21 (1942) (holding that unlawful combatants who violate the laws of war, including both foreign and United States citizens, may be tried and punished by military tribunals that had been authorized by Congress).

89. *See generally* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

governmental powers and responsibilities in the United States,⁹⁰ and led to new laws intended to reinforce the war effort. As one of these new laws, Congress passed the Espionage Act of 1917⁹¹, which among other things, criminalized the opposition to military recruitment with punishment of up to twenty years in prison and fines of up to ten thousand dollars.⁹² In 1918, Congress then passed the Sedition Act, which criminalized numerous additional types of speech, such as “any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy.”⁹³ Despite these attempts to quell dissent, the United States intervention in the war, as well as the Wilson Administration itself, had become intensely unpopular in the United States during this period.⁹⁴ Many people voiced their displeasure with the war and the administration both orally and in writing. In response, under the new espionage and sedition laws, the federal government responded harshly. For example, postal censors removed publications from circulation that were critical of the government,⁹⁵ and many people were sentenced to long prison terms for making statements that were deemed “unpatriotic.”⁹⁶ The government prosecuted approximately two thousand people under the Espionage Act resulting in nearly one thousand convictions.⁹⁷

In an incident not far from the symposium in Bismarck, Kate O’Hare was arrested by federal authorities for delivering a speech opposing the war in Bowman, North Dakota, and was given a five-year sentence and ten thousand dollar fine for violating the provision of the statute criminalizing interference with military recruitment.⁹⁸ Other examples abound. In South

90. James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371, 388 (2010).

91. Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793-94 (2006)).

92. *Id.* § 3, 219.

93. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553, 553-54.

94. H.C.F. BELL, *WOODROW WILSON AND THE PEOPLE* 228 (1945) (discussing the difficulties faced by the Wilson Administration).

95. Danley K. Cornyn, *The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers’ Right of Free Speech*, 87 TEX. L. REV. 463, 470 n.59 (2008).

96. Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 319 (2007).

97. Margulies, *supra* note 56, at 631.

98. Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661, 1694-96 (2004); Kathleen Hall, *File Sessions: Archival Court Records in Higher Education*, 75 UMKC L. REV. 25, 27-28 (2006).

Dakota, the government arrested and convicted twenty-seven farmers “for sending a petition to the government calling the war a ‘capitalist war’ and objecting to the draft quota for their county.”⁹⁹ The Federal government arrested Eugene Debs in Ohio for a speech decrying the United States involvement in the First World War and encouraging people to resist the draft, and he was sentenced to ten years in prison.¹⁰⁰ The film producer, Robert Goldstein, was also sentenced to ten years in prison for making a film, called “The Spirit of ‘76,” because it depicted cruelty by British soldiers during the American Revolution, which was deemed to be potentially detrimental to our ally during World War I, and resulted in his conviction for aiding and abetting Germany via this film.¹⁰¹ Poet E.E. Cummings was arrested and subjected to a military detention camp for professing a denial of antipathy toward Germans.

During the first Red Scare, government officials subjected an estimated ten thousand foreign citizens to arrest, imprisonment, beatings, and forcible confessions because of their political beliefs.¹⁰² Such raids were carried out in over thirty cities.¹⁰³ Several people were also convicted for distributing leaflets in opposition to sending United States troops to Russia and United States efforts to impede the Russian Revolution.¹⁰⁴ Moreover, United States Attorney General Mitchell Palmer used the Sedition Act to deport

99. MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 45* (1990).

100. *See Debs v. United States*, 249 U.S. 211, 212-13 (1919); Kennedy, *supra* note 98, at 1685-702; Andrew Green, *Silence in the Courtroom*, 24 LAW & LITERATURE 80, 90-92 (2012); *see also* JEREMY COHEN, *CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING* 114 (YEAR).

101. Robert N. Strassfeld, “*Lose in Vietnam, Bring the Boys Home*,” 82 N.C. L. REV. 1891, 1897 (2004); Geoffrey R. Stone, *Roy R. Ray Lecture: Freedom of the Press in Time of War 1667*, 59 SMU L. REV. 1663, 1667 (2006); Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321, 365-66 (2010); *see also Goldstein v. United States*, 258 F. 908, 911 (9th Cir. 1919).

102. Hollis V. Pfitsch, *The Executive’s Scapegoat, the Court’s Blind Eye? Immigrants’ Rights after September 11*, 11 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 151, 167 (2005); Brian McGiverin, *In the Face of Danger: A Comparative Analysis of the Use of Emergency Powers in the United States and the United Kingdom in the 20th Century*, 18 IND. INT’L & COMP. L. REV. 233, 248-49 (2008); Jim Cornehl, *The USA Patriot Act: The Assault on Civil Liberties*, Z MAGAZINE, July 2003, *reprinted in* THE PATRIOT ACT: OPPOSING VIEWPOINTS 77, 84 (Louise I. Gerdes ed., 2005).

103. Pfitsch, *supra* note, at 102; Cornehl, *supra* note 102, at 84.

104. *See generally* *Abrams v. United States*, 250 U.S. 616 (1919); *see also* Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 679 (2011).

several hundred foreign citizens from the United States because of their political beliefs.¹⁰⁵

After World War I ended, the restrictions upon freedom of speech and political belief began to ease.¹⁰⁶ President Wilson commuted Robert Goldstein's sentence; President Warren G. Harding later commuted Kate O'Hare's and Eugene Debs' sentences; and other prisoners had their sentences commuted as well.¹⁰⁷ In 1921 Congress repealed the Sedition Act.¹⁰⁸ Once again, the pendulum of government policies swung back toward greater protections for political and civil liberties of the people once the crisis abated.¹⁰⁹

D. WORLD WAR II

As another example, remember the internment of thousands of innocent people of Japanese, German, and Italian descent during World War II.¹¹⁰ Over one hundred ten thousand people of Japanese ancestry living on the Pacific Coast and other regions of the United States were forcibly interned in War Relocation Camps after Japan's attack on Pearl Harbor.¹¹¹ President Franklin D. Roosevelt had signed Executive Order 9066 in 1942 mandating

105. Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOBAL LEGAL STUD. 169, 191 (2012); Theodore Y. Blumoff, *The Marketplace of Ideas in Cyberspace*, 51 MERCER L. REV. 817, 818 (2000).

106. McGiverin, *supra* note 102, at 249.

107. Margulies, *supra* note 56, at 630-31; Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 337-38 (2011).

108. McGiverin, *supra* note 102, at 248-49.

109. Geoffrey R. Stone, *Wikileaks and the First Amendment*, 64 FED. COMM. L.J. 477, 479 (2012).

Over time, we have come to understand that these episodes from our past were grievous errors in judgment in which we allowed fear and anxiety to override our good judgment and our essential commitment to individual liberty and democratic self-governance. We have come to understand that, in order to maintain a robust system of democratic self-governance, our government cannot constitutionally be empowered to punish speakers, even in the name of national security without a *compelling* justification.

Id. (emphasis in original).

110. Franz, *supra* note 75, at 330-46 ("The power and the rhetoric of war increased during World War II, with the arbitrary internment of law abiding American citizens of Japanese descent—an internment approved by the judiciary for the sake of the most remotely perceived effect on the war effort."). See generally CHARLES MCCLAIN, *THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS* (1994); GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

111. George Kawamoto, *Mentoring for a Public Good*, 22 HASTINGS WOMEN'S L.J. 361, 365 n.24 (2011). In addition, approximately eleven thousand German-Americans and three thousand Italian-Americans were also incarcerated. Philip A. Thomas, *Emergency and Anti-Terrorist Powers*, 26 FORDHAM INT'L L.J. 1193, 1212-13 (2003).

the internment.¹¹² Two-thirds of the people who were incarcerated in the camps were citizens of the United States.¹¹³ Many of the Japanese detainees were held in deplorable conditions. Fred Korematsu, a Japanese-American citizen, and some others decided to remain in their homes and not to comply with the order.¹¹⁴ Upon his arrest, Mr. Korematsu argued the executive order was a violation of equal protection and of the right to due process of law under the Fourteenth Amendment to the Constitution.¹¹⁵ In 1944, the Supreme Court upheld his conviction and the government's policy mandating the internment in *Korematsu v. United States*,¹¹⁶ although this decision has subsequently been regarded as a low point in the court's history.¹¹⁷ Moreover, critical evidence indicating the internment was not a military necessity, and the vast majority the people who were imprisoned were not a military threat, was wrongfully withheld by the government in this case. Decades later, Fred Korematsu's conviction was overturned through a coram nobis retrial.¹¹⁸ A presidential commission indicated the government's actions had been based on "race prejudice, war hysteria, and a failure of political leadership."¹¹⁹ President Ronald Reagan signed

112. Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942); Kawamoto, *supra* note 111, at 365 n. 24.

113. Cornehls, *supra* note 102, at 85. In the decades leading up to this action, other government acts enshrining racism as an official policy had been taken, heightening an overall climate of prejudice. For example, California passed an anti-miscegenation law in 1905 forbidding marriages between Caucasians and East Asians. Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1, 26-27 (2002). In 1924, Congress passed the Asian Exclusion Act, prohibiting immigration of East Asians. James A. Long, *Genetic Plastic Surgery: How Neo Eugenics Creates a Culture of Stage Moms*, 7 U. ST. THOMAS L.J. 203, 204 n.5 (2009) (citing the Asian Exclusion Act, also known as the Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153).

114. See generally Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1 (2005).

115. *Id.*

116. 323 U.S. 214 (1944).

117. G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 202-04 (2011); Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 CONST. COMMENT. 485, 508 (2002) ("The confinement of Americans of Japanese descent during the Second World War has come to be considered a national disgrace.").

118. *Korematsu*, 584 F. Supp. at 1406 (granting a writ of coram nobis, which vacated Fred Korematsu's previous conviction due to the government's concealment of critical exculpatory evidence in *Korematsu v. United States*, 323 U.S. 214 (1944)). See Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to be Repeated*, 39 PEPP. L. REV. 163, 172 (2011).

119. Roger Daniels, *Bringing Governments to Justice*, 18 ASIAN AM. L.J. 147, 154 nn.16-18 (2011) (quoting Commission on the Wartime Relocation and Internment of Civilians, 102d Cong. 457 (1992)).

The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to Americans and resident

legislation in 1988 apologizing on behalf of the United States for the injustice that was done by the internment.¹²⁰ The government has also paid over \$1.6 billion in reparations to those who had been interned and their heirs.¹²¹

At the symposium addressing September 11 where I spoke last year in Bismarck, a professor in the audience later showed me one of the barracks – now located on the Bismarck State College campus – that had once been used to hold prisoners at the Fort Lincoln Internment Camp in North Dakota during World War II.¹²² It was haunting to see in person. Fort Lincoln was the largest internment camp in the United States, holding an estimated 3850 detainees.¹²³ In addition to German and Italian seamen and United States residents of Japanese descent, Fort Lincoln imprisoned people who were caught up in the Latin American Detention Program during World War II, where residents of countries in Latin America with ties to Germany were arrested and taken to the United States to be held in detention for the duration of the war.¹²⁴ Despite subsequent government acknowledgment of the lack of evidence that they were Nazi sympathizers, thousands of people were detained and separated from their families for years, and many had their property confiscated by the government.¹²⁵ In October of 2003, the North Dakota Museum of Art hosted an exhibit called Snow Country Prison memorializing the internment of the detainees at Fort Lincoln.¹²⁶

aliens of Japanese ancestry who, without any individual review or probative evidence against them, were excluded, removed and detained by the United States during World War II.

Id.

120. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988); *see generally* Eric K. Yamamoto & Ashley Kaiyo Obrey, *Reframing Redress: A “Social Healing through Justice” Approach to United States-Nagive Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *ASIAN AM. L.J.* 5 (2009).

121. Kawamoto, *supra* note 111, at 365 n.24.

122. *See generally* Brian Gehring, *Internment Camp Barracks Building May Have New Home*, *BISMARCK TRIB.* (Oct. 30, 2011), http://bismarcktribune.com/news/local/internment-camp-barracks-building-may-have-new-home/article_a811efa8-01ab-11e1-846e-001cc4c002e0.html (describing the barracks at Fort Lincoln that held American citizens of Japanese and German descent during World War II).

123. *Fort Lincoln Internment Camp*, *BISMARCK CAFÉ*, <http://www.bismarckcafe.com/blogs/fort-lincoln-internment-camp> (last visited Nov. 7, 2012).

124. Cindy G. Buys, *Nottebohm’s Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?*, 11 *CHI.-KENT J. INT’L & COMP. L.* 1, 8-12 (2011).

125. *Id.*

126. *German American Internee Coalition*, http://www.gaic.info/camp_doj.html#fortlincoln (last visited on June 12, 2012); Martha Nakagawa, *Snow Country Prison Exhibit Opening Brings Internees Back to Internment Camp*, *FOIT TIMES* (Nov. 18, 2003), <http://www.foitimes.com/internment/Snow%20Prison.htm>.

E. COLD WAR

As a final example (although many others could also be explored), during the Cold War, the House Un-American Activities Committee (HUAC) conducted an extensive investigation of suspected Communists and ostensible “fellow travelers.”¹²⁷ Led by Senator Joseph McCarthy, the committee subpoenaed thousands of people who were forced to testify about the political affiliations and activities of themselves and others or face imprisonment.¹²⁸ People who refused to sign “loyalty oaths” or who did not testify satisfactorily before HUAC lost their livelihoods without due process protections.¹²⁹ The government undertook other measures that restricted freedom of expression and association.¹³⁰ James E. Leahy, who

127. Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061, 1065-67 (2004); Cornehl, *supra* note 102, at 85. *See generally* ROBERT K. CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES: 1945-1950* (1952).

128. Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1170-72 (2010); Cornehl, *supra* note 102, at 85.

129. Cope, *supra* 96, at 320; Murray & Wunsch, *supra* note 84, at 80; Cornehl, *supra* note 102, at 85. Lee Hall, *Disaggregating the Scare from the Greens*, 33 VT. L. REV. 689, 713 n.135 (2009) (“[W]itnesses were not provided with the rights they would be entitled to even in a civil trial, although their livelihoods were at stake. ‘Witnesses were frequently confronted with accusations from unidentified informants and denied any opportunity to confront their accusers or to present their own witnesses.’”) (quoting David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10-14 (2003)).

130. *See* Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 949-50, 954 (2009).

The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States.

Id.

The article subsequently notes that “On May 30, 2002, Attorney General John Ashcroft . . . once again authorized FBI agents to monitor political and religious activities without any showing that unlawful conduct might be afoot.” *Id.*; *see also* Hall, *supra* note 129, at 713 n.135.

In 1952, Congress authorized and funded detention centers for suspected subversives in Arizona, California, Florida, Oklahoma, and Pennsylvania. Thus, for more than a generation after World War II the federal government planned to detain ‘dangerous’ citizens and foreigners wholly outside the criminal process, and the FBI accordingly engaged in widespread political spying until the 1970s – not for any criminal law purpose, but simply so that it could maintain lists of suspicious persons to be detained in a future emergency. In the 1960s, the FBI’s list included civil rights and anti-war movement activists, including Dr. Martin Luther King, Jr.

Id. (citations omitted) (quoting David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10-14 (2003)).

graduated from the University of North Dakota School of Law in 1949, presented a book to the law school that he wrote entitled, *THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM*, in which he recounts that:

The late 1940s and early 1950s were turbulent years in our history, an era during which the country was engaged in a prolonged witch-hunt for subversives. Public employees, and especially teachers, were required to take a loyalty oath pledging that they did not advocate the overthrow of the government and were not members of any organization that did so advocate; members of the Communist party were prosecuted for allegedly advocating the overthrow of the government; some teachers were required to list *every* organization to which they belonged during the previous five years, and the House of Representatives created the House Un-American Activities Committee, which conducted an ongoing investigation of subversive activities in the country. Even the writers and producers of motion pictures came under scrutiny during an investigation to see if there were Communists in Hollywood.¹³¹

Of this period, Elwyn Brooks White wrote “[t]he most alarming spectacle today is not the spectacle of the atomic bomb in an unfederated world, it is the spectacle of the Americans beginning to accept the device of loyalty oaths and witch-hunts, beginning to call anybody they don’t like a Communist.”¹³² Leahy continues, “[d]uring these times when the country was obsessed with ferreting out subversives, the rights protected by the First Amendment – the right openly to advocate one’s views, no matter how unpopular, and to associate with whomever one chose, no matter how unacceptable they might be – took a severe beating.”¹³³

But again, once the anti-Communist hysteria subsided, the pendulum shifted back toward greater protections for individual rights, and this episode has become viewed as a less than shining moment in our country’s history.¹³⁴ In the words of one scholar, who compares the government’s actions during the Cold War with the government’s actions after September

131. JAMES E. LEAHY, *THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM* 112-13 (1991) (on the first page of the book in the UND Law Library is the handwritten inscription: “May 1, 1991, To the University of North Dakota School of Law. James E. Leahy, Class of 1949”).

132. *Id.*

133. *Id.*

134. Taylor, *supra* note 128, at 1171 (discussing the fact that, “[d]espite the near-universal condemnation of HUAC and McCarthy era anti-Communist tactics, no doctrinal rule prevents Congress from dusting them off for use again”).

11, “[i]n short, just as we did in the McCarthy era, we have offset the decline of traditional forms of repression with the development of new forms of repression. A historical comparison reveals not so much a *repudiation* as an *evolution* of political repression.”¹³⁵

These events are just a few examples of instances in which our Constitutional values of individual freedom, checks and balances, separation of powers, and limitations on the potential for abuse of government power have been put to the test when our nation has been confronted with national emergencies. As they demonstrate, often the immediate response to a national crisis is to impose restrictions upon civil liberties, and for the government to strengthen its grip on the handles of power. These examples also show us that, while the pendulum may swing away from protection of individual rights during the crisis, at least in the past, it subsequently has a tendency to swing back toward greater protection of those freedoms once the crisis has receded.¹³⁶

IV. POST-SEPTEMBER 11 RESPONSES AND STRAINS ON THE CONSTITUTION

Turning now to September 11 and its aftermath, we understand inherent tensions must be balanced between protecting civil liberties and protecting national security. These tensions are not merely academic, as is our study of constitutional issues that have happened in the distant past, beyond the personal memories of most people living today. These tensions are very real, and are deeply felt within all of us, due to our lived experiences of September 11.

A. RECALLING PERSONAL EXPERIENCES

Of course, each of us can clearly remember that day. This symposium has encouraged us to share our stories through the 100 Stories Project and throughout the event,¹³⁷ so I, too, will share a glimpse of mine. On the drive into my office in Washington, DC that morning, I learned of the first airplane hurtling into the World Trade Center, and a colleague at work

135. Cole, *supra* note 129, at 2.

136. As another example, the legal doctrine that permitted the government to restrict freedom of speech if that speech had a tendency to incite or cause illegal activity eventually evolved into the incitement to imminent lawless action standard, which is more protective of the freedom of speech. See the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

137. DVD: 100 Stories Project, September 11 Ten Years Later: Impact on the Heartland (Dusty Anderson 2011) (according to the cover of the DVD, “[i]n preparation for the symposium BSC collected stories from North Dakotans and from visitors to our great state describing [September 11] from their individual perspectives. The stories relayed to us are collected here as a tribute to the shared experience of a day that changed us all”).

informed me of the second. My husband was consulting that day at Fort McNair, which is a military establishment across the Potomac River from the Pentagon, and he saw the smoke rising up from the third airplane that had hit the Pentagon. My thoughts, of course, immediately turned to his safety when I learned about the attack at the Pentagon. The devastation continued with Flight 93 crashing in Pennsylvania.

Three pilots from the North Dakota Air National Guard, who were serving at Langley Air Force Base in Virginia, immediately launched their F-16 fighter planes, and we took comfort in their defense of the capitol as they circled the skies around Washington, D.C. throughout the day of the attacks. I was pleased to be able to thank personally one of those pilots, Lt. Col. Dean Eckmann, who also spoke at the symposium on September 11 in Bismarck. On the morning of September 11, I was supposed to have a conference call with my colleagues in my organization's New York office, which is on Wall Street a few blocks from Ground Zero. I spoke with them briefly, as they were shutting down the office in the midst of the smoke, dust and debris that was blanketing New York City. My supervisor was at Reagan National Airport a few miles from the Pentagon about to fly from Washington, DC to New York that morning, and of course her flight was grounded. The government imposed an emergency shutdown, not only of air traffic across the country, but also of ground transportation in Washington, DC, so I walked with my colleagues to one of their nearby apartments and waited for hours watching the news.

Once the emergency traffic shutdown in Washington was lifted and we could return home, as my husband and I drove past the smoldering Pentagon that afternoon, our hearts joined with millions of Americans throughout the country – and with sympathetic neighbors throughout the world – who resolved to prevail over the terrorists who had wrought this unthinkable tragedy. In Washington, D.C. and across the country we wondered what may be targeted next – the White House, Capitol, other military or civilian establishments, other cities and states? We also wondered in what forms the next attacks may come – bioterrorist attacks on public water supplies, detonation of nuclear bombs, explosions on trains or subways? American flags sprang up throughout the nation's capital – on overpasses above the highways, on automobile windows and bumpers, on porches, hats and t-shirts. We all felt an urgent imperative to strengthen our country's protection from another attack and to pursue the network of terrorists who were involved in bringing about this devastation.

B. THE PATRIOT ACT AND OTHER GOVERNMENTAL RESPONSES

In the immediate aftermath of September 11, Congress and the administration leapt into action. One week after the attacks, the Bush Administration submitted the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,” otherwise known as the Patriot Act, to Congress and urged them to enact it immediately and without change.¹³⁸ The bill passed the Senate without floor debate and the House with relatively minor changes.¹³⁹ Only Senator Russell Feingold voted against the bill in the Senate, and only 66 Representatives voted against it in the House, compared to 357 voting in favor.¹⁴⁰ President Bush signed the 342-page bill into law on October 26, 2001, just six weeks after the attacks.¹⁴¹

Among other changes to federal law, the Patriot Act of 2001 reduced restrictions over intelligence gathering that could take place within the United States; broadened law enforcement agencies’ ability to search e-mail communications, Internet activities, and other records; expanded the definition of terrorism; and so on.¹⁴² Proponents of the Patriot Act have claimed it provided the federal government with enhanced tools to fight against terrorists and to prevent terrorist attacks from occurring in the future.¹⁴³ However, opponents of certain provisions in the law have raised concerns that it authorized the government to watch over the shoulders of its own citizens without probable cause, and reduced the checks and balances on potential governmental overreaching in many areas.¹⁴⁴ Opponents have also questioned the constitutionality of some of these provisions. Debates about these issues, and about what should be the

138. USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001); Richard Henry Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449, 486, n.157 (2008). See 147 Cong. Rec. S11,020 (daily ed. Oct. 25, 2001) (statement of Senator Feingold indicating that the Bush Administration’s “pressure [on Congress] to move on this bill quickly, without deliberation and debate, has been relentless.”).

139. THE PATRIOT ACT: OPPOSING VIEWPOINTS 14 (Louise I. Gerdes ed., 2005). But see Orin S. Kerr, *Internet Surveillance Law After USA Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607, 607 (2003).

140. 147 Cong. Rec. H 7,224 (daily ed. Oct. 24, 2001); 147 Cong. Rec. S11,059-60 (daily ed. Oct. 25, 2001).

141. Daniel E. Lungren, *A Congressional Perspective on the Patriot Act Extenders*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 427, 429 (2012); THE PATRIOT ACT, *supra* note 139, at 14-17.

142. USA PATRIOT ACT, Pub. L. No. 107-56, tit. III, 115 Stat. 272, 296-342 (2001).

143. Tom Ridge, Dir. of Homeland Security, Address at the Allegheny County Emergency Operations Center (July 15, 2004), *reprinted in* THE PATRIOT ACT, *supra* note 139, at 20-27; see also THE PATRIOT ACT, *supra* note 139, at 14 (noting Department of Justice support).

144. THE PATRIOT ACT, *supra* note 139, at 14 (noting American Civil Liberties Union opposition).

appropriate balance between national security and civil liberties, have continued across the United States since September 11.¹⁴⁵ These controversies have resulted in some changes to the original version of the Patriot Act, but other sections, as well as new provisions, remain contested.¹⁴⁶ This section discusses a few examples of the more controversial provisions in the Patriot Act as originally enacted in the weeks following September 11 as the government's immediate response to the crisis.

The Patriot Act significantly expanded the permissible parameters of clandestine domestic surveillance of United States citizens by the federal government. Previously, the government had to obtain a warrant from a special court established by the Foreign Intelligence Surveillance Act (FISA) by demonstrating probable cause that a United States citizen was acting as an "agent of a foreign power" before it could initiate surveillance.¹⁴⁷ Congress had originally enacted FISA in 1978 after two congressional investigations revealed "that the executive branch had consistently abused its power and conducted domestic electronic surveillance unilaterally and against journalists, civil rights activists, and members of Congress (among others) in the name of national security. Mindful of these abuses, Congress originally strictly limited FISA's scope,"¹⁴⁸ in an attempt to balance the government's intelligence gathering with civil liberties.

However, under the Patriot Act's changes to FISA, the government no longer needs to demonstrate that the United States citizen is an "agent of a foreign power."¹⁴⁹ Instead, federal officials could obtain a warrant in the FISA court to seek information concerning a United States person, that relates to the ability of the United States to protect against actual or potential attack or that relates to "clandestine intelligence activities."¹⁵⁰ Moreover, the purpose of the surveillance no longer has to be primarily a foreign intelligence-gathering activity, but could now have primarily a law enforcement purpose with intelligence-gathering being only secondary.¹⁵¹

145. See generally RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

146. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 115, 120 Stat. 192, 211-13 (codified as amended at 18 U.S.C. § 3511 (2006)).

147. THE PATRIOT ACT, *supra* note 139, at 14-17.

148. Hina Shamsi & Alex Abdo, *Privacy and Surveillance Post-9/11*, HUMAN RTS., Winter 2011, at 7.

149. THE PATRIOT ACT, *supra* note 139, at 14-17.

150. *Id.*

151. Robert C. Power, "Intelligence" Searches and Purpose: A Significant Mismatch between Constitutional Criminal Procedure and the Law of Intelligence-Gathering, 30 PACE L. REV. 620, 664 (2010) ("After the USA-PATRIOT Act amendment, FISA now reverses the

These changes provide the government with a substantial expansion of authority. Under the new law, virtually anyone in the United States could be subject to broad surveillance, arguably weakening the pre-September 11 construction of the Fourth Amendment's protection against unreasonable searches and seizures without probable cause.¹⁵²

Additionally, the Patriot Act allows federal agents to seek warrants that encompass broad surveillance of a specific individual, rather than requiring a warrant for a particular e-mail account, cell phone, or telephone line.¹⁵³ The warrant now follows the individual, regardless of location or the communication device being used. Civil rights advocates are concerned this provision may encourage nationwide judge shopping, where federal agents will seek warrants only from judges who are most likely to grant them; rather than being required to obtain the warrant from the court where the individual is located.¹⁵⁴

As another issue, prior federal law did not expressly address warrants for Internet searches, whereas the Patriot Act allows federal agents to obtain a surveillance warrant to obtain the Internet addresses visited by a person under investigation.¹⁵⁵ By way of comparison, the federal law regarding telephone lines has permitted federal authorities to obtain general surveillance warrants in order to tap telephone lines, but only for purposes of determining which telephone numbers were calling in and were being called – not to listen into the conversations themselves (again unless there was a particularized search warrant issued against a suspect for probable cause).¹⁵⁶ By contrast, with respect to the Internet, the new law allows the government to obtain the Internet addresses of the websites the subject is visiting, and therefore the government knows the content and information contained in those websites.¹⁵⁷ Advocates of privacy and civil liberties have suggested that such broad searches are more akin to listening into the

relationship, purporting to legitimate FISA searches in which the foreign intelligence purpose is 'significant,' but secondary to a law enforcement purpose.”).

152. John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, HUMAN RTS., Winter 2002, reprinted in THE PATRIOT ACT, *supra* note 139 at 147, 153; THE PATRIOT ACT, *supra* note 139, at 14-17; Lisa Ugelow & Lance J. Hoffman, *Fighting on a New Battlefield Armed with Old Laws: How to Monitor Terrorism in the Virtual World*, 14 U. PA. J. CONST. L. 1035, 1046-47 (2012).

153. USA PATRIOT ACT, § 814, Pub. L. No. 107-56, tit. III, 115 Stat. 272, 382-84 (codified as amended at 18 U.S.C. §1030 (2006)).

154. Steven A. Osher, *Privacy, Computers, and the Patriot Act: The Fourth Amendment Isn't Dead, but No One Will Insure It*, 54 FLA. L. REV. 521, 525-26 (2002).

155. See generally *id.* at 14-17, 104-14. But see Kerr, *supra* note 139, at 115-24.

156. See generally Osher, *supra* note 154, at 104-14; THE PATRIOT ACT, *supra* note 139, at 14-17. But see Kerr, *supra* note 139, at 115-24.

157. Osher, *supra* note 154, at 104-14; THE PATRIOT ACT, *supra* note 139, at 14-17; but see Kerr, *supra* note 139, at 115-24.

content of telephone conversations (which would be a Constitutional violation without a specific warrant upon proof of probable cause), and therefore question the constitutionality of such significantly broadened surveillance of citizens who are not suspected of committing crimes.¹⁵⁸

The Patriot Act also changed the law to allow government officials to enter and search the homes of private citizens without notifying them beforehand, called a “sneak-and-peek” search.¹⁵⁹ Federal agents would now be able to secretly enter a family’s home while they are not there, download their computer files, rummage through their possessions, plant listening devices, and seize any items they choose.¹⁶⁰ And under the Act, the individuals would only be notified after the fact, sometimes not for a significant time period.¹⁶¹ Again, this provision has raised questions of constitutionality and of appropriateness in a democratic society.¹⁶²

Concern has also been expressed with respect to libraries under the Patriot Act. Although the Patriot Act does not specifically address libraries, it authorizes federal agents to secretly collect tangible records of any kind, which would include circulation records, computer usage, and other data concerning library patrons, on the assertion of a federal agent that the patrons are part of a terrorism investigation (they do not have to be a suspect, but simply part of the investigation).¹⁶³ Previously, unless they were able to demonstrate probable cause, the FBI had only been able “to obtain bank records, credit records and certain other commercial records [and even those] only upon some showing that the records requested related to a suspected member of a terrorist group.”¹⁶⁴ Law enforcement officers had only been able to obtain other records (besides bank records, credit records, and certain other commercial records) with a subpoena after demonstrating probable cause.¹⁶⁵

Under the Patriot Act, the government no longer needed to have any evidence that the people under investigation were members of a terrorist group or were otherwise suspected of engagement in terrorism, but could

158. Osher, *supra* note 154, at 104-14; THE PATRIOT ACT, *supra* note 139, at 14-17. *But see* Kerr, *supra* note 139, at 115-24.

159. Feingold, *supra* note 138, at 179; THE PATRIOT ACT, *supra* note 139 at 127-28.

160. Feingold, *supra* note 138, at 179; THE PATRIOT ACT, *supra* note 139 at 127-28.

161. Feingold, *supra* note 138, at 179; THE PATRIOT ACT, *supra* note 139 at 127-28.

162. Feingold, *supra* note 138, at 179; THE PATRIOT ACT, *supra* note 139 at 127-28.

163. Bernie Sanders, *Unpatriotic Act*, PUBLISHERS WEEKLY, Aug. 18, 2003, *reprinted in* THE PATRIOT ACT, *supra* note 139, at 96, 97. USA PATRIOT ACT, Pub. L. No. 107-56, tit. III, § 215, 115 Stat. 272 (2001) (amending the Foreign Intelligence Surveillance Act of 1978, tit. V, § 501(a)(1)).

164. *Id.*

165. Ramesh Ponnuru, *1984 in 2003? Fears About the Patriot Act are Misguided*, NAT’L REVIEW, June 2, 2003, *reprinted in* THE PATRIOT ACT, *supra* note 139, at 89, 94.

now acquire entire databases on innocent people.¹⁶⁶ Opponents of this provision of the Patriot Act have argued the government's requests for warrants to conduct these searches are not subject to rigorous judicial scrutiny, as the government no longer needs to demonstrate probable cause and the scope of the investigations are no longer focused but can be expansive.¹⁶⁷ Librarians can be compelled to cooperate with the FBI in providing information and monitoring Internet usage.¹⁶⁸ Furthermore, gag orders can be imposed upon the librarians, who are forbidden from telling anyone that a search has been conducted or that records were handed over to the government – and forbidden even from contacting their own attorney to seek legal advice on what to do about the situation.¹⁶⁹ The new law forbade them from consulting anyone.¹⁷⁰ As the past has demonstrated, the FBI has previously had a history of infiltrating and monitoring law-abiding groups that were considered by the government to be controversial, including Martin Luther King Jr.'s Southern Christian Leadership Conference, which was advocating for racial justice.¹⁷¹ Again, librarians and others have protested this expanded power of the government to investigate the reading and Internet habits of United States citizens who are not suspected of wrongdoing.

People have also expressed concern that the definition of terrorism has been expanded to include “domestic” as well as international terrorism.¹⁷² The Act defines “domestic terrorism” to include any activities that:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; [that] (B) appear to be intended . . . (ii) to influence the policy of a government by intimidation or coercion; . . . and (C) occur primarily within the territorial jurisdiction of the United States.¹⁷³

Questions have been raised as to whether this broadened definition of support for terrorism may encompass actions such as charitable contributions made to pro-life organizations like Operation Rescue, or to environmental organizations such as Greenpeace, which have both had a

166. Sanders, *supra* note 163, at 97.

167. *Id.* at 98-99.

168. *Id.*

169. *Id.*

170. *See id.*

171. Hall, *supra* note 129, at 713 n.135.

172. Cornehl, *supra* note 102, at 79.

173. USA PATRIOT ACT, Pub. L. No. 107-56, tit. III, § 802, 115 Stat. 272, 376 (codified at 18 U.S.C. § 2331(5)).

few extremist members in the past who have resorted to violent measures.¹⁷⁴

Under their expanded investigative authority, federal agents have also scrutinized expressions of political dissent. For example, while at his local gym in San Francisco, a sixty-year old retired man commented that he thought the Iraq war was prompted by a concern for oil and corporate profits instead of terrorism.¹⁷⁵ Shortly thereafter, the FBI came to his home to question him about his political views.¹⁷⁶ Bureau agents also visited a college student in North Carolina for displaying a poster in her home in opposition to President Bush's position on capital punishment during his term as the governor of Texas.¹⁷⁷

Proponents of the Patriot Act assert these enhanced surveillance mechanisms are necessary to help prevent terrorist attacks in the future. President George W. Bush stated at the signing ceremony that the previous law "was written in an era of rotary telephones," and the new law is updated to enable surveillance of new technological methods of communication.¹⁷⁸ The Patriot Act particularly concerns the Internet as a new method of perpetrating crime. Indeed, the Defense Department alone is the subject of tens of thousands of cyber attacks each year, and the dangers that cyber crime pose to our military and our economy are potentially massive.¹⁷⁹ Additionally, under the old laws, federal agents had to seek new search warrants for each new state or district in which they were conducting an investigation on an individual; whereas under the new law the warrants are valid across all states and districts, making it much easier to pursue a subject.¹⁸⁰

Advocates of civil liberties have questioned some of the Patriot Acts' provisions, although they too support many of the other changes to federal law contained within this legislation. They have suggested authorization to obtain such a broad array of information against United States citizens, without a particularized search warrant indicating the place to be searched and without probable cause, is an unconstitutional invasion of American citizens' privacy. Advocates are concerned the federal government, particularly the executive branch, is no longer subject to as rigorous judicial

174. Cornehls, *supra* note 102, at 79.

175. *Id.* at 83.

176. *Id.*

177. *Id.*

178. Osher, *supra* note 154, at 106.

179. *Id.* at 105.

180. *Id.* at 106-07.

oversight as it previously had been.¹⁸¹ They are concerned the expanded definition of terrorism will sweep in a much broader range of activities. People have also expressed concern that the government may use its expanded surveillance authority to monitor and record information about guns and gun ownership, even when the gun owners are not suspected of any illegal activity.¹⁸²

Indeed, a coalition of both conservative and liberal advocates came together in the years after its enactment to question the wisdom of some of the Patriot Act's provisions regarding domestic surveillance.¹⁸³ Alongside liberal groups such as the American Civil Liberties Union, influential conservatives such as Grover Norquist (President of Americans for Tax Reform), David Keene (President of the American Conservative Union); Lori Waters (Executive Director of the Eagle Forum); and former Republican Congressman Bob Barr from Georgia (who was previously a manager of the House's impeachment process), have all questioned certain provisions of the Patriot Act for giving the government too much power with too much secrecy and stripping citizens of basic rights to privacy and civil liberties.¹⁸⁴ These principles resonate with people throughout the United States, as we continue to hear people call for smaller government and for less governmental intrusion into personal lives. Former Republican House Majority Leader Dick Armey from Texas had also worked to modify several portions of the bill before it was passed, and later labeled the United States Department of Justice under Attorney General John Ashcroft as "the biggest threat to personal liberty in the country."¹⁸⁵ Republican

181. For a discussion of the assertion that "law does little to constrain the modern executive," see ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15 (2010); SCOTT M. MATHESON, JR., *PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES* 6 (2009) ("Bush's pursuit of unchecked unilateral power without regard to legislative and constitutional restraints and without respect for the roles of the other branches of government sets his administration apart.").

182. Burt Cohen, *A Liberal's Conservative Case Against President Bush*, N.H. UNION LEADER, Oct. 27, 2004, at A13 ("Gun owners in New Hampshire have reason for concern. In addition to giving the government expanded authority to get the personal records of citizens – books you take out of the library, where you go on the Internet, financial and medical records – the feds, thanks to Bush and John Ashcroft's Patriot Act, can now much more easily gain access to all information regarding who buys, sells, or owns a gun. It's no wonder the National Rifle Association has joined the opposition to this anti-constitutional legislation.").

183. Ponnuru, *supra* note 165, at 90.

184. Jake Tapper, *Conservative Constitutional Catfight! Right-wing Activists Team Up with the Left-wing ACLU to Bash the PATRIOT Act; The Justice Department is Not Amused*, SALON (Apr. 11, 2003), http://www.salon.com/2003/04/11/aclu_7/; Ponnuru, *supra* note 165, at 90; Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1171-72 (2008).

185. Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1196 (2006); POSNER & VERMEULE *supra* note 181, at 1171-72 (2008). Although representing Texas in Congress, Dick Armey grew up in North Dakota, and earned his

Congressman Don Young from Alaska has been quoted as saying on a call-in show on Alaska Public Radio that the USA PATRIOT Act was the “worst act we ever passed.”¹⁸⁶

The government also implemented other controversial responses in the wake of September 11. For example, Attorney General John Ashcroft issued an order to the Bureau of Prisons entitled “Monitoring of Attorney-Client Communications of Designated Federal Prisoners,” which permits the government to listen to conversations between lawyers and their clients that had previously been privileged.¹⁸⁷ Some travelers have objected to the pat-down searches and body-scanning technologies at airports that the Transportation Security Administration (TSA) has implemented under the Aviation and Transportation Security Act of 2001, perceiving them to be publicly humiliating physical violations invading their right to privacy.¹⁸⁸

In addition to raising concerns about the civil liberties of United States citizens, the government’s policies after September 11 have also significantly impacted the lives of thousands of foreign citizens and their families. Professor David Cole of Georgetown University has raised questions about the government’s treatment of immigrants – particularly its policies targeting Muslim, Arab, and South Asian immigrants.¹⁸⁹ After September 11, the Attorney General obtained unilateral authority – at his or her own discretion – to detain citizens of other countries in the United States for an unspecified period of time, and without a hearing.¹⁹⁰ Even if the detained individual was allowed a hearing and an immigration judge ruled the person should be released, new regulations allowed the prosecutor to keep him locked up, simply by filing an appeal of the release order, with no showing that the appeal is likely to succeed.¹⁹¹ It allowed the federal

bachelor’s degree from Jamestown College and a master’s degree from the University of North Dakota. 149 CONG. REC. 5827 (2002).

186. Tapper, *supra* note 184. The USA PATRIOT Act was the “worst act we ever passed. Everybody voted for it, but it was stupid, it was what you call ‘emotional voting.’” (statement of Rep. Don Young, R-Alaska).

187. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INTL L. 11, 30, n.96 (2010) (quoting Attorney General Order 2529-2001 RIN 1120-AB08, 66 Fed. Reg. 55,061-66 (Oct. 26, 2001)).

188. *See, e.g.*, the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597, 597-98 (2001). Although the Constitution does not expressly articulate a right to privacy, this right has been interpreted to be inherently protected as emanating from the First Amendment’s right to freedom of assembly and freedom of speech, the Fourth Amendment’s prevention of unreasonable search and seizure, the Ninth Amendment’s guarantee of non-enumerated rights that are retained by the people, and the Fourteenth Amendment’s right to due process. Jacqueline Smith-Mason, *Privacy Rights Versus Public Safety after 9/11*, PHI KAPPA PHI FORUM, Fall 2011, at 14.

189. Cole, *supra* note 129, at 48-54.

190. *Id.* at 52-53.

191. *Id.*

government to imprison foreign citizens indefinitely, even when they have prevailed in their judicial hearings.¹⁹²

In the aftermath of September 11, the government detained over twelve thousand people in investigating the attacks¹⁹³ – with some estimates ranging as high as five thousand people,¹⁹⁴ refusing to release information about those who were detained, including their identities. Their families and friends had no idea what was happening to them. The government tried hundreds of immigrants in secret proceedings, closed not only to the public and press, but also to family members of those who were detained.¹⁹⁵ Many people were locked up and deported.¹⁹⁶ Many were imprisoned for months without being charged or allowed to see their families before finally being released.¹⁹⁷ Civil liberties advocates believe that these measures were in violation of the right to due process, and question the prudence of these policies on practical grounds.¹⁹⁸

C. THE CONSTITUTION AND DETAINEES

The treatment of detainees who have been captured by the United States has also raised troubling questions.¹⁹⁹ We can all recall the “enhanced interrogation techniques” that had been used against some prisoners, which were alleged to have caused “severe pain or suffering” that would constitute torture under the International Convention Against Torture

192. *Id.*

193. *Id.* at 51.

194. Kim Zetter, *The Patriot Act is Your Friend*, WIRED (Feb. 24, 2004), <http://www.wired.com/politics/law/news/2004/02/62388?currentPage=all>.

195. Cole, *supra* note 129, at 51-52.

196. Zetter, *supra* note 194, at 46.

197. Cornehls, *supra* note 102, at 80. According to this chapter, the Center for National Security Studies and other organizations filed a lawsuit against the Department of Justice to obtain information about those who had been arrested and held. The final order in that case was entered in August of 2002, by which time most of those who had previously been arrested had either been deported or released. Some had been imprisoned for up to seven months without having charges brought against them and without being allowed to interact with their family members. *Id.* Tapper, *supra* note 184 (according to the Justice Department, 765 Arabs and Muslims “were detained on violations of immigration laws, of whom 478 were deported and 134 charged with other crimes, leading to around 100 convictions”).

198. Cole, *supra* note 129, at 54. (“There is good reason to doubt whether these measures will in fact make us safer. By penalizing even wholly lawful, nonviolent, and counter-terrorist associational activity, we are likely to waste valuable resources tracking innocent political activity, drive other activity underground, encourage extremists, and make the communities that will inevitably be targeted by such measures far less likely to cooperate with law enforcement. And by conducting law enforcement in secret, and jettisoning procedures designed to protect the innocent and afford legitimacy to the outcome of trials, we will encourage people to fear the worst about our government.”).

199. *See generally* JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* (2011).

that the United States has ratified, as well as violate United States law.²⁰⁰ We remember the vivid photographs depicting the abuse faced by prisoners at Abu Ghraib, as well as other individuals who have come forward with allegations of maltreatment.²⁰¹ Martin Breaker, who graduated from the University of North Dakota School of Law in 2011, previously served as a commanding officer in Iraq in the aftermath of the scandal of prisoner abuse at the United States military facility at Abu Ghraib, and has spoken publicly about his experiences.²⁰² In 2003, after thirty-two years of military service in both active and reserve duty, he retired from the Army Reserve, but once the Abu Ghraib events surfaced, he volunteered to return to duty serving in Iraq from 2005 to 2008, because he wanted “to help restore American honor and dignity that had been tarnished.”²⁰³ Colonel Breaker attributed the Abu Ghraib scandal to a “failure of leadership,” and recounted, “[h]e helped institute a program of hygiene, medical care and education ‘to win the hearts and minds’ of Iraqis.”²⁰⁴

Fortunately, the government subsequently renounced those enhanced interrogation techniques. In 2005, Congress passed the Detainee Treatment Act²⁰⁵ sponsored by Senator John McCain, who had himself been subjected to torture as a former prisoner of war.²⁰⁶ This Act explicitly mandated that all captives held by the United States will be protected against torture.²⁰⁷

200. Kaveri Vaid, *What Counts as “State Action” under Article 17 of the Rome Statute? Applying the ICC’s Complementarity Test to Non-Criminal Investigations by the United States into War Crimes in Afghanistan*, 44 N.Y.U. J. INT’L L. & POL. 573, 588 (2012) (noting the International Committee for the Red Cross has confirmed that United States interrogation policies and practices included “suffocation by water (or waterboarding), prolonged standing in stress positions (resulting in detainees being forced to urinate and defecate on themselves), forced nudity, cramped confinement in a box, prolonged nudity, sleep deprivation combined with stress positions, exposure to cold temperatures, prolonged shackling, and food deprivation and restriction.”) (footnotes omitted); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 399 (2006); see generally Cole, *supra* note 129.

201. Manfred Nowak et al., *The Obama Administration and Obligations under the Convention Against Torture*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 33, 44 (2011).

202. Stephen J. Lee, *Retired Army Colonel, in Crookston: Leadership Failure Main Reason for Abu Ghraib Scandal*, GRAND FORKS HERALD, Mar. 6, 2012, at A2.

203. *Id.*

204. *Id.*

205. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)).

206. Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL’Y 271, 282-83 (2011) (“Led by the public advocacy of Senator John McCain, a survivor of torture during his years of captivity during the Vietnam War, Congress enacted the Detainee Treatment Act of 2005, which expressly prohibited cruel, inhuman, or degrading treatment of any person in United States custody.”).

207. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)).

The Obama Administration has also indicated that it will abide by the Geneva Conventions and has repudiated the use of torture.²⁰⁸

Concern has also been raised about United States policy concerning the continued detention of “enemy combatants,” as they were known under the Bush Administration, or “unprivileged enemy belligerents,” as they are known in the Obama Administration.²⁰⁹ According to the Executive Branch, this terminology signifies that the individual is a civilian who has directly engaged in armed conflict against the United States in violation of the laws of war.²¹⁰ The administrations under both President Bush and President Obama have claimed that such a person may be detained for the duration of the hostilities, and that the Geneva Convention protections do not apply to that individual. In the years since September 11, untold numbers of extrajudicial prisoners have been held by the United States government, both in known locations such as Guantanamo Bay, Cuba, as well as in covert interrogation sites in other regions of the world.²¹¹

Questions have also been raised about the Constitutional right to Due Process of detainees who are held by the United States. Two months after the September 11 attacks, President Bush announced that captives held by the United States could be tried by military commissions, instead of by the civilian federal court system.²¹² The following year, the detention camp at Guantanamo Bay, Cuba was established to hold such detainees.²¹³ The President asserted that the Joint Resolution for the Authorization for Use of Military Force against Terrorists, enacted shortly after September 11, provided the authority to detain combatants indefinitely to prevent their return to the battlefield.²¹⁴ Moreover, the administration indicated that

208. Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 2 (2009) (“President Obama, as promised during his campaign, has forcefully repudiated Bush’s interrogation policies, indicating that, in his view, at least some of the techniques sanctioned by Bush amount to torture.”).

209. Michael T. McCaul & Ronald J. Sievert, *Congress’s Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and its Adoption of Commission Rules that Fully Comply with Due Process*, 42 ST. MARY’S L.J. 595, 609-11 (2011).

210. McCaul & Sievert, *supra* note 209, at 609-10.

211. Sidney Blumenthal, *This is the New Gulag: Bush has Created a Global Network of Extra-Legal and Secret U.S. Prisons with Thousands of Inmates*, GUARDIAN, May 6, 2004, at 24.

212. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

213. Ashley C. Nikkel, *Painting Ourselves into a Corner: The Fundamental Paradoxes of Modern Warfare in Al Maqaleh v. Gates*, 12 NEV. L.J. 443, 452-53 (2012).

214. Jonathan Hafetz, *Military Detention in the “War on Terrorism”*: Normalizing the Exceptional after 9/11, 112 COLUM. L. REV. SIDEBAR 31, 36 (2012), http://www.columbialawreview.org/wp-content/uploads/2012/03/31_Hafetz.pdf; Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1849 n.87 (2011) (“[T]he

since the detainees were not on United States soil, the Constitution did not apply to them, and therefore they had no access to United States courts to review the legality of their detention.²¹⁵ The administration also asserted that anyone to whom it gave the designation “enemy combatant” was not covered by the Geneva Convention protections, and therefore did not have access to counsel, the right to a trial, or even knowledge of the charges against them.²¹⁶ In the following years, relatives and friends of the detainees filed habeas corpus cases in the federal courts to challenge the constitutionality of the administration’s actions.

The first of these to reach the Supreme Court was *Rasul v. Bush*²¹⁷ in 2004, where the petitioners had been imprisoned at Guantanamo Bay for over two years without any charges brought against them, without any trial or conviction, and where they denied that they engaged in or plotted acts of aggression against the United States. In the case, the Supreme Court held the Executive Branch did not have the authority to deny the detainees access to the United States justice system, the detainees have a right to petition for habeas corpus, and the Executive Branch must provide the detainees with the opportunity to hear and refute the evidence brought against them that caused them to be classified as “enemy combatants.”²¹⁸ Even though Cuba retained “ultimate sovereignty” over Guantanamo Bay Naval Base, the United States exercises plenary and exclusive jurisdiction and control, and therefore it will be considered within the territorial jurisdiction of the United States for purposes of habeas petitions.²¹⁹

That same year, the Supreme Court heard *Hamdi v. Rumsfeld*,²²⁰ in which a United States citizen, who had been captured in Afghanistan, was being detained indefinitely in naval briggs in Virginia and South Carolina, as an “illegal enemy combatant,” without any formal charges, without any oversight of the determination of his status, and without access to an attorney or to the courts.²²¹ The Supreme Court ruled in this case that, under the Due Process Clause, United States citizens must be able to challenge their classification as an “enemy combatant,” by receiving notice

White House has insisted that the AUMF allows for indefinite detention of individuals at Guantanamo Bay.”).

215. Margulies, *supra* note 56, at 630-31.

216. Hafetz, *supra* note 214, at 37.

217. 542 U.S. 466 (2004).

218. Margulies, *supra* note 56, at 630-31.

219. Melissa J. Durkee, *Beyond the Guantanamo Bind: Pragmatic Multilateralism in Refugee Resettlement*, 42 COLUM. HUM. RTS. L. REV. 697, 726 (2011).

220. 542 U.S. 507 (2004).

221. John J. Gibbons, *Does 9/11 Justify a War on the Judicial Branch?*, 63 RUTGERS L. REV. 1101, 1109 (2011).

of the factual basis for their classification, and a fair opportunity to rebut the government's factual assertions before an impartial decision maker. Justice O'Connor noted in the majority opinion "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."²²²

As a result of *Rasul* and *Hamdi*, the Defense Department established the Combatant Status Review Tribunals to determine whether detainees held by the United States were correctly designated as "enemy combatants."²²³ When Congress passed the Detainee Treatment Act of 2005,²²⁴ it restricted the detainees' right to petition for habeas corpus in federal courts, limiting the judiciary's ability to review the tribunals' decisions.²²⁵ In 2006, the Supreme Court heard *Hamdan v. Rumsfeld*,²²⁶ in which the court held these military commissions were not valid because their structures and procedures violated both the Uniform Code of Military Justice and the Geneva Conventions.²²⁷ If the President were to convene military commissions, they must be convened pursuant to a statute passed by Congress (not just a Department of Defense order), or sanctioned by the laws of war as codified by Congress in the Uniform Code of Military Justice, and the military commissions failed to meet either of these criteria.²²⁸ Nor was there anything in the legislation passed in the aftermath of September 11 authorizing the war efforts – the Joint Resolution for the Authorization for Use of Military Force against Terrorists – that would have authorized the President to establish these military commissions.²²⁹ Moreover, the Court held the congressional limitations on habeas corpus only applied to petitions filed after the enactment of the Detainee Treatment Act of 2005, not to those that had been filed previously.²³⁰

222. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004).

223. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

224. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)).

225. Saurav Ghosh, *Boumediene Applied Badly: The Extraterritorial Constitution after Al-Maqaleh v. Gates*, 64 STAN. L. REV. 507, 511 (2012).

226. *Hamdan*, 548 U.S. at 636.

227. See *id.* at 567.

228. See generally Dawn Johnsen, *The Story of Hamdan v. Rumsfeld: Trying Enemy Combatants by Military Commission*, in PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

229. *Hamdan*, 548 U.S. at 594.

230. *Id.* at 572.

Shortly after this decision, Congress passed the Military Commission Act of 2006,²³¹ which authorized the detainees to be tried by military commissions, and which retroactively restricted detainees' right to petition for habeas corpus in federal courts. However, it did not formally suspend habeas corpus under the Constitution.²³² The lawyers advocating for the rights of the detainees believed the procedures established by this statute were still deficient, so they went back to the courts.

In 2008, the Supreme Court in *Boumediene v. Bush*²³³ ruled that the Military Commissions Act of 2006 unconstitutionally limited the rights of detainees to access judicial review in violation of the Suspension Clause of the Constitution, and once again held detainees have the right to challenge their detention in the federal courts.²³⁴ At that point, some of the detainees had been held at Guantanamo for six years without judicial determination as to their status.²³⁵ The government again argued that since Guantanamo Bay was under the sovereignty of Cuba, the detainees were not within the jurisdiction of the United States, and therefore they had no constitutional rights.²³⁶ The Court reiterated its holding in *Rasul*, indicating because the United States government had complete jurisdiction and control over Guantanamo Bay, it had de facto sovereignty, and therefore the constitutional protections do apply to the prisoners being held there.²³⁷ Moreover, the Court held the Military Commissions Act unconstitutionally restricted the detainees' right to petition for a writ of habeas corpus, and unless Congress specifically suspended the right to habeas corpus under the Suspension Clause, the detainees still retained this right.²³⁸

Shortly thereafter, Congress passed the Military Commissions Act of 2009,²³⁹ which President Obama signed into law, in an attempt to address these issues.²⁴⁰ The American Civil Liberties Union (ACLU) and others still had some concerns that it fails to bring the tribunals in line with the

231. Pub. L. No. 109-366, 120 Stat. 2600.

232. U.S. CONST. art. 1, § 9, cl. 2.

233. 553 U.S. 723 (2008).

234. *Boumediene*, 553 U.S. at 724.

235. Laurel E. Fletcher et al., *Defending the Rule of Law: Reconceptualizing Guantanamo Habeas Attorneys*, 44 CONN. L. REV. 617, 658 (2012).

236. *Boumediene*, 553 U.S. at 739-54.

237. *Id.* at 754-55.

238. *Id.* at 771 ("If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.")

239. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. § 948a-950t (Supp. IV 2010)).

240. See generally McCaul & Sievert, *supra* note 209, at 609-10.

Geneva Conventions and the United States Constitution.²⁴¹ The executive branch has been operating under this new law, and Congress held hearings in 2011 to monitor its progress.²⁴² During the first two years after *Boumediene*, federal district courts granted 19 petitions for habeas corpus and denied 15.²⁴³ However, in more recent years, the district courts and the United States Court of Appeals for the District of Columbia Circuit have rejected all such petitions.²⁴⁴ In June of 2012, the Supreme Court rejected the petitions for certiorari made by seven Guantanamo detainees appealing the denials of their petitions for habeas corpus by the lower courts.²⁴⁵ The previous month, Khalid Sheikh Mohammed, who allegedly masterminded the September 11 attacks, was arraigned at a hearing in a military courtroom in Guantanamo Bay, and his trial is expected to commence next year.²⁴⁶ The saga persists.

D. CONTINUED DEBATES BETWEEN SECURITY AND LIBERTY

Our nation is still in the midst of struggling to balance these factors: to make our country as safe as possible (of course acknowledging that nothing is fail-proof), while at the same time preserving those fundamental values for which our country stands. After the original Patriot Act was enacted into law, a series of additional statutes have been passed to modify provisions in the original law and to add and strengthen other security

241. Laura M. Olson, *Prosecuting Suspected Terrorists: The "War on Terror" Demands Reminders about War, Terrorism, and International Law*, 24 EMORY INT'L L. REV. 479, 485 n.38 (2010).

While the Military Commissions Act of 2009 ("MCA 2009"), which is Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, addresses some of the defects of the military commissions established in 2006, the military commissions remain vulnerable to constitutional challenge, in particular both the scopes of personal and subject matter jurisdiction may be broader than permissible under the U.S. Constitution and IHL [international humanitarian law].

Id.

242. *Justice for America: Using Military Commissions to Try the 9/11 Conspirators, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011), available at http://judiciary.house.gov/hearings/hear_04052011.html (last accessed July 5, 2012).

243. Linda Greenhouse, *Goodbye to Gitmo*, OPINIONATOR (May 16, 2012), <http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/>.

244. *Id.*

245. *The Court Retreats on Habeas*, N.Y. TIMES, June 14, 2012, at A34.

For four years, the justices have left it to the Court of Appeals for the District of Columbia Circuit to devise rules for the Guantanamo habeas cases. That court has developed substantive, procedural and evidentiary rules that are unjustly one-sided in favor of the government. . . . In the 19 appeals it has decided, the court has never allowed a prisoner to prevail.

Id.

246. Dina Temple-Raston, *Capturing KSM*, VIRGINIA-PILOT, July 1, 2012, at E9.

measures. Among others, these measures include the Cyber Security Research and Development Act,²⁴⁷ the Cyber Security Enhancement Act,²⁴⁸ the Twenty-First Century Department of Justice Reauthorization Act,²⁴⁹ the Federal Information Security Management Act,²⁵⁰ the Intelligence Reform and Terrorism Protection Act,²⁵¹ and the USA Patriot Improvement and Reauthorization Act.²⁵² Congress continues to hold hearings on the Patriot Act and other related statutes and issues.²⁵³ On May 26, 2011, several amendments to the Foreign Intelligence Surveillance Act (FISA) that had been enacted as part of the Patriot Act were extended by Congress.²⁵⁴ A vast array of governmental, academic, non-profit, and for-profit entities continue to focus on legal and policy issues surrounding the government's actions to prevent further acts of terrorism and countervailing concerns about protection of rights and freedoms.²⁵⁵

During 2012, the American Bar Association – which has been a leader in debating these issues and keeping them in the forefront of the American public policy discussions – has published a multipart series in the *ABA Journal* highlighting some of these continuing controversies under the caption of “Patriots Debate: The Meaning of the Constitution in a Time of Terror.”²⁵⁶ The series includes articles depicting various viewpoints on topics such as the war powers of Congress and the President,²⁵⁷ targeted killings of terrorists, cyber warfare, coerced interrogations, domestic

247. Pub. L. No. 107-305, 116 Stat. 2367 (2002).

248. Pub. L. No. 107-296, § 225, 116 Stat. 2135, 2156 (2002).

249. Pub. L. No. 107-273, 116 Stat. 1758 (2002).

250. Pub. L. No. 107-347, tit. III, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C.).

251. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

252. Pub. L. No. 109-177, 120 Stat. 192 (2006).

253. See, e.g., *Reauthorization of the Patriot Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 16 (2011); *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 11 (2011); *Permanent Provisions of the Patriot Act: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 39 (2011); *USA Patriot Act: Dispelling the Myths: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011).

254. Patriot Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216; see also Charlie Savage, *Deal Reached on Extension of Patriot Act*, N.Y. TIMES, May 20, 2011, at A16; Edward C. Liu, CONG. RES. SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXTENDED UNTIL JUNE 1, 2015 2 & nn.11-12 (2011), available at <http://www.fas.org/sfp/crs/intel/R40138.pdf>.

255. See, e.g., GEORGETOWN SECURITY LAW BRIEF, <http://www.securitylawbrief.com/> (a resource by the Center on National Security and the Law at Georgetown University Law Center).

256. PATRIOTS DEBATE, A.B.A. J., <http://www.abajournal.com/topic/patriots+debate> (last visited Nov. 7, 2012).

257. See generally SETH WEINBERGER, RESTORING THE BALANCE: WAR POWERS IN AN AGE OF TERROR (2009).

terrorism, and national security letters.²⁵⁸ The July 2012 issue features an article entitled “Insider Threats: Experts Try to Balance the Constitution with Law Enforcement to Find Terrorists.”²⁵⁹ It notes “[h]ere, the issue is whether the training and intelligence-gathering activities of law enforcement officials are sufficiently balanced against constitutional protections of religious and political thought. And do law enforcement tactics and policies encourage Muslim-Americans to help weed out the troublemakers, or do they encourage continued racial stereotypes?”²⁶⁰ The ABA’s Standing Committee on Law and National Security is publishing a new book entitled PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW, on which the series of articles is based.

These national deliberations persist within the nation’s capital and throughout the United States.²⁶¹ Lawyers continue to defend the rule of law, due process, the powers of the presidency and of Congress, individual rights and liberties, and all look to various interpretations of the Constitution to justify their positions. Some celebrate the fact that the government has not implemented some of the more egregious responses to this crisis that it has in reaction to previous national crises.²⁶² Others highlight the new forms of government infringements upon rights and freedoms, which are of equal concern as those in the past.²⁶³

258. Richard Burst, *Insider Threats: Experts Try to Balance the Constitution with Law Enforcement to Find Terrorists*, A.B.A. J. (Jul. 1, 2012, 5:10 AM), http://www.abajournal.com/magazine/article/insider_threats_experts_try_to_balance_the_constitution_with_law_enforcemen/.

259. *Id.*

260. *Id.* at 2.

261. See generally NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* (2003); DAVID K. SHIPLER, *THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES* (2011).

262. Cole, *supra* note 129, at 1.

[A]s we launch a war on terrorism in response to the horrific attacks of September 11, 2001, scholars, government officials, and pundits remind us repeatedly that we have avoided the mistakes of the past: we have not locked up people for merely speaking out against the war, as we did during World War I; we have not interned people based solely on their racial identity, as we did during World War II; and we have not punished people for membership in proscribed groups, as we did during the Cold War.

Id.

263. *Id.* at 1-2.

Today’s war on terrorism has already demonstrated our government’s remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history. We have not, it is true, interned people solely for their race, but we have detained approximately two thousand people, mostly through administrative rather than criminal procedures, and largely because of their ethnic identity. In addition, we have subjected Arab and Muslim noncitizens to discriminatory deportation, registration, fingerprinting, visa processing, and interviews based on little more than their country of origin. We have not, it is true, made it a crime to be a *member* of a terrorist group, but we have made guilt by association the linchpin of the war’s strategy, penalizing people under criminal and immigration laws

Former Vice President Dick Cheney, in releasing his new book shortly before the 10th anniversary of September 11, stated one of the greatest accomplishments of his service under the Bush Administration is the United States did not have another September 11 type attack on United States soil for the rest of the administration's tenure, and he attributes that success to the enhanced governmental powers that his administration initiated.²⁶⁴ However, in response to a similar assertion about the absence of subsequent attacks, Republican Congressman Bob Barr noted: "It's always difficult to disprove a negative," and he highlighted: "You can't legitimately say that it's because of the expanded powers . . . that we haven't had another terrorist attack."²⁶⁵ He indicated that the fact the United States has not experienced another major terrorist attack may well be because of increased public awareness and because the government has learned from the mistakes it had made before September 11.²⁶⁶ He has continued to oppose various provisions of the Patriot Act and other government actions in the wake of the attacks.²⁶⁷

V. CONCLUSION

During the symposium in Bismarck, we explored some of the fundamental rights and values that are enshrined in the United States Constitution, as well as some of the challenges to those liberties that have arisen during times of national crisis. As discussed above, the United States is still in the midst of struggling to balance national security with fundamental liberties. Our three branches of government are at the center of this struggle. Congress, in passing the Patriot Act and subsequent reauthorizations, the Military Commissions Acts, and other measures. The President, in spearheading both enactment and rigorous implementation of the Patriot Act and using all methods that he views are at his disposal to combat terrorism. And the Supreme Court, in striving to ensure that sufficient checks and balances remain and that the rights and values enshrined in our Constitution are upheld even during this latest national

for providing "material support" to politically selected "terrorist" groups, without regard to whether an individual's support was intended to further or in fact furthered any terrorist activity.

Id.

264. Opinions, *The Rest of the Iraq Story: According to Cheney*, N. WYO. DAILY NEWS, Jan. 27, 2012, at 4 ("Cheney's proudest moment, as recounted in his book, is the day he and Bush left office knowing that no other terrorist attacks had occurred on American soil during their watch."); *see also* Dick Cheney, *In My Time: A Personal and Political Memoir* 456 (2011).

265. Tapper, *supra* note 184.

266. *Id.*

267. John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 464 (2010).

crisis. It is important to note that the President and members of Congress also swear to protect and uphold the Constitution.

The rule of law and the United States Constitution have been significantly affected by the inevitabilities of the post-September 11 world, and by the need to use new methods to counter new forms of terrorism and warfare. Yet we must also be conscientious about how we are meeting these new challenges, whether all of the new governmental powers are necessary or even effective, what privacies and freedoms we are giving up in accepting these new powers, and whether some of them may have gone too far in eroding the constitutionally protected freedoms that we cherish in our country.

Some of the original provisions of the Patriot Act have lapsed or have been overturned by the courts, but the government has still retained much greater power than it had before September 11. We may now be living in a new era, where we will have to grapple with how much of our civil liberty we are willing to sacrifice and hand over to the government for an indefinite period of time.²⁶⁸ It is crucial to recall that the restrictions on civil liberties that occurred during previous national emergencies subsequently abated when the crisis was over.²⁶⁹ But how long will the current crisis last? Will it ever have a definitive end? How much of our freedom do we want to sacrifice? What margin of greater security do these sacrifices truly enable us to enjoy? How should we continue to contend with the strains on the US Constitution that have come in the aftermath of September 11, while at the same time taking the actions that are warranted to protect national security? Will the pendulum gradually swing back toward a greater respect for individual rights, civil liberties, and limited government? These are questions that we will all continue to confront long into the future. One factor providing significant optimism in facing these momentous questions is the very fact that committed and thoughtful people are engaging in these discussions throughout the United States, as exemplified by the event held in North Dakota on the eleventh anniversary of September 11. As long as these conversations continue, they will help to ensure that the pendulum will not sway too far, for too long, toward one side or the other, but that an appropriate balance will soon be brought back into equilibrium.

268. Cornehls, *supra* note 102, at 85.

269. *Id.*