

REVIEW ESSAY

A Prescription for Perilous Times

Review of *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*. By Geoffrey R. Stone. W.W. Norton & Company, 2004. 730 pages.

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INTRODUCTION

It seldom happens that a scholar makes a lasting contribution both to legal history and to the most pressing constitutional issues of the day in the same work. It is more rare that an academic does so in a book accessible to a general audience. *Perilous Times*¹ accomplishes that feat. For these reasons, and for another as well, the book should be regarded as a triumph.

University of Chicago Law Professor Geoffrey R. Stone has written an important work of constitutional history, not only because of what he has to say, but also because of the time in which he says it. The tragedy of September 11, 2001 generated reactions by every branch of the federal government, as well as by the general public and a host of public-regarding institutions in American society. Each of those reactions has implicated the balance between liberty and security that historically has been tested in this country during times of crisis. *Perilous Times* lucidly constructs and conveys the nation's accumulated lessons of experience from the Sedition Act of 1798 to recent events in the "war on terrorism," thereby arming Americans with some of the knowledge necessary to grapple successfully with the challenges of our own time. Professor Stone, in other words, offers not just a bracing reminder of historic threats to America's celebrated civil liberties tradition, but also a constitutional compass for current use in a world that has changed in important respects yet remains much the same.

Some legal academics who read *Perilous Times* may be inclined to conclude that the book covers well-traveled historical ground without embodying the hallmarks of "cutting-edge" scholarly analysis: insights that are subtle, clever,

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

novel, counterintuitive, arcane, or provocative. Such a quick dismissal of *Perilous Times* would be a serious mistake for several reasons. First, although most of the episodes treated in the book will be familiar to historically-minded readers, Professor Stone combines a lively presentation of the facts with a critical eye toward the constitutional issues at stake.

Second, the integrative historical work he performs amounts to an impressive and useful scholarly contribution in itself. Specifically, *Perilous Times* tells a story with a balanced, two-fold moral that is sobering yet ultimately affirming of America's capacity to learn from past mistakes and make moral and constitutional progress. In six historical periods, Professor Stone finds that the federal government and the citizenry overreacted, needlessly sacrificing civil liberties at the altar of perceived threats to national security. In each period, however, there were heroes—politicians, jurists, journalists, and political dissenters of lower station and great courage—who realized that the country was betraying the principles to which it aspires and who summoned the fortitude to speak out. After each episode, moreover, some learning took place; our country returned to a more liberty-friendly equilibrium, with the historical trend pointing in the direction of greater protection of civil liberties. Yet because today's repression does not tend to be the same as yesterday's, our country has difficulty learning the more general lesson that national crises lead to repression. By clearly identifying a disturbing historical pattern in which current governmental conduct is implicated, Professor Stone contributes to the project of preventing current and future repression.

Third, and most importantly, we are currently at war, and at this critical juncture, Professor Stone's book embraces an idea that the ever-increasing intellectual sophistication of academic constitutional lawyers may cause them to undervalue. In the case of the constitutional virtues, familiarity does breed contempt—or, at least, “inattention,” as the late, great Professor Ely once noted in a different setting.² But at this moment in American history, defenses of the chastening power of civil liberties to protect dissenters and other minorities must not be left solely to the pages of the popular press. By virtue of its very accessibility to most citizens, *Perilous Times* instantiates its own compelling theme by helping to create the culture of civil liberties in this country that its author champions.

Perilous Times can profitably be evaluated on three levels by asking a series of questions. First, does the book adequately defend its normative conclusion that unjustified deprivations of civil liberties have taken place throughout American history during wartime? Second, are Professor Stone's reform proposals likely to succeed by facilitating a more appropriate balance between liberty and security in times of national crisis? Third, does *Perilous Times* offer a useful framework for assessing the government's actions since September 11?

2. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (arguing that “‘substantive due process’ is a contradiction in terms”).

The three parts of this Review address each of those questions in turn. *Perilous Times* is excellent in its descriptions and normative assessments of the relevant history, notwithstanding some relatively modest concerns about the empirical sample from which the book draws its conclusions. The lessons of history it develops, moreover, remain highly relevant in a post-September 11 world. The book's proposals for reform, however, are less strong. This vulnerability is due not to any failing on Professor Stone's part, but rather to how challenging it proves to significantly reduce the likelihood of repression in times of crisis. Without a further transformation of social values in America, it is difficult to see how Professor Stone's mechanisms will do much to alleviate the pressures he identifies as having caused the excesses of the past.

Yet this sobering reality should not lead us to lose sight of the intellectual and civic achievement embodied in *Perilous Times*. Americans often fail to see how current governmental conduct continues a disturbing historical pattern. Ultimately, Professor Stone's greatest contribution in helping to prevent future repression lies in his identification of that trend. *Perilous Times* equips Americans to integrate and appreciate the judgments of the court of history, thereby rendering our national community somewhat better able to resist the repressive urge.

I. HISTORICAL FINDINGS

A. PROFESSOR STONE'S HISTORICAL ANALYSIS

The subject of *Perilous Times* is the fate of free speech in particular, and civil liberties more generally, in the United States during six periods of armed conflict. Professor Stone observes that “[t]he United States has attempted to punish individuals for criticizing government officials or policies only during six episodes in our history.”³ He devotes most of the book to investigating each of those episodes.

The first occurred at the end of the eighteenth century, when America was on the brink of war with France and Congress passed the Sedition Act of 1798. That statute criminalized the publication or utterance of a disloyal statement against the federal government, Congress, or President with the intent to bring them into contempt or disrepute.⁴

More than a half-century later, in the midst of the Civil War, President Lincoln suspended the writ of habeas corpus,⁵ disarming the judiciary from reviewing the legality of the arrests and detentions of individuals who criticized

3. STONE, *supra* note 1, at 12.

4. *Id.* at 33–44.

5. See U.S. CONST. art. I, § 9. For a good recent discussion of the Suspension Clause, see Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660–74 (2004) (Scalia, J., dissenting). It is worth noting—because it is often overlooked—that a suspension of the writ does not alter the government's legal duties or a detained individual's rights; rather, it precludes any governmental liability for violations. *Id.* at 2683 (Thomas, J., dissenting) (“I do not see how suspension [of the writ of habeas corpus] would make

the Lincoln Administration.⁶ Included among them was the widely censured military tribunal conviction of Clement Vallandigham, a leader of the Copperheads who was imprisoned and later exiled for condemning President Lincoln, the Emancipation Proclamation, the military draft, and the war itself.⁷

Fast-forwarding some sixty years, the Wilson Administration silenced opposition to America's participation in the First World War. Two famous resisters were Emma Goldman and Mollie Steimer, fierce opponents of American intervention.⁸ Pursuant to the Espionage Act of 1917 and the Sedition Act of 1918, the federal government prosecuted about 2,000 people for opposing the war and the draft; individuals convicted under those statutes were regularly sentenced to prison terms ranging from ten to twenty years.⁹ The most famous victim may have been Eugene Debs. The recipient of a million votes as the Socialist Party's presidential candidate during the 1912 election, he was arrested, prosecuted, and sentenced to ten years' imprisonment for denouncing the war and conscription.¹⁰

A quarter-century later, in the midst of World War II, a severe civil-liberties problem was triggered by the federal government's forcible internment of 120,000 people of Japanese descent who were not suspected of any wrongdoing.¹¹ Fred Korematsu was perhaps the most recognizable surviving member of that suspect class, as a result of a Supreme Court decision that bears his name.¹² At the urging of President Roosevelt, moreover, the federal government sought to suppress dissent "by prosecuting, denaturalizing, or deporting those who questioned [America's conduct of] the war, especially American fascists."¹³

Picking up where World War II left off, the early years of the Cold War marked "one of the most repressive periods in American history."¹⁴ Endeavoring to stifle criticism, the federal government imposed uncompromising loyalty programs, conducted invasive legislative investigations, and criminally pros-

constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy.").

6. STONE, *supra* note 1, at 80.

7. *Id.* at 94–108.

8. *Id.* at 138–46.

9. *Id.* at 12, 146–53, 184–91.

10. *Id.* at 196–97.

11. *Id.* at 287.

12. See *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming petitioner's conviction for remaining in part of a designated "military area" from which persons of Japanese ancestry had been ordered excluded). In 1983, Mr. Korematsu filed a petition for writ of error *coram nobis* to have his conviction set aside for "manifest injustice." *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). Judge Marilyn Patel granted his petition. *Id.* at 1420. As Professor Stone relates, "Judge Patel found that in its presentation of evidence to the federal courts in the course of Korematsu's prosecution and appeal, including in the U.S. Supreme Court, the government had *knowingly and intentionally* failed to disclose critical information that directly contradicted key statements in General DeWitt's final report, on which the government had asked the courts to rely." STONE, *supra* note 1, at 306; see also *infra* note 52 and accompanying text.

13. STONE, *supra* note 1, at 12.

14. *Id.* at 312.

ecuted leaders and members of the United States Communist Party.¹⁵ This part of the Cold War was a time dominated by Senator Joseph McCarthy and the House Un-American Activities Committee.¹⁶

During the Vietnam War of the late 1960s and early 1970s, antiwar protesters organized huge political demonstrations and engaged in extensive civil disobedience. Political violence erupted at times—for example, at the 1968 Democratic National Convention and at Kent State University, where students were shot and killed.¹⁷ The Federal Bureau of Investigation (FBI) tried to impede the efforts of political dissidents; the federal government sought to have the *New York Times* and *Washington Post* enjoined from publishing the “Pentagon Papers,” which had been leaked to the newspapers by Daniel Ellsberg; and the government prosecuted protesters for showing contempt for the American flag and burning draft cards.¹⁸ The Vietnam War was a time of deep social tension, during which America also bore witness to student strikes, teach-ins, and the Supreme Court’s emphatic rejection of an administration’s claims of national security.¹⁹

“In each of these episodes,” Professor Stone relates, “the nation faced extraordinary pressures—and temptations—to suppress dissent.”²⁰ *Perilous Times* explores how the federal government and the public responded to those pressures, critically evaluating their performances and clarifying the circumstances in which they proved most willing to yield to temptation.²¹ The book concludes by turning from past to present, assessing in a coda the impact of the Bush Administration’s prosecution of the “war on terror” on civil liberties.²²

As should be clear from this brief overview, the reference to “Free Speech in Wartime” in the full title of *Perilous Times*, while reflecting the book’s principal focus, understates the breadth of the work’s descriptive and normative concerns. A more appropriate choice of subtitle would have been “Civil Liberties in Wartime.” The issue here is more rhetorical than substantive, but it is nonetheless real. Because the central civil-liberties questions arising out of the federal government’s response to September 11 have to date had little to do with the suppression of political dissent, as Professor Stone himself notes,²³ *Perilous Times* might strike some potential readers as less relevant to current events than it actually is. “Although this work focuses on freedom of speech rather than on civil liberties more generally,” Professor Stone writes, “the central lessons apply across the board.”²⁴ His claim is correct, and it explains the attention he gives to

15. *Id.* at 312–14.

16. *Id.* at 373–93.

17. *Id.* at 459–71.

18. *Id.* at 471–82, 500–16.

19. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (“The Pentagon Papers Case”) (rejecting the government’s attempt to stop publication of Vietnam War documents).

20. STONE, *supra* note 1, at 13.

21. *Id.* at 528–50.

22. *Id.* at 550–57.

23. *Id.* at 551.

24. *Id.* at 13 n.*.

President Lincoln's suspension of the writ of habeas corpus and the Japanese internment during World War II. "Wartime psychology," Justice Jackson has instructed us, "plays no favorites among rights but tends to break down any right which obstructs its path. And the fall of one weakens others."²⁵

Another aspect of the book's coverage is implicit in the above summary but deserves explicit mention. In discussing each historical episode, Professor Stone separately investigates the conduct of each branch of the federal government. He further evaluates the behavior of those individuals who had the greatest impact on events over the course of two centuries. They include the Presidents: John Adams, Thomas Jefferson, Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Lyndon Johnson, Richard Nixon, and George W. Bush.²⁶ Also scrutinized are the Supreme Court Justices: Samuel Chase, who came close to impeachment for his judicial conduct in enforcing the 1798 Sedition Act; Roger Taney, whose 1861 order was flatly ignored by President Lincoln; Oliver Wendell Holmes and Louis Brandeis, who initially lost the battle within the Court over free speech in the World War I era but eventually won the war; and Felix Frankfurter, Robert Jackson, Hugo Black, and Earl Warren, who struggled with the question of free speech for Nazis and Communists.²⁷ Finally, Professor Stone pays close attention to the conduct and arguments of the dissidents, including (in addition to those mentioned above) Matthew Lyon, the first person prosecuted under the 1798 Sedition Act; the self-proclaimed "Hitler of America" William Dudley Pelley; Communist Party leader Eugene Dennis; blacklist victims Lillian Hellman and Dalton Trumbo; and draft-card burner David Paul O'Brien.²⁸ Professor Stone's discussion of this compelling array of personalities, whom he fairly calls "some of the most interesting characters in American history,"²⁹ makes for highly enjoyable reading. So do the many rare photographs, posters, and illustrations that adorn various pages of the book.

B. STONE'S HISTORICAL THESIS

According to Professor Stone, the most important lesson of history regarding the choices Americans have made between liberty and security during perilous times is compelling and unambiguous: "[T]he United States," he concludes, "has a long and unfortunate history of overreacting to the dangers of wartime. Again and again, Americans have allowed fear to get the better of them."³⁰ While recognizing that "each of the six episodes we have examined presented a distinct challenge," his judgment is that "in every instance the nation went too

25. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 112 (1951).

26. STONE, *supra* note 1, at 13.

27. *Id.* at 13-14.

28. *Id.* at 14.

29. *Id.* at 13.

30. *Id.* at 528.

far in restricting civil liberties.”³¹

Acknowledging that his conclusion cannot be proven by the verbal or logical equivalent of a mathematical proof, Professor Stone nonetheless finds support in inferential reasoning:

Certainly, we know that in every one of these episodes the nation came after the fact to regret its actions and to understand them, in part, as excessive responses to war fever and/or government manipulation. The Sedition Act of 1798 has been condemned in the “court of history,” Lincoln’s suspensions of habeas corpus were declared unconstitutional by the Supreme Court in *Ex parte Milligan*, the Court’s own decisions upholding the World War I prosecutions of dissenters were all later effectively overruled, and the internment of Japanese Americans during World War II has been the subject of repeated government apologies and reparations. Likewise, the Court’s decision in *Dennis* upholding the convictions of the leaders of the Communist Party has been discredited, the loyalty programs and legislative investigations of that era have all been condemned, and the efforts of the U.S. government to “expose, disrupt and otherwise neutralize” antiwar activities during the Vietnam War have been denounced by Congress and the Department of Justice.³²

Professor Stone does not view such “after-the-fact judgments” as controversial or surprising: “Fear, anger, and fervent patriotism naturally overwhelm the capacity of individuals and institutions to make clearheaded judgments about risk, fairness, and danger.”³³ Moreover, he contends, fearful citizens demand protection from their leaders, who are quick to respond by decreasing the risk to the majority at the expense of minority “others,” whether “Jacobins, secessionists, anarchists, Japanese Americans, Communists, or hippies.”³⁴ “This is not theory,” Professor Stone chillingly concludes. “It is the unimpeachable lesson of history.”³⁵

Professor Stone convincingly demonstrates the United States’s unnecessary sacrifices of civil liberties during these six periods of national crisis. At this moment in our country’s history, moreover, the moral of Professor Stone’s story belongs on anyone’s short list of urgent messages for Americans and their leaders to understand. Indeed, some of the quotations in the book practically jump off the page because they are so obviously relevant to the conduct of officials in Washington in the wake of September 11.

In describing the near-war with France in 1798, for example, Professor Stone writes: “Blurring the line between dissent and treason, Federalists accused Republicans of disloyalty.”³⁶ He further relates that “[t]he leading Federalist

31. *Id.*

32. *Id.* at 529.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 28.

journal . . . coined the statement ‘He that is not for us, is against us.’”³⁷
Compare those statements with this language at the end of the book:

[L]ike previous wartime leaders, members of the Bush administration have used fear to their political advantage and tarred their opponents as “disloyal.” Shortly after September 11, President Bush warned, in terms strikingly reminiscent of language used by Adams, Wilson, and Nixon, “You are either with us or with the terrorists.” Although the president was referring specifically to other nations, Attorney General John Ashcroft went even further, castigating American citizens who challenged the government’s restrictions of civil liberties: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.”³⁸

Although close correspondences such as these might cause skeptical readers to question whether some of the historical narrative in *Perilous Times* is results-oriented, Professor Stone extensively documents his bottom line regarding history’s unambiguous verdict. He shows that the country was not made noticeably safer by the wartime repression that has occurred throughout American history.

Perilous Times is all the more timely because its basic theme, while sobering, also is hopeful and full of respect for humankind’s ability to rise above its initial, base reactions. One of the principal messages in *Perilous Times* is that America can improve its record. Cautious optimism is warranted, Professor Stone submits, for three reasons.

“Despite the fears that swept the nation in the periods we have examined,” he first notes, “*some* individuals maintained a sense of perspective and recognized that the demands for suppression were unwarranted.”³⁹ Congressmen Gallatin and Livingston in 1798, for example, recognized that the Federalists were attempting to silence, and thereby destroy, the political opposition through intimidation; they stressed the draconian chilling effect on core political speech that the Sedition Act would impose; and they rejected publicly the notion that a political opinion, as opposed to an objective fact, could be proven true or false.⁴⁰ Those two leaders possessed as much foresight as they had fortitude; it was not until 1974 that the Supreme Court would affirm: “Under the First Amendment there is no such thing as a false idea.”⁴¹

Second, Professor Stone observes, “the nation did not always succumb to wartime hysteria. Many proposals for the suppression of speech were rejected in

37. *Id.* at 29.

38. *Id.* at 551–52.

39. *Id.* at 532.

40. *Id.* at 25–33.

41. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

these periods because individuals in positions of authority understood them to be unwise.”⁴² To return to the example of the Sedition Act of 1798: As offensive to modern free-speech principles as it was, it was significantly less so than other proposals considered and rejected by Congress at the time, one of which would not have recognized truth as a defense.⁴³

Third, Professor Stone insists, “[o]ver time, we *have* made progress. . . . [T]he major restrictions of civil liberties of the past would be *less* thinkable today than they were in 1798, 1861, 1917, 1942, 1950, or 1969.”⁴⁴ The humor in one of Professor Stone’s examples helps to make his point: “A reasonable analogy to the prosecution of Eugene Debs during World War I would be the prosecution of Howard Dean in 2004 for his opposition to the war in Iraq.”⁴⁵ Today, Professor Stone might have suggested, all Americans can safely smile at the notion of such a prosecution only because our country has learned some of the painful lessons of the past:

In terms of both the evolution of constitutional doctrine and the development of a national culture more attuned to civil liberties, the United States has made substantial progress. This is a profound and hard-bought achievement. We should neither take it for granted nor underestimate its significance. It is a testament to the strength of American democracy.⁴⁶

The balance between critique and praise—pessimism and optimism—evident in such passages lends credibility to the author’s argument.

For all these reasons, Professor Stone concludes that Americans are not doomed to make the same mistakes again. In suggesting that learning is possible, he offers welcome reassurance that our efforts to resist excess in wartime need not amount to a continual exercise in futility:

It is, of course, much easier to look back on past crises and find our predecessors wanting than to make wise judgments when we ourselves are in the eye of the storm. But that challenge now falls to this generation of Americans. Freedom of speech can endanger security, but it is also the fundamental source of American strength. As Justice Louis Brandeis explained in 1927, “Those who won our independence . . . knew that . . . fear breeds repression” and that “courage is the secret of liberty.” Those are the two most central lessons for Americans to bear in mind.⁴⁷

Professor Stone calls on citizens and leaders to have the courage of America’s most enduring convictions. He identifies courage in the face of fear as the

42. STONE, *supra* note 1, at 532.

43. *Id.*

44. *Id.* at 533.

45. *Id.* at 551.

46. *Id.* at 533.

47. *Id.* at 557.

ultimate prescription for perilous times.

Professor Stone offers an encouraging alternative to the historical account of Seventh Circuit Judge Richard Posner. Judge Posner, though acknowledging “that when a nation is surprised and hurt there is a danger that it will overreact,” nonetheless suggests “it is only with the benefit of hindsight that a reaction can be separated into its proper and excess layers.”⁴⁸ Among other rhetorical questions, Judge Posner asks: “In hindsight we know that interning the Japanese-American residents of the West Coast did not shorten World War II. But was this known at the time? If not, should not the government have erred on the side of caution, as it did?”⁴⁹ He thus reveals himself to be one of very few legal commentators prepared to defend *Korematsu*.⁵⁰

Judge Posner offers a counsel of despair. He fails to explain how the Americans whose stories Professor Stone tells had the benefit of foresight at the moment the country was overreacting, or how our nation has proven itself better able to distinguish proper from excess over the years, even at the time of action. When they are heeded, in other words, the lessons of history afford us the rough equivalent of a retrospective vantage point in the present moment. Respectfully, therefore, Judge Posner errs in suggesting without qualification that “it is only with the benefit of hindsight that a reaction can be separated into its proper and excess layers.”⁵¹

Contrary to Judge Posner’s submissions, moreover, strong evidence exists that the federal government knew at the time that the Japanese Americans subject to the internment orders did not pose a threat. Internal government reports attested to the loyalty of Japanese Americans. Peter Irons’s work, for example, shows that the government intentionally lied in justifying the internment.⁵²

48. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 299 (2003).

49. *Id.*

50. The Chief Justice, too, defended the *Korematsu* Court’s decision to uphold the internment of Japanese aliens, and he criticized the Court only mildly for upholding the internment of American citizens of Japanese ancestry. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 203–09 (1998); see Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing Rehnquist’s book).

51. POSNER, *supra* note 48, at 299.

52. See Peter Irons, *Introduction to JUSTICE DELAYED: THE RECORD OF THE JAPANESE INTERNMENT CASES 5–6* (Peter Irons ed., 1989) (“The evidence at issue in the Justice Department records dealt with claims by General John L. DeWitt, the Army officer who directed the West Coast evacuation and internment programs, that Japanese Americans were disloyal as a racial group and had committed acts of espionage on behalf of Japan. DeWitt had made these claims in an official Army report that had been refuted by other federal agencies, including the Federal Communications Commission, the Office of Naval Intelligence, and the FBI. Disturbed by the ‘suppression of evidence’ that attested to the overwhelming loyalty of Japanese Americans and by the presentation to the Supreme Court of DeWitt’s ‘lies’ about espionage by this group, two of the Justice Department lawyers assigned to the cases—Edward J. Ennis and John L. Burling—had mounted a determined but futile effort to persuade Solicitor General Charles Fahy that he had an ‘ethical obligation’ to give the Supreme Court the true facts in the cases. Over these protests, Fahy assured the Court in defending *Korematsu*’s conviction that he stood behind every ‘line, word, and syllable’ of DeWitt’s disputed report.”); see also PETER IRONS, *JUSTICE AT WAR* 278–310 (1983) (criticizing the DeWitt report); *supra* note 12.

Further, Judge Posner neglects a fundamental point. Let us assume counterfactually that some number of Japanese Americans posed a threat. Even under those circumstances, mass internment—involving the use of race to determine who would be free and who would be interned—constitutes an unconscionably blunt instrument of national security. Surely, the core conservative commitment to colorblindness is not subservient to administrative convenience on the domestic front during wartime.⁵³

For these reasons, the verdict of history is decidedly different from Judge Posner's. In direct response to the episode of the Japanese internment, Congress enacted 18 U.S.C. § 4001(a), which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The legislative history makes clear that the enactment of § 4001(a) was animated in large measure by Congress's rejection of the federal government's conduct towards Japanese Americans during World War II.⁵⁴

This is for the best. Judge Posner's logic is disturbing in its implications. What kind of executive action would it exclude? If “it is only with the benefit of hindsight that a reaction can be separated into its proper and excess layers,”⁵⁵ then, for example, there exists no way to assess objectively the wisdom of a proposed policy of detaining all Muslims in this country for security reasons until the “war on terror” has been won—whenever that is. No reasonable person, including Judge Posner, would defend such a policy. But Judge Posner offers no reassurance that the Muslim-detention hypothetical is distinguishable from the general view he espouses, which is so unsustainable that he contradicts it later in the same chapter. He writes that “the measures taken during World War I and the Red Scare that followed . . . should have been perceived as hysterical, or basely political, or both, at the time.”⁵⁶

It might be suggested that the above criticism, and the Muslim-detention hypothetical in particular, is not fair to Judge Posner—that there is an innocent and undeniable sense in which only hindsight can resolve disputes over how much our society should constrict civil liberties during wartime to survive or avoid catastrophic losses of life. Judge Posner's defense of *Korematsu* is

53. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (“In the eyes of government, we are just one race here. It is American.”). But see *Johnson v. California*, 125 S. Ct. 1141, 1157 (2005) (Thomas J., joined by Scalia, J., dissenting) (rejecting the Court's holding that strict scrutiny is the proper standard of review for an equal protection challenge to a state policy of racially segregating prisoners in double cells for up to sixty days whenever they enter a new correctional facility based on the proffered rationale that such segregation prevents racial gang violence).

54. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (plurality) (“Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950 . . . which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II. H.R. REP. NO. 92-116 (1971); *id.*, at 4 (“The concentration camp implications of the legislation render it abhorrent”).

55. POSNER, *supra* note 48, at 299.

56. *Id.* at 308.

deliberately inflammatory, so the argument might run, but his phraseology ought not obscure the insight behind his implicit observation that the government must make momentous decisions in situations of genuine uncertainty and grave threat. Indeed, if the Muslim-detention hypothetical is not unfair to Judge Posner, then it does not go far enough. After all, if there is literally no way to assess now whether current government actions taken to combat terror are excessive, why stop at Muslims? Why not really err on the side of caution and detain indefinitely all opponents of the war or all critics of the Bush Administration? Judge Posner cannot possibly be endorsing such totalitarian conduct.

There is truth to this perspective, but the directionality of Judge Posner's hyperbole remains troubling. It is one thing to exaggerate for the sake of effect to unsettle received views that are insufficiently considered; it is quite another when one's hyperbole serves only to reinforce past errors. Judge Posner's defense of *Korematsu* falls into the latter category: The case illustrates that the political branches and the courts need greater sensitivity to civil liberties in times of national crisis, not less.

Fortunately, Professor Stone offers a welcome corrective: Americans need not throw up their hands in the struggle to balance liberty and safety during times in which their security is endangered. We can distinguish "proper" from "excessive" by mustering the courage to honor our constitutional commitments and rationally "to connect cause and effect."⁵⁷

None of this is to suggest that the balance between liberty and security must remain the same no matter how acute the threat to the nation's safety. That straw man is not the message of *Perilous Times*. For all but the most knee-jerk, doctrinaire civil libertarians, the tragedy of September 11 changed the thinking of concerned Americans. Professor Stone's powerful point, rather, is this: In light of this nation's regrettable record of overreacting during times of crisis—its tendency systematically to underprotect liberty rather than underprotect security—both citizens and government officials alike should skeptically scrutinize the claims of any governing administration that certain liberty-reducing measures are necessary to protect the public safety. They should ask whether a persuasive logical connection exists between the liberty-reducing powers the government seeks and the security enhancements it promises. If such a nexus is reasonably perceived, moreover, they should inquire whether the measures appear cost-justified in terms of the civil-liberties protections that would be sacrificed.

57. STONE, *supra* note 1, at 547. Judge Posner offers the contrary submission that the real "lesson of history" is that "[o]fficialdom has repeatedly and disastrously underestimated" dangers to the nation's security—for example, the failure to anticipate the Pearl Harbor and September 11 attacks. POSNER, *supra* note 48, at 298–99. In response, Professor Stone notes the lack of any "evidence that the nation's overprotection of constitutional rights caused these misjudgments. 'Pragmatic constitutional reasoning' should make some effort to connect cause and effect." STONE, *supra* note 1, at 547. Judge Posner offers no such evidence, nor does any appear to exist.

C. PROFESSOR STONE'S SAMPLE

Professor Stone submits that the six historical episodes he explores can be divided into two groups of three according to the intensity of the suppression of dissent. Whereas public or governmental intolerance of dissenting voices was especially severe in 1798, World War I, and the Cold War, the urge to silence dissidents was less intense in the Civil War, World War II, and the Vietnam War. The most important explanation for this discernible difference in attitude, Professor Stone suggests, was “the extent to which national political leaders *intentionally* inflamed public fear.”⁵⁸

For example, there existed broad public support for our country's participation in World War II; accordingly, dissent never threatened to demoralize or divide the American people, and President Roosevelt perceived no need to instigate a public attack on political dissent.⁵⁹ During World War I, by stark contrast, President Wilson “faced the challenge of rallying a nation to fight a war even though it had neither been attacked nor threatened with attack. To create an ‘outraged public’ and inspire citizens to make the sacrifices war demands, Wilson . . . fostered a public mood of fear, anger, and rabid patriotism.”⁶⁰ According to Professor Stone, “[h]istory teaches that it is the *interaction* of ‘ordinary’ war fever with cynical efforts by opportunistic political leaders that is most likely to result in what Jefferson called ‘the reign of witches.’”⁶¹

Perilous Times' identification of the independent variable most responsible for the country's systematic overreactions during six wartime episodes in American history is convincing and potentially useful. The United States has fought in several other conflicts, however, and Professor Stone does not explicitly explain why he does not discuss the War of 1812, the Mexican War, the Spanish American War, Korea, or the first Gulf War. He does state that “[t]he United States has attempted to punish individuals for criticizing government officials or policies *only* during six episodes in our history.”⁶² The implication is that no widespread suppression of speech took place during the five conflicts just mentioned. Insofar as that is correct, the question arises whether Professor Stone's strong conclusions are partly affected by selection bias—that is, the choice of which wars to study. At the very least, the reader of *Perilous Times* would benefit from an explanation of why five of the conflicts in which the United States has fought did not generate serious civil liberties concerns on the home front.

Professor Stone may not have adequately examined American history in coming to his normative conclusions for another reason. This country has

58. STONE, *supra* note 1, at 533.

59. *Id.* at 533–34.

60. *Id.* at 534.

61. *Id.* at 535.

62. *Id.* at 12 (emphasis added).

endured episodes of repression outside the wartime context—such as the anti-Masonic hysteria of the 1820s and early 1830s;⁶³ the Mormon persecution of the 1840s and 1850s;⁶⁴ antebellum repression of anti-slavery voices, including censorship of the United States mails;⁶⁵ repression of anarchists after the Haymarket Riot of 1886;⁶⁶ the targeting of socialists and the labor movement during the late nineteenth century;⁶⁷ the Red Scare of 1919–1920 in the immediate aftermath of World War I;⁶⁸ the criminal syndicalism laws of the 1920s and 1930s;⁶⁹ and attacks against civil-rights advocates by many Southern communities in the 1960s.⁷⁰ It is not apparent, therefore, that a wartime setting is either necessary or sufficient for the existence of systematic repression in this country, and the book's central focus on six wartime episodes does not reflect that lesson of experience. Such concerns, however, are relatively modest. *Perilous Times* covers the periods in American history during which civil liberties were most vulnerable. A wealth of historical evidence supports the book's conclusions.

II. REFORM PROPOSALS

A. PROFESSOR STONE'S DIAGNOSES OF PROBLEMS AND SUGGESTIONS FOR REFORM

Professor Stone suggests that in a democratic society, “[a] critical determinant of how the nation responds to wartime is the attitude of the public itself.”⁷¹ He believes that the public responded quite well in some of the six episodes, such as when the citizenry voted the Federalists out of power in 1800, and when

63. See, e.g., ALICE F. TYLER, *FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860*, at 351–58 (1944).

64. See, e.g., LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 44–64 (1979).

65. See, e.g., MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 155–81 (2000); CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* 196 (Harper & Row 1964) (1940) (“A valuable case history in the use of censorship to restrict social criticism, extending far beyond the requirements of public safety, is afforded by the experience of the ante-bellum South in imposing a rigid censorship on incoming mail from the Northern states. The Southern record demonstrates the difficulty of suppressing pernicious and dangerous propaganda without at the same time destroying the literature of reform, of protest, and of sanative criticism.”).

66. See, e.g., JOHN A. GARRATY, *THE NEW COMMONWEALTH, 1877–1890*, at 166–70 (1968); see also STONE, *supra* note 1, at 143 (discussing the Haymarket Riot).

67. See, e.g., *In re Debs*, 158 U.S. 564 (1895). Eugene V. Debs appears at various points in Professor Stone's narrative. See, e.g., STONE, *supra* note 1, 141–42 (discussing Debs's life and opposition to World War I).

68. See, e.g., STONE, *supra* note 1, at 220–25. As this citation shows, Professor Stone discusses the Red Scare at some length.

69. See, e.g., William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 383–84 (citing E. FOSTER DOWELL, *A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES* (1939)).

70. See, e.g., MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (2d ed. 1995).

71. STONE, *supra* note 1, at 535.

even Republican newspapers and party members during the Civil War objected to the military's particularly egregious attempts to squash Democratic and Copperhead dissent.⁷² "More often, however, the public either has failed to protest the suppression of dissent or vociferously demanded and supported it," for instance during World War I and the early Cold War.⁷³ "With few exceptions," Professor Stone disturbingly submits, "even the traditional bulwarks of civil liberties—the legal profession, higher education, the press, 'liberal' politicians and intellectuals, and committed civil libertarians—were unwilling to confront the storm of public accusation and condemnation."⁷⁴

Professor Stone argues that citizens must come to internalize a robust conception of civil liberties, including the duty to tolerate and even to consider dissenting views. He suggests that the public must understand why civil liberties matter, why citizens must safeguard them, and how the pressures of wartime can threaten individual rights. In this regard, he maintains that the media, organizations like the American Civil Liberties Union, educational institutions, government agencies, foundations, and the legal profession can play a critical role in nurturing "a *culture* of civil liberties."⁷⁵

Turning from the public to the federal government, Professor Stone observes that Congress has enacted the Sedition Acts of 1798 and 1918, as well as the McCarran Internal Security Act of 1950. His assessment is blunt: "This is a dreary record of legislative achievement."⁷⁶ Congress has shown an ability to exercise restraint, he acknowledges, but most often "it has either failed to exercise a check on public hysteria or, in some instances, moved far beyond anything the public demanded."⁷⁷ The Sedition Act of 1798 is a good example of the latter phenomenon.⁷⁸ Enacted in the name of national security but actually aimed at allowing the Federalists to achieve partisan advantage over the Republicans, that statute would appear in almost any constitutional lawyer's short list of the most constitutionally offensive statutes ever enacted by Congress. Some members of Congress knew better and spoke out—for example, Congressmen Gallatin and Livingston in 1798—but they were exceptional. "More often, Congress responds to war fever with draconian legislation."⁷⁹

As proposals for reform, Professor Stone suggests certain rules or protocols. One would prohibit Congress "from enacting wartime legislation that limits dissent *without full and fair deliberation*."⁸⁰ Another would mandate that such

72. *Id.* at 536.

73. *Id.*

74. *Id.*

75. *Id.* at 537.

76. *Id.* at 538.

77. *Id.*

78. The 1798 Sedition Act may be a classic instance of a principal-agent problem. The Act served the interests of members of Congress better than it did the interests of their constituents. Accordingly, it is unsurprising that Congress went further in suppressing dissent than most citizens desired.

79. *Id.* at 539.

80. *Id.*

legislation contain a “sunset” provision “requir[ing] reconsideration no less than annually.”⁸¹ Professor Stone asserts that “Congress could also respond better in the future by taking the Constitution more seriously,” a suggestion he believes cannot be dismissed as naïve because “Congress *does* attempt to act within the confines of the Constitution, particularly when it has guidance from the Supreme Court, and even in time of war.”⁸²

Professor Stone concludes that “[a] similar evaluation applies to the executive.”⁸³ Whereas Presidents Adams, Wilson, and Roosevelt could hardly be deemed champions of free speech in 1798, 1917, or 1942, Presidents Lincoln and Truman “did better.”⁸⁴ Interestingly, he maintains that “[p]erhaps the single most important step presidents can take to improve the response of the executive branch in future crises is to ensure that every administration has within its highest councils individuals who will ardently and credibly defend civil liberties.”⁸⁵ Professor Stone regards it as “no coincidence that Harry Truman adopted the federal loyalty program at a time when his inner council lacked such a voice, and one of the most serious concerns about the administration of President George W. Bush is the absence of any senior official representing civil libertarian views.”⁸⁶

Turning to the judiciary, Professor Stone contends that “it is appropriate for courts to take the special circumstances of wartime into account in determining whether the government has sufficient justification to limit the constitutional right at issue.”⁸⁷ He insists, however, that courts must not “abdicate their responsibilities in the face of assertions of national security or military necessity.”⁸⁸ He therefore rejects the argument that courts should recognize their own limitations in the face of exigencies and suspend the ordinary standards of judicial review, deferring to the political branches when faced with allegedly grave questions of national security. In Professor Stone’s view, “[t]he comparative advantages of courts over the executive and legislative branches in interpreting and enforcing constitutional rights are striking.”⁸⁹ These advantages include insulation from electoral political pressures and a greater concern for the preservation of civil liberties.⁹⁰ While acknowledging that courts must not

81. *Id.* at 540.

82. *Id.* at 540, 541.

83. *Id.* at 542.

84. *Id.* Because World War II did not trigger any significant political dissent, and because President Roosevelt interned 120,000 people of Japanese descent, it might be more appropriate to suggest that he was no champion of “civil liberties” as opposed to “free speech.”

85. *Id.*

86. *Id.*

87. *Id.* at 543.

88. *Id.*

89. *Id.*

90. *Id.* There may be reason to question whether courts necessarily are more likely to preserve civil liberties than are the political branches—certainly the Warren Court was. But throughout American history, it is not obvious that courts generally were the institutions most concerned with protecting individual rights. Compare, for instance, the work of the Reconstruction Congress with that of the

impede the government's ability to meet a crisis, he underscores the total lack of historical basis for that concern: "Although Congress and the president have often *underprotected* free speech in wartime, there is not a single instance in which the Supreme Court has *overprotected* wartime dissent in a way that caused *any* demonstrable harm to the national security."⁹¹ Most often, in cases such as *Schenck v. United States*,⁹² *United States v. Dennis*,⁹³ and *Korematsu v. United States*,⁹⁴ "the justices have yielded too readily to their own fears or to executive and legislative demands that they not stand in the way."⁹⁵

Professor Stone advises that "in periods of relative calm the Court should consciously construct constitutional doctrines that will provide firm and unequivocal guidance for later periods of stress."⁹⁶ He further recommends that "the Court must define clear constitutional rules that are not easily circumvented or manipulated"⁹⁷ *Brandenburg v. Ohio*,⁹⁸ he submits, constitutes a great example of an instance in which the Court acted consistently with both suggestions. In response to the submission that any measures the Court takes will be futile because other avenues of oppression emerge just as soon as a liberty-protective judicial decision is rendered,⁹⁹ he observes that the government's attempts to eviscerate dissent "have become both more subtle and less effective" over time.¹⁰⁰

Similarly, Professor Stone rejects as unduly pessimistic the "conventional wisdom [based on decisions such as *Korematsu* and *Dennis*] that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency."¹⁰¹ The Court, he believes, "has

Taney Court. See, e.g., John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1215 (1997) ("The granting of broad power to Congress was necessary in the view of the Framers, in part because it would have been unimaginable to them that the Supreme Court would be composed of a majority of persons who would move faster than Congress to protect the civil liberties of minority race persons.").

91. STONE, *supra* note 1, at 544 (emphases added).

92. 249 U.S. 47 (1919) (upholding the conviction of an individual accused of violating the Espionage Act for distributing leaflets criticizing the World War I draft).

93. 341 U.S. 494 (1951) (upholding the conviction of an individual, over First Amendment objections, for attempting to organize the Communist Party).

94. 323 U.S. 214 (1944) (upholding the military order committing thousands of people of Japanese ancestry to internment camps).

95. STONE, *supra* note 1, at 545.

96. *Id.* at 548.

97. *Id.*

98. 395 U.S. 444 (1969) (creating the "*Brandenburg test*," according to which speech presenting a grave danger of imminent lawless action to fall outside the First Amendment's protections).

99. This is an illustration of a more general legal phenomenon, one evident in such other contexts as campaign finance reform. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 224 (2003) ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."). Whether successful reforms exceed successful evasions over time is context-sensitive and inevitably contested.

100. STONE, *supra* note 1, at 549.

101. *Id.*

a long, if uneven, record of fulfilling its constitutional responsibility to protect civil liberties—even in time of war.”¹⁰² He cites as examples *West Virginia State Board of Education v. Barnette*,¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁴ *Yates v. United States*,¹⁰⁵ and *New York Times Co. v. United States* (the “Pentagon Papers” case).¹⁰⁶ Moreover, because the political branches “have consistently deferred to the Supreme Court’s interpretation of the First Amendment,” he asserts that “these decisions have had a major impact on how the United States responds to the exigencies of wartime.”¹⁰⁷

B. EVALUATING PROFESSOR STONE’S REFORM PROPOSALS

The proposals for reform in *Perilous Times* are not as strong as the book’s historical analysis. This relative weakness is not attributable primarily to any intellectual failing on Professor Stone’s part; rather, it reflects the daunting reality that the social forces he identifies are so difficult to control. Those forces undermine the effectiveness of mechanisms designed to reduce the likelihood of repression in perilous times.

To be sure, the public, various private organizations, the Congress, and the Executive Branch ought to value civil liberties in periods of national crisis more than they have historically. Beyond identifying for those entities repeated historical excesses, however, it is not clear how to transform the values of citizens and elected officials so that they come to view threats to civil liberties more seriously than they do. It is one thing to inform people that our nation has an unfortunate history of unjustified suppression of dissenting voices during wartime; it is quite another to get them to care. And lest that concern be dismissed as overly pessimistic, one should note that the Bush Administration’s post-September 11 orientation towards civil liberties was essentially nonexistent as a campaign issue during the last Presidential election.¹⁰⁸

This is a key point. Congressional protocols, statutory sunset provisions, and executive inclusion of liberty-friendly voices would help to safeguard human freedom during crises, at least to some extent, in the ways Professor Stone indicates. But a further transformation of social values is necessary to support the consistent implementation of such protective measures. The challenge is particularly daunting because the rights of dissidents and other minorities—not members of the dominant, majoritarian culture—are most vulnerable in perilous

102. *Id.* at 550.

103. 319 U.S. 624 (1943) (relying upon First Amendment principles to invalidate a regulation requiring students to salute the flag).

104. 343 U.S. 579 (1952) (holding unconstitutional President Truman’s wartime nationalization of the steel mills).

105. 354 U.S. 298 (1957) (concluding that the Smith Act is limited to speech that incites illegal action).

106. 403 U.S. 713 (1971) (rejecting the government’s attempt to stop publication of Vietnam War documents).

107. STONE, *supra* note 1, at 550.

108. See *infra* Part III for a discussion of civil liberties in the “war on terror.”

times.¹⁰⁹

Turning to the judiciary, we have seen¹¹⁰ that Professor Stone stresses the role of clear rules in adequately protecting civil liberties during wartime:

As the Court has learned by experience and sustained reflection, if the nation is to preserve civil liberties in the face of war fever, the Court must define clear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, presidents, or even future Supreme Court justices. Malleable principles, open-ended balances, and vague standards may serve well in periods of tranquility, but they will fail us just at the point when we most need the Constitution. As the law professor Vincent Blasi has argued, the Court must establish firm principles in ordinary times in order to ensure that the nation does not underprotect dissent in times of crisis.¹¹¹

Professor Stone's focus on the importance of constraining judicial discretion is persuasive, and his reliance on Professor Blasi's influential work is useful. Professor Blasi provides an orienting interpretive framework that is powerful and subtle, counseling judicial adoption of what he calls the "pathological perspective":

[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.¹¹²

Professor Blasi writes that "[o]ne feature unites the various pathologies that first amendment doctrine should be designed to combat: a shift in fundamental attitudes or perceptions among one or another group of persons whose judgments have an important influence on the general level and vigor of public debate and private inquiry."¹¹³ First Amendment doctrine and discourse, he submits, should be articulated with an eye towards preserving, in the face of pathologies, the long-run theoretical integrity and practical efficacy of our constitutional tradition's commitment to free speech.¹¹⁴

Nonetheless, Professor Stone's reliance on the "pathological perspective" to defend the virtues of clear rules in perilous times is problematic for several

109. To the extent the necessary reorientation of values can take place only outside the context of wartime, an analysis of peacetime repression, *see supra* Part I.C, would seem critical as a supplement to Professor Stone's work. The author is grateful to *The Georgetown Law Journal* book reviews editor, Charles C. Speth, for articulating that point.

110. *See supra* note 97 and accompanying text.

111. STONE, *supra* note 1, at 548–49.

112. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

113. *Id.* at 451.

114. *Id.* at 452.

reasons. To begin with, Professor Blasi does not himself conceive a rule-oriented approach as being of primary importance:

It would be a mistake to assume that the strategy for protecting the central norms of the first amendment must emphasize the tactic of doctrinal compulsion—the fashioning of specific, highly protective tests that would bind lower courts and officials in times of stress. It is doubtful that legal standards could ever be designed with sufficient prescience and precision to achieve that type of behavioral effect to any great degree.¹¹⁵

Instead, Professor Blasi stresses the efficacy of inculcating basic attitudes regarding the value of free speech, procedural mechanisms and institutional structures that are resistant to a panicky sense of urgency, and legal methodologies and doctrines that assume less in the way of judicial independence from political pressures.¹¹⁶ “[C]ourts that adopt the pathological perspective,” he argues, “should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.”¹¹⁷ But Professor Blasi “view[s] principles, precepts, and historical benchmarks as more important weapons in the battle against pathology than legal standards, despite the fact that by their very nature principles, precepts, and lessons of history must be more open-ended and less binding than at least some legal standards can be.”¹¹⁸

Putting aside the reliance on Professor Blasi’s work, it is not clear that Professor Stone is correct to place so much emphasis on the constraining power of legal rules. The choice between bright-line rules and flexible standards implicates a famously complicated jurisprudential and ideological debate.¹¹⁹ That choice, and the related debate in constitutional law between categorization and balancing, cannot be made satisfactorily by focusing on the problem of protecting civil liberties in wartime in isolation from other legal settings in which the selection is relevant. Professor Blasi himself has written that “the pathological perspective is just one of several considerations that should figure in the formulation of first amendment doctrine.”¹²⁰

Nor is it self-evident as a general matter (the conventional wisdom notwithstanding) that rules constrain behavior more than standards. Rules, which lack the chilling effect imposed by standards, may free individuals to pursue counter-

115. *Id.* at 467. Note that Professor Blasi does not distinguish between rules and standards in his discussion. The distinction he makes between constraint and discretion, however, seems clear enough.

116. *Id.* at 467–69.

117. *Id.* at 474.

118. *Id.*

119. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1991).

120. Blasi, *supra* note 112, at 495.

purposive advantage right up to the line demarcated by the rule.¹²¹ Further, rules often leave gaps or generate conflicts, rendering mechanical application difficult or impossible; ostensibly vague standards, by contrast, may resonate with the constraining effect of social norms.¹²² As it becomes increasingly apparent that rules generate unfair results that turn on technicalities, moreover, the pressure on regulators and the regulated to circumvent a rule-bound regime will increase.¹²³ A clear rule constrains less insofar as judges become less prepared to enforce it.¹²⁴

Particularly in a wartime setting, rigid rules may not be optimal if one's goal is to protect civil liberties. One might well prefer a flexible standard in a situation where a clear rule is likely to push the government to adopt the (rigid) exception to the general rule. Consider the recent *Hamdi* decision.¹²⁵ If Congress suspended the writ of habeas corpus in response to a hypothetical majority opinion authored by Justice Scalia,¹²⁶ the result would be worse from an overall civil-liberties perspective than the outcome compelled by the actual *Hamdi* plurality, which employed the *Mathews v. Eldridge* balancing analysis.¹²⁷

In any event, the choice between rules and standards is of little consequence by itself, because nothing within a rule or standard identifies the interpretive filter through which either is applied. As Frederick Schauer has observed, "The

121. KELMAN, *supra* note 119, at 41; Kennedy, *supra* note 119, at 1773–74; Sullivan, *supra* note 119, at 63.

122. KELMAN, *supra* note 119, at 44.

123. *Id.* Note that Kelman focuses only on those individuals subject to regulation. See Sullivan, *supra* note 119, at 261 ("[D]ecisionmakers [may] spend time inventing end-runs around [rules] because they just cannot stand their over- or under-inclusiveness.").

124. See Kennedy, *supra* note 119, at 1701 (arguing that rules become standards when "judges [are] simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform"); cf. KELMAN, *supra* note 119, at 45, 49–51 (distinguishing the "real operative rule" from the "nominal rule" based on the exceptionality of total rule enforcement).

125. See *infra* Part III.A for a fuller discussion of *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

126. In his dissent in *Hamdi*, which was joined by Justice Stevens, Justice Scalia provides an historical analysis whose conclusion is sweeping:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.

Hamdi, 124 S. Ct. at 2660–61 (Scalia, J., dissenting) (referencing the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001)).

127. 424 U.S. 319 (1976). See *Hamdi*, 124 S. Ct. at 2646 ("Mathews dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process. 424 U.S., at 335. . . . The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards.' *Ibid.*").

'ruleness' of prescriptive language is not determined by the language itself. It is determined instead by the norms of internalization of those to whom the language is directed."¹²⁸ More specifically, Professor Schauer notes that "when, as with the first amendment, and as with the idea of free speech itself, the rule exists in open ended and theory-laden language, the likelihood of a rule simply collapsing into its justification is great."¹²⁹ Professor Stone's call for clear rules, therefore, is insufficient. We also require a strong sense of what counts as the relevant category—for example, what conduct our legal culture signifies by use of the term "torture."¹³⁰ That meaning must be so deeply shared that it resolutely resists collapse into underlying rationales or hijacking for extrinsic rationalizations. The repressive forces Professor Stone means to control are so powerful and pernicious precisely because they tend to undermine that shared sense of meaning.

The basic point of the above analysis, it is worth underscoring, is *not* that rules are necessarily undesirable, that the rules-versus-standards debate should be resolved in favor of standards, or that doctrinal moves of the sort Professor Stone advises can make no difference. Rather, the sobering lesson here concerns the lack of cause for confidence that greater use of rules will prevent repetitions of repression in times of war. There is no way for the judiciary to pre-commit to adequately protecting civil liberties before an emergency occurs. In the American system of government, the balance between liberty and security during national crises ultimately lies in the hands of Supreme Court Justices, and they cannot avoid exercising the human faculty of judgment at the time of decision.

This is hardly to suggest, however, that decision makers will not better execute their responsibilities if their judgments are informed by the lessons of history. As discussed in the previous Part, one such lesson evident in *Perilous Times* is that repression does not tend to repeat itself but takes new forms. The World War I restrictions on speech, for example, have not been replicated, nor has the Japanese internment. Those facts are important because they show that American society learns from the past and often avoids repeating the same mistakes. They substantiate Professor Stone's contention that "we *have* made progress. . . . [T]he major restrictions of civil liberties of the past would be *less* thinkable today than they were in 1798, 1861, 1917, 1942, 1950, or 1969."¹³¹

Another important implication, however, is that our country has difficulty learning the more general lesson that crises lead to repression. Today's unnecessary sacrifices of civil liberties are harder to prevent because they are not the same as yesterday's. We may feel a sense of enlightenment because there is no sedition act or race-based internment, yet we often fail to see how current

128. Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 18 (1989) (citing Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186–90 (1986)).

129. *Id.* at 22.

130. See *infra* note 177 and accompanying text.

131. STONE, *supra* note 1, at 533.

governmental conduct continues a disturbing historical pattern. In this regard, Professor Stone's greatest contribution in helping to prevent future repression lies in his clear identification of that trend. A powerful way to avoid repeating a problem is to recognize it as one instance of a regrettable, longstanding tendency. *Perilous Times* allows Americans to throw a moral and constitutional sea-anchor into history, one that renders our interpretive community a little better at resisting the propensity to repress.¹³²

Professor Stone employs history to advocate the value of rules in restraining repression. But in the end it may be his historical description rather than his jurisprudential prescription that offers the greatest promise of restraint. A shared understanding of history and the revealed pathologies of law are weaker tethers than we might wish. Yet it would be a shame if our theoretical sophistication concealed from us how much better they are than nothing.

III. AFTER 9/11

It is instructive to consider *Perilous Times* in the context of recent events, and not merely because the book concludes with a brief evaluation of the Bush Administration's responses to the terrorist attacks of September 11, 2001.¹³³ Professor Stone's historical thesis helps to make sense of much that has happened since September 11 by enabling readers to perceive in current events the continuation of a pattern that has repeated itself throughout American history.

A. THE ENEMY COMBATANT CASES

Have you ever gone to a movie and reacted incredulously when the credits appeared on the screen because you could not believe the film was over when important questions had not been resolved? *Perilous Times* leaves the impression of having ended too soon. Specifically, the Supreme Court completed its October 2003 Term by rendering three historic decisions in terrorism cases arising out of the tragedy of September 11: *Hamdi v. Rumsfeld*,¹³⁴ *Rumsfeld v. Padilla*,¹³⁵ and *Rasul v. Bush*.¹³⁶ Though Professor Stone does not discuss the

132. Cf. James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 524 (1999) ("Integrity is many things. In part, it is a moral sea-anchor—a line cast out into the past that seeks to tie together our present actions and our past commitments, to compel us to contemplate the tension between the two. But integrity, at least as I have described it, is more than a search for coherence; it is also a search for universalizable principle. The two dimensions of the activity parallel one another. Just as the process of universalization makes us generalize synchronically, forcing us to extend our principles to people we might have found it convenient to ignore, the move towards coherence forces us to generalize diachronically, stretching out our actions and principles on the examining table of time.")

133. STONE, *supra* note 1, at 550–51.

134. 124 S. Ct. 2633 (2004) (discussed in the text below).

135. 124 S. Ct. 2711 (2004). Jose Padilla is the American citizen who was apprehended by federal agents in Chicago's O'Hare International Airport upon arrival from Pakistan. He was transported to New York on a material-witness warrant issued by the United States District Court for the Southern

Court's holdings, they implicate several of the central themes in *Perilous Times*. For example, and using history as a guide, it might be instructive to learn Professor Stone's assessment of each branch's conduct in those cases.

Consider, for instance, the *Hamdi* litigation. As the Executive Branch pressed the claim that the President possesses inherent authority as Commander-in-Chief to designate an American citizen an enemy combatant and to detain him indefinitely without access to counsel even absent congressional authorization,¹³⁷ the Congress did nothing. Not so the Supreme Court. Yet reasonable people may disagree about whether the Court's decision in *Hamdi* is best viewed as strongly protective of civil liberties or as overly deferential to the government's asserted security interests.

In her plurality opinion announcing the judgment of the Court, Justice O'Connor concluded that Congress had authorized Hamdi's detention,¹³⁸ but she limited that finding of authorization (for the purposes of deciding the case) to the individuals fighting against the United States in Afghanistan,¹³⁹ and she issued the critical qualifier "that indefinite detention for the purpose of interrogation is not authorized."¹⁴⁰ Turning from the threshold question of detention authority to the issue of due process, moreover, Justice O'Connor rejected the Executive Branch's assertions of breathtaking presidential power. "We reaffirm today the fundamental nature of a citizen's right to be free from involuntary

District of New York in connection with its grand-jury investigation into the September 11 terrorist attacks. He was then detained as an alleged "enemy combatant" in the Consolidated Naval Brig in Charleston, South Carolina by order of President Bush. *See id.* at 2715–16. Seeking to challenge his indefinite detention, Padilla filed a petition for writ of habeas corpus in the New York federal court against Secretary of Defense Rumsfeld. The Court, through the Chief Justice, did not decide the merits of the controversy, holding instead that Padilla had sued the wrong person in the wrong court. In particular, the Court held that Melanie A. Marr, the commander of the South Carolina Naval Brig, was the only proper respondent to Padilla's petition because she, not Secretary Rumsfeld, was Padilla's custodian. *Id.* at 2717–22. The Court further concluded that the Southern District of New York did not have personal jurisdiction over Commander Marr. *Id.* at 2722–25. For a discussion of some of the reasons why the Court's procedural holding in *Padilla* is problematic, see Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1983–88 (2005). *See also* *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 416–26 (2004) (arguing that the Court should have conducted a traditional venue inquiry).

136. 124 S. Ct. 2686 (2004). The question presented in *Rasul* was "whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba." *Id.* at 2690. The Court held that federal courts possess statutory jurisdiction to hear such challenges. *Id.* at 2699.

137. *See Hamdi*, 124 S. Ct. at 2639 ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."); *see also* Brief for the Respondents at 13–18, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (No. 03-6696) (advancing this argument).

138. Justice O'Connor relied on the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), which authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the terrorist attacks of September 11, 2001.

139. *Hamdi*, 124 S. Ct. at 2639–40.

140. *Id.* at 2641.

confinement by his own government without due process of law,”¹⁴¹ she wrote, underscoring that “[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.”¹⁴² Through these words, with which most of her colleagues agreed, it is almost as if Justice O’Connor was rejecting the premise of *Korematsu* on behalf of the Court and vowing never to make the same mistake again.¹⁴³ “We therefore hold,” she wrote, “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹⁴⁴ “In so holding,” Justice O’Connor continued:

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. . . . Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions. . . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.¹⁴⁵

Four other Justices, moreover, would have gone further.¹⁴⁶

141. *Id.* at 2647.

142. *Id.* at 2648.

143. *See Korematsu v. United States*, 323 U.S. 214 (1944) (affirming petitioner’s conviction for remaining in part of a designated “military area” from which persons of Japanese ancestry had been ordered excluded); *see also supra* note 12 (discussing why petitioner’s conviction was ultimately set aside).

144. *Hamdi*, 124 S. Ct. at 2648.

145. *Id.* at 2650–51.

146. *See id.* at 2652–60 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment) (concluding that congressional authorization was necessary to detain Hamdi and determining that Hamdi’s detention was unlawful based on a lack of congressional authorization);

Turning to the circumstances of Hamdi's detention, Justice O'Connor pulled no punches in assessing the Government's conduct to date: "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."¹⁴⁷ Justice O'Connor also clarified the scope of Hamdi's right of access to counsel:

Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand.¹⁴⁸

In sum, Justice O'Connor made clear that neither assertions of presidential power nor pleas for judicial restraint would succeed in removing the Court from the critical separation-of-powers dynamic "when individual liberties are at stake."¹⁴⁹

At the same time, however, the plurality declined to announce that detained enemy combatants always have a right to counsel. Further, Justice O'Connor went on to write that "[h]earsay, for example, may need to be accepted as the most reliable available evidence from the Government in [an enemy combatant] proceeding,"¹⁵⁰ that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided,"¹⁵¹ and that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."¹⁵²

id. at 2660–74 (Scalia, J., joined by Stevens, J., dissenting) (concluding based on an extensive historical analysis that Hamdi's detention was unlawful absent suspension of the writ of habeas corpus). Justice Souter's opinion explicitly draws upon *Korematsu*'s rejection by the court of history. *See id.* at 2653–56 (repeatedly emphasizing that Congress acted with "the purpose of avoiding another *Korematsu*" in passing the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress").

147. *Id.* at 2651 (plurality opinion).

148. *Id.* at 2652.

149. *Id.* at 2650.

150. *Id.* at 2649.

151. *Id.*

152. *Id.* at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §§ 1–6 (1997)). Army Regulation 190-8 was adopted to implement the Geneva Convention. It specifies the procedures that administrative military tribunals must follow in determining a detainee's prisoner-of-war (POW) status. *Id.*; *see also Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that the Government was violating Army Regulation 190-8 because the President, not a competent military tribunal, had determined the POW status of Taliban detainees, including Hamdi). The United States Court of Appeals for the District of Columbia Circuit recently considered the Government's appeal of a district court ruling adopting Justice Souter's reasoning and applying it to the detainees at Guantánamo Bay, Cuba. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (Robertson, J.), *appeal docketed*, No. 04-5393 (D.C. Cir. Nov. 12, 2004). On July 15, 2005, the D.C. Circuit reversed the district court's

Whatever the reason *Perilous Times* does not include discussion of *Hamdi*, *Padilla*, and *Rasul*—it probably has to do with the timing of the decisions relative to when the book went to press—this is a significant omission, one Professor Stone hopefully will address in other writing. The historical research reflected in *Perilous Times* renders him well situated to assess the performance of each branch in those cases, as well as to analyze the wisdom of the public's reaction, an issue discussed below.

B. THE FATE OF CIVIL LIBERTIES IN THE “WAR ON TERROR”

Using “history as a gauge,” Professor Stone ends by briefly evaluating the Bush Administration's reaction to the terrorist attacks of September 11, 2001.¹⁵³ His general assessment is that the government's response “has been both positive and negative,”¹⁵⁴ though he devotes almost all his attention to the latter. On the one hand, he remarks, “President Bush deserves credit for his response to the risk of hostile public reactions against Muslims and Muslim Americans.”¹⁵⁵ Further, he observes that so far “there have been no federal criminal prosecutions of any individuals for criticizing the [Bush] administration's policies against terrorism.”¹⁵⁶ He concludes that “the cultural, political, and constitutional barriers the United States has erected to protect antiwar speech from outright suppression are higher than they have ever been, and thus far they have held.”¹⁵⁷

On the other hand, Professor Stone notes that officials in the Bush Administration “have used fear to their political advantage and tarred their opponents as ‘disloyal’”; those officials have stated that public criticism of the Administration's policies serves the interests of only the terrorists.¹⁵⁸ He is concerned as well about the far-reaching powers claimed by the Administration to address the security crisis:

The more questionable restrictions included indefinite detention, with no access to judicial review, of more than a thousand *noncitizens* who were lawfully in the United States and had not been charged with any crime; blanket secrecy concerning the identity of these detainees; refusal to permit many of these detainees to communicate with an attorney; an unprecedented assertion of authority to eavesdrop on constitutionally protected attorney-client communications; secret deportation proceedings; the incarceration for

judgment, holding that, among other things, Congress had authorized the military commissions at Guantánamo Bay, the Geneva Convention gave detainees no right to enforce the treaty's provisions in court, and the Guantánamo military commissions satisfied Army Regulation 109-8's “competent tribunal” requirement. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

153. STONE, *supra* note 1, at 550–51.

154. *Id.* at 551.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

more than two years of an American citizen, arrested on American soil, incommunicado, with no access to a lawyer, solely on the basis of an executive determination that he was an “enemy combatant”; significant new limitations on the scope of the Freedom of Information Act; expanded authority to conduct undercover infiltration and surveillance of political and religious groups; increased power to wiretap, engage in electronic eavesdropping, and covertly review Internet and e-mail communications; new power secretly to review banking, brokerage, and other financial records; and expanded authority to conduct clandestine physical searches.¹⁵⁹

Professor Stone also criticizes the “atmosphere of urgency and alarm”¹⁶⁰ in which Congress enacted the USA PATRIOT Act, a statute drafted by the Justice Department.¹⁶¹ In his view, there was no “serious deliberation,” resulting in “a statute that has fairly been characterized as opportunistic and excessive.”¹⁶² Specifically, he underscores: the inclusion into the law of several controversial investigative practices that have nothing to do with fighting terrorism; the Act’s failure to require reasonable executive-branch accountability; the absence of traditional checks and balances in the statute; and the law’s disregard of the basic principle of narrow tailoring when the government seeks to interfere with civil liberties.¹⁶³

Once the initial post-September 11 fears settled, Professor Stone observes, Congress became less deferential to bold assertions of executive authority. Hence, Congress balked when Attorney General John Ashcroft announced his intent to implement a Terrorism Information and Prevent System (TIPS),¹⁶⁴ which would have encouraged citizens to spy on one another and report suspicious activities to the government.¹⁶⁵ Similarly, the Justice Department’s plans for a second controversial PATRIOT Act, the Domestic Security Enhancement Act of 2003,¹⁶⁶ met with widespread and effective opposition from the public, the press, and a bipartisan coalition in Congress.¹⁶⁷

159. *Id.* at 552.

160. *Id.* at 553.

161. 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, 115 Stat. 272 (2001) (codified in scattered titles of U.S.C.).

162. STONE, *supra* note 1, at 553.

163. *Id.*

164. See Dan Eggen, *Under Fire, Justice Shrinks TIPS Program*, WASH. POST, Aug. 10, 2002, at A1 (describing the program’s unpopularity).

165. STONE, *supra* note 1, at 553.

166. See Charles Lane, *U.S. May Seek Wider Anti-Terror Powers*, WASH. POST, Feb. 8, 2003, at A1 (describing the program); Domestic Security Enhancement Act (proposed), confidential memo (2003), http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf (proposing reduced judicial oversight over surveillance, creation of a DNA database resting only on executive “suspicion,” removal of judicial restraints on local police spying on religious and political organizations, federal-government authority to obtain library and credit-card records without a warrant, and federal-government authority to keep secret the identity of any individual detained in a terror investigation).

167. STONE, *supra* note 1, at 553–54.

Professor Stone also submits that “[t]he Bush administration went out of its way after September 11 to excite rather than calm public fears,” declaring a “war on terrorism” that might never end to justify the assertion of extraordinary executive powers.¹⁶⁸ He is equally concerned that an administration, once again, “may have seriously misled the American people in order to heighten the public’s insecurity and build support for escalating the war.”¹⁶⁹ He writes: “Just as the Federalists exaggerated the risk of a French invasion in 1798 to justify a military buildup, and Lyndon Johnson exaggerated the events surrounding the Tonkin Gulf incident in order to justify a more aggressive strategy in Vietnam, George Bush exaggerated the evidence that Saddam Hussein had weapons of mass destruction in order to justify his invasion of Iraq.”¹⁷⁰

Moreover, Professor Stone is highly critical of former Attorney General Ashcroft’s dismantling of longstanding Department of Justice guidelines, which has enabled the FBI to monitor many political and religious activities without making a showing of potential criminal behavior and without conducting those investigations with the special care that has traditionally been required.¹⁷¹ “The effect,” he claims, “is to expose religious and political organizations to *extensive* FBI monitoring without *any* objective grounds for suspicion and with much *reduced* supervisory control.”¹⁷²

Finally, Professor Stone stresses “[a]n even more troubling free speech issue arising out of the ‘war’ on terrorism”: the Bush Administration’s democracy-undermining “obsession with secrecy.”¹⁷³ Examples include the refusal to disclose the names of those detained after September 11; the narrowing of the Freedom of Information Act (FOIA);¹⁷⁴ the unprecedented closing of deportation proceedings; and the redaction of “sensitive” information from tens of thousands of government documents and websites. Such “obsessive secrecy,” he concludes, “effectively constrains oversight by both the press and the public and directly undermines the vitality of democratic governance.”¹⁷⁵

C. THE LESSONS OF HISTORY IN A POST-9/11 WORLD

Perilous Times thus finds plenty to criticize in the Bush Administration’s conduct since September 11. Events occurring after the book was written (in addition to the facts of the Supreme Court cases discussed above) have provided further cause for concern.¹⁷⁶ A non-exhaustive list includes the scandal at the

168. *Id.* at 554.

169. *Id.* at 555.

170. *Id.*

171. *Id.* at 555–56.

172. *Id.* at 556.

173. *Id.*

174. 5 U.S.C. § 552 (2000).

175. STONE, *supra* note 1, at 557.

176. *See supra* Part III.A.

Office of Legal Counsel over the so-called “torture memos”;¹⁷⁷ the now-undisputed findings that Iraq had no weapons of mass destruction, despite the Bush Administration’s many assertions to the contrary;¹⁷⁸ the 9/11 Commission’s findings that Iraq had no substantial connection to Al Qaeda, also despite the Administration’s contrary claims;¹⁷⁹ and various controversies over the United States’ interrogation practices—including strong evidence of torture—in Iraq, Afghanistan, and Guantánamo Bay, Cuba—particularly the Abu Ghraib prison scandal.¹⁸⁰ It might be instructive to learn Professor Stone’s views of those events in light of his extensive historical research.

For present purposes, the basic question is whether Professor Stone’s historical thesis provides an insightful analysis of recent events. To be sure, the accumulated lessons of experience do not apply seamlessly to a post-9/11 world. In no previous conflict did technology empower a lone terrorist to kill literally thousands of Americans in one catastrophic event. A nuclear bomb in a suitcase in the middle of a city, or a biological or chemical agent in a food or water supply could effect just that horrific result. The government’s interest in information may be more compelling now than at any point in our history. In *Hamdi*, for example, only Justice Scalia, joined in dissent by Justice Stevens, acknowledged this weighty question, though he did not deem himself competent to resolve it.¹⁸¹ The government’s interest in interrogation may now justify

177. See R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive’s Power*, WASH. POST, July 4, 2004, at A12 (discussing the memos, which both asserted that the executive had the inherent power to carry out certain kinds of torture and defined torture so narrowly that certain acts most Americans would regard as torture would not be deemed such).

178. See Glen Kessler, *Bush Recasts Rationale for War After Report*, WASH. POST, Oct. 10, 2004, at A32 (discussing President Bush’s changing rationale for the war in Iraq).

179. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 REPORT 334–336 (2004), available at <http://www.9-11commission.gov>.

180. See, e.g., Bradley Graham, *No Pattern of Prisoner Abuse, General Says; All Who Are Found Guilty Will Be Held Accountable, Abizaid Tells Senators*, WASH. POST, May 20, 2004, at A23 (discussing the prisoner abuse at the infamous Abu Ghraib prison in Iraq); Josh White, *Abuse Report Widens Scope of Culpability; Generals Point to Contractors, Military Intelligence Soldiers*, WASH. POST, Aug. 26, 2004, at A1 (discussing the interrogation methods used in Afghanistan and Guantánamo Bay); ANTONIO M. TABUGA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (“The Taguba Report”) (2004), http://www.npr.org/iraq/2004/prison_abuse_report.pdf (detailing the abuse at Abu Ghraib and its genesis in Afghanistan and Guantánamo Bay).

181. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2673 (2004) (“I frankly do not know whether these tools are sufficient to meet the Government’s security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court’s competence, to determine that.”). Some zealous defenders of civil liberties regard Justice Scalia’s conclusion in *Hamdi* as congenial even though they do not typically endorse predominantly historical legal analyses. It is not apparent, however, why history should be dispositive in the face of unprecedented technological and political developments. Justice Scalia’s view would prevent Congress from explicitly authorizing and routinizing an executive enemy-combatant-designation scheme, or else might require Congress to squint at the Suspension Clause’s requirements of “Rebellion” or “Invasion.” See *Hamdi*, 124 S. Ct. at 2673–74 (“If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases

certain otherwise excessive restrictions on civil liberties.

At the risk of belaboring the point, it is worth pausing to consider just how much times appear to have changed. In 1951, Justice Jackson offered these words in concluding a public address:

It is customary to tell students how urgently these great issues challenge them, and how soon they will have to face the greatest challenge of history. I forbear such extravagances. The problems of liberty and authority ahead are slight in comparison with those of the 1770's or the 1860's. We shall blunder and dispute, and decide and overrule decisions. And the common sense of the American people will preserve us from all extremes which would destroy our heritage.¹⁸²

Would it be an “extravagance” to suggest that the liberty and authority problems of our time compare favorably to those of the Revolution and Civil War? It is not obvious that such a claim would be an overstatement.

Yet there is much to explore here, for the more things change in the ways described above, the more they appear to stay the same in the ways documented in *Perilous Times*. The intensity of the government's security interest may be greater now, but the Bush Administration has proven itself to be no more trustworthy than past administrations in its exercise of executive power. It is not apparent how much of the conduct for which the Bush Administration is responsible has made our country safer. United States military lawyers, for example, have expressed great concern that our failure to comply with the Geneva Conventions and our harsh interrogation tactics render American troops more vulnerable in the event they are captured.¹⁸³

In the cases of alleged enemy combatants, moreover, the government's violations of individual rights have not furthered its legitimate security concerns. There seems to be no reason to believe that according the various detainees a fact-finding hearing before a neutral magistrate would have endangered national security. For instance, it is difficult to discern—and the Bush Administration has not identified—any harm to the country that would have resulted had the government run the Article 5 “competent tribunals” required

of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an ‘invasion,’ and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court.”). It is noteworthy, in this regard, that Justice Scalia went further in protecting civil liberties than Justices Souter and Ginsburg were prepared to go. *See supra* note 146.

182. Jackson, *supra* note 25, at 117.

183. *See* JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 34 (2004), available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>; *see also* Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. TIMES, Nov. 9, 2004 at A14 (“Scott L. Silliman, professor of military law at Duke University, said . . . that in asserting that the Guantánamo prisoners are unlawful combatants and outside the reach of the Geneva Conventions, ‘the government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States’ own ability to demand application of the Geneva [Conventions] to Americans captured during armed conflicts abroad.’”).

under the Third Geneva Convention—to which the United States is a party—to determine whether the Guantánamo detainees were prisoners of war.¹⁸⁴

Nor would the nation's safety have been imperiled had the government accorded Yaser Esam Hamdi and Jose Padilla minimal due process by allowing them to challenge the government's factual allegations against them. The government's stated interest in not allowing a defense attorney to destroy the interrogation environment¹⁸⁵ did not have much force in *Rumsfeld v. Padilla*.¹⁸⁶ Before President Bush declared Padilla an enemy combatant, the government had held him on a material witness warrant in New York, where he had "conferred" with his court-appointed counsel "in person."¹⁸⁷ As for Hamdi, the government's concerns could have been met in several ways short of locking him up in the South Carolina Naval Brig and allowing him no outside contact for more than two years. One option might have been to grant Hamdi limited, monitored access to counsel for the sole purpose of challenging his alleged enemy-combatant status.

Indeed, one struggles in vain to understand how the country has been rendered safer by President Bush's unprecedented assertion of authority to declare U.S. citizens apprehended anywhere "enemy combatants" and to detain them indefinitely, incommunicado, without access to counsel, and with only minimal judicial review of the facts supporting the executive allegation of enemy-combatant status.¹⁸⁸ Regrettably, the government's conduct in *Hamdi* was distressing. Hamdi was denied counsel, allegedly because the insertion of a

184. See *supra* note 152 (discussing the Army regulation adopted to implement the Third Geneva Convention, which mandated that a competent military tribunal determine a detainee's prisoner-of-war status); see also *supra* note 183.

185. See, e.g., *Hamdi*, 124 S. Ct. at 2685 (Thomas, J., dissenting) ("[P]roperly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42–43. See also App. 347–351 (affidavit of Col. D. Woolfolk)."). Cf. *Rumsfeld v. Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting) ("Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process." (citation omitted)).

186. See *supra* note 135.

187. See *Padilla*, 124 S. Ct. at 2730 (Stevens, J., dissenting).

188. See *Hamdi*, 124 S. Ct. at 2652–53 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("[T]he Government contends that Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant; and even that challenge may go no further than to enquire whether 'some evidence' supports Hamdi's designation; if there is 'some evidence,' Hamdi should remain locked up at the discretion of the Executive. At the argument of this case, in fact, the Government went further and suggested that as long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. ('[H]e has an opportunity to explain it in his own words' '[d]uring interrogation'). Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional." (citations omitted)).

defense lawyer would poison the interrogation environment, yet he was granted counsel as a matter of executive “discretion” on the day the government’s brief in opposition to Hamdi’s petition for certiorari was due at the Supreme Court.¹⁸⁹ Then, after eight of the nine Justices rejected the President’s position and the Court held that Hamdi was constitutionally entitled to a fact-determining hearing before a neutral magistrate,¹⁹⁰ the government struck a deal with Hamdi *and released him* rather than provide such a hearing.¹⁹¹ One wonders what happened to the grave threat to national security that Hamdi had allegedly posed. One also wonders how long Hamdi would have remained in solitary confinement in the South Carolina Naval Brig had the Supreme Court not intervened.

Jose Padilla refiled his habeas petition in the United States District Court for the District of South Carolina.¹⁹² The government was there litigating vigorously¹⁹³ despite the apparent existence of five votes for the proposition that Padilla’s detention had not been authorized by Congress.¹⁹⁴ The district court held that the government had to either criminally charge Padilla or release him. But on September 9, 2005, the United States Court of Appeals for the Fourth Circuit reversed the district court’s judgment, concluding that the AUMF authorized the President to detain Padilla militarily.¹⁹⁵ It remains to be seen whether the Supreme Court will grant certiorari.

189. See Jerry Markon, *Military to Watch Prisoner Interview: Hamdi’s Lawyer Resents Monitoring*, WASH. POST, Jan. 31, 2004, at B3 (“Armed with the favorable ruling, the Bush administration refused to allow Hamdi to see an attorney. But it reversed itself last month when the Pentagon announced that Hamdi would be allowed access to counsel because his intelligence value had been exhausted and that giving him a lawyer would not harm national security. The announcement, which came on the eve of a government filing due at the Supreme Court, said the decision ‘should not be treated as a precedent’ for other cases in which the government had determined that someone is an enemy combatant.”).

190. *Hamdi*, 124 S. Ct. at 2635–75. Only Justice Thomas accepted the President’s argument. See *id.* at 2674–85 (Thomas, J., dissenting).

191. See Jerry Markon, *Hamdi Returned to Saudi Arabia; U.S. Citizen’s Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A2.

192. Petition for Writ of Habeas Corpus, *Padilla v. Hanft*, Civ. No. 2:04CV2221 (D.S.C. July 2, 2004).

193. See, e.g., Phil Hirschhorn, *Attorneys for Accused Enemy Combatant Demand U.S. Prove its Case*, Jan. 6, 2005, <http://www.cnn.com/2005/LAW/01/06/padilla.hearing/> (“On Wednesday, defense attorneys and prosecutors argued over the legality of Padilla’s detention for more than two hours before U.S. District Judge Henry Floyd. . . . The government relied on the U.S. Constitution and the congressional authorization of the use of force against the perpetrators of the September 11 attacks as grounds for Bush’s action. ‘The argument basically is under (the congressional authorization) and the president’s inherent authority as commander-in-chief, he had the appropriate authority to declare Mr. Padilla an enemy combatant under these facts and detain him,’ said Assistant U.S. Attorney Miller Shealy.”).

194. The five votes are those of the four *Padilla* dissenters plus that of Justice Scalia in *Hamdi*. See *supra* note 126. In *Padilla*, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer wrote: “Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits—and the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, adopted on September 18, 2001, does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States.” 124 S. Ct. at 2735 n.8 (Stevens, J., dissenting). It is possible, however, that Justice Breyer could deem Padilla’s detention not “incommunicado,” and therefore authorized, insofar as he receives the process specified in *Hamdi*. The Fourth Circuit did not address the question whether Padilla is due at least as much process as Hamdi.

195. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

The point of these illustrations is that in a post-9/11 world, many of the lessons of history Professor Stone identifies remain salient. If left to its own devices, the government will tend to underprotect civil liberties even when no discernible benefit to security results. Accordingly, skepticism—not deference—should be the judiciary’s basic posture in reviewing the constitutionality of executive-detention activities in wartime.

Unfortunately, another lesson of history is relevant here: Rather than holding fast to what Professor Stone has called “a *culture* of civil liberties,”¹⁹⁶ much of the public does not seem concerned about the government’s conduct in the enemy combatant cases—or the situation at Guantánamo Bay. The President has asserted authority to declare anyone an enemy combatant, even citizens living and working in the United States. Perhaps the general public’s apparent lack of anxiety is attributable to its having categorized the issue as pertaining only to minority “others.” It is difficult to believe that the Bush Administration would have proceeded the same way had citizens expressed widespread outrage; the political cost would have been too high.

The American public, therefore, would profit from reading Professor Stone’s book and internalizing its message. The utopian quality of that sentiment, however, points to a deep, unspoken problem lurking beneath the pages of *Perilous Times*. The book is accessible to most citizens and therefore instantiates its theme by contributing to the (re)creation of the culture of civil liberties in this country that its author rightly regards as essential. Yet the more effectively *Perilous Times* gives instance to the values it defends, the greater is the paradoxical tragedy that the work will not receive the public reception and widespread readership it deserves. At best, scholarly contributions of this sort influence the popular political culture only in indirect, highly mediated ways. The sad truth is that most Americans do not read much at all, let alone consult trenchant books of legal history.¹⁹⁷ Ultimately, it falls upon various public and private institutions to pick up the slack. *Perilous Times* will help them to execute their responsibilities.

CONCLUSION

Although it remains unclear how to persuade Americans to care more about civil liberties in times of national crisis, Professor Stone convincingly argues that they should learn the lessons of their shared past so as to properly value

196. STONE, *supra* note 1, at 537.

197. Hence political rhetoric and sensational portrayals of events play at least as prominent a role in political discourse in the United States as do basic facts. Consider, for example, how long many Americans have persisted in the belief that Saddam Hussein’s regime possessed weapons of mass destruction and had close ties to al Qaeda when President Bush ordered an invasion. *See, e.g.*, Richard Cohen, Editorial, *Hold Bush Accountable*, WASH. POST, Oct. 28, 2004, at A25 (“Dana Milbank recently reported on a poll showing that 72 percent of Bush’s supporters believe Iraq did in fact possess weapons of mass destruction and that 75 percent believed Hussein gave al Qaeda ‘substantial support.’ These beliefs are false, in contradiction of the facts, and even Bush, when pressed, has admitted that.”).

civil liberties in confronting the security challenges of this unsettling time. The lessons of history he underscores are deeply relevant to the decisions citizens make in selecting the leaders who will determine how to balance the liberty Americans cherish and the security they demand. A more-informed citizenry tends to choose leaders who make more-informed decisions. Or, at least, that is the theory of government on which Americans have staked both their freedom and their safety.

Even for Americans who want to learn from those who came before them, however, a significant impediment is that few citizens are self-taught in the discipline of recalling their shared past. Professor Stone provides the sort of teaching that makes such learning possible; he brings the Republic's relevant history to life in a way that is as accessible to laypersons as it is to lawyers. In enabling Americans to situate contemporary debates about liberty and security in a broader historical context, therefore, Professor Stone has performed a great service to this country at a critical juncture in its development. If *Perilous Times* eventually becomes integrated into the national consciousness to the extent its contribution warrants, it will be more difficult to convince citizens that significant curtailments of civil liberties in the "war on terror" are necessarily desirable, unavoidable in any event, and undeserving of robust judicial review. Then, when the assertions of a current administration essentially reduce to the suggestion that "[y]ou are scared—trust us,"¹⁹⁸ Americans will be prepared to act on a response of this order: "Yes, we are afraid—but we understand that trust without verification is antithetical to democracy and the rule of law, and our courage is greater than our fear."

Professor Stone has completed his work with skill and sensitivity to those enduring values of the American constitutional culture that are threatened in the time in which we live. Let us hope the branches of the federal government, states, the news media, educational institutions, the legal academy, civil-liberties organizations, and a significant number of fellow citizens perform their roles with similar care in the years to come. Let us hope their efforts evidence an adequate appreciation of the lessons of history that Professor Stone has so ably expressed.

198. See, e.g., STONE, *supra* note 1, at 555 ("As the former ambassador James Goodby has written, in the Bush administration fear has too often 'become the underlying theme of domestic and foreign policy.' The 'bottom line has been . . . 'You are scared—trust us.'") (quoting James Goodby & Kenneth Weisbrode, *Bush's Corrosive Campaign of Fear*, FINANCIAL TIMES (Nov. 19, 2003) (alteration in original)); see also, e.g., Transcript of Oral Argument, at 45–46, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (No. 03-6696) ("MR. DUNHAM: May it please the Court. Mr. Clement [the Principal Deputy Solicitor General] is a worthy advocate and he can stand up here and make the unreasonable sound reasonable. But when you take his argument at core, it is, 'Trust us.' And who is saying trust us? The executive branch. And why do we have the great writ? We have the great writ because we didn't trust the executive branch when we founded this Government. That's why the Government is saying trust us is no excuse for taking away and driving a truck through the right of habeas corpus and the Fifth Amendment that no man shall be deprived of liberty except upon due process of law.").