

# Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime

*Samuel Issacharoff & Richard H. Pildes\**

*Times of heightened risk to the physical safety of their citizens inevitably cause democracies to recalibrate their institutions and processes and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in "normal" times. This article explores the ways in which the American courts have responded to the tension between civil liberties and national security in times of crises. This history illustrates that courts have rejected both of the two polar positions that characterize public discourse on these issues. Civil libertarians argue that political bodies are too easily gripped by passions, hysteria, and self-interest in these times and that courts therefore ought to play a central role in protecting liberty. Executive unilateralists argue that the qualities that uniquely characterize the executive branch, such as decisiveness, access to information, and efficiency, must become so dominant in these moments that few checks,*

---

\* Issacharoff is the Harold R. Medina Professor of Procedural Jurisprudence at Columbia Law School. Pildes is An-Bryce Professor of Law and Co-Director, Center on Law and Security, New York University School of Law; his research was supported, in part, by the Center on Law and Security at NYU School of Law. The authors thank Eyal Benvenisti, Ruth Gavison, Jack Goldsmith III, Gerald Neuman, Geoffrey Stone, and the participants at the Cegla Center Conference on National Security for helpful comments. All responsibility for the positions taken in this paper falls on the authors alone. Olivia Radin provided invaluable research assistance.

*if any, should constrain executive prerogatives. Oddly, civil libertarians and executive unilateralists find implicit consensus in the view that, in times of war, courts have tended not to play a significant role in overseeing executive power. We argue to the contrary: historically, a significant constitutional tradition of judicial scrutiny in the United States during times of war does exist. But this scrutiny does not take the form of courts making first-order substantive judgments about the content of liberty or other claimed constitutional rights. Nor does it take the form of judicial assessment of how significant or credible the national security claims of the executive branch might be. Instead, judicial oversight has been focused on preserving the institutional structures and processes through which decisionmaking on these issues takes place. The judicial role has centered on the second-order question of whether the right institutional processes have been used to make the decisions at issue, rather than on what the content of the underlying rights ought to be. This approach has historically rejected or resisted most claims of executive unilateralism. When courts have upheld the government's actions, they have done so only after a judgment that Congress, as well as the executive, has endorsed the action. This approach has also rejected the civil libertarian framework. When courts find bilateral institutional endorsement, they have typically accepted the joint political judgment of how liberty and security tradeoffs ought to be made. By focusing on congressional endorsement of emergency measures, the courts have created a broad-based political accountability for the actions taken in the name of national security. We suggest that even if congressional endorsement is more apparent than real in some of these contexts, the judicial maintenance of this structure of rhetorical justifications sustains desirable understandings of political structure. Because the President and Congress draw from different political constituencies in a presidential rather than a parliamentary system, we also raise questions about whether the American judicial approach to these questions should be limited to political systems with separated executive and legislative powers.*

## INTRODUCTION

Times of heightened risk to the physical safety of their citizens inevitably cause democracies to recalibrate their institutions and processes and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in "normal" times. This was true for France

during its experience with Middle Eastern terrorism in the 1980s;<sup>1</sup> for Germany during its encounter with the domestic terrorism of the Baader-Meinhoff gang in the 1970s;<sup>2</sup> for Great Britain during the sustained violent conflict in Northern Ireland (as well as today);<sup>3</sup> for Italy in its conflicts with law-and-order terrorist bombings in the 1970s;<sup>4</sup> for Spain during the 1980s;<sup>5</sup> for India in its struggles to maintain order in the midst of the largest and one of the most heterogeneous democracies in the world;<sup>6</sup> and for Israel during

---

1 For terrorist trials, France changed the nature of its fact-finding bodies; it eliminated the participation of a majority of lay individuals and substituted a panel of judges (all but one of whom were anonymous) as the fact-finders in these terrorism trials. Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* 121 (1998). France suffered a campaign of bombings concentrated in downtown Paris by a group identifying itself as the Committee for Solidarity with Arab and Middle Eastern Political Prisoners, later determined to be a pro-Iranian cell connected to a Christian Marxist terrorist group from Lebanon, the FARL. *Id.* at 101.

2 Germany centralized the prosecution and adjudication functions in terrorism cases and provided special protections for those involved in these roles. *Id.* at 121.

3 The changes in the legal framework applied in Northern Ireland are far too extensive to list here, but among the most noteworthy is the creation of special terrorism courts, known as Diplock Courts, for the trial of specific offenses such as bombings, weapons offenses, and murders. These courts were presided over by a single judge without the jury normally required under British law. The British also resorted to legally-permitted more aggressive use of surveillance techniques, greater use of confessions, and similar changes in the legal approach to "normal" crime. *Id.* at 122-25. For more recent British modifications of the preexistent legal order to address terrorism threats, see Virginia Henning, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights*, 17 *Am. U. Int'l L. Rev.* 1263 (2002) (concluding that the Anti-Terrorism Act of 2001 is consistent with the European Human Rights Convention, in light of the "public emergency" that terrorism poses).

4 Generalizing from the specific experiences of these countries, Professor Heymann notes that during the 1980s, Great Britain, Germany, Israel, and Italy all made similar types of changes to their criminal justice processes:

These nations have extended the powers of police to search, engage in electronic surveillance, and interrogate suspects. They have sought additional ways to protect witnesses against threats, even at the cost of increasing the risks of error or witness malice by doing away with important occasions for confrontation with the defendant. Finally, they have sought ways to protect the fact-finder — judge or jury — from intimidation.

Heymann, *supra* note 1, at 106.

5 Among other policy changes, Spain authorized its intelligence agents to assassinate terrorists living abroad. *Id.* at 115.

6 See Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 *Mich. J. Int'l L.* 311 (2001) (arguing

its long-running struggle with terrorism.<sup>7</sup> It is now true for the United States as well, as the government (national and state) modifies the legal framework designed for normal times to adjust to the radical new security threat<sup>8</sup> posed by militant Islamic fundamentalism reflected in the events of September 11, 2001. These changes may be effective or counterproductive, necessary or excessive. But that change will take place is certain, based on the experience of all modern democracies confronted with security threats of this type and magnitude.

Yet in the political culture of today, at least in the United States, acknowledgment of this reality is clouded by the polarized assertions of two factions. On one side are executive unilateralists. Reasoning from the correct starting point that these contexts necessitate a greater degree of the distinct qualities the executive branch tends to possess — "speed, secrecy, flexibility, and efficiency that no other governmental institution can match"<sup>9</sup> — these advocates of national security conclude that unilateral executive discretion, not subject to oversight from other institutions, is required. On the other side are what might be called civil libertarian idealists. Advocates of this view sometimes deny, to themselves or to their audiences, that shifts in the institutional frameworks and substantive rules of liberty/security tradeoffs do, indeed, regularly take place during times of serious security threats; at other times, they recognize the historical patterns of these shifts but refuse to accept any induction from experience that would legitimate such changes.

The United States constitutional system has the longest experience with these issues. The United States has not, before now, been subject to the kind of security threats, or the risk of external wars with domestic consequences, that have characterized many European democracies; yet with military

---

that India's preventative detention policies under the National Security Act of 1980 are consistent with international and domestic law requirements).

- 7 See, e.g., Emanuel Gross, *Democracy in the War Against Terrorism — The Israeli Experience*, 35 Loy. L.A. L. Rev. 1161 (2002); Matthew H. James, *Keeping the Peace: British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int'l L. 405, 433-39 ((1997) (discussing administrative detention, travel restrictions, and other prevention of terrorism legislation).
- 8 For detailed documentation of the scope of that threat, offered by the former Director and Senior Director during the 1990s for Counterterrorism of the National Security Council (an executive branch entity created in the aftermath of World War II), see Daniel Benjamin & Steven Simon, *The Age of Sacred Terror* 3-219 (2002).
- 9 Harold Hongju Koh, *The National Security Constitution* 119 (1990). Lest this quote be misconstrued, we should point out that Professor Koh is critical about the extent to which both courts and Congress defer, in his view, to executive branch initiative in areas of national security.

governments imposed at one time for over a decade in parts of the country, a civil war that slaughtered 600,000 citizens, foreign saboteurs, and risk of military attack, the United States has hardly been immune from the struggle to accommodate liberal values in extreme political contexts.

This essay begins by chronicling the United States experience with these issues, some of that experience widely known, some more obscure, to gain perspective on how the constitutional regime that historically has most prized individual liberty has addressed these issues. That experience reveals that the judicial approach to these issues has been, on the whole, more complex, and oriented toward different questions, than either executive unilateralists or civil libertarian idealists recognize. Contrary to the modern civil libertarian stance, the American courts have only rarely addressed these issues through the framework of individual constitutional rights. Yet contrary to the executive unilateralist position, courts also have been reluctant to find the executive to have unfettered discretion to make liberty/security tradeoffs. Instead, the courts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts. Through this process-based approach, American courts have sought to shift the responsibility of these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.

We then shift from past to present. Intriguingly, the few judicial decisions to date that address the new legal structures emerging in the United States embody the same framework for analysis that American courts have used in earlier eras of exigent circumstances. Despite the flourishing since the 1960s of a rights-based mode of discourse among political philosophers and abstractly-oriented constitutional theory, along with the rise of myriad rights-based civil society organizations, the American courts continue to engage these issues through a process-based, institutionally-focused approach. That approach permits deviations from the ordinary legal structures and rules, but it rarely endorses the position that the executive can make these deviations through unilateral decision. By revealing this process-based approach to the American judicial role during wartime, this essay aims to suggest (but not answer) several large theoretical questions. One is a comparative issue. The American courts work in a system of separated and divided executive and legislative powers. When the American courts emphasize the importance of bilateral institutional endorsement of both political branches of new legal structures for addressing exigent security contexts, those courts can, therefore, rely on two institutional actors, with different democratic pedigrees, different incentives, and different interests to which they respond, to provide the political judgment behind policies adopted in the name of

security. Separation-of-powers systems also can introduce temporal space between the moments at which each institution acts. How much of the American process-based approach can therefore be carried over to courts that work in parliamentary systems? Is the deference American courts show to the judgments of "the political branches" appropriate only within a system of separated and divided legislative powers? Or is this deference justified even when courts confront the unified executive-legislative powers of a parliamentary regime, which is the case in most European democracies?

A second large question concerns process-based approaches to issues of individual rights and constitutionalism more generally. In the American legal academy, process-based approaches came under withering intellectual critique in the 1980s.<sup>10</sup> That critique argued that such approaches necessarily embed substantive judgments about the underlying values at stake, because there is no way to judge which processes to adopt, and no way to evaluate the consequences of various processes of decisionmaking, without drawing on underlying substantive value judgments. Of course that is true. But it does not follow from this critique, as is often assumed, that courts are likely to do a better job by taking on the role for themselves of always making these first-order value judgments directly. And despite the academic criticism, process-based approaches have had — and continue to have — an enormous pull on American courts, particularly, as we will show, in times of crises, both ancient and contemporary. In exploring the actual experience of constitutional democracy during crisis, it is therefore important to ask why, despite the theoretical questions about process-based reasoning, such methodologies continue to have such a powerful grip on courts during crises. Does this suggest a problem in the intellectual critique of such approaches? Or does this record suggest a problem in how courts have conceived their task in difficult circumstances?

## I. THE RULE OF LAW AND BILATERAL CONSTITUTIONAL POWER

Few would contest the essential proposition that a constitutional democracy under military threat must find a "balance to be struck between liberty and security."<sup>11</sup> Nor is there much reticence on either side of the balance

---

<sup>10</sup> See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 59 *Yale L.J.* 1063 (1980); Richard Davies Parker, *The Past of Constitutional Theory — And Its Future*, 42 *Ohio St. L.J.* 223 (1981). For a critique of this critique, see Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *Va. L. Rev.* 747 (1991).

<sup>11</sup> David Cole, *Enemy Aliens*, 54 *Stan. L. Rev.* 953, 955 (2002).

for advocates to invoke the "rule of law" as the dispositive high ground in mediating between liberty and security. Unfortunately, the sacredness of the rule of law as an argumentative trump draws much from its character as what Jeremy Waldron terms "an essentially contestable concept."<sup>12</sup> In seeking to enter this fray, we therefore choose to begin not at the highest levels of abstraction with an effort to reason deductively from such concepts as "the rule of law," "individual rights," or "liberty." We start instead inductively, with the doctrinal building blocks that are the stock-in-trade of constitutional lawyers.

A review of the positive law indicates that much of the debate over liberty versus security misses the most essential structure of this field of law. Examined across nearly two centuries worth of case law, although admittedly not a tremendously robust number of actual cases, what emerges took us somewhat by surprise. Much as the current public debate is cast in terms of the rights discourse that so dominates contemporary constitutional debate, or at least the academic variant of it, the cases actually turn largely on a different set of considerations. The cases speak to a modest and uncertain role for the courts in addressing issues of national security. In terms of actually defining first-order claims of rights, American courts show great reticence to engage the permissible scope of liberties in direct, first-order terms. Perhaps, as expressed by Chief Justice Rehnquist, "[j]udicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'"<sup>13</sup> This echoes the Court's concern of a century-and-a-half ago in *Luther v. Borden* that the actual practices of judicial inquiry could hardly respond to the terms in which a military struggle for control of Rhode Island was actually being conducted: "Could the court, while the parties were actually contending in arms for possession of the government, call witnesses before it and inquire which party represented a majority of the people? ... The ordinary course of proceeding in courts of justice would be utterly unfit for the crisis."<sup>14</sup>

At the same time, however, the cases do not quite support the Chief Justice's further claims that "[t]he traditional unwillingness of courts to

---

12 Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *Law & Phil.* 137 (2002) (relying on the philosopher W.B. Gallie for a definition of essentially contestable concepts as those whose core properties constitute the subject of debate); see also Richard H. Fallon, Jr., "The Rule of Law" as a Concept in *Constitutional Discourse*, 97 *Colum. L. Rev.* 1, 6 (1997).

13 William H. Rehnquist, *All the Laws But One* 205 (1998).

14 *Luther v. Borden*, 48 U.S. (7 How.) 1, 43-44 (1849).

decide constitutional questions unnecessarily also illustrates in a rough way the Latin maxim *Inter arma silent leges*: In time of war the laws are silent."<sup>15</sup> Rather, the cases show a high level of judicial attentiveness to questions of institutional decisionmaking in general and, more specifically, to the role of the Constitution as a check on unilateralism by the executive. If the framework for judicial determinations is shifted from individual rights to processes of institutional decisionmaking, the American experience offers some rather surprisingly stable observations about legal constraints in times of national emergency.

We focus on the judicial emphasis on the role of Congress as a partner in the determination of the nature and scope of national emergency. In focusing this way on institutional process, rather than rights, we share the main analytic concern of Professors Katyal and Tribe in their work on one specific issue, that of whether it is constitutional under American law to use military tribunals to try "enemy combatants."<sup>16</sup> Katyal and Tribe, however, derive their view, which, like ours, emphasizes institutional mechanisms rather than individual rights, from a first-order reading of the constitutional text; their argument is that textual considerations resist executive unilateralism. Instead, we ground our position in the way American courts have actually worked through these issues over the long course of constitutional confrontations with exigent contexts.

Thus, before examining the current disputes over the use of military commissions, or indeed many of the extraordinary powers claimed in the wake of the September 11th terrorist attack, it is useful to revisit some

---

15 Rehnquist, *supra* note 13, at 202. For criticism from another judge of Chief Justice Rehnquist's suggestion that law is silent during times of war, see the discussion of the Israeli Supreme Court's decisions in Aharon Barak, *Foreword — A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16 (2002). For an express contrast between the Israeli and American views on the role of courts in times of military exigency, see H.C. 7015/02, *Ajuri v. IDF Commander*, 56(6) P.D. 352 (Sept. 3, 2002), unofficial English translation at <http://www.imra.org.il/story.php3?id=13491> (Israeli Supreme Court decision reviewing relocation of terror accomplices from the West Bank to Gaza and directly contrasting approach taken from that described by Chief Justice Rehnquist in *All the Laws But One*); see also Eyal Benvenisti, *Inter Armas Silent Leges? National Courts and the "War on Terrorism,"* in *International Law and Terrorism* (Andrea Bianchi ed., forthcoming 2003) (drawing on Israeli, European, and Canadian judicial response to argue for possibility of more substantively-based judicial review of claims of national security).

16 See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).

of the more dramatic assertions of military prerogatives within the United States. Here the standout cases are no doubt the imposition of martial law within the United States in the striking forms of the assignment of military governors to the states of the former Confederacy following the Civil War and the internment of American citizens of Japanese descent during WWII or in the decidedly lesser form of the seizure of American steel mills during the Korean War and the enforcement of the terms of the hostage release agreement with Iran.

### **A. The Civil War and Reconstruction Governance**

Much of the discussion of the wartime role of civil liberties has looked to the two Civil War-era habeas corpus decisions, *Ex Parte Milligan* and *Ex Part McCardle*. In each case, the Court examined the power of the executive to order military forces to maintain public order against civilians; each case challenged the use of military tribunals to try and sentence civilians. *Milligan*, decided first, condemned these tribunals. *McCardle*, decided when the War itself was two years more distant, paradoxically avoided the question altogether by concluding that the Court had no jurisdiction to address the issue — a decision whose effect was to permit the use of military tribunals. From these two momentous decisions, which stand in some practical tension with each other, many modern commentators assert that the American Supreme Court developed a rights-based constitutional framework for constraining executive power, even during the most threatening constitutional crisis in our Nation's history.<sup>17</sup> But the actual engagement with rights, power, and crisis reflected in these cases is richer, and has a far more profound shaping influence on contemporary law, than these rights-based accounts suggest.

At issue in *Milligan* were the same competing frameworks for judicial confrontations with these issues of security that are being faced by the courts in our era. The government argued — much as today — that in times of war, the executive power "must be without limit" and that the Constitution's provisions are "silent amidst arms."<sup>18</sup> But all nine justices on the Court agreed that the use of military commission to try civilians in places "where the

---

<sup>17</sup> This view seems to have originated with Charles Warren's classic history of the Supreme Court, published in 1923. 3 Charles Warren, *The Supreme Court in United States History* 149, 154 (1923).

<sup>18</sup> The facts in these and the following paragraphs are taken from 6 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, at 182-253 (1971) (Part One: Oliver Wendell Holmes Devise).

courts are open and their process unobstructed"<sup>19</sup> is beyond the scope of the President's powers. Thus, while the Court acknowledged that "[d]uring the late wicked Rebellion ... considerations of safety were mingled with the exercise of power," it also unanimously agreed that this crisis could not translate into an ongoing suspension of the writ of habeas corpus.<sup>20</sup> But passionate, intense disagreements tore the Court in two about how to understand the relationship between constitutional law, rights, and executive power during crisis.

A bare majority of the Court believed that the right judicial approach is to tackle head on the issue of individual rights during wartime. Thus, in famous, soaring passages that civil libertarians have quoted ever since, this narrow majority concluded that President Lincoln's use of military tribunals had violated the individual due process rights of Milligan (who was part of a military branch of the Peace Democrats, a border-state organization in favor of conceding Southern independence and using armed force to free Confederate prisoners). A military, rather than civilian, trial was insisted on by Secretary of War Stanton; Milligan was convicted and sentenced to death. Typical of the Court majority's constitutional proclamations, which invoked the Fourth Amendment (on searches, seizures, and warrants), the Fifth (on grand juries), and the Sixth (on public jury trials), were passages in which the Court denied that the scope of rights varied at all during times of war:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false ...<sup>21</sup>

Sweeping declarations of this character are what led commentators — several generations down the road — to proclaim *Milligan* "the palladium of the rights of the individual" and "one of the bulwarks of American liberty."<sup>22</sup>

If the majority option were all there is to *Milligan*, it would indeed stand as a striking endorsement — from within the practice of constitutional

---

19 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

20 *Id.* at 109.

21 *Id.* at 120.

22 These passages are taken from 3 Warren, *supra* note 17, at 149, 154.

law — of the civil libertarian position. Moreover, in the context of heated debates in times of perceived threats to security or liberty, there is a strong temptation to read this passage from *Milligan* as if this were a clear and irrevocable holding. But the actual battles inside and outside the Court over the response to the suspension of habeas corpus suggest that there is more to this moment, for at least three reasons.

First, President Lincoln's administration first suspended the writ of habeas corpus nationwide through unilateral executive action; this action, on the basis of his own purported unilateral authority, was among the most controversial President Lincoln took during the war.<sup>23</sup> But less than a year later, Congress responded by adopting legislation that expressly authorized suspension of habeas corpus. President Lincoln always continued to assert that he had the power on his own authority to take such measures, but by the time *Milligan* came to the Court, the justices faced bilateral institutional endorsement, from both Congress and the President, of the need to suspend habeas corpus. By legislating, Congress had empowered the President, but it had also constrained him to exercising powers within the boundaries the legislation had meted out.

Under the sweeping rhetoric of the Court as stalwartly standing guard against anarchy and despotism, the congressional response should not matter at all. However, this dynamic political process between legislature and executive is precisely what caused four justices, spearheaded by then-Chief Justice Chase, to go out of their way to disavow vehemently the rights-grounded line of reasoning of the *Milligan* majority. This concurring bloc of justices rejected the constitutional approach to these issues even as they too held the military tribunals illegal. But this group of the Court wanted nothing to do with framing the case as a clash between executive power and the rights of individuals. Instead, for these justices, the issue should have been centered on the relationships between political institutions, in particular, the relationship between Congress and the President. The fatal flaw of Lincoln's administration, in this view, was that the President had exercised power beyond the domain in which *Congress* had authorized him to act. Confronting the question in terms of the rights of individuals was, in the view of these justices, disastrous; doing so left no room for contingencies in other exigent times in which there might be good reason for more intrusive restraints on individual rights — as long as both

---

23 The facts surrounding the suspension of habeas corpus are drawn from the central work to address these issues, Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 51-75 (1991).

Congress and the President agreed such intrusions were justified. In the context at hand, the civilian courts had integrity and remained loyal to the government. "But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be actively sympathetic with the rebels, and the courts their most efficient allies." Rights-oriented constitutional decisions freeze into place, much more rigidly than is desirable (in this view), the institutional options that ought to be available to the government. For "when the nation is involved in war ... it is within the power of Congress to determine [when exceptional measures, such as military tribunals, are justified]." In essence, in this view, Milligan sought relief against unconstrained executive action — against a president who was trying to wield emergency powers beyond the boundaries Congress had authorized. The enormous failing of the majority approach was to transform this challenge to executive authority into a challenge to legislative authority; indeed, the majority approach, by constitutionalizing the issues around matters of individual rights, transformed the case into a challenge to the power of the entire national government, even when acting in concert, to invoke emergency powers (such as suspension of habeas corpus) and re-calibrate the rights of individuals during wartime. This, Chief Justice Chase and those who joined him concluded, was an absolutist, non-pragmatic vision of constitutional law that ought to be strenuously resisted.

Thus, where five members of the Court spoke in terms of unchanging individual rights, the other four members rejected this approach and spoke only in terms of institutional powers. The contrast could not be more striking. Rather than ringing declarations of rights, themes of political institutions and democratic politics course through the concurrence's insistent approach:

Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers? ...

We have confined ourselves to the question of power. It is for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the question [from the majority of the Court] had been put on that ground, without denial of the existence of a power which we

believe to be constitutional and important to the public safety — a denial which ... seems to draw in question the power of Congress ...<sup>24</sup>

The constitutional inquiry therefore started and finished with what authority Congress had given to President Lincoln. The concurrence, in a perhaps strained, pro-liberty reading of the statute<sup>25</sup> suspending habeas corpus, concluded that Congress had prohibited military trials of civilians where the regular courts were open (even though such persons could be arrested and detained without further process until a grand jury could meet).

*Milligan*, therefore, despite its unanimous rejection of military trials for civilians, is not even on its own, internal terms, a "palladium of the rights of the individual." It can be described as *a play* for that vision of constitutional law, led by five members of the Court, but it was a play just as forcefully and immediately countered by an institutional-process oriented view of the rest of this profoundly divided Court. Of course it may be countered that whatever the concurrence may have declared, the holding of the Court is represented by the majority opinion. But this is only the first reason the Civil War cases do not represent any sort of unvarnished rights-oriented, libertarian view of national powers during wartime. As with any first declaration of constitutional principle, particularly one that barely obtained a majority of the Court, the question remains whether this was only a first cut at the issue or whether this was a stable and reasoned rendition of constitutional principle.

This then leads us to the second reason to question the stability of the claimed rights resolution in *Milligan*. Public reaction to *Milligan* was vehement and outraged toward the Court — and the Court clearly got this message. The outrage was not because of the result (that military trial had been illegal, a result that itself seems to have been widely accepted),<sup>26</sup> but precisely because of the framework within which the Court majority had addressed the issue. That is, in the public reaction to *Milligan*, opinion

---

24 71 U.S. at 139, 141.

25 For the argument that judges often have greater discretionary space than they acknowledge, within which they can legitimately give pro-liberty readings to statutes that would otherwise involve serious constraints on basic dimensions of liberty, see Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975).

26 See William Lasser, *The Limits of Judicial Power: The Supreme Court in American Politics* (1988). See also Fairman, *supra* note 18, at 221, who notes that the Court had earlier ordered *Milligan* released and that the release itself had only generated "casual interest," but when the justifying opinions came down, enormous controversy over the decision erupted.

specifically took sides on the debate that had taken place in the Court; and that body of opinion seems to have sided with the politics-reinforcing approach of Chief Justice Chase's concurrence, not with the rights-oriented approach of the narrow majority. This debate was no mere academic or elite affair; it was heated and the dominant subject of public discourse.<sup>27</sup> As one of the leading studies of these issues notes, when the decision in *Milligan* was made public,

[T]he country erupted into the most violent and partisan agitation over a Supreme Court decision since the days of *Dred Scott*. The views of the majority on the lack of power in Congress to institute military tribunals, which were not necessary to the decision ... split the nation, or at least its press, into two hotheaded camps.<sup>28</sup>

For by turning the case into a direct confrontation between executive power and individual constitutional rights, the majority had suggested that courts, through constitutional law, would play a major role in resolving the looming conflicts between claims of rights and national power as the country entered the post-Civil War period of Reconstruction. The analogy to *Dred Scott*, invoked repeatedly, was resonant because there too the Court had invoked individual constitutional rights (there, the liberty of slaveholders over their "property") in a gratuitous context not necessary to the decision and had done so to constrain the power of the entire national government's political branches, acting in concert, to address central debates about how the government ought to respond to exigent times.

For these reasons, the rights-oriented, abstract, and absolutist majority approach of *Milligan* provoked reactions that turned the decision into a completely partisan event.<sup>29</sup> Those who supported congressional power to shape the aftermath of the Civil War vilified the Court; Southerners and their supporters praised the Court. None of this had been necessary, because had the Court taken the pragmatic, institutional-process approach of the concurrence, the decision would have been widely accepted.

Apart from the divisive public reactions to *Milligan*, commentators, too,

---

27 For discussion of the relationship between politics, popular opinion, and Supreme Court decisionmaking in this era, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 *Geo. L.J.* 1, 16-38 (2002).

28 Clinton Rossiter, *The Supreme Court and the Commander in Chief* 30-31 (2d ed. 1976).

29 Neely, *supra* note 23, at 176 ("In short, *Ex parte Milligan* at first had an entirely partisan reputation.").

for many years repudiated the rights analysis of *Milligan's* majority. At the time, for example, the leading law review of the era excoriated the Court for brazenly reaching out to proclaim large issues of constitutional rights, with so much at stake, when the Court could have reached the same result on narrow, widely acceptable grounds that did not shut down the capacity of bilateral, congressional-executive power to deal with related issues down the road.<sup>30</sup> Most authorities argued for many generations that the ringing proclamations of the inviolable role of rights during wartime would never, in fact, be heeded by the Court in actual times of crisis. In the 1890s, Professor John W. Burgess, one of the leading political scientists of the era, concluded, "It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded." In the 1940s, one of the great scholars of the Presidency, Edward Corwin, wrote, "[I]t would be difficult to uncover a more evident piece of arrant hypocrisy than [the famous passage quoted above] from Justice Davis' opinion for the majority [in *Milligan*]."<sup>31</sup> And indeed, *Milligan* had almost no practical effect at the time on even the narrow issue it addressed, military trials for civilians, nor has it had any practical effect since on issues of liberty during wartime.<sup>32</sup>

The third reason that *Milligan's* majority must be seen as no more than a feint in the direction of a rights-based constitutional law of wartime is that the Court itself, two years later, very likely responding to the storm that *Milligan's* sweeping language had caused, essentially changed direction, repudiated the rights-based approach, and embraced the institutional-process vision. In *Ex parte McCardle*, the Court found that Congress had legally stripped the court of jurisdiction to review the fate of a newspaper editor held by military authorities in Maryland for trial before a military commission for having published incendiary pro-Confederate tracts.<sup>33</sup> The entire controversy in *McCardle* was itself caused by the "needless breath of language in *Milligan*," as a leading historian of these events has concluded.<sup>34</sup> In response to the threat that *Milligan's* broad, rights-based pronouncements had cast, Congress soon legislated (over presidential veto) to take away the Court's jurisdiction in the pending case of *McCardle*; for that litigation raised the possibility that the Court would pass on broad issues concerning the

---

30 Fairman, *supra* note 18, at 224-25.

31 Edward S. Corwin, *The President: Offices and Powers: History and Analysis of Practice and Opinion* 165-66 (1940).

32 Neely, *supra* note 23, at 184.

33 *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

34 Fairman, *supra* note 18, at 237.

constitutionality of post-Civil War Reconstruction that Congress was then controlling. Thus, the lesson of *Milligan's* attempt at an aggressive, rights-based set of constraints on Congress during wartime and its aftermath was that exigent circumstances were ultimately going to be controlled by Congress, not the Court: "Far from inducing Congress to act with greater restraint, the effect of the opinion [in *Milligan*] was rather to put party leaders into a more revolutionary frame of mind."<sup>35</sup> The *Milligan* majority's approach, the Court quickly learned, begat the political response that returned to the Court in *McCardle*.

This time around, the Court resolved matters on what can be understood as the institutional-process method for addressing rights during wartime. Unanimously, the Court in a brief decision held that Congress had the power to legislate and deny the Court jurisdiction to review whether the military trial for *McCardle* had been lawful. Thus, the Court did not reach the merits of the issue one way or the other; it instead held that a valid institutional process, involving legislation by the politically accountable institutions of the government, had determined that the Court was to be closed to these issues.<sup>36</sup> *McCardle's* "rights" were therefore fully determined by the process by which Congress had acted, and that was the end of the matter. As to whether Congress had acted for legitimate reasons in closing the courthouse doors, the Court wrote simply, "We are not at liberty to inquire into the motives of the legislature."<sup>37</sup> Thus, the brief dalliance with a rights-based approach to such issues was over, and as we shall show, it has largely stayed over ever since. *Milligan*, the individual, was freed from the sentence his military trial imposed, but not on the basis of reasons the Supreme Court was prepared to endorse a second time. *Milligan* came into favor for a more libertarian generation of academic commentators, starting with the post-World War I period, but it has never affected presidential behavior during exigent times nor Supreme Court decisionmaking. Writing in the 1950s, Clinton Rossiter concluded, "No justice has ever altered his opinion in a case of liberty against authority because counsel for liberty recited *Ex Parte Milligan*."<sup>38</sup> Writing in the 1990s, Mark Neely similarly concluded, "[T]he real legacy of

---

35 *Id.* at 237.

36 The Court also tantalizingly suggested that another legal route to the Supreme Court might have been available to *McCardle*, should he have availed himself of it, so that technically the Court did not conclude that Congress had the power to close off every possible legal avenue to reaching the Supreme Court to test the constitutionality of military detention and trial. 74 U.S. at 506.

37 *Id.* at 514.

38 Rossiter, *supra* note 28, at 35.

*Ex parte Milligan* is confined between the covers of constitutional history books. The decision has had little effect on history.<sup>39</sup> *Milligan's* result is accepted, but its reasoning has never become part of the positive law of American constitutional practice. On how courts ought to reason about rights during wartime, there is no question that the concurring approach of Chief Justice Chase has prevailed.

American scholars have long argued over whether *Milligan* and *McCardle* can be "reconciled." More interesting, though, is to see them as elements in an early struggle between alternative visions of constitutional law during times of crisis that we have described here. *Milligan*, beneath its unanimous result, reflect judges riven between two competing ways of understanding their role during times of crisis. The majority tried to constrain political institutions with a rights-grounded approach and reaped the whirlwind. The concurrence would also have constrained unilateral executive power, but only because such a constraint could be read into the relevant congressional legislation that addressed the same issue. That institutional-process oriented constraint placed responsibility and control of the issues back in the hands of the politically accountable branches — though the courts would still play the significant interpretive role of deciding exactly what Congress had or had not permitted the executive to do.

By the time of *McCardle*, therefore, the Court had overwhelmingly concluded that its role should be oriented towards institutions and not first-order enforcement of rights. And the lesson the Court drew in this era from its engagement with such charged and complex issues seems to have been the lesson it has held to ever since, for judicial oversight in times analogous to this era has similarly been overwhelmingly process-oriented rather than rights-oriented. Indeed, in modern cases raising the most similar issues, such as use of military trials during wartime and its aftermath, the Court has repeated, almost verbatim, exactly the same, process-oriented rationale of *McCardle* and the concurrence in *Milligan*, even when the Court is holding executive action illegal. Thus, in striking down the use after World War II of military tribunals instead of civilian courts for individuals not connected with the military, the Court focused on a close textual analysis of the congressional authorization of martial law in the Hawaiian Organic Act. In that interpretive mode, the Court found Congress had not manifested an intent to grant the executive the "power to obliterate the judicial system of Hawaii."<sup>40</sup> Thus, the military trials were unilateral executive action that was illegal precisely

---

39 Neely, *supra* note 23, at 184.

40 *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

because the President had acted outside the area of congressional-executive agreement.

During the aftermath of the Civil War, the Court confronted, in *Mississippi v. Johnson*,<sup>41</sup> an even more far-reaching challenge to executive power than that which the Court was to face in *Milligan* and *McCardle*. In *Johnson* too, the Court worked out the institutional process approach to struggling with issues surrounding presidential power during military circumstances.

At issue in *Johnson* was the constitutionality of Reconstruction-era military command over the states of the former Confederacy, under what was termed "an act for the more efficient government of the rebel States," although generally referred to as part of the Reconstruction Acts. The case is full of wonderful historical ironies. President Johnson was forced to defend powers assigned to the executive under the Reconstruction Acts, powers that were implemented over a presidential veto, which, in turn, prompted the impeachment of Johnson.<sup>42</sup> Mississippi, for its part, invoked the reserved sovereign powers of a State of the Union as a defense to the imposition of martial law. Having lost the Civil War in the battlefield and having had its claims of a right to secession thwarted, Mississippi now turned around and argued that the Constitution protected the inherent powers of the states against the federal executive.

Relying on the nineteenth-century distinction between the executive and ministerial functions of the President, the Court found that so long as the President acted pursuant to the powers set out by Congress in the Reconstruction Acts, the Court was without jurisdiction to enjoin the President in the discharge of his non-ministerial functions. The critical issue was the scope of the congressional mandate, which required the President under the Acts

to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. ... [O]ther duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The

---

41 71 U.S. (4 Wall.) 475 (1866).

42 See Eric Foner, *Reconstruction: America's Unfinished Revolution 198-227*, 333-38 (1988) (recounting battles over passage and implementation of Reconstruction Acts); John F. Kennedy, *Profiles in Courage* 115 (1956) (valorating, perhaps peculiarly, the casting of the decisive vote by Senator Edmund G. Ross preventing the removal of Johnson as President after his impeachment by the House).

duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.<sup>43</sup>

Accordingly, there could be no "judicial interference with the exercise of Executive discretion."<sup>44</sup> As the Court summarized the matter, "A bill praying for an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State."<sup>45</sup>

In sum, even during the moment of greatest constitutional crisis in American history, when the Constitution's claim to define governance for nearly half the country was under direct challenge, courts did engage in questions of the limits on executive and military governance. They did not defer uncritically to claims of unilateral executive authority. And while *Milligan* did offer a brief moment of the Court being drawn to an individual-rights approach to the role of constitutional law in times of emergency, the political and public response to that foray almost immediately led the Court to back away — not away toward abdicating any role at all in these times of emergency, but toward a different way of implementing that role. The Court continued to assert that there were limits to unilateral executive power, even in these periods. But they were limits of institutional process, not ones of individual rights. The Court concluded it would do best by insuring fidelity to the overall constitutional commitment to the dynamic, deliberative judgments reached by the politically accountable branches, the legislature and executive, as to how the tradeoff between liberty and security ought to be made during wartime.

## **B. Japanese Internment**

Our claim thus far is simply that the Civil War-era decisions manifest a pronounced judicial emphasis on the role of Congress in limiting the danger of executive unilateralism, even in the context of a complete breakdown in constitutional order. We do not mean to wax rhapsodic over the sufficiency of bilateralism as a check against oppression during wartime challenges to domestic security. The risk of an entire nation, and its elected representatives, succumbing to wartime hysteria is ever present. Among the most egregious examples in American history of wanton, because so unnecessary, disregard for important individual interests during wartime is the forced evacuation and

---

43 71 U.S. at 499.

44 *Id.*

45 *Id.* at 501.

relocation of Japanese residents and citizens during World War II. In legal circles, this event is associated with the *Korematsu* decision.<sup>46</sup> The context is a powerful counterexample to any view that executive and legislative checks and balances, even in a system of separated and divided powers, are adequate to protect against excessive security measures.

The West Coast of the United States was put under military command during this period. Through the military command of General J.L. DeWitt, the forced relocation of the Japanese was imposed. But President Roosevelt specifically authorized this policy in the infamous Executive Order No. 9066.<sup>47</sup> In addition, within a month, Congress confirmed and ratified this Executive Order. The argument made for the military order was that there was no way, short of evacuation, for the military commanders to determine which Japanese residents and citizens were loyal and which not, and the purported evidence of espionage threats among some Japanese on the West Coast that did exist was serious enough to justify exclusion of the entire group. The entire federal government effectively concurred. This forced evacuation quickly led to forced detention for several years in relocation centers, with devastating attendant losses of property, livelihood, and much else.

That the evacuation and detention policies were unjustifiable is not one of the seriously disputed issues in American history, particularly in light of the subsequent decision of the United States Congress to offer reparations to the interned Japanese-Americans. The evidence offered for General DeWitt's decision rested on ethnic stereotyping and fear, not genuine fact.<sup>48</sup> The relative political powerlessness of the Japanese on the West Coast does more to explain why they were relocated while the more politically powerful Japanese on Hawaii (under a different military command) and Germans on the East Coast were not. But what judgment should be reached on the Supreme Court's role in all this? Any judgment on the positive-law experience of the United States must come to terms with this event.

Conventionally, the Court fares no better than the other institutions of the national government in this regard. *Korematsu* is excoriated as one of the two or three worst moments in American constitutional history. The decision is thought to offer numerous lessons about the inability of courts during wartime to provide any check on political excesses, particularly those jointly

---

46 *Korematsu v. United States*, 323 U.S. 214 (1944).

47 For a rich account of the context out of which this Executive Order emerged, see Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (2001).

48 For documentation, see the now classic account of the internment process in Peter Irons, *Justice at War 25-47* (1983).

endorsed by the executive and legislature. But the idea that *Korematsu* and its inherent racialism represent the full story about the judicial encounter with the World War II internment of the Japanese is a creation of the narrative American constitutional law has come to tell about this episode. That conventional account ignores the companion case to *Korematsu*, *Ex parte Endo*,<sup>49</sup> decided the same day as *Korematsu*. As Professor Gudridge describes in a recent revisionist analysis, *Korematsu* can only be properly understood in the context of *Endo*.<sup>50</sup> For while *Korematsu* upheld as constitutional the initial evacuation order that required the Japanese to leave the West Coast, *Endo* unanimously held, at the very same time, that the continued detention of the Japanese was illegal. The Court saw a fundamental distinction between the policies of acts perceived as those of exigency, such as the detention order in *Korematsu*, the imposition of curfew restrictions on Japanese upheld in *Hirabayashi v. United States*,<sup>51</sup> and ongoing detention, the subject of *Endo*. Evacuation and restrictions on mobility reflected military judgment (faulty or pernicious as they may have been) of what was necessary for security. Detention, however, reflected political and policy judgments, not military ones. Despite the emphasis *Korematsu* has had at the expense of *Endo*, the fact is that even during this bleak episode, the Court continued to resist executive branch actions that, at most, rested on political and policy, rather than military, judgments.

*Endo* has been largely forgotten by many American constitutional scholars, in part because it plays almost no role in the standard casebooks in the field. We assume few foreign students of American constitutional law are aware of *Endo*, and many professors of constitutional law have surely neglected *Endo*. But once *Endo* is brought back into the picture, the significance of *Korematsu* has to be cast in a broader framework. For disturbing as it is as a symbol of the policies of the national government, *Korematsu* as an actual legal decision turns out to have had no practical effect at the time it was decided. By the time the Court was deciding *Korematsu*, forced evacuation had taken place two years earlier; the practical question was whether continued detention was permissible. And on that, *Endo* was decisive; indeed, the President, perhaps having been notified that the Court was going to hold the detentions illegal, had already ordered the relocation camps closed the day before *Endo* was decided.<sup>52</sup> On the day that the two

---

49 *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

50 Patrick Gudridge, *Remember Endo?*, 116 Harv. L. Rev. 1633 (2003).

51 320 U.S. 81 (1943).

52 On the debates about whether the Court held up the opinion in *Endo* so that the executive branch could first order the release of those interned or whether the White

decisions were handed down together, the most immediate practical matter at stake was whether the detained Japanese would be released. Under *Endo*, they were. The initial evacuation had long ago taken place; the Court could not undo that or its consequences. All the Court could do, as a practical matter, was order the end to continued detention. And that is what it did.

In reviewing *Korematsu* in light of both *Endo* and *Hirabayashi*, an interesting picture emerges of judicial attentiveness to the sweep of executive authority, even if the end result may not satisfy all civil liberty concerns. Thus, in *Hirabayashi*, the Court specifically relied on the fact that "Congress authorized and implemented such curfew orders,"<sup>53</sup> which left unresolved any claim of unilateral authority vested in the executive: "We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question."<sup>54</sup> Only once assured that Congress and the executive had acted in tandem did the Court assume the quietism claimed by Rehnquist:

Where the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warring, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.<sup>55</sup>

This then provides the jurisprudential method distinguishing *Endo* from *Korematsu*. Insofar as the issue before the Court concerned detention taken pursuant to bilaterally-determined exigency, the Court remained on the sidelines:

[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war areas at the time they did ... . We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons ... constituted a menace.<sup>56</sup>

By contrast, in *Endo* the Court found the critical element of congressional participation missing. Thus, *Endo* became an exercise in statutory

---

House was informed that the Court was about to act, see Irons, *supra* note 48, at 344-46.

53 320 U.S. at 91.

54 *Id.* at 92.

55 *Id.* at 93.

56 *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

interpretation, not constitutional law, which will often result when the Court insists on determining whether executive action is authorized by Congress:

The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

...But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.<sup>57</sup>

Throughout the Japanese internment and related cases, the Court self-consciously struggled to preserve a congressional oversight role of the executive, even as the Court upheld all the executive's actions up until the *Endo* case.<sup>58</sup> Before leaving the topic of the Japanese internment during World War II, we must note that *Korematsu* also has had no legal or jurisprudential effect. At least until now, the decision has never been cited to support any government action of which we are aware. The only jurisprudential effect *Korematsu* has been, in fact, to encourage more aggressive, not less, judicial review of executive and legislative actions during security contexts. *Korematsu* has constituted "an infernal baseline" in American constitutional law; far from legitimating repressive wartime policies, its only doctrinal role has been as a symbol of what ought to be avoided in political practice and constitutional law.<sup>59</sup> But there is also the cautionary note struck by Justice Jackson in dissent. Jackson argues that it is unrealistic to expect courts to do anything other than rubberstamp military decisions during times of war. As a result, to ask courts to do any more, or to expect that they will do any more, can be no more than a foolhardy self-defeating illusion. The danger, according to Jackson, is that once courts are drawn into the process of substantive review

---

57 *Ex parte Mitsuye Endo*, 323 U.S. 283, 300-02 (1944).

58 For internal evidence of this self-conscious effort, consider Irons' account of Chief Justice Stone's comments at Court conferences on the cases: "Convinced that the Court must not compromise the exercise of the military's wartime powers over the civilian population, he [Stone] was equally determined to affirm the primacy of Congress in setting limits on military authority." Irons, *supra* note 48, at 325.

59 *See, e.g., Sternberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (invoking *Korematsu* and *Dred Scott* to attack Court's ruling on abortion rights).

of extraordinary powers, their role as constitutional arbiters will be at the very least compromised, if not altogether undermined. In language reminiscent of *Luther v. Borden* and of the cautions of Chief Justice Rehnquist, Jackson worries:

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.<sup>60</sup>

---

60 323 U.S. at 245-46 (Jackson, J., dissenting).

At least for the intervening half-century, Jackson was wrong about the lasting effects of *Korematsu*. Nonetheless, his caution pushes to the frontier of where we are willing to go in this paper. There is a historical/descriptive argument to be made about the role of American constitutional law in forcing bilateral review of claimed states of emergency. On that score, we are fairly confident that the courts have, in practice, neither abdicated that role entirely nor defined their role aggressively; instead, courts have only sought to ensure vigilance over the institutional tendency to concentrate power in the hands of the executive and its military. If Congress endorses or perhaps even acquiesces in that concentration, the courts have accepted that judgment. If Congress has resisted, the courts have found the executive to have gone beyond even its wartime powers. Beyond that institutionally-focused enforcement of checks and balances, however, is the question whether courts could or should attempt substantive oversight when extraordinary powers are invoked through proper channels. Even with the full collaboration of all political branches, critics will say, important rights can nonetheless be violated. But as a descriptive and historical matter, American courts have viewed the costs of putting judgment of these questions into the hands of courts to outweigh the benefits of leaving these freighted questions in the joint hands of the legislature and executive.

### C. Probing the Limits

The focus on bilateral sources of authority for emergency powers has carried American courts through some of the most difficult departures from the ordinary workings of American criminal law. For example in *Ex parte Quirin*,<sup>61</sup> the most direct precedential authority for the current use of military commissions to try civilians, the Court upheld the use of extraordinary processes to try German saboteurs who had landed on Long Island, shed their uniforms, and entered the murky world of "unlawful combatants." The Court returned to the now-familiar inquiry into the constitutional division of powers: "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."<sup>62</sup> Thus, the Court in *Quirin* refused to address whether the executive, acting on its own authority, had the power to order the use

---

61 317 U.S. 1 (1942).

62 *Id.* at 39.

of military tribunals for those it designated enemy combatants, even though the executive expressly pressed this claim (similarly, the Court declined to address whether Congress could deny the executive this authority<sup>63</sup>). Instead, the Court upheld President Roosevelt's actions precisely because he was exercising authority that Congress had expressly delegated to him.

Once observed through this prism, many highly problematic cases concerning the tension between emergency powers and ordinary workings of law begin to align themselves in recognizable fashion. An interesting example emerges from the negotiated resolution of the Iran hostage crisis in 1981. As part of the negotiations, the U.S. pledged to release all Iranian assets held in the U.S. from any legal embargo. This brought the negotiated terms of release into direct conflict with ongoing legal proceedings against Iran, including a prejudgment attachment of assets by Dames & Moore against Iranian bank assets in the U.S. In *Dames & Moore v. Regan*,<sup>64</sup> the Court had to decide whether the President was properly empowered to use "blocking orders" against foreign assets as part of his arsenal in negotiating the resolution to the hostage crisis. In now-familiar fashion, the Court turned to the scope of congressional authorization under the International Emergency Economic Powers Act to define the ambit of emergency power: "Because the President's action in nullifying the attachments and ordering the transfer of assets was taken pursuant to specific congressional authorization, it is 'supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'"<sup>65</sup> The Court's conclusion that the congressional statutes did, in fact, authorize the President's actions has been deeply controversial.<sup>66</sup> But the Court did

---

63 *Id.* at 47.

64 453 U.S. 654 (1981).

65 *Id.* at 656 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

66 *See, e.g., Koh, supra* note 9, at 139-40:

Yet by finding legislative "approval" when Congress had given none, Rehnquist not only inverted the *Steel Seizure* holding — which had construed statutory nonapproval of the president's act to mean legislative disapproval — but also condoned legislative inactivity at a time that demanded interbranch dialogue and bipartisan consensus ... *Dames & Moore* also sent the *president* the wrong message. In responding to perceived national crises, the Court suggested, the president should act first, then search for preexisting congressional blank checks, rather than seek specific prior or immediate subsequent legislative approval of controversial decisions. Thus, *Dames & Moore* championed unguided executive activism and congressional acquiescence in foreign affairs over the constitutional principle of balanced institutional participation.

preserve the formal structure of authority in which bilateral endorsement is, in principle, required even in crises.

It should come as no surprise that the Court in *Dames & Moore* relied directly on the *Steel Seizure Cases* as its polestar, for our thesis would be considerably weakened were we not able to show the converse of our claim: what happens when the executive acts without congressional authorization or clearly beyond the bounds of such authorization. As with *Dames & Moore*, the *Steel Seizure Cases* involved emergency powers in derogation of customary civil processes, as opposed to criminal protections. At issue was an order given by President Truman seizing domestic steel mills to ensure continued production during the Korean War in the face of a threatened nationwide strike. Unlike the cases in which the Court was able to find the executive acting within the scope of an extraordinary grant of power by Congress, President Truman claimed:

that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.<sup>67</sup>

In striking down the seizure of the steel mills, the Court made two separate determinations that are critical as we turn to the current setting. First, the Court found the seizures beyond the President's inherent authority as Commander-in-Chief because they were executed outside of the theater of battle.<sup>68</sup> More significantly, the Court relied on the fact that there was no formal declaration of war as indicating a lack of congressional authorization for the claim of exceptional powers: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President."<sup>69</sup> The presidential claim, accordingly, was an unconstitutional arrogation of "law-making power of Congress to presidential or military supervision or control."<sup>70</sup> That finding was made easier by the fact that Congress had expressly considered the authorization of executive power to

---

67 *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

68 *Id.* at 587.

69 *Id.* at 588.

70 *Id.*

seize vital industrial plants to secure labor peace, but then rejected it in passing the Taft-Hartley Act in 1947.<sup>71</sup>

As in *Korematsu*, it fell to Justice Jackson to fully expound the normative theory underlying the Court's concern. In an appeal to transcendent principle, Jackson cautions:

The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies — such as wages or stabilization — and lose sight of enduring consequences upon the balanced power structure of our Republic.

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.<sup>72</sup>

Although Justice Jackson fully anticipated that threats and the exigencies of national security would necessarily alter the constitutional balance between liberty and security, he saw the Court's role primarily in the preservation of separation of political power between the executive and the legislature:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>73</sup>

After canvassing the mechanisms by which emergency or state of siege powers are assigned in various European democracies, Jackson concludes with what, in our view, must be the foundation of the constitutional inquiry:

---

71 *Id.* at 586.

72 *Id.* at 634-35. (Jackson, J., concurring) (footnote omitted).

73 *Id.* at 637-38.

This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.<sup>74</sup>

Failing such congressional authorization, the invocation of emergency powers to authorize the seizure of the steel mills failed.

With this as the constitutional backdrop, we turn now to the contemporary setting. One further note should be added before we do so. By focusing on the importance of political ratification of the executive's demands for extraordinary power, we can reconcile in part the apparent tension between Katyal and Tribe, on the one hand, and Jack Goldsmith and Cass Sunstein, on the other. For Katyal and Tribe, the recourse to military tribunals in the current context is constitutionally impermissible, largely because it "succumbs to an executive unilateralism all too familiar in recent days."<sup>75</sup> In trying to limit the precedential effect of *Quirin*, Katyal and Tribe point to the overt declaration of war against a clear enemy nation, the congressional authorization of the commissions, and perhaps even some political leveraging of the Court that may call into question whether *Quirin* should be treated as true precedential authority.<sup>76</sup> For Goldsmith and Sunstein, this cannot be the full story; indeed, given the ambiguity of the congressional authorization of tribunals in World War II, they make a strong case that the Bush Administration stands on firmer legal grounds than did the Roosevelt Administration in the use of military commissions.<sup>77</sup> The difference in the two

---

74 *Id.* at 652.

75 Katyal & Tribe, *supra* note 16, at 1260.

76 *Id.* at 1291.

77 Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comm. 261 (2002).

scenarios may lie in the background political norms, including the procedures required in military commissions themselves, that confirm the importance of bilateral political support.<sup>78</sup> Perhaps the clearest manifestation is that while *Korematsu* continues in force as decisional law, albeit morally tarnished, the political branches have paid reparations to the victims of the Japanese internment. There may be a benefit, whose exploration lies beyond the scope of this paper, not only in requiring congressional authorization as a necessary precondition for the use of exceptional powers, but to ensure *post facto* political accountability for such invocations of extraordinary powers.<sup>79</sup>

## II. THE UNCERTAINTY OF UNCONVENTIONAL WAR

### A. Executive Detention of "Enemy Combatants"

The most controversial legal power the United States government has not just asserted but actually deployed at this point in the war on terrorism is probably the power to detain preventively both citizens and non-citizens whom the executive concludes are "enemy combatants." The consequence of such a designation is that the individual can be detained under military control for the duration of the circumstances that constitute the "war" or the context of combat involved. There is no process resembling in any way the ordinary rule-of-law-like trial circumstances of proof. There is no question of punishment involved; the justification for confinement is both interrogation for intelligence purposes and incapacitation for prevention of future harms. Confinement is for an "indefinite period" under this approach, as the government acknowledges. Thus far, the United States has applied this designation to three persons, including one United States citizen allegedly taken off the battlefield in Afghanistan, Yaser Hamdi, and one United States citizen captured in Chicago, Illinois, Jose Padilla, who allegedly was associated with al Qaeda and was engaged in "hostile and war-like acts," including efforts to construct and deploy a radioactive "dirty bomb."<sup>80</sup>

What rights does a person, particularly a United States citizen or a

---

78 *Id.*

79 Cass Sunstein makes a similar argument with regard to decisions of the Israeli Supreme Court concerning the use of physical coercion of prisoners by the General Security Services. Sunstein focuses on the decision of the Court to rule narrowly that the disputed practices could only be utilized if authorized by the national legislature. See Cass Sunstein, *Designing Democracy: What Constitutions Do* 3-4 (2001).

80 The third designated enemy combatant at the time this piece went to press is a

person having the status of a permanent member of this society (i.e., a legally resident alien), have in this context? The typically polar positions we described at the outset are vividly displayed in this context. Civil libertarians vehemently assert that a United States citizen, or for that matter any person in the U.S., cannot be confined without the ordinary protections of a criminal trial. They decried the government's attempt to create a "two-tiered legal system,"<sup>81</sup> in which terrorism cases were segregated institutionally (through military detention), procedurally (through radically distinct, and more minimal, processes of fact-finding), substantively (in terms of what the government was required to show and by what standards of proof), and philosophically (preventive confinement rather than punishment-based confinement). The lens through which these critics view the "enemy combatant" problem was that of the ordinary criminal trial, which these criticisms implicitly or explicitly take to be the model of what the rule of law requires to justify locking up an American citizen. At the same time, the government asserted a strong version of the unilateral executive position it viewed as necessary to respond effectively to terrorism. Thus, the government argued that one designated an "enemy combatant" was not entitled to counsel to challenge the facts underlying that designation and that courts were not empowered to review the executive's factual judgments that justified this designation.<sup>82</sup>

Lower federal courts have now weighed in on these disputes in both cases involving United States citizens deemed by the President to be "enemy combatants" and hence detainable without a criminal trial. We will focus principally on the decision in the *Padilla* case, but both there and in the *Hamdi* case, the lower courts have taken precisely the path the predecessor courts we have described took in determining how to adjust the rule of law model from ordinary times to the context of serious domestic security threat.

The court in *Padilla*<sup>83</sup> strongly rejected the civil libertarian view that only ordinary criminal trial processes can justify confining an American

---

Qatari citizen named Ali Marri. See *Enemy Combatant Designation Challenged in Court*, Wash. Post, July 10, 2003, at A11.

81 Charles Lane, *U.S. Crafts Separate Legal Web for Terror: The Parallel System of Laws Could Intrude on the United States' Familiar Criminal-Justice Procedures*, *Critics Said*, Wash. Post, Dec. 1, 2002, at A1.

82 The government's fallback position was that any such review must be limited to determining only whether there is "some evidence" that supports the executive's determination — the position the court adopted.

83 *Padilla v. Bush*, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002). At the time this article goes to press, there has been no appellate decision in this litigation.

citizen for indefinite duration. At the same time, the court refused at several points to endorse executive unilateralism. Nor did the court take on the first-order role of itself defining, through constitutional law, the "rights" of American citizens in this context. Instead, the court played the process-based, institutionally-focused role that American courts have consistently played in addressing similar issues. Thus, the court defined the boundaries of governmental powers and individual protections by insisting on a bilateral, executive-congressional partnership; once the court had established that such a partnership was reflected in the process by which the category of "enemy combatant" was created and applied, the court largely deferred to the first-order judgments of other institutional actors. Moreover, it did so by directly invoking the "democratic process" focus of earlier cases such as the *Steel Seizure* decision.

The steps by which the court navigated its way through the difficult issues reveal the institutional focus so characteristic of American courts during exigent circumstances. The most profound questions centered around whether a citizen could be confined indefinitely, without trial, based on a presidential designation of "enemy combatant" status. Intimately bound up with that question was the bearing of an Act of Congress that bars the detention of American citizens "except pursuant to an Act of Congress."<sup>84</sup>

The government argued that the position of executive unilateralism was so embedded in the constitutional text and structure that the Act of Congress could not stop the President from using his Commander-in-Chief powers<sup>85</sup> during wartime to determine that individuals were "enemy combatants." That is, the government argued that Congress could not constitutionally legislate to deny the President this power. The court agreed with the President's position that the current circumstances do constitute wartime for purposes of invoking the President's Commander-in-Chief powers (in part because Congress had legislated to recognize this circumstance, even though it had not issued a formal declaration of war against Afghanistan or any other state or entity). The court also echoed earlier Supreme Court decisions in stating that the question of what military measures might be necessary in these circumstances is well beyond the realm of the kinds of questions courts ought to address. Nonetheless, the court also refused to endorse unilateral executive authority; thus, it rejected the claim that Congress could not bar the President from detaining classes of citizens, including enemy combatants

---

84 18 U.S.C. § 4001 (a).

85 U.S. Const. art. II, § 2, cl. 1 (defining the President as "Commander in Chief of the Army and Navy of the United States").

during wartime. Instead, the court found that the Act of Congress that precluded citizen detention without congressional authorization to be fully applicable to Padilla's case.

The court then went on to hold that executive detention of "enemy combatants" was, nonetheless, lawful. It did so because the court found that Congress had itself legislated in a way as to endorse the President's power to order these detentions. A week after September 11, 2001, Congress had legislated broadly to give the President the authority to "use all necessary and appropriate force against those ... organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States ... ." <sup>86</sup> Only as a result of this specific Act of Congress did the court conclude that the President had the legal power to detain enemy combatants (if the facts supported his designation). Thus, on the central question at stake, the court upheld the President's power, but not on the unilateral basis the President asserted. The court held that the prior legislation barring all detentions except pursuant to an Act of Congress continued to constrain the President's powers, but that the requirements of that earlier Act had been met because Congress itself had legislated to bring about bilateral endorsement of presidential power to detain "enemy combatants" in the wake of September 11th.

Having resolved the general issue about the potential scope of presidential power, the court turned to the more narrow question of who could decide, and through what processes, whether the specific facts supported the conclusion that any particular individual was indeed an "enemy combatant." Here too the court resolved the issues by focusing more on institutional allocation of authority issues than directly on issues of "individual rights." Padilla's lawyers did assert that various constitutional rights — the right to counsel, the right to avoid self-incrimination, and the right to due process — required that he be given a lawyer to contest the underlying facts and that the court make its own determination about whether the facts justified his detention. But the court rejected the view that specific constitutional rights associated with the trial process had any application to an alleged enemy combatant who was neither being tried nor being punished for past acts, but, rather, was only being detained. This approach was consistent with the court's earlier rejection of the view that only the familiar criminal trial model can be used to justify confinement of a citizen. Once again, though, the court was not

---

86 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

willing to go all the way to unilateral executive control of the decision to detain; once again, the court relied on the authority of other institutions, rather than its own first-order judgments, about what process was required to justify detention.

Thus, the court did find that Padilla was entitled to consult with a lawyer. But the court did not hold that this right rested on any constitutional foundation (having rejected trial-type rights as a justification, the court left open questions about what due process might require). Instead, the court relied on congressional statutes that regulated the habeas corpus process and the court's own remedial powers. The court concluded that Padilla's "right to present facts [through counsel] is rooted firmly in the statutes that provide the basis for his petition." That is, Padilla would get access to counsel, contrary to the claims of unilateral executive proponents, but that access would not rest on any finding that he had a constitutional right to such access, contrary to the strong civil libertarian position. By grounding this right in congressional legislation, the court enabled an ongoing political process to play a significant role in resolving the difficult questions about the boundaries of executive power during emergency contexts. Had the court instead found the right to counsel to be constitutionally grounded, the courts, rather than Congress and the President, would have become the central actor in resolving these issues.

The final question addressed by the court was whether the courts can review the factual basis for the executive's "enemy combatant" designation, and if so, under what standard. Once again, each side moved toward the polar positions characteristic of these struggles. Padilla argued that "he is entitled to a trial on the issue of whether he is an unlawful combatant or not." The government argued that the court should not review the President's determination at all. Here, too, the court rejected either pole. Instead, it concluded — admittedly, on a question with little prior authority either way — that the President's determination would be judicially reviewed, but only under a minimal requirement that there be "some evidence" to support the "enemy combatant" designation. And even though the context was novel, the court offered a remarkable articulation of the general judicial stance toward analogous questions throughout American history. The limited judicial role entailed in the minimal, "some evidence" standard resulted not, in the court's judgment, because judges are unable to decide "whether facts have been established by competent evidence"; indeed, the court said that if there is any task — viewed in isolation — that judges are trained to perform, it is that very task. But the very point of the institutional focus American courts bring to these issues is that the right judicial role is not a question that ought to be considered in isolation. Instead, the question has to be viewed from the

perspective of which institutions do and ought to have the authority to make these decisions. Given the stakes involved in wartime judgments, and the ultimate accountability of political branches for whether domestic security is achieved, the court concluded that the right institutional allocation of authority argues for some judicial oversight of the executive, but only the minimal oversight reflected in the "some evidence" standard.

Let us now step back from the specifics of this intriguing decision on the most difficult legal question involving claims of "rights" that has yet confronted the American courts. The court framed each particular question it was asked in the language and structure of institutional analysis that Justice Jackson had lucidly outlined in the *Steel Seizure Cases*. Rejecting both a rights-based analysis and the assertions of unilateral executive authority, the court explicitly invoked Justice Jackson to reach the conclusion that the exercise of presidential power to detain even citizens as "enemy combatants" had been lawful precisely because the President had been acting with the bilateral endorsement of Congress in exercising this power. The court carved out a minor role for judicial oversight — a role itself justified by congressional enactments — and a far more important role for executive-legislative partnership to determine the boundaries of these powers. As the court put it:

The "political branches," when they make judgments on the exercise of war powers under Articles I and II, *as both branches have here*, need not submit those judgments to review by Article III courts. Rather, they are subject to the perhaps less didactic but nonetheless searching audit of the democratic process.<sup>87</sup>

This is a democratic-process based view that emphasizes that the judicial role in reviewing assertions of power during exigent circumstances should focus on ensuring whether there has been bilateral institutional endorsement for the exercise of such powers — rather than a view that the judicial role should be to determine on its own the substantive content and application of "rights" during wartime. This is not a view that might please more abstract academic "rights theorists," be they political philosophers or constitutional theorists. It is, however, the characteristic way in which American courts have approached their role of reviewing exercises of power of the political branches during wartime. In one of the most complex legal settings so far posed by the post-September 11th events, the detention without trial of those the President designates as enemy combatants, it is thus intriguing to see

---

<sup>87</sup> *Padilla*, 233 F. Supp. 2d at 607.

the courts turning to the same general framework for analysis that the courts have drawn on since the Civil War for defining their role in addressing rights claims during times of war.<sup>88</sup> Whatever one thinks of how that framework is applied in specific cases, the endurance of this general structure of analysis is noteworthy.

### III. BILATERALISM AS HEALTHY ILLUSION?

Civil libertarians will not, of course, be content with the historical practice of American courts of channeling these issues into bilateral, executive-legislative decisionmaking structures. The most direct challenge to that approach will be the same as to all "legal process" approaches to decisionmaking: Courts ought not avoid dealing with the substantive issues of what rights we have during exigent circumstances by deferring to the judgments of political branches, even if both the executive and the legislative agree. Rights should be not hostage to the vagaries of democratic politics, even the consensus politics, when it exists, of both political branches.

Our project is not to engage in these first-order normative debates. Instead, we seek to characterize the positive-law experience of the United States in a way that highlights features of that experience often neglected — as a necessary prelude to serious normative assessment. But even from within the historical interpretation we offer here, civil libertarians can still raise two further objections. First, even if courts have constructed a

---

88 The other case involving military detention of an American citizen, *Hamdi*, also operates within this same framework, though more ambiguously so. In upholding these detention practices, while still endorsing some degree of judicial review over executive determinations of enemy combatant status, the Fourth Circuit relied heavily on its interpretative judgment that Congress had endorsed these detentions. The court wrote: "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi v. Rumsfeld*, 316 F.3d 450, 467-68 (4th Cir. 2003). At the same time, however, that court also strongly emphasized, in a case involving battlefield capture, the powers of the executive branch under "under the war powers of Art. II." *Id.* at 473. That emphasis on Article II suggests the possibility of an inherent executive authority, which might conceivably obtain even absent congressional endorsement. But the court did not need to resolve these ultimate questions of authority, given its conclusion that Congress had, indeed, endorsed the detentions. Recently, the en banc Fourth Circuit denied a petition for rehearing and rehearing en banc of the panel's decision. *See Hamdi v. Rumsfeld*, 337F.3d 335 (4th Cir. 2003).

doctrinal and rhetorical framework that emphasizes bilateral institutional participation in decisionmaking tradeoffs of rights and security, how is this framework applied in actual practice? Are courts not, in fact, pretending in these cases that Congress has actually signed off on the executive action at issue? Is it not an illusion to suggest that Congress has endorsed the executive action, a dangerous illusion, indeed, for it enables courts to defer responsibility for hard decisions onto the putative agreement of both political branches? Second, even if the courts take this framework seriously, how much can the political process effectively cabin in a determined President or Chief Executive during wartime? Is it not a further illusion to believe or suggest that Congress or other political actors *could* stand up to the executive branch during eras of serious security threats? Thus, even if there is bilateral institutional endorsement, is not the congressional role inevitably a meaningless rubber stamp? And does that not turn judicial review, which piggybacks onto the congressional role, also into a meaningless rubber stamp?

The first category of questions tests how the institutionally-oriented, process-based theory is (and ought to be) applied in fact. Certainly, this framework defers many of the critical questions that will matter in specific cases. Thus, even if congressional participation is doctrinally required, there are further questions of how specific that participation must be and how close in time to the executive action to justify concluding that the required bilateral institutional endorsement is present. On timing, for example, Congress might have legislated close in time to a specific executive action, so that Congress can plausibly be viewed as having acted to endorse that particular action, but the legislation might then stay on the books for years. When the next crisis comes along, should the courts accept this much earlier congressional endorsement as effective endorsement of similar executive action in the new context? Or should courts require more contemporaneous authorization — in effect, remanding the problem back to Congress for a current affirmative act on its part? The current debate over military tribunals illustrates this point.<sup>89</sup> When the Supreme Court confronted the constitutionality of these tribunals in the World War II context of the *Quirin* case, Congress had legislated recently to authorize use of such tribunals.<sup>90</sup> Those who argue

---

89 We are indebted to Jack Goldsmith for this example.

90 *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (noting that "Congress [in the relevant legislation] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases" and holding that "Congress [in the relevant provisions] has authorized trial of offenses against the law of war before such commissions").

that such tribunals are also constitutional in the present context point to this same legislation, which has remained in place for many decades, as evidence of continuing legislative endorsement of such tribunals. Yet Congress has not directly debated the issue in many years. Should Congress' silence in intervening years, its failure to repeal the earlier legislation, be treated as tantamount to affirmative legislative endorsement?<sup>91</sup> Should it matter that Congress did expressly confirm and endorse the *Quirin* Court's interpretation of this law in 1950, when Congress recodified these provisions?<sup>92</sup> Or is this 1950 confirmation still insufficient? Should courts shift the burden of inertia and require more contemporary legislative endorsement, if bilateral institutional endorsement is constitutionally required?

Second, and more broadly, such congressional legislation as there is will often be cast at a high level of generality. Only rarely will Congress have focused in an exact way on the precise assertion of executive authority at issue; more typically, Congress will have legislated, if at all, in more general terms, in contexts not exactly those in which the executive currently seeks to act. Courts therefore will have a good deal of interpretive latitude to decide whether the congressional legislation is "close enough" to be treated as effective endorsement of the disputed executive action. More corrosively, the argument would run, courts in most cases will have so much interpretive room, given the generalities of legislation, that the legislation itself cannot control or determine the outcome; instead, courts will necessarily be relying on other considerations in making this judgment. Thus, this process-based framework, tied to the judicial demand for bilateral institutional endorsement, provides no meaningful constraint on judicial decisionmaking.

A different, but related, final point of criticism is prominently associated with the work of Professors Harold Koh and Laurence Tribe. This critique argues that for much of the post-World War II period the Supreme Court did give teeth to the requirement of bilateral institutional endorsement, but that over the last generation or so, the Court has become too willing to find congressional endorsement of executive action in foreign affairs and security contexts.<sup>93</sup> This critique suggests the institutional focus of courts is potentially

---

91 For an argument that constitutional principles should sometimes make Congressional inaction or silence insufficient, in contexts in which the Constitution should be understood to require affirmative legislative endorsement, see Laurence H. Tribe, *Constitutional Choices: Construing the Sounds of Congressional and Constitutional Silence* 31-35 (1985).

92 For the history, see Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag* 2d 249, 253-54 (2002).

93 See Koh, *supra* note 9, at 148 (decrying "the trend toward executive insulation

determinate enough, but argues that the Court has failed to consistently adhere to the terms of this approach.

These are the right kinds of questions to ask from within the institutionally-oriented, process-based approach to these issues. To evaluate any of these criticisms would require case-by-case analysis of how the Court has applied the requirement of bilateral institutional endorsement to specific issues. That is not our project here, for our aim is only to illuminate the general principles that characterize the predominant American judicial approach to these issues. But there is one intriguing point to note even if some or all of these criticisms turn out to be convincing. For the structure of judicial analysis always preserves the *possibility* of ultimate congressional control. The courts consistently resist any endorsement of ultimate unilateral authority resting in the hands of the executive branch, though the executive typically presses this argument. As a result, even if it is fair to view courts as quite expansive in their willingness to find congressional action present, this structure of analysis ensures that, should Congress disagree at any point, it will have the authority to step in and block a great deal of the executive action that courts otherwise have found constitutional. Indeed, given the extraordinary political salience of these issues, it might be more appropriate to conclude in these contexts than in routine ones that Congress' failure to act to stop the executive actually is tantamount to endorsement (or shows, at least, an unwillingness to take responsibility where it is appropriate for courts to lay the responsibility at Congress' feet). If Congress were to want to stop the use of military tribunals or the executive detention of captured battlefield combatants, the cases leave open the possibility that Congress would be able to override the executive and do so.<sup>94</sup> If courts incline toward

---

from judicial review in foreign affairs [as] a relatively recent development, which finds little support in our constitutional traditions"); Laurence H. Tribe, *American Constitutional Law* 677 (3d ed. 2000) ("the continuing failure to develop a more consistent and less manipulable approach to congressional silence creates the risk that the Legislative reins on executive authority will grow ever looser, given a Court that seems willing at times to indulge presidential aggrandizement").

94 To enact legislation, Congress might have to override a presidential veto. But Congress' bicameral legislative resistance to executive action, even if Congress does not have a large enough majority to override a presidential veto, might be enough for courts to find congressional rejection of executive authority and to conclude that the executive's action could be sustained only if the President were acting in an area of inherent executive authority that Congress could not regulate. We are unaware of any cases that address the constitutional significance of congressional rejection that has majorities in both Houses of Congress that are nonetheless not large enough to override a presidential veto.

construing broad legislation as endorsement of executive action, Congress can unmistakably legislate in a more pointed way that courts will then likely take as an effective bar to that executive action (absent an unusual conclusion that the area is reserved for executive authority alone). Thus, even if one were to conclude that congressional endorsement in the cases should be seen as a fiction courts have created, that fiction could still be a healthy one. Through such doctrinal and rhetorical structures of analysis, courts channel the issues back into the bilateral political process and keep open a critical congressional role, should Congress strongly disagree with executive action during crises.

A distinct and difficult question is whether the political process approach does, descriptively, ever provide a check on executive power during times of crisis. While the conventional view seems to be that presidents rarely face resistance during wartime or similar circumstances, particularly on tradeoffs between civil liberties and securities, the story is not as simple as that. For one, it is a mistake to conceive of the "executive branch" as necessarily a unified entity, even (or especially) in these contexts. Often, there are rivalries between different parts of the executive branch, and at times these conflicts become a means by which liberties receive some degree of protection; at other times, specific individuals in powerful executive branch positions marshal their authority and power into means for challenging executive impulses toward unjustified suppression. The first process is illustrated by the British experience during World War II, which is magisterially documented by Brian Simpson.<sup>95</sup> Simpson argues that, despite the absence of a written constitution, Great Britain had the best wartime record of preserving civil liberties among the Western democracies; this result stemmed from the intense distrust and rivalry between the intelligence services and other components of the government's executive branch. The second process is chronicled in Geoffrey Stone's history of the American experience during World War II, where courts again played a minor role in protecting civil liberties, yet where the World War I experience of state suppression of political dissent was not repeated to nearly the same extent.<sup>96</sup> In the former context, the Attorney General, Francis Biddle, himself steeped in the civil liberties tradition, managed to resist most of President Roosevelt's insistent demands to "indict the seditionists." Indeed, the Justice Department played a major role in ensuring that there were virtually no state prosecutions for

---

95 Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (1992).

96 Geoffrey R. Stone, *Free Speech in World War II: "When Are You Going to Indict the Seditionists"* (forthcoming 2004).

disloyalty and no enactment of state sedition acts during this period. Though in hindsight the record of rights-protection for dissident speech was not perfect in this era, it was dramatically better than during the World War I experience, largely as a result of internal dynamics within the executive branch itself. Once again, this is hardly to say that the results were optimal, nor is it to say that executive branch conflict and debate will work with the same effect, or even at all, in different circumstances. But it is to highlight the fact that even internal executive branches have, at times, provided genuine protection for rights during wartime — even in the face of countervailing pressures from the Chief Executive or other parts of the executive branch. Disparaging the process-based approach of the American courts, based on the assumption that a unified executive branch will always fail to internalize civil libertarian values to some extent, is, at the very least, too simple.

Congress, too, is often assumed to abdicate wholly to the executive on these issues. But if there is tension, at times, even within the executive branch, one would expect even more of that to be manifested through Congress. After all, there are partisan incentives for at least one party to seek to expose or exaggerate executive failings, along with the institutional incentives of Congress to resist executive power. The current experience during the "War on Terror" suggests precisely this mixed picture; and that picture will surely change, as the political-process model would endorse, depending on whether there are further major terrorist attacks. Congress did overwhelmingly and immediately, six weeks after the September 11, 2001, attacks, adopt the USA Patriot Act.<sup>97</sup> Some have criticized the Act for its rebalancing of the scales between liberty and security;<sup>98</sup> others have praised Congress for ensuring a continuing oversight role for itself and courts in key areas under the Act.<sup>99</sup> Yet since that moment in the immediate aftermath of September 11th, Congress has resisted several executive branch initiatives. Congress barred funding for the data-analysis program known as the Total Information Awareness Program, unless the Defense Department reported to Congress on the effectiveness of the Program and its impact on civil liberties. When the government asked Congress for authorization to obtain broader personal information on American citizens, including financial information,

---

97 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

98 See, e.g., Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 Loy. U. Chi. L.J. 933 (2002).

99 See, e.g., Michael T. McCarthy, *Recent Developments, USA Patriot Act*, 39 Harv. J. on Legis. 435, 439-40 (2002).

the relevant congressional committees refused. When the executive branch, with some congressional support, sought to make permanent the provisions of the Patriot Act, Congress refused. After the legislation was then carved down dramatically to address the problem of "lone-wolf" terrorists, members of Congress succeeded in adding even to that power a sunset provision that requires it to be revisited. And when the executive floated proposals for more expansive legislation, known as Patriot II, than that initially enacted after September 11th, the legislation was quickly killed off in Congress. And all of this congressional resistance has taken place when Congress and the White House are controlled by the same political party.<sup>100</sup> As Jeffrey Rosen concludes, there has emerged in the United States Congress, a year or so after September 11th, "a principled, bipartisan libertarian constituency" that is "willing to defend privacy, even in the face of popular fears."<sup>101</sup>

Finally, the political system has itself created institutional structures for attempting to build into the executive-congressional relationship mechanisms for addressing civil liberties-security issues in an informed, deliberative manner. Recently, many more Americans have become aware of a longstanding entity, the Office of the Inspector General, which is located within many executive branch agencies, including the Justice Department. That Office has already issued two extraordinarily comprehensive — and often quite critical — evaluations of how federal security policies are being administered during the "War on Terror."<sup>102</sup> These reports, which have received front-page media coverage, offer many advantages over litigation, as long as the officials involved act with the requisite independence and diligence. First, they generate detailed information on enforcement much more quickly than could ever be done through the processes of litigation. Second, because these reports are generated from within the executive branch, the investigators have access to officials throughout the government. Third, these reports appear to have significant credibility, including in the eyes of those inclined to

---

100 The government floated a proposed eighty-six-page draft bill, labeled Patriot II by many, though it has thus far not introduced the proposed legislation in light of bipartisan resistance to this draft when it was first presented. See Mary Dalrymple, *Tough Son of Patriot Draft Raises Hackles of Civil Libertarians*, CQ Wkly., Feb. 15, 2003, at 405.

101 Jeffrey Rosen, *Why Congress Is Brave and the Courts Aren't*, 228(20) New Rep. 19 (2003).

102 See Office of the Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003); see also Philip Shenon, *Report on U.S. Antiterrorism Law Alleges Violations of Civil Rights*, N.Y. Times, July 21, 2003, at A1 (reporting on second report from this Office).

support executive branch policies, precisely because they are produced by executive branch officials themselves. Finally, because the reports are meant to inform policy, rather than attach sanctions or monetary liabilities to specific individuals as in litigation, they are not constrained as court decisions are by problems of affixing blame to individuals. As a result, the reports might well contribute more productively to ongoing political debate and assessment of executive branch actions during wartime.

Once again, none of this is to argue that the political-process-based approach of the courts is without serious costs or that it leads to the optimal balance between rights and security. We do mean to enrich discussion of this neglected perspective, though, by suggesting at least two points. The first is that the political process does not fall "silent during wartime." While there has long been debate about whether the courts fall silent in these periods,<sup>103</sup> it is clear that, in at least some contexts, political deliberation and conflict over rights and security do continue in these periods — and probably increasingly so over time. The second point is that one cannot evaluate the judicial channeling of these debates into politics simply by looking at the failures and costs that have resulted from the way the political process has responded in different contexts. The costs and benefits of this process-based judicial approach must be weighed against the costs and benefits of a full-blown, aggressively rights-oriented alternative that courts might pursue. One should not assume that such an alternative is without potential costs of its own. Any serious analysis of the role of courts versus political institutions during wartime must compare alternative approaches against each other and must realistically recognize both the costs and benefits associated with alternative institutional strategies for addressing these difficult issues.

---

103 With respect to the American courts, a recent, provocative, empirical study takes issue with the conventional view that courts rubberstamp government action during crises. Professors Lee Epstein, Jeffrey Segal, and Gary King have assessed Supreme Court cases dealing with civil liberties and claims of individual right from 1941 to 1999; their study compares how often the government prevails in these cases during times of war or crisis (as they operationalize that context) as compared to other times. They find that aliens prevail *more often* during wartime and that the government lost slightly more often in high-visibility cases in these periods; they also found that the government prevailed during wartime more often in cases involving protest demonstrations, internal security, and conscientious objection. As Professor Mark Tushnet claims in a careful essay reassessing the conventional wisdom, "these results [of the Epstein, King, Segal study] are striking, and clearly mean that one must temper the strongest claims made about the silence of law during wartime." Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime* (Georgetown Univ. Law Ctr., Working Paper Series No. 368323, 2003).

## CONCLUSION

Systems that separate and divide executive and legislative powers might justify a more process-based, institutionally-focused judicial role in addressing questions of what changes in the substance of rights and the institutional structures for protecting them are warranted during times of crises, such as wars. Courts in all systems are placed in difficult circumstances in being asked to take on such questions; while the courts have the advantage of independence from immediate political circumstance, courts also suffer manifold disadvantages in these contexts by virtue of their lack of access to full information, lack of systematic appreciation of the interlocking consequences of individual actions, and lack of direct responsibility for the consequences decisions on these issues might have. Though critics of the limited judicial role on these issues often frame the problem as a character failing — courts need to have more "courage" — this longstanding judicial practice, across many generations, suggests that there are deeper structural and institutional reasons that consistently lead judges to define their role in specific, limited ways.

In the American system, courts have drawn on the distinct attributes of a separated-powers system to carve out a well-defined but under-appreciated role during times of crisis. The American courts have neither endorsed unilateral executive authority nor taken it as their role to define directly the substantive content of rights in these contexts. Instead, the courts have tied their own role to that of the more political branches. Where both legislature and executive endorse a particular tradeoff between liberty and security, the courts have accepted that judgment. Where the executive has acted in the face of legislative policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely. That deep historical pattern is reemerging today as we begin to see the judicial response to issues like the power to define "enemy combatants," or the role of intelligence gathering and prosecutorial actors in pursuing "foreign agents," or in debates over the proper role for military tribunals. Bilateral institutional action might provide a special kind of check on the institutional excess that is always a concern during times of crisis. American courts have long acted on the view that it does. Approaches to these issues that focus on abstract disputes over the meaning of various "rights" or "the rule of law" miss the central feature of actual American constitutional practice on these issues: the judicial emphasis on second-order issues of appropriate institutions and processes, through which courts seek mainly to ensure that the right

institutional process supports the tradeoff between liberty and security at issue. Whether that jurisprudential approach is the right one for courts that operate in parliamentary systems of unified executive and legislative powers is a question to be left for another day.

