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CONGRESS, CIVIL LIBERTIES, AND THE WAR ON TERRORISM

Neal Devins*

In exercising his war-making powers, the President has historically pursued war-related initiatives that implicate civil liberties. Meanwhile, the Congress, with little incentive to resist these initiatives, has played a steadily declining role in war-making. In this Essay, Professor Devins examines this dynamic, and argues that with Congress largely standing on the sidelines as the President leads the nation in war, it is the American public that has become the principal check on the powers of the President in wartime.

* * *

Two weeks after the September 11 terrorist attacks, Supreme Court Justice Sandra Day O'Connor told a law school audience that "we're likely to experience more restrictions on our personal freedoms than has ever been the case in our country."¹ And while O'Connor did not reveal her thinking on the legality of proposed anti-terrorism legislation, she made clear that the Court might well be influenced by social and political forces. Indeed, rather than invoke the language of lawyers (by speaking about the Framers' intent, *stare decisis*, and the like), Justice O'Connor suggested that "a great deal of study, goodwill, and expertise"² would hold the key to the Court's balancing of civil liberties and national security.

Fourteen years earlier, when the Senate was considering Robert Bork's Supreme Court nomination, social and political forces also played a decisive role. At that time, however, civil libertarians held the upper hand. Rejecting Bork's claim that the First Amendment should not protect "any speech advocating the violation of law,"³ the Senate Judiciary Committee concluded that "[o]ur system is built upon" protecting "[p]olitical dissidents who make statements that flirt with the edges of the law."⁴

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¹ Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5 (quoting Supreme Court Justice Sandra Day O'Connor).

² *Id.* (quoting Supreme Court Justice Sandra Day O'Connor).

³ S. EXEC. REP. NO. 100-7, pt.3, at 51 (1987) (quoting Robert Bork).

⁴ *Id.* at 54.

None of this comes as a surprise. Differences between peace and wartime are to be expected. "The safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty."⁵ Elected officials certainly understand this.⁶ For this very reason, one did not need a crystal ball to predict Congress's acquiescence to post-September 11 restrictions on civil liberties.

In the pages that follow, I will explain why it is that (1) the President, more than Congress, is likely to pursue war-related initiatives that implicate civil liberties, and (2) Congress rarely has incentive to resist these initiatives. In so doing, I will argue that the principal check on presidential power comes neither from Congress nor the Supreme Court; instead, it comes from the American people. "Liberty," as Learned Hand put it, "lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."⁷

I. THE PAST IS PROLOGUE: CIVIL LIBERTIES IN WARTIME

Regardless of what courts decide or elected branches legislate, "the ultimate security for . . . [civil rights and liberties] lies in the tolerance of private citizens."⁸ Popular sentiment, not judicial edicts, explain the eventual repudiation of the 1798 Alien and Sedition Act, the 1917 Espionage Act, the internment of Japanese-Americans during World War II, and McCarthy era restrictions on civil liberties. At the same time, the American people wait until after the threat of war is over before reexamining the appropriateness of wartime restrictions on rights and liberties.

Consider, for example, World War I era restrictions on political speech. In 1915, President Woodrow Wilson informed lawmakers that

the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws . . . who have poured the poison of disloyalty into the very arteries of our national life.⁹

⁵ Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46.

⁶ In the wake of September 11, can we imagine today's Senate Judiciary Committee "disagreeing categorically" with Bork's concern about political dissidents advocating violence?

⁷ LEARNED HAND, *The Spirit of Liberty*, in THE SPIRIT OF LIBERTY 189, 190 (3d ed. 1960).

⁸ ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES xiv (1951).

⁹ 53 CONG. REC. 99 (1915).

Two years later, Congress enacted the Espionage Act.¹⁰ Under this statute, anyone who “willfully cause[d] or attempt[ed] to cause insubordination [or] disloyalty” in the military would be subject to “imprisonment for not more than twenty years”;¹¹ moreover, the statute deemed “nonmailable” any publication (including letters) “advocating or urging treason, insurrection, or forcible resistance to any law of the United States.”¹² And while lawmakers turned down a provision allowing the President to jail anyone publishing materials that he deemed useful to the enemy, congressional intent was to be restrictive. In particular, lawmakers wanted to send a message to immigrants: shed your allegiances to foreign nations and ideas or get out.

Between June 1917 and June 1920, over two thousand people were prosecuted under the Espionage Act, and over one thousand of those were convicted.¹³ For its part, a unanimous Supreme Court devoted one paragraph to First Amendment concerns when upholding the Espionage Act in *Schenck v. United States*.¹⁴ By the end of the war, however, Americans began taking the First Amendment seriously. With the debate over the Versailles Peace treaty convincing many that their enthusiasm for the war was misplaced, people became more concerned about their freedoms. No longer viewing the government as benevolent, many came to value First Amendment protections and, in so doing, started to embrace the then-emerging modern civil liberties movement.

The failure of elected officials, judges, and the American people to exercise their responsibility as guardians of the Constitution continued through World War II. In particular, the wartime internment of Japanese-Americans represents one of the most egregious violations of constitutional principles that this nation has ever witnessed. With no evidence of disloyalty or subversive activity and without the benefit of any form of hearing, Americans were imprisoned solely because of their ancestry.

Within weeks of the December 1941 Pearl Harbor assault, Japanese-Americans — linked by color and culture to a treacherous enemy and lacking political power — became an easy target for wartime frustration. In testimony before Congress, California Attorney General Earl Warren claimed that “when we are dealing with the Caucasian race we have methods that will test the loyalty of them . . . when we deal with the Japanese we are in an entirely different field and

¹⁰ Act of June 15, 1917, ch. 30, 40 Stat. 217 (repealed 1948).

¹¹ Tit. I, § 3, 40 Stat. at 219.

¹² Tit. XII, § 2, 40 Stat. at 230. For an insightful analysis of both the Act and World War I era free speech, see DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997).

¹³ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 183 (1998), cited in Michael B. Brennan, Book Review, 83 MARQ. L. REV. 221, 229 (1999).

¹⁴ 249 U.S. 47, 51–52 (1919). At the time of *Schenck*, the Court had not begun to develop its speech-protective First Amendment jurisprudence.

we cannot form any opinion that we believe to be sound.”¹⁵ On March 21, 1942, Congress enacted legislation ratifying an FDR executive order that empowered the military to “prescribe military areas” and “determine, from which any or all persons may be excluded.”¹⁶ Pointing to “[e]vidence that a tightly knit fifth column exists in the United States,” members of Congress uniformly supported the legislation, approving it with little debate in either the House or Senate.¹⁷

But the evidence Congress pointed to — War Department “findings” — did not exist. As Assistant Secretary of War John McCloy put it: “[S]ocial considerations rather than military ones determine the total exclusion policy.”¹⁸ Before the Supreme Court, however, allegations by the American Civil Liberties Union of racial prejudice and inconsistencies in the War Department Report were not enough to undo the government’s internment of Japanese-Americans. Instead, the Court deferred to the judgment of the “war-making branches of the Government,” concluding that “hardships are part of war” and that “[c]itizenship has its responsibilities as well as its privileges.”¹⁹

Eighteen years later, Earl Warren (speaking as Chief Justice of the United States) argued that the Supreme Court’s willingness to go along with the internment does not “in a broader sense” tell us whether “a given program is constitutional.”²⁰ Pointing to “the limitations under which the Court must sometimes operate,” Warren thought that the people and their elected officials must sometimes “bear the primary responsibility” for sorting out the Constitution’s meaning.²¹ These words proved prophetic: Starting with Gerald Ford’s 1976 declaration that the evacuation was “wrong” and culminating in 1988 reparations legislation, elected government efforts to remedy this injustice revealed an encouraging self-awareness and humility in popular government.²²

And so it goes. During the Red Scare of the early 1950s, all parts of government and the American people joined forces in limiting free speech. When the crisis atmosphere lessened with the death of Stalin and end of the Korean War,

¹⁵ *National Defense Migration: Hearings on H.R. 113 Before the House Select Comm. Investigating Nat’l Def. Migration*, 77th Cong. pt. 29, at 11,015 (1942) (statement of Earl Warren, California Attorney General).

¹⁶ 88 CONG. REC. 2724 (1942) (proclamation of Lt. Gen. J.L. DeWitt).

¹⁷ 88 CONG. REC. 2723 (1942) (remarks of Sen. Reynolds). *See generally id.* at 2722–26, 2729–30 (describing the debate over alien control and military zones).

¹⁸ *Japanese-American and Aleutian Wartime Relocation: Hearings Before the House Comm. on the Judiciary*, 98th Cong. 42 (1984) (quoting John McCloy).

¹⁹ *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944).

²⁰ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962).

²¹ *Id.* at 192.

²² Ford’s declaration and the legislation that followed were prompted by the efforts of civil libertarians. *See* PETER IRONS, *JUSTICE AT WAR* (1983); PETER H. IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1989).

the public mood started to change, opening the door for judges interested in championing First Amendment freedoms.²³ Today, the public has relatively little interest in limiting the weapons used by law enforcement in fighting the war on terror. As I will discuss, the incentive of both lawmakers and the American people is to embrace executive branch restrictions on civil liberties. And while Warren Court expansions of civil liberties protection have changed social norms governing civil liberties, it is nevertheless true that there has only been modest resistance to the war on terror-related restrictions on civil liberties.²⁴ Over time, the public and its elected representatives may change their minds; in the meantime, however, the war on terror reflects the historical pattern that “[i]t is neither desirable nor remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.”²⁵

II. THE PRESENT IS PROLOGUE: EXPLAINING THE PRESIDENTIAL ADVANTAGE IN WAR-MAKING²⁶

Wartime civil liberties are also captive to the President’s ever-expanding power over war-making. During the past fifty years, presidents have gained more and more control over foreign relations, especially war-making. Unlike the traditional (pre-Korean War) practice of leaving to Congress the decision to initiate war against foreign nations, social and political norms increasingly see the president as the “sole organ” of the United State in international affairs.²⁷

²³ Commenting on *Yates v. United States*, 354 U.S. 298 (1957) (concluding that the Smith Act is limited to speech that incites illegal action), I.F. Stone noted that the Court, by making the “First Amendment a reality again,” “reflect[ed] the steadily growing public misgiving and distaste for . . . [Joseph McCarthy and others] who have made America look foolish and even sinister during the last ten years.” I.F. STONE, *THE HAUNTED FIFTIES 1953–1963*, at 203 (1963). For a detailed history of Court-Congress relations at the time of *Yates*, see WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962).

²⁴ For a general treatment of the Warren Court, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000). For a treatment of how these changing expectations impact on the war on terror, see Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002). For additional discussion, see *infra* notes 58–60 and accompanying text.

²⁵ REHNQUIST, *supra* note 13, at 224–25. Two years after September 11, there are signs that the American people and their elected officials are beginning to grow wary of war on terror-related restrictions on civil liberties. Concerns of overzealous law enforcement have pressured the administration to launch a public relations campaign to defend its terrorism efforts. See Eric Lichtblau, *Administration Plans Defense of Terror Law*, N.Y. TIMES, Aug. 19, 2003, at A1.

²⁶ Portions of this section are drawn from Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65 (2000).

²⁷ For a history of Congress’s diminishing role in war-making, see Louis Fisher,

Thanks to the singularity of the office, presidents are well positioned to advance their interests before Congress, the nation, and the world. "The opportunities for presidential imperialism are too numerous to count," according to Terry Moe and William Howell, "because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power."²⁸

When presidents act, moreover, it is up to the other branches of government to respond. In other words, presidents often win by default — either because Congress chooses not to respond or because its response is ineffective. Furthermore, by end-running the burdensome and oftentimes unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the presidency. In other words, the president's personal interests and the presidency's institutional interests are often one and the same.

Presidents, of course, sometimes need Congress to enact legislation. In pursuing their health care and faith-based initiatives, Bill Clinton and George W. Bush had little choice but to turn to Congress. Here, Congress has the upper hand. Rather than having to do battle with the president on his own field (enacting legislation that is subject to a presidential veto), it is up to the President to overcome the burden of inertia by cajoling Congress into action. As such, modern day presidents often advance their agendas through unilateral action rather than legislative strategies.²⁹

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress's 535 members has some stake in Congress as an institution, parochial interests often overwhelm this collective good. In particular, members of Congress need to be reelected to advance their (and their constituents') interests. For this reason, lawmakers are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."³⁰

Nowhere is the gap between legislative and presidential incentives more stark than war powers. To start with, as Lou Fisher and others have shown, the

Congressional Abdication: War and Spending Powers, 43 ST. LOUIS U. L.J. 931 (1999).

²⁸ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

²⁹ See *id.* at 154–69 (noting that Congress, from 1973–1998, only overturned three of roughly one thousand executive orders through legislation). See generally RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983). For this very reason, President Bush responded to Congress's intransigence on his faith-based initiative proposal by making use of existing laws to distribute fifty million dollars to religious organizations to help the government assist the needy. See Bill Broadway, *Faith-Based Groups Benefit From New Federal Grants*, WASH. POST, Aug. 3, 2002, at B9.

³⁰ Moe & Howell, *supra* note 28, at 144.

constitutional design envisions (at a minimum) a significant congressional role.³¹ Notwithstanding this clear constitutional mandate, the modern Congress has very little incentive to play a leadership role. This ever-diminishing congressional role is a byproduct of many factors including the end of the mandatory draft (something that ensured strong constituent interest in war powers), the launching of military strikes with little or no casualties, and the changes in how lawmakers run for office (especially the increasing pressure to pay attention to local constituencies). For all these reasons, “[r]ather than oppos[e] the President on a potential military action,” most members of Congress “find it more convenient to acquiesce and avoid criticism that they have obstructed a necessary mission.”³²

Presidents, in contrast, often are motivated to seek war-making power. Presidents achieve status — fame — by leading the nation into battle.³³ Unwilling to overcome the burden of inertia and rein in the President, Congress typically stands on the sidelines. More striking, today’s Congress almost always complies with presidential requests for war-making authority. Nevertheless, modern-day presidents, rather than allow Congress to tinker with their requests for legislative authority, often act unilaterally on war-related issues.³⁴ By pointing to existing federal legislation, their inherent power as Commander in Chief, and U.N. resolutions and treaties, presidents expand their institutional power through every fame-inducing exercise of self-interest.

I will elaborate on these themes in the next part of this Essay. Specifically, I will call attention to the ever-diminishing congressional role in war powers by detailing both recent legislation supporting George W. Bush’s war on terror and lawmaker acquiescence to most of the President’s war-related initiatives.

III. CONNECTING THE DOTS: CONGRESS, CIVIL LIBERTIES, AND THE WAR ON TERROR

Against the backdrop of Congress’s declining role in war-making and the diminished status of civil liberties during wartime, it is little wonder that (1) the Bush administration has been the moving force in initiating war on terror-related limitations on civil liberties, (2) Congress has largely facilitated presidential dominion of the war on terror by approving most provisions of legislation

³¹ See generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* (1981).

³² Fisher, *supra* note 27, at 1006.

³³ For this very reason, the framers intended that Congress play the dominate role in initiating military actions. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

³⁴ See generally Fisher, *supra* note 27.

introduced by the White House and generally standing on the sidelines when the President claimed that the Constitution or existing law supported one or another initiative, and (3) the public has backed most war-time limitations on civil liberties (especially those of noncitizens). None of this is to say that Congress has been irrelevant. Because of above-discussed differences in enacting legislation and responding to unilateral presidential action, Congress has made modest changes to the President's legislative proposals. Also, through oversight hearings, television appearances, newspaper interviews, and the like, members of Congress have played some role in shaping public discourse and, with it, administration policy. For the most part, however, Congress's impact has been indirect and relatively insubstantial.

Consider, for example, the USA Patriot Act:³⁵ One week after the September 11 attacks, the Department of Justice sent legislation to Congress that would grant law enforcement agencies additional powers to tap telephones, conduct searches, monitor the Internet, police financial transactions, share grand jury testimony, and much more. Although roundly criticized by civil liberties groups,³⁶ members of Congress — with both the terrorist attacks and the October 2001 anthrax scare on their minds — wasted little time in placing national security concerns ahead of civil liberties. Making use of a secretive expedited procedure, the House (voting 357 to 66) and Senate (voting 98 to 1) approved the USA Patriot Act on October 24 (even though many lawmakers who voted for it never had a chance to read the bill).³⁷

For the most part, the final version of the Patriot Act mirrored the administration's bill. To the extent that members of Congress valued civil liberties, it was simply too "difficult to launch a frontal challenge to a popular president before the practical results of his policies are known."³⁸ At the same time, civil liberty interests scored some modest victories: Congress eliminated a provision that would have allowed information obtained from foreign government wiretaps to be used against Americans even if the wiretaps were unconstitutional; Congress required the administration to file charges, begin deportation proceedings, or release foreign suspects within seven days; and (most significant) half of the Act's

³⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

³⁶ See John Lancaster & Walter Pincus, *Proposed Anti-Terrorism Laws Draw Tough Questions; Lawmakers Express Concerns to Ashcroft, Other Justice Officials About Threat to Civil Liberties*, WASH. POST, Sept. 25, 2001, at A5.

³⁷ See Elizabeth A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, 59 CQ WEEKLY 2533 (Oct. 27, 2001).

³⁸ Elizabeth A. Palmer & Adriel Bettelheim, *War and Civil Liberties: Congress Gropes for a Role*, 59 CQ WEEKLY 2820 (Dec. 1, 2001). For a detailed accounting of how national security concerns overwhelmed civil liberties interest, see Robert O'Harrow, Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002, at W6 (Magazine).

surveillance measures were scheduled to sunset in 2005.³⁹ In these limited but important ways, the USA Patriot Act calls attention to the ways in which Congress is well positioned to exercise authority on matters that require legislation (even on foreign affairs matters where Congress typically defers to the President).

The Patriot Act is revealing for other reasons. First, through the sunset provision, Congress deferred to the executive, approved a politically popular measure, and acknowledged the concerns of civil liberties constituents. More to the point, the sunset provision makes Congress a player of sorts in the implementation of the Patriot Act. If popular support for the Act and/or the president diminishes, Congress can simply refuse to renew the Act. Along the way, lawmakers can participate in the war on terror without having to legislatively override the president; instead, through oversight hearings and the like, lawmakers can speak their minds to the Attorney General and others charged with the implementation of the Act. In this way the Patriot Act reflects Congress's penchant for "fire alarm" oversight, that is, a system of "rules, procedures, and informal practices" that allow Congress and its constituents to examine executive branch implementation of federal statutes.⁴⁰

Second, the Act creates numerous opportunities for the President to act unilaterally. By claiming that his actions are grounded in the Patriot Act, the president can pursue a range of initiatives that Congress would likely never have enacted into law. According to civil liberty interests (who, admittedly, have incentives to overstate their concerns): "The Patriot Act has been almost a complete sideshow to what has happened administratively What they've ended up accomplishing is what they wanted in the Patriot Act originally and which Congress refused to give them."⁴¹ For example, the Justice Department has aggressively interpreted Act provisions allowing the government to detain suspects in terrorism cases.⁴² Over time, it is likely that the president will continue to extend the Patriot

³⁹ For a chart comparing key provisions of the administration's bill to the House and Senate bills, see Elizabeth A. Palmer, *Anti-Terrorism Bills Head for Floor Votes, but Tough Negotiations Lie Ahead*, 59 CQ WEEKLY 2327, 2330 (Oct. 6, 2001).

⁴⁰ Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). For this very reason, lawmaker interest in the treatment of detainees was piqued by a critical report prepared by the Justice Department's Inspector General. Specifically, after criticizing the Department for holding the detainees without bond until they were cleared by the FBI, the Senate Judiciary Committee held hearings to examine Justice Department policy. See Edward Walsh, *Treatment of Detainees Defended*, WASH. POST, June 26, 2003, at A3.

⁴¹ Jackie Koszczuk, *Lawmakers Struggle to Keep An Eye on Patriot Act*, 60 CQ WEEKLY 2284, 2286 (Sept. 7, 2002) (quoting the American Civil Liberties Union's Timothy Edgar).

⁴² See *id.* at 2285–86. On some matters, however, the Bush Administration has had to seek supplemental legislation from Congress. For example, the government cannot seek the death penalty without specific statutory authority. Consequently, in an effort to expand its power to launch capital punishment prosecutions, Attorney General Ashcroft has asked

Act to fit his needs. Unless and until public opinion directly checks the president or, alternatively, prompts Congress to use its oversight powers to challenge the expansionist tendencies of the presidency, this pattern will persist.

Third, recognizing that congressional oversight may affect public opinion and thereby constrain presidential initiatives, civil liberties' interests in Congress have engaged in a pitched battle with the Bush White House over what documents the administration turns over to Congress. Consider, for example, the efforts of then Senate Judiciary Committee chair Patrick Leahy (D-Vt). After observing that "it would be difficult" for Congress to challenge the administration legislatively, Leahy spoke of oversight as civil libertarians' best hope of altering policies "by pressuring the administration to take a second look at their decisions in the face of high-profile publicity."⁴³ Along these lines, the Senate Judiciary Committee held hearings to examine the Justice Department's handling of classified wiretaps and searches in terrorism cases.⁴⁴ More significantly, the Committee released to the public information it obtained from the Foreign Intelligence Service Act Court about FBI misrepresentations (most of which were made during the Clinton administration).⁴⁵ For its part, the Bush administration has resisted congressional oversight. It has often refused to share even general information about the Patriot Act's implementation.⁴⁶ It has also sought to deflect House Judiciary Committee inquiries about the administration's use of its new anti-terrorism powers, claiming that the House Intelligence Committee (not the Judiciary Committee) had jurisdiction over the issue.⁴⁷

The reaches (and limits) of the president's power of unilateral action are also

Congress to strengthen the Patriot Act. See Susan Schmidt, *Ashcroft Wants Stronger Patriot Act; Expanded Death Penalty and Bonds Changes Sought*, WASH. POST, June 6, 2003, at A11.

⁴³ Palmer & Bettelheim, *supra* note 38, at 2823. Likewise, Leahy thought that oversight was the only way to challenge the Bush administration on its military tribunal order. For Leahy: "You're not going to be passing legislation in a situation like this . . . I'm not unaware of the polls. . . [W]hat can be done is to have real oversight . . . make sure we get honest answers about what is being done . . ." John Lancaster, *Hearings Reflect Some Unease With Ashcroft's Legal Approach*, WASH. POST., Dec. 2, 2001, at A25 (quoting Sen. Patrick J. Leahy).

⁴⁴ *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Sen. Comm. on the Judiciary*, 107th Cong. (2001). At the time of these hearings, the Senate was under Democratic control. It is unclear how a Republican led Senate would have pursued oversight.

⁴⁵ See David G. Savage, *A Year After: Administration Defends Secret Searches in Terror War*, L.A. TIMES, Sept. 11, 2002, at I9.

⁴⁶ See Koszczuk, *supra* note 41, at 2284.

⁴⁷ See Adam Clymer, *Justice Dept. Balks at Effort to Study Antiterror Powers*, N.Y. TIMES, Aug. 15, 2002, at A21. As it turns out, House Intelligence had not sought the information nor did it plan to oversee the administration of the Patriot Act. *Id.*

revealed in two other executive branch initiatives — a November 2001 presidential order allowing the use of special military courts to try suspected terrorists⁴⁸ and a Department of Justice program designed to facilitate private citizens' monitoring of possible terrorist activity (TIPS: Terrorism Information and Prevention System).⁴⁹ The saga of Bush's military tribunal order underscores the limits of Congress's ability to effectively check presidential orders and — perhaps more importantly — the potency of social norms (including other countries as well as elite and public opinion) to constrain administration overreaching. The initial order, among other things, suggested that trials might not be public and that the death penalty could be imposed by a two-thirds vote of the tribunal. March 2002 regulations implementing the order, however, declared that trials will be public, that the death penalty will require a unanimous vote, that defendants must be proven guilty beyond a reasonable doubt, and that the government will provide military lawyers for the accused.⁵⁰

For its part Congress placed little pressure on the administration to modify its initial proposals. December hearings were held, but “lawmakers, aware of Bush's strong approval ratings, [largely] avoided head-on confrontations on [this and other] matters related to the war.”⁵¹ In sharp contrast, editorial writers, law professors, and European Union allies signaled strong disapproval of the order.⁵² Public opinion polls, moreover, revealed that eighty percent of Americans believed that the president should make changes in the criminal justice system in consultation with

⁴⁸ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

⁴⁹ OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 12 (2002).

⁵⁰ See Dep't of Def., Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. The implementing regulations, in large measure, mean that proceedings before a military tribunals “are in most respects like military trials under the Uniform Code of Military Justice.” Goldsmith & Sunstein, *supra* note 24, at 288. For a more recent assessment (calling attention to limits placed on the ability of defense counsel to gather information and engage in confidential communications with their clients), see Neil A. Lewis, *Rules Set Up for Terror Tribunals May Deter Some Defense Lawyers*, N.Y. TIMES, July 13, 2003, at A1.

⁵¹ Adriel Bettelheim, *Hill Treads Carefully in Challenging Ashcroft Over Expansion of Anti-Terror Powers*, 59 CQ WEEKLY 2903 (Dec. 8, 2001).

⁵² For editorials, see *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, at A24; *An Un-American Secrecy*, L.A. TIMES, Nov. 17, 2001, at B24; *Military Justice (Continued)*, WASH. POST, Nov. 26, 2001, at A24. For law professor opposition, see Law Professors' and Lawyers' Letter to Senator Leahy (Dec. 5, 2001), available at http://www.law.yale.edu/outside/html/Public_Affairs/152/Leahy.pdf (letter signed by more than seven hundred law professors and lawyers opposed to “legally deficient, unnecessary, and unwise” military tribunal order). For European opposition, see Marc Champion et al., *Europe Tour by Ashcroft Starts Sourly — Moussaoui is Offered Legal Help by France as U.S. Sparks Unease*, WALL ST. J., Dec. 13, 2001, at A18.

Congress, not by executive order.⁵³

That the Bush administration responded to these pressures is hardly surprising. The military tribunal order was but one of many presidential initiatives. By modifying that order in the face of domestic and international criticism, the President improved his standing with our allies and with domestic constituents (who might complicate the administration's effort to pursue other war on terror initiatives — by battering it in the media, by pressuring Congress to play a more aggressive oversight role, etc.). Likewise, the administration has little reason to make use of its modified military tribunal policy; its detention policies are in place and, if need be, it can make use of civilian courts.⁵⁴

For similar reasons, the Justice Department responded to criticism of its TIPS policy. Originally designed to allow mail carriers, utility employees, and truckers to report suspected terrorist activities, the program was scaled back to “events that are obviously public” (so that mail carriers and utility workers would not participate in this voluntary program).⁵⁵ This move was a response to public opinion polls (where more than half expressed concern of law enforcement “snoop[ing] on people's private lives”) and to extensive lobbying by social conservatives and civil libertarians (lobbying that prompted Congress to prohibit the TIPS Program in the Homeland Security Act).⁵⁶ Unlike the USA Patriot Act and military tribunal order, the TIPS saga suggests that Congress can constrain administration initiatives. And while the administration (through threats of a presidential veto) might have been able to preserve the original program, TIPS — like the military tribunal order — reveals that the administration is willing to compromise on some initiatives in order to pursue its broader agenda. In particular, with concerns over civil liberties growing (at least until the next terrorist attack), the administration has little to gain by pursuing initiatives that can be likened to a “1984 Orwellian-type situation . . .

⁵³ Robin Toner & Janet Elder, *Public is Wary But Supportive on Rights Curbs*, N.Y. TIMES, Dec. 12, 2001, at A1. A slim fifty-one percent majority, moreover, opposed trying foreigners in military proceedings. *Id.* In another poll, however, sixty-four percent said that they favored military tribunals for non-citizens suspected of terrorism. See NPR News, Poll: Security Trumps Civil Liberties (Nov. 30, 2001), at <http://www.npr.org/news/specials/civillibertiespoll/011130.poll.html>.

⁵⁴ See Charles Lane, *Debate Crystallizes on War, Rights; Courts Struggle Over Fighting Terror vs. Defending Liberties*, WASH. POST, Sept. 2, 2002, at A1.

⁵⁵ Dan Eggen, *Under Fire, Justice Shrinks TIPS Program*, WASH. POST, Aug. 10, 2002, at A1.

⁵⁶ Homeland Security Act of 2002, Pub. L. No. 107-296, § 880, 116 Stat. 2135, 2245. Initially, the House — but not the Senate — defunded TIPS in proposed Homeland Security legislation. See Eggen, *supra* note 55; Neil A. Lewis, *Traces of Terror: The Attorney General; Ashcroft's Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, July 24, 2002, at A1; Eddy Ramirez, *Americans Still Divided on Issue of Rights vs. Security; Survey: People Oppose Airport Racial Profiling, but Back Monitoring Prisoner-Lawyer Talks*, L.A. TIMES, Sept. 17, 2002, at A4.

where neighbors are reporting on neighbors.”⁵⁷

Notwithstanding its decisions to modify its TIPS and military tribunal policies, the Bush administration has felt relatively little pressure from the public or Congress on civil liberties issues. Opinion polls show widespread support both for eliminating constitutional protections to those who enter the country illegally and for monitoring conversations between accused terrorists and their lawyers.⁵⁸ More telling, only twenty-one percent of those polled in September 2002 think that the activities of the federal government pose a serious threat to their constitutional rights.⁵⁹ Also, in April 2002, over seventy percent of those polled acknowledged that Americans will have to give up some of their personal freedoms to make the country safe from terrorist attack.⁶⁰ In other words, although the public expects the government to protect personal privacy and other civil liberties, the public seems willing to give the Bush administration wide latitude in restricting civil liberties.

For its part, Congress has placed few limits on the president. Rather than act institutionally to check the president, Congress has largely left it to individual members to speak out on the civil liberty implications of the war on terror. Through opinion pieces and interviews published in newspapers, appearances on television, and statements made at hearings or on the floor, lawmakers have engaged in a variety of jawboning tactics. In significant measure, these efforts seem very much like those of media outlets: Instead of using their formal lawmaking and investigatory powers, members of Congress use their status to publicize their concerns (and thereby affect social norms) through the media. That Congress often makes its voice heard in such an indirect way is to be expected. Formal congressional action is limited by the president’s power of unilateral action, by Congress’s diminishing role on war powers, and by the nation’s practice of affording fewer civil liberties protections during wartime. Over time, the war on terror may drag on — so much so that public and elite opinion may push Congress to play a more active role. On the other hand, as it did with military tribunals and

⁵⁷ These are the words of administration supporter Orrin Hatch (R-Utah). See Adam Clymer, *Traces of Terror: Security and Liberty; Worker Corps to be Formed to Report Odd Activity*, N.Y. TIMES, July 26, 2002, at A18. For opinion poll data showing increasing concern about civil liberties, see Richard Morin and Claudia Deane, *Altered Lives, Changing Attitudes; In Poll, Most Americans Say 9/11 Affected Them Permanently*, WASH. POST, Sept. 8, 2002, at A1.

⁵⁸ See Ramirez, *supra* note 56.

⁵⁹ ABC News Poll (Sept. 5–8, 2002), available at <http://nationaljournal.com/members/polltrack/2002/issues/02civilrights.htm>. On the other hand, more than sixty percent of those polls were somewhat or very concerned about losing some of their civil liberties. See CBS News/N.Y. Times Poll (Sept. 2–5, 2002), available at <http://nationaljournal.com/members/polltrack/2002/issues/02civilrights.htm>.

⁶⁰ CBS News Poll (Apr. 15–18, 2002), available at <http://nationaljournal.com/members/polltrack/2002/issues/02civilrights.htm>.

TIPS, the Bush administration may preempt a legislative backlash by modifying its policymaking in ways that avoid such direct confrontations.

IV. CONCLUSION: WHAT ABOUT THE COURTS?

That the administration has successfully advanced most of its agenda before Congress and the American people is consistent with both the historic record on wartime civil liberties and the emerging tradition of presidential dominion over war powers. Past practice also suggests that the judiciary will step aside and let the administration conduct its war as it sees fit. Yet in the summer and fall of 2002, federal trial and appellate judges "across the ideological spectrum" sometimes responded "with skepticism, alarm or downright hostility" to the "administration's sweeping claims of unbridled executive authority to hold secret deportation hearings, label and incarcerate 'enemy combatants' without access to lawyers or judges, and commingle activities of counterintelligence agents and criminal prosecutors."⁶¹

It is difficult to predict whether and how the Supreme Court will resolve these issues. At this juncture, I anticipate that the administration, ultimately, will be allowed to pursue all (or nearly all) of its policies. First, as long as the "country still seems emotionally engaged in this war" (so that Bush administration policies seem tied to a war effort, not the transformation of the nation into a police state),⁶² there is little reason to think that the Court will depart from its normal practice of deferring to executive branch claims of military necessity. In its 2001–2002 term, for example, the Justices signaled their concern with terrorism by expanding the power of police both to detain a suspect for questioning and to search passengers on a bus.⁶³ In both cases, explicit reference was made to the ongoing war against

⁶¹ Linda Greenhouse, *War of Secrets: Judicial Restraint; The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, § 4, at 3. In the winter and spring of 2003, however, federal appeals courts sustained Bush administration initiatives. See Steve Fainaru, *Court Says Detainees' IDs Can Be Kept Secret*, WASH. POST, June 18, 2003, at A1; Louis Fisher, *War on Terror: Who is Minding the Courts on Rights?*, L.A. TIMES, Feb. 23, 2003, at M2; Richard A. Serrano, *U.S. Appellate Court Rules Against Guantanamo Detainees*, L.A. TIMES, Mar. 12, 2003, at A19. This is not to say that the Bush Justice Department has suffered no setbacks. On July 14, 2003, the Fourth Circuit Court of Appeals issued an en banc decision rejecting (at least for now) Department efforts to block accused September 11 conspirator Zacarias Moussaoui from questioning a captive Al-Qaida operative in U.S. custody. Jerry Markon, *Moussaoui Prosecutors Defy Judge*, WASH. POST, July 15, 2003, at A1.

⁶² Marcia Coyle, *The Law's Wartime Silence, Pro-Rights Rulings Tend to Come After Conflict Ends*, NAT'L L.J., Sept. 9, 2002, at A1.

⁶³ *United States v. Drayton*, 536 U.S. 194 (2002) (holding that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches); *United States v. Arvizu*, 534 U.S. 266 (2002) (holding that in

terrorism: In the bus case, Solicitor General Ted Olson spoke of the need to limit passenger rights “[i]n the current environment”;⁶⁴ in the detention case, Justice O’Connor noted at oral argument that “[w]e live in perhaps a more dangerous age today than we did when this event took place.”⁶⁵ Second, lower court rulings against the Bush administration may well be tied to the Justice Department’s staking out unduly extreme positions when narrower fact based claims might well have prevailed.⁶⁶ In other words, even if the administration loses some skirmishes, it is quite possible that it will change legal tactics and eventually succeed in advancing its policies.

Finally, in explaining why Congress will allow the executive to limit wartime civil liberties, I do not mean to suggest that the situation we face today is akin to Wilson-era restrictions on political speech or the World War II internment of Japanese-Americans. The “nation is now far less trusting of government, and far more solicitous of the accused, than it was sixty [or ninety] years ago.”⁶⁷ In particular, this changing baseline means that the administration will not pursue certain policies and will moderate policy proposals that are out of line with social norms. Changes in both the military tribunal order and the TIPS program suggest that this is the case. For the same reasons proponents of civil liberties should look to the American people and opinion leaders, not Congress, to constrain administration initiatives. Limited both by the president’s power of unilateral action and its new-found custom of deferring to the executive on war powers,

evaluating whether reasonable suspicion exists to detain a suspect, the detaining officer’s experience and the context of the event must be considered). Along the same lines, the Justices (on March 24, 2003) refused to hear an American Civil Liberties Challenge to Bush Administration monitoring of telephone conversations and e-mails. See Ann Gearan, *U.S. Wins Appeal on Domestic Spy Powers*, AP ONLINE, Mar. 24, 2003, available at 2003 WL 1731665. And while the Court did not issue a substantive ruling, their action allowed the administration to continue (at least for now) making use of wiretaps approved by the Foreign Intelligence Surveillance Court. See also Charles Lane, *High Court to Review Religious College Case*, WASH. POST, May 20, 2003, at A6 (noting that the Supreme Court rejected an appeal over the detention of prisoners held at Guantanamo Bay; filed by a group of clergy and lawyers, the appeal had challenged a lower court ruling that the plaintiffs lacked standing to pursue the litigation).

⁶⁴ Charles Lane, *High Court to Hear Case on Public Searches; Ruling Could Affect Domestic War on Terrorism, Bush Administration Says*, WASH. POST, Jan. 5, 2002, at A10.

⁶⁵ Linda Greenhouse, *Court Rules on Police Searches of Motorists*, N.Y. TIMES, Jan. 16, 2002, at A17. For a general treatment on how the War on Terror implicates Fourth and Fifth Amendment protections (in non-terrorism cases), see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

⁶⁶ See Jeffrey Rosen, *Private Enemy: Ashcroft Goes Over the Edge*, NEW REPUBLIC, July 8, 2002, at 14.

⁶⁷ Goldsmith & Sunstein, *supra* note 24, at 289. Consequently, two years after the September 11 terrorist attack, concerns of overzealous law enforcement are beginning to resonate with the American people. See Lichtblau, *supra* note 25.

Congress will only be willing to limit the president on matters that are likely moot; matters in which the American people, opinion leaders, and our allies are likely to convince the president to change his policies.