Chapter 1

Introduction

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Threats to national security generally prompt incursions on civil liberties. The relationship has existed since the presidency of John Adams and has continued through two world wars, the cold war, Vietnam, and today. This historical phenomenon is commonplace, but the implications of that history for our post-9/11 world are less clear.

In the long run, if we are to cope with present and future crises, we must think deeply about how our historical experience bears on a changing world. This book explores the past and present relationship between civil liberties and national crises, with contributions from leading legal scholars and historians. These individuals seek both to draw historical lessons and to explore how the present situation poses unique issues.[1]

Some definitions are a necessary prerequisite to these issues. The terms *national security* and *civil liberties* may not have been in use during some of these periods or may have been used differently. For our purposes, we define national security as involving a perceived violent threat that implicates either the stability of the government (subversion), the general safety of a large numbers of members of society, or the government's ability to engage successfully in armed conflicts. We define civil liberties to include issues relating to freedom of expression, due process, restrictions

on government surveillance, and discrimination against minority groups (thus encompassing what are sometimes called *civil rights*).

The more optimistic accounts of American history hold that restrictions on civil liberties based on national security are few and far between—and are quickly corrected when the precipitating crisis passes. Indeed, optimists believe that the backlash against repression can actually strengthen civil liberties in the long run. More pessimistic observers contend that Congress and the president routinely overreact to domestic or foreign threats and that their interventions leave permanent scars on constitutional freedoms. An intermediate view is that there is no real trend, that each crisis is unique, as is its aftermath.

Unfortunately, serious analysis of such historical trends is scarce, though there is no lack of excellent treatments of individual crises. This book attempts to fill the gap. The first part focuses on specific episodes in American history. The goal is to understand how those episodes bear (or perhaps do not) on present dilemmas.

The authors of these historical chapters develop several themes. The first involves the way in which threats are perceived by political actors, presented to the public, labeled (as wars or otherwise), and absorbed by public opinion. Another involves the political dynamic of civil liberties restrictions: their origin among national leaders or grassroots groups, the resistance to them that develops; and their use in advancing existing agendas. Finally, we consider the historical trajectory: do these crises lead to permanent retrenchment of civil liberties, do the effects fade, or is there possibly a learning curve that ultimately results in stronger protections for civil liberties?

The second part of the book looks both backward and forward from the twentieth century episodes discussed in the first part. The back story behind the twentieth-century experience, given by Jan Lewis, covers key episodes from the Alien and Sedition Acts to the late nineteenth century. Lewis's survey reveals several precursors of twentieth century themes.

The remainder of Part II looks to the future. Recent decades have seen dramatic changes in the world. For instance, the potential access to weapons of mass destruction by nonstate actors may fundamentally change how the government responds to threats. At the same time, technology makes it possible to fight wars without the mass mobilizations required in the past. Other important changes are more subtle. Our current demographics and attitudes toward minority groups have evolved, altering the environment that racial and ethnic minorities weather during crises. The Supreme Court has increasing confidence in its institutional powers, as shown by the jus-

tices' intervention in the 2000 presidential race. Finally, America is now the world's sole superpower, but faces a more robust international human rights regime. Some of these changes may turn out not to make a fundamental difference, but all of them have the potential to do so.

This book does not attempt to explore all of these changes, but instead focuses on two key issues: the changing role of the courts and the relationship between technology and privacy. The concluding chapter, by Stephen Holmes, argues that some of the authors may have underestimated the seriousness of the risk posed by terrorism, particularly in connection with weapons of mass destruction. Holmes argues, however, that the Bush administration's insistence on unprecedented levels of secrecy and its brusque attitude toward human rights and civil liberties issues have actually been counterproductive in their long run effects.

Most of the heavy lifting is done in the individual chapters, for which this introduction seeks to set the stage, first, by reviewing the current legal situation. Because none of the chapters cover the United States' response to 9/11, a brief overview of this history is in order. Readers may be familiar with many of these events, but it is illuminating to assemble the legal developments into a narrative. Moreover, in even a few years, memories of these developments may fade, so a reprise may be useful for later readers.

It is also helpful to piece together the stories in each chapter to provide a larger view of the historical trajectory. Each episode has its own peculiarities and historical texture, but certain themes are consistent. Some are discussed in the concluding chapter. Others are sketched here to make the individual chapters cohere.

Finally, there is the question of how history reproduces itself in new circumstances, or fails to do so. The 9/11 response has some striking similarities to earlier episodes—not entirely coincidentally, in that some earlier actions (especially in World War II) served as models for the Bush administration. But there are also some equally striking differences, which reflect changes in technology, legal culture, and internationalization. The introduction closes with a few thoughts about the similarities and differences.

Civil Liberties and the Response to 9/11

The government response to 9/11 and the war on terror raised a number of civil liberties concerns. Perhaps the most fundamental centered on the treatment and trials of individuals detained as suspected terrorists. Almost none were United States residents or citizens, so the American

public was not directly affected. What makes these issues fundamental, however, is that they go to the applicability of the rule of law in a period of emergency, because the executive branch initially claimed the power to deal with detainees free from judicial or congressional restrictions and any due process requirement. The result was a prolonged confrontation between the judiciary and the president, with Congress attempting to oust the courts and impose restrictions of its own on the president. I will consider the detention issue in depth and then briefly review other civil liberties concerns.[2]

The detention issue arose only a few months after 9/11. Congress passed a resolution authorizing the president to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the attacks.[3] As part of this response, the president ordered an invasion of Afghanistan to attack al Qaeda and the Taliban regime.

On November 13, 2001, President Bush issued a military order regarding the detention of terrorists.[4] Section 1 of the order states that "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order under section 2 to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."

Section 2 defines who is subject to this order, or, more precisely, authorizes the president to do so in the future. The president need merely make a written finding that there is "reason to believe" that a person was a member of al Qaeda, has engaged in acts of international terrorism against the United States, or has harbored such individuals. The president must also find that "it is in the interest of the United States that such individual be subject to this order." Essentially, then, the targets are everyone who has assisted al Qaeda or engaged in terrorism against the United States—or, more precisely, those who are suspected of doing so by the president. Individuals covered by this order do not include American citizens.

Section 3 provides for detention of these individuals, who are to be "treated humanely" and "afforded adequate food, drinking water, shelter, clothing, and medical treatment." Section 4 then provides that "any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." Subsection (c) sketches the procedures for such trials, which

are to provide a "full and fair trial." Finally, section 7 provides that individuals "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

Three months later, the president supplemented this order with a classified directive not fully declassified until June 2004, denying the protections of the Geneva Conventions to supporters of al Qaeda, whether captured during the Afghanistan conflict or elsewhere. The first paragraph concludes that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the support of states." "Our Nation recognizes," the memo continues, "that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva."

The second paragraph considers applying the Geneva Conventions to al Qaeda and the Taliban. As to al Qaeda, the president concludes: "I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva."

The president rejected the sweeping argument that because Afghanistan is a failed state, the Geneva Conventions did not apply to the conflict as a whole. He did not, however, provide Taliban supporters with prisoner of war status, notwithstanding contrary arguments by the U.S. State Department (Powell 2002). Nevertheless, "as a matter of policy," the memo directs the armed forces to "continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

The document was based in part on the advice of White House counsel (and later briefly Attorney General) Alberto Gonzales (Gonzales 2002). Gonzales argued that "the war against terrorism is a new kind of war." He continued:

> The nature of the new war places a premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete

> Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.

Gonzales argued, however, that the United States would continue to be constrained by several factors: "(i) its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [Geneva], (ii) its applicable treaty obligations, (iii) minimum standards of treatment universally recognized by the nations of the worlds, and (iv) applicable military regulations regarding the treatment of detainees."

The memo was sharply contested by the legal adviser to the State Department, William H. Taft IV, who argued that the Geneva Convention should apply to Taliban detainees in Afghanistan (2002). But the president ultimately sided with Gonzales, except to the extent that he was willing to classify Taliban members as unlawful combatants under Geneva rather than as being entirely outside the purview of the Geneva Conventions.

Besides eliminating the substantive provisions of Geneva as applied to al Qaeda, the president's decision also effectively eliminated its procedural ones as well (for a detailed critique of the president's position and its legal rationale, see Jinks and Sloss 2004, 97). Under Article 6, "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," constitute POWs, "such persons shall enjoy the protection of the Present Convention until such time as their status has been determined by a competent tribunal." Article 6 might apply to Taliban and perhaps to some of their al Qaeda supporters in Afghanistan. Common Article III imposes other requirements in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." In such conflicts, punishment is not allowed "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized parties." Thus, where they apply, the Geneva conventions not only provide substantive protection but require significant procedural safeguards beyond those promised in the president's detention order.

Failure to comply with Geneva was potentially be more than an international embarrassment if the conventions apply. Under a federal statute, the War Crimes Act,[5] United States nationals or members of the armed forces who commit war crimes are subject to life imprisonment or the death

penalty if the victim dies. War crimes include "any conduct . . . defined as a grave breach" in the Geneva conventions and any violation of common Article 3. Geneva III, article 130, lists "willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention" as a grave breach. Thus, failure to follow proper procedures before imposing punishment on detainees potentially was a serious federal offense, even a capital one. The president sought to avoid these potential consequences—and with them the need to provide procedural protection—by ruling the Geneva Conventions completely inapplicable to al Qaeda and its supporters, and by classifying Taliban soldiers as unlawful combatants.

The Supreme Court proved resistant to the president's decisions. Perhaps the contemporaneous publicity about abuses at the Abu Ghraib prison impaired the administration's standing with the Court, as L. A. Powe points out. In any event, its initial encounter with the detention issues in June of 2004, the Supreme Court split in its rationale but agreed almost unanimously in the result: eight justices rejected the government's position that it had an nonreviewable right to detain "enemy combatants" without a hearing.[6] The individual detained in that case was a American citizen, which undoubtedly made the government's argument more difficult. Four justices, led by O'Connor, held that the detainee was entitled to some form of due process hearing. Justice O'Connor's opinion acknowledged a power of detention but also began to stake out limits: for example, detention cannot be solely for the purposes of interrogation and cannot extend beyond the armed conflict at question. Justice O'Connor was thus faced with the difficult question of how to determine whether an individual fell within what she called the narrow category of unlawful combatants. She attempted to provide a fair process for determining the facts, allowing the government to begin the process by filing factual affidavits but then allowing the petitioner in the case, Hamdi, the chance to provide evidence in rebuttal. Four other justices, in two different opinions, would have held Hamdi's detention squarely unlawful. Only Justice Thomas voted in favor of the government's position.[7]

In a later case decided in June of 2006, *Hamdan v. Rumsfeld*,[8] the Court again rebuffed the administration's efforts to evade legal restrictions. Hamdan involved the use of military commissions to try enemy belligerents under the presidential order discussed earlier. In an opinion by Justice Stevens, the Court held that the president lacked the power to establish military tribunals under congressional enactments and under the Geneva Convention. Again, the president's effort to operate free from outside legal restrictions was rebuffed.

After Hamdan, Congress stepped into the detainee issue. The Military Commissions Act of 2006 modifies the rules governing detainees while attempting to limit judicial review.[9] It prohibits enemy combatants subject to the act from invoking the Geneva Convention as a source of rights. The statute attempts to provide a fairer hearing by sending appeals to the Court of Military Commission Review rather than the secretary of defense and by protecting the military judges in tribunals from adverse career consequences. The statute guarantees the defendant's right to be present at all points in the proceeding (contrary to the president's order), but allows classified material to be edited before being introduced at trial. It also allows the use of some coerced statements against the defendant. Finally, the statute makes it clear that conspiracy to violate the laws of war is a separate offense. This point was for some time hotly contested.

The most fundamental change, however, is to eliminate the writ of habeas corpus for "any alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." The term *enemy combatant* is broadly defined to include anyone who provides "material support" for hostilities and appears to apply even to permanent residents in the United States. The statute also attempts to oust the courts from independently interpreting the Geneva Conventions. Notably, however, Congress did not contest the Court's determination that the Geneva Conventions do apply to the detainees.

The new statute has already been challenged in court. As L. A. Powe points out in chapter 7, there are two ways to view Hamdan. One is based on separation of powers, a demand that Congress be brought into the process of deciding how to treat detainees. The other is a rule of law demand that procedures be consistent with the due process clause. How the Court handles the habeas issue remains to be seen at this writing.[10] In the meantime, the political balance of power has shifted, with the demise of the Republican majority in both houses of Congress. Given that the Military Commissions Act narrowly passed Congress on a highly partisan vote, the detainee issue may not have reached its final legislative resolution.

Quite apart from its invocation of military authority as a basis for detention, the administration also used the immigration laws as a basis for detention after 9/11. The attorney general used this authority to detain more than 5,000 foreign nationals (Cole 2004, 1753, 1777–8). Many of these individuals were held for extended periods before being released. Others were deported after closed hearings. Section 1226a of the USA PATRIOT Act authorizes the government to detain any alien whom the

government has "reasonable grounds" to believe involved in any activity that "endangers the national security of the United States." Because of ambiguous language in the statute, it is unclear if the statute authorizes indefinite detention of such aliens, although it does appear that such a detention decision at least would have to be renewed every six months.

This detention provision was only one aspect of the PATRIOT Act, Public Law 107-56, which was enacted only six weeks after 9/11. Few congressional committee hearings about the legislation were held, and there was little debate within Congress. The final legislation was not crafted by the usual conference committee, but instead reconciled in private negotiations between administration officials and a small group of legislators. It was only several years later, when the PATRIOT Act was renewed in March 2006, that any extensive congressional debate took place. The result was to temper some of the statute's provisions but to reenact the bulk with few changes.

Among its other provisions, the PATRIOT Act broadly authorizes the government to obtain private records in the hands of third parties, such as records of library use. It also expands the use of electronic surveillance. As it turns out, however, the statutory expansion of electronic surveillance was more or less a red herring, given that the government's real surveillance program is extra-statutory and much broader.

In the aftermath of Vietnam and Watergate, Congress had enacted a statute extensively regulating the use of surveillance for intelligence purposes. The Foreign Intelligence Surveillance Act (FISA) gives the United States broad authority to intercept communications between foreign powers, but a special court must give approval if the surveillance is likely to involve communications with an American citizen or resident alien. In an emergency, the attorney general may authorize surveillance for seventy-two hours without a court order.

Not content with the authority provided by FISA, the president authorized a far more sweeping interception program soon after 9/11, eliminating any use of warrants or court orders. The administration claimed that these interceptions were justified under the president's inherent executive authority and also under the statute authorizing the use of military force (AUMF) after 9/11. (Note that this is the same AUMF that the Bush administration used to justify detainee treatment and military trials. The Supreme Court viewed the statute as authorizing some military detentions but not as overriding the Geneva Conventions or existing federal statutes.) The program was in place for several years before it was disclosed through a leak. The president has requested that Congress explicitly authorize the

program; so far, he has obtained only temporary authority for a modified version of the program.

Finally, although restrictions on speech have not figured significantly in the response to 9/11, federal law does create a potential chilling effect on freedom of association. Sections 2339A and 2339B of the federal criminal code make it a crime to give "material support" to designated terrorist organizations or to give such support knowing that it will be used for illegal acts. Material support is defined to include "any property, tangible or intangible, or service," including expert advice or assistance. The precise sweep of these provisions is unclear, and not surprisingly, there are allegations that they have chilled charitable contributions to Islamic organizations.

How do these activities compare with past responses to national security crises? By examining the historical chapters in this book, we can begin to answer that question.

Responses to Crises in American History

The primary purpose of this book is to set these recent events in historical context. Part I focuses on the twentieth century experience. Alan Brinkley describes the experience during World War II and the ensuing Red Scare. World War I engendered a violent reaction to dissent—a somewhat ironic turn for a war that, after all, was supposed to make the world forever safe for democracy. But the grand democratic ambition of the war also provided an ironic justification for repression: anyone who opposed the war clearly posed a grave danger to the future of world democracy, making a small current sacrifice in liberty reasonable to secure a more glorious future.

The espionage and sedition acts were reminiscent of the alien and sedition acts more than a century earlier. The Espionage Act of 1917 made it illegal to discourage enlistment in the military and banned seditious materials from the mails. The postmaster general interpreted the term *seditious* to include anything critical of the government's motives. Unhappy that its powers were not even broader, the Wilson administration obtained the passage of the Sedition Act of 1918, which made it a crime to insult the government, the flag, or the military. The Sedition Act also banned any activities that interfered with war production or the prosecution of the war. Beyond these legal measures, the government also encouraged extralegal attacks on dissidents. The greatest burden again fell on immigrants.

After the war, demands for loyalty revived in the great Red Scare. The Justice Department made 6,000 arrests on a single day. Most people were eventually released, though some were deported and others remained in custody for weeks.

These government actions created a backlash. Building on the earlier Free Speech League, Roger Baldwin helped create the National Civil Liberties Bureau in 1917, which was renamed the American Civil Liberties Union three years later. On the Supreme Court, Justices Holmes and Brandeis moved toward a libertarian interpretation of the First Amendment, creating the foundation of modern free speech doctrine.

Brinkley argues that governments have often used crises to seize power in excess of what is really needed, pursuing preexisting agendas in the name of national security. The victims tend to be chosen because of their lack of political influence rather than because of any real danger they pose.

A contrasting view appears in John Yoo's appraisal of civil liberties during World War II. In his view, FDR adopted policies that went well beyond those of the Bush administration today in terms of their effects on civil liberties. As Yoo points out, Bush modeled his order on one FDR issued to establish a military commission for the trial of Nazi saboteurs. FDR intimated that he would execute the prisoners without regard for the Supreme Court, and the Court quickly upheld the convictions. Unlike the post-9/11 regulation created by the Defense Department and then modified by Congress in the Military Commissions Act of 2006, FDR's order did not define commission procedures or delimit the crimes that the tribunals could try.

FDR also engaged in much more sweeping detention than the Bush administration did, beginning with 3,000 Japanese citizens and then confining more than 100,000 Japanese-Americans. Congress soon gave its approval with a statute criminalizing violations of the evacuation order. Even before Pearl Harbor, FDR issued a broad authorization of electronic surveillance of suspected subversives, but requested that such investigations be kept to a minimum and limited as much as possible to aliens.

Yoo asks about the differences between the responses FDR and Bush adopted. Why was Bush's response more limited? The answer, Yoo believes, lies in the nature of the conflicts. The deepest incursions into civil liberties were in the world wars, where the threat to national security was the greatest. This, he suggests, explains the "relative restraint—from a historical perspective—of the Bush administration." Because of the networked nature of modern terrorism, a more focused response was required.

In terms of the differing reactions to the government's actions, Yoo also emphasizes the greatly strengthened role of the Supreme Court in American society. He speculates that "the Bush administration's acceptance of judicial supremacy," all too common in his view among political actors these days, "may have led it to moderate its policies in anticipation

of court challenges." In contrast, FDR had much less reason to be concerned about the views of the courts.

After World War II, of course, Russia replaced Germany as America's greatest adversary, and internal security policies shifted accordingly. Ellen Schrecker's chapter probes the history of the early cold war. She reminds us of some of the excesses of the period: the FDA inspector dismissed because he refused to answer questions about his hiking companions; the cook who was considered a security risk in Sacramento because the city is a state capitol; the loyalty oath for anyone seeking a fishing permit in upstate New York. Schrecker examines these incidents not as aberrations, but as reflective of the worst incidents of political repression in American history.

Schrecker views the Communist Party as the most dynamic force on the left during the 1930s, because the party's front groups dominated left wing culture. After the war, when the party represented a legitimate security threat, the Truman administration overreacted to the threat of subversion. Admittedly, Schrecker says, information about Soviet espionage did justify many of the security precautions of the postwar era. But espionage was not really the central concern of the Truman White House's anticommunism effort. The administration was more concerned about threats of sabotage by communist union officials who might use strikes to cripple the defense program. Waterfront unions were a particular target of anticommunist activities. Employers then co-opted anticommunist efforts to eliminate union activists.

Because party membership was secret, members could only be identified by behavioral cues. Unfortunately, many on the left who were not Communist Party members evinced similar behaviors. The security program thus turned into a witch hunt that cost people their jobs or security clearances for sometimes trivial conduct. In statistical terms, the effort to avoid false negatives inevitably led to a large number of false positives. Because the FBI relied on secret informants and sometimes illegal procedures, it was unwilling to divulge the bases for accusations, making defense against the charges impossible.

More fundamentally, Schrecker contends, the security issue was ultimately fueled by partisan politics. Truman made serious revisions in the loyalty program only after the Republicans took control of Congress, but this did not defuse Republican use of the issue. Republicans recognized that the issue provided the most effective way to challenge Truman. For this reason, the Republican leadership encouraged Senator Joseph McCarthy's anticommunist crusade. The Eisenhower administration toughened the

security program, eager to distinguish itself from its predecessor. But by 1954, when the issue was losing political appeal, Eisenhower had decided to bring McCarthy down. Eisenhower recognized that the political momentum of the anticommunist crusade was fading.

In Schrecker's view, the kind of repression that occurred during the early cold war—and the Court's initial collaboration with and later rejection of that repression—recurs with such frequency during crises as to cast doubt on optimistic scenarios about long-term progress on civil liberties issues. The author of chapter 5 takes a less pessimistic view.

Geoffrey Stone brings the historical progression to a close with his analysis of the Vietnam War era. He focuses on surveillance issues. Both Johnson and Nixon were appalled by the intensity of the opposition to the war. By the mid-1960s, however, it had become impossible to base prosecutions on mere dissenting speech. Instead, the government prosecuted individuals for conduct, such as burning draft cards; more important, it used domestic surveillance to disrupt the antiwar movement.

As that movement expanded in the mid-1960s, the FBI expanded its domestic surveillance efforts beyond suspected communists. In 1965, it began wiretapping the Students for a Democratic Society (SDS) and the Student Non-Violent Coordinating Committee (SNCC). The anticipated evidence of ties with the Communist Party did not materialize. President Johnson also requested FBI reports on antiwar members of Congress, journalists, and professors. In 1968, the FBI's activities turned from surveillance to disruption. FBI agents infiltrated antiwar groups to destabilize them.

Other government agencies undertook their own investigations. At the urging of President Johnson, the CIA began an effort to infiltrate and monitor antiwar activities, as well as opening international mail of individuals involved in the antiwar movement. Even army intelligence officers got into the act, assigning 1,500 undercover agents and ultimately collecting evidence on more than 100,000 opponents of the war. In 1969, the National Security Administration (NSA) began to intercept phone calls of antiwar advocates.

When President Nixon took office, these activities expanded. For instance, the Central Intelligence Agency provided the FBI with more than 12,000 domestic intelligence reports annually (all quite illegal, given the CIA charter's prohibition of CIA involvement in domestic security). The Nixon administration also used the IRS to identify supporters of antiwar organizations and then target them and their organizations with tax investigations. By 1970, the administration began assembling an enemies list and moved to centralize domestic intelligence in the White House.

These programs remained secret until an antiwar group broke into an FBI office to steal and then release about 1,000 sensitive documents. As more of the government's activities became public, congressional investigations began. A Senate committee found that the FBI alone had more than half a million domestic intelligence files.

During the 1970s, Congress and the president enacted restrictions to halt such activities. The army terminated its program and destroyed its files. President Ford banned the CIA from conducting surveillance on domestic activities and prohibited the NSA from intercepting any communication beginning or ending on American soil. Ford's attorney general imposed stringent limits on FBI investigations. Federal legislation limited electronic surveillance without a warrant from a special court.

One of the lessons of this history is that neither repression nor opposition to repression has an inherent partisan bias. The Democratic Johnson showed no more regard for civil liberties than the Republican Nixon; on the other hand, ameliorating the worst abuses of the Vietnam era was also a bipartisan effort.

As Stone observes, many of these post-Vietnam safeguards have now been dismantled or at least significantly weakened since 9/11. In 2002, Attorney General Ashcroft authorized the FBI to attend, for surveillance purposes, any event open to the public. The USA PATRIOT Act authorizes the government to demand medical records, financial records, and other documents from third parties without probable cause. Most important, the Bush administration began a secret electronic surveillance program that disregarded the statutory restrictions enacted in the 1970s.

This brings us directly to the topic of the next section. How much does the present response to antiterrorism mirror past national security efforts? How has the reaction to current government programs compared with past reactions? In short, what can we learn from this history that is relevant today?

The More Things Change?

How much of our recent experience, and of the modern experience described in Part I, was a surprise? Part II addresses the question. First up is Jan Lewis, who provides an overview of national security issues through the turn of the last century.

She begins with the Alien and Sedition Acts passed by Congress in 1798. In the congressional debates over these bills, she sees signs of conflicting conceptions of citizenship and national security. Against the background of the French Revolution, Federalist anxieties about the nation's security

were acute and focused on their political opponents and on immigrants. At Federalist urging, the naturalization period was increased to fourteen years to limit citizenship to individuals who had fully assimilated American culture. The Alien Enemies Act and Alien Friends Act, between them, authorized the president to deport any alien who was a native of an enemy country or whom he considered "dangerous to the peace and safety of the United States." Although no one was ever deported, the statutes cut off the flow of immigration to the United States and caused some resident aliens to flee. This was the first of many times that immigrant communities came under special suspicion during a national security crisis.

More notorious than either of these, however, was the Sedition Act, which made it illegal to defame any branch of the federal government. The Federalists considered their Republican opponents to be enemies of the state, not legitimate political adversaries. Fourteen prosecutions were brought under the Sedition Act, and Lewis observes that they were specifically designed to silence the president's critics and ensure his reelection. In the eyes of the Federalists, however, this targeting was not a matter of party politics but of national security, because they considered their opponents to be advocates of an international revolutionary ideal. Lewis believes that, as a result of Federalist attacks, the left wing of the Republican party was effectively silenced.

Lewis then briefly examines a largely forgotten episode, the War of 1812. New Englanders traded with the British enemy, interfered with militia recruitment, and sometimes seemed to welcome a British victory. Mobs attacked opponents of the war, especially in Baltimore, but the Madison administration chose not to renew the Sedition Act. On the other hand, in a remarkable incident, General Andrew Jackson detained judges who had attempted to issue habeas corpus writs or otherwise challenge his military rule of the city of New Orleans.

The remaining civil liberties episodes discussed by Lewis revolve around issues of race. Before the Civil War, the government sharply restricted abolitionist speech. Abolitionist tracts were banned from the mail in the South with the tacit consent of the federal government; a gag rule prevented congressional consideration of abolitionist petitions; and anti-abolition riots were not uncommon. A lesser known incident took place in 1836, when seditious libel charges were brought based on possession of abolitionist publications in Washington, D.C. The prosecutor was Francis Scott Key (notwithstanding the "land of the free" line in the anthem he penned). The jury acquitted, but only after the defendant had languished in jail for eight months.

The civil liberties issues of the Civil War are more familiar fare. Lincoln suspended habeas corpus and authorized widespread military arrests. In terms of the effects on dissenters, Lewis observes, the pattern was to clamp down and then let up on particular dissenters. Efforts to suppress newspapers or Democratic critics were often met with political outcries, at which point the government would retreat.

The story of civil liberties in the South, during and after the war, is less familiar. Travel within the Confederacy required a passport. As in the North, habeas corpus was limited and political dissidents were targeted during the war. Civil liberties fared poorly again in the South as Reconstruction wound down in the 1870s. Southern mobs routinely broke up political meetings and attacked dissidents. Black voters were subject to intimidation and violence. In an 1898 riot in Wilmington, a mob of two thousand burned down a newspaper office and gave the mayor a day to leave town. The number of black victims is still not known.

Lewis finds that national security (at least in the sense of foreign threats) was sometimes but not always the basis for infringing civil liberties during the nineteenth century. But even when the country faced no foreign threat, the targets of government restrictions were always social outsiders such as blacks; indeed, attacks on them were one way of defining nationalism. Lewis also finds that the process of limiting civil liberties was entangled with party politics in each instance, not only in its origins but in its ability to reshape the political landscape.

An observer who is familiar with the early twentieth-century experience would find much that is familiar in this even earlier history: targeting outsider groups such as immigrants and ethnic minorities in World War I, using national security measures against political dissidents and partisan opponents. This is not too surprising: the individuals who were in power in the first third of the twentieth century were very likely to have come of age during the nineteenth. Thus there are clear continuities bridging the turn into the twentieth century.

What about continuities between the current century and its predecessor? Do current clashes between civil liberties and national security reflect the same dynamics as twentieth-century episodes, or should we expect a different dynamic?

Many readers may be startled by John Yoo's assertion that the Bush security program is more restrained than its predecessors. Yet a review of the history shows that the latest response to a national security threat has not included some of the major abuses of previous periods. Unlike the Alien and Sedition Act, the Civil War, World War I, or the cold war, there

have been no prosecutions based on dissent from government policies. Compared with the Alien and Sedition Act, World War I, or World War II, ethnic communities or immigrants as a group have not been branded as disloyal, let alone confined to internment camps. Although some actions focused on immigrant communities and some security measures have had a greater impact on Arab-Americans, we have not seen the deliberate targeting of an ethnic group of earlier periods. This is not meant to minimize impacts on Arab-American communities, but instead to address their proper scale relative to the vigilante efforts of World War I or the internment camps of World War II. Also, so far as we know, surveillance has not—unlike in the Vietnam era—targeted domestic dissenters. And unlike the Civil War or World War II, there have been no mass detentions of American citizens.

These changes are due in part to the changed nature of the threat, as John Yoo and others observe. The current situation is different because technological advances give enemies of the state a greater ability to organize, communicate covertly, and unleash mass destruction. Thus, unlike most previous crises, this one does not involve fears of a potential mass movement against government policies, rather, the task of identifying a small network of opponents and neutralizing their efforts. Also, unlike the Civil War or either World War, neither the war on terror domestically nor American military actions in the Middle East has required mass mobilization or placed serious burdens on large sectors of the public. For this reason, there may be less reason for security measures to degenerate into campaigns against political dissidents. On the other hand, surveillance issues loom very large,[11] but, at the same time, few members of the public have any direct tie to the foreign nationals who are the major targets of interrogation, detention, and possible trial.

Another significant change pertains to the role of the courts. Yoo notes that many lower courts have been less willing to defer to the executive than in past crisis periods. In his chapter on the role of the Supreme Court, Powe views the Court as historically uninterested in protecting civil liberties except during the Warren Court period. Even the Warren Court, he observes, was unwilling to act when it faced strong opposition from Congress. Still, Powe admits that he is surprised by the relatively high protection given to civil liberties in the past few years.

In terms of the judicial role, then, the current era may be different. Hamdi seemed to break the historical pattern of judicial passivity, although the ruling can be read as retaining at least some level of deference to the executive. The more recent ruling in Hamdan clearly showed an unwillingness

to defer to either the president or Congress, striking down military tribunals despite Congress's apparent effort to derail the litigation. As Powe observes, this is a sharp deviation from prior practice. Moreover, as Yoo speculates, the Court's greater aggressiveness may reflect society's growing acceptance of judicial primacy in interpreting the Constitution. He also observes that Bush did not have the opportunity to reshape the judiciary that FDR had enjoyed by the time of World War II, further weakening Bush's position.

If Powe is right that congressional opposition has a damping effect on the Court, removing such opposition with the 2006 switch in congressional control to the Democrats may further embolden the justices. Of course, some justices may find more reason to leave issues to the other two branches on the theory that divided government will lead to a more vigorous and constructive political debate. The response to the most recent congressional legislation should therefore shed significant light on how the Court responds to shifts in political power.

To some extent, all of this may be seen as confirming the optimistic view of an upward trend in crisis treatment of civil liberties over the course of American history. Political resistance to the executive programs has been outspoken, in contrast to both world wars. Compared with even the Vietnam era, courts have been more aggressive in supporting civil liberties and the executive's incursions on civil liberties have been less blatant.

For instance, even if the administration had tried to target political dissenters, it would have been unlikely to succeed because First Amendment doctrine has greatly solidified, even since the Warren Court era. One of the few points on which both liberal and conservative justices agree is the need for staunch protection of free speech. This is one area where the optimistic story seems correct. Beginning with the Holmes and Brandeis efforts to defend speech after World War I, constitutional doctrine has become progressively more protective of dissent. And given the Court's increased prominence and power—enough to allow it to intervene for the first time in history in a presidential election—there is little reason to think the Court would have backed down on this issue had there been a post-9/11 effort to suppress dissent.

But before applauding our progress over the past, it is also important to consider the changed context in which today's civil liberties concerns arise. Unlike past crises, the current threat arises from an ideological and religious movement that has never had any significant traction on American soil. This, as much as increased respect for civil liberties, may explain why dissenters have not been targeted by the government for prosecution

or surveillance. Mass detention of American Arabs was not a plausible option, given that the attackers were all foreigners (rather than American citizens or permanent immigrants) and that the United States has important Arab allies (especially Saudi Arabia). Thus, many of the repressive actions of earlier periods were probably not available to the Administration after 9/11 even if it had wanted to use them. There may also be some tendency for administrations to avoid measures that caused controversy in immediate preceding crises, either reverting to still earlier measures (such as the revival of military trials by the Bush administration) or creating novel measures (FDR's use of wiretapping).

Another important respect in which this crisis differs from its predecessors is the role of international law. From the first, the administration was aware of the potential application of the Geneva Conventions to its activities. Even more so, the administration's legal memoranda showed keen awareness that both the Geneva Convention and antitorture norms had been incorporated into domestic law, thereby raising the threat of criminal penalties for violations. This was not a legal situation that presidents had ever faced. Military lawyers were also outspoken in their concerns about compliance with international law, as well as conformity to what they regarded as the dictates of due process. In Hamdan, the Supreme Court relied in part on the Geneva Conventions to invalidate the administration's unilateral effort to create military tribunals. In response, Congress attempted to oust the Court from reliance on international law, but made its own effort to meet the demands of Geneva and other international requirements.

The increased profile of international law in this crisis period partly reflects fundamental changes in the international system. In no small part because of American efforts in the postwar period, multilateral institutions have become much stronger and international human rights law has emerged. That some of these human rights guarantees have been adopted into domestic law merely reflects the growing acceptance of international norms. Once given the sanction of the United States criminal code, international law provisions had to be dealt with one way or another, not simply ignored.

A recurrent theme in American history has been the formation of national identity. As early as the Alien and Sedition Acts, national security disputes were entangled with divergent views of national identity. At that time, Jeffersonian Democrats resisted incursions of civil liberties, Federalist advocates considered Democrats tainted with internationalist ideals at the expense of distinctly American values. Today, a somewhat similar struggle

seems to be taking place over the extent to which America should remain free from the entanglements of international norms.

Both the increased sway of international law and the entrenchment of the Supreme Court's role as constitutional arbiter can be seen as reflections of the same fundamental trend toward a legalist regime, in which government decisions are seen as essentially governed by legal norms rather than discretion. The Bush administration has fought against this regime with strong arguments for unilateral presidential authority. In turn, this effort has encountered sharp resistance, not only from courts but as well from other segments of the legal profession (including the American Bar Association, military lawyers, and State Department counsel). The resistance is probably heightened by the perception that the threat of terrorism has no clear end point, so that the administration is demanding a permanent rather than temporary deviation from the legalist regime.

Future national security efforts will also be shaped by technological changes. Technology creates the possibility of asymmetrical warfare. Small groups can threaten powerful nation states, using electronic communications to operate and potentially gaining access to weapons of mass destruction. In their contribution, Paul Schwartz and Ronald Lee point to an ongoing dialectic between civil liberties and national security. They argue that technological change can both aid and harm national security and civil liberties, leading to a continual evolution of legal regulation. On the one hand, they note, technological changes may create continual policy flux, eliminating the time needed to reach a deliberative balance between civil liberties and national security. On the other hand, the private sector's important role in developing and commercializing technology may lessen the government's ability to preside over the civil liberties and national security dynamic. If one thing is clear, it is that technology will continue to develop in new and sometimes unexpected ways, posing ongoing challenges for the advancement of both national security and civil liberties.

Concluding Thoughts

Civil liberties and national security have been in tension since the early days of the republic. Technology, international human rights laws, and judicial independence have all brought important changes. The contributions to this volume illuminate several important continuities.

First, presidents of all political parties and ideological stances have focused almost exclusively on national security in times of crisis, with little or no thought of civil liberties. Liberal Democrats like Woodrow Wilson,

Franklin Roosevelt, and Lyndon Johnson seemed to waste no time worrying, any more than moderate Republicans like Richard Nixon or conservative Republicans like George W. Bush did. The only exception is the cold war, where the impetus for incursions of civil liberties came from Congress, and presidents were less enthusiastic—though generally acquiescent. It may have been significant that cold war subversion charges were often leveled against government officials (including ultimately military officers), impairing the functioning of the bureaucracy the president heads.

Second, responses to crises have always been intertwined with partisan politics. Presidents use national security as a partisan weapon. Support for civil liberties is most likely to come from the president's partisan political opponents if it exists at all within the political mainstream. We see this pattern as early as the Alien and Sedition Acts and as recently as the 2006 elections.

Third, conflicts over civil liberties and national security often are entangled with disputes over national identity. The question is what it means to be a loyal American. Sometimes, as in the case of German Americans in World War I or Japanese Americans in World War II, the issue concerns ties to foreign nations or cultures. Sometimes, the issue is the extent to which American identity is consistent with attachments to international ideas (for which Jeffersonian Democratic Republicans, McCarthy-era "subversives," and Clinton Democrats were equally attacked).

Although the optimistic view of ever-upward progress on civil liberties is too simple, there is some support in recent history for this hypothesis. In particular, the aftermath of the Vietnam era, as exemplified in the Watergate scandal, seems to have permanently changed the degree of deference that courts, the press, and the public are willing to give unilateral presidential action. Moreover, as noted earlier, the result of earlier crisis has been to solidify First Amendment doctrine as a barrier to repression of dissenters.

Trends regarding other issues are less clear. For instance, military tribunals played a major role in the Civil War era, were submerged again until World War II, and then were forgotten until resurrected by the Bush administration. With regard to surveillance, changes in technology seem to play an equal role with changes in legal norms, making prediction difficult.

Obviously, references to history cannot dictate answers to the questions of today. Hopefully, however, the historical perspective this volume provides will help illuminate current issues. We seem to be repeating the past in both obvious ways and more subtle ways. History can provide fresh insights into our current situation because of these enduring themes.

Equally important, the terrorist threat differs in significant ways from previous national security issues. As we have seen, the response to the threat has also been distinctive in important respects, and it has taken place in a changed setting of increased judicial independence. It also bears noting that another major terrorist attack, on the scale of 9/11 or above, would shift American policies and politics in ways that cannot be readily predicted. In this book, we do not attempt to speak to hypothetical future events and their relationship with past episodes.

The chapters that follow this introduction probe the continuities and discontinuities from the John Adams administration through the George W. Bush administration from the perspectives of historians and constitutional lawyers. We do not attempt to present any orthodoxies, if indeed there is any orthodoxy to be found on these issues today. The authors have different perspectives and sometimes speak in different voices. They include at least one architect of Bush administration policy as well as some outspoken critics, and others who take the stance of the detached observer.

Our goal is to foster a discussion among key issues about the ways in which history can (and cannot) illuminate current clashes between national security and civil liberties. Although no book could hope to settle the ongoing debate about the relationship between civil liberties and national security, at least the debate may proceed more intelligently if we take care to understand the implications of past episodes for today's disputes.

Notes

1. The Russell Sage Foundation also contemplates a separate volume of comparative perspectives on these issues, which is the reason that the current volume focuses exclusively on the United States.
2. For an excellent collection of background materials on these issues, see Abrams 2005.
3. U.S. Congress, Authorization for Use of Military Force (AUMF), 115 Stat. 224 (2001).
4. The order is most readily accessible on the White House website, http://www.whitehouse.gov/news/releases/2001.
5. 18 U.S.C. 2441.
6. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
7. *Hamdi* is notable as evidence that ideology is not everything, even in the hardest constitutional cases. The critical vote for Justice O'Connor's position was Justice Breyer, commonly considered a member of the liberal block. Chief Justice Rehnquist, a strong conservative voice, also allied himself with O'Connor's centrist views. In the meantime, the two most conservative members of the Court (Thomas and Scalia) came to diametrically opposite

conclusions, and Scalia was joined by Justice Stevens, the most liberal member of the Court.

8. *Hamdan v. Rumsfeld*, 548 U.S. forthcoming (2006).
9. Pub. L. No. 109-366.
10. For a more detailed history of the detainee issue, see Margulies 2006. Readers should keep in mind his perspective as counsel for certain detainees. See also two leading authorities on federal jurisdiction, Fallon and Meltzer 2007, 2031.
11. For a discussion of the surveillance issues, see the chapter by Schwartz and Lee, as well as Donohue 2006, 1059.

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