

Law, War, and the History of Time
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INTRODUCTION

When President George W. Bush told the American people in September 2001 that the nation was at war, he drew upon an iconic American narrative. The onset of war, in American legal and political thought, is more than a catalytic moment. It is the opening of an era: a wartime. Wartime is thought to be an era of altered governance. It is not simply a time period when troops are sent into battle. It is also a time when presidential power expands, when individual rights are often compromised. An altered rule of law in wartime is thought to be tolerable because wartimes come to an end, and with them a government's emergency powers. That, at least, is the way law and wartime are understood.

War is thought to break time into pieces. War often marks the beginning of an era, the end of another, as in antebellum, postbellum, and simply

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“postwar” (meaning after World War II). War has its own time. During “wartime,” regular, normal time is thought to be suspended. Wartime is when time is out of order.

Ideas about the temporality of war are embedded in American legal thought. A conception of time is assumed and not examined, as if time were a natural phenomenon with an essential nature, providing determined shape to human action and thought. This understanding of time is in tension with the experience of war in the twentieth century. The problem of time, in essence, clouds an understanding of the problem of war.

Much attention has been paid in recent years to wartime as a state of exception,¹ but not to wartime as a form of time. For philosopher Giorgio Agamben, a state of exception “is a suspension of the juridical order itself,” marking law’s boundaries.² Viewing war as an exception to normal life, however, leads us to ignore the longstanding persistence of war. If wartime is actually normal time, as this Essay suggests, rather than a state of exception, then law during war can be seen as the form of law we in fact practice, rather than a suspension of an idealized understanding of law.

In scholarship on law and war, time is seen as linear and episodic. There are two different kinds of time: wartime and peacetime. Historical progression consists of moving from one kind of time to another (from wartime to peacetime to wartime, etc.). Law is thought to vary depending on what time it is. The relationship between citizen and state, the scope of rights, and the extent of government power depend on whether it is wartime or peacetime. A central metaphor is the swinging pendulum—swinging from strong protection of rights and weaker government power to weaker protection of rights and stronger government power.³ Moving from one kind of time to the next is thought to swing the pendulum in a new direction.

This conceptualization is embedded in scholarship in law and legal history,⁴ it is written into judicial opinions,⁵ it is part of popular culture.⁶ Even

1. See, e.g., GIORGIO AGAMBEN, STATES OF EXCEPTION 4 (Kevin Attell trans., 2005); Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 NYU L. REV. 1 (2005).

2. AGAMBEN, *supra* note 1, at 4.

3. See, e.g., WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218–25 (1998); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 12–13, 527–30, 535–55 (2005).

4. See Epstein et al., *supra* note 1, at 3–6 (discussing the pervasiveness of the assumption that rights are curtailed in wartime, and citing examples). Epstein et al. question the assumption that times of crisis impact the Supreme Court, noting that “despite the crisis thesis’s resilience—no study has rigorously assessed it” *Id.* at 6. The authors set out to provide a rigorous quantitative assessment, finding that

works that seek to be revisionist aim largely for a different way to configure the pendulum, leaving the basic conceptual structure in place.⁷ But the conception of time that has been embedded in thinking about law and war is in tension with the practice of war in the twentieth century. This understanding of time no longer fits experience, but it has continued to shape our thinking.⁸

There are three significant impacts of viewing wartime as exceptional, or viewing history as divided into different zones of time based on peace and war. First, there is a policy problem: war-related time zones cause us to think that war-related laws and policies are temporary. Second, there is a historiography

[t]he justices are, in fact, significantly more likely to curtail rights and liberties during times of war and other international threats. On the other hand, contrary to what every proponent of the crisis thesis has so far suggested, while the presence of war does affect cases unrelated to the war, there is no evidence that the presence of war affects cases directly related to the war.

Id. at 9 (citation omitted). While the authors recognize the contested nature of definitions of states of war and emergency, they take the timeframe of World War II as easily discernible and examine cases only between the dates of December 7, 1941, and August 14, 1945. The time period from August 14, 1945, to the outbreak of hostilities in Korea on June 27, 1950, is assumed to be a non-war/crisis time against which the 1941–1945 years are compared. *Id.* at 46–47 & n.208. Yet World War II is not as easy to place in time as these authors assume. See *infra* Part III.A. For a critique of their methodology, see Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1834–38 (2003). A helpful new critique is Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453 (2010).

5. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919).

6. See, e.g., *Star Trek Deep Space Nine: Inter Arma Enim Silent Leges* (Paramount Television March 3, 1999), http://memory-alpha.org/en/wiki/Inter_Arma_Enim_Silent_Leges.

7. See, e.g., THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2005). While generally retaining assumptions about war's temporality, the essays in Tushnet's collection treat "constitutional policy making during wartime as an *example* of constitutional policy making generally, not as an exception to it." *Id.* at 3. Without taking up the concept of time, Mark Brandon argues that U.S. engagement in war is a persistent feature of American history and is not confined to the wartimes usually discussed by scholars. Mark E. Brandon, *War and the American Constitutional Order*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 11–38 (Mark Tushnet ed., 2005).

8. An exception to the tendency to ignore issues of temporality in scholarship on law and war is OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 174–80 (2006). "Normalcy and emergency are often seen to occupy alternate, mutually exclusive, time-frames," Gross and Ní Aoláin write. *Id.* at 174.

Normalcy exists prior to crisis and is reinstated after the emergency is over. Crises constitute brief intervals in the otherwise uninterrupted flow of normalcy. Emergency powers are supposed to apply only while the exigency persists. They are not to extend beyond that time-frame into ordinary times.

However, this view of the temporal relationship between normalcy and emergency does not account adequately for the possibility that emergencies will become entrenched and prolonged. Rather than the exception, crises may become the norm . . .

Id. at 174–75 (citation omitted). See also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L. J. 1011, 1073 (2003).

problem: time zones can cause scholars to fail to look for war-related impacts on American law outside of the time zone of war. Finally, the model of the swinging pendulum does not lend itself to a broader analysis of the relationship between war and rights over time, or to the way rights are impacted by war-related state-building, which tends to endure.⁹

This Essay explores the role of wartime in legal thought. The starting point is an examination of time itself. Scholarship on time shows that “time” does not have an essential nature.¹⁰ Instead, as sociologist Emile Durkheim and others have argued, our understanding of time is a product of social life. This helps us to see that “wartime,” like other kinds of time, does not have an essential character, but is historically contingent.

The Essay then turns to the way wartime is characterized in scholarship on law and war, arguing that a particular understanding of war and time is a feature of this literature. The idea of wartime found in twentieth-century legal thought is in tension with the American experience with war. To examine this dynamic, the Essay takes up an iconic twentieth-century war, World War II, finding that this war is harder to place in time than is generally assumed, in part because the different legal endings to the war span over a period of seven years.

Next, the Essay considers the way that scholarship on the history of rights during war attempts to periodize World War II, and finds that the fuzziness in the war’s timing repeats itself in scholarship on law and war. Scholars who believe themselves to be writing about the same wartime are not always studying the same span of years.

The difficulty in confining World War II in time is an illustration of a broader feature of the twentieth century: wartimes bleed into each other, and it is hard to find peace on the twentieth-century American timeline. Meanwhile, although the Pearl Harbor attack was on the Territory of Hawaii, all twentieth-century military engagement occurred outside the borders of American states. Because of this, a feature of American military strategy has been to engage of the American people in a war at some times,¹¹ and at other times to insulate

9. On war and state-building, see for example, ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1989); SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT (Ira Katznelson & Martin Shefter eds., 2002); BARTHOLOMEW H. SPARROW, *FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE* (1996).

10. ALBERT EINSTEIN, *RELATIVITY: THE SPECIAL AND GENERAL THEORY* 30–33 (Robert W. Lawson trans., 1921); STEPHEN HAWKING, *A BRIEF HISTORY OF TIME* 147 (rev. ed. 1998).

11. See SUSAN A. BREWER, *WHY AMERICA FIGHTS: PATRIOTISM AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ* (2009).

them from war. Isolation from war in the late twentieth century, through the use of limited war and advanced technology, enabled the nation to participate in war without most citizens perceiving themselves to be in a wartime.¹²

The Essay closes with a discussion of the way the tension between war's seamlessness and our conception of temporally distinct wartimes surfaces in contemporary cases relating to Guantánamo detainees. In these cases, Supreme Court Justices first attempted to fit the post-September 11 era into the traditional and confined understanding of wartime. But ultimately, anxiety about war's temporality informed Justice Kennedy's argument for judicial review in *Boumediene v. Bush*.¹³

My aim in this Essay is to critique the way that the concept of wartime affects thinking about war and rights, but not to argue that *war itself* has no impact. One reason that wartime has so much power as a way of framing history is that the outbreak of war is often experienced as ushering in a new era, particularly when war follows a dramatic event like Pearl Harbor.¹⁴ After that attack, for example, Supreme Court Justice Felix Frankfurter said to his law clerk: "Everything has changed, and I am going to war."¹⁵ The onset of war is seen, however, not as a discrete event, but as the beginning of a particular era that has temporal boundaries on both sides. I do not wish to question the power of these catalytic moments, but rather to call attention to the way they bring into being a set of assumptions about their endings, because they are seen as the onset of a temporally confined war. Pearl Harbor, for example, was thought to launch the United States into an era—World War II—that would, by definition, come to an end. Unpacking war's temporality can be a path toward a more satisfactory understanding of the ongoing relationship between war and American law and politics.

12. See ADRIAN R. LEWIS, *THE AMERICAN CULTURE OF WAR: THE HISTORY OF U.S. MILITARY FORCE FROM WORLD WAR II TO OPERATION IRAQI FREEDOM* (2007).

13. 553 U.S. 723 (2008).

14. On the way Pearl Harbor is remembered, see EMILY S. ROSENBERG, *A DATE WHICH WILL LIVE: PEARL HARBOR IN AMERICAN MEMORY* (2003).

15. MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953* 47 (1999); Melvin I. Urofsky, *The Court at War and the War at the Court*, 1996 J. SUP. CT. HIST. 1, 1 (1996).

September 11 was also widely viewed as a break in time, although there is controversy about whether it initiated a new "war" era, or something else. *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* (Mary L. Dudziak ed., 2003). See also *SEPTEMBER 11 NEWS.COM*, <http://www.september11news.com/> (last visited Sept. 23, 2010); *THE SEPTEMBER 11 DIGITAL ARCHIVE*, <http://911digitalarchive.org/index.php> (last visited Sept. 23, 2010).

I

UNDERSTANDING HISTORICAL TIME

To best examine assumptions about war's temporality, first we need to think about how to think about time. Though time has been an important topic of study in many fields, historians, Lynn Hunt recently argued, have paid little attention to it. "Like everyone else," she writes, "historians assume that time exists, yet despite its obvious importance to historical writing—what is history but the account of how things change over time?—writers of history do not often inquire into the meaning of time itself."¹⁶ One of the difficulties in examining time is that the words we use to describe it seem to presuppose an understanding of time. Hunt explains: "Time feels like an essential and defining feature of human life, yet when pressed to define it, we inevitably fall back upon duration, change, and ultimately, the tenses of our languages, past, present, and future."¹⁷

16. LYNN HUNT, MEASURING TIME, MAKING HISTORY 5 (2008).

17. *Id.* at 4. See also WILLIAM H. SEWELL, JR., LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 11 (2005). There, however, is a body of work on the history of timekeeping. See, e.g., DAVID S. LANDES, REVOLUTION IN TIME: CLOCKS AND THE MAKING OF THE MODERN WORLD (rev. ed. 2000). Scholarship on time in U.S. history expands upon E.P. Thompson's classic work, E.P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, 38 PAST AND PRESENT 56 (Dec. 1967), finding the impact of mechanical time beyond the factory, and exploring other ways that time is framed and divided. For example, Mark Smith explores the impact of clock-time on southern slavery in MARK M. SMITH, MASTERED BY THE CLOCK: TIME, SLAVERY, AND FREEDOM IN THE AMERICAN SOUTH (1997). Alexis McCrossen focuses on the cultural meanings of "Sunday" in ALEXIS MCCROSSEN, HOLY DAY, HOLIDAY: THE AMERICAN SUNDAY (2000).

Even when historical work does not explicitly examine questions of time, William Sewell suggests that "historians have implicit or working theories about social temporality." SEWELL, *supra* at 6. Historians "believe that time is *fateful*. Time is irreversible, in the sense that an action, once taken, or an event, once experienced, cannot be obliterated. It is lodged in the memory of those whom it affects and therefore irrevocably alters the situation in which it occurs." *Id.* at 6–7. Further, historians believe that

every act is part of a *sequence* of actions and that its effects are profoundly dependent upon its place in the sequence . . . [H]istorians assume that the outcome of any action, event, or trend is likely to be *contingent*, that its effects will depend upon the particular complex temporal sequence of which it is a part.

Id. at 7. Within this framework, the conception of time shared by historians is complex, embracing a "diversity of temporalities" as well as an assumption that time is heterogeneous. *Id.* at 9. In other words, "that different historical times have, effectively, different rates of change . . ." *Id.* This conception of time affects the theory of causality in historical work. Sewell suggests that "Temporal heterogeneity implies *causal heterogeneity*. It implies that the consequences of a given act are not intrinsic in the act but rather will depend on the nature of the social world within which it takes place." *Id.* at 10.

Turning to social science, Sewell identifies teleological forms of temporality in some works. For Karl Marx, Emile Durkheim, and others, Sewell suggests, history was viewed as

A common assumption is the idea that time is linear. Time's linearity is often thought to be a natural and inevitable feature of time, and is sometimes contrasted with a cyclical view of time.¹⁸ Anthropologist Carol Greenhouse suggests that scholars tend to think of nonlinear time as embedded in traditional cultures. Forms of time that are thought to flow from particular cultural contexts are often referred to as "social time." Social time is thought to be culturally constructed, as compared with linear time that is thought to exist in nature.¹⁹

But even linear time has a history and is understood within a cultural context. Linear time is also social time, Greenhouse argues. "The idea of time that has dominated public life in the West since the thirteenth century . . . came to Europe with Christianity," she writes.²⁰ It included two ideas that "had long roots in Jewish and . . . Christian tradition: first, the origin of time in creation and, second, the end of time in a day of judgment. The linearity of time derives from the geometric connection between these two end points."²¹ According to Greenhouse, secular understandings of time are often hazy about the nature of origins and endpoint, but retain this linearity.²² Once time is thought of as a progression from one point to another, other assumptions follow. "To speak of 'linear time' is to refer to the image of time as an irreversible progression of moments, yielding ordinal conceptions of past, present, and future as well as duration."²³

Emile Durkheim noted the difficulty in seeing the cultural nature of time. "We cannot conceive of time," he wrote, "except on condition of distinguishing its different moments."²⁴ If we "try to represent what the notion of time would

the temporal working out of an inherent logic of social development The direction and meaning of history were a consequence not of the largely contingent events that made up the surface of history but of longterm, anonymous causal forces, of which particular historical events were at best manifestations.

Id. at 83. Some works in legal history are consistent with teleological conceptions of time. Finding an inherent progress narrative in legal history, or viewing the path of the law as one of modernization, involves teleological conceptions of temporality, in which the fundamental direction of legal change is driven by larger forces outside the particularities of the experience and acts of those who encounter the law. See Mary L. Dudziak, *Brown and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851 (2004).

18. CAROL J. GREENHOUSE, A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES 19–28 (1996).

19. *Id.*

20. *Id.* at 20.

21. *Id.*

22. *Id.* at 183–84.

23. *Id.* at 19–28 (citations omitted) (discussing linear and social time).

24. EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 10 (J.W. Swain

be without the processes by which we divide it, measure it or express it with objective signs, a time which is not a succession of years, months, weeks, days and hours! This is something nearly unthinkable.”²⁵ But Durkheim asks: “what is the source of this differentiation?”²⁶ For Durkheim, Greenhouse explains, these “categories of thought are born in social, or collective, experience.”²⁷

If linear time, like cyclical time, is social time, it does not follow that particular constructions of time have an absolute hold in discrete cultures. Instead, Greenhouse argues, competing conceptions of time overlap and compete for ascendancy. Initially, in the West, a linear understanding of time competed with indigenous European ideas that time was a pendulum, moving between binary oppositions (day/night, summer/winter).

If linear time dominates public life in the West, then, it is because its primary efficacy is in the construction and management of dominant social institutions, not because it is the only “kind” of time that is culturally available. The meanings of linear time are inseparable from its cultural history of use.²⁸

Scholars have tied the meanings of time to the experience of modernity. Building on the work of historian E.P. Thompson, other scholars have suggested that “clock time” brought time-discipline to labor, which aided development of the factory system.²⁹ Developments in science, technology,

trans., 2d ed. 1976).

25. *Id.*

26. *Id.* at 12.

27. GREENHOUSE, *supra* note 16, at 26–27.

28. *Id.* at 23. An example of cyclical time is the ordering of farm chores according to the seasons in ROBERT B. THOMAS, *THE OLD FARMER’S ALMANAC* (2009).

One cultural use of linear time appears in American law. According to Greenhouse, law involves “the constant expansion of a linear time framework in the production and use of ‘precedent’” GREENHOUSE, *supra* note 18, at 184. Law’s endpoint in this linear progression, however, “is neither fixed nor envisioned. It is symbolically coterminous with a national social life” *Id.* Law’s temporality is distinctive, she argues, both because it is cumulative (“all interests and histories can be represented as pertaining to the social field in which the law operates”), and because it is reversible (past decisions can control present ones; and precedent can be reversed). *Id.*

Time is a critical framing device in international law, Gross and Ní Aoláin argue. GROSS & NÍ AOLÁIN, *supra* note 8, at 179. “The main traditional feature of the international legal system is its dichotomized division between times of peace and wartime, with the former constituting the norm and the latter the exception to that norm.” *Id.*

There is very little work on temporality in legal history, but this is changing. See Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329 (2010); Christopher Tomlins, *Revolutionary Justice in Brecht, Conrad, and Blake*, 21 LAW & LIT. 185 (2009) (discussing justice and temporality).

29. David Brody, *Time and Work During Early American Industrialization*, 30 LAB. & HIST. 5, 24–39 (1989); Thompson, *supra* note 17, at 56. See also GERHARD DOHRN-VAN ROSSUM,

business, and global affairs have affected cultural understandings of time. The creation of the telegraph and laying of transcontinental telegraph cables was an important step. According to an enthusiast in 1886, the telegraph “leaves no interval of time between widely separated places proportionate to their distances apart.”³⁰ But this shift was disconcerting. When individuals communicated across great distances, different parts of the day—noontime, nighttime, and morning—coincided. Even within a region, the clock did not impose uniform time, as localities had their own times, so that one o’clock in the afternoon might come to neighboring towns at different moments. A movement for a world “standard time” was hoped to bring predictability to a variability in clock time that flummoxed railroad schedules and military campaigns.³¹ The railroads first put standard time into effect, dividing the United States into different time zones. Not long before European representatives gathered at the Berlin Conference to divide parts of the globe into colonial empires, leaders from twenty-five countries met in 1884 in Washington, D.C., to divide the world into twenty-four time zones.³² An International Conference on Time in 1912 tried unsuccessfully to rationalize a calendar that remained chaotic. Two years later a German businessman proposed a system to divide the year into the weeks and months we now follow.³³ Meanwhile, in the 1890s, a machine was invented that could stamp an employee’s card when the worker entered and left the shop.³⁴ “Punctuality and the recording of work time did not originate in this period,” historian Stephen Kern writes, “but never before had the temporal precision been as exact or as pervasive as in the age of electricity.”³⁵ Once time was viewed as uniform and governed by the clock, Benedict Anderson has suggested, time helped knit together a common sense of national identity. Clock time “created a shared ‘simultaneity’ of experience that linked individuals together in an ‘imagined

HISTORY OF THE HOUR: CLOCKS AND MODERN TEMPORAL ORDERS 289–321 (Thomas Dunlap trans., 1996). Mark Smith takes the impact of clock time beyond the industrial context in SMITH, *supra* note 17.

30. STEPHEN KERN, *THE CULTURE OF TIME AND SPACE, 1880–1918* 11 (2d ed. 2003) (quoting Canadian engineer Sanford Fleming).

31. See LANDES, *supra* note 17, at 303–04; ROSSUM, *supra* note 29, at 347–50; SMITH, *supra* note 17, at 178–80; CHERYL A. WELLS, *CIVIL WAR TIME: TEMPORALITY AND IDENTITY IN AMERICA, 1861–1865* 7 (2005).

32. KERN, *supra* note 32, at 12.

33. *Id.* at 13–14.

34. *Id.* at 14–15.

35. *Id.* at 15; ROSSUM, *supra* note 29, at 289–321; SMITH, *supra* note 17, at 178–84; Eviatar Zerubavel, *The Standardization of Time: A Sociohistorical Perspective*, 88 AM. J. OF SOCIOLOGY 1, 5–6 (1982).

community' moving together through time."³⁶ For Anderson, the clock's rationality drove out other conceptions of time, such as religious conceptions of time.³⁷

In new scholarship, Thomas M. Allen argues, social historians "have demonstrated empirically that changes in time consciousness cannot be explained as a story of progress from a more primitive to a more rational organization of time."³⁸ This literature shows that

the homogeneity of time that supposedly results from the centrality of such instruments as clocks, watches, and calendars to modern life is only possible if technologies produce time by themselves Once we begin to ask what people did with technologies of time, and why they wanted such technologies, the homogeneity of modern national time begins to shatter into myriad fragments of heterogeneous, local, and transient temporal cultures.³⁹

Heterogeneous temporalities do not drive people apart, Allen argues, but instead "are themselves the threads out of which the fabric of national belonging has long been woven."⁴⁰

The heterogeneity of time helps us to see that, in Allen's words, time is not "a transhistorical phenomenon, an aspect of nature or product of technology existing outside of human society," but is "a historical artifact produced by human beings acting within specific historical circumstances."⁴¹ Allen argues that there is a need for new scholarship on the relationship between time and the nation that "attend[s] to the recursive and dynamic interactions between these two terms."⁴²

36. THOMAS M. ALLEN, *A REPUBLIC IN TIME: TEMPORALITY AND SOCIAL IMAGINATION IN NINETEENTH-CENTURY AMERICA* 6 (2008) (quoting BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983); BENEDICT ANDERSON, *IMAGINED COMMUNITIES* xii, 47–65, 67 (new ed. 2006)).

37. ANDERSON, *supra* note 36, at 24–27. According to Anderson, The idea of a sociological organism moving calendrically through homogenous, empty time is a precise analogue of the idea of the nation, which also is conceived as a solid community moving steadily down (or up) history. An American will never meet, or even know the names of more than a handful of his 240,000,000-odd fellow-Americans. He has no idea of what they are up to at any one time. But he has complete confidence in their steady, anonymous, simultaneous activity.

Id. at 26 (citation omitted).

38. ALLEN, *supra* note 36, at 10.

39. *Id.*

40. *Id.* at 11.

41. *Id.*; accord GREENHOUSE, *supra* note 18, at 1–4.

42. ALLEN, *supra* note 36, at 11.

The relationship between war and time is also complex. War is often experienced as altering history, but the idea that war breaks time into discrete segments masks continuities. A more satisfactory understanding of war, time, and law must bring a cultural history of time into the history of law and war. We need to view wartime, like linear time, as social time.

II

WAR · TIME

“Wartime” is important to American law, but as with other ways of categorizing time, we don’t tend to inquire about it. Wartime is treated as if it were a distinct feature of our world, as if warfare brought with it a particular temporality.⁴³ The impact of this way of categorizing time on our thinking goes unexamined.

One way of organizing war and time that historians employ is periodization. War is sometimes thought of as dividing time into one era and another. The Civil War, historian Cheryl A. Wells writes, “split nineteenth-century American time into two discrete units: antebellum and postbellum.”⁴⁴ War is so commonly thought to frame the beginning or ending of an era that periods thought of as peacetimes are often defined in reference to war. Between World War I and World War II, for example, are “the inter-war years,” often marked out as a discrete era.⁴⁵ The iconic status of World War II is reinforced in the way history after 1945 is often called “postwar,” in spite of the fact that nations would clash soon after in Korea, Vietnam, and elsewhere.⁴⁶

43. Common ideas about war and temporality are discussed *infra* at text accompanying footnotes 1–8.

44. WELLS, *supra* note 31, at 1. In an analysis of ideas about time during the Civil War, Wells argues that the war did not fully replace concepts of time held by nineteenth-century Americans. Instead, overlapping ideas about time, based on the clock, religion, the seasons, and the sun and moon, were held in the South and North before the war and after. *Id.* The war interceded with its own “battle time,” which “reconfigured antebellum temporalities.” *Id.* at 5. War was carried on in a complex “temporal web,” as “booming cannons superseded watches’ and clocks’ ability to order society, and God’s time became increasingly secular in the face of battle.” *Id.* Beyond the battlefield, many had to “abandon the modernity of the clock and embrace, at least during the war, task orientation.” *Id.* On the way the Civil War has been remembered, see THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE (Alice Fahs & Joan Waugh eds., 2004); DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).

45. See, e.g., WILLIAM J. NEWMAN, THE BALANCE OF POWER IN THE INTERWAR YEARS, 1919–1939 (1968) (examining what the authors call the “interwar period”); HOWARD ROFFMAN, UNDERSTANDING THE COLD WAR: A STUDY OF THE COLD WAR IN THE INTERWAR PERIOD 10 (1977).

46. Tony Judt’s epic work on Europe after World War II, for example, is simply titled “Postwar: A History of Europe Since 1945.” TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE

Dividing time into wartime and peacetime can be a convenient way to periodize history, but more is at stake in our constructions of wartime. Law is thought to vary depending on what time one is in. The ancient maxim is *inter arma silent leges*, roughly translated as “In time of war, law is silent.”⁴⁷ Most argue that law is, in fact, not *silent* during wartime, but it is generally assumed that law is *different* during wartime.⁴⁸ The arguments tend to be over whether the balance between rights and security in a particular war context is the right one, and whether departures from peacetime rules are useful or regrettable.⁴⁹

An example of the way the concept of “wartime” affects legal scholarship is Geoffrey Stone’s *Perilous Times: Free Speech in Wartime*, a leading work on rights and war.⁵⁰ Stone focuses on the negative impact of war on free speech rights. He argues that the history of law during discrete wartimes serves as a warning about future rights and security tradeoffs during future wartimes, in the hope that next time leaders might strike the right balance.⁵¹ Stone views

1945 (2005). Continuous U.S. engagement in war since 1945 is discussed in, for example, BREWER, *supra* note 11.

47. The phrase *Inter arma silent leges*, originally *Silent enim leges inter arma*, is attributed to Cicero. See THE YALE BOOK OF QUOTATIONS 156 (Fred R. Shapiro ed., 2006). According to Saby Ghoshray, “[s]ome of the more notable usages of the term have been found in a few Supreme Court decisions” including Justice Antonin Scalia’s opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004). Saby Ghoshray, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 711 (2008).

48. Specifically, the assumption is that, during war, the law accords less protection to civil liberties and more to security interests. See, e.g., LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS xii–xvi (2008); MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 5–7 (1990); Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 932–43 (1919); Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFTSRA L. REV. 795, 802–816 (2004). See also Epstein et al., *supra* note 1, at 5–9, 18–20, (citing adherents to the “crisis thesis”).

49. Many scholars decry the idea that law applies differently during war, but nevertheless tend to view the courts as acting differently during wartime. See GROSS & NÍ AOLÁIN, *supra* note 8, at 98–105; Epstein et al., *supra* note 1, at 5–9, 18–20 (citing examples). The contrary example of the Supreme Court protecting rights and limiting executive power in the context of war is the Civil War-era case *Ex Parte Milligan*, 71 U.S. 2 (1866), which Clinton Rossiter calls “the great exception.” CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 26–39 (rev. ed. 1976).

50. STONE, *supra* note 3.

51. Other writers, including Chief Justice William Rehnquist, also focus on times of war as a way to discern lessons for the future. REHNQUIST, *supra* note 3. Rehnquist focuses thirteen of his eighteen chapters on the Civil War. *Id.* Since Rehnquist, like Stone, intends to draw lessons from history for contemporary law, the very structure of the book makes clear that, for him, the Civil War provided the most significant lessons. The Civil War was followed by a long stretch of peacetime, “briefly interrupted in 1898 by the Spanish-American War,” but that conflict “lasted

wartimes as exceptional—the only times when the U.S. government has punished opposition to its policies. The federal government “prohibits political dissent *only* in wartime,” he writes.⁵² His narrative is constructed along a timeline in which the defining feature of particular episodes is war. Each of his chapters focuses on a particular war.⁵³

Stone draws support for this conceptualization especially from the experience of World War I. This era is, as Stone suggests, a particularly powerful example of the government tendency to overreact and repress liberty during war. For example, Congress passed the Sedition Act of 1918, “the most repressive legislation in American history,” during World War I.⁵⁴ The Act criminalized statements that were thought to endanger the war effort, including “disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or the naval forces of the United States, or the flag of the United States”⁵⁵ The only Sedition Act case to reach the Supreme Court was *Abrams v. United States*, involving Russian immigrants who protested the war by throwing leaflets off rooftops and out windows. The Supreme Court upheld their conviction, prompting an important dissent by Oliver Wendell Holmes and Louis Brandeis.⁵⁶ Earlier that year, the Court also upheld Charles Schenck’s conviction under the Espionage Act of 1917,⁵⁷ which, among other things, criminalized conspiracy “to cause insubordination . . . in the military and naval forces of the United States.”⁵⁸ The conspiracy of Schenck and his Socialist Party companions was to distribute leaflets calling for resistance to the draft and urging draftees to protect their constitutional rights.⁵⁹ This time Holmes wrote the majority opinion upholding Schenck’s conviction. In a

only a few months, and it was sufficiently short and one-sided as to pose little danger to civil liberties,” he writes. *Id.* at 171. In the remaining chapters, Rehnquist discusses civil liberties during World War I and World War II. The book’s scope is limited to declared wars, Rehnquist writes, because “the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war.” *Id.* at 218. *See also* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. REV. 273 (2003) (discussing the way courts learn from the experience of past wars).

52. STONE, *supra* note 3, at 5.

53. Chapter one is a bit ambiguous, focusing on, “The ‘Half War’ with France” in the late eighteenth and early nineteenth centuries. *Id.* Remaining chapters follow the trajectory of iconic American wartimes: the Civil War, World War I, World War II, the Cold War, and Vietnam. *Id.*

54. *Id.* at 185.

55. Sedition Act of 1918, 65 Pub. L. No. 150, 40 Stat. 553, 553 (1918).

56. *Abrams v. United States*, 250 U.S. 616, 627–28 (1919).

57. *Schenck v. United States*, 249 U.S. 47, 48–49, 53 (1919).

58. Espionage Act of 1917, 64 Pub. L. No. 24, ch 30, § 3, 44 Stat. 217, 219 (1917).

59. *Schenck*, 249 U.S. at 49–51.

famous passage, he wrote that the nature of free speech rights differed depending on the time they were invoked: “When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right.”⁶⁰

Civil liberties violations during World War I are, for Stone and other scholars, evidence of wartime’s impact on American law. Wartimes are contrasted with non-wartimes, which do not appear in the narrative, and which are assumed to be the “normal times” against which times of military engagement can be compared. Important to Stone’s argument that wartime has generated the greatest threat to civil liberties is not simply the compelling experience, outlined in his chapters, of those subject to American power during wars, but also an assumption that wartime is an exceptional time. To underscore the exceptional nature of war, he calculates that peacetime makes up “roughly 80 percent of our history”⁶¹ When it comes to the twentieth century, however, in Stone’s own narrative, war is nearly seamless from the onset of World War II through Vietnam.⁶² And earlier in the century, Stone can only present war as exceptional by ignoring the “small wars” in Haiti, the Philippines, and elsewhere.⁶³ He retains the notion of distinct time zones (wartime and peacetime), even though peacetime seemed increasingly elusive

60. *Schenck*, 249 U.S. at 52 ; cf. STONE, *supra* note 3, at 146–60, 184–96, 198–211. See also PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* (1980).

Justice Holmes retained the idea of war’s temporality in *Abrams*, as he and Justice Brandies began a series of dissents in which they would lay out a set of ideas that became central to First Amendment jurisprudence. In his *Abrams* dissent, Holmes wrote that government “power undoubtedly is greater in time of war than in time of peace But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same.” 250 U.S. at 627–28. In providing the occasion for Holmes to articulate a more robust First Amendment vision, perhaps war both restricted rights and laid the basis for their later expansion. Mark Tushnet makes a similar argument about *Korematsu*. Mark Tushnet, *supra* note 51. Compared to the traditional image of a pendulum swinging from protection of rights in peacetime and security in wartime, the development of a more robust rights jurisprudence in reaction to war suggests that the pendulum has a more complicated path.

61. STONE, *supra* note 3, at 5. Mark Brandon comes to the opposite conclusion, finding that military engagement has occurred through “80 percent of the life of the nation.” Brandon, *supra* note 7, at 11.

62. STONE, *supra* note 3, at 235–526 (narrating from World War II through Vietnam).

63. See MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002); PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES* (2006); MARY RENDA, *TAKING HAITI: MILITARY OCCUPATION AND THE CULTURE OF U.S. IMPERIALISM* (2000).

in the twentieth century.⁶⁴

I should emphasize that I agree with Stone's important observation that during wars there has been "a mood of fear and anxiety that can readily explode into intolerance and vigilantism," and that during the wars Stone discusses, "national political leaders went out of their way to inflame these responses by promoting a climate conducive to repression."⁶⁵ But it is important to examine war's temporality as a framing device in this literature,⁶⁶ especially in light of the assumption that war's impact is confined to exceptional states, and is not part of the "normal" course of American life. The idea of discrete wartimes continues to do important work for Stone and others well into a century when the dividing lines between times of war and peace became much more difficult to see.

A. When Was World War II?

For the formulation of wartime-as-exceptional-time to work, war must have temporal limits. One way to place a war neatly in time would be to use the date it was declared and the date an armistice was signed. The last time the United States declared war was during World War II. All military engagements since that time, and many before it, happened without the benefit of a congressional declaration of war.⁶⁷ Since World War II, congressional ratification of military action and funding for wars are often seen as the functional equivalent of a formal declaration, as with the Vietnam-era Gulf of Tonkin Resolution, but this kind of congressional action often happens after military action is underway.⁶⁸ Generally, definitions of "wartime" tend to be

64. In contrast to Stone, other scholars view the impact of war as continuous rather than episodic. See *infra* at Part II.D.

65. STONE, *supra* note 3, at 535.

66. On the importance of frames to our understanding of the world we occupy, see IRVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). Todd Gitlin explains: "Frames are principles of selection, emphasis, and presentation composed of little tacit theories about what exists, what happens, and what matters." TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT* 6 (1980).

67. FRANCIS WORMUTH & EDWIN BROWN FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 55 (2d ed. 1989).

68. See GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* 161 (1986); GARY HESS, *PRESIDENTIAL DECISIONS FOR WAR: KOREA, VIETNAM, AND THE PERSIAN GULF* 225-26 (2001). On congressional ratification of post-9/11 military action, see for example, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005).

circular. According to *The Oxford Essential Dictionary of the U.S. Military*, a wartime is “a period during which a war is taking place.”⁶⁹

Even an iconic war like World War II has been hard to locate firmly in time.⁷⁰ This issue arose in a murder case on an Army base in California in 1949. John Lee, a prisoner at the U.S. Army Disciplinary Barracks at Camp Cooke, and three others, were charged with attacking and killing another

69. *Wartime*, in THE OXFORD ESSENTIAL DICTIONARY OF THE U.S. MILITARY (2001). It seems important to define “war,” but the definition of war has become more ambiguous. In *The Prize Cases*, the U.S. Supreme Court defined war as simply “[t]hat state in which a nation prosecutes its right by force.” 67 U.S. (2 Black) 635, 666 (1863). Traditionally, an essential component of a definition of war was that it was between states. But the state has dropped out of attempts to define war. For example, *The Oxford Companion to American Military History* defines war by referring not to violence between nations, but to “organized violent activity, waged not by individuals but by [people] in groups.” THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 773–75 (2000). Ambiguity in the definition of war reinforces the ambiguity in the definition of wartime.

For Hedley Bull, the involvement of the state affects the legitimacy of a conflict, but not whether it is a “war.” HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (3d ed. 2002). He describes war this way:

War is organised violence carried on by political units against each other. Violence is not war unless it is carried out in the name of a political unit; what distinguishes killing in war from murder is its vicarious and official character, the symbolic responsibility of the unit whose agent the killer is. Equally, violence carried out in the name of a political unit is not war unless it is directed against another political unit

We should distinguish between war in the loose sense of organised violence which may be carried out by any political unit . . . and war in the strict sense of international or interstate war, organised violence waged by sovereign states. Within the modern states system only war in the strict sense, international war, has been legitimate; sovereign states have sought to preserve for themselves a monopoly of the legitimate use of violence.

Id. at 178–79.

Definitions of war have turned on the nature of adversaries (e.g. state or non-state groups), and the objectives of those adversaries (e.g. territorial conquest or defense). As the twentieth century evolved to reveal continuums in these categories, the implements of war may have become more important. By mid-century, troops and machine guns had lost their defining power, and instead airpower was more central to whether military activity seemed like a war. By the early twenty-first century, catastrophic bombing, in itself, did not signal war’s presence (e.g. the 1993 World Trade Center bombing), but the use of airplanes in the September 11 attacks helped fuel the perception that the nation was at war. See Elaine Tyler May, *Echoes of the Cold War: The Aftermath of September 11*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 38–40 (Mary L. Dudziak ed., 2003).

On the history of U.S. airpower and the way it has been imagined, see MICHAEL S. SHERRY, THE RISE OF AMERICAN AIR POWER: THE CREATION OF ARMAGEDDON (1987).

70. In one sense, “war time” had a very specific meaning during World War II. President Franklin Delano Roosevelt instituted year-long “daylight savings time” in 1942, calling it “War Time.” The first introduction of daylight savings time in the United States had been in 1918, to conserve resources during World War I. Stephen Young, *24/7: A Resource Guide to the Law of Time Standards*, LLRX, June 3, 2002, <http://www.llrx.com/features/time.htm> (last visited Oct. 2, 2010).

inmate, Charlie Taylor, with knives they had made using pipes and other materials at hand. They were convicted following a court martial and sentenced to death, but Lee's sentence was later reduced to life in prison at Alcatraz.⁷¹ The difficulty in the case was that Article 92 of the Laws of War provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."⁷² Lee brought a *habeas corpus* challenge, arguing that the date of the crime, June 10, 1949, was a time of peace, depriving the court-martial of power over the case.⁷³ The case would turn on whether June 1949 was wartime or peacetime.

This kind of issue had arisen before. During the Boxer Rebellion in China, Private Fred Hamilton was sentenced to life at hard labor for the killing of Corporal Charley Cooper at Camp Reilly, Peking, China, on December 23, 1900.⁷⁴ Hamilton challenged the court martial, arguing that there was no jurisdiction under the laws of war, because a court martial was only appropriate "in time of war, insurrection or rebellion" ⁷⁵ The case turned on whether a time of war existed on the date of the crime. There had been no declaration of war between the United States and China, yet the court found that a state of war existed

by reason of the occupation of Chinese territory by the large military force of this government, under authority of the Department of War, the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government there engaged on a war basis⁷⁶

The jurisdiction of the court martial was sustained.⁷⁷

71. Lee v. Madigan, 248 F.2d 783 (9th Cir. 1957); *Four Sentenced to Die in Camp Cooke Murder*, L.A. TIMES, Sept. 15, 1949, at 1. Sources I have found so far do not disclose whether the sentences of the other inmates were also reduced. The others did not join Lee in his *habeas corpus* action.

72. Lee v. Madigan, 358 U.S. 228, 229–30 (1959); Article of War 92, 10 U.S.C. § 1564 (1946 ed., Supp. IV).

73. Lee, 358 U.S. at 229–30. The leading work on Cold War era courts martial is ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* (2005).

74. Hamilton v. McClaughry, 136 F. 445, 446–47 (D. Kan. 1905).

75. *Hamilton*, 136 F. at 447.

76. *Id.* at 451.

77. *Id.* See Boot, *supra* note 63, at 97–98, 336–37; Eileen P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942* (2001). *Hamilton* was relied on in *Ex parte Johnson*, 3 F.2d 705 (D. Kan. 1925), which dismissed a similar challenge to a court martial of a soldier who was in the state of Chihuahua, Mexico, under

Lee v. Madigan would seem to be more straightforward, because the relevant war—World War II—had been declared. The case would turn on when World War II ended. What were the possibilities? Germany surrendered on May 8, 1945. Japan announced its decision to surrender on August 14, 1945, and surrender documents were officially signed on September 2, 1945. From these events, it would seem clear that the war was over in 1945, as most historians have assumed.⁷⁸ But on December 31, 1946, President Truman proclaimed the cessation of hostilities, noting that “a state of war still exists”⁷⁹ If a state of war continued, then what had changed to justify a cessation of hostilities? It was “in the public interest” the president suggested, “to declare, that hostilities have terminated.”⁸⁰ As late as 1951, “as a legal matter,” the nation was still in a state of war against Germany. Truman called for an end to this state of war in July 1951, but stressed that this would not affect the occupation of Germany.⁸¹ A declaration of peace with Japan occurred on April 28, 1952.⁸²

The various endings to World War II left the Court in something of a muddle in *Lee v. Madigan*. And Congress made it murkier, terminating some Articles of War in 1947, but not all.⁸³ Article 92 was not repealed. Hence, the government argued that the nation was “not then ‘in time of peace’ for the purposes of Article 92.”⁸⁴ In a 1948 case, *Ludecke v. Watkins*, the Court held that ending a state of war was a “political act,” and courts must defer to the

the command of General John Pershing, to pursue Pancho Villa. Similarly, in *United States v. Ayers*, 4 C.M.A. 220 (1954), the U.S. Court of Military Justice held that a “time of war” existed in Korea in December 1950, in spite of the absence of a declaration of war. In *United States v. Anderson*, 17 C.M.A. 588 (1968), the U.S. Court of Military Justice held that the United States was in a “time of war” in Vietnam on November 3, 1964, for the purpose of the offense of desertion in violation of Article 85, Uniform Code of Military Justice. See generally Joseph Romero, *Of War and Punishment: “Time of War” in Military Jurisprudence and a Call for Congress to Define its Meaning*, 51 NAVAL L. REV. 1 (2005).

78. See, e.g., DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* 798–851 (1999) (dating the end of World War II in 1945).

79. Cessation of Hostilities of World War II, 1946 Pub. Papers 514 (Dec. 31, 1946).

80. *Id.*; President Harry S. Truman, *President’s Proclamation*, N.Y. TIMES, Jan. 1, 1947, at 1.

81. Letter to the President of the Senate Recommending Legislation to Terminate the State of War with Germany, 1951 Pub. Papers 378 (July 9, 1951). Occupation powers stemmed from the conquest of Germany, rather than an ongoing state of war.

82. Statement by the President on the Termination of the State of War With Japan, 1952–1953 Pub. Papers 302 (Apr. 28, 1952).

83. See H. R. Rep. No. 2682, 79th Cong., 2d Sess. (1947); H. R. Rep. No. 799, 80th Cong., 1st Sess. (1947); S. Rep. No. 339, 80th Cong., 1st Sess. (1947).

84. *Lee v. Madigan*, 358 U.S. 228, 230 (1959).

judgment of other branches.⁸⁵ In *Woods v. Cloyd Miller*, decided the same year, the Supreme Court upheld a rent-control law as an appropriate exercise of Congress's war-related powers, even though it was passed in 1947, after the fighting had ended, and it addressed a *post-war* housing crisis.⁸⁶ The Court found that the war power "does not necessarily end with the cessation of hostilities," but "includes the power 'to remedy the evils which have arisen from its rise and progress' and continues for the duration of that emergency."⁸⁷ Prohibition laws were upheld after World War I under a similar rationale.⁸⁸

But these cases did not drive the Court's decision in *Madigan*, Douglas argued. "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another."⁸⁹ The Court's job was "to determine whether 'in the sense of this law' peace had arrived."⁹⁰ While the Court in previous cases had found the war powers to extend long beyond the dates of surrender, *Madigan* concerned "a grant of power to military tribunals to try people for capital offenses," unlike cases on regulatory powers.⁹¹

85. 335 U.S. 160, 169 (1948) (citing *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70 (1869)). In *Ludecke*, a German national was detained under the Alien Enemy Act of 1798 after Germany had surrendered, but a peace treaty had not yet been signed. *Id.* at 162–63. Ludecke contended that the President's war powers under the Act did not "survive cessation of actual hostilities," and so he should be released. *Id.* at 166. The Court found, however, that "[w]ar does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops." *Id.* at 167. The end of war was a political question, not a question for judges who did not have the "technical competence or official responsibility" for this. *Id.* at 170.

86. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141–44 (1948).

87. *Id.* at 141 (quoting *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U.S. 146, 161 (1919)). The district court in *Woods* struck down Title II of the Housing and Rent Act of 1947, finding it to be unconstitutional. 333 U.S. at 140–41. The plaintiffs in *Woods* had argued that if war power was not contained within wartime, the power would be too broad, since "the effects of war under modern conditions may be felt in the economy for years and years . . ." *Id.* at 143–44. But for the Court, there was a "direct and immediate" relationship between the housing crisis and war, so Congress's war power had been properly invoked. *Id.* at 144.

88. In *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919) and *Ruppert v. Caffey*, 251 U.S. 264 (1920), the Court held that liquor regulation under the War-Time Prohibition Act was constitutional after World War I hostilities had ended. Finding continuing war-related power in *Hamilton*, the Court suggested that "[t]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." 251 U.S. at 161. See also Note, *Prohibition and the War Power*, 33 HARV. L. REV. 585 (1920).

89. 358 U.S. at 231.

90. *Id.* (citing *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 69 (1869)).

91. 358 U.S. at 231–32. Douglas distinguished *Woods* and *Hamilton* on the basis that "[t]hese cases deal with the reach of the war power, as a source of regulatory authority over national affairs, in the aftermath of hostilities," while *Madigan* concerned courts martial for

Assuming that Congress was “alive to the importance” of constitutional guarantees to a fair trial when it enacted Article 92, the Court gave the Article a “common sense” reading, holding that the date of the crime was a “time of peace” as those words were used in the Article.⁹² In spite of the nod to *Ludecke*, Douglas tried to wring out of Article 92 a reading that comported with his view of common sense.⁹³

World War II’s beginning, at least for the United States, would seem to be clearer than its ending. December 7, 1941, was “the day that will live in infamy,” when Japan attacked Pearl Harbor. But there was also a “War before the War,” as political scientist Edward S. Corwin has put it.⁹⁴ He notes the “problem of dating” the origins of conflict in his classic work *Total War and the Constitution*, finding the “first, faint impulse” toward U.S. participation in World War II in 1934.⁹⁵

Constitutional historian Paul Murphy also recognized the fluidity of World War II in *The Constitution in Crisis Times*. His chapter “Total War Crisis and Its Impact on the Constitution” opens in 1936, as President Franklin Roosevelt “quietly summoned to the White House the director of the Federal Bureau of Investigation, J. Edgar Hoover,” as the “intensifying European situation” heightened concerns about national security and domestic subversion.⁹⁶ Congress joined the fray, first with the Dies Committee on un-American activities in the House, created in May 1938, and passing the Hatch Act, “embodying the first anti-Communist prohibition in federal employment” in August 1939.⁹⁷ For Murphy, these developments were part of a domestic “security drama of the years from 1938 to 1947,” which was in part a standoff between Congress and the White House, as security was politicized.⁹⁸ But domestic security problems during these years “were minor when compared

capital offenses. *Id.* at 232.

92. 358 U.S. at 235–36.

93. The problem of the legal end to war has reappeared in post-9/11 scholarship. See John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT’L & COMP. L. REV. 222 (2004); John M. Hagan, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1328 (2004); Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L. SECURITY L. & POL’Y 53 (2006). The ending of war under international law is discussed in L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 82–86 (2d ed. 2000).

94. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 22 (1947).

95. *Id.* at 22–34.

96. PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918–1969* 213 (1972).

97. *Id.* at 213–16.

98. *Id.* at 218.

with the massive challenges of the international situation of the times.”⁹⁹ Though the “World War II crisis” would culminate in the years between 1941 and 1945, it began to play out in the late 1930s.¹⁰⁰ David Bixby also shows that Germany’s militarization affected American legal thinkers well before Pearl Harbor and before Germany overtook Poland in 1939, as seen in the arguments, made by some critics of President Roosevelt’s 1937 court-packing plan, that independent courts protected American democracy from the majoritarian excesses evident in German Nazism.¹⁰¹

These examples illustrate that even for the twentieth century’s most iconic American war, there is an uneasy and uncertain relationship between *wartime* and war *power*. War provides the occasion for use of war powers, but it is hard to contain war within “wartimes.” With no clear temporal boundary, the imaginary pendulum does not return to center.

B. When Was Gobitis?

The slipperiness of World War II’s beginning and ending complicates arguments about the way war affects rights. Simply assuming that the war’s impact on American life was confined between the dates of the bombing of Pearl Harbor and Japan’s surrender can lead to confusion. Using Pearl Harbor as the starting point for World War II leads some to categorize one important civil liberties case, *West Virginia State Board of Education v. Barnette* (1943),¹⁰² as a wartime case, and another, *Minersville School District v. Gobitis* (1940),¹⁰³ as a non-wartime case.¹⁰⁴ In *Gobitis*, the Supreme Court upheld the constitutionality of a compulsory flag salute requirement. The plaintiffs, Lillian and William Gobitas,¹⁰⁵ refused to salute the flag because their Jehovah’s Witness religious beliefs forbade them from doing so. The Court held that the children’s expulsion from public school was not only acceptable, but would

99. *Id.*

100. *Id.* at 218–19, 246.

101. David Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 746–53 (1981).

102. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

103. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

104. For example, in Epstein et al.’s important quantitative study, war/crisis-related cases begin with Pearl Harbor and end with V-J day, leaving cases outside this timeframe as the non-wartime cases against which cases within these dates are compared. Epstein et al., *supra* note 1, at 46–47.

105. Lillian and William’s last name is misspelled in court documents. Although “Gobitis” is in the case name, the correct spelling of their name is “Gobitas.” SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 19 (2000).

also protect important national interests. Just three years later, the Court reversed itself, finding that a compulsory flag salute requirement violated the First Amendment.¹⁰⁶ The Court's change of heart is sometimes attributed to timing: peacetime for *Gobitis* and wartime for *Barnette*.¹⁰⁷ Justice Robert Jackson, writing for the majority in *Barnette*, explicitly referred to the international context, arguing that restricting the freedom to dissent could undermine democracy itself, leading to the "unanimity of the graveyard."¹⁰⁸ The anti-totalitarian rhetoric of his opinion, and the date of the case itself, falling within the dates of a declared war, lead scholars to cite *Barnette* as an example of the way rights can expand in wartime.¹⁰⁹

A conception of the dangers to the nation in a global context is central to *Gobitis* as well as *Barnette*, however. Both cases invoke ideas about national security. Justice Felix Frankfurter, who wrote the majority opinion in *Gobitis* and dissented in *Barnette*, was concerned about the survival of democracy in a dangerous world, just as Justice Jackson was. The flag salute fostered unity, Frankfurter wrote in *Gobitis*, and "[n]ational unity is the basis of national security." Therefore the compulsion of national unity was within the government's power.¹¹⁰

Shawn Peters and others have demonstrated the impact of the war on the Court as it grappled with *Gobitis*.¹¹¹ The case was argued on April 25, 1940. By then, Germany had overrun Poland, Norway, and Denmark. Adolf Hitler launched an offensive against Belgium, the Netherlands, and Luxemburg on May 10, followed by the Battle of France. The Court decided *Gobitis* on June

106. *Gobitis*, 310 U.S. 586; *Barnette*, 319 U.S. 624.

107. See Geoffrey Stone, *When Are You Going to Indict the Seditiousists?*, 2 INT'L J. CONST. L. 334, 366 (2004).

108. 319 U.S. at 641. Robert Tsai suggests that Jackson drew upon President Roosevelt's idea of the "Four Freedoms," and that Roosevelt's influence was important to the outcome of the case. Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L.R. 363, 363-443 (2008).

109. Mark A. Graber, *Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 96 (Mark Tushnet ed., 2005). Richard A. Primus argues that the change from *Gobitis* to *Barnette* can be explained by the Court's concerns about Nazism in *Barnette*, a concern he implies was new in that case. RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 197-99 (1999). See also Epstein et al., *supra* note 1, at 46-47. Other scholars, in contrast, view *Gobitis* as affected by the context of war. LAWRENCE FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 282-84 (2002); MURPHY, *supra* note 96, at 197; PETERS, *supra* note 105, at 48, 52-55, 69-70; Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257, 266-74 (1977).

110. 310 U.S. at 595.

111. PETERS, *supra* note 105, at 48, 52-55, 69-70; Danzig, *supra* note 109, at 266-74.

3, eleven days before the Germans marched into Paris. France surrendered on June 25. The American public was consumed with this news.¹¹² Frankfurter was overwhelmed with concern about the war. “Hardly anything else has been on my mind,” he wrote to President Roosevelt.¹¹³ He tied the international crisis to his work on the *Gobitis* opinion, and “privately touted the notion that the Supreme Court had an obligation to consider the critical importance of national security when it weighed the constitutional issues at stake” in the case.¹¹⁴ Some Supreme Court law clerks, critical of the outcome, referred to *Gobitis* as “Felix’s Fall of France Opinion.”¹¹⁵ For Frankfurter, security ultimately required narrowing rights. For Jackson in *Barnette*, in contrast, security was enhanced by expanding rights. It is not that one case was affected by wartime, and one was not. Instead, the context of war weighed on the justices as they decided both cases. *Gobitis* and *Barnette* represent different conceptions of how to safeguard national security in a dangerous world.

Through the debates of the 1930s, 40s, and 50s, judges, legislators, litigants and others often conceptualized rights in terms of national security.¹¹⁶ Rights could expand, contract, and change in ways that aided war-related governance or enhanced national security. The example of the flag salute cases signals a broader problem: when we assume that national security is at issue only in temporally confined wartimes, we miss the more pervasive impact of military conflict on American law.

112. KENNEDY, *supra* note 78, at 426–27, 438–43.

113. PETERS, *supra* note 105, at 55.

114. *Id.* at 54.

115. *Id.* at 65.

116. Another example is the importance of Cold War foreign relations to civil rights reform, including *Brown v. Board of Education*. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). The Justice Department argued in its *amicus* brief in *Brown* that “the existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries.” Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (No. 8), 1952 WL 82045. Thousands of State Department documents from the era detail the way race discrimination harmed the U.S. image around the world, undermining the American Cold War mission. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 104–06 (2000); Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. OF AM. HIST. 32 (2004). *See also* THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 45–48 (2001). Scholarship on civil rights and foreign relations has been pulled back into the time zone analysis. *See, e.g.*, Graber, *supra* note 109; PHILIP KLINKNER AND ROGERS SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999). It is more accurate to see this work as a challenge to the idea that war/security-related impacts are limited to time zones rather than as a reinforcement of it.

C. War and Equality Rights

The difficulty of configuring war in time also affects scholarship on equality rights and war. Equality has sometimes been part of the classic wartime/swinging-pendulum analysis, with equality rights contracting during war. The most important example is the internment of persons of Japanese heritage during World War II. Justified at the time on national security grounds, the internment program was later widely condemned.¹¹⁷ In 1988, Congress called it a “fundamental injustice,” and provided reparations for internees.¹¹⁸ In 1944, when the Court upheld the relocation program in *Korematsu v. United States*, the ruling provoked passionate dissents.¹¹⁹ However, a year earlier the first Supreme Court opinion on the program, *Hirabayashi v. United States*, which upheld a conviction for violating a curfew order, was unanimous.¹²⁰ The standard analysis of these cases relies on the fact that they were decided during wartime, and that the pendulum swung away from rights and toward security.¹²¹

Equality rights complicate the traditional rights/security story, however, because sometimes equality rights increased during war. For example, the rights of African Americans improved during World War II, in spite of continuing discrimination.¹²² Similarly, President Woodrow Wilson came to embrace woman suffrage during World War I, arguing to Congress that it must consider “the unusual circumstances of a world war in which we stand and are judged . . . in the view of all nations and peoples.”¹²³

117. *E.g.*, PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1968).

118. Civil Liberties Act of 1988, 50 App. U.S.C. §§ 1989–1989(d) (2006) (“Restitution for World War II Internment of Japanese-Americans and Aleuts”).

119. 323 U.S. 214 (1944).

120. 320 U.S. 81 (1943).

121. *E.g.*, IRONS, *supra* note 117; TENBROEK, ET AL., *supra* note 117.

122. For example, during World War II, President Roosevelt responded to pressure from civil rights leaders and issued an executive order calling for nondiscrimination in defense industries and creating the Committee on Fair Employment Practices. *See* MERL E. REED, *SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT’S COMMITTEE ON FAIR EMPLOYMENT PRACTICE 1941-1946* (1991). *See also* DANIEL KRYDER, *DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II* 53–66 (2000); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* (2003); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1986); *WORLD WAR II AND MEXICAN AMERICAN CIVIL RIGHTS* (Richard Griswold del Castillo ed., 2008).

123. *Wilson Makes Suffrage Appeal but Senate Waits*, N.Y. TIMES, Oct. 1, 1918, at 13. *See also* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 174 (2009). On war and the exclusion of women from military service as

As a general rule, scholars who argue that war has provided an occasion for the expansion of rights work with the same background assumptions that inform the civil liberties literature: the idea that American history is divided into time zones (wartime/peacetime), that wartime is inevitably succeeded by peacetime, and that movement across these temporal markers triggers changes in the rights environment.¹²⁴ But scholars who argue that World War II enhanced equality rights periodize the war in different ways. For example, Michael Klarman sees World War II as pivotal to civil rights reform, but describes the war era as spanning 1940 to 1950.¹²⁵ Philip Klinkner and Rogers Smith argue that the “modern civil rights era,” occurred “in the wake of World War II and during the Cold War, including its ‘hot’ Korean and Vietnamese phases,” suggesting that the era of war-induced change was from December 1941 to November 1968, ending in the middle of the war in Vietnam.¹²⁶

The difficulty of periodizing war’s impact illustrates an enduring problem in the war and rights literature: what to make of the Cold War. Is the Cold War a “war” that triggers the rights/security pendulum?¹²⁷ Most historians see the period as developing in the aftermath of World War II, but different in important ways from the World War II years. During the Cold War, civil rights advances were clearly made, but civil right politics were also constrained by Cold War politics.¹²⁸

The puzzle of the Cold War might help us to question whether, at least since the onset of World War II, it makes sense to think of American history as divided into time zones (wartime/peacetime) at all. And perhaps Klinkner and Smith’s effort to draw the years 1941 to 1968 together into one era of change helps to illuminate something more fundamental. Historian Michael Hogan and others have shown that the post-World War II years were a crucial period of

an impediment to gender equality, see LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* (1999); Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96 (2008).

124. See, e.g., KRYDER, *supra* note 122, at 3–4, 251; NALTY, *supra* note 122, at 4.

125. MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 171–235 (2004).

126. Klinkner & Smith, *supra* note 116, at 4.

127. Most free speech/civil liberties writers appear to treat it that way. See, e.g., STONE, *supra* note 3. For an extended discussion of the way the Cold War figures in scholarship on war and individual rights, see Mary L. Dudziak, *Unlimited War and Social Change: Unpacking the Cold War’s Impact* (USC Law Legal Studies Paper No. 10–15), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1676460.

128. See Dudziak, *COLD WAR CIVIL RIGHTS*, *supra* note 116, at 12–13.

national security state building.¹²⁹ Rather than imagining a (reasonably) static state structure episodically impacted by war, Klinkner and Smith are pointing to the moment in American history when the state became decidedly militarized, in a national security context that—at least for a time—facilitated civil rights reform.¹³⁰

In spite of the temporal puzzles in the scholarship, scholars draw upon works of equality during the Cold War as support for the proposition that “wartime” is a time during which some rights are enhanced, reading it back into the traditional time zone analysis, except that the pendulum is thought to swing both ways during war.¹³¹

D. Endless War

Although scholarship on war and rights tends to view war as confined to particular time zones, some scholars see the relationship of the state to war as continuous, rather than episodic. For example, Mark Brandon argues that war has had a persistent impact on the American constitutional order, suggesting that war takes up “80 percent of the life of the nation.”¹³² This assessment makes Brandon’s understanding of American history the opposite of Geoffrey Stone’s, who suggests that “roughly 80 percent of our history” has been peacetime.¹³³ Consistent with Brandon, a Congressional Research Service Report, included as an appendix to this Essay, finds that during the twentieth century there were only six years when the United States did not employ military force overseas.¹³⁴ Scholarship on American military engagements illustrates that U.S. involvement in military conflict overseas extends throughout the twentieth century and is not confined to identifiable

129. MICHAEL J. HOGAN, *A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945-1954* (1998).

130. On the broad impact of war and militarization on American culture and politics during this era, see MICHAEL S. SHERRY, *IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S* (1995). See also PAUL BOYER, *BY THE BOMB’S EARLY LIGHT: AMERICAN THOUGHT AND CULTURE AT THE DAWN OF THE ATOMIC AGE* (1995); ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (rev. ed. 2008).

131. See Graber, *supra* note 109 (relying on Klinkner & Smith, *supra* note 116).

132. According to Brandon, since the Revolutionary War, “armed forces of the United States have participated in eighty-four distinct, significant engagements In aggregate, these wars and actions have occurred in 182 of the last 228 years since 1776.” Brandon, *supra* note 7, at 11. Only six of these wars were declared. *Id.*

133. STONE, *supra* note 3, at 5.

134. RICHARD F. GRIMMETT, *CONG. RES. SERV., RL 32170, MILITARY CONFLICTS OF THE UNITED STATES DURING THE TWENTIETH CENTURY: INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2009* (2009). An excerpt from this report appears as an Appendix to this paper.

wartimes.¹³⁵ In addition, historian Michael Sherry emphasizes the importance of militarization in American politics and culture since the 1930s.¹³⁶ A body of scholarship argues that war has had a persistent impact on the state, particularly in the twentieth century, and that the impact has increased over time.¹³⁷

As Paul Kramer puts it, the twentieth century began with a war in the Philippines “that refused to end by American command.”¹³⁸ The United States had a duty to bring American ideals to other lands “until the empire of our principles is established over the hearts of all mankind,” Senator Albert J. Beveridge of Indiana argued in 1898.¹³⁹ The project of American empire would keep American forces in the Philippines, fighting an independence movement, long after the Spanish American War was declared to be over.¹⁴⁰ From the turn of the century until the United States entered World War I, American forces were also deployed in Cuba, Panama, Nicaragua, Mexico, Haiti, and the Dominican Republic.¹⁴¹

All American wars in the twentieth century were fought overseas, so that the direct confrontation with battle experienced during the Revolutionary War and the Civil War was absent for most Americans. Because of this, during World War I and World War II, the Wilson and Roosevelt administrations worked to engage the American people with war.¹⁴² Treasury Secretary Henry

135. In recent years, scholarship emphasizing the role of war in American history, including the impact of war on state-building, has proliferated. *E.g.* FRED ANDERSON & ANDREW CAYTON, *THE DOMINION OF WAR: EMPIRE AND LIBERTY IN NORTH AMERICA, 1500–2000* (2005); BOOT, *supra* note 63; BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* (1994); SHAPED BY WAR AND TRADE, *supra* note 9; SPARROW, *supra* note 9. *See also* KRAMER, *supra* note 63; RENDA, *supra* note 63.

136. *See* SHERRY, *supra* note 127.

137. *Id.*; Martin Shefter, *International Influences on American Political Development, in* SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT (Ira Katznelson & Martin Shefter eds., 2002).

138. KRAMER, *supra* note 63, at 1.

139. *Id.*

140. *Id.* On American empire, see FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); Christina Duffy Burnett, “*They say I am not an American...*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L. L. 659 (2008).

141. BOOT, *supra* note 63, at 129–204. On Haiti, see RENDA, *supra* note 63. In addition, U.S. courts defined the Boxer Rebellion in China in 1900 as a U.S. wartime. *Hamilton v. McLaughry*, 136 F. 445, 451 (D. Kan. 1905). For American veterans, war was ongoing. Criteria for membership in the Veterans of Foreign Wars includes conflicts during most years of the twentieth century. *See VFW Eligibility Information, VETERANS OF FOREIGN WARS* (Oct. 2005), <http://www.vfw.org/resources/pdf/eligibility05.pdf>. *See also* Dudziak, *supra* note 127.

142. *See* BREWER, *supra* note 11, at 55–57, 98–104. During World War II, President Roosevelt created the Office of War Information, while the less successful Committee for Public Information, also known as the Creel Committee, operated during World War I. ALLEN M.

Morgenthau sought to “use *bonds* to sell the *war*,” during World War II, “rather than *vice versa*.”¹⁴³ There were more efficient ways to raise revenue than war bonds, Morgenthau explained in a radio address, but he hoped to give every American “a chance to have a financial stake in American democracy—an opportunity to contribute toward the defense of that democracy.”¹⁴⁴ Bonds were “the spearhead for getting people interested in the war.”¹⁴⁵ In addition to war bonds, victory gardens and even the income tax were promoted in part to enable citizens to feel that they were personally engaged in the war effort.¹⁴⁶ The experience of war for most Americans came from their everyday experiences thousands of miles from the combat zone: their civic engagement, their exposure to war-related popular culture (including radio and newsreels, and Hollywood films), and their relationships with friends and family who were deployed.¹⁴⁷ The cultural production of wartime was, in part, a government project.¹⁴⁸

As the century proceeded, technologies of warfare would first engage the American people with war and then would help to isolate them from the experience of war. The Cold War and the nuclear arms race brought national security into American homes, as children were taught to “duck and cover” in the event of a nuclear blast, and families stocked personal bomb shelters.¹⁴⁹ This intimacy with war would fade by the last decades of the twentieth century. Military planners took the lessons of the war in Vietnam to be that the nation could not fight a prolonged war without support at home. One way to address that issue was to encourage support through a public relations campaign, as in

WINKLER, *THE POLITICS OF PROPAGANDA: THE OFFICE OF WAR INFORMATION, 1942-1945* 1-3 (1978). On mass mobilization during World War I, see CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* (2008).

143. JOHN MORTON BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II* 17 (1976).

144. *Id.*

145. *Id.*

146. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in The Expansion of the Income Tax During World War II*, 37 *BUFF. L. REV.* 685, 685-87 (1989).

147. On the impact of war on civic engagement, see Theda Skocpol et al., *Patriotic Partnerships: Why Great Wars Nourished American Civic Volunteerism*, in *SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT* 134-180 (Ira Katznelson & Martin Shefter eds., 2002).

148. See MAUREEN HONEY, *CREATING ROSIE THE RIVETER: CLASS, GENDER, AND PROPAGANDA DURING WORLD WAR II* 28 (1984); CLAYTON R. KOPPEL & GREGORY D. BLACK, *HOLLYWOOD GOES TO WAR: HOW POLITICS, PROFITS AND PROPAGANDA SHAPED WORLD WAR II MOVIES* 82-112 (1990). See also STEVEN CASEY, *SELLING THE KOREAN WAR: PROPAGANDA, POLITICS, AND PUBLIC OPINION 1950-1953* 5-9 (2008); GUY OAKS, *THE IMAGINARY WAR: CIVIL DEFENSE AND AMERICAN COLD WAR CULTURE* 30-32 (1994).

149. BOYER, *supra* note 130, at 353; MAY, *supra* note 130, at 223.

World Wars I and II. A different way was to isolate the public from war. A lack of engagement could mean a perception of the absence of wartime—the cultural production of non-wartime. An example of this was the 1991 war with Iraq. In Iraq, the lesson of Vietnam was operationalized, as military planners sought to insulate the American people from Desert Storm.¹⁵⁰

Military historian Adrien R. Lewis calls Desert Storm “The War without the People.”¹⁵¹ The United States went to war without a draft, but that was only one manner of insulating the public. Military leaders led with the Air Force, rather than Army ground troops, to attack Iraq’s Republican Guard. It was “the first time in history that a field army has been defeated by airpower,” Air Force Chief of Staff, General Merrill A. McPeak claimed.¹⁵² For the American public, the reliance on air power lent the war a patina of bloodless precision. Rather than images of person-to-person combat, smart bomb videos were projected into American living rooms. “The impressive array of aircraft and precision weapons . . . shown again and again on nationwide television reinforced American faith in technological solutions.”¹⁵³ Defense analyst Thomas Donnelly put it more starkly: “As much as anything else, it was the video-game-like images from the first Gulf War of precision-guided munitions neatly deposited onto Saddam’s tanks and palaces that revived America’s confidence in its military and began to put the ghosts of Vietnam to rest.”¹⁵⁴

But the most important absence of people in the Iraq War was that American leaders sought to wage it “without disturbing the American people.”¹⁵⁵ Presidential historian Timothy Naftali writes that President George H.W. Bush “viewed the home front in the Gulf crisis through the lens of Vietnam. He had seen how a lack of public support had torn the country and its military apart twenty years earlier, and he did not want to see that happen again.”¹⁵⁶ An answer to the lessons of Vietnam for military planners was a “new American way of war” that did not deeply engage the American citizenry.¹⁵⁷ It would seem like a wartime in Iraq, Kuwait, and in the homes of

150. LEWIS, *supra* note 46, at 317, 339–40 (2007). See also IRAQ AND THE LESSONS OF VIETNAM (Lloyd C. Gardner & Marilyn B. Young eds., 2007) (arguing that the lessons of Vietnam were misapplied in the 2003 war in Iraq).

151. LEWIS, *supra* note 46, at 317.

152. *Id.* at 339.

153. *Id.* at 317, 339–40.

154. THOMAS DONNELLY, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, STRATEGY AND AIR POWER 1 (2005), available at http://www.aei.org/docLib/20050302_NSOMarch05_graphics.pdf.

155. LEWIS, *supra* note 46, at 375.

156. TIMOTHY J. NAFTALI, GEORGE H.W. BUSH 114 (2007).

157. *Id.* at 374–75.

deployed soldiers.¹⁵⁸ However, it was a military strategy to carve time into separate categories in different spaces. Political scientist Andrea K. Grove argues that President Bush “actively excluded an American audience.”¹⁵⁹ Journalist David Halberstam writes that “[f]or much of the country it was a kind of virtual war, something few people were engaged in or had sacrificed for. Thus, like many things celebrated in the modern media, it was distant and oddly nonparticipatory; when it was over, it was over, leaving remarkably little trace.”¹⁶⁰ For most Americans, everyday life had not changed, and home was not a homefront; the new American way of conflict was a war that was not meant to feel like a war.

Comparing the public mobilization during World War II with the public insulation from war in Desert Storm helps to illustrate the way perceptions of wartime can be facilitated for political or military objectives, or can be avoided.¹⁶¹ This helps to explain the dissonance between the data of nearly continuous American military engagement, on the one hand, and the popular sense, on the other hand, that wartime in American history is an aberration. This dissonance has important consequences. The tactic of limited war, historian Marilyn Young argues, enables endless war.¹⁶²

If military engagement is persistent, not episodic, is there a way to capture the impact of war on rights? For some scholars, the discreteness of wartime changed in the twentieth century, particularly once nuclear weapons, with their massive destructiveness and immediacy, altered the security environment.¹⁶³ But the boundaries between wartime and peacetime, between the domestic and the international, eroded earlier, before formal U.S. involvement in World War II, and even before full-scale war broke out in Europe.¹⁶⁴ It is best to think of

158. See generally CATHERINE LUTZ, *HOMEFRONT: A MILITARY CITY AND THE AMERICAN 20TH CENTURY* (2001) (discussing the disconnect between life on American military bases in the United States and in the rest of the country).

159. ANDREA K. GROVE, *POLITICAL LEADERSHIP IN FOREIGN POLICY: MANIPULATING SUPPORT ACROSS BORDERS* 50 (2007). See also William Boot, *The Press Stands Alone*, 29 *COLUM. JOURNALISM REV.* 23, 23–24 (1991).

160. DAVID HALBERSTAM, *WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS* 13 (2001); Donnelly, *supra* note 154, at 1.

161. There is an expanding literature on the ways the American public has been mobilized for war. See, e.g., BREWER, *supra* note 11; CASEY, *supra* note 148; STEVEN CASEY, *CAUTIOUS CRUSADE: FRANKLIN D. ROOSEVELT, AMERICAN PUBLIC OPINION, AND THE WAR AGAINST NAZI GERMANY* (2001).

162. *BOMBING CIVILIANS: A TWENTIETH CENTURY HISTORY* (Yuki Tanaka & Marilyn B. Young eds., 2008); Marilyn Young, “Limited War” (on file with author).

163. Michael Sherry places the nuclear age within the context of the history of airpower, suggesting that airpower, rather than atomic weapons, was initially responsible for the erosion of the boundaries between wartime and peacetime. See SHERRY, *supra* note 69.

164. See, e.g., Bixby, *supra* note 101, at 746–53.

American legal history, from at least the late 1930s onward, as unfolding amid concerns about national security in a global context leading to and through war.¹⁶⁵ War and militarization play a role in legal history, but that history is not separable into time zones.

The traditional understanding of rights and wartime relies on a simple on/off switch: war triggers a change in the law that ebbs when war is over. A better way to examine the impact of military conflict on rights would be to look instead for moments of vulnerability in U.S. national security in which rights are implicated.¹⁶⁶ This would enable us to see the Cold War not as a separate “wartime” triggering federal government involvement in civil rights reform, or as a follow-through from World War II, but as an example of a more enduring phenomenon: the persistence of global conflict and national security in twentieth-century conceptions of rights.

III

TIMING THE WAR ON TERROR

Anxiety about time has broken to the surface in recent years as we find ourselves in an ambiguous era. It is called a wartime, but is simultaneously described as an era without war’s usual boundaries in time and space.

For President George W. Bush, September 11 initiated a “new kind of war,” not against a nation-state, but against terrorism.¹⁶⁷ The United States fought an “ism” before, Marilyn Young has noted. In the Cold War, the enemy was not Koreans or Vietnamese, but Communism.¹⁶⁸ The new threat of terrorism seemed an amoeba-like mass that could pop up anywhere.¹⁶⁹ Traditionally, when nations fought each other, wars were thought to be

165. Michael Sherry argues that militarization has been a central feature of American history since the 1930s, but some scholars view war as central to shaping the nation from the founding. SHERRY, *supra* note 130, at xi, 15–63; *see also* PORTER, *supra* note 135, at 243–96. While many scholars confine their analysis to external wars after the Civil War, Peter Maguire focuses on the militarization of the western border during American expansion, and sees American wars with American Indian nations as important to shaping American national identity in the nineteenth century. PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 6–7, 19–37 (2001).

166. One example was the need to address civil rights during the early years of the Cold War when race discrimination harmed U.S. international prestige and was thought to undermine U.S. foreign policy objectives. Dudziak, *COLD WAR CIVIL RIGHTS*, *supra* note 116, at 80–83. The historiography on rights and the Cold War is discussed in more detail in Dudziak, *supra* note 127.

167. President George W. Bush, *President Discusses War on Terror at National Endowment for Democracy* (Oct. 6, 2005), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051006-3.html>.

168. Marilyn Young, *Ground Zero: Enduring War, in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 14 (Mary L. Dudziak ed., 2003).

169. *Id.*

bounded in space by their territory, and in time by one nation's defeat. Once the enemy was not a nation-state or even an identifiable social group, but an ideology, war was no longer confined in space or time, but seeped into the global spaces where evil ideas appeared to reside.¹⁷⁰ As the immediacy of September 11 receded, the nation seemed to enter an ambiguous era that was neither wartime nor peacetime.

That the distinction between peace and war seemed increasingly muddled was illustrated by a 2005 essay by legal scholars Samuel Issacharoff and Richard H. Pildes, describing the dividing lines not as between wartime and peacetime, but between "normal times" and "times of heightened risk to the physical safety" of citizens.¹⁷¹ Post-9/11 scholarship often focused on the idea of emergency or crisis, and persisted in the assumption that normality is a state of existence that is outside times of danger. Many considered whether "war" or "state of emergency" was the better way to frame the sort of security environment Americans found themselves in.¹⁷² "Wartime" and "peacetime" broke down, but the basic temporal structure (normal times, ruptured by non-normal times) largely remained in place, even if it seemed unclear whether normal times would ever return.¹⁷³

The seeming lack of end to this era would trouble the Supreme Court

170. For Vice President Dick Cheney, the war on terror appeared to extend backwards in time. He told visiting diplomats, "There was a war on in the 1990's, but we didn't know it." David E. Sanger, *Does Calling It Jihad Make It So?*, N.Y. TIMES, Aug. 13, 2006, available at <http://www.nytimes.com/2006/08/13/weekinreview/13sanger.html>.

171. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 124–40 (Mark Tushnet ed., 2005).

172. E.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); Kim Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004). As "emergency" became a dominant framing device, some scholars recharacterized American wartimes as emergency times. See ERIC A. POSNER & ADRIEN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

173. Mark Tushnet argues,

The already long duration of the "war on terrorism" suggests that we ought not think of it as a war in the sense that the Second World War was a war. It is, perhaps, more like a condition than a war—more like the war on cancer, the war on poverty, or, most pertinently, the war on crime. Suspending legality during a time-limited war is one thing. Suspending it during a more or less permanent condition is quite another.

Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 45 (Mark Tushnet ed., 2005). I agree with Tushnet that the post-9/11 era should be viewed as "a normal state of affairs" and not an emergency; however I would also place it in the continuum of American warfare, since normal time has been war time for at least the past hundred years.

when it took up post-9/11 cases related to Guantánamo detainees. In a series of cases, the Court initially framed arguments within the traditional paradigm, assuming that wartime was temporary and its impact on law eventually would wane. But the seemingly endless character of the war on terror challenged the idea that war was necessarily bounded in time, and eventually this affected the Court's willingness to place limits on executive power even during a time conceptualized as wartime.

In 2004, the Court took up a challenge brought by an American citizen who was apprehended in Afghanistan and detained at Guantánamo as an "enemy combatant."¹⁷⁴ In *Hamdi v. Rumsfeld*, Justice Sandra Day O'Connor, writing for a plurality of four, was troubled by the potentially indefinite character of Hamdi's detention. Her concern was not with "the lack of certainty regarding the date on which the conflict will end," but with "the substantial prospect of perpetual detention."¹⁷⁵ O'Connor observed that:

If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.¹⁷⁶

The Court did not have to face the prospect of endless detention, however, at least not yet. O'Connor found that the war on terror, at that moment, fit within conventional understandings of military conflict, with temporal limits, for there were "[a]ctive combat operations" against the Taliban in Afghanistan.¹⁷⁷ It was appropriate to detain Hamdi "for the duration of these hostilities."¹⁷⁸

174. Justice O'Connor noted that there was "some debate as to the proper scope" of the term "enemy combatant," but in this case, the "enemy combatant" was a person the government alleged was "part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

175. *Id.* at 520.

176. *Id.*

177. *Id.* at 521.

178. *Id.* The plurality found, however, that due process required that Hamdi have an opportunity to challenge his detention. "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens," O'Connor wrote. *Id.* Justice Antonin Scalia went further in his concurrence, arguing that the only lawful options for the government were for Congress to suspend the right to *habeas corpus*, which Congress may do only in times of invasion or rebellion, or Hamdi must be tried using the usual procedures in criminal cases. *Id.* at 573 (Scalia, J., concurring).

In *Rasul v. Bush*, a case involving foreign nationals captured in Afghanistan and held at Guantánamo, the Court held that it had power to hear their *habeas corpus* petition. 542 U.S. 466 (2004). Justice Kennedy, concurring, expressed concern that "as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes

Four years later, in *Boumediene v. Bush*, the problem of temporality seemed more pressing. The Court found unconstitutional a statute intending to strip federal courts of jurisdiction over *habeas corpus* challenges brought by Guantánamo detainees.¹⁷⁹ It was lawful to detain those who had fought against the United States “for the duration of the conflict,” as Justice Anthony Kennedy wrote for the majority.¹⁸⁰ However, Kennedy was troubled by this war’s lack of boundaries. The present conflict “if measured from September 11, 2001, to the present, is already among the longest wars in American history.”¹⁸¹ One of the reasons *habeas corpus* was needed was that “the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more.”¹⁸² The lack of time boundaries made this conflict different than past wars, Kennedy reasoned. More judicial oversight was required.¹⁸³

The “new kind of war” of the twenty-first century broke the problem of war’s temporality into the open, revealing anxiety over the impact of perpetual war on American democracy itself.¹⁸⁴ But the problem of war’s seamlessness, and its impact on rights and governance, is a problem with a much longer pedigree. President Dwight D. Eisenhower warned in his 1961 presidential farewell address that the nature of war threatened the future of American democracy. There was an “imperative need” for a relationship between private industry and the military to confront mid-twentieth century global threats.¹⁸⁵ “Yet we must not fail to comprehend its grave implications,” he urged.¹⁸⁶ At

weaker.” *Id.* at 488 (2004) (Kennedy, J., concurring). *See also* *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (expressing concern about “[i]ncommunicado detention for months on end”) *See generally* Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 86–87 (2008).

179. *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

180. *Id.* at 771.

181. *Id.* at 771.

182. *Id.* at 785.

183. *Id.* at 794.

184. *See, e.g.*, FISHER, *supra* note 48, at 188–206, 361; JACK GOLDSMITH, *THE TERROR PRESIDENCY* 102–04 (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 30, 44–48, 263, 330–32 (2008); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007); FREDERICK A.O. SCHWARZ, JR., & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007). *See generally* Mary L. Dudziak, *A Sword and a Shield: The Uses of Law in the Bush Administration*, in *THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT*: 39–58 (Julian Zelizer ed., 2010).

185. President Dwight D. Eisenhower, *Farewell Radio and Television Address to the American People*, Jan. 17, 1961, Public Papers of the Presidents, John T. Woolley & Gerhard Peters eds., The American Presidency Project, University of California, Santa Barbara, CA, <http://www.presidency.ucsb.edu/ws/index.php?pid=12086> (last visited Oct. 2, 2010).

186. *Id.*

stake was “the very structure of our society.”¹⁸⁷ Americans must “guard against the acquisition of unwarranted influence,” and must “never let the weight of this combination endanger our liberties or democratic processes.”¹⁸⁸ Eisenhower’s challenge to be attentive to the way the nature of war affects democracy transcends the particular issue (the military-industrial complex) that gave rise to his remarks.

For President Eisenhower, the changing character of war required new vigilance to maintain the vitality of American democracy. This concern is more pressing than ever when the nation’s engagement with war is both more continuous and more difficult to see.¹⁸⁹

A cultural framing of wartimes as discrete and temporary occasions, destined to give way to a state of normality, impedes our ability to address Eisenhower’s warning. To take seriously war’s presence as an ongoing feature of American democracy, a starting point is to cease viewing the nation’s history as divided into time zones, and to look instead for war’s enduring mark on American politics and American law.

187. *Id.*

188. *Id.*

189. Adrien Lewis points to this problem, noting that with the demise of the citizen soldier with the move to all-volunteer forces, the relationship between the people, the military, and the government was severed undermining democratic checks on military action. LEWIS, *supra* note 46, at xix. *See also* CARL VON CLAUSEWITZ, ON WAR 13–31 (Michael Howard & Peter Paret trans., Beatrice Heuser ed., 2007).

After September 11, 2001, the government erected security barriers in American cities, but President George W. Bush praised Americans for carrying on with their daily lives, “working and shopping and playing, worshipping at churches and synagogues and mosques, going to movies and to baseball games.” President George W. Bush, Address to the Nation, November 8, 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011108-13.html>. The administration announced homeland security color codes to enable awareness of the level of the threat from terrorism, but these codes were widely satirized. Homeland Security Presidential Directive-3, Department of Homeland Security, March 11, 2002, http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm. This contrasts with World War II, when consumer goods were rationed, and Americans were encouraged to buy bonds to fund the war and plant “victory gardens.” Engagement with World War II pervaded daily life. KENNEDY, *supra* note 78, at 623, 626, 644–45, 654–55. Military engagement pervaded Cold War culture as well, as “duck and cover” drills became routine in American schools, and American families stocked home bomb shelters. MAY, *supra* note 130, at 90–97.

APPENDIX: MILITARY CONFLICTS OF THE UNITED STATES DURING THE
TWENTIETH CENTURY*INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2009*¹⁹⁰
[ABRIDGED]

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SUMMARY

This report lists hundreds of instances in which the United States has used its armed forces abroad in situations of military conflict or potential conflict or for other than normal peacetime purposes. . . .

The instances differ greatly in number of forces, purpose, extent of hostilities, and legal authorization. Eleven times in its history the U.S. has formally declared war against foreign nations. These eleven U.S. war declarations encompassed five separate wars: the war with Great Britain declared in 1812; the war with Mexico declared in 1846; the War with Spain declared in 1898; the First World War, during which the U.S. declared war with Germany and with Austria-Hungary during 1917; and World War II, during which the U.S. declared war against Japan, Germany, and Italy in 1941, and against Bulgaria, Hungary, and Rumania in 1942.

Some of the instances were extended military engagements that might be considered undeclared wars. These include the Undeclared Naval War with France from 1798 to 1800; the First Barbary War from 1801 to 1805; the Second Barbary War of 1815; the Korean War of 1950-53; the Vietnam War from 1964 to 1973; the Persian Gulf War of 1991, global actions against foreign terrorists after the September 11, 2001 attacks on the United States, and the War with Iraq in 2003. With the exception of the Korean War, all of these conflicts received Congressional authorization in some form short of a formal declaration of war. Other, more recent instances often involve deployment of U.S. military forces as part of a multinational operation associated with NATO or the United Nations.

190. Richard F. Grimmett, *Instances of the Use of United States Armed Forces Abroad, 1789-2009*, CONGRESSIONAL RESEARCH SERVICE (Jan. 27, 2010), http://books.google.com/books?id=EveYYRb_A2IC&printsec=frontcover&dq=grimmatt+military+conflicts&source=bl&ots=9H8TOo4p9K&sig=Zrk5Oz_A5eZ0adNS31VAfHNh9UM&hl=en&ei=jo6qTlrlIYaisAO_8LDYAw&sa=X&oi=book_result&ct=result&resnum=1&sqi=2&ved=0CBkQ6AEwAA#v=onepage&q&f=false.

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The majority of the instances listed prior to World War II were brief Marine or Navy actions to protect U.S. citizens or promote U.S. interests. A number were actions against pirates or bandits. Covert actions, disaster relief, and routine alliance stationing and training exercises are not included here, nor are the Civil and Revolutionary Wars and the continual use of U.S. military units in the exploration, settlement, and pacification of the Western part of the United States.

* * *

[*Instances of the use of force prior to 1900 have been deleted. Information on uses of force from 1900 to 2004 has been heavily abridged.*¹⁹¹]

- 1899–1901 *Philippine Islands.* U.S. forces protected American interests following the war with Spain and conquered the islands by defeating the Filipinos in their war for independence.
- 1900 *China.* May 24 to September 28. American troops participated in operations to protect foreign lives during the Boxer rising, particularly at Peking. For many years after a permanent legation guard was maintained in Peking.
- 1901 *Colombia (State of Panama).* November 20 to December 4. U.S. forces protected American property on the Isthmus and kept transit lines open during serious revolutionary disturbances.
- 1902 *Columbia.* April 16 to 23. U.S. forces protected American lives and property at Bocas del Toro during a civil war.
- 1903–1914 *Panama.* U.S. forces sought to protect American interests and lives during and following the revolution for independence from Colombia over construction of the Isthmian Canal. With brief intermissions, United States Marines were stationed on the Isthmus from November 4, 1903, to January 21, 1914, to guard American interests.

191. For a full listing, see Grimmert, *supra* note 190.

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- 1906–1909 *Cuba*. September 1906 to January 23, 1909. U.S. forces sought to restore order, protect foreigners, and establish a stable government after serious revolutionary activity.
- 1912–1925 *Nicaragua*. August to November 1912. U.S. forces protected American interests during an attempted revolution. A small force, serving as a legation guard and seeking to promote peace and stability, remained until August 5, 1925.
- 1912–1941 *China*. The disorders which began with the overthrow of the dynasty during Kuomintang rebellion in 1912, which were redirected by the invasion of China by Japan, led to demonstrations and landing parties for the protection of U.S. interests in China continuously and at many points from 1912 on to 1941. The guard at Peking and along the route to the sea was maintained until 1941. In 1927, the United States had 5,670 troops ashore in China and 44 naval vessels in its waters. In 1933 the United States had 3,027 armed men ashore. The protective action was generally based on treaties with China concluded from 1858 to 1901.
- 1914 *Dominican Republic*. June and July. During a revolutionary movement, United States naval forces by gunfire stopped the bombardment of Puerto Plata, and by threat of force maintained Santo Domingo City as a neutral zone.
- 1914–1917 *Mexico*. Undeclared Mexican-American hostilities followed the *Dolphin* affair and Villa's raids and included capture of Vera Cruz and later Pershing's expedition into northern Mexico.
- 1915–1934 *Haiti*. July 28, 1915, to August 15, 1934. U.S. forces maintained order during a period of chronic political instability.
- 1916–1924 *Dominican Republic*. May 1916 to September 1924. American naval forces maintained order during a period of

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	chronic and threatened insurrection.	
1917–1918	World War I. On April 6, 1917, the United States declared war with Germany and on December 7, 1917, with Austria-Hungary. Entrance of the United States into the war was precipitated by Germany's submarine warfare against neutral shipping.	
1917–1922	<i>Cuba</i> . U.S. forces protected American interests during insurrection and subsequent unsettled conditions. Most of the United States armed forces left Cuba by August 1919, but two companies remained at Carnaguey until February 1922.	
1918–1920	<i>Soviet Russia</i> . Marines were landed at and near Vladivostok in June and July to protect the American consulate and other points in the fighting between the Bolshevik troops and the Czech Army which had traversed Siberia from the western front. A joint proclamation of emergency government and neutrality was issued by the American, Japanese, British, French, and Czech commanders in July. In August 7,000 men were landed in Vladivostok and remained until January 1920, as part of an allied occupation force. In September 1918, 5,000 American troops joined the allied intervention force at Archangel and remained until June 1919. These operations were in response to the Bolshevik revolution in Russia and were partly supported by Czarist or Kerensky elements.	
1925	<i>China</i> . January 15 to August 29. Fighting of Chinese factions accompanied by riots and demonstrations in Shanghai brought the landing of American forces to protect lives and property in the International Settlement.	
1926–1933	<i>Nicaragua</i> . May 7 to June 5, 1926; August 27, 1926, to January 3, 1933. The coup d'état of General Chamorro aroused revolutionary activities leading to the landing of American marines to protect the interests of the United States. United States forces came and went intermittently until January 3, 1933.	

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- 1927 *China*. February. Fighting at Shanghai caused American naval forces and marines to be increased. In March a naval guard was stationed at American consulate at Nanking after Nationalist forces captured the city. American and British destroyers later used shell fire to protect Americans and other foreigners. Subsequently additional forces of marines and naval vessels were stationed in the vicinity of Shanghai and Tientsin.
- 1932 *China*. American forces were landed to protect American interests during the Japanese occupation of Shanghai.
- 1941 *Germany*. Sometime in the spring the President [Roosevelt] ordered the Navy to patrol ship lanes to Europe. By July, U.S. warships were convoying and by September were attacking German submarines. In November, the Neutrality Act was partially repealed to protect U.S. military aid to Britain.
- 1941–1945 World War II. On December 8, 1941, the United States declared war with Japan, on December 11 with Germany and Italy, and on June 5, 1942, with Bulgaria, Hungary and Romania.
- 1945 *China*. In October, 50,000 U.S. Marines were sent to North China to assist Chinese Nationalist authorities in disarming and repatriating the Japanese in China and in controlling ports, railroads, and airfields. This was in addition to approximately 60,000 U.S. forces remaining in China at the end of World War II.
- 1948 *Berlin*. After the Soviet Union established a land blockade of the U.S., British, and French sectors of Berlin on June 24, 1948, the United States and its allies airlifted supplies to Berlin until after the blockade was lifted in May 1949.
- 1950–1953 *Korean War*. The United States responded to the North Korean invasion of South Korea by going to its assistance,

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	pursuant to United Nations Security Council resolutions. U.S. forces deployed in Korea exceeded 300,000 during the last year of the conflict. Over 36,600 U.S. military were killed in action.	
1950–1955	<i>Formosa (Taiwan)</i> . In June 1950 at the beginning of the Korean War, President Truman ordered the U.S. Seventh Fleet to prevent Chinese Communist attacks upon Formosa and Chinese Nationalist operations against mainland China.	
1958	<i>Lebanon</i> . Marines were landed in Lebanon at the invitation of its government to help protect against threatened insurrection supported from the outside.	
1962	<i>Thailand</i> . The 3d Marine Expeditionary Unit landed on May 17, 1962, to support that country during the threat of Communist pressure from outside; by July 30, the 5,000 marines had been withdrawn.	
1962	<i>Cuba</i> . [Cuban Missile Crisis.]	
1962–1975	<i>Laos</i> . From October 1962 until 1975, the United States played an important role in military support of anti-Communist forces in Laos.	
1964–1973	<i>Vietnam War</i> .	
1965	<i>Dominican Republic</i> . The United States intervened to protect lives and property during a Dominican revolt and sent more troops as fears grew that the revolutionary forces were coming increasingly under Communist control.	
1970	<i>Cambodia</i> . U.S. troops were ordered into Cambodia.	
1975	<i>Mayaguez incident</i> . On May 15, 1975, President Ford reported he had ordered military forces to retake the SS <i>Mayaguez</i> , a merchant vessel en route from Hong Kong to Thailand with U.S. citizen crew which was seized from	

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Cambodian naval patrol boats in international waters and forced to proceed to a nearby island.
- 1981 *El Salvador*. [A]dditional U.S. military advisers sent to El Salvador, bringing the total to approximately 55, to assist in training government forces in counterinsurgency.
- 1982 *Sinai*. [Participation] in the Multinational Force and Observers in the Sinai.
- 1982–1983 *Lebanon*. [Participation in multinational force in Lebanon.]
- 1983–1989 *Honduras*. [Exercises to support Honduras against Nicaragua.]
- 1983 *Grenada*. On October 25, 1983, President Reagan reported a landing on Grenada by Marines and Army airborne troops to protect lives and assist in the restoration of law and order and at the request of five members of the Organization of Eastern Caribbean States.
- 1986 *Libya*. U.S. air and naval forces . . . conducted bombing strikes on terrorist facilities and military installations in Libya.
- 1987–1988 *Persian Gulf*. [Naval forces protect shipping lanes in the Persian Gulf after the Iran-Iraq War.]
- 1989 *Andean Initiative in War on Drugs*. [U.S. military assistance to Andean nations of Colombia, Bolivia, and Peru to aid their war on drugs.]
- 1989 *Philippines*. [U.S. fighter planes assisted the Aquino government to repel a coup attempt.]
- 1989–1990 *Panama*. [Invasion of Panama and seizure of General Noriega.]
- 1991 *Iraq*. [Operation “Desert Storm.”]

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1992–1995	<i>Somalia.</i> U.S. armed forces [deployed] to Somalia in response to a humanitarian crisis.	
1994–1995	<i>Bosnia.</i> U.S. warplanes under NATO command [involved in hostile action] against Bosnian Serb forces.	
1994–1995	<i>Haiti.</i> [U.S. intervention in Haiti. Troop levels increased to 20,000.]	
1995–2004	<i>Bosnia.</i> [U.S. troops deployed to Bosnia-Herzegovina and Croatia.]	
1998	<i>Afghanistan and Sudan.</i> On August 21, 1998, by letter, President Clinton reported to Congress that he had authorized airstrikes on August 20th against camps and installations in Afghanistan and Sudan used by the Osama bin Laden terrorist organization.	
1998	<i>Iraq.</i> During the period from December 16-23, 1998, the United States, together with the United Kingdom, conducted a bombing campaign, termed Operation Desert Fox, against Iraqi industrial facilities deemed capable of producing weapons of mass destruction and against other Iraqi military and security targets.	
1998–2001	<i>Iraq.</i> [Enforcement of] the “no-fly” zones over Iraq.	
[1999–2004]	<i>Yugoslavia/Kosovo.</i> U.S. air strikes against Yugoslavia in response to the Yugoslav government’s campaign of violence and repression against the ethnic Albanian population in Kosovo. [Thousands of American troops deployed to the region] as part of a NATO-led security force and for humanitarian disaster relief operations for Kosovar refugees.	
2001–present	<i>Terrorism threat.</i> On September 24, 2001, President George W. Bush reported to Congress, “consistent with the War Powers Resolution,” and “Senate Joint Resolution 23” that in response to terrorist attacks on the World Trade Center and the Pentagon he had ordered the “deployment	

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of various combat-equipped and combat support forces to
a number of foreign nations. . . .”

2001 *Afghanistan*. [War in Afghanistan begins.]

2003 *Iraq War* [begins.]