Making Law/Making War in a World on Fire

(*forthcoming in* Christopher Tomlins and Michael Grossberg, eds., *The Cambridge History of Law in America* (Cambridge University Press, 2006))

Mary L. Dudziak

USC Legal Studies Research Paper No. 06-11

LEGAL STUDIES RESEARCH PAPER SERIES

University of Southern California Law School
Los Angeles, CA 90089-0071

Making Law/Making War in a World on Fire

Mary L. Dudziak[1]
Judge Edward J. and Ruey L. Guirado Professor of Law, History and Political Science, USC Law School
mdudziak@law.usc.edu

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Introduction

At the close of what came to be called the First World War, Woodrow Wilson and other world leaders embarked upon what was surely a utopian mission. It was not on American soil that armies had slaughtered each other. But Americans had been there in the carnage, and so in its aftermath, an American president took up the task of ensuring that it would never happen again. He hoped to create a world body, a League of Nations, and through it order for a lawless world. Through their efforts, world leaders hoped to hold back a force that had long structured and tortured human affairs, and that had become, in their eyes, newly unthinkable due to the horrifying consequences of modern weaponry. The airplanes and submarines that took bloodshed across continents and seas gave the world a new common goal: to end forever the specter of war. The League is most famous, of course, for its failure, but in that utopian moment, we can see an element that would not be lost on the rest of the twentieth century. Americans and

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[1] Special thanks to Rebecca Leffler for her assistance with this essay.

NOTE: The Cambridge History of Law in America requires that authors use only sparse citations, for example for quotations. The literature on law and war largely cannot be cited, unfortunately, and will instead be discussed in an accompanying bibliographic essay. The length limit also restricts my ability to fill in historical examples. I intend to build on this work in the future, and would be grateful for any comments and criticism.

others held on to the belief that somehow human action could stave off this most ancient form of politics. And they often turned to law as a means of holding back the forces of warfare.

War would not be contained by law, of course. Instead war would be a defining feature of the twentieth century. Just as nations are at times made by war, war helped build the twentieth century American state. Government programs and regulations created in wartime were often drawn on after war to serve new purposes. As national security came to be dependent on the development of weapons technology, a permanent armaments industry developed, drawing upon increasing shares of government revenue. By the 1930s, Michael Sherry has argued, militarization was a central feature of American life, and the impact of war and militarization would only increase through the rest of the century.[1] Yet writing on American legal history seems to assume that wartimes are times of exception. If the topic under consideration is not the exception (war), then war-related issues tend not to fit in the narrative.

Writing that focuses directly on law and war often shares this assumption that wartime is a time of exception. History is conceptualized as divided into time zones: wartime and peacetime. The dominant image in writing on law and war is of a pendulum swinging back and forth between protection of rights during peacetime and protection of security during wartime. Switching from one time zone to another sets the pendulum swinging in a new direction. The existence of time zones serves a particular function in the law. It enables war to be seen as an exceptional state, as a time when, regrettably it is thought, the usual rules do not apply. In times of war, the saying goes, law is silent. Scholars debate the degree to which law really is, or should be, silent during wartime. There is often an underlying consensus, however, that wartime is

different, is exceptional, and that wartime is preceded and followed by periods of normality.

The notion of time zones would seem to have particular utility for the law of war. The transition from one time zone (non-war) to another (war) could signal that it was the moment to call upon one of the legal indicia of war, such as a declaration of war, a power of the U.S. Congress. But by the late twentieth century, the declaration of war clause of the U.S. constitution seemed to have fallen into the box of constitutional anachronisms along with the third amendment, which bars quartering soldiers in private homes in peacetime. But there could be a reason that Congress often had nothing to declare. Perhaps the nation was never *not* at war.

According to U.S. Government reports, the United States has been engaged in military actions overseas all years but ten since the close of World War I, but this does not include not-so-covert actions, like the 1961 Bay of Pigs invasion.[2] When American troops went overseas, they took weapons and on occasions, shot people. Out of all of this killing, only some of it was made into a "war." Or perhaps it would be better to say it this way: of these events experienced on the ground as warfare, across human bodies as warfare, only some were treated by the nation as war. A bullet might have the same trajectory as it cuts through flesh, it might trigger the same nerve endings; what is different is its geopolitical rendering.

The time zone/pendulum conceptualization of law and war is difficult to maintain in the twentieth century. Since few wars were declared, the formal legal markers of war cannot always be turned to to mark off the time zones. There were some iconic events to signal an opening of war, but wars were often eased into over time. Beginnings and endings are often difficult to see. All twentieth century military engagements happened elsewhere. Because of this, a government project during war would be selling the war to the American people – helping them to see that it

was a "war" that their security depended on, even though bombs were not falling in American neighborhoods. But not all overseas military engagements were promoted as "wars," even if the experience was the same for the civilian populations where American troops landed.

And so a striking characteristic of American military engagement in the twentieth century is its constancy. Because of this, war and militarization belong not at the margins of American histories, including legal history, but at the center.

Law is not only a subject of legal regulation. Law also helps us to see what war is. It is most common in legal history to treat "war" as a natural phenomenon existing outside the law, and to view law as interacting with it. The arguments are about the nature of the interaction. Yet it is in part through law that twentieth century war came to be imagined and understood. War could not be prevented, and so rules were laid down defining the line between just and unjust wars, and the word "war" was attached to some U.S. military engagements but not others. In conflicts, there were rules of engagement, and war crimes. In these ways, law calls into existence a conception of war.

The wars engaged in by Americans in the twentieth century were not experienced, for the most part, in the form of concrete destruction of American communities. Instead, war was something outside, something that threatened the perceived domestic tranquility within. The idea of a "shadow of war" invoked by Michael Sherry's landmark study of the impact of militarization on American politics and culture is captured in an image from a 1941 advertisement: "a bomber's shadow darkening a suburban home offered a metaphor apt for a half-century of anxiety about the nation's safety. It showed both the ominous shadow cast by war and the still untouched scene beneath it – both hovering danger and lingering tranquility,

external threat and domestic innocence."[3] The externality of the threat – the distance of the danger – meant that it lacked a concreteness. Ambiguous dangers require narratives that give them shape and meaning. We can see this in a later context, on a July 2004 cover of the *L.A. Weekly*. In the image, a mother looked lovingly at the infant in her arms. Into the baby's mouth she gently held – not a baby bottle – but a U.S. laser-guided missel. For this progressive paper, the threat from military action came not from above, but from within. In both contexts, American innocence is threatened by military action.

In the history of war and American law since the end of World War I, law mediates between perceived threats and the self-conception of American innocence. Law is often seen as a protection against war, as a boundary, as an alternative to armed conflict. In this history, however, law also enables war, it provides a framework for American involvement in destruction while maintaining a self-conception of nonaggression. Law helps us to see what war is. In this sense, law makes war possible.

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This essay will explore different ways in which war has figured in the history of American law since World War I. First, law was turned to as a mechanism to hold back war or to control its practice. In outlawing forms of warfare as inhumane, humanitarian law implicitly carves out forms of war that are right and noble. When it does so, law helps enable certain forms of warfare.

Perhaps ironically, alongside of American hopes to eradicate war came the increasing focus on war in the U.S. economy and government. Wartime programs and government powers were turned to "peacetime" uses, and eventually "peacetime" came to be conceptualized not as a

time of absence from war, but a time of engagement with war prevention. And so, long before President Dwight D. Eisenhower would warn of the dangers to democracy of a "military industrial complex," war became a central feature of American political and economic life, and a justification for various government powers. There was no longer a "wartime" to cabin the war powers. War became an engine of statebuilding and a logic of government.

Law was also one of the tools of war, especially the facets of war waged on the homefront. The conventional narrative about law and war in American history focuses most often on the impact of war on civil liberties and the scope of executive power. The idea that there is a balance between liberty and security, and that during war the balance tips in favor of security, is an example of government use of law as a technology of national security – the idea, at least, that ratcheting back on rights makes the nation safer. But law is also a different kind of tool in what is often called a "war of ideas." Because American law is seen as a reflection of American democracy, at times the protection of legal rights itself has aided American war efforts by aiding solidarity at home and by enhancing the image of the nation abroad. In these contexts, law is a tool of war.

The essay ends with a consideration of the implications of the post-September 11 world. While it may appear as an era characterized by a retreat from law, as the United States took steps to shield its actions from scrutiny by domestic and international courts, another image of law appears – that of the sovereign police, needing to police the world and therefore to submit to no authority.

Law as an End to War

"It is not now possible to assess the consequences of this great consummation," Woodrow Wilson said to Congress, in announcing the Armistice on November 11, 1918. "We know only that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, is at an end and that it was the privilege of our own people to enter it at its most critical juncture in such fashion and in such force as to contribute... to the great result."[4] Perhaps it is the inevitable fate of wars that they take on transcendent meanings. Perhaps there is a human need to ascribe such meanings to wars, as a way to account, in retrospect, for the uncountable casualties. It would be the ironic fate of this Great War to be the war to end all war. And in its wake, world leaders soon united in a hopeless quest to ensure that war itself would not circle the earth again.

The question of how peace would succeed war was a focus in the negotiations that led to the Treaty of Versailles. Drafted at the Paris Peace Conference, the treaty contemplated the creation of a League of Nations. The League would be the lawful path away from warfare, as nations would agree to resolve disputes not by armed conflict, but by arbitration and consultation. Nations that violated this pact would be subject to a boycott by all its members, and in Article 10, controversial among American critics in the Senate, signatories would aid a member who was attacked by another nation.[5] President Wilson crossed the country in a futile effort to raise sufficient American support to carry the treaty through the Senate. In speeches, he urged that the League was the world's only hope against war. Without the League to protect the peace, he warned the alternative was a militarized nation with "secret agencies planted everywhere," and a President transformed from a civil leader into "a commander in chief, ready to fight the world."[6] A mix of American isolationism and domestic political conflict blocked

Wilson's efforts. After a protracted debate, the Senate rejected the treaty, and, as Wilson famously put it, broke "the heart of the world."[7]

If Americans could not prevent war through a League of Nations, perhaps they could do it more directly, through law itself. On August 27, 1928, fifteen nations signed a treaty, the Kellogg-Briand Pact, a solemn pledge of peace. According to the Pact, these nations' leaders were "Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated." This was a radical break from the past, when national security was ensured by armaments rather than by agreements. But the consequences of war had been spelled out in the blood of their citizens, and for some, at least, it seemed too high a price to pay. Therefor the nations pledged to each other "that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."[8] The power of Kellogg-Briand, however, was only in its rhetoric. The pact had no enforcement power. In ratifying it, the U.S. Senate made clear that the U.S. retained the right of self-defense, and was not compelled to take action against a nation that broke the treaty. And so, as powerful as the ideas behind this peace pact may have been, its words could not hold back the invasion of Manchuria by Japan only three years later, Italy's invasion of Ethiopia in 1935, or Germany march across Europe beginning with Austria in 1938.

Once World War II had run its course, nations gathered for another conference, this time in San Francisco, hoping once again that they could create a world body and an international legal system that would replace warfare with a rule of law. After the carnage of the war, this hope might seem again a utopian gesture, but so important was it, that it is inscribed in the

opening words of the founding document of the body they would create: the United Nations. The Preamble of the U.N. Charter announced their purposes: “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,...do hereby establish an international organization to be known as the United Nations.” The United Nations was ratified by the United States and initially forty-nine other nations. Its effectiveness was quickly hampered by Cold War politics. While it has played an important role in peacekeeping efforts at different times, its continued existence is perhaps the greatest testament to a lasting hope, if not belief, that law and global institutions can be an impediment to the forces of war.

Another step taken to end war through law after World War II was the prosecution of the war’s perpetrators. The most famous of these was the prosecution of Nazi leaders at Nuremberg. The U.S. prosecution team was led by U.S. Supreme Court Justice Robert Jackson, on leave from the Court. The Nazis had engaged in the torture and slaughter of Jews and other innocent civilians, and a horrified world expected retribution. Many also believed that the Nazis must be held responsible so that acts like theirs would never happen again. Nazi leaders were charged with conspiracy to wage aggressive war, waging aggressive war, war crimes and crimes against humanity. The evidence of the crime of aggressive war included Germany’s violation of the Kellogg-Briand pact, and other aggressive actions. In the first two counts, waging war itself was criminalized. The most controversial aspect of the Nuremberg trials was that many elements of the charges lacked precedent in international law. Law was constructed after the fact and applied to the defendants, something that in the United States would be an unconstitutional *ex post facto* law. Debate raged about whether the tribunal was applying new international law retroactively,

and whether that was moral. In his opening statement, Robert Jackson defended the tribunal in this way:

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason." The prosecuting nations hoped to use international law "to meet the greatest menace of our times: aggressive war," he told the tribunal. "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."[9]

What is most interesting about this moment is the turn to formal legal process. It is as if the world itself had too much blood on its hands, and could not bear the simple finality of the usual course of victor's justice: a bullet to the head. In the end, after a year-long trial, three of the twenty-four Nazi leaders were acquitted. Twelve were sentenced to death and seven were sentenced to various prison terms. The fact that a small number were acquitted and others were not executed seemed a defense of the trials themselves. It could be argued that they were not simply a long and bureaucratic means of execution. Yet the Allies hoped to do more than to model lawfulness. Through the formalities of a trial, they hoped to display before the world, and embed in historical memory, evidence of the terrible crimes of the war and of the Holocaust. It

was the trial process itself, not the imposition of the sentences, that would most ensure that these crimes would never happen again.

After World War II, the age of the "Great" and "Good" Wars had passed, and the world slipped into a Cold War, seeming to teeter, at times, on the edges of self-annihilation. Law as a path to peace was supplanted by an arms race. The way to guard against war now was to have more nuclear weapons than your adversary. But a more modest role for legal institutions would survive it all. Law became a tool of "peacekeepers" on more limited missions in various parts of the world. If law could no longer save the world from itself, it might still enable legal missionaries to act as saviors.

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One of the innovations of the twentieth century for the United States was the creation of a new route toward officially sanctioned military actions. As David Golove has argued, the creation of the United Nations transformed the war powers, creating an alternative route for making war through the U.N. Security Council.[10] The United States relied upon this mechanism not long after it was created. On June 24, 1950, North Korean forces crossed the 38th parallel into South Korea, seriously escalating a civil war that had been simmering since the withdrawal of Japan after World War II had left it without political leadership. Almost immediately, Korea became a Cold War battleground, with the potential for a war between the U.S. and the U.S.S.R. President Truman ordered ground troops to Korea on June 30, without consulting with Congress. He maintained that time was important, and consultation unnecessary: "I just had to act as Commander-in-Chief, and I did."[11] The U.N. Security council had sanctioned the "police action" against North Korea's invasion, allowing Truman to justify forgoing Congressional approval.

In later years, Presidents would act without formal Security Council authorization or a declaration of war, but often with some level of consultation with either Congress or the U.N. In 1955, Dwight D. Eisenhower sought congressional authorization to send troops into Taiwan to protect the government from the communist Chinese. Eisenhower told Congress that his position as commander-in-chief gave him a certain amount of authority to act, but "a suitable congressional resolution would clearly and publicly establish" that such authority existed.[12] Congress then ratified unilateral authority to deploy troops to protect against "international communism." Eisenhower relied on this Congressional resolution when he sent troops into Lebanon without congressional approval in 1958.[13]

President Kennedy continued Truman's and Eisenhower's use of military power without congressional approval. He dispatched air and naval transport for the ill-fated Bay of Pigs invasion intended to overthrow Cuban leader Fidel Castro, and he deployed troops in Vietnam without consulting Congress. Other armed conflicts involved the use of U.S. troops at the direction of the president alone: in Laos in 1962, the Congo in 1964, and the Dominican Republic in 1965.[14]

As the war in Vietnam escalated during Lyndon Johnson's presidency, Congress authorized military action, but not through a declaration of war. In circumstances that remain disputed, it was reported that a U.S. ship came under fire from the North Vietnamese in the Gulf of Tonkin. Although the veracity of these reports were questioned at the time, it was enough to motivate Congress to pass the Gulf of Tonkin Resolution, which gave Congressional support for "the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further

aggression."[15]

Congress's failure to pass a declaration of war led to questions of the war's legality. The State of Massachusetts filed suit against the Secretary of Defense, arguing that without a formal declaration of war, the war was unconstitutional. The case was dismissed by the Supreme Court as nonjusticiable, over a dissent by Justice William O. Douglas.[16] Meanwhile, Congress continued to pass appropriations bills, funding the war. While some have argued that this and other episodes eroding the use of Congress's formal constitutional role in declaring war in essence cedes excessive war power to the president, others have argued that Congress's power of the purse has been another means through which a more nuanced contemporary Congressional role in war power is exercised.

Hoping to reassert a Congressional role in warmaking, Congress passed the War Powers Act over Nixon's veto in 1973. The Act requires the president to notify Congress within forty-eight hours of sending troops into hostilities, and requires that troops must be removed within sixty days if Congress does not declare war or authorize the use of force.[17] The House Judiciary Committee also engaged in oversight of presidential war-related actions during the Nixon Administration, investigating Nixon's order to bomb Cambodia without Congressional authorization in 1969.[18]

The United States engaged in a number of overseas military engagements in later years. For the most part, these were limited in scope and duration, enabling the nation to maintain a conception of a nation at peace, while at the same time sending troops into battle. Presidents drew upon their Commander-in-Chief power, and did not call upon Congress for declarations of war. Engagements could for a time be justified as extensions of the Cold War. For example, in

1983, President Ronald Reagan sent U.S. troops to the island nation of Grenada to put down a coup, based on false assumptions that Cuba, a Communist government, was supporting the coup. Rather than seek the authority of law for his actions, in the name of the Cold War, in 1985-86 Reagan violated federal law, by using Iranian arms sales to generate secret funds for the Contra forces seeking to oust the leftist Sandinista government of Nicaragua, in what became knows as the "Iran/Contra Affair."[19]

War was also *made* in the law when war's contours were labeled and categorized. War since the beginning of recorded history has involved killing and destruction. But all killing and destruction is not the same in the law of war. The twentieth century saw the proliferation of categories of "war crimes," and also an increasingly complicated U.S. relationship to international law.

This aspect of the law of war is in part a reaction to the history of technology. New mechanisms of destruction would lead to new forms of atrocities. The modern use of chemical weapons began in World War I. The Germans killed over 5000 Allied troops in just one chlorine gas attack on the Belgian village of Ypres on April 22, 1915. The British also used chemical weapons, and the United States developed chemical weapons capability. After the war, concerns about the horrendous and destructive nature of chemical weapons led the signing of the 1925 Geneva Protocol on Chemical Weapons, which prohibited use of these weapons, but not their production or stockpiling.[20]

As unjust ways of waging war were spelled out, between the lines was an image of the good war. A lawless waging of war presupposed a lawful war. And so as human rights law carved out the categories of human rights violations, they also enabled uses of the war power –

killings and destruction – that could be seen as right, proper and lawful.

It has been important to the American self-conception for American wars to be seen as the right kind of wars: lawful wars. One of the difficulties, of course, is that the history of warfare does not tend to play out in a tidy narrative. Some U.S. military efforts could be placed as far under the radar as possible in covert military actions, increasingly used after World War II, but decreasingly covert in an age of high tech media technology. And in the regular, acknowledged wars, things could go remarkably wrong. The events of March 16, 1968 are surely just one well disclosed example of this. On that morning American troops embarked on a search and destroy mission in the village of My Lai in South Vietnam. American forces had suffered heavy casualties at the hands of guerilla forces hiding among local villagers. Civilians would be at market that morning, and U.S. soldiers could go after enemy troops, but when they entered the village itching for battle they encountered elderly peasants, children, unarmed women. Somehow their mission of killing continued in spite of the absence of its intended target or any enemy fire. The carnage is hard to imagine. The villagers were not just shot from afar, but bayoneted. At least one girl was raped before being murdered. Some were shot in the back of the head while praying. Others ordered into a ditch and sprayed with machine gun fire. Lieutenant William Calley was the only person charged in these events, and was convicted of murder and sent to prison, but after two days was released and his sentence commuted to home confinement on orders of President Nixon. Calley's defense was that he was simply following the orders of his commander to kill everyone in the village.[21] This defense, of course, had a chilling ring to it, since it had been heard before in the halls of Nuremberg.

How is it that the United States, a nation that saw itself as taking ideas of freedom and

justice to other lands, had found itself implicated in the bullet ridden bodies of children scattered in a Vietnamese rice field? There was no way to undo the horror of My Lai, of course, but there would have to be efforts to extricate America from it all. There would be two ways to do this. Atrocities need not be seen as the acts of the nation, but only of rogue elements, abusive soldiers. That could be accomplished, perhaps feebly, through the prosecution of Calley. And in later years, the U.S. would loosen the binds of international law itself.

In 1998, the Statute of Rome established the International Criminal Court, a permanent international body to prosecute human rights violations, and a goal of the human rights movement for decades. The United States refused to sign the treaty. The Clinton administration argued that it would subject American military personnel to politically motivated prosecutions. The world now had a tribunal that could enforce human rights law, but not against the United States. In defending this position in 2002, Under Secretary of State John Bolton pointed first to the need to ensure that American troops overseas not be subject to prosecution in a non-U.S. court.[22] The ICC decision coincided with a broader withdrawal from international law. President George H.W. Bush had signed the Kyoto environmental treaty, but his son President George W. Bush pulled the U.S. out of the Treaty in 2001.

War, Statebuilding and Governance

Franklin Delano Roosevelt is remembered as a great wartime president, having led the nation through World War II. Yet in 1933, when he delivered his first inaugural address, Roosevelt cloaked the *first* term of his presidency in the metaphor of war. As the nation faced an economic crisis, Roosevelt admonished that "the only thing we have to fear is fear itself." The

nation would move forward, he urged, "as a trained and loyal army willing to sacrifice for the good of a common discipline." Larger, national purposes would "bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in times of armed strife." The powers the president would need would be warlike powers "that a stricken nation in the midst of a stricken world may require." If Congress failed to grant the President such power, "I shall ask the Congress for the one remaining instrument to meet the crisis -- broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."[23] The speech was celebrated, but Eleanor Roosevelt admitted that it was "a little terrifying" that "when Franklin got to that part of his speech when he said it might become necessary for him to assume powers ordinarily granted to a President in wartime, he received his biggest demonstration."[24]

Roosevelt would not need to go to Congress for such warlike powers, for in fact they remained in the President's office, left over from the first World War. FDR's use of war powers for domestic problems was just one example of a common feature of twentieth century governance. Sometimes, as for Roosevelt, war powers could be used because the domestic problems were analogous to war. Later, increasingly, domestic issues were seen as related to national security and so germane to the war powers. In either case, war became a central logic of twentieth century American statebuilding.

As the twentieth century began, war enabled the quintessential act of nation-building for the United States: the acquisition of territory in the Carribean and the Pacific.[25] From World War I onward, war-related statebuilding instead took the form of new federal government powers.

American constitutional scholars tend to focus inward when examining great debates about the scope of government power in the first decades of the twentieth century, but global events, especially war, had an important impact on the expansion of federal government power. Although no part of the "Great War" was fought on American soil, many facets of American life were affected by it. More than 50,000 U.S. soldiers were killed in combat, and another 206,000 were wounded. U.S. allies depended heavily on billions of dollars in American loans, and the U.S. provided as much as two-thirds of allied military supplies. The war was thought of as a new kind of war, an unprecedented global conflict. Congress responded with new statutes giving the president power to raise armies by conscription, censor communications with foreign countries, regulate foreign-language press in the United States, and take control of rail, telephone, and telegraph systems.[26]

Not long after the war, a new emergency would soon grip the nation. This time U.S. military uniforms were donned by veterans, the "Bonus Marchers," who traveled to the nation's capital in 1932 to challenge the effect of depression-era government belt-tightening on military pensions.[27] It mattered that the "Great Depression" followed the "Great War" and intersected with the beginnings of World War II. The legal history of the era has been richly told, but in the telling legal historians have tended to cabin these events as a domestic interlude in between war periods. Yet World War I provided antecedents for the powers drawn upon by both Herbert Hoover and FDR to address the economic crisis of the depression. War was invoked as a metaphor to signal the need for national commitment and sacrifice. And the idea of war would, in this context, serve its conventional function: signaling a time of exception; reassuring the nation that an expansion of government power need not be feared. If conceptualized as war-

related, it could be imagined as ephemeral.

It was not just the Bonus Marchers who cloaked themselves in wartime imagery during the depression. "We all have been saying to each other the situation is quite like war,"Secretary of State Henry Stimson wrote in 1931.[28] As Robert Higgs has written, Americans "looked back with nostalgia on Woodrow Wilson's quasi-dictatorial authority to mobilize resources during World War I. Proposals to revive the authoritative emergency programs of 1917-1918 bloomed like wildflowers."[29] As a presidential candidate, Franklin Delano Roosevelt argued that the nation was faced with "a more grave emergency than in 1917," and even before the election, New Dealers were researching whether certain wartime grants of power could be used to allow Roosevelt to enact emergency measures.[30] Once Roosevelt was elected, according to William Leuchtenburg, "There was scarcely a New Deal act or agency that did not owe something to the experience of World War I."[31]

The new President turned immediately to wartime powers. Under the Trading with the Enemy Act of 1917, a World War I measure still on the books, he issued an executive order requiring banks nationwide to close for three days to curb a panic-driven outflow of capital. The President then sought retroactive approval from Congress in the quickly enacted Emergency Banking Act.[32] Other wartime measures were revived with New Deal legislation, many in the famous first Hundred Days. Congress gave the president power to aid farming and industry with the Agricultural Adjustment Act (AAA) and the National Industrial Recovery Act (NIRA), and Leuchtenburg argues that "the war spirit carried the Agricultural Adjustment Act through."[33] Roosevelt named as the head of the Agricultural Adjustment Administration George Peek, who had served on the War Industries Board. The Tennessee Valley Authority, a New Deal

experiment in regional planning, evolved from a wartime nitrate and electric power project. New Deal public housing projects also had their beginnings in the war. The Civilian Conservation Corps, formed to use civilians to help conserve natural resources, was purposely structured to be similar to the wartime mobilization of troops. Recruits gathered at Army recruiting stations, wore World War I uniforms, and slept in Army tents. These New Deal programs were defended in militaristic terms. Representative John Young Brown of Kentucky said to his fellow Democrats: "we are at war today . . . . I had as soon start a mutiny in the face of a foreign foe as start a mutiny today against the program of the President of the United States."[34]

If a mutiny occurred, it would come from the courts. In 1935, the Supreme Court questioned the broad congressional delegations of power to the executive to regulate commerce for the sake of economic recovery. In *Panama Refining Co. v. Ryan* (1935), the Court held one portion of the delegation of power in NIRA unconstitutional. The Act allowed the president to prohibit the interstate shipment of oil in excess of state quotas, but the Court argued that there were not enough guidelines to support this delegation of legislative authority: "Congress left the matter to the President, without standard or rule, to be dealt with as he pleased."[35] *Panama Refining* had limited application, but it was soon clear that the case was the beginning of the unraveling of the New Deal. In *Schechter Poultry Corp. v. United States* (1935), the Court struck down Section 3 of the NIRA, which allowed the president to establish industry-wide regulations on wages, hours, and trade practices for the purpose of restoring economic stability. Wartime analogies would not move the Supreme Court, which found the statute to confer an unconstitutional delegation of government power. "Extraordinary conditions," the Court

maintained, "do not create or enlarge constitutional power."[36] Concern for maintaining the constitutional balance of power also led the Court to strike down other New Deal measures, such as the Agricultural Adjustment Act in *United States v. Butler* (1936).[37] This time the specter of totalitarian authority lurked behind the New Deal. Excessive federal power at the expense of the states threatened to convert the United States "into a central government exercising uncontrolled police power in every state of the Union."[38]

By the end of 1936, federal judges had issued about 1600 injunctions to prevent officials from enforcing acts of Congress, and a conflict between the judiciary and the executive branch loomed, leading eventually to Roosevelt's infamous "court-packing plan." While the plan was pending, however, the Court handed down decisions that undermined the view that the judiciary would continue to frustrate New Deal goals. In 1937, *West Coast Hotel v. Parrish,* the Court suddenly upheld minimum wage legislation that was almost exactly like legislation it struck down a year before.[39] In *Jones and Laughlin* (1937) it found the National Labor Relations Act to be constitutional, embracing an analysis of the commerce power that seemed the mirror opposite of one it had rejected just the year before.[40] At the time, the shift was primarily attributed to Justice Roberts, who appeared to have changed his position in *West Coast Hotel*, causing the Court to shift from 5-4 against economic regulation to 5-4 in favor of it. The Court's motive was questioned; some suspected their purpose was to defeat the court-packing plan, however the Court's confidential vote and Roberts's switch occurred before the plan was even introduced.[41] Others suggested the Court simply followed the election returns. More recently, historians have argued that a dramatic "switch in time that saved nine" is not an accurate way to characterize the Court's trajectory, as the Court's jurisprudence shows a more gradual evolution, and later New

Deal cases were based on more carefully drawn statutes. Whatever the cause of rulings that, in 1937, were perceived to be a great break with the past, the Court's direction was solidified with the resignation of New Deal opponent Justice Willis Van Devanter in May 1937, allowing Roosevelt to appoint a new justice and giving the New Deal a 6-3 advantage.[42]

Meanwhile the court-packing bill was defeated. Although the nation had rallied around the strong warrior mantle the President had taken on in 1932, with the rise of Adolph Hitler in Germany, concentrations of power seemed ominous. Letters to the editor of American newspapers ran strongly against the bill, claiming that FDR was engaging in a dictatorial power grab. Many saw the courts as America's protection against the abuses of majoritarianism that Americans witnessed in Hitler's Germany.[43] A May 1937 Senate Judiciary Committee report did not explicitly compare Roosevelt to Hitler, but mentioned "the condition of the world abroad" and hinted that allowing the president to tamper with the judiciary would lead to autocratic dominance and a rejection of democratic principles. The report concluded that the court plan was "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[44]

The world would soon prepare for another war. Along the way Congress and the Court placed broader war and foreign affairs powers in the hands of the president. *Curtiss-Wright v. United States* (1936) gave the president seemingly boundless power in foreign relations by declaring constitutional Congress's joint resolution delegating discretion to the president to embargo arms sales to warring Latin American countries. The President's power in this area was not derived only from Congress, the Court declared, but was an aspect of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of

international relations."[45]

In 1935, Hitler violated the Treaty of Versailles by introducing military conscription and creating an air force. German troops soon occupied the Rhineland, and Hitler contemplated expanding Germany into Czechoslovakia and Austria. Civil war raged in Spain, resulting in the establishment of a fascist regime; Italy, under fascist leader Mussolini, invaded Abyssinia (Ethiopia). Japan waged war on China in July 1937. As Roosevelt put it in October 1937, there was an "epidemic of world lawlessness."[46] Congress tried to use law to construct a buffer between the U.S. and the outbreak of war, passing the Neutrality Act of 1937, which forbade the shipment of weapons to nations at war. In 1938, in an effort to democratize war policymaking, Congress toyed with the idea of a constitutional amendment that would allow Congress to call a popular referendum to decide whether to declare or engage in war. Roosevelt argued strongly against it, privately saying that the proponents of the amendment had "no conception of what modern war . . . involves." The proposed amendment lost a test vote in the House, and was not seriously pursued again.[47]

In 1938, Hitler took Austria and Czechoslovakia, Japan captured the Spratly Islands southwest of Manila, Madrid was taken over by Franco, and Mussolini took Albania. Roosevelt, alarmed by the speed with which fascism was spreading, began a rearmament campaign. Germany invaded Poland in 1939, leading Britain and France, who had pledged to help defend Poland, to enter the war. Poland fell, and Finland soon followed. By June 1940, Germany had taken Denmark, Norway, the Netherlands, Belgium, and France.[48]

Stunned by the swiftness of Germany's conquest of Europe, Americans again looked to Roosevelt for leadership in the midst of crisis, yet their fears of Hitler had not yet coalesced into

a national commitment to go to war. After six weeks of heated debate, the President convinced Congress to repeal the Neutrality Act, putting the U.S. in a position to aid Britain and France, and in September 1940, Congress authorized the first "peacetime" conscription. But the international context complicated domestic politics. The shifts of power involved in the New Deal's "war" on depression began to seem more menacing; it seemed that preparations for the war against the economic emergency could easily slide into preparations for involvement in the world war. It was unclear where one war ended and the other began. Roosevelt added to this ambiguity. In his January 1939 address to Congress, he said: "All about us rage undeclared wars – military and economic. All about us grow more deadly armaments – military and economic. All about us are threats of new aggression – military and economic."[49] As Michael Sherry argues, preparations for World War II were "less a wholly new enterprise than a continuation of the earlier struggle on a different front, one with an identifiable enemy to replace the faceless fear of the Depression."[50]

In May 1941, Roosevelt directly laid the basis for war-related expansion of federal power. He declared an unlimited national emergency, arguing that although war had not come to American soil, "indifference on the part of the United States to the increasing menace would be perilous,"and therefore the nation "should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere."[51] The declaration allowed Roosevelt to use leftover World War I provisions as needs arose, and he used his authority to re-instate the Council of National Defense, create an Office of Emergency Management, call military reservists to active duty, regulate banking and foreign trade, and exercise control over industries such as munitions,

power, transportation, and communications. The March 1941 Lend Lease Act delegated authority to the president to sell, lend, or lease military materials to nations whose defense was deemed necessary to the United States, and gave him broad discretionary power to regulate the armaments industry.[52]

The expansion of "war powers" was not confined to sites of conflict or strategic resources, but touched the daily lives of average Americans. The War Powers Act of December 1941 gave Roosevelt the authority to redistribute war-related functions, duties, powers, and personnel among government agencies as he saw fit. It gave him broad control over international trade and foreign-owned property in the U.S., and allowed censorship of all communications between the U.S. and any foreign country. A Second War Powers Act soon followed, authorizing executive agencies to acquire any private property necessary for military purposes. It also gave the president the widest economic control ever granted to the executive, allowing him to "allocate . . . materials or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." Congress also passed the Emergency Price Control Act, establishing the Office of Price Administration to control prices and rents.[53] The income tax expanded from a "class tax" to a "mass tax," doing more than raising revenue needed at wartime: it provided individual citizens with an opportunity to participate in a wartime politics of sacrifice.[54] The broad-based income tax would stay in place after the war, providing the mechanism for funding an expanded post-World War II state.

The Supreme Court added to the aggregation of federal power. While the Court adopted a more deferential posture in reviewing the constitutionality of acts of Congress in the late

1930s, it was during World War II that the Court virtually eliminated federalism as a limit on Congressional power. *Jones and Laughlin v. NLRB*, the 1937 case that seemed to signal a new, more permissive approach to the New Deal, concerned the steel industry. Jones and Laughlin was a major steel corporation with an interstate existence, its tentacles reaching throughout the nation, embedded in interstate commerce. In contrast, the 1942 case *Wickard v. Filburn*, in which the Court upheld a more expansive reach of federal power, concerned an Ohio farmer, whose wheat was not an interstate product, but was used as chickenfeed on his own farm. Filburn's chickenfeed had exceeded his wheat allotment under the Agricultural Adjustment Act. In finding that Congress could regulate home produced and consumed agricultural products, the Court adopted a "cumulative effects" test. Even if a farmer's home-consumed wheat did not have a substantial effect on interstate commerce, it was still within Congress' regulatory power if put together with others similarly situated, the cumulative effect was "far from trivial."[55] The Court's holding seemed to decimate federalism as a limit on Congressional power. Why had the Court gone so far?

There is more to the World War II context of Wickard than the date, 1942, alone. In announcing wheat quotas, Secretary of Agriculture Wickard gave a speech, "Wheat Farmers and the Battle for Democracy." He argued that federal control over wheat was crucial, so that the federal government would have a predictable supply. The U.S. need[56]ed to send wheat to England, a wheat-importing country, that was isolated by German U-boats from its usual suppliers in Europe. Wickard called on farmers to do their patriotic duty and comply with federal law because that would enable the U.S. government to use wheat supplies to help England fight the Nazis. Because the speech had confused Filburn about his wheat quota, it was

part of the case, and part of the record before the Court. It is important to the history of federalism to see the great expansion of federal power as generated not by a reaction to the Court-packing plan, but instead in the context of the importance of federal control over the economy during wartime. A stronger role for the states wilted in the face of wartime national security.[57]

By the end of the war, the American economy was booming. New questions arose about the government's ability to maintain prosperity. Roosevelt's war analogies had treated the Depression and World War II as exceptional states requiring temporary solutions. Now permanent solutions were needed. Popular journalist John Gunther expressed Americans' "quarrelsome, anxious mood" after the war, and inquired as to its meaning. Did the nation's lack of vision "show that, to become efficient, this country needs the stimulus of war?"[58]

In an effort to scale national control back to peacetime levels, President Harry S. Truman ordered government officials "to move as rapidly as possible without endangering the stability of the economy toward the removal of price, wage, production, and other controls toward the restoration of collective bargaining and the free market."[59] While most of the wartime control agencies were shut down by the end of 1945, some became permanent governmental departments or agencies, and many of the powers held by the dismantled agencies were transferred to permanent agencies.[60] Yet government control was not surrendered. In 1946 Congress passed the Employment Act, basically imposing a duty on the federal government to use all available resources to maintain economic stability.[61] Over one hundred wartime executive orders and statutes were left in place after WWII, giving the president leeway in addressing the increasing tensions overseas.

The Supreme Court signed on to an expansive use of the war power. To ease a postwar housing shortage, Congress passed the Housing and Rent Act of 1947 restricting rents in "defense rental areas." Even though the act was passed after hostilities had formally ended, because the effects of war could be felt on the economy for years, the Court in *Woods v. Cloyd W. Miller* (1948) found the act to be a constitutional use of the war power.[62]

During the Korean war, President Truman's exercise of broad power extended to the homefront. Facing a threatened strike in the steel industry, and concerned that a strike would disrupt production of war materiel, Truman issued an executive order seizing the steel mills. The controversy quickly made its way to the Supreme Court, and the Court put a break on the President's ability to define the scope of war-related executive powers. As Justice Black wrote for the Court majority: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."[63] But in spite of the Court's efforts to pull back on federal government war-related powers, by mid-century war had become embedded in American governance in a way that no Court could undo.

The most important carry-over from World War II was not the bureaucratic structures, the statues and the judicial precedents – the legal edifice of the war – important as it was. Instead, the most substantial impact on American politics and diplomacy, American culture and law, was the radiation that continued to fall across countrysides. What has often been mistakenly called the "postwar" era emerged under a nuclear cloud. Even to Americans, the destruction of

Hiroshima and Nagasaki were ominous, for it was immediately clear that the awful power that had been unleashed upon the Japanese would someday find its way into the hands of American adversaries. And at mid-century, Americans lacked the utopianism of the World War I generation. They did not dare to hope that war would not come again; at the same time they came to believe that the next war would bring a nuclear holocaust and the end of human existence itself. And so at the end of the war, the nation's joyfulness was tinged with the unease we can feel in the words of Dwight Macdonald, as the story of Hiroshima and Nagasaki continued to unfold:

"May we hope that the destructive possibilities are so staggering that, for simple self-preservation, [other nations] will agree to 'outlaw' The Bomb? Or that they will foreswear war itself because an 'atomic' war would probably mean the mutual ruin of all contestants? The same reasons were advanced before World War I to demonstrate its 'impossibility'; also before World War II. The devastation of these wars was a terrible as had been predicted – yet they took place."[64]

Fifty years later, the historical memory of the war was comfortably stripped of these dark elements; but it is important to remember that when bands of brothers returned home to kiss lovers and strangers, for many there was in the sweetness a bitter aftertaste.

This overwhelming sense of the threat of nuclear arms, and therefore the nation's dependence on nuclear technology, helps us to see the logic underlying the post-World War II "Red Scare," fueled by fears, real and fictional, of American "atom spies," and of a more enduring problem: the nation's dependence, for its very existence, on technological advancement. Dwight D. Eisenhower addressed this latter issue in 1960, on the final day of his

presidency. Eisenhower, himself a war hero, was swept into office in 1952 in the belief that he would lead the nation out of the muddled war in Korea. While he succeeded in a retreat behind the 38th Parallel, by the end of his second term there was no escaping the militarization – not simply of government and economy – but of American life itself.[65] Americans stocked their bomb shelters; children learned to "duck and cover" against a nuclear blast in school; military readiness was a part of daily living.[66] In this context, upon leaving office, Eisenhower left the nation with a warning. Peace itself now rested on a tie between the military and American industry, he warned. A new "military-industrial complex" was both vital – supplying the armaments that would protect American security – but it was also dangerous. As much as "we recognize the imperative need for this development," Eisenhower warned, "we must not fail to comprehend its grave implications." His concern was that the power residing in the alliance of industry and the military might undermine democracy itself, and urged, "We must never let the weight of this combination endanger our liberties or democratic processes." Ultimately American leadership and prestige rested "on how we use our power in the interests of world peace and human betterment."[67] It was no longer possible to take war out of the project of American governance. The question, instead, was to what purpose the nation would put the tools of war.

Law as a Tool of War

"LONG LIVE THE CONSTITUTION OF THE UNITED STATES," a World War I circular seemed to shout to its readers. On the other side it began as emphatically: "ASSERT YOUR RIGHTS!" This anti-war circular would result in Charles Schenck being thrown in jail.

It was, of course, not the document's quotations from the constitution that would get Schenk and his Socialist Party compatriots into trouble. Instead it was the purpose of their arguments: to encourage opposition to the war and resistance to the draft. Drawing on the Thirteenth Amendment, the circular argued, "A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man....He is forced into involuntary servitude....He is deprived of all freedom of conscience and forced to kill against his will."[68]

Schenck and other Socialist Party members mailed thousands of these circulars to men who had been called up for World War I military service. For this they were arrested for violating the Espionage Act of 1917, which made it a crime to wilfully cause "insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States."[69]

The Supreme Court upheld Schenck's conviction, seeing his actions as an attempt to obstruct government enlistment efforts. As Justice Oliver Wendell Holmes wrote for the Court, "Of course the documents would not have been sent unless it was [sic] intended to have some effect."[70] In this context, the First Amendment would provide no protection. "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." Wartime was an exceptional context: "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."[71] Holmes then invoked what would become a central first amendment concept, even though in this case it seemed to have no teeth: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to

create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[72] In this case, even if Schenck's efforts were ineffective, it seemed enough that he was doing what he could to impede the draft. The Court upheld his conviction.

Schenck is a classic case in the swinging pendulum analysis, and is taken as an example of the way the Court during wartime is less protective of rights, and more protective of national security. But the swinging pendulum analysis is problematic. In some contexts wartime has been the occasion for the expansion of rights. And the fuzziness of wartimes makes movements of the pendulum hard to measure.

Another way to view these cases would be to see the Court, like the executive branch, engaged in the project of wartime governance, managing rights – not along a narrow continuum but in a multifaceted way – in a manner that aided, or at least did not undermine, national security. Sometimes the differences on the Court are more about how national security is best enhanced, than about the relative importance of rights and security.

In *Schenck* and other cases, the Court most often accorded the executive branch the powers it sought during wartime to raise an army, maintain wartime production, and protect national security. When courts loosened constitutional restraints on executive action during wartime, law functioned as a tool enabling wartime governance.

Geoffrey Stone has called the Sedition Act of 1918 "the most repressing legislation in American history."[73] The Act criminalized the saying of things that were thought to endanger the war effort, including "disloyal, profane, scurrilous or abusive language about the form of the government, the Constitution, soldiers and sailors, flag or uniform of the armed forces," or support the German war effort, or opposition to the United States.[74] The only Sedition Act case

to reach the Supreme Court was *Abrams v. United States* (1919)[75] involving Russian immigrants who protested the war by throwing leaflets off rooftops and out windows. The Supreme Court upheld their conviction. No matter how hapless their efforts, it was enough that the defendants intended to provoke opposition to the war.

In *Abrams*, Justice Holmes, joined by Justice Brandies, began an important line of dissenting opinions. Government power was greater in wartime, Holmes argued, but "the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[76] He found Abrams's flyers to be harmless, and the prosecution to be unconstitutional. Holmes concluded with a vision of constitutionalism that would powerfully inform first amendment jurisprudence:

"Persecution for the expression of opinions seems to me perfectly logical.... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[77]

It may be that the power of Holmes's vision, carved in this wartime case, leads us to a paradoxical conclusion. This wartime suppression of rights, by leading to an expansive and influential vision of the first amendment, albeit in a dissent, ultimately informed a broader vision of free speech rights in the long run. Mark Tushnet would make such an argument in a different context: sometimes the examples of the suppression of rights lay the basis for greater protection

in later years.[78]

The context of World War I infused American rights discourse, both where rights were denied and where they were extended. In the final years of the long campaign for woman suffrage, Suffragists used wartime ideology to prove their point. In 1918, picketers from the National Women's Party surrounded the White House, holding banners with messages intended to embarrass the war effort. One banner read: "TO THE RUSSIAN ENVOYS...WE THE WOMEN OF AMERICA TELL YOU THAT AMERICA IS NOT A DEMOCRACY. TWENTY MILLION AMERICAN WOMEN ARE DENIED THE RIGHT TO VOTE."[79] President Wilson, who had resented the suffrage protesters, came to embrace woman suffrage as a war measure arguing to Congress that it must consider "the unusual circumstances of a world war in which we stand and are judged not only by our own people and our own consciences but also in the view of all nations' and peoples'...." The President believed that the suffrage amendment "was vitally essential to the successful prosecution of the great war of humanity in which we are engaged." It was Wilson's "duty to win the war and to ask you to remove every obstacle to winning it." It was not just that the United States hoped to bring democracy to other lands, and in other lands democracy increasingly meant the inclusion of women in government. Also, the nation had made "partners of the women in this war," he continued: "shall we admit them only to a partnership of suffering and sacrifice and toil and not to a partnership of privileged and right?"[80] Once the Nineteenth Amendment was finally ratified in August 1920, some believed that women voters would support the League of Nations, in the interests of peace.[81]

Ideas about war also informed the constitutionality of forced sterilization of the "feeble

minded." In *Buck v. Bell* (1927), Justice Holmes majority opinion invoked the ultimate sacrifice in wartime: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence." In eugenic theory, wartime took too many of the best of the gene pool. Sterilization of the genetically inferior helped keep things in balance. In the mistaken science of the 1920s, in this case a denial of rights to the "feeble minded" protected the nation against the genetic consequences of war. *Buck v. Bell* is an example of the way that ideas about war inform law during times we conceptualize as peacetime.

Before long, a new global war darkened the horizon. In one sense, it is easy to tell when World War II began. December 7, 1941, was "the day that will live in infamy," as FDR would call it, the day of the Pearl Harbor attack. Congress declared war on Japan the following day, and on Germany and Italy soon after. But war had been waging in Europe and Asia long before that. American support for the Allied war effort, and threats to U.S. security from German U-boats, had increased over time. And even in the late 1930s, as Hitler rose to power, before he began the German march across Europe, the ominous rise of fascism affected the way Americans thought about their future, their security and their government.

The impact of this war, like many others, came to the United States over time, but Pearl Harbor served as a catalytic point, the moment of most intense national mobilization. Security concerns had filtered into Supreme Court opinions before 1941, but it was Pearl Harbor that led Justice Felix Frankfurter to tell his law clerk: "Everything has changed, and I am going to war."[82] It led Justice Frank Murphy to become a lieutenant colonel in the Army on inactive status, and to

do literally what the rest of the Court did figuratively: during Court recesses, he put on a military uniform[83]. The Court, like the rest of the country, felt called into wartime service, though they would sometimes differ about how best to serve their country during war.

Soon after Pearl Harbor, Japanese Americans became a target of wartime fears, especially once the West Coast began preparations for a possible attack, including air-raid drills and blackouts. Roosevelt confirmed this nervousness in his December 9 radio address, saying, "The attack at Pearl Harbor can be repeated at any one of many points in both oceans and along both our coast lines and against all the rest of the hemisphere."[84] Soon, public figures began to call for all persons of Japanese heritage to be confined to camps.

On February 19, 1942, seventy-four days after the attack on Pearl Harbor, Roosevelt issued Executive Order 9066, which authorized the Secretary of War to prescribe certain areas as military areas that people could be excluded from. On March 21, Congress passed a statute to enforce the terms of Executive Order 9066. This "exclusion order" was used to relocate people from their homes into internment camps in various places across the U.S. Images of this relocation effort, the photographs of small Japanese-American children tagged with numbers, under armed guard, and of families carrying children and household belongings as they left their homes, are some of the most iconic American images of the impact of World War II at home. By the end of the war, thousands of people had been relocated.[85]

Fred Korematsu would become the subject of perhaps the most iconic case about rights at wartime in the twentieth century. An American citizen born of Japanese immigrants, Korematsu had not intended to challenge the exclusion order; he was arrested while walking down a San Leandro, California street with his girlfriend. He was convicted of being a person of

Japanese descent present in an area covered by and exclusion order. In 1944, the Supreme Court upheld his conviction.

Justice Black insisted at the outset of his majority opinion that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and therefore "courts must subject them to the most rigid scrutiny." Still, the Court found the exclusion order to be justified under the circumstances. "Korematsu was not excluded from the Military Area because of hostility to him or his race," Black argued. "He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures." The Court could not "availing ourselves of the calm perspective of hindsight -- now say that at that time these actions were unjustified."[86]

Justice Roberts, in dissent, disagreed. *Korematsu* was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[87] Justice Murphy believed that the exclusion order "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[88] The most memorable opinion came from Justice Jackson, who distinguished between executive and military actions during wartime, and the role of the courts. It was one thing for the military to distort the constitution during wartime, and entirely another for the courts to do so.

"A military order, however unconstitutional, is not apt to last longer than the military emergency....But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions

such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. ...There it has a generative power of its own, and all that it creates will be in its own image."[89]

The *Korematsu* case has been almost universally criticized in the decades since. Records indicate that actual subversive activities by persons of Japanese heritage were rare and quickly identified; detaining all people of Japanese descent – despite proof of citizenship, loyalty, or service to the United States – was an extreme reaction to a minuscule threat. Pre-existing racism against Japanese on the west coast is seen as a major factor in the decision to exclude them from the area.[90]

The internment cases are often cited for the proposition that rights are restricted during wartime. An assumption is that there is a trade-off between rights and security, and during wartime the pendulum naturally swings in the direction of security. In another important series of cases, however, the Court itself grappled with the question of whether the sacrifice of rights at wartime really enhanced security, or whether it undermined it.

In *Minersville School District v. Gobitis* (1940), the Supreme Court took up the constitutionality of compulsory flag salute laws. The Court held that the expulsion of children from public school for refusing to salute the flag based on religious beliefs was not only acceptable, but would protect important national interests. According to Justice Felix Frankfurter, writing for the majority, the flag salute fostered unity, and "National unity is the

basis of national security."[91] Just three years later, in *West Virginia State Board of Education v. Barnette* (1943), the Court reversed itself, striking down such a law. This time the Court viewed the liberty/security balance differently. As Justice Jackson wrote for the Court, the "ultimate futility of such attempts to compel coherence is the lesson of … the fast failing efforts of our present totalitarian enemies."[92] According to Paul Murphy, the reversal "was largely driven by the Court's desire to distinguish America from wartime Germany" where laws compelling salute of the national flag in the name of conformity of action and belief were the norm.[93] It did not help that the West Virginia flag salute was reminiscent of the Nazi salute Both cases invoked conceptions of national security. For Frankfurter, security required narrowing rights. For Jackson in *Barnette*, security was enhanced by expanding rights.

The best example of the sort of loaded weapon that Justice Jackson warned of in *Korematsu* was the Nazi saboteurs case, *In re Quirin* (1942). This case involved eight Nazi terrorists who landed under cover of night on east coast American beaches with the objective of slipping in unnoticed, and committing acts that would terrorize civilians, such as blowing up department stores. But plans went off-track rather quickly, and one of the Nazis who wanted to expose the plot ended up traveling to FBI headquarters and spilling a suitcase full of cash on the table when he was unable through other means to get agents to pay attention to his story. The saboteurs were rounded up and secluded. Once safely away from the press, a supposed successful FBI sting operation was released to the press with much fanfare. FDR and his Justice Department quickly decided that the saboteurs must be tried by a military tribunal, not in civilian courts. But was this constitutional? The saboteurs' counsel filed a habeas corpus action that found its way quickly before the U.S. Supreme Court. Upon hearing of this action, FDR told his

Attorney General: "I want one thing clearly understood....I won't give them up." He wouldn't have to. The Court decided the case within twenty-four hours, issuing a short order upholding the tribunals. The Court's opinion itself would follow three months later. The tribunals themselves were concluded quickly, with guilty verdicts and death sentences for all. Five days later, FDR commuted two of the sentences to prison terms. The executions of the other six were carried out the same day.[94]

Chief Justice Stone then had the unhappy task of writing an opinion justifying the constitutionality of a process that resulted in executions that had already been carried out. There were inherent difficulties in the arguments and conflicts among the justices positions, rendering the writing, in Stone's words, "a mortification of the flesh."[95] An opinion was finally released, roundly criticized, and then seemed to drop into oblivion. But *Quirin* would experience a resurrection in the aftermath of the attacks on the United States on September 11, 2001. Again, foreign terrorists had come to the U.S. intent on destabilizing American society. *Quirin* was dusted off and rehabilitated, a tool in a new "war on terror."

The complicated relationship between rights and security during World War II and after can be seen in the civil rights of African Americans. African Americans participated in the war effort, but faced caps on enlistment and segregation within the armed services. Racial segregation was justified in part on the idea that integration would undermine the cohesion of military units, harming the nation's fighting strength. But the rest of the world noticed American race discrimination, and many came to wonder about the seeming contradiction that a war against Nazi racism was being fought by the segregated Army of a nation rife with racial discrimination. African American activists argued for a "Double V" during the war: victory

abroad against fascism, victory at home against racism. Civil rights and labor leader A. Philip Randolph threatened a march on Washington to protest discrimination in defense industries. The threat of hundreds of thousands of African Americans marching on the nation's capital pressured FDR to issue an executive order banning race discrimination in defense industries. Also during the war, in *Smith v. Allright* (1944), the Supreme Court struck down the "white primary," practices that had kept African Americans from voting in primaries, which in the heavily Democratic South usually selected the winning candidate. Thurgood Marshall viewed the case as the NAACP's most important before *Brown v. Board of Education* (1954).[96]

A Cold War national security environment would succeed World War II, and soon affected domestic as well as international politics. In order to generate political support for foreign aid to non-Communist governments, President Truman characterized the struggle between the U.S. and the Soviets as between two fundamentally different ways of life – one free, the other totalitarian. In a global zero-sum game, anything that undermined the U.S. was seen as aiding its adversary, the Soviet Union.[97] This bipolar conceptualization of world politics, with the U.S. as the leading democracy, would continue to the end of the century, even after the collapse of what President Ronald Reagan called the "evil empire." In the name of the Cold War, the U.S. would sometimes support brutal, non-democratic regimes because they were anti-communist. And at home, for a time, Cold War domestic politics led to suppression of free speech and political rights, ironically undermining the practice of democracy in the nation held up as the democratic model.

If Communist governments overseas were a threat, Communists at home were feared as a "fifth column" that was ready to undermine American democracy from within. In an atmosphere

of Cold War anxiety, a Wisconsin Senator seized the issue as a means of gaining political visibility. On February 9, 1950, in Wheeling, West Virginia, Joseph McCarthy claimed that he held in his hands a list of 205 employees of the State Department who were members of the Communist Party. He had no such list, but his sensational claims that Communists had infiltrated sensitive areas of the government helped fuel the witch-hunts already underway. Just as government and industry had banded together to fight a world war, they banded together to route out communists. Much of the damage done in the name of anti-communism came not simply from the parading of witnesses before House and Senate committees, but from the private industry blacklists that followed.[98] But the government's role was not only investigatory. Leaders of the American Communist Party were prosecuted for violating the Smith Act. By meeting to discuss Marx and Engels, and by sharing a hope that someday a workers' revolution might overthrow capitalism, they were seen as conspiring to achieve violent overthrow of the U.S. government. The Supreme Court upheld their convictions in *Dennis v. United States* (1951).[99] While there was no evidence in the record of the harm to U.S. national security perpetrated by the defendants, Justice Frankfurter insisted in his concurrence that the Court could take judicial notice of the dangers of communism.[100]

In the Cold War context, any political scuffle anywhere in the world seemed at best to affect the global balance between democracy and communism, and at worst a step toward global annihilation. In this context, the proportion of the defense created by the government was a reflection of the perceived size of the threat. A 1950 National Security Council report, NSC-68, warned that the U.S.S.R. presented a threat like never before, because "the Soviet Union, unlike previous aspirants to hegemony, is animated by a new fanatic faith, antithetical to our own, and

seeks to impose its absolute authority over the rest of the world....With the development of increasingly terrifying weapons of mass destruction, every individual faces the ever-present possibility of annihilation should the conflict enter the phase of total war." The situation was not simply one of national security: "The issues that face us are momentous, involving the fulfillment or destruction not only of this Republic but of civilization itself."[101]

Yet ultimately the battle to contain the Soviet empire would be not one of weapons, but one of ideology. As NSC-68 saw it, the conflict was between the freedom characterized by American democracy and the "slavery under the grim oligarchy of the Kremlin."[102] One important way to fight the Cold War was to project a positive image of American democracy.

The U.S., unfortunately, was not always projecting the image of the free, just society NSC-68 had in mind. Racism and violence in the American South were making headlines around the world, and the Soviets used it to their advantage. For example, in 1946 Isaac Woodward, an African American veteran on his way home still in uniform, was beaten and blinded in both eyes by police in South Carolina. In 1946, veteran George Dorsey returned home to Georgia after serving five years in the U.S. Army only to be lynched by a mob of white men who shot Dorsey, his wife, and their two companions. These incidents were widely reported and caused particular outrage because these men were soldiers.[103]

The widespread publication of stories like these reached beyond U.S. borders, and did not project the image of America the world was intended to see. The Dorsey story was reported in a Soviet publication, which characterized it as an example of increasing violence toward African Americans in the U.S.[104] The Soviet press reported other lynchings and mob violence, and claimed that African Americans were deprived of economic rights, living in a state of semi-

slavery, and were often denied the right to vote. By 1949, the "Negro question" was a principal Soviet propaganda theme,[105] and the U.S. government believed that racism at home was harming U.S. foreign relations. For this reason, civil rights reforms that aided the reconstruction of the global image of American democracy enhanced national security. Law could be a tool in the Cold War through the protection of some civil rights.

The best example of this was the school segregation cases leading up to *Brown v. Board of Education* (1954). The Justice Department filed *amicus curiae* briefs arguing that segregation damaged U.S. prestige around the world. The *Brown* brief quoted Secretary of State Dean Acheson, who argued that international attention given to American race discrimination was of increasing concern.

"The hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions. In such countries the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country."[106]

School segregation was a particular focus of foreign criticism, Acheson said. "Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy." For these reasons, race discrimination was a "constant embarrassment" to the U.S. government and "jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[107] When *Brown* was decided, it was used extensively by the Voice of American and in State Department programming for other nations, and was celebrated by the world press.[108] The Court had finally

undercut an issue that had been one of the Soviet Union's most successful propaganda themes since the Cold War began.

While *Brown* greatly aided the U.S. image, American diplomats faced new challenges in the early 1960s as peaceful civil rights demonstrators were brutalized in the South. Images from Birmingham, Alabama and elsewhere flooded the international press. Meanwhile, African diplomats from newly independent nations were refused service at restaurants, especially along a Maryland state highway, as they traveled from the United Nations in New York to Washington, D.C. Ultimately the Kennedy Administration supported civil rights legislation, both for the nation and in the state of Maryland. President Kennedy said in an address to the nation: "We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of the free except for the Negroes?"[109] The President then asked his Secretary of State to testify on behalf of the federal civil rights bill, since the bill was needed to aid U.S. foreign affairs. A State Department staff member testified in Maryland, urging the state legislators that the country needed the state to pass a civil rights bill so that the nation could effectively wage the Cold War. In both contexts – federal power to regulate civil rights and federal pressure regarding state civil rights laws – the federal government pushed the boundaries of federalism to meet the needs of national security. The Civil Rights Act was finally passed in 1964, and it was celebrated around the world as evidence that the U.S. was on the road to remedying its civil rights problems.[110]

Rights and security were in play in several Vietnam War-era cases. In the "Pentagon Papers" case, *New York Times v. United States* (1971),[111] the New York Times and the Washington Post published portions of a top-secret document disclosing government decision-

making regarding Vietnam. The government quickly sought to enjoin the newspapers from printing more of the document, arguing that the release of the confidential information was a threat to national security while the U.S. was at war. The case reached the U.S. Supreme Court in just eighteen days. Noting that the sort of "prior restraint at issue in this case went to the heart of first amendment values, the Court held that the government's arguments about potential harm from publication were not sufficiently compelling to prevent publication. The Pentagon Papers was quickly published as a paperback, and became an overnight best-seller.

In contrast to World War I, Supreme Court also upheld the right to publicly disagree with the war, even when it involved wearing a jacket emblazoned with the words "Fuck the Draft."[112] While the Court held that the First Amendment protected the right to swear about the war, its embrace of dissent was limited. In *United States v. O'Brien* (1968), the defendant argued that burning his draft card was constitutionally protected free speech. While noting that symbolic conduct was, in some contexts, protected by the first amendment, the Court held that the ban on destroying draft cards was related to the important government interest of maintaining a military draft.[113]

The male-only draft came under scrutiny. With an expansion of women's equal protection rights still on the horizon, a South Dakota district judge upheld the male-only draft in 1968, finding that Congress had properly "followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."[114] The male-only draft would be found unconstitutional by another district judge in 1980, but the ruling was overturned by the Supreme Court in *Rostker v. Goldberg* (1981).[115] The Court also upheld a Massachusetts law that gave veterans and absolute preference in employment, in spite

of the discriminatory impact on women in *Personnel Administrator of Massachusetts v. Feeney* (1979).[116]

Through this history, rights were often conceptualized in terms of national security. Rights could expand, contract and change in ways that aided wartime governance or enhanced national security.

Law, Sovereignty and the September 11 World

September 11, 2001, brought massive destruction to American soil, as hijackers piloted two airliners into the towers of the World Trade Center in New York City, a third into the Pentagon building outside of Washington, D.C., while a forth crashed into a field in Pennsylvania after its passengers, upon hearing of the World Trade Center crashes, tried to overcome their hijackers. For a moment, these events brought America and the world together, as peoples around the world made pilgrimages to American embassies with flowers and candles to express their grief. These events might have been characterized as a horrific crime. But President George W. Bush soon announced that the nation was in "a new kind of war" which called for a military response, rather than an effort to find and punish the perpetrators.

This "new kind of war" was not against a nation, but against terrorism. As Marilyn Young has argued, the U.S. has engaged in wars against "isms" since Korea, when the nation saw itself as fighting – not Koreans – but Communists. Terrorists, like Communists, were not confined to a particular state, and so the nation could make war against this new enemy where ever it seemed to reside.[117] The U.S. first set its sights on the Taliban in Afghanistan, and then Iraq, with U.S. officials variously arguing that there were ties between that nation and the Al

Queda terrorist group, and that Iraqi President Sadam Hussein had weapons of mass destruction that threatened American security, claims that it could never verify. Acting without U.N. authorization, the U.S. war on Iraq would seem to be a lawless act, flouting the idea of an international rule of law, which had once been the promise of the United Nations. From another perspective, however, there was a law-related logic to U.S. unilateralism. As Ruti Teitel has argued, the U.S. saw itself as the world's superpower, as the police power of the world, the enforcer of law, and could not itself be subject to the police power. Acting in the face of disapproval by some of its once closest allies, however, the U.S. easily toppled Hussein, but threatened its own legitimacy in the world community.[118]

This new war had more dramatic effects domestically than had any military engagement since Vietnam. Congress to passed the "USA Patriot Act" in September 2001, giving the government broad powers to detain and deport noncitizens, and expanded investigatory power for law enforcement. Most important was the President's assertion of sole authority to determine the scope of executive power, and the Administration's efforts to exercise power in such as way as to render it unreviewable. The justification for this was the fact that September 11 had "changed everything." Critics of Administration policy were criticized as engaging in September 10 thinking. And so September 11 was treated as a new time zone, a space of exception, a time when normal rules must be suspended. Legal scholars debated what the constraints of an emergency regime should be, but the Administration continued to act as if law itself belonged to a bygone era.

Hundreds of prisoners taken in Afghanistan were not held as prisoners of war in that country, and were not transported to the United States, but were taken instead to the U.S.

military base at Guantánamo Bay, Cuba. The U.S. government claimed that Guantánamo was not within the jurisdiction of U.S. courts because it was outside U.S. territory. The Geneva Conventions protecting prisoners of war did not apply either, the Administration asserted, because the detainees were "unlawful combatants," rather than conventional military forces. Guantánamo therefore seemed to be a law-free zone. In both the domestic and international context, the Administration claimed sole power to define the lawful scope of its own action. The U.S. Supreme Court placed a limited break on the power of the executive to define the boundaries of his own power in *Hamdi v. Rumsfeld* (2004), a case holding that a U.S. citizen seized in Afghanistan can challenge his detention in U.S. courts.[119] Still, the Administration's vision of law was of the sovereign ruler as the embodiment of law itself. The Administration justified broad power as necessary to combat the threat of global terrorism. The consequences of unreviewable power seemed evident, however, not long after a case challenging the Guantánamo detentions was argued in the Supreme Court, as news broke of the torture of Iraqi prisoners by American soldiers. Images of naked, hooded prisoners flooded the international press, undermining American prestige throughout the world. It was clear that the U.S. had come far from the moment shortly after 9/11 when the world had grieved along with Americans. Now American power seemed tawdry and dangerous.

Prosecutions of soldiers involved in Abu Ghraib, it was hoped, would help to distance the prisoner abuse from America itself by illustrating that the perpetrators had violated their nation's norms.[120] But as troublesome news from Iraq and Afghanistan continued to play out around the world, one thing was clear. The image of America was sealed in the "war on terror," and the meaning of that story would be written in history books far from the command of any American

president. This was again a war making America, in the hearts and minds of those it touched, and in ways America could not control.

Conclusion

The twentieth century provides a sharp contrast to the old saying: "in times of war, law is silent." It is not just that law was not silent during warfare, but that law provided a language within which war could be seen. War is not a natural category outside the law, but is in part produced by it. Across decades of conflict, law was a marker that defined for the nation some of those times when conflict would be contemplated as a "war." And law helped cabin other uses of force as "peacekeeping," or other non-"war" actions. The laws of war, by identifying forms of warfare that crossed the humanitarian line, also helped carve out forms of warfare that were right and noble. It was in the realm of international law that law was turned to with utopian hopes more than once during the century, first to outlaw war itself, and then the more modest, but still ill-fated quest to create a world body that would broker disputes between nations and avoid the inevitability of war.

If law helped to "make" war, war also made law in the twentieth century. While it has been common to see war's impact on American legal history as episodic, this essay argues instead that the impact of war and national security was central and continuing. "War is the mother of states," political scientists have argued.[121] As an engine of statebuilding, war also fueled the development of law related to American statebuilding. Government programs and regulations created during a war did not go away but were drawn upon afterward to serve new purposes. In this way, war-related legal developments became entrenched.

The Supreme Court was affected by wartime pressures. While much attention has been paid to the wartime context of civil liberties cases, the Court's caselaw on federalism and the scope of Congressional power must also be viewed in the context of war. While the beginnings of what is sometimes called the "New Deal revolution" on the Court happened before the U.S. entered the war, the case embracing the furthest extension of federal power, *Wickard v. Filburn*, was a World War II case implicating federal control over war-related commodities. What began in 1937 was consolidated and extended during the war.

When the Court turned to individual rights, the story has not been a simple one of a pendulum swinging between rights and security. Instead, security concerns often informed the Court's jurisprudence, but security might be advanced by contracting, expanding or modifying rights, depending on the context. *Korematsu* during World War II and *Dennis v. United States* during the Cold War are classic cases were rights were restricted in the service of conceptions of national security. In *Brown v. Board of Education*, in contrast, racial discrimination had become an international embarrassment, undermining U.S. prestige. Expanding rights in that context enhanced national security.

The story of *Brown* helps us to see another important way that law and war together made America during the twentieth century. In the context of the Cold War, projecting an image of American justice was central to maintaining a conception of American democracy – a story of America for the world. This was seen as essential to U.S. prestige and to U.S. national security. In later years, the world's perceptions of American democracy have not weighed as heavily on American policy makers. This would become again a central issue after September 11, especially after the exposure of abuses at the hands of Americans at Abu Ghraib. The U.S.

seemed to retreat from subordination to legal regulation, as if law itself would undercut American security. The new world many imagined had been created by September 11 required instead that the U.S. project power. But bad news continued to filter out from Iraq, Afghanistan and Guantanamo. As much as the United States tried to hold the reigns of power, the story of the war, and conceptions of its lawfulness, informed the world's understandings of American identity in a way that no president could control.

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