

**Unlimited War and Social Change:  
Unpacking the Cold War's Impact**

**Mary L. Dudziak**

**USC Legal Studies Research Paper No. 10-15**



**LEGAL STUDIES  
RESEARCH PAPER SERIES**

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

## **Unlimited War and Social Change: Unpacking the Cold War's Impact**

Mary L. Dudziak  
Judge Edward J. and Ruey L. Guirado Professor of Law,  
History and Political Science  
USC Gould Law School

September 2010

This paper is a draft chapter of *WAR · TIME: A CRITICAL HISTORY* (under contract with Oxford University Press). For more on this project, see *Law, War, and the History of Time* (forthcoming *California Law Review*):

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1374454](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374454).

NOTE: This is very much a working draft, not a finished piece of work. I would be grateful for any comments and criticism. I can be reached at: [mdudziak@law.usc.edu](mailto:mdudziak@law.usc.edu).

## **Unlimited War and Social Change: Unpacking the Cold War's Impact**

### **Abstract**

This paper is a draft chapter of a short book critically examining the way assumptions about the temporality of war inform American legal and political thought. In earlier work, I show that a set of ideas about time are a feature of the way we think about war. Historical progression is thought to consist in movement from one kind of time to another (from wartime to peacetime, to wartime, etc.). Wartime is thought of as an exception to normal life, inevitably followed by peacetime. Scholars who study the impact of war on American law and politics tend to work within this framework, viewing war as exceptional. This conception of war does not capture the predominant nature of American war, at least since World War II, characterized not by cataclysmic battles and great military victories, but by “small wars,” surveillance, and stalemate.

The ambiguity of the Cold War might have signaled that the conventional categories no longer fit – that wartime and peacetime coexisted or had melted together. But rather than viewing the Cold War years as rupturing the older categories of war and peace, contemporary thinkers find ways to fit the experiences of that era into pre-existing conceptual boxes. The Cold War becomes for some writers a “wartime,” complete with a dramatic ending.

This paper examines historical and contemporary thinking about the Cold War. Turning to scholarship on war and rights, my focus is not on the way particular rights or lines of caselaw develop, but instead on the way writers conceptualize the world within which rights are framed. Ultimately I argue that a wartime frame persists in our thinking about the Cold War, and this obscures our understanding of the impact of war on domestic law and politics. It reinforces the idea that war is a discreet historical experience, and that “peacetime” is the norm, when instead ongoing limited war has become the American experience. The years of the Cold War are one moment in a longer pattern of ongoing war.

## Unlimited War and Social Change: Unpacking the Cold War's Impact

Mary L. Dudziak  
USC Gould School of Law

That war is a generator of social change is almost a historical cliché, but even clichés need explication and analysis.

Roger Daniels<sup>1</sup>

The facts of war do not speak for themselves.

Adam J. Berinsky<sup>2</sup>

Just what it was that nuclear weapons exploded in the summer of 1945 has long been the subject of controversy. They obliterated nearly two hundred thousand people in the Japanese cities of Hiroshima and Nagasaki, but Little Boy and Fat Man did more than melt flesh, city streets, and tall buildings. They marked the beginning of an age – an atomic age – and with it a changing conception on warfare.<sup>3</sup>

George Orwell wrote in the fall of 1945 that the bomb was likely to change the structure of global politics. Weak states would become weaker, and “two or three monstrous super-states,” each with nuclear weapons, would “divid[e] the world between them.” These monster states would not use the bomb against each other. Instead, each state might be “unconquerable and in a permanent state of ‘cold war’ with its neighbors.” The nuclear age would be, therefore, a “cold war” era, in which the world would see “an end to large-scale wars at the cost of prolonging indefinitely ‘a peace that is no peace.’”<sup>4</sup>

The idea of a “cold war” was, of course, intentionally contradictory. The term was popularized by Walter Lippman and Bernard Baruch, and entered American political

---

<sup>1</sup> Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle: University of Washington Press, 1988), 186.

<sup>2</sup> Adam J. Berinsky, *In Time of War: Understanding American Public Opinion from World War II to Iraq* (Chicago: University of Chicago Press, 2009), 65.

<sup>3</sup> Boyer, *The Bomb's Early Light*; Richard Rhodes, *The Making of the Atomic Bomb*.

<sup>4</sup> George Orwell, “You and the Atomic Bomb,” Nuclear Age Peace Foundation, [http://www.wagingpeace.org/articles/0000/1945\\_orwell\\_you-and-the-bomb.htm](http://www.wagingpeace.org/articles/0000/1945_orwell_you-and-the-bomb.htm) (originally published October 19, 1945).

discourse in 1947.<sup>5</sup> But the question of what the Cold War was, and even when it happened, has ever since been subject of debate. Whether the Cold War was a “wartime,” a “peacetime,” some sort of hybrid, or simply a historical time-marker is a question of more than historical interest. After 9/11, scholars searching for historical comparisons turned to the Cold War-era. Many argued that the new security-infused environment shared characteristics with the Cold War, with frightening implications for contemporary policy-making.<sup>6</sup>

The Cold War is regularly invoked by contemporary writers interested in war and social change, but without examining definitional ambiguities.<sup>7</sup> In order to draw policy implications from the Cold War, and simply to understand the Cold War’s impact on American society at the time, we need a firmer grasp on the nature of the Cold War, and its role in the history of American wartime.

In earlier chapters, I have shown that a set of ideas about time are a feature of the way we think about war.<sup>8</sup> Historical progression is thought to consist in movement from one kind of time to another (from wartime to peacetime, to wartime, etc.). Wartime is thought of as an exception to normal life, inevitably followed by peacetime. Scholars who study the impact of war on American law and politics tend to work within this framework, viewing war as exceptional.<sup>9</sup> This conception of war does not capture the

---

<sup>5</sup> Bernard Baruch, “Text of Bernard Baruch’s Address at Portrait Unveiling,” *New York Times*, April 17, 1947, 21; Walter Lippmann, “Today And Tomorrow, The Cold War: Study Of U.S. Policy,” *Washington Post*, September 2, 1947, 11; Walter Lippmann, *The Cold War, a Study in U.S. Foreign Policy* (New York: Harper, 1947).

<sup>6</sup> See, e.g., David Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” *Harvard Civil Rights-Civil Liberties Law Review* 38 (Winter 2003): 1-30; Elaine Tyler May, “Echoes of the Cold War: The Aftermath of September 11,” in *September 11 in History: A Watershed Moment?* ed. Mary L. Dudziak, 38-40 (Durham: Duke University Press, 2003).

<sup>7</sup> This is a feature of scholarship on the Cold War and social change, including my book *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).

<sup>8</sup> See Mary L. Dudziak, “Law, War, and the History of Time,” *California Law Review* (forthcoming 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1374454](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374454).

<sup>9</sup> E.g. Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (New York: W.W. Norton & Company, 2005); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998). For a contrary view, see Mark Brandon, “War and the American Constitutional Order,” *Vanderbilt Law Review* 56 (November 2003): 1815-1865. See also works cited at n. \_\_\_\_.

predominant nature of American war since World War II, however, an era not characterized by cataclysmic battles and great military victories, but by “small wars,” surveillance, and stalemate.<sup>10</sup>

The Cold War’s ambiguity might have signaled that the conventional categories no longer fit – that wartime and peacetime coexisted or had melted together. Arguments along these lines informed American policymakers during the late 1940s and early 50s, and were part of the discourse of national security state building.<sup>11</sup> But rather than viewing the Cold War years as rupturing the older categories of war and peace, contemporary thinkers find ways to fit the experiences of that era into pre-existing conceptual boxes. For some writers, the Cold War becomes a “wartime,” complete with a dramatic ending.<sup>12</sup>

This paper examines historical and contemporary thinking about the Cold War. It does not focus on the subjects at the heart of Cold War historiography: what was the Cold War, when did it begin and end, what were its central dynamics, who was at fault for what? It asks instead a different question: how has the framing of the Cold War affected thinking about war, wartime, and individual rights. Turning to scholarship on war and rights, my focus is not on the way particular rights or lines of caselaw develop, but instead on the way writers conceptualize the world within which rights are framed. Ultimately I will argue that a wartime frame persists in our

---

The understanding of war that has dominated military planning as well as American legal thought was the idea that American wars were large-scale military engagements with other powerful nations, punctuated by peacetimes. An era of limited war proceeded, but American military planners retained their focus on large-scale wars.

Jeffrey Record, “The American Way of War: Cultural Barriers to Successful Counterinsurgency,” The Cato Institute, Policy Analysis no. 577, September 1, 2006, [http://www.cato.org/pub\\_display.php?pub\\_id=6640](http://www.cato.org/pub_display.php?pub_id=6640). Scholarship on law and politics also retained this framing, so that the study of war’s impact on American life has focused on the iconic wars of the past, and not the limited wars that have become central to American war-making. For an example of this conception of wartime in legal scholarship, see Bruce Ackerman, “This is Not a War,” *Yale Law Journal* 113 (June 2004): 1871-1907, 1872.

<sup>10</sup> Critics of American military planning make a similar argument: that weapons systems and military training are based on a traditional conception of wartime, which is at odds with the actual contemporary American warfare. Record, “The American Way of War;” Brent C. Bankus, “We’ve Done This Before,” *Small Wars Journal* 4 (February 2006): 33-36. See also M.W. Shervington, “A Hundred Years of Irregular Warfare,” *Small Wars Journal* 4 (February 2006): 1-45.

<sup>11</sup> See Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954* (New York: Cambridge University Press. 1998).

<sup>12</sup> John Lewis Gaddis, *The Cold War: A New History* (New York: Penguin, 2005).

thinking about the Cold War, and this obscures our understanding of the impact of war on domestic law and politics. It reinforces the idea that war is a discreet historical experience, and that “peacetime” is the norm. This obscures the way, in the years after World War II, ongoing limited war has instead been the American experience.<sup>13</sup> The years of the Cold War are one moment in a longer pattern of ongoing war.

### **The Cold War and the Idea of Wartime**

The Cold War era was a time of anxiety in American culture, and nothing captured this more clearly than the image of a clock. The Doomsday Clock measured movement toward a nuclear apocalypse. First called “The Clock of Doom” when it appeared in June 1947, the clock was intended to represent the state of mind of nuclear scientists, but soon became a ubiquitous symbol of nuclear danger. In 1953, after both the United States and the Soviet Union tested powerful thermonuclear bombs, the hands of the clock moved to two minutes to midnight, so that, in the words of *Bulletin* editor Eugene Rabinowitch, “only a few more swings of the pendulum,...and atomic explosions will strike midnight for Western civilization.”<sup>14</sup> Although the hands of the clock promoted nuclear anxiety and the idea of impending doom, the hands moved only fourteen times in forty-eight years, and never more than seven minutes at a time.<sup>15</sup> In that sense the clock was largely a representation of time standing still. Across the years, the world remained tethered to the same moment, a moment of impending nuclear annihilation.

Nuclear war would have meant the end of the Cold War, since many writers in the late 1940s and the 1950s described the Cold War as anything short of World War III.

---

<sup>13</sup> While my focus in this paper is on post-World War II American war, I am not arguing that ongoing, limited war is new during this period. For discussion of the impact of small wars in earlier years, see Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2000); Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002). For small wars in the history of the United Kingdom, see Christopher Bayley and Tim Harper, *Forgotten Wars: The End of Britain’s Asian Empire* (London: Penguin, 2007); Byron Farwell, *Queen Victoria’s Little Wars* (New York: W.W. Norton, 1985).

<sup>14</sup> Mike Moore, “Midnight Never Come,” *Bulletin of Atomic Scientists* 18, 51 (November 1995): 16-27. John-Francis Phipps argues that “The bomb is a time bomb: it personifies time in the sense of providing the capacity for creating the biggest ever bang in time, a nuclear apocalypse in an otherwise empty space, a cataclysmic man-made event.” John-Francis Phipps, *Time and the Bomb* (Oxford: Pica Press, 1982), 8.

<sup>15</sup> Bob Hanke, “Speed,” *The Semiotic Review of Books* 15, no. 2 (2005): 1-12 (p. 1); Moore, “Midnight Never Come,” 19; Doomsday Clock Timeline, *Bulletin of the Atomic Scientists*, <http://www.thebulletin.org/content/doomsday-clock/timeline>.

If the Cold War was anything short of World War III, and if World War III was global annihilation, then the Cold War was anything short of an apocalypse. In this rendering the Cold War was defined in reference to an imaginary. Underlying the anxiety of Cold War thought was the idea that once nuclear weapons were created, nuclear conflagration was inevitable.<sup>16</sup>

This idea is captured in the 1959 film *On the Beach*. In the film, clouds of deadly radiation from nuclear war drifted slowly and inevitably to Australia, home to the world's final living inhabitants. The war itself seemed the result of inevitable human folly once nuclear weapons came into existence. It was left to the Australians and a band of American submariners to await their terrible fate, armed only with suicide pills. A final image of the town square carried a contradictory message. "There is still time" blared the banner of a religious group, yet the square's windblown emptiness belied the message.<sup>17</sup>

The anxieties of the nuclear age were manifested in post-World War II national security politics. Historian Michael Hogan argues that Cold War struggles over American policy and the nature of the state were about more than combating communism. Also at stake was American national identity, the nation's role in the world, and the impact of Cold War policies on domestic institutions.<sup>18</sup>

After World War II, Americans hoped for a return to peacetime concerns. Initially, as American leaders worked to restructure political control of the military, they divided in their perceptions of the world conditions that the nation confronted. Hogan writes that in battles over the budget and military policy, some policymakers viewed the idea of distinctions between war and peace to be a "technicality" outmoded in a new era "when the United States had to be prepared for war on a permanent basis."<sup>19</sup> President Harry S. Truman himself encouraged war hysteria to generate support for foreign aid in his "Truman Doctrine" speech in 1947, but the president tried to maintain the idea of a peacetime world, insisting that his policies were not "mobilization for war," but instead "preparedness."<sup>20</sup> "The central challenge of state-making in the early Cold War," Hogan argues, "was to prepare for permanent struggle

---

<sup>16</sup> Dwight Macdonald, "The 'Decline to Barbarism'" (1945), in Barton Bernstein, ed., *The Atomic Bomb: The Critical Issues* (New York: Little Brown, 1976). See Boyer, *The Bomb's Early Light*.

<sup>17</sup> *On the Beach* (1959), directed by Stanley Kramer.

<sup>18</sup> Hogan, *Cross of Iron*, 24.

<sup>19</sup> *Ibid.*, 215.

<sup>20</sup> *Ibid.*, 217.



without surrendering constitutional principles and democratic traditions to the garrison state.”<sup>21</sup> By the early 1950s, however, with the onset of the Korean War, Truman’s effort to maintain the categories of war and peace, and to shift policy to peacetime pursuits, collapsed in the face of efforts to cast the Cold War “as a permanent struggle of global proportions.”<sup>22</sup> In framing American national security policy, Secretary of State Dean Acheson and others argued that the Cold War was “in fact a real war,’ against a nation that was hell bent on ‘world domination.’” As conditions worsened in Korea, political battles over the balance between domestic priorities, including a balanced budget, and national security were resolved in favor of the latter, and Hogan writes, “national security concerns became the common currency of most policy makers, the arbiter of most values, they key to America’s new identity.” In American national security ideology, “the distinction between war and peace had disappeared,” as the government transitioned from a New Deal state to a National Security state.<sup>23</sup>

A national security state with an ongoing focus on military engagement needed both a new bureaucratic structure, and also a new language of government. Under the National Security Act of 1947, which brought American military branches under one bureaucratic umbrella, the Department of War became the Department of Defense, and there would be a Secretary of Defense, instead of a Secretary of War. Military budgets were not war spending but defense spending.<sup>24</sup> Even as the first major hot war of the Cold War began in Korea, American leaders framed military action many miles away as defense of the American way of life. Although American soldiers largely fought against Koreans, they were seen as defending the nation against a broader and more amorphous threat: communism.<sup>25</sup>

If the United States had entered a new era, in which war and not-war co-existed, this was in tension with the traditional separation of war and peace into separate categories, and yet these distinctions remained resilient. “Americans are wont to regard war and peace as sharply distinctive conditions,” writes British military

---

<sup>21</sup> Ibid., 234

<sup>22</sup> Ibid., 265.

<sup>23</sup> Ibid., 209, 300, 313.

<sup>24</sup> National Security Act of 1947, P.L. 80-235, 61 Stat 496 (1947); Hogan, ch. 2. In addition, military justice was governed by the Articles of War until enactment of the Uniform Code of Military Justice, which went into effect May 31, 1951. (Enacted May 1950).

<sup>25</sup> Casey, *Selling the Korean War*; Marilyn Young, “Ground Zero: Enduring War,” in *September 11 in History: A Watershed Moment?* ed. Mary L. Dudziak (Durham: Duke University Press, 2003).

strategist Colin S. Gray. The notion that wartime is exceptional is a part of American military culture, he suggests. “Americans have approached warfare as a regrettable occasional evil that has to be concluded as decisively and rapidly as possible,” and soldiers “have always been prepared nearly exclusively for ‘real war,’ which is to say combat against a tolerably symmetrical, regular enemy.”<sup>26</sup> Yet during and after the Cold War, American military conflict defied these conceptual categories.

## Was the Cold War a War?

So just what was the Cold War? “Cold War,” notes historian Odd Arne Westad, along with “Third World” was “a late twentieth century neo-logism” which was “employed for various purposes and in various settings to create some of the most hegemonic discourses of the era.”<sup>27</sup> By the 1950s, he writes, the term Cold War “came to signal an American concept of warfare against the Soviet Union: aggressive containment without a state of war.”<sup>28</sup> After the collapse of the Soviet Union, in Russia and in the West, “at least in popular terms,...the Cold War has come to be seen simply as a conflict of national interests – two giant countries faced each other and battled it out for world supremacy by most means short of all-out war, or until one of them was too

---

<sup>26</sup> Colin S. Gray, “The American Way of War: Critique and Implications,” in *Rethinking the Principles of War*, ed. Anthony D. McIvor (Annapolis, MD: Naval Institute Press, 2005), quoted in Record, “The American Way of War,” 3-4. A consequence of this, for Gray, is that “the U.S. military has a long history of waging war for the goal of victory, paying scant regard to the consequences of the course of its operations for the character of the peace that will follow.” Ibid.

Brent C. Bankus finds a similar tendency in military training. “While the US military (past and present) spends most of its time involved in Military Operations Other Than War (MOOTW), or Small Scale Contingencies, the training focus is traditional symmetric operations - for example a major theater of war.” Brent C. Bankus, “We’ve Done This Before,” *Small Wars Journal* 4 (February 2006): 33-36. Similarly, Jeffrey Record has written that “since the early 1940s, the Army has trained, equipped, and organized for large-scale conventional operations against like adversaries, and it has traditionally employed conventional military operations even against irregular enemies.” Jeffrey Record, “The American Way of War: Cultural Barriers to Successful Counterinsurgency,” The Cato Institute, Policy Analysis no. 577, September 1, 2006, [http://www.cato.org/pub\\_display.php?pub\\_id=6640](http://www.cato.org/pub_display.php?pub_id=6640).

<sup>27</sup> Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge: Cambridge University Press, 2005), 2.

<sup>28</sup> Westad, *Global Cold War*, 2. According to Westad, the Soviets “never used the term officially before the Gorbachev era, since they clung to the fiction that their country was ‘peaceful’ and only ‘imperialism’ was aggressive.” Ibid.

exhausted to fight any longer.”<sup>29</sup> But the idea that the Cold War was a period defined by disputing that stopped short of war is misleading, for as Lori Lynn Bogle puts it, “it does not explain the warfare that did occur along the peripheries.”<sup>30</sup> Cold War-era warfare included major wars in Korea and Vietnam, and many other military engagements. For Anders Stephanson, the Cold War’s meaning hovers between war and war-like. A battle between its key antagonists takes place “not in the two-dimensional space of traditional battles but mediated through other realms....Real war, meanwhile, is displaced beyond the militarized heartlands onto the ‘periphery’ articulated in regional and local conflict.”<sup>31</sup>

In works on U.S. history, the Cold War most often functions as a time-period – as a way to break up segments of the past into manageable units. But periodization depends on the Cold War’s definition, and so is itself contested. Most scholars put the Cold War’s starting point somewhere from 1945-47, and the era is commonly thought to have ended between 1989 and 1991 with the thawing of U.S.-Soviet relations, the fall of the Berlin Wall, and the ultimate dissolution of the Soviet Union. Stephen F. Cohen, historian of the Soviet Union, challenges this periodization, finding origins in the initial framework of U.S.-Soviet relations after 1917, and arguing that Cold War dynamics persist in continuing U.S.-Russian relations.<sup>32</sup> As a result, for Cohen, 1989 was not an ending, but instead a new chapter in what we call the Cold War. Scholars of other regions of the world also differ from the standard American periodization. African historian David Anderson argues that the Cold War in Africa came to a close with the Rwandan genocide in 1994.<sup>33</sup> Writing about Asia, Christopher Bailey and Tim Harper argue that even World War II is merely a phase of a longer period of conflict from the 1937 Japanese attack on China to the 1980s.<sup>34</sup> What for Cohen is the

---

<sup>29</sup> Odd Arne Westad, “Introduction: Reviewing the Cold War,” in Odd Arne Westad, ed., *Reviewing the Cold War: Approaches, Interpretations, Theory* (London: Frank Cass, 2000), 1; Lori Lynn Bogle, “Introduction,” in Lori Lynn Bogle, ed., *The Cold War, Volume 1: Origins of the Cold War* (New York: Routledge, 2001), vii.

<sup>30</sup> Lori Lynn Bogle, “Introduction,” in Lori Lynn Bogle, ed., *The Cold War, Volume 3: Hot Wars of the Cold War* (New York: Routledge, 2001), vii; Robert J. McMahon, *The Cold War on the Periphery: The United States, India, and Pakistan* (New York: Columbia University Press, 1994).

<sup>31</sup> Anders Stephanson, “Fourteen Notes on the Very Concept of the Cold War,” *H-Diplo*, <http://www.h-net.org/~diplo/essays/PDF/stephanson-14notes.pdf>.

<sup>32</sup> Stephen F. Cohen, *Soviet Fates and Lost Alternatives: From Stalinism to the New Cold War* (New York: Columbia University Press, 2009).

<sup>33</sup> David Anderson, cite new mss.

<sup>34</sup> Bailey and Harper, *Forgotten Wars*, xxvii.

Cold War for Eric Hobsbawm is “the Short Twentieth Century.” For Hobsbawm, the “Age of Extremes” began in 1914, and by the early 1990s this “era in world history ended and a new one began.”<sup>35</sup>

Americans during the 1940s and 50s knew they were in a “Cold War,” but as Kenneth Osgood notes, many did not quite know what it was, and they were unable to define it to pollsters. In a 1955 poll, some responded that it was “‘war through talking,’...‘war without actual fighting,’ ‘political war,’” while others thought of it as “just like a hot war,” or “real war all over the world.” Osgood writes: “Most Americans...perceived the Cold War as a war, but as a different kind of war – one that was difficult to define, one that was fought not so much with guns and tanks and atom bombs, as with words and ideas and political maneuvers all over the world.”<sup>36</sup>

One controversy over the nature of the Cold War is simply over how to remember it. Memory of war plays an important role in American culture and politics long after a war is over.<sup>37</sup> One way that wars are memorialized is through medals honoring service in a particular conflict. But in a catalog of military medals, John E. Strandberg and Roger James Bender note that wartimes are more extensive than we might think.

The collector of United States Campaign medals soon discovers that America's military history encompasses much more than the major conflicts of the Revolutionary War, Civil War, World War I, World War II, Korean War and the Vietnam War. One soon discovers that some of our nation's early heroes emerged from battles in Cardenas, Cuba; Peking, China; Port-au-Prince, Haiti; or Bluefields, Nicaragua. Long before Marines spoke in hallowed terms of places like Guadalcanal, Tarawa, Iwo Jima and the ‘Frozen Chosin’; there was the ‘Citidel’, Peking, Veracruz, Fort Riviere, and Quilali.<sup>38</sup>

---

<sup>35</sup> Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (New York: Pantheon, 1995), 5.

<sup>36</sup> Kenneth Osgood, *Total Cold War: Eisenhower's Secret Propaganda Battle at Home and Abroad* (Lawrence, KS, University Press of Kansas, 2006), 1-2.

<sup>37</sup> See, e.g., David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge: Harvard University Press, 2001); Marita Sturken, *Tangled Memories: The Vietnam War, the AIDS Epidemic, and the Politics of Remembering* (Berkeley: University of California Press, 1997).

<sup>38</sup> John E. Strandberg and Roger James Bender, *“The Call of Duty”: Military Awards and Decorations of the United States of America* (San Jose, CA: R. James Bender Publishing, 1994), quoted in Brent C. Bankus, “We’ve Done This Before,” *Small Wars Journal* 4 (February 2006): 33-36.

As Strandberg and Bender put it, “these ‘Little Wars’ helped define America as a world military power.”<sup>39</sup>

Since 1997, veterans have lobbied for a Cold War medal, so that service during the Cold War would be honored in the same way as military deployment during World War II, Vietnam, and smaller wars like Lebanon (1958) and Grenada (1983). The timespan for Cold War medal eligibility would be from September 2, 1945 through December 26, 1991, following a periodization close to that of most diplomatic historians who do not track direct military engagement, but instead a particular era of U.S.-Soviet relations.<sup>40</sup> To frame this as a “war” generating military service medal eligibility essentially turns a diplomatic era into an old-fashioned wartime.

Senators Susan M. Collins and Blanche L. Lincoln, former Senator Hilary Rodham Clinton, and others have signed onto this vision, co-sponsoring Cold War medal legislation in 2007 and earlier years.<sup>41</sup> Although Congress created an honorary Cold War certificate for both soldiers and civilians, the Cold War medal legislation has not been enacted.<sup>42</sup> Opposition stems from the cost of supplying the medal to Cold War veterans, although cost has not impeded service medals honoring veterans of countless lesser-known conflicts. Due to the stalemate, Congress seems to remain

---

<sup>39</sup> Strandberg and Bender, *“The Call of Duty.”*

<sup>40</sup> National Defense Authorization Act for Fiscal Year 1998, S. 936, 105th Cong. Sec. 535 (1997); “The Cold War Victory Medal – Long Overdue!” American Cold War Veterans, [http://www.americancoldwarvets.org/victory\\_medal.html](http://www.americancoldwarvets.org/victory_medal.html); Armed Forces Expeditionary Medal, Institute of Heraldry, Office of the Administrative Assistant to the Secretary of the Army, [http://www.tioh.hqda.pentagon.mil/Awards/af\\_expeditionary.aspx](http://www.tioh.hqda.pentagon.mil/Awards/af_expeditionary.aspx).

The time period covered by the Cold War Medal has sometimes differed. The first bill defined the Cold War as the period from August 15, 1974 through December 21, 1991, and another from August 14, 1945 through November 9, 1989. Most proposals, however, have specified the time period as September 2, 1945 through December 26, 1991. S. Amend. 743 to National Defense Authorization Act for Fiscal Year 1998, S. 936, 105th Cong. § 535 (1997); An act to authorize appropriations for fiscal year 2000 for military activities of the Department of Defense, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes, S. 1060, 106th Cong. § 1086 (1999)(unenacted); S. Amdt. 474 and S.534 to National Defense Authorization Act for Fiscal Year 2000, S. 1059, 106th Cong. § 1086 (1999) (unenacted); Commemoration of the Victory of Freedom in the Cold War Act, H.R. 2440, 106th Cong. §§ 1, 2 (1999)(unenacted).

<sup>41</sup> S. Amend. 2163 National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong. § 556 (2007) (unenacted).

<sup>42</sup> “Cold War Certificate Approved,” Department of Defense News Release, April 5, 1999, <http://www.defense.gov/releases/release.aspx?releaseid=2031>.

firmly on the fence on the question of whether the Cold War was a “war.”

A contested understanding of the Cold War affected even the way American Cold War casualties were laid to rest. While the deaths of many American soldiers during this era went unnoticed by the American public, Major Arthur D. Nicholson, Jr., thought to be the last American Cold War death in Europe under hostile fire, “attracted wide-spread publicity in the news media. Killed by a Soviet sentry in East Germany on March 24, 1985, [he] received a hero’s return home.” But Nicholson was then remembered with an ambiguous headstone in Arlington National Cemetery, which reads: “Killed in East Germany, U.S. Military Liaison Mission.” “No mention is made of who killed him or why he was shot,” as the *Veterans of Foreign Wars Magazine* puts it. “This is reflective of how many Americans who preceded Nicholson in death during the Cold War are remembered.”<sup>43</sup>

Secrecy about Cold War-era warfare complicates commemoration. Memorials honoring service members killed during aerial and naval reconnaissance are spotty. While the Strategic Air Command Memorial at Offutt Air Force Base, Nebraska, is dedicated to “valiant strategic airborne reconnaissance crew members who gave their lives during the Cold War,” another memorial created by Ratheon Corporation remembers only crew members for ten missions involving Ratheon equipment. Compared to the Air Force, Naval aerial reconnaissance is neglected, although the “Silent Service” of undersea submarine reconnaissance “is widely recognized.”<sup>44</sup> A broader Cold War memorial has been promoted by Francis Gary Powers, Jr., whose father was shot down over the Soviet Union in the U-2 incident in 1960. At present, a Cold War commemorative museum only exists on-line.<sup>45</sup>

Ambiguity about whether the Cold War was a wartime drops away when it comes to criteria for membership in veterans organizations that base membership on wartime

---

<sup>43</sup> “Cold War Casualties Cry Out For Commemoration,” *Veterans of Foreign Wars Magazine*, (n.d.), <http://www.vfw.org/index.cfm?fa=news.magDtl&dtl=1&mid=1885>.

<sup>44</sup> Ibid., National Vigilance Park, website of the National Security Agency, Central Security Service, [http://www.nsa.gov/about/cryptologic\\_heritage/vigilance\\_park/index.shtml](http://www.nsa.gov/about/cryptologic_heritage/vigilance_park/index.shtml). The memorial includes “three of the Cold War’s deadliest shoot-downs in 1956 (Sea of Japan), 1958 (Armenia) and 1969 (off North Korea).” “Cold War Casualties,” *Veterans of Foreign Wars Magazine*.

<sup>45</sup> Ibid.; The Cold War Museum, [http://www.coldwar.org/museum/museum\\_features.asp](http://www.coldwar.org/museum/museum_features.asp).

service. The years following World War II are seen as times of war.<sup>46</sup> The Veterans of Foreign Wars, for example, honors service in Cuba, 1961; Thailand, 1962; Vietnam, 1965-1973; Iran, Yemen and the Indian Ocean, 1978-1981; and 30 days service in Korea at any time. From 1945 on, even excluding Berlin (1945-1990), every single year American service members have been deployed somewhere in the world under conditions that enable eligibility. For the nation's most important veteran's organization, war had been on-going since World War II.<sup>47</sup>

Military service medals and VFW membership are based on service in the face of hostile fire, so this illustrates that, at least for American military personnel, the Cold War was only cold as it related to direct conflict between the superpowers. Diplomatic historians, by and large, frame the contours of the Cold War by reference to U.S.-Soviet diplomatic relations, and not by reference to the usual markers of

---

<sup>46</sup> For the Veterans of Foreign Wars, the Cold War years count for membership not on the basis of the Cold War itself, but of more precise military engagements from World War II until the 1990s. Established in 1899 in the aftermath of the Spanish-American War, the VFW honors service in many twentieth century military engagements, including service in China 1900-01, Cuba 1906-1909, and Mexico 1911-1915. "VFW Eligibility Information," October 2005, Veterans of Foreign Wars, <http://www.vfw.org/resources/pdf/eligibility05.pdf>.

Disabled American Veterans includes as members persons serving in the armed forces who are "disabled in line of duty during time of war." "Time of war" is defined in the organization's ByLaws to include many 20<sup>th</sup> century conflicts, including the Boxer Rebellion in China, 1900-01. World War II, Korea and Vietnam constituted one long era of war from 1940 to 1976. From October 15, 1976 to the Iranian crisis November 4, 1979 was the only non-war period after World War II, other than a period of seven months in 1990. Disabled American Veterans, Constitution and ByLaws, p. 2, 54-55. <http://www.dav.org/membership/documents/ConstitutionBylaws.pdf>. In contrast, Paralyzed Veterans of America includes all veterans of the U.S. Armed forces with spinal cord injuries, except those with dishonorable discharges. Paralyzed Veterans of America, [http://www.pva.org/site/PageServer?pagename=memb\\_eligibility](http://www.pva.org/site/PageServer?pagename=memb_eligibility).

The American Legion is more discriminating among American military conflicts. A veterans group with 2.6 million members, established in 1919, its members have served in one of seven conflicts. Still, following World War I and II, the only years during which military service will not lead to eligibility are 1947-49, 1956-60, 1976-81, and 1984-88. Included are conflicts in Vietnam, Lebanon, Grenada, Panama, and the Gulf War/War on Terror, which appears as one long period of conflict beginning in 1990 and continuing to today. The American Legion, <http://www.legion.org/join>. While the American Legion begins World War II with Pearl Harbor, the Disabled American Veterans counts a previous year, September 16, 1940 to December 7, 1941, as service under "conditions simulating war," qualifying disabled veterans for membership. Disabled American Veterans, Constitution and ByLaws, p. 54-55.

<sup>47</sup> "VFW Eligibility Information," October 2005, Veterans of Foreign Wars, <http://www.vfw.org/resources/pdf/eligibility05.pdf>.

warfare: when the first attack and counter-attack occurred, when war was declared in some manner, and when the parties agreed to end it. This all may seem obvious, but something happens when we turn to scholarship on civil liberties in American history. That literature seems to assume that it is building upon a description of geopolitics after World War II that comes from historians of war and diplomacy, yet, as can happen in different corners of the academy, this work is more often assumed than engaged. Along the way, sometimes the Cold War is treated as if it functioned like an old-fashioned war.

## Rights in the Cold War

Historians and legal scholars often write about war as if it were an actor in history. World War II, for example, is discussed as an agent in history, doing things beyond any battlefield. “World War II shattered a world irrevocably,” historian Manning Marable writes. For Alan Brinkley, although the fighting was remote from most Americans, the war “profoundly...changed America.”<sup>48</sup> The Cold War is also referred to as a historical actor. “It would be impossible to list the ways the Cold War changed our lives,” writes military historian Robert Cowley.<sup>49</sup>

The dimensions of the Cold War at home will be familiar. The years after World War II were a low point for American civil liberties. Anticommunism fueled American politics, and labor leaders, entertainment figures, civil rights activists and others were hounded by anti-subversive boards, blacklisted out of employment, and sometimes imprisoned.<sup>50</sup> Anticommunist scape-goating during the late 1940s and the 1950s is

---

<sup>48</sup> Manning Marable, *Race, Reform, and Rebellion*, 13; Alan Brinkley, “World War II and American Liberalism,” in Lewis A. Erenberg and Susan E. Hirsch, eds., *The War in American Culture: Society and Consciousness during World War II* (Chicago: University of Chicago Press, 1996), 313-330.

To the extent that war has a structuring effect on society, it creates a difficulty for contemporaneous scholars whose understanding of the world derives from an earlier era. Marable confronted the difficulty of writing about post-World War II America in the aftermath of that war. In spite of the impact of the war, “people who thought as I did were called upon in 1945 to treat the postwar era with intellectual and critical tools more applicable to the vanished world of the thirties – a world we had never had time to understand as we lived it.” Marable, *Race, Reform, and Rebellion*, 13.

<sup>49</sup> Robert Cowley, “Introduction,” in Cowley, ed., *The Cold War: A Military History* (New York: Random House, 2006), xvi.

<sup>50</sup> Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998); Michal R. Belknap, *Cold War Political Justice: The Smith Act and the Communist Party* (Westport, CT: Greenwood Press, 1977); Gerald Horne, *Black and Red:*



seen as a product of the Cold War, but the relationship between these deprivations of rights and the geopolitical conflict constituting the Cold War is not always clear.<sup>51</sup> This era of American repression is often periodized differently than is the broader Cold War conflict between the United States and the Soviet Union.

A major focus of scholarship on Cold War-era repression is the prosecution of Communist Party members under the Smith Act, which criminalized advocating the violent overthrow of the United States. The Act was a major tool in U.S. government efforts to prosecute and shut down the American Communist Party, but the Smith Act itself was not a product of the Cold War, but was passed in 1940. The American alliance with the Soviet Union during World War II protected the party from war-era prosecution, Michal Belknap suggests, but members of the Socialist Workers Party were prosecuted in 1941, and the 1939 Nazi-Soviet nonaggression pact fueled anticommunism. The most important uses of the Smith Act, however, began in the late 1940s. In the context of heightened fears about Communism at home and abroad, the Attorney General secured an indictment of party leaders for violating the Smith Act. The legal campaign was one of the major reasons behind the decline of the American Communist Party, Belknap argues, and the nation as a whole “paid a high price for the debilitation of a small radical organization, for the methods used to incapacitate it seriously endangered rights lying at the heart of the American constitutional system.” But this Cold War story does not last for the expanse of the Cold War itself. Instead, Belknap argues, “the nature of the Cold War changed and international tensions eased somewhat.” The public lost its tolerance of government overreaching, for example through the reliance on tainted testimony, and the Supreme Court narrowed the reach of the Smith Act. By the time party leader Julius Scales was released from prison in 1963, this story had largely come to a close.<sup>52</sup> Similarly Ellen Schrecker, a leading scholar of anticommunism, notes that while anticommunism has

---

*W.E.B. Du Bois and the Afro-American response to the Cold War* (Albany: SUNY Press, 1985).

<sup>51</sup> “The Cold War was crucial” to the anticommunist repression of the late 1940s and 1950s, Ellen Schrecker writes, “though exactly how it contributed to the growth of McCarthyism is not as self-evident as it may superficially appear.” For Schrecker, the reason that the domestic repression happened in the United States and not other nations affected by the Cold War stemmed not from geopolitics, but from developments in Washington, D.C., where “anticommunist activists like J. Edgar Hoover seized the opportunity presented by the deepening antagonism to the Soviet Union to sell their supposed expertise about Communism to the rest of the political establishment.” Schrecker, *Many Are the Crimes*, xiv-xv.

<sup>52</sup> Michal Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CT: Greenwood Press, 1977), 5-7; Stone, *Perilous Times*, 252-254.

a longer history in 20th century America, it was at its zenith from 1946 to 1956.<sup>53</sup>

Although leading scholars of domestic anticommunism periodize this era of repression differently than do scholars of Cold War geopolitics, these differences are not often acknowledged in the scholarship on civil liberties and war.<sup>54</sup> The focus of work on American rights and liberties, of course, is not on the dynamics of the Cold War itself, but on the way that it affected American law. Differences in periodization make it unclear what produced the Cold War's impact. Was it a war, having a war-like impact? Was it simply a span of time, with no causal impact other than the passage of time? Was it a specific set of security-infused politics? Was it the direct impact of international affairs on the domestic scene? These questions are not always taken up, but still the Cold War does work in legal scholarship – it is seen as having causal power. Authors take up the Cold War as if they are writing about the same phenomenon without addressing definitional ambiguity.

The importance and also the difficulties of examining the impact of war on rights is illustrated by the work of leading First Amendment scholar Thomas Emerson. “War and preparation for war impose serious strains on a system of freedom of expression,” he argues.

Emotions run high, lowering the degree of rationality which is required to make such a system viable. It becomes more difficult to hold the

---

<sup>53</sup> Schrecker, *Many Are the Crimes*, xvi.

Focusing specifically on political repression, Robert Justin Goldstein shows repression deepening and waning during different moments in the Cold War. He argues that increases in repression are tied principally to “hot wars,” so that there is less repression from the end of the Korean War until Vietnam. But for his model to work, the Cold War becomes the functional equivalent of a hot war, since he sees the era from 1946 to 1954 as producing increased repression. And he limits the Vietnam era to 1965 to 1975, even though the United States was deeply engaged in Vietnam before the Gulf of Tonkin incident. Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to 1976* (Urbana-Champaign: University of Illinois Press, 2001). On Vietnam, see Marilyn B. Young, *The Vietnam Wars, 1945-1990* (New York: HarperCollins, 1991); Robert J. McMahon, *The Limits of Empire: The United States and Southeast Asia since World War II* (New York: Columbia University Press, 1999).

<sup>54</sup> Eric Posner and Adrian Vermeule potentially avoid the problem of defining the scope of eras of crisis like the Cold War. They acknowledge that periods of crisis, including war-induced crisis, have fuzzy boundaries. “The boundary between emergency and non-emergency is so fuzzy and indistinct that no one can be severely faulted for failing to specify where it lies.” They get around this difficulty by focusing on “core cases in which emergency is undisputed.” Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007), 43.

rough give-and-take of controlled controversy within constructive bounds. Immediate events assume greater importance; long-range considerations are pushed to the background. The need for consensus appears more urgent in the context of dealing with hostile outsiders. Cleavage seems to be more dangerous, and dissent more difficult to distinguish from actual aid to the enemy.<sup>55</sup>

Because of this, Emerson suggests, it is not surprising that “throughout our history periods of war tension have been marked by serious infringements on freedom of expression.”<sup>56</sup> Emerson notes three periods when the First Amendment was most strongly under attack: World War I, the Civil War (including the years leading up to it), and “the years of the Alien and Sedition Acts.” These were “all times of war or near-war,” with the earliest period coinciding with an undeclared naval war with France.<sup>57</sup>

Emerson’s focus on wartime seems to fall apart in the twentieth century. He suggests that “during World War II, in contrast to prior wartime periods, freedom of speech to oppose the war or criticize its conduct was not seriously infringed.”<sup>58</sup> Greater sensitivity to free speech rights may have stemmed from the development of first amendment doctrine during the 1930s. But any gains from this period “were lost during the McCarthy era in the early nineteen fifties, which coincided with the hostilities in Korea.” Emerson notes, however, that “the free speech issues of that period did not relate directly to the war itself, but rather to a more general fear of communism within the United States.”<sup>59</sup> When it came to the next major hot war, Vietnam, “the controversy over freedom of speech in wartime had moved to another level,” and “the general right to oppose the war by speech was fully recognized.” Free speech problems during this era arose from “new modes of opposition” which “raised

---

<sup>55</sup> Thomas I. Emerson, *A System of Freedom of Expression* (New York: Random House, 1970), 55-56.

<sup>56</sup> Emerson, *A System of Freedom of Expression*, 56.

<sup>57</sup> Emerson, *A System of Freedom of Expression*, 56. Alexander DeConde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801* (New York: Charles Scribner's Sons, 1966).

<sup>58</sup> Emerson, *A System of Freedom of Expression*, 56. Stephen Feldman, in contrast, argues that “governmental efforts to suppress dissent during World War II were extensive. In fact, considering the ‘paucity of opposition to the war,’ governmental suppression might even be described as ‘extraordinary’ or ‘monumental.’” Stephen Feldman, *Free Expression and Democracy in America: A History* (Chicago: University of Chicago Press, 2008), 422.

<sup>59</sup> Emerson, *A System of Freedom of Expression*, 56.

different issues concerning the border between expression and action.”<sup>60</sup>

And so although Emerson makes broad statements about wartime as the most important threat to freedom of speech, in the twentieth century, with the exception of World War I, times of major wars and times of repression do not line up. “A more general fear of communism” is more important than the Korean War or Vietnam. Something in this era is producing repression. If it is not war itself, perhaps it is “near-war” with the Soviet Union. But Emerson’s eras of rights restrictions don’t coincide with the greatest periods of U.S.-Soviet tension. For example, the Supreme Court’s dampening of the government’s ability to prosecute Communist Party members under the Smith Act and a peak in Cold War anxiety as the Soviet satellite Sputnik circled the earth, both happened in 1957.<sup>61</sup> Cold War domestic repression was on the wane, even as fears that the Soviets gained the upper hand in the space and technology race heightened. This may suggest that something other than geopolitical affairs is driving the narrative of eras of rights restriction.

Although Emerson focuses on the importance of domestic anticommunism, rather than the geopolitical Cold War, others treat the Cold War as a war era. In a leading account of free speech during war, Geoffrey Stone treats the Cold War as a “war.” As to just what the dimensions were of the Cold War, he writes that “the Berlin blockade, the fall of China, and the Korean War were not independent events, but part of a ‘slow-motion hot war, conducted on the periphery of rival empires.’” Stone carries the story of the Cold War to 1957. During this time, the first amendment was “in extremis.”<sup>62</sup>

---

<sup>60</sup> Emerson, *A System of Freedom of Expression*, 56. Nevertheless, Emerson considered the Supreme Court ruling in *United States v. O’Brien*, 391 U.S. 367 (1968) upholding prosecution for burning a draft card to be “a serious setback for First Amendment theory.”

<sup>61</sup> *Yates v. United States*, 354 U.S. 298 (1957); Robert A. Divine, *The Sputnik Challenge: Eisenhower’s Response to the Soviet Satellite* (New York: Oxford University Press, 1993).

<sup>62</sup> Geoffrey Stone, *Perilous Times: Free Speech in Wartime*, 311, \_\_\_. Stone’s quote is from William M. Wiecek, “The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*,” *Supreme Court Review* 2001 (2001): 375, 417. The end-point in 1957 for Stone is the Supreme Court ruling in *Yates*.

In an analysis of the impact of crisis on judicial decisionmaking, Harry Edwards compares the Cold War to World War II, but doesn’t explicitly argue that the Cold War was a “war.” “Like World War II,” he writes, “the Cold War claimed serious constitutional casualties on the domestic front. In a climate made almost hysterical by fear of communist infiltration, the Government engaged in battle against ideas, waging war against speech and associational activities seen as dangerously disloyal....The Court’s Cold War experience with seditious speech, for instance, interrupted the development of free speech doctrine so thoroughly that recovery took close to twenty years.” Harry T. Edwards, “The Judicial Function and the

Cass Sunstein also treats the Cold War as if it is a war in “Judicial Minimalism in War,” however he gives it a different timespan. For Sunstein, judicial minimalism is when judges do “no more than necessary to resolve cases.”<sup>63</sup> To explore the role of minimalism in cases involving trade-offs between rights and national security, he takes up Supreme Court cases decided during the Civil War, World War I, World War II, the Cold War, and the war on terrorism. One of his examples is *Kent v. Dulles*, a 1958 case involving denial a passport to Rockwell Kent, who hoped to travel to England and Helsinki, Finland to attend a meeting of the World Council of Peace. Kent’s passport was denied because he was allegedly a member of the Communist Party. The passport office asked Kent to submit an affidavit regarding his Communist Party affiliation, and he refused, arguing that the affidavit requirement was illegal. Although an expansive opinion would have been possible, Sunstein notes that the Court instead adopted narrow grounds, holding that the passport denial “was beyond the statutory authority of the Secretary of State.”<sup>64</sup>

“Was *Kent v Dulles* decided during war?” Sunstein asks. “In a sense, it was not; military forces were not engaged in 1958, and the Court was aware of that fact.” Still, “in 1958, the Cold War was at its height, and in the period many people believed that the United States was, in some sense, at war with the Soviet Union.”<sup>65</sup> The Veterans of Foreign Wars would disagree with Sunstein on the question of whether military forces were engaged in 1958, but they would agree on another matter: that the Cold War

---

Elusive Goal of Principled Decisionmaking, *Wisconsin Law Review* 1991: 1 (1991): 837-865, 844-845.

<sup>63</sup> Cass Sunstein, “Judicial Minimalism in War,” 2004 *Supreme Court Review* (2004): 47-109, 48. “In general,” Sunstein writes, “the Supreme Court has adopted a form of minimalism having three central components: a requirement of clear congressional authorization for executive action intruding on interests with a claim to constitutional protection; an insistence on fair hearings, including access to courts, for those deprived of liberty; and judicial decisions that are themselves shallow and narrow and that therefore impose modest constraints on the future.” *Ibid.*, 51.

Although Sunstein’s focus is wartime, he variously discusses “times of war” and times when the nation’s security is threatened.

<sup>64</sup> “Proceeding in minimalist fashion,” Sunstein argues, “the Court left undecided the question whether Congress could constitutionally give that authority to the President. The advantage of the minimalist approach is that it reflects commendable uncertainty about difficult questions, enlisting political safeguards as the first line of defense against unjustified intrusions on freedom.” *Ibid.*, 81.

<sup>65</sup> *Ibid.*

continued to be a force during the late 1950s.<sup>66</sup>

A different approach is taken in one of the more notable recent studies of the impact of war and crisis on courts, Lee Epstein, Daniel E. Ho, Gary King, and Jeffrey A. Segal, “The Supreme Court During Crisis: How War Affects Only Non-War Cases.”<sup>67</sup> Epstein et al. do not restrict their analysis to “war,” since that would miss important international crises.<sup>68</sup> The wars they take up are World War II,<sup>69</sup> Korea, Vietnam, the Gulf Wars and Afghanistan. They do not include the Cold War, although they suggest that “it is possible that our third measure of crisis, a rally effect, may capture periods of particular intensity during the Cold War.”<sup>70</sup> Because this quantitative study compares Supreme Court cases decided during war/crisis periods with cases outside those periods in order to measure the impact of crisis on the Court, an effect of their approach is to render much of the Cold War era as peacetime or non-crisis time, against which times of crisis are compared. Years that count as peace, or non-crisis, for Epstein, et al., fall within what others see as a national security-infused crisis period for individual rights.<sup>71</sup>

---

<sup>66</sup> For the Veterans of Foreign Wars, Americans faced hostile fire under conditions leading to VFW membership eligibility in 1958 in Berlin, Lebanon, Taiwan Straits, Quemoy and Matsu Islands, and Vietnam. VFW Eligibility Information, Veterans of Foreign Wars, <http://www.vfw.org/resources/pdf/eligibility05.pdf>.

<sup>67</sup> Lee Epstein, Daniel E. Ho, Gary King, and Jeffrey A. Segal, “The Supreme Court During Crisis: How War Affects Only Non-War Cases,” *New York University Law Review* 80 (April 2005): 1-116.

<sup>68</sup> Epstein, et al., use three definitions of “crisis,”: first, “the absence or presence of war;” second, “four international crises that specialists have labeled as ‘major’ (the Berlin Blockade, the Cuban Missile and Iran-Hostage Crises, and September 11);” and third the presence or absence of a ‘rally effect.’” *Ibid.*, 46.

<sup>69</sup> For a critique of the way Epstein et al. periodize World War II, see Dudziak, “Law, War, and the History of Time;” Silverstein and Hanley, “The Supreme Court and Public Opinion in Times of War and Crisis.”

<sup>70</sup> Epstein, et al., “The Supreme Court During Crisis,” 46 n. 204. The authors note that defining crises is critical to their effort, but also that “a clear definition of crisis may simply not be possible.” *Ibid.*

<sup>71</sup> In a new article on the role of public opinion in the impact of war and crisis on courts, Gordon Silverstein and John Hanley ask the question: “Was the Red Scare a ‘wartime?’” While not directly resolving whether it was a “wartime,” the authors find Epstein, et al., too limited in their description of international crises during the Cold War years, and instead find more convincing Kim Scheppele’s analysis, noting that the Cold War was “a far longer event, one lasting essentially from the fall of Berlin in April 1945 to the fall of the Berlin Wall in November 1989.” This periodization brings Silverstein and Hanley more

Bruce Ackerman's treatment of the Cold War is closer to Epstein, et al., than Stone. "Classical wars traditionally involve a battle against sovereign states," he writes. Ackerman puts the Cold War together with the War on Drugs and the War on Poverty as rhetorical uses of war-talk. A narrow framing of war aids Ackerman's argument that the war on terror should be conceptualized as a state of emergency, not a war.<sup>72</sup> Ackerman's narrow framing parallels Justice William Rehnquist's. In *All the Laws But One*, he restricts his analysis of war and civil liberties to declared wars because he thinks they are more important.<sup>73</sup> International law scholar Detlev F. Vagts writes that, as a legal matter, "the Cold War was never treated as a war, even an imperfect one, except during those two flare ups," in Korea and Vietnam. "It was only an 'emergency,' one that lasted as a matter of law from 1950 to 1976."<sup>74</sup> For Vagts, conflicts that fit the legal definition of war are wars between states.

Although it would simplify matters to define war as restricted to conflicts between states, definitions of war for the military and others have become more ambiguous. Traditionally, an essential component of a definition of war was that it was between states,<sup>75</sup> but the state dropped out of attempts to define war at the end of the twentieth century. For example, *The Oxford Companion to American Military History* (2000) defines war by referring not to violence between nations, but to "organized violent

---

closely in line with the periodization of diplomatic historians, however the authors also note that in 1957, "while the Cold War was far from over, in many ways a corner had been turned...and the Court's decisions reflected and were consistent with that change." But the only corner turned in 1957 was a judicial one, as the Court showed itself more willing to second-guess domestic anti-communism. As a result, Silverstein's and Hanley's largely helpful intervention remains at times limited by the problems in periodization reflected in the civil liberties scholarship as a whole. Gordon Silverstein and John Hanley, "The Supreme Court and Public Opinion in Times of War and Crisis," *Hastings Law Journal* 61 (July 2010): 1453-1501, 1478-1479.

<sup>72</sup> Bruce Ackerman, "This is Not a War," *Yale Law Journal* 113 (June 2004): 1871-1907, 1872-1873. Many versions of this argument have been made by other scholars. See, e.g., Mary Ellen O'Connell, "When is a War not a War? The Myth of the Global War on Terror," *ILSA Journal of International & Comparative Law* 12 (Spring 2006) 535-540; Detlev F. Vagts, "War" in the American Legal System," *ILSA Journal of International & Comparative Law* 12 (Spring 2006) 541-545.

<sup>73</sup> William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 171.

<sup>74</sup> Vagts, "War" in the American Legal System." One of Vagts' objections to calling the "war on terror" a war stems from the fact that it is not against a state.

<sup>75</sup> In the Prize Cases, the U.S. Supreme Court defined war as simply "that state in which a nation prosecutes its right by force." 67 U.S. 635, 666 (1863).

activity, waged not by individuals but by [people] in groups.”<sup>76</sup> In *The Anarchical Society: A Study of Order in World Politics*, Hedley Bull writes that the involvement of the state affects the legitimacy of a conflict, but not whether it is a “war.”<sup>77</sup> The Cold War is usually thought of as a conflict between states, so its definitional ambiguity arises not from the presence or absence of states, but rather from the fact that the two nations whose relationship defines the scope of the Cold War did not engage in warfare directly with each other.

These definitional problems do not plague historian Stanley Kutler. In *The American Inquisition: Justice and Injustice in the Cold War*, eras of repression do not necessarily

---

<sup>76</sup> John Whiteclay Chambers II, ed., *The Oxford Companion to American Military History* (New York: Oxford University Press, 2000), 773-775. In addition, the U.S. Army’s *American Military History* includes a section on “The War against the Taliban and al Qaeda.” Richard W. Stewart, ed., *American Military History, Volume II: the United States Army in a Global Era, 1917-2003* (Center of Military History, United States Army: Washington, D.C., 2005), 464, <http://www.history.army.mil/books/AMH-V2/AMH%20V2/chapter14.htm#b2>.

<sup>77</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002), 178-179.

War is organized violence carried on by political units against each other. Violence is not war unless it is carried out in the name of a political unit; what distinguishes killing in war from murder is its vicarious and official character, the symbolic responsibility of the unit whose agent the killer is. Equally, violence carried out in the name of a political unit is not war unless it is directed against another political unit . . . We should distinguish between war in the loose sense of organized violence which may be carried out by any political unit . . . and war in the strict sense of international or interstate war, organized violence waged by sovereign states. Within the modern state system only war in the strict sense, international war, has been legitimate; sovereign states have sought to preserve for themselves a monopoly of the legitimate use of violence.

Definitions of war have turned on the nature of adversaries (e.g. state or non-state groups), and the objectives of those adversaries (e.g. territorial conquest or defense). As the twentieth century evolved to reveal continuums in these categories, the implements of war may have become more important. By mid-century, troops and machine guns had lost their defining power, and instead air power was more central to whether military activity seemed like a war. By the early twenty-first century, catastrophic bombing, in itself, did not signal war’s presence (e.g. the 1993 World Trade Center bombing), but the use of airplanes in the September 11 attacks helped fuel the perception that the nation was at war. Elaine Tyler May, “Echoes of the Cold War: The Aftermath of September 11,” in *September 11 in History: A Watershed Moment?* ed. Mary L. Dudziak, 38-40 (Durham: Duke University Press, 2003). On the history of U.S. air power, see Michael S. Sherry, *The Rise of American Air Power: The Creation of Armageddon* (New Haven, CT: Yale University Press, 1987).



stem from war. Instead, “the formula for political repression follows a classic pattern, reflecting a wider state of affairs. Internal stress and external threats, sometimes in combination, heighten tensions in a society and stimulate demands for conformity.”<sup>78</sup> While Kutler describes the Cold War as doing things, he is more specific about its impact, and he limits the scope of the relevant time-frame. “The Cold War of the late 1940s and 1950s evoked official repression on an unprecedented scale,” Kutler writes. Government action during the post-WWII years was complicated, he suggests, and the nature of Cold War repression is not always well captured by broad themes, but instead turned in part on bureaucratic processes and interests.<sup>79</sup>

There are many other examples, but these works illustrate the quandary: when scholars discuss whether the Cold War affects rights, they differ in their understanding of what, and even when, the Cold War was.

To the extent that the Cold War plays a causal role in the history of rights, a periodization different from the Cold War of diplomatic history is necessary, since the red baiting of this era was on the wane by the late 1950s, and was largely eclipsed in the mid-1960s by a moment when, prodded in part by the civil rights movement, courts and legislatures expanded civil rights, free speech rights, the rights of criminal defendants, reproductive rights, and more. The persecution of the American left began to ease after 1957, as the Court stepped back from its McCarthy-era caselaw in *Yates v. United States* and other cases, overturning convictions under the Smith Act. In *Yates*, the Court made Smith Act prosecutions more difficult, narrowing the scope of the act to advocacy of concrete action to overthrow the government, rather than advocacy of abstract Communist doctrine.<sup>80</sup> The Court would shift further toward protecting rights within a few years, striking down as unconstitutional a requirement that Communist Party members could not apply for passports in *Aptheker v. Secretary*

---

<sup>78</sup> Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982), xii.

<sup>79</sup> Ibid. Kutler examines Cold War repression through detailed narratives of specific cases, like government efforts to deport labor leader Harry Bridges.

In a focused study of “Cold War Political Justice,” Michal Belknap sees Cold War era repression as part of a pattern, but it is not a pattern based on wartimes and peacetimes. Instead, the system of justice is occasionally hijacked for partisan political purposes, and these tendencies are more frequent during times of crisis, including not only wars but also “periods of extreme racial tension or bitter confrontations between labor and capital.” Michal Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CT: Greenwood Press, 1977), 4.

<sup>80</sup> *Yates v. United States*, 354 U.S. 298 (1957).

of *State* in 1964.<sup>81</sup> By this time, the Court's shift in a more progressive direction in many areas of law was solidified by the retirement of Justices Felix Frankfurter and Charles E. Whittaker in 1962, and their replacement with Byron White and Arthur Goldberg.<sup>82</sup>

Geoffrey Stone largely ends his analysis of the Cold War in 1957, but the broader span of the Cold War years saw both restrictive and expansive protection of rights.<sup>83</sup> Changes in individual rights don't neatly track the moments when global tensions rose and fell. For example, the moment the world came closest to nuclear war, during the Cuban Missile Crisis in October of 1962, was not the height of free speech restriction.<sup>84</sup> That same month, the Kennedy Administration supported James Meredith's efforts to enroll at the University of Mississippi, which had denied him admission because of his race. Earlier that year, the Supreme Court decided two landmark cases, holding that states could not require prayer in public schools, and finding that the Court was not barred from considering a state's skewed voting districts, paving the way toward the requirement of one-person, one-vote.<sup>85</sup> Rights were expanding just as the nation came closest to nuclear war.

---

<sup>81</sup> *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). In 1961, a divided Court upheld a finding of the Subversive Activities Control Board that the Communist Party of the United States was a "Communist action organization" dominated and directed by the Soviet Union, and so required to register with the Board as a subversive organization. *Communist Party of the United States v. Subversive Activities Control Bd. No. 12*, 367 U.S. 1 (1961), and in another 5-4 split, the Court also upheld the prosecution of Julius Scales for being an active member of the Communist Party, in violation of the Smith Act, but unanimously overturned John Francis Noto's Smith Act conviction, finding insufficient evidence of active advocacy of overthrow of the government. *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

<sup>82</sup> Lucas A. Powe, *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2002); Timeline of the Justices, Supreme Court Historical Society, [http://www.supremecourthistory.org/history/supremecourthistory\\_history\\_timeline.htm](http://www.supremecourthistory.org/history/supremecourthistory_history_timeline.htm).

<sup>83</sup> My book *Cold War Civil Rights* argues that limited equality rights expanded during the early years of the Cold War, just when freedom of association and speech were limited by anti-communist purges. My point here is different: the rights at the core of post-World War II ("McCarthy era") repression also expanded during the geopolitical Cold War, and at a time when Cold War tensions increased.

<sup>84</sup> Michael Dobbs, *One Minute to Midnight: Kennedy, Khrushchev, and Castro on the Brink of Nuclear War* (New York: Knopf, 2008).

<sup>85</sup> *Engle v. Vitale*, 370 U.S. 421 (1962); *Baker v. Carr*, 369 U.S. 186 (1962). Powe, *The Warren Court*.

If wars are geopolitical events, not events internal to the world of rights and liberties, their beginnings, endings, and the overall path of the struggle would surely be measured by something other than legal change. Otherwise the *effect* of war (its impact on law) has taken on causal power, and the argument has become circular. Ending an analysis of the Cold War at the moment they can measure an end to its impact shows us that the “Cold War” being measured in civil liberties scholarship is not the Cold War of diplomatic history.

In treatments of law and war, wartimes’ causality tends to be inferred from the way it coincides (or doesn’t) with times of repression.<sup>86</sup> Even in a detailed work like Stone’s, the mechanism driving the impact of war on rights tends not to go beyond descriptions like that of Emerson. Stone’s focus is not on the nature of a war-era, of course, but on its impact. But if, as Emerson suggests, it is not Cold War national security itself that affects rights, but domestic anticommunism, then the impact of war/security on rights will not necessarily line up with international threats. Instead, it will line up with the domestic conceptualization of threats. This understanding is produced in part by external events, but it is most importantly produced by a domestic discourse about security.<sup>87</sup>

The idea that the impact of war and security on rights comes more from the domestic politics of security than from the external threat itself is supported by new work on war and public opinion. Adam Berinsky argues that public opinion during war is determined by the same factors that affect public opinion during other times. War and crisis in the abstract are not what affect public opinion, at least in a sustained

---

<sup>86</sup> There are works that base an argument about the importance of war on more concrete findings. See, e.g., Shawn Francis Peters, *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kansas: University Press of Kansas, 2000). See also the literature on civil rights and the Cold War, discussed later in this paper.

<sup>87</sup> David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, rev. ed., 1998).

The role of domestic politics plays out in the work of Stephen Feldman. He argues that the period of repression after World War II was not the full Cold War era, but instead the “Red Scare.” For Feldman, the origins of the period were in worsening relations between the United States and the Soviet Union, but this was drawn upon in electoral politics. In the 1946 midterm elections, “Republicans ‘experimented’ with anti-Communism as a political sword wielded against Democratic incumbents and the New Deal.” They painted President Truman and the Democrats as “soft on Communism.” Richard Nixon and Joseph McCarthy both used fears of communist influence to win elections to the House and Senate. This strategy succeeded. Republicans gained twelve seats in the Senate and fifty-five in the House, giving the party control of both houses of Congress. Feldman, *Free Expression and Democracy*, 432-433.

way over time. Rather, Berinsky argues, the American public's reaction to war is mediated through domestic politics and interest groups, in the same way the public's perceptions of domestic matters are.

The public may be directly influenced by some dramatic events, such as Pearl Harbor and 9/11, but – as in the domestic arena – public opinion is primarily structured by the ebb and flow of partisan and group-based political conflict. These factors shape support for policies of war just as they shape policies of peace. Moreover, we can better understand critical public choices during times of international conflict – notably, support for civil liberties and the election of political leaders – by looking to the same factors that shape opinion on the domestic stage.<sup>88</sup>

From this perspective, we need to examine not only war and the domestic reaction, but also the filter between the two: the construction of narratives of war, sometimes in partisan ways.

The idea that a domestic and often partisan political discourse is more important to public opinion on war than war itself helps explain the disconnect between the period of civil liberties repression and the path of Cold War international relations. What is often called the Cold War's impact is, with important exceptions, better framed as a Red Scare of the Cold War era – a period of domestic politics that coincides with and is affected by early Cold War geopolitics.<sup>89</sup> The principal determinants are not international relations, but instead the way international affairs create a language for domestic political repression.

An important qualification to this analysis, however, is work on rights during the Cold War era that specifically draw upon sources on international relations, and show concrete relationships between rights and international affairs. The literature that does this systematically is work on racial equality, broadly defined, during the early Cold War years. For civil rights historians the years after World War II were a time of both repression and the expansion of rights. Civil rights activists were often red-baited and their activities restricted, but during these years the Supreme Court held that racial segregation in public schools was unconstitutional, and Congress passed landmark civil rights legislation. During these years, global attention was given to American race discrimination, and American diplomats believed that international criticism of American segregation harmed U.S. foreign affairs. A body of scholarship now illustrates the specific connections between Cold War-era foreign affairs and

---

<sup>88</sup> Berinsky, *In Time of War*.

<sup>89</sup> See Schrecker, *Many are the Crimes*.

domestic civil rights reform.<sup>90</sup>

But the Cold War impact on civil rights did not last through the expanse of the Cold War era. By the mid-1960s, U.S. Information Agency analysis suggested that American race relations no longer had such a negative impact on U.S. international prestige. Following the passage of important civil rights legislation, the message was finally getting through that the U.S. government was behind civil rights. Although peoples of other nations continued to believe that more had to be accomplished, American democracy seemed less complicit in racial oppression. Ultimately the U.S. government believed that its propaganda battle had succeeded, and peoples of other nations were more likely to believe that the United States government supported civil rights. At the same time, other matters, especially Vietnam, drowned out the impact of civil rights on the U.S. image abroad.<sup>91</sup>

This civil rights literature differs from the works on repression of civil liberties in that it draws upon specific impacts of Cold War foreign affairs on civil rights, documented by concrete foreign affairs-related archival sources. While both the civil rights literature and the civil liberties literature argue that the Cold War impacts rights, only the former supports the argument with sources from foreign relations-related archives. To the extent the civil liberties literature makes arguments related to geopolitics, authors draw upon domestic politics and policy sources, not diplomatic records. Drawing upon foreign relations sources, civil rights historians are able to make more precise arguments about the relationship between Cold War concerns and individual rights. There is more to it than timing.

In spite of important methodological differences, these works are conflated by scholars seeking to broadly characterize rights in the Cold War era, as if they were

---

<sup>90</sup> See., e.g., Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000); Thomas Borstelmann, *The Cold War and the Color Line: American Race Relations in the Global Arena* (Cambridge, MA: Harvard University Press, 2001); Brenda Gayle Plummer, *Rising Wind: Black Americans and U.S. Foreign Affairs, 1935-1960* (Chapel Hill: University of North Carolina Press, 1996); Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (New York: Cambridge University Press, 2003); Penny M. Von Eschen, *Race Against Empire: Black Americans and Anticolonialism, 1937-1957* (Ithaca: Cornell University Press, 1997); Jonathan Rosenberg, *How Far the Promised Land?: World Affairs and the American Civil Rights Movement from the First World War to Vietnam* (Princeton: Princeton University Press, 2005), *The Impact of Race on U.S. Foreign Policy: A Reader*, ed. Michael L. Krenn, (New York: Garland Publishing, 1999).

<sup>91</sup> Dudziak, *Cold War Civil Rights*, LBJ chapter.

demonstrating a causal impact from the same source.<sup>92</sup> This is one of the reasons we see a variety in approaches to periodization. Different timeframes are relevant in different works in part because they are not, in fact, covering the same historical phenomenon.

The absence of similar evidence of a direct connection between rights and foreign affairs in other work on Cold War era civil liberties reinforces the idea that it is better to view domestic politics as the prime determinant.<sup>93</sup> The fact that domestic politics during the red scare often invoked global affairs did not mean that global affairs were actually driving domestic policy. Instead, the state of the world and U.S.-Soviet tensions were a framework drawn upon in domestic political discourse. International affairs were a rhetoric of the red scare, but domestic repression during this era could proceed independently from the actual dynamics of U.S. foreign relations.

This helps us to see that whether or not the Cold War was a “wartime,” something more is needed to understand rights in the post-World War II-era. International affairs including war affect domestic rights in historically specific and concrete ways. Rights map on different timelines, some geopolitical, some domestic. The Cold War affects rights not because the era was war-like, with a start, a finish, and repression in the middle. Instead the early Cold War era produced two things at the same time: a foreign relations climate to which the American global image was important, thereby facilitating some social change; and a domestic climate of political repression in which international affairs became a rhetoric of what was in essence and era of domestic politics.

The difficulty in lining up war or Cold War national security with the impacts on rights after World War II does not mean that the U.S. role in global affairs is unconnected from legal history. Instead, it matters to look for specific connections between rights and national security, rather than letting the conceptual categories of wartime and peacetime do the work.

### **Limited War and Social Change**

If the Cold War is an era of ambiguity when the categories of war and peace collapsed

---

<sup>92</sup> Mark Graber, “Counter-stories: Maintaining and Expanding Civil Liberties in Wartime,” in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark V. Tushnet (Durham: Duke University Press, 2005).

<sup>93</sup> Cold War foreign affairs did not generate a perceived need for expanded equality rights across the board. For example, while U.S. propaganda on race emphasized equality, U.S. propaganda on women emphasized domesticity. Laura A. Belmonte, *Selling the American Way: U.S. Propaganda and the Cold War* (Philadelphia: University of Pennsylvania Press, 2008).

together, was it an era when military conflict itself ceased to be distinguishable, and therefore important to, American law and politics? The Korean War experience helps us explore that question.<sup>94</sup>

The Korean War, which never formally ended, has been called “the Forgotten War.” The first major hot war of the Cold War, Korea has largely eluded the attention of scholars interested in war and domestic social change. Though sometimes noted, it is most often collapsed into the Cold War period, as compared with Vietnam, which is analyzed on its own.<sup>95</sup> Korea matters not only because it was an important military engagement, costly in lives and treasure, impacting domestic American politics as well as international affairs. Korea was also the first major military conflict of the atomic age. The Korean War exemplified the kind of warfare the United States would engage in for the rest of the twentieth century. It was a limited war. Modern limited

---

<sup>94</sup> Perhaps a defense of the tendency of scholarship on war and rights to ignore many wars in American history is the idea that only large wars affect American law and politics. But this runs contrary to scholarship on the constitution and war powers. In *Presidential War Power*, Louis Fisher shows that small wars were important. “The first exercise of the commander-in-chief clause involved actions by President Washington against certain Indian tribes” in 1789. In 1794, President George Washington used his powers and the militia of four states to put down the “Whiskey Rebellion,” a violent protest in Pennsylvania against a tax on whiskey, the first time troops were used by the president to put down a domestic insurrection. The war with France, 1798-1800, is sometimes called first undeclared American war. No formal declaration was passed by Congress, but President John Adams did seek congressional support for his actions. In the early twentieth century, the United States “intervened regularly in other countries to “protect lives and property,” and Fisher includes these conflicts in his analysis of the history of America war powers. The small wars, it seems, matter to American constitutional law, at least for Fisher’s treatment of the rise of Presidential war powers. Louis Fisher, *Presidential War Power*, 2<sup>nd</sup> ed. (Lawrence, KS: University Press of Kansas, 2004), 17, 23-25, 56-75; 54 Department of State Bulletin 474, 484 (1966).

Kim Scheppele’s influential work provides a more detailed argument about the Cold War’s impact. Along with Hogan, Scheppele finds a shift in the state in the Cold War era. For Scheppele, the United States transitions to a politics of emergency, dangerously enhancing executive power. She compares the United States during the Cold War to wartime Germany. Scheppele’s time-frame for the Cold War mirrors the consensus periodization in diplomatic history: from after World War II to the fall of the Soviet Union in 1991. Kim Lane Scheppele, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” *Journal of Constitutional Law* 6 (May 2004): 1-75. Jill Elaine Hasday uses a similar periodization in “Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War,” *Kansas Journal of Law and Public Policy*, 5 (Winter 1996) 129-152.

<sup>95</sup> See Steven Casey, *Selling the Korean War: Propaganda, Politics, and Public Opinion in the United States, 1950-1953* (New York: Oxford University Press, 2007), 4-5. Paul Murphy considers the Cold War and Korea together. Murphy, *The Constitution in Crisis Times*, 279-309.

war, military historian Adrien Lewis argues, “was an artificial creation caused by the development of nuclear weapons.”<sup>96</sup> One of the driving dynamics of the war was what American leaders sought to avoid: all-out war with the Soviet Union.

World War II liberated Korea from Japanese occupation. American and Soviet forces occupied Korea after the war, with Americans in the south and Soviets in the north, divided by the 38<sup>th</sup> parallel. This was meant to be a temporary postwar arrangement, however by 1948, as U.S.-Soviet relations deteriorated, the border became a militarized Cold War boundary. In August 1948, the Republic of South Korea was formed, followed a few weeks later by the Democratic People’s Republic of Korea in the north. Expecting that the United States would not intervene, North Korean forces invaded the south on June 25, 1950, with the aid of Soviet advisors and equipment. These developments shocked President Truman. The United Nations Security Council quickly passed a resolution calling for support to repel the invasion. Meanwhile, North Korean forces quickly pushed South Korean forces to Pusan at the southern end of the Korean peninsula. Believing that the stakes in Korea included “the ominous threat of a third world war,” Truman committed American ground troops. Three years and millions of civilian and military casualties later, the Americans and Soviets, North and South Koreans had settled into an ongoing stalemate near the point it had all begun: the 38<sup>th</sup> parallel.<sup>97</sup>

During the Korean War, Susan A. Brewer writes, “the Truman administration confronted a problem its successors would face in future wars: how to persuade Americans that they were fighting for the highest stakes in a limited war in a small faraway country about which they knew nothing.”<sup>98</sup> Marilyn Young puts it more starkly: post-World War II administrations “had to create a public tolerance for war as normal rather than aberrational, so normal that after a while only those who were actively engaged in fighting it – and their families -- noticed it was being fought at all.”<sup>99</sup>

The U.S. government had a hand in generating public perception of the Cold War. “As the nation assumed an ongoing state of war,” Brewer writes, “government propaganda became permanent and professional.” During World Wars I and II, the government relied upon temporary war-related agencies for public relations

---

<sup>96</sup> Adrian R. Lewis, *The American Culture of War: The History of U.S. Military Force from World War II to Operation Iraqi Freedom* (New York: Oxford University Press, 2007), 203.

<sup>97</sup> Lewis, *American Culture of War*, 85-90; Casey, *Selling the Korean War*.

<sup>98</sup> Susan A. Brewer, *Why America Fights: Patriotism and War Propaganda from the Philippines to Iraq* (New York: Oxford University Press, 2009), 145.

<sup>99</sup> Marilyn Young, “Limited War, Unltd.” (unpublished paper), 4.



campaigns. After World War II, “instead of calling upon poets, historians, and artists to serve in a temporary wartime agency, the government expanded the role of policymakers, public relations specialists, and journalists in public information departments throughout the executive branch.”<sup>100</sup> With most of the nation focused on domestic concerns, Truman’s efforts sought to reach the 25% of the America public who believed they followed international affairs. “They courted their support with special briefings and appointments to presidential advisory boards and committees....Officials figured that if these notables endorsed their product the rest of the public would buy it.”<sup>101</sup>

During the Korean War, Young writes, the press “protected the public from a too concrete knowledge of what US military power had wrought,” including the extent of Korean casualties which numbered two to three million, compared with over 33,000 Americans.

From the beginning, bombing runs were described as precision targeting and the targets identified were always military. There was acknowledgment that non-combatants did get hurt, but the issue was always cast in terms of intention. “The issue of intention,” Sahr Conway-Lanz has written, “and not the question of whose weapons literally killed civilians or destroyed their homes, became the morally significant one for many Americans.”<sup>102</sup>

Although the U.S. military largely fought Koreans, in Korea and through the rest of the Cold War, the defining national security objective was containing the Soviet Union and avoiding a nuclear apocalypse.<sup>103</sup> Pusan was important not so much as a point from which U.S. and U.N. forces would push back against the North Korean army, but instead as a site of conflict over communism. By defining Korea as a battle to stop Soviet aggression, Americans could translate this faraway war into something that protected their own security. By containing the Soviets and thereby avoiding World War III, the Korean conflict could be seen as safeguarding American neighborhoods. And on the homefront, congressional investigatory committees did not interrogate North Korean sympathizers, but communist fellow travelers.<sup>104</sup>

---

<sup>100</sup> Brewer, *Why America Fights*, 142-143.

<sup>101</sup> *Ibid.*, 143-144. See also Berinsky.

<sup>102</sup> Young, “Limited War, Unltd.,” 9.

<sup>103</sup> Young, “Ground Zero: Enduring War.”

<sup>104</sup> See Casey, *Selling the Korean War*.

To fully grasp the impact of war on rights in this era, we need to see it as this double-layered phenomenon, in which the imaginary (World War III and the idea of Soviet domination)<sup>105</sup> drives the cultural reaction as much or more so than the state of any particular battle. The homefront experience comes from the way war touches everyday Americans.<sup>106</sup> While this is tied to the deployment and deaths of loved ones, it comes also from the way the story of a war is told, the way it is understood on the street corner. Long before the Cold War, the U.S. government understood this dynamic, and worked to create favorable wartime domestic climates. During Korea and other wars along the periphery of American global power, the domestic culture and politics of war has been more important to law and rights at home than what happened in any foxhole.

With the U.S. government public relations apparatus and political elites working to convince the American public that Korea's importance lay in the broader Cold War struggle, it is not surprising that this hot war's impact has been collapsed within a longer, colder conflict. Korea's importance for examining social change and limited war is that it helps us to focus on the dynamic that would drive domestic reaction to war through the rest of the century. From Korea, to Vietnam, to Iraq, and to the forgotten stops along the way, the "war" that affects rights during the Cold War era and after is not the war of Clausewitz, but the war of Paul Virilio.<sup>107</sup> What matters is not dynamics on the battlefield, but the perceptions of war at home.

This dynamic would prove to be important in the early years of the twenty-first century, when buildings fell in Manhattan, and an American president declared war on terrorism. But that will be the topic of my next chapter.

---

<sup>105</sup> It should go without saying that by an "imaginary" I don't mean to suggest that there was no threat of Soviet aggression, but rather that Soviet aggression and fear of World War III was the framing idea in the imagination of Americans.

<sup>106</sup> See Catherine Lutz, *Homefront: A Military City and the American Twentieth Century* (Boston: Beacon Press, 2001).

<sup>107</sup> Paul Virilio, *War and Cinema: The Logistics of Perception* (London: Verso, 1989); Paul Virilio, *Desert Screen: War at the Speed of Light* (London: Continuum, 2002).