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Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War

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Although perceived military necessity provoked such intellectual and structural transformations, the national government did not shed these new understandings at the end of the Civil War, and the government now appears just as reluctant to abandon them at the end of the Cold War.

America transformed its legal and governmental structure in response to the perceived dangers of Soviet expansionism in the decades after World War II. The Cold War lasted so long, and so many people believed that it would last indefinitely, that precious little thought was given during this struggle to how the nation would restructure itself once the emergency had passed. The American Civil War provides a powerful model for thinking about the transformations that took place during the Cold War and about how a transformation back to peacetime law can be made now.

Both the Civil War and the Cold War fostered a pervasive sense of crisis centered on the premise that resort to undemocratic measures was necessary to save the nation. Spurred by the felt necessities of wartime, this way of thinking prioritized action over contemplation, and effectiveness over consultation. Proponents argued that war sped up time and shrank space. Responding as quickly as possible to national crises was both necessary and desirable, even at the expense of compromise and deliberation. Wartime emergency measures could appropriately apply to people far from actual fighting.

This mentality drove fundamental restructuring of the national government. In the Cold War, as in the Civil War, the government expanded its power and reach dramatically. On the assumption that the executive was best suited to act quickly and decisively, Lincoln and the Cold War Presidents concentrated this power in themselves. Congress and the courts both accepted executive supremacy in wartime and regeared their own operations to meet the demands of national emergency.

Although perceived military necessity provoked such intellectual and structural transformations, the national government did not shed these new understandings at the end of the Civil War, and the government now appears just as reluctant to abandon them at the end of the Cold War. After the Civil War, Congress was not eager to surrender the ease and efficiency of wartime decision-making, and the President was weak or only weakly committed to restoring the rule of law. Having dismissed deliberation and compromise as mere extravagances in wartime, resurrecting their importance in peace became far from automatic.

Our Civil War experience should lead us to expect that our transition back to peace will be neither easy nor smooth. The return to peacetime law after the Civil War was neither, even though the emergency measures taken during this much shorter war were explicitly temporary. The Civil War shows us that the transition back after a massive national emergency can be made. But it suggests, above all else, that such a transformation will be difficult and slow without deliberate government action and

Jill Elaine Hasday *is Articles Editor of the Yale Law Journal. This paper was awarded the Edgar M. Cullen Prize for the Best Paper by a first-year student at Yale Law School.*

careful planning about both the ending of emergency law and the shaping of peacetime rules. Restructuring our nation for peacetime, thinking about and planning the future, is presumably not a radical suggestion, but we have done too little of it thus far. The history of the Civil War both suggests just how dangerous this can be and offers concrete lessons for reestablishing the rule of law now.

I. Emergency Power in the Civil War

A. An Immediate Response to a "clear, flagrant, and gigantic case of Rebellion"

From the start, President Abraham Lincoln responded to the crisis of the Civil War by claiming exponentially augmented powers for the federal government and by consolidating this power in himself. He avoided congressional consultation on the assumption that Congress could not respond to the crisis quickly enough and out of fear that congressmen might not agree to do what Lincoln knew was necessary to preserve the Union.

Lincoln effectively implemented emergency rule in just the first eleven weeks of the Civil War. His first step after the April 12, 1861 firing on Fort Sumter was to decide that Congress, then in recess, should not reconvene as soon as possible. Lincoln's executive proclamation of April 15 called for a special session of Congress to address the secession crisis, but one that would not meet until July 4.[1] Presumably, Lincoln hoped he could resolve the crisis by then. Lincoln's next move was to institute a blockade on Confederate ports on April 19, an action hitherto regarded as both unconstitutional and contrary to international law except in declared, foreign wars.[2] The next day, he assumed two core congressional functions. Lincoln directed that nineteen ships be added to the navy,[3] although the Constitution directs Congress "[t]o provide and maintain" this force.[4] Suspicious of the loyalty of the national bureaucracy, he also ordered the Treasury Secretary to advance two million dollars to three private citizens "to be used by them in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defence and support of the government."[5] Such an expenditure without congressional appropriation or authorization was, of course, contrary to the constitutional provision that "[n]o Money shall be drawn from the Treasury but in consequence of Appropriations made by Law."[6] On April 27, in response to secessionist activity in Baltimore—Washington, D.C.'s link to the rest of the Union—Lincoln suspended the writ of habeas corpus in the area,[7] the first of four such presidential proclamations made in the first eleven weeks of the war, and the first of eight made over the course of the war.[8] Finally, on May 3, Lincoln called for volunteers for the regular army, although Congress had not authorized an expansion of the armed forces.[9]

Acceding to Lincoln's unilateral restructuring of federal power and the crisis mentality of the times, Congress exercised no effective restraint on the President after it reconvened and adopted emergency measures of its own. On August 6, 1861, Congress sustained all of Lincoln's post-Sumter actions "respecting the army and navy of the United States," declaring them "hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[10] Although many believed that only Congress could suspend the writ of habeas corpus, Congress did not address that issue until two years into the war when Lincoln had already suspended the writ seven times. While the March 3, 1863 "Act relating to Habeas Corpus" did not concede that the President had such authority, it authorized future suspensions and its net effect was to legitimize his previous proclamations.[11] This Act also declared that properly enforcing wartime executive orders or legislation would be a defense in civil suits brought against federal officers[12] and directed that suits involving official indemnity be transferred to federal courts.[13] While unsurprising today, these latter provisions represented, like the habeas corpus authorization, unprecedented exercises of federal power. Under traditional American law, military officers sued for such trespasses as false imprisonment and unwarranted seizures could not use a superior's orders as a defense and were personally liable for damages[14] (although they were frequently reimbursed by Congress).[15] Such suits became common during the Civil War, prompting Congress to take its unusual action.[16]

National leaders tended to understand such dramatic assertions of wartime power in one of three ways. The first view, propounded most prominently by Congressmen Thaddeus Stevens and Charles Sumner, held that while the Constitution did not provide for any emergency powers beyond those explicitly enumerated,[17] it simply did not control matters related to the suppression of the rebellion. Stevens once declared that he "would not stultify" himself by pretending that a certain wartime measure was constitutional, and then voted for it anyway.[18] Sumner shared such sentiments. "Glorious as it is that the citizen is surrounded by the safeguards of the Constitution," constitutional rights, Sumner argued, were "superseded by war which brings into being other rights which know no master."[19] A popular literature quickly developed in support of this position, with much of the material arguing that Union victory required the wartime suspension of the Constitution. As the *Continental Monthly* editorialized, a "[g]reat crisis required great measures."[20]

While historians have tended to view Stevens and Sumner as "extremist" advocates of the war power,[21] their constitutional position was in fact the most long-established in America. In the

eighteenth and early nineteenth centuries, the dominant constitutional paradigm featured a sharp separation between the rule of law and crisis government. This "liberal constitutionalism" recognized that the executive would have to take far-reaching actions in the most serious national emergencies and posited that the integrity of the Constitution could best be preserved by limiting its application to peacetime. While the President had no constitutional emergency authority, he could act outside the Constitution in grave crises.[22] Stevens and Sumner were well within this tradition.

The second view of war powers prominent during the Civil War shared Stevens's and Sumner's conviction that the Constitution granted no emergency authority beyond that specified, but held that the Constitution retained its supremacy in wartime. Proponents argued that almost all of Lincoln's emergency measures were unconstitutional and demanded that they be immediately abandoned. Chief Justice Roger B. Taney's opinion in *Ex parte Merryman* (1861) was the most important explication of this view and the most significant piece of opposition literature written during the war.[23]

Indeed, armed hostilities were over for thirteen years before Congress definitively ended emergency rule, having finally come to understand that the perpetuation of crisis government threatened its interests and those of the nation.

On April 19, 1861, pro-secession mobs in Baltimore prevented Union troops from passing through the city on their way to guard Washington, D.C. That night, local authorities burned Baltimore's most important railroad bridges—the capital's sole connection to the North and West—supposedly to protect the city from Union troops seeking revenge for the day's rioting.[24] On April 27, Lincoln authorized the suspension of habeas corpus "at any point or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington."[25] Under this authorization, John Merryman, suspected of organizing a secessionist troop movement, was taken into military custody on May 25. He immediately petitioned Taney, on circuit in Baltimore, for a writ of habeas corpus.[26] Stipulating that he was acting as a Supreme Court Justice from chambers rather than as a circuit judge, Taney issued the writ the next day.[27] When he was disobeyed because of the President's April 27 directive,[28] Taney wrote an opinion challenging the constitutionality of Lincoln's suspension of habeas corpus.

Taney denied Lincoln's authority to reassign powers within the national government or to go beyond the powers enumerated in the Constitution. According to him, "the necessity of government, for self-defence in times of tumult and danger" did nothing to increase executive power. The government, Taney argued, "derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted."[29] The Founders did not provide for general emergency rule or martial law because the only efficiency they were concerned about was that the Constitution "guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression."[30] For this reason, the Constitution authorized only Congress to suspend habeas corpus.[31] Taney concluded by rejecting the notion that unconstitutional methods could help preserve the Constitution. Declaring the overriding of civil processes when civil courts functioned military usurpation, he warned that unconstitutional stratagems of this sort would only undermine what they intended to save. Permitting such usurpation would destroy the "government of laws," leaving "every citizen hold[ing] life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[32] For his parting shot, the Justice had a copy of his opinion sent to the President.[33]

The third, and dominant, view of war powers espoused during the Civil War agreed with Taney that the Constitution was binding in war, but argued that it was a flexible document that allowed the President to take necessary emergency action. This approach, labeled the "adequacy-of-the-Constitution" position soon after Sumter,[34] held that the Constitution had been misinterpreted since its ratification. Southerners had focused too much attention on the prohibitions in the Constitution. Adequacy writers stressed that the Constitution also imposed positive duties upon the national government.[35] The government had a responsibility to maintain itself as the base for a more perfect Union,[36] to guarantee to every state a republican form of government,[37] and to provide for the general welfare.[38] The President, in particular, was obligated to see that the laws were faithfully executed and to carry out his oath to preserve, protect, and defend the Constitution to the best of his ability.[39] War powers, as far-reaching as necessary to preserve the Union, were entirely consistent with the Constitution.[40]

Lincoln was always the most effective advocate of adequacy constitutionalism. Throughout the war, the President insisted

that his emergency measures did not exceed what the Constitution allowed.[41] "[C]ertain proceedings are constitutional," he argued in response to critics of the suspension of habeas corpus, "when, in cases of rebellion or Invasion, the public Safety requires them," although they would not be constitutional otherwise.[42] The Founding Fathers themselves "plainly" endorsed such an interpretation, as demonstrated by their provision for the suspension of habeas corpus in national emergencies.[43] Indeed, important powers and positive duties placed on the national government in times of crisis pervaded the Constitution. Lincoln argued in his July 4, 1861 message to Congress, in classic adequacy constitutionalism form, that the United States could only fulfill its constitutional responsibility to guarantee to every state a republican form of government[44] by keeping the states in the Union. Preventing a state's secession was "an indispensable *means*, to the *end*, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory."[45]

Lincoln was equally confident that "the strong measures" to which he had resorted were in fact "indispensable to the public Safety."[46] There were two, equally important, components to this claim. The first was an insistence that the national government was not trampling on any personal liberties unnecessarily. The second was that some significant trampling was required to preserve the Union. Lincoln's response to his critics was that he, too, was "devotedly for" the "safe-guards of the rights of the citizen against the pretensions of arbitrary power . . . *after* civil war, and *before* civil war, and at all times 'except when, in cases of Rebellion or Invasion, the public Safety may require' their suspension."[47] Lincoln harbored no doubts that the "clear, flagrant, and gigantic case of Rebellion"[48] the nation faced required extensive executive action. "We are contending," he wrote, "with an enemy, who . . . drives every able bodied man he can reach into his ranks, very much as a butcher drives bullocks into a slaughter-pen. No time is wasted, no argument is used."[49]

As early as the end of 1861, Lincoln's adequacy constitutionalism dominated the executive branch and Congress. In 1863, in a case which replicated in miniature the struggle between Lincoln and Taney on the war power, the Supreme Court sided with this majority, further legitimating the politicians' crisis mentality and governmental restructuring. The *Prize Cases*[50] involved a challenge to the legality of Lincoln's blockade order. The lawyers for the shipowners whose vessels and cargo had been seized reiterated the essence of Taney's argument in *Merryman*, contending that the executive was limited to those powers specifically granted by the Constitution and observing that the authority to declare a blockade was not such a power.[51] Lincoln's defense, of course, was that the blockade order was within his constitutional authority because he needed such power in order to fight secession.[52] Justice Grier, writing for a majority of the Court, agreed that the Constitution did not stand in the way of an effective Union war effort. Although the common understanding before this case had been that blockades were only constitutional in declared, foreign wars, and the Civil War lacked both a foreign enemy and a congressional declaration of war, Grier wrote that "[t]he proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."[53] The President had the constitutional authority, as commander in chief and chief executive officer, to recognize national emergencies and confront them quickly and effectively.

B. Civil War Battlefields

The triumph of adequacy constitutionalism in the executive, legislative, and judicial branches of the national government during the Civil War affected citizens throughout the United State. For the national government, in word and deed, extended the "battlefield" where wartime measures were operative far beyond actual battle sites. In the process, it starkly revealed the potential dangers inherent in a doctrine that placed no constraints on the state's power to assess and counter national emergencies, relying instead on national leaders to impose appropriate limits on themselves.

Anxious to establish his absolute discretion to determine what was necessary to preserve the Union, Lincoln's official rhetoric about the extent of war powers was particularly far-reaching and indiscriminate. As early as October 14, 1861, Lincoln wrote the commanding general of the Union army that "[t]he military line of the United States for the suppression of the insurrection may be extended so far as Bangor in Maine." Lincoln authorized the general, or any officer acting under his authority, "to suspend the writ of habeas corpus in any place between that place and the city of Washington."[54] No obvious specific incident motivated this order, and it came six weeks before Lincoln suspended habeas corpus in Missouri, a critical border state that saw guerilla violence and perpetual military campaigns from the beginning of the war.[55] In September 1862, Lincoln broadened the geographic scope of the suspension to include "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice" *wherever found*.[56]

Congress and the Supreme Court displayed their own, more limited, expansiveness. The March 3, 1863 Habeas Corpus Act authorized the writ's suspension "throughout the United States, or any part thereof,"[57] but attempted (unsuccessfully) to place limits on the President's power to detain "citizens of states in which the administration of the laws has continued unimpaired in the . . . Federal courts."[58] The Supreme Court held in the

Prize Cases (1863) that all residents of the Confederate states "whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies." Their property could be seized regardless of their personal allegiances. [59]

But the army's official proclamations about its war powers were the most sweeping by the end of the conflict. On August 16, 1864, Ulysses Grant, by then the commanding general of the Union army, declared that essentially all southern males of draftable age, which included those seventeen to fifty, would be treated as combatants. The order thoroughly blurred the line between civilians and soldiers, but perhaps it is not surprising that Grant issued such a directive. With all other considerations subordinated to military needs during the Civil War, he may have come to believe that there were no limits on his power to prosecute the war. While Grant's order apparently did not lead to blanket military arrests,[60] it stands as the pinnacle of the national government's progressive expansion during the Civil War of the battlefield where wartime rules applied.

The reigning elite argued that the only way the country could protect itself from the forces threatening the survival of the American democracy was to abandon some of the very democratic processes which the nation was fighting to preserve.

Lincoln's *political* rhetoric fully supported this official expansionism. Indeed, in an 1863 public letter defending military arrests, Lincoln seemed almost paranoiac, declaring that at the outbreak of the war "[Confederate] sympathizers pervaded all departments of the government, and nearly all communities of the people."[61] He went on to insist that military arrests were

> constitutional *wherever* the public safety does require them—as well in places to which they may prevent the rebellion extending, as in those where it may be already prevailing—as well where they may restrain mischievous interference with the raising and supplying of armies, to suppress the rebellion, as where the rebellion may actually be—as well where they may restrain the enticing men out of the army, as where they would prevent mutiny in the army.[62]

Or, as Lincoln put it in a now-famous metaphor: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? . . . I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy."[63]

Not surprisingly given such sentiments, the practical effect of Lincoln's wartime measures extended significantly beyond the actual battlefield. Fortunately, this expansion was more cautious and calibrated than Lincoln's official and political rhetoric suggested. Having asserted his unchecked power to preserve the Union by whatever means necessary, Lincoln actually exercised his discretion more reasonably.

The North, militarily secure for the great majority of the war, saw a relatively small percentage of military arrests and trials. Mark E. Neely, Jr.'s study of 866 people arrested by the military in the first ten months of the war[64] found that a maximum of 18.4% of the prisoners were from states north of the (always volatile) border states.[65] Five percent of the at least 4,271 trials conducted by military commission during the war took place in the North.[66]

The strife-torn border states were much more strictly controlled. Neely found that citizens from those states accounted for more than 40.5% of the military arrests he studied.[67] More than half (55.5%) of the trials by military commission conducted during the war occurred in Missouri, Kentucky, and Maryland, with 46.2% occurring in turbulent Missouri alone.[68]

Military controls were as severe in the Confederate states. Although the Union army's control over the South was very limited in the first year of the war, Neely found that 26.3% of the people arrested in the first ten months of the conflict were citizens of Confederate states, either residents of areas the Union army already occupied or southerners in the North when the war began.[69] However, wartime measures did distinguish southern unionists from their secessionist neighbors. The Supreme Court sanctioned the capture of all property located in the South.[70] But Congress's ultimate Captured and Abandoned Property Act authorizing military seizures in the Confederacy provided for the restoration of loyal citizens' property.[71]

C. Thinking About Peace

Lincoln's extension of military controls is typical of the larger pattern of his war power policies. Under the mantle of adequacy constitutionalism, Lincoln claimed the authority to do whatever was necessary to quell the crisis the nation faced. But the practical effect of his wartime measures, while significant, was more limited and discriminating than either his political

rhetoric or official proclamations. The most important limitation that Lincoln imposed upon himself was that his wartime measures would end with the war.

From his first address after the firing on Fort Sumter, Lincoln took care to assure the Union that emergency rule would be temporary. Lincoln told the special session of Congress that convened on July 4, 1861 that "*after* the rebellion [was] suppressed . . . he probably [would] have no different understanding of the powers, and duties of the Federal government, relatively to the rights of the States, and the people, under the Constitution, than that expressed in the inaugural address."[72] Two years later, in his next important discussion of constitutional law, Lincoln reemphasized that personal liberties would be fully restored in "the indefinite peaceful future" that would begin at the end of the Civil War. The nation had to swallow harsh medicine in its moment of crisis, but Lincoln refused to believe, he wrote in another of his folksy analogies, "that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them during the remainder of his healthful life."[73] As evidence of America's unwillingness to tolerate wartime measures permanently, Lincoln noted that when General Andrew Jackson suspended habeas corpus in New Orleans in the immediate aftermath of the War of 1812, "the permanent right[s] of the people . . . suffered no detriment whatever."[74]

Lincoln's many wartime orders (and Congress's wartime enactments) that explicitly terminated at the end of the rebellion supported such rhetoric.[75] But, above all else, the unfettered functioning of the 1864 presidential race firmly established Lincoln's commitment to the restoration of peacetime rule after the war. While elections during national emergencies would become the norm in United States politics, America's 1864 election was the world's first presidential election held in wartime,[76] a precedent set despite immense logistical difficulties[77] and although Lincoln knew that the border states had voted overwhelmingly against him in 1860.[78] Before the 1864 election, Lincoln took care to dispel rumors that he would attempt "to ruin the government" if defeated, publicly pledging that he would peacefully leave office if he lost at the polls.[79] The election took place a month later without violence or impediment.[80] Days afterward, Lincoln reflected on its significance in a public address which indicated that even in Lincoln's expansive view of his war powers, the Constitution placed real limits on the executive in wartime. The 1864 election, in which the Democratic Party called for the cessation of hostilities, had threatened to alter the entire course of the war. If elected, George McClellan, the Democratic candidate, might have been willing to negotiate a settlement recognizing the Confederacy.[81] In his November 10 address, Lincoln ruefully acknowledged that during the election the loyal members of the Union had been "*divided*, and partially paralyzed, by a political war among themselves."[82] Nevertheless, he insisted that "the election was a necessity." We cannot, he declared, "have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us."[83]

The 1864 election was an ultimate confirmation that the Constitution was not only flexible enough to permit the effective waging of war, but powerful enough to cope with the unimaginable weight this war placed on democratic processes. Clear evidence, as Lincoln said, of "how *sound*, and how *strong*" the nation still was,[84] the election announced that democracy would survive the war.[85] The importance of this assurance cannot be overestimated. Even before the 1864 election the knowledge that peacetime rule would eventually be restored exerted an important check on the Lincoln administration. Secretary of State William Seward told a friend during the war that he acted with the knowledge that after the government had saved the country, it would have to "cast [itself] upon the judgment of the people, if we have in any case, acted without legal authority."[86] Indeed, the influential editor Horace Greeley, a frequent critic of military arrests of civilians, wanted it to "be distinctly understood . . . that each arrest [would] be made the subject of rigorous and dispassionate inquiry after peace."[87]

D. Actually Reestablishing the Rule of Law

Although the national leadership maintained a firm and explicit commitment throughout the Civil War to reestablishing peacetime rule at the end of hostilities, the transition back was still difficult and uneven. The draft ended and demobilization occurred almost immediately and without a hitch,[88] but other wartime measures lingered on. The *Milligan* decision of 1866[89] and its aftermath provides perhaps the best example of the nation's rocky journey back to peace and represents perhaps the best argument for the deliberate planning of such transitions.

Lamdin P. Milligan, a civilian living in Indiana, was arrested in 1864 on the order of the local military commandant. A military commission found him guilty of participating in a pro-secessionist conspiracy and sentenced him to death.[90] In *Ex parte Milligan*, the prisoner argued that the military had no constitutional right to try a civilian when the civil courts of the state were open and functioning.[91] Two years earlier, when the Civil War was still raging, the Supreme Court had denied that it had jurisdiction to review the proceedings of a military commission.[92] But, as the Court acknowledged in *Milligan*, "the temper of the times," and the concerns of the Court, had dramatically shifted between 1864 and 1866:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and

> discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.[93]

By deliberate inaction, Congress allowed the executive to confront the Cold War unfettered by basic constitutional restraints that the legislative branch could never have explicitly surrendered.

The Court accepted Milligan's case and his argument that he should be released.[94] Secure in the Union victory, it declared that constitutional prohibitions applied "equally in war and in peace . . . at all times, and under all circumstances,"[95] that neither the President, nor Congress, nor the judiciary could infringe on constitutional rights.[96] Denying that martial law in civilian areas had ever been a necessity, the Court observed that if the war *had* required such measures, "it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[97] The case marked the Court's transition back to a peacetime perspective and was an important symbol of the end of the war. However, this landmark constitutional opinion had little practical effect. Although civil courts re-opened almost everywhere in the South soon after Appomattox,[98] trials by military commission did not end with the war or with the *Milligan* decision.

While the Supreme Court had every incentive to discard its wartime mentality, the rest of the national government had compelling reasons to want emergency rule to continue. The Court's embrace of adequacy constitutionalism during the Civil War prevented it from exercising much of a check on Lincoln or Congress. Freed from concern for the preservation of the Union, the Justices had much more discretion and could resume their cherished roles as defenders of constitutional liberties. In contrast, wartime controls greatly empowered the other branches and made their decision-making much easier. The allure such vestiges of emergency rule had for President Andrew Johnson and a more powerful postwar Congress did not dissipate simply because the emergency was over.

The Supreme Court announced its holding in *Milligan* on April 3, 1866, one day after President Johnson proclaimed that the rebellion was entirely suppressed.[99] General Grant, however, was convinced that Congress had as much right to order military prosecutions as the President had to forbid them. Construing Johnson's proclamation to close only military courts not established by statute, Grant authorized army officers in the South to arrest and hold for military trial civilians accused of violating state criminal or civil laws against whom state authorities had failed to act.[100] Grant's order, while in accord with federal statutes meant to protect African-Americans from unfair treatment in southern courts,[101] went against *Milligan* and perhaps misinterpreted Johnson's order.[102] Regardless, the President did not take action against the general, either because he did not have the political strength to oppose the popular war hero or because he approved of the order. Thus, in 1866, the year of the *Milligan* decision, there were 229 military trials of civilians.[103]

Congress, for its part, continued to authorize military prosecutions on the theory that only dictum in *Milligan* implied that Congress, like the President, did not have this power.[104] The Military Reconstruction Act of March 2, 1867 permitted military trials of civilians where state courts were open when necessary to protect persons and property, suppress insurrection, disorder, and violence, or punish criminals.[105] President Johnson, whose veto of this bill was overridden, argued that the Act contradicted the *Milligan* decision.[106] Initially, the Supreme Court agreed to hear a challenge to the law. In *Ex parte McCardle* (1869),[107] a Vicksburg newspaper publisher arrested and awaiting military trial on the charge of encouraging violent resistance to Reconstruction statutes that aided freedmen, argued that his confinement was unconstitutional.[108] Anxious to be rid of McCardle's suit, Congress repealed the law that provided the Court with jurisdiction over the case,[109] forcing the Court to dismiss the suit.[110] Not surprisingly, military trials increased in frequency soon after the Military Reconstruction Act's passage.[111] They continued, at a progressively slower rate, until 1870.[112] All told, there were 1,435 military trials of civilians between the end of April 1865 and January 1, 1869.[113]

The postwar history of military trials powerfully illustrates two interlocking problems that plagued the transition back to peacetime law at the end of the Civil War and that threatened to stymie any such transition. First, it indicates the dangers posed by a weak President or one only weakly committed to ending emergency rule. Johnson was never as popular as Lincoln or Grant and never as committed as Lincoln to restoring the rule of

law. As a Vice President who came to power upon Lincoln's assassination, Johnson did not begin his tenure with the broad base of political support popularly-elected Presidents enjoy. A relatively conservative Democrat, he had few friends in the Republican-dominated Congress. Beyond such peculiarities, Johnson, who was not prominent during the war, could not claim the popular appeal and moral authority of a war hero. Even if he was eager to end military trials, which is unclear, he lacked the political power to do so. Thus, such institutions of emergency rule could continue without the strong executive support that had been their impetus.

Second, Congress's shortsightedness also largely contributed to the perpetuation of military trials for years after the Civil War had ended. Anxious to protect freedmen and southern unionists from the injustices they faced in southern courts, the postwar Republican Congress concocted a quick-fix solution without considering the long-term importance of reestablishing peacetime law deliberately and systematically. Instead of permanently restructuring federal jurisdiction to create a system that would promote equal justice in the South, Congress used wartime measures for peacetime purposes. Rather than furthering the reestablishment of the rule of law, the nation's lawmakers ignored *Milligan*'s clear statement that Congress could not authorize military commissions to try civilians in peacetime[114] and manipulated the Court's jurisdiction to perpetuate their policies. As a result, the nation's transition back to peace after the Civil War was uneven and very slow. Indeed, armed hostilities were over for thirteen years before Congress definitively ended emergency rule, having finally come to understand that the perpetuation of crisis government threatened its interests and those of the nation.

In 1868, Grant, politically empowered by the heroic military past Johnson lacked, replaced Johnson as President. He made full use of his office's still extant emergency powers. Although the last ex-Confederate state was readmitted to the Union in 1871,[115] President Grant regularly employed federal troops in the South, throughout his two terms, to enforce Reconstruction policies, uphold Republican state governments, and maintain the peace generally.[116] No longer in control as they had been during the Johnson years, congressmen grew increasingly hostile to such emergency procedures. Their dissatisfaction with Grant's continued recourse to the military peaked after the election of 1876, in which Grant sent troops into Florida, South Carolina, Louisiana, and Virginia with the stated mission of guarding the canvassers and preventing fraud.[117] The Democratic candidate, Samuel J. Tilden, won a majority of the popular vote in this contest, but challenges to the returns from the former three states left him one vote short of a majority in the electoral college. A congressionally-appointed commission eventually gave all the disputed electoral votes to the Republican candidate, Rutherford B. Hayes.[118] Democrats in Congress charged that Tilden would have won a clear majority in the electoral college if federal troops had not directly and indirectly intimidated southern voters.[119] This outcry led to an understanding with President-elect Hayes that he would remove the remaining federal troops from the South at the beginning of his term[120] and set the stage for the passage of the Posse Comitatus Act of 1878, which essentially prohibited the military from engaging in domestic law enforcement.[121] Outraged by the results of the 1876 election but also generally concerned about military intrusions into domestic affairs usurping civilian authority,[122] Democrats in Congress were so determined to enact this statute that they left the army without appropriations for half a year.[123] The sense of pressing national emergency had finally passed.

II. The Civil War as Precedent

The Cold War was clearly more than a reprise of the Civil War. There were significant differences between the two conflicts, differences which had important consequences for the fate of liberty during each national emergency. Yet though not an exact precedent, the Civil War can help us understand emergency rule in the Cold War, and the years after Appomattox suggest how a transition back to the law of peace can now be accomplished.

While the Civil War saw notable transgressions of the boundary between civilian and soldier, the very nature of the Cold War blurred this line more seriously. The Civil War was fought on American soil at clearly defined battle sites, whereas the Cold War was conducted through a series of proxy, often covert, wars in other countries. Such secret, distant conflicts did not produce readily identifiable battlefields or combatants. With no one marked as particularly obliged to defend the nation, all became more equally responsible.

Beyond these differences in means, the stakes were higher during the Cold War. Although the South was devastated by the end of the Civil War, the North's wartime strategy was always tempered by the knowledge that the Union army's ultimate purpose was to reunite the South with the North, not destroy the region. The South, in turn, could inflict little damage on northern territory. The Cold War placed no limits on the United States' desire to thwart Soviet expansionism. The war exposed us to nothing less than the danger of nuclear annihilation. While the dueling armies of the Civil War had both believed they were fighting to uphold the Constitution, the ideological divide between the United States and the Soviet Union was stark.

Lastly, and perhaps most importantly, time profoundly affected the nature of the Cold War. Armed conflict in the Civil War ceased after four years, with peacetime rule completely reestablished seventeen years after the war had begun. But America's Cold War spanned more than four decades, from

approximately the end of World War II in 1945, to the collapse of the Soviet Union in 1991. With hostilities so prolonged and no end in sight, almost no thought was given during the Cold War, as it had been given in the Civil War, to how the nation would reestablish peacetime rule once the fighting was over.

Their important differences notwithstanding, the two conflicts have much in common. In fact, the precedents of the Civil War directly influenced the conduct of the Cold War, with late twentieth-century leaders systematically using what Lincoln had done to support what they sought to do a century later.[124] As these leaders noted, both wars were national emergencies that threatened the very existence of the United States. And both fostered intellectual and structural changes that led to dramatic expansions of executive power and to the widespread use of emergency measures.

By 1947, the concern of the nation was focused on the perceived threat posed by Soviet expansionism.

III. The Cold War: A Pervasive Sense of Crisis

From the start, the Cold War fostered an overarching sense of crisis. By 1947, the concern of the nation was focused on the perceived threat posed by Soviet expansionism. In July of that year, George Kennan published a highly influential article in *Foreign Affairs* that assumed a persistent state of tension between the United States and the Soviet Union and called for "a long-term, patient but firm and vigilant containment of Russian expansive tendencies."[125] "Containment" became the dominant purpose of America's foreign policy. In April 1950, National Security Council (NSC) Paper 68, the first comprehensive analysis of the nation's position after World War II, predicted an indefinite period of foreign relations crisis and recommended a massive military expansion. The Soviets, the NSC warned, were seeking to augment their power by absorbing satellites and weakening any competing system.[126]

The postulates of NSC-68 were echoed throughout the Cold War. A quarter century after the writing of that document, former President Richard Nixon defended his view that Presidents can take actions in times of crisis that would otherwise be unconstitutional, by reminding the Senate Select Committee on Intelligence that "[w]e live in imperfect times in an uncertain world. As a nation we need every possible capability, not merely to survive, but to be better able to build the kind of world in peace that has been man's perpetual goal."[127] Most recently, Oliver North offered a similar account of the crisis posed by the Cold War at the Iran-Contra congressional hearings in 1987. North argued that the Reagan administration's secret aid to anti-Communist Nicaraguan rebels in violation of statute was justified because America was "at risk in a dangerous world." "[W]e all," he suggested, "had to weigh in the balance the difference between lives and lies."[128]

Such warnings led a remarkable number of commentators and national leaders to wonder publicly whether the powers available to a democratic government were adequate to combat the menace of Communist expansionism. The Cold War, like the Civil War, promoted paradox. The reigning elite argued that the only way the country could protect itself from the forces threatening the survival of the American democracy was to abandon some of the very democratic processes which the nation was fighting to preserve. Indeed, the threat of nuclear war exponentially intensified the conviction that the government had to be able to act and react as quickly and efficiently as possible. Concerned that this emergency might never end, anxious Cold War leaders called for changes of indefinite duration. As early as 1948, Clinton Rossiter insisted in his influential *Constitutional Dictatorship* that the "Atomic Age" necessitated fundamental constitutional revision. "For all the formidable dangers they present, for all the knotty problems they pose, the accepted institutions of constitutional dictatorship are," he wrote, "weapons which the democracies will henceforth renounce at their own peril."[129] By 1961, Senator J. William Fulbright seriously questioned whether government based on separation of powers was adequate in "a world beset by unparalleled forces of revolution and upheaval."[130] "[T]he price of democratic survival in a world of aggressive totalitarianism" was, he argued, "to give up some of the democratic luxuries of the past."[131]

A. Crisis Government

In response to the pressing sense of crisis and these mounting doubts about the adequacy of the Constitution's peacetime strictures, Cold War Presidents moved quickly and decisively to establish emergency rule. Like Lincoln, they argued that broad emergency powers were constitutional in times of national crisis. While Lincoln had primarily focused on the government's responsibility to guarantee every state a republican form of government,[132] these Presidents based their claim to greatly augmented powers on the executive power[133] and commander in chief clauses[134] of the Constitution and the President's supposedly implied power over foreign affairs.[135] Lincoln and the Cold War Presidents agreed, however, that the executive had the authority to do anything necessary to preserve the United States. All would have seconded Harry Truman when he wrote that

> [t]he President, who is Commander in Chief and who represents the interest of all the people, must [be] able to act at all times to meet any sudden threat to the nation's security. A wise President will always work with Congress, but when Congress fails to act or is unable to act in a crisis, the President, under the Constitution, must use his powers to safeguard the nation.[136]

Guided by such convictions, Cold War Presidents asserted sweeping emergency authority. In the name of crisis, they vastly expanded the power the national government exercised over the lives of its citizens and consolidated this power in themselves. Truman alone established two of the most intrusive and far-reaching institutions of Cold War crisis government. Acting without statutory authorization, he declared by executive order that the executive branch would systematically screen its employees for disloyalty and bar the public's access to any government document whose release might harm the national security.

Truman's comprehensive procedures for investigating the loyalty of all incumbent and prospective executive branch employees, preliminarily established as early as 1946, gave executive officials vast discretion and employees only limited due process rights.[137] Truman originally determined that the standard for dismissal would be "reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States," with "reasonable grounds" defined to include affiliation with any group "designated by the Attorney General as totalitarian, fascist, communist, or subversive."[138] In 1951, the President lowered this already unforgiving standard to "reasonable doubt as to the loyalty of the person involved to the Government of the United States."[139] While the witch hunts this loyalty-security program fostered dissipated in the mid-1950s,[140] the security clearance system thrived throughout the Cold War. In 1985, over four million Americans held government security clearances.[141] This number represented over half of all federal employees and included one and one-half million private employees whose companies had government contracts.[142] On their own initiative and under their own asserted authority, Cold War Presidents had created and maintained a system which dramatically intruded on the privacy of a large portion of both the public and private work force.

At the same time, Truman was the first of many Cold War Presidents to shield the government from public scrutiny in a way it had never been before. Although executive secrecy had existed in one form or another since the nation's founding,[143] Truman was the first to apply systematic secrecy controls to the civil departments of the federal government.[144] Without citing any specific statutory authorization, his Executive Order 10,290 empowered executive branch officials to classify all information which they determined national security required be kept secret.[145] Although subsequent Cold War Presidents somewhat modified the sweeping scope of Truman's plan, all asserted their absolute discretion over classification in time of crisis.[146] Such unilateral control over classification gave Cold War Presidents the power to protect national security as they saw fit, without having to secure public, or even congressional, approval. Perhaps not surprisingly, this unchecked power was abused. The government radiation tests conducted under the veil of executive secrecy provide one of the more horrifying examples. Between 1945 and the mid-1970s, the federal government administered or sponsored dozens of radiation experiments on Americans on the theory that the results would help the nation prepare for nuclear attack.[147] Approximately 250,000 Defense Department personnel[148] and at least 695 private citizens[149] were exposed to radiation, often without their knowledge or consent. Some of the principal researchers have defended these experiments as reasonable and necessary in light of the apparent threat of nuclear warfare.[150] But their choice of subjects suggests that the government knew that its research might not stand up to public scrutiny. The radiation experiments disproportionately targeted unempowered groups with less ability to draw public attention to their plight. Scientists exposed indigent cancer patients to whole-body radiation, irradiated prison inmates' testicles, and served poor pregnant women a drink containing radioactive iron filings.[151] The President's unchecked classification power allowed conduct which would probably not have survived the light of day to continue for nearly three decades.

Even when the President did act with congressional authorization, emergency measures were often implemented with little consideration given to their termination. To take only the most striking example, on December 16, 1950, Truman declared a national emergency in order to manage the mounting Korean conflict, the first full-scale confrontation between the United States and the Soviet Union.[152] By statute, the declaration gave the President the power

> to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and in many other ways, manage every aspect of the lives of all American citizens.[153]

Although the Korean War ended in 1953, this state of emergency, and the extraordinary power it authorized, was not terminated until the 1976 National Emergencies Act ended all declared emergencies.[154] In 1962, President Kennedy used the declaration to justify his embargo against Cuba.[155] As late as

1973, the Nixon administration defended the prolonged life of Truman's declaration, arguing that the executive authority made available by the 1950 proclamation "has been needed during the past two decades and is still needed." This continuing need, naturally, resulted "from the very acts and threats of aggression which the U.S. and its allies have faced since 1950."[156]

Such long-lasting states of emergency would not have been possible, of course, without congressional assistance. Congress, by both explicit action and systematic inaction, largely contributed to the establishment and perpetuation of crisis government during the Cold War. Truman's emergency proclamation was so powerful because hundreds of statutes gave the President sweeping powers in declared emergencies.[157] Two of the most important reasons the 1950 state of emergency lasted so long were that Congress did not design its emergency legislation to be self-terminating and did not remedy the matter of outlived emergency proclamations until twenty-six years after Truman responded to the conflict in Korea. By that time, as the congressional report recommending the termination of all existing states of emergency noted, "[a] majority of the American people ha[d] lived all their lives under emergency government."[158] Congress's emergency legislation had routinized and codified crisis government.

During both national emergencies, broad emergency powers obscured the line between civilian and combatant, battlefield and sidelines.

But direct congressional action like the emergency statutes was somewhat unusual.[159] Congress's dominant foreign relations strategy during the Cold War, one that ultimately did more than its emergency legislation to support crisis government, was consistent acquiescence to presidential assertions of power. This strategy seems to have been a product of both Congress's sense that the crises of the Cold War often demanded unimpeded executive action[160] and its ardent desire to avoid the political liabilities associated with acting as a public check on the President's power to fight Soviet expansionism.[161] As a result, by 1967, the Senate Committee on Foreign Relations could rightfully conclude that "it is no longer accurate to characterize our government, in matters of foreign relations, as one of separate powers checked and balanced against each other."[162] Although the Constitution gives Congress the power to declare war,[163] provide for the common defense,[164] regulate foreign commerce,[165] and reject treaties,[166] the executive in fact had "virtual supremacy" over foreign affairs.[167] By deliberate inaction, Congress allowed the executive to confront the Cold War unfettered by basic constitutional restraints that the legislative branch could never have explicitly surrendered.

This congressional acquiescence, coupled with the omnipresent sense of crisis, also led to judicial decisions which systematically supported the executive in foreign affairs. While the Court refused to accept that emergencies create powers in the first important case of the Cold War, *Youngstown Sheet & Tube Co. v. Sawyer* (1952),[168] this decision contained legal realist seeds of judicial support for executive control over foreign policy. After 1971, the Court consistently upheld presidential management of foreign relations, either by sustaining the President on the merits or by refusing to hear challenges to executive actions.[169]

Youngstown was a definitive rejection of extra-constitutional crisis government. To prevent an imminent nationwide strike of steelworkers during the Korean War, Truman had seized most of the nation's steel mills without specific statutory or constitutional authority.[170] He claimed that his plenary powers as chief executive and commander in chief enabled him to take such action in an emergency.[171] Cold War anxiety was high in 1952, with many people predicting that the Korean War would lead to a world war between the United States and the Soviet Union. But in *Youngstown* the Court denied that the President had plenary authority in an emergency. His powers, the Court held, had to come "from an act of Congress or from the Constitution itself."[172]

The Court continued to restrain executive authority in a few subsequent national security cases,[173] but every Supreme Court decision after 1971 upheld executive power over foreign relations. Two major reasons emerge for the President's consistent success. First, the Court recognized that congressional inaction inevitably leads to increased executive control, with such control eventually recognized as appropriate. Even in *Youngstown*, the two most enduring concurrences made this legal realist point. Justice Jackson had "no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems."[174] Justice Frankfurter deemed it impermissible to ignore "the gloss" which actual practice had placed on the Constitution. "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," of course, created such a gloss on executive power.[175] Second, the sense of crisis engendered by the perceived necessities of the Cold War strengthened the tendency of legal realism to support the

never completely abandoned the rhetoric of congressional constitutional supremacy in foreign affairs, a perceived, though not always actual, need for rapid responses to foreign crises made the equation of congressional silence with approval much easier to accept.

Dames & Moore v. Regan (1981)[176] is a paradigmatic example of the Court's melding of legal realism with a crisis mind-set. In *Dames & Moore*, the Supreme Court upheld President Carter's authority to nullify judicial attachments, transfer frozen Iranian assets, and suspend private commercial claims against Iran as part of an executive agreement to free the American hostages held in Iran, although the Court found no express statutory basis for the President's suspension of private claims.[177] In supporting this ruling, Justice Rehnquist's majority opinion referred to Justice Jackson's discussion in *Youngstown* about the flexibility of the constitutional relationship between Congress and the President and the "history of congressional acquiescence in conduct of the sort engaged in by the President."[178] Rehnquist went on to assert that the executive agreement was constitutional for two reasons, both related to the magnitude of the Iran hostage crisis. First, he argued that Congress's failure to delegate authority over private claims against Iran to the President should not imply congressional disapproval because Congress could not have anticipated the hostage crisis and so had no time to authorize the President appropriately.[179] Second, Rehnquist implied that the President's powers in foreign affairs were elastic, expanding in emergencies. Even if the President did not have plenary authority to settle claims, Rehnquist argued that

> where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[180]

As this case well-illustrates, the sense that rapid action was required to protect Americans made it easier for the Court to attribute less significance to a lack of explicit congressional authorization. This was the case even where, as here, the crisis had passed and Congress had had ample time to approve the President's actions. By the time *Dames & Moore* was decided, the hostages had been home for months. Indeed, the hostage agreement, long in coming, had rather predictable terms, and the ultimate accord gave the United States six months before the frozen Iranian assets were to be returned, more than sufficient time for Congress to approve the transfer.[181]

B. Cold War Battlefields

Cold War Presidents asserted broad, constitutional authority to meet the persistent threats posed by the Cold War and the perceived need to respond to these threats as quickly as possible. These executive assertions, made possible by congressional acquiescence and judicial tolerance, led to the establishment of a crisis government in which the duration of the crisis was never defined. As in the Civil War, the "battlefield" where the wartime rules applied was extremely expansive. Lincoln's repeated declarations of authority to enforce wartime controls anywhere in the United States breached the boundary between civilian and soldier; but throughout the Civil War, actual battle sites remained fairly well-defined. While there were some guerilla bands, particularly in Missouri,[182] soldiers were also generally easy to identify. In the Cold War, it was often very difficult to say where the United States was fighting or to recognize the combatants. As a result, the government could much more effectively define all areas as potential battlefields and all citizens as responsible for protecting the nation's welfare.

Much of America's Cold War foreign policy was based on the twin postulates that the Soviets sought to augment their power by creating satellite states, and that Soviet expansionism could be contained by what George Kennan called "the adroit and vigilant application of counter-force at a series of constantly shifting geographical and political points, corresponding to the shifts and maneuvers of Soviet policy."[183] Working on these assumptions, America pursued its containment strategy in a series of proxy wars.[184] The Cold War view, articulated in a State Department defense of the legality of the Vietnam War, was that "[a]n attack on a country far from our shores [could] impinge directly on the nation's security."[185] Almost by definition, these frequent, undeclared, and often covert wars involved the nation in nearly constant armed conflict and made separating the sites of war from the areas of peace, and combatants from civilians, extremely difficult.[186]

Indeed, the government extended emergency rule far into the domestic realm. Truman's 1950 emergency declaration gave him and future Presidents the statutory authority to establish crisis government within the territory of the United States.[187] In fact, the executive branch went beyond these congressionally-approved powers in its domestic battles against Communism. Both the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) systematically spied on United States citizens in violation of statute.[188] Among other activities revealed in the 1970s, the CIA opened more than 215,000 letters to or from the Soviet Union between 1952 and 1972.[189] The purpose of the FBI's Counter Intelligence Program (COINTELPRO) was, in the words of one court, to "expose, disrupt, misdirect, discredit, or otherwise neutralize the activities" of leftists in the United States.[190]

While the Supreme Court attempted in *Youngstown* to draw clear boundaries between the battlefield and the homefront, as the Cold War progressed it became, in good legal realist fashion, increasingly accepting of executive expansion of the area where emergency rule was operative. In *Youngstown*, the majority rejected Truman's argument that his powers as commander in chief included the authority to control, during an undeclared war, such civilian affairs as the operation of the nation's steel mills.[191] As Justice Jackson articulated the Court's concern in his now-classic concurrence,

> no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[192]

[T]here are good reasons for concern about such a mingling of civil and military police responsibilities.

But "theater of war" was "an expanding concept" in Cold War America, as Justice Black's majority opinion in *Youngstown* noted.[193] *Haig v. Agee* (1981),[194] in which the Court decided a national security case on the explicit assumption "that grave problems of national security and foreign policy are by no means limited to times of formally declared war,"[195] was typical of the Court's increasingly expansive view later in the Cold War. Philip Agee, a former CIA agent who embarked on an international campaign to discredit the agency,[196] had had his passport revoked by the secretary of state. The Court found that "[t]he revocation of Agee's passport rest[ed] in part on the content of his speech."[197] Nevertheless, it sustained the action, quoting *Near v. Minnesota*'s argument that "'[n]o one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.'"[198] *Near*, however, had endorsed such prior restraint "only in exceptional cases," defined as only "'[w]hen a nation is at war.'"[199] In omitting this important qualifier and deciding that the emergency rule should apply during the general, persistent crisis of the Cold War, the Supreme Court only further blurred the distinction between war and peace.

C. Thinking About the End of the Cold War: There was "no end in sight."

In the Cold War, as in the Civil War, executive action, congressional support or acquiescence, and judicial acceptance established and maintained crisis government. During both national emergencies, broad emergency powers obscured the line between civilian and combatant, the battlefield and the sidelines. In the Civil War, however, Lincoln's insistence that his wartime measures would not survive the war was firm and explicit. This commitment to the restoration of peacetime rule assumed, of course, that the war would eventually end. America's Cold Warriors were far less certain that Soviet expansionism would ultimately be vanquished. George Kennan's 1947 article advocating containment was one of the few, if not the only, important Cold War document to suggest that the war might not last indefinitely. Kennan took care to remind his readers that "the possibility remains (and in the opinion of this writer it is a strong one) that Soviet power . . . bears within it the seeds of its own decay, and that the sprouting of these seeds is well advanced."[200] But the comments of the Senate Committee on Foreign Relations in 1967 were far more typical. In the minds of the overwhelming majority of the Cold War leadership, there was "no end in sight" to the "global commotions" of the Cold War. America's "involvement in world crisis" would be of "indefinite duration."[201] With such a mind-set, planning for the reestablishment of peacetime law after the collapse of the Soviet Union could only seem irrelevant.

IV. Conclusion

But the Soviet Union did collapse and America was left unprepared to make the transition back to peace. Above all else, the Civil War tells us that peacetime rule cannot be reestablished without deliberate effort and planning, even when the end of the war is expected. Thankfully, the period after the Civil War also provides us with some concrete, much-needed lessons about how to return to the rule of law.

First, though the Supreme Court may have the greatest incentive to end emergency government, judicial activism will not be enough. Recognizing that the crisis of the Cold War has passed would allow the current Court, like the *Milligan* Court, to reassert its authority as a co-equal branch and to reaffirm its celebrated commitment to defending constitutional liberties. At the same time, the aftermath of the Civil War suggests that judicial opinions alone do not reestablish peacetime rule. The Court held in *Ex parte Milligan* (1866) that military trials of civilians were unconstitutional where civil courts functioned, but such trials continued for four more years because Congress and President Johnson were not committed to enforcing the decision.

The executive is generally more able to end emergency rule, but Presidents coming to office after a major national crisis are likely to be weak or weakly committed to reestablishing peacetime law. Since many institutions of Cold War crisis government were created by Presidents, they could be terminated by a President's unilateral action. For instance, the chief executive could reform the security clearance system at his discretion. But Presidents may be reluctant to surrender their emergency powers, and executives who enter office after the resolution of a national emergency may have much less political strength than predecessors who led the nation to victory. President Johnson, for instance, did not have the political capital of either Lincoln, the man who oversaw the Union war effort, or Grant, the commanding general of the Union army who ultimately replaced Johnson as President.

President Bill Clinton's tenure well illustrates how the institutions of emergency rule can become largely self-perpetuating when post-emergency Presidents lack the power to halt the machinery of crisis government. The "gays in the military" controversy of 1993, in which Clinton was compelled to negotiate with his own Joint Chiefs of Staff and ultimately to concede to them,[202] represents perhaps the best recent example of this phenomenon. The Joint Chiefs, who opposed ending the military's prohibition on homosexual servicemen, gained leverage in part by mobilizing veterans,[203] whose numbers had swelled during the Cold War.[204] More importantly, Clinton, who avoided military service in Vietnam, could in no way match the moral authority and political power Joint Chiefs Chair Colin Powell possessed in this area, both with the public and with Congress.[205] Indeed, Powell's recent supervision of America's victory in the Persian Gulf War had made him so enormously popular that he was frequently mentioned as a potential presidential candidate who could defeat Clinton at the polls in 1996.[206]

While Clinton has had great difficulty controlling a military made powerful and enormous by the Cold War, he too is attracted to the ease and efficiency of emergency procedures. In the wake of the April 19, 1995 terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, the most lethal act of terrorism in the nation's history, Clinton has advocated amending the Posse Comitatus Act, whose enactment finally ended Civil War crisis government.[207] Clinton's proposed amendment would allow military personnel and equipment to be used to help civilian authorities investigate crimes involving "weapons of mass destruction," such as chemical or biological weapons.[208] This exemption may be narrowly drawn and reasonable,[209] but there are good reasons for concern about such a mingling of civil and military police responsibilities. Beyond the possibility of military usurpation of civilian authority, servicemen are unfamiliar with the constitutional rights which guide domestic police work.[210] Perhaps more significantly, delegating domestic functions to the military appears to be an implicit acceptance of the current size, power, and resources of the military, all of which are products of the Cold War. Clinton's proposed statutory amendment could make a post-Cold War demobilization even more politically and logistically difficult.

Ultimately, Congress may be best suited to leading the nation back to the rule of law, although both the Civil War and the Cold War suggest that this will not happen automatically. During the Cold War, Congress benefitted from avoiding political accountability in foreign affairs. After the Civil War, Congress wanted to take power back from the President, but was not interested in dismantling the government's emergency apparatus. Grown accustomed to the simplicity and speed of wartime decision-making and reluctant to surrender the powers the national government had claimed for itself during the Civil War, it did little to reverse the intellectual and structural transformations fostered by national emergency. The current Congress appears willing to accept Clinton's proposed amendment of the Posse Comitatus Act as an appropriate response to fears of domestic terrorism.[211] At the same time, any congressman who has lived through the Cold War should realize, as post-Civil War congressmen eventually did, that emergency rule is ultimately incompatible with legislative power, that congressional deliberation and compromise do not survive in crisis government. Moreover, congressmen surely understand that constraining the President's power over national security will be much less politically dangerous for them now that the Cold War is over. Congress should have a strong incentive to reestablish the rule of law and it certainly has the power to do so, through its lawmaking and oversight functions.

Thus far, however, the institutional apparatus of the Cold War has remained firmly entrenched, although the major justification for its development has disappeared. The steps the government has taken to reestablish peacetime law, such as President Clinton's recent executive order declassifying early Cold War documents and liberalizing declassification standards, have been too long in coming and too tentative.[212] As Senator Moynihan warned his colleagues in January 1991, constitutional procedures like Congress's power to decide whether the nation will go to war

> simply eroded in the cold war with the prospect of nuclear confrontation, permitting no time for reflection and consultation. . . . In the aftermath of the cold war, what we find is a kind of time warp in which we are acting in an old mode in response to a new situation.[213]

The Cold War lasted for almost five decades. Now is the time to take action to ensure that emergency rule does not continue for another half century. The only way we can truly "win the peace" is to reestablish the democratic rule of law. The lessons of the Civil War can help us.

Notes

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1. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 331 (Roy P. Basler et al. eds., 1953).
2. Abraham Lincoln, Proclamation of a Blockade (Apr. 19, 1861), *in* 4 Basler, *supra* note 1, at 338. For a discussion of the pre-war view on the constitutionality of blockades, see *Prize Cases*, 67 U.S. (2 Black) 635 (1863).
3. Lincoln did not inform Congress of his actions on April 20, 1861 until May 26, 1862. ABRAHAM LINCOLN, TO THE SENATE AND HOUSE OF REPRESENTATIVES (May 26, 1862), *reprinted in* 5 Basler, *supra* note 1, at 241.
4. U.S. CONST. art. I, § 8, cl. 13.
5. ABRAHAM LINCOLN, TO THE SENATE AND HOUSE OF REPRESENTATIVES (May 26, 1862), *reprinted in* 5 Basler, *supra* note 1, at 242.
6. U.S. CONST. art. I, § 9, cl. 7.
7. Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), *in* 4 Basler, *supra* note 1, at 347; *see infra* text accompanying notes 24-33.
8. *See* Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus in Florida (May 10, 1861), *in* 4 Basler, *supra* note 1, at 364; Letter from Abraham Lincoln to Winfield Scott (June 20, 1861) (authorizing suspension of habeas corpus with regard to William Henry Chase, army major suspected of disloyalty), *in* 4 Basler, *supra* note 1, at 414; Letter from Abraham Lincoln to Winfield Scott (July 2, 1861) (authorizing suspension "on or in vicinity of any military line which is now, or which shall be used, between the City of New York and the City of Washington"), *in* 4 Basler, *supra* note 1, at 419; Letter from Abraham Lincoln to Winfield Scott (Oct. 14, 1861) (extending military line where habeas corpus can be suspended "so far as Bangor in Maine"), *in* 4 Basler, *supra* note 1, at 554; Letter from Abraham Lincoln to Henry W. Halleck (Dec. 2, 1861) (authorizing suspension in Missouri), *in* 5 Basler, *supra* note 1, at 35; Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862) (suspending writ for all persons arrested or imprisoned by military), *in* 5 Basler, *supra* note 1, at 436-37; Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863) (authorizing suspension "throughout the United States" wherever there is disloyal activity), *in* 6 Basler, *supra* note 1, at 451.
9. Abraham Lincoln, Proclamation Calling for 42,034 Volunteers (May 3, 1861), *in* 4 Basler, *supra* note 1, at 353.
10. An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other Purposes, ch. 63, § 3, 12 Stat. 326, 326 (1861).
11. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863).
12. *Id.* § 4, at 756.
13. *Id.* § 5, at 756-57.
14. *See, e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 599-600 (1838) ("[W]henever the President takes an active part in an illegal action, to the injury of an individual, though it be done by the hand of his subordinate, he will be responsible in a civil suit, along with that subordinate: and . . . the latter cannot be excused for doing an unlawful act, by pleading the command of his official superior. This is the rule of the common law, in the analogous case of master and servant. The subordinate officer is not obliged to do any act which he believes to be unlawful; if the President insists on it, he may resign, or refuse, and take the chance of a removal.").
15. For instance, General Andrew Jackson continued to impose martial law on New Orleans after it was known that the treaty ending the War of 1812 had been concluded, but before the treaty was ratified. Upon ratification, Jackson was challenged in a court action. His defense was that he had acted out of necessity to prevent mutiny among his troops. Nevertheless, Jackson was fined $1000. Congress refunded the money with interest in 1844, almost thirty years later. Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 245-46, 248-51 (1981).
16. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 259 (1982); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 186-89 (1926). Pierce Butler brought one of the earliest suits of this sort against Simon Cameron, the Secretary of War. Butler had been arrested on Cameron's orders in August 1861, on suspicion of being a Confederate officer, and was held for about a month in Fort Lafayette. Upon his release, Butler sued, charging assault and battery and false imprisonment. The case was eventually dropped. RANDALL, *supra*, at 188-89.
17. The Constitution specifically permits the national government to call out the militia to suppress insurrection and to suspend the writ of habeas corpus during rebellion. U.S. CONST. art. I, § 8, cl. 15; *id.* at art. I, § 9, cl. 2.

18. CONG. GLOBE, 37th Cong., 3d Sess. 50-51 (1863). *See also* CONG. GLOBE, 37th Cong., 1st Sess. 414 (1861); James Albert Woodburn, *The Attitude of Thaddeus Stevens Toward the Conduct of the Civil War*, *in* 1 AMERICAN HISTORICAL ASSOCIATION ANNUAL REPORT, 1906, at 213 (1908).
19. CONG. GLOBE, 37th Cong., 2d Sess. 2196 (1862).
20. 3 CONTINENTAL MONTHLY 631-32 (1863).
21. *See, e.g.*, RANDALL, *supra* note 16, at 30-31; HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 5-6 (1978).
22. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1389-90 (1989), for an excellent discussion of liberal constitutionalism.
23. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). See Gerald I. Jordan, The Suspension of Habeas Corpus as a War-Time Political Control Technique ch. 9 (1941) (unpublished Ph.D. dissertation, UCLA), for a discussion of political propaganda based on Taney's opinion. *See generally* DAVID M. SILVER, LINCOLN'S SUPREME COURT (1956) (Taney's life and career).
24. MARK E. NEELY, JR., THE FATE OF LIBERTY 4-5 (1991).
25. Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), *in* 4 Basler, *supra* note 1, at 347.
26. *Merryman*, 17 F. Cas. at 144-45.
27. *Id.* at 146.
28. *Id.* Harold M. Hyman has suggested that one of the reasons behind the army's unwillingness to release Merryman was that disloyalty was not a crime in 1861. HAROLD HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 94 (1973). The only federal offense Merryman could have been accused of was treason, which carried with it very specific evidentiary requirements and was punishable by death. *See* U.S. CONST. art. III, § 3; Act for the Punishment of certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).
29. *Merryman*, 17 F. Cas. at 149.
30. *Id.* at 150.
31. *Id.* at 145.
32. *Id.* at 152.
33. *Id.* at 153. Merryman was released from military custody shortly after Taney issued his opinion. Once the Secretary of War was assured that Merryman would be charged with treason, he had Merryman transferred to a civilian jail. In November 1861, Merryman was released on $20,000 bail. The government pursued the case no further. SILVER, *supra* note 23, at 36; RANDALL, *supra* note 16, at 162 n.43.
34. Timothy Farrar, a legal commentator, coined the phrase and was one of the earliest and most effective proponents of adequacy constitutionalism. *See* Timothy Farrar, *The Adequacy of the Constitution*, 21 NEW ENGLANDER 52 (1862).
35. *See, e.g.*, LIFE, SPEECHES, AND ORATIONS OF DURBIN WARD OF OHIO 55-56 (Elizabeth Probasco Ward ed., 1888). Congressman Ward, a conservative Democrat, stressed in an 1863 speech that "[i]f our rulers are restrained by the limits of constitutional power, they are also obligated by the grants of power which the Constitution confers."
36. *See* U.S. CONST. pmbl.
37. *See id.* at art. 4, § 4.
38. *See id.* at art. 1, § 8, cl. 1.
39. Lincoln's Attorney General, Edward Bates, based his defense of Lincoln's suspension of habeas corpus on the President's constitutional responsibility to take care that the laws are executed, *id.* at art. II, § 1, cl. 1, and on the oath Lincoln took before entering office to "preserve, protect, and defend the Constitution" to the best of his ability, *id.* at art. II, § 1, cl. 8. "It is," Bates wrote, "the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform his duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government." Suspension of the Privilege of the Writ of Habeas Corpus (July 5, 1861), 10 Op. Att'y Gen. 74, 82-83 (1868). Bates went on to argue that the Constitution left the means by which a President should combat insurrection to his discretion. *Id.* at 83-84.
40. *See* Farrar, *supra* note 34; WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES (43d ed. 1871). Whiting was the Solicitor in Lincoln's War Department. The principal theme of his influential treatise, first published in 1862, was that "*martial* law, when in force, is *constitutional* law." WHITING, *supra*, at 64.
41. *See, e.g.*, ABRAHAM LINCOLN, TO ERASTUS CORNING AND OTHERS (JUNE 12, 1863), *reprinted in* 6 Basler, *supra* note 1, at 262.
42. *Id.* at 267.
43. *Id.* at 264.
44. U.S. CONST. art. 4, § 4.
45. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 Basler, *supra* note 1, at 440.
46. ABRAHAM LINCOLN, TO ERASTUS CORNING AND OTHERS (June 12, 1863), *reprinted in* 6 Basler, *supra* note 1, at 264.
47. *Id.* at 262 (quoting U.S. CONST. art. I, § 9, cl. 2, provision authorizing suspension of habeas corpus).
48. *Id.* at 264.
49. Abraham Lincoln, To Horatio Seymour (Aug. 7, 1863), *in* 6 Basler, *supra* note 1, at 370.
50. 67 U.S. (2 Black) 635 (1863).
51. *Id.* at 648-50 (argument for claimants).
52. *See id.* at 660 (argument for United States).
53. *Id.* at 670.

54. Letter from Abraham Lincoln to Winfield Scott (Oct. 14, 1861), *in* 4 Basler, *supra* note 1, at 554.
55. Letter from Abraham Lincoln to Henry W. Halleck (Dec. 2, 1861), *in* 5 Basler, *supra* note 1, at 35; WILLIAM E. PARRISH, TURBULENT PARTNERSHIP: MISSOURI AND THE UNION, 1861-1865 (1963).
56. Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *in* 5 Basler, *supra* note 1, at 437.
57. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863).
58. *Id.* §§ 2-3, at 755-56. The Secretaries of State and War were directed to furnish lists of all such prisoners to federal district and circuit judges "as soon as may be practicable." Prisoners not indicted by the next grand jury were to be released by the judges upon taking an oath of allegiance to the United States and, if the judge ordered it, posting a bond for good behavior. Congress further provided for criminal penalties for officers who disobeyed the judges' discharge orders and for a petitioning procedure by which prisoners could be brought to a judge's attention if the lists were not furnished within twenty days of the prisoners' arrests. These provisions, however, had little practical effect. The War Department was slow in supplying the original listing of prisoners, and Joseph Holt, the Department's Judge Advocate General, interpreted the statute to exclude civilians triable by military commission. This was a significant exception, one which left the executive unrestrained in all cases where martial law was instituted. *See* RANDALL, *supra* note 16, at 166-67; HYMAN, *supra* note 28, at 253-54. After the war, the Supreme Court held in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 116-17 (1866), that the Act included civilians subject to military arrest and sentence.
59. 67 U.S. (2 Black) 635, 674 (1863).
60. NEELY, *supra* note 24, at 81-82.
61. ABRAHAM LINCOLN, TO ERASTUS CORNING AND OTHERS (June 12, 1863), *reprinted in* 6 Basler, *supra* note 1, at 263.
62. *Id.* at 265-66.
63. *Id.* at 266-67. Similarly, William Whiting, Solicitor of Lincoln's War Department, argued in his well-circulated, highly influential treatise that martial law extended anywhere help was given to the enemy. The Constitution, he wrote, "does not prescribe any territorial limits, within the United States to which [the executive's] military operations shall be restricted. . . . It does not exempt any person making war upon the country, or aiding and comforting the enemy, from being *captured*, or arrested wherever he may be found." WHITING, *supra* note 40, at 89, 165-66.
64. Mark E. Neely, Jr., *The Lincoln Administration and Arbitrary Arrests: A Reconsideration,* 5 ABRAHAM LINCOLN ASS'N PAPERS 7, 12 (1983).
65. *Id.* at 15. Neely suggests that this relatively small percentage explains why the military arrests "caused a minimum of social unrest." *Id.* at 9. As he writes, "at least 81.6 percent of the arrests posed little political threat to the Lincoln administration and affected persons from areas where loyalty to the United States was, at the very least, a cloudy question," namely Confederates, citizens of the border states, and foreigners arrested for blockade running. *Id.* at 15.
66. NEELY, *supra* note 24, at 168, 173.
67. Neely, *supra* note 64, at 13.
68. NEELY, *supra* note 24, at 168.
69. Neely, *supra* note 64, at 13-14.
70. Prize Cases, 67 U.S. (2 Black) 635, 674 (1863).
71. An Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States, ch. 120, § 3, 12 Stat. 820, 820 (1863).
72. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 Basler, *supra* note 1, at 439.
73. ABRAHAM LINCOLN, TO ERASTUS CORNING AND OTHERS (June 12, 1863), *reprinted in* 6 Basler, *supra* note 1, at 267. An emetic is an agent that induces vomiting.
74. *Id.* at 268-69. *See also* Sofaer, *supra* note 15 (full discussion of Jackson's suspension of habeas corpus). William Whiting, the War Department Solicitor with the very expansive view of the executive's war powers, took care to note in his *War Powers Under the Constitution* that such powers exist "only in actual war, ending when war ends, to be used in self-defense, to be laid down when no longer necessary." WHITING, *supra* note 40, at 52.
75. *See, e.g.,* Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863) (suspending writ for "duration of said rebellion"), *in* 6 Basler, *supra* note 1, at 451; An Act to authorize the President of the United States in certain Cases to take Possession of Railroad and Telegraph Lines, and for other Purposes, ch. 15, § 5, 12 Stat. 334, 334-35 ("[T]he provisions of this act, so far as it relates to the operating and using said railroads and telegraphs, shall not be in force any longer than is necessary for the suppression of this rebellion.").
76. HYMAN, *supra* note 28, at 210.
77. *See id.* at 203-05, 278-79.
78. In 1860, Lincoln won 10.3% of the vote in Missouri, 2.4% in Maryland, and .9% in Kentucky. However, Lincoln was much more successful in the border states four years later. In 1864, he won 69.7% of the vote in Missouri, 55.1% in Maryland, and 30.2% in Kentucky. William E. Gienapp, *Abraham Lincoln and the Border States,* 13 ABRAHAM LINCOLN ASS'N PAPERS 13, 23 (1992).
79. ABRAHAM LINCOLN, RESPONSE TO A SERENADE (Oct. 19, 1864), *reprinted in* 8 Basler, *supra* note 1, at 52.
80. HYMAN, *supra* note 28, at 279.
81. *See* Mark E. Neely, Jr., *The Lincoln Theme Since Randall's*

Call: The Promises and Perils of Professionalism, 1 ABRAHAM LINCOLN ASS'N PAPERS 10, 18-21 (1979).
82. Abraham Lincoln, Response to a Serenade (Nov. 10, 1864), *in* 8 Basler, *supra* note 1, at 100.
83. *Id.* at 101.
84. *Id.*
85. America's preeminent poet, Walt Whitman, wrote at the time that the 1864 election was the "last-needed" proof "[t]hat our national democratic experiment, principle, and machinery could triumphantly sustain such a shock, and that the Constitution could weather it, like a ship in a storm, and come out of it as sound and whole as before." WALT WHITMAN'S CIVIL WAR 285, 290 (Walter Lowenfels ed., 1961).
86. FREDERICK SEWARD, SEWARD AT WASHINGTON, AS SENATOR AND SECRETARY OF STATE 608-09 (1891).
87. N.Y. TRIB., Sept. 3, 1862.
88. HYMAN, *supra* note 28, at 282.
89. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
90. *Id.* at 6-7.
91. *See id.* at 28-30 (argument for petitioner). The United States, of course, argued that the "battlefield" where martial law applied extended to Indiana. "[N]either residence nor propinquity to the field of actual hostilities" was the appropriate "test to determine who is or who is not subject to martial law." Indiana, the government's lawyers noted, "had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers, and were actually ordered into the ranks." *Id.* at 17 (argument for United States).
92. *Ex parte* Vallandigham, 68 U.S. (4 Wall.) 243, 251 (1864). The petitioner in this case, Clement Vallandigham, an anti-war leader convicted by a military commission in Ohio, argued, like Milligan, that a military court had no jurisdiction over a civilian when the local civil courts were operating. *Id.* at 244-48.
93. *Milligan*, 71 U.S. at 109.
94. *Id.* at 107. All nine Justices agreed that the Indiana military commission did not have jurisdiction to try and sentence Milligan. However, four Justices filed a separate opinion to dissent from the Majority's assertion that Congress could not have constitutionally extended jurisdiction to the commission. *Id.* at 136.

Taney was not on the Court to hear *Milligan*. He died on October 12, 1864. SILVER, *supra* note 23, at 185.
95. *Milligan,* 71 U.S. at 120.
96. *Id.* at 125.
97. *Id.* at 126.
98. HYMAN, *supra* note 28, at 289.
99. *Milligan*, 18 L. Ed. 281, 281 (1866) (citing date decided); Andrew Johnson, A Proclamation by the President of the United States of America (Apr. 2, 1866), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 432 (James D. Richardson comp., 1896-1901). The Court did not issue its full opinion in *Milligan* until December 17, 1866. *Milligan*, 18 L. Ed. at 281 (citing date opinion was delivered).
100. U.S. ARMY, GENERAL ORDERS, 1866, at No. 44 (1867); *see also* HYMAN, *supra* note 28, at 487; HYMAN & WIECEK, *supra* note 16, at 326-27.
101. Under the 1866 Freedmen's Bureau Act, the Bureau was authorized to establish local courts in which freed blacks could obtain a fair hearing. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866). By the time of the Act's passage, the Bureau had already been operating such courts for several months. *See* BELZ, *supra* note 21, at 114.
102. The documentation on this latter point is ambiguous and has divided historians. According to Harold M. Hyman and William M. Wiecek, Johnson directed that all the military's civilian prisoners be released and all military trials of civilians where civil courts functioned end. HYMAN, *supra* note 28, at 487; HYMAN & WIECEK, *supra* note 16, at 326. Mark E. Neely, Jr. and James E. Sefton argue, however, that Johnson approved of Grant's actions. NEELY, *supra* note 24, at 178; JAMES E. SEFTON, THE UNITED STATES ARMY AND RECONSTRUCTION, 1865-1877, at 78-84 (1967).
103. NEELY, *supra* note 24, at 176-77.
104. *See* HYMAN, *supra* note 28, at 495-96.
105. Military Reconstruction Act, ch. 153, 14 Stat. 428 (1867).
106. ANDREW JOHNSON, MESSAGE TO THE HOUSE OF REPRESENTATIVES (Mar. 2, 1867), *reprinted in* 6 Richardson, *supra* note 99, at 504-05.
107. 74 U.S. (7 Wall.) 506 (1869).
108. *Id.* at 507-08. *See* HYMAN, *supra* note 28, at 503.
109. An act to amend an Act entitled "An Act to amend the Judiciary Act, passed September 24, 1789," ch. 34, 15 Stat. 44 (1868). The Court had accepted the case under the jurisdiction provided by the Habeas Corpus Act of February 5, 1867. *McCardle*, 74 U.S. at 508.
110. *McCardle*, 74 U.S. at 514.
111. There were 35 military trials in May 1867, compared to a total of 28 in the previous eleven months. NEELY, *supra* note 24, at 178-79.
112. *Id.* at 179. In total, there were 181 trials in 1867 and 104 the year after that. In 1869 and 1870, military trials were held only in Texas and Mississippi. *Id.* at 177.
113. *Id.* at 176-77.
114. *Milligan*, 71 U.S. at 122.
115. HYMAN, *supra* note 28, at 525.
116. General Terry, whose command included Kentucky, Tennessee, and the coastal states from South Carolina to Mississippi, reported at the time that in 1871 he had dispatched more than 200 expeditions to perform law enforcement duties. He reported more than 160 such operations in 1872, not

including the ones made in South Carolina to suppress the Klu Klux Klan. The number of such expeditions, however, apparently declined over time. General McDowell reported 42 in the same territory in 1874, and General Ruger reported 71 in 1876. U.S. WAR DEP'T, REPORT OF THE SECRETARY OF WAR, 1871-72, at 63; *id.*, 1872-73, at 84; *id.*, 1874-75, at 51; *id.*, 1876-77, at 83. There were 9050 federal troops in the South in October 1870, 8038 in October 1871, 7368 in October 1872, 7701 in October 1874, and 6011 in October 1876. SEFTON, *supra* note 102, at 262.

117. ULYSSES GRANT, MESSAGE TO THE HOUSE OF REPRESENTATIVES (Jan. 22, 1877) (responding to congressional inquiry), *reprinted in* 7 Richardson, *supra* note 99, at 418-21.

118. C. VANN WOODWARD, REUNION AND REACTION (1951), and KEITH I. POLAKOFF, THE POLITICS OF INERTIA (1973), offer good accounts of the election of 1876.

119. *See* 5 CONG. REC. 2111-20, 2251-52 (1877).

120. *See* WOODWARD, *supra* note 118; POLAKOFF, *supra* note 118.

121. "Posse Comitatus" literally means the power or the force of the county. Classically, a sheriff could summon the adult, male population of a county to assist him in keeping the peace or pursuing and arresting felons. BLACK'S LAW DICTIONARY 1162 (6th ed. 1990). The 1878 Posse Comitatus Act read:

> From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152 (1878).

122. For instance, Congressman Atkins, the Democratic chairman of the House Appropriations Committee, referred to the wider implications of domestic peacetime use of the military in his remarks in favor of the Act. "I hope," he said,

> it will be the pleasure of this Congress before it adjourns its labours to mature and enact such legislation as will in the future be a guide to the Executive of this country in the use to which the Army of the United States is to be put, and that henceforth the Army shall never again be employed for such anti-republican and unconstitutional purposes as that of upholding or overthrowing State governments.

6 CONG. REC. 288 (1877).

123. *See* 5 CONG. REC. 50, 2171, 2213, 2215, 2241, 2247-50, 2251-52 (1877).

124. One of the issues of contention in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), a successful challenge to President Truman's seizure of most of the nation's steel mills on the ground of national security, was Lincoln's treatment of private property in wartime. Justice Frankfurter argued in his concurrence that "[i]t would pursue the irrelevant to re-open the controversy over the constitutionality of some acts of Lincoln during the Civil War," but went on to carefully distinguish Lincoln's railroad seizures from the seizure in question. *Id.* at 611 (Frankfurter, J., concurring). Chief Justice Vinson's dissent included a lengthy argument that Lincoln's actions supported Truman's seizure. *Id.* at 685-87 (Vinson, C.J., dissenting). Truman, of course, agreed. In his 1956 memoirs, the former President argued that Lincoln's wartime policies supported his *Youngstown* defense that "the President has a clear duty to take steps to protect the nation" when "there is danger that a vital portion of the economy will be crippled at a time that is critical to the nation's security." HARRY S. TRUMAN, 2 MEMOIRS: YEARS OF TRIAL AND HOPE 473 (1956).

Similarly, Richard Nixon often invoked Lincoln's adequacy constitutionalism to support his argument that the President was responsible for determining what activities were constitutionally permissible in the area of national security or, as the former President phrased the notion, that "when the President does it, that means that it is not illegal." *See, e.g., Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16; *see also* Sally Bedell Smith, *CBS-TV Purchases Nixon Videotapes*, N.Y. TIMES, Mar. 13, 1984, at C17.

125. *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 575 (1947). Kennan wrote under the *nom de plume* "X."

126. NATIONAL SECURITY COUNCIL, NSC 68: A REPORT TO THE NATIONAL SECURITY COUNCIL BY THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY (Apr. 14, 1950), *reprinted in* 1 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: 1950 NATIONAL SECURITY AFFAIRS, FOREIGN AND ECONOMIC POLICY 234-93 (1974).

127. 4 SENATE SELECT COMM. TO STUDY GOVERNMENTAL

OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. No. 755, 94th Cong., 2d Sess. 171 (1976) (Nixon's response to interrogatory 77).

128. 100-7 *Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st Sess., pt.1, at 181, 183, 188 (1987) (testimony of Oliver North).

129. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 297 (1948).

130. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 1 (1961).

131. *Id.* at 7. Similarly, the 1954 Hoover Commission Report on Governmental Organization concludes with: "[W]e are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply." 1954 Hoover Commission Report on Governmental Organization, *quoted in* 1 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 127, at 9. Paul Kennedy, a historian famous for predicting America's decline, wrote in 1987 that the United States "may not always be assisted by its division of constitutional and decision-making powers, deliberately created when it was geographically and strategically isolated . . . but which may be harder to operate when it has become a global superpower, often called upon to make swift decisions vis-à-vis countries which enjoy far fewer constraints." PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 524-25 (1987).

132. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 Basler, *supra* note 1, at 440.

133. U.S. CONST. art. II, § 1, cl. 1. The argument was that this clause gave the President inherent power to do whatever was necessary to preserve the Constitution. Lincoln's Attorney General, Edward Bates, had made the same case in 1861. *See supra* note 39. Cold War proponents, however, attempted to buttress their claim by noting that the Constitution limited Congress to the powers "herein granted," U.S. CONST. art. 1, § 1, but did not contain a similar restriction on the President. Truman's argument to the District Court in *Youngstown*, for example, was based on this distinction between Articles I and II. *See* J. MALCOLM SMITH & CORNELIUS P. COTTER, POWERS OF THE PRESIDENT DURING CRISIS 135 (1960) (argument of Assistant Attorney General Baldridge).

134. U.S. CONST. art. II, § 2, cl. 1. The State Department's 1965 defense of the legality of United States participation in Vietnam was largely based on this clause. "The Constitution," the State Department lawyers argued, "leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress." Office of the Legal Advisor, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1101 (1966).

135. Presidents have often based this latter claim on dicta from United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). That case involved a challenge to a joint resolution of Congress authorizing the President to forbid arm sales to Bolivia. *Id.* at 311-14. After the Court concluded that the resolution was not an unconstitutional delegation of legislative authority, Justice Sutherland's majority opinion went on to declare that the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *Id.* at 320. Most recently, Oliver North cited *Curtiss-Wright* to support his testimony at the Iran-Contra hearings. 100-7 *Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran, supra* note 128, at pt. 2, at 38-39, 133-34 (testimony of Oliver North).

136. TRUMAN, *supra* note 124, at 478 (Truman was defending his seizure of the steel mills).

137. Truman established a Temporary Commission on Employee Loyalty in 1946. Exec. Order No. 9806, 11 Fed. Reg. 13,863 (1945). On March 21, 1947, he promulgated more permanent and comprehensive procedures. Under this system, accused employees had the right to a hearing, to which they could bring counsel and present evidence and favorable witnesses. While they were told the charge against them, they were not permitted to know the identities of their accusers. Exec. Order 9835, 12 Fed. Reg. 1935 (1947).

138. Exec. Order 9835, 12 Fed. Reg. 1935 (1947).

139. Exec. Order 10,241, 16 Fed. Reg. 3690 (1951).

140. *See* RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 171-192 (1990).

141. *Federal Government Security Clearance Programs: Hearings Before the Permanent Senate Subcomm. on Investigations of the Comm. on Governmental Affairs*, 99th Cong., 1st Sess. 2 (1985).

142. *Id.* (opening statement of Senator Sam Nunn). See William B. Barton, Jr. & Krista L. Peterson, *Industrial Security Clearances: Heightened Importance in a World of Corporate Acquisitions, Takeovers and Foreign Investment*, 18 PUB. CONT. L.J. 392 (1989), for more on the importance of security clearances in private industry.

143. Franklin Roosevelt was the first President to enact an

official classification system. His 1940 Executive Order directed defense agencies to protect sensitive information regarding military installations and equipment from disclosure. Exec. Order No. 8381, 3 C.F.R. 634 (1938-1943).
144. Exec. Order 10,290, 3 C.F.R. 789 (1949-1953).
145. *Id.* To the extent that any statutory basis for this executive order existed, it is most likely to be found in section 161 of the Revised Statutes, which dates back to the early days of the republic. This provision authorized the head of each government department "to prescribe regulations . . . for the distribution and performance of its business, and the custody, uses, and preservation of the records, papers, and property appertaining to it." *See* 5 U.S.C. § 301 (Supp. II 1965-66).
146. *See* Exec. Order No. 12,356, 3 C.F.R. 166 (1982) (Reagan); Exec. Order No. 12,065, 3 C.F.R. 190 (1978), *reprinted in* 50 U.S.C. § 401 (Supp. V 1981) (Carter); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975), *reprinted in* 50 U.S.C. § 401 (Supp. III 1973) (Nixon).
147. STAFF OF SUBCOMM. ON ENERGY CONSERVATION AND POWER OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., AMERICAN NUCLEAR GUINEA PIGS: THREE DECADES OF RADIATION EXPERIMENTS ON U.S. CITIZENS 1 (Comm. Print 1986) (citing Department of Energy documents); *see also* John H. Cushman, Jr., *Study Sought on All Testing on Humans*, N.Y. TIMES, Jan. 10, 1994, at A12; Melissa Healy, *Science of Power and Weakness*, L.A. TIMES, Jan. 8, 1994, at A1; Keith Schneider, *A Spreading Light on Radiation Tests*, N.Y. TIMES, Jan. 14, 1994, at A14.
148. *Veterans' Claims for Disabilities from Nuclear Weapons Testing: Hearing Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 1st Sess. 2 (1979) (statement of Senator Alan Cranston, citing Department of Defense estimates). *See generally* THOMAS H. SAFFER & ORVILLE E. KELLY, COUNTDOWN ZERO: GI VICTIMS OF U.S. ATOMIC TESTING (1982).
149. STAFF OF SUBCOMM. ON ENERGY CONSERVATION AND POWER, *supra* note 147, at iii (citing Department of Energy documents).
150. Healy, *supra* note 147. Eugene Saenger, a University of Cincinnati radiologist who conducted experiments on low-income subjects, told an interviewer in 1970 that "[t]he most important field of investigation today is that of attempting to understand and mitigate the possible effects of nuclear warfare upon human beings." He was, he contended, "a person who takes the defense of our country very seriously." *Id.*
151. STAFF OF SUBCOMM. ON ENERGY CONSERVATION AND POWER, *supra* note 147, at 15-18 (citing Department of Energy documents); Healy, *supra* note 147; Schneider, *supra* note 147.
152. Proclamation No. 2914, 15 Fed. Reg. 9029 (1950).
153. SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, INTERIM REPORT, S. REP. No. 1170, 93d Cong., 2d Sess. 2 (1974).
154. National Emergencies Act, Pub. L. No. 94-412, § 101, 90 Stat. 1255 (1976). At the time of the Act's passage, four states of emergency had not been terminated. In addition to Truman's Korean War declaration, Franklin Roosevelt's 1933 declaration to handle the banking crisis, Act of Mar. 9, 1933, ch. 1, 48 Stat. 1 (1933); Nixon's 1970 declaration to cope with the Post Office strike, Proclamation No. 3972, 3 C.F.R. 473 (1970); and Nixon's 1971 declaration to meet balance of payment problems, Proclamation No. 4074, 3 C.F.R. 60 (1971), were still in effect. Most commentators assume that the National Emergencies Act terminated these states of emergency. *See, e.g.,* Lobel, *supra* note 22, at 1401. But Congress may not have this authority. Whether the four states of emergency are still in effect has not been tested by litigation.
155. *See* Proclamation No. 3447, 3 C.F.R. 157 (1959-1963).
156. *Hearings Before the Senate Special Comm. on the Termination of the National Emergency*, 93d Cong., 1st Sess. 65 (1973) (statement of acting Assistant Secretary of State H.G. Torbert on behalf of Nixon administration).
157. In 1976, Congress reported that over 470 such statutes were in existence. SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, *supra* note 153, at 2.
158. *Id.* at 1. Emergency rule had been in effect since Roosevelt's still-operative 1933 declaration. *Id.*
159. Congressional McCarthyism represents a major exception to this general trend. The House Un-American Activities Committee and Senator Joe McCarthy were vigilant and unimpeded by constitutional concerns in their search for Communist subversives within the United States. *See generally* FRIED, *supra* note 140.
160. In 1967, the Senate Foreign Relations Committee concluded that the principal cause of the executive's dominance over foreign affairs "ha[d] been the circumstance of American involvement and responsibility in a violent and unstable world." SENATE FOREIGN RELATIONS COMM., S. REP. No. 797, 90th Cong., 1st Sess. 5 (1967).
161. Many commentators have made this latter point. In a 1961 article, Senator Fulbright called the Congress a "largely parochial-minded body of legislators." Fulbright, *supra* note 130, at 7. Others have been more blunt. Professor Philip Kurland, for instance, simply concluded that Congress lacked "the guts to stand up to its responsibilities." Philip Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 636.
162. SENATE FOREIGN RELATIONS COMM., *supra* note 160, at 5.
163. U.S. CONST. art. I, § 8, cl. 11.
164. *Id.* at art. I, § 8, cl. 1.
165. *Id.* at art. I, § 8, cl. 3.
166. *Id.* at art. II, § 2, cl. 2.
167. SENATE FOREIGN RELATIONS COMM., *supra* note 160, at 5.

168. 343 U.S. 579 (1952).
169. The Court's refusals to hear challenges to the President did much to support executive authority. For example, in Goldwater v. Carter, 444 U.S. 996 (1979), the Court dismissed Senator Goldwater's challenge to President Carter's unilateral termination of a mutual defense treaty with Taiwan. The opinion was issued as a per curiam, with four Justices concurring on the grounds that the case presented a non-justiciable political question, *see id.* at 1002 (Rehnquist, J., concurring), and one arguing that the controversy was not ripe, *see id.* at 996 (Powell, J., dissenting). Although only one Justice voted to uphold the asserted presidential authority on the merits, *see id.* at 1006 (Brennan, J., dissenting), Presidents have used the case to support their unilateral termination of treaties. The Reagan administration, for instance, cited *Goldwater* in terminating United States acceptance of the bilateral Friendship, Commerce, and Navigation Treaty with Nicaragua. *See* Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1199 (D. Mass. 1986) (dismissing private challenge to State Department's notice of termination of treaty), *aff'd*, 841 F.2d 1 (1st Cir. 1987).
170. *Youngstown*, 343 U.S. at 579.
171. *Id.* at 582.
172. *Id.* at 585.
173. For instance, in Kent v. Dulles, 357 U.S. 116 (1958), the Court reversed the executive's denial of passports to alleged Communists because it found no clear statutory statement of congressional authorization. *Id.* at 130.
174. *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).
175. *Id.* at 610-11 (Frankfurter, J., concurring).
176. 453 U.S. 654 (1981).
177. *See id.* at 660, 674-75, 680.
178. *Id.* at 668-69, 678-79. "Justice Jackson himself recognized," Rehnquist wrote, "that executive action in any particular instance falls . . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Id.* at 669.
179. *Id.* at 678.
180. *Id.* at 688.
181. Rehnquist did not make this point, but the information is contained within his statement of the facts of the case. *See id.* at 664-65.
182. *See generally* PARRISH, *supra* note 55.
183. Kennan, *supra* note 125, at 57; *see also* STEPHEN E. AMBROSE, RISE TO GLOBALISM: AMERICAN FOREIGN POLICY, 1938-1980, at 189 (2d ed. 1980) (on NSC-68).
184. For example, Truman attempted to thwart Communist expansion in Greece and Turkey in the immediate aftermath of World War II. After the Soviet Union occupied Czechoslovakia in 1948, Truman authorized the CIA to conduct operations in Italy. WALTER LAFEBER, THE AMERICAN AGE 452-55, 459 (1989).
185. Office of the Legal Advisor, *supra* note 134, at 1101.
186. As the Senate Select Committee on Intelligence observed in 1976, "[t]he recognizable distinctions between declared war and credible peace have been blurred through these [Cold War] years by a series of regional wars and uprisings, in Asia, the Middle East, Latin America, Europe, and Africa." 1 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 127, at 8.
187. *See* SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, *supra* note 153, at 1-2.
188. *See* COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT (1975); 1 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 127. These two reports brought these activities to national attention in the 1970s.
189. The CIA maintained a watch list that singled out certain groups for special attention, including many with no intelligence connections. *See* MORTON HALPERIN ET AL., THE LAWLESS STATE 140-42 (1976).
190. Hobson v. Wilson, 737 F.2d 1, 10 (D.C. Cir. 1984).
191. *Youngstown*, 343 U.S. at 587; *see also id.* at 611 (Frankfurter, J., concurring); *id.* at 632 (Douglas, J., concurring). In his memoirs, Truman asserted that his steel seizure was constitutional "in an age when . . . . [t]here are no longer sharp distinctions between combatants and noncombatants, between military targets and the sanctuary of civilian areas." TRUMAN, *supra* note 124, at 478.
192. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring). The Court put forth a similar vision of the Cold War battlefield in Kent v. Dulles, 357 U.S. 116 (1958), in which the Court held that the Secretary of State's wartime discretion to deny passports did not indicate what powers the Secretary had when America was not involved in a declared war. *Id.* at 128.
193. *Youngstown*, 343 U.S. at 587.
194. 453 U.S. 280 (1981).
195. *Id.* at 303.
196. *See id.* at 283-86.
197. *Id.* at 308.
198. *Id.* (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931)).
199. *Near*, 283 U.S. at 716 (quoting Schenk v. United States, 249 U.S. 47, 52 (1919)).
200. Kennan, *supra* note 125, at 580.
201. SENATE FOREIGN RELATIONS COMM., *supra* note 160, at 6.
202. Despite six months of negotiations, Clinton's "don't ask, don't tell" policy represented little change from existing military policy. *Compare* 10 U.S.C. § 654 (Supp. V 1993) (codification of new policy) and 32 C.F.R. § 41 app. A, pt. 1(h) (1994) (new policy regulation) with 32 C.F.R. § 41 app. A, pt. 1(h) (1982) (old policy regulation). In the first eight months in which the new policy was in effect, the military discharged 507 people for

homosexuality, about the same rate as under the previous absolute gay ban. Eric Schmitt, *"Don't Ask, Don't Tell" Policy Illegal, Judge Says Pentagon is Barred from Discharging 6 Gays*, MIAMI HERALD, Mar. 31, 1995, at A1.

203. James Burk, *Power, Morals, and Military Uniqueness*, SOCIETY, Nov.-Dec. 1993, at 29; Tod Ensign, Book Review, PROGRESSIVE, Aug. 1993, at 41; Pat Towell, *Campaign Promise, Social Debate Collide on Military Battlefield*, CONG. Q. WKLY. REP., Jan. 30, 1993. In a move designed to encourage opposition to liberalization of the gay ban among current and former servicemen, Colin Powell, Chairman of the Joint Chiefs of Staff, told sailors at Annapolis nine days before Clinton's inauguration that he would understand if they chose to resign in the event they disagreed with Clinton's ultimate decision. *General Colin L. Powell: Forrestal Lecture Series, U.S. Naval Academy* (Jan. 11, 1993) (C-Span television broadcast, Jan. 12, 1993).

204. As of September 30, 1993, there were 27,242,000 veterans living in the United States. Of this figure, 19,067,000 were post-World War II veterans. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1994, at tbl. 566 (114th ed. 1994) (citing OFFICE OF INFO. MANAGEMENT & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, VETERAN POPULATION).

205. In his announcement of his ultimate policy on gay servicemen, Clinton strongly implied that Congress would have overridden any proposal he made if he had acted without the support of the Joint Chiefs. Remarks Announcing the New Policy on Homosexuals in the Military, 1993 PUB. PAPERS 1109, 1110 (July 19, 1993); *see also* Remarks on the Dismissal of FBI Director William Sessions and an Exchange with Reporters, 1993 PUB. PAPERS 1112, 1114 (July 19, 1993) (lifting ban on homosexual conduct "would have faced certain swift and immediate defeat in the United States Congress because of the opposition of the Joint Chiefs").

206. *See, e.g., Colin Powell, the Reluctant Candidate*, TIME, June 20, 1994, at 15; Rupert Cornwell, *The Man Who Might Be President*, INDEPENDENT, Oct. 17, 1994, at 19; Jon Meacham, *How Powell Plays the Game*, WASH. MONTHLY, Dec. 1994, at 33; James Risen, *The Man on Horseback*, FIN. WORLD, Jan. 17, 1995, at 16. More recently, Bob Dole, the Senate majority leader and the front-runner for the Republican presidential nomination in 1996, mentioned Powell as a possible vice presidential nominee. Walter Shapiro, *The Survivor*, ESQUIRE, Apr. 1995, at 64; Michael Tackett, *Dole Says He Might Seek Powell as Running Mate*, CHI.TRIB, Dec. 18, 1995, at A3.

207. The modern version of the Posse Comitatus Act, only slightly changed since its enactment in 1878, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1988). *See supra* notes 121-23 and accompanying text for a discussion of the original version of the Act.

Congress amended the Posse Comitatus Act five times in the 1980s. These changes were largely designed to make military resources available to assist in combatting illicit narcotics trafficking. National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 1243(a), 101 Stat. 1163 (1987); Defense Drug Interdiction Assistance Act, Pub. L. No. 99-570, §§ 3051, 3053, 3056, 3057, 100 Stat. 3207-74 (1986); Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1423(a), 99 Stat. 752 (1985); Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1405(10), 98 Stat. 2622 (1984); Department of Defense Authorization Act, 1982, Pub L. No. 97-86, § 905(a)(1), 95 Stat. 1114 (1981). All Acts are codified as amended at 10 U.S.C. §§ 371-80 (1988).

208. *See, e.g.,* Todd S. Purdum, *Terror in Oklahoma: The Overview; Clinton Seeks More Anti-Terrorism Measures*, N.Y. TIMES, Apr. 27, 1995, at A1.

209. The White House has insisted that its proposal is not designed to erode the fundamental principle behind the Posse Comitatus Act, *id.*, but rather seeks to benefit from the military's "'considerable expertise'" regarding particular forms of weapons. John F. Harris, *President Expands Proposal for Countering Terrorism; 1,000 New Jobs Tagging Explosives, Military Included*, WASH. POST, Apr. 27, 1995, at A1 (quoting Deputy Attorney General Jamie Gorelick).

210. In *Bissonette v. Haig*, the Eighth Circuit noted that:

> The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985), *aff'd on reh'g*, 800 F.2d 812 (8th Cir. 1986) (en banc), *aff'd*, 485 U.S. 264 (1988) (allegations of unreasonable seizure by military personnel in violation of Posse Comitatus Act state cause of

action).
211. By a vote of 91-8, the Senate on June 7, 1995 approved a bill that would allow the military to assist federal law enforcement agencies during domestic emergencies involving weapons of mass destruction. Comprehensive Terrorism Prevention Act, S. 735, 104th Cong., 1st Sess. § 908 (1995); 141 CONG. REC. S7857 (daily ed. June 7, 1995) (noting bill's approval). The House Judiciary Committee passed a similar measure on December 5, 1995. Comprehensive Antiterrorism Act, H.R. 1710, 104th Cong., 1st Sess. § 312 (1995); 141 CONG. REC. H14002 (daily ed. Dec. 5, 1995) (noting Committee passage).
212. Recognizing that "dramatic changes have altered, although not eliminated, the national security threats that we confront," Executive Order 12,958 requires the public release of secrets more than twenty-five years old. Intelligence agencies, and the Departments of Defense, State, Energy, and Justice, are to be given until the year 2000 to identify information that is still sensitive; all other information will be declassified automatically. Most new secrets will be declassified after ten years. While an important preliminary step toward reestablishing the rule of law, the new order allows significant exemptions. More importantly, it keeps the classification system within the executive's absolute discretion, protecting classifiers' judgments from judicial review. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (1995). Indeed, the Clinton administration recently drafted rules that would allow federal investigators to examine the financial records of more than two million government workers and servicemen with access to classified information. Tim Weiner, *Plan to Detect Spies Would Open Private Records of U.S. Workers,* N.Y. TIMES, Apr. 12, 1995, at A1.
213. 137 CONG. REC. S110 (daily ed. Jan. 10, 1991).