Article

Wartime Judgments of Presidential Power: Striking Down but Not Back

William G. Howell†

When assessing presidential actions taken during war, Supreme Court Justices do not merely acknowledge the objective threat that the nation faces. They often argue, and almost always imply, that foreign threats sanction judicial deference to the President.

Two tendencies exhibited by the Court support both assertions. First, even when they overturn presidential wartime initiatives, Justices make a point of conveying their appreciation for the material threat that the nation faces.[1] Indeed, even landmark repudiations of presidential power during periods of war acknowledge the practical challenges presidents face in leading the nation to military victory.[2] Second, when they overturn presidential wartime initiatives, Justices often intimate that the Court might have ruled differently if either the exigencies of war were more immediate or the President's initiative more integral to the war effort itself.[3]

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1. *See, e.g.*, Boumediene v. Bush, 128 S.Ct. 2229, 2274 (2008) ("The real risks, the real threats, of terrorist attacks are constant and not likely to soon abate.").

2. *See, e.g.*, *id.* at 2276–77 ("[T]he President . . . begin[s] the day with briefings that may describe new and serious threats to our nation and its people. The law must accord the executive substantial authority to apprehend and detain those who pose a real danger to our security.").

3. *See, e.g.*, *id.* at 2277 ("If, as some fear, terrorism continues to pose

As a prelude to a more comprehensive analysis of Supreme Court rulings on presidential power during times of peace and war,[4] this Article employs a least likely research design and scrutinizes the opinions of three Supreme Court cases: *Ex parte Milligan*,[5] *Youngstown Sheet & Tube Co. v. Sawyer*,[6] and *Boumediene v. Bush*.[7] These three cases, most would agree, constitute the preeminent examples of judicial wartime rebukes of presidential power during each of the last three centuries. Hence, if the Justices in these cases acknowledge the exceptional nature of war and the importance of temporarily conferring discretion upon the presidents who wage it, then they surely do so in the larger class of wartime challenges to presidential power. Wherever the upper bound of judicial deference may lie, these three cases demonstrate that the lower bound nonetheless recognizes the relevance of war when adjudicating challenges to presidential power and the possibility of upholding at least some actions that, if evaluated during periods of peace, would not withstand judicial scrutiny.

With hopes of avoiding distractions, five points warrant mention from the outset. First, the discussion that follows is meant to be strictly positive. I have no interest in engaging the rich, voluminous, debates about what Justices ought to do during periods of crisis.[8] These normative debates for much too long have lacked empirical grounding, as scholars advance doctrine without any systematic evidence about how judges actually behave during times of peace and war. This Article (and the larger project to which it alludes) clarifies how wars actually impact judicial decision making on issues of presidential power. More specifically, it investigates how Supreme Court Justices,

dangerous threats to us for years to come, the Court might not have this luxury.").

4. WILLIAM HOWELL, IN TIMES OF WAR: PRESIDENTIAL POWER AND THE MAKING OF PUBLIC POLICY (forthcoming).

5. 71 U.S. (4 Wall.) 2 (1866).

6. 343 U.S. 579 (1952).

7. 128 S. Ct. 2229 (2008).

8. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 101–22 (2006); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1096–134 (2003); Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313–21 (2007); Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 973–70 (2004); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 935–49 (2004).

in their own opinions, talk about war when reflecting upon either the constitutionality or statutory authority of presidential actions taken during war. It has nothing to say about whether these rulings, or the jurisprudence that supports them, are good or bad.

Second, as much as is possible, the analysis herein focuses squarely on wartime judicial rulings on presidential power, and not on the larger class of civil liberties and rights which have received ample attention elsewhere.[9]

Third, this Article makes no pretense of having revealed a formal doctrine or principle that wars automatically trigger. The proposition that judges evaluate presidents by different standards during times of peace and war has always been contested.[10] The observations below, therefore, speak to what might more appropriately be called a norm of judicial decision making. Indeed, while wars may influence a Justice's assessment of presidential power,[11] the onset of war does not automatically trigger a new set of rules or procedures that explicitly bind the Justice to one course of action or another.

Fourth, this Article examines how the Justices' opinions reflect upon their thinking about the relevance of war. Its purpose decidedly is not to use these opinions to establish either the precedential value of a case, or the general importance of a case in the pantheon of judicial rulings. Consequentially, in addition to the majority opinions, I also cull the entirety of concurring and dissenting opinions (very much including dicta) for references to the incidence of war and its relevance for judicial decision making.[12]

9. *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); GEOFFREY R. STONE, WAR AND LIBERTY (2007); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism:* Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes?, 30 AM. J. TRIAL ADVOC. 165 (2006); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

10. *See, e.g.*, Ronald K.L. Collins & David M. Skover, *What is War? Reflections on Free Speech in "Wartime,"* 36 RUTGERS L.J. 833, 833 (discussing whether different standards of judicial review are appropriate during wartime).

11. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2274 (2008).

12. Admittedly, when examining dissenting opinions, the assertion that these cases constitute a "least likely" research agenda begins to break down. Though the majority opinions constitute setbacks for presidents during times

Finally, the fact that this small sample of wartime opinions so prominently and pervasively features practical considerations about war does not prove that wars *caused* the Justices to rule as they did. Even the most careful reading of the three cases, after all, does not substitute for a systematic evaluation of the universe of war- and peace-time challenges to presidential power.[13] Additionally, it is quite possible that Justices reason backwards from positions they take on purely ideological grounds.[14] During war, unelected Justices also may feel compelled to signal to the President, Congress, and the public that they understand the security threat facing the nation, and that they appreciate the sacrifices of those individuals who are trying to address it. The cases, nonetheless, present a hard test for the more modest proposition that Supreme Court Justices give credence to norms that, depending upon one's formulation, recommend varying amounts of heightened judicial deference during times of war.

The Article proceeds as follows. Part I very briefly summarizes the relevant literature on presidential power, war, and what scholars have intermittently called "crisis jurisprudence,"[15] the "constitutional law of war,"[16] "executive expediency discourse,"[17] the "doctrine of constitutional relativity,"[18] and

of war, there is no reason to believe that the dissenting opinions examined below represent a hard case for the proposition that Justices are more prone to defer to the President during peace than during war.

13. This Article, nonetheless, may help inform the kind of quantitative study that would provide a basis upon which to draw causal inferences. The Justices in these three cases offer no indication that they hold presidents to higher standards during periods of war than during times of peace, suggesting that war can only aid a President's chances in court. *See infra* Part II. Additionally, the probability that the courts would uphold wartime actions taken by presidents is likely to increase when the nation faces larger, more imminent security threats, and when Justices are asked to evaluate presidential actions that are integral to the military campaign. And the age, popularity, and perceived success of a war may also bear upon the Court's willingness to overturn assertions of presidential authority. By analyzing a much larger sample of war- and peace-time challenges to presidential power, each of these empirical claims can readily be tested.

14. *See, e.g.*, Ward Farnsworth, *Dissents Against Type*, 93 MINN. L. REV. 1535, 1536–37 (2009) (arguing that Justices generally vote in criminal cases based on their preferred policy outcomes).

15. Epstein et al., *supra* note 9, at 1.

16. EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 76 (1947).

17. Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 674 (1998).

the "judicial deference thesis."[19] Part II, which constitutes the core of this essay, culls three landmark rulings against executive power for indications of how wars (if at all) influenced the Justices' decisions. Part III then summarizes the lessons from these cases and offers some modest assessments about judicial checks on presidential power.

I. THEORIES OF EXECUTIVE POWER IN WARTIME

Wars do not merely disrupt systems of governance. Wars remake governments. They thrust politicians into new debates about policy issues, they reshape the relationships between individuals and states, and they redefine the very purposes of government.[20] And wars have the potential to do more still. They can reallocate power among the various branches of government. And almost always, scholars and statesmen have argued since at least the nation's founding, wars do so in ways that benefit the President.[21]

A. FOUNDING CONCERNS ABOUT WAR AND PRESIDENTIAL POWER

The Founders worried a great deal about the possibility that foreign wars might stimulate presidential action and exalt the office of the presidency. Indeed, it was for precisely this reason that the Constitution vests so much war-making authority in Congress, which was thought to slow the pace of war, rather than the President, who was feared to use the military for his own private purposes and who, through war, might find the means by which to consolidate his control over the machinery of government.[22]

In Federalist Number 8, Alexander Hamilton recognized that "[i]t is of the nature of war to increase the executive at the expense of the legislative authority."[23] Echoing these senti-

18. *See* LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 288 (1951).

19. *See* Posner & Vermeule, *supra* note 8, at 313.

20. *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 57–77 (1987); David R. Mayhew, *Wars and American Politics*, *in* 3 PERSPECTIVES ON POLITICS 473, 473–93 (2005).

21. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 105 (2003).

22. *See* U.S. CONST. art. I.

23. THE FEDERALIST NO. 8, at 68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ments, Madison argued in Helvidius 4 that "[w]ar is in fact the true nurse of executive aggrandizement."[24] After all, Madison continued, "[i]n war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed."[25] Hamilton and Madison, of course, disagreed vehemently about the merits of a powerful presidency. But on their particular assessment of war's contribution to presidential power, the two adversaries stood together. If any branch of government benefits from war, it is the executive.

On the issue of ratification, the Anti-Federalists broke with both Hamilton and Madison, insisting that the Constitution's safeguards of individual liberty were wholly insufficient.[26] But at a deeper level, they too shared Hamilton and Madison's assessments of war and presidential power.[27] *The Anti-Federalist Papers* bristle with condemnation against an "elective king" whose war powers permit, and even encourage, the concentration of virtually all government authority.[28] Writing under the pseudonym Cato, George Clinton recognized the President as "the generalissimo of the nation . . . [who] of course, has the command and controul [sic] of the army, navy and militia; he is the general conservator of the peace of the union . . . ."[29] By taking the nation to war, Clinton insisted, the President would brandish powers that no government of a free people should retain.[30] Clinton recognized that wars do not merely augment the power of the federal government generally; they fundamentally alter the President's power vis-à-vis Congress and the courts.[31] Through war, Clinton and his fellow Anti-Federalists charged, a fledgling democracy would revert to the very monarchical system over which a revolution was waged.[32]

24. JAMES MADISON, HELVIDIUS NUMBER IV (1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 87 (Morton J. Frisch ed., 2007).

25. *Id.*

26. TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING 37 (Joseph M. Bessette ed., 1995).

27. *See generally* GARY L. GREGG, THINKING ABOUT THE PRESIDENCY: DOCUMENTS AND ESSAYS FROM THE FOUNDING TO THE PRESENT 7 (2005).

28. *See generally* 2 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

29. CATO, TO THE CITIZENS OF THE STATE OF NEW YORK (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 28, at 116.

30. GREGG, *supra* note 27, at 7.

31. *Id.* at 6.

32. *Id.*

The Founders' concerns have persisted for over two centuries. They reappeared a generation later in Joseph Story's *Commentaries on the Constitution of the United States*.[33] They constituted a central preoccupation in the Civil War writings of William Whiting, who sought to both understand and defend Lincoln's wartime rule.[34] Writing in the wake of the Second World War and Franklin Roosevelt's reign in office, presidency scholars such as Edward Corwin and Clinton Rossiter argued that presidents exert a degree of influence over foreign *and* domestic policy during times of war that is unimaginable during times of peace; and, not coincidentally, that the courts have done very little to check this expansion.[35] More recently, historians such as Arthur Schlesinger and Stephen Graubard have suggested that wars, throughout the nation's history, have fundamentally altered the executive machinery of government.[36] And contemporary deployments in Afghanistan and Iraq have sparked renewed discussions of an "imperial presidency, redux" and its implications for our system of governance.[37] In 1956, Rossiter nicely summarized conventional wisdom on the topic: it has become an "axiom of political science," he noted, that "great emergencies in the life of a constitutional state bring an

33. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 546–80 (photo. reprint 1987) (Boston, Hilliard, Gray & Co. 1833).

34. WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 17–61 (10th ed. 1971).

35. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1948, at 275–318 (3d ed. 1948); CLINTON ROSSITER, THE AMERICAN PRESIDENCY 82–111 (1956).

36. STEPHEN GRAUBARD, COMMAND OF OFFICE: HOW WAR, SECRECY AND DECEPTION TRANSFORMED THE PRESIDENCY FROM THEODORE ROOSEVELT TO GEORGE W. BUSH 3–32 (2004); ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 35–68 (1973).

37. *See* Arthur Schlesinger, *The Imperial Presidency Redux*, WASH. POST, June 28, 2003, at A25; *see also* MATTHEW CRENSON & BENJAMIN GINSBERG, PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED 178–215 (2007); PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 120–32 (2005); JAMES P. PFIFFNER, POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION 84–194 (2008); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 10–37 (2007); ARTHUR M. SCHLESINGER, WAR AND THE AMERICAN PRESIDENCY 45–69 (2004); FREDERICK A.O. SCHWARZ & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 153–200 (2007).

increase in executive power and prestige, always at least temporarily, more often than not permanently."[38]

If Rossiter's observation warrants the status of social scientific axiom—and there are reasons to believe otherwise[39]—one naturally wonders exactly how it came to be such. From where does this wartime expansion of presidential power originate? Contenders certainly include the voting habits of a deferential Congress, the willingness of leaders of both parties to affirm executive authority, and the propensity of an impressionable public to rally behind its President. But Rossiter's axiom also may implicate the courts. Scholars have long suggested, and many have explicitly recommended, that judges and Justices who evaluate directives issued by presidents openly reflect upon the incidence of war, and in so doing, they often grant the President greater discretion to pursue policy ends during periods of war than during times of peace.[40]

B. CONSTITUTIONAL PROVISIONS AND PRESIDENTIAL POWER IN WAR

When trying to advance a domestic or foreign policy agenda during times of war, what powers can presidents draw from the Constitution? Very few, at least explicitly. In its design of the office of the presidency, the Constitution is quite precise about some matters. It specifies exactly how the President and Vice-President will be elected,[41] who can run for office,[42] and who can vote,[43] the precise day on which a newly elected President will take office,[44] and the terms by which the President's salary can be adjusted.[45] None of these matters, though, address the actual powers that presidents can exercise once in office. Compared to the clear litany of responsibilities granted to

38. ROSSITER, *supra* note 35, at 64–65.

39. William Howell & Tana Johnson, *War's Contributions to Presidential Power*, *in* OXFORD HANDBOOK ON THE U.S. PRESIDENCY (forthcoming by George Edwards & William Howell eds., 2009).

40. *See, e.g.*, SCHLESINGER, *supra* note 36, at 141 (discussing the role of the presidential power during the Korean War).

41. U.S. CONST. art. II, § 1.

42. *Id.*

43. U.S. CONST. amend. XIX.

44. U.S. CONST. amend. XX, § 1.

45. U.S. CONST. art. II, § 1.

Congress,[46] the constitutional bases for presidential power, whether during war or peace, are deeply ambiguous.

Consider, for instance, how the Constitution distributes authority over the waging of war. On the one hand, the Constitution gives Congress the power to: "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"[47] "raise and support Armies;"[48] "provide and maintain a Navy;"[49] "make Rules for the Government and Regulation of the land and naval Forces;"[50] "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[51] and "provide for organizing, arming, and disciplining, the Militia."[52] The President, by contrast, is: "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;"[53] and may "appoint Ambassadors, and other public Ministers."[54] Accounting for either the number or specificity of war powers granted, a plain reading of the Constitution hardly affords the President a deep reservoir of authority on matters involving war.

For purposes of assessing presidential power in wartime, though, the key question has less to do with the prosecution of a war, and more to do with the President's ability to develop and implement his domestic and foreign policy agenda while it is waged. Here again, though, a superficial reading of the Constitution hardly supports the contention that presidents have at their disposal vast powers to govern the country during periods of war. The Constitution, after all, says precious little about what presidents can do when the life of the nation is imperiled. Nowhere, for instance, does the Constitution recognize anything akin to Locke's prerogative powers, with which presidents can act without statutory authorization, and in some cas-

46. *See, e.g.*, U.S. CONST. art. I, § 8 (listing numerous powers conferred on Congress).

47. *Id.* cl. 11.

48. *Id.* cl. 12.

49. *Id.* cl. 13.

50. *Id.* cl. 14.

51. *Id.* cl. 15.

52. *Id.* cl. 16.

53. *Id.* art. II, § 2, cl. 1.

54. *Id.* cl. 2.

es against it, in order to preserve a larger public good.[55] According to Jeffrey Tulis, the Founders "did not choose to make provisions for the institutional encouragement of demagoguery in time of crisis, refusing to adopt . . . the Roman model of constitutional dictatorship for emergencies."[56] To the contrary, notes Gary Lawson, "[t]he Constitution deals with extraordinary times primarily through ordinary powers."[57] Indeed, the only explicit mention that constitutional protections might be lifted during crises concerns the suspension of habeas corpus "when in Cases of Rebellion or Invasion the public safety may require it."[58] This provision, though, is found in Article I, not Article II—and hence grants wartime power to Congress rather than the President.

On what basis, then, might one find a constitutional rationale for presidents exercising expansive powers during war? Three sources stand out: the designation of commander in chief, the executive power, and the Take-Care Clause. Plainly, a veritable army of scholars has debated the bold (some would say tyrannical) actions that presidents have taken in the name of any one or combination of these constitutional provisions.[59]

55. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 237 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

56. JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 30 (1988).

57. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 291 (2007).

58. U.S. CONST. art. I, § 9, cl. 2.

59. *Compare* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 117–33 (1990) (discussing the Iran-contra affair, and noting that the "pervasive national perception" that the President must act swiftly and secretly to respond to fast-moving international events "has almost inevitably forced the executive branch into a continuing pattern of evasion of congressional restraint"), *and* JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION 55–63 (2008) (critiquing the unitary executive theory, saying it has "no basis in history or coherent thought," but noting "it could be called the legal philosophy of President George W. Bush," and urging that it "needs to be understood and resisted with a firmer grasp of the nation's formative ideals"), *and* David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19–56 (David Gray Adler & Larry N. George eds., 1996) ("The unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution."), *with* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 143–82 (2005) (contending, based on the Constitution's text, structure, and history, that the President has flexible war-making and foreign affairs powers), *and* Lawson, *supra* note 57, at 303–10

As previously indicated, this Article neither joins nor referees this normative debate. Rather, it makes a more basic claim: that presidents, justified or not, exploit constitutional ambiguity to their own advantage, in the short term to advance particular policy initiatives, and in the longer term to consolidate their power more generally. In ambiguous constitutional provisions, presidents have found a basis upon which to exalt their position within our system of separated powers, and to claim authority that nowhere appears, at least explicitly, in Article II. And particularly during times of war, the Constitution's inherent ambiguity "provide[s] the opportunity for the exercise of a residuum of unenumerated power."[60]

Consider, for starters, the title of commander in chief, which confers upon the President primary responsibility for waging war. Advocates of a strong President, and presidents themselves, have long argued that this title places presidents at the very center of war.[61] Where this constitutional obligation abuts other statutory or constitutional limitations, say these same advocates, the former should predominate.[62] After all, Chief Justice Hughes famously argued, the power to wage war is "a power to wage war successfully."[63] These same scholars note that the successful prosecution of any war sometimes requires presidents to act outside the strict boundaries of statutory or constitutional authority.[64] Having recognized that "[p]eacetime procedures do not necessarily fit wartime needs,"[65] advocates of a vigorous wartime presidency argue, we must employ different standards for evaluating the conduct of presidents during periods of peace and war.[66]

Advocates of a "unitary" presidency similarly offer a more expansive reading of Article II's Vesting Clause during periods

("[M]ore exercises of [the 'executive Power'] will be constitutionally permissible during crises than during normal times . . . .").

60. RICHARD PIOUS, THE AMERICAN PRESIDENCY 38 (1979); *see also* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUDS. Q. 854–56 (1999).

61. *See, e.g.*, SCHLESINGER, *supra* note 36, at 141 (discussing the term "commander-in-chief" in relation to President Franklin D. Roosevelt).

62. *Id.* at 68–99.

63. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

64. *See, e.g.*, SCHLESINGER, *supra* note 36, at 143–44 (discussing the constitutionality of the President's actions during the Korean War).

65. Hirabayashi v. United States, 320 U.S. 81, 106 (1943) (Douglas, J., concurring).

66. *Id.*

of war. These scholars make much of the fact that the Constitution gives the President, and the President alone, the "executive Power."[67] The President therefore deserves wide latitude to oversee personnel and policy within the executive branch. When evaluating whether specific actions taken by presidents conform to their executive power, some say, we must invariably make decisions about the "reasonableness" of his actions—that is, we must determine whether a president's actions are "proportionate to the end, efficacious, and respectful of background constraints based in rights and structure."[68] Where presidential actions fail to meet "standards of reasonableness,"[69] the courts and Congress have an obligation to overturn them. But the standards of reasonableness themselves, common sense dictates, must vary according to the context in which the actions occur. Certain actions that are reasonable during war assuredly are not during peace. Hence, the executive power that the Constitution confers upon the President necessarily, and quite naturally, expands and contracts as the nation moves into and out of war.

Presidents, too, must "take Care that the Laws be faithfully executed,"[70] which establishes the third, and arguably most defensible, constitutional basis for relaxing peace-time checks on a wartime presidency. Strictly speaking, the Take-Care Clause does not distinguish between periods of war and peace. Because laws enacted by Congress do, though, the clause nonetheless bestows upon presidents unique opportunities to exercise power during periods of war. Congress has enacted literally hundreds of laws that grant presidents emergency powers that are triggered whenever the nation goes to war[71]—powers that

67. *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 55 (2008); Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, (2009).

68. Lawson, *supra* note 57, at 306. This originalist understanding of the Vesting Clause, of course, is highly contested—so much so, in fact, that Posner and Vermeule, whose work is the focus of Lawson's article, openly reject it. *See* Posner & Vermeule, *supra* note 8, at 313. Calebresi and Yoo, meanwhile, argue that the powers afforded to the unitary executive are not conditional upon the existence of a state of emergency; quite the contrary, they argue that presidents should retain total control over the executive branch during times of both peace and war. *See* CALABRESI & YOO, *supra* note 67, at 18–21.

69. For further discussion of the standards of reasonableness, see GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 52–56 (2004).

70. U.S. CONST. art. II, § 3.

71. For an overview of laws that grant the President emergency powers and their invocation, see HAROLD C. RELYEA, CONG. RESEARCH SERV., NA-

allow presidents to "seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law, seize and control all transportation and communication, regulate the operation of private enterprise, restrict travel, and, in a variety of ways, control the lives of United States citizens."[72] Indeed, so many emergency powers sit on the books that in 1976 Congress felt compelled to enact the National Emergencies Act, which sought to clarify the precise conditions under which presidents could invoke emergency powers and the procedures for doing so.[73]

Thus reading expansive powers into vague constitutional provisions, advocates of a powerful presidency establish the basis for a "crisis jurisprudence" that is meant to govern how judges and Justices evaluate presidential actions taken during times of war. The next sub-section summarizes key claims of crisis jurisprudence. The remainder of this Article then examines whether the Supreme Court, when overturning specific wartime actions taken by presidents, draws larger lessons about the exercise of presidential power during times of war—that is, whether they explicitly reject the tenets of crisis jurisprudence, and thereby strike back when they strike down.

C. CRISIS JURISPRUDENCE

An extraordinary body of work on crisis jurisprudence, one that can only briefly be summarized here, offers a blueprint for judicial deference during periods of war.[74] Though most of the scholarship focuses on government abridgements of individual rights during times of war, a good deal of it implicates the President. To be sure, scholars have offered a wide range of reasons why judges and Justices employ crisis jurisprudence.[75] Its core

TIONAL EMERGENCY POWERS 16–19 (2007), *available at* http:/www.fas.org/sgp/crs/natsec/98-505.pdf.

72. *Id.* at 4.

73. *Id.* at 12; s*ee* 50 U.S.C. §§ 1601–1651 (2000 & Supp. 2006).

74. For useful recent summaries, see sources cited *supra* note 9.

75. Explanations for the persistence of crisis jurisprudence vary widely, with different scholars emphasizing different determinants. Some focus on judicial concerns that the President might be especially prone to ignoring objectionable court rulings during times of war. *See, e.g.*, HOWELL, *supra* note 21, at 136–75; SMITH, *supra* note 18, at 261–87; PHILIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS" 130–40 (1974). Another scholar emphasizes the tendency of judges, like some elected officials, to exaggerate the threat faced by the nation. Wells, *supra* note 8, at 922. Still others highlight the informational and tactical advantages of the executive and legislative branches

thesis, though, can be stated quite simply: when the life of the nation is in danger, the courts (some say appropriately, others not) grant presidents the widest possible latitude to prosecute wars; and consequentially, at least some presidential actions—both international and domestic—that do not survive judicial scrutiny during times of peace do so, as a matter of course, during periods of war.

Crisis jurisprudence constitutes a direct repudiation of the notion, periodically expressed by the Justices themselves, that the government cannot change "a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."[76]

Quite the opposite, crisis jurisprudence insists that the Constitution, if it is to survive, must adapt and evolve.[77] The material context in which presidents operate crucially shapes the judiciary's assessment of the constitutionality of their actions. And as contexts go, wars legitimate presidential action like no other. As Justice Felix Frankfurter argued so forcefully, "the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."[78]

The precise bounds of the argument, of course, remain vigorously disputed. Most concede that crisis jurisprudence does not imply the utter dissolution of constitutional checks on presidential power during times of war.[79] Wars do not permit the

in meeting foreign crises. *See* Posner & Vermeule, *supra* note 8, at 313–21. Others highlight the tendency of judges to rally behind their President. *See* Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 687–95 (1997). Finally, going one step further, Melvin Urofsky notes Justices' proclivity to participate in the war efforts themselves. *See* Melvin I. Urofsky, Inter Arma Silent Leges: *Extrajudicial Activity, Patriotism, and the Rule of Law*, *in* TOTAL WAR AND THE LAW 26–36 (Daniel R. Ernst & Victor Jew eds., 2002).

76. People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 127 (1865).

77. *See* Epstein et al., *supra* note 9, at 4–6 (explaining why the Supreme Court alters its constitutional analysis under conditions of national threat).

78. Korematsu v. United States, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring).

79. *See* Lee Epstein et al., The Supreme Silence During War 1 (2003) (unpublished manuscript, on file with New York University), *available at* http://www.nyu.edu/classes/nbeck/q2/king.propensity.pdf (finding that when the country is at war, the probability that the Supreme Court upholds a civil rights or liberties claim drops by only fifteen percent).

transformation of presidents into dictators. But they do permit a reasonably large number of actions that, during times of peace, would not pass constitutional muster. Consider the long list of allowances endorsed by Justice George Sutherland:

> To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.[80]

Presidents may not achieve everything they want during times of war. But if Sutherland's sentiments are shared by other Justices, presidents ought to achieve a significantly higher proportion of policy victories during war than they do during peace. Consequentially, as Edward Corwin puts it:

> War does not of itself render constitutional limitations liable to outright suspension by either Congress or President, but does frequently make them considerably less stiff—the war emergency infiltrates them and renders them pliable. Earlier constitutional absolutism is replaced by constitutional relativity: it all depends . . . [on] what the Supreme Court finds to be reasonable in the circumstances.[81]

Crisis jurisprudence thereby puts Justices into the business of assessing the size and imminence of foreign threats, and of gauging the extent to which presidential policies effectively address them. As Justice Black argued in the majority opinion to *Korematsu v. United States*, the much-maligned decision that upheld President Roosevelt's executive order placing Japanese Americans in internment camps, "[w]hen, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[82] Consequentially, crisis jurisprudence demands greater deference for larger wars and dictates that judges look more favorably upon presidential policies that are more closely linked to the war efforts themselves.[83] Assuredly,

80. United States v. Macintosh, 283 U.S. 605, 622 (1931).

81. CORWIN, *supra* note 16, at 80.

82. *Korematsu*, 323 U.S. at 220.

83. *See* Garrison, *supra* note 9, at 166 ("This view of judicial decision-making assumes that, when called upon to curtail executive and legislative

presidents cannot free themselves from constitutional or statutory shackles by sending a handful of troops abroad. Nor can presidents, when waging larger wars, claim extra-constitutional powers to reshape policies that have nothing to do with the military campaign itself. But when exerting power that is commensurate with an external threat, and when advancing policies that qualitatively improve the nation's chances of prevailing over that threat, presidents can proceed with some confidence that the judiciary will not stand in their way.

Nevertheless, crisis jurisprudence remains a prescriptive theory of judicial behavior, and it is not a formal rule or doctrine that Justices must follow. When arguing their case before the Supreme Court, counsel for the President regularly plead with the Justices to grant due deference to the President during periods of war.[84] The Justices, though, are entirely free to disregard such pleas, to forswear crisis jurisprudence, and to evaluate presidential wartime initiatives exactly as if they had been issued during peace. Whether crisis jurisprudence has influenced the content of court rulings is therefore entirely an empirical question.

D. EMPIRICAL SUPPORT FOR CRISIS JURISPRUDENCE

Much of the literature on crisis jurisprudence assumes that judges defer to the President during periods of war,[85] and then sets about trying to identify why this is so. From this scholarship, though, it is difficult to know just how pervasive—some would say insidious—crisis jurisprudence actually is. We simply lack the evidence required to evaluate when judges behave in ways that are consistent with the predictions of crisis jurisprudence and when instead they forsake the exigencies of war and check the exercise of presidential power. Three studies come close, but none offers a definitive answer.

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infringement of civil liberties during times of war and national crisis, the courts will fail to do so and take a very deferential and muted posture toward the actions of the other political branches.").

84. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 92 (1866) (recounting government counsel's argument that the Court should defer to the will of the commander in chief when it comes to decisions made in times of war).

85. *But see* Epstein et al., *supra* note 9, at 28–29. These counterclaims, however, are in the minority. As Epstein and her colleagues recognize, "the crisis thesis is sufficiently convincing to the vast majority of members of the legal community that one version or another has made its way into judicial opinions and off-the-bench writing of Court members." *Id.* at 36.

Methodologically, Lee Epstein and her colleagues have written the best quantitative study on crisis jurisprudence.[86] Surveying the universe of Supreme Court cases involving civil liberties during the latter half of the twentieth century, Epstein and her co-authors find substantial evidence that the courts do in fact take a narrower view of individual rights during periods of war.[87] Interestingly though, they find that the courts are more likely to overturn policies that directly involve a war effort and that infringe upon individual rights.[88] Unfortunately, these findings speak only tangentially to issues involving presidential power. Many of the cases in their data set concern challenges to laws enacted by Congress, rather than policies directly advanced by presidents. Moreover, it is difficult to know whether a particular ruling supports Congress, the President, both, or neither. And the preponderance of presidential actions that come before the Court are not analyzed at all.

The next two studies focus more intently on the presidency. The political scientist Tom Clark examined appellate court rulings on non-criminal cases over a one-hundred-year-period, but found no evidence of heightened judicial deference to the executive during periods of war.[89] In fact, Clark's findings suggest that appellate judges are significantly more likely to rule against the President during wartime.[90] He concludes that "constitutional checks and balances placed on executive power do not necessarily collapse during wartime."[91]

Finally, in earlier research, I investigated every executive order that was challenged on constitutional or statutory grounds in a federal court between 1942 and 1998.[92] I found that courts affirm executive orders eighty-three percent of the time, and so doing, they occasionally provide justification for further expansions of presidential power.[93] I unearthed no evi-

86. *Id.* at 6–10 (introducing the different components of their methodology).

87. *Id.* at 109 ("We show that war causes the Court to decide cases unrelated to the war in a markedly more conservative direction than they otherwise would.").

88. *Id.*

89. *See* Tom S. Clark, *Judicial Decision Making During Wartime*, 3 J. EMPIRICAL LEGAL STUD. 397–419 (2006).

90. *Id.* at 416.

91. *Id.*

92. *See* HOWELL, *supra* note 21, at 151–74.

93. *Id.* at 154–55.

dence, however, that either the frequency of court challenges or the propensity of judges to side with the President systematically varies according to whether the country is at war.[94]

Whatever their merits, these latter two studies hardly form the last word on the judiciary's treatment of the presidency during periods of war. And they certainly do not disprove claims about the pervasiveness of crisis jurisprudence. It is quite possible that judges hear very different types of cases during times of war than during times of peace, even if the size of their caseloads remains roughly constant. On especially high-profile cases, judges may delay rendering a decision until after a military conflict has subsided; and Supreme Court Justices, of course, may refuse to grant certiorari in cases that would certainly command their attention during periods of peace. Neither study, moreover, examines the universe of Supreme Court challenges to presidential power over an extended time period. Recognizing the limitations of the existing quantitative work on the topic, Clark cautions that "much further analysis [is required] before a broad claim may be staked about the nature of non-criminal adjudication during wartime."[95]

II. THREE LANDMARK SUPREME COURT RULINGS ON PRESIDENTIAL POWER

The federal judiciary has not been shy about overturning policies backed by wartime presidents. Since 1933, in fact, the Supreme Court has ruled against the government in thirty-nine percent of the 691 wartime cases to which the U.S. government was a direct party; and the Supreme Court ruled against the government in roughly thirty percent of those wartime cases that were argued by the Solicitor General, whose presence may reveal aspects of the President's views about a case's importance.[96] For the government generally, and the President in particular, war-time losses in the courts are not a rare occurrence. For the scholarly interest that they have attracted though, three judicial challenges to presidential war powers stand above all others. This section carefully reviews

94. *Id.* at 166–67 (illustrating how individual judges vote on challenges to presidential actions pertaining to war).

95. *See* Clark, *supra* note 89, at 416.

96. To verify the percentages used in this data set, see The Judicial Research Initiative, Research Databases and Data Archives, http://www.cas.sc.edu/poli/juri/databases.htm; *see also* WILLIAM HOWELL, IN TIMES OF WAR: PRESIDENTIAL POWER AND THE MAKING OF PUBLIC POLICY (forthcoming).

each for what they say about the judiciary's understanding of the relationship between war and presidential power.

A. *EX PARTE* MILLIGAN

Controversy in *Ex parte Milligan* centered on the fate of Lamdin P. Milligan, who at the Civil War's height in 1864 had been arrested at his home in Indiana and charged with conspiracy against the Government of the United States, inciting insurrection, giving aid and comfort to the Southern enemy, and violating the laws of war.[97] According to the U.S. military Commandant of the District of Indiana, Milligan had been participating in a plot to liberate Confederate prisoners of war and, eventually, to overthrow the state governments of Indiana, Ohio, and Michigan.[98] For these crimes, Milligan was tried in a system of military commissions that President Abraham Lincoln had unilaterally created in 1862.[99] Unlike civilian courts, military commissions denied defendants the opportunity to be present during the proceedings and to receive a jury trial.[100] The military commission found Milligan guilty and sentenced him to death.[101]

Fortuitously for Milligan, the Civil War ended just before his scheduled hanging on May 19, 1865.[102] The exigencies of war having subsided, Milligan's lawyers promptly appealed his sentence.[103] The circuit court's two-judge panel, however, could not come to any resolution over the essential issues of the case, namely: whether an 1863 congressional statute gave the President the necessary authority to suspend the writ of habeas corpus and try citizens in military commissions rather than civilian courts;[104] whether a civilian court had jurisdiction to hear

97. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 6 (1866).
98. *Id.* at 6–7.
99. *Id.* at 6.
100. *Id.* at 29–30.
101. *Id.* at 7.
102. *Id.*
103. *Id.* at 7–8.
104. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863). According to the President, this Act effectively codified the President's unilateral creations of military commissions in 1861. Counsel for Milligan, however, argued that Congress did not contemplate, and hence did not authorize, the trial of U.S. citizens outside of civilian courts. *Milligan*, 71 U.S. at 30–32.

an appeal from a military commission;[105] and whether a civilian court could discharge a defendant from custody.[106]

In 1866, the case came before the Supreme Court, which sided with Milligan.[107] According to the Court, neither the 1863 statute nor local conditions in Indiana justified the imposition of martial law or the creation of military tribunals.[108] The Court further ruled that as a United States citizen with no military experience who inhabited a Northern state quite distant from the war's primary hostilities, Milligan retained the right to be tried in a civilian court.[109] The Court then found the substantive allegations against Milligan sufficiently weak as to warrant his immediate release from custody.[110]

At the time, much of the press and public viewed the Court's ruling as a setback for Republican members of Congress who, over the continued resistance of President Andrew Johnson, sought to reconstruct the South.[111] In particular, pro-Republican newspapers condemned the decision as "judicial tyranny," "the most dangerous opinion ever pronounced by that tribunal," and a "sorry attempt of five not so very distinguished persons to exhibit themselves as profound jurists, whereas they have only succeeded in proving themselves to be very poor politicians."[112] The *New York Herald* called the Court "a relic of the past, nine old superior pettifoggers, old marplots, a formidable barrier to the consummation of the great revolution."[113] The *Cleveland Herald* compared the ruling to the *Dred Scott* decision;[114] the *Chicago Tribune* claimed that the decision would do little to improve the unfavorable impression of the Court;[115] and the *Washington Chronicle* openly accused the Justices of treason.[116] *The New York Times* lamented that instead of supporting "the common sense doctrine that the Constitution pro-

105. *Milligan*, 71 U.S. at 9–11.
106. *Id.* at 31–32.
107. *Id.* at 134–42.
108. *Id.* at 134.
109. *Id.* at 134–35.
110. *Id.* at 135.
111. *See, e.g.*, 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 211–12, 219 (1971); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 430–33 (2d ed. 1926).
112. *See* WARREN, *supra* note 111, at 430–31.
113. *See id.* at 432 n.1.
114. *See id.* at 432.
115. *See* FAIRMAN, *supra* note 111, at 218.
116. *See* WARREN, *supra* note 111, at 433.

vides for the permanence of the Union," the Court "throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it."[117]

Quickly, though, the case's importance would transcend the political struggles occurring in the aftermath of the Civil War. For many, *Milligan* would emerge as a monument to judicial checks on presidential war powers, and as a rejection of the notion that there exists, as John Quincy Adams argued in 1831, a "war power" that is "limited by regulation and restricted by provision in the Constitution" and a "peace power" that is "only limited by the usages of nations."[118] In the period between World Wars I and II, Charles Warren praised the decision as "one of the bulwarks of American liberty,"[119] that "has since been recognized by all men as the palladium of the rights of the individual,"[120] and that dealt "a staggering blow to the plans for the use of the military forces in the process of Reconstruction then being matured by Congress."[121] And at century's end, Chief Justice William Rehnquist criticized the Court's opinion for having introduced arguments that were not pertinent to the specific controversy at hand but also admitted that the decision "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[122]

According to Oren Gross, *Milligan* is the paradigmatic example of the "Business as Usual" model of judicial decision making.[123] Indeed, for Gross, it is the only Supreme Court case to warrant an extended discussion of this model. In contrast to theories of "accommodation," the Business-as-Usual model postulates that judges interpret the Constitution the same way

117. *Id.* at 429.

118. CORWIN, *supra* note 16, at 78. This notion also comports with Lincoln's conception of presidential war powers. For longer discussions on Lincoln, see CORWIN, *supra* note 35, at 275–83. *See also* DANIEL FARBER, LINCOLN'S CONSTITUTION 115–43 (2003); CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 273–87 (1943).

119. WARREN, *supra* note 111, at 427.

120. *Id.* at 432.

121. *Id.* at 423.

122. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 137 (1998).

123. *See* Gross, *supra* note 8, at 1043; *see also* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385–433 (1989); Posner & Vermeule, *supra* note 8, at 15–18 (describing the "civil libertarian view" of wartime jurisprudence).

during periods of war and peace.[124] Essentially prescriptive, the model dictates that:

> [A] state of emergency does not justify a deviation from the 'normal' legal system. No special 'emergency' powers are introduced either on an ad hoc or a permanent basis. The ordinary legal system already provides the necessary answers to any crisis without the legislative or executive assertion of new or additional government powers.[125]

Lee Epstein and her colleagues go further still.[126] The "*Milligan* thesis," they contend, not only suggests that the courts guard basic civil liberties in times of both war and peace, but that the courts actually subject the government to greater scrutiny during periods of war.[127] As Epstein et alia argue, *Milligan* stands for the fundamental proposition that "the justices must become especially vigilant in protecting rights and liberties during 'commotions.'"[128]

Each of these characterizations of *Milligan* has its share of supporting evidence. In their arguments before the Supreme Court, all three of Milligan's attorneys insisted that his case had more to do with presidential war powers than it did with a single man's fate.[129] According to David Field, constitutional checks on presidential power "were made for a state of war as well as a state of peace."[130] James Garfield, who would assume the presidency fifteen years later, pleaded with the Court not to let the Constitution be "lost in war."[131] And if the British King lacked the power to "stretch the royal authority far enough to justify military trials," as Attorney General Jeremiah Black argued, then surely the President could not read the Constitution

124. *See* Gross, *supra* note 8, at 1044 ("The Business as Usual model rejects the possibility that a tension exists between protecting the security of the nation and maintaining its basic democratic values, including the rule of law.").

125. Gross, *supra* note 8, at 1043.

126. *See* Epstein et al., *supra* note 9, at 6–8 (explaining the need for a more vigorous study of Supreme Court decisions during war and peace).

127. *Id.* at 3.

128. *Id.* (using the term "commotions" to describe "major international events, including war, that threaten the security of the nation").

129. *See* BROOK THOMAS, CIVIC MYTHS 109 (2007) ("Milligan's attorneys argued that their client had been denied rights by the Constitution and that those rights could not be suspended during wartime.").

130. DAVID DUDLEY FIELD, CONSTITUTIONAL QUESTIONS IN THE SUPREME COURT OF THE UNITED STATES: THE *MILLIGAN* CASE (1867), *reprinted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 38 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

131. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 47 (1866).

as granting the requisite authority to do so.[132] After all, Black famously argued, the Constitution "does not carry the seeds of destruction in its own bosom."[133]

According to Milligan's counsel, it was the province of the Court to ensure that presidential actions during times of war comply with the Constitution—which, they claimed, conferred on the President rather limited war powers in Article II. Consistent with how Epstein et alia would later characterize *Milligan*, Black noted that:

> [I]t is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.[134]

When the nation stands on a war footing, Black argued, the courts must not cower before an energetic commander in chief. If the Court adjusts its behavior at all during times of war, it should do so by summoning altogether new courage to check the exercise of presidential power.

For Justice David Davis, who would write the majority opinion in *Milligan*, such appeals seemed to resonate. Having deferred to the President repeatedly through the Civil War,[135] Davis seized *Milligan* as an opportunity to reclaim authority during peacetime that had been lost during the war. Though Milligan's case was but one of many circulating through the federal judiciary, the Court saw fit to use it as an opportunity to vaunt the Constitution as working "equally in war and in peace," protecting "all classes of men, at all times, and under all circumstances."[136] To argue otherwise, Davis seemed to say, was to accept the notion that the Constitution functioned much

132. JEREMIAH S. BLACK, ARGUMENT IN BEHALF OF LAMBDIN P. MILLIGAN, IN THE SUPREME COURT OF THE UNITED STATES (1866), *reprinted in* 2 LEGAL MASTERPIECES 944 (Van Vechten Veeder ed., 1903).

133. THOMAS, *supra* note 129, at 109.

134. ESSAYS AND SPEECHES OF JEREMIAH S. BLACK 525 (Chauncey F. Black ed., New York, D. Appleton & Co. 1885).

135. In *Ex parte Merryman*, 17 F. Cas. 144, 152–53 (1861), the Court did attempt to curtail the President's ability to detain U.S. citizens. Lincoln, however, refused to comply with the judicial order, and in every subsequent case that challenged his prosecution of the war, the Court deferred to the executive branch. *See, e.g.*, *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 248 (1863); The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863).

136. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

like a gas lamp, to be turned on and off at a single man's discretion. But Davis and four of his colleagues expressly rejected such a notion:

> No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.[137]

At first glance, this seems like a sharp rejection of crisis jurisprudence. But a closer look reveals that the Court's majority opinion in *Milligan* also is steeped in practical considerations about the President's ability to lead the nation during times of war. The opinion hints that if the world looked different than it did in either 1866, when the Court rendered its opinion, or in 1864, when Milligan was arrested and sentenced, then Milligan might well have swung from the gallows.[138]

From the outset, the Justices suggested that their very willingness to take the case depended upon the war's cessation. The opening lines of Justice Davis's opinion admitted that "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."[139] With the return of peace, though, "considerations of safety" need not be intermingled with "the exercise of power," and at long last the Court could review a case without "the admixture of any element not required to form a legal opinion."[140] The opinion that Davis would write, though, was not purely legal. With the nation reunified, the Court continued to measure presidential power against the exigencies of war.

In his argument on behalf of the federal government, Benjamin Butler had emphasized the importance of accommodating a more expansive view of presidential power. He noted:

> In carrying on war, when in the judgment of him to whom the country has entrusted its welfare—whose single word, as commander of the army, can devote to death thousands of its bravest and best sons—we give to him, when necessity demands, the discretion to govern, out-

137. *Id.* at 121.

138. *Id.* at 122 (explaining that had Milligan simply been tried according to the laws of Indiana, he still could have been found guilty and punished appropriately).

139. *Id.* at 109.

140. *Id.*

> side of the ordinary forms and constitutional limits of law, the wicked and disloyal within the military lines.[141]

Although the Court ultimately ruled against the government, elements of Davis's opinion gave credence to Butler's claims. In particular, Davis implied that the Court would have ruled differently had Milligan been arrested and tried in Virginia rather than Indiana.[142] This did not reflect concerns about the constitutionality of military commissions *per se,* but rather an assessment of whether or not *local conditions* permitted the conduct of a fair and open trial in a civilian court. In Indiana, Davis noted, the civilian courts continued to operate; the state government allied itself with the North; and the theater of military operations remained distant.[143] Had any of these facts differed, Davis might have recognized the need for martial law and the operation of military commissions and hence would have upheld Milligan's death sentence.[144]

Davis further weighed the material threat that Milligan posed to the cause of the North. The Justice made much of the facts that Milligan was a U.S. citizen; had lived in the Northern state of Indiana for 20 years; had never been convicted of a crime; and had never served in the military.[145] Indeed, he repeated these facts several times in his opinion.[146] One can interpret these comments as indicative of the Court's views on Milligan's guilt or innocence. Or, alternatively, one can read these elements of the opinion as saying that threats to national security do justify extra-constitutional actions by presidents. The threats just need to be sufficiently grave for the Court to sanction such actions.

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141. *Id.* at 92.

142. *Id.* at 127 ("Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.").

143. *Id.* at 126.

144. Davis noted:

> There are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society.

Id. at 127.

145. *Id.* at 7.

146. Davis begins his opinion by asserting these facts. *See id.* at 107–08.

In his dissent, meanwhile, Chief Justice Chase openly endorsed the central tenets of crisis jurisprudence. According to Chase, the appropriate scope of governmental power—initiated by Congress, executed by the President—critically depended upon the circumstances in which the nation found itself. For Chief Justice Chase, war, above all other factors, augments state power:

> Where peace exists the laws of peace must prevail. . . . [But] when the nation is involved in war . . . it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the arm or against the public safety.[147]

Chase openly rejected the idea that presidents, during times of war, could unilaterally create military tribunals.[148] But as long as Congress sanctioned his actions, the President could create alternative court systems that would survive judicial scrutiny during periods of war, though perhaps not during times of peace.

To be sure, Davis's majority opinion contains strong language, almost all of it dicta, indicating support for constitutional limits on presidential power and distrust of any president who would use war as a pretext for aggrandizing his own authority. But the opinion also contains repeated references to a host of practical considerations about the President's ability to prosecute war, and, by inference, the deference that the Court ought to grant him. Moreover, Chief Justice Chase, along with three other Justices, simply rejected the claim that the Constitution is anything but a fluid document that affords greater powers to the government generally, and Congress and the President in particular, during times of war.[149] When national security concerns are sufficiently acute, or when a perceived threat to a war's prosecution is sufficiently great, the Court, in its discretion, may decide to grant the adjoining branches of government allowances that it would promptly retract during peaceful times. That it chose not to for Lamdin Milligan does not undermine the general proposition that wars can only aid,

147. *Id.* at 140.

148. *Id.* at 140–42 (arguing that only Congress has the authority to provide for the organization of a military commission).

149. Edward Corwin therefore summarized the lessons of the case this way: "the Bill of Rights *could* be suspended in wartime if, in the controlling judgment of *Congress*, the war effort and public safety required it." CORWIN, *supra* note 16, at 80.

and can never hurt, presidents in their quest to expand their base of power.

B. *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER*

After affirming some of the most extraordinary exercises of presidential power in World War II, the Supreme Court rebuked the President right at the height of the Korean War. The occasion centered on a long-standing labor-management dispute. When in April of 1952 the Federal Wage Stabilization Board failed to broker an agreement between the steel industries and their employees, the United Steel Workers of America announced its intention to launch a nationwide strike.[150] In response, President Truman issued executive order 10340, which directed Secretary of Commerce Charles Sawyer to immediately seize the steel mills and ensure their continued operation.[151] After initially complying with the executive order, the owners of the steel mills challenged its constitutionality in the federal courts.[152]

Just one month after Truman issued his executive order, the Supreme Court heard arguments in the case.[153] Lawyers for the steel mills argued that the President's order amounted to an unconstitutional commandeering of private property and a usurpation of Congress's legislative authority.[154] Moreover, the President's actions arguably violated the basic procedures for reconciling labor-management disputes in the 1947 Labor Management Relations Act, more popularly known as Taft-Hartley.[155] President Truman's counsel responded that the order, though not expressly authorized by statute or the Constitution, was needed in order to avert a national catastrophe.[156]

150. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–83 (1952).

151. *Id.* at 583.

152. *Id.*

153. Truman entered his order on April 9, 1952. *Id.* Responding promptly due to the importance of the issues raised, the Court heard arguments on the case starting May 12, 1952. *Id.* at 584.

154. *See id.* at 582 ("The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President.").

155. *See id.* at 586 ("[T]he [labor-management dispute] plan that Congress adopted in [the Taft-Hartley] Act did not provide for seizure under any circumstances.").

156. *Id.* at 582.

The government's effort to wage war in Korea, after all, critically depended upon the uninterrupted production of steel.[157]

In a 6-3 ruling, the Court found in favor of the mill owners.[158] Each of the Justices in the majority wrote a separate concurring opinion, a fact that suggests that each was motivated by a slightly different set of considerations. For many, though, one central fact proved dispositive: when debating Taft-Hartley, members of Congress had considered, and rejected, an amendment that would have granted the President the power to directly intervene in labor-management disputes when the nation was at war.[159] Consequently, the will of Congress seemed to expressly prohibit the specific actions of President Truman. And as Justice Robert Jackson recognized in his now-famous concurrence, presidential power reaches its nadir when in direct opposition to the wishes of Congress.[160]

The media initially characterized *Youngstown* as a stunning rebuke of Truman's authority, and of the notion that presidents during times of emergency possess powers not explicitly recognized in either the Constitution or in statute. A *New York Times* editorial described the decision as "a redefinition of the powers of the President" that "deliberately checked" the "trend towards indefinite expansion of the Chief Executive's authority" and "minimize[d] the implied powers of the Presidency."[161] Likewise, the *Los Angeles Times* editorial page characterized the decision as Truman's "severest rebuff" from the Court, which found that "the President has no 'inherent powers' which enable him to make law to suit himself either in an emergency or at any other time."[162]

157. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952) (noting how "steel is an indispensable component of substantially all" weapons and materials used by the armed forces).

158. *Youngstown*, 343 U.S. at 589 ("[The] seizure order cannot stand.").

159. *See id.* at 586 (discussing Congress's refusal to adopt governmental seizure as a method of settling labor disputes).

160. *See id.* at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

161. *Steel: Theory and Practice*, N.Y. TIMES, June 3, 1952, at 28; *see also* Arthur Krock, *In the Nation: A Lesson for Critics of the American System*, N.Y. TIMES, June 5, 1952, at 30 (describing the significance of the decision considering "five of the six justices in the majority held against the leader of their party and the executive power from which they had received their appointments").

162. *Truman Gets His Severest Rebuff*, L.A. TIMES, June 3, 1952, at A4.

As in *Milligan*, elements of *Youngstown* reject the idea that presidents can freely claim powers during times of war that are unavailable to them during periods of peace. Justice Hugo Black, writing for the majority, suggested that Truman's greatest error consisted of usurping Congress's lawmaking powers.[163] The problem was not that private property was seized by the government; it was that the President, rather than Congress, ordered the seizure. "In both good times and bad," Black concluded, Congress alone retains the lawmaking power that is required to address the sorts of problems posed by the threatened steel workers strike.[164] No overriding public purpose, including the successful prosecution of a foreign war, justified the president's unilateral assumption of lawmaking authority.[165]

Checks on the independent exercise of presidential power during times of war also appear in the concurring opinions in *Youngstown*. Justice William Douglas began his opinion thus: "There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised."[166] Justice Jackson further worried that presidents might use wars as a pretext for asserting new controls over the conduct of domestic affairs. No president, he argued, can justifiably "enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[167]

While Justices in the majority challenged the President's unilateral policymaking, dissenting Justices emphasized the importance of presidential leadership during periods of war. Indeed, the strong view that emergencies afford presidents absolutely no additional power was in the distinct minority, as each of the concurring opinions offered exceptions to such a claim, and several (along with the three dissents) explicitly rejected it.[168] While extolling a rather narrow interpretation of

163. *Youngstown*, 343 U.S. at 589.

164. *Id.*

165. *Id.* at 588 (emphasizing that the "Constitution does not subject [the] lawmaking power of Congress to presidential . . . supervision or control," even when "[t]he power of Congress to adopt such public policies . . . is beyond question").

166. *Id.* at 629 (Douglas, J., concurring).

167. *Id.* at 642 (Jackson, J., concurring).

168. *See infra* notes 169–75 and accompanying text.

the Constitution's Commander-in-Chief Clause, Justice Jackson admitted that the Constitution itself might be unworkable if the Justices failed to "indulge some latitude of interpretation for changing times."[169] Justice Tom Clark openly endorsed the view that presidential power naturally, and unavoidably, expands during periods of crisis: "[T]he Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself."[170]

In fact, the Justices expressly held open the possibility that they would uphold some presidential actions during periods of war, even though these same actions would not withstand judicial scrutiny during times of peace. While finding this particular executive order unconstitutional, Justice Felix Frankfurter refused to "define the President's powers comprehensively."[171] But at various points, the Justices in the majority nonetheless suggested that they might have ruled differently had Congress at least formally authorized the military action,[172] or had the Korean War approached the size of either of the first two world wars.[173] From the vantage point of the Justices in the majority, the Korean War simply did not amount to a sufficiently pressing national security threat to justify the President's seizure of the steel mills.[174] But by recognizing that "the President's inde-

169. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

170. *Id.* at 662 (Clark, J., concurring).

171. *Id.* at 597 (Frankfurter, J., concurring).

172. *Id.* at 613 (Frankfurter, J., concurring) (recognizing the "powers that flow from declared war").

173. *Id.* at 659 (Burton, J., concurring) (recognizing that the current seizure did not result from "a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war"). Reflecting on this case nearly a half century later, Chief Justice William Rehnquist noted the significance of Truman's decision to call the Korean War a "police action" rather than a war that required Congress's formal authorization. He then concluded that "I think that if the steel seizure had taken place during the Second World War, the government probably would have won the case under the constitutional grant of the war power to the president." WILLIAM H. REHNQUIST, THE SUPREME COURT 191 (Alfred A. Knopf 2001) (1987); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 29 (1993) (noting the "sweeping claim of presidential prerogative" that President Roosevelt enjoyed during World War II).

174. *See Youngstown*, 343 U.S. at 659 (Burton, J., concurring) ("The present situation is not comparable to that of an imminent invasion or threatened attack.").

pendent power to act depends upon the gravity of the situation confronting the nation,"[175] the Court held open the possibility that at least some wars might permit, or even require, precisely the kinds of actions that Truman himself took in 1952.

Within the context of the Korean War, one can well imagine still more changes to the case's facts that might have elicited a different ruling. One wonders, for instance, how the Justices might have ruled had: it been employees of a weapons manufacturer, rather than a steel industry, who threatened to strike; clearer evidence of a steel shortage existed; the threatened strike came on more suddenly, and the prospective of a resolution appeared dimmer; or a more convincing case been made that success on the battlefield critically depended upon the continued operation of the mills. According to Maeva Marcus, "the majority of the Court appeared unconvinced that the necessity for the seizure was as great as the administration claimed," in part because the government was still allocating steel for recreational purposes and substantial inventories of steel were reportedly on hand.[176] Indeed, according to some observers at the time, the country had enough steel for defense projects for at least thirty days after a strike, during which time labor and management might have settled their differences, and the steel mills might have reopened without the need for presidential intervention.[177] Had steel supplies been scarcer, or had the strike been more disruptive, the Court might well have affirmed Truman's order.[178]

Shortly after the early and more sensationalist media reports on the case, observers began to see that *Youngstown*

175. *Youngstown*, 343 U.S. at 662 (Clark, J., concurring).

176. Maeva Marcus, *Presidential Power in Times of Crisis:* Youngstown Sheet & Tube Co. v. Sawyer (1952), *in* CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT 65, 76 (Gregg Ivers & Kevin T. McGuire eds., 2004).

177. *Steel: Hands Off*, WASH. POST, June 11, 1952, at 14.

178. Interestingly, editorials in the *New York Times* abandoned their initial interpretation of the case as a broad repudiation of presidential wartime power, and instead began to publish a series of articles that suggested the Supreme Court left open the possibility that various mitigating circumstances might justify the President taking extraordinary measures in future crises. *See, e.g.*, Arthur Krock, Editorial, *Powers of a President After the Steel Case*, N.Y. TIMES, June 8, 1952, at E3 (listing areas in the concurring opinions that left room for the President to act without specific statutory authority); Editorial, *Seizure Ends, But Strike Goes On*, N.Y. TIMES, June 8, 1952, at E2 (describing how the Court's decision does not necessarily "preclude extraordinary Presidential action in [future] times[s] of emergency").

plainly did not cage the wartime President once and for all. Reflecting on the case in a June 5, 1952 essay, Walter Lippmann argued that the President unquestionably retained the authority to use emergency measures should a genuinely unanticipated national emergency arise.

> No one . . . has said or implied that the President cannot act to avert a national disaster unless there is express statutory authorization for the measures he believes he must take. If the disaster, which has to be dealt with, is of a kind which no one has foreseen, if therefore there is an absence of statutory law, there is no doubt at all that the President could act according to his best judgment . . . until Congress can convene and can legislate.[179]

Stephen Galpin at the *Wall Street Journal* shared Lippmann's perspective, claiming that "[n]one of the nine justices contended that the President does not have some powers not expressly spelled out in the Constitution. To contend that would be to deny the President the power to act quickly and decisively in a real emergency . . . such as an invasion."[180]

Youngstown constituted a genuine setback for Truman's effort to wage an increasingly unpopular war in Korea. Justice Jackson's concurrence established, arguably, the single most important framework for judges and Justices who would subsequently evaluate challenges to presidential power. The case, though, hardly amounts to a wholesale repudiation of crisis jurisprudence. In this instance, a rather stunning alignment of facts about the Korean War, the labor-management dispute, and the legislative history of Taft-Hartley worked against the President. But the Justices repeatedly suggested that under slightly different circumstances, they might have upheld the President's wartime activities, knowing full well that they plainly would not during times of peace.

C. *BOUMEDIENE V. BUSH*

Nearly 150 years after *Milligan*, the Supreme Court once again evaluated the use of wartime military tribunals to try individuals suspected of either plotting or engaging in violence against the U.S. government.[181] This time, Lakhdar Boumediene stood at the center of the controversy. The federal gov-

179. Walter Lippmann, Op-Ed., *Today and Tomorrow: The Court and the Steel Case*, WASH. POST, June 5, 1952, at 17.

180. Stephen K. Galpin, *The President's Powers: Impact of Court Ruling Goes Beyond Its Literal Words*, WALL ST. J., June 6, 1952, at 4.

181. Boumediene v. Bush, 128 S. Ct. 2229, 2229 (2008).

ernment charged Boumediene, a citizen of Bosnia-Herzegovina, with planning an attack on a U.S. Embassy in October of 2001.[182] At the time of the Supreme Court hearing, Boumediene was held at the U.S. Guantanamo Bay Detention Facility, which, according to the Bush administration, remained outside of the jurisdiction of U.S. civilian courts.[183] *Boumediene v. Bush* raised questions about the legality of the detention of all suspects held at the Guantanamo Bay military base, as well as the constitutionality of the system of military tribunals designed to try them.

In June 2008, the Supreme Court once again repudiated presidential assertions of power.[184] In the majority opinion, Justice Anthony Kennedy insisted that the Supreme Court could, in fact, consider habeas appeals by Guantanamo detainees, even though Congress had stripped the U.S. civilian courts of jurisdiction over the trials of these non-U.S. citizens.[185] The Court further ruled that the operating system of military tribunals did not afford sufficient Due Process protections and, in the Court's judgment, would render decisions that were prone to error.[186] *Boumediene* thereby paved the way for Guantanamo prisoners to challenge their detainment in civilian courts, and set in flux a system of tribunals that had been years in the making.

It is much too soon to evaluate *Boumediene*'s long-term significance. In the near term, the case appears to have upset the Bush administration's anti-terrorism policies.[187] As one de-

182. Matteo M. Winkler, *When 'Extraordinary' Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 LOY. L.A. INT'L & COMP. L. REV. 33, 61 (2008).

183. *See Boumediene*, 128 S. Ct. at 2244 ("The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus.").

184. *Id.* at 2275 (holding that the petitioners are entitled to seek the writ of habeas corpus, and striking down Military Commissions Act Section 7 as unconstitutional).

185. *Id.* at 2277. The existing system of military tribunals did offer detainees limited access to civilian courts. Combatant Status Review Tribunals (CSRTs), which operated in the District of Columbia Court of Appeals, were charged with reviewing the status of individuals held at Guantanamo. *Id.* at 2241 ("[T]he Deputy Secretary of Defense established [CSRTs] to determine whether individuals detained at Guantanamo were 'enemy combatants' . . . .").

186. *Id.* at 2270.

187. *See* Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. 172, 172 (2008) (noting how the Court's recent de-

tainee's defense lawyer put it, the ruling "appears to demolish this argument that the Constitution does not apply in Guantanamo Bay."[188] Georgetown Law Professor Neal Katyal called the decision "astounding."[189] Robert Barnes of the *Washington Post* characterized the ruling as "a historic rebuke to the Bush administration,"[190] while Jonathan Mahler, a *New York Times* journalist, wrote, "it seems indisputable that the court is more powerful today than ever."[191] The Supreme Court decision dealt "perhaps the final blow" to the President's detainee policy, according to *Boston Globe* reporter Farah Stockman.[192] "The court's majority took aim at Bush's long-held assertion that, as U.S. commander in chief during wartime, he has broad powers to detain terrorist suspects as he sees fit in order to protect the nation."[193] Legal experts agreed that *Boumediene* "left Bush with few options."[194]

As noted above, the Justices in previous decisions made much of the fact that the President lacked legislative authorization for his wartime directive (*Milligan*), or that he acted contrary to the will of Congress (*Youngstown*). But in *Boumediene*, the President had plainly secured Congress's authorization to establish military tribunals, and the Court nonetheless ruled against his assertion of power.[195] Indeed, the President sought this congressional authorization under the instruction of some of the Justices just two years earlier. In *Hamdan v. Rumsfeld*,[196] a precursor to *Boumediene*, members of the Court informed the President that the system of military tribunals he had unilaterally created would stand on firmer constitutional

cision in *Boumediene* has the possibility to "lead to the frustration and/or invalidation of existing [anti-terrorism] policies").

188. William Glaberson, *Lawyers for Detainees Plan to Use Justices' Ruling to Mount New Attacks*, N.Y. TIMES, June 14, 2008, at A14.

189. Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK3.

190. Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A1.

191. Mahler, *supra* note 189.

192. Farah Stockman, *Justices Open US Court to Detainees: Deal Setback to Bush; Influx of Cases Expected*, BOSTON GLOBE, June 13, 2008, at A1.

193. *Id.*

194. *Id.*

195. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2242, 2274 (2008) (explaining that although the MCA authorizes the creation of military tribunals, the Act unconstitutionally suspends the writ of habeas corpus).

196. 548 U.S. 557 (2006).

ground if he secured Congress's formal authorization.[197] At that time, the system of military tribunals operated under a 2001 military order issued by the President.[198] In 2006, therefore, Congress enacted the Military Commissions Act (MCA), which authorized the system of military tribunals proposed by the President.[199] In 2007, President Bush then issued executive order 13425, which, under the unmistakable authority of MCA, superseded the original military order.[200] Remarkably, though, the Court in *Boumediene* still saw fit to overturn a system of tribunals that both the President and Congress had a hand in creating.

Dissenters in *Boumediene* charged the majority with a "bait and switch,"[201] an accusation that conservative media and Republicans in Congress vaunted repeatedly in the days that followed the ruling.[202] But these objections raise a more fundamental question: if the Court was going to provide enemy combatants with access to civilian courts, why did it not do so in *Hamdan* rather than *Boumediene*?[203] The President's system

197. For example, Justice Breyer stated in his concurrence:

> Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Id. at 636 (Breyer, J., concurring). For more on this issue, see Michael P. Van Allstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309–71 (2006) (analyzing the "claimed power of the president to create federal law on the foundation of the executive's status as the constitutional representative of the United States in foreign affairs").

198. Military Order No. 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

199. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

200. Exec. Order No. 13,425, 72 Fed. Reg. 7,737 (Feb. 14, 2007).

201. *See* Boumediene v. Bush, 553 U.S. 2229, 2285 (2008) (Roberts, C.J., dissenting); *id.* at 2294 (Scalia, J., dissenting).

202. *See, e.g.*, Editorial, *Combating the Combatants Decision*, NAT'L REV., June 13, 2008, http://author.nationalreview.com/?q=MjE1MQ== (follow "Combating the Combatants Decision – 06/13" hyperlink) ("There was still the fact that Congress—at the beckoning of the very Court—had provided the jihadists held at Gitmo with an unprecedented array of protections, including judicial review.").

203. In *Hamdan*, the Court found that the then-operating military tribun-

of military tribunals, after all, stood on significantly stronger ground in the latter case than in the former.[204] Whereas President Bush was implementing a unilateral directive in the first case, he was faithfully executing a congressional statute in the latter.[205] Moreover, the reconstituted military tribunals under the MCA prohibited the use of evidence obtained by torture or inhumane treatment,[206] which, some argued, should have allayed concerns raised by the majority in *Hamdan* that the military tribunals violated the Geneva Conventions.[207]

One can only speculate about why the Court passed on the opportunity to substantively reject a unilaterally-created tribunal system, only to do so two years later. Contributing factors, though, likely include the absence of any terrorist attack stateside,[208] the growing public disaffection with the Iraq War,[209] and the President's poor standing with the American public.[210] This was a President, after all, whose party lost both chambers of Congress in the 2006 midterm elections[211] and who

als lacked "power to proceed," but it stopped short of insisting that enemy combatants have access to civilian courts. Instead of examining the President's argument that it would be impracticable to apply the rule and principles of law that govern the trial of criminal cases in the United States districts courts' to Hamdan's commission, the Court called into question the President's unwillingness to apply the "rules for courts-martial." Hamdan v. Rumsfeld, 548 U.S. 557, 567, 623 (2006).

204. Military Commissions Act of 2006, § 948b ("The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.").

205. *Id.*

206. *Id.* § 948r(b).

207. *Hamdan*, 548 U.S. at 567. See, in particular, Article 5 of the Third Geneva Convention, which states that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

208. Patrick McGeehan, *Bush Honors Veterans at the Intrepid*, N.Y. TIMES, Nov. 12, 2008, at A24 (mentioning "the absence of another terrorist attack on American soil since 9/11").

209. *See* Carl Hulse, *On Wave of Voter Unrest, Democrats Take Control of House*, N.Y. TIMES, Nov. 8, 2006, at P2 (describing how "public dissatisfaction with the Iraq war" was a primary reason for Democrats taking control of the House).

210. *See* Paul Steinhauser, *Poll: More Disapprove of Bush Than Any Other President*, CNN NEWS, May 1, 2008, http://www.cnn.com/2008/POLITICS/05/01/bush.poll/.

211. Hulse, *supra* note 209, at P2.

registered among the lowest approval ratings in the modern era.[212] Crucially, the threat of terrorism in the eyes of many had abated significantly, in part because of the lack of any attacks on the U.S. homeland. Reflecting on the Court's ruling in *Hamdan*, Robert Pushaw recognized that "the Justices usually defer to the military judgments of the majoritarian branches, often because they have no other realistic choice. If the terrorists escalate their attacks and the President responds aggressively, history suggests that the Court will back down."[213] Had the United States suffered another catastrophic attack between the summers of 2006 and 2008, it seems plausible that the Supreme Court would have rendered a different decision.

Boumediene itself offers evidence in support of this supposition. The Court repeatedly emphasized its appreciation for the national security threat that the nation faced, and the importance of granting the President deference as he designed policies to address it.[214] Just as it did in *Youngstown*, however, the Court in *Boumediene* ruled against the President because a majority did not believe that the President's policies were strictly necessary for the nation to prevail in war.[215] Justice Kennedy wrote that, "although the Court is sensitive to the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad, these factors are not dispositive because the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction."[216] The Court thus implies that if credible evidence did exist, then concerns about the "financial and administrative costs" of a ruling against the President would not merely be salient, they would prove dispositive.

212. Steinhauser, *supra* note 210.

213. Robert J. Pushaw, Jr., *The 'Enemy Combatant' Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1078 (2007).

214. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.").

215. *Id.* at 2237.

216. *Id.* Later in the opinion, Kennedy again noted that, "[t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over [Guantanamo Bay], none are apparent to us." *Id.* at 2261.

As it did in both *Milligan* and *Youngstown*, the *Boumediene* Court couched its opinion in language that appeared, at least superficially, to reject crisis jurisprudence. Kennedy articulated the position most forcefully, insisting that, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times."[217] But notice the language here. Justice Kennedy did *not* write that the laws and Constitution must bind the President in war just as tightly as they do in peace—rather, they must merely "survive" and "remain in force."[218] And throughout the majority opinion, Kennedy identified material wartime conditions under which the Court might uphold presidential policies.

The Court, for instance, raised a variety of concerns about the type of war that preoccupied the nation. In particular, the majority expressed skepticism that crisis jurisprudence requires the Court to defer to the President in a war that lacks clear frontlines, enemies, and timetables.[219] And just as Truman's failure to secure a formal congressional authorization for waging the Korean War influenced the majority in *Youngstown*, so did Bush's failure to formally declare war for the majority in *Boumediene*. Kennedy emphasized that past practices of judicial deference during declared wars did not establish precedent for the current military campaign.[220] Though "common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the enemy . . . ."[221] Deference, the Court explicitly recognized, is often justified during times of war. But consistent with the dictates of crisis jurisprudence, the Justices themselves must evaluate whether the exigencies of a particular war require deference to a particular policy that, all concede, would not withstand judicial scrutiny during peace.

Harkening back to *Milligan*, the *Boumediene* Court again noted that the military tribunals, over which the government retained complete control, were physically located far from the

217. *Id.* at 2277.

218. *Id.*

219. *See id.* at 2262 (discussing the immeasurable duration of conflict and territorial limits of the war).

220. *Id.* at 2248–49.

221. *Id.*

field of battle.[222] Had this been otherwise, though, deference to the President might have been justified. "[I]f the detention facility were located in an active theater of war," Kennedy expressly noted, "arguments that issuing the writ would be 'impracticable or anomalous' would have more weight."[223] Then, later in the opinion, Kennedy admitted that:

> The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus.[224]

Substituting "government power" for "law's writs" yields a near-perfect expression of crisis jurisprudence. After all, crisis jurisprudence does not require the judiciary to uphold every action taken by presidents during times of war. Rather, it asks judges and Justices to evaluate the context in which presidents take action. If courts deem the exigencies of the war at hand sufficiently great, and the President's policy sufficiently important to protecting the nation, then they are to recognize the exceptional nature of war and defer to the President, even though a strict reading of existing statute or the Constitution counsels otherwise.

Assessments of such "practical considerations" of war constitute the key point of disagreement between the five members of the majority and the four dissenters in *Boumediene*. In his dissent, Chief Justice Roberts repeatedly cautioned the Court not to second-guess the elected branches, which retain more expertise about the conduct of war than does the judiciary.[225] And over and over again, Roberts quoted precedent in advocating that the government's protection of individual rights be "'tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict.'"[226] The gov-

222. *Id.* at 2261–62 (noting how the facility is not "located in an active theater of war").

223. *Id.* (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)).

224. *Id.* at 2274–75. In his short concurrence, Justice Souter similarly noted that "in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country." *Id.* at 2278, (Souter, J., concurring).

225. *See, e.g.*, *id.* at 2280 (Roberts, C.J., dissenting) ("All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.").

226. *Id.* at 2285 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004)).

ernment's "weighty interests" during war deserved not mere recognition, Roberts insisted; in this instance, they required actual deference.[227]

In his own dissent, Justice Antonin Scalia appeared simply aghast at the majority's unwillingness to defer to the other branches of government as they fought the single most important war of the new millennium. He began his dissent with a long list of the offences committed by terrorists against the United States. "America is at war with radical Islamists," he intoned, and then proceeded to count off the number of U.S. citizens who died in every major terrorist attack since the 1983 bombing of the Marine barracks in Lebanon.[228] The Court had no business overturning a policy that both the President and Congress deemed imperative to the nation's fight against terrorism.[229] Meddling in their affairs, Scalia ominously predicted, "will make the war harder on us. It will almost certainly cause more Americans to be killed."[230]

Boumediene, it bears recognizing, does not settle the dispute over existing military tribunals. Detainees at Guantanamo now have greater access to U.S. civilian courts, but as of this Article's publication, it remains unclear what specific Due Process protections they will be granted. We still do not know whether civilian courts retain jurisdiction over only those detainees held at Guantanamo Bay, or whether the courts might hear appeals from suspects held at other military posts around the globe. And, of course, we have yet to see how the newly-elected President Barack Obama and the strengthened Democratic majorities in Congress will respond to this gauntlet laid down by the Supreme Court.

One thing, though, is certain: as written, much of *Boumediene* actually affirms crisis jurisprudence. The majority recognized a variety of instances when judicial deference to the President is due in wartime, a central tenet of crisis jurisprudence. The dissent, moreover, railed against the hubris demonstrated by a group of Justices telling the elected branches how they

227. *Id.*

228. *Id.*

229. *See id.* at 2296 ("It is . . . clear that Congress and the Executive—*both* political branches—have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war . . . .").

230. *Id.* at 2294.

ought to wage war. And a single vote separates the two sides on this dispute.

Like the previous two cases, *Boumediene* also raises important questions about the timing of Supreme Court rulings on presidential power. In *Milligan*, the Court waited until after the Civil War had ended before overturning a conviction secured under Lincoln's system of military tribunals. In *Youngstown*, the Court ruled against a President who was waging a very different war (both in scope and popularity) than the one he commenced two years earlier. And most striking, perhaps, the Court took a pass on Bush's military tribunals in *Hamdan*, only to overturn a statutorily authorized version of them two years later in *Boumediene*. Late in unpopular wars, when the nation has either grown accustomed to a perceived foreign threat, or the threat itself has substantially abated, presidents would appear most vulnerable to a setback in the courts. If these three cases are emblematic of larger trends, past and present, we can expect twenty-first century presidents to initiate wars without substantial judicial interference, and to enjoy continued deference as long as they maintain domestic political support.

CONCLUSION

Milligan, *Youngstown*, and *Boumediene* affirm the Supreme Court's willingness to periodically stand up to wartime presidents. Justices will not permit presidents to do whatever they please during times of war, summoning Locke or Lincoln to justify acts that patently violate existing statutory or constitutional provisions. Those who advocate a narrow, "Business as Usual" reading of the President's commander-in-chief powers can find language to support their claims in each of these three cases.

It is important, though, not to overstate matters. For presidents waging war, these cases were not total defeats. Again and again, the Court suggested alternative situations under which it would uphold the President's wartime policies. And in each case, three or four dissenting Justices appeared convinced that the contemporary war justified the President's actions. The cases, moreover, confirm the basic principles of crisis jurisprudence. Again, crisis jurisprudence does not dictate that political and constitutional checks on presidential powers wholly

dissipate during times of war. Rather, crisis jurisprudence suggests that judges and Justices recognize the exceptional nature of war and grant special allowances to the presidents who wage it. In these three cases, a majority of Justices chose not to grant such allowances. But almost every Justice admitted that under different circumstances, they would. And in so doing, the Justices breathed life into crisis jurisprudence at the same moment that they defied a president waging war. With these rulings, the Court struck down, but not back.