INTER ARMA SILENT LEGES: IN TIME OF WAR THE LAWS ARE SILENT

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Inter Arma Silent Leges: In Time of War the Laws Are Silent

On October 26, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act was passed into legislation. Title 1, Section 106 states that the president has the authority to “confiscate property…that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States.” Title 2, Section 201 of the USA PATRIOT Act provides for the authority to intercept wire, oral and electronic communications relating to terrorism. Unauthorized searches and confiscation of property would seem to be in violation of Americans right to privacy. Although the words ‘right to privacy’ do not appear in the Constitution, Americans have come to expect the right to be left alone in their personal lives, possessions, and property. In addition, the Fourth and Fifth Amendments along with interpretations by the courts have established there is protection for one’s life and property from governmental abuse. So, the USA PATRIOT Act seems to be in violation of the individual’s right to privacy.

The most striking part of the USA PATRIOT Act was the minimal amount of debate that surrounded the passage of it. According to the Electronic Privacy Information Center, Attorney General John Ashcroft gave the 342-page document to Congress, instructing them to pass it within one week without changes. There was little debate and no House, Senate, or Conference Reports were made. According to

1 U.S.A. PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Public Law 107-56: GPO, 2001).
EPIC, “The chairman of the Senate Judiciary committee managed to convince the Justice Department to agree to some changes…. However, the Attorney General warned that further terrorist attacks were imminent, and Congress would be to blame if it did not pass the bill. The hurried debate led to Leahy’s contributions being mostly stripped from the bill.”3 Leahy had convinced the Justice Department to agree to change some of the privacy standards, but the hurried debate led to most of those concessions being taken away. Senator Russ Feingold was the only member to object to the bill saying, “In the wake of these terrible events our government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster.”3 How is it that this act came to be passed without further discussion into the possibility of its unconstitutionality and vast new governmental powers? What justifications do the branches of government give in order to validate passing this and other similar acts? I will examine different governmental tactics as well as historical examples of previous constitutional controversies that have helped set the precedent for today.

The internment of Japanese-American citizens after the attacks on Pearl Harbor, as well as the Alien and Sedition Acts of 1798 are two prior incidents that seem to overreach federal power and violate fundamental rights. Early presidents called forth the militia without congressional authorization to suppress internal rebellions, and in 1919 the Justice Department conducted what became known as Palmer Raids on suspected communists in America. Strikingly, they all coincide

around a time of national emergency. The three branches of government occasionally come together to help justify passing acts that compromise individual civil liberties. Louis Fisher’s work on constitutional law will be pertinent for this analysis. Several other well-established authors will be used including Richard Posner, Howard Ball, and others. Posner is a judge who writes extensively on the separation of powers doctrine and Ball is a professor of political science and his expertise is on the Supreme Court.

Furthermore, these examples of constitutionally questionable acts are easily passed and accepted during a time of national crisis. A long history of congressional and judicial precedent as well as expanding presidential power are responsible for the relinquishing of constitutional guarantees in return for the expansion of power during times of national emergencies. The precedent for such justification stems from the interpretation of the separation of powers doctrine as well as the doctrine of checks and balances. Ken Kersch, a scholar in the field of civil liberties, suggests that constitutional development is a linear process that changes throughout time in conjunction with the multiplicity of meanings and interpretations derived. This is how the construction of civil rights changes throughout time as well. He argues that changes in the meaning of some of the rights in the Bill of Rights had to undergo changes as America developed from an agrarian, rural state to an industrial, urban state. These changes may have been small and spread throughout several decades, but together they have culminated in an expansion of federal power and a multiplicity of meanings to help produce future justifications. History has proven that when a power
granted collides with an independent right, the right does not necessarily win, as would be expected. We are currently living in a time that values the protection of civil liberties, but that is not to say they were not valued prior to the initial civil liberties movement of 1910. The Constitution was written to check unaccountable power, and Americans throughout history have expected the federal government to uphold this obligation. Currently, however, the balance between expansion of power during a national emergency and individual liberties is overwhelmingly out of balance.

Our system of government was set up to provide for checks and balances that ensure each branch will be kept within its specific boundaries outlined in the Constitution. The doctrine of separation of powers will be discussed further, as well as its importance in guarding against the concentration of power. Louis Fisher, who writes extensively on this theory, says “That powers are separated to preserve liberties. But separation can also destroy liberties.” This destruction of liberties comes from the expansion of power each branch seeks to exert. Sometimes the separation can lead to fragmentation and division of authority, instead of the original intention of unity. Fisher states this precisely when he contends, “A tension runs throughout the American system of government. Statutory and constitutional restrictions are erected to keep the actions of the executive and legislative branches within legal boundaries. The drive for political power continually tests those boundaries, often stretching them to do what the law forbids.” The stretching that occurs comes from the interpretation of vague clauses within the Constitution. Over the course of time, the rights laid out in

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5 Ibid., xi.
the Constitution have been interpreted many different times and in many different
fashions. It is not easy to identify something as ‘unconstitutional’ since the document
itself is a framework that is still being interpreted today. Due to the vagueness of the
text, the rights and guarantees granted have been judicially-interpreted, since most are
not specifically stated. Today, it is even more important to reevaluate how certain
constitutional rights need to be revisited and reinterpreted.

For example, the Fourth Amendment protects against unreasonable searches
and seizures, and establishes the right to be secure in your home, papers, etc. In the
landmark case of Mapp v. Ohio (1961), the U.S. Supreme Court decided that anything
seized during an unwarranted search was illegal and inadmissible in a court of law.
However, with new technology, such as cell phones and the internet, a reinterpretation
is needed in order for the vagueness of ‘home’ to be relevant today. Does home
necessarily mean anything physically within the walls surrounding the home? Or can
home be interpreted as including conversations that can be traced from outside the
home or emails sent to someplace outside the home? The vagueness of the
constitutional text is continually being questioned and reinterpreted as technology
changes along with societal norms. As an example, the 2001 case of Kyllo v. United
States demonstrates the difficulty of doctrine to keep up with technological changes.
Police officers used a thermal imaging device from across the street to scan an
apartment complex for abnormal amounts of heat caused by marijuana heat lamps.
The Supreme Court ultimately declared the search unreasonable since the test revealed
details of a private home that previously could not be determined without entry using a legal warrant.

Even the founders debated the meaning of the text among themselves. When establishing the first national bank, the founders extensively debated the meaning of the word ‘necessary’ from Article 1, Section 8 known as the necessary and proper clause. James Madison defined necessary as ‘the means necessary to the end’ with the end being an enumerated power. He argued that creative interpretation of this clause could lead to a slippery slope. Thomas Jefferson defined necessary as ‘not convenient’ and also worried about a slippery slope deriving from confusion between the two. Alexander Hamilton defined necessary as anything needful, conducive, or incidental to the ‘general’ end of government, which is anything that works. Ultimately, John Marshall defined necessary as anything convenient or useful in his famous decision, *McCullough v. Maryland.* Seeing how even they had to interpret the meaning of the text only demonstrates the relevance of it today.

Throughout this thesis, I will examine how real and imagined crises have led to the expansion of federal power and to the eventual passage of the USA PATRIOT Act. I will briefly review the origins of the Constitution and the grants of power given to each branch. Next, I will proceed with an historical timeline highlighting significant acts and/or opinions which are viewed today as unconstitutional and were produced during times of national emergencies. Finally, I will conclude with the events of September 11, 2001 and how this emergency has led to the dissolving of several

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6 Kathleen, Sullivan, “American Constitutional Law” (notes taken by lecture, Ohio University, Athens, Ohio, January 14, 2009).
constitutional liberties and expansive presidential power. Fisher reasserts this point throughout his book by saying, “In these times of crises, or perceived crises, the constitutional system of checks and balances gives way to centralized authority and arbitrary actions, injurious not only to the individuals receiving the abuse but to the nation and its constitutional values.” During these times, “fear, anger, and bias swell in power to inflict personal, institutional and constitutional damage.” In conclusion, during times of emergency loyalty to the nation takes first place. This often times forces preserving the separation of powers to second place.

**Origins of the Constitution**

When the framers came together at the Philadelphia Convention to draft the Constitution, they were well aware of the difficulties that lie ahead. Furthermore, they were familiar with the British system of governance and they knew what aspects of that system they did not want to incorporate into the United States system. Separating the purse and the sword was one of the most important aspects of the Constitution. They did not want to leave the war-making power with the power to fund war. They vested Congress with the important ability of declaring war. In Article 1, Section 8 of the U.S. Constitution it states: “Congress shall have the power…to declare war…to raise and support armies…to provide for organizing, arming, and disciplining the Militia.” Only Congress can declare war, which was an important power that the framers did not want in the hands of the executive. As Louis Fisher states, “The

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Framers knew about dangers and emergencies and they understood the virtues of speed and secrecy. They lived at risk also, but drafted a charter that vested in Congress the crucial responsibility for moving the nation from peace to war.”¹ This was one of the fundamental separations that the framers held in high regard.

They did, however, vest in the executive the power to be commander in chief. Article 2, Section 2 states: “The President shall be 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” [Emphasis my own]. In present day justifications, presidents and executive branch administrators use the commander in chief clause to find authority to implement certain acts, justify their policies, disregard Congress, and expand power. Scholars debate whether this clause is merely a title or if it is an implication of further powers not specifically delegated. If one takes special note of the clause, it reads ‘when called into the actual service’, which once again is deemed only by Congress’s constitutional power to declare war. The interpretation of the time was that the commander in chief would be responsible for conducting, not declaring, war.

Another basic principle of constitutionalism, which is used in present day justifications to further expand power, is the doctrine of natural/higher law. John Locke’s *Second Treatise on Civil Government* argued that people lived in a state of nature that was governed by laws of nature that were true for everybody. The law directed people in how to live and reason in everyday life. This ‘higher law’ did not

need to be written, for everyone lived in this state already. Locke said, “Reason…which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.” Natural law ultimately stems from God and therefore it is natural for us to look to something ‘higher’ when we are in a state of uncertainty. Present day justifications have roots in this teaching by the fact that when a national emergency happens, people look to someone or something bigger than ourselves, in this case the government, to protect us. In essence, we freeze up and expect someone else to guide us through the crisis. Judge Andrew Napolitano summed up this analogy by saying, “The Natural Law school of thought argues that freedom comes by virtue of being created human, from our very nature, and holds that laws created by Kings or Legislatures are always secondary to the Natural Law.” This school of thought is also replicated in the Declaration of Independence when it states, “That all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.” It is at the very core of the United States system of government.

Locke also articulated about the function of the national government as a protector of the people. He referred to this power as the ‘federative power’, which would be construed today as national security since it was dealing with protection from external threats. As Jean Smith states, “Locke placed full responsibility for the “federative power” in the executive. In contrast to the domestic authority of the

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2 Fisher, Constitutional Conflicts, 3.
executive, which was severely restricted, the federative power was essentially extraconstitutional and depended upon the skill and judgment of those whom it was entrusted. This power derived from something outside of the Constitution and was exercised by Locke and those who studied his work. Today, these theories have been articulated into the expansion of the executive branch as they have sought to construe it as their extraconstitutional duty to protect the nation. Even though Smith realizes the origins of extraconstitutional interpretations, he later warns about the ability of that power to destroy liberties. He says, “A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument.”

By this, he means that although the Constitution allows the president to seek authority from other means, this cannot be a blank check to violate the separation of powers that was vital to the founding of our nation. As evidence, take Madison’s words from *The Federalist 47*, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The practice of allowing one branch, namely the executive, to hold all the power is exactly what the framers feared would happen and mirrored what they experienced from Great Britain. The British King was viewed as an enemy to the people, and the authors of the Constitution understood this and deliberately separated power amongst the branches of government. In terms of the branches checking each other’s power, Andrew Napolitano points out that it was understood that the liberties granted by the Bill of

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5 Ibid., 63.
Rights could be efficiently upheld by an independent judiciary. Thomas Jefferson, who was present at the Philadelphia Convention, was an active participant in arguing for an independent judiciary. However, as will be analyzed later, many times the judiciary sidesteps important issues and uses what is known as the ‘political question’ doctrine to eliminate themselves from the issue.

Another way that powers have been derived from the Constitution and helped to expand power is through what is known as implied or inherent powers. These powers are not specifically enumerated in the Constitution, nor specifically granted by Congress. Throughout history, executive officials have looked to increase their power by claiming inherent power. Fisher lists the different titles that have been conferred to imply this extraconstitutional power: “implied and inherent, incidental and inferred, aggregate, powers created by custom and acquiescence, and delicate ‘penumbras’, ‘interstices’, ‘emanations’, and ‘glosses’.” There are a few different places where one can look to try and interpret what the founders intended and how power has been derived.

The first place is the Tenth Amendment which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” During the Philadelphia Convention, debate ensued whether or not the words ‘expressly delegated’ ought to be included or not. However, it was argued by Madison that it was not possible to try and limit a government to exercise merely expressly delegated powers, and this was

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evidenced by his words in *Federalist 44*: “No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.”8 Authorizing any means to establish an end has been practiced time and time again throughout our nation’s history, and one of the places this can be justified from is the ‘necessary and proper’ clause. It states: “Congress shall have the power…to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States.” This clause, throughout time, has embraced many things and aspects that one would never have thought the framers intended or imagined.

One of the first instances of dealing with the implied powers issue was in 1890 in a case brought to the Supreme Court called *In re Neagle*. The case dealt with judges riding the circuit and the power to appoint deputy marshals, but the important piece from this case is what Justice Miller announced in the opinion: “In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is ‘a law’ within the meaning of this phrase.”9 [Emphasis my own]. Also, the Court held that the president’s duty also embraced “the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the

8 Ibid., 14.
government under the Constitution.” These examples explain just how early in our nation’s history powers were being derived and justified from sources outside the constitutional order. What starts out as a debate can then be used to justify an opinion of a case, which sets a precedent for multiple people and courts to seek authority from it.

*McCulloch v. Maryland* is another landmark case which resulted in the expansion of federal power. In the opinion, Marshall mirrored an idea from Justice Story’s *Commentaries* when he introduced what is called the concept of ‘resulting powers’. He explained that they were “powers which flowed not merely from a combination of the enumerated powers contained in Article 1, but from the aggregate powers of the national government itself.” All of these different cases and opinions is what helped to set the precedent for expansion of the federal government and the authority sought by government officials. Using words and phrases from these early cases, contemporary federal government officials have justified their actions of usurpation of power on these implied and inherent powers that stem from outside the Constitution. It is a complex and dangerous example of how limited grants of power, even limited, implied powers, can be reinterpreted and used as precedent to help claim extensive amounts of power. Like Fisher argues, “Practice and acquiescence for a number of years can be instrumental in fixing the meaning of the Constitution. To the extent that an action is favorably exposed to popular judgment, custom does expand

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10 *In re Neagle*, 135 U.S. 1, 27 (1890), accessed through Findlaw, March 14, 2010.
power.”¹² This practice and acquiescence is evident in today’s expansion of executive power, which has taken place and substantially grown from the Civil War onward.

The vagueness of the Constitution is beneficial when used properly. John Marshall argued that the Constitution was designed to be vague so that interpreters could make it relevant to the changing times. This is an important factor not to be overlooked. The founders were uncertain of what the future held, so they understood that they needed to write the Constitution in a way that would be relevant and would work for decades to come. This idea of a living Constitution is essential for the document to succeed today. Most judges currently view the document as a dynamic blueprint that helps guide them to the most constitutional answer. The dangers of vagueness arise when the people interpreting the Constitution use the textual gaps to construe their own ideals and values into it. In order to ensure a correct interpretation, discussion must take place to determine if it is legitimate. Furthermore, discussion is even more important when the government has implied powers from the textual gaps. Implied powers are not dangerous or illegitimate if the interpretative community discusses the constitutionality of the implied power. If the political process of checks and balances is in place, then this will eliminate abuse of implying powers from the Constitution. This thesis discusses the danger that arises when the discourse and political process is shut down due to a national crisis.

¹² Fisher, Constitutional Conflicts, 18.
Early Examples: Alien and Sedition Acts

The Constitution is a document meant to preserve and protect individual liberties from what is not expressly stated or implied. Seeking ‘inherent’ power, as discussed previously, can put those liberties in a dangerous position to be abused. The danger comes when the political branches stop checking power. This section highlights how early partisan politics caused an unhealthy balance between individual liberties and federal power. During the nineteenth century Fisher argues that “presidents resorted to military force for the announced purpose of protecting American lives and property—actions that would be cited as a legal source for enlarging executive power.”¹ Even in the early years of the republic, with the new democratic spirit alive, this action of governmental usurpation of power was present. Examples of these smaller earlier practices include President George Washington’s Neutrality Proclamation, calling forth the militia when Congress was not in session, and the Prize cases. Following these precedents, civil liberties were majorly curtailed and the executive expanded authority through the Alien and Sedition Acts of 1798.

When George Washington was inaugurated as the nation’s first president, he declared that ‘we walk on untrodden ground’. He meant that this was a new path the United States was headed along, and uncertainty lay ahead. When the French were at war overseas, the United States had to decide its position. Washington responded with an impartiality statement in 1793. Debate ensued between Hamilton and Madison whether or not the president had the authority to declare foreign matters. They

¹ Fisher, Presidential War Power, 16.
exchanged arguments using the pseudonyms “Pacificus” (Hamilton) and “Helvidius” (Madison). Hamilton’s argument was that Washington had authority to issue a proclamation because the power of foreign relations was executive in nature. He also used the Article II argument of presidential authority found in the commander in chief clause. Madison, on the other hand, believed that Congress maintained authority over foreign relations unless expressly stated by the Constitution. He argued his point based upon Congress’s power to declare war. Even though Congress has continued to declare neutrality henceforth, Hamilton’s argument laid precedent for future expansion of executive authority and started the debate over the president’s constitutional powers.

During Jefferson’s presidency, there was debate about whether or not he had the authority to call forth the militia when Congress was not in session. After Congress had recessed in 1807, a British ship fired upon the Chesapeake, a U.S. ship, causing Jefferson to immediately respond to the emergency with military action. He reported his action to Congress as they reconvened: “To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved.”\(^2\) Here Jefferson acted on his inherent authority as commander in chief and felt awaiting constitutional authority from Congress would cause an even bigger consequence to the nation. Hamilton, again writing under a pseudonym ‘Lucius Crassus’, did not believe Jefferson had to explain his actions to Congress. He wrote, “It belongs to Congress only, to go to war. But when a foreign nation declares, or openly and avowedly makes

war upon the U.S., they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.”³ Debate about the president’s ability to conduct war laid the framework for future expansion of executive authority.

During the War of 1812, President Madison responded to a rebellion over the whiskey tax in Pennsylvania by calling forth the militia. The Court responded to his action of suppressing an internal rebellion in the case of *Martin v. Mott*: “The authority to decide whether the exigency has arisen belongs exclusively to the President, and that decision is conclusive upon all other persons.”⁴ The Court in essence declared that the president has the authority to decide whether an emergency is dire enough to commit troops without congressional authorization. This decision is contradictory to how the framers intended the president’s authority to be used. They were adamant about circumscribing his authority to make unilateral military decisions. As Louis Fisher says, “The President never received a general power to deploy troops whenever and wherever he thought best, and the framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation.”⁵ This is not the way the government has reacted in times of war, however.

During the Civil War, we see another example of a crisis leading to an expansion of executive power. This was a period when the United States was desperate to find a way to keep the nation united. Faced with imminent danger, the

⁴ Smith, *The Constitution and American Foreign Policy*, 171.
Supreme Court decided a series of cases known as the Prize cases in which President Lincoln was given unilateral authority to decide military actions. Justice Grier spoke for the majority and issued this: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is found to accept the challenge without waiting for any special legislative authority.”6 (Emphasis my own). Does this ‘special legislative authority’ mean Congress’s constitutional right to declare war? One can see how this opinion has been used as precedent in modern attempts to usurp power. Justice Grier continues about the president’s commander in chief role:

Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decision and acts of the political department of the Government to which this power was entrusted. ‘He must determine the degree of force the crisis demands’.7 [Grier’s emphasis].

This case is a startling example of a national crisis that gave way to the allowance of greater executive power. Congress was given the constitutional right to declare war, and this case sets the precedent for future expansion of executive authority. What the Court may have thought was a temporary assertion of power has turned out to be used to justify present day expansion of power as well.

The most startling example from this early period comes from the rights and liberties guaranteed by the Constitution that were abridged in the name of national security through the passage of the Alien and Sedition Acts. The acts took part through

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7 Ibid.
a sequence starting with a Naturalization Act, followed by two Alien Acts and a Sedition Act.

At the time, 1798, war with France was looming along with political divisiveness between Federalists and Republicans. Prior to this time, political parties were almost nonexistent, with people typically supporting politicians and not necessarily a party. With the election of 1800 coming closer, the Federalists were adamant to stop the newly formed opposition, the Jeffersonian Republicans. The Republicans supported the French Revolution and wanted the U.S. to aid in the fight. In order to garner support, the press created a heightened sense of emergency by frequently reporting of spies lurking in the United States. People began to urge the government to stop this before war broke out and as anxieties heightened. The Federalists were determined to stop this opposition. In this period of U.S. history, the freedom of speech and expression was one that was held dearly by the commonwealth. As one scholar puts it, “In 1798, freedom of the press was already the people’s ‘darling privilege’, as Federalist Congressman Harrison Gray Otis of Massachusetts put it during the Sedition Act debate.”\(^8\) The founders gained a majority of their independence from Great Britain through the press, and this freedom was a high priority when constructing the Bill of Rights. Although this freedom was viewed as a privilege, this era in U.S. history did not provide a strong protection for the freedom of

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press or other First Amendment civil liberties. However, the debate proceeding the Alien and Sedition Acts argues for stronger civil liberties protections.

Due to the urgency created by the citizenry, the government responded by passing the Naturalization Act, which required all aliens to maintain U.S. residency for fourteen years, instead of five, before gaining citizenship. However, a week later Congress passed the Alien Act which allowed the president to deport any aliens he determined were dangerous to the safety of the United States. As Louis Fisher argues, the Alien Act “transferred unchecked power to the President to deport suspicious aliens, and the statute added procedures for notifying the alien about his deportation. An alien could seek from the President a license allowing him to avoid deportation…granting the license was discretionary on the part of the President and he could revoke the license whenever he shall think it proper.”9 Leaving discretion to the president to revoke any license he deems proper is a dangerous power not originally granted to the president. It was carelessly given to him during a time of emergency, with no clear definitions of what crimes and punishments the aliens had done.

Next, the second Alien Act was labeled the Alien Enemies Act and was passed another week after the first one. This time, any alien who identified with an enemy nation was subject to arrest, imprisonment or deportation. This is an awfully slippery slope from the first act, and was heightened by the sense of urgency and crisis looming throughout the nation. This time, there was no need to suspect improper activity; mere identification with an enemy nation sufficed10 to arrest or imprison the alien. One can

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10 Ibid.
easily see how this act sets precedent for modern day imprisonment of enemies deemed dangerous to the U.S. during wartime. Guantanamo Bay is an example that will be discussed later in which President Bush imprisoned citizens and aliens deemed ‘enemy combatants’ without allowing them due process of law. Some of these prisoners have been there for years without an end in sight. This also parallels how the Alien and Sedition Acts were used. Andrew Napolitano says, “The Acts even allowed the President to imprison certain aliens in the United States for as long as the President felt public safety required it.”\textsuperscript{11} Legislation such as the Alien and Sedition Act is not only a curtailment of civil liberties at that time, but it is also dangerous because of its permanency throughout history. Although the Naturalization, the first Alien Act and the Sedition Act had sunset clauses that allowed them to expire, the Alien Enemies Act still stands and the constitutionality of the acts was never decided upon by the Supreme Court. During a crisis, people justify these actions because they are viewed as temporary solutions, but it is evident throughout history that once expansion and authority are given it is very hard to get them back.

Lastly, the Sedition Act was passed another week later by Congress and this time the penalties of the act went to \textit{citizens} who were deemed ‘seditious’. This was in an effort to halt opposition from the Republicans. The statute reads that punishment went to anyone who said (or wrote) anything about the president or Congress if: 1) it was deemed to be “false, scandalous and malicious”, 2) had the intent to “defame” those political institutions or bring them into “contempt or disrepute”, 3) “excite” any

\textsuperscript{11} Napolitano, \textit{The Constitution in Exile}, 195.
hatred against them, or 4) “stir up” sedition or act in combination to oppose or resist federal laws or any presidential act to implement those laws.”\textsuperscript{12} The Sedition Act was extremely political, and was intended to be used against the Jeffersonian Republicans. Their political opposition was cast as sedition and allowed them to be prosecuted under this act.

The Federalists also discouraged political opposition by writing about it in the press. One Federalists paper, \textit{The Porcupine’s Gazette}, reported about the uselessness of debating the acts. It reported, “Twice or more he [a local farmer] has been to the tavern to find a newspaper, and read the laws...Bet one mug of toddy on the meaning of a certain passage in the act and lost. He has been to the tavern 5 times since to run down the tax and alien and sedition act—spent lots of time and money each evening. Such are the many of the growlers against our government.”\textsuperscript{13} This passage shows how Federalists not only discouraged political debate, but they alluded to the fact that common citizens should not debate policies, nor do they know the meaning of the acts. The framers intended the people to be able to censure the government and their actions, not the other way around. The act also, as Curtiss writes, made it seditious to try and weaken the confidence of the citizens in their government, or speak maliciously against the administration, or defend the actions of the French.

Examples of political opposition found in the Republican newspapers of the time highlight that people were debating the constitutionality of the acts. From \textit{The Independent Chronicle} comes this: “And whereas those Acts of the Federal

\textsuperscript{12} Fisher, \textit{The Constitution and 9/11}, 79.

Government called the Alien and Sedition Acts, have created uneasiness and
dissatisfaction in the minds of many of the people of the United States, the Acts (if not
incompatible with the Constitution of the Federal Government) if continued will
further divide the people of these States, and will be attended with consequences,
detrimental to the interest of them.”¹⁴ Also, *The Herald Liberty* reported its concern by
saying this:

As long as there continues to be but one opinion in America, with respect to all
foreign enemies, we think little is to be dreaded. But when the government of
our choice, makes resolutions and passes laws, many of which are impolitic,
some unjust, and others unconstitutional, then there is serious cause of
alarm…We think the ‘Alien Bill’ unjust and unconstitutional; unjust, inasmuch
as it will operate as a lure and trap to foreigners; and, unconstitutional, because
it makes one man the legislator, the party offended, the judge, the witness and
the jury—a blending of powers unknown to the Constitution. We hold the
‘Sedition Bill’ to be impolitic, unjust and unconstitutional—Impolitic, because
it will create dissensions; unjust, because it will operate on the unwary, who
have hitherto been accustomed to freely investigate public measures; and
unconstitutional, because it goes to an abridgment of the liberty of speech and
of the press—rights expressly guaranteed by the Constitution.¹⁵

This acknowledgment of the curtailment of rights by the Alien and Sedition Acts
shows that people were aware of the constitutional controversy they created. There
was discussion over the unconstitutionality of the acts, but it was not taking place in
the federal government. It was being held by citizens and the press, but only to be
stifled by the Federalists who ruled Congress and passed the act. The crisis created by
partisanship is what led the Federalists to stifle congressional communication over the
constitutionality of the acts.

The Sedition Act ended up arresting twenty-five men, one of which was Matthew Lyon who was a member of the House of Representatives from Vermont. He was the first person indicted under the Sedition Act, and his violation was making ‘seditious’ remarks about President Adams. As Fisher states, Lyon claimed the president was “swallowed up in a continual grasp for power, in an unfounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.”\(^\text{16}\) There is no way one can contend that the framers intended for speech such as this to be punished by the government. The framers themselves hotly debated the Constitution and its liberties, often ending in duels and even death. Lyons was eventually sentenced to four months in prison and a $1,000 fine.

These acts were easily passed due to the nature of the national crisis as well as the Federalists capturing all three branches of the government. The constitutionality of the acts was never decided upon and the Alien Enemies Act still stands today. In fact, in 1799 the Congress that passed the Alien and Sedition Acts was also responsible for passing the Logan Act, which “provided for fines and imprisonment to punish American citizens who carry on unauthorized correspondence or intercourse with foreign governments for the purpose of influencing American policy.”\(^\text{17}\) This case is far from the Alien and Sedition Acts in reference, but used them as precedent to create another act that restricts First Amendment rights and seems to be unconstitutional as well. The Logan Act is still on the record today, which leaves the door open for presidents and other politicians to create arguments to justify their current actions.

\(^{17}\) Fisher, *Constitutional Conflicts*, 227-228.
Shortly after the Alien and Sedition Acts were passed, debate did take place urging stronger protections for freedom of the press as well as other First Amendment liberties. The debate came in the form of the Kentucky and Virginia Resolutions which argued that states did not have to enforce laws that are in violation of the Constitution. Madison was behind the Virginia Resolutions, and Jefferson was behind the Kentucky Resolution. Madison’s draft argues this:

That the General Assembly doth particularly PROTEST against the palpable and alarming infractions of the Constitution, in the two late cases of the ‘Alien and Sedition Acts,’ passed at the last session of Congress; the first of which exercises a power nowhere delegated to the federal government, and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto,—a power that more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has never been justly deemed the only effectual guardian of every other right.¹⁸

This statement by Madison exemplifies the discourse that occurred after the acts passed, not only about the constitutional controversy of them, but of the importance of a free press and open communication needed to thrive in a democracy. In the Kentucky Resolution, Jefferson speaks of the states right to challenge unconstitutional proceedings by the federal government. He says:

Whenever the General Government assumes undelегated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself....Each

party has an equal right to judge for itself, as well as infractions as of the mode and measure of redress.  

Here, Jefferson argues that states are obligated to provide a check on the actions of the federal government. If the federal government will not check itself amongst the three branches, then the states can check abuses of power as well. In addition to providing a strong argument for state rights and a strong argument against the violations of the Alien and Sedition Acts, the Kentucky Resolution argues for a strong civil liberties protection. It reads:

That no power over the freedom of religion, freedom of speech, or freedom of press being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people: That thus manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgement by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same.  

The reaction to the violations of civil liberties and the discussion that ensued arguing for stronger protection is an important piece from this time period. Although this crisis evolved out of partisan politics, the opposition was present and arguing to be heard. The Federalists party, as well as the Federalists press, shut down the discussion about the dangers of these acts, but it played an important role nonetheless. Once Jefferson won the election of 1800, he pardoned all people charged under the Alien and Sedition Acts.

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20 Ibid.
Drawing from precedent that is rooted in possible constitutional violations is dangerous and as Richard Posner identifies, “In conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later.” Legalistic limitations are given for a reason, and the founders designed the Constitution in a way to make amending it difficult. To minimize the risk of error, amendments are not things that can be added on a whim. During a national emergency, people are more apt to make such drastic changes since they understand amending it would take time. Times like those are when the Constitution should be heavily protected rather than easily amended. Congress should fervently debate acts that are introduced and the courts should challenge the constitutionality of acts produced during times of national crises. Curtailing individual liberties has never made the United States safer.

The fears from the period that saw the Alien and Sedition Acts are what allowed the government to pass such hostile legislation. As Judge Andrew Napolitano argues in his book, “The government does not care much for facts and true guilt when it is suppressing free expression during wartime. Perceptions and fears are enough to steamroll over constitutionally guaranteed liberties.” That seems to be how freedom of speech was easily eroded during this period in America’s history. He continues, “By manipulating legitimate fears after a serious security crisis, the government can make changes that permanently erode liberties.” The legislators who passed the Alien and

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Sedition Acts in 1798 might have thought that this was a temporary restriction on citizens and aliens, but it is an easy parallel to what the government has done since then. The same restrictions might not have been exactly duplicated, but the argument for balancing national security concerns with individual liberties has been used time and time again since this period. Michael Kent Curtiss reiterates this point when he says, “The Sedition Act is not simply an artifact from a bygone era of American constitutional law. The issues raised by the act go to the very heart of freedom of speech in a democracy. These issues reappeared, again and again, in nineteenth and twentieth century battles over free speech.”

Legislation and decisions that take place during national emergencies are not simultaneously erased after the crisis; they remain on the books and influence future law.

As evidence, the precedent from the Alien and Sedition Acts was used in a 1948 case involving the removal of a German national from the United States. The case, *Ludecke v. Watkins*, relied on the Alien Enemy Act of 1798 and its authority allowed the president to remove enemy aliens from the country during a ‘declared war’. President Truman passed that authority to the attorney general and gave him the discretion to deem aliens dangerous. Ludecke, the German national, was taken into custody eight months after Germany surrendered and filed for a writ of *habeas corpus* which was eventually denied. Justice Frankfurter delivered the opinion for the Court, which upholds the earlier acts and introduces the political question doctrine. The opinion reads:

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As Congress explicitly recognized...some statutes ‘preclude judicial review’. Barring questions of interpretations and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The very nature of the President’s power to order the removal of all enemy aliens reflects the notion that courts may pass judgment upon the exercise of his discretion. This view was expressed by Mr. Justice Iredell shortly after the Act was passed and every judge before whom the question has since come has held that the statute barred judicial review. We would so read the Act if it came before us without the impressive gloss of history.24

This opinion in essence says that the other political branches of government prevent this question from being reviewed by the courts due to the precedent set as well as the passage of time. With such constitutional issues and liberties at stake, it is important to review these questions in the court. While the other branches are just as important and authorized to make such decisions, crises and political pressures enhance the chance of passing acts that diminish individual rights and liberties. That is why the court should review cases such as this. As Fisher observed, “Federal judges are concerned that the judiciary ‘should abdicate its decision making responsibility to the executive branch whenever national security concerns are present’.”25 That is a dangerous issue that needs to be observed, because the expansion of power that the executive seeks has increased substantially. Posner argues the importance of this practice when he says, “People whose profession is to protect national security are unlikely to give a great deal of weight to civil liberties unless required to do so by some outside force, such as the judiciary.”26 Unless the judicial branch, vital to the preservation of liberties, reviews acts that compromise those liberties, they will be easily curtailed. The

24 Smith, The Constitution and American Foreign Policy, 149.
26 Posner, Not a Suicide Pact, 61.
Ludecke opinion continues with the political question doctrine by saying, “These are matters of political judgment for which judges have neither technical competence nor official responsibility.” It is hard to justify that the Supreme Court does not have responsibility to decide the constitutionality of an act passed in 1798; especially when it upholds deporting a citizen deemed dangerous solely by the president or his agent. Furthermore, Frankfurter writes about the power of the executive in national security concerns:

The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights…Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined….Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States. The Founders in their wisdom made him not only the Commander in Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.

The framers were wise in their doctrines, but they also made it an issue to separate the powers among three branches, and to set up checks and balances to keep each branch in their rightful spot. Opinions such as this are dangerous to the public when the other branches are giving more and more authority to the executive.

The practice of the courts to use the political question doctrine is especially dangerous, because power is given to the executive without the threat of recourse.

27 Smith, The Constitution and American Foreign Policy, 150.
28 Ibid.
Fisher agrees by saying, “Respect for the President is important, but far more important is respect for the Constitution and checks and balances. Members of Congress have not merely a right but a duty to reach independent judgments on war making and to place legal limits on presidential power.” I would further this statement by arguing the judiciary also has a right to review the limits of this power and not to sidestep the issue as merely political in nature. Even more, the court of public opinion can and has been used to help rein in expansive power. The Alien and Sedition Acts were viewed as unconstitutional because it was fiercely repudiated by the public through the press. It is not only a matter for the political branches to check one another, but rather the public discourse that proceeds such actions is just as important and influential in providing an additional check to the government.

Whether the crisis is driven by politics or an attack, actions by the government must be checked by the branches of government as well as the public. Although Jefferson pardoned those affected by the Alien and Sedition Acts, one act remains on the books and the Supreme Court never ruled on the constitutionality of any of them. The government was embedded with additional powers during this crisis, and those powers far exceeded the crisis. This is dangerous and undemocratic. In order for implied powers to be legitimate, political discussion and balance must be in place in order to ensure that abuse does not happen. Responsibility to the rights and guarantees of the Constitution is not merely for the branches of government to uphold; the public also has a right to insist on the adherence to our nation’s most important document.

Fisher, Presidential War Power, 189.
With the modern expansion of presidential power and authority, especially during times of national crisis, the time is never as important as now to constantly scrutinize the actions of the government.
Expansion During World War I and World War II

The next era in American history where we find expansion of presidential powers created by a national emergency comes during the two World Wars. Using the precedent set by the earlier acts and opinions cited, the executive has expanded power again during the national crises created during the two wars. Again we see the erosion of rights as the government seeks to declare national security threats as more important than constitutional rights. The major difference between these cases and the previous section is the actual involvement in a serious, global war. Although the precedent from the previous decades was used to justify the expansion during this period, the broad usurpation of power during this era has been used substantially more to justify expansion today.

Beginning with the fears created during WWI, the Espionage Act of 1917 was created and used to broaden federal power as well as curtail civil liberties. The Palmer Raids on suspected communist during 1919 was another example of governmental usurpation of power during this era that will be explained later. Finally, the most intrusive curtailment of civil liberties and broadest enhancement of presidential power came during World War II with the internment of Japanese-American citizens. This period in U.S. history highlights the importance of preserving our rights laid out by the Constitution. As Louis Fisher says, “Constitutionalism cannot survive, even in the presence of a Constitution, if the principles and standards of behavior are matters of
whim for those in authority.”¹ As will be exemplified, those in authority sought to greatly expand their power during these national security crises.

While World War I was taking place overseas, the United States began to see its involvement as imminent. Once Congress declared war against Germany in 1917 and entered the fight, the press began a campaign to garner support for the war. Just like the press did during the Alien and Sedition Acts, they began emphasizing the repercussions for people who did not support the United States or tried to oppose the war. Although President Wilson followed the constitutional guidelines and let Congress declare war, a speech given shortly after reveals his willingness to usurp power and declare it himself:

I feel that I ought…to obtain from you full and immediate assurance of authority which I may need at any moment to exercise. No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and power of the Congress are behind me in whatever it may become necessary for me to do.²

From this speech, it is clear that President Wilson has a broad understanding of his constitutional powers as commander in chief. Notice how he says his “plain implication of constitutional duties and powers” referencing the implied and inherent powers discussed previously. Once again, this is the seeking of extraconstitutional powers that helps justify expanding federal power. The speech is also a warning to

¹ Fisher, Constitutional Conflicts, 2.
² Fisher, Presidential War Power, 68.
Congress that he feels he has the backing and authority from them to do ‘whatever may become necessary’. Under this pretense, the Espionage Act of 1917 was enacted.

The Espionage Act became law shortly after the United States entered into the war. Lawmakers were concerned with critics on the homefront and as David Rabban adds, “Lawyers in the Department of Justice became concerned that existing federal laws would be insufficient to regulate the conduct of the individual during wartime.”

So, in order to regulate individual conduct the Espionage Act was created. Title 1, Section 3 reads as follows: “Whoever, when the U.S. is at war, shall willfully make or convey false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the U.S. is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the U.S., or shall willfully obstruct the recruiting or enlistment services of the U.S., to the injury of the service or of the U.S., shall by punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both.” The text of this act closely resembles the Sedition Act of 1798.

The repression of free speech with this act did not go unnoticed by the public either. As Rabban argues, “The extensive repression of antiwar and radical speech during and after WWI made many Americans sensitive to infringements on speech for the first time.” The federal government justified these infringements as legitimate

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4 Ibid., 254.
5 Ibid., 16.
based upon the national security crisis taking place. Jean Smith contends that, “The power of Congress to punish seditious speech and censor the press is limited by the First Amendment, but the Court nevertheless sustained a serious of convictions for seditious utterances during World War I under the Espionage Act.” Justice Holmes wrote about the broad discretion the government had during times of national emergencies in his opinion in *Schenck v. United States*, which upheld the Espionage Act as constitutional. He wrote, “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” This is a strong statement concerning individual liberties, but as Smith argues the federal government weighed national security concerns as more important than the constitutional right to free speech. Another judge during this time stated, “That speech which in ordinary times might be clearly permissible, or even commendable, in this hour of national emergency, effort and peril, may be as clearly treasonable and therefore properly subject to review and repression.” These opinions not only use the precedent from the Alien and Sedition Acts era, but they support even broader expansion of presidential power by the assertion from the judiciary that they will not uphold certain rights.

In the years following the Espionage Act, fear of communists and anarchists loomed throughout the country. To combat this fear, known as the ‘Red Scare’, the federal government conducted what is known as Palmer Raids. During the roundup,

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8 Rabban, *Free Speech and Its Forgotten Years*, 261.
almost 5,000 people were arrested and taken into custody. Almost none were charged, and later most were found to be innocent. Judge Napolitano parallels this to present day actions by the Bush administration: “The government’s claimed powers to arrest anarchists without charge and incarcerate them without trial are identical to President Bush’s present-day claims that he can do likewise to ‘enemy combatants’.”

The government claimed the ability to violate constitutional rights of due process by the national security crisis taking place. Whether this threat was real or imagined, the federal government should be hesitant to imply powers that are not debated or checked by the other branches. One specific violation during the Palmer Raids is explained by Fisher: “Rules were changed in midstream to deny the right of an alien to have assistance from counsel, withholding professional help sorely needed for those unable to understand English. The Justice Department gathered evidence to be used against the aliens, only after which they could consult an attorney.”

These actions by the government violate the Sixth Amendment’s guarantee to right of counsel, and these actions are justified by the government as legitimate based upon the supposed national security threat.

As Justice Brandeis acknowledged in a case during this period, “A real emergency can justify the repression of speech when there is not time to permit reliance upon the slower conquest of error by truth.”

The problem with this argument is that ‘real emergency’ is debatable. At a time of public fear, a certain threat or group

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11 Rabban, Free Speech and Its Forgotten Years, 370.
of people may seem like a ‘real emergency’ and later found to be completely innocent. That is the danger of compromising constitutional rights during national emergencies. Also, error by truth is at the foundation of the United States democratic process and should not be whimsically compromised in the hands of the government. Zachariah Chafee, a prominent scholar writing for the Harvard Law Review in 1919, said this: “For those who believed that the Bill of Rights can be placed on the shelf in time of war by the ‘uncontrolled will’ of the government, he insisted that the first Ten Amendments to the Constitution ‘were drafted by men who had just been through a war’.”

People seem to have forgotten that the founders of the Constitution had just fought a war, and drafted the Constitution in a way that one cannot quickly amend it to fit certain situations taking place. This was not the case, however, as the country entered its next national security threat during World War II.

On December 7, 1941 a military base at Pearl Harbor was attacked by the Japanese and thus entered the United States into World War II. Panic and frenzy ensued throughout the country, and this panic soon turned into fear of a domestic threat from Japanese-American citizens. This was the first time that another country had attacked American soil, and the government was going to do whatever possible to calm the chaos. As reported by Lawrence E. Davies in *The New York Times* on February 11, 1942, “The FBI reported it found ammunition and other contraband while raiding Japanese colonies 80 miles south of San Francisco. Federal and state officials met with military leaders to discuss the prospect of moving Japanese-

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Americans from coastal areas to inland concentration camps.\textsuperscript{13} A day later the \textit{Washington Post} ran a story by Walter Lippman “referring to the Pacific Coast as a combat zone, part of which ‘may at any moment be a battlefield’ and no one—citizen or alien—has a constitutional right ‘to reside or do business on a battlefield’.”\textsuperscript{13} This continued to heighten the anxiety and fear of the nation, and the government was quick to react. With the precedent set by earlier administrations during national emergencies, the federal government was sure to claim this attack as the most extreme national emergency yet. Extreme emergencies called for extreme reaction by the national government. Examples of these extreme reactions can be found in some of the news articles published at the time. One from the \textit{San Francisco News} reported:

\begin{quote}
A new evacuation order which may affect 200,000 Pacific Coast enemy aliens and their American-born children was awaited today as governors of states…announced they would permit Japanese aliens to live only in concentration camps if they were moved inland. Rep. John H. Tolan (D, Cal.), heading a House Committee investigating national defense migration, said he had polled the governors of 15 states…on proposals to send evacuees from Pacific Coast states. Nine replied, in effect: “No Japanese wanted—except in concentration camps.”\textsuperscript{14}
\end{quote}

This reaction by governors and member of Congress is shocking, and there should be more discussion surrounding the violation of civil liberties and constitutional guarantees. With the fear of danger instilled, the government was quick to jump to unnecessary conclusions. A similar article from \textit{Time Magazine} breeds fear by reporting:

\begin{quote}
\textsuperscript{13} Ibid., 144-145.
\end{quote}

\begin{quote}
\end{quote}
[Describing raids of Japanese civilians on West Coast] These hit-&-run raids did not satisfy the West Coast. The Coast was not scared, not angry, but anxious. Westerners have a tradition of meeting violence with quicker vengeance. From the West Coast a cry went up: “Give us martial law!” West Coast citizens knew that martial law would mean loss of their civil liberties, but they wanted it anyhow. They feared the Japs in their midst. Some 88% of the 126,947 Japs in the U.S. live along the Pacific Coast. California alone has 33,569 alien Japanese, another 60,148 U.S. citizens of Japanese descent. In the eyes of Tokyo, even the most domesticated U.S.-born Nisei are loyal subjects of Japan. In sum: California is Japan’s Sudentenland. California’s Attorney General Earl Warren last week said he favored martial law.\(^{15}\)

This article is an example of the press creating heightened fears in the public, as well as reporting of government officials who are calling for the same types of action. The fear of Pearl Harbor halted the democratic debate usually surrounding important constitutional guarantees such as the right to life, liberty, and the pursuit of happiness.

On February 19, 1942 President Roosevelt issued Executive order 9066, which created a curfew order for Japanese citizens. The order read, “All persons of Japanese ancestry within a designated military area are required to be within their place of residence between the hours of 8 p.m. and 6 a.m.” A month later Congress ratified the order. The Supreme Court also unanimously upheld it against a man named Gordon Hirabayshi, a citizen who had never even been to Japan and refused to obey the order. Similar to the press during the Alien and Sedition era, the press at this time was instilling fear by reporting cases of sabotage by Japanese residents. This fear led many of them to not question the governments’ actions when violating the Constitution. One article from *Time Magazine* in 1942 reported this:

Arresting three native-born Americans was a jolt to the West Coast citizens. Californians began to look hard at the 33,000 Japanese aliens in their midst. Last week Attorney General Francis Biddle marked off 88 coastal areas from which all enemy aliens will be evacuated by February 24. Forbidden territory so far includes San Francisco’s waterfront, where 1,500 alien fishermen keep their boats; all lighthouses, radio and power stations, dams, airports, defense plants; 17 truck-farming districts where Japs for years have grown winter fruits and vegetables for U.S. tables…FBI men this week descended on San Pedro’s Terminal Island, rounded up some 400 alien Japanese fishermen and cannery workers who live right in the middle of one of the Navy’s big West Coast stations…Other stories of the week: Narcotics Commission Harry J. Anslinger told Treasury Secretary Henry Morgenthau Jr. that for the past ten years Japan has encouraged smugglers to peddle dope in the U.S.—in order to prepare U.S. citizens for Japanese domination.¹⁶

Reports such as this are what fueled the fire for many Americans, wanting the government to quickly stop the imminent danger they believed was looming.

Fisher states, “The court accepted the government’s action as a necessary response to ‘the danger of sabotage and espionage’. “¹⁷ What danger to ‘sabotage and espionage’ a man who had always been a U.S. citizen [Hirabayshi] and never even visited the country we were at war with is a hard contention to make. The quote from Fisher stems from the opinion drafted by Chief Justice Stone in which he claimed that “the war power of the national government is ‘the power to wage war successfully’”, which is a very broad reading of the war power as well as malleable to whomever is in possession of that power. He continues on by saying, “Since the Constitution commits to the executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury

or danger in the selection of the means for resisting it.” He then says that no court can contest the ‘wisdom of their judgment’, and ends the opinion with a startling comment about infringing personal liberties. It reads, “If it was an appropriate exercise of the war power, its validity is not impaired because it has restricted the citizen’s liberty. Like every military control of the population of a dangerous zone in wartime, it necessarily involves some infringement of individual liberty.”18 The comments made throughout this opinion are a startling example of the broad, implied federal power sought during this time. The implied powers became illegitimate when the government ceased debate about the constitutionality of the Executive Order. How the government comes to accept that civil liberties ‘necessarily involve some infringement’ during wartime is hard to contemplate.

However, Richard Posner gives a suggestion in his book that says, “Civil disobedience can be a duty of government in extreme circumstances to its citizens, even if not a right…Rooting out an invisible enemy in our midst might be fatally inhibited if we felt constrained to strict observance of civil liberties.”19 This is a far reaching contention that the government has a duty or right to disobey the Constitution and infringe upon the rights of the citizens to whom it is intended to protect. The government and a majority of citizens during this era did not feel constrained to strict adherence to the Constitution, and it is exemplified by an article published in Time Magazine. The article once again created fear of the threat from Japanese citizens, and admitted that innocent people would be affected. It reported:

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19 Posner, Not a Suicide Pact, 6, 14.
All along the West Coast the presence of enemy aliens became a suddenly, sinisterly glaring fact: Japanese worked all day on hands & knees in geometrically perfect truck gardens which sometimes overlay oil pipelines, and Japanese settlements near big airplane plants and military posts…No citizens of a democracy could be happy about some of the pathetic situations which these orders created. For every potential fifth columnist, hundreds of innocent aliens would suffer….But the West Coast valued safety more than vegetables, more than the comfort or livelihood of foreigners who might be innocent but were still foreigners.20

This article not only presented the fear of the citizens, but admitted that there would be innocent victims created by this order. But, as the article contends, the people valued their safety rather than the constitutional rights of those innocent foreigners.

Shortly after the Hirabayshi case came before the court, the infamous case of Korematsu v. United States was heard. This case involved the relocation that took place in accordance to President Roosevelt’s Executive Order. More than 120,000 Japanese-American citizens were removed from their homes and relocated to internment camps known as ‘relocation centers’ as a result of this order. Korematsu was an American citizen of Japanese descent who disobeyed the order and remained in his home to later be arrested. The case came before the Supreme Court and Justice Black wrote the shocking opinion upholding the exclusion order:

We upheld the exclusion order as of the time it was made and when petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are a part of war, and war is an aggregation of hardships….Compulsory exclusion of large groups of citizens from their homes except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by

hostile forces, the power to protect must be commensurate with the threatened danger.\textsuperscript{21}

The need for action was great and the threat was real, but there is no doubt still a constitutional right that every citizen be free from governmental usurpation of power when that power infringes upon life, liberty and the pursuit of happiness. Most of the Japanese-American citizens relocated were innocent and had no ties to Japan whatsoever. The Court even admits to that in the opinion: “Exclusion was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country….Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”\textsuperscript{21} Although the Court claims otherwise, this is a case of racial prejudice which deserves the highest scrutiny when deciding whether personal liberties were violated. This case ended up producing the strict scrutiny test that is used to help racial minorities fight discrimination, so it was not a complete failure on the part of the Court. However, the problem with this case was that the government miscalculated the type of power needed to address the national threat. The burden of war should not overrule the most basic of the United States’ freedoms. The government acted too quickly and on a worst-case scenario which ended up producing one of the most embarrassing and undemocratic events in U.S. history.

Although there were articles circulating during this time calling for government action and agreeing with the internment of Japanese citizens, there were

people who were arguing against this constitutional violation. One article in the *San Francisco News* reported, “National headquarters of the ACLU in New York City meanwhile assailed the army’s evacuation order for the West Coast military area as ‘far too sweeping to meet any proved need’ and urged it to be modified ‘to provide hearings for all citizens before evacuation’.”

It was not that people were not talking about the constitutional violations; it was just that no one was responding to them.

Another article depicting the hardships this would create for innocent civilians said this:

> They were U.S. citizens who had spent their lives on U.S. soil --farmers who tilled the rich brown loam in the Santa Clara Valley, fishermen riding the slow swells off San Diego…But they learned last week that, in a nation’s hour of peril, having been born a citizen is not enough. So they began to pack their keepsakes, lift their slant-eyed children on their arms, and start on the long migration east across the Sierra Nevada’s…They were some of the West Coast’s 70,000-odd Nisei. Their honorable ancestors were Japanese. This was martial law…Sober citizens felt they had good reason to be harsh.  

It took the government twenty years to offer reparations for the property lost during the relocation, and it was not until 1988 that formal apologies were made to the remaining survivors along with $20,000 in payment. Although the government issued reparations for their actions, the expansion gained during this time along with the constitutional arguments for this wartime behavior did not return to pre-war conditions. President Roosevelt said that when the war was over, “the powers under which I act automatically revert to the people—to whom they belong. Yet those powers did not revert to the people when the war was over; presidential powers are not

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surrendered so easily.” This is definitely what history has shown; powers granted are easily expanded, but hardly reinstated.

The term ‘battlefield’ has continuously changed along with modern warfare, and to say the federal government has power over any battlefield is saying that they have power everywhere. This will be exemplified later when the events of September 11, 2001 and modern day war are discussed. However, if we are to gain any of the powers back that have been taken and expanded, we must actively seek them. As noted by the Court, they will not question the wisdom of Congress and of the executive when exercising the war power and even Congress had a hard time reining in the power. Fisher describes the difficulties the legislative branch had in restricting executive power during this time: “[Said by a Senator] Although it might be distasteful and dangerous to vest the executive with powers unchecked and unbalanced, I question whether we have any choice but to do so.” He continues by stating that the “Senate Foreign Relations Committee noted the expansion of presidential power and said that if blame is to be apportioned, ‘a fair share belongs to the Congress because of its acquiescence and passivity…[which is probably the most important single fact accounting for the speed and virtual completeness of the transfer of the war power from the legislative branch to the President.’”

This poses a serious dilemma. If the judiciary is going to sidestep the issue, and if the legislature cannot control it, who will be able to stop further expansion?

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25 Ibid., 137-138.
Ever since World War II, the federal government has not reverted any of the powers back to the people that were taken during this time. Although there were many foreign security issues and threats throughout the proceeding decades, it wasn’t until September 11, 2001 that another major, catastrophic attack on U.S. soil occurred. As will be discussed next, precedent set during WWII and the preceding eras contributed to the expansive federal government and executive power that is presently in effect.

As questioned by Howard Ball in his book, “Can national security demands and the U.S. Constitution’s constraints coexist? They must. The nation has seen that question repeated throughout its history: during and after the Civil War, World War I, and World War II. Ultimately, the principles at the heart of representative government endured—although after all of these battles there was pain and death and tragedy and injustice.”26 The question that remains, however, is: was this damage and injustice irreparable? Yes the Constitution and U.S. representative government existed after these battles, but it is not enough for it to simply exist if it is quickly and easily compromised during a national crisis.

September 11, 2001 and The USA PATRIOT Act

The morning of September 11, 2001 shocked the world. Nineteen Al Qaeda terrorists hijacked four U.S. commercial airliners to begin their suicide mission. Two of the planes went into the World Trade Centers in New York City, one flew into the Pentagon in Arlington, Virginia, and the fourth one was headed to Washington, DC but crashed into a Pennsylvania field after attempts by the passengers to stop the terrorists. Close to 3,000 people, mostly civilians, were killed in these attacks. As the buildings burnt and collapsed, the world stood still as they watched it unfold from the television. Panic and chaos ensued across the country, as we waited for answers as to how and why these horrible acts took place. America united in anger and pride, wanting revenge as quickly as possible for the ones responsible for these attacks. The proceeding reactions from the federal government and president that are still in place nine years later were more than most Americans expected.

Shortly after the attacks President George W. Bush launched what he called the War on Terrorism. This war was not like any war the world had seen before. The undeterrable and disastrous nature of the terrorists’ attacks led the U.S. to strive to prevent future attacks from occurring rather than waiting to punish after the attack. This new Bush doctrine was called preventative war, which was much different than the former preemptive policy that declares war only when a conflict is imminent. This has led to many questionable and controversial issues that will be discussed in this section.
The invasion of Afghanistan and the Iraq War are two emanations from this war policy that expand presidential power immensely. Discussed even further are the USA PATRIOT Act and the enemy combatants held at Guantanamo Bay. These examples provide an overwhelming illustration of how a national crisis gave room for the federal government to expand power and suppress individual liberties.

Howard Ball, writing extensively on Bush’s doctrine, sums up the controversy in his book: “The legal arguments presented to the President by the Justice Department from 2001-present, as well as the arguments presented by the U.S. government to the justices of the U.S. Supreme Court…place in sharp focus the critically important—and very controversial—issue of presidential powers vs. the principles of separation of powers and checks and balances.”¹ The checks and balances put in place centuries ago have been compromised due to the usurpation of presidential power that President Bush immediately assumed under his commander in chief title and the inherent powers argument. The inherent powers Bush claimed were illegitimate and dangerous due to the fact that no one provided a check and discussed the constitutionality of his actions. Ball continues by saying, “When immediately after 9/11, Bush defined the War on Terror as a ‘continuing threat’ he set in place a network of laws and policies of expansive scope and uncertain duration, unchecked by any acquiescent Congress that went along with the legislative proposals proffered by the White House.”² The “network of laws and policies” referred to were enacted to combat the national

² Ibid., 9-10.
emergency, but have remained in place almost a decade later as seen in previous examples of expansive federal power remaining indefinitely.

The acquiescence of Congress at this time was alarming due to the war power drifting almost completely into the hands of the executive. Fisher argues this point as well saying, “An atmosphere of real or contrived urgency encouraged legislative passivity”\(^3\) at this time. He continues by saying that, “typically the Supreme Court declares that it would be a breach of the Constitution for Congress to transfer its legislative powers to the President.”\(^4\) However, this is exactly what Congress did and the Courts allowed. Part of the reason this power was so easily transferred was due to the nature of the attacks and the fear culminating after the crisis. As seen previously, national security emergencies are given priority over elementary constitutional procedures and guidelines. Fisher provides another basis for Congress relinquishing its constitutional duties in declaring war with Iraq:

> Congress seemed incapable of analyzing a Presidential proposal and protecting its institutional powers. The decision to go to war cast a dark shadow over the health of the United States political institutions and the celebrated system of democratic debate and checks and balances….Congress voted under partisan pressures, with inadequate information, and thereby abdicated its constitutional duties to the President. Congress suffered a loss, as did popular control and the democratic process.\(^5\)

The decision was quickly decided by Congress due to the national crisis and outrage from the 2001 attacks. The democratic process did suffer during this time because there was very little debate about the decision to go to war and almost no conclusive

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\(^4\) Ibid., 85.  
proof to link Iraq to the Al Qaeda terrorists. After only weeks of negotiations, Congress passed the Authorization for the Use of Military Force against Iraq (AUMF). This “granted Bush the broadest authority to do battle against any nation, organization, or person he determined to have been involved in 9/11 or to be part of planning future terrorist actions against the United States.”\(^6\) [Emphasis my own]. This authorization of executive power is constitutionally debatable. Leaving the discretion to go to battle solely in the hands of the executive and for events unknown in the future is far from the framers intent. A foundation of the U.S. Constitution is its ability to check unaccountable executive power.

One of the most startling examples of broad expansion of power during this crisis comes from the passage of the USA PATRIOT Act in 2001. The House members were given this 342-page document on the morning of the vote, and it is very unlikely that the majority of the members read the entire legislation. There was little debate, given that they had one week to pass it without changes, and there was no House or Senate Report. Only one Senator objected, and the House passed the bill on October 26, 2001 with a vote of 357 to 66. During the small amount of debate that ensued, House members were quick to retract any doubts and questions they had due to the political pressure and patriotism surrounding the attacks. As one newspaper reported:

> Spurred by the September 11 attacks and the recent anthrax scare, the House voted 357-66 in favor of a wide range of antiterrorism tools titled the USA PATRIOT Act…To quell concerns that the new law could lead to civil liberties violations if abused, many of the bill’s provisions will expire in four

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years. That expiration was a key condition for many Democrats and Republicans who had balked at the initial plan put forth by Ashcroft. “This is a bill that is vitally needed,” said Rep. James Sensenbrenner (R., Wis.), chairman of the House Judiciary Committee. “We need to get the intelligence necessary to protect the people of the United States of America from whatever the enemy has up its sleeve.”… “This bill, ironically, which has been given all of these high-flying acronyms—it is the PATRIOT bill, it is the U.S.A. bill, it is the stand-up-and-sing- ‘The Star-Spangled Banner’ bill, has been debated in the most undemocratic way possible,” said Rep. Barney Frank (D. Mass.).

Frank was right when he stated that this bill has been debated in the most undemocratic way, and it is responsible for the current expansion of presidential power as well as erosions of individuals’ rights.

There are many controversial issues found within the act, but Andrew Napolitano sums them up when he says: “Whatever its perceived merits in the War on Terror, the PATRIOT Act is a lawless law because it allows the federal government to obtain information without a warrant, thus violating the Fourth Amendment, and it quashes speech in violations of the First Amendment, and overreaches the scope of federal power in violation of the Ninth Amendment.”

One would think that multiple constitutional safeguards within the same piece of legislation would be scrutinized by Congress, but this was not the case with the quick passage of this act. Following in step with the Alien and Sedition Acts, as well as the Japanese internment order, the USA PATRIOT Act was discussed in the press. Even though there were more vociferous critics this time around, the federal government still failed to critically debate the bill and its perceived unconstitutionality. One example from the press discusses the bill before it was passed and reads:

In a televised broadcast on September 11, President Bush addressed the nation thus: “Today…our very freedom came under attack…America was targeted for attack because we are the brightest beacon of freedom and opportunity in the world. And no one will keep that light from shining.” Except, it appears, for the U.S. government itself. Since the terrible attacks on September 11, three anti-terrorist bills have been introduced…All three claim to have solutions to the problem of terrorism within the United States. This is doubtful. However, the more troubling concern is the serious infringements upon civil liberties that they promise…Plain and simple: The idea that America is fighting for freedom is a fallacy because these measures aim to destroy it.\(^9\)

This article shows that people were discussing the repercussions of the act and providing the public with information about the civil liberties at stake. Another article passed a day after the bill passed said this:

Bush maintained the law will allow the government to capture terrorist ‘while protecting the constitutional rights of all Americans’. One of the swiftest-moving bills in federal history, the law was proposed five days after the September 11 terror attacks. Fears of civil liberties led some members of Congress to push through a sunset provision, capping the wiretapping and surveillance powers at four years. Senior Judiciary Committee member Senator Orrin Hatch (R-Utah) said the majority of Americans do not see the law as an erosion of civil rights. ‘I don’t know anybody in this country who’s afraid of their law enforcement people at this time. They’re afraid of terrorism,’ Hatch said.\(^10\)

Similar to the Alien and Sedition Acts, the USA PATRIOT Act came with a sunset clause. Even though the sunset clause expired most of the Alien and Sedition Acts, significant portions of the USA PATRIOT Act have been resigned into legislation each time the sunset provisions come up for renewal. Another interesting point to make is that although the press is making an effort to discuss the constitutionality of the act, the congressmen quoted all seem to be supporting the president and his proposed bill.

The Fourth Amendment protects against unreasonable searches and seizures and declares that warrants must be issued describing the persons, things and places to be searched. However, Title II is labeled ‘Enhanced Surveillance Procedures’ and has a plethora of Fourth Amendment violations. To start, Section 201 calls for the “authority to intercept wire, oral, and electronic communications relating to terrorism.”\(^\text{11}\) U.S. citizens have a constitutional right to be secure in their homes, which includes the right not to be unreasonably searched. The statute becomes vague when it says “relating to terrorism” because the government could claim there was a relation, or the evidence may have been falsely given by someone. Then, in Section 202, the USA PATRIOT Act gives the exact same authority but this time to “communications relating to computer fraud and abuse offenses”. This is not even related to terrorism, nor would the government officials voting on this expect this to be hidden in the text.

Andrew Napolitano lists some of these examples of uses by the USA PATRIOT Act that are outside the scope of terrorism: “Money laundering charges to a Las Vegas strip club, copyright infringement on a fan website of ‘Stargate SG-1’, child pornography charges, and a ‘sneak-n-peak’ provision that allows the government to stage a burglary and obtain evidence without your knowledge.”\(^\text{12}\) While those are crimes that should be brought to justice, the purpose of the USA PATRIOT Act was to intercept and obstruct terrorism, not domestic crime. It should not be included in the


act, and Congress has the responsibility of reviewing it even if the country is in a state of emergency.

Another Fourth Amendment violation under Title II is under Section 213 which provides for the “authority for delaying notice of the execution of a warrant,” and Section 215 which allows “access to records and other items under FISA.”\(^\text{13}\) Section 215 continues on by prohibiting the person issued a warrant from disclosing the purposes of the investigation. That person is also prohibited from disclosing to any other person that the FBI is searching and obtaining things pursuant to an investigation. Search warrants are a fundamental safeguard provided for in the Constitution, and no matter what the state of emergency across the nation, there is no justification for deliberate abuse. As Napolitano says, “The ‘order or request’ [Sec. 215] from the FBI need not disclose the nature of the investigation for which it is being requested.”\(^\text{14}\) That is in direct contention to the constitutional requirement that the person being searched shall have a right to know the nature of the search. Furthermore, it is ludicrous to make it a crime to tell someone, anyone, that you have received a search warrant under the authority of the USA PATRIOT Act, which is what Napolitano argues is against the First Amendment protections.

In regards to the Fourth Amendment provisions, there was public debate about the violations caused by them. Although it did not stop the federal government from passing the act, the news did report of its violations. *The Morning Star* printed this:

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However, the civil liberties campaigners warned that the measure was a ‘runaway train’ which would give federal authorities vast new powers of surveillance and detention in violation of the Bill of Rights... The ACLU said that the measures were not consistent with the Fourth Amendment privacy protection of requiring that warrants specify the place to be searched... Major legislation traditionally takes several months, if not years, to be approved, but this Bill streaked through Congress in less than six weeks.\textsuperscript{15}

This act is somewhat different than the previously discussed acts because there was public outrage at some of the provisions of the bill. However, it makes this case even more striking because the bill was passed even quicker due to the national crisis stifling democratic debate.

The need for intelligence is great, but constitutional rights should not be violated in order to gather intelligence. Richard Posner offers an explanation the government has used to justify this behavior: “Valuable intelligence might be extracted from conversations or communications between innocent people.”\textsuperscript{16} Innocent is the key word. Although valuable information may come from innocent people that is no justification for relinquishing one’s constitutional right to be free from unreasonable searches. Reasonableness can be a flexible word, and leaving this discretion in the hands of one person is highly undemocratic.

Title I, Section 106 of the USA PATRIOT Act is designated for presidential authority. It permits the president to “confiscate property…that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the U.S.”\textsuperscript{17}

The Fifth Amendment provides that no person shall be deprived of life, liberty, or

\textsuperscript{16} Posner, Not a Suicide Pact, 91.
\textsuperscript{17} U.S.A. PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Public Law 107-56: GPO, 2001).
property without due process of law. With the passage of this act, the president alone has the authority to determine if a person has aided or engaged in hostilities and then is permitted to confiscate any property he determines is applicable. This in essence erases a check upon the executives’ actions and gives him blanket authority. The act was also implemented immediately after it was signed into law. As one newspaper reported:

> Ashcroft said he immediately authorized 94 federal attorneys and 56 FBI field offices to begin implementing the law within the hour after Bush had signed it. For example, by the close of business yesterday [Oct. 26], it was expected that federal agents might have reviewed unopened emails and voicemails for suspected terrorist that it has had under surveillance and that stacks of intelligence data would be forwarded to federal prosecutors. Until yesterday, that was prohibited. Federal sources also said some of the more than 900 people detained since September 11, many on immigration violations, might now be prosecuted because of the new powers the law provides to law enforcement officials.\(^{18}\)

Implementing such a controversial bill hours after it becomes law is a shocking declaration to make by the government. But, they were ready to face the terrorist attacks and they were willing to do whatever was necessary. What should have been necessary, however, was more political debate around the possible constitutional violations.

Eventually as Congress started to question some of Bush’s actions, he shied away from claiming statutory authority and relied primarily on his constitutional inherent presidential powers under Article II. He also sought authority for his war policy through the United Nations instead of through Congress. The U.N., however, is not a legitimate legal substitute for Congress’ constitutional obligations. Claiming

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inherent power, President Bush was unchecked by any other political branch until the courts finally stepped in. Once again the crisis at hand eliminated the democratic debate needed to ensure implied powers do not become abused. Howard Ball contends that, “For almost three years, until the Federal Judiciary, especially the United States Supreme Court, intervened in June 2004, President Bush did not have any institutional checks on his actions against terror at home and abroad.”19 Before this intervention, however, President Bush expanded presidential power in the name of national security through dealing with enemy combatants and detaining them at Guantanamo Bay.

The War on Terror and terrorism in general is a new concept to most Americans. Until the events of September 11, 2001, no one really knew much about terrorist and how and where they were organized. The effect of globalization has made the fighting of terrorism a more complex issue than traditional wars. The shrinking globe has made communicating quicker than ever. Terrorists have spread out all over the globe, making anywhere they reside a potential battlefield. The issue with September 11 and the aftermath is now we know that terrorist are living and working in the United States. Is our nation now a battlefield? Does the expansive nature of the federal government during wartime now affect all citizens? Also, when will this terminate since terrorism is not a battle that will stop in the near future? These are pertinent questions raised by this new type of warfare, and the expanding definition of war is something that should be discussed.

The government has begun to label terrorist activities as war versus crime in order to get over the reluctance of expanding executive and congressional wartime

authority. However, the problem with this new definition is that labeling domestic activity as war, not crime, is placing citizens’ constitutional rights in jeopardy of being abused. As the court cases that will be discussed exemplify, the government has been allowed to hold citizens and aliens in custody due to the shifting definitions of ‘enemy combatant’ and ‘suspected terrorist’ versus statutory criminal offenses. In a 2001 court case, Zadvydas v. Davis, the Court said “anyone who finds himself in the United States, unless he is an illegal entrant stopped at a port of entry, has some constitutional rights beyond the bare right to apply for habeas corpus.”

However, if the person is defined as a ‘prisoner of war’, then they no longer are protected by the same constitutional guarantees. Furthermore, defining someone as a ‘war criminal’ means they do not even get all the same rights as a prisoner of war, such as the right not to give up information. This dilemma raises serious questions about who decides what title a person receives, and what constitutional rights does that person get to protect them?

In 2002, the Department of Defense defined an enemy combatant as “an individual who, under the laws, and customs of war, may be detained for the duration of an armed conflict. The term includes a member, agent, or associate of Al Qaeda or the Taliban.” Additionally, the president gave two justifications for his ability to detain enemies: “The first was constitutional…Article II alone gives [him] the power to detain enemies during wartime, regardless of congressional action. The second was

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20 Posner, Not a Suicide Pact, 55.
Labeling enemies and detaining them indefinitely is a broad expansion of power that should not be left in the hands of one branch; at least without extensive debate.

One example comes from the Fifth Amendment protection of a grand jury that becomes limited once a person is defined as an enemy combatant: “The protection of a grand jury does have certain limitations; military personnel do not have to be indicted by a grand jury during ‘time of war or public danger’. This section is vague and ‘cases arising in the land or naval forces’ has been stretched to include enemy combatants or other people only tangentially connected to the military.”

This is precisely the problem with the vagueness of “time of war” and “public danger” when the battlefield is all around us and the possibility of ceasing the fight is minimal. Arguments such as this one are one way in which the federal government has expanded power during this most recent national emergency.

The precedent that President Bush used to justify trying enemy combatants in a military tribunal versus a civil court comes from the 1942 case of Ex Parte Quirin. President Roosevelt appointed a military commission to try four German spies caught on U.S. soil. He declared that anyone associated with an enemy or enemy nation was denied access to civilian court. The spies filed for a writ of habeas corpus claiming their right to a jury and trial were violated under the Fifth and Sixth Amendments. The Supreme Court denied them their claim. Since this 1942 case, military tribunals had not been used. Bush cited this case as applicable precedent for supporting his

tribunals. He mainly relied upon his inherent, commander in chief powers to implement the tribunals. Many scholars believe this was not an applicable precedent. Institutional checks should rein in this usurpation of power and contest the executive’s argument if it is not legitimate.

Howard Ball is one scholar who claims that this is not an accurate precedent to use as justification: “Unlike Bush, in 1942 President Roosevelt was not claiming inherent or exclusive constitutional authority [to create the military commission]. He acted under a mix of constitutional authority accorded to the President and statutory authority granted by Congress.”23 This is not how Bush acted, however, since he was relying mainly on his inherent presidential powers. As stated before, inherent power is not always dangerous or illegitimate. The danger rests when the institutional checks are stopped in the name of national security, which is what happened in this instance. Fisher also shows the dissimilarities between the two when he says, “Careful scrutiny of the 1942 experience rebuts the notion that the Nazi saboteur case is a reliable or attractive precedent for the Bush initiative in 2001. The Roosevelt administration was so torn by its handling of the case that it adopted an entirely different procedure in 1945 to deal with two other German spies.”24 The Bush administration should never have been able to get away with using precedent that is unreliable and not similarly paralleled. Finally, Napolitano offers his view on the Bush administrations actions:

The President—using standards not legislated by Congress, not approved by any court, and not made known to the public—has claimed the right to incarcerate Americans as enemy combatants until the War on Terrorism is over….Nowhere in the Quirin opinion did the

24 Fisher, Presidential War Power, 205.
court say the President had blanket authority to declare anyone an enemy combatant at the request of the Attorney General. Nowhere did the court say the President could indefinitely lock up anyone who didn’t cooperate with the Justice Department.25

This is precisely why it is imperative to keep in place the doctrine of separation of powers and checks and balances, especially during times of national crisis. The expansion of power sought during this time is exponential, and it has not been until recently that we have seen the reinstatement of institutional checks and constitutional guarantees.

Using this precedent, President Bush began to define and detain enemy combatants in Guantanamo Bay, Cuba. Before they reached the Supreme Court in 2004, these cases began to imitate other historical precedents of presidential expansion of power during a national crisis. The Justice Department even went so far as to say this, as stated by Fisher, “[The Justice Department] insisted that whenever the administration decided to detain a U.S. citizen indefinitely, without trial, federal judges had no right to interfere with executive judgments.”26

As an example, the case of Hamdi v. Rumsfeld is quoted: “The fourth circuit juggled two values: the judiciary’s duty to protect constitutional rights (especially of U.S. citizens) versus the deference that courts should grant to military decisions reached by the President. Each time the circuit came down squarely on the side of presidential power.”27 The courts have an obligation to uphold the Constitution, and it is detrimental to citizens’ rights to have them overlooked and blatantly abused in the name of national security and presidential power.

A disquieting example from these enemy combatant cases is one of a Turkish man named Murat Kurnaz. Fisher provides the example in his book saying, “[He] was

27 Ibid., 193.
apprehended in Pakistan for a reported $3,000 bounty payment. After being tortured in a prison camp...he was taken to Guantanamo and held there for more than four years as an ‘enemy combatant’. He was finally released in July 2006. The record showed no evidence of terrorist activity.”28 This is highly undemocratic of the U.S. government to detain people and deny them of constitutional rights by simply skirting the definition of ‘citizen’.

The actions of the federal government after the events of September 11, 2001 have left a stain on U.S. democracy. How much federal power must be usurped and abused before we put an end to it? The nation has seen plenty of mistakes in the past to use as illustrations for not allowing it to be repeated. The Supreme Court cases of the three enemy combatants, however, give hope that executive power may have finally come to a stop, or at least may have halted the expansion of power.

Conclusion: Where are we now?

As this thesis has demonstrated, periods of national crisis spawn expansion of the federal government, along with the curtailment of civil liberties. The majority of the incidents described prior to September 11, 2001 have been repudiated by the public as well as the government at sometime or another after the emergency has ceased. Time is of the essence, and many times we do not see the full picture or the consequences of actions until long after the instance. The Kentucky and Virginia Resolutions of 1798 brought awareness to the constitutional violations of the Alien and Sedition Acts, and called for stronger protection of civil liberties. Similarly, after the Japanese internment cases came before the Court, the press began to urge people to think about the constitutional violations and civil liberties that this incident produced. Finally, critics of the 2001 USA PATRIOT Act spoke out against its civil liberties violations to let the public know they were questioning the governments’ actions. Once again, it wasn’t until after the act had been implemented and constitutional rights abridged did the government take action and check the executive’s claimed power. The most important advice that history can offer is to see the mistakes others have made and take action to ensure that they do not happen again. If we are to take any advice from the three instances exemplified in this thesis, it is to never stop the healthy political debate surrounding the governments’ actions. Separation of powers and checks and balances do not skid to a halt when a crisis happens; it is in those moments that constitutional rights are most vulnerable and therefore should be protected more fervently.

The most outspoken critic of the USA PATRIOT Act and the only Senator to reject the bill was Russ Feingold. His words, as reported in The Washington Post, are the kinds of
debate that should be surrounding such a controversial bill and should be done by more than
one member of Congress. The article says:

Voting against the anti-terrorism bill wasn’t even a close call for Senator Russell
Feingold (D-Wis.). It didn’t matter that everyone else was voting for it, or that 9
months ago he had voted to confirm the bill’s prime advocate, Attorney General John
Ashcroft. What mattered most, he says, were the freedoms that were being taken
away. In an interview yesterday, Feingold said that despite the lopsided margins, many
of his fellow legislators voted for the measure only because they felt they had no
choice. He said that even the bill’s title—the ‘USA PATRIOT Act’—was part of the
‘relentless’ pressure to move it swiftly. ‘This is one of the ridiculous things they do in
Washington,’ he said. ‘They want to intimidate people…A number of my colleagues
said they thought I was right on the merits but felt they had to vote for it
anyway.’…This is not a bill that is carefully tailored to the terrorism problem. The
whole tenor of the debate was ‘let’s grab as much as we can given the fear of
terrorism.’ He said that he was also listening to his constituents, who understand that
government should not be given too much power…He said that he does not believe
that patriotism requires everyone to walk in lockstep. ‘Unity doesn’t mean unanimity,’
he said. ‘The problem is that these things tend to go only in one direction.’

Members of Congress do have a choice, more so an obligation, to uphold the Constitution and
critically debate controversial issues. Given the fear of terrorism, the tenor should be in the
direction of protecting the institutions of government and the rights guaranteed to the people.
Patriotism does not have to be to the president, but it can and should also be to the
Constitution.

It has never been more important then now to question those in power and provide
discourse on the importance of our nation’s system of checks and balances and separation of
powers. The Constitution was written during a time of crisis and struggle, but it still managed
to provide both the necessary power for the federal government to work, as well as the basic
rights and liberties required for its citizens. We must strive to keep these two desires in
balance. As Richard Posner writes, “A national emergency, such as a war, creates

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disequilibrium in the existing system of constitutional rights.”\textsuperscript{2} This disequilibrium is something that has to be continually checked and reviewed with each new emergency to ensure that constitutional rights are not compromised. Posner continues by saying, “The powers that the Constitution grants to Congress and the President have to be adjusted to the rights that the Constitution grants the individuals affected by the exertions of those powers.”\textsuperscript{3} Presently, the executive branch is the one that has continued to push this boundary, and it is up to the rest of us to demand balance again.

Fortunately, the enemy combatant cases that started to grant extreme presidential power and expansion made their way to the Supreme Court. Howard Ball contends that, “the Court moved from the sidelines to the center of the debate over whether the administration’s response to the terrorist attacks of September 11, 2001 reflects an appropriate balance between national security and individual liberty.”\textsuperscript{4} Although the Court was the first one to move from the sidelines, Congress has also showed that they will not allow further abuse by the executive branch. As Louis Fisher dictates, “The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that the Congress is a co-equal branch of government is the dominant fact of national politics today.”\textsuperscript{5} Hopefully, this recognition will remain and the acquiescence previously displayed will be a thing of the past. No longer will Congress be forced into a premature decision that they later come to regret, if they begin to question and analyze the executives’ policies. The obligation to defend constitutional rights is not only left for the federal government, however. As this paper has

\textsuperscript{2} Posner, \textit{Not a Suicide Pact}, 147.
\textsuperscript{3} Ibid., 68.
\textsuperscript{4} Ball, \textit{Bush, The Detainees, and The Constitution}, 89.
\textsuperscript{5} Fisher, \textit{Constitutional Conflicts}, 284.
evidenced, the branches are and have been susceptible to forfeiting their independence to the executive. Louis Fisher agrees and offers this:

It is the obligation of scholars, citizens, and the media to constantly press upon Congress and the courts the need to safeguard individual rights, constitutional values, and structural checks. Those values are far more important than a show of national unity behind a particular President. Patriotism worth its name grants the highest priority to the nation—not to the Chief Executive—and knows the difference between the two.6

When a national emergency strikes, as will undoubtedly happen again, we must show patriotism to our country and its highest values, but we must not let that patriotism and unity be destructive to our democratic system. We value the Constitution and its liberties, so we must unite behind that and demand it be upheld throughout the struggle. We have a renewed sense of hope for this balance, as the opinions in the Hamdi v. Rumsfeld case exemplify.

Howard Ball asserts this renewed attitude by saying this about O’Connor’s opinion:

“After engaging in the balancing of the competing interests, O’Connor concluded that due process due citizens outweighs the government’s arguments that in wartime presidential judgments are primary.”7 He continues by including this quote from the opinion:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation’s citizens….Whatever power the United States Constitution envisions for the executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.8

The most powerful words from the Hamdi opinion come from Justice Scalia’s words:

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crises—that, at the extremes of military exigency, inter arma silent leges. Whatever the general merits of the view that war silences law or

6 Fisher, The Constitution and 9/11, 247
7 Ball, Bush, The Detainees, and The Constitution, 118.
8 Ibid.
modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war.⁹

Hopefully, the view that laws are not silenced in a time of war will continue to last in the United States and will be upheld by its citizens and government alike.

⁹ Ibid., 121.
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