

Constitutions Under Stress: International and Historical Perspectives

Geoffrey Stone, Patricia M. Wald, Charles Fried, and Kim Lane Scheppelle

On May 12, 2005, the Academy held its 1892nd Stated Meeting in Washington, D.C. Stephen Trachtenberg, President of George Washington University, and Leslie Berlowitz, Chief Executive Officer of the Academy, welcomed Fellows and their guests to a meeting that focused on the constitutional questions raised when democratic governments seek to balance civil liberties with national security strategies. The meeting was part of an ongoing Academy project on the relationship of Congress and the Court. Serving as moderator, Robert C. Post (Yale Law School) noted that the project's initial focus on the tension between the federal legislature and judiciary has been expanded to consider the stress placed on constitutional forms of government by the events since 9/11. What is the relationship between civil liberties and the need to enforce greater security? What is the boundary between constitutional law and politics? How have other constitutional democracies dealt with the war on terror?

The members of the Academy steering committee on Congress and the Court include cochairs Jesse Choper (Boalt Hall School of Law, University of California, Berkeley) and Robert C. Post (Yale Law School) as well as Linda Greenhouse (*The New York Times*), Abner Mikva (University of Chicago Law School), Nelson Polsby (University of California, Berkeley), Judith Resnik (Yale Law School), and Leslie Berlowitz (American Academy).

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Geoffrey Stone

I want to open our discussion by making three basic points. First, the United States has a long and unfortunate history of overreacting to the dangers of wartime, and, as a consequence, it has excessively restricted civil liberties in these circumstances. Second, the courts could, in theory, play a salutary role in checking some of those excesses, but they have tended to be exceedingly deferential to the legislative and executive branches, particularly during wartime – too often they have not restrained those abuses. Third, the courts need to take a less deferential stand and have more confidence in their ability to influence these matters.

Beginning as early as 1798, less than a decade after the Constitution was enacted, Congress passed the Alien and Sedition Acts. They were promulgated by Federalist legislators in part to prepare the nation for an impending war with France, but primarily to cripple the Republican Party of Jefferson

and Madison, with an eye toward the 1800 Presidential Election. The Alien Act authorized President John Adams to detain and deport any noncitizen without a hearing, without the opportunity to present evidence, and without any judicial review. The Sedition Act effectively made it a crime for any person to criticize the President, the Congress, or the government of the United

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States. The Federalists defended this legislation on the grounds that, in time of war, it was essential that there be national unity and that dissent not be allowed to demoralize American citizens or create a lack of confidence in the President or in the government. The Republicans objected that the Alien Act violated the “due process” clause and that the Sedition Act violated the First Amendment; but the Federalists had the votes to override those objections.

The Sedition Act was used exclusively against members of the Republican Party for their criticisms of Adams and the Federalists. Ultimately, Jefferson won the 1800 election and freed those who had been jailed under the Act. Fifty years later, Congress

declared the Sedition Act unconstitutional, and, in the years since, the Supreme Court has never missed an opportunity to assert that the Act violated the First Amendment.

We can learn an important lesson from this first wartime experience: in moments of crisis, national leaders, or those who aspire to be national leaders, tend to use the pretext of a crisis to enact policies that will serve their own partisan interests. It is a pattern that has recurred throughout our history.

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During the Civil War, one of the major civil liberties issues involved Lincoln's suspensions of habeas corpus. In some instances, the nation's circumstances justified this action, but in others, it was excessive and unnecessary. During the course of the war, Lincoln and his administration found it increasingly easy to suspend the writ of habeas corpus in order to control civilian citizens, even when there was no military reason to do so.

In World War I, the United States enacted some of its most repressive legislation relating to dissent. The Wilson administration brought America into an unpopular war. Wilson was reelected in 1916 on the platform that he had kept this country out of war, and when the United States finally entered the conflict in 1917, there was substantial opposition. Many believed that our entry into World War I had little to do with making the world safe for democracy and much more to do with making the world safe for war profiteers. In response, Wilson took two steps.

First, he created the Committee on Public Information, which was essentially a propaganda arm of the federal government. Its purpose was to produce a flood of lectures, editorials, cartoons, and movies designed to generate hatred of all things German and of anyone who might doubt the wisdom or morality of the war.

Second, the Wilson administration strongly advocated the enactment of the Espionage Act of 1917 and the Sedition Act of 1918. This legislation made it a crime for any person to criticize the government, the war, the draft, the Constitution, the flag, the military, or the uniform of the U.S. military. Unlike the Sedition Act of 1798, which rarely resulted in prison sentences of longer than four to six months, these acts authorized prison terms of up to twenty years, and lengthy sentences were routinely meted out. More than two thousand persons were prosecuted under this legislation during World War I, and as Zachariah Chafee said at the time, "The consequence of this legislation was that it became perilous for anyone to question the legitimacy of the United States' role in the first World War." The individuals prosecuted ranged from the obscure to the powerful.

A twenty-year-old Russian Jewish émigré named Mollie Steimer, who threw some leaflets from a rooftop on the lower East Side of New York, was prosecuted and convicted under the Sedition Act, sentenced to fifteen years in prison, and then deported. At the other extreme was Eugene Debs, the 1912 Socialist Party candidate for President who received 6 percent of all the votes cast.

In 1918, Debs gave a speech in Ohio in which, by innuendo, he criticized the draft by praising those who had the courage to resist it. He was prosecuted, convicted, and sentenced to ten years in prison. After the war ended, the Sedition Act was repealed, and those individuals imprisoned under the Act were gradually released. President Roosevelt eventually granted amnesty to all of them. Again, there was recognition that we had lost our heads and overreacted in wartime.

In World War II, the primary civil liberties issue involved the internment of almost one hundred and twenty thousand individuals of Japanese descent. Although undertaken under the guise of military necessity, the reality we know now (and many people knew at the time) is that the policy had less to do with military necessity than with politics, racial hatred, and a failure of national leadership. After Pearl Harbor there was no call for the internment of individuals on the West Coast. That movement developed four to six weeks after December 7, as rumors of possible espionage and sabotage spread through the West Coast. Although the rumors were unsubstantiated, individuals began to see opportunities to eliminate the

competition of both Japanese Americans and Japanese citizens. Of the one hundred and twenty thousand men, women, and children interned, two-thirds were American citizens. They remained in concentration camps for approximately three years.

No evidence was ever presented that these individuals were disloyal or had done anything to deserve such treatment. The Secretary of War, Henry Simpson, did not support internment, and the Attorney General, Francis Biddle, vigorously objected to it on the grounds that it was unconstitutional and immoral. FBI Director J. Edgar Hoover also opposed internment, saying that the FBI had already rounded up anyone on the West Coast, whether of Japanese, Italian, or German ancestry, who posed a danger to the United States. He declared that there was no national security justification for this action. Nonetheless, Franklin Roosevelt signed Executive Order 9066 and did so essentially for political reasons. Concerned about the out-

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come of the 1942 congressional elections and not wanting to alienate voters in California, Arizona, Oregon, and Washington, he appeased the racists on the West Coast who demanded internment. The Supreme Court upheld the constitutionality of the order, and although this decision has never been overruled, it is regarded as one of the worst failures in the Court's history.

During the Cold War, McCarthyism was the primary issue. Faced with a real concern about Soviet militarism, espionage, and sabotage, the United States fell into a series of witch-hunts that went beyond any rational investigation of individuals who might actually have posed a danger to the country.

America was whipped into a frenzy of political opportunism designed to attack the Democratic Party, which had been in power for the preceding sixteen years. The Democrats were charged with failing to keep America safe because of the alleged infiltration of thousands of “Communists” in the government, education, labor, the press, the legal profession, and the like. Led by Richard Nixon and Joseph McCarthy, the Republican Party leveraged this concern into an era of blacklisting, public humiliation, investigation, and prosecution of individuals for their political beliefs and associations. The Supreme Court, in a pivotal decision, upheld the constitutionality of the conviction of the Communist Party leaders.

In periods of crisis, an understandable tendency on the part of our leaders and citizens is to lash out at those we believe to be dangerous and disloyal, leading to aggressive government action to protect us from such people. National leaders, who are, after all, responsible to the electorate, tend to respond immediately to public fears and anxieties. Moreover, in some circumstances, they not only yield to the demands of the public but cynically exacerbate those fears and demands in order to serve their own partisan political purposes. This process will recur in the future, as it has in the past.

There are many ways we can address these concerns. One, in particular, involves the courts. In peacetime, we rely upon courts to serve as a critical check against the violation of civil liberties and individual rights. Although courts have often served the nation well in fulfilling this responsibility, in time of war they have too often abdicated that responsibility and taken a highly deferential approach. Most judges feel that they lack sufficient knowledge and experience to deal wisely with questions of national security and military necessity, and consequently they tend not to second-guess military commanders or civilian leaders during wartime. Moreover, the stakes can be extraordinarily high: a mistake by judges who insist upon the protection of civil liberties over the objections of the executive or the legislature can cause real harm to the nation. But those with little sensitivity to civil liberties can cause real harm to the nation as well.

Toward the end of the Cold War, during the Vietnam War, and in June 2004 in its *Guan-tánamo Bay* and *Hamdi* decisions, the Supreme Court has taken a stronger view of

these issues. Over the last twenty-five years the Court has demonstrated that it can play a more effective role than it has historically by insisting on accountability from legislative and executive officers. It is critical to the future well-being of our society that judges and justices continue to play this role and exercise closer scrutiny of government actions in wartime than they have in the past. Therein lies the path to true safety.



Patricia M. Wald

The history of the American Constitution has been an interpretative, not an amendatory, one. To illustrate this viewpoint, I want to focus on the interpretive history of the Fifth Amendment that forbids any person “to be deprived of life, liberty, or property without due process of law.” The Fifth Amendment applies to the federal government; the Fourteenth Amendment extends that same bar to state governments.

Where did this right to “liberty” come from and what does it cover? Does it have any enforcement teeth? From Civics 101, you know that the Declaration of Independence spoke of “certain unalienable Rights” including “Life, Liberty and the pursuit of Happiness.” It stated: “Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.” The colonists’ grievances included rendering the military independent of and superior to civil power – a debate that is still going today – and transporting colonists overseas to be tried for pretended offenses. So far we haven’t used the power of rendition to transport citizens, but we have used it to transport noncitizens.

The right to liberty evolved through the thirteenth-century Magna Carta, the Petition of Rights, and the Bill of Rights in England. Accompanying these was habeas corpus,

which required the King’s officials to produce individuals in their custody and to justify that custody before the civil courts.

What liberty covers is a long and fascinating subject – still a work in progress. But one thing is certain: it covers the right to be free from arbitrary arrest and detention.

Again, there is a recurrent theme in our present dilemmas. In 1628, Lord Coke fought back an attempt to create an exception to the writ of habeas corpus when the King was “acting for reasons of state.” In the body of our own Constitution, Article One, Section Nine allows the suspension of the writ of habeas corpus “only in Cases of Rebellion or Invasion” when “the public Safety may require it.”

What liberty covers is a long and fascinating subject – still a work in progress. But one thing is certain: it covers the right to be free from arbitrary arrest and detention, what Justice O’Connor recently called in the *Hamdi* case, “the most elemental of liberty interests: the interest in being free from physical detention by one’s own government.” An aside here: a poll conducted by Human Rights Watch a few years ago found that Eastern Europeans emerging from the Soviet bloc prized the basic right not to be held in custody far above any other political and civil right, including free speech and free press, and above access to jobs, education, and housing.

How has this guarantee of liberty fared in our constitutional history? Geoffrey Stone considered this issue in time of war, but I want to remind you that the Supreme Court constantly reiterates that liberty is the paradigm in both war and peace: “In our society, liberty is the norm and detention without trial is the carefully limited exception.” How carefully limited? Individuals can be imprisoned after conviction and also before trial if a magistrate deems them safety or recidivist risks. They can be detained as material wit-

nesses if their appearance at trial cannot be assured. The mentally disabled and narcotics addicts can be civilly committed for treatment if they pose a danger to themselves or others, but only by court order. Temporary restraints can be put on all of us for crowd control. If he has reasonable cause to think you're about to commit a crime, a policeman can stop you in the street long enough to question you and ensure that you do not

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have weapons. Noncitizens can be detained before and after deportation proceedings. In cases of declared war, the 1798 Enemy Alien Act allowed aliens to be held in custody for the duration of the war. The recent Patriot Act permits a seven-day detention of suspected terrorists before they are charged or released, but to date this provision has not been used.

Congress has authorized all of these exceptions, and the courts have upheld them as meeting the crucial due process of law requirement in peace and in war. Indeed, in 1969, Congress passed a law specifically stipulating, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress." However, candor again compels us to acknowledge that this law was created to repeal an earlier 1950 act, enacted during the Red Scare, which authorized detention of persons the government deemed likely to engage in sabotage or espionage – again a law mercifully never invoked.

Geoff has referred to the infamous internment of more than one hundred thousand

Japanese Americans during World War II with no justification except for war hysteria and false military allegations. Earl Warren, then Attorney General of California, backed their expulsion from the West Coast. Charles Fahey, the Solicitor General and a wonderful civil libertarian judge with whom I had the privilege to serve briefly on the D.C. Circuit, argued its validity before the Supreme Court, albeit on a technicality, namely that the order it reviewed and upheld pertained only to assembling Japanese Americans temporarily, not to their internment for the duration. John Ferran's recent biography of Wiley Rutledge – another great civil rights judge – tells us that Rutledge was influenced by William Douglas who also voted for internment, saying at the time: "Where the peril is great and the time is short, temporary treatment on a group basis may be the only practical expedient." Many years later, Douglas openly regretted the decision, but Rutledge justified his stance on the ground that World War II was, and remember these words, a war "different in total scope" than any before and thus merited "a greater alteration of power and liberty." Sound familiar?

As I said earlier, the history of our Constitution is an interpretive, not an amendatory, one. Everything that has happened has been under the rubric of "due process of law." Abuses are unlikely to stop, even with the advent of two important new factors. The *first* is international humanitarian law (IHL). It consists of international treaties such as the Geneva and Hague Conventions to which the United States is a party, as well as customary international law, the norms that civilized countries feel an obligation to accept. At times, the U.S. government recognizes parts of customary law and, at other times, rejects or ignores parts. But, in general, it does profess to follow the Conventions to which it has subscribed, although often making its own decisions as to what those conventions require. Relevant here are the Geneva Conventions III and IV that set out a specific protocol for determining the status of a prisoner as soon as possible after capture on a battlefield. Is the prisoner a legitimate prisoner of war entitled to distinct rights and privileges but allowed to be held in custody for the duration of the conflict? Or is he an innocent bystander or a so-called illegal combatant who is not entitled to prisoner-of-war status because his group has not followed the laws of war or because he himself is a renegade?

The United States held thousands of these hearings on the battlefield during the Vietnam War and in Desert Storm, but it did not do so in the Afghan War. The Geneva Conventions require humane treatment for all prisoners, but they are silent on the subject of what to do with a combatant who is not a prisoner of war – one of the lacunae in international humanitarian law left either to domestic law or, some might say, international customary law.

The International Compact for Civil and Political Rights (ICCPR), signed by the United States, is another part of the new calculus of liberty. Section Nine of the ICCPR sets out a parallel right to our Fifth Amendment: the right not to be detained unless a prisoner is charged before a magistrate. It states, "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary detention." The ICCPR has the status of international customary law. The United States has also ratified a Convention against Torture and Inhumane or Degrading Treatment.

It is settled law that, should there be a conflict, our own Constitution trumps all other sources of law – common law, statutory law, or even international law – but that same Constitution recognizes treaties as the supreme law of the land. Several Supreme

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Court cases, early and late, have held that our laws should be interpreted whenever possible to accommodate our international commitments. In the minds of many, these obligations should inform the interpretation of what constitutes "deprivation of liberty without due process of law."

The *second* new element in the tension between liberty and security under the Fifth Amendment is the kind of war that we've been thrust into after 9/11: the global war on terror. Parts of it are like traditional wars – the Afghan campaign and the invasion of Iraq – but other parts are not: the hunt for Al

Qaeda and other terrorists, cells, and networks in our country and all over the world, isolated or in packs. Current U.S. governmental theory maintains that suspected terrorists can be picked up anywhere in the world and imprisoned without rights of any kind as enemy combatants in this new war. They have no “due process” rights: even American citizens can be apprehended on American soil and turned over to the military on that basis. As a result, in the past four years, our military has detained, without charges or judicial hearings, some fifty thousand individuals in Afghanistan, Iraq, Guantánamo, and even U.S. military brigs, apart from an unknown number held in undisclosed locations or by the CIA.

Are there any checks on the alleged liberty infringements of these persons who are detained basically on the executive’s say-so? Three cases did reach the Supreme Court two years ago, but they provide only limited answers to that general question. We know that in the case of foreign captives imprisoned in Guantánamo, the Court avoided making any constitutional pronouncements on their liberty rights, but it did say that the habeas corpus statute, by its own terms, included them in its orbit, and they would get some kind of hearing in the federal district court. Whether that ruling applies only to Guantánamo or every other detention spot is still not settled; whether it would grant relief only if the detainee could show he was an innocent bystander is equally unclear.

The Pentagon has instituted a regime of “hearings” to determine if a detainee is truly just an innocent. In these hearings, detainees have no counsel; they are shackled and not allowed to see any sensitive materials. Out of 550 hearings conducted thus far, the government has released the findings on thirty-eight. It maintains, however, that this is enough due process to obviate anything more in a habeas corpus hearing in the real court. These cases are now working their way up to the high court. Recently the Senate has passed an amendment taking away this right, and so the future of these cases is unclear.

The second case last year involved an American captured in the combat zone in Afghanistan. He also claimed to be an innocent. Here the Court stepped up to the constitutional plate and said that in the case of a citizen, due process required a hearing (perhaps only a military one) with notice of charges; counsel; access to incriminating evidence,

possibly modified if national security is at stake; and the ability to defend oneself. But the ruling also said that a citizen could be detained for the duration of the conflict in which he is engaged if he is shown to be a combatant against the United States or its allies, based on a post-9/11 law authorizing necessary and appropriate force against anyone who planned or harbored the 9/11 perpetrators.

The last case involves an American who was arrested at O’Hare International Airport on suspicion of training in Al Qaeda camps and planning sabotage. He was held without charges for three years incommunicado – a sentence that was aborted temporarily on a technicality because his writ of habeas corpus was brought in the wrong district. In the last few months, he has been indicted for criminal acts of aiding terrorism and removed to civilian custody.

Where are we now? Unless the executive capitulates on its insistence that Article II gives the President, as commander in chief, omnipotent powers to designate anyone as an enemy combatant and detain him indefinitely without rights or restrictions, we very possibly have constitutional crises ahead. Most people – and this includes myself – are looking to Congress for help in formulating a regime to deal with some very basic unanswered questions about liberty. Michael Ignatieff, writing in *The New York Times* last year, said, “To defeat evil, we may have to traffic in evil: indefinite detentions, coercive interrogations, targeted assassinations, even preemptive war.” But he adds, “They should all be subjected to critical review, free and open debate, and various forms of judicial review. War needs to be less secretive. A more painful truth is far better than lies and illusions.”

I cannot go into the many proposals for reconciling liberty and security in this new war; some are too tough for many civil libertarians and others are too weak for many “securitarians.” The best possible solution would be for Congress to debate how to answer the basic questions involved in preserving liberty – for citizens, for noncitizens, wherever detained, wherever arrested. Whatever solutions reached by Congress in the free and open legislative hearing process could then be assessed by the Court to determine their constitutionality. Very recently Congress has begun to define rules and re-

view processes for Guantánamo detainees as well as prohibitions from torture and inhumane treatment for all detainees, but at this point, the outcome is unclear. Here again, due process is threatened with itself becoming a prisoner of war.



Charles Fried

It’s commonplace to chronicle how crises are manufactured and then opportunistically manipulated to overcome constitutions. The practice dates back to the Roman Republic of Julius Caesar and Augustus and extends to Hitler and the Reichstag fire – the final burial of the Weimar Constitution.

Sometimes, the crises are real, not manufactured, but they are still used opportunistically for political ends. As Geoff just described, Japanese exclusion is a perfect example. One interesting fact he did not mention: The Japanese exclusion ended on November 15, one

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week after the presidential election. The culprits were Roosevelt and perhaps Earl Warren, then Attorney General of California.

Of course, it is a fact that crises put constitutions under “processual” stress. Constitutions assume slow, consultative, deliberative processes that do not allow us to act in a great hurry, as illustrated by Lincoln’s calling up the Army, quite against the Constitution, after the firing on Fort Sumter. And crises put stress on the *content* of the decisions, not just the *processes* by which they’re reached, as evidenced by the Alien and Sedition Acts. Crises also point out the fact that constitutions have gaps in them: they have not been drafted with careful consider-

ation of all possible situations. After all, constitutions are not mathematical systems: they are created by people, and people make mistakes. Beyond the question of how real crises are opportunistically manipulated to allow politicians to overcome constitutions is the issue of how imagined constitutional

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crises are manufactured and manipulated for political ends. I have two examples: McCarthyism and the war on terror. From the 1920s until sometime after the end of World War II, a sizable and socially, intellectually, and politically prominent minority in this country – and in the West generally – was enthralled by Bolshevism and what were then called the “progressive forces” in the world. Consider two examples: Durant’s reporting from the USSR in *The New York Times*, for which he received a Pulitzer Prize, and the views of French intellectuals that persisted in some quarters until as recently as 1989.

After World War II, and particularly after the murder of Jan Masaryk in Czechoslovakia, there was a decisive turn away from “progressivism,” but there was also a fighting back that led to something called a myth of McCarthyism. All myths have real villains, and Joseph McCarthy was an honest-to-goodness villain who used accusations of spying as a stick to beat political opponents in the name of constitutional principle. At the same time, the myth of McCarthyism fails to recognize that there were real problems and real enemies, and many of the so-called victims were not victims at all. As late as 1975, the court on which I was privileged to sit overruled its Committee of Bar Overseers to allow the reinstatement of Alger Hiss (*In the Matter of Alger Hiss*, 368 Mass. 447, 1975). All this was a myth because it is now clear to all but the most obdurate that Alger Hiss was a Soviet agent, and so described in Soviet and Hungarian secret police files.

According to the myth, in those years, membership in the Communist Party of the United States was something like a benign eccentricity. We have since come to understand that the Party was actually a tightly controlled body, manipulated from Moscow. But the way in which courts and many institutions responded at that time came to be regarded as a paradigm of what should not be. The myth now declares: if it was done during that period, it must be wrong, and we must do the opposite. That, of course, is how myths work.

Let me give you an example of a group of things that are now assuming mythical status of the same sort: the Patriot Act, John Ashcroft, the Justice Department, and the war on terror. Here we have exactly the same kind of myth as the myth of McCarthyism – and it is being used opportunistically to make political points where there are political points to be scored. The status of aliens is one example. We are now being told that individuals, who are in this country either as guests or as trespassers, cannot be removed without elaborate procedures. But anybody who has worked in the legal system – as I did when I was Solicitor General – saw how those procedures were regularly manipulated to create almost indefinite postponements of actions that should have been swift and inevitable. As rules have been adopted to alleviate these postponements, both in this country and in the United Kingdom, the myth is being used opportunistically and politically to attack opponents. We should not be fooled.

Let me cite a second example. We are in the process of inventing a whole set of constitutional rights around ill-defined terms such as privacy and data mining. This practice invokes bogus, nonexistent constitutional principles that would deny the government the authority to compile and sift public information (available to *The New York Times* or *People for the American Way*) in order to identify persons not for detention or for income tax audits but for further investigation.

From looking at old movies, I’m reminded that G-Men used to park in front of mob funerals, take down the license plate numbers of those inside, and then laboriously go through public records to discover who these people were. That was primitive data mining, and it didn’t enter anyone’s head to suggest that a constitutional right was at

stake. Today, learned commissions, authorized by, of all things, the Department of Defense, are making these preposterous arguments. Imagine if *People for the American Way* attended public lectures by persons being considered for judicial appointments, studied their writings in databases, and then published these in a newspaper. Would that be a constitutional violation? No, it’s not state action. But if the government does that, it becomes a constitutional violation. That is what we are hearing today, and this is the result of myth-making posing as argument.



Kim Lane Scheppele

I want to conclude this panel discussion with a consideration of constitutionalism in the context of the global war on terror. Following World War II, the world witnessed the most spectacular commitment to constitutionalism ever recorded – an extraordinary accomplishment that has not been sufficiently acknowledged. In the United States, we tend to talk about a specific Constitution, but the term “constitutionalism” signifies a number of critical principles. One is the principle of constrained government – the idea that government does not occupy

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all of the available space. The separation of church and state is a subset of constrained government, as is the permission to develop multiple political parties and other civil society groups. A second principle is the sep-

aration of powers, specifically how executive power is constituted and limited in constitutional governments. Third is a set of commitments to the rights of individuals that relate specifically to the limitations placed on the way governments can treat both citizens and noncitizens. A fourth principle – more prominent abroad than in this country – is the separation of policing and military functions. It is crucial to have a civilian police force that does not respond to military chains of command that go directly up to an executive.

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Why did constitutionalism grow so spectacularly after World War II? There were a number of factors: lessons learned from the collapse of the Weimar Constitution and the rise of Nazi Germany; the retreat of military governments in Latin America in the 1970s and 1980s; the fall of Communism in Eastern Europe and the eventual deconstruction of the Soviet Union; and finally, the impact of specific forces in specific places – for example, the end of apartheid in South Africa. However, the rise of constitutionalism was greatly aided and abetted by the growth of a supportive infrastructure of international institutions and international law, including, as Judge Wald mentioned, international human rights and humanitarian law.

Since 9/11, however, there has been a marked retreat of constitutionalism worldwide as a result of the anti-terrorism campaign. It is most evident in the new and fragile constitutional democracies that were unable to put down strong roots before they were buffeted by the forces after 9/11, but problems are emerging in more established governments as well.

As you know, military governments have ruled Pakistan for half of its half-century history. President Pervez Musharraf seized power in a military coup in 1999, suspended the constitution, and declared martial law. The Supreme Court of Pakistan ruled that the Musharraf government held power constitutionally but gave Musharraf until September 2002 to hold elections and turn the reigns of power back to a civilian government. Then 9/11 happened – and what was Musharraf's response?

Pakistan became one of the states on the front line in the war on terror, and, for a variety of reasons, Musharraf either decided or was pushed to stay in power. On May 1, 2002, he held a referendum in which 90 percent of the voters supported his remaining president for an additional five years. When independent election observers questioned the tally, the Supreme Court was called upon to review the referendum and declared it free of taint.

In the fall of 2003, Musharraf pushed the Seventeenth Constitutional Amendment through the National Assembly, giving himself sweeping new powers. The amendment includes the declaration that all of Musharraf's earlier edicts and decrees, including the establishment of a military national security council as a permanent advisor to the president, are consistent with the constitution. Yet the constitution itself explicitly states that the military cannot act in this capacity. This is only one of twenty-nine provisions in the amendment, making it unclear exactly what the constitution of Pakistan really is. Again, on August 13, 2005, the Supreme Court of Pakistan dismissed a number of petitions against the amendment and declared it constitutional. Clearly, this situation poses an immense threat to the continuance of democracy, to the separation of powers, and to the maintenance of any structure of rights in Pakistan. For the first time in the country's history, and despite many military governments, Pakistan's military is now a permanent structural feature of its constitution.

Let me consider two other examples of fragile states where reactions to terrorism have caused parts of the constitutional order to come unglued. Colombia, a frontline state in the war against drugs, has experienced a number of insurgencies. In 1991, however, it created a new constitution, and the Colombian Constitutional Court has become one of the most impressive, interesting, and ac-

tually quite aggressive constitutional courts in the world. Yet, shortly before 9/11, President Andreas Pastrana issued an executive decree declaring a state of emergency and permitting the military to search homes, tap phones, open mail, and arrest civilians without first getting warrants from neutral judges. The Constitutional Court declared the state of emergency unconstitutional.

When new President Alvaro Uribe came into office, he pushed through parliament an anti-terrorism statute that had many of the same provisions as the executive decree; the Constitutional Court also declared this law to be unconstitutional. In summer 2004, under the banner of the global war on terror, Uribe succeeded in gaining parliamentary approval for a series of constitutional amendments, again giving the military the power to search homes, tap phones, open mail, and arrest civilians without warrant. Again the Constitutional Court struck down the amendments. Uribe immediately retaliated and passed through the parliament a constitutional amendment stipulating that the Constitutional Court can no longer review anything having to do with states of emergency – an issue that is presently before the Constitutional Court. I suspect that, in looking at this situation, other courts may sense that if you stand up too long and hard to assertions of executive power, there's a point at which courts can no longer defend themselves. This is a real possibility in Colombia.

Since 9/11, however, there has been a marked retreat of constitutionalism worldwide as a result of the anti-terrorism campaign.

Turning to a third example, Russia now has a fragile new constitution that went into effect in 1993, just after then-President Boris Yeltsin bombed the Parliament building and suspended the previous constitution. Although born in fire, the new constitution has made a real difference in the lives of Russians. The Russian Constitutional Court has handed down a number of brave deci-

sions, trying to uphold separation of powers and completely reforming criminal procedure in the country.

But after 9/11, a number of troublesome incidents occurred. Russia, of course, had its own ongoing indigenous civil war in Chechnya in which the Russian military had been sent to suppress a domestic separatist move-

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ment. One of the tactics of the Chechen rebels has been to launch terrorist strikes all over Russia, but the government had, by and large, refused to take the bait. For example, there were very few repressive laws passed after the seizure of a theater in Moscow in fall 2002, and the government did not panic after a series of subway bombings during rush hour killed many people in central Moscow.

Then, in September 2004, Chechen rebels seized 1,500 students, their parents, and their teachers and held them hostage at a school in Beslan, North Ossetia. In the attempted rescue, 350 people died, half of them schoolchildren. The response from President Vladimir Putin was immediate. He announced that the constitutional order had to be modified.

First, he proposed an end to the election of all regional governors. The Russian Parliament passed the provision, and Putin started appointing the governors – a step that obviously increased Putin's powers over the regions. Putin also sought to change the system of representation in the Duma, the lower house of the Russian Parliament, by abolishing all the single-member districts – the primary mechanism by which liberals and reformers were elected to Parliament. That provision passed the Parliament in May 2005 and was signed into law by Putin, essentially ending the parliamentary representation of liberals and other small parties. Perhaps most disturbing, however, are Putin's actions against the special Judicial

Qualification Commission (JQC), a body that disciplines judges for ethical infractions. A proposal, still under debate in the Parliament, would give Putin the power to appoint the panel and to fire judges, as long as the majority of the JQC approves. All of these actions are part of Putin's much-ballyhooed effort to join America in the war on terror, making it difficult for the United States to voice any criticism.

Given this severe stress, the fragile democracies of Pakistan, Colombia, and Russia are close to becoming nonconstitutional governments.

But it is not just fragile democracies that have had their constitutional foundations shaken since 9/11. The reaction in Britain has been particularly strong. Following 9/11, the British government declared a national state of emergency and passed a law giving the home secretary the power to detain indefinitely aliens that he "reasonably suspects are terrorists." In response to a decision of the Law Lords that this law was incompatible with the Human Rights Act because it discriminated against aliens, the government pushed through a new law that essentially allows indefinite house arrest of *both* citizens and aliens if the home secretary suspects them to be terrorists.

Respect for the Constitution in the American war on terrorism, to respond to Professor Fried, has also weakened. We can see this best in what German lawyers call the de-individuation of suspicion. It used to be the case – and the Fourth Amendment barring unreasonable searches and seizures stands for this principle – that the government could not search your home or investigate you without individuated information that you in particular had done something wrong. Since 9/11, the government has, in several instances, obtained legal authority to conduct more searches that do not require such specific suspicion. The FBI's authority to issue "National Security Letters" – expanded as part of the Patriot Act – means that the government, without judicial oversight, can subpoena Internet service providers, universities, libraries, and other institutions, ordering them to provide personal records on individuals without any evidence that the people whose records must be turned over are themselves involved in terrorist activities. And then, of course, there is the President's claimed power to declare citizens to be enemy combatants, held indefinitely in military detention with-

out charges or trial. Those so detained have not been given the opportunity to challenge the evidence against them.

American President George Bush's policy is to fight terrorism by bringing democracy and freedom to the world. I wish that he would add constitutionalism to his list because the effort to promote and preserve constitutionalism has been one of the great accomplishments of the post-World War II world. What worries me most at our present juncture is that these constitutional accomplishments may fail after 9/11. They may fail because the United States has either actively encouraged other countries to adopt policies that undermine their constitutional frameworks or has looked the other way when they do. They may fail because the United Nations Security Council has become actively involved, through its passage of Resolution 1373, in requiring all member states to fight the war on terrorism in very specific ways. The UN Security Council mandates have given governments a green light to weaken their constitutional protections to fight the war on terror. International human rights and humanitarian law, which bolstered constitutionalism during that half century after World War II, are now being undermined by a new international security law that threatens limited government, the separation of powers, the realization of rights, and the maintenance of civilian governments around the world.

We are presently at a critical moment in the history of constitutionalism – where the world system of constitutions is being challenged by a new world war. Will constitutions hold? Will they bend? Will they break? Early signs are not promising, and we may well be seeing the end of the great constitutional era. ■

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