Notre Dame Law Review

Volume 79
Issue 4 *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*

Article 5

7-1-2004

An Essay on the Spirit of Liberty in the Fog of War

Patrick Baude

AN ESSAY ON THE SPIRIT OF LIBERTY IN THE FOG OF WAR

*Patrick Baude**

Linda Greenhouse must be right when she writes in the *New York Times* that the Guantanamo detainees' cases[1] are shaping up as a question of turf between the Executive and the Supreme Court.[2] Although the Court has not heard argument at the time of this symposium, both the lower court cases and the general commentary suggest that the cases will be decided within a "standard conception" of judicial power in wartime. That standard conception begins with the proposition that a sacrifice of civil liberties is a necessary component of enhanced national security in times of great struggle, especially war or warlike times, or even times of metaphorical war (like the Cold War.) The second part of the standard conception is that federal courts, being the primary guardians of individual liberties, must accordingly reduce their active role for the duration of the war or metaphor. But finally, since the goal of the war is for normality to return some day, the courts should preserve their power by its sparing exercise. Some, like Michael Paulsen in this symposium,[3] find sanction for this outcome in constitutional interpretation—making it possible to preserve the rhetoric that the courts do fully safeguard the eternal constitutional flame, so long as we understand the true nature of that flame. Others, like Richard Posner, argue from a consistent pragmatic position that win-

* Ralph F. Fuchs Professor of Law and Public Service, Indiana University, Bloomington. The author is grateful to Professors Patricia Bellia, Daniel Conkle, Robert Rodes, and Jeffrey Stake for helpful comments, and to Darren Craig for research assistance.

1 *See, e.g.*, Gherebi v. Bush, 352 F.3d 1278, 1288–89 (9th Cir. 2003) (holding that federal district courts have jurisdiction over enemy combatants' habeas petitions); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (holding that aliens in military custody outside of U. S. territory do not have due process rights and therefore cannot seek habeas relief in the courts of the United States), *cert. granted sub nom.* Rasul v. Bush, 124 S. Ct. 534 (2003).

2 Linda Greenhouse, *It's a Question of Federal Turf*, N.Y. TIMES, Nov. 12, 2003, at A1.

3 *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV 1257 (2004).

ning wars when necessary is an essential part of constitutional protection.[4] For these writers, courts in wartime are not really compromising their constitutional function, which is properly understood as always involving a pragmatic consideration of their actions on the entire system. Pragmatism, as Richard Posner writes, is unprincipled "only if it is thought to entail the disregard of the systemic as well as immediate consequences of judicial decisions, which no pragmatist judge worth his salt believes."[5] Yet others, like William Rehnquist, find a sustained judgment of history that courts in fact stand down in times of crisis—an argument inevitably bolstered by an analysis of Abraham Lincoln's justly celebrated and prophetic greatness.[6] Predicting the future five years ago, Rehnquist wrote:

> It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws thus will not be silent in time of war, but they will speak with a somewhat different voice.[7]

If I am right about this standard conception, the main lines of the forthcoming Supreme Court decision are easy to foresee (however foolish of me it may be to commit these thoughts to print at this particular moment). Both cases arise because about six hundred prisoners were taken captive in a military action against terrorists. The captives are detained by U.S. military authorities at the naval base at Guantanamo Bay, a part of Cuba which is under a long-term lease to the United States. The exact legal situation of these prisoners with respect to international law is a point thoroughly discussed in several contributions to this symposium. The important thing for domestic constitutional law is that they have been denied the right to consult with lawyers, and there are no executive plans to involve the judicial power of the United States in any way at all in connection with their imprisonment.

The detainees (in a suit brought by "next friends" as self-appointed proxies are called in habeas actions) have taken cases to two different federal circuits. Habeas corpus, in cases like this, is an at-

---

4 *See e.g.*, Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46.

5 Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002).

6 But as Daniel Farber observes: "To expect another Lincoln would be foolish." DANIEL FARBER, LINCOLN'S CONSTITUTION 200 (2003).

7 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 224–25 (1998).

tempt by the prisoner to invoke the jurisdiction of an Article III court—i.e., the "judicial power of the United States,"[8] in determining the legality and conditions of imprisonment. In other cases, where the government seeks to imprison terrorists or enemies as "criminals" under domestic law, the government itself invokes federal judicial jurisdiction by filing an indictment. In such criminal proceedings, the crucial question is the extent to which the courts should defer to executive branch decisions, as in the *Moussaoui* case, another question still pending in the lower courts.[9] In cases like *Moussaoui*, all parties concede that the courts must decide the questions—they may disagree mainly on what the sources for decision should be, questioning the relative weights of judicial precedent, legislative action (or inaction) and, above all, presidential and military orders and findings. These are also rich questions raising other concerns about what I have been calling the "standard conception." But these disputes are in the familiar pattern of almost all ordinary exercises of judicial power—it is the duty of the courts to say "what the law is."[10]

The Guantanamo cases, however, are in a different mold. Here the Administration says the courts have absolutely no role at all to play—relying especially on the Supreme Court's 1950 decision in *Johnson v. Eisentrager*.[11] That case held that nonresident aliens detained outside the United States simply had no constitutional rights and, accordingly, there was no jurisdiction in a habeas corpus action to entertain any kind of due process challenge to their detention, punishment or execution. In terms of practical outcomes in the immediate lives of real people (as opposed to pundits or professors), there may be little difference between saying, as in *Eisentrager*, that the prisoners have no rights rather than, as in *Moussaoui*, that of course they have rights, it's just that the courts won't give them any rights unless the President wants them to. (A distinction whose triviality was perhaps famously, if inadvertently, revealed by Justice Minton's statement that immigrant aliens had received due process because "[w]hatever the procedure authorized by Congess is, it is due process"[12] (*pace* John Marshall).) The District of Columbia relied on *Eisentrager* in denying habeas jurisdiction, whereas the Ninth Circuit

8 U. S. CONST. art. III, § 1.

9 *See* United States v. Moussaoui, 336 F.3d 279 (4th Cir. 2003) (denying rehearing en banc of a lower court decision that sanctioned the government for not allowing the defendant to depose witnesses in government custody pursuant to a court order).

10 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

11 339 U.S. 763 (1950).

12 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

concluded that the special status of the Guantanamo Naval Base placed it within U.S. sovereignty.[13] The Administration has argued in the Supreme Court that the judicial branch simply has no power at all to act if the executive branch has not sought its aid in imprisoning the terrorist: "[T]he scope of those rights or procedures are to be determined by the Executive and the military, and not the courts."[14] It is this argument, of absolute and unchecked power in a matter of fundamental importance and widespread public interest, that seems to question the "standard conception."

The Court will begin by describing the issue as a question of jurisdiction to adjudicate the rights of the detainees. This seems obvious, especially given the opinion in the District of Columbia Court of Appeals, which relied on *Eisentrager*, in concert with the wording of the basic habeas corpus statute (authorizing federal judges to issue the writ "*within their respective jurisdictions*"[15]) to hold that persons captured and detained outside the United States are also outside the habeas jurisdiction conferred on Article III courts.[16] The Supreme Court will say that this interpretation of the statute raises, in this case, grave or serious constitutional doubts, citing *Marbury v. Madison*[17] for sure and probably a list of cases ending with *Immigration and Naturalization Service v. St. Cyr*.[18] To avoid the necessity of confronting these grave doubts, the Court will distinguish Guantanamo from Germany (the locus of detention in *Eisentrager*) by pointing out that the United States is de facto sovereign in Guantanamo, whereas the World War II post-war theater involved many sovereign nations exercising coordinated international control.

Having established jurisdiction, the Court will then assert that Guantanamo is not at all like the other places governed by the United States. Unlike the state of Indiana during the Civil War, there are no civil courts open in Guantanamo, and the constitutional limits on military power applied in *Ex parte Milligan*[19] therefore do not apply. Having due regard to the needs of national security in a war-like time, to

13 *See* Al Odah v. United States, 321 F.3d 1134, 1140 (D.C. Cir. 2003); Gherebi v. Bush, 352 F.3d 1278, 1288–89 (9th Cir. 2003)

14 Brief of the United States in Opposition at 26, Rasul v. Bush, Al Odah v. United States, 142 S. Ct. 534 (2003) (Nos. 03-334, 03-343)

15 *See* 28 U.S.C. § 2241(a) (2000) (emphasis added).

16 *Al Odah*, 321 F.3d at 1145.

17 5 U.S. (1 Cranch) 137 (1803).

18 533 U.S. 289 (2001) (holding that the U.S. District Court for the District of Connecticut had jurisdiction over an alien's habeas petition).

19 71 U.S. (4 Wall.) 2 (1866) (holding that the military commission did not have the authority to try, convict, and sentence the defendant because he was not a member of the military nor a prisoner of war)

the practical difficulties of determining whether the detainees really are enemy combatants, and to the fact that the procedures finally announced in March of 2002[20] meet fundamental principles of due process as balanced under the test of, say, *Mathews v. Eldridge*,[21] the Court will then direct the petitions to be dismissed. The editorial pages of the establishment press will opine somberly about the Solomonic character of Chief Justice Rehnquist's (surely) opinion. Liberals will be delighted that the Court did not blindly follow *Ex parte Quirin*,[22] which approved the actual execution of enemy combatants, including a U.S. citizen, without any substantive habeas review, and the Department of Defense will note, with pragmatic satisfaction, that it can do exactly what it wants so long as it doesn't say exactly what it thinks.

The law journals will fill up with condemnations of the Supreme Court for its abdication of the fundamental role of protecting the powerless from arbitrary authority—is there, after all, a more literal example of being discrete and insular than to be locked up in Guantanamo? I am myself delighted to have this first opportunity to explain that the hypothetical opinion I have described is terribly wrong, but for different reasons. And this error lies at the crossroads of what is wrong in the general understanding of the problem of civil liberties in war-like times. My critique is not based on a novel or original theory. It results in part from reflections on Justice Robert Jackson's dissenting opinion in *Korematsu*,[23] particularly in what we can now know about its historical context. And it results in part from revisiting Learned Hand's often quoted—but rarely taken seriously—statement about the place of courts in a free society:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to

---

20 *See* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (2003).

21 424 U.S. 319, 335 (1976). *Eldridge* held that due process is determined by balancing

> the private interest that will be affected by the official action . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

22 317 U.S. 1 (1942).

23 Korematsu v. United States, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

> help it. While it lies there it needs no constitution, no law, no court to save it.[24]

What's missing from Hand's dichotomy is what a court should do when the spirit of liberty is something between flourishing and dead, which I think would be a consensus diagnosis of today's political situation. It seems sometimes that these two important and moving texts of Jackson and Hand are often dismissed as merely eloquent. A standard rap against Robert Jackson is that the elegance of his prose made his ideas sound better than they were. Justice Jackson himself expressed a similar sense when, comparing Learned to his cousin, Judge Augustus Hand, he advised federal judges to "quote Learned, but follow Gus."[25]

The first step in my critique is this: as a matter of reality, the Supreme Court lacks both the real power and the practical decisionmaking judgment necessary to compel the President's action in circumstances thought to imperil the nation's fundamental safety. This is a contingent factual claim, which I cannot prove. It is quite possible that the Supreme Court could order the discharge of all the detainees at Guantanamo and the President would meekly comply. Factually, compliance might be ready since it appears that there may no longer be a compelling reason to continue.[26] It is certainly possible that any political authority would find unacceptable the domestic political damage of defying the Supreme Court. In some respects, this is no easier to know than it is to answer the question why Richard Nixon didn't simply burn the Watergate tapes when he first got the subpoena. If the Supreme Court were to order something more crucial to the Administration's political survival, say bail for Saddam Hussein, the political calculation might be different. In the Guantanamo case, I think the decisive question leading to near certainty that the Court will not actually free these prisoners is mainly the question of practical decisionmaking. It is difficult to conceive of courts making a decision whether there exists in actual fact a compelling government interest in continued detention of these particular people at this particular moment—it would take the courts as long to find enough Arabic, Farsi, and Pashto translators as it has taken the Federal Bureau of Investigation.

---

24 LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY 189, 189–90 (Irving Dilliard ed., 1952).

25 James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 389 (1995) (citation omitted).

26 *See* Neil A. Lewis, *U.S. Negotiating to Release Many Held at Guantanamo*, N.Y. TIMES, Jan. 10, 2004, at A5.

My second step is to argue that, in consequence, it is misleading to take jurisdiction in theory in order to defer in fact. For one thing, future judges might be misled about the state of the law, or at least faced with difficult precedents. This is at the core of Justice Jackson's dissent in *Korematsu.* The majority opinion upheld a conviction for violating a race based command to evacuate the West coast during World War II.[27] The majority upheld the conviction, as a result of accepting executive judgments that there was the equivalent of a compelling interest.[28] Justice Jackson would not have reviewed the order on its merits but would have forbidden the federal courts to play any part in its enforcement; "once a judicial opinion rationalizes such an order . . . or rather rationalizes the Constitution . . . the principle then lies about like a loaded weapon . . . ."[29] As least with respect to that particular decision, history has been more ashamed than misled. As Dennis Hutchinson has recently shown compellingly, lawyers and courts have not relied on *Korematsu.*[30]

Ironically, Justice Jackson was dissuaded from publishing his separate opinion in the *Quirin* case, and this is the case that seems to be the loaded gun currently in use. In *Ex parte Quirin,* the Supreme Court, in an emergency hearing, upheld death sentences given to Nazi saboteurs by a military commission.[31] The Supreme Court issued a brief notice upholding the military commission's action and then, after the executions had taken place and the Court had studied the matter more carefully, found considerable difficulty in writing an actual opinion.[32] The resulting patched quilt of an opinion is the principal authority for the current military commissions. Justice Jackson drafted an opinion, the heart of which was to appear in *Korematsu.* His basic point was that military measures ordered by the President should neither be reviewed by the Courts nor enforced by them:

> [I]n the long run, it seems to me that we have no more important duty than to keep clear and separate the lines of responsibility and duty of the judicial and of the executive-military arms of government. . . . If we are uncompromisingly to discountenance military intervention in civil justice, we would do well to refuse to meddle

27 *Korematsu,* 323 U.S. at 223–24.

28 *Id.*

29 *Id.* at 246 (Jackson, J., dissenting).

30 Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases,* 2002 SUP. CT. REV. 455.

31 317 U.S. 1 (1942).

32 *See* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 109–21 (2003).

> with military measures dealing with captured unlawful enemy belligerents.[33]

The political self-confidence and constitutional assurance with which the current administration has articulated and defended the essentially standardless detentions in Guantanamo might seem much less chilling if the Court in *Quirin*, following Jackson, had simply declined to interfere with, rather than upholding, the decision to kill the saboteurs.

It is a mistake, however, to focus too much on the future use of a Supreme Court precedent. The opinion also plays an important role in the politics of the moment. The beliefs and arguments of doubters within the administration itself will be eroded (or worse) if the Supreme Court upholds a measure challenged on constitutional grounds. Imagine a rising young adviser in the Departments of State or Justice, who argues that the detentions in Guantanamo are a violation of, say, the Due Process Clause of the Fifth Amendment. The surest way to end this adviser's future influence would be for the Court to assume jurisdiction and find that the clause had not been violated. If the Court declines to take jurisdiction in a way that makes plain that only the officials of the executive branch can make that determination, the adviser survives to advise again.

An important corollary of the standard conception that civil liberties must be surrendered in time of war is that our greatest challenge is to surrender them only temporarily, so that we may regain them afterwards. As Rehnquist writes: "the maxim [*inter armes silent leges*] speaks to the timing of a judicial decision on a question of civil liberties in wartime. If a decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue."[34] There are two different ways of denying the usefulness of this analysis in the Guantanamo cases.

First, one could question the truth of the underlying historical proposition. Mark Tushnet has recently spelled out a good case for skepticism here.[35] In some ways, war has been the engine of creating civil liberties rather than destroying them. The obvious cases are the way the Revolutionary War brought the Bill of Rights or the Civil War the Fourteenth Amendment. There are subtler but more interesting

---

33 *Id.* at 116 (citing an undated draft found in Justice Jackson's papers at the Library of Congress).

34 REHNQUIST, *supra* note 7, at 224 (1998).

35 *See* Mark Tushnet, *Defending* Korematsu *?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

cases as well. Some observers see *Brown v. Board of Education*[36] as a step to improve the United States' image in the developing world during the Cold War[37] and the effect of the Vietnam War experience on individual rights is a complex and disputable one.[38]

Second, one could challenge the applicability of the wartime analogy to the current government actions against terrorism. The war against terrorism is certainly not a war in the international sense of a violent armed conflict between nations—the Guantanamo detainees are not prisoners of the acknowledged war against Iraq, after all. And the "war on terrorism" may never end whereas the war in Iraq will have to, sometime, somehow. So, if the war never ends, then the suspension of rights is permanent.

Neither of these critiques is directly tied to the case I am trying to develop here. The problem with the "standard conception" of civil rights in wartime, especially as articulated by William Rehnquist, is that it has become a subpart of the doctrine of judicial supremacy, as articulated by the Rehnquist Court. The earlier idea of judicial supremacy, as expressed in such cases as *Cooper v. Aaron*,[39] was the limited claim that, in matters resolved by a judicial case within Article III, the states and political branches of the federal government were bound to respect what the courts had decided.[40] Even this limited claim is not self-evidently right or explicit in our constitutional text or early traditions, but that is a question for another day.

A striking recent example is the Court's opinion in the Commerce Clause case of *Lopez v. United States*,[41] invalidating a federal statute which prohibited possession of a firearm near a school.[42] Congress had adopted the statute in the name of the Commerce Clause, a decision which could be defended either because there is a substantial commerce in firearms or because the possession of firearms by students, taken as a whole, harms education and thus the economic future of other students.[43] The Court was convinced that the

36 347 U.S. 483 (holding that separate educational facilities based on race were inherently unequal, and that segregation violated the Equal Protection Clause of the Fourteenth Amendment).

37 *See* MARY L. DUDZIAK, COLD WAR AND CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 101–09 (2000).

38 *See* Michael R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 121–25 (1998) (noting that the Warren Court's typical legal liberalism did not extend to matters involving the Vietnam War).

39 358 U.S. 1 (1958).

40 *Id.* at 24.

41 514 U.S. 549 (1995).

42 *Id.* at 561.

43 *Id.* at 563–64.

Commerce Clause must have a judicially enforceable limit, without much regard for either the language or the history of the Constitution.[44] Those ideas upholding the statute, the majority said, were not illogical but had no enforceable limits—therefore they could not be constitutional principles.[45] "The actual limiting principle . . . [is] the weirdly circular proposition that there must *be* a limiting principle."[46] The point, in other words, is not just that the Court should enforce the Constitution: the Constitution's meaning must be adjusted so as to make it capable of enforcement. So we are left, under Article I, Section 8, with the peculiar result that Congress cannot ban guns from schools because the commerce in guns poses a hazard to education but can, probably, ban a gun from school if the prosecutor can prove that the particular gun at issue moved, however harmlessly, in commerce once upon a time.[47] The only benefit of this rule is that it gives the Court something to do while Congress passes legislation. In a recent essay, Mark Tushnet has also shown how the driving force in interpreting Section 5 of the Fourteenth Amendment has become maintaining judicial supremacy rather than finding the actual meaning of the section.[48]

My central concern with this standard conception as applied to wartime, then, is this: a "Supreme" Court can no longer say that, when the going gets tough, it will let the President make crucial decisions about human rights, torturing or interrogating or detaining whomever he thinks necessary for the survival of the republic. Instead, the courts must make that decision. But when they do, when they reach the inescapable conclusion that winning a war of survival is the only possible conclusion, they will have to reason their way backwards to that conclusion by saying that the Constitution is not violated because our rights aren't really that protected. Here it is the majority opinion in *Korematsu*[49] that is illustrative. We need not review the details here, as so much excellent description of that case is now available.[50] The important point here is that the government, with limited reason, im-

44 *Id.* at 552–53.

45 *Id.* at 564.

46 Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1393 (1997).

47 The current version of the Gun Free School Zones Act, 18 U.S.C. § 922(q) (2000), recognizes that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country." *Id.*

48 Mark Tushnet, *The Story of* Boerne v. Flores*: Federalism, Rights, and Judicial Supremacy, in* CONSTITUTIONAL LAW STORIES 521–27 (Michael Dorf ed., 2004).

49 323 U.S. 214, 214–24 (1944).

50 *See, e.g.*, ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 134–53 (2001).

prisoned U.S. citizens based on their race.[51] Justice Black's opinion for the Court found this action to be constitutional because racial discrimination could be justified by "pressing public necessity."[52] Although the words have evolved slightly (we now say "compelling public interest"), and the meaning greatly, the subsequent texture of equal protection doctrine has remained so that even invidious racial discrimination is not per se unconstitutional—and not because the Court thought or explained why that interpretation of the Fourteenth Amendment made sense, but only because it was unwilling to say that such matters should be resolved, in wartime, elsewhere. Watering rights down to preserve them in court is only a desirable strategy when the court is the only body to be legitimately concerned with them—this is the tragic face of judicial supremacy.

The Supreme Court may lack the power, in the positivist sense, to compel action by a wartime President, but it is not without cultural power. What courts do have in this situation is the power to make things clear, the power to make plain where responsibility actually lies. This is not a trivial power and it is the middle excluded from Learned Hand's false dichotomy.[53] Judge Hand should have added: "When the spirit of liberty lives in danger, a court is needed to assign responsibility for its rescue." Perhaps Learned Hand's advice about the spirit of liberty is so little heeded because most of our civic life is lived in ordinary times, when liberty is neither at great risk nor especially safe. Wartime may be, however, the limiting case to test the importance of this counsel. The important intellectual task, and the critical insight of Hand's observation, is to separate the question of civil liberties from the power of the courts. Observations that the courts have, or pragmatically should have, less power in wartime, while no doubt quite prudent or even true, do not necessarily mean that our civil liberties are, or should be, impaired.

Probably the showcase, though, for the standard conception is the way the *Korematsu* case is remembered and taught in American law schools—certainly the way I taught it before I read Patrick Gudridge's recent study of the *Endo* case.[54] *Korematsu* is seen as a case in which the Supreme Court was forced to accept racist imprisonment of American citizens in the face of overwhelming necessity to express confi-

51 *See Korematsu*, 323 U.S. at 220–21.

52 *Id.* at 216.

53 *See supra* note 24 and accompanying text.

54 *Ex parte Endo*, 323 U.S. 283 (1944); *see* Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933, 1939 (2003) (arguing that *Endo* is just as much a part of constitutional history as *Korematsu*).

dence in the President.[55] This interpretation fits nicely with the view that courts do the best they can with civil liberties, and is often fortified by the accurate observation that the idea of strict scrutiny expressed but inadequately applied in Justice Black's opinion was a doctrinal source of our postwar liberation from racial discrimination in peacetime.[56] (A similar argument,[57] albeit in a different context, is sometimes made about Justice Holmes's opinion in *Schenck v. United States*,[58] which announced a powerful test of "clear and present danger" but administered it in a tiny and harmless dose at first.[59]) What Gudridge brings to consciousness about *Korematsu*, however, is that in *Endo*, decided the same day as *Korematsu*, the Supreme Court actually struck down, largely on statutory grounds, the entire system of detention underlying the facts of *Korematsu*.[60] And President Roosevelt accepted, even anticipated, the result in *Endo*. One day before the Court released the opinions in *Korematsu* and *Endo*, upholding Korematsu's conviction but ordering Endo's release, the Secretary of War announced the termination of the entire program.[61] The main controversy around that relationship seems to center on the apparent willingness of the Court to delay release of its opinion until the Administration announced its opinion, although the Court may also have wanted to delay the opinion until after the November 1944 elections.[62] One can only wonder what the Administration would have done if Justice Black's *Korematsu* decision had been released a year earlier, lending its support to the idea that racial exclusion was a pressing public necessity.

It seems to me, then, that it is wrong to think of the courts as powerless in wartime. True, they may lack the political power to order the President to take steps he believes dangerous to the nation. (And true, also, that what the President thinks dangerous to the nation may be hard for him to distinguish from political embarrassment. One important reason for secret military tribunals in *Quirin* seems to have been the fear that it would be discovered that the Nazi saboteurs were not really caught by the vaunted J. Edgar Hoover, but turned them-

55 *See generally* YAMAMOTO ET AL., *supra* note 50, at 155–57.

56 *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 512–14 (9th ed. 2001).

57 *See generally* David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983).

58 249 U.S. 47 (1919).

59 *Id.* at 52.

60 *See* Gudridge, *supra* note 54, at 1947–53.

61 *See* PETER IRONS, JUSTICE AT WAR 344–45 (1983).

62 *Id.* at 344.

selves in immediately, and not without some difficulty.[63]) The important question about the Court's power requires the exploration of its complex interaction with what Robert Post elegantly illuminates as "constitutional culture."[64]

The underlying problem of decisionmaking in wartime is the confusion and uncertainty in almost all matters that accompany deep disruption of the attitudes, judgments, and culture that are necessary to sift and weigh the monumental decisions that need to be made. Was socialist pacifism a threat to the draft in World War I? Could Nazis blow up railroads easily? Is al Qaeda actively planning the detonation of a dirty bomb? What is needed is not "will" or even "prudence," any more than randomly sacrificing civil liberties for the war effort. What is needed is clarity. This is the true meaning of Robert Jackson's dissent in *Korematsu*. The truth, as the Court saw it, was that the President had to be given the run to make such decisions. Anything more than that, any effort to talk about the President's superior knowledge or judgment, is not true and rapidly became another part of the blinding fog. This way of looking at Jackson's position makes sense of the seeming contradiction between his role as a Justice—the courts, even real courts with preexisting jurisdiction, should not decide war cases—and as a Nuremberg prosecutor—pretend courts of victorious armies should adjudicate them. As Justice Breyer has recently reminded us, Justice Jackson's driving motive at Nuremberg was to make a record with clarity and precision to "'establish incredible events by credible evidence.'"[65] The function of courts is to tell the truth in times of crisis: it is the absence of this truth that prevents the spirit of liberty from flourishing.

This way of looking at the role of the courts leaves many questions unanswered. In particular, it leaves unanswered the question of how the political branches should value civil liberties if the courts won't pretend to tell them. Oren Gross has recently explored that question in a sustained argument that the political authorities should, in some instances, act outside the law.[66] He conditions that power on their acting frankly and being accountable after the emergency. While I do not quarrel with his analysis (in fact I am in awe of it), we

---

63 *See* FISHER, *supra* note 32, at 39.

64 Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

65 Justice Stephen Breyer, Keynote Address at the Yom Hashoah Day of Remembrance Ceremony: Crimes against Humanity, Nuremberg, 1946 (Apr. 16, 1996), *in* 71 N.Y.U. L. REV. 1161, 1162 (1996) (quoting Justice Jackson).

66 Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

must be careful to distinguish the meaning of "unconstitutional" and "unconstitutional in the view of the courts." Holding them accountable in the second sense will not be hard after the crisis. But it is holding them accountable in the first sense that is the way to the use the creative power of war for human rights. As Daniel Farber has recently argued, the true measure of Lincoln's greatness is found not by testing his will against Taney's judgment but by independently assessing Lincoln's constitutional vision and its effects on our constitutional culture.[67]

In the unlikely event you follow me to this point, it becomes clear why the hypothetical opinion I have described above would be deeply wrong. There is a principled and easy basis for saying that the courts do not have jurisdiction in a habeas case where the prisoner has been detained outside the United States. (No coincidence that *Eisentrager* was written by Robert Jackson.) The truth is that President Bush has decided that this course of action is the right one: any purported exercise of jurisdiction only contributes to confuse that opportunity for the spirit of liberty to show itself. Testifying before the Senate Judiciary Committee in December 2001, Attorney General John Ashcroft said: "Charges of kangaroo courts and shredding the Constitution give new meaning to the term 'fog of war.'"[68] Indeed they do. The greatest danger of the fog of war is when some actors, especially those with great power and responsibility, claim to see clearly while claiming that others, especially their critics, are blinded by the fog. There is much to be learned from the old sense of "fog of war," a term coined by von Clausewitz, to apply to all actions taken by everybody.[69] The Court cannot clear the fog but it can make sure that we see clearly that there is a fog. As Archibald MacLeish wrote in an imagined dialog between the astronomer Harlow Shapely and the poet Robert Frost:

> Robert: You know where you are when you're lost.
>
> Harlow: Where?
>
> Robert: Lost.[70]

---

67 FARBER, *supra* note 6 *passim.*

68 *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 312 (2002) (written testimony of John Ashcroft, U.S. Attorney General).

69 CARL VON CLAUSEWITZ, ON WAR 101 (Michael Howard & Peter Paret eds. & trans., 1976).

70 Archibald Macleish, *Apologia*, 88 HARV. L. REV 1505, 1507 (1972).