

CONGRESS, CIVIL LIBERTIES, AND THE WAR ON TERRORISM

Neal Devins*

Two weeks after the September 11 terrorist attacks, Supreme Court Justice Sandra Day O'Connor told a law school audience that "we're likely to experience more restrictions on our personal freedoms than has ever been the case in our country."¹ And while O'Connor did not reveal her thinking on the legality of proposed anti-terrorism legislation, she made clear that the Court might well be influenced by social and political forces. Indeed, rather than invoke the language of lawyers (by speaking about the framers' intent, stare decisis, and the like), Justice O'Connor suggested that "a great deal of study, goodwill, and expertise"² would hold the key to the Court's balancing of civil liberties and national security.

Fourteen years earlier, when the Senate was considering Robert Bork's Supreme Court nomination, social and political forces also played a decisive role. At this time, however, civil libertarians held the upper hand. Rejecting Bork's claim that the First Amendment should not protect "advocating violence to close, to stop the free trade in ideas," the Senate Judiciary Committee concluded that "[o]ur system is built upon" protecting "[p]olitical dissidents who make statements that flirt with the edges of the law."³

*Goodrich Professor of Law & Professor of Government, College of William & Mary. This paper was prepared for a Woodrow Wilson Center seminar on Congress and Civil Liberties During War. Thanks to Congress Project director Don Wolfenberger for inviting me to the seminar. Thanks also to Mary Carol Daly and John Shults for their help in researching this essay.

¹Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedoms*, N.Y. TIMES, Sept. 29, 2001 at B-5.

²*Id.*

³S. Exec. Rep. No. 7, 100th Cong., 1st Sess. 54 (1987).

None of this comes as a surprise. Differences between peace and wartime are to be expected. "The safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty."⁴ Elected officials certainly understand this (In the wake of September 11, can we imagine today's Senate Judiciary Committee "disagreeing categorically" with Bork's concern about political dissidents advocating violence?). For this very reason, one did not need a crystal ball to predict Congress's acquiescence to post-September 11 restrictions on civil liberties.

In the pages that follow, I will explain why it is that (1) the President, more than Congress, is likely to pursue war-related initiatives that implicate civil liberties and (2) Congress rarely has incentive to resist these initiatives. In so doing, I will argue that the principal check on presidential power comes neither from Congress nor the Supreme Court; instead, it comes from the American people. "Liberty," as Learned Hand put it, "lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."⁵

I. The Past is Prologue: Civil Liberties in Wartime

Regardless of what courts decide or elected branches legislate, "the ultimate security for [civil rights and liberties] lies in the tolerance of private citizens."⁶ Popular sentiment, not judicial edicts, explain the eventual repudiation of the 1798 Alien and Sedition Act, the 1917 Espionage Act, the internment of Japanese-Americans during World War II, and McCarthy era restrictions on civil liberties. At the same time, the American people wait until after the threat of war is over before reexamining the appropriateness of wartime restrictions on rights and liberties.

⁴Richard A. Posner, *Security Versus Civil Liberties*, THE ATLANTIC MONTHLY, December 2001, at 46.

⁵LEARNED HAND, THE SPIRIT OF LIBERTY, IN THE SPIRIT OF LIBERTY 189, 190 (3d ed. 1960).

⁶Zechariah Chaffee, Jr., *Free Speech in the United States* X (1941).

Consider, for example, World War I era restrictions on political speech. In 1915, President Woodrow Wilson informed lawmakers that "[t]he gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws. . . who have poured the poison of disloyalty into the very arteries of our national life."⁷ Two years later, Congress enacted the Espionage Act. Under this statute, anyone who "shall willfully cause or attempt to cause insubordination [or] disloyalty" in the military shall be subject to "imprisonment for not more than twenty years;" moreover, the statute deemed "nonmailable" any publication (including letters) "advocating or urging treason, insurrection, or forcible resistance to any law of the United States."⁸ And while lawmakers turned down a provision allowing the President to jail anyone publishing materials that he deemed useful to the enemy, congressional intent was to be restrictive. In particular, lawmakers wanted to send a message to immigrants: shed your allegiances to foreign nations and ideas *or* get out.

Between June 1917 and June 1920, over 2,000 people were prosecuted under the Espionage Act, and over 1,000 of those were convicted. For its part, a unanimous Supreme Court devoted one paragraph to First Amendment concerns when upholding the Espionage Act in *Schenck v. United States* (1919).⁹ By the end of the war, however, Americans began taking the First Amendment seriously. With the debate over the Versailles Peace treaty convincing many that their enthusiasm for the war was misplaced, people became more concerned about their freedoms. No longer viewing the government as benevolent, many came to value First Amendment protections and, in so doing, embrace the then-emerging modern civil liberties movement.

The failure of elected officials, judges, and the American people to exercise their responsibility as guardians of the Constitution continued through World War II. In particular, the war-time internment of Japanese-Americans represents one of the most egregious violations of constitutional principles that this nation has ever witnessed. With no evidence of disloyalty or subversive activity and without the benefit of any form of hearing, Americans were imprisoned solely because of their ancestry.

⁷53 Cong. Rec. 99 (1915).

⁸40 Stat. 219, 230 (1917). For an insightful analysis of both the Act and World War I era free speech, see David M. Rabban, *Free Speech in its Forgotten Years* (1997).

⁹249 U.S. 47, 51-52 (1919). At the time of *Schenck*, the Court had not begun develop its speech-protective First Amendment jurisprudence.

Within a few weeks of the December 1941 Pearl Harbor assault, Japanese-Americans-linked by color and culture to a treacherous enemy and lacking political power-became an easy target for wartime frustration. In testimony before Congress, California Attorney General Earl Warren claimed that "when we are dealing with the Caucasian race we have methods that will test the loyalty of them . . . when we deal with the Japanese we are in an entirely different field and we cannot form any opinion that we believe to be sound."¹⁰ On March 21, 1942, Congress enacted legislation ratifying an FDR executive order that empowered the military to "prescribe Military areas" and "determine from which any or all persons may be excluded."¹¹ Pointing to "[e]vidence that a tightly knit fifth column exists in the United States," members of Congress uniformly supported the legislation-approving it with little debate in either the House or Senate.¹²

¹⁰"National Defense Migration" (Part 29), hearings before the House Select Committee Investigating National Defense Migration, 77th Cong., 2d Sess. 11015 (1942).

¹¹56 Stat. 173 (1942) (ratifying Exec. Order 9066, 7 Fed. Reg. 1407 (1942)).

¹²88 Cong. Rec. 2723 (1942) (remarks of Sen. Reynolds). *See generally id.* at 2722-26; 2729-30.

But the evidence Congress pointed to-War Department "findings"-did not exist. As Assistant Secretary of War John McCloy put it: "[S]ocial considerations rather than military ones determine the total exclusion policy."¹³ Before the Supreme Court, however, allegations by the American Civil Liberties Union of racial prejudice and inconsistencies in the War Department Report were not enough to undo the government's internment of Japanese-Americans. Instead, the Court deferred to the judgment of the "war-making branches of Government," concluding that "hardships are part of war" and that "[c]itizenship has its responsibilities as well as its privileges."¹⁴

Eighteen years later, Earl Warren (speaking as Chief Justice of the United States) argued that the Supreme Court's willingness to go along with the internment does not "in a broader sense" tell us whether a given program is constitutional.¹⁵ Pointing to "the limitations under which the Court must sometimes operate," Warren thought that the people and their elected officials must sometimes "bear the primary responsibility" for sorting out the Constitution's meaning.¹⁶ These words proved prophetic: Starting with Gerald Ford's 1976 declaration that the evacuation was "wrong" and culminating in 1988 reparations legislation, elected government efforts to remedy this injustice revealed an encouraging self-awareness and humility in popular government.¹⁷

¹³"Japanese-American and Aleutian Wartime Relocation," hearings Before the House Committee on the Judiciary, 98th Cong., 2d Sess. 42 (1984).

¹⁴*Korematsu v United States*, 323 U.S. 214, 218, 219 (1944).

¹⁵Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962).

¹⁶*Id.* at 192.

¹⁷Ford's declaration and the legislation that followed were prompted by the efforts of civil libertarians. See Peter H. Irons, *Justice at War* (1983); Peter H. Irons, *Justice Delayed: The Record of the Japanese-American Internment Cases* (1989).

And so it goes. During the Red Scare of the early 1950s, all parts of government and the American people joined forces in limiting free speech. When the crisis atmosphere lessened with the death of Stalin and end of the Korean War, the public mood started to change, opening the door for judges interested in championing First Amendment freedoms.¹⁸ Today, the public has relatively little interest in limiting the weapons used by law enforcement in fighting the War on Terror. As I will soon discuss, the incentives of both lawmakers and the American people is to embrace executive branch restrictions on civil liberties. And while Warren Court expansions of civil liberties protection have changed social norms governing civil liberties, it is nevertheless true that there has only been modest resistance to War On Terror-related restrictions on civil liberties.¹⁹ Over time, the public and their elected representatives may change their mind; in the meantime, however, the War on Terror reflects the historical pattern that "[i]t is neither desirable nor remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."²⁰

II. The Present is Prologue: Explaining the Presidential Advantage in War Making²¹

Wartime civil liberties are also captive to the President's ever-expanding power over war making. Over the past fifty years, presidents have gained more and more control over foreign relations, especially warmaking. Unlike the traditional (pre-Korea) practice of leaving to Congress the decision to initiate war against foreign nations, social and political norms increasingly see the President as the "sole organ" of the United State in international affairs.²²

¹⁸Commenting on *Yates v United States*, 354 U.S. 298 (1957) (concluding that the Smith Act is limited to speech that "incites" illegal action), I.F. Stone noted that the Court, by making the "First Amendment a reality again," "reflect[ed] the steadily growing public misgivings and distaste for. . . [Joseph McCarthy and others] who have made America look foolish and even sinister during the last ten years." I.F. Stone, *The Haunted Fifties* 203 (1963). For a detailed history of Court-Congress relations at the time of *Yates*, see Walter F. Murphy, *Congress and the Court* (1962).

¹⁹For a general treatment of the Warren Court, see Lucas A. Powe, Jr., *The Warren Court and American Politics* (2000). For a treatment of how these changing expectations impact on the war on terror, see Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What A Difference Sixty Years Makes*, CONST. COMM. (forthcoming). For additional discussion, see *infra*.

²⁰William H. Rehnquist, *All The Laws But One* 224-25 (1998).

²¹Portions of this section are drawn from Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65 (2000).

²²For a history of Congress's diminishing role in war making, see Louis Fisher, *Congressional Abdication on War and Spending* (2000).

Thanks to the singularity of the office, presidents are well positioned to advance their interests before Congress, the nation, and the world. "The opportunities for presidential imperialism are too numerous to count," according to Terry Moe and William Howell, "because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power."²³

When presidents act, moreover, it is up to the other branches to respond. In other words, presidents often win by default-either because Congress chooses not to respond or its response is ineffective. Furthermore, by end-running the burdensome and oftentimes unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the presidency. In other words, the President's personal interests and the presidency's institutional interests are often one and the same.

²³Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 138 (1999).

Presidents, of course, sometimes need Congress to enact legislation. In pursuing their health care and faith-based initiatives, Bill Clinton and George W. Bush had little choice but to turn to Congress. Here, Congress has the upper hand. Rather than having to do battle with the President on his own field (enacting legislation that is subject to a presidential veto), it is up to the President to overcome the burden of inertia by cajoling Congress into action. As such, modern day presidents often advance their agenda through unilateral action, not legislative strategies.²⁴

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress's 535 members has some stake in Congress as an institution, parochial interests often overwhelm this collective good. In particular, members of Congress need to be reelected to advance their (and their constituents') interests. For this reason, lawmakers are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has strong incentive to free ride in favor of the local constituency."²⁵

²⁴See generally Moe & Howell, *supra* (noting that Congress, from 1973-1998, only overturned three of roughly 1,000 executive orders through legislation); Richard Nathan, *The Administrative Presidency* (1983). For this very reason, President Bush responded to Congress's intransigence on his faith-based initiative proposal by making use of existing laws to distribute \$50 million to religious organizations to help the government assist the needy. See Bill Broadway, *Faith-Based Groups Benefit From New Federal Grants*, WASH. POST, Aug. 3, 2002 at B-9.

²⁵Moe & Howell, *supra* at 144.

Nowhere is the gap between legislative and presidential incentives more stark than war powers. To start with, as Lou Fisher and others have shown, the constitutional design envisions (at a minimum) a significant congressional role.²⁶ Notwithstanding this clear constitutional mandate, the modern Congress has very little incentive to play a leadership role. This ever-diminishing congressional role is a by-product of many factors, including the end of the mandatory draft (something that ensured strong constituent interest in war powers), the launching of military strikes with little or no casualties, and changes in how lawmakers run for office (especially the increasing pressure to pay attention to local constituencies). For all these reasons, "rather than oppos[e] the President on a potential military action," most members of Congress "find it more convenient to acquiesce and avoid criticism that they have obstructed a necessary mission."²⁷

Presidents, in contrast, often are motivated to seek warmaking power. Presidents achieve status, fame if you will, by leading the nation into battle.²⁸ Unwilling to overcome the burden of inertia and rein in the President, Congress typically stands by on the sidelines. More striking, today's Congress almost always complies with presidential requests for warmaking authority. Nevertheless, modern day presidents (rather than allow Congress to tinker with their requests for legislative authority) often act unilaterally on war-related issues. By pointing to existing federal legislation, their inherent power as Commander in Chief, and U.N. resolutions and treaties, presidents expand their institutional power through every fame-inducing exercise of self-interest.

²⁶See generally Louis Fisher, *PRESIDENTIAL WAR POWER* (1995); John Hart Ely, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); W. Taylor Reveley III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCHES?* (YEAR).

²⁷Louis Fisher, *Congressional Abdication: War and Spending Powers*, 49 ST. LOUIS U. L.J. Y, 1006 (1999).

²⁸For this very reason, the framers intended that Congress play the dominate role in initiating military actions. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

I will elaborate on these themes in the next part of this essay. Specifically, I will call attention to the ever-diminishing congressional role in war powers by detailing both recent legislation supporting George W. Bush's War on Terror and lawmaker acquiescence to most of the President's war-related initiatives.

III. Connecting the Dots: Congress, Civil Liberties, and the War on Terror

Against the backdrop of Congress's declining role in warmaking and the diminished status of civil liberties during wartime, it is little wonder that (1) the Bush administration has been the moving force in initiating War on Terror related limitations on civil liberties, (2) Congress has largely facilitated presidential dominion of the War on Terror by approving most provisions of legislation introduced by the White House and generally standing on the sidelines when the President claimed that the Constitution or existing law supported one or another initiative, and (3) the public has backed most war-time limitations on civil liberties (especially those of noncitizens). None of this is to say that Congress has been irrelevant. Because of above-discussed differences in enacting legislation and responding to unilateral presidential action, Congress has made modest changes to the President's legislative proposals. Also, through oversight hearings, television appearances, newspaper interviews, and the like, members of Congress have played some role in shaping public discourse and, with it, administration policy. For the most part, however, Congress's impact has been indirect and relatively insubstantial.

Consider, for example, the USA Patriot Act: One week after the September 11 attack, the Department of Justice sent legislation to Congress that would grant law enforcement agencies additional powers to tap telephones, conduct searches, monitor the Internet, police financial transactions, share grand jury testimony, and much more. Although roundly criticized by civil liberties groups,²⁹ members of Congress with both the terrorist attack and the October 2001 anthrax scare on their minds wasted little time in placing national security concerns ahead of civil liberties. Making use of a secretive expedited procedure, the House (voting 357 to 66) and Senate (voting 98

²⁹See John Lancaster and Walter Pincus, *Proposed Anti-Terrorism Laws Draw Tough Questions; Lawmakers Express Concerns to Ashcroft, Other Justice Officials About Threat to Civil Liberties*, WASH. POST, Sept. 25, 2001 at A-5.

to 1) approved the USA Patriot Act on October 24 (even though many lawmakers who voted for it never had a chance to read the bill).³⁰

For the most part, the final version of the Patriot Act mirrored the administration's bill. To the extent that members of Congress valued civil liberties, it was simply too "difficult to launch a frontal challenge to a popular president before the practical results of his policies are known."³¹ At the same time, civil liberty interests scored some modest victories: Congress eliminated a provision that would have allowed information obtained from foreign government wiretaps to be used against Americans even if the wiretaps were unconstitutional; Congress required the administration to file charges, begin deportation proceedings, or release foreign suspects within seven days; and (most significant) half of the Act's surveillance measures were scheduled to sunset in 2005.³² In these limited but important ways, the USA Patriot Act calls attention to the ways in which Congress is well positioned to exercise authority on matters that require legislation (even on foreign affairs matters where Congress typically defers to the President).

³⁰See Elizabeth A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, 59 CQ WEEKLY 2533 (Oct. 27, 2001).

³¹Elizabeth A. Palmer and Adriel Bettelheim, *War and Civil Liberties: Congress Gropes for a Role*, 59 CQ WEEKLY 2820 (Dec. 1, 2001). For a detailed accounting of how national security concerns overwhelmed civil liberties interest, see Robert O'Harrow, Jr., *Six Weeks in August*, THE WASHINGTON POST MAGAZINE, Oct. 27, 2002 at 6.

³²For a chart comparing key provisions of the administration's bill to the House and Senate bills, see Elizabeth A. Palmer, *Anti-Terrorism Bills Head for Floor Votes, But Tough Negotiations Lie Ahead*, 59 CQ WEEKLY 2327, 2330 (Oct. 6, 2001).

The Patriot Act is revealing for other reasons. *First*, through the sunset provision, Congress deferred to the executive, approved a politically popular measure, and recognized (up to a point) the concerns of civil liberties constituents. More to the point, the sunset provision makes Congress a player of sorts in the implementation of the Patriot Act. If popular support for the Act and/or the President diminishes, Congress can simply refuse to renew the Act. Along the way, lawmakers can participate in the War on Terror without having to legislatively override the President; instead, through oversight hearings and the like, lawmakers can speak their minds to the Attorney General and others encharged with the implementation of the Act. In this way, the Patriot Act reflects Congress's penchant for "fire alarm" oversight, that is, a system of "rules, procedures, and informal practices" that allow Congress and its constituents to examine executive branch implementation of federal statutes.³³

Second, the Act creates numerous opportunities for the President to act unilaterally. By claiming that his actions are grounded in the Patriot Act, the President can pursue a range of initiatives that Congress would never have enacted into law. According to civil liberty interests (who, admittedly, have incentives to overstate their concerns): "The Patriot Act has been a complete sideshow to what has happened administratively. . . . What they've ended up accomplishing is what they wanted in the Patriot Act originally and which Congress refused to give them."³⁴ For example, the Justice Department has aggressively interpreted Act provisions allowing the government to detain suspects in terrorism cases.³⁵ Over time, it is likely that the President will continue to extend the Patriot Act to fit his needs. Unless and until public opinion directly checks the President or, alternatively, prompts Congress to use its oversight powers to challenge the expansionist tendencies of the presidency, this pattern will persist.

³³Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

³⁴Jackie Koszczuk, *Lawmakers Struggle to Keep An Eye on Patriot Act*, 60 CQ WEEKLY 2284, 2286 (Sept. 7, 2002) (quoting the American Civil Liberties Union's Timothy Edgar).

³⁵*See id.* at 2285-86.

Third (and relatedly), recognizing that congressional oversight may affect public opinion and thereby constrain presidential initiatives, civil liberties interests in Congress have engaged in a pitched battle with the Bush White House over what documents the administration turns over to Congress. Consider, for example, the efforts of Senate Judiciary Committee chair Patrick Leahy (D-Vt). After observing that "it would be difficult" for Congress to challenge the administration legislatively, Leahy spoke of oversight as civil libertarians best hope of altering policies "by pressuring the administration to take a second look at their decisions in the face of high profile publicity."³⁶ Along these lines, the Senate Judiciary Committee held hearings to examine the Justice Department's handling of classified wiretaps and searches in terrorism cases. More significant, the Committee released to the public information it obtained from the Foreign Intelligence Service Act Court about FBI misrepresentations (most of which were made during the Clinton administration).³⁷ For its part, the Bush administration has resisted congressional oversight. It has often refused to share even general information about the Patriot Act's implementation.³⁸ It has also sought to deflect House Judiciary Committee inquiries about the administration's use of its new anti-terrorism powers C claiming that the House Intelligence Committee (not the Judiciary Committee) had jurisdiction over the issue.³⁹

The reaches (and limits) of the president's power of unilateral action are also revealed in two other executive branch initiatives--a November 2001 presidential order allowing the use of special military courts to try suspected terrorists and a Department of Justice program designed to facilitate private citizen monitoring of possible terrorist activity (TIPS for Terrorism Information and Prevention System). The saga of Bush's military tribunal order underscores the limits of Congress's ability to effectively check presidential orders and B perhaps more importantly B the potency of social norms (including other countries as well as elite and public opinion) to constrain administration

³⁶Palmer and Bettelheim, *supra* note 31 at 2823. Likewise, Leahy thought that oversight was the only way to challenge the Bush administration on its military tribunal order. For Leahy: "You're not going to be passing legislation in a situation like this I'm not unaware of the polls." "[W]hat can be done is to have real oversight . . . make sure we get honest answers about what is being done" John Lancaster, *Hearings Reflect Some Unease With Ashcroft's Legal Approach*, WASH POST., Dec. 2. 2001 at A-25.

³⁷See David G. Savage, *A Year After; Administration Defends Secret Searches in Terror War*, L.A. TIMES, Sept. 11, 2002 at 1-9.

³⁸See Koszczuk, *supra* note 34, at 2284.

³⁹See Adam Clymer, *Justice Dept. Nalks at Effort to Study Antiterror Powers*, N.Y. TIMES, Aug. 15, 2002 at A-21. As it turns out, House Intelligence had not sought the information nor dit it plan to oversee the administration of the Patriot Act. *Id.*

overreaching. The initial order, among other things, suggested that trials might not be public and that the death penalty could be imposed by a two-thirds vote of the tribunal; March 2002 regulations implementing the order, however, declared that trials will be public, that the death penalty required a unanimous vote, that defendants must be proven guilty beyond a reasonable doubt, and that the government will provide military lawyers for the accused.⁴⁰

⁴⁰See <http://www.defenselink.mil/news/Mar2002/d200020321ord.pdf>. The implementing regulations, in large measure, mean that proceeding before a military tribunals "are in most respects like military trials under the Uniform Code of Military Justice." Goldsmith and Sunstein, *supra* at PIN.

For its part, Congress placed little pressure on the administration to modify its initial proposals. December hearings were held *but* "lawmakers, aware of Bush's strong approval ratings, [largely] avoided head-on confrontations on [this and other] matters related to the war."⁴¹ In sharp contrast, editorial writers, law professors, and European Union allies signalled strong disapproval of the order.⁴² Public opinion polls, moreover, revealed that eighty percent of Americans believed that the President should make changes in the criminal justice system in consultation with Congress, not by an executive order.⁴³

That the Bush administration responded to these pressures is hardly surprising. The military tribunal order was but one of many presidential initiatives. By modifying that order in the face of domestic and international criticism, the President improved his standing with our allies and with domestic constituents (who might complicate the administration's effort to pursue other War on

⁴¹Adriel Bettelheim, *Hill Treads Carefully in Challenging Ashcroft Over Expansion of Anti-Terror Powers*, 59 CQ WEEKLY 2903 (Dec. 8, 2001).

⁴²For editorials, see *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001 at A-24; *An Un-American Secrecy*, L.A. TIMES, Nov. 17, 2001 at 1-24; *Military Justice (Continued)*, WASH. POST, Nov. 26, 2001 at A-24. For law professor opposition, see http://www.law.yale.edu/yls/c_pages/yls_pa/152/Leahy.pdf (web link to letter signed by more than 700 law professors and lawyers opposed to "legally deficient, unnecessary, and unwise" military tribunal order); For European opposition, see Marc Champion, John Carreyrou, & Gary Fields, *Europe Tour by Ashcroft Starts Sourly--Moussaoui is Offered Legal Help by France as U.S. Sparks Unease*, WALL ST. J. Dec. 13, 2001 at A-18.

⁴³Robert Toner & Janet Elder, *Public is Wary But Supportive on Rights Curbs*, N.Y. TIMES, Dec. 12, 2001 at A-1. A slim 51 percent majority, moreover, opposed trying foreigners in military proceedings. *Id.* In another poll, however, 64 percent said that they favored military tribunals for non-citizens suspected of terrorism. See <http://www.npr.org/news/specials/civillibertiespoll/011130.poll.html>.

Terror initiatives B by battering it in the media, by pressuring Congress to play a more aggressive oversight role, etc.). Likewise, the administration has little reason to make use of its modified military tribunal policy--its detention policies are in place and, if need be, it can make use of civilian courts.⁴⁴

⁴⁴See Charles Lane, *Debate Crystallizes on War, Rights; Courts Struggle Over Fighting Terror vs. Defending Liberties*, WASH. POST, Sept. 2, 2002 at A-1.

For similar reasons, the Justice Department responded to criticism of its TIPS policy. Originally designed to allow mail carriers, utility employees, and truckers to report suspected terrorist activities, the program was scaled back to "events that are obviously public" (so that mail carriers and utility workers would not participate in this voluntary program).⁴⁵ This move was a response to public opinion polls (where more than half expressed concern of law enforcement "snoop[ing] on people's private lives") and to extensive lobbying by social conservatives and civil libertarians (lobbying that prompted the House -but not Senate- to defund the TIPS Program in proposed Homeland Security legislation).⁴⁶ Unlike the USA Patriot Act and military tribunal order, the TIPS saga suggests that Congress can constrain administration initiatives. And while the administration (through threats of a presidential veto) might have been able to preserve the original program, TIPS -like the military tribunal order- reveals that the administration is willing to compromise on some initiatives in order to pursue its broader agenda. In particular, with concerns over civil liberties growing (at least until the next terrorist attack), the administration has little to gain by pursuing initiatives that can be likened to a "1984 Orwellian type situation [] where neighbors are reporting on neighbors."⁴⁷

Notwithstanding its decisions to modify its TIPS and military tribunal policies, the Bush administration has felt relatively little pressure from the public or Congress on civil liberties issues. Opinion polls show widespread support both for eliminating constitutional protections to those who enter the country illegally and for the monitoring of conversations between accused terrorists and their lawyers.⁴⁸ More telling, only 21 percent of those polled in September 2002 think that the activities of the federal government pose a serious threat to their constitutional rights.⁴⁹ Also, in

⁴⁵Dan Eggen, *Under Fire, Justice Shrinks TIPS Program*, WASH. POST, Aug. 10, 2002 at A-1.

⁴⁶See *id.*; Eddy Ramirez, *Americans Still Divided on Issue of Rights vs. Security; Survey: People Oppose Airport Racial Profiling, but Back Monitoring Prisoner-Lawyer Talks*, L.A. TIMES, Sept. 17, 2002 at 1-4; Neil A. Lewis, *Traces of Terror: The Attorney General; Ashcroft's Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, July 23, 2002 at A-1.

⁴⁷These are the words of administration supporter Orrin Hatch (R-Utah). See Adam Clymer, *Traces of Terror: Security and Liberty*, July 26, 2002 at A-18. For opinion poll data showing increasing concern about civil liberties, see Richar Morin and Claudia Deane, *Altered Lives, Changing Attitudes; In Poll, Most Americans Say 9/11 Affected Them Permanently*, WASH. POST, Sept. 8, 2002 at A-1.

⁴⁸See Ramirez, *supra*.

⁴⁹ABC News poll *reprinted in* <http://nationaljournal.com/members/polltrack/2002/issues/02civilrights.htm>. On the other hand, more than 60 percent of those polls were somewhat or very concerned about losing some of their civil liberties. See *CBS News/N.Y. Times* poll *reprinted in id.*

April 2002, over 70 percent of those polled acknowledged that Americans will have to give up some of their personal freedoms to make the country safe from terrorist attack.⁵⁰ In other words, although the public expects the government to protect personal privacy and other civil liberties, the public seems willing to give the Bush administration fairly wide latitude in restricting civil liberties.

For its part, Congress has placed few limits on the President. Rather than act institutionally to check the President, Congress has largely left it to individual members to speak out on the civil liberty implications of the War on Terror. Through opinion pieces and interviews published in newspapers, through appearances on television, and through statements made at hearings or on the floor, lawmakers have engaged in a variety of jawboning tactics. In significant measure, these efforts seem very much like those of media outlets, that is: Instead of using its formal lawmaking and investigatory powers, members of Congress use their status to publicize their concerns (and thereby affect social norms) through the media. That Congress often makes its voice heard in such an indirect way is to be expected. Formal congressional action is limited by the president's power of unilateral action, by Congress's diminishing role on war powers, and by the nation's practice of affording fewer civil liberties protections during wartime. Over time, the War on Terror may drag on B so much so that public and elite opinion may push Congress to play a more active role. On the other hand, as it did with military tribunals and TIPS, the Bush administration may preempt a legislative backlash by modifying its policymaking in ways that avoid such direct confrontations.

IV. Conclusion: What About the Courts?

⁵⁰CBS News Poll *reprinted in id.*

That the administration has successfully advanced most of its agenda before Congress and the American people is consistent with both the historic record on wartime civil liberties and the emerging tradition of presidential dominion over war powers. Past practice also suggests that the judiciary will step aside and let the administration conduct its war as it sees fit. Yet, in the summer and fall of 2002, federal trial and appellate judges "across the ideological spectrum" sometimes responded "with skepticism, alarm or downright hostility" to the "administration's sweeping claims of unbridled executive authority to hold secret deportation hearings, label and incarcerate 'enemy combatants' without access to lawyers or judges, and commingle activities of counterintelligence agents and criminal prosecutors."⁵¹

⁵¹Linda Greenhouse, *War of Secrets: Judicial Restraint; The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002 at 4-3.

It is difficult to predict whether and how the Supreme Court will resolve these issues. At this juncture (October 2002), I anticipate that the administration, ultimately, will be allowed to pursue all (or nearly all) of its policies. *First*, so long as the "country still seems emotionally engaged in this war" (so that Bush administration policies seem tied to a war effort, not the transformation of the nation into a police state),⁵² there is little reason to think that the Court will depart from its normal practice of deferring to executive branch claims of military necessity. In its 2001-02 term, for example, the Justices signalled their concern with terrorism by expanding the power of police both to detain a suspect for questioning and to search passengers on a bus. In both cases, explicit reference was made to the ongoing war against terrorism: In the bus case, Solicitor General Ted Olson spoke of the need to limit passenger rights "[i]n the current environment;"⁵³ in the detention case, Justice O'Connor noted at oral argument that "[w]e live in perhaps a more dangerous age today than we did when this event took place."⁵⁴ *Second*, lower court rulings against the Bush administration may well be tied to the Justice Department's staking out unduly extreme positions, when narrower fact based claims might well have prevailed.⁵⁵ In other words, even if the administration loses some skirmishes, it is quite possible that it will change legal tactics and eventually succeed in advancing its policies.

One last thing: In explaining why Congress will allow the executive to limit wartime civil liberties, I do not mean to suggest that the situation we face today is akin to Wilson-era restrictions on political speech or the World War II internment of Japanese-Americans. The "nation is now far less trusting of government, and far more solicitous of the accused, than it was sixty [or ninety] years ago."⁵⁶ In particular, this changing baseline means that the administration will not pursue certain policies and/or will moderate policy proposals that are out-of-line with social norms. Changes in both the military tribunal order and the TIPS program suggest that this is the case. For identical reasons,

⁵²Marcia Coyle, *The Law's Wartime Silence, Pro-Rights Rulings Tend to Come After Conflict Ends*, NATL. L.J., Sept. 9, 2002 at A-1.

⁵³Charles Lane, *High Court to Hear Case on Public Searches; Ruling Could Affect Domestic War on Terrorism, Bush Administration Says*, WASH. POST, Jan. 5, 2002 at A-10.

⁵⁴Linda Greenhouse, *Court Rules on Police Searches of Motorists*, N.Y. TIMES, Jan. 15, 2002 at A-17. For a general treatment on how the War on Terror implicates Fourth and Fifth Amendment protections (in non-terrorism cases), see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

⁵⁵See Jeffrey Rosen, *Private Enemy; Ashcroft Goes Over the Edge*, NEW REPUB., July 8, 2002 at 14.

⁵⁶Goldsmith and Sunstein, *supra* at PIN.

proponents of civil liberties should look to the American people and opinion leaders, not Congress, to constrain administration initiatives. Limited both by the president's power of unilateral action and its new-found custom of deferring to the executive on war powers, Congress will only be willing to limit the president on matters that are likely moot, that is, matters in which the American people, opinion leaders, and our allies are likely to convince the President to change his policies.