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Samuel Issacharoff
NYU School of Law, Issacharoff@exchange.law.nyu.edu

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Political Safeguards in Democracies at War

SAMUEL ISSACHAROFF*

Abstract—Wartime challenges democracies both from without and within. The need to marshal resources against a foreign enemy prompts the centralization of authority which, in turn, threatens to compromise domestic liberty. This article, originally delivered as the 2008 Hart Lecture, examines the ability of democracies to survive military threat with their core liberties intact. The focus is not on the more familiar liberty versus security trade-offs, but on the ways in which divided political authority in democracies serves as a check to both military misadventure and excessive internal suppression. The article begins with a historic account of how political accountability in democracy, from Athens forward, helps explain the relative military success that democracies have enjoyed. Furthermore, even where military emergency has forced emergency measures, the longer-term result tended to be an expansion of democratic accountability, as with the grant of the franchise to those who had served. The core argument is that the political accountability of executive authority, even in times of war, has had both military and political benefits. The article then turns to an examination of the modern war on terror. Here the historic advantages of democracy in terms of citizen involvement and common enterprise are least apparent. The final sections of the article question how well our inherited institutions will perform over long-term conditions of asymmetric warfare against non-state adversaries. The final conclusion is that the new frontier of war may place greater strains on judicial oversight of executive claims of exceptional authority precisely because the political safeguards of democracy, while still critical, may not be sufficient.

1. *Introduction*

Three years ago, I had the privilege to present the Astor Lecture here at Oxford.[1] My inquiry at the time was the role that courts, especially the US

* Reiss Professor of Constitutional Law, New York University School of Law. Email: issacharoff@exchange.law.nyu.edu. I am grateful for help on this project from Cynthia Estlund, John Finnis, John Gardner, Robert Howse, Sanford Levinson, Christopher McCrudden, Richard Pildes, Peter Schuck, Jeremy Waldron, Kenji Yoshino and Adrian Zuckerman. I also relied on the research assistance of Rachel Goodman and Josh Stillman. A version of this article was presented as the Hart Lecture on 6 May 2008. It was an honour to be included in the great tradition of the Hart Lecture at Oxford University.

[1] 'When Rights Break Down: US Constitutional Responses in Times of National Security Crisis', Astor Lecture, Oxford (8 June 2005). The themes of that lecture were more fully developed in Samuel Issacharoff and

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Supreme Court, play in the contested terrain between liberty and security in times of military crisis. My argument then was primarily a positive one, aiming to give an account of how courts have historically directed their central inquiry to the question of whether both political branches have acceded to emergency measures. The claim was that courts are poorly positioned to assess the question of exigency, but well situated to resist claims for expanded and unilateral executive power. Though courts had been reluctant to accept invitations to weigh individual rights against demands for greater security, I argued that courts had nonetheless played an important role in demanding that security measures not exceed their legislative mandate. Courts were a bulwark against unilateral executive power, even as the demands of military emergency unfolded.

The attempt to give an ordered positive account corresponded to the issues of the day, so different a scant three years ago. At the time, the disastrous incursion into Iraq was still in its early stages. Furthermore, the breadth of executive authority claimed in the United States was only beginning to be realized, the national disgraces at Guantanamo and Abu Ghraib were just coming into focus, and the Supreme Court's protracted engagement with the scope of claimed emergency powers was just starting. As the Supreme Court began to address these difficult issues, it was important to emphasize longstanding constitutional tradition and to protect the historical role of court intervention in compelling interbranch collaboration. Central to the argument about bilateral accountability is the recognition that, as much as courts lack expertise in determining the scope of a military threat, they are uniquely well positioned to ensure that the claimed extraordinary powers of the executive are ratified or promulgated by the Congress.

At some level, this is a form of the argument in Justice Jackson's famous concurrence in *Youngstown Sheet and Tube Co v Sawyer*,[2] a case that prevented President Truman from using wartime emergency measures to seize the steel industry. There, Justice Jackson sought to define the permissible reach of presidential authorities in responding to emergencies. Jackson drew on themes he had first articulated as Attorney General, when he had assessed the scope of President Roosevelt's authority to commit American resources to the Allied war effort prior to the actual American declaration of war. In addressing President Truman's claim, that placing the steel industry under federal control was an inherent presidential emergency power during the Korean War, Jackson cast the authority of the executive as a product of its interaction with Congress. Under Jackson's formulation, the emergency powers of the President are at their zenith

Richard H. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime' (2004) 5 Theoretical Inquiries 1–45.

[2] 343 US 579, 636–8 (1952).

when ratified by Congress, most indeterminate when Congress has not acted, and fall to their lowest rung when presidential action conflicts with express congressional prohibitions. My work with my frequent collaborator, Richard Pildes, made a modest contribution, elaborating a judicial strategy that emerged from Jackson's powerful argument.[3]

I recognize that moving beyond the terms of my prior work creates some tension with my desire faithfully to honour Herbert Hart. Perhaps at some level of abstraction the Astor Lecture could be framed in terms consonant with the central constitutional inquiry that might have engaged Hart's great work in legal theory. Constitutional lawyers working with the raw materials of judicial decisions search first and foremost for the cognizable rules that both explain the past and predict the future. In so doing, they examine and elucidate the core societal obligations that frame our foundational principles. Nonetheless, in my view, even if this form of positive account draws heavily on an empirical description of what has occurred in past judicial rulings, it clamours for normative assessment. The latter is necessary, lest there be no justification but historical fiat to assess how constitutional challenges under the weight of wartime measures should be analysed. My aim, then and now, is not only to valorize the judicial insistence on bilateral accountability, but to provide an account of how law should operate in times of exigency. And while most of the examples will be drawn from full-bore military engagements such as the Civil War or World War II, the principles should provide guidance in the more conceptually problematic current engagement with the War on Terror. The need to push beyond a positive account becomes all the more clear given the claims of exigency that invariably erupt when national security is placed at issue.

It is to the normative account, then, that I address myself in this article. The normative foundations that I offer are not jurisprudential, but rather functional, asking primarily what institutional arrangements are most likely to meet the challenges faced by democracies under military threat. Those challenges run across two dimensions: first, building the capacity to prevail militarily and, second, maintaining the respect for liberty that defines a democratic order. It is possible to package my claims in terms of the secondary rules of legal institutions that frame the way primary matters are addressed. And perhaps I might bring my argument closer to some aspect of The Concept of Law.[4] But still, if this article does not comfortably fit within the great Hart jurisprudential tradition, perhaps I can nonetheless cast this inquiry as giving honour to Herbert Hart's wartime military service in MI5.

I advance two arguments, each partial, each admittedly contestable, yet each pointing to the role that executive accountability serves in sustaining both

[3] Issacharoff and Pildes (n 2).
[4] H.L.A. Hart. *The Concept of* Law (2nd edn OUP, Oxford 1997).

military survival and liberty in democracies in times of war. Each also has an empirical component. The first argument is that, on balance, democracies perform well in warfare, in some rough sense exceeding a random assignment of probabilities. The second is that democracies necessarily constrict liberty when under grave threat, but that these constrictions have been historically offset by an expansion of the franchise and other structural forms of governmental accountability.

What unifies these two arguments is not so much the empirical claims, which are necessarily partial and ultimately insufficient, but the broader contention that bilateralism—the need for legislative oversight of executive conduct of war, both its engagement externally and its vigilance internally—is key to the survival of democracy under threat. If this argument stands up, it should shore up the constitutional inquiry announced by Justice Jackson. Perhaps by historical accident, or perhaps by historical learning, our constitutional tradition has gravitated toward a governance structure for wartime that may help democracy prevail.

Before commencing the argument proper, I should note one further debt to Oxford. When I presented the Astor Lecture, I was fortunate to receive critical commentary from one of your colleagues, Christopher McCrudden. Professor McCrudden noted the paradox that US jurisprudence, despite its focus on rights discourse, adjudged the exigencies of national security through a structural assessment of the scope of congressional authorization. In its application, American law looked not all that different from British public or administrative law examinations of whether executive conduct is *ultra* or *vires inter* as determined by parliamentary decree. The irony is that as Britain, through the Human Rights Act and associated jurisprudence, unleashes a more robust form of judicial scrutiny, the American experience may suggest that less is likely to change than may have been expected.

I think too well of Professor McCrudden to saddle him any further with the burden of my argument. But this insight into the curious convergence of how our two oldest democracies address core issues of emergency authority did suggest that there must be deeper unifying principles at play, and it is to this nexus that I now direct myself.

2. *The Art of War*

The classic strategic thinkers—Thucydides, Machiavelli and Hobbes—all addressed the question of political power by considering the comparative advantages that societies possessed. For example, Thucydides, in analyzing the early history of Athens at war, identified four key features as the hallmarks of democracy in wartime.[5] Taken together, these features account for Athens'

[5] Thucydides, *History of the Peloponnesian War* (Rex Warner (trs)., Penguin Classics, London 1972).

initial period of great success: first, broad participation and equitable distribution of sacrifice and gain; second, transparency of decision-making; third, consensus among citizens; and fourth, political legitimacy. Thucydides saw the initial strength of Athens as its ability to distribute its burdens through taxation and broad-based support. The equalization of burdens and the predictability of that equalization were key to the sense of common enterprise that the Athenians were able to bring to war, providing Athens with its advantage in the wars against Persia and in the first stages of the Peloponnesian Wars. Although these same qualities would contribute to misguided military adventures, such as the calamitous naval attack on Sicily, the engagement of the population was key to the formidable period of Athenian ascendancy. Of course, this sort of democratized war effort creates the risk that popular passion and avarice might gain an upper hand. If these forces go unchecked, as indeed occurred, democracy's strength becomes its weakness.

Nonetheless, in the early stages, Athens's strength stemmed from its political organization. As Pericles explained in his great oration:

> In a single battle, the Peloponnesians and their allies could stand up to all the rest of Hellas, but they cannot fight a battle against a power unlike themselves .... Every one of them is mainly concerned with its own interests – the usual result of which is that nothing gets done at all, some being particularly anxious to avenge themselves on an enemy and others no less anxious to avoid coming to any harm themselves.... [E]ach state thinks that the responsibility for its future belongs to someone else, and so, while everyone has the same idea privately, no one notices that from a general point of view things are going down hill... [I]n war opportunity waits for no man.[6]

The oration encapsulates one of the wonderful features of Thucydides: as in any Greek tragedy, the strength presages the fall. I shall return to this point later.

Thucydides saw political organization as an evolutionary response to state survival, a paradigm that continues to be useful to contemporary thinkers. Phillip Bobbitt, for example, analyses constitutions as pacts that organize political power in the manner that best allows states to combat their enemies.[7] Bobbitt focuses entirely on external enemies, but if we add a touch of Hobbes and broaden the focus to include internal enemies, the seeds of an inquiry on the comparative advantage of different forms of state power are well planted. What your colleague Richard Dawkins has noted about organisms might just as well describe states: 'everybody has ancestors but not everybody has descendants.'[8]

[6] Ibid 120 (1.141).

[7] Phillip Bobbit. *The Shield of Achilles: War, Peace and the Course of History* (Knopf, New York 2002) 79–83.

[8] Richard Dawkins, 'Sustainability doesn't come naturally: a Darwinian Perspective on Values', Inaugural Lecture of the Values Platform for Sustainability (14 November 2001), available at http://www.environment foundation.net/richard-dawkins-lecture.pdf, last visited 22 March 2009.

The key move in any analysis of political organization as an adaptive response to military threat is to show how a new form of organization better husbanded resources than its predecessors. Examined from this perspective, the Magna Carta can be thought of in terms that fit within Bobbitt's constitutions-as-strategic-pacts analysis. Certainly the Magna Carta established a core understanding of governmental legitimacy turning on rule of law concerns. But one can also look beyond its formal provisions to examine what occasioned this limitation of state authority to duly enacted laws. Here the key to the Magna Carta was the perceived weakness of the English monarchy, which forced it to accept a limitation of the Crown's power—only laws passed with the consent of the legislative power could thereafter be executed.

The key historical fact emerges—as is so often the case—from military exigency which in turn serves as the catalyst for political reorganization. In the course of a failed war effort, King John was unable to sustain his military campaign to attempt to recapture English lands in France. In order to continue the military campaign against France, King John had to turn to the class of English barons to levy funds for a more centralized war effort. In exchange for broader-based military funding for the Crown, King John had to accept an early form of bilateralism in the form of political limits on the unilateral domestic authority of the Crown. Basically, the Crown needed to obtain funding for its military campaigns from the nobility and could exercise only that power which had received the approbation of Parliament. While the subsequent history of civil war between King John and the barons revealed the imperfect acceptance of this political compromise, the trade-off between greater concentration of military resources and political accountability is nonetheless instructive.

The Magna Carta is an early attempt to allow the English state to tap into some of the strategic advantages that inhere in a broader political mandate. As Thucydides recognized, the breadth of political support permits democracies to levy taxes more equitably and with greater consent from the population, creating the potential for more resources to be deployed to military defence. But taxation and consent capture only a small part of the robustness of democratic society and its potential contribution to military development. Democracies can permit the degree of liberty necessary to nurture robust economic growth and technological innovation, including innovation in military capabilities. As they mature, democracies can also draw upon broader support for their existence and marginalize extremism within their ranks without resort to excessive repression or over-reliance on police measures. Since a democracy can broaden the engaged and trustworthy strata of the citizenry, it can afford to have a larger military without threatening the stability of civilian rule. Because of broader political stability, democratic militaries can afford to devolve more tactical authority and independence to the field level officers. Finally, democratic processes allow for a change of course in response to failed strategies, where autocratic regimes are often locked in to policies that have proven unsuccessful.

These advantages are not merely theoretical. Conventional wisdom has it that the messiness of democratic politics and the incomplete hierarchy of authority make democracy a liability in wartime.[9] Yet war is often the midwife to democracy,[10] even if some more cautious accounts would conclude only that the historical record provides 'some scattered support for the view that war promotes democratization'.[11] But if we return to the evolutionary account of societal organization, in which surviving arrangements have some particular ability to persevere historically, the simple explanation of democracy as a liability in warfare looks incomplete, if not simply wrong. It is remarkable that, for all the brutal wars of the 20th century, often cast in explicitly ideological terms as battles between rival forms of political organization, democracies not only survived but saw the 'third wave' of democracy come into full flower.[12]

Rather than serving as a counterweight to the evolutionary account of political organization, it may be that the spread of democracy is in fact a confirmation of a competitive struggle for survival. Indeed, historically speaking, democracies tend to do better in war than societies with non-democratic political structures. Political scientists Dan Reiter and Allan C. Stam provide important empirical support for this thesis in their recent work, *Democracies at War*, which demonstrates to a reasonable degree of satisfaction that democracies are disproportionately successful in conflict situations.[13] Of course, success at war is difficult to measure, and Reiter and Stam's methodology is not beyond reproach; they count a US confrontation with Granada as one event, giving it equal weight to the World War II conflict with the separate Axis powers. Furthermore, any attempt to give a categorical assessment to the military supremacy of democracy is fraught with peril. Consider, for example, that the Wehrmacht likely remains the formidable military force of recent times. Nonetheless, their results are intuitively correct given the continued existence and spread of democracy, and their explanation for the democracy effect is logical. Ultimately, they attribute increased strategic success to two features of democracy: first, that the spirit of individual enterprise enables greater flexibility and individual skill in the armies and the officer corps, and second, that political accountability retards foolish ventures.

[9] The arguments on this score are well summarized in Paul Starr, 'Dodging a Bullet: Democracy's Gains in Modern War', in Elizabeth Keir and Ronald R Krebs (eds), *In War's Wake: International Conflict and the Fate of Liberal Democracy* (Basic Books, New York, forthcoming 2009).

[10] See Nancy Bermeo, 'What the Globalization Literature Says – Or Doesn't Say – About Postwar Democratization', (2003) 9 Global Governance 159–77 (reporting that more than half the long-term democracies in existence at the turn of the most recent century emerged from war or from postwar reconstruction).

[11] See Edward D. Mansfield and Jack Snyder, 'Does War Influence Democratization?', in Keir and Krebs (n 9).

[12] See Samuel Huntington, *The Third Wave Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman 1991).

[13] Dan Reiter and Allan C. Stam, *Democracies At War* (Princeton University Press, New Jersey 2002).

It is difficult to measure either proposed basis for democratic wartime success with clean empirical tools. Regardless of the difficulties in measurement, however, democracy did emerge triumphant from the war-torn 20th century, and the explanations proffered by Reiter and Stam certainly resonate with observable events. It does stand to reason that the broader the social base of support for a governing regime, the less vulnerable it should be to domestic overthrow. In turn, this allows for the creation of a broader class of junior military officers, with more discretionary authority. By contrast, autocratic leaders have long known to fear coups led by colonels and the junior ranks of the officer corps.

While military capability is no doubt a critical element in war, it may take second place to the judicious decision over when to fight and when not to fight. The general resistance of democracies to engage militarily draws from two sources. The first is the difficulty of mobilizing public support for a war-prone regime whose continued existence is dependent on public approval. Mobilizing support not only takes time, but requires elected leaders to stake their mandate on public acceptance of the wartime objectives. Both the time necessary to build support and the attendant political risks make military engagement more difficult for a democracy. Furthermore, democracies are more likely to have divided authority over warfare, such that the checks and balances of the institutions of government also serve as a brake on adventurous wars. The clearest example is found in the governmental structure established by the American Constitution, which requires that the executive initiate and Congress formalize military engagements, creating a mandatory cooling-off period. That separation of responsibility is then reinforced by the requirement that military expenditures be subject to specific congressional authorization.

In any democratic regime, accountability to political processes—both through elections and the divided authority of the executive and the legislature—makes leaders reluctant to engage in foolhardy military expeditions. As Immanuel Kant observed, 'If the consent of the citizens is required in order to decide that war should be declared . . . nothing is more natural than that they would be very cautious in commencing such a poor game.'[14] If the caution about military adventure is translated into general risk-aversion when it comes to unnecessary military engagements, then there will likely be a distributional effect on the success rates of such countries. Countries that are more risk-averse in military conflict are more likely to fight exclusively or primarily when forced to defend themselves. This tendency further predicts a historic advantage for those countries inclined to fight only when necessary; defensive combatants hold a natural advantage over their adversaries, a point recognized long ago by Sun Tzu in *The Art of War*. To the extent that the deliberative

[14] Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (Filiquarian Publishing LLC, Minneapolis 2007) (1795) 14.

processes of democracy require a citizenry that is persuaded of either the necessity of fighting defensively or the select advantages of specific aggressive wars, democracies will be more inclined to fight defensive wars than offensive ones, and they will tend to undertake only the offensive wars that are likely to be successful.[15] This responsiveness to citizens' reluctance to engage creates a corresponding disadvantage, though: democracies do better in wars initially than they do over the long term, as an exhausted or demoralized polity drains military resolve more certainly in democracy than autocracy.

Furthermore, democracies may have a kind of credibility in bargaining that can help to avoid war by strategic mistake in conditions of uncertainty. On this view, it is more difficult for democracies than autocracies to bluster about their intentions. The structures of democratic governance are more transparent, so rendering the true intentions of the national leaders more easily ascertainable by both the domestic population and foreign leaders. Moreover, precisely because of the accountability of rulers to the elected in a democracy—especially in a mature, well-established democracy—and because of the shared cost in terms of taxation and possible conscription, democratic rulers need to effectuate a political mobilization of the population in order to prepare for war (or peace). Consequently, 'the greater transparency of democratic politics makes it less likely that democratic leaders will bluff or renege on agreements. As a result, bargains will be easier to agree to and stick to, especially if both sides are democratic.'[16] Transparency reduces the 'guesswork' in divining the intentions of one's adversary,[17] thereby limiting the prospect of inadvertent escalation of hostilities.

For present purposes, the foregoing can be reduced to a small set of propositions that appear certainly plausible, even if the extensive work to establish them as fact remains an ongoing project. The key is that democracies actually perform well in war, largely because of greater judiciousness in when to fight. There are features of democratic society that certainly co-exist with the development of military prowess. The claim, though is not that democracies can outperform non-democracies militarily in all circumstances, only that they have thus far held their own historically.

The question of the day is whether these advantages are likely to hold in unconventional war. The features of democracy that provide it with an advantage in traditional war are not as clearly helpful in asymmetric battles against non-state actors. Efforts to resist terror require neither superior taxing powers, nor the mobilization of a broad citizen-based army. To the extent that the military success of democracies may be attributed to the checking function

[15] Sun Tzu, *The Art of War* (Samuel B. Griffith, (trs), OUP, Oxford 1963) (6th c. B.C.) 64.

[16] Edward D. Mansfield and Jack Snyder, *Electing to Fight: Why Emerging Democracies Go To War* (Belfer Center for Science and International Affairs, Cambridge, MA 2005) 31.

[17] Ibid.

of the citizenry on ill-advised crusades by their leaders, the absence of direct effects on the population reduces the incentive to monitor executive decision-making.[18] Furthermore, 'off-the-books' military adventures do not depend upon a sustained ability to marshal support from the citizenry, nor an ability to correct course, because the citizenry has little access to competent information. Commitments to a determined course of conduct are neither public nor therefore particularly costly or credible. Most problematically, there is little opportunity to utilize the cooling-off function of the executive-legislative power divide, as the police/military nature of the required action is poorly suited to anticipatory legislative oversight.

Indeed, democracies tend to fail at war in circumstances like those of the so-called 'war on terror.' The democratic advantage shrinks as the population gains psychological and economic distance from the conflict. Thus, a democracy is strategically weakest when it resorts to covert action and when its populace is largely free from the burdens of war—both mandatory military service and increased taxation, which necessarily constrains private consumption. Circumstances may compel this form of military engagement, but it does not play well to the historic strengths of democracy. The 'war on terror' therefore presents a particularly worrisome situation: it can be fought clandestinely, it does not require broad-scale troop mobilizations, and it can be financed essentially off the books by deficit spending. These features also enable asymmetric wars to be fought without political accountability and broad-based consent, moving far beyond the enhanced executive power necessary to and expected during the conduct of traditional wars. Concentration of power in the hands of the executive creates the potential for a democracy to engage in the risk-seeking behaviour typical of authoritarian regimes, and the possibility that it will fight on after the costs of victory have become too high, as an unchecked leader might demand. In other words, asymmetric war may dissipate the advantages that democracies have historically held in both the decision to engage in war and the conduct of warfare. As Professors Reiter and Stam conclude, covert action 'increases the risk of policy failure'.[19]

3. *Limits on Democratic Control Over War*

Lest our praise for the prospects for democracies in conventional war go untempered, we must acknowledge that democracies also share characteristic

[18] Paul Starr well captures this point: the ability to wage war without conscription and with so little call for personal sacrifice from the public may reduce the high threshold for starting wars that has been partly responsible for democracies' military success: Starr, (n 9) 17. This makes particularly striking the claim of the Bush Administration that taxes should not be raised to pay for the cost of overseas military actions. If anything, taxes and conscription appear as two mechanisms to ensure that the population understands and approves of the consequences of warfare.

[19] Reiter and Stam (n 13) 160.

disabilities. Broad participation, perhaps the greatest source of strength, is also a substantial weakness. Polities become demoralized as autocrats do not; thus, as expressed by General George Marshall, 'A democracy cannot fight a Seven Years' War.'[20] Even more problematically, the broad populace lacks a finely honed military-strategic sense, leaving public sentiment vulnerable to manipulation and democracies vulnerable to the resultant swings in public sentiment. The weakness of this kind of democratic vicissitude is evident even in the Athenian wars. The Athenians set upon the execution en masse of the Mytilenians after a failed revolt, despite the submission of the people themselves.[21] Athens first dispatched a ship with orders to kill all the Mytilenian men and enslave the women, but, after some reflection, a second ship was sent to intercept the first, with orders to abandon the planned massacre. Only by great effort was the slaughter avoided. And, while grievously wrong retaliation was averted in the particular circumstance, the Mytelenian episode portended the lack of institutional checks on the demos as decision-maker. The disadvantage of waging war while governed by popular passion was even more clear in the battle over Sicily. There, once again, the enraged population compelled an ill-fated military adventure. The result was that the entire fleet was sent into a trap, a battle that marked, effectively, the demise of Athens.

As I mentioned earlier, Thucydides's telling of the history of Athens in war gives it the shape of the classic Greek tragedy, in which the virtues that signal the rise also portend the fall. The virtues of Athens flowed from its ability to draw from the entirety of the citizenry to shoulder the burdens of war—defined both in terms of its ability to draw on collective taxation and collective decision-making. The problem with entrusting the conduct of war to the broad citizenry was that Athens at war came to be ruled by fleeting public sentiment. It had no institutions capable of serving the guardianship of its ideals or of providing constitutional accountability. Thus, the populace was free to succumb to fits of wild enthusiasm for war and to condemn totally military leaders who failed or even vacillated. Furthermore, when virtue waned, so did the reasoned aims of war. The early successes of Athens exposed the tension inherent in an increasingly belligerent empire claiming to project democratic ideals. As war continued, gains and sacrifices came to be realized unevenly, and military euphoria and private profit corroded the ideals of the society. Because Athenian virtue was entirely individual, without support or restraint from institutions, Athens proved to be exactly as vulnerable as the individuals in whom it placed its trust.

[20] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Company, New York 2007) 187.

[21] Peter Read Teachout, 'Worlds Beyond Theory: Toward The Expression Of An Integrative Ethic For Self And Culture', (1985) 83 Mich L Rev 849–93, 859–60 (book review).

Military failure signalled the Roman Republic to the shortcomings of Athenian democratic control over warfare specifically and over governmental decision-making more broadly. In response, the Romans created institutions intended to ensure integrity and responsibility independent of the men who presided over them. In Rome, warfare was subject to oversight by the Senate, even as its conduct became the province of the chief executives, the consuls. Emergencies required even greater concentration of power over military decision-making, and Rome used the unique institution of the dictatorship to accomplish it during times of military exigency. Rome's institutional concentration of executive power would provide a critical lesson for the American Framers. In times of emergency, consuls could appoint dictators for terms of precisely one year. The power of the dictator, however, was limited; he could not restructure the laws of governance, nor could he limit the standing power of the Senate or of the citizenry. As Bruce Ackerman summarizes, '[I]n all cases, there was a rigid rule: The appointing official could not select himself. As a consequence, the consuls had every incentive to resist the call for a dictatorship unless it was really necessary.'[22]

During the roughly three centuries that comprised the apex of the Roman republic, dictators were appointed 95 times, and they almost unfailingly ruled within the confines of their appointment.[23] No less a critic than Machiavelli deemed this fidelity to pre-existing governmental structures critical to the success of the dictatorships. He wrote, 'We can see that the dictatorship, as long as it was bestowed in accord with public laws and not by private authority, always benefited the city, because it is the creation of magistrates [consuls] and the granting of power by extraordinary means which harm republics, not those which are created by ordinary means.'[24]

The Framers of the American Constitution, with the help of political thinkers from Polybius to Montesquieu, identified this institutional strength as the critical distinction between the Roman republic and the mass democracy of Athens. As a result, the constitutional structure they created emphasized institutional stability and the rule of law. The Constitution recognizes that the writ of habeas corpus may be suspended during times of emergency, anticipating the necessity of increased executive power and reduced popular control during such times. Despite this express constitutional recognition of exigency, the United States is fairly exceptional in how rarely and with what difficulty it allows such emergency powers to be exercised. It is unusual among democracies, for example, that the United States holds elections at regular

[22] Bruce Ackerman, 'The Emergency Constitution', 113 Yale LJ 1029-1092, 1046 (2004).

[23] John Ferejohn and Pasquale Pasquino, 'The Law of Exception: A Typology of Emergency Powers', (2004) 2 Int'l J Const L 210–239, 226; David Bederman, 'The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause' 18 (Emory Public Law Research Paper No. 08-30, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092422, last visited 22 March 2009.

[24] Niccolo Machiavelli, *Discourses on Livy* (Julia Conaway Bondanella and Peter Bondanella (trs)., OUP, Oxford 2003) (1531) 94.

intervals in wartime, even during the Civil War and World War II. Most democracies do not valorate the normal operation of politics in such circumstances. There are longstanding claims that the failure to create mechanisms for handling true emergencies will lead to a corruption of the normal workings of constitutional democracy, a view perhaps most famously championed in American law by Justice Jackson in his dissent in *Korematsu v United States*. As expressed by Justice Jackson, such a claim to power 'lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need'.[25] The absence of such formal mechanisms leads contemporary critics to advocate the creation of specialized detention procedures overseen by special national security courts[26]—what would in effect be a post-hoc recognition of the need to structure more formal emergency measures into American constitutionalism.

More typical in modern constitutional democracies are provisions for a temporary shift to a formal emergency government in order to concentrate war-making power in the hands of the executive. These modern emergency decrees follow the Roman practice of appointing a dictator in conditions of military exigency, although the term 'dictator' has been dropped from the lexicon of democracies. Perhaps the best modern example is the state of emergency provision under the French Fifth Republic. Under Article 16 of its current constitution, France allows a state of siege to be declared with corresponding potential for the suspension of customary political rights and civil liberties.[27] At the same time, Article 16 preserves the political accountability of the president by requiring that the legislature remain in session throughout the emergency and protects the power to impeach the president, even during a formal state of emergency.[28]

War inevitably centralizes power in the executive branch, but in the United States, the requirement that Congress declare war formally (or at least tacitly) spreads war-making power among political actors. It thereby broadens political accountability for both the declaration and the maintenance of war. The United States' structure ensures that no single politician or branch of government bears full political responsibility for wartime losses, a substantial distinction from the United Kingdom's 'royal prerogative' system, which places war-making power as the exclusive province of the executive. When power is completely concentrated, there is a diminished capacity to withdraw from failed military campaigns and to rethink fundamental issues of strategy. A story from Stalin's Russia illustrates the perils of executive unilateralism taken to its extreme. Stalin, having rejected all warnings of the German assault on Moscow

[25] *Korematsu v United States*, 323 US 214, 246 (1944).

[26] See, e.g., Jack Goldsmith and Neal Katyal, 'The Terrorists' Court', NY Times, July 11, 2006. For a strong rejoinder arguing that normal legal procedures are able to address emergency threats, see David Cole and Jules Lobel, *Less Free, Less Safe* (New Press, New York 2007).

[27] French Constitution, art 16.

[28] Ferejohn and Pasquino (n 23) 217 n 20.

during World War II, became demoralized and incapacitated. Rather than changing course as the threat increased, he withdrew to his dacha. When members of his inner circle came to seek authorization to form a new command circle in case of Nazi success, a startled Stalin assumed they had come to execute him for the failures of his war command.[29]

The Bush administration favoured the terminology of prerogative power,[30] echoing the United Kingdom's royal prerogative in spite of the structural distinctions between the American and British war-making powers, Nonetheless, executive unilateralism is, historically, wrong as a positive description of the American response to the exigencies of war, even given threats that seemed to confound the openness characteristic of democratic society. As Jack Goldsmith notes, what distinguished the Bush administration response to military threats from those of the Civil War and World War II is not the extent of power claimed by the executive.[31] President Bush had not claimed the power to suspend habeas corpus, as did Lincoln, nor the power to override congressional economic controls, as did Franklin Roosevelt. In each of these earlier circumstances, however, an effort was made to enlist Congress as an ally in the policy decision, even if this effort was made after the decision had been initiated. By contrast, during the Iraq War, and through the controversial decisions over detentions and even torture, the persistent Bush executive claim was of exclusive and unaccountable powers flowing from the President's role as commander-in-chief. Efforts to engage Congress politically were notably absent at many key moments of the current war on terror.

Indeed, the claims of such executive prerogatives reach well beyond any modern conception of constitutional democracy. No country permits executive unilateralism across all the key emergency functions: declaration of the emergency, definition of emergency powers, review of the exercise of emergency powers and determination as to when the emergency is concluded. Even ancient Rome strictly enforced a time limit on the dictatorship. In contemporary democracies, France is fairly typical in requiring that the legislature remain in session throughout the emergency, so that the Constitution may not be amended by the force of executive authority. Only one recent historical example of such complete presidentialism exists, and that is the Weimar Republic. Article 48 of its Constitution, allowing for the declaration of emergencies by exclusive presidential action, combined with Article 25, allowing the President to dissolve Parliament, meant that there was no check on rule by executive decree.[32] Unsurprisingly, no post-war constitution has followed the Weimar model.

[29] The story, gathered from several sources, is recounted in Anne Appelbaum, 'How Hitler Could Have Won', *The New York Rev of Books* (25 October 2007) 34.

[30] Goldsmith (n 20) 81.

[31] Ibid 82–3.

[32] Weimar Constitution, available at http://www.zum.de/psm/weimar/weimar_vve.php, last visited 22 March 2009.

While it is not at all clear that responding to terror and terror-produced emergency is an area in which democracy has a natural evolutionary advantage, it is necessary to construct an understanding of democracy that corresponds both to the nature of the threat and to the strengths of democracies. I suggest that such an understanding will ultimately include: limitations on the use of unilateral authority in setting the terms of emergency powers; post facto review through mechanisms independent of the executive's deployment of emergency power; and judicial review once outside the bounds of military exigency. It is, of course, possible that these institutional mechanisms will fail and that democracy will succumb to the threats of terror. But the question remains of identifying the best protective mechanisms.

Perhaps, as other have argued, the key to democratic survival in the pangs of war depends on political contestation. Perhaps institutional checks will prove insufficient absent a political opposition. On this view, modern war may require a divided government to provide another safeguard, as the executive and legislature respond to different political constituencies. Separation of powers among political parties in rival government institutions may be key, and is certainly one of the advantages of presidentialism over parliamentiarism, but this division cannot be relied upon. Other institutional mechanisms may be needed. Daryl Levinson and Richard Pildes, for instance, suggest granting formalized political power to minority parties in the legislature so as to guarantee that the executive may be called to account for itself.[33] Stephen Holmes goes further and would insist on measures of adversarial accountability structured even into executive functions.[34] Each measure would create institutionalized pathways by which executive authority might be challenged and even resisted, each supplementing the tasks that formal separation of powers are supposed to enable.

The failures of the executive-driven war effort in Iraq have moved the United Kingdom, originally our closest ally in that conflict, to reconsider executive unilateralism. While as an increasingly isolated American administration continued to assert enhanced executive authority, current debates in Britain over the legacy of prerogative power point in exactly the opposite direction. We Americans may look upon some portion of that legacy of prerogative power with amusement. It is, after all, hard to imagine an American equivalent to a definition of prerogative power that includes the 'Crown's rights to sturgeon, certain swans, and whales.'[35] More seriously, the 'royal prerogative' has traditionally granted the head of state exclusive authority to engage in military

[33] Daryl Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers', (2006) 119 Harv L Rev 2311–86, 2368–70 (describing the use of various systems of 'opposition rights').

[34] Stephen Holmes *The Matador's Cape: America's Reckless Response to Terror* (Cambridge University Press, New York 2007) 300–1.

[35] House of Commons, Public Administration Committee Report (4 March 2004) available at http://www.parliament.the-stationery-office.com/pa/cm200304/cmselect/cmpubadm/422/42204.htm, last visited 22 March 2009.

conduct without any mechanism of formal parliamentary approval. In the wake of the Iraq war debacle, that power has begun to look dangerous to Parliament. As a result, the House of Lords Select Committee on the Constitution[36] has proposed measures to force formal consultation with Parliament on matters of war. Such a constitutional constraint would contain requirements akin to those found in our War Powers Act, requiring legislative endorsement while recognizing the potential need for emergency action.

Some debate exists on the question of whether the consultation requirement should be codified as legislation or as a constitutional convention. With Iraq no longer the political touchstone of British politics, and in the face of economic crises and weak support for the Labour government, the sense of urgency around reform may have passed, at least for now. Regardless of the outcome of political debates at present, however, the need for consultation is one of the legacies of the unpopular war in Iraq. As Prime Minister Brown observed, 'Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely that except in the most exceptional circumstances a government would choose not to have a vote in Parliament [before deploying troops].'[37]

4. *The Structural Dimensions of Liberty and Security*

A. *Democratic Accountability*

We turn next to the issue of civil liberties. When proponents of prerogative power see in legislative accountability an impermissible constraint on the commander-in-chief powers of the executive, they are not alone in their critique. What is perhaps an even more common criticism of the bilateral warmaking thesis comes from the left—critics assert that bilateralism is insufficient to ensure the protection of civil liberties and civil rights. With considerable justification, these critics claim that the passions of war are likely to overwhelm all branches of government. If courts' primary responsibility in wartime, both as a matter of positive law and normative argument, is to enforce interbranch dialogue and proper delegation of authority, what becomes of their independent responsibility to protect the vulnerable? In this way, does strict bilateralism not become an invitation to judicial acquiescence to whatever wartime may bring? One need only look to *Korematsu* to see the insufficiency of a judicial strategy that invites further deference to wartime political hysteria.

[36] House of Lords Select Committee on the Constitution, 'Waging War: Parliament's Role and Responsibility' (15th report of 2005-2006) 42, available at http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf, last visited 22 March 2009.

[37] Rachel Sylvester and Alice Thomson, 'Backing for Brown plan for MPs to decide war', Mail Online (London), 30 April 2005, <http://www.dailymail.co.uk/news/article-346890/Backing-Brown-plan-MPs-decide-war.html>, last visited 22 March 2009.

This concern draws on the common understanding that civil liberties are inevitably compromised in wartime, which also fuels the conclusion that democracy is poorly suited to wartime. Reflecting on his party's decline after World War I, David Lloyd George, Britain's last Liberal prime minister, wrote in his memoirs that 'war has always been fatal to Liberalism'.[38] There is no doubt some truth to this idea; when warfare reaches our shores, the government must act to protect its citizens against danger inside its sovereign territory. The examples are legion, but even our iconic leaders, Presidents Lincoln and Franklin Roosevelt, ordered preventative detentions and military commissions in times of exigency. These actions were perceived as a necessary response of government dating as far back as the War of 1812 and likely even earlier. No doubt a consistent tale could be told of the blows to civil liberties in all democracies during times of war. But pronouncing the harm done to be fatal is, per Mark Twain, a tad exaggerated.

Undoubtedly, all societies under military threat will retrench on the liberties afforded their citizens. Wartime incursion into civil liberties, however, is only half of the equation. As bad as warfare can be for rights in a democracy, the damage generally proves capable of self-repair, and, importantly, wars seem to strengthen other features of democracy. As Princeton sociologist Paul Starr explains,

> Wars have tended to make societies less liberal but more democratic – that is, they have undermined civil liberties while leading to expanded political rights. Once wars have ended, however, their illiberal effects have typically been reversed, but the democratizing and state-building effects have remained. In short, war has been a catalyst in the transformation of the liberal state, contributing to the features now associated with modern democratic liberalism.[39]

Not only do formal liberties tend to rebound from wartime constriction in mature democracies, but mass mobilization for war frequently translates into demands that expansion of the franchise be expanded to the full reaches of the mobilized population.[40] 'No conscription without representation' captures the ability of citizen armies to exert 'the pressure which extracted constitutional and electoral rights from the conservative European regimes' of the 19th and early 20th centuries.[41]

This formulation suggests that the strength of democracy, even in asymmetric war, may lie in its ability to relax formal constraints on state

[38] Quoted in Paul Starr, 'War and Liberalism', *The New Republic* (5 March 2007) 21.

[39] Starr (n 38) 22.

[40] See Ronald R Krebs, *Fighting for Rights: Military Service and the Politics of Citizenship* (Cornell University Press, Ithaca 2006) 3 ('especially after war, groups seeking first-class citizenship may deploy their military record as a rhetorical device, framing their demands as the just reward for their people's sacrifice').

[41] John Keegan, *The Second World War* (Viking, New York 1989) 22. The phrase is Professor Keegan's.

authority—the civil liberties side of the equation—precisely because political checks on governmental authority not only remain in place, but are likely to expand. Pinpointing this trade-off exposes the truly pernicious side of the Bush administration's version of executive unilateralism. The administration has contended, particularly in John Yoo's expansive account, that the logic of war allows for, and even demands, the evisceration of political safeguards,[42] a shift that would prevent democratic mechanisms from acting to restore full liberty after the security crisis.

As Machiavelli noted long ago, what kept the dictators good and allowed the decemvirs to be bad were 'the safeguards put in place to make them unable to abuse their authority.'[43] The American Framers inherited this wisdom from Montesquieu, who cautioned that '[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can then be no liberty.'[44] The Framers placed their faith in political safeguards, anticipating and allowing for reduced liberty in wartime but confident that the institutions they created would be strong enough to remain democratically responsive. This responsiveness itself would provide the outer limit on the curtailing of rights.

Of course, allowing the demos to determine when the government has gone too far in intruding upon rights is not an idea that will satisfy all parties. When there is a racial or ethnic angle to warfare, public sentiment is likely to be inflamed and minorities will remain at risk. The risk is real, particularly in cases of asymmetric warfare, But war, even a peculiarly frontless and undefined war, inevitably takes a toll. In the context of the American constitutional system, this particular solution may be the least problematic among a host of evils.

B. *The Judiciary and the War on Terror*

However much the burdens of wartime democracy must rest on the political branches, there remains the need for a fuller rendition of the role of the judiciary. All institutional arrangements must build in back-up systems to protect against structural failure. There is the risk that the legislature will fail to perform its role as a critical counterweight to the executive. Whether well-intentioned, as justifiable fear in the face of military threat, or malevolent, as in buttressing partisan alignments behind the party in power,[45] the simple fact is that Congress may fail to challenge executive claims of emergency. The risk

[42] This has been a repeated claim of the Bush Administration since 11 September 2001. John Yoo has been the most well known proponent of the thesis. See, e.g., John Yoo, *The Powers of War and Peace* (University of Chicago Press, Chicago 2005), 155, 159–60.

[43] Machiavelli (n 24) 97.

[44] Charles de Secondat Montesquieu, *The Spirit of the Laws* (Thomas Nugent, trans., Hafner Publishing Company, New York 1970) (1752) 151.

[45] This is the daunting challenge put forward by Levinson and Pildes (n 33), who argue that structural separation of powers depend critically on an oppositionist political stance in the legislative branch.

is even more pronounced in a parliamentary system, in which a challenge to a prime minister on the core conduct of a war may bring down the government in favour of the opposition. But even in the American context, it is a matter of profound dishonour to our constitutional system that, prior to the 2006 elections, not once did Congress, under the control of the Republican Party, hold meaningful hearings over the conduct of the Iraq War by a Republican President. Prior to the midterm congressional elections in 2006, Congress sat silent in the face of the national disgrace at Abu Ghraib, the continued detentions at Guantanamo, and even the cost overruns in the military's no-bid contracting practices.[46]

What happens during times of political failure? Even accepting the structural centrality of bilateral responsibility between the political branches, individual cases will press for a greater judicial role. Whether in a habeas petition, or as a defence to an affirmative claim against an individual, individual litigants will push back against the simple political calculus of emergency authority.

Here I want to distinguish the early cases decided in the post-9/11 period from those that had to confront the apparent refusal of Congress to act as a meaningful check on executive conduct. From the vantage point of bilateral authorization of emergency measures, the critical decisions from *Hamdi v Rumsfeld*[47] to *Rasul v Bush*,[48] have reinforced the central lessons from the *Youngstown*[49] decision, that executive prerogative is at its apex when approved by Congress. Conversely, when the Executive acts without congressional approval, or in the face of congressional disapproval, the range of executive prerogative drops accordingly. In the American context, the Supreme Court properly assumed the role of policing the boundaries of divided political power, a position it had previously asserted in restraining the expansion of national governmental power against the principles of federalism and the reservation of authority to the states.

Perhaps more striking than the resolute insistence of the US Supreme Court on political accountability is the parallel route taken by the House of Lords in Britain, even in the absence of formal judicial review and in the context of a parliamentary system. The Law Lords are limited by the Human Rights Act of 1998 to the ability to declare a law incompatible with the European Convention on Human Rights, but even then it remains to Parliament to

[46] See United States House of Representatives, Committee on Government Reform—Minority Staff, Special Investigations Division (Prepared for Rep. Henry A. Waxman), Congressional Oversight of the Bush Administration (Jan. 17, 2006) (outlining lack of Republican congressional oversight on many issues), http://oversight.house.gov/documents/20060117103554-62297.pdf, last visited 22 March 2009; Thomas E. Mann and Norman J. Orenstein, 'When Congress Checks Out', Foreign Affairs, November 2006, http://www.foreignaffairs.org/20061101faessay85607/norman-j-ornstein-thomas-e-mann/when-congress-checks-out.html, last visited 22 March 2009 (describing lack of congressional hearings on, *inter alia*, the conduct of the Iraq War).

[47] *Hamdi v Rumsfeld*, 542 US 507 (2004).

[48] *Rasul v Bush*, 542 US 466 (2004)

[49] *Youngstown Sheet and Tube Co. v Sawyer*, 343 US 579 (1952).

decide whether or not to act on the declaration so made.[50] The most significant of the British cases, *A v Secretary of State for the Home Department*,[51] concerns deportation orders against suspected terrorists, under circumstances in which no country would accept the deported individuals.

The suspects in *The A Case* were captured in the United Kingdom and held within its borders pursuant to Section 4 of the Anti-terrorism, Crime, and Security Act 2001 (ACSA), which allowed the Secretary of State to certify non-citizens as suspected international terrorists, and then to issue the deportation orders that resulted in their indefinite detention.[52] The European Convention on Human Rights guarantees the liberty of the person, but provides an exception for the arrest or detention of a person 'against whom action is being taken with a view to deportation.'[53] Nonetheless, prior rulings had found that if deportation was impossible because of the unwillingness of others to accept the detainee or because of the risk of torture upon deportation, indefinite detention would violate the European Convention.[54] The United Kingdom acknowledged the conflict and availed itself of the right to derogate from the Convention contained within that document.[55] The convention provides that in 'time of war or other public emergency threatening the life of the nation', member states may derogate 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.[56]

In *The A Case*, the Law Lords addressed three separate issues concerning the government's derogation decision. First, and most straightforwardly, was the question of whether there was, indeed, a qualifying public emergency threatening the life of the nation. Second was the more difficult issue of proportionality, that is, whether the measures taken in derogation of obligations under the European Convention were required by the exigencies of the situation.[57] Finally, the Lords were confronted with a substantive claim that the

[50] Human Rights Act, 1998, section 4. Until the 1998 Act, there was no basis for any judicial review of an Act of Parliament. Even under the Human Rights Act, a declaration of incompatibility only places Parliament on notice of the clash with what the Law Lords rule to be Britain's constitutional traditions. Parliament remains free to maintain a challenged statute, even in the face of such a declaration of incompatibility.

[51] [2004] UKHL 56, [2005] 2 AC 68 (HL) (hereinafter '*The A Case*').

[52] Ibid 89. ¶7

[53] Ibid [8], citing the European Convention on Human Rights, art 5. 1(f).

[54] Ibid [9] citing *Chahal v United Kingdom*, 23 Eur Ct HR 413 (1996).

[55] Ibid [11].

[56] Ibid [10], citing the European Convention on Human Rights, art 15.

[57] The European Convention gives Member States a limited right of 'Derogation in Time of Emergency'. Under art 15 of the Convention, 'In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' A member state availing itself of the right of derogation must inform the Secretary General of the Council of Europe of the measures it has taken and the reasons for them. It must also tell the Secretary General when the measures have ceased to operate and the provisions of the Convention are again being fully obeyed.

category of individuals subject to indefinite detention revealed discrimination. As I will explain further, the first two questions can be considered questions of process, about the conduct of the political branches, while the third focuses on a substantive right, and thus invites the creation of a fixed judicial rule.

The parallels to the American jurisprudence are immediately apparent in the leading opinion's focus on separation-of-powers concerns as it addresses the existence of a public emergency. That opinion, by Lord Bingham of Cornhill, provides several reasons for reaching the decision that the so-called war on terror did qualify as a public emergency, but it dwells for longest on the idea that affixing that label is a political decision, meant for the political branches and not the judiciary.[58] Lord Bingham calls the question one of 'relative institutional competence' and notes that there is very little legal content to the issue, suggesting that the court is therefore ill-equipped to make the decision.[59] On this score, he defers to the judgment of the Secretary of State.[60]

On the second question, that of proportionality, the Law Lords are far less deferential. Applying a loose, rational-relationship style of review, Lord Bingham finds that the ACSA's public security rationale cannot account for the security threats manifestly posed by UK nationals and, accordingly, its measures concerning non-nationals cannot be said rationally to address the threat.[61] Most interestingly, the Law Lords reject the claim that the nature of the response was a matter left to Parliament and the Prime Minister in favour of balancing the current emergency measures against prior parliamentary entrenchment of the Human Rights Act 1998. Once Parliament required the judiciary to give effect to convention rights, the Law Lords were empowered to declare an act of Parliament incompatible with those rights.[62]

As in the American case law, and as I will return to when discussing *Boumediene v Bush*,[63] this opinion provides an intriguing indirect defence of individual rights under emergency conditions. The—somewhat awkward—operational phrase comes from a decision of the European Court of Human Rights, which contemplates 'Judicial control of interferences by the executive with the individual's right to liberty.'[64] At first glance, the wording seems unnecessarily convoluted—why not just speak of judicial protection of the individual's right? But the phrasing conveys a subtle distinction that undergirds the opinion. The Law Lords' attempt to protect individuals does not consist primarily of preserving an inviolable set of rights against government action, but rather of regulating the manner by which the executive may act in the name

[58] [2004] UKHL 56, [2005] 2 AC 68 (HL), [27]–[29].
[59] Ibid [29].
[60] Ibid.
[61] Ibid [43]–[44].
[62] Ibid [42].
[63] 128 S Ct 2229 (2008).
[64] [2004] UKHL 56, [2005] 2 AC 68 (HL), [41] citing *Aksoy v Turkey*, 23 Eur Ct HR 553 (1996).

of emergency. As Lord Nicholls puts it in his opinion, '[t]he duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected.'[65]

Even here, concern for political safeguards forms the heart of the judicial response to claims of national security exigency.

C. *The Judiciary's Step Beyond*

As *The A Case* shows, there will be tremendous pressure to expand the judicial role beyond simple oversight of the procedures of decision-making within the political branches. In the context of an unbounded claim of national security exigency at home and abroad, courts will bristle when asked to suspend their normal willingness to engage rights claims. The third section of *The A Case* aptly demonstrates this impulse as Lord Bingham considers whether a statutory scheme that entails disparate treatment of terrorism suspects who are UK nationals and those who are not is impermissibly discriminatory. While this section is not necessary to the outcome of the case, Lord Bingham nonetheless warns that the door to arbitrary action opens when a court allows government officials 'to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.'[66] Ultimately, the Lords held that this feature of the Act constituted a substantive violation of the Human Rights Convention as well as the Convention on the Elimination of Racial Discrimination.[67]

The most recent of the American Supreme Court's confrontations with the overflow of the war on terror, *Boumediene v Bush*, suggests an intermediate solution.[68] In the course of determining whether detainees at Guantanamo could claim a constitutional right to habeas corpus proceedings in federal court, the Supreme Court placed itself as a central player in regulating the division of power among the constitutional branches. This time, however, the Court is concerned not with the constitutionality of the executive-legislative balance of power, but with the question of whether the political branches are properly limited vis-à-vis the Article III courts. Confronted with a rather unmistakable effort by Congress—with the approval and instigation of

[65] Ibid [80].

[66] Ibid [46], citing 336 US 106, 113 (1949).

[67] Ibid [68]. The effect of the ruling of the House of Lords was to force the political branches to re-examine the use of preventative detention. The Blair government sought to empower the Home Secretary to place any suspected terrorist, British or foreign, under house arrest without consulting a judge, but could not overcome political opposition to such a broad measure: 'Prevention of Terrorism Bill: Climb-Down', *The Economist* (26 February 2005) 21. Ultimately, the effect of the ruling in *The A Case* was to take the matter of detention outside the bounds of executive action and require an affirmative vote by Parliament to allow house arrest of individuals in response to increased threats to Britain. Prevention of Terrorism Act 2005, s 4(7)(a). Even such a measure would require a vote of Parliament explicitly to derogate from ECHR dictates, and the power to authorize control orders over individuals would require parliamentary re-authorization every year: s 13(1).

[68] 128 S Ct 2229 (2008).

the Executive—to strip federal courts of jurisdiction to hear claims of improper detention, the Court is called upon to define its own role under conditions of national security exigency.[69]

Certainly *Boumediene* provided the Court the opportunity to jettison its structural approach to emergency power in favour of a clear articulation that certain individual rights must be preserved in all circumstances. But, while the Court accepts that individual rights hang in the balance,[70] its discussion of those rights is secondary to an explication of the structural mechanisms that preserve them. The opinion provides historical grounding for the habeas writ as a tool for enforcing the separation of powers in pre-Revolutionary England.[71] It proceeds to explain that the Framers 'tripartite structure of governmental power was intended 'not only to make Government accountable but also to secure individual liberty'.[72] As part of that constitutional division of labour, the Suspension Clause 'protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account'.[73] Individual rights are thus clearly at stake as the court prevents political power from going unchecked, even as the opinion mostly declines to engage individual rights claims head-on.

The Court ultimately holds that a habeas court 'must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain'.[74] Since, under the statutory scheme created as a substitute for habeas—limited review in the D.C. Circuit Court of Appeals—there was no judicial ability to consider new evidence,[75] the proposed Military Commissions Act could not provide the required level of review, and 'the role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.[76] The Supreme Court thereby asserted its own role as a constitutional actor, refusing to allow Congress to

[69] Fours years earlier, in *Rasul v Bush*, the Court had ruled that habeas jurisdiction had been statutorily extended to Guantanamo through 28 USC § 2241. 542 US 466, 473 (2004). Congress then amended the statute with the Detainee Treatment Act of 2005 (DTA), stripping habeas jurisdiction from the courts and providing that the DC Circuit would have exclusive jurisdiction to review the decisions of the Combatant Status Review Tribunals. After the Court ruled, in *Hamdan v Rumsfeld*, 548 US 557, 576–7 (2006), that the amended language did not apply to cases pending at the time of the enactment of the DTA, Congress again altered the statute with the Military Commissions Act of 2006 (MCA), in order to make as clear as possible that federal courts were to have no jurisdiction in habeas or any other proceedings pertaining to the detention of aliens determined to be enemy combatants, whether they were pending at the time of enactment or had not yet been initiated. *Military Commissions Act of* 2006, § 7(a),(b). The question whether the Constitution guaranteed them access to the writ of habeas corpus was therefore squarely posed in *Boumediene*.

[70] See, e.g. 128 S Ct 2229, 2246 (stating that the Framers considered the writ a 'vital instrument' for the protection of individual rights).

[71] Ibid 2244–6.

[72] Ibid 2246.

[73] Ibid 2247.

[74] Ibid.

[75] Paradoxically, eight days after the Court issued *Boumediene*, the DC Circuit used exactly the procedures at issue to find that the detention of a designated 'enemy combatant' at Guantanamo was improper. *Parhat v Gates*, 532 F 3d 834 (DC Cir 2008).

[76] *Boumediene v Bush*, 128 S Ct 2229, 2273 (2008).

grant the executive so much power not subject to judicial review. The court asserts that, within the Constitution's separation-of-powers scheme, 'few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.'[77] Throughout the opinion, the concern for individual rights is present inasmuch as it underlies the importance of the separation of powers on which the Court focuses primarily. Nonetheless, the Constitution and the branches of government, not the detainees, are the *dramatis personae* in the opinion.[78]

Accordingly, the structural role of the judiciary is indispensable to reconciling liberty and security interests in times of emergency:

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.[79]

However, the structural account begins to look strained in *Boumediene*, as it did in the British context in *The A Case*. The judiciary can play an important structural role in preserving the forms of political accountability when security exigencies compel concentration of power for executive action. At one level, a court claiming that the principle of separation of powers also extends to the judiciary fits well within the structural account of limitations on executive prerogative. But, the form that judicial intervention necessarily takes—the adjudication of specific claims by individuals claiming a violation of their privately-held rights—pushes beyond our central thesis, that the primary guarantees of democratic liberty during emergency are structural, rather than rights-based.

An alternative account might better explain the substantive (non-process-based) aspects of opinions like *The A Case* and *Boumediene*. The inescapable fact is that these opinions come a number of years after the United States and Britain embarked upon the ill-defined war on terror, the reach of which necessarily included domestic affairs. There is a sense of impatience on the part of the judiciary, even though it had been willing in the first instance to defer to the reasoned claims of the political branches.

It may well be that there is an older, less-articulated understanding that wartime courts step aside in favour of the judgments of the political branches—at least initially. In a recent article, Adrian Vermeule intriguingly resuscitates a theory of emergency power derived from the jurisprudence of Oliver Wendell Holmes.[80] In Vermeule's account, Holmes believed that the existence of an

[77] Ibid.
[78] I am indebted to Rachel Goodman for this evocative formulation.
[79] 128 S Ct 2229, 2277.
[80] Adrian Vermeule, 'Holmes on Emergencies' 61 *Stan L Rev* 163–202 (2008).

emergency required that the judiciary allow a broad range of governmental responses. The presence of an emergency and the measures required to undertake an appropriate response are matters of fact, whose existence and scope are determined primarily by legislative mandates.[81] This seems like an intriguing early rendition of Justice Jackson's view of the relationship between executive authority and congressional mandates, wherein the scope of the President's power expands with the delegation from Congress. For Holmes, though, the passage of time allows for a reassertion of judicial authority. In a series of cases dealing with laws aimed at domestic upheavals after World War I, Holmes reclaimed judicial authority to question the assertion of exigency:

> [A] court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends on the truth of what is declared. And still more obviously so far as this declaration looks to the future and is liable to be controlled by events. A law depending on the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.[82]

For Vermeule, this was a form of ex post judicial sunsetting by which 'judges could read due process and other constitutional guarantees to permit government to wield temporary emergency powers, the flipside being that judges would rescind those powers when the emergency lapses'.[83]

On this view, *Boumediene* and *The A Case* may reflect judicial frustration with the duration and scope of the claimed emergency. Judicial deference to the political branches in defining the scope of necessary emergency powers may fade in relation to the fading of the sense of emergency. In this regard, separation of powers may be indispensible to democratic accountability for decisions made during periods of war and emergency, but if it proves insufficient over time there may still be an independent judicial role.

5. *Conclusion*

There is always the temptation to conclude that the exigencies of the moment demand a novel pathway. History may teach, but it can also be indicted as a straightjacket precluding fresh approaches to new challenges. It may be that the historic strengths of democracy will not translate well into a time when the main threats to security come from non-state actors in asymmetric combat. Inherited political safeguards could prove insufficient either to thwart misguided military ventures or protect liberty at home.

[81] Ibid 164.
[82] *Chastleton Corp. v Sinclair*, 264 US 543, 547 (1924).
[83] Vermeule (n 80) 191.

More likely, however, abandoning the historic underpinnings of democratic success in times of crisis is an invitation to panicked missteps. As Justice Kennedy fittingly formulated the concern in Hamdan v Rumsfeld[84]

> Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[85]

That cautionary note stands in a tradition that has served democracies quite well. We abandon it at considerable peril.

[84] 126 S Ct 2749 (2006).
[85] Ibid 2799 (Kennedy J., concurring).