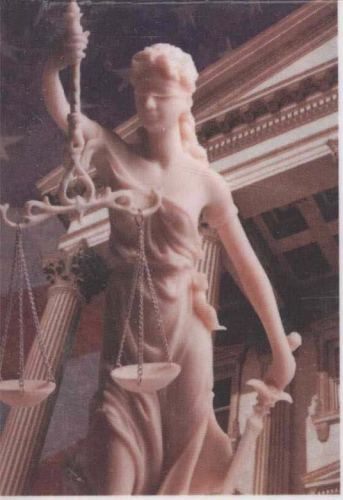

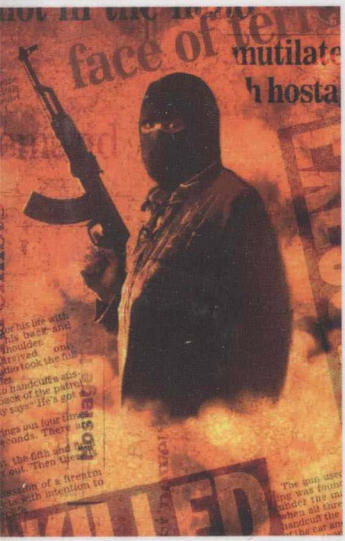

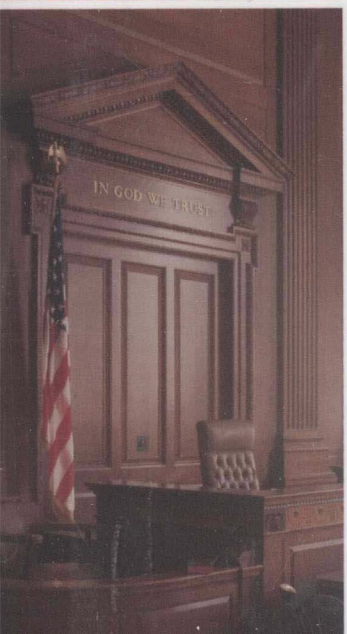

SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR

A Historical Perspective

Published by Lexington Books
A division of Rowman & Littlefield Publishers, Inc.
A wholly owned subsidiary of The Rowman & Littlefield Publishing Group, Inc.
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706
http://www.lexingtonbooks.com

Estover Road, Plymouth PL6 7PY, United Kingdom

British Library Cataloguing in Publication Information Available

Library of Congress Cataloging-in-Publication Data

Garrison, Arthur H., 1966-
Supreme court jurisprudence in times of national crisis, terrorism, and war : a historical perspective / Arthur Garrison.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7391-5102-0 (cloth : alk. paper) — ISBN 978-0-7391-5104-4 (electronic)
1. United States. Supreme Court—History. 2. Executive power—United States. 3. War and emergency powers—United States. 4. Separation of powers—United States. I. Title.
KF8742.G378 2011
342.73'0412—dc22 2010053775

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992. Printed in the United States of America

Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War

To *Him* who helped me in all parts of this book

Deuteronomy 8:18, Proverbs 3:13

To my two God sons, Nicholas and Alexander Fleming

Micah 6:8

Introduction

> I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted, and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.—President George W. Bush (2004)[1]

On one level the whole debate over the actions of President Bush post-9/11 can be understood by this simple question—were the events of September 11 a criminal act or an act of war? Less than two weeks after the attacks, with fires still burning and bodies both alive and dead yet to be recovered from the destruction of the World Trade Center, the Bush Administration, before a joint session of Congress, defined the attacks in both moral and military terms. The President informed Congress:

> Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. . . .
>
> On September the eleventh, enemies of freedom committed an act of war against our country. Americans have known wars but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have

known the casualties of war but not at the center of a great city on a peaceful morning. Americans have known surprise attacks but never before on thousands of civilians. All of this was brought upon us in a single day and night fell on a different world, a world where freedom itself is under attack. . . .

Our war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated. . . .

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have seen. It may include dramatic strikes, visible on television, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime. . . .

Our Nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. . . .

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows. . . .

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom—the great achievement of our time, and the great hope of every time—now depends on us. Our nation—this generation—will lift a dark threat of violence from our people and our future. We will rally the world to this cause, by our efforts and by our courage. We will not tire, we will not falter, and we will not fail.

It was to be the policy of the Bush administration that Al Qaeda declared war and war is what they got; and the dictates of war, not the criminal justice system, will be used to answer the soldiers of Osama Bin Laden, period.

Others acknowledged that 9/11 was an international criminal act not seen in recent history and its impact on the United States was rivaled only by Pearl Harbor, but it was a criminal act nonetheless. But even if the acts of 9/11 were analogous to war it was not uniformly agreed that it authorized the President to use his power as Commander-in-Chief without constraint. As Attorney General Reno asserted to the Supreme Court,

> The government thus had the authority to arrest, detain, interrogate, and prosecute . . . . The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and places congressionally imposed limits on incarceration. The government . . .

claims the authority to imprison citizens without counsel, with at most extremely limited access to the courts, for an indefinite term.[2]

But there is more at stake than the question of whether 9/11 was an act of war or an act of international criminality. Assuming the truth of President Bush's view that 9/11 was an act of war, it does not follow that the rule of law and Constitutional structures and limitations on Executive power are made subservient to the need for military victory and national security. As Attorney General Reno asserted to the Supreme Court,

> The broad and largely unsupervised authority claimed by the Executive Branch is also inconsistent with the fundamental principles of our Constitution. Arbitrary arrest and imprisonment by the King was one of the principal evils that the Constitution and the Bill of Rights were meant to address. See *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946). These principles have been adhered to even when national security is implicated. . . .
>
> Amici recognize that these limitations might impede the investigation of a terrorist offense in some circumstances. It is conceivable that, in some hypothetical situation, despite the array of powers described above, the government might be unable to detain a dangerous terrorist or to interrogate him or her effectively. But this is an inherent consequence of the limitation of Executive power. . . . [O]ur Nation has always been prepared to accept some risk as the price of guaranteeing that the Executive does not have arbitrary power to imprison citizens. . . . This Court has never countenanced the untrammeled authority the Executive Branch seeks in this case; it should not do so now.[3]

Concurring with this sentiment Justice Kennedy observed, "Liberty and Security can be reconciled"[4] but this reconciliation is found in the law and the traditions and principles of limited government, not in the need for security.

After the terrorist attacks on America on September 11, 2001, the question of the legitimate role of the judiciary during times of war or national crisis has become more than an academic discussion appearing in law reviews and journal articles. Within two months of the attacks of 9/11 Congress passed the Authorization to Use Military Force (AUMF) authorizing President Bush to use military force against Al Qaeda and its host country Afghanistan as well as against those individuals the President determined were involved in the attacks and those who would plan future attacks. In the resulting "War on Terrorism" with Afghanistan and Al Qaeda and later in Iraq President Bush asserted that, under his powers as Commander-in-Chief and through the AUMF, he had the authority to capture and detain various individuals as "enemy combatants." President Bush maintained four propositions in regard to his powers as Commander-in-Chief during the current national security crisis, known as the War on Terror. First, as President he is authorized to detain enemy combatants at the U.S. Naval Base at Guantanamo, Cuba without judicial review; second, the citizenship

status of a captured enemy combatant has no bearing on his detention and classification as an enemy combatant; third, the Geneva Conventions do not apply to those the President designates enemy combatants; and fourth, he has the power to submit such individuals to military commissions without judicial interference. President Bush concluded that in time of war, the "war on terrorism" in this instance, the President acting as Commander-in-Chief has exclusive powers and responsibilities in protecting the nation, and Congress with the Court to an even lesser degree are tertiary players in conducting the war. In March 2002 the Defense Department published Military Order No. 1, which created the procedures for military commissions which would be used to put enemy combatants and members of Al Qaeda on trial for acts of terrorism. Military Order No. 1 was issued in response to an executive order issued by President Bush in November 2001 which declared that captured enemy combatants and members of Al Qaeda would not be subject to trial by civilian or military courts. In July 2004 President Bush authorized the creation of a formal system of classification and review of individuals suspected of being enemy combatants and members of Al Qaeda through the Combatant Status Review Tribunal (CSRT).

Beginning in 2002 President Bush argued in various federal courts that under the Constitution he should be accorded wide discretion in the use of his Constitutional powers as Commander-in-Chief in times of war and that the judiciary has little, if any, voice in the review of that discretion. Eventually, the Supreme Court rejected the Bush Administration's broad definition of the Commander-in-Chief's power. Three years after the events of 9/11 the Supreme Court in *Hamdi v. Rumsfeld* (2004), *Rumsfeld v. Padilla* (2004), and *Rasul v. United States* (2004) collectively held that the President did not exercise exclusive powers over Congress and the Courts in how the war on terrorism would be conducted. Two years later in *Hamdan v. Rumsfeld* (2006) and four years later in *Boumediene v. Bush* (2008) the Supreme Court would continue to assert that the principles of separation of powers and limited powers in the Constitution, even in times of war, will prevail over the assertion of necessity by the President. It is how the Supreme Court has interpreted and applied various Constitutional and statutory laws to Presidential authority during the current and in past national security threats and wars that is the subject of this book. The thesis of this book is that in times of war and national crisis the judiciary maintains the Constitutional boundaries on Presidential power. The Constitution grants to the judiciary the responsibility to establish the outer boundaries of policy options, not to make its own policy determinations within those boundaries.

This book provides a historical review of the growth of Presidential power and judicial power in times of military and national crisis. In times of crisis various Presidents, both with and without Congressional autho-

rization, have sought to use the Commander-in-Chief's power to secure needed materials, silence detractors, and protect the nation from both internal and external threats. These historic examples include President Lincoln and his suspension of habeas corpus, President Wilson and Sedition Acts placing limits on political speech during World War I, the infamous raids by Attorney General Palmer and the deportation of suspected anarchists, President Roosevelt and the internment camps of World War II, and President Truman's attempted seizure of the American steel industry during the Korean War. All of these actions have been posited as evidence that in times of war or national crisis, Presidential power is used to restrict, if not abridge, civil liberties. It is almost a maxim in the academic circles of law, history, and political science that in times of war the law is silent and the judiciary provides little protection of civil liberties and opposition to executive power exercised during a national security crisis. Chief Justice Rehnquist and Justice Brennan, for example, have both publicly asserted this view of American and Constitutional history as established fact. The goal of this book is to provide the reader with a walk through history and to use this history as background for reviewing the decisions and policies of the Bush Administration and the post-9/11 cases decided by the Rehnquist Court. This book challenges the maxim that the judiciary will retreat from protecting civil liberties in times of national crisis. The primary audience for this book includes criminal justice, legal studies and political science scholars and professors looking for primary or secondary reading materials for courses on Constitutional law, selected topics in Constitutional history, selected topics in political science, legal history, terrorism, Supreme Court history as well as specific courses on civil liberties, first amendment history, topical studies in American government and judicial decision making.

This book is divided into two main parts and provides a historical chronological review of how the judiciary developed a jurisprudence of judicial deference in times of war and national security crisis as well as how the Supreme Court articulated the parameters of acceptable executive and legislative action within the Constitutional principles of separation of powers and limited powers in times of crisis and war. The first two chapters of part I will review the historical development of the President as Commander-in-Chief and how the Supreme Court participated in making the President the sole organ of American foreign policy. Chapters 3 and 4 will focus on the rise of the two Red Scares of World War I and World War II. Chapters 3 and 4 will also review how the Court handled freedom of speech and assembly in times of national crisis and how the national fear of communism infiltrated the American society. Chapters 3 and 4 will focus on the Espionage Act of 1917 and the Sedition Act of 1918 and the power of Congress to criminalize antiwar and communist speech during World War I and the rise of modern free speech jurisprudence. Chapters 5

and 6 will use the internment camp policy of President Roosevelt during World War II and the seizure of the steel industry by President Truman during the Korean War as case studies on how the Supreme Court both defined and defended the boundaries of Presidential power and how both cases establish the limits on executive power. Although the Supreme Court case *Korematsu v. United States* (1944) is the poster case for the internment policy and has been universally condemned as the Dred Scott case of the twentieth century, the Supreme Court support for the internment policy originated in *Hirabayashi v. United States* (1943) and the true error in both cases was not that the Court affirmed the internment policy but that it applied the wrong legal standard to the justifications made by the Roosevelt Administration. The failure of the Court to reign in the power of the President as Commander-in-Chief during World War II was not repeated during the Korean War. In *Youngstown Sheet & Tube v. Sawyer* (1952) the Court rejected the arguments made by President Truman that Presidential power included the power to seize the American Steel industry to prevent a strike from interfering with the production of steel to support the war effort. More importantly the concurring opinion by Justice Jackson has become the gold standard regarding categorizing and evaluating the boundaries of Presidential Commander-in-Chief powers in general and especially when those powers are used in domestic policymaking.

Part II of the book focuses on the key terrorism cases after 9/11. Chapter 7 reviews the Constitutional and political arguments that the Bush Administration submitted during the first two years after 9/11 to the federal judiciary in context with past assertions of power made by former Presidents and legal opinions issued by former attorneys general and the Office of Legal Counsel. Chapter 8 reviews the first round of post-9/11 terrorism cases, specifically focusing on the Bush Administration's assertion that the judiciary has a very limited role in the "War on Terrorism" and that the President is due very broad deference from the judiciary in his determination of how the war is to be fought. In *Hamdi v. Rumsfeld* (2004) the Court agreed that the President had the power to declare American citizens who are captured on the field of battle (outside of the United states) as enemy combatants but held that his designation was not without appeal and that he had to submit to some level of review by a neutral decision making body. The Supreme Court ruled that the President had certain powers to address national security threats during times of war that could not be used in times of peace but that these powers were not without limit.

Chapter 9 continues to review the post-9/11 policies of the Bush Administration, specifically the assertion that it had the power to detain enemy combatants at the U.S. Naval Base at Guantanamo Bay, Cuba without any fear of judicial interference through habeas corpus. In *Rasul v. Bush* (2004) the President suffered a more clear defeat when the Court held that the right

of statutory habeas corpus was fully applicable to the detainees and that they could not be separated from the courts by Presidential fiat. The Court also addressed the procedures established by President Bush by executive order to place various terrorists and enemy combatants on trial through military commissions. The Court held in *Hamdan v. Rumsfeld* (2006) that although the President had the power to establish military commissions he could not do so in violation of statutory law governing such commissions and could not violate standing treaties ratified by the Senate which, in part, defined the laws of war. In *Boumediene v. Bush* (2008) the Court addressed if the right to habeas corpus, as a Constitutional matter, was applicable to the detainees at Guantanamo. The Court held that the President could not establish a "constitutional free zone" in which he could act to detain individuals without any judicial review of the detention. The Court held for the first time that the Constitution fully applies to Guantanamo because the United States exercises full de facto control over the area and as such is governed by the Constitution and is subject to judicial enforcement of individual Constitutional rights. Chapter 9 reviews the *Rasul*, *Hamdan*, and *Boumediene* decisions, specifically regarding the values and purposes of separation of powers and limited powers embodied in the Constitution and the Court protection of those principles under the rule of law.

Chapter 10 concludes with an essay on the rule of law in times of crisis. Much ink has been spilled over the question of "how" and to "what" extent the Judiciary should exercise deference to the political branches in times of war and national security crisis. Chapter 10 addresses the question from a different perspective: Under the Madisonian model, why does the judiciary have a role in national security policy in the first place? Hamilton described the Judicial Department as the least dangerous branch because it neither controls the sword or the purse. Madison designed a Constitutional system in which the Constitution would be the Supreme Law of the Land. With the Constitution as the pantheon of all laws and actions under our system of government, the Supreme Court has developed into the final arbiter of "what" the Supreme Law of the Land allows the three branches of government to do both in peace and war. Concurrent with Madison's and Hamilton's design, history has placed its own requirements on the three branches and has made its own determinations on the power of the judiciary.

From the earliest days of the republic it has been debated what role the President, outside of Congressional sanction, has in developing and implementing foreign policy, including the power to use the armed forces of the United States to implement that policy. For the first half of the nineteenth

century the judiciary did not enter the debate, but beginning with the war of rebellion by the southern slave states, the Supreme Court began to develop a jurisprudence to place boundaries on the power of the President in times of war. The power of the President to create commissions and to try American citizens not involved in active rebellion was rejected but the power of the President to respond to acts of war without Congressional recognition of war was affirmed. The first three decades of the twentieth century saw the Court develop limits on the protection of the First Amendment in times of national crisis and world war, but by the end of middle of the century the Court had asserted that times of crisis do not elevate the President to Commander-in-Chief of the nation. The Court has consistently defended the power of the government to act, but has developed and enforced the outer boundaries of Constitutional power. Even in war, there are limits to governmental power and those limits belong to the Court to defend and for the Constitution to impose.

The rule of law in times of crisis is not easily defended; for those who suffer under the lack of protection are easily sacrificed for the greater good as perceived by those who guard the good. But it is asked who will guard the guardians? The history of the Supreme Court in times of crisis is far from simple or without controversy. The goal of this book is to review how the federal judiciary and the Supreme Court developed the jurisprudence that the power of government is not without limits and by the middle of the twentieth century had developed a jurisprudence to control the power of the President in what the Court itself held was an area in which the President was the "sole organ" to implement: foreign policy. It will be asserted throughout this book that the Court has adopted a historical jurisprudence that although acknowledges that the weighing of choices within the scales of politics is not for the Court to review, but the boundaries of the choices that can be put in those scales are governed by the scales of justice. And the Constitution requires that the principles of limited powers and separation of powers require that the rule of law govern Presidential action in both peace and war. The Court has historically agreed that in times of war the elected branches can approach the outer limits of Constitutional power but as the muse of the Constitution, the Court has historically said to the proud waves of national protection and security: You may come so far and here your proud waves must stop.

From the earliest days of western history even before Rome, kings have been above men. But there was also the law and before Greece became one nation and the cradle of democracy, it was said of the principles of the law in the face of kings that no one, subject or citizen, man or woman, slave or king, is above the law.[5]

NOTES

1. President Bush, State of the Union Address, January 20, 2004.
2. Brief of Amicus Curiae Janet Reno et al. in *Rumsfeld v. Padilla* 524 U.S. 426 (2004), 2–3.
3. Ibid., 27, 29–30.
4. *Boumediene v. Bush* and *Al Odah v. United States* 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed 2d 41, 96–97(2008).
5. Legendary Pictures, *300*, DVD (Burbank, CA: Warner Home Video, 2007).

Contents

I

National Security, the Rise of Presidential Power, the Rule of Law, and the Development of Constitutional Boundaries on Political Necessity and the War Power