

## The Effect of War on the Supreme Court<sup>1</sup>

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The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances . . . When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . but if society is disturbed by civil commotion . . . these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.

—*Ex parte Milligan* (1866), in which the Supreme Court held that a civilian accused of disloyalty to the Union could not be tried in a military court in areas where the regular courts remained open.

We uphold the exclusion order. . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

—*Korematsu v. United States* (1944), in which the Court upheld an executive order authorizing the exclusion of Japanese-Americans from areas of the Pacific coast.

Running through these quotations from landmark Supreme Court decisions is a common strand: The justices seem to suggest that their institution ought to play a

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<sup>1</sup> This chapter is a summary of our article, Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, “The Supreme Court During Crisis: How War Affects only Non-War Cases,” *New York University Law Review*, 80, 1 (April, 2005): 1-116. A copy of this article, along with a replication data file and the statistical software we used, are available at <http://gking.harvard.edu/files/abs/crisis-abs.shtml>.

different role in times of “emergency and peril” than when “peace prevails.” But the cases cited above stand for fundamentally different propositions about that role. *Milligan* implies that the justices must become especially vigilant in protecting rights and liberties during “commotions.” *Korematsu* commends quite the opposite: that the justices ought to be especially willing to subordinate rights and liberties when America is threatened. If *Korematsu* is testimony to the continued viability of Cicero’s *maxim inter arma silent leges* (“during war law is silent”), as many suggest that it is, then *Milligan* provides a counter punch: During war the law speaks loudly.

The Court has not expressly overruled either decision; both would appear to remain valid law. But this is not so in the eyes of many members of the legal community. To an overwhelming majority, the Court’s jurisprudence in times of crisis is far more in line with the dictates of *Korematsu* than with the language of *Milligan*. Indeed, the belief that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted in post–September 11th America, and has been so widely accepted since the World War I period, that most observers no longer debate whether the Court, in fact, behaves in this way. Instead, the discussions are over how this came about or whether the Court should embrace a “crisis jurisprudence.” As the legal scholar Norman Dorsen puts it:

[N]ational security...has been a graveyard for civil liberties for much of our recent history. The questions to be answered are not whether this is true—it demonstrably is—but why we have come to this pass and how we might begin to relieve the Bill of Rights of at

least some of the burden thus imposed on it.<sup>2</sup>

This is a strong claim, and one strongly endorsed by a large fraction of the analysts who have examined the relationship between Court decisions and threats to national security. But does this claim, sometimes called the “crisis thesis,” accurately capture jurisprudence during threats to the nation’s security? Do the justices, in fact, rally around the flag, supporting curtailments of rights and liberties in wartimes that they would not support during periods of peace?

We raise these questions because—despite the crisis thesis’s resilience—no study has rigorously assessed it: Virtually all evidence in its favor comes from isolated anecdotes or descriptions of a few highly selected Court decisions rather than from systematic analyses of a broad class of cases. Determining whether a piece of conventional wisdom can withstand rigorous scrutiny is almost always a worthwhile undertaking, but it is made even more so here because the crisis thesis continues to provide fodder for debate. A number of judges, along with a handful of commentators, challenge the idea in its entirety, suggesting that, in line with *Milligan*, the Court acts as a guardian, not a suppressor, of rights during times of war.

Debate continues to date for good reason: No one has yet attempted a large-scale systematic study aimed at addressing the factual underpinnings of the crisis thesis. It has been only in the last decade or so that scholars have developed the high-quality data and statistical tools required to conduct such a study. With those data and tools now in place, we examine the validity of the crisis thesis. Using the best data available on the causes and outcomes of every civil rights and liberties case decided by the Supreme Court from

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<sup>2</sup> Norman Dorsen, “Foreign Affairs and Civil Liberties,” 83 *American Journal of International Law* 840, 840 (1989).

1941 to 2001 and employing methods chosen and tuned especially for this problem, we explore systematically the Court's decisions during periods when the country is in "emergency and peril" or in relative peace. Our findings provide the first systematic support for the existence of a crisis jurisprudence: *The justices are, in fact, significantly more likely to curtail rights and liberties during times of war and other international threats*. On the other hand, contrary to what every proponent of the crisis thesis has so far suggested, while the presence of war does affect cases unrelated to the war, *there is no evidence that the presence of war affects cases directly related to the war*.

We demonstrate and explain this apparently contradictory result in three steps. We begin, in Part I with the crisis thesis and examine its supporting literature, why the Court might respond to threats to national security by suppressing rights, and what kind of evidence exists for this outcome. While less consensus exists in the literature about what types of cases are likely to be affected by war, virtually all supporters of the crisis thesis suggest that the effect is strongest for cases most directly related to war. Part II explains the basic approach we bring to the debate, defining the concepts of a "crisis" and war-related cases, describing the set of civil rights and liberties cases we analyze, and explaining our methods. In Part III, we detail our results, which both support and challenge conventional views about the effect of war on the Court.

## I. Political and Judicial Responses to War

Proponents of the crisis thesis argue that the Supreme Court assumes "a highly deferential attitude when called upon to review governmental actions and decisions"<sup>3</sup> during times of threat to the nation's security, supporting curtailments of civil liberties

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<sup>3</sup> Oren Gross, "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 23 *Yale Journal of International Law* 437, 491 (1998).

and rights it otherwise would not. On this account, then, there are two relevant sets of responses to crises: the government's and the Court's. The former takes steps to curtail rights and liberties during wartimes, and the justices—to a greater extent than they would in times of peace— uphold those measures, along with others that may infringe on rights and liberties.

In what follows, we detail these responses. We begin with the political branches of government and then turn to the primary focus of our inquiry, the Court.

#### A. Political Responses to War

When societies confront crises, they respond in different ways. Sometimes they use military force to attack their aggressors; sometimes they do not. Sometimes they impose economic sanctions; sometimes they do not. Sometimes they undertake diplomatic efforts; sometimes they do not. But, as many studies reveal, one response appears essentially universal: In times of emergency—whether arising from wars, internal rebellions, or terrorist attacks—governments tend to suppress the rights and liberties of persons living within their borders. They may respond in this way out of a desire to present a unified front to outsiders, their perception that cleavages are dangerous, or, of course, their belief that national security and military necessity must outweigh liberty interests if government is to be protected and preserved.

Whatever the reason, the United States is no exception to this rule. Indeed, America's history is replete with executive and legislative attempts, during times of urgency, to restrict the people's ability to speak, publish, and organize; to erode guarantees usually afforded to the criminally accused; or to tighten restrictions on

foreigners or perceived enemies. The “ink had barely dried on the First Amendment,”<sup>4</sup> as Justice Brennan once observed, when Congress passed two restrictive legislative enactments: the Sedition Act, which prohibited speech critical of the United States, and the Enemy Alien Act, which empowered the President to detain or deport alien enemies and which the government has used during declared wars to stamp out political opponents. During the Civil War, President Abraham Lincoln took steps to suppress “treacherous” behavior out of the belief “that the nation must be able to protect itself in war against utterances which actually cause insubordination.”<sup>5</sup> Prior to America’s entry into World War I, President Woodrow Wilson “predicted a dire fate for civil liberties should we become involved.” With passage of the Espionage Act of 1917 and the Sedition Act of 1918, Wilson’s prediction was realized—with Wilson as a prime accomplice. World War II brought yet more repressive measures, most notably executive orders limiting the movement of and providing for the internment of Japanese-Americans. The Korean War and the supposed “communist menace” resulted in an “epidemic of witch-hunting, paranoia, and political grandstanding” directed against “reds” across the country. And Vietnam was accompanied by governmental efforts to silence war protests. In the United States, then, “[t]he struggle between the needs of national security and political or civil liberties has been a continual one.”<sup>6</sup>

Of course, politicians would have a difficult time enacting and implementing such curtailments on rights and liberties if those measures lacked public support. But that has

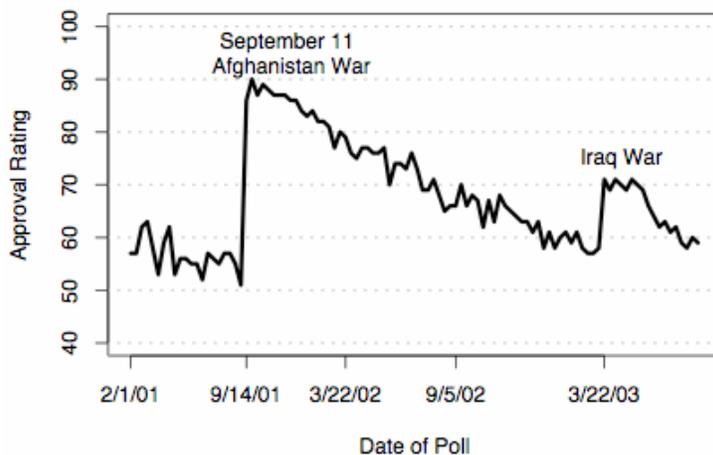
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<sup>4</sup> Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Address at the Law School of Hebrew University (Dec. 22, 1987) (transcript available at [http://www.brennancenter.org/resources/downloads/nation\\_security\\_brennan.pdf](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf)).

<sup>5</sup> Zechariah Chafee Jr., *Free Speech in the United States* 266 (1941).

<sup>6</sup> Note, “Developments in the Law—The National Security Interest and Civil Liberties,” 85 *Harvard Law Review* 1130, 1133 (1972).

not been the case during crises for which we have survey data. In a general sense, the data reveal that public confidence in the President, who is often the catalyst for repressive legislation, soars in the face of international crises. This “rally effect” gave Franklin Roosevelt a twelve-point increase after the Japanese attacked Pearl Harbor, John Kennedy a thirteen-point lift during the Cuban Missile Crisis, and George H.W. Bush a fourteen-point boost when Iraq invaded Kuwait. As Figure 1 shows, in the wake of September 11, 2001, George W. Bush’s approval rating jumped a record-setting thirty-five points, from fifty-one percent on September 7 to eighty-six percent on September 14.



**Figure 1:** Percentage of Americans approving of the way George W. Bush is handling his job: The “rally effect” generated by September 11, 2001.<sup>7</sup>

<sup>7</sup> Between February 1, 2001, and February 2, 2003, the Gallup Organization fielded eighty-three polls on the public’s approval of President George W. Bush. The question asked in all instances was: “Do you approve or disapprove of the way George W. Bush is handling his job as president?” We depict the percentage of respondents approving of his performance. September 14, 2001, is the date of the first Gallup poll fielded after September 11, 2001. The data may be found in David W. Moore, *Bush Approval Rating Remains at 70% Level* (May 1, 2003), at <http://www.gallup.com/poll/content/default.aspx?ci=8308> (last visited Nov. 13, 2004).

Survey data also reveal a public supportive of specific efforts on the part of political actors to curtail rights and liberties. Consider Americans' response subsequent to September 11. As Table 1 shows, all but one restriction on rights designed to furnish the government with significant authority to combat terrorism—the indefinite detainment of terrorist suspects without charging them—attained the support of a substantial majority of respondents.<sup>8</sup>

Measure	Support	Oppose	Don't Know
Wiretap telephone	69	29	2
Intercept email	72	23	5
Intercept ordinary mail	57	39	4
Examine Internet activity	82	15	3
Detain suspects for a week without charging them	58	38	3
Detain terrorists indefinitely without charging them	48	48	4
Examine students' education records	76	22	2
Examine telephone records	82	17	1
Examine bank records	79	20	1
Track credit card purchases	75	21	4
Examine tax records	75	24	1

**Table 1.** Percentage of Americans supporting and opposing anti-terrorist measures in the wake of September 11, 2001.

## B. The Court's Response to War

In light of the public opinion data, it should not be a surprise that the U.S. Justice Department undertook many of the activities listed in Table 1, or that Congress passed and the President signed the USA Patriot Act of 2001, which also contains some of these measures. Nor should we be surprised that legislators, with the backing of the President,

<sup>8</sup> The survey had 603 total respondents. The question was: "In order to reduce the threat of terrorism in the U.S., would you support or oppose giving law enforcement broader authority to do the following things? Would you support or oppose giving them broader authority to [INSERT EACH ITEM]?" The data are from a National Public Radio/Kaiser Family Foundation/Kennedy School of Government survey conducted from October 31, 2001, to November 12, 2001. The results are available at [http://www.npr.org/programs/specials/poll/civil\\_liberties/civil\\_liberties\\_static\\_results\\_4.html](http://www.npr.org/programs/specials/poll/civil_liberties/civil_liberties_static_results_4.html) (last visited Oct. 30, 2004).

proposed the Patriot Act in the first instance. Such a response to an “emergency” on the part of elected officials is not an anomaly.

In contrast to the President and Congress, the Supreme Court lacks an electoral connection and is ostensibly insulated from public pressure by life tenure and salary protection under Article III of the Constitution. While it can take years for lawsuits connected to conflicts to make their way to the nation’s highest tribunal, does the Supreme Court nevertheless respond contemporaneously to crises? The answer to this question falls generally under one of two rubrics: (a) the *Milligan* thesis of the Court as a guardian of civil rights and liberties, leading the Court to depart dramatically from the preferences of the public and elected officials; and (b) the crisis thesis, reflecting *Korematsu*, that the Court’s response mirrors that of the citizenry and its leaders.

Proponents of the *Milligan* thesis stress difference: While the balance of American society rallies around the flag in times of crisis, the Court takes a more deliberate approach, electing to protect rather than curtail rights and liberties. The justifications for this claim are many, but each begins with the design of the federal judiciary as juxtaposed against the political branches of government. Because the justices hold life-tenured positions, they are freer than elected officials to ignore public opinion. In fact, by removing the Court from the whims of the electorate and their elected officials, the Framers explicitly sought to create an institution of government that would stand above the fray and enforce the law free from overt political influences. The Court would be a force for legal stability. It would decide cases, not on the basis of politics, but according to the law and would “guard the constitution and the rights of individuals from

the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves.”<sup>9</sup>

Many prominent legal scholars and jurists have subscribed to the *Milligan* thesis of the Court as a guardian of rights in times of war, and not as a suppressor of those very rights. But far more commentators and a number of federal judges have advanced the crisis thesis. Whether writing in the early 1900s, the early 2000s, or eras in between, they argue that when the nation’s security is under threat, the Court adopts a jurisprudential stance that leads it to curtail rights and liberties it otherwise would not, an effect that is widely perceived to be stronger for cases directly related to the war. The Court’s response to wars is the same as that of the rest of American society: It too endorses the efforts of elected officials to suppress rights and does not “guard” the Constitution.

Why would the Court act in this way? Proponents of the crisis thesis offer a number of answers. One is that the Constitution demands judicial deference to the Executive and the legislature during times of international crisis. Such a reading might follow from the Constitution’s grant of emergency powers to the Executive and the legislature and its silence with regard to the judiciary. It also follows, supporters of the crisis thesis assert, from the fact that the elected branches, not the courts, are best equipped to cope with the emergency at hand. If the Court failed to recognize this fact, if it failed to treat the Constitution as accommodating necessary trade-offs between security and liberty, the Court would be “convert[ing] the Bill of Rights into a suicide pact.”<sup>10</sup>

A second answer stresses the behavioral response of justices to wars and other national emergencies. To supporters of the crisis thesis, that response takes the form of a

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<sup>9</sup> *The Federalist*, No. 78, at 381 (Alexander Hamilton) (Terence Ball ed., 2003).

<sup>10</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

patriotic fervor on the part of justices, rather than a guardian impulse, and manifests itself in a response to repress rights. As political scientist Joel Grossman writes: “When World War II broke out, feelings of patriotism and concern about the success of the war effort affected Americans nearly universally, including the Justices of the Supreme Court.”<sup>11</sup> Other scholars have variously described this behavioral phenomenon as one in which “domestic judicial institutions tend to ‘go to war’” or “rally ’round the flag.” Whatever they deem it, the overall message is the same: In times of war, a justice’s underlying preferences toward rights and liberties grow more conservative, resulting in behavior that falls well in line with the crisis thesis.

## II. An Empirical Examination

The crisis thesis, as we have explained, is sufficiently convincing to the vast majority of members of the legal community that one version or another has made its way into judicial opinions and off-the-bench writings of Court members. And, yet, empirical support for it is rather flimsy. It consists not of systematically derived data and carefully designed and executed analyses, but rather of anecdotal evidence. So, for example, in an effort to show that Court members get swept up in the patriotic fervor surrounding them, scholars tell stories of justices who, at the request of presidents, spoke to lay audiences on the importance of supporting military efforts; of some who were “active proponents of [governmental] war policies;”<sup>12</sup> and of others who chastised colleagues inclined to support individual liberties, rights, or justice claims. Capturing the flavor of this form of evidence is the often-told story of Chief Justice White’s response to an attorney, who, at

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<sup>11</sup> Joel B. Grossman, “The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective,” 19 *University of Hawaii Law Review* 649, 672-73 (1997).

<sup>12</sup> David M. Rabban, “The Emergence of Modern First Amendment Doctrine,” 50 *University of Chicago Law Review* 1207, 1331 (1983).

oral argument, claimed that the military draft lacked public support: “I don’t think your statement has a thing to do with legal arguments and should not have been said in this Court. It is a very unpatriotic statement to make.”

Ultimately, then, the crisis thesis falls short of being a well-supported theory about the Court’s role in wartime. It is rather a hypothesis necessitating systematic evaluation. Undertaking that task could move us in several directions. But since our interest lies in determining the breadth and depth of the thesis—specifically, the extent to which it accurately captures Court responses to national security threats across a range of disputes and litigants—we focus on the outcomes of cases (a) in which parties claimed a deprivation of their rights or liberties, (b) which the Supreme Court resolved on the merits, whether in times of war or not, and whether directly related to the international crisis or not, over the last six decades (1941–2001 terms).

Such a focus enables us to scrutinize the key observable implication of the crisis thesis: When the nation’s security or its soldiers are at risk, the justices should be less likely to rule in favor of criminal defendants, war protestors, and other litigants who allege violations of their rights.

#### A. Research Tasks

Assessing this implication required the undertaking of four research tasks. First, using Harold J. Spaeth’s U.S. Supreme Court Database, which contains detailed information on Court decisions, we identified all cases involving rights, liberties, and justice issues decided since 1941.<sup>13</sup> We also gathered information about whether the

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<sup>13</sup> Spaeth’s database actually dates back only to 1953. Following Spaeth’s coding rules and with his guidance, we backdated the dataset to include the 1941–52 terms.

Court ruled in favor of or against the individual claiming a deprivation of his or her rights.

Second, we determined whether the Court heard arguments in the case during a time of war. For purposes of this study, we defined wars as World War II, the Korean, Vietnam, and Gulf Wars, and the recent war in Afghanistan.<sup>14</sup> Third, and relatedly, we sought to assess whether each case in our dataset was connected to one of these wars. While less consensus exists in the literature about how related to the war the case needs to be for decisions to become more conservative, all supporters of the crisis thesis seem to believe that the effect is stronger for cases more related to the war, compared to “ordinary” (non-war-related) cases. For our purposes, a case related to the war if (a) the controversy began during the war and (b) the genesis of the case was the war itself. War-related cases include wartime draft cases, war protest cases, military takings, and deportation, citizenship, and relocation cases resulting from the war.

All in all, we gathered information on 3,344 cases, of which 23 percent were decided while a war was ongoing. Only a very small percentage of those are a direct result of the war itself (2 percent, or 62 cases).

## B. Analysis

The final task involved estimating the degree to which wars cause the Court to suppress rights and liberties in ways it would not during times of peace. Estimating this causal effect is inherently about *counterfactual* inference: We care about what the outcomes of cases decided during a war would be but for the presence of the war.

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<sup>14</sup> In a larger study, we expanded this definition to include major international conflicts (the Berlin Blockade, the Cuban Missile and the Iran-Hostage crises, and September 11).

In a research environment without any constraints, generating an estimate would be simple enough: We would create a world without a war and ask the U.S. Supreme Court to decide a case; then we would rerun history, holding everything constant other than the absence of a war, and (without it knowing about the first part of our experiment) ask the Court to decide the same case. If in the version of our history without a war we observed support for civil liberties, but in the version with a war we observed a lack of support, then we might conclude that that the war had an effect on the Court with respect to that case in the direction anticipated by the crisis thesis.

This type of counterfactual inference in examining the crisis jurisprudence was evident to Justice Jackson in *Korematsu*. In a dissenting opinion, he noted: “[i]f Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.” In other words, in the counterfactual world in which President Roosevelt’s order internment Japanese-Americans came before the Supreme Court during a time of peace, the Court would not have upheld the order.

Of course it is impossible to rerun history to estimate the counterfactual and obtain the causal effect for each particular case. This impossibility is known as the “fundamental problem of causal inference,” which, in concrete terms, means that we cannot observe the counterfactual, such as the *Korematsu* decision during peacetime.

To estimate the causal effect of war we employ a technique called “matching,” the intuition of which is quite simple. While we may not be able to rerun history to see if the Court would decide the same case differently in times of war versus peace, we can match cases that are as similar as possible in all observable respects that affect how the court decides (except whether the Court decided them during a war). Consider work by

Epstein and Rowland, which sought to investigate whether the participation of interest groups (such as the ACLU and NAACP) increase the odds of victory in court.<sup>15</sup> To conduct their analysis, Epstein and Rowland paired similar cases decided by the same judge. The only relevant point of distinction between the two was whether an interest group participated or not. Likewise, Walker and Barrow matched male and female judges of similar backgrounds to determine whether women speak “in a different voice.”<sup>16</sup> In each of these studies, the researchers attempted to control for relevant differences (whether judges or backgrounds) so that they could examine the effect of a causal factor (whether interest group participation or the sex of the judge).

That too is our objective. We seek to match cases that are analogous on all pertinent dimensions, except the key causal variable (here war), so that we can assess the effect of that key variable on Court outcomes. The intuition is that once we have matched on all relevant factors, we can infer that the remaining difference in proportions of cases decided in favor of the party alleging an abridgment of rights and against that party is due to war.

After identifying those other relevant factors (including how liberal or conservative the court was; whether the case was of national importance; how the lower court ruled on the case; and the year in which the justices resolved the dispute), all that remained was to match the cases using automated computer software.<sup>17</sup>

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<sup>15</sup> Lee Epstein & C.K. Rowland, “Debunking the Myth of Interest Group Invincibility in the Courts,” 85 *American Political Science Review* 205 (1991).

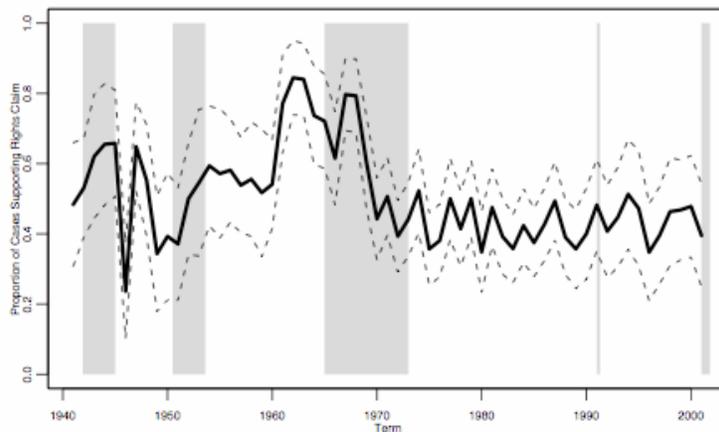
<sup>16</sup> Thomas G. Walker & Deborah J. Barrow, “The Diversification of the Federal Bench: Policy and Process Ramifications,” 47 *Journal of Politics* 596, 601–03 (1985).

<sup>17</sup> See Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth Stuart, *MatchIt: Nonparametric Preprocessing for Parametric Causal Inference* (2004) (available at <http://gking.harvard.edu/matchit/>), which implements the matching methods proposed in Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth Stuart, “Matching as Nonparametric Preprocessing for Improving Parametric Causal Inference,” (available at <http://gking.harvard.edu/files/abs/matchp-abs.shtml>).

### III. Results

What did we learn from comparing pairs of cases that were similar in most ways—except, of course, that one case in each pair was decided during a war, while the other was not? Chiefly, we found that for cases unrelated to any on-going war, *the probability of the Supreme Court deciding a case in favor of the litigant claiming an infringement of his or her rights decreases by about ten percentage points when a war is in progress.*

How substantial is ten percent? The answer, in some sense, depends on the Court itself. We make this point in Figure 2, which illustrates the actual proportion of U.S. Supreme Court decisions supporting a rights, liberties, or justice claim. The proportion varies a great deal—note, for example, unparalleled levels of liberalism in the 1960s (in the .80 range, or eighty of 100 cases in support of the rights claimant). But never has the Court been so dominated by conservatives that the proportion dipped below .30 (or thirty of 100 cases decided in favor of the party alleging a rights infringement). Rather (and, on average), that figure has hovered around a moderate .49 since the 1953 term.



**Figure 2:** The proportion of U.S. Supreme Court decisions supporting rights, liberties,

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or justice claims, 1953–2001 terms. The line depicts the proportion of support. The grey shading depicts terms during which the Court heard disputes during a war period.<sup>18</sup>

It is in light of the contemporary, rather temperate patterns in decision making depicted in Figure 2 that the importance of our findings moves into relief: Assuming that the past is the best indicator of the future, the causal effect of war on non-war cases of ten percent is substantial. This finding is hardly shocking; actually, it sits quite comfortably with the crisis thesis.

But other results from our study do come as something of a surprise. Consider first the influence of the presence of war on cases that directly derive from war. We can examine this by taking advantage of the fact that of all the cases that derive from war, some will reach the Court during wartime, while others will not arrive on the Court's docket until after the conflict has ended. This allows us to test whether the (continued) presence of a war—as compared to the subsequent peace—influences cases that derive from war. Given our previous findings that the presence of war substantially influences ordinary rights and liberties cases, we found, paradoxically, that for cases that derive from a war, whether that war was ongoing on had ended had no detectable effect on Supreme Court decision making. In these cases, the Supreme Court is no more likely to support an infringement of an individual's civil liberties when a war is ongoing than when the country is at peace. The resolution to this apparent paradox, we believe, is that when cases are directly related to the war, the traditional liberal-conservative dimension, inherent in the crisis and *Milligan* theses and operative in most of American politics,

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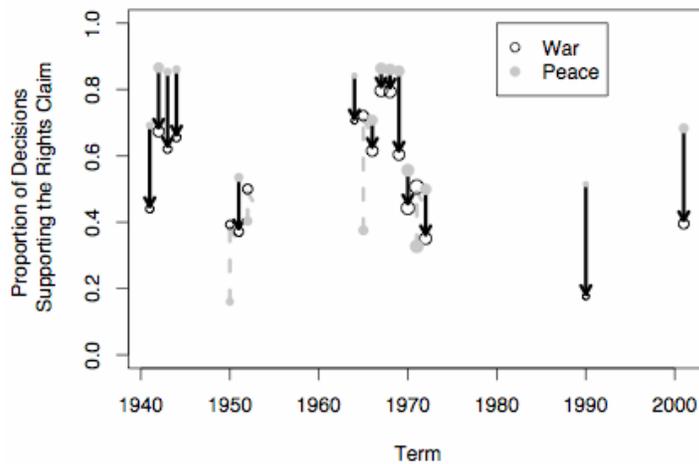
<sup>18</sup> We derived the proportion of support from the U.S. Supreme Court Database.

becomes less meaningful. For cases that are directly related to the war or conflict, the Court seeks to shift responsibility towards Congress and the Executive. Politically, this may be desirable for the justices, precisely because war-related cases present potentially severe threats to the judiciary's legitimacy. Focusing on congressional authorization ensures the political legitimacy of a ruling.

Second, when we examined particular areas of the law, we found that war not only decreases the probability of a liberal decision in First Amendment cases (those involving free speech and press, for example) but also in cases of gender and race discrimination. This calls into question the assertions of some scholars that international crises lead to enhanced protection for minorities.

Third, the effect of war on ordinary cases is not uniform. Figure 3 plots all cases matched to terms in which there was a war on the horizontal axis and the proportion of cases decided liberally on the vertical axis. The grey and black circles indicate the proportion of cases decided liberally during peace and war, respectively, and the arrows indicate the estimated causal effect of war. As one can see, we estimate relatively small effects of the Vietnam War (in the 1960s). Taking the nine Vietnam War terms collectively, the Justices became neither distinctly more nor less likely to support rights. In stark contrast comes the consistent impact of World War II. In each of the four terms encompassed by the war, the (relatively left-of-center) Court supported curtailments of rights and liberties that it otherwise would not have tolerated—with, of course, the internment at issue in *Korematsu* among them. Likewise, the Justices who sat during the Gulf War appear to have become more willing to rule against litigants claiming a deprivation of their rights, though this may stem from the small number of cases

available. Indeed, however conservative were the majorities on these Courts toward individual rights and liberties in the absence of conflict, the presence of war intensified those ideological predilections. For the majority of matched pairs, war reduces the probability of a liberal decision in wartime.



**Figure 3:** The effect of wars on the outcomes of Supreme Court cases in the areas of rights, liberties, and justice among cases unrelated to war: a comparison of matched pairs.

### III. Conclusion

The evidence we have compiled comprises the only large-scale, systematic, quantitative test of the crisis thesis to date. The large volume of prior literature devoted to this subject is entirely qualitative and, although it contains large volumes of useful description and considerable analytic wisdom, our evidence indicates that most prior causal inferences drawn about the crisis thesis in this literature are incorrect or, at best, incomplete.

Our evidence, which spans all civil liberties decisions over six decades, strongly suggests that the decisions made by the Supreme Court during wartime would have been systematically different if these same cases had been decided during peacetime. We show that war causes the Court to decide cases unrelated to the war in a markedly more conservative direction than it otherwise would. However, war appears to have no effect on the conservatism of the Court's decisions in cases closely related to an ongoing military conflict. In those cases, the Court retreats from its usual security-versus-liberty focus of decision making to a focus on institutional process.<sup>19</sup> By changing its focus to a mostly unrelated dimension, the effect of war on the conservatism of decision making in war-related cases vanishes.

Our analysis also suggests that the judiciary is no panacea for wartime curtailments on civil rights. Contrary to the rhetoric of *Ex parte Milligan*, the justices of the U.S. Supreme Court seem to feel little responsibility to “rebuke the legislative and executive authorities when, under the stress of war [those authorities] have sought to suppress the rights of dissenters.”<sup>20</sup> Alternatively, the justices have not acted entirely in accordance with Cicero's maxim. During times of war, the Court does indeed speak, but it does so in a seemingly paradoxical manner, curtailing civil rights and liberties with more frequency in times of war than in peacetime and taking this action only in cases unrelated to war. In fact, ordinary civil rights and liberties cases are precisely the ones for which war has the most detectible impact.

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<sup>19</sup> See Samuel Issacharoff & Richard H. Pildes, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime,” 5 *Theoretical Inquiries in Law* 1 (2004).

<sup>20</sup> Abe Fortas, *Concerning Dissent and Civil Disobedience* 38 (1968).