A model of presidential power adjustment during wartime: "How curious George went to Washington and has been detained ever since"

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A MODEL OF PRESIDENTIAL POWER
ADJUSTMENT DURING WARTIME:
“HOW CURIOUS GEORGE WENT
TO WASHINGTON AND HAS
BEEN DETAINED
EVER SINCE”

by

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ABSTRACT

A Model of Presidential Power Adjustment During Wartime: “How Curious George Went to Washington and has Been Detained Ever Since”

by

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The President’s power is in a state of constant flux. During times of war, the President is allowed an expanse of power normally not available during times of peace. After the war ends or becomes too unpopular, the President relinquishes the power gained. This effect, labeled in the thesis as “Expansion and Constriction”, has occurred in the major war eras of the past and is predictable. It is the focus of this thesis to show the existence of the pattern and to use the pattern to discuss the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) and its use in the war on terror. This information is useful because it will demonstrate what is needed to allow the President to exercise the power given, and what is needed to take away the power given by the USA PATRIOT Act.
To deliver the goal of showing the pattern exists and can be applied to the USA PATRIOT era, the thesis is broken up into two parts. The first part of the thesis will view key cases in the Civil War, World War I, World War II and Korean War eras. The war eras and their cases will be discussed in terms of the "expansion and constriction" pattern. After showing that a pattern exists, the second part of the thesis focuses on the USA PATRIOT Act era and if the pattern can be used to predict the outcome of this era. At the end of the thesis, solutions will be suggested that can benefit both the opponents and the supporters of the USA PATRIOT Act.
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CHAPTER 1

INTRODUCTION OF THE MODEL

There is a pattern of strengthening of presidential powers during times of crisis. During crisis the office of the President is granted, through creation of vague laws and the silence of the Court, an expanded application of power. After the crisis is over the President's powers constrict due to court rulings or acts of Congress. During the war, the need to protect the citizens of the United States is more valuable than the need to protect their civil liberties; the President gains power. As the war comes to a close, and the federal courts become involved, the need to protect the citizen’s civil liberties becomes more valuable than the need to protect the civilians themselves; the President has his power readjusted to near pre-wartime levels. This is the effect that this thesis defines as "expansion and contraction". The President ultimately does not gain or lose power but his ability is affected in a near cyclical pattern.

This pattern of change in presidential power during crisis is important because through it the model of "expansion and constriction" is created. The model may then be used, with precedence, in the present to predict the outcome of the USA PATRIOT era.
History and the current issue

"In a word, history sufficiently informs us that penal laws have never had any other effect than to destroy." (Montesquieu, 1752, section 12) Although Montesquieu never saw the devastation left by the attacks on 9-11, nor did he witness the response of the United States government to those attacks, the quote he gave can serve as a cry of every organization, group or individual citizen's lament for freedom. This thesis shall look at the effects that the post 9-11 legislation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) has on the privacy of individuals and the freedoms enjoyed. The United States government's argument for the expanded powers of the government through the USA PATRIOT Act is based on a counter-terrorism measure. The question raised by the opponents of the act is whether the USA PATRIOT power is being abused by the government at the cost of civil liberties.

At the front of the issue there are two groups. The first group comes from the President's office and law enforcement agencies seeking more power, or to keep the USA PATRIOT Act power that they enjoy. The second group comes in the form of interest groups, citizens, and towns that believe the Act was passed in haste and at a time of mourning.

The first group still maintains there is much need for the powers of the USA PATRIOT Act and that it will be used only against terrorists and never against the good citizens of America. The United States government demonstrated terrorist and criminal cases that would not have been if not for the
USA PATRIOT Act. Interviews given by agents of the Federal Bureau of Investigation (FBI) and non-federal law officials, have shown that, not only did the USA PATRIOT Act help in new cases being developed, but it also gave older cases sufficient evidence to move forward. In more than one instance a law enforcement official has stated that a case that had received high public outcry in the past would have been better understood if the different law-enforcement agencies were able to share information as they can now under the new provisions given by the USA PATRIOT Act.

The second group believes that the USA PATRIOT Act is a severe threat to civil liberties. ("Patriot Revolution", 2004) This group believes that the USA PATRIOT Act was passed too quickly and that the powers of the Act are overbroad.

The American Civil Liberties Union (ACLU) has commented that the “most troublesome” parts (of the Act) are as following:

1) Indefinite detention of non-citizens who have not been shown to be terrorists on minor visa violations if they cannot be deported because they are stateless, their country of origin refuses to accept them or because they would face torture in their country of origin.

2) Minimized judicial supervision of federal telephone and internet surveillance by law enforcement authorities.

3) Expanded ability of the government to conduct secret searches.

4) Gave the Attorney General and the Secretary of State the power to designate domestic groups as terrorist organizations and deport any non-citizen who belongs to them.

5) Granted the FBI broad access to sensitive business records about individuals without having to show evidence of a crime.

6) Lead to large-scale investigations of American citizens for "intelligence" purposes." ("ACLU Legislative", 2003)
The main issue seems to be whether the United States is willing to pay a high price for the security of its citizens. The price, according to the second position, is the freedom of those very citizens the first position protects. There have been times in United States history that the freedom of citizens had been overruled by the need for national security. The Civil War and the time around both of the world wars have been such occasions. In brief, one can look to President Abraham Lincoln’s message to Congress on July 4, 1861, “Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?” (Lincoln, 1861, as cited by Rehnquist, 1988, p. 72) The distance between President Lincoln’s words and need for the words of the USA PATRIOT Act seems to be the main concern of both groups. If a model can be formed that can predict the outcome of the USA PATRIOT Act then the sides, either for or against the Act, will have a blueprint upon which they can base their strategy.

Defining the research problem

The scope of this thesis is to show a pattern which can be used to predict the outcome of presidential powers at the time of a war era. The pattern shall show the “expansion and constriction” effect of presidential powers, and it will be consistent through time. To do this, the pattern is defined with its parts so that it may be applied throughout this thesis.

The descriptive model of the “expansion and constriction” shows the effect that crisis has on presidential power, the increase of the power and the eventual
readjustment of the power. The model relies on several components to accurately predict the near cycle of power during a time of crisis.

The components are:

1) The Crisis Itself
2) Power Given to the President
3) The Silence of the Courts
4) The Use of the Power Given to the President
5) Attack on Constitutional Rights of United States residents
6) Complaint Filed at a Federal Court Level
7) The Crisis on the Downswing
8) Federal Court Involvement
9) Readjustment of Power to President to a Lower Level.

The components of the model in detail

To begin the “expansion and constriction” effect there has to be a crisis introduced into the American political system. Crisis, for the scope of this thesis, is defined as a conventional war. A conventional war has sides based on national allegiances and is carried out in the boundaries of the nations at war, due to the war’s physical limitations there can be a winner. Without a crisis the model would not have its catalyst.

The crisis brings a wider berth of power to the President. New laws are passed, or executive commands are issued, that were not in place before the crisis occurred. It is in this time that the President not only applies his power abroad, but also at home in reaction to or prevention of attacks on domestic soil.

During the time when the President’s power increases, the federal courts are silent. The courts do not hear cases that question the authority of the
President. This allows the President to use the new power to its highest degree since the court system, which provides a constitutional check, is silent.

The President then uses the new power to safeguard the United States against foreign threats. Since the crisis is still fresh, it is at this time that the need for civil protection outweighs the need for civil liberty.

In ensuring the safety of the United States, the President enforces laws or rules that would be seen as an attack on constitutional rights of United States residents if done in times other than crisis. In this time, groups of residents are labeled the enemy due to being associated with the nation the United States would be at war with.

As the crisis continues, the residents of the United States, who were singled out by the enforcement of the new laws, take issue with the law to the United States Supreme Court (USSC). This action forces the Court to break its silence and become involved. During this time the immediate crisis is no longer as pressing as it once was.

The result is the readjustment of the President's power. The President does not lose power, but only has the constriction of power to a point similar to the position it was before the crisis occurred. There are residuals of power that do remain and become a base upon future increases of power can be built.

As the following figure (Figure 1) shows, the “Expansion and Constriction” Model is indeed near circular with its beginning and ending with Presidential Power.
To apply the model to the USA PATRIOT Act, a special pattern must first exist. To show that this pattern exists, the model will be applied to cases from the Civil War era to the Korean War era. This will show the precedent of the model and its use to explain the issues brought forth by each time of crisis.

After showing that the model is valid, it will then be applied to the case of the USA PATRIOT Act in expectation that the future of the Act can be predicted by the model. If the model cannot be applied to the case of the USA PATRIOT Act then a reason of either uniqueness of the Act, or something missing within the model, shall be given.
Outline of the thesis

Chapter Two discusses cases from the Civil War era, such as the *Prize Cases* to the Korean War era case of *Youngstown Sheet and Tube v Sawyer*. The discussion starts with each particular case background and decision. From the United States Supreme Court case rulings, along with the history of the case, a pattern of “expansion and constriction” will occur.

Chapter Three takes a section-by-section look at the USA PATRIOT Act. Starting with a time-line of the creation of the Act, a discussion on just what the Act entails is given. Applications on how the Act is being used are provided. The government states cases that it required to establish the Act and the groups opposed to the Act, state instances where they believe the Act was being abused by the authorities. Finally, the chapter concludes with cases brought against the government trying to get the USA PATRIOT Act repealed, along with a list of communities that have passed legislation that nullifies parts of the USA PATRIOT Act.

Chapter Four is the conclusion of the work. This chapter will show that the “expansion and constriction” pattern does indeed exist, with examples of the past, and that it can be applied to the current situation of the USA PATRIOT Act. With the precedent of pattern shown in the previous chapter, the model will then be fitted to the USA PATRIOT Act; a prediction can then be made based upon the model.
CHAPTER 2

THE APPLICATION OF THE MODEL

To determine if the “Expansion and Constriction” Model exists it has to be applied in its components to a time of war. For this thesis four separate periods of war have been selected: Civil War era, World War I era, World War II era, and Korean War era. These four periods will be introduced by when the war started, then specific USSC Cases are discussed that show use of power given to the President due to that war, followed by when the war had ended and how the power of the President was constricted. It is predicted that a pattern will emerge in all of the war eras.

The Presidency Pre-Civil War era

The President is the representative of the executive branch of the United States. The earliest form of an American executive power was found in the governor of the royal province. The powers of such a governor included appointment, military command, expenditure, pardons and a large connection to law making. (Corwin, 1957)
The President is Commander-in-Chief of the armed forces. He can grant pardons, make treaties, appoint public officials, including United States Supreme Court justices, with the consent of Congress, and fill temporary vacancies while Congress is not available to give consent. (United States Constitution. Article II, Section 2)

For the focus of the pre-Civil War era, only the President as the Commander-in-Chief and the President as the Organ of Foreign Affairs is important. With the lack of definition of foreign affairs in the Constitution, the President encounters a wide berth of power. The President is limited only by direct acts of Congress or intervention of the United States Supreme Court. In history, the United States Supreme Court has declined to mold the powers of the President due to the claim that the United States Supreme Court lacks both authority and expertise. There is, however, a struggle between the President and Congress.

In 1793, President George Washington issued the Proclamation of Neutrality in regards to the fighting between France and Great Britain. This caused a stir with James Madison and Thomas Jefferson, who stated that the power to declare war was for Congress and a proclamation of neutrality was akin to a proclamation of war. Alexander Hamilton, as Pacificus, wrote in defense of President Washington. (Kommers and Finn, 2004) The response President Washington gave to the situation was one that framed the incident for the Executive, saying that he "would be damned if he would be found in that place
Thomas Jefferson would later run into a situation with the purchase of the Louisiana Territory in 1803. President Thomas Jefferson was worried that he did not have the authority under the Constitution to purchase the land, even with the mention of the power of making treaties and being the Organ of Foreign Relations. President Jefferson's response was to draft a constitutional amendment that would validate his purchase after the purchase had already taken place. President Jefferson would later stop work on the further drafting of the amendment as he decided that he had the power to purchase the land due to his role as protector of the Union. (Krommers and Finn, 2004) He wrote in a letter to J.B. Colvin an explanation, "a strict observance of the written laws is doubtless one of the highest duties of a good citizen, but is not the highest...the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation; a strict and rigid observation of the laws (in some cases) may do harm." (Jefferson, 1810, p. 1)

The Civil War era

Although the Confederate States of America was formed with Robert E. Lee as its president on February 9, 1861, the Civil War itself did not start until the first shots were fired by the Confederate Army on February 12, 1861 at Fort Sumter, in Charleston, South Carolina. (Civilwar.com, 2004)
On May 25, 1861, shortly after President Abraham Lincoln’s suspension of habeas corpus, John Merryman was found in his home by federal troops and arrested. He was charged with the destruction of railroad bridges after the Baltimore riot of April 19 of the same year.

Merryman, well known in the community and also a state legislator, immediately obtained counsel on Saturday and sought a writ of habeas corpus. The next day, Chief Justice Roger Taney read the petition, and the writ was issued on Monday. The writ was addressed to General George Cadwalader, the commander of the military district in which Merryman resided. Colonel Henry Lee responded to the call of the Court for *Ex Parte Merryman* (1861) in place of General Cadwalader. Lee then gave a brief summary of the charges brought up against Merryman and reminded the Court that upon authorization of the President, Cadwalader had the authority to suspend habeas corpus for the good of the public. Due to neither Cadwalader nor Merryman being produced, the Court issued they were to appear the next day no later than twelve noon. (Rehnquist, 1998)

On May 28th 1861, the Chief Justice asked the marshal if he served notice to appear. The reply was that the marshal did go to the fort to serve the writ but was not answered when he announced himself at the gate. (Rehnquist, 1998)

Taney then issued this statement from the bench,

I ordered the attachment yesterday, because upon the face of the return of the detention of the prisoner was unlawful upon two grounds. The President under the Constitution and laws of the Unties Sates, cannot suspend the privilege of the writ of habeas corpus, nor authorize any military officer to do so. A military officer has no right to arrest a person, not subject to the rules and articles of war, for an offense against the laws
of the United States, except in and of juridical authority and subject to its control—and if the parties arrested by the military—it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to the law. (Baltimore American, 1861, p. 2)

Taney then told the marshal that he had the legal authority to form a posse to bring in the General. The marshal knew that he would be greatly outnumbered if he were to go to the gates, therefore, he declined. Taney then said he would write a conclusion of the opinion and send it to Lincoln for his action to enforce the laws.

President Lincoln never responded directly to Taney’s words, but rather made a speech to Congress pointing out that the Constitution was silent on which branch of government had the power to suspend habeas corpus and stated that he believed, when emergency rose and Congress was not in session, that the power lies within the presidency. Lincoln indirectly addressed Taney during his speech to Congress, when he stated that what Taney wanted would allow, “all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that very one be violated.” (Lincoln, 1861, as cited by Rehnquist, 1998, p. 72)

Merryman was kept imprisoned at Fort McHenry and was indicted for conspiracy to commit treason. He was then admitted to bail while Taney kept saying that as long as the civil courts were open and functioning, the military courts should not be able to try civilians. The Lincoln administration ignored Taney, but Merryman was freed on bail in the summer of 1861 and was never brought to trial for his charges. This was one of many cases that had similar indictments for treason but no prosecution during the Civil War period. Although
Merryman was never tried, the presidency had gained power and shown it by ignoring the courts. (Rehnquist, 1998) As Clinton Rossiter said, “The most a court or judge can do is read the President a lecture.” (Rossiter, 1987, as cited in Biskupic and Witt, 1997. p.120)

While President Lincoln suspended habeas corpus, the Civil War was at a crucial point. When the Court ruled against Lincoln’s use of martial rule he ignored the Court’s decision entirely. This act of disobedience by President Lincoln is shown in the model as the action of constriction remains unclear due to the war still being active.

Before President Lincoln was inaugurated on March 4, 1861, seven southern states seceded from the Union. In mid-April, after shots were fired at Fort Sumter, Lincoln instituted a naval blockade of southern ports. Due to Congress being out of session, the blockade was accomplished without Congressional consent. (Epstein and Walker, 2001) During this time four different ships were caught in the harbor and seized as part of the blockade. From the act of taking ships as “prizes” as regulated during the blockade, the Prize Cases (Prize Cases, 1863) gain their name.

During the blockade, the Amy Warwick was en route to Richmond and was held because it was one of the enemies’ property. The Hiawatha was a British ship that failed to leave port after a warning was given to all neutral ships to leave in fifteen days. The ship could not find a tow-ship and was then seized after the fifteen days expired. The Brillante was a Mexican ship that entered New Orleans over a month after the blockade was in place; it was captured while
trying to leave New Orleans. A Richmond owned trading ship, the Crenshaw, was seized trying to trade tobacco with England. The courts upheld all four seizers. The question remained, however, did the President indeed have the authority to declare the blockade without the immediate consent of Congress. (Hall, 1992) It is this question that the Prize Cases (1863) were based upon.

When Congress met in session on July 1861, they passed a measure that declared a state of war did indeed exist and authorized the closing of the southern ports. On August 6, 1861, Congress went further to cover Lincoln by passing a resolution that stated that all of the acts Lincoln did with respects to the Army, Navy and militias were retrospectively approved and made valid, as if Congress issued the orders. (Biskupic and Witt, 1997, p. 82)

In a 5-4 vote the United States Supreme Court upheld the seizure of the ships without immediate congressional action due to the powers the President has during emergency to uphold the peace and security of the nation. Justice Robert Grier wrote the majority opinion. In the opinion he summarizes, "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name...Whether the President is fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the government to which this power was entrusted." (Grier, 1863, pp. 2-3)
In dissent, Justices Roger Taney, Samuel Nelson, John Catron, and Nathan Clifford focused on the fact that Lincoln did not have the ability to declare war under the Constitution and therefore could not institute a blockade. Nelson wrote in the dissent that he believed there could be no war between the federal government, and the state in insurrection, until it is declared by Congress. Since Lincoln did not have the right to declare war, he did not have the right to issue a blockade. (Nelson, 1863)

The dissenting faction of the Prize Cases stated that only Congress could declare war, and they continued to state that the ships and cargo to be illegally held. This case was decided on the majority's opinion that the government could treat an insurrection as if war itself had been formally declared and it was the President himself that contained the power of Commander-in-Chief. (Rehnquist, 1998)

The Prize Cases show if the President acts outside of the direct power of the Constitution, the action is allowed by the Supreme Court when the action is backed up by Congress. This introduces Congress as an outside force that can help the action of the model along. With the support of Congress, the President's power is almost beyond question. This adds to the part of the model where the Courts are undecided. The vote in the case was close and the Court could not decide unanimously on how the issue should have been resolved.

In 1863, Clement Vallandigham was arrested in his home during the middle of the night. His offense was the charge of breaking General Order #38, an order given by General Ambrose Burnside. (Rehnquist, 1998) General Order
#38 stated that it was unlawful for anyone to declare sympathies with the enemy. If someone were to commit an offense against the order, then he or she would be arrested at once, tried in a tribunal with the possibility of being executed or sent over enemy lines. (Scott, 1972) This order was given to quiet any dissent that may occur from the institution of a draft into the army of the North.

On April 30th, Vallandigham spoke before a Democratic rally in Columbus, Ohio. He did so to defend the right of assembly and the freedom of speech to discuss the current state of government. He attacked General Order #38 on the grounds of the limitations of liberty and that normal citizens could not be tried under military tribunal, as was stated in General Order #38.

After his assembly speech, Vallandigham gave another the following day more directly at the expense of General Order #38. Burnside had spies sent to this speech and they reported the news back to him. Later that evening, Burnside ordered the arrest of Vallandigham. Two hours after midnight on May 5, a special train arrived in Dayton, Ohio, on board was Captain Charles G. Hutton, along with a company of sixty-seven men. Hutton and company surrounded Vallandigham's house, and after they were refused entrance, the company broke the back door down. In less than one day the military tribunal began.

Vallandigham was charged with breaking General Order #38 due to his speech that called the war an unjust war. After refusing to enter a plea, a plea of "not-guilty" was entered for him. After the two spies testified that Vallandigham gave the speech, he had one witness in his defense and his own testimony. The
tribunal called for deliberation and came back with a verdict of guilty. It is important to note that the entire military tribunal was made entirely of Burnside's subordinates.

Two days later, Vallandigham's attorney sought a writ of habeas corpus and the result was a ruling in favor of the government. The sentence for Vallandigham was for his imprisonment for the entire term of the Civil War. President Lincoln, upon hearing of the decision, faced a difficult task. He could either overturn the decision entirely or he could modify the sentencing while keeping the conviction. President Lincoln appeared to want to overturn the decision entirely and even stated that, if it were times of peace, Vallandigham would not have been tried in a military tribunal at all. However, those were not times of peace. President Lincoln could not simply overturn the sentence unless he wanted to also overturn the power given through martial rule. When asked for an explanation of why the charge of guilty had to remain, President Lincoln replied, "Must I shoot a simple-minded soldier boy who deserts while I must not touch a hair of a wily agitator who induces him to desert?" (Lincoln, 1863) President Lincoln did, however, change the sentencing from imprisonment to banishment beyond the Union lines. Later, Vallandigham would come back to Ohio and would be ignored by the government for having done so. (Rehnquist, 1998)

The action of the Civil War gave President Lincoln the power to suspend habeas corpus. Congress was not in session at the time and no immediate action was taken on their part. For this particular case the order of martial rule
was vested in a military commander. This shows that even when the President
gains the power, he may delegate the power as he sees fit. Even when the
President was having second thoughts on whether to follow up on this particular
case, he kept his course knowing that if he did pardon in this case, he would lose
the power to declare martial rule. This shows the need of the war's closing or
becoming too unpopular to be sustained for constriction to occur.

The Civil War was a war where the enemy could very well have been
someone you knew. The familiarity of the enemy in the Civil War lent itself to
making sympathies for the enemy in either camp. There were some in the
bordering northern states, Indiana, Illinois, Ohio, and Mississippi, that did not join
the Confederate Army but held sympathy with the army and the people who
made up that army. President Lincoln was faced with the decision of keeping
individual liberty intact or to secure the safety of the Union. Choosing the safety
of the Union, President Lincoln gave broad sweeping powers to his military
commanders so that they could arrest or detain any civilian that they thought
might be engaged in a wide definition of traitorous activity. The citizens were
then to be tried in military court instead of civilian court.

The sweeping authority was not limited to those areas that the South
controlled, but also where the Union controlled. To do this, President Lincoln had
to declare martial law and suspend habeas corpus. In doing this, President
Lincoln ignored the Constitution, which put the suspension of habeas corpus in
the power of the Legislature, not the Executive, and only when civilian courts
could not safely be held. Even after Congress later declared that everything that
President Lincoln did on his own was also the will of Congress, there still remained the fact that civilian courts were running and therefore, civilian trials should have taken place in those courts instead of the military tribunals. (Epstein & Walker, 2004)

Lambdin Milligan was an attorney in the North and had sympathies with the South. He did not join the Confederate Army, but he did join the “Sons of Liberty”, which was a group dedicated to freeing Confederate prisoners held in Union prisons. Milligan was arrested by federal troops in October 1864 and tried in a military tribunal. He was found guilty of treason and sentenced to hang until dead. President Andrew Johnson commuted Milligan’s death sentence to one of life imprisonment. Milligan’s attorney asked the federal courts for a writ of habeas corpus, even though he knew that President Lincoln had suspended habeas corpus during the time of the trespass by Milligan. The case reached the United States Supreme Court in 1866; one year after the Civil War had ended. (Krommers & Finn, 2004)

In Ex Parte Milligan (1866) the counsel for Milligan provided a defense that stated, since Milligan was in an area where the war was not, he should have been tried in a civil court and not under military tribunal. The military stated that the military tribune was necessary since they doubted the effectiveness of an Indiana court. (Hall, 1997)

The Court was unanimous in its decision with Justice David Davis, writing the majority opinion and a separate opinion written by Justice Salmon Chase,
joined by Justices Samuel Miller, Noah Swayne, and James Wayne, concurring.

Davis wrote in the opinion,

The Constitution of the United States is a law for rules 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. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government...Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts...Martial rule can never exist where the courts are open, and in that proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war...the framers of the Constitution, doubtless, meant to limit the right ad trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the fifth. (Davis, 1866, pp. 4-5)

According to the majority opinion, martial rule could not be imposed and a tribunal could not be accomplished on a civilian when the civil courts remained open. That, simply put, there was no power that the Executive held to do this. (Tribe, 1986) The opinion also stated that not even Congress had the power to enact martial law and suspend habeas corpus in an area where the civil courts were open. (Rehnquist, 1998)

The concurring opinion of Chase agreed with the majority, sans the part of where the majority stated that not even Congress could have enacted such measures. Chase, and the others who concurred with his opinion, stated that under the war powers Congress could enact legislation necessary to prosecute under the war and to do so even if the civil courts were open. (Chase, 1866)

Even with this difference, the outcome of the case has been hailed for its "rejection of the government's position that the Bill of Rights had no application in wartime. It would have been a sounder decision, and much more widely
approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do." (Rehnquist, 1998)

This case shows how the model can be used to describe the constriction of the President's power. The power Lincoln used was not unlike the power he used in the past. The difference is, by the time the case reached the Supreme Court, the Civil War had ended. As the model shows, when the war has ended, the need for Presidential power expansion is over and a constriction occurs.

The Civil War ended in 1865. The main fighting ceased when Union General Ulysses S. Grant ordered the surrender of Confederate General Robert E. Lee at the village of Appomattox Court House in Virginia on April 7th. Lee took until the 9th to agree upon the terms of surrender. It took until May to give word to the entire Confederate army that surrender had been issued. Between the surrender of Robert E. Lee in early April and the final word to Confederate soldiers in May, President Abraham Lincoln had been assassinated by John Wilkes Booth on April 14th. Vice-President Andrew Johnson assumed the presidency the next day. (Civilwar.com, Timeline)

The Civil War era in the "expansion and constriction" model

The Civil War is first viewed in the "Expansion and Constriction" Model by giving President Lincoln the need to assume more power in securing the civil protection of the Union even if it came at the expense of the civil liberties of the same people he had tried to protect.
Power is sometimes given to the President in times of war by Congress or the Constitution. President Lincoln did not wait for Congress to give the power he felt he needed to be effective during the Civil War; he took it for himself through the silence of the Constitution. An example of this is when President Lincoln suspended habeas corpus in areas where the war had not yet arrived. Lincoln did so in a preventive measure rather than a measure performed out of direct necessity. He also instituted a blockade that resulted in the seizing of ships. This is an act that Congress would later back up; stating that all Lincoln did in the matter was covered retrospectively by the rule of Congress. An early version of the Espionage Act of World War I was seen when Lincoln allowed General Order #38 which stated that nobody could declare sympathy for the enemy. This included speaking out against the draft. President Lincoln also issued the order to try civilians in military tribunal, instead of functioning civil courts.

During the time of federal court involvement, President Lincoln showed that even when the Court ruled against him, such as in the case of *Merryman*, that due to the freshness of the Civil War, he could ignore the Court’s wishes. By ignoring the Court, Lincoln showed that it does not matter what the outcome of the case is, the item that does matter is that a case is brought up at all. The more cases brought up means the Supreme Court is giving more credence to the possible misuse of presidential power. It is shown in the *Prize Cases*, however, that when Congress, even retrospectively, gives power to the President, the power is accepted by the Court. The Court then ruled against a request for a
civilians to be tried in civil court when the civilian broke an order given under martial rule. This power was allowed with two years still left in the Civil War. The Court ruled after the Civil War against the President's use of having a civilian tried in a military tribunal when civil courts were open. The difference between the two rulings appears to be only the time in which they were delivered. The case decided in favor of the government occurred during a crucial moment in the Civil War, while the case against the government was decided after the need for the power had disappeared.

After the Civil War, the powers of the President seem to be on a course of readjustment to near pre-wartime levels. Starting with the case of Milligan, the President's ability to try a civilian in a military tribunal when civil courts are in operation is taken away. It is also found that the President cannot declare suspension of habeas corpus in an area where war has not come; only Congress may do this. Further, both Vallandigham and Merryman eventually were freed and their sentences ignored by the United States government. This information fills the major components of the "Expansion and Constriction" Model. From the creation of the power given to the President back to the power being readjusted. All of the criteria fit and the model is shown valid for the Civil War era.

The chart for the Civil War era (Figure 2) is as follows:
World War I era

The start of the First World War for the United States is a questionable date. In 1916, the United States military started to occupy strategic areas, while on March 12, 1917, after an unsuccessful request to Congress, President Woodrow Wilson issued an executive order to arm United States merchantmen. The United States formally declared entrance into World War I on April 6 by declaring war on Germany. On December 7, 1917, the United States also declared war on Austria-Hungary. (Firstworldwar.com, Timeline)

In 1917, Congress passed the Espionage Act. In this Act was a provision that made it unlawful to obstruct the government's right to draft to create its army. It was also illegal to cause or attempt to cause any thoughts of insubordination in
the military. (Tribe, 1986) Charles Schenck was the general secretary of the Socialist Party. In the interest of his party, he directed the printing and distribution of flyers that were decidedly against the draft. The fifteen thousand flyers were then sent out to the men who were eligible for the draft near the Socialist Party headquarters in Philadelphia, Pennsylvania. The flyers urged men to visit the Socialist Party headquarters and sign a petition to Congress that would ask for the removal of the draft.

On August 28, 1917, federal agents entered the Socialist Party headquarters, seized all materials, and arrested Schenck. (Hall, 1997) Schenck was then tried in U.S. District Court (USDC) and found guilty; he then appealed to the USSC on the grounds that the Espionage Act was against the First Amendment and freedom of press. (Schenck v United States, 1919) The government stated that it was not a case about the First Amendment, rather one regarding the congressional method of raising an army. (Holmes, 1919)

Schenck, in his case, admitted that the pamphlets he created were to persuade the men in the draft to protest. He restated that this was perfectly allowable under the First Amendment protection of speech and press.

The unanimous Court decision, with Justice Oliver Holmes writing the majority opinion, saw that the defendant did have a case if he had done the distribution during peace time. In his opinion he admitted that, if the case happened during ordinary times, the defendant would have acted within his constitutional rights, however, the times were of war and the defendant must be
judged according to the time of war. (Holmes, 1919) It is from this case that Holmes developed his "Clear and Present Danger" test.

According to Justice Holmes, if there was such a time that words could raise a clear and present danger to the society of the United States, the First Amendment would give way for the protection of the greater good. (Biskupic & Witt, 1997)

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present dangers that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (Holmes, 1919, p. 5)

Even though Schenck was not successful in damaging the draft, Holmes indicated that it was not the outcome of the act, but rather the intent in which the act was performed which would be used to see if a violation had occurred or not. (Tribe, 1981) Stating that it was not unreasonable to find that the flyers could persuade the draftees into unlawful acts to refuse the induction, the United States Supreme Court upheld the conviction of Schenck. (Rehnquist, 1998) With this case, not only are actions against the government illegal, but also words that may incite such actions.

The model shows that when a crisis starts, the President enjoys the highest level of power. In this case the power was given to the President by an act of Congress. Flyers that could have been allowed in times of peace were found illegal to distribute at a time of war. The war was fresh, and the outside force of Congress was working to move the President's power in an expansion,
this led to the Supreme Court ruling unanimously in favor of the expansion of power. This supports the model, even with the outside force of Congress once again acting on the model, because it demonstrates the need for time to pass and the war to be over or unpopular for the power to constrict again.

One year after issuing a manifesto which denounced America’s entry into World War I, the Socialist Party held a convention in Canton, Ohio. During the convention, Eugene Debs gave a speech that included the world policy views of the Socialist Party. During the end of his speech, Debs commented on a recent event where he visited a location of the Socialist Party and found three of the more vocal male leaders were currently convicted under the Espionage Act for tampering with their eligibility for the draft. He then expanded on this issue stating that he was proud of those men and the women that also were arrested for blocking the military recruitment. At the end of the speech, he denounced the United States for persecuting his fellow Socialists under the guise of the Espionage Act. He went on to state that the leaders of the United States freely declared war while the working class, which could neither declare war nor peace, would be the one to fight the war. Four days later Debs was indicted by a grand jury. After being sentenced to ten years imprisonment, Debs appealed his case to the United States Supreme Court. (Rehnquist, 1998)

Debs v United States (1919) came immediately after Schenck and the “Clear and Present Danger” test was used. During his speech in Ohio, Debs was quoted saying, “You need to know that you are fit for something better than slavery and cannon fodder” and “You have your lives to lose; you certainly ought
to have the right to declare war if you consider a war necessary.” (Debs, 1919, as cited in Biskupic & Witt, 1997 p. 417)

The United States Supreme Court’s unanimous decision came down in the form of Justice Oliver Holmes’ majority opinion. Using the test set in Schenck, the Court decided that,

The one purpose of the speech, whether incidental or not does not matter...was to oppose not only war in general but this war, and that the opposition was so express that is natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief. (Holmes, 1919, p. 2)

After viewing the speech that Debs gave, the Court had to decide if his words were indeed intended to have a negative effect upon the recruitment of an army done by Congress at war time. Holmes, in the majority opinion, stated that there was evidence that before the speech, Debs had endorsed his party views that the involvement of the United States in World War I, was unjustifiable and should be opposed by all means. With these two items as evidence, the conviction of the lower court was upheld. (Biskupic & Witt, 1997)

Debs would later come up for pardon with President Woodrow Wilson and the pardon was denied. A successful attempt at pardon, however, was accomplished under President Warren G. Harding in 1921. (Rehnquist, 1998)

Although Debs was later pardoned, it is important to note that this case gave more credence to the vague powers of the Espionage Act. Not only did the Court allow the government to control written material that might be reasonably
seen as anti-government, but it also allowed control over public speech at a sanctioned political gathering.

As the war was still raging, the power of the President came into question. This case demonstrates the need for continual questioning of the President’s expanded power, as shown in the model. As Debs was eventually pardoned, it also shows that with time and the end of the war, the constriction of power is allowed, sometimes with an apology.

In 1918, Congress amended the Espionage Act to include the amendments known as the Sedition Act, making it unlawful to criticize the government or Constitution. (Government Printing Office, 1919)

*Abrams v. United States* (1919) cited five Russian-born defendants living in the United States for five to ten years. They lived in New York City, meeting in a room rented by one under an assumed name. Jacob Abrams, one of the five, purchased a printing kit and made use of it in the basement room making pamphlets urging opposition to possible United States intervention against the Bolshevik regime. The pamphlets, printed in Yiddish stated,

Workers, Russian emigrants, you who had the least belief in the honesty of our Government must now throw away all confidence, must spit in the face of the false, hypocritical military propaganda which had fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Worker Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannons, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom. Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that only the Russian Worker fights for freedom, but also here in America lives the spirit of revolution. (Abrams, 1919, as cited in Rehnquist, 1998, pp. 180-181)
For this pamphlet, Abrams, and the others, were charged with trying to incite, provoke, or encourage resistance to the United States. When the United States was at war, any willful attempt to persuade against the United States, either by verbal, or written, communication, was defined as unlawful and punishable. (Government Printing Office, 1919)

When addressed to the United States Supreme Court, the majority upheld the conviction. Justice John Clarke, who wrote the majority opinion, cited that the writers of the pamphlets wanted to halt the war effort by bringing in a major strike. (Rehnquist, 1998) The reasoning for the majority was that any questions engaging the constitutionality of the Espionage Act as a whole had been disposed of by Schenck v United States (1919) and Debs v United States (1919). Schenck introduced the "shouting Fire in a crowded movie theater" idea, while Debs was decided based on Schenck. At wartime, it is important not to do things that would incite a riot or revolution from within. Using both of the cases to set the course of precedent, Justice Clarke so wrote the majority opinion. (Cohen & Varat, 2001)

Dissenting were justices Oliver Holmes and Louis Brandeis. They saw the letters were against the Germans, whom the United States was fighting, and only stated that the United States should not pursue attack on the Russian people, which the writers felt a connection. (Rehnquist, 1998)

In dissent, Holmes stated the very precedent the majority used. He agreed with the precedent, as he did write the Schenck majority, but he said he needed to expand on his opinion. In dissent, Holmes stated, "I never have seen
any reason to doubt that the questions of law that alone were before the Court in the cases of *Schenck, Frohwerk* and *Debs* were rightly decided...only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." (Holmes, 1919, pp. 21-22) He went on to further chastise the majority, "In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them." (Holmes, 1919, p. 23)

Holmes failed to persuade the majority. Instead of using a redefined stricter version of the "clear and present danger" test, his colleagues used a "bad tendency test" which is a test that came from English common law. Instead of asking, "Do these words cause an immediate and clear threat?" the question turned to, "do these words have the tendency of making something bad happen?" (Epstein & Walker, 2001, p. 216)

According to Holmes' diary, the dissent troubled some of the majority justices so much that they called on Holmes at home in an effort to persuade him not to publish the dissent. They asked this to show unity on an issue they thought was central to the safety of the country. The issue, and the precedent set in the case, eventually became a moot point as the Sedition Act of 1918 was repealed in 1921. (Cohen & Danelski, 1994)

The Supreme Court is shown divided in this case. The opinion used in a previous case was now used in dissent. The case came at the time when the
war was almost over and, as the model shows, the constriction of Presidential power was gaining momentum. The power used by the President still came from Congress, but the act will later be repealed shortly after the war. This is an example on how, according to the model, the President's power may be constricted. The power is not constricted by the Court, but by an act of law.

The end of World War I came on November 11, 1918. The cleanup process of World War I followed and was marked by the presentation of the Treaty of Versailles on May 7, 1919 to Germany and the signing of the treaty on June 28, 1919. (Worldwarone.com, Timeline)

World War I era “expansion and constriction” model

The crisis of World War I was to be the war that ended all wars. During World War I, President Woodrow Wilson acted differently than President Lincoln. President Lincoln took the power he needed and then was backed up by the USSC and Congress later, or he would ignore any ruling unfavorable to him while citing he had the Union's best interest at hand. President Wilson was given power in the form of the Espionage Act and the Sedition amendments by Congress.

The Espionage Act, much like General Order #38 of the Civil War, made it unlawful to disrupt the draft and to attempt to cause any insubordinate thoughts in the military. The Sedition Act made it unlawful to criticize the Constitution or government.
The importance of the war, along with the vague nature of the Espionage Act, with the Sedition Act in addition, forced the cases from the World War I era to be ruled by the USSC for the government in every case. Towards the end of the war, however, dissent amongst the justices, especially Justice Oliver Holmes, show a turning nature in the thought of the nation. As stated in the Civil War era, the outcome of the case is not as important as the fact that the case is happening. With dissent, there comes a chance that the dissent will be used as a reason behind a majority opinion at a later date. With dissent the government shows uncertainty if the power of the President is being used correctly or even if it is too broad.

The resulting readjustment of power to near pre-wartime levels is not as powerful as it was in the Civil War. The Espionage Act remained, but it was also a power given slightly before the World War. Its amendment of the Sedition Act, however, had been repealed and the descendents of the people tried under the Act have been compensated for the past. After World War I, Debs was eventually pardoned, just as the case was for the Civil War trials. The United States was out of a time of war and the grip made during war loosened.

The chart that shows the World War I era (Figure 3) is as follows:
World War II era

The exact date of United States' involvement in World War II is debatable. On January 6, 1941, President Franklin Delano Roosevelt made public a pact made with the United Kingdom that the United States would allow use of its military equipment in a Lend-Lessee manner. President Roosevelt signed Lend-Lessee into being on March 11, 1941. On March 30, sixty-five Axis ships in United States territory were seized for "protective custody." The United States Navy sank a German submarine that it found while on patrol of the Atlantic Ocean on April 11, 1941. On May 27, 1941, President Roosevelt declared an "unlimited national emergency" and urged the creation of a stronger military force. Then on June 5, 1941, the United States sent a sizeable Marine force to

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Iceland in secret to prepare for a possible war. President Roosevelt also started to freeze Axis accounts in the United States while hostilities inclined. During June 22, Germany invaded the Soviet Union, as a result, on June 24, President Roosevelt extended Lend-Lessee to the Soviet Union. In the fall 1941, German submarines started to attack United States freighter ships and the United States responded with help of the British air force. On December 7, 1941, Japan bombed Pearl Harbor, Hawaii. The United States declared formal war against Japan on December 8. As a response to the declaration of war by the United States, Japan declared war against the United States after the bombing of Pearl Harbor; Germany and Italy were forced to declare war against the United States by treaty with Japan on December 11, 1941. ("World War Two" n.d.)

When the United States and Germany were at war during World War II, Richard Quirin and seven other individuals from the German armed forces were trained to infiltrate and sabotage opposing war machines. Four of the men, including Quirin, were sent via German submarine to Amagansett Beach on Long Island, New York. Landing in July 1942, they branded German military uniforms, which they promptly buried, and then dressed in civilian clothing. They carried with them explosives and incendiary devices. The other four landed in Ponte Vedra Beach, Florida. All eight men were arrested by the FBI in either New York or Chicago. They were charged with the plan of destroying the war industries in the United States. (Rehnquist, 1998)

President Franklin D. Roosevelt then established a military commission to try them for transgression against the United States and for breaking the Articles
of War. (Hall, 1997) Roosevelt, after the special commission was made, blocked any trial by civilian courts of these individuals. (Rehnquist, 1998) Seven of the Germans wanted petitions of habeas corpus filed for them. The United States Supreme Court denied the petitions and six of the Germans were executed a week later. (Hall, 1997)

The Supreme Court did issue a full opinion late in October regarding *Ex Parte Quirin* (1942), the unanimous opinion stated that the military trial was within the President’s power, especially when combined with the congressional adoption of the international common law of war. The Court went on to find that the accused were tried fairly with the military commission and the sentence would remain due to the sufficiently charged order of unlawful belligerency. (Hall, 1997) The Court deemed that civil trial privileges and constitutional privileges did not apply to those who entered the United States as belligerents. It was also not necessary for Roosevelt to set up a special commission because Congress already had military commissions set up to try those found guilty against the laws of war. (Biscupic & Witt, 1997)

The opinion the Court stated that it was important for the war effort to allow, not only the protection from the enemy abroad, but also the ability to seize the enemy from within. The enemy, according to the Court, had broken the laws of war when Quirin tried to sabotage the United States from within its boarders. (Tribe, 1981)

With this case the United States Supreme Court gave a broader power to the President where terrorism on American soil was concerned. This was done
by allowing citizens of a foreign government, which have not formally declared
war on the United States, to be tried as enemy combatants if the individuals have
been suspected of committing crimes against the United States. Instead of being
allowed privileges given under the Constitution, the offenders must answer
directly to a military tribunal, even if there is no direct war in the United States
and the civil courts are open.

This case shows again the support of Congress increasing the President's
power. It differs from Lincoln's era due to the nationality of the offenders were
that of Germany and not of the United States. There was one exception of a
party in *Quirin* who said that they were a naturalized citizen of the United States.
This claim was mostly ignored by the Court and he was to stand trial with the rest
of the enemy combatants. The model shows that because the President was
given the power by Congress, and the war was in the beginning stages, the
expansion of power allowed the President to order military tribunals for those he
labeled "enemy combatants".

World War II saw the United States worry about its Japanese population
on the West Coast. President Franklin D. Roosevelt, at the advice of numerous
officials and the Western Defense Command, signed Executive Order number
9066 which empowered the secretary of war to create areas from which United
States citizens could be excluded. The Order was signed in February; in March
Roosevelt created the War Relocation Authority. The War Relocation Authority
created the power to contain all West Coast Japanese American citizens.
Congress unanimously passed legislation strengthening the executive orders. (Hall, 1997)

Gordon Hirabayashi was born in Seattle, Washington. In 1942 he was a senior at the University of Washington while General John DeWitt imposed the curfew. Consciously ignoring the curfew Hirabayashi remained in an area deemed a military area to be void of Japanese Americans. He was arrested and convicted in federal court. Stating that the executive order itself was unconstitutional, Hirabayashi wanted his case to be taken to the United States Supreme Court. (Rehnquist, 1998)

The Court voted unanimously to uphold the sentencing of Hirabayashi. Chief Justice Harlan F. Stone delivered the majority opinion in Hirabayashi v United States 1943. In the opinion the Court discussed three basic items.

The first was that Japanese immigrants were not eligible for American citizenship. Under Japanese law, the American born children of the Japanese immigrants were to be considered Japanese citizens to stop the assimilation of the Japanese culture.

The second point that the Court made was, with the United States at war with Japan, a reasonable conclusion could be made by Congress and the President that there might have been spies and saboteurs of Japanese citizenry living in the United States. During times of war, the Legislative and Executive may make laws or orders to ensure the safety of the nation, even if such orders may place one ethnic group aside from another. (Hall, 1997)
The last thing the Court based the decision on was the fact that Roosevelt did not act alone, but rather he had the full unanimous backing of Congress. The act was allowed due to the constitutional power of the federal government, along with the joint action of Congress and the President, during an emergency time of war. (Stone, 1943)

Though the decision was unanimous, Justices William Douglas, Wiley Rutledge, and Frank Murphy wrote separate opinions. Murphy wrote in his opinion that this would be the first time that the Court had allowed a substantial restriction of civil liberty of the citizens of the United States based solely on their ancestry. Murphy then likened the treatment of the Japanese Americans to that of the Jews in Germany. He also stated that this action went to the very limit of what the government could do, war time or not. (Murphy, 1943)

This case showed that even when the President receives the power of Congress to do an action, when his power is at its highest, the Court can still debate within itself if the power is justified. The dissents in this case show that, although the outside force of Congress can affect the model, it can still stand. The dissent in the Court shows that, during the time of war, the Court tends to be indecisive in constricting the President's power.

Korematsu v United States (1944) was a case where after an executive order to clear parts of the West Coast out from Japanese aliens and Japanese-Americans, a natural born citizen protested the relocation. This was the first time the Court heard a case that did not deal with a curfew, but rather total relocation based on ancestry.
Coming to argument in October 1944, the Court reached a decision. Basing the reasoning on the precedent set forth in *Hirabayashi v United States* (1943), Justice Hugo Black wrote the majority decision which confirmed the side of the government. (Rehnquist, 1998) The opinion stated that exclusion was justified by the presence of an unknown number of disloyal citizens of Japanese origin. Congress, and the executive branch, through the exercise of the war powers, possessed the constitutional authority to exclude citizens from certain areas during the time of war. (Melone, 2000)

Black explained that the Court, in *Hirabayashi*, sustained the conviction because it was an issue of curfew. The curfew was constitutionally prohibited due to its discriminatory nature, but was upheld as an action of the government during war time to help prevent espionage and sabotage in an area threatened by Japanese attack. (Black, 1944) There were three separate dissents by Justices Owen Roberts, Francis Murphy and Robert Jackson.

The dissenters voted to uphold the curfew, but to strike down the relocation. Justice Roberts, in dissent, stated that the case of *Hirabayashi* was good because it kept people off the streets and it could not be reasonably seen as the precedent to keep people indefinitely out of their own homes and relocated to another area against their will. In short, Justice Roberts believed the case showed a definite, indisputable, and clear violation of constitutional rights. (Cohen & Danelski, 1994)

In dissent, Justice Jackson offered reasons why the Court should not be used as a tool to enforce a law that was created by the military for use on the
citizens of the United States. According to Jackson, the Court lacked the ability to judge a military order. It lacked the expertise to declare the order bad or good. Jackson also stated that an order, made in a place of the United States that was disrupted to the point of martial rule, need to be successful, not lawful. Jackson then issued his thought that if the Court should be able to confine the military to the rules of the Constitution, neither should the Constitution be distorted to give acceptance to the laws made under martial rule. If one military law is ruled constitutional, Justice Jackson rationalized that then all military laws must be constitutional. If the Court ruled for the government, then the Court would lose its identity as a civil court and it would become an agent of military rule.

Jackson saw that the law should not have been able to stand up in the Court due to its nature. The Court, traditionally, played a part of a safeguard against misuse of law creating powers of the Congress and of the President. Without the ability to keep the creators of laws in a check, the Court loses power and the American public loses a safeguard against the agencies that, not only create law, but also have rule over the military to enforce the law.

Justice Jackson was worried that there would come a time when the ability to use the military on United States soil would become abused, and since the Court ruled for the government in Korematsu, that abuse would go unchecked. He stated, if a military commander over stepped his bounds under the Constitution, it becomes an incident, but if the Court rules and approves of that incident, then it becomes a doctrine added to the Constitution. (Jackson, 1944)
One of the main concerns Justice Jackson expressed about the law is that it singled out a certain ethnic group. That the citizens of the United States were being found at fault for nothing more than not being able to choose their parents at birth. Nowhere in the law issued did it state that criminals against the United States, even if they were of Axis Power heritage, were bound to the law issued.

Another concern of Jackson’s was that United States’ citizens of Japanese ancestry, subject to that law, were found impossible to comply. The law stated that the citizens, like the residents subject to the curfew upheld in Hirabayashi, could not leave their homes. This particular law also added in the fact that they also could not stay in their homes. The only way for United States citizens to comply with this law was to turn themselves over to the military for interrogation, detention, and indefinite relocation to a designated area. With the Court in agreement with the executive order, the government was given great power to use military law, which was not constitutional in foundation or usage, in areas not under siege. (Jackson, 1944)

One can see that the same case used for precedent in the majority can also be called upon in a dissent. In this case the majority felt that the goal of the executive order was more important than the ability for a United States citizen to live where he or she wanted. Thus, the citing of Hirabayashi confirmed their decision to expand the power of allowing, curfew to allowing the relocation of the citizens as well.

The majority did agree, however, that the reasoning behind both cases dealt with the United States’ right to defend itself and sometime impose certain
issuances that might stifle the normal living conditions of its citizens during time of war. As Justice William Rehnquist stated, “this case brings to reason the Latin maxim of *Inter arma silent leges* or ‘In time of war the laws are silent’.” (Rehnquist, 1998, p. 224)

The model shows that during the war the Court will remain undecided in its action regarding to constrict the President’s power. This is reflected at the Court decision stage in the model. In this case, the Court questions the use of the military as a legislative power. The Court, due to the time of the war and the President’s support by Congress, becomes indecisive in regards to constricting the President’s power.

The Japanese attacked Pearl Harbor on December 7, 1941. Immediately after this attack the territorial governor, Joseph B. Poindexter, under the authority of the Organic Act of 1900, suspended habeas corpus. With Hawaii under martial law, U.S. Army General Walter C. Short took command over the territory. General Short organized military tribunals and closed all civil courts and used this position to try any civilian for violations of military orders under a military tribunal. (Hall, 1997)

Lloyd Duncan was a civilian ship fitter in the Honolulu Navy Yard. In February 1944, he was arrested for getting into a fight with two armed marine sentries. He was charged with violation of a general order that prohibited assault on military personnel. He was then tried in a military court and found guilty. He was sentenced to six months in prison.
Upholding his protest to being tried in a military court, Duncan sought a writ of habeas corpus from Judge Delbert Metzger. Judge Metzger granted the writ stating that the military had no place trying the civilian Duncan and therefore he should be released to a civil court. (Rehnquist, 1998)

The Court of Appeals for the Ninth Circuit reversed the decision by Metzger and as a result, *Duncan v Kahanamoku* (1946) went before the United States Supreme Court. With a 6-2 decision, the Court decided to overturn the decision by the Court of Appeals. Justice Hugo Black delivered the majority opinion while Justices Francis Murphy and Harlan Stone concurred; dissenting were Justices Harold Burton and Felix Frankfurter.

In his majority opinion, Black stated that the Organic Act's authorization of martial law did not set up authorization for the military to close the civil courts and try civilians by military tribunes. Black went on to state that the dangers of war were not, at the time of the offense, pressing nor immediate. The offense, beyond being a bar fight that involved two military personnel, did not involve malicious acts towards the military at all.

Justice Murphy filed his concurring opinion that added, since the civil courts could have been in operation, and there was not an immediate threat to their safety, trying a civilian by military tribunal was not constitutional.

Chief Justice Stone agreed with the outcome of the case, but wanted to make sure that the point of the civil courts not being endangered, in any sense, and, therefore, should never have been closed by the military, was understood.
In dissent were Justices Frankfurter and Burton. Their base of dissent stemmed from the time of the Court’s decision. They argued that the Court was using hindsight to judge a case instead of using the facts, as they were at the time the offense happened.

In closing the section on the World War II cases, two quotes are used. The first is from Laurence Tribe, “Indeed, the Court has repeatedly held that there are constitutional limits on the jurisdiction of courts-martial, restriction which draw their force from the fact that courts-martial do not afford defendants the procedural rights which the Constitution guarantees in Article III proceedings.” (Tribe, 1981, p. 60) That is to say, even in wartime, unless very dire circumstances present themselves, civilians should be tried in civil court and not in a military tribune. Justice Rehnquist’s comments on Duncan fit not only that particular case, but rather as a description of the United States Supreme Court itself, “...the good news for the people of Hawaii was that the court held that martial law there during World War II had been unlawful; the bad news was that the decision came after the war was over, and a year and a half after martial law had been ended by presidential order...here is also the reluctance of the courts to decide a case against the government on an issue of national security during a war.” (Rehnquist, 1998, p. 221)

This case shows that the power used by the executive, during a time of war, does not translate into a power the executive may use when war is not present. The model shows that timing plays an important factor in the Court deciding to constrict the executive’s power. The timing of this case happens after
the war has ended. This case is just one of the first cases of the World War II era that would lead to the constriction of the executive's power.

The end of World War II happened in stages. Germany officially surrendered in the Russian Headquarters in Berlin, Germany, on May 7, 1945. Japan surrendered on August 15, 1945 in a radio address by the Emperor of Japan. ("World War Two", Timeline)

World War II era "expansion and constriction" model

World War II shows a return to the President taking power instead of asking for it. Different philosophies exist on how of the Presidents themselves choose to act as President. The action of taking power, against the action of asking for power to be given, seems to be a component of presidential philosophy and is not in the range of this thesis. It is important to note that the "Expansion and Constriction" Model is shown valid for both.

Power taken by President Franklin D. Roosevelt mirrors that taken by President Lincoln in allowing martial rule to be declared and having civilians be tried in military tribunals while civil courts are open. This power was taken away from the President at the end of the Civil War and reappears during the World War II era. President Roosevelt also established military tribunals to bring foreign nationals to trial as enemy nation combatants, if they were found on United States soil trying to sabotage. During the course of World War II,
President Roosevelt gave orders which restricted where Japanese Americans could live.

While complaints were filed at the federal level, the war was in different points of flux during the decisions of the Court cases. In the case that involved enemy combatants on United States soil, the Court found the power pre-existed for the President to summon a tribunal to give a trial to an enemy. The Court then ruled that relocation and curfew for Japanese Americans was allowable due to the constitutional power given to the President and Congress to mark certain territory, during times of war, as places citizens cannot go. The point that the relocation was aimed solely at one ethnic group was given in dissent. One year away from the end of the war, dissent started to become stronger against the use of the President’s expanded power. It would be after the war had concluded that the government would lose a case built around executive power gained during the war. The Court ruled, as it had in the Civil War, that if the civil courts are open then a civilian cannot be tried in a military tribunal.

As the power of the President readjusted to near pre-wartime levels the United States President kept the power to try a military combatant in a military tribunal, with the reasoning of the power is pre-existing of the war and is a power set in the Constitution. The relocation and curfew of the Japanese Americans, however, were found unconstitutional; apology by the government was given, along with reaffirmations to the descendents of those re-located. The tribunal method of trying civilians while the civil courts were in operation, once again, was taken away.
The chart for the World War II era (Figure 4) is as follows:

![Chart for World War II Era]

**Figure 4. Chart for World War II Era**

Korean War era

The United States' involvement in the Korean War began on June 26, 1950, when President Harry S. Truman authorized General Douglas MacArthur to send ammunition and military supplies to protect Seoul, South Korea from falling to the North Korean Army. On June 27, 1950, the United Nations Security Council issued a resolution that requested for members to give military aid to South Korea. On the same day, President Truman offered the United States Air Force and Navy as military help to South Korea. On June 30, 1950, President
Truman allowed the use of United States ground forces in the Korean War. (Korean-war.com, Timeline)

In 1951, the steel industry had a labor dispute. In December 1951, the United Steelworkers Union announced that it would begin a strike at the end of the month when its contract ended with the steel companies. The Federal Mediation and Conciliation Service and the Federal Wage Stabilization Board tried to work a settlement out between management and labor. The efforts were unsuccessful, and on April 4, 1952, the steel industry workers released a statement saying that on April 9, they would go on strike. (Epstein & Walker, 2001)

On the eve of the strike, President Truman told Secretary of Commerce, Charles Sawyer, that the steel mills were to remain open, even if it meant that the United States government would run them. The order was given at a time where any stoppage in the production of steel would seriously threaten the efforts of the United States in the Korean War. (Tribe, 1981)

After issuing the executive order to Sawyer, Truman immediately gave Congress notice of his actions. The response of Congress was to take no action for or against the executive order. Relying on previous instances of executive seizure without congressional approval during wartime, Truman thought his actions to be valid as the Commander-in-Chief. (Hall, 1997) The result was fourteen impeachment resolutions were introduced in Congress, the steel companies sought an injunction against Sawyer and the solicitor general refused Sawyer permission to even see the brief. (Tribe, 1981)
While Truman argued that the executive power of being commander-in-chief allowed for his actions, the steel industry brought up the Labor Management Act of 1947. The Act, they stated, was to let the parties come up with their own settlement during bargaining, and if no settlement was reached, to allow Congress to become involved. The steel industry stated that the act of being silent meant Congress had rejected the executive act of seizing the steel mills. (Hall, 1997)

The Supreme Court, in *Youngstown Sheet and Tube v Sawyer* (1952), ruled 6-3 in favor of the steel mills. Justice Black wrote the majority opinion and Justices Frankfurter, Burton, Jackson and Clark concurred. The three dissenting justices were Vinson, Reed and Minton. Vinson wrote the dissent.

Black, with Douglas, in his majority opinion stated that the, "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of the property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." (Black, 1952, p. 1)

Four justices-Burton, Clark, Frankfurter, and Jackson stated that although the President may have more powers than those enumerated in Article II, he nevertheless went against the implied will of Congress when the executive order to seize the steel mills was issued. (Epstein & Walker, 2001) Jackson, in his opinion, stated,

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at the lowest ebb, for then he can
rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. (Jackson, 1952, p. 6)

Justice Jackson also went on to state that the President’s powers fluctuate during certain times. Jackson described three situations which he felt the President's powers might be challenged.

1. When the President acts according to the direct or implied authorization of Congress then his power is at its strongest. His power under this method includes all power granted to him by the Constitution, powers granted outside of the Constitution and any measure he may take that acts in accordance to the will of Congress. If any act the President does is deemed unconstitutional during this level of power it is a sign that the United States government itself lacks the power the President was trying to use. It is at this level, according to Jackson, that the burden of persuasion may fall on the challenger.

2. When the President uses power in the absence of the will of Congress, he can use his own Constitutional powers as well as ones that have come from other sources outside of the Constitution. It is through the silence of Congress that the President enjoys this level of power. During this time the actual events that shape the time also shape the President’s power, rather than theories of law.

3. When the President uses power against the will of Congress he is at his lowest form of power. The President must rely solely upon power given to him by the Constitution, weighed against the Constitutional power Congress may enjoy in the same matter. (Jackson, 1952, pp. 7-8)

Justice Jackson then wrote in his dissent that President Truman’s executive order fell into the last and least justifiable category. That was the reason Jackson used to vote against the President’s use of power.

The previous cases have shown that when Congress acts as an outside force to give the President his power, the Courts are reluctant to constrict the power. Justice Jackson’s dissent describes this in better detail. When the
President acts alone, against the will of Congress, his power is at his lowest. When the President acts and Congress is silent, his power is at a mid level. The highest level occurs when the President acts and has the support of Congress. The addition that is made to observation of Jackson by the model is that timing has a lot of value to the issue. If the war is popular, or fresh, then the Court will find it harder to constrict the President’s power. When the war becomes unpopular or starts a downswing, the constricting process may begin. This case shows the introduction of an international governing body as the catalyst for the President’s expansion of power. This outside power acts upon the model like Congress would, however the actions are not as strong as if Congress ordered them. This shows that the President can use power he felt necessary to respond to an international organization, but the power is not at a high level since the request and support did not come from the Congress. The model shows that since the Korean War, at the time of the case, was unpopular and not backed by Congress, the constriction of the President’s power occurred.

On July 7, 1953, the United States, China, and North Korea signed an armistice ending the Korean War for the United States. South Korea did not sign and had only signed a non-aggression treaty in 1991. (Korean-war.com, Timeline)
Korean War era "expansion and constriction" model

While the war was never formally declared by the United States against North Korea, the Korean War is still a form of crisis for the United States. During the war, President Truman gained the power to wage a longstanding war without the consent of Congress to declare war. Truman also settled a labor dispute which he felt necessary to keep the war effort running. Like Presidents Franklin Roosevelt and Lincoln, President Truman did not ask for the power he received, but rather took it for himself.

The result at the federal level was that the President could sustain a war without the consent of Congress during a time of need. The Court did decide, however, against the government in regards to the steel-mill dispute. This happened as the war effort became greatly unpopular and the war itself did not have a visible end to it. This shows that even if the war is not on the decline, if it becomes overly unpopular that this may substitute for the decline in the "Expansion and Constriction" Model. This is due to the lack of support for the war by Congress; as Justice Jackson noted, the President is at his lowest power when the Constitution is silent and the Congress is not openly supporting the President.

When power was readjusted to near pre-wartime levels, President Truman lost any power he may have gained by having undeclared war against North Korea. Eventually the President's ability to wage an undeclared war was limited.
and the basis for the limitation started with President Truman's action in the Korean War.

The chart for the Korean War era (Figure 5) is as follows:

![Chart for Korean War Era]

Figure 5. Chart for Korean War Era

Conclusion of the war eras

The conclusion of Chapter 2 shows that even though different circumstances brought the different wars, though the Presidents achieved power through different means, and though the wars ended under different circumstances, the "Expansion and Constriction" Model showed to yield valid pattern.
CHAPTER 3

THE USA PATRIOT ACT ERA

This chapter shall look at the beginning of the USA PATRIOT Act era which was caused by Al-Qaeda attack against the United States on September 11, 2001. Following the review of the attacks, the USA PATRIOT Act will be examined. To conclude the chapter it will be seen if the USA PATRIOT era can be explained by the “Expansion and Constriction” Model introduced in Chapter 1 and established in Chapter 2.

History of the USA PATRIOT Act era

The United States’ war on “terrorism” resulted from the attack on September 11, 2001. At 8:15 a.m. Eastern Time Zone, American Airlines flight 11 was noticed to be off course. The airplane would be the first of four planes to be hijacked that day. American Airlines flight 77, United Airlines flight 175 and United Airlines flight 93 were also hijacked.

As a result of the hijacking, American Airlines flight 11 was piloted into New York City, New York, and subsequently into the north tower of the World Trade Center at 8:47 a.m. United Airlines flight 175 was piloted into the south tower of the World Trade Center at 9:03 a.m. American Airlines flight 77 crashed into the Pentagon in Washington, District of Columbia, at 9:48 a.m. The final
airplane, United Airlines flight 93, crashed into the area near Shanksville, Pennsylvania, at 10:06 a.m. ("Flight", 2001)

The United States Congress declared war on "terrorism" on September 15, 2001. This declaration did not specify a particular group or nation. In declaring war on "terrorism", Congress did not declare a conventional war but rather drafted the "Authorization for Use of Military Force" (AUMF) resolution. ("What Sort of War", 2001) The AUMF allows the President to use all force he deems necessary against the nations, organizations or people, he considers a threat. He can also use force against those he believes planned, authorized, committed or gave aid to the terrorist attacks, including any nation that is suspected in harboring the terrorists. ("Use of Force", 2001)

The USA PATRIOT Act was then drafted to enhance the Executive's power to carry out the "Use of Force Resolution." The Bush Administration drafted the act.

The USA PATRIOT Act

On September 24, 2001, the Bush Administration submitted the anti-terrorism legislation to Congress while the ACLU and other civil liberties groups released the "In Defense of Freedom at a Time of Crisis" statement:

Hearings have just started in the House of Representatives with other hearings scheduled September 25th, on the Anti-terrorist Act of 2001. The proposed legislation is intended to "combat terrorism and defend the Nation against terrorist acts." It now appears to be moving on an expedited schedule although many in Congress and elsewhere are encouraging the House and Senate to go cautiously and prudently without rushing into this legislation. (2) A broad coalition of civil rights and civil liberties groups as well as other political, religious, immigration, and
related organizations have signed the "In Defense of Freedom at a Time of Crisis" statement. The diverse coalition has just been established because of concerns about threats to civil liberties as the Nation addresses security and other issues in this time of war. ("Chronology of the Patriot Act", n.d., p. 3)

On October 10, 2001, the anti-terrorism bill went to the Senate floor. On October 11, the House anti-terrorism bill passed through the Judiciary Committee. On October 24, 2001, the House passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The new bill, H.R. 3162, was the result of negotiations to resolve differences between House and Senate anti-terrorism bills (H.R.2975 and S. 1510). On October 25, 2001, the Senate passed H.R. 3162, which is known as the USA PATRIOT Act. The vote was 98-1 with Senator Russ Feingold (WI) the only member voting against passage of the bill. On October 26, 2001, President Bush signed the USA PATRIOT Act into law in a Rose Garden ceremony. The time taken from introduction to passing into a law was 16 days. ("Chronology of the Patriot Act", n.d., p 4)

Title I deals with giving the Executive increased power over the internal security of the states. There are no cases of record against Title I powers.

Title II deals with surveillance, its methods, its definition, and its jurisdiction. Surveillance has been increased to include cases against chemical weapons, terrorist threats, computer fraud and abuse. This Title is one of the main parts of the USA PATRIOT Act that has come under review in the public.

In a July 26, 2002, response to the Committee on the Judiciary in the United States House of Representatives, the Assistant Attorney General, Daniel
J. Bryant, stated that there were no cases against or complaints filed against Title II of the USA PATRIOT ACT. The letter states that under Section 203, there had been approximately 40 disclosures of information from grand juries to other branches of the federal government. When asked which area of the federal government the information went to and how many separate grand juries were the source, Bryant replied, "The Department has not drawn a distinction between foreign intelligence, counterintelligence, or foreign intelligence information shared in these disclosures...We do not maintain such data (on the sources of the information)". (Bryant, 2002, p. 6) When asked if the information was asked for in a reasonable time from the court supervising the grand jury as per Section 203, Bryant stated that notices were filed in at least 38 districts in a timely fashion, but the exact time of the filings could not be recalled due to the department not maintaining records on the subject. In respect to the disclosure of other materials from Title II, Bryant was vague at best, never giving a direct number and often citing that the question could not be answered because the information was classified and an answer would be provided to the correct authorities when deemed necessary. (Bryant, 2002)

The government has cited that Title II has helped the FBI to find and stop Florida resident Sami Al-Arian. Section 218 was used in investigating Sami Al-Arian and other members of a Palestinian Islamic Jihad cell in Tampa, Florida.

Al-Arian was charged, in February 2003, with conspiracy to commit murder in an attempt to help Palestinian suicide bombers in Israel. (Goldstein, 2003) Previously the FBI had telephone and fax taps on Sami Al-Arian but could
not share the information with local law enforcement until the passing of the USA PATRIOT Act.

Al-Arian is being accused of using his charity, school and think tank as covers for raising money for Islamic Jihad. Al-Arian claimed that the enterprises are all legitimate and was designed for Muslim education and to further relationships between Arabs and Americans.

Defense attorneys for Al-Arian have stated that they will do everything they can to challenge every aspect of the USA PATRIOT Act. Calling the Act a result of the government overreacting to 9/11, defense attorney, William B. Moffitt, believed he can be successful in whittling away the USA PATRIOT Act with the information found in this case.

The United States government has responded by saying without the help of the USA PATRIOT Act, Al-Arian would not have been caught. The government went further in stating that the FBI had information that would have been useful in the arrest of Al-Arian for over a year and not being allowed to share the information with the local authorities that could make the arrest was frustrating. The point was given with an example of the critical reaction of efforts to deport Al-Najjar, Al-Arian's brother-in-law. Although the FBI had information that would have made the deportation process of Al-Najjar better received and easier to accomplish, the FBI could not submit the information they had due to pre-USA PATRIOT Act restraints. ("Fla. Case Puts Patriot", 2004)

In September 2003, Portland, Oregon, a group of United States citizens was charged with the attempt to travel to Afghanistan to contribute their services
to Taliban and Al-Qaeda. The case was built upon evidence gathered through recording devices applied to the inside of resident's homes. The devices remained for months. During this time everything that was said within the house was recorded. This included conversations of the owners of the homes, their guests and even children. The ACLU claims that such devices put into homes for an extended period of time, without the knowledge of the owners, goes against the Fourth Amendment. The surveillance through Foreign Intelligence Surveillance Court (FISC) warrants originated in 1978 to allow the FBI and Central Intelligence Agency (CIA) to spy on American citizens for the express restriction of use in hunting foreign spies. The warrant is issued by a secret court and probable cause does not need to be shown, as it does in a normal criminal warrant. In addition to an ordinary court warrant, a special warrant can be issued by Attorney General Ashcroft which allows 72 hours of surveillance before a court warrant is sought out. (Kramer, 2003)

Under the USA PATRIOT Act, the attorneys for the defense cannot see material gained by the surveillance unless they can show definite deception by the government in gaining the information. This, according to the ACLU, makes the defense come against a difficult situation; "Obviously there is no way to make that showing if the material is secret." (ACLU, 2002)

The Portland case strengthened the government's claim to Title II powers as half of the defendants eventually entered a guilty plea with agreements to testify against the other half of the people involved. The government, through the
use of Title II, stopped an act of war against the United States by using information gained. (Kramer, 2003)

Search and seizure is another problem area. According to the May 13, 2003 letter to the Judiciary Committee from Bryant, federal investigators have been allowed, on over a dozen occasions, to delay informing people about searches or seizures of their property. The delays have lasted for as long as three months and have been extended more than 200 times.

There were 47 separate occasions which searches were conducted and the informing of the target had been delayed, while on 15 separate occasions, property was seized and the owners were not told until the federal authorities deemed it necessary.

The United States Attorney General, John Ashcroft, stated that he personally authorized over 170 emergency orders for surveillance that allowed officials 72 hours of surveillance before they had to seek permission from a secret court. Ashcroft declined to state how many of the 170 cases involved terrorism. The report also stated less than 10 FBI field offices have conducted investigations involving mosques and only 9 of them were connected to ongoing criminal investigations. (Bryant, 2003) Two senators, Ron Wyden (D-OR) and Lisa Murkowski (R-AK), recently submitted a bill that would limit the Title II and FISA surveillance techniques to only foreign intelligence gathering and not criminal cases, bringing the FISA warrants back to their original purpose.

The expanded FISA powers were later questioned for constitutionality in court. The court was a secret Foreign Intelligence Surveillance Court of Review.
The decision was reached after a closed hearing and the power given to the US government by the USA PATRIOT Act was used during the trial. Namely, only the government was allowed to present its side of the case and the statements made by the government to obtain the wiretaps were held confidential and not available for review. In a normal wiretap case the defense attorney would have access to all statements made by the government that led to the securing of the wiretap. Under the USA PATRIOT Act the government material is classified and the defendant’s lawyer can only examine the material if they can show evidence of government deception. Without examining the material there is no way of showing deception in the material. This line of logic was also upheld in the secret court, even though it was one of the centers of concern from the ACLU and others that supported the defendants through amicus curiae briefs. The Supreme Court declined to hear the case.

Section 203 was also used in capturing Zacarias Moussaoui, John Walker Lindh, Richard Reid, Jose Padilla, and Abu Zubaydah. Since the investigations are still pending, most details are classified.

In 2002, *Jose Padilla v. George W. Bush* (2002) was a challenge to the government’s decision to use the USA PATRIOT ACT to hold a U.S. citizen Jose Padilla in a military jail without charges, trial, or access to a lawyer. Padilla was detained as a material witness, in Chicago, Illinois, during May 2002, for a federal grand jury investigation of the September 11th attacks and was being held in New York. In June, President Bush declared Padilla as an “enemy combatant” and therefore subject to military custody, not civilian. Padilla was placed in a Navy
jail in Charleston, South Carolina. On December 4, 2002, District Court Judge Michael B. Mukasey of New York rejected the government’s claim that the government could hold Padilla indefinitely without any trial or access to counsel. Judge Mukasey did state that the government should be entitled to deference due to the circumstances of Padilla, however Padilla should have the right to a court hearing in regards to his designation of “enemy combatant.”

Judge Mukasey reaffirmed his ruling on a separate opinion on March 11, 2003. The government has filed an appeal in the Second Circuit, meanwhile the Padilla military case has been continued under classified circumstances. (Mukasey, 2002)

The FBI has initiated broad sweeps to monitor, question, arrest, detain or deport various immigrants. Young Arab and Muslim males were the first group; Middle Eastern and South Asian heritage people were the second group; the third group was done as part of “Operation Liberty Shield” and was not specifically identified with a racial category. All of the detainees have been given counsel and the government cannot reveal any going-ons, including appeals made by the detainees, as this is classified information.

The FBI, with the new powers, has charged over 200 suspected terrorists. Section 205 has allowed the FBI to hire over 264 new translators, including Arabic and Farsi.

Section 209 which allows voice mail from a third party provider to be seized with a search warrant has been used in recent criminal cases.
Section 212 has been used to obtain records and communications from internet service providers. It has been used to trace kidnapper communications and also to investigate a bomb-threat before the threat could be carried out at a high-school.

Section 216 has allowed the track of communications of terrorist conspirators, at least one major drug trafficker, a bank identity thief, a four time murderer, and a fugitive using a fake passport. The investigation of the murder of Daniel Pearl was also aided by 216.

Title III deals with money laundering and different ways of funding terrorist organizations or activities. It gives the federal government powers to label individuals or groups as terrorists and withhold domestic or international money transfers from or to the individuals.

According to a government report, 304 names of aliens (245 money launderers and 50 spouses or children of suspected terrorist) have been added to a database of counter-terrorism. This ability is new with the USA PATRIOT Act and the information sharing abilities it grants.

Section 319 has been used to seize funds that were placed in a Belize bank after the Belize government stated that they would release the funds, only to have the Belize courts block the release of funds. The funds were deposited by James Gibson, who earlier fled the United States. Further use of 319 led to secure funds of almost 1.7 million dollars. These funds will be used to compensate victims of the defendant's schemes.
Title IV deals mainly with the ability for non-citizens to travel to and around the United States. Immigrants and people applying for citizenship status are addressed in Title IV.

Section 411 allows the United States government to redefine “terrorist organization” and “engage in terrorist activity”. This means more organizations could have been added to the terrorist list, however, the exact list is not known. This also allows the Immigration and Naturalization Service (INS) to deport more aliens on the grounds of removal being security related.

Title V is used to remove barriers between law enforcement agencies, as well as to give newer tools and the ability for more extensive searches on individuals who are labeled terrorists.

Title VI creates the funding for the law enforcement agents and other people who have a role in the government’s war on terrorism. Title VI does not have any sections of note. The Title was drafted to secure funds for the agents, for the victims, and the victim’s families of terrorist attacks.

Title VII serves the main goal of strengthening provisions for the federal, state, and local law agents to share information and work together. Title VII is made entirely of one section. The section gives the ability for multi-jurisdictional work to be preformed with greater ease.

Title VIII gives the government increased power to define what a terrorist attack is. It also attributes criminal cases with the ability to be handled within the provisions of the USA PATRIOT Act.
Section 805 concerns the ban on material support, advice, and assistance provided to terrorists and terrorist organizations. This has been used on three notable accounts.

1) October 21, 2002. Six United States citizens in Buffalo, New York, were charged with providing support to terrorists by participating in weapons training in a terrorist camp in Afghanistan. At the camp they saw a suicide bombing video that detailed the attack on the USS Cole. While at the camp they also were given an in person speech by Osama bin Laden.

2) October 30, 2002. Two Pakistani nationals and one United States' citizen were charged with conspiracy to provide Stinger missiles to anti-United States forces in Afghanistan. Syed Mustajab Shah, Muhammed Abid Afridi and Ilyas Ali were charged with conspiracy to sell heroin for money to provide aid to Al Qaeda.

3) November 1, 2002. Four men, including one United States' citizen and one United States' resident, were charged with conspiracy to sell weapons to provide support to a foreign terrorist organization in a drugs-for-weapons plot. They would have received 25 million dollars of cocaine in exchange for the weapons. (Bryant, 2002)

Title IX improves the ability for the United States to gather and use intelligence. This Title focuses on agency reports to Congress and the training of different federal agencies to fight terrorism.
Title X clears up any definitions or loose ends created by the previous Titles in the USA PATRIOT Act. It also addresses the funding requests made by the USA PATRIOT Act.

Use of the USA PATRIOT Act

This section deals with the use of the USA PATRIOT Act by the government. Listed and discussed are instances brought up by the government, cases filed against the government, legislation for the USA PATRIOT Act and legislation against the Act. Both alleged proper uses and alleged abuses are included in this section.

In 2003, in Las Vegas, Nevada, the FBI confirmed that the USA PATRIOT Act was used to secure financial information in a strip club case that included four Las Vegas politicians and Michael Galardi, the owner of the clubs, Jaguars and Cheetahs. (Page, 2003)

After the 2003 FBI sting of the Las Vegas politicians, who were accused of accepting bribes from Galardi in return for favorable political decisions for his businesses, FBI Spokesman Jim Stern stated, “A section of the Patriot Act was used appropriately by the FBI and clearly within the legal parameters of the statute.” (Radke, 2003, p. 7B)

The elected officials of Nevada, not implicated in the sting, went on record with mixed opinions on the use of the USA PATRIOT Act. Senator Harry Reid (D-NV), who is the minority whip, stated, “The law was intended for activities related to terrorism and not to naked women”. (Kalil & Tetreault, 2003, p. 4A)
Representative Shelley Berkley (D-NV) stated that she was going to inquire to the FBI about its guidelines for using the Act in cases that don't involve terrorism. "It was never my intention that the Patriot Act be used for garden-variety crimes and investigations". (Kalil & Tetreault, 2003, p. 4A) Representative Jim Gibbons (R-NV) said it may be too soon to judge the Act and its uses. Senator John Ensign and Representative Jon Porter (both R-NV) declined to make statements. (Kalil & Tetreault, 2003)

Cases brought against the USA PATRIOT Act

Libraries are expressing concerns with Title II stating that they must give information about their customers without informing the customer that such information had been given. This is not limited to library records, but also all property of the library, including the computers and computer use. The ACLU has filed a Freedom of Information lawsuit to press the government in releasing some information, to form an idea if the FBI is abusing its power. The questions asked by the ACLU, on behalf of the libraries, were similar to the questions asked by the House Judiciary Committee. In October 2003, the ACLU reported their findings.

Attorney General Ashcroft has gone to great lengths to keep secret even the most basic information about the FBI's spying. For example, in answering questions posed by the House Judiciary Committee, he classified information that should not have been classified, including information that would have shown how often the FBI is spying on people based on their exercise of First Amendment rights. The little information that we do have suggests that the FBI is abusing its powers. For example,
a survey conducted by the University of Illinois suggested that, by December 2001, the FBI had already approached 85 out of some 1500 libraries. (ACLU, 2003, p. 5)

Although the ACLU’s report showed that the FBI has been exercising its power given under the USA PATRIOT Act, the report lacks proof of misuse of the power. The report does not comment whether the FBI were legitimately using the requests, as a method of tracking a suspected terrorist, or not.

In response to the new FBI demands, a public library in Seattle, Washington, has printed over 3,000 bookmarks to hand out with the items checked out by their patrons. The bookmarks inform the patron that the FBI, with permission of a secret federal court, may inspect the patron’s reading list and its internet usage; the library would also not be allowed to inform the patron if the FBI was requesting information for surveillance. (Goldstein, 2003)

The Nevada Library Association (NLA) instituted a policy that has the computers log only the book a patron currently has checked out and erases that information from memory after the patron returns it. The computers are also wiped clear of internet memory after each day. This goes against the USA PATRIOT Act’s ability to request information as such from the libraries.

The NLA also urged Congress to repeal sections of the Act that go against the fundamental rights of the citizens of the United States. (Sebelius, 2003) The reasoning behind the NLA’s acts, according to Library District Executive Director Daniel Walters is, “A fundamental principle in public libraries is a lack of censorship, and there is no such thing without assurance of privacy.” (Koch, 2003, p. 9B)
In May 2003, the Kitsap Regional Library of Kitsap County, Washington, had a board of trustees meeting to discuss the Title II effects on the library system. Their response was to mandate that warning signs of the government’s “infringement on constitutional civil rights” (Gardner, 2003, p. 2B) were to be posted at all libraries in that district. The warning signs include the information of what can be requested without consent or knowledge and for how long records could be kept on individuals. The warning signs also add the personal feelings of the board of trustees that the USA PATRIOT Act has provisions that violate civil rights, and those provisions should be replaced. (Gardner, 2003)

Libraries are not the only targets of the USA PATRIOT Act. Journalists who reported on the internet hacker, “Lamo”, have been sent letters which stated subpoenas under the USA PATRIOT Act would be for all notes, emails, interviews, travel and expenses brought up during the creation of any article on Lamo. The main logistical problem that journalists are facing is that the FBI is requesting all records used in the articles to be reserved for three months; articles that have been written over one year ago. (Scassel, 2003)

Although not explicitly mentioned as an expanded power of the FBI, the FBI is using the term “Internet Service Provider” to label “Internet Service Consumer.” With this relabeling, the FBI has sent letters of intent to subpoena materials gathered by journalists and have strongly requested that the journalists “not disclose this request or its contents to anyone.” (McCullagh, 2003, p. 1) Both the relabeling of “Provider” to “Consumer” and the request of non-disclosure
are not covered in the expanded power of the FBI under the USA PATRIOT Act, although they are citing the Act as the basis of such power, namely from Title II.

The acts under Title III have been used to label charity organizations as groups linked to terrorism and be acted upon as such. Title III has led to investigations of any form of money transfer that may be linked to terrorism. New arrests and detentions have been made by federal agents who have targeted certain charitable groups that send money abroad, especially to the Middle East, shutting those organizations down under investigating terrorism. (Michaels & Van Bergen, 2002)

The effect of Title III also branches out into the business world of the United States. Investors who have had their funds in over-seas accounts now have an indefinite waiting period before the United States government releases those funds for use in the United States. According to James Cullors of Literature Publications Incorporated, a small business in Las Vegas, Nevada, he has been waiting for funds still in classified investigations after over a year of requesting the funds being transferred from their over-seas bank account. (Cullors, 2003) In Boston, Massachusetts, state legislative Representative Key Khan (D) had a wire transfer blocked because her husband, Nasir Khan, a naturalized citizen, has his name on a special list. The list was made up of people who could have had their name used as an alias. No notification was given to Representative Khan until an extensive search was done through her department. (Goldstein, 2003)
The Humanitarian Law Project (HLP), based in California, has been instructing the Kurdistan Workers' Party (PKK) in international human rights law. Since the PKK is currently labeled as a terrorist organization by the United States, the Humanitarian Law Project would be breaking the law under the USA PATRIOT Act if it continued to provide instruction in human rights law. The HLP, instead of waiting for the government to bring charges, filed a direct lawsuit against United States Attorney General John Ashcroft.

*Humanitarian Law Project v John Ashcroft* (2004) was decided by the United States District Court of California, Judge Audrey Collins presiding. During the case David Coal, a Georgetown University law professor, argued for the plaintiff. John Tyler, attorney for the Justice Department, handled the case for the United States. Coal argued that the USA PATRIOT Act was overbroad in parts, especially in the language that was used to define illegal acts. In her decision Judge Collins stated that since the USA PATRIOT Act made providing "expert advice or assistance" illegal, that the definitions should be more narrow and as they are now the open-ended definition of "expert advice or assistance" is "impermissibly vague and in violation of the First and Fifth Amendments." (Judge Collins, 2004, p. 1) There are no distinctions between advice given to help end a resolution peaceably and advice that would encourage violence. ("Court Rules Against", 2004)

The federal government, under the USA PATRIOT Act, has detained approximately 1200 people. Reasons for detention fall under three categories: material witnesses, immigration violators, and federal crimes. The first two
categories are groups of people who have not had their names released to press or even their families.

In August 2002, federal District Court judge Gladys Kessler ordered the Justice Department to release the names of all detainees held. "Unquestionably," she said in her opinion, "the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law." (ACLU, 2002, p. 13) Two weeks later, after being contacted by the federal government, Judge Kessler changed her ruling so that immediate disclosure of the names of the first two groups was not needed. (Moyers, 2002)

On November 28, 2001, the ACLU of New Jersey, under state law, requested the names of all Immigration and Naturalization Service detainees held in Hudson and Passaic County jails. This request was denied by the government. On January 22, 2002, in New Jersey Superior Court, they argued that New Jersey state law requires disclosure of the information. Then on March 27, 2002, New Jersey Superior Court Judge Arthur D'Italia granted access to the records. The government announced its intention to appeal and was granted a 45-day stay of the ruling. After April 22, the Department of Justice issued an interim regulation that purported to override state law in New Jersey and elsewhere by prohibiting state and local officials from releasing the names of INS detainees housed in their facilities. On the basis of the Justice Department's interim regulation, the state court of appeals reversed the trial court. The New
Jersey Supreme Court refused to hear the appeal. (*ACLU of New Jersey v. County of Hudson*, 2002)

During April 22, 2003, the ACLU of Northern California filed a federal lawsuit challenging the secret “no fly”, and other transportation, watch lists. The lawsuit, filed in federal district court, follows two Freedom of Information Act (FOIA) and Privacy Act requests. According to the ACLU, the lawsuit was necessary because the government had refused to confirm the existence of any protocols, procedures, or guidelines, as to how the “no fly” lists were created. The ACLU also claims that the government refused to detail how the lists are being maintained or corrected and, importantly, how people, who are mistakenly included on the list, may have their names removed. The ACLU is seeking immediate release of those names and procedures to gather the names.

The ACLU earlier filed the FOIA and Privacy Act requests on behalf of itself and Jan Adams and Rebecca Gordon. In 2002, both women were told by airline agents that their names appeared on a secret “no fly” list at San Francisco International Airport. The women were briefly detained by San Francisco Police while their names were checked against a “master” list. In March, the ACLU asked for a list of names to be released by the airport. On April 8, the airport released 400 pages of documents which confirm that 339 air passengers, between September 2001 and March 2003, were stopped or questioned at San Francisco International Airport in connection with the “no fly” list. (*Rebecca Gordon et al., v. FBI et al.*, 2003)
Osama Awadallah was charged with making two false statements during a
grand jury proceeding arising out of the terrorist attacks of Sept. 11. The charges
were later dropped. Awadallah was held by the U.S. government shackled and in
solitary confinement for a total of 83 days, from September 21 until December
13, 2001. He was initially held on a material witness warrant. After his
appearance before a grand jury, 20 days following his detention, he was indicted
on charges of perjury because he had denied knowing the name of one of the
Sept. 11 terrorists.

During May 2002, Judge Shira A. Scheindlin of the U.S. District Court for
the Southern District of New York, dismissed the perjury charges against him and
ruled that his detention, as a material witness, without being charged was
unlawful. \(\textit{United States v Osama Awadallah}, 2002\)

On October 2002, \textit{Yaser Hamdi v. Donald Rumsfeld} (2004), was brought
about due to the government’s decision to detain United States' citizen, Yaser
Hamdi, in a military jail without charges, trial, or access to a lawyer. Then on
August 16, 2002, a federal District Court Judge in Richmond, Virginia, ordered
the government to produce additional evidence to support its decision to
designate Hamdi as an “enemy combatant.” The government appealed the
decision to the Fourth Circuit. On January 8, 2003, the Fourth Circuit held that
the government’s showing of concern was enough evidence to label Hamdi as an
“enemy combatant” and therefore deny him access to counsel and leave him in
the military jail. \(\textit{Hamdi v Donald Rumsfeld}, 2004\)
For June 28, 2004, the United States Supreme Court ruled in *Hamdi v Rumsfeld* (2004). The ruling enabled both United States citizens and foreign nationals seized as suspected terrorists the right to stand trial under United States court. This ruling is a direct counter against the USA PATRIOT Act by being directed against the Authorization for Use of Military Force (AUMF), which the USA PATRIOT Act was created to support. The specific part of the AUMF which was being protested was the power of holding the suspects indefinitely with no chance of having a trial in a court. The ability to deny access to a lawyer while being interrogated was also taken away by the Court’s ruling. The Court did not rule fully against the government and upheld the President’s ability to label United States citizens as suspected enemy combatants and hold them as such. This power, according to the Court, was given to the President from the Congress in the form of the USA PATRIOT Act. The difference between that particular power from the USA PATRIOT Act and the powers they ruled against was given by Justice Sandra Day O’Connor, “clear that a state of war is not a blank check for the President when it comes to the rights of the nation’s citizens.” (O’Conner, 2004, p. 1) Justice O’Connor then went on to state that, although the Court declared that the suspected terrorists were entitled to a trial, a military tribunal may suffice.

The ruling had concurring opinions, dissents and dissents in part. The Court was split on not only the issue of the case, but also of how to interpret the possible issues. Judicial blocs were also split as Chief Justice William Rehnquist joined with the liberal side of the Court’s decision and moderate Justice John

In its opinion, the Court analyzed the main components of the case. Is Hamdi allowed due process and who can be declared an “enemy combatant”? The Fourth Circuit court declared, basing its ruling upon Ex parte Quirin, “one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.” (Ex parte Quirin, 1942) According to the Fourth Circuit court, since Hamdi was found in a land which the United States was at war with, he was no longer a citizen, but could be labeled an “enemy combatant” and treated as such with no claim to due process.

In the Court’s decision, it is stated that the designation of “enemy combatant” had not been defined by the government. The usage in the case had been assumed by the Court to mean, "part of or supporting forces hostile to the United States or coalition partners and engaged in armed conflict against the United States". (O’Connor, 2004, p. 2)
The AUMF authorizes the President to use all necessary and appropriate force against nations, organizations, or persons associated with the September 11, 2001, terrorist attacks. Justice O'Connor wrote in her opinion,

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. (O'Connor, 2004, p. 2)

In dissent, Scalia and Stevens suggested that there is a special procedure for imprisonment of a citizen accused of aiding the enemy in a time of war. They stated that, although in the plurality that O'Connor wrote stated that the prisoners of war must be released at the end of hostilities, it only applies to enemy aliens, and not citizens being accused of being traitors. Citizens who are accused of being traitors are tried under criminal law. Stevens and Scalia went on in dissent to discuss that the 1679 Habeas Corpus Act made it clear that indefinite imprisonment, on reasonable suspicion of helping the enemy, was not an option as long as the writ was not suspended. "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal." (Scalia, 2004, p. 34)

Scalia and Stevens' dissent concluded that even though many may think liberty should give way to security in times of crisis, that at the "extremes of military exigency, inter arma silent leges." (Rehnquist, 1998, p. 224) should hold

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no meaning in applications of the Constitution to any case wartime or not. (Scalia, 2004)

In contrast, the dissent of Justice Thomas stated that the United States government is acting perfectly within its limits of the war powers given to the Executive, and that the government should not have to give the suspected terrorists a trial, or allow them to have a lawyer present while being interrogated. (Thomas, 2004)

Justice Souter, joined by Justice Ginsburg concurred with part of the plurality and a dissent with the plurality. They agreed with the plurality’s rejection of any limitation on the exercise of habeas corpus. They could not agree, however, with the statement of the plurality that the AUMF gave the government the power to detain anyone that is designated as an “enemy combatant”, solely because they are declared as such by the President.

The Court stated that, even though a decision which gave the right of the alleged terrorists the opportunity to have lawyers present during interrogations and to have a trial under a United States court, the decision itself was limited to those prisoners being held at Guantanamo Bay, and not to prisoners held by the United States elsewhere.

The ruling of Hamdi shows a rarely used part of the model. The war on “terror” has not ended and the President has gained the powers he is using by the Congress. Previously it has been established that if the power is given by Congress then the Court is more reluctant to constrict the power, also if the war is ongoing it is rare to find the Court constricting the President’s power. The
reason why Hamdi apparently goes against the model is because of popular opinion is shifting towards constricting the President's power. Popular opinion is acting as an outside force on the model. The model shows that opinion can strengthen the power, as in the time of World War II relocations, and that it can weaken the power, as in the Korean War. This ruling means, according to the model, that the point at which the Court remains undecided to restrict the power has past. The constriction has begun, however, since Congress was the agent that gave the President power, the expansion of the power is still the trend. This, according to the model, is because of a lack of the war's end. The war on "terror" has started to become more unpopular, but it has not met the breaking point.

After the ruling on Hamdi became public, the Las Vegas Review-Journal ran a story from the Associated Press on July 3, 2004, that according to Gina Holland, nine Guantanamo Bay detainees had challenges filed on their behalf as recently allowed by the decision of Hamdi. According to the report, approximately 600 more detainees are expected to have challenges filed for them.

The attorneys for the nine detainees stated in their Friday court filings that, "the prolonged, indefinite, and restrictive detention is arbitrary and unlawful". (Holland, 2004, p. 2A) At time of the filing, Pentagon spokesman, Major Michael Shavers, went on record stating, "No decision has been made on how we are going to comply with the Supreme Court ruling. The ruling wasn't simple, and while we certainly will comply, the exact manner is still being discussed." (Holland, 2004, p. 2A)
In *United States v. Richard Reid* (2003) the ACLU of Massachusetts filed amicus curiae brief opposing a broad gag order that barred Reid's lawyer from talking to other lawyers, including anyone in his office, about his case. The court gave Reid's attorney permission to expand the number of people he talked to as long as the discussion related to the defense of Reid. The conversation for the lawyer was strictly limited to the legal field and could not be discussed in the press. Later Reid pleaded guilty. (*United States v Richard Reid*, 2003)

On August 22, 2002, the Justice Department stated that a secret court had limited the ability of investigators to coordinate surveillance against terrorism suspects and announced plans to appeal the ruling. In an unprecedented move, the federal government appealed a May ruling by the Foreign Intelligence Surveillance Court (FISA), stating it unnecessarily narrowed new anti-terror laws that allowed a wider berth in conducting electronic surveillance and in using information obtained from the wiretaps and searches. In the previously secret May ruling, the court criticized the government for a number of misstatements and omissions in applications, and stated it had violated court orders regarding information sharing between investigators and prosecutors. But in the May ruling, made public for the first time August 22, 2002, the court ruled that intelligence officials cannot give advice related to the surveillance to investigators carrying out the searches or wiretapping. The court also implemented an oversight requirement.

The workings of the court have been kept secret. The court, made up of judges designated by the Supreme Court Chief Justice, deals mostly with secret
or top secret information and has never before published any of its rulings. (Charles, 2002)

On April 6, 2004, the American Civil Liberties Union (ACLU) filed a lawsuit against the Federal Bureau of Investigation (FBI). The lawsuit, Doe and ACLU v Ashcroft (2004), was filed following the guidelines set by the FBI in a gag provision, a power given to the FBI by Section 505 of the USA PATRIOT Act. The lawsuit challenged the FBI's use of the National Security Letters (NSL) that allow the FBI to demand customer records from Internet Service Providers (ISP) and other information or business services. The records could be demanded based solely on the FBI's suspicion of an individual and did not require judicial oversight. The ACLU based its lawsuit on grounds of First and Fourth Amendment violations inherent in Section 505. The gag provision delayed the disclosure of the case for two weeks from the initial filing. The ACLU claimed that the USA PATRIOT Act was overbroad in granting the FBI the power to demand personal business information of an individual without judicial oversight or informing the individual being investigated. The government, as in past cases, has stated that the sensitive and timely nature of anti-terrorist efforts require the ability to search personal records without the delay a judicial oversight would cause. ("In ACLU Case", 2004)

On September 29, 2004, Judge Victor Marrero of the Southern District of New York, ruled in favor for the ACLU. The ruling declared Section 505 of the USA PATRIOT Act illegal. The decision was based on two issues. The first issue was with regard to the gag provisions, and was held unconstitutional due to
the First Amendment. The second issue was in regard to the demanding of personal business records without oversight; this was overturned based on the Fourth Amendment. In his decision, Judge Marrero stated, "Under the mantle of secrecy, the self-preservation that ordinarily impels our government to censorship and secrecy may potentially be turned on ourselves as a weapon of self-destruction." (Marrero, 2004, p. 2)

After the ruling the United States Government released information stating that the case was not against the USA PATRIOT Act itself, but rather against an older law upon which Section 505 was based. Steven J. Duffield, a Senate Republican Policy Committee analyst, released in email that stated the ACLU lawsuit was not against the USA PATRIOT Act and that the ruling only struck the 1986 law on which Section 505 of the USA PATRIOT Act was based. The ACLU claims that since Judge Marrero made comments in reference to the FBI's power to demand email records of individuals, the claim that the case was against the 1986 law is invalid. It is the ACLU's claim that only Section 505 of the USA PATRIOT Act gave the FBI the right to demand email records without judicial oversight. In addition to the lack of the power to demand email in the 1986 law, the statute also only granted power to perform a search if the transmission was deemed to be going to or from a foreign agent, and not a civilian. ("ACLU Blasts", 2004)

The ruling in this case comes at a time when the war on terrorism is losing focus. The United States is in current debate whether the war is a winnable war and if the war is being handled properly by the current Bush Administration. The
model shows that if the war is on a decline or if the popularity of the war is on the
decline, then the power gained by the President, during a time of crisis, weakens
as the crisis weakens.

Section 505 of the USA PATRIOT Act gave a power from Congress to the
Executive that, during times of peace, would not have been created. It was not
until almost three years after the creation of the power that a lawsuit had been
filed against Section 505. This, according to the model, happens due to the
passage of time allowing the courts to become less undecided on the action to
take in regards to the expanded powers of the President. The model suggests
that if the case would have been brought before the court when the USA
PATRIOT Act was first passed, the decision would be in favor of the government
and not the ACLU.

Legislative reactions to the

USA PATRIOT Act

Since the legislation put forth by Ann Arbor, Michigan, to limit the reach of
the USA PATRIOT Act on January, 7, 2002 (Schabner, 2004), there have been
258 more communities in 38 states, who include three state-wide responses to
the USA PATRIOT Act, for a sum of almost 45 million people, who have joined in
protest of the USA PATRIOT Act. The legislative powers in the places have
passed measures that nullify some of the, in their belief, overbroad powers of the
USA PATRIOT Act. (ACLU, 2004)
Senators Russ Feingold (D-WI) (the only person to vote against the act), Lisa Murkowski (R-Alaska) and Representatives Bernie Sanders (I-VT) and Jerrold Nadler (D-NY) and Joseph Hoeffel (D-PA) have tried to introduce bills that would take back portions of the act. The bills, however, have failed. (Holland, Jessie, 2003)

The government’s use of the USA PATRIOT Act allowed increased search and seizure projects. To perform the projects the government requested, additional funding needs to be released. On July 22, 2003, the House of Representatives voted 309-118 to strike down funding for a search and seizure power. (Hentoff, 2003)

In March 2003, a bill was introduced in response to library backlash. Vermont Representative Bernie Sanders (independent) introduced the Freedom to Read Protection Act. The act allows the same powers that Title II allows but the guidelines to use libraries as a means of surveillance are increased. (Gardner, 2002) Specifically, the proposed legislation would protect the privacy of patrons by preventing law enforcement agencies from compelling bookstores and libraries to release lists of books purchased or borrowed. The USA PATRIOT Act had broadened the scope of searches allowed under the Foreign Intelligence Surveillance Act. The proposed legislation would also require the Attorney General to more completely report to the Congress on a regular basis, the results of such searches.

Due to not following procedure, the Freedom to Read Protection Act was not offered as an amendment to the Justice Department’s Spending bill. On
Tuesday, July 22, 2003, restrictive procedural rules denied Bernie Sanders (I-VT), C.L. "Butch" Otter (R-ID) and John Conyers Jr. (D-MI) to offer their amendment to the Commerce-State-Justice Appropriations bill. The proposal would stop funds from being used to search bookstore or library records under Section 215 of the USA Patriot Act.

The House did adopt an amendment that prevents the Justice Department from "sneak and peek" warrants authorized by the USA PATRIOT Act. The House vote represents the first example of congressional intent to limit Justice Department powers under the Act.

The Safety and Freedom Ensured Act (SAFE Act) was introduced by a bipartisan coalition of senators led by Republican Larry Craig of Idaho and Democrat Richard Durbin of Illinois. The proposed act would put severe limitations on the use of the USA PATRIOT Act powers that dealt with domestic spying on college professors or students. (AAUP, 2004)

Legislative support for the USA PATRIOT Act

Recently John Ashcroft made trips across the United States trying to rally support for the USA PATRIOT Act. These were done to promote the goals that the government has achieved only by having the Act in place. Ashcroft was asking for both popular and legislative support. He was asking for funding for the provisions of the Act, as well as giving information about the Act, so that states and local communities can enhance their constitutions with the Act instead of
creating barriers between the local and federal governments. Utah has been one of the states to draft legislation to improve the state's ability to use the USA PATRIOT Act in respect to local law enforcement agents working alongside federal agents or agents of another county, city and even state.

PATRIOT II, has also come in support of the original USA PATRIOT Act. This item was drafted by the Bush Administration without the knowledge of Congress. In it the loopholes created in the USA PATRIOT Act have been closed. The bill, drafted by the staff of Attorney General John Ashcroft, entitled the Domestic Security Enhancement Act of 2003, includes the following major ideas that would change how the USA PATRIOT Act currently operates.

Section 201, "Prohibition of Disclosure of Terrorism Investigation Detainee Information": Safeguarding the dissemination of information related to national security has been a hallmark of Ashcroft's first two years in office, and the Domestic Security Enhancement Act of 2003 follows in the footsteps of his October 2001 directive to carefully consider such interest when granting Freedom of Information Act requests. While the October memo simply encouraged FOIA officers to take national security into consideration without risking sensitive business information and personal privacy. The proposed legislation would enhance the department's ability to deny releasing material on suspected terrorists in government custody through FOIA. (Lewis & Mayle, 2004)

Section 202, "Distribution of 'Worst Case Scenario' Information": This would introduce new FOIA restrictions with regard to the Environmental Protection Agency (EPA). As provided for in the Clean Air Act, the EPA requires
private companies that use potentially dangerous chemicals to produce a "worst case scenario" report detailing the effect that the release of these controlled substances would have on the surrounding community. Section 202 of this Act would, however, restrict FOIA requests to these reports, which the bill's drafters refer to as "a roadmap for terrorists." By reducing public access to "read-only" methods for only those persons who live and work in an area most likely to be affected by a worst case scenario, this subtitle would obfuscate an established level of transparency between private industry and the public.

Section 301-306, "Terrorist Identification Database": These sections would authorize creation of a DNA database on "suspected terrorists," expansively defined to include association with suspected terrorist groups, and non-citizens suspected of certain crimes or of having supported any group designated as terrorist.

Section 312, "Appropriate Remedies with Respect to Law Enforcement Surveillance Activities": This section would terminate all state law enforcement consent decrees before Sept. 11, 2001, not related to racial profiling or other civil rights violations, which limit such agencies from gathering information about individuals and organizations. The authors of this statute claim that these consent orders, which were passed as a result of police spying abuses, could impede current terrorism investigations. It would also place substantial restrictions on future court injunctions.

Section 405, "Presumption for Pretrial Detention in Cases Involving Terrorism": While many people charged with drug offenses punishable by prison
terms of 10 years or more are held before their trial without bail, this provision would create a comparable statute for those suspected of terrorist activity. The reasons for presumptively holding suspected terrorists before trial are related to the nature of what a terrorist can accomplish if not held.

Section 501, "Expatriation of Terrorists": This provision, the drafters say, would establish that an American citizen could be expatriated if he relinquishes his nationality by providing support to a group the United States declares as a terrorist organization. But whereas a citizen formerly had to state his intent to relinquish his citizenship, the new law affirms that his intent can be "inferred from conduct." Thus, engaging in the lawful activities of a group designated as a "terrorist organization" by the Attorney General could be presumptive grounds for expatriation. (PATRIOT II, 2001)

PATRIOT II has not passed through legislation as of yet. Currently the Justice Department is requesting that PATRIOT II pass through legislation, while opponents of the Act are seeking petitions to stop the passing. (ACLU, 2003)

The model applied to the Patriot era

The attack on the United States on September 11, 2001, initiated the "Expansion and Constriction" Model by allowing the President to assume more power in hopes of both, preventing future terrorist attacks on the United States, and to deal with those responsible for the 9/11 attacks. Like President Lincoln,
President Bush was granted the power to secure the civil protection of the United States, even if it was at the expense of the civil liberties of the United States.

President Bush did not take power, as did President Lincoln, nor did he wait for Congress to act entirely as did President Wilson. President Bush, and his administration, drafted the USA PATRIOT Act and then Congress passed it giving the President the power he sought.

During the war on terrorism, President Bush has instituted an attack on terrorism both at home and abroad. Searching for alleged terrorists in the United States, the USA PATRIOT Act has been used. Under the use of the Act, a person accused of being a terrorist can be put on a secret list which denies the ability to travel on commercial airlines, freezes the financial accounts, and allows for his or her indefinite detention and allows for trial under military tribunal as enemy combatants of the United States. As seen in Chapter 2, the previous war eras had cases similar and all have been found to be illegal after the war ended. The Court has even stated, during the Civil War, that during a time when civil courts are operational, a civilian may not be tried in a military tribunal. The indefinite detention of civilians in the United States is reminiscent of World War II and the detention-curfew imposed on Japanese Americans. With these similarities, it can be seen that during the beginning of the USA PATRIOT era, the President's increased power allows for the government to defy what the Court has established.

President Bush, like President Lincoln, has shown that the courts may be held impotent. While President Lincoln ignored any court rulings against the
government, President Bush showed that even when the courts have ruled against the United States (Center for National Security Studies v United States Department of Justice, 2004) that, through letters sent by the Department of Justice to the presiding judge, he could persuade the judge to overturn the judgment due to the nature of the USA PATRIOT Act and the timely nature of the war on terrorism.

Again, as it has been shown through the other eras, it is not always the outcome of the court cases, but rather the increase in number of the cases themselves. Even in dissent, as in Justice Jackson’s dissent in the case of Korematsu, a trend can be shown for eventual readjustment of presidential power.

After the wars in the eras of Chapter 2 had either finished or had become too unpopular to continue, the President’s power began to readjust to near pre-wartime levels. The problem faced in the USA PATRIOT era, is the lack of a conventional war. The United States is in a state of perpetual war on terrorism. Congress, when issuing the war on terror, did not define on which terrorist group war was declared. Instead of specifying a group, Congress has allowed the President to do what he felt needed to stop terrorism abroad.

This information fills the major components of the “Expansion and Constriction” Model and shows that the USA PATRIOT era does not fit the model. There is a current struggle of increasing the USA PATRIOT Act powers by one group whereas another group, is attempting to minimize the current powers. At present both groups are in a form of deadlock without the guidance
of whom these powers, or lack, of will be directed to and safeguarded from. The problem lies with the lack of a declaration of war in a conventional means. With no conventional war declared, and with the support of Congress to wage war against an undefined nation, the power gained by the President cannot find a way to pre-war time readjustment. The courts, although not silent, have become impotent and undecided. As can be seen in this chart (Figure 6), most of the cases decided against the government.

CHART OF CASE OUTCOMES

RULED FOR THE GOVERNMENT

The “Portland 7” case-United States wins with sentences of imprisonment against the still living members of the “Portland 7”. Case is dropped when the last member is confirmed killed in action overseas.

US v Richard Reid (2002)-Case is dropped when Reid pleads guilty.

Center for National Security Studies v United States Department of Justice (2004)-Decision later reversed by presiding judge.

RULED AGAINST THE GOVERNMENT

Jose Padilla v. George W. Bush (2002)-Under Appeal by Government while Padilla’s military trial still goes on. (Case essentially ignored by United States; Padilla still imprisoned)

Humanitarian Law Project v John Ashcroft (2004)-United States asked to define “support” better in the USA PATRIOT Act.

Rebecca Gordon et al., v. FBI et al. (2004)-Government ordered to review the no-fly list for possible errors and give a sworn statement that they have reviewed it)
United States v. Osama Awadallah (2002)-Case subject to Osama only.

Hamdi v Rumsfeld (2004)-Only deals with detainees at Guantanamo Bay, and does not specify what sort of trial the detainees are allowed.

Doe and ACLU v Ashcroft (2004)-Case strikes Section 505 and can be appealed by the government.

Figure 6: Cases of the Patriot Era

Even in the case of Hamdi, where the government lost its ability to deny the Guantanamo detainees a trial and access to lawyers, the Court did not state how and under what authority the detainees must be tried. As it can be seen in the statement made by the Pentagon, in reference to the Court’s decision not being clear, and by the statement by Justice O’Connor in reference to the trial not having to be a civil trial, that a military tribunal would suffice, the case which took away power from the AUMF did so in a way that left its decision open to the government’s interpretation. The model fit the previous war eras because there was a definite enemy which the United States had declared war on. Having a definite enemy leads to having a definitive end to the war. This then allowed the “Expansion and Constriction” Model to carry out its course.

The following figure (Figure 7) shows the chart of the “Expansion and Constriction” Model when it was tried to be applied to the USA PATRIOT era.

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Figure 7. Chart for Patriot Era
CHAPTER 4

ALICE SITS DOWN FOR BREAKFAST

The USA PATRIOT Act has been seen as an attack on civil liberties. This is not an uncommon occurrence during times of war. In the past it has been shown that every war era has had such effects on civil liberties. The difference between the past war eras and the current, is the past wars were conventional wars and have ended. The current war is unconventional and there can be no end until the United States decides not to pursue its goal of having a war on "terror." This means an indefinite suppression of civil liberties. The intent of this thesis was to show that a pattern of power shifting in the presidency occurred during times of war. The pattern, labeled the "Expansion and Constriction" Model, was then applied to cases of past wars to show validity. The model was then applied to the USA PATRIOT Act so that a prediction could be made. This chapter will answer four questions:

1. Does the "Expansion and Constriction" Model exist?
2. Can it be applied to the case of the USA PATRIOT Act?
3. What prediction can be made from the Model?
4. What future use, if any, exists?
The "expansion and constriction" model tested

To test the "Expansion and Constriction" Model, cases were selected from eras of war in the United States. Each case was then broken down into the component parts that the "Expansion and Constriction" Model needed to function. Every war from the past eras, when fitted into the components, made the model valid. The pattern from war rising to the increased berth of presidential power to the subsequent readjustment of that power to near pre-wartime level, held up in testing.

The adjustment of power started with the introduction of hostilities and the readjustment of power began when the federal courts became involved. It is not the court decisions that make the component, but rather the court cases themselves. Having a court case at the federal level indicates that the nation is taking issue with one of the expanses of power the President had during the time of crisis. As the number of court cases at the federal level increased, more opinion towards the readjustment of power was shown, even dissents are found useful. The fact that the court cases exist is just as important as the outcome of the cases. Even if the government wins the court case, history has shown that eventually, through other means, the power of the President will be readjusted.

It has been shown that the court cases will sometimes be decided in the government's favor and strengthen the President's adjusted power, but eventually more cases will come into the USSC and the outcomes will start to favor the near readjustment of the President's power back to pre-crisis times.
The following figures are the resulting charts created showing the testing done to the "Expansion and Constriction" Model in the war eras of Chapter 2; (Figure 2, Figure 3, Figure 4, and Figure 5).

The charts listed above show that there is a predictable pattern which has been shown valid from the Civil War era to the Korean War era. A precedent of power adjustment of the presidency during crisis time exists. Can the precedent of the "Expansion and Constriction" Model be applied to the current situation with the USA PATRIOT Act?

Application of the "expansion and constriction" model to Patriot era

The "Expansion and Constriction" Model had been successfully applied to the cases in Chapter 2; however, could it also be applied to the USA PATRIOT Act with equal success? In the past era cases, all of the components of the model have shown to have existed. The problem that occurred while trying to apply the "Expansion and Constriction" Model to the USA PATRIOT Act in Chapter 3 was due to the differences found in the case of the USA PATRIOT Act.

The components of the "Expansion and Constriction" Model as seen valid through the cases of the past eras are:

1) A Crisis which can be seen as a conventional war.
2) Power Given to the President
3) The Silence of the Courts
4) The Use of the Power Given to the President
5) Attack on Constitutional Rights of United States residents labeled as "enemy nation related".
6) Complaint Filed at a Federal Court Level
7) The Crisis on the Downswing
8) Federal Court Involvement  
9) Readjustment of Power to President to a Lower Level

The details of the USA PATRIOT Act case do not lend themselves to fit into the components of the "Expansion and Constriction" Model as applied to the cases of Chapter 2. The USA PATRIOT Act's case shows these components instead:

1) The Crisis not being a conventional war due to lack of definition of a conventional enemy which belongs to a nation.  
2) Power Given to the President  
3) The Silence of the Courts  
4) The Use of the Power Given to the President  
5) Attack on Constitutional Rights of United States residents labeled as "terrorists"  
6) Complaint Filed at a Federal Court Level  
7) The Crisis not on the downswing due to the lack of defining the enemy which the United States is fighting in conventional war terms.  
8) Federal Court Involvement-stifled due to lack of definition of the "enemy nation".

Reviewing Figure 5 and Figure 7 shows the main differences between the case of the USA PATRIOT Act era and the previous crisis cases is the lack of a conventional war being the main crisis and the use of the term "terrorist" instead of "enemy nation". With those changes to the components, the crisis becomes perpetual and the "Expansion and Constriction" Model cannot be applied.

To make the "Expansion and Constriction" Model apply to the USA PATRIOT Act era, the word "terrorist" must be connected to a specific terrorist group. Currently there is a lack of a single group. This means there can be no end to the war since the enemy is not defined conventionally. The word "terrorist" may be defined as an ideological group that has declared war against the United States. Since the United States has not declared war on all forms of
terrorism, such as the Irish Republican Army (IRA), but rather a very specific group of terrorist, al-Qaeda, a definition of “enemy nation” can be given to that specific terrorist organization.

With this new definition of “terrorist” as “enemy nation”, the crisis becomes a conventional war which no longer is perpetual, but eventual, in ending. This, in turn, will let the “Expansion and Constriction” Model apply to the USA PATRIOT Act era, and a prediction of readjustment of power can be made.

With the new corrections to the USA PATRIOT Act case, the “Expansion and Constriction” Model fits and the chart for the Model appears as following (Figure 8):

Figure 8. New Chart for the Patriot Era
Prediction

With the USA PATRIOT Act now having components that fit the "Expansion and Constriction" Model, precedent shows that the President's powers will eventually readjust themselves to near pre-wartime levels. Currently there are only two major court cases that involve the USA PATRIOT Act. One case eventually affirms the government's use of the USA PATRIOT Act and the other case calls a portion of the power given by the USA PATRIOT Act unconstitutional. If more federal cases on the USA PATRIOT Act are introduced, then the "Expansion and Constriction" Model shows that no matter the outcome of the cases, eventually a readjustment of power will occur. This is not to say that all of the powers granted by the USA PATRIOT Act will be taken away. Some of the power, such as the allowance of the FBI, CIA and local law enforcement to work jointly, is anticipated to remain. Some of the Act itself is only temporary and has an expiration date if not renewed. There is also the chance of the government using the structure of the USA PATRIOT Act to introduce new legislation but that is beyond the scope of this thesis.

Future use of the "expansion and constriction" model

As stated in Chapter 1, there are two groups that have issue with the USA PATRIOT Act. One group wishes to maintain or increase the powers given through the USA PATRIOT Act, and the other group wishes to eliminate or
readjust the powers given by the USA PATRIOT Act. With the "Expansion and Constriction" Model, both groups can now formulate a successful plan of action.

If one were to want to increase or maintain the powers of the USA PATRIOT Act, then the need for an ongoing crisis arises. Only through a sustained crisis can the President maintain powers adjusted by the USA PATRIOT Act. To sustain the crisis of war, the term of "Terrorist" must remain vague and useable beyond the ideological group of al-Qaeda.

The other group wishes to readjust the powers given by the USA PATRIOT Act and can use the "Expansion and Constriction" Model to show that, through federal court involvement, and not through protesting, they can lead to the readjustment of power. Win or lose in the federal court system, the issue that this group tries to raise will be brought to the forefront of American politics and eventually will have the desired outcome of power readjustment.

One limitation of the current model is that the model does not take the personalities that make up the Congress, Supreme Court or the President in consideration. Future studies could be conducted to determine the effects personalities have on this model. This does not seem to effect the eventuality of readjustment, but rather the speed at which the readjustment occurs may be effected.

The readjustment has been shown in the past not to be an instant occurrence, but rather something which happens over a period of time; sometimes over generations. It has been shown in this thesis that, even though generations may pass, the power given through the USA PATRIOT Act will
readjust to near pre-wartime levels. This conclusion has been called optimistic but, "like Alice, I like to believe three impossible things before breakfast." (Davidson, 1983, p. 74)
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