Bill of Wrongs
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Review
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Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism
by Geoffrey R. Stone
Norton, 730 pp., $35.00

The People Themselves: Popular Constitutionalism and Judicial Review
by Larry D. Kramer
Oxford University Press,337 pp., $29.95

1.
Of the innumerable expressions of patriotism in America, "My country, right or wrong!" is surely the most succinct. Geoffrey R. Stone sets it at the head of his history of free speech in a time of war, not for the truth of it but as exemplifying a much-loved conception of patriotism. Its author was Stephen Decatur, the naval hero who, in 1805, commanded the raiding party that burned the captured American frigate Philadelphia off Tripoli. Today the United States is waging war in the same part of the world, no longer an upstart country avenging insults to its youthful national pride. But to say now that Decatur's loyal toast scarcely rises above the level of a slogan does nothing to undermine its emotive, unifying power.

Patriotism, however defined, plays a powerful part in Geoffrey Stone's engrossing history of the fate of civil liberties when the country goes to war. In making his points about the corrosive effects of war, or the rumor of war, upon civil liberties, Stone is far from being an absolutist. At all points he takes the hardheaded view that when a democracy such as ours is under grave threat the rights of individuals have to be balanced against the right of the nation to defend itself against subversion. What interests Stone as a legal scholar is the social pressures and processes by which that often tenuous balance is achieved or undone. Orthodox legal scholarship has seldom made good use of historical evidence or historical methods, deficiencies Martin S. Flaherty has brilliantly analyzed.[*] Stone gives as much attention to the changing historical settings as to the legal and constitutional developments that grew from them. High constitutional principles had to survive and find their meaning in the give and take of everyday politics.

Most of Stone's book is devoted to modern wars. It begins, however, with the quasi war with France, our erstwhile Revolutionary ally, because the single most blatant instance of using politics as an instrument for repressing civil liberties was coeval with the birth of the American political system as we now know it. Today Americans are commonly heard to say, "I know my rights." But the men who had taken such pains to add a Bill of Rights to the Constitution, and who had designed the Constitution to deflect the forces of faction and corruption, came to be bitterly divided over the meaning of those rights. Within a decade they had split into two factions, Federalists, led by Alexander Hamilton and John Adams, and Republicans, led by Thomas Jefferson and James Madison, with each denouncing the other for betraying the Revolution, each building a party machine, each sponsoring a party newspaper. Stone takes it for granted that when high principle is reduced to everyday politics, the result is "petty jealousies, partisan squabbling, and deep distrust." But he notes more ominously that the Founding Fathers of the Republic "were unsure of the constitutional system they had put in place." And their differences of opinion were unfailingly projected onto the battlefield of partisan politics.

Distrust and uncertainty could take many forms but found an especially virulent outlet in the paranoia surrounding the French Revolution. Europeans and Americans both saw "Jacobinism" as a political, economic, and religious catastrophe. England joined Prussia, Austria, Spain, and the Netherlands in a coalition to preserve monarchy and to wage war against France. The declared policy of strict American neutrality was undermined by British interference with American shipping and impressments of American sailors, and by French commerce raiding, which resulted in the capture or destruction of hundreds of American merchant vessels. John Adams, failing to distinguish himself as Washington's chosen successor, looked on while Congress abrogated the treaties with France and began military preparations. In such an atmosphere, Stone observes, "the nation's commitment to civil liberties was quickly rationalized out of existence." This development he sees reenacted time and again in succeeding centuries.

The most disturbing events of the quasi war turned out to be not British and French affronts to American national pride but the partisan campaign of domestic repression and censorship for which the specter of war with France was only a pretext. In an era of political extremism hotheads and rounders of all political persuasions traded curses and blows (even in the halls of Congress), while mobs laid hands on men designated as political targets. But it was the Federalists, reaping enormous advantages from being the party in power, who passed laws in 1798 for the express purpose of suppressing individuals and institutions claiming rights of dissent under the Constitution. The Enemy Aliens Act (still in effect today), which allows the president to order the detention, confinement, or deportation of citizens of countries with which the US is at war, the Alien Friends Act (which expired after two years), and the Sedition Act (lasting only for the term of Adams's presidency) furthered no legitimate government goals, serving only to institutionalize xenophobia and popular hysteria under the cover of national security.

While there was a measure of bipartisan support for the Enemy Aliens Act, the Sedition Act was designed to punish a different class of enemies, namely people and publications assailing President Adams and the war measures associated with his party. With respect to the targets of the Sedition Act, the Republican propagandists, of whom twenty-five were arrested and ten actually stood trial, were a truculent lot. Matthew Lyon, Thomas Cooper, and James Callender were the kind of men who could never see a hornets' nest without prodding it with sticks. It is not disputed that they denounced the President as an ignoramus and a tyrant, complained bitterly of the costs of preparing for war, and—in common with their Federalist antagonists—engaged in wholesale character assassination. Still, given the inflammatory political culture of the time, how those commonplace activities amounted to the crime of sedition is almost unintelligible.

What is staggering, moreover, is the degree to which the federal judiciary exhibited the spirit of vendetta. To appreciate the effect this had upon Sedition Act prosecutions, one has to remember that all the federal judges (enjoying lifetime tenure) were Federalists. And the court system then in place had justices of the United States Supreme Court riding circuit to preside over local federal cases. Thus it was that Federalist judges punished Republican defendants for the purported crime of heaping abuse on the Federalist President. These justices virtually directed Federalist juries to render guilty verdicts, passed excessive sentences, levied ruinous fines, and relied upon Federalist United States marshals to make the conditions of imprisonment as severe and demeaning as possible.

Faced with an opposition so obdurate, Jefferson was not content to lament "the afflicting persecutions and personal indignities we had to brook." While Republicans throughout the country organized protests, Jefferson and Madison persuaded the legislatures of Kentucky and Virginia to pass resolutions affirming state sovereignty and declaring the Alien and Sedition Acts to be unconstitutional. No other state backed these positions, and no amount of protest availed to

protect Republicans against persecution. But just as the Adams administration derived its power from party ascendancy, it was a reversal of political fortune that brought the party of Jefferson into power in 1800. Determined to have an end to political bloodletting, the Republicans, Stone tells us, took to heart their president's call for national amity ("We are all Republicans—we are all Federalists"), moving the nation into the "Era of Good Feelings."

While the United States and France managed to compose their differences without resorting to war, war with England could not be avoided in 1812. Only now it was Mr. Madison's War, not Mr. Adams's, and Federalists no longer were pro-war. On the contrary, in the winter of 1814–1815 they convened at Hartford, Connecticut, in order to find a way to thwart the war effort. Despite flirting with secession, these unreconstructed Federalists were not persecuted. Thirty years later, when the United States declared war against Mexico, many Americans denounced the venture as a land grab and a subterfuge for invigorating the Slave Power. But there was no concerted campaign to silence dissenters. Although Stone does not dwell on the contrasts between the almost-war with France and these subsequent conflicts, one may well conclude that the extremes to which the Federalists had carried their assault on free speech and free association made it impossible for a political party in the early nineteenth century to exploit war for purely partisan advantage.

Stone draws unsettling conclusions from the preceding era of very bad feelings, tracing "important patterns of discourse" that came to prevail in later wars. Subversion and sabotage have been seen as ever-present threats. Suspicion and animosity have been directed against foreigners (or outsiders), who are accused of owing allegiance to enemies of the United States, whether hostile European or Asian powers or the Confederate States of America. Labeled as subversives, both aliens and citizen dissenters have suffered from organized campaigns of vilification and disinformation. Preoccupation with wartime security takes the form of equating criticism with disloyalty, while lawful acts of protest and mere association with dissenters are equated with treason. Moreover, these assumptions and attitudes have powerful effects on the government and the courts, which can be persuaded to use the language of crisis legislation, emergency executive orders, and jurisprudence adapted to the demands of the moment in order to justify sweeping denials of constitutional liberties.

2.
In Stone's analysis of war crises after 1798, all these factors come into play. And although his book is subtitled "Free Speech in Wartime," many such episodes concern violations of rights to free association and wrongful detentions. Indeed, the best-known cases of the Civil War and World War II concern the suspension of habeas corpus on the one hand and the internment of Japanese-Americans on the other. Each war presents a particular profile of repression or attempted repression, with no one branch of the government and no single popular institution escaping criticism.

The Civil War, which offered the most serious threat ever mounted against the nation's unity, proved less of a threat to civil liberties than the quasi war of the 1790s had. The reason may perhaps be a more settled popular appreciation of the constitutional principles on whose behalf the war was fought; but Stone also gives credit to Abraham Lincoln. As the candidate of the newly formed Republican Party (with no connection to the Jeffersonian party of that name) he had to deal with die-hard members of the older Democratic Party, the so-called Copperheads, who opposed the war. They had outspoken and powerful leaders among elected officials and politicians, as well as newspapers given to headlining conscription riots, Union army debacles, and the "tyrannical" excesses of President Lincoln.

Lincoln "was politically committed to the basic principle of free speech," Stone writes, pointing to the Republican Party's embrace of free _expression, a commitment based on decades of battling suppression of antislavery opinion and activities. The principal attacks on free _expression during Lincoln's administration came as much from Union generals as from legislators or judges. Ambrose Burnside, as commander of the Department of Ohio, took it upon himself to declare martial law in April 1863, issuing General Order No. 38, which prohibited "the habit of declaring sympathies for the enemy." Accordingly, a court-martial jailed Clement Vallandigham, a leading Copperhead, and a federal judge denied his petition for a writ of habeas corpus. The reaction of many Republican newspapers was not to justify the action but to denounce it, and prominent Republican leaders condemned this departure from party and constitutional principles. Undaunted, Burnside proceeded to shut down the newspapers that sided with Vallandigham, expanding the list of actions that caused Lincoln, "vexed with Burnside for acting so imperiously," to order his vexatious general to release Vallandigham but to expel him from the Union and send him to a Confederate state. Subsequent action by General John M. Schofield to curb the press brought further odium on Lincoln's conduct of the war.

Faced with serious criticism of these proceedings, Lincoln—whom Stone credits with genuine tolerance for even the most vituperative of his detractors —did something quite extraordinary for an American president. He made two thoughtful and principled defenses of his actions. The first was in response to the Democratic resolutions, known as the "Albany Resolves," adopted at an 1863 meeting of Democrats, which denounced the Lincoln administration for violating the Constitution. The second was in a special address to Congress disputing Justice Taney's decision in Ex parte Merryman that the president lacked authority unilaterally to suspend habeas corpus, as Lincoln had done on eight separate occasions. Weighing Lincoln's record, Stone dismisses these criticisms, considering him to be both an able constitutional lawyer and a president committed to "harmonizing liberty and power through constitutional discourse."

While Stone clearly admires Lincoln, he is critical of Woodrow Wilson, faulting him for resuscitating the long-discredited idea of punishing "sedition." One might suppose that the author of Constitutional Government in the United States (1908) would have shared Lincoln's vision of harmonizing liberty and power in pursuit of the greater good. As a professor of government, Wilson had written that "agitation is certainly of the essence of a constitutional system," yet even before his election he publicly favored aggressive action to root out disloyalty. As Stone poses the question, the central issue was "whether the United States could punish public opposition to the war because it might sap the nation's resolve and thus the war effort." Wilson's answer was yes. He got his wish when Congress enacted the Espionage Act of 1917.

It was not Congress, however, but Wilson who insisted upon an expansive interpretation of the act. And he exerted himself to arouse public feeling against suspected agitators. His Committee on Public Information, headed by George Creel, was established to fan popular support for the war effort, an aim that Stone observes was within the legitimate activities of government. With the backing of the attorney general, however, the CPI went on to foster voluntary organizations that were used to help identify disloyal Americans. Citizen-sleuths in the American Protective League numbered more than 200,000, and they reported thousands of people to the authorities on the basis of gossip and hearsay. There were many similar groups, including some that resorted to vigilante tactics and mob violence.

Faced with challenges to the Espionage Act, the federal courts struggled to develop a free speech jurisprudence, for which "there was scant judicial precedent." Judges Learned Hand, George Bourquin, and Charles Fremont Amidon sought principled interpretations of the act by requiring "a tight causal connection between speech and harm, or concrete evidence of a direct impact on

individuals in the armed forces, or express advocacy of law violation." Stone praises the judges who took their stand against indiscriminate attacks on dissent for their insistence that "freedom of speech is not a mere personal privilege of the individual but a fundamental element of the democratic process even in wartime." But at the time they proved to be in the minority and earned the disapproval of other judges, as well as the condemnation of politicians, bar associations, and newspapers. Some jurists who favored free _expression and free association still felt constrained to support dubious interpretations of the laws, as when the federal courts allowed "juries to infer specific intent" to violate the Espionage Act "from the bare possibility that the speaker might have had such an intent." When the heat is on, it is naive to assume that the courts will consistently interpose their countervailing force against popular feeling. "What occurred in the federal courts of 1917–18 was not the result of confusion over a technical point of law. It was, rather, the consequence of war hysteria."

Examples could be multiplied from the protracted Red Scare that gripped the United States in the 1920s, the Japanese internments of World War II, and the repressive measures taken during the cold war, the McCarthy witch hunts, the Vietnam War, and the current "war on terror." While Stone describes different stratagems and subterfuges to which government officials, lawmakers, judges, and vigilantes resorted during each of these episodes, what is most striking about his narrative is the continuities, as the same reactions of paranoia and repression recur with eerie regularity.

To read Perilous Times is to be confronted with the powerful social, cultural, and institutional barriers to the protection of civil liberties in wartime. It is important, however, to stress, as Stone does, that our nation "did not always succumb to wartime hysteria." There have, he shows, been considerable enlargements of the scope and promise of the First Amendment and other constitutional protections—for example, the Supreme Court's dismissal of the Smith Act—although after September 11 these were once again challenged, for example, by the Bush administration's Patriot Act, passed by Congress "in an atmosphere of urgency and alarm," and which

smuggled into law several investigative practices that have nothing to do with fighting terrorism, but that law enforcement officials had for years tried unsuccessfully to persuade Congress to authorize. It failed to require reasonable executive branch accountability, undermined traditional—and essential—checks and balances, and disregarded the fundamental principle that government intrusions on civil liberties should be narrowly tailored to avoid unnecessary invasions of constitutional rights. This is a book whose discerning legal and constitutional analysis, clear prose, and humane outlook deserve the highest praise.

3.
Perilous Times is a chronicle of minority rights imperiled by a tyranny of the majority. The People Themselves is the obverse, a chronicle of majority rights usurped by a small and elite class of jurists. The two books are not in conflict. Both are concerned with the way different interpretations of the Constitution have adversely affected the conduct of government over the past two centuries. Both will inevitably be read for the historical perspectives they provide on what the courts and the government are up to in the present. While Stone tracks historical violations of specific provisions of the Bill of Rights, Larry Kramer's objective is to establish the historical authority of "the people themselves" to determine how the Constitution has worked in particular situations, through the exercise of "popular constitutionalism." For Kramer these two phrases have expansive meanings that emerge from detailed historical analysis.

In the eighteenth century, before constitutions were written, Kramer writes, people carried on extralegal resistance to laws or decrees of government that they considered violations of an unwritten, time-honored "customary constitution." Some of the principles of that constitution had once found written _expression in England in formal documents: the Magna Carta of 1215, the Petition of Right of 1628, the Declaration of Rights of 1689, all of which had limited the authority of kings who claimed a divine right to govern. In the eighteenth century when political thinkers derived the authority of government from the sovereignty of the people, these early documents could be thought of as expressions of a customary constitution, which had always defined government's limits and guided intervention in its activities by the sovereign people.

Popular constitutionalism first manifested itself in such interventions. They are not to be confused with the creation of written constitutions, drafted and adopted by elected conventions that claimed to act as "we the people." Kramer pays little attention to formal constitution-making, presumably because it was not the people themselves that did the making. These, after all, were lawyers' constitutions. How then did the people themselves intervene to exercise their sovereignty? The answer is a little startling. "Crowd action," he says, "represented a direct _expression of popular sovereignty."

Identifying riots as an exercise of the highest political authority has to be seen as part of a wider movement among historians to confer respectability, not to say legitimacy, on eighteenth-century mobs—the use of the word "crowd" is preferred. "Crowd actions" have been found to involve all classes of people and to be directed against violations of traditionally accepted social values: "skimmingtons" or "charivaris," in which adulterers were shamed, food riots against merchants who charged too much in times of scarcity, and, most pertinently, organized riots, like the Boston Tea Party, that challenged established authority in the name of constitutional rights. John Philip Reid at New York University's Legal History Colloquium has led a generation of distinguished scholars in finding a large, popular, extralegal element in the articulation and enforcement of law in every form and particularly in the constitutional and legal activities of the American Revolution.

Kramer's popular constitutionalism is one such element, defining and affirming the customary constitution by showing what it was not. Popular constitutionalism was best exemplified before 1776 in the riots that defeated enforcement of the Stamp Act of 1765 and the Tea Act of 1773. What popular constitutionalism could be after 1776 is more elusive. Though it did not create the new state constitutions, it was in some sense present in what Kramer believes was a widespread consciousness of the customary constitution. That consciousness continued somehow to convey the will of the people themselves independently of anything written. "Evidence abounds," Kramer asserts, "of the ongoing vitality of the customary constitution after the Declaration of Independence and drafting of new state constitutions." He apparently has the customary constitution in mind when he later refers to "the original sense of a constitution as popular law for the people themselves to interpret and enforce." He finds evidence for the continuity of that original sense mainly in legal opinions that defer to custom and tradition. But he further tells us that "numerous instances of popular enforcement could be cited (for politics in the 1780s and 1790s was often an unruly affair)."

At some point, however, the customary constitution as an _expression of popular sovereignty faded from existence, and popular constitutionalism had somehow to be applied to the written Constitution of the United States as understood in the popular mind. It took effect less against

government than in and through government and through the political parties contending for control of government. The 1790s, which figure in Stone's account as a kind of continuing model of government violation of constitutional rights in wartime, become in Kramer's account the breeding ground for a new popular constitutionalism directed against such violations. In the 1790s, as republican government steadied itself, the numbers of citizens engaged in politics swelled, as did their demands to control the course of government. This was reflected in much more than expanded suffrage and higher voter turnouts, though these were certainly important. It appeared as well in the emergence of new organizations, new forms of communication and political _expression, and new public rites and rituals. Juries, mobs, and other traditional local institutions remained important, but now so too were the budding political parties, the Democratic-Republican societies, and the new partisan press. Public opinion became the active ingredient in politics, popular sovereignty acquired a concrete meaning, and the Constitution could be read as the words of the people themselves. Popular constitutionalism thus becomes Kramer's term for popular political action of any kind that gains its leverage from affirmation of constitutional principles. He finds a prime example in the Kentucky and Virginia Resolutions of 1798 against the Alien and Sedition Acts. But the principal vehicle of popular constitutionalism, after the federal Constitution replaced the "customary" one as the people's own, was the political party. Popular constitutionalism triumphed in the Republican Party's victory in the election of 1800. After that it disappeared for a time and revived only with the building of a Democratic Party under Andrew Jackson and Martin Van Buren in the 1830s and 1840s. Local Democratic clubs and assemblies "formed the base of a pyramid by which the voice of the people was gathered, consolidated, and transmitted to higher authority." When the Whig Party organized itself in the same way, popular constitutionalism found expression principally in party politics.

This is a novel and creative way of looking at constitutional history, giving intellectual continuity to disparate activities occurring over several centuries. It is instructive to see a common element in such varied matters as, say, the Boston Tea Party of 1773, the Virginia and Kentucky Resolutions of 1798, and the Democratic Party of the 1840s. Kramer never does define popular constitutionalism, but in his narrative it becomes a kind of ongoing ideological belief, a creed in whose name "the people themselves" have long acted to protect their constitutional rights and privileges. His argument would be more persuasive to historians without this reification of a broad descriptive term. But he has endowed it with a historical presence and a capacity for action, laying the groundwork for the role he assigns it in contests with the courts, and particularly the Supreme Court, over interpretation of the Constitution.

Here we meet the main theme of the book. Almost from the beginning of the national government the judiciary had been developing an exclusive claim to "say what the law is." To do so it had to overcome claims of the executive and legislative branches to an equal authority. The court's instrument was judicial review of legislation. During the early years of the republic it was presumed that if a piece of legislation flagrantly violated the Constitution, the courts would be obliged to disregard it in their decisions and thus annul it. In the nineteenth century the courts began to extend judicial review to legislation that could be said to violate the Constitution only by placing the Constitution itself within a system of jurisprudence that, Kramer argues, was unknown and incomprehensible to the people themselves or to their elected representatives.

Before the Civil War, while the courts were creating this system, the other branches of government successfully affirmed their own competence to ascertain what the Constitution meant and were supported by popular constitutionalism embodied in the Whig and Democratic parties. But after the war, the Supreme Court increasingly exercised and stretched judicial review to discover in the Constitution meanings unknown to its authors or to "the people themselves." The crowning example was Lochner v. New York (1905), in which the Supreme Court, by a line of

reasoning so thin as to be almost invisible to laymen, held that a law limiting working hours in bakeries violated the Constitution. By this time popular constitutionalism had subsided again in surrender to judicial supremacy. In the twentieth century, Kramer writes, it revived in the Progressive movement, and it gained a victory in the success of New Deal legislation against judicial challenges, and then in the exercise by the courts of "judicial restraint" for a time thereafter. But during the last half-century the exclusive right of the Supreme Court to settle constitutional issues has won all but universal acceptance, as demonstrated in the broad consensus that the decision in Bush v. Gore settled the dispute over the presidential election of 2000.

Kramer's argument is that the Supreme Court has arrogated to itself a role that cannot be justified on the basis of our political history and our experience as a people. His objective is to revive popular constitutionalism once again, not through any particular organization or activity, but by reminding people that the government is their government and that the Constitution is their constitution, subject to their interpretation in their own way.

The People Themselves, by extending John Philip Reid's approach to constitutional and legal history, offers a fresh way of viewing the origins and limits of judicial review. It challenges conventional constitutional jurisprudence and conventional constitutional history with a deeply researched historical pedigree for popular refusal to accept the Supreme Court's usurping title to the people's document. The effectiveness of the challenge depends heavily on our acceptance of the word "themselves" as applied to the people exercising popular constitutionalism. Popular constitutionalism as we first encounter it in crowd actions is indeed the work of actual people who can be seen and heard. The leap of logic required of us is from "themselves" to "the." But it is a long leap, a longer leap than we have already made in giving popular constitutionalism a continuous if fitful existence as a force in itself. Insofar as they take political action, the people themselves are always a small minority of the actual population.

Moreover, popular actions, whether by crowds or parties, can be directed toward unconstitutional ends. Many of the violations of constitutional rights described by Stone have had overwhelming popular backing. In some instances the courts have proved more protective of constitutional rights than Congress or the president or any party. Recently it took the Supreme Court to insist that the American citizen Yaser Hamdi, captured in Afghanistan and held for two years without access to a lawyer, had the right to contest his detention in court. He was released. Nevertheless, Stone himself, citing an earlier version of Kramer's argument, insists that "the protection of freedom must come ultimately from the people themselves," as indeed it did in 1800 and 1860. Democratic constitutional government rests on the assumption that the people themselves, or the active majority of them, will do right in the long run, better than any officers of government far removed from them. George Washington, who never understood or condoned the Republican opposition to his government, nevertheless was confident that "the Mass of our Citizens require no more than to understand a question to decide it properly."

In the immediate aftermath of the September 11 terrorist attacks, America's citizens seem to have resigned their power of decision about the Constitution to the President and the politicians of both parties, who pushed through enactment of legislation that Stone describes as having "disregarded the fundamental principle that government intrusions on civil liberties should be narrowly tailored to avoid unnecessary invasions of constitutional rights." Since then, however, Congress and some of the people they represent have expressed second thoughts about both the impact and the scope of the act, and the administration decided not to pursue its plans for a more intrusive Patriot Act II.

In a development that Kramer would welcome as a confirmation of his thesis, something that deserves to be called "popular constitutionalism" has revived in a grassroots movement to deny the constitutionality of the act. Coming together in an organization called the Bill of Rights Defense Committee, people in widely separated towns, cities, counties, and several states have persuaded city and town councils to pass resolutions condemning the administration's threats to civil liberties, much as the Virginia and Kentucky Resolutions defied the Alien and Sedition Acts. By recent count, over 380 local city councils have adopted such resolutions, declaring themselves to be "safe zones" against prosecutions for violations of the act. Whether they will have long-term practical effect in limiting federal authorities has yet to be shown.

The election of 2004 cannot be taken as a mandate for the administration to violate the Constitution and its Bill of Rights. The refusal of Congress to pass further legislation expanding the administration's monitoring and surveillance capacities led Stone to conclude that "once fears had settled, the response was more clear-eyed and more resistant to further expansions of executive authority." This supports his argument that the people themselves have come to accept a far different balancing of individual rights and national security than was imagined in the first years of the Republic, or during the military conflicts of the century just past. We have to hope that in the end the people themselves will assert their authority, as they have in the past, to interpret and defend a Constitution dedicated as much to minority rights as it is to majority rule.

Notes
[*] Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," Columbia Law Review, Vol. 95 (April 1995), pp. 523–608.