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I thank the Committee for inviting me to provide a somewhat different perspective at these hearings. But I should say at the outset that I have not served in the Bush administration. I do not see it as my role to defend the administration against any particular claim of abuse, much less against all claims that critics might want to pursue. I have no doubt that the Bush administration has made some mistakes.

So I'm sure there is room for this Committee to contribute to a constructive public debate on a number of issues. What I hope to do is simply to raise some cautions against letting criticism boil into rage. It is right to raise questions. But we should keep the larger context in view.

The first point I want to make is my main point: Nothing that has happened since September of 2001 is more extreme or more disturbing than what has been done by other presidents in the past. Let me cite some reasonably well known examples from our history.

Is there question now about the adequacy of congressional debate or the form of the resulting resolutions authorizing war in Afghanistan and Iraq? In the spring of 1941, President Roosevelt directed our navy to patrol into the mid-Atlantic in order to provide protection for ships bringing arms to Britain. Britain was engaged in full-throated naval war with Germany, the "Battle of the Atlantic." The U.S. Navy was not simply enlisted to make a show of force but to attack German U-boats when it encountered them – which it did repeatedly, with the full understanding that U-boats were likely to treat U.S. warships as enemy targets in return. Hundreds of American sailors were lost to U-boat attacks and the whole venture probably goaded Hitler into declaring war on the U.S. right after the U.S. navy suffered what seemed a terrible blow on December 7. But President Roosevelt, through this entire military venture, never asked Congress for a resolution of support, let alone a formal declaration of war.

Less than a decade later, President Truman committed half a million troops to a war in Korea. He also declined to ask for a congressional resolution of approval or support. Truman could not, as FDR did with his naval policies in summer and fall of 1941, speak of "steps short of war." President Truman committed U.S. forces to a full-scale war in Korea from the outset. But Truman claimed that because the UN Security Council had authorized a military response to North Korea's invasion of South Korea, it was not necessary for the U.S. Congress to make any separate determination of what should be done with U.S. forces.

State Department lawyers insisted at the time that ratification of the UN Charter had implied U.S. consent to such arrangements. But no president since then has dared to claim UN authorization made it unnecessary for Congress to have its own say. (Certainly President George H.W. Bush was careful to follow up UN authorization for military action against Saddam in 1990 with a separate resolution of approval from the U.S. Congress.) Yet President Clinton, when he committed U.S. air power to the war against Serbia in 1999 did not get authorization from the UN. He did seek authorization from Congress – but then went ahead with weeks of intense bombing, even after Congress refused to provide such authorization.

Are critics worried about abuse of civil liberties at home? President Roosevelt authorized wire tapping of anyone suspected of involvement with potential security threats. The authorization was not limited to overseas lines. Nor was it limited to known enemies. The authorization was given in the spring of 1940 – almost two years before congressional declarations of war established which powers were our official enemies. Once the Second World War started, President Roosevelt insisted that enemy combatants found in the United States – the famous German saboteurs landed from a U-boat on Long Island – should be tried by a secret military commission, which paid no attention to the fact that some of the saboteurs were U.S. citizens. Meanwhile, Hawaii was placed under martial law and even charges involving financial improprieties of local (civilian) stock brokers were left to military officials to judge and punish by their own lights.

During the First World War, the Wilson administration sent anti-war critics to prison for publishing cartoons that derided military conscription. The Lincoln administration had actually closed down some newspapers during the Civil War. Using the military as an enforcement arm, it sent more than ten thousand civilians to military detention without benefit of ordinary judicial process. Critics did not suffer in this way during the Second World War. But some 120,000 Japanese-Americans were placed behind barbed wire for most of the war. They were not charged with any crime. They were held in detention camps on the sole basis of suspicious ancestry.

Compared to such extreme measures in the past, the Bush administration has acted with great caution. I don't at all mean to suggest that recollection of past abuses should immunize all current policies from criticism. Many things were accepted in the 1940s – racial segregation in the armed forces is an obvious example – which would now be regarded as utterly outrageous. We live in a different historical context and we are obliged to judge many questions from our own perspective, not the perspective of our grandparents.

But history is at least a reminder that not every abuse becomes a precedent for subsequent, more extreme abuses. If there is any evident pattern in our experience since the Civil War, it is that each war experience has left a residue of caution that affected the way the next war was conducted at home. President Wilson did not think to suspend habeas corpus, as Lincoln did during the Civil War. President Roosevelt did not think to invoke criminal process against expressions of anti-war opinion, as Wilson did. Part of

the reason is that there were post-war second thoughts about wartime abuses. Lincoln's suspension of habeas corpus was condemned in the Supreme Court's post-war (1866) ruling in *Ex Parte Milligan*. Wilson's prosecutions were challenged, at least in spirit, in the post-war dissents of Justices Holmes and Brandeis, demanding that the government meet some burden of proof before claiming mere denunciations of government policy – mere speech – could be treated as “clear and present danger.”

In short, we have, in the past, recovered our balance after the excesses of wartime. So we should not treat every abuse as if it paves the way for an unobstructed slide into peacetime tyranny. If we have gone too far, we can recover our balance – as we have in the past.

This brings me to the next main point I want to make. It is, of course, precisely in wartime that presidents feel entitled to relax (or disregard) ordinary legal scruples. And, of course, there is a good reason for this. In wartime, the president must give priority to questions of basic security. It's more important to keep the enemy at bay than to uphold every peacetime standard of due process or constitutional limitation. The public tends to share this view – which is why Presidents Lincoln, Wilson and Roosevelt are all still honored, even though they presided over many questionable wartime measures.

Our late Chief Justice, William Rehnquist, wrote a book on “Civil Liberties in Wartime” (called *ALL THE LAWS BUT ONE*, after President Lincoln's argument that he must not let all the laws go to ruin out of excessive tenderness toward the one law on habeas corpus). In analyzing President Roosevelt's decision to place Japanese-Americans in detention camps, Rehnquist quotes the recollection of FDR's Attorney General, Francis Biddle about the president's thinking at the time: “Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any war time president.” Rehnquist was taken with the statement that he repeats it in the last pages of the book.

One can say that the war against terror – or indeed the war in Iraq – has now gone on longer than any previous war. One can say a war “against terror,” is so open-ended, it may go on for decades. One can say, therefore, we cannot accept controversial Bush administration policies with quite the equanimity that past generations showed toward hard presidential war measures, because – unlike past generations – we have no assurance that these measures will prove temporary.

All of these are fair points and worth considering. But we should remind ourselves that in the immediate aftermath of the 9/11 attacks, we had no reason to think the country could go on for seven years without a repeat of terror attacks on that scale. We are now looking at these questions with the benefit of hindsight. We should remind ourselves that decision-makers in the Bush administration did not have that luxury. We should at least accord them the some of the charitable presumption we granted to other wartime administrations – whose actions we have sometimes repudiated (as with the detention of Japanese-Americans in World War II) while still recognizing the context that

allowed generally decent people in those administrations to make some wrong turns. And we should recall that, if we can't see a definite endpoint to a "war on terror," it was not easy to say when precisely we shifted from post-9/11 emergency to a more long-term policy environment of routine vigilance.

And that brings me to my last point. It's hard to have a sober debate in wartime, because passions run too high – including the strongest passions, fear and anger. In that sense, we should be in a better position to debate issues of presidential power and civil liberties in 2008 than we were in 2001 or 2002-03. But we have the opposite disability today. Where war tends to bring people together, we now face extreme partisan division.

Our partisan divisions aren't the result of the war and they aren't the result of the peace. They have been building for a long time. They were only briefly in remission, perhaps for a year or so, after the original 9/11 attacks. Political scientists have constructed fairly precise models to measure partisan voting in Congress. (Keith Poole of UCSD and Howard Rosenthal of NYU are the most prominent analysts of these trends.) What they find is that partisan voting in Congress has been building steadily over the past two decades and is higher now than at any time in the past century. Southern Democrats are no longer a different party from Northern Democrats. Liberal Republicans in the Northeast – well, there aren't many of them left.

We have had two very close presidential elections – and angry disputes about whether votes were counted fairly. We have, behind that, an electorate that is more readily mobilized on partisan lines than in the past. We used to rely on the same three television networks and the same few news services or national news magazines for our printed news. Now we have narrow-casting cable programs, talk radio, the Internet. It's possible to get constant coverage of all political and world developments all the time – and entirely from a left-liberal or entirely from a highly conservative perspective.

The one thing that follows is that issues tend to cluster. Feelings about one issue tend to reinforce inclinations about the next issue. It's logically possible to support gay marriage, a woman's right to choose on abortion and strong measures to avert global warming -- while simultaneously supporting the claim that the Second Amendment confers an individual right to bear arms and we should stay in Iraq until we finish the job. Someone holding this set of views would not necessarily be incoherent or befuddled. But it is hard to find such a person in Congress, on the radio, on the op-ed pages, on any popular website.

What this means is that people who are angry at the Bush administration for other reasons – because they oppose tax cuts, say, or Bush policies on the environment – will be much more likely to suspect the worst about Bush administration war policies and security policies and respect for constitutional proprieties in these areas. So there are strong temptations to appeal to the people who think this way by escalating charges in this area. The Constitution is the most precious thing we have in our common political keeping. What could be more of a betrayal than betraying the Constitution? Anyone who seeks to paint the Bush administration in a bad light will gravitate to such charges.

The Bush team aren't just misguided, they aren't just deaf to the lessons of recent experience, they aren't just blind to emerging trends – they're enemies of the Constitution!

We can't, of course, remove politics from debates about how presidents have performed. And we can't go into a presidential election campaign without a lot of heated rhetoric about how high the stakes are for the country. But we should remind ourselves that we're not in the best position to make good judgments when we're at our most emotional.

We should have a debate about presidential power and presidential policies. But we should try to keep it within bounds. Democrats don't want to leave the country more exposed to terror attacks. Republicans don't want to leave the country devoid of constitutional safeguards for liberty and privacy. We will all have to live in the same country and share the same Constitution. We do have real enemies – and they aren't Democrats or Republicans. Our real enemies want to kill people in America. We should not lose sight of that deep fact in the background – even though so many other trends encourage us to focus our enmities on partisan rivals within this country.