In November of 1814, the White House lay in ashes, burned to the ground by British troops. President James Madison was living in temporary quarters at the so-called Octagon House, having returned to Washington after fleeing the city. His government had seen division and humiliation, and it had not yet seen Andrew Jackson’s redemptive after-the-fact triumph in New Orleans, which would come a few months later. In a letter to Virginia governor Wilson Cary Nicholas on November 25, 1814, Madison reflected on the difficulties that the nation faced in prosecuting the war:

You are not mistaken in viewing the conduct of the Eastern States as the source of our great difficulties in carrying on the war; as it certainly is the greatest, if not the sole, inducement with the enemy to persevere in it. The greater part of the people in that quarter have been brought by their leaders, aided by their priests, under a delusion scarcely exceeded by that recorded in the period of witchcraft; and the leaders are becoming daily more desperate in the use they make of it. Their object is power.\(^1\)

It was not a stray comment on Madison’s part. In a letter to former president Thomas Jefferson more than two years earlier, he had complained that “the seditious opposition in Massachusetts and Connecticut, with the intrigues elsewhere insidiously co-operating with it, have so clogged the wheels of the war that I fear the campaign will not accomplish the object of it.”\(^2\) And in a letter to a New England sympathizer in September 6, 1812, he lamented:
I will not conceal the surprise and the pain I feel at declarations from any portion of the American people that measures resulting from the National will constitutionally pronounced, and carrying with them the most solemn sanctions, are not to be pursued into effect, without the hazard of civil war. This is sure not . . . a course consistent with the duration or efficacy of any Government.3

Nor was Madison much, if at all, exaggerating the situation. The behavior of at least some of the Federalist opposition—which involved marshaling state resources to oppose federal policy, openly siding with the enemy against Washington, and frankly contemplating the dissolution of the union—looks as positively disloyal in retrospect as it did to Madison at the time.

One might reasonably expect, given the scope and scale of the opposition to the war and the intensity of the president’s feelings about it, that he would have taken bold action against the opposition. It is an age-old maxim, after all, that “inter arma silent leges”—that the law, along with the liberty that it protects, falls by the wayside when a country is threatened. In the War of 1812, not only was the country threatened, the White House and the Capitol lay in ruins—and the president saw domestic political opposition as the main reason that the British persisted in their war effort. What’s more, this was the period immediately following the era of the Alien and Sedition Acts, the latter of which had criminalized criticism of the federal government and its policies. It had also been deployed barely a decade earlier against members of Madison’s political party by the very same Federalists who were now opposing the president’s policies. If ever a moment in American political history justified a measure of political repression, the War of 1812 was surely one.

Yet the many books about the history of civil liberties in the United States in wartime all seem to have a chapter missing—and strangely, it is the chapter that would deal with this very period. For example, Geoffrey Stone’s book on the history of free speech in wartime jumps straight from the Sedition Act and the quasi-war with France in the late 1790s to the Civil War.4 The late chief justice William Rehnquist touches on the War of 1812 only glancingly in his famous book, All the Laws but One: Civil Liberties in Wartime. He devotes a few paragraphs to Andrew Jackson’s repression of dissent in New Orleans, but as to Madison’s handling of civil liberties during the war more generally, he offers only two derisive sentences: “True, during the War of
1812, the British sailed into Chesapeake Bay, burned the capital, and briefly invaded Maryland. But that was only an episode in a war that was quite unlike the Civil War, and the national government under President James Madison was too weak and inert to abridge anyone’s civil liberties.”

There is a reason that the standard treatments of civil liberties in wartime omit this period, and Rehnquist’s barb suggests it: despite the dire threat that the nation faced, the War of 1812 did not see serious infringement of civil liberties. Particularly in comparison with presidents during other wars, Madison showed remarkable restraint in nearly all respects during the War of 1812, which took place in the country’s infancy, when there was still great conceptual space for robust claims of presidential power to restrain freedom. The war saw dramatically fewer intrusions on civil liberties than did later wars or even earlier episodes short of war in the country’s still-young history.

Madison’s leading biographer, Ralph Ketcham, who described Madison as the “unimperial president,” wrote that

Madison’s course [during the War of 1812] was consistent with his theory of republican government and especially of the use of executive power. Though in the last extremity he might have suspended civil liberties or even marched in the army, even to have had to do so would for him have been a stunning, profoundly sorrowful defeat—a “victory” in such an effort would have had only a bitter taste . . . to have acted as a tyrant within his own country would have been to default grievously and utterly. . . . To be imperious, or domineering, or grand was to him simply inappropriate in a president who was the agent of the people, the follower of Congress in matters of policy, and the creature of the Constitution in the definition of his powers. In this sense Madison’s conduct of the War of 1812, with all its difficulties, indecisiveness, and failures, was an ultimate triumph in that republican government emerged confirmed and strengthened.

Irving Brant, in his book about Madison’s presidency during the war, similarly called Madison

the bulwark of civil liberties in a passion-torn country wherein the spirit of treason ran rampant. He took this stand at a time when Jefferson was suggesting tar and feathers, hemp [nooses] and confiscation [for dissenters], when a justice of the Supreme Court was asking
for prosecution under unwritten law, and when personal calumnies were being poured in a ceaseless stream upon his head by the very men whose liberties he was refusing to curtail.⁷

The story of civil liberties during the War of 1812 is often ignored because it is a story of a dog that didn’t bark—of repression that did not occur, of strong executive actions not taken, and of risks incurred and tolerated, not preempted. While a few ugly episodes caveat Madison’s record of restraint, the overall pattern contrasts sharply with the more familiar narrative of executive excess during times of peril.

That fact, in turn, raises two vexing questions. First, why does Madison’s record diverge so dramatically from the conventional conduct of presidents in wartime? Was it, as Rehnquist suggests, a function of his being “weak and inert”—not quite enough of a president to violate civil liberties as a man of greater mettle surely would have done? Or was it, as Ketcham and Brant describe, a matter of principle, of commendable outlook and philosophy? Or was it, perhaps, something else?

Second, to the extent that Madison’s restraint flowed from choice, not constraint, should we think of it as virtue or vice? In the modern era, we tend to fear excessive executive muscularity, even as we demand action of our presidents. But in Madison’s day, the contours of the presidency—and public expectations of it—were still very much contested. Madison’s handling of domestic opposition during the War of 1812 thus offers a rare opportunity to imagine executive crisis management in an America in which the executive had not evolved in such a relentlessly Hamiltonian direction as it did in later years. Instead of asking whether and how the president went too far—as we would of Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, and George W. Bush—we should ask whether Madison went far enough.

Unprecedented Dissent

The War of 1812 saw the most concerted domestic opposition to any war that the United States has ever fought. Historian Donald R. Hickey describes it as “America’s most unpopular war,” noting that “it generated more intense opposition than any other war in the nation’s history, including the war in Vietnam.”⁸ Opposition to the war was immediate, ferocious, and highly
regional—with the Federalists of the New England states, which had tight commercial ties to Britain, especially strident in their opposition.

One distinctive feature of the opposition to the War of 1812 was that unlike opposition to the Vietnam War, it was not chiefly a citizens’ protest movement—an amalgamation of individuals who opposed federal policy. The chief actors were the most senior officials of state governments, exercising control over the actions of their states at a time when states had a dramatically greater role in the execution of policy than they do today. Particularly because the militias were run not by the federal but by the state governments and were key to any national mobilization, state officials were essential actors in any national military endeavor. President Obama does not need cooperation from the governors of Connecticut or Massachusetts to wage war in Afghanistan today. But a president in 1812 could not effectively wage war in Canada or along the New England coast with the governors of those states actively seeking to frustrate the war effort. To prosecute such a war, the still-nascent federal executive, particularly in the very modest non-Hamiltonian form in which Madison conceived it, would need their active assistance. Instead, Madison got their active hostility.

At the onset of the war, at least, outright obstruction of the war effort was minimal, and the Federalists largely limited themselves to criticizing the president, the war, and the president’s motives and purpose. The Federalists, conscious of the possibility of eroding the authority of government itself, initially urged only political protest. In New York and New Jersey, for example, they distanced themselves from those who opposed the war through what they termed “any irregular opposition—by violence, by menace, or illegal combinations.” Connecticut officials took a similar view, and the Massachusetts House of Representatives called for domestic order a few weeks after Congress declared war.

That early commitment to patriotic dissent, however, did not last for long. Once the war began in earnest, Federalists did not limit themselves to the sort of antiwar rallies that they held throughout New England in the summer of 1812—rallies in which they denounced the war and Madison’s supposed alliance with France. Madison also faced concerted Federalist resistance, as Ketcham explains, to efforts to collect taxes, recruit military officers, mobilize militias, enforce court orders, regulate trade, and even deploy the army and navy. In July of 1812, Federalist members of Congress who voted
against the war urged their constituents toward outright obstruction of the war effort. The obstruction went further, writes Ketcham:

Massachusetts refused to send militia to meet a British invasion of Maine, Vermont smugglers drove herds of cattle into Canada to feed British troops, Connecticut Federalists talked of a New England army free from Federal control, and the Massachusetts legislature called for a convention to play regional “self-defense,” and to decide whether “to lay the foundation for a radical reform in the national compact.”

Pamphleteer John Lowell III, who gave the war the moniker “Mr. Madison’s War,” urged militia members not to fight. And as Harvey Strum describes, opposition to the war among New York militia members was substantial enough that it meaningfully impeded military operations:

When Colonel Solomon Van Rensselaer proposed a sortie into Canada the militia refused to cross the border. Efforts to launch an attack . . . failed because only sixty-six of four hundred troops would cross into Canada. At the battle of Queenstown [Queenston Heights] in October [1812] more than 1,200 militiamen refused the pleadings of General Van Renssaeler to cross the Niagara River to relieve troops trapped by the British. When General Harry Dearborn tried to march on Montreal a month later the militia refused again to invade Canada. . . . [There were] frequent mutinies and mass desertion.

Meanwhile, New England courts insisted that only their state governors, not federal officials, could muster the state militias. Madison faced outright disobedience from Federalist governors in readying militia recruits; the governors of Massachusetts and Connecticut simply defied the commander in chief and prevented the use of their militias for national purposes, even to protect the coastline threatened by the Royal Navy. The New England state courts took what Brant calls the “seditious sophistry” of the governors even further. They found that the governors, not the president, had the power to declare the sort of emergency that would warrant mustering the militia. To make matters worse, they also found certain militia recruits to be debtors, ordered them arrested and bailed, but required them to stay home under court order—thus preventing them from serving in the militias. Smuggling of goods to the British was rampant on the land and sea frontiers.
Some of the opposition was secessionist in nature. Former secretary of state Timothy Pickering, for example, insisted that “to my ears there is no magic in the sound of Union . . . let the Union be severed.”14 And Gouverneur Morris, who had been a delegate at the Constitutional Convention, talked openly of the New England states’ breaking off and forming a separate peace with Britain. Said Morris, “An Union of the commercial states to take care of themselves, leaving the War, its Expense and its Debt to those choice Spirits so ready to declare and so eager to carry it on, seems to be now the only rational Course.”15 As one Massachusetts reverend put it: “If at the present moment no symptoms of civil war appear, they certainly will soon.”16

These events culminated in the Hartford Convention in 1814, a gathering of some of the New England states behind closed doors to discuss reforms to—and even an end to—the national compact. Although the convention did not ultimately urge secession—its final report only proposed some constitutional amendments and expressed New England’s grievances against Republican government—the possibility of a more radical outcome loomed over the entire convention. Indeed, the convention’s proceedings were conducted in secret, and until January 5, 1815, the day that the report became public, it was unclear just how dramatic the recommendations would be. Madison himself did not know that the effort would peter out until the report was released, and as any president would in such circumstances, he harbored very real concerns that the convention would result in a public uprising or insurrection.17 Indeed, the extraordinary fact that several states would gather, in the middle of war, even to consider withdrawing from the union and forging a separate peace with the enemy has no analog in any subsequent American conflict.

What Madison Did Not Do

Presidents facing a great deal less domestic opposition during wartime have often done a great deal more to suppress it than Madison did. The country has faced bigger crises than it faced during the War of 1812, but it has never faced such concerted, focused, and energetic opposition to national policy by formal constitutional actors at a time of crisis of comparable magnitude. Yet the list of dogs that did not bark here—the things that Madison did not do—is striking. Unlike John Adams and Woodrow Wilson, he did not repress dissent. Unlike Abraham Lincoln, he did not suspend habeas corpus. And unlike
presidents in conflicts from the Civil War to World War II to the contemporary war on terror, he actually disclaimed the authority to hold American citizens in military custody. Each of those judgments warrants consideration.

As a preliminary matter, Madison refused to embrace legislation like the Sedition Act, which had been enacted under President John Adams in 1798. The Sedition Act had made it a crime to “write, print, utter or publish . . . any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute.” Madison had been one of the primary opponents of the act. Indeed, he had been the secret author of the Virginia Resolution and had helped to write the Virginia House of Delegates Report of 1799, which assailed the act on the grounds that it was “lev-eled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.” The report concluded “that the General Assembly . . . does hereby renew, its protest against ‘the alien and sedition-acts,’ as palpable and alarming infractions of the Constitution.” In his famous Commentaries on the Constitution, published much later in 1833, Justice Joseph Story, in an apparent nod to Madison and the other critics of the Alien and Sedition Acts, notes dryly that the constitutionality of the acts was “assailed with great earnestness and ability at the time.”

By 1812, the Sedition Act had been repealed but not struck down, and it was Madison’s turn to be at the helm of government during a time of crisis and the Federalists’ turn to be an embittered out-party railing against the government. Story, then a young justice, was sufficiently alarmed by how “offenders, conspirators, and traitors [were] enabled to carry out their purposes almost without check” that he proposed, in effect, that Madison switch sides and learn to love the Sedition Act. He suggested that Congress once again “give the Judicial Courts of the United States power to punish all crimes and offences against the Government, as at common law.” As Brant describes Story’s proposal—made to the attorney general, who passed it on approvingly to Madison—“any act prejudicial or injurious to the United States, which would at the common law be a public offense, should be deemed an offense against the United States and punishable with a fine or imprisonment.” Vice President Elbridge Gerry proposed more far-reaching measures. According to Jan Ellen Lewis, he “recommended an array of measures to suppress the ‘internal foe’: loyalty lists, vigilance committees, federal
legislation to punish ‘refractory governors,’ and a state law to punish seditious editors.”

Story’s idea was not quite as illiberal as it probably seems to modern readers. Indeed, it took the Supreme Court until 1964—in the famous case of *New York Times v. Sullivan*—to decisively reject the constitutionality of seditious libel laws. At the time that Story offered his friendly suggestion, the case law actually supported the constitutionality of such a proposal; the Sedition Act, after all, had not been struck down, and prosecutions under it had taken place. So Story was really proposing that the president and Congress use power that the Constitution as then understood by the courts arguably granted them to deal with dissent. Madison, however, rejected the idea on principle, staying true to the position that he had taken toward dissent and criticism of public officials while the Federalists were in power.

Indeed, Madison even tolerated the open talk about and movement toward secession. Not only did he not prosecute Federalist newspaper publishers, he made no effort to stop the Hartford Convention from taking place. The War Department sent a colonel to Hartford to keep an eye on the convention for signs of rebellion or treason, and when the officer sent less-than-comforting accounts of what was happening, the administration made plans to send in troops if a rebellion materialized. But, as Ketcham notes, “all this watchful concern by the administration . . . occurred without whipping up the public against the dissenters, without attempting to interfere with the Hartford Convention, and without any special declarations of emergency or other measures that might have led to detentions, strictures of the press, threats to public meetings, or other curtailments of civil liberties.”

Madison also showed a remarkable unwillingness to detain U.S. nationals in military custody or to subject them to military trials. In the modern age, the detention of U.S. citizens under military authorities has presented one of the great legal controversies of the war on terror. George W. Bush famously claimed the authority to order it. While the Supreme Court did not define the exact parameters of the authority, it did approve the general principle that the president has some authority to detain a U.S. citizen who becomes part of enemy forces and is captured abroad. Even President Obama, who has promised not to hold Americans outside the criminal justice system, has not disavowed the authority to do so.

Prior wars have seen far broader assertions of domestic detention authority than President Bush’s, assertions that covered individuals well beyond
those actively affiliated with enemy forces. Franklin Roosevelt, of course, interned Japanese American civilians in the absence of any suspicion of disloyalty on the part of any particular individual. And Lincoln’s suspension of the writ of habeas corpus permitted the detention of a great many Confederate sympathizers in border states—people who were not themselves members of the Confederate army.

The War of 1812 saw some proposals for expanded military detention powers. According to one scholar, Congress beefed up the military’s power to punish disobedient members of the militia, and some Republican members sought to give military courts the power to try civilian as well as military spies, which the law then seemed to preclude. That proposal, writes Jan Ellen Lewis, was intended “to cover contingencies that seem eerily familiar from our current war on terror: American citizens caught aiding the enemy on foreign soil and apprehended traitors who successfully applied for writs of habeas corpus from civilian judges.” The plan, however, wilted under Federalist opposition and Republican lack of commitment to it. Republican support, Lewis writes, was soft, and while the debate offered an opportunity “to go on the record against treason,” the appetite for actually changing the law proved “half hearted.”28

In fact, during the War of 1812, Madison deferred to habeas judgments not only by federal courts but by state courts ordering the release of U.S. citizens suspected of spying for the enemy. What’s more, he seems to have willingly accepted that the military lacked the authority to detain such people and try them before military tribunals except with congressional authorization—a position that in some respects anticipates the Supreme Court’s Civil War–era holding in *Ex Parte Milligan*.29 As legal scholar Ingrid Brunk Wuerth describes it, during the War of 1812, state courts issued habeas writs—and even awarded damages against military commanders—to U.S. citizens detained for allegedly aiding the enemy.30 Madison, Wuerth notes, concurred in those judgments.31 That period, she writes, demonstrates the “extraordinary caution with which the courts and President Madison viewed the detention of U.S. citizens even in a declared war, and even on evidence that the detainee traveled abroad, met with the enemy, and might divulge future intelligence information.”32

Wuerth offers two remarkable examples of this restrictive view of federal detention authority in practice. The first is the case of Samuel Stacy, arrested on July 1, 1813, as a spy and traitor for aiding the British in their near-capture of Sackets Harbor on Lake Ontario. American Commodore Isaac Chauncey,
naval operations overseer for Lakes Ontario and Erie, blamed Stacy for the attack on Sackets Harbor and “hop[ed] to see Stacy hung as a traitor to his country in part as an example to other ‘base’ and ‘degenerate’ Americans who might become spies and informers.” Stacy petitioned the Supreme Court of New York for a writ of habeas corpus, and the court issued the writ on the grounds that Stacy was a natural-born citizen of the United States. When Major General Morgan Lewis refused to hand Stacy over to the court and sought to try him by court martial, the chief judge held him in contempt for disregarding the writ. Madison agreed with the court that the military lacked the power to detain Stacy and try U.S. citizens in courts martial, and thus, Wuerth writes, on July 26, 1813, “Secretary of War Armstrong ordered Stacy released ‘on the ground that a citizen cannot be considered as a spy.’”

Similarly, Elijah Clark, an American citizen living in Canada, was found guilty of spying by a court martial in August 1812 and was ordered to be hanged. At the insistence of President Madison, however, Major General Hall ordered that “as a citizen, Clark was ‘not liable to be tried by a court martial as a spy’” and that unless Clark was arraigned for treason or another crime in civil court in New York, he had to be released from military custody.

Put simply, during the War of 1812 Madison took a view of detention that has echoes in much later legal developments yet involved a degree of self-restraint that no subsequent president has been willing to live with. His tolerance of the notion that U.S. nationals suspected of aiding the enemy could not be held in military custody but had to be tried in civilian courts foreshadows the Supreme Court’s later holding in *Ex Parte Milligan* that citizens cannot be tried by military commissions if the civilian courts are open for business. His understanding that the only means of detaining an American citizen was by civilian trial for treason anticipates the dissent by Justice Antonin Scalia in *Hamdi*, in which Scalia wrote that “where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution’s Suspension Clause . . . allows Congress to relax the protections temporarily. Absent suspension, however, the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge.” Madison’s willingness to submit to judicial review of military detention judgments far exceeded that of the early Bush administration, which argued that courts should not look into government evidence supporting a detention. No president since Madison has put
these threads of legal thought together in quite the same way during an active conflict so as to render the military powerless to act against citizens that the president believes are spying for the enemy.

More generally, no president since Madison has taken such a tolerant approach to those that he believes are colluding with the enemy against the war effort through their speech, their office, or their arts. Even modern presidents, constrained by modern First Amendment law, have a variety of legal tools at their disposal for dealing with at least some of the conduct that Madison tolerated. For example, someone who aided the enemy today the way that the 1812-era spies aided the British could be prosecuted under a variety of espionage laws, statutes forbidding giving aid to the enemy, and (depending on the nature of the enemy group) laws forbidding providing material support for terrorism. Nearly all presidents have neared the limit of their arguable legal powers during a time of conflict and pushed the limit to one degree or another—some presidents have even obliterated it, with varying degrees of grace or infamy. The most fundamental difference between them and Madison is that he did not even approach the limit.

Several Important Caveats

There are at least five caveats to acknowledge in considering Madison’s restraint. The first is what one might term the extra-legal dimension of repression—both by unofficial actors and by executive branch actors beneath the presidential level. The slow pace of communications in the early nineteenth century and the resulting diffusion of notionally unitary executive power made the president less immediately accountable for all actions taken in the name of national policy than any president could be after transportation and communications began to speed up. As a result, commanders in the field had a great deal more autonomy than any field commander has today. Moreover, local communities often took care of local dissenters by sometimes quite brutal means that conveniently did not sully presidential hands. Although Madison does not seem to have directly encouraged either governmental or nongovernmental actors to repress dissent, he nevertheless reaped the benefit of those activities—for which he did not have to take responsibility.

Consider, for example, the mob that rioted in Baltimore against local Federalist publishers. Madison may have declined to seek legislation like the Sedition Act, but that did not mean that dissenting voices necessarily
enjoyed the robust protection of their right of free speech. The riots came about because the citizens of Baltimore, a majority Republican town, did not take kindly to the relentless attacks published by a Federalist newspaper, the *Federal-Republican*, on Madison’s decision to wage the war. After the declaration of war in June of 1812, a Republican mob systematically destroyed the newspaper’s printing office, and Republican city officials took only meager steps to stop the mob. The unruly population thus roamed the streets of Baltimore looking for the editors of the *Federal-Republican* and searching their houses until the newspaper’s publishers were ultimately driven from the city.

The riots escalated when one of the editors decided to reestablish the paper in Baltimore. A large crowd gathered, shouting insults and throwing stones at a house in which there were a number of Federalists. The Federalists defended their position, and one of the rioters was killed and others badly injured. The Republican mob responded by arming itself and even brought cannon to the site. Again, the official reaction was slow. Conveniently, Mayor Edward Johnson just happened to have left for his country home that day, and the commander of the city’s militia, General John Stricker, made no haste in obtaining the signatures necessary to call in the militia. After a night-long standoff, he negotiated the arrest of the Federalists holed up in the house and put them in jail for safekeeping. After the militia dispersed, however, the mob outside the jail where the Federalists were being held threatened to attack the jail. And although Mayor Johnson, who had since returned, tried to calm the mob, the Republicans stormed the jail and beat anyone in their path. One Federalist—a Revolutionary war hero—was killed, and one was severely attacked and trampled almost to death. Several others were beaten and tortured.36

As reports about what had happened in Baltimore spread throughout the country, Federalists lost no time in insinuating that Madison had whipped up the fury of the mob. That certainly overstated the matter; Madison bore no responsibility for stoking or encouraging the riots. At the same time, he did nothing to quell them, though they went on for days and Baltimore is not far from Washington. Because the jail and post office were in the same building and the post office was a federal institution, he certainly knew about the protective jailing of the Federalists, but he did not consider an assault likely and seems to have regarded the whole affair as a local matter in any event.37
abridgment, but conceptions of the presidency differed sharply then. Madison certainly did not imagine himself to be an activist president who served as the nation’s protector in chief. His intention was to limit his own powers to the maximum extent possible, not to relieve local authorities of their responsibility for keeping lawless mobs at bay.

Concerns about mob violence—officially encouraged or not—also arose elsewhere, and the worry that mobs might have a degree of official backing was not altogether irrational. Indeed, attitudes about mobs during that era, like those about the presidency, differed from attitudes today; many people saw mobs as having a legitimate role in enforcing community norms. While Madison himself showed no interest in using mob violence for that purpose, his predecessor, Thomas Jefferson, saw them as a potentially useful instrument. Even as Joseph Story was suggesting legal action at the outset of the war to handle dissenters, Jefferson wrote to Madison that sending “a barrel of tar to each state south of the Potomac” would do the trick. In an approving reference to mob hangings of loyalists in Maryland in 1776, Jefferson suggested that in Northern states, “you may . . . have to apply the rougher drastics of . . . hemp and confiscation.”

General Andrew Jackson, meanwhile, had his own strategy for dealing with dissent. Jackson declared martial law in New Orleans in December 1814 and did not lift it for months, despite the British withdrawal. Jackson harbored none of Madison’s scruples about silencing critics of government. When a Louisiana state senator published a letter in the Louisiana Courier complaining that Jackson did not have the authority to impose martial law and calling on all Frenchmen in the city to rally against the general, Jackson immediately ordered his arrest and trial by court martial. Federal judge Dominic A. Hall issued a writ of habeas corpus for the senator, but Jackson was undeterred—he arrested the judge too and had him escorted out of town with a warning not to come back. Jackson also warned the local federal marshal not to try to intervene. Although the senator was quickly cleared by the court martial, Jackson overruled the verdict and kept him in custody anyway. In addition, Jackson suspended the legislature and even threatened to blow it up during his period of rule in New Orleans.

When Jackson sought retroactive approval from Madison for his actions in New Orleans, the president did not oblige; acting secretary of war Alexander J. Dallas repudiated Jackson’s claims that the War of 1812 necessitated the imposition of martial law. But if Madison did not give Jackson the cover
that the general sought, he did not do anything about Jackson’s behavior
either. Jackson was, after all, the war’s biggest hero, and his success repre-
sented to no small degree the administration’s vindication. What’s more,
Louisiana itself was something of a special case—a new state with underde-
developed institutions and a substantial French population of mixed loyalties.
There is at least some reason to think that Madison himself regarded Loui-
siana as a place where a different set of rules might apply—that he showed
some tolerance of the idea that a commander in such a place might do as
circumstances required. While he was not willing to give Jackson’s actions
any gloss of legality, he does not appear to have been troubled by them.

The second caveat is that certain wartime practices that we now regard
as beyond the pale were, during the War of 1812, undertaken without apol-
ogy. Congress, for example, encouraged civilian attacks on British warships,
a practice that would be unthinkable today. Most prominent was the power
to detain enemy civilians living in the territory of a belligerent country,
which was then well-established in international law and remained common
practice through World War II.

One part of the Alien and Sedition Acts that was not repealed—indeed, it
remains on the books to this day—was the Alien Enemies Act of 1798, which
authorizes the president to detain, relocate, or deport enemy aliens in times
of war. Enacted in anticipation of war with France, it saw its first use against
British aliens during the War of 1812. The Alien Enemies Act states:

> Whenever there is a declared war between the United States and any
> foreign nation or government . . . and the President makes public
> proclamation of the event, all natives, citizens, denizens, or subjects
> of the hostile nation or government, being of the age of fourteen years
> and upward, who shall be within the United States and not actually
> naturalized, shall be liable to be apprehended, restrained, secured, and
> removed as alien enemies.

Even as Madison had objected vigorously to other provisions of the Alien
and Sedition Acts, he had expressly withheld complaint about the Alien Ene-
mies Act. In the Virginia General Assembly Report of 1799, he had written:

> With respect to alien enemies, no doubt has been intimated as to the
> federal authority over them; the Constitution having expressly dele-
> gated to Congress the power to declare war against any nation, and of
> course to treat it and all its members as enemies.
Consequently, there was no contradiction when on February 23, 1813, Secretary of State James Monroe issued an order by which “enemy aliens, residing or being within forty miles of tide water, were required . . . to retire . . . beyond that distance from the tide water” to a place designated by federal marshals, who were authorized to arrest enemy aliens who did not comply. That sort of action discomforts modern civil libertarian sensibilities, but similar proclamations were issued during both World War I and World War II.

The War of 1812 also saw instances of reprisal against British prisoners in response to British mistreatment of American prisoners of war. While treatment of prisoners was generally humane and generous on both sides, the British decision during the winter of 1813–14 to try twenty-three Irish Americans for treason provoked a cycle of retaliation by the Americans. Normal treatment—whereby prisoners of war lived in barracks, were allowed to work in towns, and were either paroled or traded to freedom—gave way to close confinement on both sides and threats to kill prisoners of war until the British backed down from their threat to hold trials. Some reprisals and threats were ordered by Madison himself.42 Again, that seems terribly dissonant in an era in which the Third Geneva Convention defines state obligations with respect to prisoners, but prisoner treatment then was almost purely a function of reciprocity and of each state’s interest in protecting its own captured people. Reprisals were an uncomfortable fact of life.

A third caveat is that Madison’s solicitude for the rights of Americans suspected of aiding the British most emphatically did not apply to slaves. John Fabian Witt describes the aid that British troops received from former slaves, who escaped by the thousands from their American owners. Urged on by the British—who even offered them a bounty to join the British armed forces—escaped slaves served as guides for the enemy and took up arms against their oppressors at home in large numbers. Fugitive slaves even returned to their plantations to secretly encourage fellow slaves to rise up and escape en masse, and many had a hand in the destruction of Washington in 1814. When slaves were captured, state court habeas corpus was not the order of the day. Rather, there were executions—and in large numbers. Witt writes that slave executions in Virginia, for example, doubled from 1812 to 1813 and increased sharply again the following year.43

The fourth caveat is that some of Madison’s forbearance may reflect, at least in part, a tactical concession to political weakness. The central government at that time simply did not have the power to fight the British
and simultaneously coerce large numbers of New England Federalists with powerful state offices and patronage networks to bend to Washington’s will. Madison had to pick his battles. And while his tolerance surely reflected both his views on individual liberty and his views on the proper role of a republican executive, it also allowed him to make a virtue of necessity. Practical circumstances simply did not permit him to assert the sort of domestic control that other presidents have sought to exercise. Madison had to conserve scarce resources to fight the British; he could not afford to fight other Americans. In that respect, his philosophical position was convenient as well as sincere.

The fifth caveat is that while Madison had a modest conception of the executive and a regard for civil liberties that was unusual in a wartime president, he also seems to have had a flair for what we now call covert actions—and their attendant deceit of the public, Congress, and international interlocutors. The issue of presidential power and civil liberties, on the one hand, and the issue of covert action and secrecy, on the other, are deeply connected in the minds of modern scholars and citizens—a result of the Watergate and Vietnam eras, during which presidents applied the tools of foreign covert action and espionage to handle domestic dissent. These eras, merged, to some degree, concerns about civil liberties during wartime with the more general problem of presidential accountability for covert actions and espionage. In Madison’s day, however, the two issues would have seemed altogether unrelated. Nonetheless, it bears notice that in his remarkable book on the history of American covert actions, Stephen F. Knott observes that Madison was far from a Boy Scout in his use of covert action. His efforts to acquire the Florida territories, in fact, involved unilateral executive exertions that do not square neatly with the hagiographic portraits of a man committed to a republican conception of executive power. Knott writes that

[while] many chroniclers of Madison’s presidency view him as a model of restraint in his exercise of executive authority. . . . [An] examination of Madison’s presidency actually reveals that contemporary opponents of covert activity who invoke the legacy of the Founders are either deliberately disingenuous or simply unaware of the persuasive evidence that points to the endorsement of [the Florida] operations by this preeminent Founder. . . . James Madison believed covert operations were an essential part of America’s foreign-policy arsenal.44
Knott describes in great detail how Madison sent secret agents to both East and West Florida to foment rebellions against Spain—rebellions under leaders who would then ask the United States to intervene and acquire the territories. The idea, a success in the case of West Florida and a failure in the case of East Florida, was that the United States should be seen not as having designs on the Floridas but merely as responding to the local population’s yearning for liberty. Knott also notes that

Madison revealed his familiarity with the unseemly necessities of foreign relations by procuring, at public expense, a prostitute for a foreign envoy. He probably had this particular event in mind when he noted that “appropriations to foreign intercourse are terms of great latitude and may be drawn on by very urgent and unforeseen occurrences.” During Madison’s presidency, intelligence reports and other secret government documents were also given added protections by a formal system of classification (consisting of “secret,” “confidential,” and “private”).

Madison’s major covert operations—at least those discussed by Knott—were directed against Spain, not Britain, and they predate the War of 1812, limiting their relevance to a discussion of Madison as a wartime president with respect to civil liberties. At the same time, Knott makes the important point that one should not romanticize Madison’s views of presidential power, at least not without factoring in the less public aspects of his actions.

Philosophy, Impotence, or Pragmatism? Virtue or Vice?

The caveats discussed above, while important, do not individually or collectively render Madison’s conduct during the War of 1812 less extraordinary in its deviation from the historical or present-day norms of presidential conduct during wartime. It is too easy to conclude, with Rehnquist, that Madison was just a wimp—that surely had he been a real man, he would have violated at least someone’s civil liberties. While the weakness of the federal government during his administration—a weakness that itself reflected his philosophical commitments—no doubt played some role, it does not fully explain Madison’s approach.

Another possible explanation for Madison’s conduct during the war that also has some merit is that he was being a pragmatic politician—one with an
acute awareness of what he could and could not feasibly accomplish. Madison knew how divided the country was. He also knew that the procedural machinations in Congress that had preceded the declaration of war had given rise to a great sense of grievance among the Federalists. Repression would only fuel that grievance with legitimate complaints about Republican conduct. Incurring such political damage may be worth it if one expects real gain from the repressive actions in question, but in Madison’s case the possible gain was not huge. The Federalists, after all, were an entrenched political class in certain parts of the country, and the Republicans were not apt to dislodge them by means of repression. Restraint kept open the possibility of reconciliation and persuasion.

Ultimately, however, Madison’s approach chiefly appears to have had its roots in principle, in Madison’s core beliefs about executive power in a republic. Many commentators today still profess similar views, but American expectations of the presidency have long since passed them by. Ketcham explains that Madison’s views of executive power were forged in reaction to Hamilton’s vision of the executive during the 1790s:

Though Madison greatly admired Washington and had worked closely with Hamilton for many years, he was first amazed and then appalled at what the executive department became under Hamilton’s guidance. Madison’s sympathies for a vigorous executive, for an efficient civil service, and for a sound public credit led him to support many of Hamilton’s proposals taken by themselves, but it was the totality the Virginian opposed. . . . Far from an executive taking its lead in policy from the legislature and being the executor of its will, as republican theory required, Hamilton had created a machine to lead and dominate the nation.46

Madison saw virtue in a lot of what the modern eye would see as weakness in an executive. And specifically, Ketcham explains, he saw republican virtue in a conception of the executive as almost an agent of the legislature:

To him, recognizing, even acceding to, congressional pressures seemed somehow republican in spirit; or to put it conversely, Madison saw danger in an executive so far from, so independent of congressional opinion as to find himself defying it. As all the world watched to see what the new republic would do as it faced Armageddon, Madison felt
obliged to resist Caesarism, pro-consulism, or, more precisely, Hamiltonism of any kind. He was unable to envision how, in the manner of a Lincoln or a Churchill or a Roosevelt, the chief executive of a democratic nation might in emergencies necessarily move away from strictly republican modes and act with vigor, highhandedness, and even ruthlessness to defend the nation. . . . [R]ather than face the known and manifest threats to every principle of free government, Madison chose, deliberately, to accept the dangers of weak and divided, even compromised councils.47

Consistent with that view, as we have seen, Madison did notably less than prevailing constitutional law at the time would have tolerated—and less than his raw power would have permitted him to do. When state courts ordered the release of suspected spies, Madison did not have to comply with their judgments; he could have, as Andrew Jackson did in the same conflict, defied them. He could have argued for a broad interpretation of his powers to detain, try, and punish collaborators with the enemy. He could have sought legislation to empower himself. When his own attorney general and vice president and a sitting justice of the Supreme Court suggested that he seek legislation that would give him legal leverage against his political opponents and U.S. citizens aiding the enemy, he did not have to demur. Many presidents have taken strident constitutional positions before coming to power and have lived to enjoy the embarrassment of taking the opposite view when changed power arrangements counseled it. Madison probably could not have squelched all Federalist dissent, but he did not have to tolerate as much of it as he did with as little pushback as he offered, and he certainly did not have to tolerate conduct as openly traitorous as the Hartford Convention. We should, therefore, understand the gap between what Madison did and what he plausibly could have done as a function of his conviction. That marginal difference goes to the crux of the difference between Madison and the classic wartime president. Madison did somewhat less than he could have done; the typical wartime president, to one degree or another, does more—sometimes a little bit more, sometimes a lot more. Our image of the president in wartime is one of a president who pushes the envelope. Madison sealed his envelope without even filling it completely—let alone overstuffed it.

The harder question is whether such restraint merits admiration or contempt. Clinton Rossiter once wrote that a president who is not “widely and
persistently accused in his own time of ‘subverting the Constitution’ . . . may as well forget about being judged a truly eminent man by future generations.”

Put another way, if the White House burns and the president has not arrested the people who are calling for dissolution of the country, has he perhaps shown too tender a solicitude for their civil liberties at the expense of the larger national interest—or, indeed, the nation itself?

That question, of course, has no simple answer. Madison’s approach certainly diverges greatly from what the American public would expect of the president today. At least since Lincoln, presidents have operated on the assumption that the country will forgive them for excess in the honest service of the nation’s security but will never forgive them for not doing everything in their power to protect the country—whether by saving the union, defeating Nazism, or fighting terrorism. That presidential instinct reflects public expectations. We remember Lincoln and Roosevelt as among our greatest presidents because of their wartime leadership—leadership that is only a little besmirched in our memory by the liberties that they took with civil liberties. We hate Korematsu, but it does not diminish our love of Roosevelt. We celebrate Ex Parte Milligan, but it does not diminish our love of Lincoln. America loves winners in its presidents, and its historical memory shows them great forgiveness.

This willingness to forgive reflects the total victory of the Hamiltonian vision of the executive over the one that Madison championed. Particularly in academic circles, people may fret in Madisonian language about executive power. We sometimes talk about how presidents should not push the line, how they should live within the constraints set by other branches and view themselves as agents of congressional will. But in practice, the country has voted with its feet. We are all Hamiltonians now. Today, a president who sought to do less than the Constitution allowed in pursuit of critical national security objectives would be accused of dereliction of his duty as commander in chief if those objectives were then not met and the country paid the price.

Imagine, for a moment, that President Obama announced that he had to free everyone from Guantanamo Bay against whom he could not bring criminal charges in a federal court—a position that would roughly approximate for noncitizens the one that Madison took concerning U.S. citizens along the northern border during the War of 1812. Or imagine that President Bush had erred on the side of caution in interrogating Khalid Sheikh Mohammed for intelligence after his capture in 2003 and that a major attack had taken
place that was even plausibly attributable to his restraint. Leaving any arguably lawful approach untried would damage a president’s standing in the public mind far more completely—and far less redeemably—than would a little extremism now and then in defense of security. Or, at least, so presidents seem to think—and the public certainly rewards that sort of thinking.

One can plausibly argue that Madison might have prosecuted the war more effectively and to a better, faster conclusion had his tolerance of Federalist opposition not communicated division to the British and thus prolonged Britain’s willingness to fight. Yet, though perhaps only barely, Madison got away with it. In the end, the United States fought Britain to a standstill, and the Treaty of Ghent was largely seen at the time as some sort of victory. That has to ameliorate the judgment of Madison. The difference, after all, between a repressive wartime presidency and a tolerant one—between the Hamiltonian executive that we now expect and the republican one to which Madison was committed—did not result in the difference between victory and defeat.

To be sure, Madison’s approach had considerable benefits too. By not using more repression than he needed to, he avoided a spate of tit-for-tat legal retaliations against his foes through which an expectation might have arisen that the party in power would stifle any criticism of itself. That was particularly important in the country’s infancy, when the political traditions of tolerance and free speech were still inchoate. The Sedition Act remained an anomaly. It did not, as it very well might have, become a norm. More fundamental is the fact that Madison demonstrated that a republic could fight a war without cannibalizing its own republican institutions. That had never been done before, and it was hardly a foregone conclusion that it was possible. Later presidents who pushed legal limits did so within an established tradition of democracies fighting wars and emerging from them still democratic. For Madison and his time, however, that was only a hypothesis—one that the War of 1812 proved viable but whose viability did require demonstration.

In our view, at least, Madison’s conduct during the War of 1812 presents only one clear lesson for the modern wartime president: Less can sometimes be more. A president should not overestimate how much infringement on liberty wartime circumstances require, though Madison may have applied that principle to excess. Living in the gap between their notional power and the power that they are willing to exercise rightly terrifies modern presidents.
But the questions that Madison asked are ones that any president should feel himself constrained by: Is this step necessary? Do I have the authority to take it? If I do, would it be consistent with the highest vision of the office of the presidency for me to do so? Life in that gap is not all costs, it turns out. Madison’s example—one to which the American presidency has never returned—suggests that there are benefits too.

Notes


13. For an account of the machinations of the governors, see Brant, James Madison: Commander in Chief, p. 48. For an account of the behavior of the state courts, see Ketcham, James Madison: A Biography, p. 537.


15. King memo of October 1814 meeting, October 18, 1814; letter from Morris to King, November 1, 1814. Quoted in Ketcham, James Madison: A Biography, p. 592.

31. Ibid., p. 1583.
32. Ibid., p. 1585.
33. Ibid., pp. 1580–83.
45. Ibid., p. 104. For an account of the West Florida and East Florida operations, see pp. 87–104.
46. Ketcham, The Unimperial President.
47. Ibid.