INTRODUCTION

I would like to begin with Judge Posner’s “open areas,” those seams in the law where neither text nor precedent commands a result. It is in these areas where it is possible to reach several reasonable outcomes, where reasonable judges differ, where there is no “right” result, and where judges inevitably bring to bear their moral values, institutional preferences, personal ideologies, and emotional dispositions. It is in these areas where it matters most who the judge is. It is in these areas where the “action” is.

Viewing law as a whole, these open areas are relatively small, because most large-scale legal issues are “settled.” In the specific realm where national security and civil liberties intersect, however, these areas are vast. This is so because legal conflicts between national security and civil liberties arise relatively infrequently. Thus, when judges are called upon to reconcile national security with civil liberties they often find themselves adrift in one of Judge Posner’s open areas.

A recent example concerns the government’s decision to close deportation proceedings to the public after September 11, 2001. Do members of the press and public have a constitutional right to attend such proceedings, or may the government exclude them? The Supreme Court has never directly addressed this question and its precedents do not require any particular result. The
Court’s decisions suggest that, in making such determinations, judges should consider such factors as traditional practice, the value of openness to the proceedings, the importance of the government’s interest in confidentiality, and so on. Because the Supreme Court left this space open, it is not surprising that the two courts of appeals that addressed this question reached diametrically opposed results. Both were reasonable.

Justice Jackson once described the form in which these questions usually reach the courts:

Measures [ordinarily] violative of constitutional rights are claimed to be necessary to security, in the judgment of officials who are best in a position to know, but the necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself. What does it do then?

One sensible answer, if judges are to avoid the otherwise highly subjective exercise of deciding based entirely on their personal values, preferences, attitudes, ideologies, and dispositions, is to define appropriate presumptions with which to approach the decision-making process. Logic suggests, for example, that in dealing with conflicts between national security and civil liberties in time of war, judges should start with a healthy dose of deference to military and executive officials. This seems sensible for several reasons.

First, individual judges have relatively little first-hand experience with national security matters. Such cases arise infrequently, and judges are relative novices when it comes to assessing the possible implications of their decisions for national security. This cuts in favor of deference. Second, the stakes in such cases may be quite high. Unlike most legal disputes, in which an erroneous judicial decision will have only modest consequences and is usually correctable after-the-fact (if not for the parties, then at least more generally), the potential consequences to the nation if a judge is wrong in a case involving national security may be truly catastrophic. Hence, a certain measure of deference seems wise. Third, for institutional reasons, judges should be reluctant to second-guess the judgments of military and executive officials in such conflicts. If they err in rejecting those judgments, judges may harm not only the national security but also the long-term credibility of the judiciary itself. Again, logic counsels deference.

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I. THE EXPERIENCE OF LOGIC

In light of these reflections, judges throughout the twentieth century generally followed this logical course when addressing conflicts between civil liberties and national security. They sensibly presumed that the actions of military and executive officials were constitutional whenever they acted in the name of national security. The three most dramatic twentieth-century clashes between civil liberties and national security illustrate this approach.

A. World War I: “So Long as Men Fight”

When the United States entered the First World War in April 1917, there was strong opposition to both the war and the draft. Many citizens believed that our goal was not to “make the world safe for democracy,” but to make the world safe for armaments and munitions manufacturers, who were making millions from the conflict. President Woodrow Wilson had little patience for such dissent, especially when it came from naturalized Americans or foreigners living in the United States. He warned that disloyalty of foreign-born U.S. nationals “must be crushed out” of existence, and proclaimed that disloyal individuals sacrificed their civil liberties through their own behavior. Only weeks after the United States entered the war, Congress enacted the Espionage Act of 1917. Although the Act dealt primarily with espionage and sabotage, several provisions had serious consequences for the freedom of speech. Specifically, the Act made it a crime for any person willfully to “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States” or willfully to “obstruct the recruiting or enlistment service of the United States.”

Although the congressional debate makes clear that the 1917 Act was not intended to suppress dissent generally, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a full-scale prohibition of seditious utterance. The Wilson administration’s intent in this regard was made evident in November 1917 when Attorney General Charles Gregory, referring to war dissenters, declared: “[M]ay God have mercy on them, for

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6 See id. at 21.
7 See id. at 24.
8 President Woodrow Wilson, Third Annual Message to Congress (Dec. 7, 1915), quoted in David M. Kennedy, supra note 5, at 24.
10 Ch. 30, 40 Stat. 217 (1917) (repealed 1948).
11 Id. tit. I, § 3, 40 Stat. at 219.
they need expect none from an outraged people and an avenging government.”

The Department of Justice prosecuted more than two thousand individuals for allegedly disloyal or seditious expression.\(^\text{14}\) In an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed disloyal.\(^\text{15}\) The courts’ approach led routinely to guilty verdicts in Espionage Act prosecutions.\(^\text{16}\) Rose Pastor Stokes, the editor of the socialist *Jewish Daily News*, was sentenced to ten years in prison for the publication in the Kansas City Star of the following statement: “I am for the people, while the government is for the profiteers.”\(^\text{17}\) D.T. Blodgett was sentenced to twenty years in prison for circulating a leaflet urging voters in Iowa not to reelect eight congressmen who had voted for conscription.\(^\text{18}\) The Reverend Clarence H. Waldron was sentenced to fifteen years in prison for distributing a pamphlet stating that “if Christians [are] forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in.”\(^\text{19}\)

In a series of decisions from 1919 to 1920, the Supreme Court consistently upheld the convictions of individuals who had agitated against the war and the draft\(^\text{20}\) – individuals as obscure as Mollie Steimer, a Russian-Jewish émigré who had distributed anti-war leaflets on the Lower East Side of New York,\(^\text{21}\) and as prominent as Eugene V. Debs, who had received almost a million votes as the Socialist Party candidate for President in 1912.\(^\text{22}\) Embracing the

\(^{13}\) Charles Gregory, U.S. Attorney Gen., Address at the Lincoln University Memorial Dinner (Nov. 20, 1917), *quoted in All Disloyal Men Warned by Gregory*, N.Y. TIMES, Nov. 21, 1917, at 3; see also *Robert Justin Goldstein, Political Repression in Modern America: From 1870 to the Present*, at 108 (1978).

\(^{14}\) See *David M. Rabb, Free Speech in its Forgotten Years* 256 (1997).

\(^{15}\) See *id. at 257.*

\(^{16}\) See *id.*

\(^{17}\) United States v. Stokes (unreported) (D. Mo. 1918), *rev’d*, 264 F. 18, 20 (8th Cir. 1920). Stokes previously made the same statement at the Women’s Dining Club of Kansas City. *Geoffrey R. Stone, Perilous Times: Free Speech in Wartime* 171 (2004). “[A]lthough Mrs. Stokes was indicted only for writing a letter, the judge admitted her speeches to show her intent . . . so that she may very well have been convicted for the speeches and not for the letter.” *Zechariah Chafee, Jr., Free Speech in the United States* 53 (1941).

\(^{18}\) See *Walter Nelles, Espionage Act Cases* 48 (1918).

\(^{19}\) United States v. Waldron (unreported) (D. Vl. 1918), *quoted in Chafee, supra* note 17, at 55.


\(^{21}\) *Stone, supra* note 17, at 139.

\(^{22}\) *Id.* at 141.
“logical” presumption for balancing civil liberties and national security concerns in time of war, the Court explained its reasoning: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” As the law professor Harry Kalven once observed, these decisions left no doubt of the Court’s position: “While the nation is at war serious, abrasive criticism . . . is beyond constitutional protection.”

In the years after World War I, Americans came increasingly to recognize that the Espionage Act prosecutions had been excessive. Officials who had served in the Wilson administration conceded that the general atmosphere of intolerance had led to serious constitutional violations and criticized some federal judges for having “lost their heads.” The philosopher-educator John Dewey had argued before the war that suppression of dissent was justified on grounds of pragmatism, but after the war he concluded that “[t]he increase of intolerance of discussion to the point of religious bigotry” had led the nation to condemn as seditious “every opinion and belief which irritates the majority.” Over the next few years, the federal government acknowledged it had committed injustices in the name of national security, and every person who had been convicted of seditious expression during World War I was released from prison and granted amnesty. In later years, the Supreme Court implicitly overruled its World War I era decisions, acknowledging that it had failed in its responsibility to protect constitutional rights in wartime.

B. World War II: “A Constitutional Pariah”

On December 7, 1941, Japan attacked Pearl Harbor. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Army to designate military areas from which any persons may be excluded. Although the words “Japanese” or “Japanese American” never

23 Schenck, 249 U.S. at 52.
24 HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 147 (Jamie Kalven ed., 1988).
25 See Murphy, supra note 9, at 271-72; Stone, supra note 17, at 236-40.
26 Letter from Alfred Bettman to Zechariah Chafee, Jr. (Oct. 27, 1919), excerpted in Rabban, supra note 14, at 328.
28 See Stone, supra note 17, at 230-32.
appeared in the Order, it was understood to apply only to persons of Japanese ancestry. 31

Over the next eight months, almost 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon, and Arizona. Two-thirds of these men, women, and children were American citizens, representing almost 90% of all Japanese Americans. No charges were brought against these individuals; there were no hearings; and they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. They were told to bring only what they could carry. Many families lost everything. The internees were transported to one of ten permanent internment camps and placed in overcrowded rooms with no furniture other than cots. Surrounded by barbed wire and military police, they remained in these detention camps for some three years. 32

Why did this happen? Certainly, the days following Pearl Harbor were dark days for the American spirit. Fear of possible Japanese sabotage and espionage was rampant, and an outraged public felt an understandable instinct to lash out at those who had attacked us. But these acts were also an extension of more than a century of racial prejudice against the “yellow peril.” Racist statements and sentiments permeated the debate from December 1941 to February 1942 about how to deal with individuals of Japanese descent. 33

In the immediate aftermath of Pearl Harbor, there was no clamor for the mass internment of either Japanese aliens or Japanese Americans. Attorney General Francis Biddle assured the nation that “[w]e have used no dragnet techniques and have conducted no indiscriminate, large-scale raids.” 34 In the days and weeks following Pearl Harbor, the FBI arrested approximately two thousand Japanese aliens who were on its list of potentially dangerous enemy aliens. These individuals were given hearings and were then either released, paroled, or interned along with German and Italian nationals who had been found to be dangerous to national security. On December 10, 1941, FBI Director Hoover reported that “practically all” of the persons whom the FBI intended to arrest had been taken into custody. 35

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33 See Personal Justice Denied, supra note 32, at 4-6 (discussing the circumstances surrounding the decision to exclude and remove Japanese aliens and Japanese Americans from the West Coast).
In the next several weeks, however, a demand for the mass evacuation of all persons of Japanese ancestry, including American citizens, exploded along the West Coast. To some extent, this demand was fed by fears of a large-scale Japanese invasion of the mainland. Conspiracy theories abounded, and neither government nor military officials did anything to allay these anxieties. Local officials were quick to pass on to the public even the “wildest rumor of Oriental treachery,” and by January California was awash in suspicion.\(^{36}\)

On January 2, 1942, the California Joint Immigration Committee charged that even ethnic Japanese born in the United States owed their primary allegiance to their “Emperor and Japan.”\(^{37}\) The American Legion demanded the internment of all individuals of Japanese extraction.\(^{38}\) On February 4, California Governor Culbert Olson declared in a radio address that it was “much easier” to determine the loyalty of Italian and German aliens than of Japanese aliens and Japanese Americans, and that “[a]ll Japanese people, I believe, will recognize this fact.”\(^{39}\) California Attorney General Earl Warren maintained that “there is more potential danger among the group of Japanese who are born in this country than from the alien Japanese who were born in Japan.”\(^{40}\)

Although General John L. DeWitt, the top Army commander on the West Coast, initially resisted the idea of mass incarceration, the increasing political pressure from West Coast officials took a toll. DeWitt himself came to the rather bizarre view that “[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication” that the Japanese had carefully orchestrated their subversion so that when it came it would come on a mass basis.\(^{41}\)

Throughout this period, the Department of Justice opposed the mass evacuation of Japanese Americans.\(^{42}\) FBI Director J. Edgar Hoover reported to Attorney General Biddle that the demand for mass evacuation was based on “[p]ublic hysteria” rather than on fact.\(^{43}\) He repeatedly assured Biddle that the FBI had already identified suspected Japanese agents and taken them into

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\(^{37}\) See Personal Justice Denied, supra note 32, at 67-68.

\(^{38}\) Cray, supra note 36, at 117; see also Peter Irons, Justice at War 38 (1983).

\(^{39}\) Governor Culbert Olson, Radio Address (Feb. 4, 1942), quoted in Cray, supra note 36, at 117.


\(^{41}\) See Yamamoto et al., supra note 35, at 100.


custody. Hoover remarked that the army was “getting a bit hysterical.” Biddle strongly opposed internment as ill-advised, unnecessary, and cruel.

The public clamor on the West Coast, however, continued to build. The Native Sons and Daughters of the Golden West, the Western Growers Protective Association, the Chamber of Commerce of Los Angeles, and all the West Coast newspapers cried out for a prompt evacuation of Japanese aliens and citizens alike. On February 14, 1942, General DeWitt officially recommended that all persons of Japanese extraction be removed from “sensitive areas.”

Five days later, on February 19, President Roosevelt signed Executive Order 9066. The matter was never discussed in the Cabinet, “except in a desultory fashion,” and the President did not consult either General George Marshall or his primary military advisors, the Joint Chiefs of Staff. The public rationale for the decision, laid out in General DeWitt’s Final Report on the evacuation of the Japanese from the West Coast, was that time was of the essence and that the government had no reasonable way to distinguish loyal from disloyal persons of Japanese descent.

Why did President Roosevelt sign the Executive Order, over the legal, constitutional, and pragmatic objections of the Attorney General and the Director of the FBI? Politics certainly played a role in Roosevelt’s thinking. 1942 was an election year. Because of the attack on Pearl Harbor, public opinion strongly urged the President to focus American military force on the Pacific. However, Roosevelt preferred a Europe-first policy. The incarceration of 120,000 individuals of Japanese ancestry was, in part, a way to pacify those who were in favor of fighting against the perceived West Coast threat first. As the legal historian Peter Irons has observed, the internment decision “illustrates the dominance of politics over law in a setting of wartime concerns and divisions among beleaguered government officials.”

In *Korematsu v. United States*, decided in 1944, the Supreme Court embraced the “logical” presumption for dealing with conflicts between civil

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44 See *Powers*, supra note 42, at 249.
46 *Francis Biddle*, in *Brief Authority* 215-17 (1962); see also *Powers*, supra note 42, at 249; *Whitehead*, supra note 43, at 188.
47 *Biddle*, supra note 46, at 217.
48 Id. at 218.
49 See supra note 30 and accompanying text.
50 *Biddle*, supra note 46, at 219.
51 See id. at 221-23.
52 *Irons*, supra note 38, at 42.
53 323 U.S. 214 (1944).
liberties and national security. In a six-three decision, the Court, in an opinion by Justice Black, upheld the President’s action:

[W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships.

. . .

. . . To cast this case into outlines of racial prejudice . . . confuses the issue. Korematsu was not excluded from the [West Coast] because of hostility to him or his race [but] because . . . military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast . . . We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified. 54

In the years after World War II, attitudes about the Japanese internment began to shift. Referring to Hirabayashi, Justice Wiley Rutledge, who voted with the majority in Korematsu and concurred in Hirabayashi, once told Chief Justice Stone that “I have had more anguish over this case than any I have decided.” 55 Rutledge’s biographer later observed that the Japanese internment cases “pushed Wiley Rutledge along the path to his premature grave.” 56 Justice William O. Douglas, who also joined the majority in Korematsu, described his vote to uphold the Japanese exclusion as one that he “always regretted,” and in 1980 observed that Korematsu was “ever on [his] conscience.” 57

In 1962, Chief Justice Earl Warren, who had played a pivotal role in this episode as California Attorney General, reflected on the Court’s decision in Korematsu. Warren observed that war is “a pathological condition” for the nation, and that in such a condition “[m]ilitary judgments sometimes breed action that, in more stable times, would be regarded as abhorrent.” 58 This places judges in a dilemma because the Court may conclude that it is not in a very good position “to reject descriptions by the Executive of the degree of military necessity.” 59 Moreover, judges cannot easily detach themselves from the pathological condition of warfare, although with “hindsight, from the vantage point of more tranquil times, they might conclude that some actions

54 Id. at 219, 223-24 (citation omitted); see also Yasui v. United States, 320 U.S. 115, 117 (1943) (upholding the conviction of a Japanese American citizen for violating a curfew order based on Executive Order 9066); Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943) (same).
57 See Stone, supra note 17, at 304.
59 Id. at 192.
advanced in the name of national survival” had in fact violated the
Constitution. Warren later conceded that the Japanese internment was “not
in keeping with our American concept of freedom and the rights of citizens,” and
admitted privately that he deeply regretted his own actions in the matter.62

On February 19, 1976, as part of the celebration of the Bicentennial of the
Constitution, President Gerald Ford issued Presidential Proclamation 4417, in
which he acknowledged that, in the spirit of celebrating our Constitution, we
must recognize “our national mistakes as well as our national achievements.”63

“February 19th,” he continued, “is the anniversary of a sad day in American
history,” for it was “on that date in 1942 . . . that Executive Order No. 9066
was issued.” President Ford observed that “[w]e now know what we should
have known then” – that the evacuation and internment of loyal Japanese
American citizens was “wrong.”64

In 1980, Congress established the Commission on Wartime Relocation and
Internment of Civilians to review the implementation of Executive Order
9066.65 The Commission, composed of former members of Congress, the
Supreme Court, and the Cabinet, as well as several distinguished private
citizens, unanimously concluded that the factors that shaped the internment
decision were racial prejudice, war hysteria, and a failure of political
leadership, rather than military necessity.66 Several years later, President
Ronald Reagan signed the Civil Liberties Act of 1988,67 which officially
declared that the Japanese internment was a “grave injustice” and offered an
official presidential apology and reparations to each of the Japanese American
internees who had suffered discrimination, loss of liberty, loss of property, and
personal humiliation because of the actions of the U.S. government.68 Over
the years, Korematsu has become a constitutional pariah. The Supreme Court
has never cited it with approval of its result.69

60 Id. at 191-92.
62 CRAY, supra note 36, at 520.
64 Id.
65 Id.
66 PERSONAL JUSTICE DENIED, supra note 32, at 1.
67 See id. at 5-8.
of $20,000 to each surviving internee. By 1998, the total payout was $1.6 billion, paid to
80,000 claimants. ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND
NEGOTIATING HISTORICAL INJUSTICES 30-31 (2000).
70 Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and
the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 485 n.99.

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. The Berlin Blockade, the fall of China, the Soviet atomic bomb, the Korean War, and the Cuban Missile Crisis were not a string of independent events, but “a slow-motion hot war, conducted on the periphery of rival empires.”

During this era, the nation demonized members of the Communist Party, “endowing them with extraordinary powers and malignity.”

When Harry Truman became President in 1945, the federal and state statute books already abounded with anti-Communist legislation. As the glow of our wartime alliance with the Soviet Union evaporated, Truman came under increasing attack from a coalition of Southern Democrats and anti-New Deal Republicans who sought to exploit fears of Communist aggression.

As House Republican leader Joe Martin declared on the eve of the 1946 election, “the people will vote tomorrow” between chaos and Communism, on the one hand, and “the preservation of our American life,” on the other.

In Wisconsin, Joseph R. McCarthy castigated his opponent as “Communistically inclined,” and in California Richard Nixon charged his opponent of “consistently voting” the Moscow line.

The Democrats lost fifty-four seats in the House.

Thereafter, the issue of loyalty became a point of contention in party politics. By 1948, Truman was boasting that he had imposed on the federal civil service the most extreme loyalty program in the “Free World.”

There were limits, however, to Truman’s anti-Communism. In 1950, Truman vetoed the McCarran Internal Security Act, which called for the registration of all Communists; Congress passed the Act over Truman’s veto.

The long shadow of the House Committee on Un-American Activities fell across our campuses and our culture. University of Chicago President Robert M. Hutchins observed: “The question is not how many teachers have been fired, but how many think they might be, and for what reasons ... The entire teaching profession of the U.S. is now intimidated.”

Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, and others.

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72 Id. at 428.


74 Id. at 26.

75 Id. at 26-27.

76 See id. at 27.

77 Id. at 33.


79 Caute, supra note 73, at 429 (alteration in original).
Lillian Hellman, James Thurber, and Arthur Miller. Fear of ideological contamination swept the nation.

In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Irving Howe lamented “this Congressional stampede to . . . trample the concept of liberty in the name of destroying its Enemy.” Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included not only the McCarran and Communist Control Acts, but extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and associations; and direct prosecution of the leaders and members of the Communist Party of the United States.

The key constitutional decision in this era was *Dennis v. United States*, which involved the prosecution under the Smith Act of the leaders of the American Communist Party. The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a six-two decision, the Court held that the convictions did not violate the First Amendment. The Court concluded that because the violent overthrow of government is such a grave harm, the danger need be neither clear nor present in terms of the “probability of success, or the immediacy of a successful attempt,” to justify suppression. In a plurality opinion, Chief Justice Vinson explained that the “formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members,” combined with the “inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom

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80 See *Stone*, supra note 17, at 313, 365; see also *Goldstein*, supra note 13, at 307-08.
84 341 U.S. 494 (1951) (plurality opinion).
86 *Dennis*, 341 U.S. at 495.
87 *Id.* at 516-17.
88 *Id.* at 509.
petitioners were in the very least ideologically attuned, convince us that their convictions were justified."  

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld the Subversive Activities Control Act, sustained far-reaching legislative investigations of “subversive” organizations and individuals, and affirmed the exclusion of members of the Communist Party from the Bar, the ballot, and public employment. In so doing, the Court clearly put its stamp of approval on an array of actions we today look back on as exemplars of McCarthyism. The Justices accepted without serious question “a generic ‘proof’ of Communism’s seditious nature” and simply shut their eyes “to the real-world consequences” of their decisions. As the historian David Caute has concluded, in the early 1950s the Constitution was “concussed in the courts,” and this was especially so in the Supreme Court, which too often served as “a compliant instrument of administrative persecution and Congressional inquisition.”

II. THE LOGIC OF EXPERIENCE

As these episodes illustrate, the Supreme Court’s dominant approach in the twentieth century to resolving conflicts between civil liberties and national security was to employ the “logical” presumption. For all the reasons identified earlier, the Court embraced a highly deferential stance, presuming that restrictions of civil liberties in wartime were constitutionally justified so long as the government could offer a reasonable explanation for its actions. But, as we have seen, this approach proved disastrous. *Schenck*, *Korematsu*, and *Dennis* have all come to be regarded as constitutional failures and as black marks on the Court’s reputation.

A. The Twentieth Century

The problem, quite simply, is that although a presumption of deference to executive and military officials in wartime may be logical in theory, it fails in practice. With the benefit of hindsight, the reasons for this failure are evident. A policy of deference assumes that those making the critical judgments are

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89 Id. at 510-11.

90 See, e.g., Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 112-15 (1961) (upholding the Subversive Activities Control Act’s requirement that Communist and Communist-front organizations register with the government); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (upholding the power of the House Committee on Un-American Activities to require a Vassar College instructor to answer questions about his past and present membership in the Communist Party); Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952) (upholding a New York law providing that no person who knowingly becomes a member of an organization advocating the violent overthrow of government may be appointed to any position in a public school).

91 Wiecek, supra note 71, at 434.

92 CAUTE, supra note 73, at 144.
properly taking the relevant factors into account in a fair and reasonable manner. If they fail to do so, the underlying rationale for deference is destroyed. As it turns out, this essential predicate for a policy of judicial deference in these circumstances is lacking. Government officials charged with responsibility for the nation’s security tend to exaggerate the dangers facing the nation, both to protect themselves in the event they fail and to persuade legislators and the public to grant them as much power as possible. Moreover, government officials charged with responsibility for the nation’s security tend not to be particularly sensitive to the importance of civil liberties and are therefore too quick to sacrifice those liberties in order to achieve their primary goal of safeguarding national security. Finally, opportunistic politicians tend to exploit periods of real or perceived crisis for partisan and personal gain. A time-honored method of gaining and/or consolidating power is to incite public fear, demonize an internal “enemy,” and then “protect” the public by prosecuting, interning, deporting, and spying upon those accused of “disloyalty.”

These three considerations are not exhaustive, but they adequately explain why the “logical” presumption of judicial deference to executive and military officials inevitably leads to decisions like *Schenck*, *Korematsu*, and *Dennis*. It is pointless, indeed dangerous, to defer to those whose judgments are likely to be distorted by such influences. As a practical matter, military and executive officials will invariably overvalue national security concerns at the expense of civil liberties. There may be sound reasons for judges to be cautious when they question military and executive officials, but pragmatism – informed by experience – demands that courts be more rigorous in their exercise of judicial review if we are to avoid more decisions like *Schenck*, *Korematsu*, and *Dennis*.

Of course, the comparative advantage that courts have over the executive and legislative branches in interpreting and enforcing individual liberties is familiar. Responsiveness to the electorate may be essential to the day-to-day workings of democracy, but that responsiveness can lead to the unnecessary sacrifice of the rights of those who are regarded as different, dangerous, or disloyal. Judges with life tenure and a more focused attention on the preservation of civil liberties are more likely to protect our freedoms than the elected branches of government. As the journalist Anthony Lewis has observed, “[t]he distinctive American contribution to the philosophy of government has been the role of judges as protectors of freedom.”

93 Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom, in The War on Our Freedoms: Civil Liberties in an Age of Terrorism* 47, 67 (Richard C. Leone & Greg Anrig, Jr. eds., 2003). The framers were aware of this:

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous
The central challenge, though, is not merely to protect our civil liberties, but to do so without unduly preventing the government from protecting national security. If courts were irresponsibly aggressive in protecting civil liberties in wartime, if they were inclined to cripple the nation’s capacity to wage war effectively, if they regarded the Constitution as a “suicide pact,” it would make sense to insist on judicial deference. But nothing could be further from the truth. Throughout our history, judges have erred too much on the side of deference in times of crisis. Like other citizens, judges do not want the nation to lose a war, and they certainly do not want to be responsible for a mass tragedy. As Chief Justice Rehnquist has observed, “judges, like other citizens, do not wish to hinder a nation’s ‘war effort.’” Moreover, judges, like other citizens, are not immune to the fears and anxieties of the moment. This makes them even more prone to err on the side of deference.

Not surprisingly, then, although Congress and the President have often under-protected civil liberties in wartime, there is not a single instance of a decision of the Supreme Court that has overprotected civil liberties in a way that has caused any demonstrable harm to national security. The concern that courts may unduly shackle the nation’s ability to fight is unfounded in history. There is no reason in logic or experience to believe that courts, freed of the constraint of blind deference, would give excessive protection to civil liberties and thus jeopardize national security.

Moreover, even if courts were more demanding in their scrutiny of wartime restrictions of civil liberties, the potential “danger” would not be so dire. There are many ways to achieve a desired level of security. If one measure is unavailable, others can be pursued. Suppose, for example, that the Supreme Court had invalidated the Espionage Act of 1917 or the Smith Act of 1940, and prevented the government from prosecuting opponents of the draft in World War I or members of the Communist Party in the 1950s. Even in the unlikely event that this would have hampered the protection of national security, the government could easily have attained the same overall level of safety by, for instance, increasing the penalties for particular crimes, such as draft evasion or espionage, or by committing greater resources to investigating and prosecuting spies and saboteurs.

In a world of limited resources, the government must always choose between different means of achieving its objectives. Should it expand the

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innovations in the government, and serious oppressions of the minor party in the community.


94 Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”). See generally RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

95 WILLIAM H. RENquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 221 (1998).
number of investigators? Spend more on training? Invest in more advanced technology? The Constitution creates a presumption against the deprivation of civil liberties as a means of achieving the government’s legitimate goals. It does this for compelling reasons. In wartime, such measures as punishing dissent, spying on citizens, and interning possible domestic enemies are unduly attractive to public officials; not because they are essential to protect the nation, but because they are relatively inexpensive, cater to the witch-hunt mentality, create the illusion of decisive action, burden those who already are viewed with contempt, and enable public officials to silence their critics in the guise of serving the national interest. Such measures should be a last, not a first, resort.

B. The Twenty-First Century

Because we know from experience that there is a repeated pattern of excessive restriction of civil liberties in wartime, courts in the twenty-first century must abandon the “logical” presumption of deference to executive and military authority and employ a more rigorous standard of review. In light of experience, we know that the “logical” presumption is dangerous. The lesson of decisions like Schenck, Korematsu, and Dennis is that courts must closely scrutinize invocations of military necessity and national security as justifications for limiting civil liberties.

It is often repeated as a form of conventional wisdom, however, that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency. The historian Clinton Rossiter once observed that “[t]he government of the United States, in a case of military necessity . . . can be just as much a dictatorship, after its own fashion, as any other government on earth.”96 The Supreme Court, he added, “will not, and cannot be expected to, get in the way of this power.”97 The decisions most often cited in support of this proposition are, of course, Schenck, Korematsu, and Dennis.

This does not give the Court its due. In fact, the Court has already learned the lessons of history and has increasingly rejected the “logical” presumption. The Justices are acutely aware of the Court’s past failures, and no Justice wants the next Schenck, Korematsu, or Dennis to taint his or her legacy.

It is, of course, impossible to mark a precise moment at which this shift occurred, but a good candidate would be June 17, 1957, when the Court handed down four decisions that reversed the course of constitutional history. The most important of those decisions was Yates v. United States,98 which put an end to the government’s prosecution of Communists under the Smith Act

96 Clinton Rossiter, The Supreme Court and the Commander in Chief 54 (1951).
97 Id.
and effectively ended the era of McCarthyism in the Supreme Court. Since that day, the Court has tended to take a much more aggressive role in scrutinizing government invocations of national security as a justification for limiting civil liberties in wartime.

Over the past half century, at least five Supreme Court cases have posed significant civil liberties versus national security conflicts somewhat analogous to those in *Schenck*, *Korematsu*, and *Dennis*. The first two arose out of the Vietnam War; the latter three involved the war on terrorism. In each of these cases, the Court eschewed the sort of judicial deference that had so ill-served the nation in the earlier era.

The two Vietnam War cases implicated the First and Fourth Amendments, respectively. *New York Times Co. v. United States* involved one of the most dramatic confrontations in American constitutional history. The U.S. government attempted to enjoin publication by the *New York Times* and the *Washington Post* of the Pentagon Papers, a top secret study of the Vietnam War, prepared within the recesses of the Defense Department, that had been made available to the newspapers “through an unprecedented breach of security.” The government maintained that publication of the Pentagon Papers would grievously harm national security. In a six-three decision, the Court rejected the executive’s national security claim and ruled that the government could not constitutionally enjoin the publication. Justice Black observed that the “word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment,” and Justice Stewart insisted that the government could not constitutionally enjoin the publication because it had failed to prove that disclosure “will surely result in direct, immediate, and irreparable damage to our Nation.”

Several years later, President Richard Nixon maintained that the executive is constitutionally exempt from the ordinary requirements of the Fourth Amendment when it undertakes national security investigations. Specifically, the government argued that in order to protect the nation from violent acts of subversion, the President must be free to engage in national security wiretaps without complying with the warrant and probable cause requirements. In

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100 403 U.S. 713 (1971) (per curiam).
103 *Id.* at 719 (Black, J., concurring).
104 *Id.* at 730 (Stewart, J., concurring).
United States v. U.S. District Court (Keith),\textsuperscript{105} the Court unanimously rejected this contention, holding that even in national security investigations the President has no constitutional authority to wiretap American citizens on American soil without a judicially issued search warrant based upon probable cause.\textsuperscript{106}

Although acknowledging that the President has a constitutional responsibility to protect the nation,\textsuperscript{107} the Court cautioned that “[h]istory abundantly documents the tendency of Government” to abuse its authority when constitutional liberties are at issue.\textsuperscript{108} Moreover, because executive branch officials are charged with keeping the nation safe, they are not “neutral and disinterested” arbiters in deciding whether there is probable cause to search.\textsuperscript{109} Thus, even in the context of national security investigations, “[t]he Fourth Amendment contemplates a prior judicial judgment” before government investigators may use “constitutionally sensitive means in pursuing their tasks.”\textsuperscript{110}

More recently, the Supreme Court has addressed and sternly rejected Bush administration claims of executive authority in the war on terrorism. In three decisions, the Court refused to grant deference of the sort that had led to the results in Schenck, Korematsu, and Dennis. In Rasul v. Bush,\textsuperscript{111} the Court held that federal courts have habeas corpus jurisdiction to review the legality of the confinement of the Guantanamo Bay detainees.\textsuperscript{112} This issue was especially acute in light of the circumstances in Afghanistan. Ordinarily, soldiers wear uniforms. This reduces the likelihood that bystanders will mistakenly be swept up as enemy soldiers. In Afghanistan, however, local fighters – both the Taliban and those who fought alongside American troops – did not wear uniforms. It was thus inevitable that some noncombatants would be captured during the conflict. In Rasul, the Court rebuffed the arguments of the Bush administration and held that the Guantanamo Bay detainees could invoke the writ of habeas corpus to contest in federal court whether they had fairly been determined to be enemy combatants.\textsuperscript{113}

In Hamdi v. Rumsfeld,\textsuperscript{114} decided on the same day in 2004 as Rasul, the Court went even further. Yaser Hamdi, an American citizen, was seized in Afghanistan by the Northern Alliance (an American ally) and turned over to

\textsuperscript{105} 407 U.S. 297 (1972).
\textsuperscript{106}  Id. at 324.
\textsuperscript{107}  Id. at 310.
\textsuperscript{108}  Id. at 314.
\textsuperscript{109}  Id. at 317.
\textsuperscript{110}  Id.
\textsuperscript{111}  542 U.S. 466 (2004).
\textsuperscript{112}  Id. at 485.
\textsuperscript{113}  Id.
\textsuperscript{114}  542 U.S. 507 (2004) (plurality opinion).
the U.S. military. In April 2002, Hamdi was covertly shipped to a military brig in South Carolina. The Bush administration maintained that Hamdi was an “enemy combatant” and that it could therefore detain him indefinitely, without access to counsel, and without any formal charge or proceeding.

In an eight-one decision, the Court held that this violated Hamdi’s right to due process of law. In her plurality opinion, Justice O’Connor declared that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertion before a neutral decisionmaker.” O’Connor explained that it “is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” In rejecting the government’s contention that the Court should play “a heavily circumscribed role” in reviewing the actions of the executive in wartime, O’Connor pointedly observed that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

Hamdan v. Rumsfeld, decided in June 2006, involved the plight of Salim Ahmed Hamdan, a Yemeni national, who was seized by militia forces in Afghanistan in 2001 and turned over to the U.S. military, which later transported him to prison in Guantanamo Bay. In 2003, President Bush deemed Hamdan eligible for trial by military commission for unspecified offenses. A year later, the government charged Hamdan with conspiracy “‘to commit . . . offenses triable by military commission.’” In habeas and mandamus petitions, Hamdan maintained that (1) the military commission, which had been established by executive order, lacked authority to try him because neither congressional statute nor the law of war authorized trial by a military commission for the offense of conspiracy, and (2) in any event, the procedures adopted for military commissions in the executive order violated the basic tenets of military and international law.

115 Id. at 510.
116 Id. at 510-11.
117 Id. at 535.
118 Id. at 533.
119 Id. at 532.
120 Id. at 535-36. After this decision, the Bush administration released Hamdi rather than give him a hearing, on condition that he renounce his U.S. citizenship and promise to leave the country and never return. Eric Lichtblau, U.S., Bowing to Court Ruling, Will Free “Enemy Combatant,” N.Y. TIMES, Sept. 23, 2004, at A1.
122 Id. at 2759.
123 Id. (alteration in original) (quoting Petition for Writ of Certiorari app. e at 65a, Hamdan, 126 S. Ct. 2749 (No. 05-184)).
124 Id.
As in *New York Times Co.*, *Keith, Rasul*, and *Hamdi*, the Court declined to grant broad deference to the executive, instead making its own independent determination of the legality of the President’s action. In a five-three decision, the Court held that Congress had not authorized the use of military commissions to try the offense of conspiracy and that the President had no inherent constitutional authority to expand the jurisdiction of such commissions.125

The Court held further that the military commissions established by President Bush’s executive order violated both the Uniform Code of Military Justice and the 1949 Geneva Conventions.126 Specifically, the executive order authorized the military commissions to admit into evidence any proof that would have probative value to a reasonable person, without regard to the ordinary rules of evidence applied under the Code of Military Justice, and to preclude the accused and his civilian lawyer from learning of any evidence presented by the prosecution involving classified information or other material implicating national security.127 The Court emphatically rejected the President’s assertion that, as Commander in Chief of the Army and Navy, he could constitutionally impose these procedures even though they violated both federal and international law.128

**CONCLUSION**

In terms of judicial review of conflicts between civil liberties and the national security, the twenty-first century has had a rather good start. Having learned from the mistakes of the past, the Court (or at least a majority of the Justices) has jettisoned the “logical” presumption evidenced in *Schenck, Korematsu*, and *Dennis*, and replaced it with the “pragmatic” presumption of close judicial scrutiny evidenced in *Rasul, Hamdi*, and *Hamdan*. This is a fundamental step forward in American constitutional history.

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125 *Id.* at 2785.
126 *Id.* at 2791, 2793.
127 *Id.* at 2786-87.
128 *Id.* at 2773.