Korematsu Brief and Guantánamo

by Paul Wolf, 19 December 2003

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The Justices and Guantánamo
by Elaine Cassel, *citypages.com*, 12 November 2003

On November 10, the U.S. Supreme Court agreed to hear whether or not prisoners in Guantánamo Bay, Cuba may challenge the legality of their detentions as enemy combatants in U.S. courts. The Supreme Court has limited the appeal to that very specific and narrow issue. The U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia both summarily dismissed the petitions for *writ of habeas corpus* filed in behalf of 12 Kuwaitis, 2 Brits, and 2 Australians, 16 of the 650-plus prisoners captured in Pakistan and Afghanistan and interned in Cuba for going on two years.

The government's position is disingenuous, that the prisoners are not on sovereign U.S. territory, therefore the federal courts are closed to them. But the lease between the Cuban and U.S. governments specifically holds otherwise. In effect since the end of the Spanish-American war in 1903, the pertinent provision for the lease of the 45 square mile area that makes up the U.S. Naval Base says that "the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain." The lease gives the U.S. civil and criminal jurisdiction over all persons located therein. On its official web site, the U.S. Navy describes Guantánamo as "a Naval reservation, which, for all practical purposes, is American territory. Under the [lease] agreements, the United States has for approximately [one hundred] years exercised the essential elements of sovereignty over this territory, without actually owning it."

While it should be noted that earlier legal precedent ruled that a base in Bermuda was not "sovereign" U.S. territory, that case did not deal with a prison camp presided over by military guards. To suggest that the U.S. can create a law-free zone where it may imprison whomever it wants whenever it wants for as long as it wants -- and never charge or try them -- is an astoundingly absurd proposition from any government, let alone one that purports to live by the rule of law.

The prisoners' petitions for writs of habeas corpus asked for modest relief -- that they have the opportunity to challenge the basis for their detention as enemy combatants. On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order"). 66 Fed. Reg. 57, 833-36. (Nov. 13, 2001). Section 1(e) of the Military Order states that, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained. . . ." Section 2 provides that any non-citizen of the United States may be detained if the President determines "in writing" that "there is reason to believe" he or she "is or was a member of the organization known as al Qaida" or has engaged in or supported terrorism or other acts aimed at injuring the United States.

The prisoners' attorneys insist that they have the right, under international law, to see the evidence against them, and to have the rights guaranteed prisoners of war under the Geneva Conventions. These include the right to be charged with crimes or released and, if charged, to have legal counsel and fair tribunals. Intelligence experts have conceded that no more than a handful of the men could have any real intelligence value or could have been involved with al Qaeda. Most are likely there because others turned them in order to get huge money bounties. The U.S. was handing out fistfuls of dollars to people in the street who would name names, promising "snitches" enough money to take care of their families for a lifetime.

The lower federal courts also went far afield from their stated case precedent, *Johnson v. Eisentrager*, a 1950 Supreme Court case that arose out of World War II. There, Germans who had been tried and convicted by military tribunals wanted to challenge their convictions in federal court. The Supreme Court ruled that they could not. But these men had at least the semblance of due process -- they were charged, given attorneys, and tried. For the District of Columbia trial and appellate court to jump from those facts to foreclose the Guantánamo prisoners from judicial review was a huge leap unsupported by the facts or the law.

The Bush Administration pleaded with the Supreme Court not to grant the appeal. It warned the court that waging war was the President's business, not the Court's. This was also an argument so absurd and frightening that alarms ought to be clanging in the hearts and minds of every American. Since when does the President tell the Supreme Court what cases to take? Since when is the Supreme Court not the supreme law of the law -- the last word in all things legal and judicial? Before he was President, Bush thought the Court could anoint him President. The Court agreed. Now, he thinks that same Court cannot consider, merely consider (the Court may well agree with the lower courts, but I doubt it) whether courts might have jurisdiction over prisoners in Guantánamo so that his detention orders might be subject to some modicum of judicial oversight. That arrogance alone -- even if the policy at issue were not so terrifying -- justifies taking down this Administration a peg or two.

I would bet that the Supreme Court will decide that Guantánamo is enough of a U.S. territory that the prisoners detained there are allowed to have access to the courts. In a year from now, if the case finds its way back to the U.S. District Court in the District of Columbia, we will see plenty of stonewalling by the administration, much like it has done in the Moussaoui case. You don't think they are going to play by the book, do you? Of course, the "book" is a lot better for them in D.C. then in front of Judge Brinkema in Virginia. The D.C. trial and appellate courts are highly conservative and beholden to the Bush administration. And if Bush gets his way, the mad woman Janice Brown, the judicial nominee who does not even know the meaning of the term "supremacy clause" (she stumbled badly with Sen. Arlen Specter asked her about it in the Senate judiciary committee hearing that just recommended her for a full vote) and who thinks the 14th Amendment has nothing to do with the states, will be sitting on the D.C. appeals court.

It is too early to get excited and think that justice will be done for the prisoners in the black hole of Guantánamo. But it is some consolation that the Supreme Court, for once, has said no to Bush, no to Rumsfeld, and no to Solicitor General Theodore Olson. "We will have a look at this case," they said. For now, we have this small gesture, the tiny glimmer of hope, for which to be grateful.

The Upcoming Supreme Court Cases
Involving the Guantánamo Detainees
Why They Will Be Transcendently Important
By Edward Lazarus, *FindLaw*, 13 November 2003

Every year, the Supreme Court decides a group of especially significant cases, landmarks in the evolution of our constitutional system. Last year, for example, the decisions assessing the constitutionality of the University of Michigan's affirmative action programs were among the landmarks of the Term.

And then, every once in a while, for good or for ill, the Court decides a case of truly transcendent importance -- a *Dred Scott v. Sanford* or *Brown v. Board of Education* or *Nixon v. United States*. Such a case not only has powerful legal and political significance but also tests and illuminates the character of the Court and of the country.

Separating the transcendent cases from the merely important ones, is a task best done with benefit of hindsight. But in this column, I will hazard a prediction.

Recently, the Supreme Court granted review of the cases arising from the detention of aliens captured in Afghanistan and now imprisoned at Guantánamo. In resolving these cases, the Supreme Court will be testing nothing less than its own and the nation's commitment to the rule of law and the ideal of Americanism that may yet inspire a planet. Its decisions on these issues are almost certain to be of the kind of transcendent importance that makes or breaks not only a Term, but a Court, and even a nation.

Why the Stakes in the Guantánamo Cases Are Exceptionally High

At first blush, perhaps what I have said will seem like overstatement. After all, the actual legal issue that is before the court is fairly narrow, and extremely remote from everyday American life.

The issue is this: Do the federal courts have the authority to consider, even minimally, the legality of the detention of aliens seized last year during the fighting in Afghanistan and imprisoned at the U.S. military base at Guantánamo Bay? Or, alternatively, is their imprisonment (and eventual release, if they are ever released, and trial, if they are ever tried) a matter left entirely to the discretion of the Executive Branch?

The stakes in the Guantánamo cases, however, extend far beyond the seemingly arcane world of federal court jurisdiction. At bottom, the Bush Administration is claiming for itself the unilateral authority to detain the citizens of allied countries, hold them without charge, deny them access to lawyers, and grant them no recourse either to American courts or to relief under international law.

In short, the Administration is claiming the right to create a modern-day Bastille in which it can warehouse foreign nationals for justifications known only to itself. That question is a profoundly important one. In a technical sense, it involves the meaning of Constitutional Due Process, and its application to foreign nationals held by the U.S.. But it a deeper sense, it involves the issue of what kind of nation America wants to be -- one where the Executive department considers itself legally accountable, or one where it does not.

The Key Supreme Court Precedent Relevant to the Guantánamo Cases

As a legal matter, the Administration's position is not without some basis in past case law. The key precedent is the 1950 Supreme Court decision in *Johnson v. Eisentrager*.

The case arose because, near the end of World War II, a U.S. military tribunal convened in China convicted a group of Germans of aiding the Japanese against the United States -- a war crime. The Germans sought review of their convictions. But the Court ruled that U.S. federal courts had no jurisdiction to hear their claims.

Is *Eisentrager* just like the Guantánamo cases? The answer is no -- for three reasons.

- First, the Germans had already received some due process, having been convicted of war crimes by a properly constituted legal tribunal. The Administration claims the right to imprison the Guantánamo detainees with no process at all.

- Second, the Germans were clearly "enemy combatants," and thus had radically diminished legal rights. In contrast, the Guantánamo detainees say they are not -- and, indeed, that they never participated in any hostile action against the U.S.. (Far from being soldiers in enemy armies, many are citizens of countries allied with the United States.) In addition, for the purposes of assessing federal court jurisdiction, as a technical matter, these denials of enemy combatant status must be deemed to be true. And that makes perfect sense. These issues are the ones the federal court, if it had jurisdiction, would consider. They shouldn't be resolved before the court can even take a look.

- Third, the Germans were held abroad. The detainees are held in Guantánamo, which (as Anupam Chander has explained in a column for this site) is U.S. territory in everything but "ultimate sovereignty" -- which rests with Cuba.

Once all these facts are put together, *Eisentrager* seems quite inapposite. There, the Germans were seeking judicial redress as convicted enemy combatants being held on foreign soil. Here, the Guantánamo detainees are seeking judicial redress as foreign nationals neither charged with, nor convicted of, any crime, while they are being held on land entirely within U.S. control.

Still, *Eisentrager* is a broadly written opinion. And it contains snippets of language from which a clever lawyer (like Solicitor General Ted Olson) could plausibly argue that the combination of a foreign nationality and extraterritoriality means no constitutional rights, and no recourse to an American court. And technically, Guantánamo is extraterritorial.

The Court's 1990 decision in *United States v. Verdugo-Urquidez* could also lend credence to such a view. There, the Justices ruled that U.S. agents did not have to comply with the Fourth Amendment's limits on searches and seizures when, while in a foreign country, the agents seized the property of a nonresident alien (who was wanted in a drug case).

But *Verdugo-Urquidez*, too, is distinguishable: Although the defendant in that case could not avail himself of the Fourth Amendment's warrant clause, he was nonetheless afforded all other due process protections afforded criminal defendants when ultimately tried. As Justice Kennedy's concurring opinion makes clear, that case stands only for the proposition that what process is "due" a non-citizen in a case involving extraterritorial actions by the United States will depend on individual facts and circumstances.

In short, the decision lends only modest support for the idea that the U.S. may permanently deny due process to detainees who are locked up in what, in effect, in U.S. territory.

Another Way the Administration Can Win: Deference on Enemy Combatant Status

Despite these distinctions, a broad reading of *Eisentrager*, plus reliance on a broad reading of *Verdugo-Urquidez*, could mean a win for the Bush Administration. And there's another way it could win, as well.

The Administration could also prevail if it convinced the Court that it must consider the Guantánamo detainees "enemy combatants" (notwithstanding their denials) because the Administration claims they are and, according to the Administration, no court has the power to review this judgment.

As noted above, such a ruling would thwart typical jurisdictional law. It would also be unfair, as it would summarily resolve against the detainees the very question they seek to have a court review -- and then deny court review based on that summary resolution. Placing someone who seeks review in that impossible position is hardly due process in any sense of the phrase.

What Will Likely Be the True Basis for the Court's Decision

In the end, however, I don't expect that the Justices are going to decide the Guantánamo cases based mainly on a reading of the Court's precedents. Neither *Eisentrager* nor *Verdugo-Urquidez* provide clear enough guidance.

Indeed, the Executive's claim of authority to act independently of any outside legal constraint, and without providing any due process, is truly unprecedented. In *Eisentrager*, as noted above, convictions had already been duly rendered. In *Verdugo-Urquidez*, a seizure was at issue; after that seizure, process could and did follow.

As a result, the Justices have lots of room, in the Guantánamo cases, to make law without disturbing previous decisions. Thus, instead of looking to precedent, I think a majority -- including Justice Anthony Kennedy, the Court's pre-eminent moralist and a crucial swing vote -- will be moved by a visceral repulsion. They will be repelled -- rightly so -- by the idea that the Executive Branch may limitlessly detain any person without trial of any kind and hold that person incommunicado without any judicial review at all.

That didn't happen in *Eisentrager* or *Verdugo-Urquidez*. But it's happening now at Guantánamo.

For these Justices, such Executive self-aggrandizement will run headlong into basic notions of Constitutional checks and balances, and of the proper role of the Judicial Branch in particular. It will also run smack into the historical view -- dating back at least to the Magna Carta -- that unchecked Executive authority is a basic hallmark of tyranny.

This negative reaction, moreover, is likely to be compounded by the fact that the Administration's legal arguments will importantly hinge on a claim that, even viewed charitably, is mere hair-splitting. It is the claim that Guantánamo, land that the United States holds under lease in perpetuity and over which it exercises total control, is not U.S. territory because Cuba holds "ultimate sovereignty" to the land.

For these reasons, I believe the Court will rebuke the Administration in the Guantánamo cases. At a minimum, it will require that judicial review of "enemy combatant" status be provided.

Even If Legally Defensible, the Bush Administration's Claims Are A Policy Disaster

Meanwhile, a question of surpassing importance remains unanswered. I've explained why the Bush Administration is able to concoct a plausible (though not convincing) legal basis for its claim of unrestrained power over the Guantánamo detainees. But why in the world is it choosing to do so?

In the international community, the Administration's approach exposes the nation to the corrosive charge of hypocrisy. The charge is simple but powerful: America cannot impose democratic norms on others while flouting the rule of law at home.

Meanwhile, this approach exposes Americans stationed abroad to the substantial danger that other countries will give Americans taken prisoner the same legal rights the U.S. is affording the Guantánamo detainees -- that is, none at all.

Even within our own borders, the Administration approaches creates risk and distrust. Most people recognize that, in the age of terrorism we now entered decisively, Americans will be called upon to trade some of their liberty for a greater assurance of security. But, at the same

time, they hope that incursions on liberty will be minimized -- taken as a regrettablenecessity, not a fresh opportunity to avariciously expand power.

This hope is dashed when, as in the Guantánamo cases, the Executive Branch arrogates to itself the right to exercise totally unreviewable power. Courts patrol the boundary of our liberties. But what if the courts cannot intervene?

In sum, we can be hopeful (though never extravagantly) that the Guantánamo cases will mark a decisive high note in the Supreme Court's sporadic history of checking unbridled governmental power. But it will remain a sad and troubling fact that the hubris of the Bush Administration made this test of national character necessary in the first place.

Brief of Amicus Curiae Fred Korematsu
in Support of Petitioners Al Odah, *et al*

An amicus brief on behalf of Fred Korematsu was filed with the Supreme Court by American Constitution Society supporter Geoffrey Stone of the University of Chicago in the cases of *Odah v. U.S.*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld* . The brief uses history to argue that, in times of war, the U.S. has often sacrificed fundamental freedoms *unnecessarily*. Korematsu urges the court to avoid the repetition of past mistakes and to closely scrutinize the government claims of "military necessity" in these cases to ensure that the government does not unnecessarily impair individual freedoms and the traditional separation of powers. On the brief with Professor Stone were Professors David Strauss (the faculty advisor of the ACS chapter at Chicago) and Stephen Schulhofer of NYU Law School.
PDF copy of this Brief.

INTEREST OF *AMICUS CURIAE*[1]

More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*,[2] this Court upheld his conviction, explaining that because the United States was at war the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half-a-century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed, unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

SUMMARY OF ARGUMENT

Petitioners in these cases have been deprived of their liberty for extended periods of time without any opportunity for a fair hearing before a competent tribunal to determine whether there is any factual or legal basis for their confinement and without any assistance of counsel. Unlike Fred Korematsu, who was at least permitted to challenge in court the constitutionality of his internment, the Petitioners have been denied even that fundamental right. The United States insists that this denial of even minimal due process is constitutional and federal courts lack jurisdiction to review that determination because the United States is at war.

Although the specific legal issues presented in these cases differ from those the United States has faced in the past, the extreme nature of the government's position is all-too-familiar. It may be that it is essential in some circumstances to compromise civil liberties in order to meet the necessities of wartime, but history teaches that we tend too quickly to sacrifice these liberties in the face of overbroad claims of military necessity. Fred Korematsu's experience is but one example, of many. In this instance, the claim, accepted in effect by the courts below, that the government may detain individuals indefinitely without any fair hearing overreaches the bounds of military necessity. To avoid repeating the mistakes of the past, this Court should make clear that the United States respects fundamental constitutional and human rights -- even in time of war.

ARGUMENT

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that we often react too harshly in circumstances of felt necessity and underestimate the damage to civil liberties. Typically, we come later to regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798 , the suspension of *habeas corpus* during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

I. TIME AND AGAIN, IN PERIODS OF REAL OR PERCEIVED CRISIS, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES

History teaches that, in time of war, we have often sacrificed fundamental freedoms unnecessarily. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and

failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.

A. THE ALIEN AND SEDITION ACTS OF 1798

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.[3]

The Republicans opposed these measures, leading Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans "would sink the glory of our country and prostrate her liberties at the feet of France."[4] Against this backdrop, and in a mood of patriotic fervor, the Federalists enacted the Alien and Sedition Acts of 1798.

The Alien Friends Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.[5] Congressman Edward Livington aptly observed in opposition to the Act that with "no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion."[6]

The Alien Friends Act expired on the final day of President Adams's term of office, and has never been renewed. The Sedition Act of 1798 prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute.[7] The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against every influential Republican newspaper and the most vocal critics of the Adams administration.[8]

The Sedition Act also expired on the last day of Adams's term of office. The new President, Thomas Jefferson, pardoned those who had been convicted under the Act, and forty years later Congress repaid all the fines.[9] The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has often reminded us in the years since that the Sedition Act of 1798 has been judged unconstitutional in the "court of history."[10]

B. THE CIVIL WAR: THE SUSPENSION OF *HABEAS CORPUS*

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for

espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. Some of these orders were more warranted than others. The most extreme of the suspensions, which applied throughout the entire nation, declared that "all persons ... guilty of any disloyal practice ... shall be subject to court martial."[11]

Under this authority, military officers arrested and imprisoned as many as 38,000 civilians, with no judicial proceedings and no judicial review.[12]

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*[13] that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. As Chief Justice Rehnquist has observed, *Milligan* "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[14]

C. WORLD WAR I: THE ESPIONAGE ACT OF 1917

When the United States entered World War I, there was widespread opposition to both the war and the draft. Many citizens argued that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier.

President Wilson had little patience for such dissent. He warned that disloyalty "must be crushed out" of existence[15] and declared that disloyalty "was ... not a subject on which there was room for ... debate." Disloyal individuals, he explained, "had sacrificed their right to civil liberties."[16]

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.[17] Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.[18] The Wilson administration's intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[19]

In fact, the government worked hard to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information, which produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German and of all persons whose "loyalty' might be open to doubt.[20]

The government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft, and in an atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment -- often 10 to 20 years in prison -- to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.[21] But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.[22]

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920 -- most notably *Schenck*,[23] *Debs*,[24] and *Abrams*[25] -- the Court consistently upheld the convictions of individuals who had agitated against the war and the draft -- individuals as obscure as Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaflets written in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President. As Harry Kalven once observed, the Court's performance was "simply wretched."[26]

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.[27] Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.[28]

D. THE RED SCARE: 1919-1920

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and spectacular bombings triggered the period of public paranoia that became known as the "Red Scare" of 1919-1920. AttorneyGeneral A. Mitchell Palmer announced that the bombings were an "attempt on the part of radical elements to rule the country."[29]

Palmer established the "General Intelligence Division" within the Bureau of Investigation and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID unleashed a horde of undercover agents to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the "alien filth" captured in these raids as creatures with "sly and crafty eyes, lopsided faces, sloping brows and misshapen features" whose minds were tainted by "cupidity, cruelty, and crime." [30] More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the government had acted without legal authorization and without complying with the minimum standards of due process.[31]

This report marked the beginning of the end of this era. As the *Christian Science Monitor* observed in June 1920, "in the light of what is now known, it seems clear that what appeared to be an excess of radicalism" was met with a real "excess of suppression."[32] In 1924, Attorney General Harlan Fiske Stone ordered an end to the Bureau of Investigation's surveillance of political radicals. "A secret police," he explained, is "a menace to free government and free institutions."[33]

E. WORLD WAR II: INTERNMENT

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to "designate military areas" from which "any persons may be excluded."[34] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; 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. Many families lost everything.

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.[35] In *Korematsu v. United States*,[36] this Court, in a six-tothree decision, upheld the President's action. The Court offered the following explanation:[37]

> [We] 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....
>
> Korematsu was not excluded from the [West Coast] because of hostility to ... his race, [but] because ... the military authorities ... decided that the [] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area].... We cannot -- by availing ourselves of the calm perspective of hindsight -- say that these actions were unjustified.

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." "February 19th," he noted, "is the anniversary of a sad day in American history," for it was "on that date in 1942 ... that Executive Order 9066 was issued." President Ford observed that "we now know what we should have known then" -- that the evacuation and internment of these individuals was "wrong." Ford concluded by calling "upon the American people to affirm with me this American Promise -- that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated."[38]

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. The Commission was

composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1983, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[39] Shortly thereafter, lower federal courts granted extraordinary writs of *coram nobis* in the *Korematsu* and *Hirabayashi* cases, finding that government officials had known at the time of the internment decision that there had been no military necessity and that government officials had intentionally deceived the Supreme Court about this state of affairs.[40]

In vacating Fred Korematsu's forty-year-old conviction because it was the result of "manifest injustice," Federal District Judge Marilyn Hall Patel emphasized the need for both executive branch accountability and careful judicial review:[41]

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability....

In 1988, President Reagan signed the Civil Liberties Restoration Act, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons," and offered a formal 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 United States government.[42] This Court's decision in *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result.[43]

F. THE COLD WAR: LOYALTY OATHS AND MCCARTHYISM

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. With the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of "loyalty" quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World."[44]

But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarren Act, which required the registration of all Communists. Truman explained that the Act was the product of "public hysteria" and would lead to "witch hunts."[45] Congress passed the Act over Truman's veto.[46]

In 1954, Congress enacted the Communist Control Act,[47] which stripped the Communist Party of "all rights, privileges, and immunities." Only one Senator, Estes Kefauver, dared to vote against it. Irving Howe lamented "this Congressional stampede to ... trample ... liberty in the name of destroying its enemy."[48]

Hysteria over the "Red Menace" swept the nation and generated a wide range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged "subversives"; abusive legislative investigations designed to punish by exposure; public and

private blacklists of those who had been "exposed"; and criminal prosecutions of the leaders and members of the Communist Party of the United States.[49]

This Court's response was mixed. The key decision was *Dennis v. United States*,[50] which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard -- even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.[51]

Over the next several years, the Court upheld farreaching legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment.[52] In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism. In later years, the Court effectively overruled *Dennis* and its progeny, recognizing once again that the nation had been led astray by the emotions and fears of the moment.[53]

II. TO AVOID A REPETITION OF PAST MISTAKES, THIS COURT SHOULD CLOSELY SCRUTINIZE THE GOVERNMENT'S CLAIMS OF "MILITARY NECESSITY" IN THESE CASES TO ENSURE THAT CIVIL LIBERTIES ARE NOT UNNECESSARILY RESTRICTED

As in past episodes, the issues raised in these cases involve a direct conflict between our most precious civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make mistakes in the present. We should learn from our experience.

During World War I, John Lord O'Brian served as Special Assistant Attorney General in charge of the War Emergency Division of the Department of Justice. In this capacity, he played a central role in enforcing the Espionage Act of 1917. Four decades later, reflecting on his own experience, O'Brian cautioned against the "emotional excitement engendered ... during a war," and warned that "the greatest danger to our institutions" may rest, not in the threat of subversion, but "in our own weaknesses in yielding" to wartime anxiety and our "readiness to ... disregard the fundamental rights of the individual." He expressed the hope that "our judges will in the end establish principles reaffirming" our nation's commitment to civil liberties.[54]

As Chief Justice Rehnquist has written, "[i]t is all too easy to slide from a case of genuine military necessity ... to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[55]

It is, he added, "both desirable and likely that more careful attention will be paid by the courts to the . . . government's claims of necessity as a basis for curtailing civil liberty."[56] This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.[57] *Korematsu* and *Dennis* are examples of this phenomenon.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis.

This Court should make clear that the United States adheres to the rule of law even in wartime, and that even in wartime the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel.

This Court should make clear that, even in wartime, the United States does not abandon fundamental liberties in the absence of convincing military necessity. Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

GEOFFREY R. STONE
DAVID A. STRAUSS
STEPHEN J. SCHULHOFER

Footnotes

1. This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief. Filing and printing costs were paid by the MacArthur Justice Center at The University of Chicago Law School.

2. 323 U.S. 214 (1944).

3. James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (New Haven: Yale, 1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* 195 (New York: Free Press, 1975).

4. Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont, June 25, 1798, in Charles Francis Adams, ed., 9 *The Words of John Adams* 202 (Boston: Little, Brown, 1854).

5. *See* An Act Concerning Aliens, 5th Cong., 2d Sess., in 1 *The Public Statutes at Large of the United States of America* 570-72 (Boston: Little, Brown, 1845). The Alien Enemies Act, which was adopted at the same time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy.

6. 8 *Annals of Congress* 2006-11 (Gales and Seaton 1851).

7. *See* An Act for the Punishment of Certain Crimes against the United States, 5th Cong., 2d Sess., in 1 *Public Statutes at Large* 596-97.

8. See John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956).

9. Cong. Globe, 26th Cong, 1st Sess. 411 (May 23, 1840). *See* 26th Cong., 1st Sess., Doc. 86, House Rep.

10. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

11. Roy P. Basler, ed., 5 *The Collected Works of Abraham Lincoln* 436-437 (New Brunswick, N.J.: Rutgers University Press, 1956).

12. *See* Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York and Oxford: Oxford University Press, 1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998).

13. 4 Wall. (71 U.S.) 2 (1866).

14. William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (New York: Vintage Books, 1998).

15. Woodrow Wilson, "Third Annual Message to Congress," quoted in David M. Kennedy, *Over Here: The First World War and American Society* 24 (New York: Oxford University Press, 1980).

16. Quoted in Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (New York: Norton, 1979).

17. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

18. See Geoffrey R. Stone, *Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, The Origins of the "Bad Tendency Test": Free Speech in Wartime, 2003 *Sup. Ct. Rev.* 411

19. *New York Times* 3 (Nov. 21, 1917).

20. *See* Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (Ithaca: Cornell University Press, 1960).

21. *See* Zechariah Chafee, *Free Speech in the United States* 52 (Cambridge: Harvard University Press, 1941)

22. Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

23. *Schenck v. United States*, 249 U.S. 47 (1919).

24. *Debs v. United States*, 249 U.S. 211 (1919).

25. *Abrams v. United States*, 250 U.S. 616 (1919).

26. Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (New York: Harper & Row, 1988).

27. Cong. Rec. 66th Cong., 2d Sess. 293-94 (Dec. 13, 1920).

28. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

29. Quoted in Robert K. Murray, *Red Scare: A Study in National Hysteria*, 1919-1920, 9 (New York: McGraw-Hill, 1955).

30. "Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others," Hearings before the Comm. on Rules, House of Representatives 27 (1920).

31. *See* National Popular Government League, Report upon the Illegal Practices of the United States Department of Justice (1920).

32. *Christian Science Monitor* (June 25, 1920).

33. Quoted in Max Lowenthal, *The Federal Bureau of Investigation* 298 (New York: Sloane, 1950).

34. Executive Order No. 9066, 7 Fed. Reg. 1407 (1942). On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified as 18 U.S.C. § 1383) (1974) (repealed 1976).

35. See Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (Washington D.C.: Government Printing Office, June 1983); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (Seattle: University of Washington Press, 2003).

36. 323 U.S. 214 (1944). *See also Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); *Yasui v. United States*, 320 U.S. 115 (1943) (same).

37. 323 U.S. at 219-20, 223-24.

38. Presidential Proclamation 4417, "An American Promise," February 19, 1976, quoted in Eric K. Yamamoto, *et al.*, Race, Rights and Reparation: Law and the Japanese American Internment 400 (Gaithersburg, Md.: Aspen, 2001).

39. Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 5, 8 (Washington D.C.: Government Printing Office, June 1983).

40. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Gordon Hirabayashi also successfully filed a petition for a *writ of coram nobis*. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). *See also* Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 Amerasia Journal 51 (2002).

41. Korematsu, 584 F. Supp. at 1420.

42. 102 Stat. 903, Public Law 100-383 (Aug. 10, 1988) (codified at 50 U.S.C. § 1989(b)) (1996).

43. *See* Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 *Sup. Ct. Rev.* 455, 485 n 99.

44. *See* David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (New York: Simon and Schuster 1978).

45. *New York Times* (Sept. 21, 1950).

46. 64 Stat. 987, 50 U.S.C. § 67.

47. 68 Stat. 775, 50 U.S.C. § 841.

48. Irving Howe, "The Shame of U.S. Liberalism," 1 *Dissent* 308 (Autumn, 1954).

49. *See* generally Ralph S. Brown, *Loyalty and Security* (New Haven: Yale University Press, 1958); Caute,

supra note 43; Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* (New York: Alfred A. Knopf, 1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).

50. 341 U.S. 494 (1951).

51. *See* Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 211 (New York: Harper & Row, 1988); William M. Wiecek, The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States, 2001 *Sup. Ct. Rev.* 375.

52. *See, e.g, Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1959).

53. *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell* , 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

54. John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 Harv. L. Rev. 1, 3-4, 26 (1952). See John Lord O'Brian, Changing Attitudes toward Freedom, 9 *Wash. & Lee L. Rev.* 157 (1952).

55. Rehnquist, *supra note* 12, at 224.

56. *Id.*, at 225.

57. *See Id.*, at 222.

Geneva Conventions of 1949:
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
http://www.yale.edu/lawweb/avalon/lawofwar/geneva05.htm
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Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949
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Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
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