THE ROLE OF COURTS IN TIME OF WAR[A1]

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I.
INTRODUCTION

Preservation of fundamental constitutionnal rights is the most important responsibility of the federal judiciary.[1] The structural protections enjoyed by Article III judges—life tenure; no diminution of salary; two-thirds Senate vote for impeachment[2]—are designed to insulate the judicial branch from political pressures in order to make it possible for it to act as an institutional safety-net in settings where a risk of majoritarian overreaction exists.

It is a truism that the risk of government overreaching peaks during periods of national crisis, especially wartime. It is also a truism that risks associated with the full-fledged enjoyment of certain constitutional rights increase during wartime. Thus, in time of war or national crisis, federal judges have the daunting responsibility of balancing a heightened risk of government overreaching against a heightened risk created by enforcing certain constitutional rights against the government. How should a federal judge react in such a setting when the political branches assert that enforcement of an individual constitutional right poses an unacceptably high risk?

One extreme would be for the Article III judiciary to take the government's assessment of risk at face value, effectively leaving the scope of constitutional rights during wartime in the hands of the political branches. Given the difficulty of second-guessing the government's initial risk assessment, such a passive approach is institutionally seductive. But both history and human nature tell us that government estimates of the risks associated with unpopular or frightening

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A1 This paper was initially presented before the Second Circuit Judicial Conference in June, 2003, in connection with a panel on the role of the Article III judiciary in times of national crisis chaired by Judge Jose Cabranes. The original citations and much of the original text have been retained. Although subsequent events, including the revelation of the torture of prisoners in the military prison at Abu Ghraib and the Supreme Court's response to the government's effort to wall off the judiciary from constitutional oversight of the treatment of detainees, are discussed briefly in this paper, I have not made an effort to update the paper in any comprehensive manner. Most importantly, the paper was delivered prior to Geoffrey Stone's far more comprehensive treatment of many of the same issues in his recent book Free Speech in Wartime. I was assisted in preparing for the Judicial Conference by reading an earlier draft of Judge Block's article appearing in this issue.

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1. Article III of the U.S. Constitution establishes the federal judiciary. U.S. CONST. art. III.

2. *Id.*

behavior are often overstated, especially in times of great national stress. We have only to remember the Alien and Sedition Acts, Lincoln's suspension of the writ of habeas corpus, the Palmer raids after World War I, anti-union activity during the Depression, the Japanese internment camps, the McCarthy era, and the jailing of draft card burners during the Vietnam War.[3]

The other extreme would be to insist that the judicial role should not change during wartime. Under such a view, the classic "checking" function of a federal judge as a brake on majoritarian overreaching should continue unabated during periods of crisis, with the government required to satisfy an extremely high burden of justification before it can act in derogation of traditional constitutional values. Although the examples are less well-known, federal judges have occasionally played precisely such an aggressively protective role during periods of military insecurity.[4]

If forced to choose, I would opt for the latter approach. Abdication of the judiciary's checking function during time of war or national crisis is virtually certain to result in serious misbehavior by overzealous government officials who will, in good faith, abuse their powers in the name of national security. The tragic misbehavior at Abu Ghraib[5] merely illustrates the certainty that power will be abused in the name of national security unless its exercise is subject to effective outside scrutiny.

But we should not be forced to choose between the extremes of no effective judicial protection, or full-scale peacetime judicial review. Abdication of effective judicial oversight in time of war virtually guarantees the kind of oppressive behavior that has far too often marred our constitutional heritage. Ask a Japanese-American who was forced from her home and confined in a concentration camp during World War II what she thinks of a system with no judicial effective protection. On the other hand, insistence on a "business as usual" approach to judicial risk assessment in wartime may pose unacceptable levels of danger to society. Ask someone getting on a plane today whether a fairly administered prophylactic search of her baggage and the baggage of fellow passengers violates the Fourth Amendment.[6]

Instead of being forced into an either/or choice between extremes, I wonder if it is possible to distill from our wartime experiences an intermediate position that would permit the Article III judiciary to continue to play an important checking function during wartime, while taking account of the changed reality that war brings? I propose to canvass briefly two strands of our wartime judicial

3. *See* discussion in Part II, *infra*.

4. *See* discussion in Part III, *infra*.

5. *See* Jim Hoagland, *End of Empire*, WASH. POST, May 9, 2004, at B7 (discussing the mistreatment of prisoners in the military prison at Abu Ghraib).

6. U.S. CONST. amend. IV (confers a right against searches without due process; also infers a right to privacy).

experience, and to suggest an appropriate role for the Article III judiciary in a time of military hostility.

II.
THE STANDARD STORY: JUDICIAL COLLAPSE IN TIME OF WAR OR NATIONAL CRISIS

The standard story is that the United States Constitution is like a canvas deck chair: Article III judges unfold it on sunny days to enjoy the good weather, but, at the first hint of rain, they fold it up and put it in storage until the sun comes out again. Regrettably, there is significant historical support for the "deck chair" theory of constitutional law. It's entirely possible that our constitution has lasted for 200 years precisely because it never gets wet.

The perceived threat posed by the French Revolution caused us to put the First Amendment into cold storage almost before the ink was dry. The panic and revulsion that greeted the excesses of the French Revolution led to the passage of the Alien and Sedition Acts, four integrated statutes enacted by the Federalist Congress in 1798: (1) the Alien Act, authorizing deportation of "dangerous" aliens; (2) the Alien Enemies Act, authorizing the imprisonment or deportation of aliens "associated" with a nation with which the United States was at war; (3) the Naturalization Act, increasing the waiting period for citizenship from 5 to 14 years in an effort to prevent French and Irish immigrants from voting in the election of 1800; and (4) the Sedition Act, banning "false, scandalous, or malicious writing" against the government.[7]

No efforts were made to enforce the Alien or Alien Enemies Acts. The Naturalization Act was repealed by the Republican Congress in 1802, assuring Jefferson access to the immigrant vote in the 1804 election. The Sedition Act was, however, used vigorously by the Adams administration against its critics, resulting in the arrest and imprisonment of several prominent opponents of the Adams's administration, including Benjamin Franklin's nephew, Benjamin Franklin Bache, who died in jail, and Matthew Lyon, a member of Congress from Vermont.[8]

Faced with widespread use of the Sedition Act to silence critics of the Adams administration, the Article III judiciary took almost no action to preserve free speech. Indeed, several Federalist trial judges were the principal cheerleaders in a spate of overtly political trials of opponents of President Adams.[9] Re-

7. Sedition Act, ch. 73, 1 Stat. 596 (1798); Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Act, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

8. *See generally* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1964); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

9. *See, e.g.*, FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 336 (1849) (discussing Justice William Paterson's

spect for constitutional values was restored, not by the judiciary, but by the good sense of the American people in rejecting the policy at the polls in the election of 1800, and by Presidential pardons issued by President Jefferson.[10]

During the Civil War, President Lincoln suspended the writ of habeas corpus in order to impose military rule. Initially, Lincoln suspended the writ only in areas where military force was needed to assure order, such as the rail line connecting Washington, D.C. with Baltimore and Philadelphia. Chief Justice Taney, writing as a Circuit Justice, pronounced such a unilateral suspension unlawful in *Ex parte Merryman.*[11] Lincoln ignored him. In 1862, confronted with widespread opposition to the nation's first military draft, Lincoln extended the suspension throughout the United States. While Lincoln sought to mitigate the rigors of military rule, repeatedly writing to military commanders to urge them to be sparing in the use of the arrest power, between 10,000–15,000 persons were arrested, many of whom were guilty of nothing more than vigorous opposition to the war.[12] The federal judiciary failed to intervene effectively until the war was over.[13]

At the close of the war, military rule was imposed on the states of the Confederacy pending readmission to the Union, with readmission conditioned on ratification of the Fourteenth Amendment. In *Ex parte McCardle,*[14] the Supreme Court permitted Congress to oust the Court from jurisdiction over an appeal challenging the constitutionality of post-war military rule, even after the appeal had been fully briefed and argued.

During World War I, a combination of war hysteria and fear of the Russian revolution led to a crackdown on opponents of the war under the Espionage Act of 1917[15] and the Sedition Act of 1918.[16] In the months following the enactment of the Espionage Act, thousands of persons were arrested for obstructing the draft and opposing the war. The Justice Department reported 1956 indictments during 1919–20, and 877 convictions. Judicial response is exemplified by

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involvement with the seditious libel prosecution of Matthew Lyon).

10. Opposition to the Alien and Sedition Acts centered on the Kentucky and Virginia Resolutions, which argued that states retained power to nullify federal laws violative of the Constitution. *See* Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888). *See also* James Madison, Virginia Resolutions of 1798, *reprinted in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888). Compared to the Kentucky and Virginia Resolutions, judicial review seems tame. The Alien, Alien Enemy, and Sedition Acts were permitted to expire in 1801.

11. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

12. *See* MARK NEELY, FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991); WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

13. *See Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866). *See infra* note 49 and accompanying text. (discussing judiciary failure to effectively intervene).

14. 74 U.S. (7 Wall.) 506 (1868).

15. 40 Stat. 217–231.

16. 40 Stat. 553–54.

cases like *Schenck v. United States*,[17] and *Debs v. United States*,[18] provoking the famous Holmes-Brandeis dissents that eventually became the basis of current free speech law.[19]

Schenck was the General Secretary of the Socialist Party. He was convicted under the Espionage Act of 1917 for conspiracy to obstruct the draft by distributing 15,000 copies of a pamphlet opposing conscription. Justice Holmes wrote for the Court in upholding the conviction. Eugene V. Debs was the five-time Socialist Party candidate for President. He was convicted in connection with a speech in Canton, Ohio in which he praised draft resisters. Debs was sentenced to ten years in prison. While in prison, he polled almost one million votes for President in the 1920 election. President Harding commuted Debs's sentence on December 25, 1921.[20]

At the close of World War I, the Palmer raids—a crackdown on aliens with suspect political beliefs—lead to widespread imprisonment and deportation of leftist dissenters. Woodrow Wilson appointed A. Mitchell Palmer as Attorney General in 1919. Palmer, assisted by a young aide, J. Edgar Hoover, vigorously enforced the Espionage Act of 1917 and the Sedition Act of 1918 against socialists and communists. During the summer of 1919, a series of anarchist bombings rocked eight American cities. In one attack, a suicide bomber partially destroyed Palmer's home in Washington, D.C. In response, Palmer unleashed a series of violent raids against radicals, arresting 10,000 persons on November 7, 1919, and another 6000 on January 2, 1920. Almost all the arrestees were eventually released without charges.[21]

Judicial response to the Palmer raids was virtually non-existent. Instead, a courageous Assistant Secretary of Labor, Louis F. Post, voided more than 1500 deportations.[22] Ultimately, 247 persons were deported. Mitchell provoked a minor panic by predicting that the communist revolution was scheduled for May 1, 1920. When the revolution did not materialize, Palmer lost much of his influence, and failed to secure the Democratic nomination for President in 1920.[23]

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17. 249 U.S. 47 (1919).

18. 249 U.S. 211 (1919).

19. Justice Holmes, after writing for the Court in *Schenck* and *Debs*, broke with the majority and joined Justice Brandeis in dissenting in *Abrams v. U.S.*, 250 U.S. 616 (1919). The Supreme Court's path to the modern First Amendment begins with the Holmes-Brandeis dissent in *Abrams*.

20. *See* DAVID A. SHANNON, THE SOCIALIST PARTY OF AMERICA: A HISTORY (1967); MARGUERITE YOUNG, HARP SONG FOR A RADICAL: THE LIFE AND TIMES OF EUGENE VICTOR DEBS (1999).

21. *See* STANLEY COHEN, A. MITCHELL PALMER: POLITICIAN (1963); ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920 (1955); WILLIAM PRESTON, ALIENS AND DISSENTERS; FEDERAL SUPPRESSION OF RADICALS, 1905–1933 (1963). *See also,* Allan L. Damon, *The Great Red Scare and the Role of A. Mitchell Palmer, in* 19 AMERICAN HERITAGE 22–27, 75–77 (1968).

22. Post was Palmer's nominal superior in connection with the deportations because, in those days, the Bureau of Immigration was located in the Labor Department.

23. *See* COHEN, MURRAY, PRESTON, and Damon *supra* note 21.

During World War II, a lethal combination of racism and war hysteria led to the forcible relocation of Japanese-Americans from their homes on the West Coast, and their incarceration in internment camps in the interior.[24] The moving force behind the Japanese internments was Lt. Gen. John L. DeWitt, the ranking military official in California, whose reports of conspiracies led to the issuance of Executive Order 9,066, authorizing internment of enemy aliens and sympathizers.[25] Within a week of the issuance of the order, General DeWitt issued the first of 108 relocation orders resulting in the forcible evacuation of approximately 120,000 Japanese-Americans, including 70,000 citizens, to concentration camps in Idaho, Colorado, Wyoming, and New Mexico. No relocated person was ever shown to be guilty of unlawful activity. In 1988, Congress provided each survivor of the internment with a $20,000 compensatory payment, and a signed apology by the President.[26] No effort was made to invoke the Executive Order authorizing internment of enemy nationals against German-Americans and/or Italian-Americans.

The Supreme Court upheld the Japanese internment in *Korematsu v. United States*.[27] The World War II Court also cut back on *Ex parte Milligan*[28] by upholding the trial before a military commission of alleged German saboteurs who had been landed by submarine on Long Island, even though the civilian courts were available and functioning.[29]

During the Cold War with the Soviet Union, thousands of persons, caught up in the passions of the McCarthy era, were fired, deported, or jailed because of their suspected communist sympathies.[30] Judicial response to McCarthyism is exemplified by *Dennis v. United States*,[31] where the Supreme Court upheld the Smith Act,[32] outlawing the Communist Party, and *Harrisiades v. Shaughnessy*,[33]

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24. *See generally* ROGER DANIELS, PRISONERS WITHOUT TRIAL, JAPANESE-AMERICANS IN WORLD WAR II (1993); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

25. Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942). The San Francisco Museum maintains a web site containing General DeWitt's evacuation instructions to the Japanese-American community, and his final 1943 report on the relocation program. *See* http://www.sfmuseum.net/ war/dewitt0.html.

26. 50 App. U.S.C.A. § 1989 (1988). Approximately 60,000 persons received a payment of $20,000, together with a Presidential letter of apology signed by President Clinton.

27. 323 U.S. 214 (1944).

28. 71 U.S. (4 Wall.) 2 (1866). *See infra* note 49 and accompanying text.

29. *See Ex parte* Quirin, 317 U.S 1 (1942).

30. For a sampling of the voluminous literature on the McCarthy Era, *see* ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (1994); KENNETH O'REILLY, MCCARTHY ERA BLACKLISTING OF SCHOOL TEACHERS, COLLEGE PROFESSORS AND OTHER PUBLIC EMPLOYEES: THE FBI RESPONSIBILITIES PROGRAM FILE AND THE DISSEMINATION OF INFORMATION POLICY FILE (1989); THOMAS C. REEVES, MCCARTHYISM (1982).

31. 341 U.S. 494 (1951).

32. 18 U.S.C. § 2385 (2004). The Smith Act prohibited any attempts to advocate the overthrow of government.

33. 342 U.S. 580 (1952).

where the Supreme Court upheld punitive deportations of long-time permanent residents many years after their membership in the Communist Party had terminated.

During the Vietnam War era, the massacre at Kent State University[34] and the Supreme Court's upholding of the jailing of draft card burners in *United States v. O'Brien*,[35] bear witness to the passions that render it difficult to maintain constitutional values in time of war.

In the post-September 11 period, the passion and fear generated by the murderous assaults on the World Trade Center and the Pentagon, coupled with the continuing threat of terrorist attacks, has triggered the most recent clash between government power and individual rights. The federal judiciary's uneven reaction has reflected the difficulty of the task.

The denial of a parade permit to marchers in New York City seeking to protest the looming war with Iraq was an unfortunate throwback to deck chair constitutional enforcement.[36] On the other hand, the government's effort to hold suspected terrorists incommunicado and without access to counsel by labeling them "enemy combatants" subject to indefinite military detention was met with a more effective response by the Article III judiciary.

Chief Judge Mukasey grappled with whether Edward Padilla, an American citizen taken into custody in Chicago in connection with an apparent plot to bomb an airplane, was subject to indefinite confinement by the military as an "enemy combatant" linked to the Taliban, without access to counsel and without judicial review of the basis for his designation as an enemy combatant. Judge Mukasey's initial decision upheld the legality of prolonged military detention of American citizens as enemy combatants, but required that Padilla be permitted to confer with counsel and to challenge the government's basis for labeling him an enemy combatant.[37] In connection with such a review, the government would be required to produce some evidence supporting its position.[38]

The government appealed even that minor limitation on its power. The Second Circuit upheld Judge Mukasey's decision[39] but the Supreme Court reversed on jurisdictional grounds, holding that the military's decision to transfer Padilla from New York to a military brig in Charleston, South Carolina immedi-

34. Several students were students killed by the Ohio National Guard at Kent State University in 1970. *See* Krause v. Rhodes, 471 F.2d 430 (1972).

35. 391 U.S. 367 (1968).

36. United for Peace and Justice v. City of New York, 323 F.3d 175 (2d Cir. 2003). The demonstrators were permitted to hold a massive anti-war rally on February 15, 2003, but were forbidden to hold a march. Ironically, the difficulty of confining the demonstrators to fixed positions caused more disruption and friction than a march. Subsequent permits for marches have been granted. *See* Jennifer Steinhauer, *Bloomberg Agrees to Work With Antiwar Protesters on Best Route for a March in Manhattan*, N.Y. TIMES, Mar. 6, 2003, at B3.

37. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002).

38. *Id.*

39. Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003).

ately prior to the service of a writ of habeas corpus had successfully deprived Judge Mukasey of habeas corpus jurisdiction.[40]

If the story had stopped with the Supreme Court's willingness to allow an Article III court to be ousted of jurisdiction in *Padilla*, it would have looked disturbingly like the Supreme Court's collapse in *Ex parte McCardle*. Fortunately, there is more to the story. In *Hamdi v. Rumsfeld*,[41] the Fourth Circuit held that American citizens indefinitely detained as enemy combatants in connection with activities occurring in Afghanistan in a prison located on the American military base in Guantanamo Bay, Cuba, were ineligible for habeas corpus review.

In a decision announced simultaneously with *Padilla*, the Supreme Court reversed, upholding the government's substantive power to detain American citizens indefinitely as "enemy combatants," but holding that American citizens detained at Guantanamo Bay were entitled to file habeas corpus petitions, and that Hamdi, a dual Saudi/American citizen, was entitled to a hearing and to the assistance of counsel in connection with a challenge to the government's allegation that he was an "enemy combatant" captured while fighting for the Taliban against American forces in Afghanistan.[42]

Justices Stevens and Scalia dissented in *Hamdi*, rejecting the government's effort to use military detention as a substitute for criminal prosecution. The dissenters argued that the government must either file formal criminal charges, or release Hamdi.[43]

Rather than face even the watered-down hearing ordered by the Court's majority, the government released Hamdi to his home in Saudi Arabia, after requiring him to renounce his American citizenship and promise to remain in Saudi Arabia for five years.[44]

The Supreme Court also dealt with the plight of approximately 650 aliens also being held incommunicado at Guantanamo pursuant to the government's assertion that, as "enemy combatants" allied with the Taliban, they fell outside the protection of the Geneva Convention and beyond the scope of habeas corpus review.[45]

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40. Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004).

41. 296 F.3d 278 (4th Cir. 2002). *See also* Johnson v. Eisentrager, 339 U.S. 763 (1950) (German soldiers captured in China after war and held abroad not entitled to habeas review).

42. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

43. *Id.* at 2660–2674.

44. Jerry Markon, *Father Denounces Hamdi's Imprisonment; Son Posed No Threat to U.S., He Says*, WASH. POST, Oct. 13, 2004, at A4.

45. Charles Lane, *Terrorism Cases Reach High Court; 'Enemy Combatant' Issue Before Justices*, WASH. POST, Apr. 18, 2004, at A1. Approximately 650 persons captured in Afghanistan were confined at Guantanamo, Cuba. *Id.* Reports have circulated of approximately twenty suicide attempts by Guantanamo detainees. Manuel Roig-Franzia, *Guantanamo was Prepared for Suicide Attempts; Risk That Detainees Will Harm Themselves is Heightened by Conditions at Prison, Say Psychologists*, WASH. POST, Mar. 2, 2003, at A7.

In *Rasul v. Bush*,[46] the District Court had dismissed a habeas corpus petition seeking a review of the basis for determining that an alien-detainee was an enemy combatant. The Supreme Court reversed, upholding habeas corpus jurisdiction over Guantanamo, but providing little guidance concerning the procedures to be followed in determining whether an alien-detainee is, in fact, an enemy combatant subject to indefinite detention.[47]

In the wake of the Supreme Court's decision in *Rasul*, a number of Guantanamo Bay detainees were released. Disturbingly, immediately after their release, three British nationals alleged that significant brutality took place at Guantanamo. Even more disturbingly, reports have circulated that additional detainees are being held incommunicado in secret locations outside the United States.[48]

Judicial reaction to the government's insistence on holding secret deportation proceedings for suspected alien-terrorists was also mixed. The Sixth Circuit rejected a blanket secrecy rule governing certain categories of deportation proceedings.[49] The Third Circuit upheld the secrecy order.[50] The Supreme Court denied review, in large part because the hearings had already been held.[51]

The standard story of "deck chair" constitutional justice predicts the jurisdictional collapse in *Padilla*, the failure to stop secret deportation hearings, and the refusal to grant a parade permit to anti-war demonstrators. It also predicts the lower court refusals to act in *Hamdi* and *Rasul*. The story of deck chair constitutional justice does not, however, predict Chief Judge Mukasey's strenuous effort to insure a degree of judicial oversight over the Executive's treatment of suspected terrorists, or the Supreme Court's basic adoption of Judge Mukasey's formula in *Hamdi* and *Rasul*. Even if the grim picture painted by the standard story of deck chair constitutional justice is correct as a historical matter (I will argue in a moment that it is much too simplistic), the current situation differs in one dramatic aspect from our earlier Article III wartime experiences. In earlier settings, the war or national crisis was limited to a defined time period, usually a period of formal hostilities or defined national confrontation. Thus, whatever suspension of constitutional values might have taken place during the war, the courts were confident that some day the war would be over and the sun would come out again, permitting re-deployment of the deck chair. Sadly, in the world that we have entered since September 11, the war against international terrorism

46. 215 F. Supp.2d 55 (D.D.C. 2002).

47. Rasul v. Bush, 124 S.Ct. 2686 (2004).

48. For current information on the Guantanamo Bay detention facility, dubbed Camp X-Ray, including a compendium of press reports concerning conditions of confinement, see http://www.yourart.com/research/encyclopedia.cgi?subject=/Camp%20X-Ray.

49. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

50. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002).

51. North Jersey Media Group, Inc. v. Ashcroft, 538 U.S. 1056 (2003).

seeking to target America is not likely to have a foreseeable end point.[52] Our future will almost certainly be lived in fear of terrorist attack and at an appropriately high level of national preparedness. Judicial decisions that dilute constitutional values because of the threat posed by international terrorism may well have a permanent impact on the nature of our constitutional system. This time, in rejecting the government's position in *Hamdi* and *Rasul*, the Supreme Court followed a more courageous tradition, recognizing that if the deck chair is folded up and put away, there is no telling when, if ever, it can be taken out of storage again.

III.
THE COUNTER-STORY: JUDICIAL COURAGE IN TIME OF WAR OR NATIONAL CRISIS

The Supreme Court's opinions in *Hamdi* and *Rasul* draw on a more hopeful story of judicial behavior in time of war. While it is important to call attention to the undeniable gap between aspiration and achievement revealed by the wartime cases in which courts have failed to preserve constitutional values, the standard deck chair story of the failure of the Article III judiciary to protect constitutional rights in time of war or national crisis is too simplistic. The actual historical record is more complex, with numerous examples of Article III judges standing firm against governmental overreaching during periods of national crisis, even in politically risky settings.[53]

It is true that the Article III judiciary did little or nothing to mitigate the violations of free speech associated with the Alien and Sedition Acts in the late 1790's. But one can hardly demand a vigorous judicial response to an unconstitutional Act of Congress prior to *Marbury v. Madison*[54] and the establishment of judicial review in 1803.[55]

Judicial protection of constitutional values was more effective during and immediately after the Civil War. Although *Ex parte McCardle*[56] is occasionally cited as an example of judicial collapse, the case is less extreme than often rec-

52. *See* Donald H. Rumsfeld, *A New Kind of War*, N.Y. TIMES, Sept. 27, 2001, at A21 ("Forget about 'exit strategies;' we're looking at a sustained engagement that carries no deadlines. . .").

53. *See* discussion, *infra*.

54. 5 U.S. (1 Cranch) 137 (1803).

55. Prior to the maturation of judicial review as the standard response to unconstitutional actions by the government, resistance to the Alien and Sedition Acts took the form of the Kentucky and Virginia Resolutions, a claim by the states of power to nullify unconstitutional federal actions. *See* note 10, *supra*. The next example of judicial review of an act of Congress did not occur until 1856, when the Court invalidated portions of the Missouri Compromise in what may be its most reviled decision. Dred Scott v. Sandford, 60 U.S. 393 (1856). The first Supreme Court opinion invalidating an act of Congress under the First Amendment did not take place until 1963 in Lamont v. Postmaster General, 381 U.S. 301 (1965).

56. 74 U.S. (7 Wall.) 506 (1869).

ognized.

McCardle was a federal habeas corpus challenge to the arrest and imprisonment of a newspaper editor by federal military authorities in Reconstruction Mississippi. The charges stemmed from a series of editorials published in the *Vicksburg Times*. Petitioner challenged the constitutionality of imposing federal military rule on Mississippi until it agreed to ratify the Fourteenth Amendment.[57] The writ was denied in the Circuit Court, but McCardle was ordered released pending Supreme Court review pursuant to an 1867 Congressional statute that expedited habeas corpus appellate review in an apparent effort to provide protection to newly freed slaves.[58] The *McCardle* appeal was widely viewed as a difficult test case challenging both the constitutionality of military Reconstruction and the policy of conditioning readmission on ratification of the Fourteenth Amendment. After the Court ruled in February, 1868 that it possessed jurisdiction to hear McCardle's appeal, the Supreme Court heard four days of oral argument early in March, 1868, during which members of the Court appeared to agree that military Reconstruction raised serious constitutional questions. In response, Congress promptly repealed "so much" of the 1867 act "as authorized an appeal from the judgment of the Circuit Court to the Supreme Court. . . ."[59]

The Supreme Court stepped away from a confrontation with Congress by delaying its opinion until April, 1869, by which time the Fourteenth Amendment had been safely ratified by Florida (June 9, 1868); North Carolina (July 4, 1868); Louisiana (July 9, 1868); and South Carolina (July 9, 1868), thus bringing the number of ratifying states to the required 28 of the then 37 states; and by avoiding the merits by holding that Congress possessed plenary power over the Court's appellate jurisdiction, even after an appeal had been briefed and argued, and even when the denial of jurisdiction was clearly aimed at preventing a decision in a particular case.[60] At the same time, the Court noted that a more cumbersome path to the Supreme Court in habeas settings that pre-dated the 1867

57. The timing of the petition was important, since Congress had conditioned re-admission to the Union on ratification of the Fourteenth Amendment. In fact, proponents of the Fourteenth Amendment needed at least some of the coerced Southern ratifications in order to satisfy the 3/4 rule. The hope of opponents of the Fourteenth Amendment was to disrupt military Reconstruction in order to prevent ratification of the Fourteenth Amendment. An argument surfaces occasionally today that the Fourteenth Amendment is unconstitutional because it was ratified under coercive circumstances. For an example of the genre, *see* Joseph E. Fallon, *Power, Legitimacy and the Fourteenth Amendment*, CHRONICLES MAGAZINE, March 2002.

58. In *Ex parte McCardle*, 73 U.S. 318 (1868), the Supreme Court ruled that habeas corpus provisions of the Judiciary Act of 1867, 14 Stat. 385, had vested the Court with appellate jurisdiction over the Circuit Court's exercise of original habeas corpus jurisdiction. Prior to the 1867 act, the Supreme Court's appellate jurisdiction in habeas cases had been confined to settings where the Circuit Court was reviewing the exercise of original habeas jurisdiction by the District Court. The 1867 act was apparently intended to streamline the process by rendering the District Court proceedings optional.

59. Act of March 27, 1868, ch. 34, 15 Stat. 44.

60. 74 U.S. (7 Wall.) 506 (1869).

statute continued to exist.[61]

McCardle is, however, not the whole story of the Supreme Court's defense of constitutional values at the close of the Civil War. In *Ex parte Milligan*,[62] the Court invalidated President Lincoln's attempt to try allegedly disloyal persons before military commissions in areas like Indiana where civilian government was functioning normally.[63] An earlier decision by Chief Justice Taney sitting as a Circuit Judge held that the President lacked unilateral authority to suspend the writ of habeas corpus.[64] In *Ex parte Garland*,[65] and *Cummings v. Missouri*,[66] the Supreme Court invalidated government-mandated exclusionary loyalty oaths that would have prevented thousands of defeated Southerners from re-entering the democratic process. In *United States v. Klein*,[67] the Supreme Court refused to permit pardoned Southerners to be excluded from restitution programs. While modern eyes would have wished a similar degree of firmness in enforcing the newly-minted equality guarantees of the Fourteenth Amendment,[68] the Supreme Court's record in defending constitutional rights in the immediate aftermath of the Civil War is defensible. In *McCardle*, the Court permitted Congress to block a constitutional challenge to military Reconstruction and the procedure for ratifying the Fourteenth Amendment, but in *Milligan*, *Garland*, *Cummings*, and *Klein* the Court vigorously asserted constitutional values in a time of great national crisis.[69]

The response of the Article III judiciary to the First World War is similarly

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61. *Id* at 515–16. The alternative route to Supreme Court review required that the habeas proceeding begin in the District, not the Circuit, court. It survived the repeal. Decision in a subsequent effort to invoke the alternative jurisdictional basis to challenge military Reconstruction was delayed until after ratification of the Fourteenth Amendment. *Ex parte Yerger*, 75 U.S. (8 Wall.) 506 (1868). The decision in *McCardle* apparently pre-dated *Yerger*, but was not announced until 1869.

62. 71 U.S. (4 Wall.) 2 (1866).

63. It is unclear whether *Milligan* rests on an absolute constitutional prohibition, or on a failure of Congress to have authorized the military tribunals. The distinction may be important in interpreting *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding the use of a Congressionally authorized military commission to try eight alleged German saboteurs who were landed on Long Island by a German submarine). The question of whether resort to military commissions to try terrorists in settings where civilian courts are available requires explicit Congressional authorization is of obvious relevance to today's issues.

64. *Ex parte* Merryman, 17 F. Cas. 144 (C.CD. Md. 1861) (No. 9,487).

65. 71 U.S. (4 Wall.) 333 (1867).

66. 71 U.S. (4 Wall.) 277 (1867).

67. 80 U.S. (13 Wall.) 128 (1871).

68. The first major Supreme Court enforcement of racial equality did not take place until *Strauder v. Virginia*, 100 U.S. 303 (1880) (prohibiting statutory exclusion of African-Americans from juries). The Court had narrowly construed the privileges or immunities clause of the Fourteenth Amendment in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), rendering the clause virtually useless in protecting newly freed blacks against state discrimination.

69. It is true, of course, that effective judicial review during the Civil War era tended to emerge only after the military threat had ended. In fairness, though, the atmosphere of crisis continued to exist throughout Reconstruction.

mixed. While the Supreme Court rejected free speech challenges to sedition prosecutions that, today, would be deemed unconstitutional, individual members of the Article III judiciary vigorously sought to uphold constitutional values.[70] Learned Hand's seminal decision in *Masses Publishing Co. v. Patten*,[71] blocking the government's effort to deny a radical magazine access to the mails, opened the way to the modern First Amendment, even though his decision was reversed by a Second Circuit court less attuned to the protection of constitutional rights in wartime.[72] Most importantly, Justice Holmes, after authoring the Court's opinions in *Schenck*, *Debs*, and *Frohwerk*, broke with the Court's majority and, joined by Justice Brandeis, authored the dissent in *Abrams v. United States*[73] that began the march to the modern First Amendment.[74]

The World War I experience indicates the importance of actions by individual judges who remain committed to the defense of constitutional values in wartime, even when they dissent from prevailing judicial norms. The intellectual sparks generated in defeat by Learned Hand, Holmes and Brandeis lit the way to the future.

One of the enduring judicial statements of the free speech principle emerged from the crucible of World War II when the Supreme Court invalidated compulsory flag salutes in *West Virginia State Board of Education v. Barnette*.[75] Our view of judicial preservation of constitutional values during World War II is, however, justly colored by the spectacular failure in *Korematsu*,[76] where an unsavory combination of racism, government lying, and war hysteria led to the forced evacuation and internment of approximately 120,000 Japanese-Americans.[77]

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70. Schenck v. United States, 249 U.S. 47 (1919), involved a prosecution for distributing 15,000 leaflets challenging the draft as violative of the Thirteenth Amendment, and urging persons to "assert your rights." A conviction under the Espionage Act for conspiring to interfere with military recruiting was upheld by a unanimous Court, with Holmes writing the opinion. *See also* Debs v. United States, 249 U.S. 211 (1919) (unanimously affirming ten-year prison sentence for speech before Socialist Convention) (opinion by Holmes, J.); Frohwerk v. United States, 249 U.S. 204 (1919) (unanimously affirming conviction for series of newspaper articles criticizing decision to send troops to France) (opinion by Holmes, J.). *Schenck*, *Debs* and *Frohwerk* have almost certainly been overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which applied a much more rigorous version of the "clear and present danger" test to government assertions of the need to censor. If the *Brandenberg* test had actually been applied in *Schenck*, *Debs* or *Frohwerk*, the convictions would have been reversed because virtually no evidence existed that the speech actually posed a danger to the war effort.

71. 244 F. 535 (S.D.N.Y. 1917).

72. Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917).

73. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

74. *See also* Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J. and Holmes, J., concurring); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J. and Brandeis, J., dissenting).

75. 319 U.S. 624 (1943), overruling Minersville School District v. Gobits, 310 U.S. 586 (1940).

76. 323 U.S. 214 (1944).

77. *See also* Hirabayashi v. U.S., 320 U.S. 81 (1943) (upholding military curfew order di-

But the decision in *Korematsu*, upholding a criminal conviction for refusing to be forced to be evacuated to a concentration camp, overshadows a more complex picture painted by the Court's simultaneous decision in *Ex parte Endo*,[78] directing the issuance of a writ of habeas corpus to a loyal Japanese-American who had challenged the government's insistence on continuing her exclusion and internment in the absence of evidence of disloyalty. The unanimous opinion in *Endo*[79] avoided constitutional issues by invoking the canon of construction that statutes should be read to avoid potential constitutional questions. The Court reasoned that the Executive Order and statute authorizing the Japanese interment should be read to require individualized proof of disloyalty as a condition for continued detention.[80] Since no one questioned petitioner's loyalty, she was entitled to immediate release.[81] Moreover, since no evidence existed that the remaining internees were disloyal, the practical result of *Endo* was the immediate termination of the Japanese internment program.

There is, I believe, a close resemblance between the Supreme Court's World War II behavior in *Korematsu* and *Endo*, its post-Civil War behavior in *McCardle, Milligan, Garland, Cummings*, and *Klein*, and its current behavior in *Padilla, Hamdi, and Rasul*.

In each setting, confronted with a massive national crisis, the Court declined to interfere with a constitutionally doubtful military program (military Reconstruction in *McCardle*; Japanese-American internment in *Korematsu*; indefinite military detention of suspected terrorists in *Rasul* and *Hamdi*). Once the military program was in place, however, the Court in all three eras acted quickly and decisively to place significant limits on the military program in order to defend core constitutional values.

Judicial defense of constitutional values during the Cold War is also a complex story. In 1951, the *Dennis* majority declined to second-guess the government's assertion that leaders of the Communist Party were engaged in a massive conspiracy to overthrow the government by force and violence.[82] But, in *Youngstown Sheet & Tube Co. v. Sawyer*,[83] the Court delivered one of the strongest judicial rebukes in our history to the Executive branch by overturning President Truman's effort to seize the nation's steel mills at the height of the Ko-

rected at Japanese Americans).

78. 323 U.S. 283 (1944).

79. Justices Murphy and Roberts, who dissented in *Korematsu*, each filed separate concurrences in *Endo* urging broader relief on constitutional grounds.

80. 323 U.S. 283 (1944).

81. Since no issue was raised concerning petitioner's loyalty, the *Endo* Court did not explicitly address the burden of proof in settings where disputes over loyalty existed. But the canons of constitutional construction adopted by the Court appear to make it clear that the government must bear the burden of proving individualized grounds for detention.

82. Dennis v. United States, 341 U.S. 494 (1951).

83. 343 U.S. 579 (1952).

rean War to forestall a crippling strike. And, as with *Korematsu* and *Endo* during World War II, the Court modified the national security program upheld in *Dennis* by imposing safeguards designed to preserve constitutional values. In *Yates v. United States*,[84] the Court invoked the same canon of construction that it had used in *Endo* and read the Smith Act as permitting the advocacy of the need for overthrow of the government as an abstract principle, as opposed to a plan for immediate action. Rather, as construed by the *Yates* Supreme Court, the Smith Act required individualized proof of actual instigation of unlawful action. In *Noto v. United States*,[85] the Court reversed a Smith Act conviction, finding that teaching the inevitability of proletarian revolution against capitalism was not sufficiently concrete to justify conviction. After *Yates* and *Noto*, the government discontinued the Smith Act prosecution.

The judicial response to the loyalty security program was likewise mixed. In *Communist Party v. SACB*,[86] the Court upheld the obligation that members of the Communist Party register with the government, but in *Albertson v. SACB*,[87] the Court rendered the program unenforceable by ruling that the Fifth Amendment prohibited punishing people for refusing to register. Moreover, in *Aptheker v. Sec'y of State*,[88] the Court invalidated a ban on granting passports to communists, and in *United States v. Robel*,[89] the Court struck down a ban on employing communists in defense plants. After *Robel*, the Subversive Activities Control Board was disbanded. Finally, in *Lamont v. Postmaster General*,[90] the Court stuck down a requirement that persons register with the government in order to receive "communist political propaganda" from abroad.

The Vietnam War era continued the mixed pattern. Overturning the First Circuit, the Supreme Court upheld the convictions and lengthy prison sentences meted out to persons who had publicly burned their draft cards to express opposition to the war.[91] The Court declined to second-guess the government's assertion that the burning of draft cards posed a threat to the administration of the Selective Service Act.[92]

On the other hand, in *Oestereich v. Selective Service System*,[93] aided by a confession of error by Solicitor General Erwin Griswold, the Court declined to permit the Selective Service System to engage in punitive reclassification of war

84. 354 U.S. 298 (1957).
85. 367 U.S. 290 (1961).
86. 367 U.S. 1 (1961).
87. 382 U.S. 70 (1965).
88. 378 U.S. 500 (1964).
89. 389 U.S. 258 (1967).
90. 381 U.S. 301 (1965).
91. United States v. O'Brien, 391 U.S. 367 (1968).
92. *Id.*
93. 393 U.S. 233 (1968).

protestors. Moreover, in *Cohen v. California*,[94] the Court upheld the right of a protestor to use profanity in public to protest the draft. Finally, in *New York Times v. United States*,[95] the Court declined to permit government suppression of the Pentagon Papers despite the government's assertion that publication entailed serious risk.[96]

IV.
CONCLUSION

I believe that our complex experience with wartime judging provides some guidance to Article III judges in dealing with the current crop of war-related constitutional issues.

First, it underlines the judiciary's responsibility to assure continued self-government during wartime. In our history, democracy has always transcended wartime crises. The Alien and Sedition Acts were repudiated at the polls in the election of 1800. In the midst of the Civil War, the nation experienced a vigorous election in which Lincoln defeated his ousted military chief, George McClellan. Wilson defended his World War I policies in vigorously contested 1918 Congressional elections. Roosevelt defeated Dewey in a hard fought Presidential election in 1944. Eisenhower won the 1952 election by promising to end the Korean War. Lyndon Johnson was literally driven from office in 1968 by opposition to his Vietnam War policies.

In order for democracy to have meaning, the Article III judiciary must assure the reciprocal flow of information that makes democracy possible. The ability of opponents and proponents of the government's policies to express themselves vigorously is an absolute pre-condition of democracy. The *Barnette*, *Cohen*, and *Pentagon Papers*[97] cases illustrate the Article III judiciary's commitment to free speech, even in wartime. The Second Circuit's refusal to protect the right of opponents of the war in Iraq to hold a peace march anywhere in Manhattan on February 15, 2003 was not consistent with that tradition.[98]

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94. 403 U.S. 15 (1971).

95. 403 U.S. 713 (1971) (also referred to as the *Pentagon Papers* case).

96. Several Second Circuit judges reacted to the pressures of the war in Vietnam with insistence on respect for separation of powers when the Executive seeks to wage war unilaterally. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (suggesting possibility of judicial review) (Dooling, J.); Holtzman v. Schlesinger, 361 F.2d 553 (E.D.N.Y. 1973) (Judd, J.) (enjoining continued bombing of Cambodia over Congressional opposition), *vacation of stay by Second Circuit denied*, 414 U.S. 1304 (Marshall, J.), *stay vacated*, 414 U.S. 1316 (Douglas, J.), *stay reinstated*, 414 U.S. 1321 (Marshall, J., acting for full Court), 1322 (Douglas, J., dissenting), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (Oakes, J., dissenting).

97. New York Times v. U.S., 403 U.S. 713 (1971).

98. United for Peace and Justice v. City of New York, 323 F.3d 175 (2d Cir. 2003). In fairness, one should not overstate the impact of the refusal. The demonstrators were permitted to hold a rally attended by hundreds of thousands of protestors. But the difference between a march and a stationary rally is more than semantic. A march is witnessed by the public and is far more accessi-

Conversely, a free people cannot engage in self-government unless the government is required to disclose its activities to the people. Excessive government secrecy makes democracy impossible. Blanket orders requiring secret deportation proceedings, and extended detention of terrorism suspects without access to court or counsel under conditions of secrecy, render it impossible for citizens to fulfill the duties of self-government.

Finally, defense of democracy during wartime requires judicial action to preserve the principle of separation of powers. Especially during wartime, a danger exists that undue power will be concentrated in the Executive branch. *Youngstown Sheet*[99] reminds us that enforcement of principles of separation of powers against the Executive is crucial during wartime. In deciding whether alleged terrorists may be tried by military commissions or the civilian courts, one of the crucial issues is whether Congress has authorized the use of military commissions. Indeed, the distinction between *Milligan*, outlawing the use of military commissions during the Civil War, and *Quirin*, upholding the use of military commissions during World War II, may be the extent to which Congress authorized the President to circumvent available civilian judicial fora.

The second constitutional value that must be preserved by the courts, especially during wartime, is regard for the rule of law. *Endo* illustrates the principle. In *Korematsu*, the Supreme Court upheld the facial constitutionality of the Japanese internment. At the same time, the Court in *Endo* required individualized assessment of the loyalty of each internee and immediate release in the absence of evidence of disloyalty.

The unfortunate insistence by the current government of the right to detain persons without access to court or counsel for extended periods of time simply cannot be squared with respect for the rule of law. In fact, the refusal by the Supreme Court in *Hamdi* and *Rasul* to permit the Executive to operate the Guantanamo detention camp outside the rule of law is fully consistent with our wartime judicial tradition.

A final lesson drawn from our wartime judicial experience is that war alters the legal landscape. In each of our wartime settings, the judiciary has deferred to at least one major controversial government program deemed necessary to preserve grave national interests. In the aftermath of the Civil War, the Supreme Court ducked legal issues raised by military Reconstruction. During World War I, the Court supported censorship that, ultimately, proved unendurable by a free society. During World War II, the Court accepted the Japanese internment. During the Cold War, the Court upheld the ban on the Communist Party. During

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ble to participants who may enter and exit the proceedings along the line of march. A rally is experienced by the participants alone, and is not easily accessible once the size of the crowd exceeds a given number. New York City was the only venue worldwide which did not allow a march on February 15, 2003.

99. 343 U.S. 579 (1952).

the Vietnam War, the Court deferred to arguments that jailing draft card burners was necessary to protect the Selective Service System.

I predict that the change in the legal landscape in the current era will involve a significant expansion in the government's power to gather information. Reacting, in part, to the excesses of the Hoover era at the FBI, Congress and the courts have imposed serious Fourth Amendment restrictions on the government's power to engage in surveillance, wiretapping, infiltration, coercive interrogation, and other investigative techniques. Most importantly, surveillance of foreign intelligence targets was governed by a standard far looser than surveillance of domestic targets. September 11 may have eliminated the distinction between foreign and domestic targets. I believe that the courts will give the Executive branch whatever power it says it needs to engage in effective intelligence gathering—foreign and domestic—at least until evidence of abusive behavior surfaces.

In each of our prior wartime experiences, the Article III judiciary has linked acceptance of the government's basic security program with an insistence that the program adhere to fundamental constitutional values. Military Reconstruction was limited by *Milligan*,[100] *Garland*,[101] *Cummings*,[102] and *Klein*.[103] Japanese internment was limited by *Endo*.[104] Outlawing the Communist Party was limited by *Yates*[105] and *Noto*,[106] as well as *Albertson*.[107] Jailing draft card burners was limited by *Oestereich*[108] and *Cohen*.[109]

The Court's current decisions in *Hamdi* and *Rasul* appear consistent with the Court's wartime pattern—deference to the government's substantive assertion of power to detain—but reflect strong protection of the rule of law and impose procedural requirements requiring individualized showing of a need for detention.

100. 71 U.S. (4 Wall.) 2 (1866) (respect for civilian authorities).
101. 71 U.S. (4 Wall.) 333 (1867) (*ex post facto*).
102. 71 U.S. (4 Wall.) 277 (1867) (Bill of Attainder).
103. 80 U.S. (13 Wall.) 128 (1871) (separation of powers).
104. 323 U.S. 283 (1944) (individualized treatment).
105. 354 U.S. 298 (1957) (requiring actual instigation of violence).
106. 367 U.S. 290 (1961) (requiring actual instigation of violence).
107. 382 U.S. 70 (1965) (Fifth Amendment).
108. 393 U.S. 233 (1968) (no punitive reclassification).
109. 403 U.S. 15 (1971) (opening alternative means of protest).