2007

Freedom of Religion, the War on Terrorism, and the Courts

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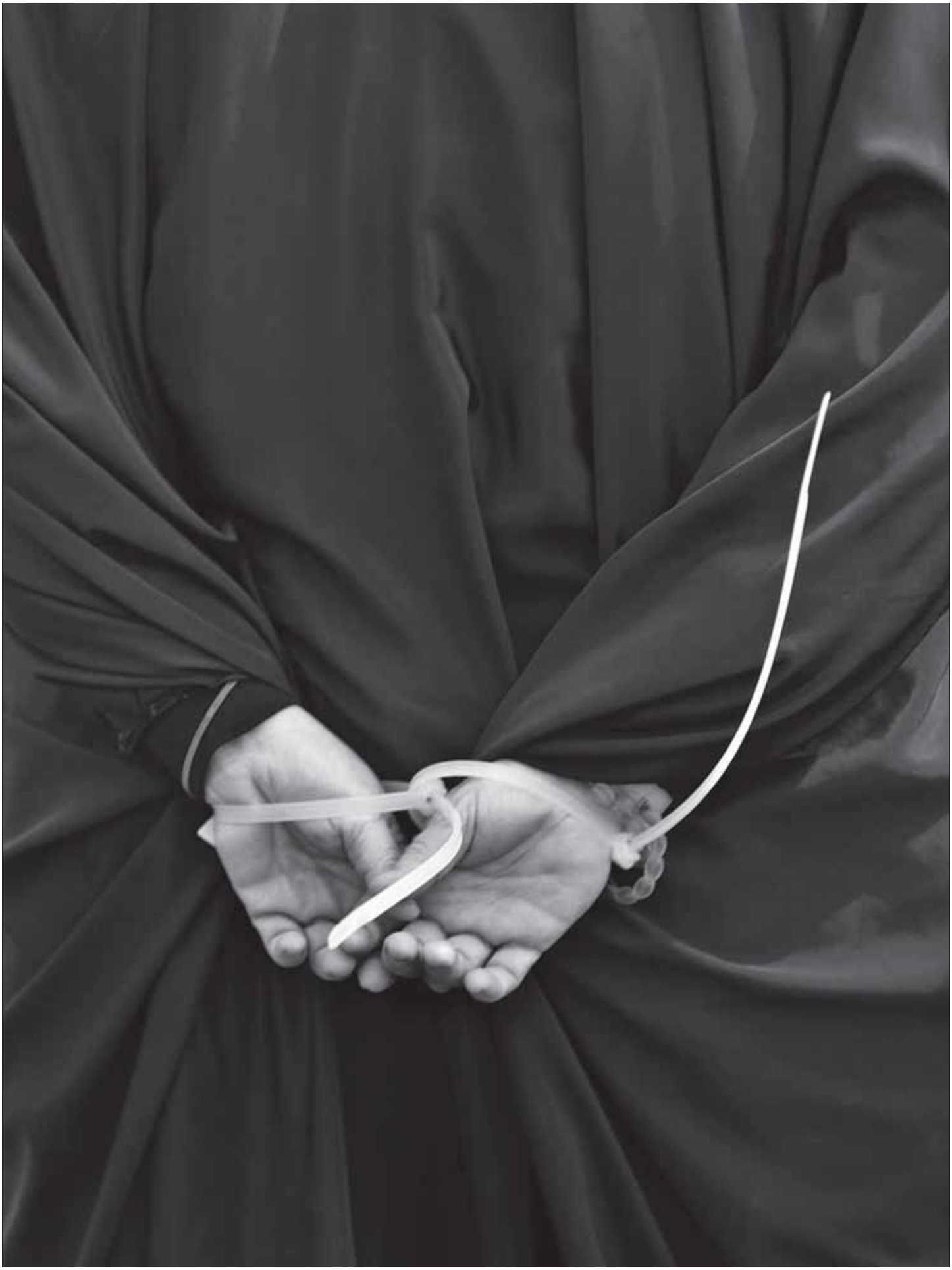
A fundamental question about the protection of religious freedom in the twenty-first century concerns, centrally, the role of the Supreme Court in our constitutional system. More particularly, it concerns the responsibility and capacity of the Supreme Court to protect the freedom of religion during the war on terrorism. ⁎ The war on terrorism poses a unique problem in American history. It is the first time in our nation's history that the enemy of the United States has been defined in religious terms. In protecting ourselves against this enemy, it is therefore quite sensible to take religion into account in developing measures to preserve our security.

Consider the following: (1) The government targets its surveillance programs—including electronic surveillance and infiltration by undercover agents—at mosques and other Muslim organizations that are thought to harbor radical Muslims; (2) The government prohibits any person to preach the "glorification of terrorism," which includes certain sermons by radical imams; (3) The government requires all Muslim airline passengers to undergo extensive security investigations before they are allowed to board commercial airplanes; (4) The government interns all Muslims in the United States, including Muslim Americans, in detention centers, where they will remain until they are individually determined to be loyal to the United States.

We have already instituted (1) and England has already instituted (2). It is easy to envision (3) following another round of 9/11-type attacks, particularly if it involves Muslim Americans, and although (4) may seem extreme, it is important to remember than the United States interned 120,000 individuals of Japanese descent, including some 80,000 Japanese Americans, during World War II. Put simply, the war on terrorism poses not only a serious threat to the United States, but a unique threat to the freedom of religion.

There are, of course, many constitutional doctrines, involving both the Free Exercise and Establishment Clauses of the First Amendment, which would guide the analysis of these questions, were they to arise. But constitutional doctrines are also subject to interpretation and to the exercise of judgment in their application to particular situations.

This essay is based on the 2006 John Nuveen Lecture, delivered on November 2, 2006, in Swift Lecture Hall.



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"I am for the people, while the government is for the profiteers . . ."

Equally—indeed, more—important in times of national crisis is the general approach the Supreme Court takes to resolving conflict between national security and individual liberties.

How should judges approach the decision of cases involving the constitutionality of such measures if they are taken by the executive and legislative branches of government to protect the national security? As a matter of first principles, logic would seem to suggest that in addressing cases involving threats to the national security judges should start with a healthy dose of deference to military and executive officials. This seems sensible for several reasons.

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

Not surprisingly in light of these reflections, judges have traditionally followed this logical course when addressing conflicts between individual liberties and national security. They have presumed that the actions of military and executive officials were constitutional whenever they acted in the name of national security. The three most dramatic twentieth-century clashes between civil liberties and national security illustrate this approach.

When the United States entered the First World War in April 1917, there was strong opposition to both the war and the draft. President Woodrow Wilson had little patience for such dissent. Only weeks after the United States entered the war, Congress enacted the Espionage Act of 1917. A year later, it enacted the Sedition Act of 1918. These laws effectively made it a crime for any person to criticize the government, the president, the draft, the war, the Constitution, or the military of the United States. The Department of Justice prosecuted more than 2,000 individuals for allegedly disloyal speech, and in an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed disloyal. The result was the suppression of virtually all criticism of that war.

For example, Rose Pastor Stokes, the editor of the socialist *Jewish Daily News*, was sentenced to ten years in prison for saying, "I am for the people, while the government is for the profiteers," during an antiwar statement to the Women's Dining Club of Kansas City. D. T. Blodgett was sentenced to twenty years in prison for circulating a leaflet urging voters in Iowa not to reelect a congressman who had voted for conscription. The Reverend Clarence H. Waldron was sentenced to fifteen years in prison for distributing a pamphlet stating that "if Christians [are] forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in."

In a series of decisions in 1919 and 1920, the Supreme Court consistently upheld the convictions of individuals who had agitated against the war and the draft. Embracing the "logical" presumption for balancing civil liberties and national security concerns in time of war, the Court explained its reasoning: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right."[1]

In the years after World War I, Americans came increasingly to recognize that these prosecutions had been excessive. Officials who had served in the Wilson administration conceded that the general atmosphere of intolerance had led to serious constitutional violations and criticized some federal judges for having lost their heads. Over the next few years, the federal government acknowledged that injustices had been done in the name of national security and every person who had been convicted of seditious

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A soldier escorts several Japanese American children and a pastor in the back of a truck during their evacuation from Bainbridge Island, Washington to a relocation center. Photo dated 1942.

expression during World War I was released from prison and granted amnesty. In later years, the Supreme Court implicitly overruled its World War I era decisions, effectively acknowledging that it had failed in its responsibility to protect constitutional rights in wartime.

The critical civil liberties issue in World War II arose out of the Japanese American internment. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Army to "designate military areas" from which certain "persons may be excluded." Over the next eight months, almost 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon, and Arizona. Two-thirds of these men, women, and children were American citizens, representing almost ninety percent of all Japanese Americans. No charges were brought against these individuals; there were no hearings; and they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything. The internees were transported to one of ten permanent internment camps and placed in overcrowded rooms with no furniture other than cots. Surrounded by barbed wire and military police, they remained in these detention camps for some three years.

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

Although the Department of Justice maintained that

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a mass evacuation of Japanese Americans was both unnecessary and unconstitutional, and although FBI director J. Edgar Hoover reported to Attorney General Biddle that the demand for mass evacuation was based on "public hysteria" rather than on fact, FDR nonetheless signed the Executive Order, largely for political reasons. Roosevelt did not want to alienate voters on the West Coast, and 1942 was an election year.

In *Korematsu v. United States*,[2] decided in 1944, the Supreme Court embraced the "logical" presumption for dealing with conflicts between civil liberties and the national security. In a six-to-three decision, the Court, in an opinion by Justice Black, upheld the President's action:

> [W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . To cast this case into outlines of racial prejudice . . . confuses the issue. Korematsu was not excluded from the [West Coast] because of hostility to . . . 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—now say that at that time these actions were unjustified.[3]

In the years after World War II, attitudes about the Japanese internment began to shift. 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 loyal Japanese American citizens was "wrong."[4]

Several years later, President Ronald Reagan signed the Civil Liberties Restoration Act of 1988, which officially declared that the Japanese internment was a "grave injustice" and offered an official Presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the United States government. Over the years, *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result.

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. During this era, the nation demonized members of the Communist Party and the long shadow of the House Committee on Un-American Activities fell across our campuses and our culture. Red-hunters demanded, and got, the blacklisting of thousands of individuals and a fear of ideological contamination swept the nation.

The key constitutional decision in this era was *Dennis v. United States*,[5] which involved the prosecution under the Smith Act of the leaders of the American Communist Party. The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a six-to-two decision, the Court held that their convictions did not violate the First Amendment. The Court concluded that because the violent overthrow of government is such a grave harm, the danger need be neither clear nor present to justify suppression.

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld far-reaching legislative investigations of "subversive" organizations and individuals and affirmed the exclusion of members of the Communist Party from the bar, the ballot, and public employment. In so doing, the Court put its stamp of approval on an array of actions we today look back on as models of McCarthyism. As the historian David Caute has concluded, in the early fifties, "the Constitution was concussed in the courts," and this was especially so in the Supreme Court, which too often served as "a compliant instrument of administrative persecution and Congressional inquisition."[6]

As these episodes illustrate, the dominant approach of the Supreme Court in the first half of the twentieth century to resolving conflicts between civil liberties and the national security was to employ the "logical" presumption. For all

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the reasons I identified earlier, the Court embraced a highly deferential stance, presuming that restrictions of civil liberties in wartime were constitutionally justified so long as the government could offer a reasonable explanation for its actions. But, as we have seen, this approach proved disastrous. These decisions have all come to be regarded as black marks on the Court's reputation.

The problem, quite simply, is that although a presumption of deference to executive and military officials in wartime may be logical in theory, it fails in practice. With the benefit of hindsight, the reasons for this failure are evident. A policy of deference assumes that those making the critical judgments are properly taking the relevant factors into account in a fair and reasonable manner. If they fail to do so, the underlying rationale for deference is destroyed. As it turns out, the essential predicate for a policy of judicial deference in these circumstances is — predictably — lacking. Government officials charged with responsibility for the nation's security tend naturally to exaggerate the dangers facing the nation both to protect themselves in the event they fail and to persuade legislators and the public to grant them as much power as possible. Moreover, government officials charged with responsibility for the nation's security tend not to be particularly sensitive to the importance of civil liberties and are therefore too quick to sacrifice those liberties in order to achieve their primary goal of safeguarding the national security. Finally, opportunistic politicians tend to exploit periods of real or perceived crisis for partisan and personal gain. A time-honored method of gaining and/or consolidating power is to incite public fear, demonize an internal "enemy," and then "protect" the public by prosecuting, interning, deporting, and spying upon those accused of "disloyalty."

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

Of course, the comparative advantage of courts over the executive and legislative branches in interpreting and enforcing individual liberties is familiar. Responsiveness to the electorate may be essential to the day-to-day workings of democracy, but that responsiveness can lead the government too readily to sacrifice the rights of those who are regarded as different, dangerous, or disloyal. Judges with life tenure and a more focused attention on the preservation of civil liberties are more likely to protect our freedoms than the elected branches of government.

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

In fact, the Court, I believe, has already learned the lessons of history and has increasingly rejected the "logical" presumption. The Justices are acutely aware of the Court's past failures, and no Justice wants his or her legacy to be similarly tainted.

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

The two Vietnam War cases implicated the First and Fourth Amendments, respectively. *New York Times Co. v. United States* involved one of the most dramatic confrontations in American constitutional history. The U.S. government attempted to enjoin publication by the *New York Times* and the *Washington Post* of the Pentagon Papers,

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a "top secret" study of the Vietnam War, prepared within the recesses of the Defense Department, that had been made available to the newspapers through an unprecedented breach of security. The government maintained that continued publication of the Pentagon Papers would grievously harm the national security. In a six-to-three decision, the Court declined to defer to the executive's national security claim and ruled that the government could not constitutionally enjoin the publication. Justice Stewart insisted that the government could not constitutionally enjoin the publication because it had failed to *prove* that disclosure "will surely result in direct, immediate, and irreparable damage to our Nation."[7]

Several years later, President Richard Nixon maintained that the executive is constitutionally exempt from the ordinary requirements of the Fourth Amendment when it undertakes *national security* investigations. In *United States v. United States District Court* (*Keith*),[8] the Supreme Court unanimously rejected this contention, holding that even in national security investigations the President has no constitutional authority to wiretap American citizens on American soil without a judicially issued search warrant based upon probable cause.

More recently, the Supreme Court has addressed and sternly rejected Bush administration claims of executive authority in the war on terrorism. In each of these three decisions, the Court refused to grant deference to the executive. In *Rasul v. Bush*,[9] the Court held that federal courts have habeas corpus jurisdiction to review the legality of the confinement of the Guantanamo Bay detainees. In *Hamdi v. Rumsfeld*,[10] the Court held that the government could not indefinitely detain an American citizen captured in Afghanistan without giving him a hearing meeting the requirements of due process. And in *Hamdan v. Rumsfeld*,[11] the Court held that the procedures adopted by President Bush for military commissions violated the basic tenets of military and international law.

Capturing the spirit of these decisions, Justice Sandra Day O'Connor explained in *Hamdi* that it "is during our most challenging and uncertain moments" that our Nation's commitment to the Constitution "is most severely tested," and "it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." In rejecting the government's contention that the Court should play "a heavily circumscribed role" in reviewing the actions of the executive in wartime, O'Connor pointedly observed that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[12]

In terms of judicial review of conflicts between civil liberties and national security, the twenty-first century has gotten off to a rather good start. Having learned from the mistakes of the past, the Court (or at least a majority of the Justices) has jettisoned the "logical" presumption evidenced in the earlier era and replaced it with the more "pragmatic" presumption of close judicial scrutiny evidenced in *Rasul*, *Hamdi,* and *Hamdan*. This is a fundamental step forward in American constitutional history. Whether it will carry forward to possible restrictions of the freedom of religion as the war on terrorism unfolds remains to be seen.

Endnotes

1. *Schenck v. United States*, 249 U.S. 47 52 (1919).

2. 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. 114 (1943) (same).

3. *Id.*, 219–20, 223–24.

4. Presidential Proclamation 4417, "An American Promise," February 19, 1976.

5. 341 U.S. 494 (1951).

6. David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 144 (Simon and Schuster 1978).

7. *Id.*, at 730 (Stewart, J., concurring).

8. 407 U.S. 297 (1972).

9. 542 U.S. 466 (2004).

10. 542 U.S. 507 (2004).

11. 548 U.S.—(2006).

12. 542 U.S., at 536.