

# War Fever

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As Justice Robert Jackson observed more than half a century ago, “[i]t is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security.”<sup>1</sup> Indeed, the United States has a long and unfortunate history of overreacting to the dangers of wartime. Again and again, Americans have allowed fear to get the better of them. Some measure of fear, of course, is inevitable—even healthy—in time of war. Otherwise, it would be difficult, if not impossible, for a nation to make the sacrifices war demands. An essential challenge to democracy, then, is to find a way to channel these forces so they play a constructive rather than a destructive role.

Throughout our history, whether in the Sedition Act of 1798, the suspensions of the writ of habeas corpus during the Civil War, the widespread repression of dissent during World War I, the internment of Japanese-Americans during World War II, the loyalty programs and legislative investigations of the Cold War, or the widespread surveillance and infiltration of dissident political groups during the Vietnam War, the United States has repeatedly gone too far in restricting civil liberties in time of war.

To be sure, this cannot be proved with the exactitude of mathematics. Nor can one prove it merely by looking back and blithely inferring that because each of these wars ended well, the restrictions of civil liberties were unwarranted.

As with any counterfactual, we cannot know for certain what would have happened if Lincoln had not suspended the writ of habeas corpus, Wilson had not prosecuted those who protested World War I, or Truman had not imposed a federal loyalty program during the Cold War. Perhaps the Confederate States of America would still be with us; perhaps we would have lost World War I; perhaps the Berlin Wall would still be standing. Perhaps. But with the benefit of hindsight<sup>2</sup> and a deeper understanding of the nature of

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1. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 116 (1951).

2. On the problem of hindsight, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571 (1998). Psychologists have found that people tend to overstate the predictability of past events. *See, e.g.,*

these events than existed at the time, it is difficult to believe that any of these results would have followed.

Because it is impossible to know the counterfactual for certain, we have to rely to some degree on reasoning by inference. Certainly, we know that in every one of these episodes the nation came later to regret its actions and to understand them as excessive responses to war fever. The Sedition Act of 1798 has been condemned in the “court of history,”<sup>3</sup> Lincoln’s suspensions of habeas corpus were declared unconstitutional by the Supreme Court in *Ex parte Milligan*,<sup>4</sup> the Court’s own decisions upholding the World War I prosecutions of dissenters have all been overruled,<sup>5</sup> and the internment of Japanese Americans during World War II has been the subject of repeated government apologies and reparations.<sup>6</sup> Likewise, the Court’s decision in *Dennis v. United States*,<sup>7</sup> upholding the convictions of the leaders of the Communist Party, has been discredited;<sup>8</sup> the loyalty programs and legislative investigations of that era have been condemned;<sup>9</sup> and the efforts of the U.S. government to “expose, disrupt and otherwise neutralize” antiwar activities during the Vietnam War have been denounced both by Congress and by the Department of Justice.<sup>10</sup>

These after-the-fact judgments should not be controversial. They are sound conclusions based on comprehensive information about the actions and motives of the government in each of these episodes. Moreover, it should hardly surprise us that a nation swept up in war fever would lose all sense of proportion and lash out at those deemed “disloyal.” The fear, anger, and fervent patriotism engendered during a war naturally undermine the capacity of individuals and institutions to make clear-headed judgments about risk, fairness, and danger. We all know this as a matter of personal experience. It is

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Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975).

3. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

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

5. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dennis v. United States*, 341 U.S. 494 (1951).

6. See Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215, 234-35 (2003).

7. 341 U.S. 494 (1951).

8. See *Brandenburg*, 395 U.S. 444.

9. See *United States v. Robel*, 389 U.S. 258 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Scales v. United States*, 367 U.S. 203 (1961).

10. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 487-500 (2004).

difficult to make calm, thoughtful decisions in a state of agitation, outrage, or passion.<sup>11</sup>

The challenge of remaining level-headed may be even greater at the collective level than at the individual level, for as the powerful emotions triggered by war cascade through the nation, they grow ever more intense.<sup>12</sup> Suspicion feeds suspicion; fear breeds fear. People see spies and saboteurs around every corner and rumors run rampant. As the distinguished political scientist John Keane has observed, “[f]ear eats the soul of democracy.”<sup>13</sup> After World War I, Judge Charles Fremont Amidon recalled that in Espionage Act prosecutions, otherwise “sober, intelligent” men acted “with the savagery of wild animals.”<sup>14</sup>

When citizens grow fearful, they insist that their leaders protect them, and public officials respond.<sup>15</sup> It is natural to seek safety in the face of dan-

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11. See PAUL SLOVIC, *THE PERCEPTION OF RISK* 220-31 (2000); Richard M. Doty et al., *Threat and Authoritarianism in the United States, 1978-1987*, 61 J. PERSONALITY & SOC. PSYCHOL. 629 (1991); Susan E. Jackson & Jane E. Dutton, *Discerning Threats and Opportunities*, 33 ADMIN. SCI. Q. 370, 384-86 (1988); Arne Öhman et al., *The Face in the Crowd Revisited: A Threat Advantage with Schematic Stimuli*, 80 J. PERSONALITY & SOC. PSYCHOL. 381 (2001); Andrew J. Tomarken et al., *Fear-relevant Selective Associations and Covariation Bias*, 98 J. OF ABNORMAL PSYCHOL. 381 (1989); W. Kip Viscusi, *Alarmist Decisions with Divergent Risk Information*, 107 ECON. J. 1657, 1657-59 (1997); Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1585 (2003) (reviewing ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)).

12. On the phenomenon of cascades, see CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 54-73 (2003); Chip Heath et al., *Emotional Selection in Memes: The Case of Urban Legends*, 81 J. PERSONALITY & SOC. PSYCHOL. 1028 (2001); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

13. John Keane, *Fear and Democracy*, in *VIOLENCE AND POLITICS: GLOBALIZATION'S PARADOX* 226, 235 (Kenton Worcester et al. eds., 2002).

14. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 70 (1941).

15. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1127 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)). For commentary on these behavioral phenomena, see SLOVIC, *supra* note 11; Kuran & Sunstein, *supra* note 12; Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 769-71 (1990); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003) [hereinafter Sunstein, *Beyond the Precautionary Principle*]; Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002) [hereinafter Sunstein, *Probability Neglect*]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (Daniel Kahneman et al. eds., 1982). For an excellent discussion of these issues in the context of the Supreme Court's decision in *Dennis*, see Christina E. Wells, *Fear and Loathing in Constitutional Decision-making* (June 24, 2004) (unpublished manuscript, on file with author).

ger, especially when we can lessen the risk to ourselves by disadvantaging “others”—whether they be Jacobins, secessionists, anarchists, Japanese-Americans, Communists, hippies, or Muslims.<sup>16</sup> This response enables us both to secure our own safety and to vent our fury at those we already hold in contempt. If we have to put some “traitors” or aliens in jail to increase our sense of security, so be it. Indeed, all the better. This is not theory. It is the unimpeachable lesson of history.

In light of the inevitable pressures of wartime, is there anything we can do to prevent similar overreactions in the future? Are we doomed to repeat this pattern over and over again?

## I

Before addressing this question, we should consider two preliminary issues. First, is it true that the fear produced by wartime causes us to *overreact*? Certainly, fear is a proper response to danger.<sup>17</sup> Fear can sharpen our focus, draw our attention to prior misjudgments (perhaps we failed to protect ourselves properly against the risk of terrorist attacks before September 11, 2001), and enable us to protect ourselves better in the future.

But we are concerned here not with fear in that limited sense, but with fear that runs out of control and impairs rather than informs sound decision making. Even in its most instinctive form, fear is risk averse. We are more likely to flee a shadow that may be an attacker than to move closer to determine what it is. This is a natural and sensible response. The harm of being

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16. “One of the most destructive . . . problems facing contemporary society is the pervasive tendency of people to respond with hostility and disdain toward those who are different. . . . This tendency to reject those who are different is well-documented in the literature on prejudice.” Jeff Greenberg et al., *Evidence for Terror Management Theory II: The Effects of Mortality Salience on Reactions to Those Who Threaten or Bolster the Cultural Worldview*, 58 J. PERSONALITY & SOC. PSYCHOL. 308, 308 (1990). See JOHN L. SULLIVAN ET AL., POLITICAL TOLERANCE AND AMERICAN DEMOCRACY 250-51 (1982); Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867, 885-88 (1993); Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954); Donald R. Kinder, *Opinion and Action in the Realm of Politics*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 778, 789-93 (Daniel T. Gilbert et al. eds., 1998); Joachim Krueger & Russel W. Clement, *The Truly False Consensus Effect: An Ineradicable and Egocentric Bias in Social Perception*, 67 J. PERSONALITY & SOC. PSYCHOL. 596 (1994); James H. Kuklinski et al., *The Cognitive and Affective Bases of Political Tolerance Judgments*, 35 AM. J. POL. SCI. 1 (1991); John Mueller, *Trends in Political Tolerance*, 52 PUB. OPINION Q. 1, 16-17 (1988); Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1 (1982); David A. Wilder & John E. Thompson, *Assimilation and Contrast Effects in the Judgments of Groups*, 54 J. PERSONALITY & SOC. PSYCHOL. 62 (1988).

17. See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 626-35 (2003).

“wrong” if we flee is much less than the harm of being “wrong” if we inspect. What concerns us here, however, is *excessive* fear—fear that is pathological and leads to irrational decisions—decisions that would *not* be made by individuals with equal knowledge in a state of calm. Faced with the dilemma of the shadow, we would all endorse the decision to flee, even if we were evaluating that dilemma at leisure. But the decisions to enact the Sedition Act of 1918,<sup>18</sup> to intern almost 120,000 people of Japanese descent, or to adopt the McCarran Internal Security Act of 1950<sup>19</sup> were *not* decisions we would ratify in a state of calm. They were severe *overreactions* based on excessive and ill-informed fear.

Second, how seriously should we take these wartime suppressions of civil liberties? Even if the nation overreacted in these situations, were these important errors, or were they minor consequences of the perilous course of a war? Civil libertarians often argue that once constitutional rights are compromised, they are lost forever. If that were true, it would surely be essential to avoid *any* unnecessary limitation of civil liberties, regardless of circumstance. If rights, once lost, could not later be regained, then civil liberties would be in a permanent downward spiral. But that is simply not the case. In fact, after each of these episodes, the nation’s commitment to civil liberties rebounded, usually rather quickly, sometimes more robustly than before.

Of course, it was not inevitable that this would be so, but it has been our historical experience. In that sense, then, the worst-case scenario—that rights once lost are not regained—has not yet come to pass.<sup>20</sup> As long as wars are of reasonably limited duration, this is a significant consideration in assessing the long-term dangers of suppressing civil liberties in wartime.

But this does not mean that wartime repression is unimportant. For government unjustifiably to deny an individual her freedom—whether freedom of speech, freedom of religion, or freedom from detention—for a year, or for several years, is a matter of moment both for the individual and for the nation. For government to tell an individual that she may not state her opposition to the war, pray to her god, or leave an internment camp until a war is over is a drastic assault on individual liberty.

However, given the sacrifices we ask citizens, especially soldiers, to make in time of war, it is often argued that it is a small price to ask others to

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18. Act of May 16, 1918, ch. 75, 40 Stat. 553.

19. Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987.

20. The clearest judicial warning about a possible ratchet-down effect was offered by Justice Jackson in *Korematsu*, where he observed, “[O]nce a judicial opinion rationalizes [an emergency in] order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such [a response to the emergency], the Court for all time has validated [a] principle . . . . [that] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). For a rebuttal, see Posner & Vermeule, *supra* note 17.

surrender some part of their peacetime liberties to help win the war. As members of Congress argued in defense of the Sedition Act of 1918,<sup>21</sup> people should restrain their criticism in order to maintain the national unity that is essential to the war effort. And as the Court argued in *Korematsu v. United States*,<sup>22</sup> “hardships are part of war, and war is an aggregation of hardships.”<sup>23</sup>

This is a seductive and dangerous argument. To fight a war successfully, it is always necessary for soldiers to risk their lives. But it is not always necessary for others to surrender their freedoms. That necessity must be demonstrated, not merely presumed. And this is especially true when, as almost always happens, the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents, and noncitizens. In those circumstances, “we” are making a decision to sacrifice “their” rights—not a very prudent way to balance the competing interests.

This argument is particularly misguided when the freedom of speech is at issue. A critical function of free speech in wartime is to help the nation make wise decisions about how to conduct the war, whether its leaders are leading well, whether to end the war, and so on. If free speech is essential to self-governance in ordinary times, it is even more critical when citizens must decide whether to let the Southern states secede, withdraw our troops from Vietnam, or launch a regime change in Iraq. Those questions *cannot* be put in suspension during a war, much as some political leaders might want them to be.

When the government silences dissent, in wartime or otherwise, it warps the thinking process of the community and undermines the very essence of self-government. Free and open debate can help save the nation from tragic blunders. Indeed, democracies generally fare better than dictatorships in long wars precisely because of “the greater ability of citizens in democracies to scrutinize,” to dissent, and to help shape “proposed courses of action.”<sup>24</sup> Thus, although restrictions of free speech may be time-limited, and may not carry over once peace is restored, they have profound implications *during* the war both for the individual and for the nation.

## II

So, can we do better? Surely, yes. Despite the fear that has swept the nation in wartime, *some* individuals have managed to maintain a sense of perspective and have recognized at the time that the demands to restrict civil liberties were unwarranted. Examples include, among many others, Con-

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21. See 56 CONG REC. 4633-37 (1918).

22. 323 U.S. 214 (1944).

23. *Id.* at 219.

24. SUNSTEIN, *supra* note 12, at 8. See LUTHER GULICK, ADMINISTRATIVE REFLECTIONS FROM WORLD WAR II 121-29 (1948).

gressmen Albert Gallatin and Edward Livingston in 1798; Professor Zechariah Chafee and Judge Learned Hand during World War I; Justices Oliver Wendell Holmes and Louis Brandeis during the Red Scare; Attorneys General Robert Jackson and Francis Biddle during World War II; Senators Estes Kefauver and Herbert Lehman and Justices Hugo Black and William Douglas during the Cold War; and so on.<sup>25</sup> If they could understand the realities they faced, others can as well.

Moreover, the nation has not always succumbed to wartime hysteria. Many proposals for the suppression of civil liberties were rejected in these periods because individuals in positions of authority understood them to be unwise. For example, oppressive as the Sedition Act of 1798 may have been, it was less severe than many of the proposals Congress rejected at the time.<sup>26</sup> Similarly, Congress in 1917 enacted a version of the Espionage Act much less repressive than the one proposed by the Wilson administration.<sup>27</sup> And although Wilson was prepared to go quite far in suppressing dissent, he rejected calls to suspend the writ of habeas corpus. It is, ultimately, a matter of degree. For the nation to “do better” in the future means not that it will strike the “perfect” balance between liberty and security but that it will err more on the side of liberty than it has in the past.

Over time, we *have* made progress. Like the assertion that we have excessively restricted civil liberties in past wars, this judgment cannot be proved with certainty. Each situation is distinct, and no one can predict definitively that the United States will never reenact the Sedition Act of 1798 or undergo another era of McCarthyism. Indeed, if the United States had been struck within a single month with six terrorist attacks on the scale of those of September 11th, who knows what measures the nation would have adopted?

Nonetheless, the major restrictions of civil liberties in the past would be *less* thinkable today than they were in 1798, 1861, 1917, 1942, 1950, or 1969. In terms of both the evolution of constitutional doctrine and the development of a national culture more attuned to civil liberties, the United States has made substantial progress. This is a profound and hard-bought achievement. We should neither take it for granted nor underestimate its significance. It is testament to the strength of American democracy.<sup>28</sup>

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25. See generally STONE, *supra* note 10.

26. One of these proposals, for example, did not recognize truth as a defense. Another would have defined as “seditious” any expression that stated or implied that officers of the government had enacted laws because of motives that were hostile to the liberties of the people. See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 63 (2000); JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 107-11 (1956).

27. See Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 345-54 (2003).

28. For competing views on the question of progress over time in the constitutional protection of civil liberties, compare Posner & Vermeule, *supra* note 17, at

## III

How, then, do we get it right in the future? The most daunting obstacle to a more measured response is the practical reality that by the time citizens and public officials realize they are in the midst of a crisis, it may already be too late.<sup>29</sup> The time to prepare for a crisis is *before* rather than after it strikes.

A critical determinant of how the nation responds to wartime stress is the attitude of the public itself. Citizens in a self-governing society cannot expect public officials to respond calmly and judiciously without regard to their own response.<sup>30</sup> As Judge Learned Hand reflected in 1944,

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.<sup>31</sup>

In some wartime episodes, the public has responded remarkably well. In 1800, for example, Americans voted the Federalists out of power. The election of Jefferson and the demise of the Federalist Party were, in no small part, a direct rebuke to the Federalists for the Sedition Act of 1798. Similarly, during the Civil War, although some Republicans demanded that the government suppress “disloyal” speech, many Republican newspapers, political leaders, and party members protested the more egregious efforts of military commanders to suppress Democratic opposition.<sup>32</sup>

More often, however, the public has either failed to protest the suppression of dissent or vociferously demanded it. In World War I, World War II,

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622-25 (skeptical about claim of progress) with WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (1998) (supportive of claims of progress), Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002) (same); and Mark V. Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003) (same).

29. See Posner & Vermeule, *supra* note 17, at 637 (“People feel fear because they perceive a threat; they cannot step outside of themselves and doubt their own beliefs because they know that fear can interfere with cognition.”).

30. Reflecting upon such issues, Robert Jackson once noted that there are circumstances in which “fear and anxiety create public demands” for assurances of security “which may not be justified by necessity but which any popular government finds irresistible.” Jackson, *supra* note 1, at 107.

31. Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 189-90 (Irving Dillard ed., 3d ed. 1974). See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

32. See STONE, *supra* note 10, at 106-07.

and the Cold War, for example, most members of the public were swept up in the frenzy or, at the very least, cowed into submission. With few exceptions, even the traditional bulwarks of civil liberties—the legal profession, higher education, the press, “liberal” politicians and intellectuals, and committed civil libertarians—were unwilling to confront the storm of public accusation and condemnation. Fearful of losing clients, contributions, subscribers, votes, status, respect, or employment, even those who should have known better bowed to the fierce pressures to conform.

Because the protection of liberty ultimately “lies in the hearts of men and women,” citizens must understand and internalize the value of civil liberties. They must appreciate why civil liberties matter and why *they* have a responsibility to protect them. They must understand that, under the pressures and anxieties of wartime, even well-meaning individuals succumb to mob mentality, doing things that “they would be entirely ashamed to do on their own.”<sup>33</sup>

To withstand the perils of war fever, a nation needs not only *legal* protection of civil liberties but a *culture* of civil liberties. Educational institutions, government agencies, foundations, the media, political leaders, the legal profession, and civil liberties organizations must help cultivate an environment in which citizens are more informed, open-minded, skeptical, critical of their political leaders, tolerant of dissent, and protective of the freedoms of *all* individuals. Above all, as Judge Hand observed, “[t]he spirit of liberty is the spirit which is not too sure that it is right.”<sup>34</sup> These are values and capacities that can be learned, ingrained, and exercised over time. We see this clearly today in the effort to build democracy in Iraq. This is not a one-time event, but a *continuing* process of reaffirmation and education.<sup>35</sup>

The media play a key role. In addition to their general educational capacity, the media have an immediate impact on the public’s response to a crisis. By sensationalizing “newsworthy” but low-risk dangers, they can generate a sense of panic that quickly cascades through society. People routinely overreact to vivid depictions of frightening but improbable dangers. Lurid reports of sniper shootings, for example, send ripples of fear through a community, triggering excessively cautious responses. This can have a devastating effect on society when the precipitating event is a terrorist attack. In such circumstances, the “excessively cautious” response may not be merely to avoid the sniper’s haunts but to insist that government detain and/or deport aliens, anarchists, Japanese-Americans, or Muslims because of an exaggerated sense of the danger they pose to the nation.<sup>36</sup>

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33. SUNSTEIN, *supra* note 12, at 128.

34. Hand, *supra* note 31, at 190.

35. Henry Steele Commager, *To Secure the Blessings of Liberty*, N.Y. TIMES, Apr. 9, 1939, (Magazine), at 4.

36. See Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 PSYCHOL. SCI. 185, 186-88 (2001); Sunstein, *Beyond the Precautionary Principle*, *supra* note 15, at 1057; Jeffrey Rosen,

## IV

Although the perspective and disposition of the public are critical in determining the nation's response in wartime, it eventually falls to the government to enact and enforce laws, implement policies, and interpret the Constitution. How well have the three branches of the federal government fulfilled these responsibilities, and how can they do better in the future?

Over the years, Congress has enacted such repressive legislation as the Sedition Act of 1798,<sup>37</sup> the Sedition Act of 1918,<sup>38</sup> and the McCarran Internal Security Act of 1950.<sup>39</sup> This is a dreary record of legislative achievement. On the other hand, Congress has not reflexively adopted every repressive law proposed in wartime. To the contrary, Congress has demonstrated that it is quite capable of acting with restraint. Too often, however, it has either failed to exercise a check on public hysteria or, in some instances, moved far beyond anything the public demanded.

This is understandable. Congress is readily susceptible to stampeding fear. Even apart from their own anxieties, elected officials are naturally responsive to the wants of voters. They are therefore likely to act quickly and decisively when citizens are in a state of panic.<sup>40</sup> Indeed, once fear overwhelms the public, there is no sure way to defuse it. Even conscientious efforts to reassure people by explaining that they are "overreacting" tend only to exacerbate their anxiety.<sup>41</sup> In such circumstances, the best way to alleviate

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*Naked Terror*, N. Y. TIMES, Jan. 4, 2004, § 6 (Magazine), at 10. Like the media, civil liberties organizations play both an educational role and an ameliorative one even after crises arise. Although such organizations have not always had the courage of their convictions, they have made invaluable contributions. Organizations like the Free Speech League in World War I and the ACLU today ensure that perspectives that might otherwise be disregarded are represented in legal and political discourse. They articulate often unpopular positions to judges, legislators, and others so they can make better-informed and more thoughtful decisions. Particularly in times of national emergency, when many others are silenced by fear, such organizations need the nation's support.

37. Act of July 14, 1798, ch. 74, 1 Stat. 596.

38. Act of May 16, 1918, ch. 75, 40 Stat. 553.

39. Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987.

40. John Stuart Mill insisted that "[p]rotection . . . against the tyranny of the magistrate is not enough," and that constitutional government also requires protection "against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose . . . its own ideas and practices . . . on those who dissent from them." John Stuart Mill, *On Liberty*, in UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 69, 73 (Geraint Williams ed., 1993). See SUNSTEIN, *supra* note 12, at 23 (legislators, "like everyone else, ought to be expected in some cases to abandon their otherwise clear assessment of policy and law if people are united against them").

41. See Sunstein, *Probability Neglect*, *supra* note 15, at 95 (the only effective way to reduce fear of a low probability risk may be to "[c]hange the subject").

public fear may be to demonstrate that the government is taking action, whether or not such action is likely to be effective. Although this may calm the public, the very fact that the government takes drastic action may also affirm the legitimacy of the fear. And, of course, the precise *nature* of the “drastic” action is critical. It is one thing to announce a tripling of the defense budget and quite another to jail or deport hundreds or even thousands of innocent people in order to salve the public’s anxiety.

Some members of Congress have courageously stood fast and insisted that the nation do the “right” thing, rather than what the public demands or what seems expedient or opportunistic. But such individuals have been the exception. More often, Congress has responded to war fever with draconian and even savage legislation.

There are several steps Congress could take to break, or at least alleviate, this pattern. For example, it could adopt standing “rules” or protocols to guide it whenever it considers wartime legislation that would limit civil liberties.<sup>42</sup> An obvious peril in wartime is that Congress will act rashly in response to public hysteria. To forestall this, Congress could enact a rule prohibiting it from enacting wartime legislation that limits civil liberties without full and fair deliberation. A recent illustration of unwarranted expedition was Congress’s adoption of the USA PATRIOT Act of 2001.<sup>43</sup> In its rush to act decisively in response to the attacks of September 11th, Congress ignored its established procedures, abandoning both the committee process and the requirement of full floor debate. Moreover, it did this in the face of serious and well-articulated concerns about the act’s impact on civil liberties.<sup>44</sup> A clear rule against such action, a mandatory “cooling off” period, would have afforded Congress a fuller opportunity to consider the more problematic features of the legislation. The debates over the Espionage Act of 1917 provide a useful illustration of an instance in which full deliberation led to more thoughtful and more carefully crafted legislation.<sup>45</sup>

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42. Such protocols are especially important when wartime legislation restricts the civil liberties of a particular group. Such legislation is likely to be especially problematic, for it is too easy for members of the “majority” to sacrifice the rights of “others” in order to secure their own safety. This is why there is a strong constitutional preference for laws that apply neutrally to all persons. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456-57 (1985); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1037 (2003); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2165 (2002); Sunstein, *Beyond the Precautionary Principle*, *supra* note 15, at 1011.

43. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1 (Supp. 2001)).

44. See Gross, *supra* note 42, at 1033.

45. See Stone, *supra* note 27, at 345-54.

Another such protocol might require that any wartime legislation limiting civil liberties contain a “sunset” provision. Because such legislation will often be warped by the effects of a crisis mentality, it should automatically expire, unless re-enacted, within a relatively short time. Interestingly, both the Sedition Act of 1798 and the PATRIOT Act of 2001 incorporated this device. The former expired by its own terms on March 3, 1801,<sup>46</sup> the date of the next presidential inauguration. The latter included a sunset requirement for at least some of its provisions of December 31, 2005.<sup>47</sup> This was a sound idea, poorly executed. Four years is too long. Most wars do not last that long; in any event, enormous damage can be done by misguided legislation in four years. To be effective, such provisions should require reconsideration no less than annually.

There are obvious objections to such rules. For one thing, it is not easy to define the precise circumstances in which such protocols should kick in.<sup>48</sup> What is “wartime” legislation? Moreover, legislators in a state of high emotion can always find ways to circumvent such rules by arguing that they are inapplicable to the *particular* crisis they face. And the same hysteria that might lead Congress to enact unwise or unconstitutional legislation in the first place might also lead it to override any protocols that are intended to restrain precipitous action. These are all reasonable objections, but they suggest only that such rules are imperfect, not that they could not help at the margin. Anything that slows the process, allows for greater deliberation, and limits the potential scope and impact of hastily enacted legislation limiting civil liberties is salutary.<sup>49</sup>

Congress could also respond better in the future by taking the Constitution more seriously. Just as a deeper understanding of civil liberties might enable the public to react more calmly to the exigencies of wartime, so too a deeper appreciation of constitutional rights might help their elected senators and representatives better meet their responsibilities. This may seem naive. A cynic would argue that Congress does not care one whit about the Constitution in times of perceived crisis. The cynic would be wrong.

How well has Congress fulfilled these responsibilities in the past? There are two elements to this question: How seriously has Congress taken its obligation to act in accord with the Constitution, and how seriously has it taken the decisions of the Supreme Court?

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46. Act of July 14, 1798, ch. 74, 1 Stat. 596.

47. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1).

48. Gross, *supra* note 42, at 1022-23, 1069-96. On legislation that takes effect only upon a declaration of war or a presidential proclamation or executive order under the National Emergencies Act, 50 U.S.C. §§ 1601, 1621 (2000), see Gross, *supra* note 42, at 1065-66.

49. For a skeptical view of such rules, see Posner & Vermeule, *supra* note 17, at 637-39.

Consider the issue of wartime dissent. Congress has *never* directly defied a decision of the Supreme Court regarding the meaning of the First Amendment. When Congress enacted the Sedition Act of 1798, the Espionage Act of 1917, and the Sedition Act of 1918, the Court had not yet had occasion to construe the First Amendment, so Congress was on its own. In 1798, the Federalists and Republicans fully debated the constitutionality of the proposed legislation. Moreover, in their reliance on Blackstone to give meaning to the First Amendment, and their amelioration of the most extreme elements of the common law of seditious libel, the Federalists made a perfectly plausible case for the constitutionality of the Sedition Act. Whatever might be the judgment of the “court of history,” in 1798 the Federalist position was certainly credible.<sup>50</sup> Likewise, Congress took quite seriously its constitutional responsibilities in debating the Espionage Act of 1917 and, as in 1798, clearly rejected the provisions proposed by the Wilson administration it believed unconstitutional.<sup>51</sup>

Even in the nation’s most extreme anti-speech legislation, the Sedition Act of 1918, Congress seriously addressed its constitutional responsibilities. When Senator Joseph France of Maryland proposed an amendment designed to limit the scope of the legislation, the Senate voted unanimously to adopt his amendment. It was only after the Justice Department vehemently opposed the France amendment that the Senate acquiesced.<sup>52</sup>

Thus, in each of these instances, Congress—proceeding without any Supreme Court guidance—took seriously its constitutional responsibilities. (This is not to suggest that these acts were, or should have been thought to be, constitutional. It is only to suggest that even in these extreme instances Congress addressed the First Amendment issues and reached results that were not at the time implausible.)

By the time Congress enacted the Smith Act of 1940,<sup>53</sup> the McCarran Internal Security Act of 1950,<sup>54</sup> and the Communist Control Act of 1954,<sup>55</sup> the Supreme Court had begun to develop its own interpretation of the First Amendment. None of these laws defied those decisions. In the mid-1920s, the Court had held in *Gitlow v. New York*<sup>56</sup> and *Whitney v. California*<sup>57</sup> that the

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50. See STONE, *supra* note 10, at 36-44.

51. See Stone, *supra* note 27, at 345-54.

52. See STONE, *supra* note 10, at 190-91.

53. Smith Act, ch. 439, 54 Stat. 670 (1940).

54. Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987.

55. Communist Control Act of 1954, ch. 886, 68 Stat. 775.

56. 268 U.S. 652, 654 (1925) (upholding New York criminal anarchy statute forbidding any person to advocate, advise, or teach “the duty, necessity or propriety of overthrowing . . . organized government by force or violence”).

57. 274 U.S. 357, 359-60 (1927) (upholding California criminal syndicalism statute prohibiting any person from knowingly becoming a member of any organization that advocates “the commission of crime, sabotage . . . , or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change

government could constitutionally prohibit the express advocacy of violent overthrow of government. The Court did not cast serious doubt on those precedents until its 1957 decision in *Yates v. United States*.<sup>58</sup> Thus, whatever we might think today of the constitutionality of the Cold War legislation, those laws were consistent with prevailing judicial precedent at the time they were enacted.

Moreover, Congress has enacted no legislation directly prohibiting dissent (other than express advocacy of violent overthrow of the government) since the Sedition Act of 1918, and it has enacted no legislation directly prohibiting even express advocacy of violent overthrow since *Yates*. All this clearly suggests that Congress *does* attempt to act within the confines of the Constitution, particularly when it has guidance from the Supreme Court, and even in time of war.<sup>59</sup>

## V

A similar evaluation applies to the executive. For the most part, wartime Presidents have not gone out of their way to celebrate or protect dissent in wartime. John Adams, Woodrow Wilson, and Franklin Roosevelt were hardly champions of free speech in 1798, 1917, or 1942.<sup>60</sup> Abraham Lincoln and Harry Truman did better. During the Civil War, Lincoln offered a thoughtful and rigorous analysis of free speech in wartime, and throughout the war he tolerated a storm of vituperative criticism without *once* calling for its suppression.<sup>61</sup> Truman's record was more mixed. At his worst, Truman surrendered completely to public pressure and political self-interest when he promulgated the federal loyalty program in 1947. At his best, however, when he vetoed the McCarran Internal Security Act of 1950 and boldly challenged

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in industrial ownership . . . or effecting any political change"), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

58. 354 U.S. 298, 319-20 (1957) (adopting a narrow construction of the Smith Act in order to avoid doubts about its constitutionality), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978).

59. As the Supreme Court has developed a more robust constitutional jurisprudence, Congress has, if anything, tended to be too passive in making its own independent judgments about when potential legislation may be unconstitutional. See Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 458-59, 473-74, 497-99 (1971). This also suggests, by the way, that congressional protocols requiring the use of ordinary legislative processes to ensure adequate deliberation and sunset provisions might have a positive impact. If Congress can discipline itself to act within the constitutional parameters set out by the Court, there is no reason to believe it cannot discipline itself to act within the legislative parameters it sets out for itself.

60. See generally STONE, *supra* note 10.

61. See *id.* at 126-32; Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1 (2003).

Joseph McCarthy, he was arguably the most determined presidential advocate of wartime civil liberties the nation has ever known.<sup>62</sup>

Perhaps the most important step future Presidents can take to improve the response of the executive branch in such crises is to ensure that every administration has within its highest councils individuals who will ardently and credibly defend civil liberties. Public servants like John Lord O'Brian, Alfred Bettman, Frank Murphy, Robert Jackson, Francis Biddle, and Clark Clifford all played significant roles in helping to temper the government's response to wartime hysteria.<sup>63</sup> As Cass Sunstein has explained, "[g]roup polarization occurs when group members, engaged in deliberation with one another, end up taking a more extreme position in line with their predeliberation tendencies."<sup>64</sup> This is especially likely, and especially dangerous, when people are angry or frightened. In such circumstances, even a lone dissenter can play a critical role.<sup>65</sup>

It was no coincidence that Harry Truman adopted the federal loyalty program at a time when his inner council lacked such a voice,<sup>66</sup> and one of the most serious concerns about the administration of President George W. Bush is the absence of any senior official who represents these views. Such individuals may sometimes or even often lose the policy debate, but an administration *without* such a voice is much more likely to embrace extreme positions than one that fosters genuine internal deliberation on these questions. This is critical.

## VI

What is the appropriate role of courts in wartime? To what extent can—and should—the Constitution, as interpreted and applied by the judiciary, restrain the pressures for wartime suppression of dissent? Justice Jackson described the form in which these questions usually reach the Supreme Court:

Measures [ordinarily] violative of constitutional rights are claimed to be necessary to security, in the judgment of officials who are best in a position to know, but the necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself. What does it do then?<sup>67</sup>

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62. See STONE, *supra* note 10, at 334-38.

63. See *generally id.*

64. SUNSTEIN, *supra* note 12, at 11.

65. See *id.* at 7-8, 27; David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602 (1976).

66. See STONE, *supra* note 10, at 342.

67. Jackson, *supra* note 1, at 115.

After two centuries of wrestling with this question, we seem to have reached consensus on two key propositions: the Constitution applies in time of war, but the special demands of war may affect the application of the Constitution. This was essentially the position Lincoln advanced during the Civil War, and it is the position Chief Justice Rehnquist supports today.<sup>68</sup> We have thus rejected the more extreme positions—that the Constitution is irrelevant in wartime, and that wartime is irrelevant to the application of the Constitution.

This means that in applying the governing constitutional standard in any particular area of the law—whether it be clear and present danger, compelling governmental interest, “unreasonable” searches and seizures, or whatever—it is appropriate for courts to take the special circumstances of wartime into account in determining whether the government has sufficient justification to limit the constitutional right at issue. It does *not* mean, however, that courts should abdicate their responsibilities in the face of assertions of national security or military necessity.

Some scholars contend that this stance accords courts excessive authority in time of war. In their view, because war presents a nation with unique challenges and dangers, the ordinary standards of judicial review should be suspended entirely. Under this view, whereas *Brandenburg* might state the proper First Amendment test for reviewing restrictions of dissent in normal times,<sup>69</sup> courts should grant great deference to the executive in wartime and resort to something more like the World War I era “bad tendency” test.<sup>70</sup> After all, when national security is at stake, the potential harm to the nation is particularly grave. If judges err in their assessment of the possible dangers of dissent and prohibit the government from acting when action is necessary, the consequences could be dire. Moreover, judges are not particularly well situated to make critical judgments about issues of national security, for such judgments often involve matters of great complexity and secrecy. Courts are therefore more likely to flounder in dealing with such matters than in addressing more run-of-the-mill constitutional disputes. When grave issues of national security are at stake, the nation must be more willing to tolerate the risks of unconstrained executive power—including the risk that such power will be abused for political gain. Or so the argument goes.<sup>71</sup>

There is some merit in these concerns, but not much. The comparative advantages of courts over the executive and legislative branches in interpret-

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68. See REHNQUIST, *supra* note 28, at 221-25.

69. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

70. On the “bad tendency” test, see Stone, *supra* note 27, at 341; Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411.

71. See REHNQUIST, *supra* note 28, at 205 (“Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as ‘military necessity.’”); Posner & Vermeule, *supra* note 17, at 605-07.

ing and enforcing constitutional rights are striking. Responsiveness to the electorate is essential to the day-to-day workings of democracy, but as the framers of the Constitution well understood, that responsiveness can also lead elected officials too readily to sacrifice the rights of a despised or feared minority. Judges with life tenure and a more focused attention to the preservation of civil liberties are more likely to protect constitutional rights than the elected branches of government. As Anthony Lewis has observed, “[t]he distinctive American contribution to the philosophy of government has been the role of judges as protectors of freedom.”<sup>72</sup>

The central question, of course, is not how to protect constitutional rights in wartime, but how to protect those rights *while still allowing the government to respond effectively to a crisis*. If courts were irresponsibly aggressive in protecting civil liberties in wartime, if they were inclined recklessly to cripple the nation’s capacity to wage war, or if they regarded the Constitution as a “suicide pact,”<sup>73</sup> it would certainly make sense to empower the elected branches to override their judgments. But nothing could be further from the truth. Throughout American history, judges have erred on the side of deference in times of crisis. As Chief Justice Rehnquist has observed, “judges, like other citizens, do not wish to hinder a nation’s ‘war effort.’”<sup>74</sup> Moreover, judges, like other citizens, are not immune to the fears and anxieties of the moment. Like other citizens, judges do not want the nation to lose a war, and they do not want to be responsible for a mass tragedy. This makes them even more prone—perhaps too prone—to err on the side of deference.<sup>75</sup>

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72. Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 47, 67 (Richard C. Leone & Greg Anrig, Jr. eds., 2003). The framers were aware of this:

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Garry Wills ed., 1982).

73. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

74. REHNQUIST, *supra* note 28, at 221.

75. For the argument that in periods of crisis courts have tended to use a “process-based/institutionally oriented approach,” rather than an individual rights-oriented approach, and that this is a preferable way for the courts to review the legality of governmental action in emergency situations, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES* L. 1 (2004). Under this view, courts tend to shift difficult constitutional decisions in such periods away from themselves by insisting on *joint* legislative and executive action. This is a

Not surprisingly, then, in *Schenck v. United States*,<sup>76</sup> *Korematsu*,<sup>77</sup> *Dennis*,<sup>78</sup> and a host of other wartime decisions, the Supreme Court has applied constitutional standards in a way that strongly accords the President and Congress the benefit of the doubt. Although Congress and the President have often *underprotected* civil liberties in wartime, there is not a single instance in which the Supreme Court has *overprotected* such freedoms in a way that caused *any* demonstrable harm to national security. The fear that courts cannot be trusted in such circumstances because they will irresponsibly shackle the nation's ability to fight is simply unfounded.

Of course, there will be occasions when the judiciary gives greater protection to civil liberties than the legislature or the executive. The elected branches tend to give inadequate weight to civil liberties in wartime, and it is the responsibility of courts in our constitutional system to act as a corrective. But there is no reason in logic or experience to believe that courts give *excessive* protection to those rights in a way that jeopardizes the national interest.

On the other hand, history is replete with instances in which the nation has excessively suppressed civil liberties in wartime without any compelling or even reasonable justification. The problem is not too much judicial enforcement, but too *little*. Although some judges, like George Bourquin, Charles Amidon, and Learned Hand during World War I,<sup>79</sup> proved themselves courageous, independent, and confident in their faith in civil liberties, too many other judges have been too timid, too much "company men," and too easily cowed by wartime clamor. And although the Supreme Court has occasionally taken a strong stance in defense of civil liberties in wartime, as in *Yates* and *Pentagon Papers*,<sup>80</sup> more often the Justices have yielded too readily to their own fears or to executive and legislative demands that they not stand in the way.<sup>81</sup>

Moreover, even if judges and Justices were more determined in their protection of civil liberties in wartime, the potential "dangers" would not be so dire. There are many ways to achieve a desired level of security. If one measure is unavailable, others can be pursued. Suppose, for example, the Supreme Court had invalidated the Sedition Act of 1798, the Espionage Act of 1917, or the Smith Act of 1940, preventing the government from prosecuting critics of John Adams, opponents of the draft in World War I, or members of the Communist Party in the 1950s. Even in the unlikely event that this would have hampered national security, the government could easily have attained the same overall *level* of security by, for instance, increasing the

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thoughtful and interesting analysis. It should be used to supplement rather than supplant the individual rights approach.

76. 249 U.S. 47 (1919).

77. *Korematsu v. United States*, 323 U.S. 214 (1944).

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

79. See STONE, *supra* note 10, at 160-70.

80. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

81. See, e.g., *Dennis*, 341 U.S. 494; *Korematsu*, 323 U.S. 214; *Schenck*, 249 U.S. 47.

penalties for particular crimes, such as draft evasion or espionage, or by committing greater resources to ferreting out spies and saboteurs.

In a world of limited resources, the government always must choose between different means of achieving its objectives. Should it expand the number of FBI agents? Spend more on training? Invest in more advanced surveillance or data technology? The Constitution takes off the table the suppression of civil liberties as an “easy” means of achieving, or seeming to achieve, the government’s goals. It does this for compelling reasons. Laws restricting civil liberties are especially appealing to public officials in wartime because they are relatively inexpensive, cater to public fear, create the illusion of decisive action, burden only those who already are viewed with contempt, and enable public officials to silence their critics in the *guise* of serving the national interest. Thus, as the Constitution commands, such measures should be a last, not a first, resort.<sup>82</sup>

Judge Richard Posner has recently presented a contrary analysis, and it is worth considering. In celebration of something he calls “pragmatic constitutional reasoning,” Posner criticizes civil libertarians for embracing an “unsound” approach “to the balance between liberty and security.”<sup>83</sup> He argues that what judges do in interpreting and applying the Constitution is to weigh “the competing interests at stake—call them public safety and liberty.”<sup>84</sup> He charges that civil libertarians give undue weight to constitutional rights. In his view, “[n]either interest should enjoy priority over the other in the balancing process,” and because the relative importance of liberty and security will vary “from time to time,” the law “should be flexible.”<sup>85</sup>

To the extent Posner rejects the extreme position that the *outcomes* of constitutional analysis should not vary with the circumstances, I agree. Constitutional analysis does entail a balancing of interests, whether reflected in the “clear and present danger” standard or the “bad tendency” test. A particu-

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82. It might be argued that judicial decisions denying the government the ability to use its first-choice response—stifling dissent—force it to be “inefficient” in protecting national security. But if stifling dissent seems an efficient means of protecting national security, it is most likely because the government does not fairly take account of the interests of those Jacobins, anarchists, and Communists whose speech is punished or chilled in order to achieve greater security (or greater apparent security) for the majority of citizens who are not inconvenienced. Nor does it give any weight to the deleterious impact on government decision making when dissident perspectives are excised from public discourse. If those interests were properly weighed, the suppression of dissent would seem much less “efficient.” That, in any event, is the theory of the First Amendment. I should add that I do not for a moment suggest that protecting free speech is “costless.” The point, rather, is that the protection of free speech is worth some cost to society, and that in the past we have tended to miscalculate both the costs and the benefits.

83. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 303-04, 296 (2003).

84. *Id.* at 296.

85. *Id.*

lar speech may create a clear and present danger in one setting, but not in another, and certainly the circumstances of wartime are relevant in making such determinations.

Posner errs, though, when he insists that courts should weigh liberty and security “equally.” He bases this judgment on two assumptions—security is as important as liberty, and the nation is as likely to underprotect security as it is to underprotect liberty.<sup>86</sup> I do not take issue with the first assumption. For these purposes, I can concede that security is as “important” as liberty, though I am not quite sure what that means. But even accepting that premise, I disagree with the second assumption. Posner acknowledges that on occasion the United States has excessively restricted civil liberties in wartime.<sup>87</sup> But the real lesson of history, he argues, cuts in the opposite direction. In his view, “[o]fficialdom has repeatedly and disastrously underestimated” dangers to the nation’s security.<sup>88</sup> He offers as examples underestimation of the risk of secession leading up to the Civil War, of the danger of a Japanese attack on the United States in 1941, of the threat of Soviet espionage in the 1940s, of the possibility of the Tet offensive during the Vietnam War, and, of course, of the risk of terrorist attacks before September 11, 2001.<sup>89</sup>

No doubt, some of this is right. But it is irrelevant. That the government may underestimate these dangers is no reason to shut our eyes to the fact that it *also* underestimates the dangers of silencing dissent. The proper response to Posner’s insight is for the government to take those other dangers more seriously. The right way to do that, however, is *not* by restricting civil liberties. There is no evidence that the nation’s “overprotection” of constitutional rights *caused* any of these misjudgments. “Pragmatic constitutional reasoning” should make some effort to connect cause and effect.

Moreover, and more fundamentally, nothing Posner says addresses the fact that there are systemic reasons why public officials leap too quickly to restrict civil liberties in wartime. Pragmatic constitutional reasoning must consider those systemic factors if it is to strike the right “balance” between liberty and security. Otherwise, as we have seen repeatedly in our history, we *unnecessarily* lose liberty without any corresponding gain in security. Judge Posner argues that this is all futile because

it is only with the benefit of hindsight that a reaction can be separated into its proper and excess layers. In hindsight we know that interning the Japanese-American residents of the West Coast did not shorten World War II. But was this known at the time? If not,

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86. *Id.* at 298.

87. *Id.* at 298-302.

88. *Id.* at 298.

89. *Id.* at 298-99. For a critical view of Posner’s analysis in this respect, see Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 710 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)).

should not the government have erred on the side of caution, as it did?<sup>90</sup>

This misses the point. Because we know from “hindsight” that there is a repeated *pattern* of excessive restriction of civil liberties in wartime, the goal is not only to recognize this pathology when it occurs, which may indeed be difficult, but also to create *barriers* that will make it less likely to happen in the future.

The law is rife with presumptions designed to improve decision making. We exclude certain types of evidence in criminal trials, for example, because we presume it will unduly prejudice or inflame the jury. We presume people to be innocent unless proven guilty beyond a reasonable doubt because we know that once an individual stands accused by the state the jury is likely to begin its deliberations with a strong bias toward guilt. We require a warrant for searches and seizures because we do not trust law enforcement officers to decide for themselves whether there is probable cause.

In terms of civil liberties in wartime, the nation needs to erect similar presumptions to guard against overreaction. Indeed, much of the evolution of First Amendment doctrine from *Schenck* to *Brandenburg* reflects precisely this process of building a “fortress” of doctrinal presumptions in order to withstand the undue pressure to stifle dissent in wartime.<sup>91</sup>

All that said, there remains the question whether anything courts do in these periods really matters. It is often said that, as a practical matter, Presidents do what they please in wartime. Attorney General Biddle once observed that “the Constitution has never greatly bothered any wartime President,”<sup>92</sup> and Chief Justice Rehnquist has suggested that “[t]here is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt.”<sup>93</sup>

The record, however, is more complex. Although Presidents may think of themselves as bound more by political than by constitutional constraints in time of war, the two are often linked. Lincoln did not propose a sedition act, Wilson rejected calls to suspend the writ of habeas corpus, and Bush has not advocated a federal loyalty program for Muslim Americans, much less confined them in internment camps. Even in wartime, Presidents have not attempted to restrict civil liberties in the face of *settled* Supreme Court precedent. Although Presidents often push the envelope where the law is unclear, they do not defy established constitutional doctrine.

Perhaps this is because they respect the law; perhaps it is because they do not want to pick a fight with the Supreme Court in the midst of a war. Whatever the explanation, the phenomenon is unmistakable, and it is impor-

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90. POSNER, *supra* note 83, at 299.

91. See STONE, *supra* note 10, at 521-25.

92. FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

93. REHNQUIST, *supra* note 28, at 224.

tant. The Supreme Court is not powerless to influence these matters. As Chief Justice Rehnquist has noted, “a decision in favor of civil liberty will stand as a precedent to regulate future actions of Congress and the Executive branch in future wars.”<sup>94</sup> The record bears this out.

This suggests that in periods of relative calm the Court should consciously construct constitutional doctrines that will provide firm and unequivocal guidance for later periods of stress. Perhaps the best example of this in modern constitutional law is the Court’s 1969 decision in *Brandenburg*, in which the Court redefined fifty years of jurisprudence in order to embrace a clear and unambiguous standard to deal with future crises.<sup>95</sup>

As the Court has learned by experience and sustained reflection, if the nation is to preserve civil liberties in the face of wartime fear and hysteria, the Court must articulate clear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, Presidents, or even future Supreme Court Justices. Malleable principles, open-ended balances, and vague standards may serve well in periods of tranquillity, but they will fail us just at the point when we most need the Constitution. As Vincent Blasi has persuasively argued, the Court must establish firm principles in ordinary times in order to ensure that the nation does not underprotect civil liberties in times of crisis.<sup>96</sup>

This raises a further problem. Even if the Court does articulate clear doctrines that firmly protect civil liberties, and even if the President and Congress abide by such decisions in wartime, we have repeatedly seen that as soon as the Court closes off one avenue of repression, others appear. Mark Tushnet has noted this phenomenon:

Judges . . . develop doctrines and approaches that preclude the repetition of the last generation’s mistakes. Unfortunately, each new threat generates new policy responses, which are—almost by definition—not precluded by the doctrines designed to make it impossible to adopt the policies used last time. And yet, the next generation again concludes that the new policy responses were mistaken. We learn from our mistakes to the extent that we do not repeat precisely the same errors, but it seems that we do not learn enough to keep us from making new and different mistakes.<sup>97</sup>

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94. *Id.* at 222.

95. See Wells, *supra* note 11, at 1576-77.

96. See Blasi, *supra* note 42, at 452-59, 506-14; Gross, *supra* note 42, at 1048; Wells, *supra* note 15. For a critical view, see Posner & Vermeule, *supra* note 17, at 643 (“It is perverse for a government to commit itself not to respond vigorously to emergencies.”).

97. Tushnet, *supra* note 28, at 292. See William J. Brennan Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 *ISR. Y.B.*

After the Supreme Court made it difficult in the 1930s and 1940s for the United States to criminalize “disloyal” speech,<sup>98</sup> public officials shifted to loyalty programs that denied “disloyal” individuals the “privilege” of public employment. After the Court held this unconstitutional,<sup>99</sup> the government shifted to public exposure to harass political dissidents. After the Court held that unconstitutional, the government moved to undercover infiltration, disruption, and monitoring in order to undermine wartime dissent.<sup>100</sup> As long as government officials persist in devising inventive new ways to weaken dissent, courts must stay in the chase.

But this is not a lesson in futility. In the free speech context, for example, over the decades, and in the face of ever more speech-protective constitutional standards, the efforts of government to suppress dissent have become both more subtle and less effective. World War I dissenters were sentenced to fifteen years in prison. That is a far cry from an FBI agent harassing an anti-war protester during the Vietnam War by mailing an anonymous letter to her parents reporting her “radical” activities. Both actions are unconstitutional and indefensible, but if the Supreme Court has moved the nation from the former to the latter, we have indeed come a long way.

Finally, it is often said that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency. The decisions most often cited in support of this proposition are *Korematsu* and *Dennis*. Clinton Rossiter once observed that “[t]he government of the United States, in a case of military necessity . . . can be just as much a dictatorship, after its own fashion, as any other government on earth.”<sup>101</sup> The Supreme Court, he added, “will not, and cannot be expected to, get in the way of this power.”<sup>102</sup>

This does not give the Court its due. There are many counterexamples. During World War II, the Court consistently upheld the First Amendment rights of American Fascists and Communists in a series of criminal prosecutions and denaturalization proceedings,<sup>103</sup> effectively putting an end to the

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ON HUM. RTS. 11 (1988); Gross, *supra* note 42, at 1020; Posner & Vermeule, *supra* note 17, at 624-25.

98. *See, e.g.*, *Baumgartner v. United States*, 322 U.S. 665 (1944); *Hartzel v. United States*, 322 U.S. 680 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943); *Taylor v. Mississippi*, 319 U.S. 583 (1943). *See* Stone, *supra* note 6, at 243-44.

99. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elbrandt v. Russell*, 384 U.S. 11 (1966).

100. *See* STONE, *supra* note 10, at 487-500.

101. CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 54 (1951).

102. *Id.*

103. *See* *Keegan v. United States*, 325 U.S. 478 (1945) (overturning the convictions of twenty-four members of the Bund who had been charged with advocating draft evasion); *Baumgartner*, 322 U.S. at 677 (the government cannot constitutionally denaturalize a former member of the German-American Bund for making “sinister”

government's efforts to punish such individuals for their speech. In 1943, at the very height of the war, the Court boldly held in *West Virginia Board of Education v. Barnette*<sup>104</sup> that the government could not constitutionally compel children in public schools to pledge allegiance to the American flag,<sup>105</sup> a decision that triggered a furious public response. At the end of World War II, the Court held that civilians in Hawaii could not be tried by military tribunals,<sup>106</sup> and in 1944 the Court held that Executive Order no. 9066 did not authorize the detention of individuals of Japanese ancestry who had been found to be loyal American citizens, effectively marking the end of the Japanese-American internment.<sup>107</sup> During the Cold War, the Court rejected President Truman's effort to seize the steel industry<sup>108</sup> and, in a series of decisions beginning with *Yates*,<sup>109</sup> helped usher out the era of McCarthyism. During the Vietnam War, in a rash of decisions illustrated most dramatically by *Pentagon Papers*,<sup>110</sup> the Court confidently rejected national security claims by the executive and vigorously enforced constitutional freedoms.<sup>111</sup>

So, although it is true that the Court tends to be careful not to overstep its bounds in wartime, it is also true that the Court has a long, if uneven, record of fulfilling its constitutional responsibility to protect civil liberties—even in time of war.<sup>112</sup> And because the Congress and the President have

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statements); *Hartzel*, 322 U.S. at 683, 688-89 (the government cannot constitutionally punish an individual for distributing pamphlets that depicted the war as a "gross betrayal of America," denounced "our English allies and the Jews," and assailed the "patriotism of the President"); *Schneiderman*, 320 U.S. at 154, 157 (the government cannot constitutionally denaturalize an American citizen because of his membership in the Communist Party unless it can prove by "clear, unequivocal and convincing" evidence that he had personally endorsed the use of "present violent action which creates a clear and present danger of public disorder or other substantive evil"); *Taylor*, 319 U.S. at 586, 590 (holding that the government cannot constitutionally punish an individual for stating that "it was wrong for our President to send our boys . . . [to be] shot down for no purpose at all").

104. 319 U.S. 624 (1943).

105. *Id.*

106. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

107. *Ex parte Endo*, 323 U.S. 283 (1944).

108. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

109. *Yates v. United States*, 354 U.S. 298 (1967), *overruled by Burks v. United States*, 437 U.S. 1 (1987).

110. *N. Y. Times Co. v. United States*, 403 U.S. 713 (1971). *See also United States v. U. S. Dist. Court (Keith)*, 407 U.S. 297 (1972) (unanimously rejecting the government's claim of power to conduct national security wiretaps without judicial approval).

111. *N.Y. Times Co.*, 403 U.S. at 714.

112. For a more pessimistic view, see EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 177 (1947) ("[I]n total war the Court necessarily loses some part of its normal freedom of decision and becomes assimilated . . . to the mechanism of the national defense.").

consistently deferred to the Supreme Court's interpretation of the Constitution, these decisions have had a major impact on how the United States responds to the exigencies of wartime.<sup>113</sup>

## VII

It is, of course, much easier to look back on past crises and find our predecessors wanting than to make wise judgments when we ourselves are in the eye of the storm. But that challenge now falls to this generation of Americans. Freedom can endanger security, but it is also the fundamental source of American strength. As Justice Louis Brandeis explained in 1927, "Those who won our independence . . . knew that . . . fear breeds repression" and that "courage [is] the secret of liberty."<sup>114</sup> Those are the two most central lessons for Americans to bear in mind.

To strike the right balance, this nation needs political leaders who know right from wrong; federal judges who will stand fast against the furies of their age; members of the bar and the academy who will help Americans see themselves clearly; a thoughtful and responsible press; informed and tolerant citizens who will value not only their own liberties, but the liberties of others; and Justices of the Supreme Court with the wisdom to know excess when they see it and the courage to preserve liberty when it is imperiled. We shall see.

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113. See REHNQUIST, *supra* note 28, at 221, 224-25 (noting that an important part of the progress the nation has made in its protection of civil liberties in wartime is due to the "fact that the First Amendment had come into its own," and that in future wartime situations it is both "desirable and likely" that courts will more carefully scrutinize "the government's claims of necessity as a basis for curtailing civil liberty").

114. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).